



STRENGTHENING GENDER EQUALITY IN LAW

MAPPING DISCRIMINATORY LAWS
AGAINST WOMEN AND GIRLS IN KENYA



Strengthening Gender Equality in Law: Mapping Discriminatory Laws against Women and Girls in Kenya

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ACRONYMS

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| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CRC | Convention on the Rights of the Child |
| FGM | Female genital mutilation |
| IDLO | International Development Law Organization |
| UN WOMEN | United Nations Entity for Gender Equality and Women's Empowerment |
| UPR | Universal Periodic Review |

PREFACE

Equality in law is crucial to gender equality and can benefit multiple development outcomes. It can sustain efforts towards just, peaceful and inclusive societies; environmental and climate justice; equal participation in decision-making at all levels; universal access to essential public services; and economic prosperity for all. Yet discriminatory legislation remains in all regions of the world, limiting the potential of billions of women and girls and often excluding them from the benefits of development. Different standards for women and men in applying for a passport, choosing employment, transferring nationality, participating in court proceedings, receiving inheritance, and deciding when and whom to marry, among others, make it clear that more can be done collectively to eliminate discriminatory laws and achieve gender equality.

In response, the “Equality in law for women and girls by 2030: A multi-stakeholder strategy for accelerated action” was launched by UN Women, International Development Law Organization (IDLO) and other partners, including: the African Union, the Commonwealth, Inter-Parliamentary Union, Organisation Internationale de la Francophonie, Secretaría General Iberoamericana, the Office of the United Nations High Commissioner for Refugees, the United Nations Office on Drugs and Crime, Equality Now, Global Citizen, Global Campaign for Equal Nationality Rights, International Association of Women Judges, Muslims for Progressive Values, and Women’s Learning Partnership.

The strategy calls for urgent action to fast-track the repeal of discriminatory laws in a range of thematic areas, including women’s economic empowerment, minimum age of marriage provisions, nationality rights, discriminatory rape laws, and family and personal status laws. It aims to achieve reforms in 100 countries and is expected to address the legal needs of more than 50 million women and girls. The review of national legal frameworks and the establishment of road maps for the elimination of laws that discriminate against women and girls is an essential component of actualizing the goals of the strategy.

This report is a joint initiative between UN Women and IDLO that furthers this important work in Kenya. It is a comprehensive review of laws with the aim of identifying those that discriminate against women and girls as well as any gaps and inconsistencies in legal protection. The report creates a framework for law reform and operates as a rich resource for the Government, civil society organizations, academia, international organizations, and all actors in the legal, judicial and other thematic sectors. It is a valuable resource that will help realize the country’s Vision 2030 blueprint.

It is the hope of UN Women and IDLO that the Government and all stakeholders will join hands in using this report to harness the power of the rule of law in ending discrimination against women and girls in Kenya.



FOREWORD

More than 2.5 billion women and girls around the world are affected in multiple ways by discriminatory laws. Whether in the area of economic rights, political and public participation, education, labour and employment or family life, there is inadequate legal protection to enable women and girls to have equal enjoyment of human rights.

The *Report on Strengthening Gender Equality in Law: Mapping Discriminatory Laws against Women and Girls in Kenya* is the product of a joint initiative of UN Women and IDLO. It is a comprehensive review of laws in Kenya that was undertaken with the aim of identifying those that discriminate against women and girls as well as the gaps and inconsistencies in legal protection.

The Report identifies discriminatory laws in a range of thematic areas including women's economic empowerment, family and personal status laws. The Report creates a useful baseline of the discriminatory laws that have been identified and proposals made for their reform. It also operates as a rich resource for the Government, civil society organizations, academia, international organizations and all actors in the legal, judicial and other thematic areas.

The Kenya Law Reform Commission looks forward to playing a key role in the reform of the areas of law identified in the Report to ensure conformity with the Constitution of Kenya and international instruments that Kenya has ratified, *inter alia*. The Commission is also available to provide advice and technical assistance to State and non-State actors in the implementation of this Report. This is in line with our mission to provide leadership

in law reform through the continuous review of the law, ensuring its systematic development and reform in conformity with the Constitution.

The Commission supports UN Women and IDLO in the expectation that all stakeholders will join hands in using this Report to harness the power of the rule of law to end discrimination against women and girls in Kenya.

Christine A. Agimba

Chairperson

Kenya Law Reform Commission



EXECUTIVE SUMMARY

Overview

The objective of this legal assessment was to identify and critically analyze the provisions in the laws of Kenya that are discriminatory toward women and girls or that lead to discriminatory outcomes, as well as gaps in the law that result in discrimination against or disempowerment of women and girls. This report also highlights the challenges that undermine the effective implementation of the existing laws in Kenya. It is intended to lead to solutions to the identified gaps through law reform and implementation of the proposed policy actions and ultimately to the full enjoyment of rights and fundamental freedoms of women and girls, without discrimination.

This report is premised on the fact that equality under the law is crucial to achieving gender equality and women's empowerment, as the law is a powerful and efficacious tool for the

protection and fulfillment of human rights. The study is part of the initiative: "Equality in law for women and girls by 2030: A multi-stakeholder strategy for accelerated action", which seeks to establish a road map at the national level for the elimination of laws that discriminate against women and girls.

The research and analysis in this assessment were carried out between February 2020 and September 2021, before the general elections held on August 9, 2022. Changes were made only to reflect certain legislative updates in Kenya in the time since.¹ As such, the report functions as a baseline of the legal environment for women and girls at that time and can be used to measure the performance of the new administration.

Scope and analytical framework

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the main normative framework for this legal assessment report. Reference is also made to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the Beijing Platform for Action, the 2030 Agenda for Sustainable Development and other relevant international and regional instruments. The scope of the study and the analysis conducted are focused on the key areas of discrimination against women and girls as articulated in CEDAW and the Maputo

Protocol: marriage and family; succession and inheritance; political and public life; labor and employment; sexual and reproductive health rights; sexual and gender-based violence; and nationality. It focuses on an analysis of national laws and relevant policies on these themes to establish the extent to which they comply, are aligned with, and promote the norms, standards and principles articulated in CEDAW and other international and regional human rights instruments.

Study method

The report involved an in-depth review of the Constitution of Kenya 2010 and existing legislation at the national level and mapping these against the principles and standards contained in CEDAW and further elaborated in the CEDAW General Recommendations on specific themes, as well as other human rights commitments at the regional and global levels. Reference was also made to the existing legislative and policy frameworks at the regional level, the concluding observations by the various treaty bodies to Kenya as well as the recommendations

in the resolutions and reports of UN Special Procedures. The legal assessment report further leveraged existing studies, publications and commentaries relevant to the subject matter. The report concludes with recommendations based on the findings on the level of compliance or non-compliance of current legislation, with a distinction being made between the recommendations that require legal reform and those that require policy/programmatic interventions.

Organization of the report

The legal assessment is organized into five main parts as follows:

PART I provides background information about the Republic of Kenya, including its governance structure, with a focus on the legislative branch of government, population and sources of law. The section also describes the problem statement necessitating the legal assessment report and expounds on the research methodology and normative framework.

PART II presents discussions on Kenya's regional and international obligations relating to gender equality and non-discrimination. The section highlights Kenya's commitments to ensuring gender equality and eliminating all forms of discrimination in all spheres. Kenya is a state party to the following international and regional multilateral treaties:

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of Racial Discrimination
- Convention on the Rights of the Child

- Convention on the Elimination of All Forms of Discrimination Against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of Persons with Disabilities
- African Charter on Human and Peoples' Rights
- African Charter on the Rights and Welfare of the Child
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Other relevant international policy frameworks based on human rights law that are referred to in this report include the Beijing Declaration and Platform for Action (1995), Security Council Resolution 1325 on Women, Peace and Security (2000), and subsequent resolutions on women, peace and security and "Transforming our World: The 2030 Agenda for Sustainable Development (2015)".

Relevant regional and sub-regional laws and standards include African Union (AU) Agenda 2063: The Africa We Want; East African

Community (EAC) Vision 2050: Regional Vision for Socio-Economic Transformation and Development (2015); Continental Policy Framework on Sexual and Reproductive Health and Rights (2006); African Union Gender Policy (2009); the African Commission on Human and Peoples' Rights Guidelines on Combating Sexual Violence and Its Consequences in Africa (2017); African Union Strategy for Gender Equality & Women's Empowerment (2018); the Declaration and Action Plan to End Cross-border Female Genital Mutilation; and African Commission on Human and People's Rights Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (2014).

PART III presents a critical assessment of the domestic legislative and policy framework governing gender equality and non-discrimination in Kenya. The section focuses on seven themes: marriage and family; succession and inheritance; political and public life; labor and employment; sexual and reproductive health; sexual and gender-based violence; and nationality.

The following laws were scrutinized:

1. Births and Deaths Registration Act (Chapter² 149), Laws of Kenya
2. Law of Succession Act (Chapter 160), Laws of Kenya
3. Penal Code (Chapter 63), Laws of Kenya
4. Children Act, 2022 (No. 29 of 2022)
5. Public Officer Ethics Act, 2003
6. Sexual Offences Act, 2006 (No. 3 of 2006)
7. Employment Act, 2007 (No. 11 of 2007)
8. Counter-Trafficking in Persons Act, 2010 (No. 8 of 2020)
9. Kenya Citizenship and Immigration Act, 2011 (No. 12 of 2011)
10. Prohibition of Female Genital Mutilation Act, 2011 (No. 32 of 2011)
11. Political Parties Act, 2011 (No. 11 of 2011)
12. Land Act, 2012 (No. 6 of 2012)

13. Land Registration Act, 2012 (No. 3 of 2012)
14. Teachers Service Commission Act, 2012 (No. 20 of 2012)
15. Matrimonial Property Act, 2013 (No. 49 of 2013)
16. Marriage Act, 2014 (No. 4 of 2014)
17. Victim Protection Act, 2014 (No. 17 of 2014)
18. Protection Against Domestic Violence Act, 2015 (No. 2 of 2015)
19. Community Land Act, 2016 (No. 27 of 2016)
20. Health Act, 2017 (No. 21 of 2017)
21. Prevention of Torture Act, 2017 (No. 12 of 2017)

PART IV provides an analysis of selected case law on gender equality and women's empowerment in Kenya. This section shows the role the courts have played in advancing the implementation of gender equality imperatives contained in the Constitution of Kenya and the normative standards under CEDAW and other human rights instruments that Kenya is a state party to.

PART V sums up the recommendations in the report. The recommendations are separated into two categories, namely, those that require law reform and those that require policy and programmatic interventions. The latter recommendations are vital to ensuring that the legislation in place translates into tangible results on the ground.

PART VI concludes the assessment and maps the way forward.

Key findings and recommendations of the legal assessment report

The analysis reveals that a total of nine laws or provisions must be repealed in whole or in part, seventeen laws must be revised or amended, and new laws must be enacted in seven thematic areas to bring Kenya's legislative framework in line with its regional and international obligations on gender equality and women's empowerment.

The legal assessment on gender discriminatory laws in Kenya establishes that generally, Kenya has a robust constitutional, policy and legal framework meant to empower women and girls and remove barriers faced by women in political, social and economic spheres. Nonetheless, Kenya's legal framework by itself has proved inadequate to fully realize the rights of women and girls. This is due to the inability to fully implement the existing provisions, reinforced in some instances by a patriarchal culture and gender stereotypes that discriminate against women and girls. In some instances where legal frameworks promote formal gender equality or meet normative standards set by international and regional treaties, the executive has not been able to ensure full implementation of the provisions. This has hindered the substantive enjoyment of rights and fundamental freedoms by women and girls on an equal basis with men and boys. Furthermore, the report has uncovered that several provisions in the

laws are explicitly discriminatory against women and girls. In fact, some of the provisions have been successfully challenged in the courts and found to be in contravention of the Constitution of Kenya 2010, and thus void. These provisions nonetheless remain in the statute books.

The report recommends that the explicitly discriminatory provisions in the law be amended immediately as a matter of urgency, as these cannot be subject to progressive realization. Existing gaps in legal protections should be addressed through the enactment of specific legislation, as in the case of sexual and reproductive health. Besides law reform, the study recommends specific policy and program actions by duty bearers to enable the full implementation of the provisions in the law and equal enjoyment of rights by women and girls in practice. Efforts to influence social and behavioral change at the community level, including of retrogressive customs and practices, will also need to be stepped up and sustained.

A comprehensive matrix of recommendations on law reform is provided in Part V as well as Appendix 1 to this report. Some of the findings and recommendations under each theme are summarized below.

Marriage and family

This theme covers three issues: consent and the right to marry, matrimonial property, and equality in parental responsibility within and outside marriage.

The legal assessment report has established that while the Constitution of Kenya 2010 anchors strong equality and non-discrimination provisions under Article 27, Article 24(4), as

read with Article 170(5), effectively claws back the equality provisions to the extent that they exclude Muslim women. Likewise, the Marriage Act, 2014 and Matrimonial Property Act, 2013, as well as the Kadhis' Court Act (Cap. 11), discriminate against Muslim women in marriage and family relations. Kenya needs to "codify Muslim family law in a manner that is compatible with

Article 27 of the Constitution and articles 1, 2 and 16 of the Convention,” as recommended by the CEDAW Committee following a review of Kenya’s eighth periodic report.³

The Kenyan Constitution, as well as provisions of the Marriage Act, 2014 and the Children Act, 2022, prohibit child marriage and provide for the free and full consent of both parties to a union. In Kenya, the minimum age of marriage is 18 years. This is also the minimum age of sexual consent. Under Kenyan law, a child is defined as any human being under 18 years of age. In reality, however, child marriage persists in some communities in Kenya.

In matters relating to matrimonial property, Article 45 of the Constitution safeguards equality of rights for spouses from the beginning of marriage to its dissolution. Further, Article 68 of the Constitution requires Parliament to “enact legislation...to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage” and “to protect the dependents of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land”.

The Matrimonial Property Act, 2013 is the primary framework governing division of matrimonial property in Kenya and is a progressive improvement on the former Married Women’s Property Act, 1882. However, the Matrimonial Property Act, 2013 contains some clawback provisions, such as section 7, which tends to undermine substantive equality in the division

of matrimonial property upon divorce by requiring proof of contribution. Section 3 of the same Act is also problematic to the extent that it excludes Islamic marriages from the equality provisions. It is recommended that these and other sections identified be amended to align with the constitutional guarantees of equality, Article 16 of CEDAW and with the concluding observations made to Kenya by the CEDAW Committee upon review of its eighth periodic report in 2017.

On parental responsibility, the legal assessment report identified two statutes that contain provisions that expressly discriminate against children born out of wedlock and their mothers. These are: the Births and Deaths Registration Act (Cap. 149) and the Law of Succession Act (Cap. 160). Such provisions give discretion to fathers of children born out of wedlock on whether or not to accept parental responsibility for their biological children. This is contrary to Articles 27 and 53 of the Constitution of Kenya, CEDAW, the Maputo Protocol and other treaties that uphold the best interests of the child and equal parental responsibility and rights, regardless of the marital status of the parents. The study therefore recommends amending sections 2(2) and 2(3) of the Law of Succession Act (Cap. 160) in so far as they discriminate against children born out of wedlock. Similarly, section 12 of the Births and Deaths Registration Act (Cap. 149) ought to be repealed as it discriminates against unmarried women and children born out of wedlock.

Succession and inheritance

In matters of succession, the Law of Succession Act (Cap. 160) contains several clauses that directly discriminate against women and girls in intestate succession. The situation is aggravated by the exclusion of Muslims from the application of the Act as well as of several listed regions,

mostly in rural areas, where properties are subject to customary law. Personal law applies in these cases, which directly discriminates against certain groups of persons, particularly women and girls. Notably, Kadhis’ courts are exempt from application of the equality provisions

under the Constitution to the extent necessary for the application of Islamic law in matters relating to marriage, divorce, inheritance and personal status.⁴ The lack of clear rules on how matrimonial property is divided, combined with the fact that women cannot be appointed as Kadhis, and the exemption from the equality

provision on matters relating to divorce before Kadhis' courts, has resulted in discriminatory outcomes for Muslim women. The legal assessment report recommends a review of the Law of Succession Act (Cap. 160) to accord with the Constitution, and specifically a repeal of sections 32, 33, 35(1), 36(1), 39, 40(1) and 44.

Sexual and reproductive health rights

The Constitution of Kenya in Article 43 (1) guarantees all persons the right to the highest attainable standard of healthcare, including reproductive health. The Health Act, 2017 provides for an overarching legal framework for health. The Act guarantees reproductive healthcare as well as the right to emergency treatment. It underscores the importance of prioritizing the needs of vulnerable and marginalized groups in the provision of healthcare. A public inquiry conducted by the Kenya National Commission on Human Rights confirmed that essential reproductive health services remain unavailable or inaccessible, especially for marginalized and vulnerable populations.

Despite the vast policy framework governing reproductive health matters, there is a lack of a cohesive legislative framework on sexual and reproductive health and rights. This includes assisted reproduction. The various attempts to introduce a framework through the Reproductive Health Care Bill, 2019, and the Assisted Reproductive Technology Bill, 2019,

have been met with heated opposition from religious leaders and other sectors. Furthermore, despite Article 26(4) of the Constitution, which allows for abortion in specified instances, Kenya's Penal Code (Cap. 63) criminalizes abortion under sections 158, 159, 160 and 228. This has denied women and girls access to safe abortion and post-abortion care services.

The legal assessment report recommends an amendment to sections 158, 160 and 228 of the Penal Code to align with the Constitution; that the High Court judgement in *Federation of Women Lawyers (FIDA – Kenya) & 3 others v. Attorney General & 2 others*⁵ be implemented by reinstating the Standards and Guidelines for Reducing Maternal Morbidity and Mortality from Unsafe Abortion in Kenya of 2012; and that Kenya withdraw its reservation under Article 14 of the Maputo Protocol. It is also recommended that a comprehensive law relating to reproductive healthcare and assisted reproduction be enacted.

Land and economic empowerment

Article 40 of the Constitution of Kenya protects the right to property, providing that "every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya". The Article even specifically forbids Parliament from enacting a law permitting the

State or any person to limit or restrict in any way the enjoyment of the right on any of the grounds under Article 27 (which includes sex).

Certain policies and gender-sensitive laws have fostered equality in land ownership and management. For example, the Women Enterprise Fund, Youth Enterprise Development Fund

and the Access to Government Procurement Opportunities, under which 30 percent of public procurement opportunities are reserved for women, young people and persons with disabilities, are all positive initiatives toward ensuring women's economic empowerment.

Despite the safeguards above and those contained in the Land Act, 2012, Land Registration Act, 2012, Community Land Act, 2016, and even the National Land Policy (2009), women continue facing challenges due to customary practices that discourage their ownership and inheritance of land. According to a 2017 report by the Kenya National Bureau of Statistics, "[w]omen provide 80 percent of Kenya's farm labor and manage 40 percent of the country's smallholder farms, yet they own only roughly 1 percent of agricultural land and receive just

10 percent of available credit".⁶ The Kenya Economic Report 2020 has documented the gender disparity in terms of financial inclusion, in favor of males (85.6 percent) relative to females (80.3 percent).⁷

It is recommended to implement gender equality commitments in the National Land Policy. Awareness-raising programs on the land law provisions, as well as catalytic funds, would go a long way toward addressing the gap in women's access to and enjoyment of land and economic rights. Moreover, the amendment of relevant provisions of the Law of Succession Act (Cap. 160), Matrimonial Property Act, 2013, and the Marriage Act, 2014, which affect women's property ownership under succession and matrimonial property, is recommended.

Employment and labor

Kenya's economic policies do not recognize or provide for financial compensation for domestic care work. Care work done by women in their own households across the country is unrecognized as an economic contribution, and not valued or compensated in any way. This disadvantages women, who in most cases shoulder parental responsibilities, home care and farm work. It is recommended to measure and value the unremunerated work of women, in line with the CEDAW Committee's General Recommendation 17 (1991) and the CEDAW Committee's Concluding Observations in the review of Kenya's eighth periodic report in 2017.

Section 29 of the Constitution of Kenya entitles female workers to be fully paid for three months' maternity leave. Section 5(3)(a) also protects female employees from harassment and discrimination by the employer on the basis of being pregnant. In its Concluding Observations on the eighth periodic report in 2017, the CEDAW committee highlighted concern around the issue of direct payment of maternity benefits by employers, that it may lead to discrimination against women applicants and that mothers who adopt children or who suffer miscarriages or give birth to stillborn babies are not covered by the Employment Act of 2007.

Participation in the public and political spheres

Article 27(6) of the Constitution of Kenya requires the State to take "affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination". Article 27(8)

of the Constitution reflects this obligation by requiring the State to "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”. This provision is reiterated in Article 81(b) on the general principles of the electoral system, that “not more than two-thirds of the members of elective public bodies shall be of the same gender”. This principle is what has commonly been referred to as “the two-thirds gender principle” or “the two-thirds gender rule”.

The failure to enact a law to enable implementation of the two-thirds gender rule across elective and appointive posts, despite the provisions of the Constitution and several court orders, has been a major blow to ensuring women’s participation and representation. Furthermore, a combination of factors – gender stereotypes leading to volatile electoral environments, coupled with campaign financing – have created a situation where women candidates are generally at a disadvantage in comparison with men. The legal assessment recommends the enactment of legislation to ensure the achievement of the two-thirds gender rule as well as fast-tracking the enactment of the Special Interest Groups (Amendment) Bill, 2019 made

under Article 100 of the Constitution. Moreover, to boost the work of women human rights defenders in the public space, it is recommended that comprehensive legislation recognizing and protecting their rights be enacted.

The above law reform efforts will have to be supplemented with the enforcement of existing legislation, such as the Political Parties Act, 2011, whose provisions require political parties to ensure gender balance in their party lists and organization structures, and the provisions of the Election Offences Act, 2016 and the Election Campaign Financing Act, 2013. Other factors that deter women from participating in public life, such as violence against women in elections and socio-cultural gender stereotypes, will need to be confronted to ensure women have an equal and safe playing field to compete with men. The enforcement of existing laws coupled with community sensitization to wither gender stereotypes in communities is key.

Nationality

Article 14 of the Constitution of Kenya provides for equality of mothers and fathers in endowing citizenship to their children so long as they were citizens on the date of birth of their children.⁸ This right is reiterated in the Citizenship and Immigration Act, 2011. Married women can, under the current Constitution, confer citizenship to their husbands from foreign countries, a progressive move from the previous Constitution under which only men could confer such status to their wives. It is recommended that Kenya

implement section 15 of the Citizenship and Immigration Act and ensure, in line with the CEDAW Committee’s Concluding Observations to Kenya, “that all refugee and stateless women married to Kenyan nationals may obtain citizenship and confer it on their children without administrative barriers”.⁹ Further, it is recommended that Kenya ratify the two statelessness conventions: the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

Sexual and gender-based violence

Under this broad theme, the study addresses five sub-themes: sexual violence, domestic

violence, female genital mutilation, trafficking of

women and girls and violence against women in elections.

Generally, Kenya has in place a legislative and policy framework regulating the prevention and management of sexual and gender-based violence. Some of the statutes are the Children Act, 2022; Sexual Offences Act, 2006; Counter-Trafficking in Persons Act, 2010; Prohibition of Female Genital Mutilation Act, 2011; Protection Against Domestic Violence Act, 2015; and Computer Misuse and Cybercrimes Act, 2018.

Women and girls continue to face sexual and gender-based violence, thus violating their human rights to dignity, security and physical and psychological integrity. These acts of violence persist, often reinforced by cultural practices and a justice system that poses significant challenges for women and girls.

The legal assessment report examines the issue of violence against women in the context of elections, which has been a major deterrent for women to offer their candidature for leadership positions. The current legal framework, including the Election Offences Act, 2016, does not recognize sexual and gender-based violence in the context of elections.

There are statutory laws that discriminate, directly or indirectly, against women, or contain gaps that occasion discriminatory outcomes around gender-based violence. Gaps in policy and programs have been identified that inhibit the implementation of laws related to gender-based violence, resulting in continued violations of the human rights of women and girls.

Some of the proposals on law reform that the report makes include the following:

- Amend section 19 of the Prohibition of Female Genital Mutilation Act, 2011, to proscribe all forms of female genital mutilation in line with the judgement of the High Court in *Tatu Kamau v. Attorney General & 2 others*.¹⁰
- Amend section 24 of the Prohibition of Female Genital Mutilation Act, 2011, which provides for the offence of failure to report instances of female genital mutilation, which has led to further violations of the rights of victims of female genital mutilation.
- Amend the Sexual Offences Act, 2006 and the Penal Code (Cap. 63) to include the crime of marital rape.
- Amend sections 16, 17 and 18 of the Sexual Offences Act, 2006 to remove the loophole in more lenient sentences for child pornography, exploitation of prostitution and trafficking for sexual exploitation and to align them with the more stringent sentencing under the Counter-Trafficking in Persons Act, 2010.
- Amend the Elections Offence Act, 2016 to make linkage with the Sexual Offences Act, 2006, so as to guide the investigation and prosecution of forms of sexual violence outlined under the Sexual Offences Act that could be perpetrated and manifested as election-related sexual violence.
- Amend Rule 6(c) of the Electoral Code of Conduct to add some specificity on violence against women in elections and include various forms of sexual violence and sexual harassment.
- Fully operationalize the Legal Aid Act, 2016 to boost access to justice for victims of sexual and gender-based violence, who are often indigent.
- Fully operationalize the Victim Protection Act, 2014, which would enhance protection and redress, especially for women and girls.
- Ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the 1954 Convention Relating to the Status of Stateless Persons; and the 1961 Convention on the Reduction of Statelessness.

Role of Kenyan courts in promoting equality and empowerment of women and girls

The legal assessment establishes that the judiciary has played a significant role in breathing life into and advancing the application of the gender equality provisions contained under Article 27 of the Kenyan Constitution and firmly secured in the CEDAW Convention and the Maputo Protocol. In matters such as succession disputes, the courts have diligently upheld the equality provisions and acted as a bulwark against discriminatory customary practices that might otherwise marginalize women, particularly married women, by restricting their inheritance rights to their deceased parents' and husbands' estates. Jurisprudence has firmly established that the definition of a child under the Law of Succession Act includes a child born outside of marriage. Thus, customary practices that discriminate against married daughters have been said to be repugnant to justice and morality and against the letter of the Constitution and the Judicature Act (Cap. 8).

Likewise, courts have annulled certain provisions under the Law of Succession Act (Cap. 160) and the Births and Deaths Registration Act (Cap. 149) that are discriminatory against children born out of wedlock. Such provisions have selectively made parental responsibility over children discretionary for their unmarried fathers and not unmarried mothers.

In terms of representation of women in the public sphere, the Constitution under Article 27 requires the State to take legislative and other measures to ensure that “not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”. Since the landmark Supreme Court of Kenya decision *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*¹¹ on the two-thirds gender rule, three other superior court judgments have compelled Parliament to enact a law to ensure the realization of the two-thirds gender rule.

Due to the failure to enact requisite legislation on the two-thirds gender rule in Parliament, in September 2020 the then Chief Justice advised the President on the dissolution of parliament pursuant to Article 261(7) of the Constitution.¹²

In recognition of the critical role that political parties play in democratic processes, the courts have upheld that they have a responsibility to ensure adherence to the two-thirds gender rule in their party lists, and that the electoral management body has a legal mandate to reject lists that do not conform to this rule. Moreover, the Kenyan judiciary has clarified that the two-thirds gender rule applies not only to elective posts, but also to appointive posts. Thus, in *Marilyn Muthoni Kamuru & 2 others v. Attorney General & another*¹³, the High Court declared as unconstitutional a cabinet selection that comprised less than a third women.

The Kenyan courts have also advanced access to justice for victims of sexual and gender-based violence by applying liberal and purposive interpretations to the Constitution, holding that failure by investigative agencies to conduct a prompt and professional investigation into complaints of defilement and other forms of sexual violence amounts to discrimination.¹⁴ Similarly, in what was a landmark win for accountability and redress for victims of post-election violence, the High Court in December 2020 declared that the failure to conduct effective investigations and prosecutions for sexual and gender-based violence during the post-election violence violated the duty of the Kenyan State, and awarded damages to victims.¹⁵ The High Court has also declined entreaty to legalize female genital mutilation, holding that the practice of culture is limited in the instances where the same violates the right to health, human dignity and the right to life of women and girls.¹⁶

The division of matrimonial property upon divorce remains highly contentious. The legal

position pertaining to sharing matrimonial property upon the divorce of spouses, especially where one spouse relies on non-monetary contribution, remains imprecise. The lack of clarity in the law and divergent interpretations by courts on how to quantify such contributions has complicated the process and led to mostly women being disadvantaged financially. The study recommends reform of the law to inject more clarity on the term 'contribution' and on the Practice Directions issued by the judiciary on handling matrimonial disputes. Moreover, conducting further research is desirable to provide an evidence-based formula for the valuation of domestic or unpaid work. This is in line with the CEDAW Committee's recommendations to Kenya in its 2017 review of Kenya's compliance with the CEDAW Convention.



PART I

INTRODUCTION

1.1 BACKGROUND

Kenya is an east African country that lies astride the equator on the east coast of Africa. The government estimates that as of 2019, approximately 85.5 percent of the total population is Christian, and 11 percent is Muslim. Groups constituting less than 2 percent of the population include Hindus, Sikhs, Baha'is, and those adhering to various traditional religious beliefs, according to the 2020 Report on International Religious Freedom: Kenya. The Kenya National Bureau of Statistics, 2019 reveal that women make up slightly more than half of the total population: out of a total of 47,564,296 persons, 23,548,056 were males, 24,014,716 females and 1,524 intersex.¹⁷

Kenya's legal system is pluralistic. The country's 2010 Constitution provides for the operation of different laws if they conform to constitutional standards. Reference to the "law" in Kenya, therefore, and for purposes of this legal assessment, includes: the Constitution as the supreme law of the land; statutory law at the national level; international law; customary law; and religious laws. The study focuses on laws that are relevant to non-discrimination against women and girls.

In Kenya, there exist various laws and policies aimed at safeguarding the rights of women and girls and eliminating gender-based discrimination. These are discussed in detail in Part III of the report. Following the promulgation of the 2010 Constitution, significant progress has been made in improving the administrative, institutional, legal and policy frameworks towards gender equality. Nonetheless, despite progressive national and international commitments, more remains to be done to realize gender equality. As aptly captured in the National Policy on Gender Development of 2019, "despite a progressive Constitution that promotes gender equality and women's empowerment, gender inequality remains a key issue of concern in Kenya. The patriarchal social order supported by statutory, religious and customary laws and practices; and the administrative and procedural mechanisms for accessing rights have continued

to hamper the goal of attaining gender equality and women's empowerment".¹⁸

The promulgation of the Constitution of Kenya on 27 August 2010 paved the way for a robust bill of rights under Chapter 4 of the document, which contains explicit equality provisions. Worth noting is that following the 2010 Constitution, governance in the country is devolved, or shared between two levels of government, the national government and 47 county governments. The national government and the county governments are "distinct and inter-dependent" and are required to conduct their affairs "on the basis of consultation and cooperation".¹⁹ At the national level, the legislative authority is vested in Parliament (comprising the National Assembly and the Senate), and at the county level, it is vested in the 47 county assemblies.²⁰ In the bicameral system, the National Assembly can originate a bill on any matter, but if the legislative proposal touches on a matter²¹ concerning county governments, then there must be concurrence with the Senate.²² The Senate's legislative authority is limited to matters concerning the interests of counties and their governments.²³ The legislative authority of counties is confined to functions and powers of county governments that fall under Part II of the Fourth Schedule to the Constitution. This legislative assessment focuses on discriminatory and equality laws enacted at the national level of government.

Since the promulgation of the Constitution in 2010, treaties ratified by Kenya can directly be applied in the domestic sphere without any further legal formalities. Under Articles 2(5) and 2(6) of the Constitution, the general rules of international law, as well as any treaty or convention ratified by Kenya, form part of Kenyan law. This was a progressive move from the former constitutional regime and a major win towards reinforcing the application and interpretation of gender equality provisions. The Constitution of Kenya 2010 expressly recognizes "sex" as a grounds for discrimination under Article 27, explicitly asserting,

inter alia, that “[w]omen and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”.²⁴ Unlike the former Constitution of 1969, the 2010 Constitution gives women, on an equal basis with men, the right to pass on their Kenyan citizenship status to their spouses and children.²⁵

The country has made several diverse commitments at the regional and international levels towards securing equality of opportunities and ensuring non-discrimination based on gender in all spheres. These commitments form part of the laws of Kenya under the Constitution. Key among these include the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW),²⁶ which is the globally accepted legal standard, and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol),²⁷ which is the continental legal standard for promoting equality and the empowerment of women and girls.

1.2 REPORT OVERVIEW

During the sixty-third session of the Commission on the Status of Women in 2019, UN Women, the African Union, the Commonwealth, the Inter-Parliamentary Union, the Organisation Internationale de la Francophonie and Secretaría General Ibero-Americana, in collaboration with International Development Law Organization (IDLO) and several civil society organizations, launched “Equality in law for women and girls by 2030: A multi-stakeholder strategy for accelerated action” (the Multi-stakeholder Strategy) as a road map for the elimination of laws that discriminate against women and girls at the national level. The Multi-stakeholder Strategy seeks to fast-track the repeal of discriminatory laws in 100 countries between 2019 and 2023.

This assessment reviews laws that are discriminatory against women and girls in Kenya. It seeks

The unanimous adoption of “Transforming our World: the 2030 Agenda for Sustainable Development” on 25 September 2015²⁸ at the United Nations General Assembly signaled the solemn commitments of all States to address equality gaps to ensure sustainability, peace and prosperity for all people. Soon after, in 2016, Kenya embarked on the development of a country road map to guide the transition from the Millennium Development Goals to the Sustainable Development Goals.²⁹ Prior to that, Kenya’s Vision 2030, the country’s long-term development blueprint, sought to mainstream gender equality in all aspects of society.³⁰ Gender equality and the empowerment of women remain key priorities under the Third Medium Term Plan for 2018-2022 of Kenya Vision 2030.³¹ This plan is currently the primary instrument to drive the implementation of the Sustainable Development Goals during the five-year period, under the theme Transforming lives: Advancing socio-economic development through the ‘Big Four’, namely, universal health care, food security, affordable housing and manufacturing.

to uncover gaps, inconsistencies and contradictions, highlight challenges and opportunities, and suggest ways in which these gaps can be addressed so as to contribute to the aims of the Multi-stakeholder Strategy. The recommendations in this report for the Government and other actors, if implemented, will contribute to the achievement of the Sustainable Development Goals, particularly Goal 5 on gender equality, and target 5.1, which calls for ending all forms of discrimination against women and girls everywhere by 2030, covering all areas of discrimination in the law, policies and practices. Furthermore, this legal assessment report will serve as an important monitoring and reporting tool for the country’s compliance with international norms.

1.3 METHODOLOGY

This legal assessment involved a review of the Constitution of Kenya 2010 and existing legislation at the national level, and mapping these against the principles and standards contained in CEDAW, and further elaborated in the CEDAW General Recommendations on specific themes; the CEDAW Committee Concluding Observations to Kenya and relevant General Recommendations for Kenya; shadow reports to State CEDAW reports; commentaries and studies on the Maputo Protocol; and relevant documents of UN Special Procedures and mandates. Reference was also made to existing legislative and policy frameworks at the regional

level and concluding observations by the various treaty bodies to Kenya. The study also leveraged previous country-focused studies and literature on gender discriminatory laws; country Universal Periodic Review reports and recommendations; State documents; laws; policies; court cases; and general material on the law, gender and discrimination against women and girls in Kenya. Recommendations have been drawn up based on the findings on the level of compliance or non-compliance of legislation with international and regional human rights obligations and the nation's Constitution.

1.4 THE NORMATIVE FRAMEWORK FOR THE ASSESSMENT

This report employs CEDAW³² as the primary framework for the legal assessment. CEDAW seeks to eliminate discrimination against women in all its forms and manifestations and provides internationally accepted gender equality standards. The Convention is based on three key principles: substantive equality, non-discrimination and state obligation.³³ Using CEDAW as the framework for legal review is advantageous for several reasons. As observed by the United Nations Development Fund for Women, “as a human rights treaty, it strongly advances a rights-based approach to claiming rights”.³⁴ As an equality treaty, CEDAW, *inter alia*, “takes into account the social construction of gender; provides for a comprehensive guarantee of equality in all fields – civil, political, economic, social, cultural and other fields; mandates not only equality in law but more importantly, equality of results (*de facto* or actual equality)”.³⁵

Under Article 2 of CEDAW, State parties “condemn discrimination against women in all its forms” and commit “to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation”.

Furthermore, under Article 2 of the Convention, State parties have the following legal obligations:

“(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) ...;

(e) ...;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.”

Alongside CEDAW, reference will also be made to the Maputo Protocol, which is the continental standard for promoting equality and empowerment of women and girls. The Maputo Protocol was adopted on 7 November 2003 as a response to the lack of implementation of international human rights law norms in Africa and entered into force on 25 November 2005.³⁶ Kenya acceded to the Protocol five years later in October 2010. The Protocol provides for the robust protection of women and girls and offers an African-nuanced lens to advocate for legal reform. It reaffirms in binding treaty law the principle of gender equality as enshrined in the Constitutive Act of the African Union and other soft law instruments safeguarding gender equality and protection of the rights of women and girls at the continental level.

The Maputo Protocol contains provisions on all forms of violence against women, the elimination of harmful cultural practices, equality of rights in marriage and family relations, and access to justice for women. The Protocol promotes non-discrimination in all its forms in education and training as well as economic, social, health and reproductive rights, among other rights for women. In Article 2(1) of the Maputo Protocol, State parties undertake to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures” and, inter alia, to:

“a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination, particularly those harmful practices which endanger the health and general well-being of women;

c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.”

It is clear from the above that the Maputo Protocol underscores the significance of a good legislative framework in engendering gender equality and eradicating gender discrimination, and the importance of taking positive action to address laws that discriminate, which is the subject of this legal assessment.

Women’s human rights, including the basic right to equality and non-discrimination in the enjoyment of their human rights, have also been recognized in various other international instruments including: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of Persons with Disabilities as well as the African Charter on Human and Peoples Rights and the African Charter on the Rights and Welfare of the Child. Where applicable, provisions in these instruments will be referenced to bolster the provisions of CEDAW and the Maputo Protocol.

1.5 KEY CONCEPTS

The following relevant concepts frame and inform the analysis and review of laws in this study:

Equality

The concept of equality is not defined in the instruments, but a close reading of CEDAW text, for instance, unearths different theories of equality – formal equality, substantive equality and transformative equality. The CEDAW Committee has sought to articulate the content and meaning of the right to equality.³⁷

Substantive equality

Despite the adoption of several formal laws and declarations, inequality and discrimination continue to pervade the lives of women and girls. The CEDAW Committee notes that “a purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, which the Committee interprets as substantive equality”.³⁸ The CEDAW Committee interprets the obligation to ensure equality to mean de facto equality, that is, equality in fact, actual equality or equality of results. Article 4 of CEDAW notes that temporary special measures such as quotas may be necessary to address de facto inequality. This standard is important because traditional models of equality have failed to address historical gender discrimination, prevailing gender stereotypes, and traditional gender roles that perpetuate discrimination and inequality. As noted by the United Nations Development Fund for Women, “[s]ubstantive equality looks beyond legal guarantees of equal treatment, and inquires into the impact of interventions”.³⁹

Equality of opportunity

This concept suggests that the law should ensure that all individuals have equal opportunity, taking into consideration their starting position to gain access to desired benefits. The problem with this approach is that providing “equal chances” to both women and men may not automatically lead to equal results in cases where women begin from a disadvantaged position. In such cases, it may be necessary to employ temporary special measures until the playing field is even.

Transformative equality

This principle underpins several CEDAW provisions, such as Articles 2(f) and 5, which together require State parties to address prevailing gender relations and the persistence of gender-based stereotypes. Article 4 of CEDAW requires that State parties implement temporary special measures to accelerate de facto equality between men and women. The CEDAW Committee recommends that States implement an effective strategy to redistribute power and resources among women and men⁴⁰ and adopt measures “towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined

male paradigms of power and life patterns”.⁴¹ States should also focus on the modification or transformation of harmful norms, prejudices and stereotypes and create the conditions necessary for women to exercise their autonomy and agency and “develop their personal abilities, pursue their professional careers and make choices without the social limitations”.⁴²

Formal equality

Formal equality is often understood as providing similar treatment to similar people. In this approach, men and women are considered similar and are therefore provided with the same treatment. As a result, differences based on biology, such as pregnancy or maternity; or differences based on social roles, such as women’s domestic work, are ignored. Social and cultural differences – social perceptions of women as weak, economically dependent and housebound – and their impact on women are also disregarded. By ignoring these differences, the actual needs of women are not addressed, leading to a violation of their human rights. Formal/de jure equality can lead to de facto discrimination where pre-existing discrimination is not considered, or the consequences of the law are not anticipated.

Non-discrimination

This legal assessment uses the definition of non-discrimination as contained under Article 1 of CEDAW, which defines discrimination against women to mean “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”. A similar definition is contained under Article 1(f) of the Maputo Protocol.

Direct and indirect discrimination

Direct discrimination against women “constitutes different treatment explicitly based on grounds of sex and gender differences”.⁴³ Direct discrimination is also referred to as disparate treatment discrimination, that is, intentional discrimination. This refers to a law, action or omission that has the “purpose” of discriminating against women, for example, unequal retirement age, unequal inheritance rights, terminating employment on the basis of marriage or pregnancy, and different ages of marriage for boys and girls. Indirect discrimination against women, on the other hand, “occurs when a law, policy, program or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure”.⁴⁴ The CEDAW Committee went on to observe that “indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men”.⁴⁵ In laws, indirect discrimination occurs where rules are neutral but in practice lead to exclusions and unfair results for a protected group such as women. Indirect discrimination is also referred to as disparate impact discrimination, that is, unintentional discrimination whereby giving unequal shares introduces inequality.

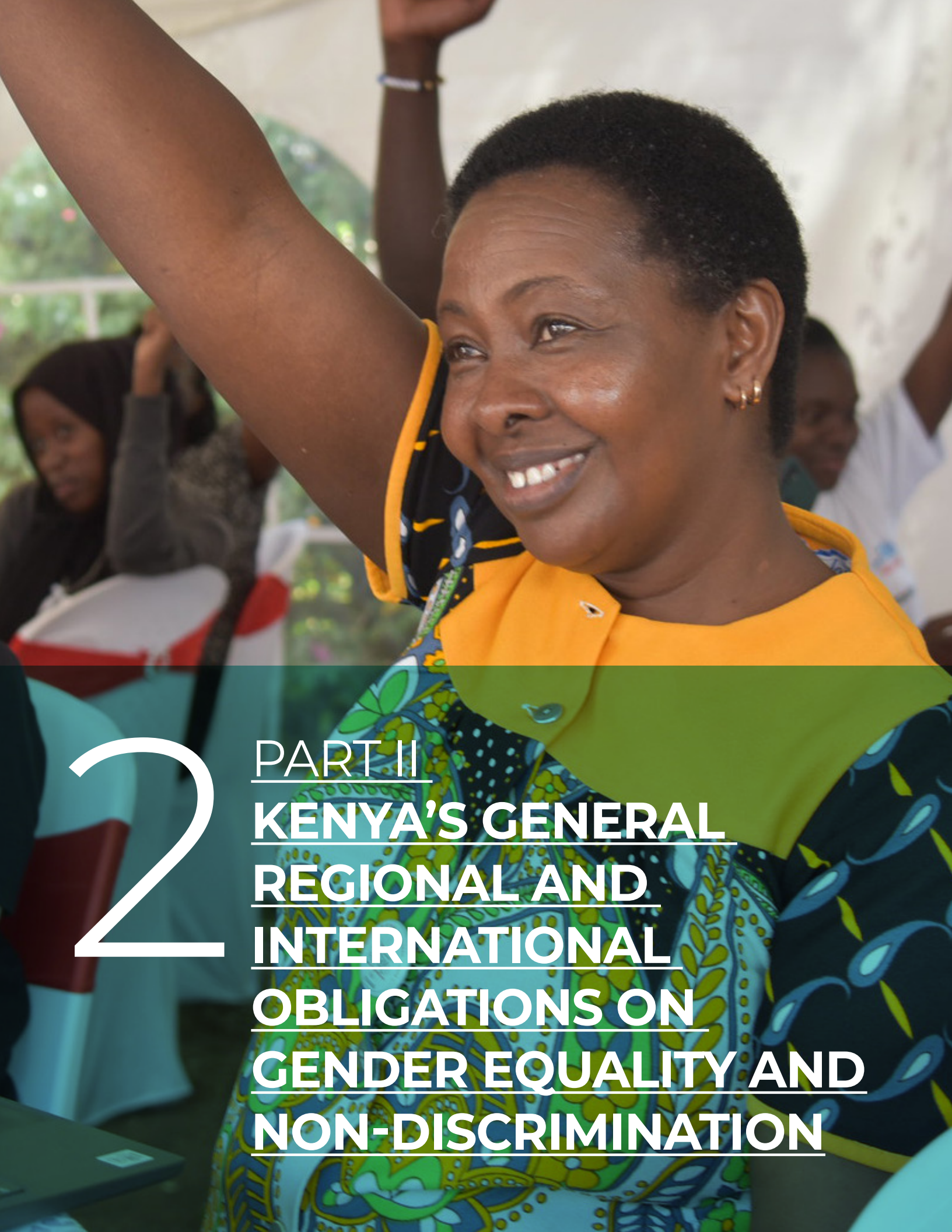
Intersectionality

Intersectionality is the idea that one's identity is not singular but is often composed of multiple identities, such as those of race, economic or social status, religion, disability, or age, and that these identities bring their related systems of advantage or disadvantage. Laws are often blind to intersectional discrimination. To achieve substantive equality, it is important for laws and their interpretation to contemplate intersecting discriminations in women's lives. The concept of intersectionality has been adopted by international human rights law, notably by the CEDAW Committee, which affirmed that: "States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programs designed to eliminate such occurrences, including, where appropriate, temporary special measures."⁴⁶

The principle of intersectionality is an important pillar in the United Nations' principle of Leave No One Behind. This principle compels state actors "to focus on discrimination and inequalities (often multiple and intersecting) that undermine the agency of people as holders of rights. Many of the barriers people face in accessing services, resources and equal opportunities are not simply accidents of fate or a lack of availability of resources, but rather the result of discriminatory laws, policies and social practices that leave particular groups of people further and further behind."⁴⁷

State obligations relating to gender equality

The State is the primary duty bearer in ensuring the equality and empowerment of women and girls in law and in practice. The term "State" refers to all organs of the government and encompasses executive, legislative, judicial and administrative structures as well as local government units. This entails obligations of means and results. A State undertakes to comply with a specific means of implementation (obligation of means), such as the enactment of a law or policy, and to ensure that the measures chosen (for instance a law) result in the elimination of discrimination (obligation of results). Where, for instance, a gender equality law exists, but is only partially or not implemented at all, then the State has not fulfilled its obligation of results.⁴⁸



2

PART II
KENYA'S GENERAL
REGIONAL AND
INTERNATIONAL
OBLIGATIONS ON
GENDER EQUALITY AND
NON-DISCRIMINATION

2.1 GENDER EQUALITY NORMS AND STANDARDS

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Kenya ratified CEDAW on 9 March 1984. Since then, the Government has submitted up to the eighth periodic State Party report.⁴⁹ CEDAW is the most significant international instrument on the protection of women's rights and the equality of men and women.

Other instruments

Other international instruments safeguarding the human rights of women include the Universal Declaration of Human Rights, the Convention on the Rights of Child, and the Convention on the Rights of Persons with Disabilities. The treaty monitoring bodies with responsibility for overseeing the implementation of these treaties, such as the CEDAW Committee, issue General Comments as recommendations to State parties on how to discharge their legal obligations to ensure human rights.

United Nations Security Council Resolution 1325, on Women, Peace and Security

This 2000 Resolution "reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peacebuilding, peacekeeping, humanitarian response and in post-conflict reconstruction and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security".^{50 51} Many States have drafted and adopted national action plans that seek to implement the provisions of the Security Council's guidance in domestic law and policy. Kenya has so far adopted two National Action Plans; the most recent covers the period from 2020 to 2024. The second Plan focuses on the localization of United Nations Security Council Resolution 1325 and provides a framework that will enhance and amplify the collective voices of women at the grassroots and national levels. The National Action Plan recognizes the peace and security role that women and women-led community organizations play as a valuable contribution to sustainable peace.

Beijing Declaration and Platform for Action

The Beijing Declaration and Platform for Action of the Fourth World Conference on Women⁵² identified, as critical policy priorities in the global economy, the persistent burden of poverty on women, and inequalities in education, training, economic structures and policies, productive activities and access to resources. The Beijing Platform recognizes that women's rights are human rights⁵³ and that "women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace".⁵⁴

The 2030 Agenda for Sustainable Development

The 17 goals and 169 targets of the 2030 Agenda are integrated and indivisible, ensuring gender equality is mainstreamed throughout. For example, under Goal 1 on ending poverty everywhere, States undertake by 2030 to "ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance". As well as being mainstreamed throughout the goals of the 2030 Agenda, there is a specific goal, Goal 5, on gender equality. Under Goal 5, States undertake to achieve the following targets:

5.1 End all forms of discrimination against women and girls everywhere.

5.2 Eliminate all forms of violence against women and girls in the public and private spheres, including trafficking, sexual and other types of exploitation.

5.3 Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation.

5.4 Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate.

5.5 Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making, including political, economic and public life.

5.6 Ensure universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the Programme of Action of the International Conference on Population and Development, the Beijing Platform for Action and the outcome documents of their review conferences.

Goal 16 on peace, justice and strong institutions is also highly relevant to the issue of women's equality in law and practice. Under target 16.3, States undertake to "promote the rule of law at the national and international levels and ensure equal access to justice for all".

2.2 SPECIFIC RECOMMENDATIONS TO KENYA BY INTERNATIONAL HUMAN RIGHTS TREATY BODIES AND OTHER EXPERT REVIEW PROCESSES

CEDAW Committee Recommendations to Kenya (2017)

The CEDAW Committee is the monitoring body that oversees the implementation of CEDAW. Every four years, the State parties submit a report to the CEDAW Committee indicating the measures undertaken to give effect to the provisions of the Convention.⁵⁵ These reports

are discussed during the CEDAW Committee's regular sessions. Kenya last reported to the CEDAW Committee in 2017.⁵⁶ A summary of the Concluding Observations made by the CEDAW Committee on the eighth periodic report of Kenya in 2017 are appended to this assessment.

Voluntary National Review (2020)

In its second Voluntary National Review on the implementation of the Sustainable Development Goals, the Government of Kenya reported the various barriers to achieving gender equality and empowerment of all women and girls in the following terms:

*"...inadequate gender statistics, dissemination and use of gender research; medicalisation of female genital mutilation (FGM); cross border FGM; inadequate responses to gender-based violence, including limited prevention mechanisms and harmful socio-cultural practices such as FGM, child marriage and widow inheritance; [w]eak entrepreneurial skills and opportunities amongst women to start and sustain income generating activities and [i]nsufficient financial resources for gender mainstreaming and women empowerment programmes."*⁵⁷

Third Cycle Universal Periodic Review (2020)

In its third cycle review under the Universal Periodic Review conducted in January 2020, Kenya committed to amending discriminatory laws against women and the elimination of harmful practices and gender-based violence against women and girls. Kenya also accepted several other recommendations on protection and promotion of the rights of women and girls. A matrix on the accepted recommendations relevant to this study is affixed to this report as Appendix 4.

2.3 REGIONAL NORMS ON EQUALITY AND NON-DISCRIMINATION

Achieving full gender equality in all spheres of life is a critical element of the African Union's Agenda 2063: The Africa We Want.⁵⁸ Women and girls' empowerment and addressing violence and discrimination against women and girls are earmarked as the topmost priority areas toward achieving this goal.⁵⁹ The African Union boasts a robust normative and institutional framework on gender equality and women and girls' rights.⁶⁰ There are several other treaties and soft law instruments that form a continental framework for the protection and promotion of the rights of women and girls.⁶¹

- Continental Policy Framework on Sexual and Reproductive Health and Rights (2006)
- African Union Gender Policy (2009)
- African Women's Decade 2010–2020 (2010)
- African Charter on Human and Peoples' Rights (1981)
- African Charter on the Rights and Welfare of the Child (1990)
- African Charter on Human and Peoples' Rights General Comment No. 1 (Article 14) (2012)
- African Charter on Human and Peoples' Rights General Comment No. 2 (Article 14) (2014)
- Joint General Comment on African Charter on Human and Peoples' Rights and African Charter on the Rights and Welfare of the Child on Ending Child Marriage (2017)
- African Union Strategy for Gender Equality & Women's Empowerment 2018-2028 and African Charter on Human and Peoples' Rights Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (2014)

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or the Maputo Protocol, is the most influential instrument on gender equality and non-discrimination in the African continent. The various General Comments by the African Commission on Human and Peoples' Rights further augment and expound on the rich substantive provisions.

The Maputo Protocol came into force in 2005. Kenya acceded to the Protocol in October 2010. Like CEDAW, the Maputo Protocol explicitly provides for a definition of discrimination. Accordingly, discrimination is “any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life”.⁶²

The African Commission is the supervisory body over the Maputo Protocol. Periodic reports are to be submitted every two years in accordance with Article 62 of the African Charter, indicating the legislative and other measures undertaken for the full realization of the rights herein recognized. Kenya submitted the initial periodic report in 2020 alongside its twelfth and thirteenth periodic reports on the African Charter on Human and Peoples' Rights.

Kenya is a member of the East African Community.⁶³ The East Africa Community Treaty, the EAC Vision 2050 and the Gender Policy 2018 provide a supporting policy framework for member states to advance the empowerment of women and girls. On the legislative front, the East African Community Gender Equality and Development Bill, 2017 seeks to provide a legislative framework for gender equality.



3

PART III

KENYA'S DOMESTIC

LEGISLATIVE

FRAMEWORK

GOVERNING GENDER

EQUALITY AND NON-

DISCRIMINATION

3.1 SOURCES OF LAW IN KENYA

Kenya practices a pluralistic legal system. There are various sources of law:⁶⁴

- The Constitution of Kenya, 2010 (“the Constitution”)
- Acts of Parliament/county assemblies
- African customary law
- Common law and equity
- Islamic law
- International law

The Constitution is the supreme law of the land. Any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency.⁶⁵ The preamble recognizes the ethnic, cultural and religious diversity of Kenya and commits to living “in peace and unity as one indivisible nation”. Notably, the Constitution expressly stipulates that there is no state religion.⁶⁶ The Constitution further recognizes culture as “the foundation of the nation and as the cumulative civilization of the Kenyan People and Nation”⁶⁷ and safeguards the right to language and culture, including the right to participate in the cultural life of the person’s choice. The freedom of religion, belief and opinion is secured.⁶⁸ Of critical relevance to the present analysis is the interpretation clause in the Constitution, Article 259(1)(a), which requires that the Constitution be interpreted in a manner that “promotes its purposes, values, and principles”. Judges are to adopt an interpretation that “advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights”.⁶⁹

The Constitution mandates judges to ensure that justice is done to all, irrespective of status, and to promote the use of traditional dispute resolution mechanisms. However, such mechanisms must not contravene the Bill of Rights, be repugnant to justice and morality, or result in outcomes that are repugnant to justice or morality or are inconsistent with the Constitution or any written law.⁷⁰

Free participation in social and cultural life is recognized as a human right under international law.⁷¹ Indeed, it has been noted that “the full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world”.⁷² Notably, it has been stated that the right to culture is not *carte blanche*, it is subject to international human rights instruments. As such, “no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope”.⁷³ The Committee on Economic, Social and Cultural Rights has, however, cautioned that limitations to participate in cultural life may be necessary “in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights”.⁷⁴

It is important to point out that the majority of Kenyans, especially in rural areas, resolve their disputes using traditional dispute resolution mechanisms that are based on customary law. According to the Alternative Justice Systems Baseline Policy by the judiciary of Kenya, “[m]ost disputes, approximately 95%, are resolved through informal and non-State-based means outside the confines of Courts”.⁷⁵

The Judicature Act (Cap. 8) provides: “The High Court, the Court of Appeal and subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.”⁷⁶ The repugnancy provision is ambiguous and does little to offer adequate protection for women against discriminatory customary norms. It is therefore largely left to the courts to interpret whether a particular law or custom is in tandem with the Constitution or repugnant to law, justice and morality. As noted above, only

a small fraction of the cases will get to such an adjudication, as the majority of cases are resolved through alternative justice systems and alternative dispute resolution mechanisms at the community level.

It is important to point out from the outset that the customary and religious laws of different communities in Kenya are not uniform, and that several contain positive and enabling norms and provisions that are supportive to women and girls. Reference to discriminatory customary and religious laws in this report should therefore be understood to refer to those norms and practices in the particular communities where they occur, rather than a blanket condemnation of all customary laws, norms and practices of all communities in the country. Most customary systems, however, are premised on patriarchal philosophical underpinnings and norms that are discriminatory and often misogynistic toward women and girls.

3.2 EQUALITY GUARANTEES UNDER THE CONSTITUTION

The Constitution underscores equality, equity, inclusiveness and non-discrimination as national values and fundamental principles of governance.⁷⁷ Article 27 is the primary non-discrimination provision. It provides that every person is equal before the law and has the right to equal protection and benefit.⁷⁸ Article 27(3) provides that women and men have the right to equal treatment, including the right to equal opportunities in political, social, economic and cultural spheres. Under Articles 27(4) and 27(5), the State and all persons are not to discriminate directly or indirectly against any person on any grounds, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. Under this Article, the State is also duty-bound to take “affirmative action programmes and policies designed to redress any disadvantage suffered

by individuals or groups because of past discrimination”.

On matters involving political representation, the State is obliged to take legislative and other measures to ensure that no more than two-thirds of the members of elective or appointive bodies shall be of the same gender.⁷⁹ Moreover, Kenya's electoral system is to comply with the principle that “not more than two-thirds of the members of elective public bodies shall be of the same gender”.⁸⁰ Article 100 of the Constitution reiterates this principle, obliging Parliament to enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities. Pursuant to Article 100, the National Assembly attempted, through the Representation of Special Interest Groups Laws (Amendment) Bill, 2019⁸¹ to enact a law to meet this requirement.⁸²

Kenya's robust Bill of Rights protects various other rights, including freedom and security of the person, the right not to be subjected to physical or psychological torture⁸³ and the right to property.⁸⁴ Other rights secured include acquisition of citizenship,⁸⁵ the right to the highest attainable standard of health⁸⁶ and protection of the family.⁸⁷ The Constitution guarantees free consent to marriage as well as equality of rights by parties to a marriage “at the time of marriage, during the marriage and at the dissolution of marriage”.⁸⁸ To note, however, is that the provision further allows for recognition of personal law “and family law under any tradition, or adhered to by persons professing a particular religion”.⁸⁹ There is nevertheless a reprieve to such an express clawback: that such recognition is only “to the extent that any such marriages or systems of law are consistent with [the] Constitution”.⁹⁰

Of great significance is that the equality provisions afforded under Article 27 of the Constitution are qualified by Article 24(4) of the same supreme law that states: “The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim

law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance." Moreover, Article 170 of the Constitution establishes the Kadhis' courts, whose jurisdiction is to determine "questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts". It is in these very areas that women are discriminated against.

3.3 POLICY AND LEGISLATIVE FRAMEWORK

Besides the Constitution, Kenya's National Policy on Gender and Development⁹¹ provides a sound policy framework for advancing equality and non-discrimination against women and girls. The overarching goal of the policy "is to achieve gender equality by creating a just society where women, men, boys and girls have equal access to opportunities in the political, economic, cultural and social spheres of life".⁹² The policy sets out legislative and administrative measures to address existing gaps in the realization of gender equality and women's empowerment.

This legal assessment reviews the following laws:

- **Births and Deaths Registration Act** (Chapter 149), Laws of Kenya, a 1928 statute (amended over the years) that provides for the notification and registration of births and deaths.
- **Law of Succession Act** (Chapter 160), Laws of Kenya, a statute enacted in 1972 but which commenced operation in 1981; it is the primary framework on testate and intestate succession in Kenya.
- **Children Act, 2022** (No. 29 of 2022), which safeguards the rights and welfare of the child.
- **Sexual Offences Act, 2006** (No. 3 of 2006), which makes provision for sexual offences and for the prevention and protection of all persons from unlawful sexual acts, including child pornography and sexual communication with a child.
- **Employment Act, 2007** (No. 11 of 2007), which provides significant protection from discrimination in all aspects of employment.
- **Counter-Trafficking in Persons Act, 2010**, which makes trafficking in persons a criminal offence and domesticates the provision of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
- **Kenya Citizenship and Immigration Act, 2011** (No. 12 of 2011), which provides for legal equality between the sexes with respect to acquisition of citizenship through marriage and birth.
- **Prohibition of Female Genital Mutilation Act, 2011**, which protects women and girls from all forms of female genital mutilation.
- **Political Parties Act, 2011** (No. 11 of 2011), which is a framework that regulates political parties, their registration and funding. The Act makes gender balance and representation in governing bodies and membership of parties a prerequisite to the registration of a party and the receipt of funding from the Political Parties Fund.
- **Land Act** (No. 6 of 2012) as amended by Land Laws (Amendment) Act, 2016 (No. 28 of 2016), which protects spousal interest in matrimonial property by making spousal consent compulsory in the disposition of matrimonial property.
- **Land Registration Act, 2012** (No. 3 of 2012), which consolidates and rationalizes the registration of titles to land, to give effect to the principles and objects of devolved government in land registration.

- **Teachers Service Commission Act, 2012** (No. 20 of 2012), which regulates the composition and functioning of the Teacher’s Service Commission, the body that acts as employer for teachers.
- **Matrimonial Property Act** (No. 49 of 2013), which governs rights and responsibilities of spouses with regard to matrimonial property.
- **Victim Protection Act, 2014** (No. 17 of 2014), which provides for comprehensive support for victims of crime and the abuse of power and affords special protection to vulnerable victims.
- **Marriage Act, 2014** (No. 4 of 2014), which provides for equal rights between men and women in marriage.
- **Protection Against Domestic Violence Act, 2015** (No. 2 of 2015), which offers protection and relief for victims of domestic violence as well as the protection of a spouse, children or other dependent persons.
- **Community Land Act, 2016** (No. 27 of 2016), which provides a framework to recognize, protect and register community land. The Act emphasizes the principle of equality in the benefit from community land for every member of the community.
- **Health Act, 2017** (No. 21 of 2017), which provides for the framework of healthcare services and stipulates the content on the right to reproductive healthcare and the right to emergency treatment.
- **Public Procurement and Asset Disposal Act, 2015** (No. 33 of 2015), which provides for affirmative action for women and other marginalized groups with regard to access to government procurement opportunities.
- **Prevention of Torture Act, 2017** (No. 12 of 2017), which forbids torture and all forms of cruel, degrading and inhuman punishment, and provides certain instances in which the offences of rape and sexual violence amount to torture.

3.4 LEGAL ANALYSIS

This section presents an assessment of Kenyan laws to establish their compliance with CEDAW, as well as other relevant international and regional norms and standards, identifying gaps and proffering recommendations.

3.4.1 MARRIAGE AND FAMILY RELATIONS

Women’s rights are most violated within the family domain.⁹³ Women assume various roles, responsibilities and identities that accentuate power relations and determine the extent to which they can exercise agency.⁹⁴ Most discrimination against women occurs within the family with respect to inheritance rights, succession rights and sharing of matrimonial property upon divorce, and fundamental guarantees of personal safety, security and freedom of movement, among others. As the CEDAW Committee has previously observed, “Inequality in the family is the most damaging of all forces in women’s lives, underlying all other aspects of discrimination and disadvantage, and is sheltered by ideologies and cultures.”⁹⁵ This subsection addresses equality in marriage and family relations under the following three themes:

- Consent and the right to marry
- Matrimonial property
- Equal rights and responsibility over children

Consent and the right to marry

Target 5.2 of Goal 5 of the Sustainable Development Goals on gender equality calls on States to eliminate harmful practices, such as child, early and forced marriage and female genital mutilation, by 2030. Women have a right, on an equal basis with men, “freely to choose a spouse and to enter into marriage only with their free and full consent”.⁹⁶ In expounding on equality in marriage and family relations under Article 16 of the Convention,

the CEDAW Committee has observed that “a woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being”.⁹⁷ Under Article 16(2) of CEDAW, States are legally bound to take “all necessary action, including legislation” to “specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory”. Similarly, the Maputo Protocol guarantees that “no marriage shall take place without the free and full consent of both parties” and that “the minimum age of marriage for women shall be 18 years”.⁹⁸

The above protections are secured under both the Kenyan Constitution and the Marriage Act, 2014. Article 45(2) of the Constitution provides that, “Every **adult** has the right to marry a person of the **opposite sex**, based on the free consent of the parties” [emphasis added]. The corollary to this provision is that same sex unions are not recognized and therefore do not enjoy similar legal protections.⁹⁹ In the same breadth, it is arguable that the practice of woman-to-woman marriage, which is prevalent in some cultures, is not legally recognized. However, a scan of case law indicates that when particular customary formalities are met, woman-to-woman marriages may be valid.¹⁰⁰

Section 3(1) of the Marriage Act, 2014 describes marriage as the “voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act”. Section 4 expressly stipulates that: “A person shall not marry unless that person has attained the age of eighteen years.” In fact, the Act recognizes that marriages contracted with a person below the minimum age of marriage are void.¹⁰¹ This is consistent with Article 16(2) of CEDAW, which recognizes that “[t]he betrothal and the marriage of a child shall have no legal effect”. It is an offence to marry a person below the age of 18 years with a prescribed imprisonment term of five years or a fine not exceeding Ksh 1 million (USD 10,000).¹⁰²

The Children Act, 2022 also proscribes underage marriage and crimes associated with it, such as sexual abuse. Section 23 provides: “No person shall subject a child to - in the case of a male child, forced circumcision; female genital mutilation; child marriage; virginity testing; girl child beading...” These are offences as follows:

“A person who contravenes the provisions of subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term of not less than three years or to a fine of not less than five hundred thousand shillings, or to both.”

The Sexual Offences Act, 2006 further adds to the layer of protection by penalizing sexual acts with a child in section 8 as follows:

“8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

Notably, there are glaring inconsistencies in the penalties prescribed for the offence of child marriage under the Marriage Act, 2014 and the Children Act, 2022, and by extension the Sexual Offences Act, 2006. This creates a loophole that could effectively undermine deterrence when a case is brought under the Children Act.

In terms of application of the Constitution and marriage laws, there is a gap to the extent that

child marriages involving Muslims are not covered. Section 49(1) of the Marriage Act, 2014 declares Kadhi, Sheikh or Imam's jurisdiction over Islamic marriages, and section 49(3) stipulates that any provision of the Marriage Act that is inconsistent with Islamic law is not to apply to Muslims. Furthermore, section 5 of the Kadhis' Court Act (Cap. 11)¹⁰³ gives Kadhis' courts jurisdiction over personal matters of Muslim parties. The impact of section 49(3) of these provisions is that Muslim women are excluded from the benefits guaranteed under the Constitution and the Marriage Act, 2014, which recognize the equality of men and women in marriage. This means that Muslim women are governed by sharia law, which occasions discrimination in marriage.¹⁰⁴

RECOMMENDATIONS:

- Codify Muslim family law in a manner that is compatible with Article 27 of the Constitution and Articles 1, 2 and 16 of the Convention as recommended by the CEDAW Committee following the review of Kenya's eighth periodic report.
- Repeal sections 3 and 49(1) of the Marriage Act, which exclude the application of the equality provisions to Islamic marriages.
- Repeal section 5 of the Kadhis' Courts Act (Cap 11).

Matrimonial property

Property acquired in marriage is one key avenue for women to own property in Kenya. Matrimonial property systems that discriminate against women perpetuate gender inequality in economic empowerment. Such systems are fundamentally responsible (among other causes) for high poverty indices of women compared to men across the world. The CEDAW Committee, in addressing the economic consequences of marriage, family relations and their dissolution, has called upon State parties to "provide, upon divorce and/or separation, for equality between the parties in the

division of all property accumulated during the marriage".¹⁰⁵ The CEDAW Committee has decried the over-emphasis on financial contributions and the diminished recognition of non-monetary contributions such as rearing children and household duties, noting that "such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets".¹⁰⁶ As such, "financial and non-financial contributions should be accorded the same weight".¹⁰⁷ The CEDAW Committee has clarified the duty of States as follows:

*"States parties are obligated to provide, upon divorce and/or separation, for equality between the parties in the division of all property accumulated during the marriage. States parties should recognize the value of indirect, including non-financial contributions with regard to the acquisition of property acquired during the marriage."*¹⁰⁸

At the national level, the Constitution and the Matrimonial Property Act, 2013 provide the primary legal framework on property ownership rights of spouses in and at the dissolution of marriage. The Matrimonial Property Rules, 2022 were also enacted to facilitate the expeditious resolution of disputes. Article 45(3) of the Constitution guarantees equality of parties in all stages of marriage. The provision states: "Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage." Article 68(c)(iii) of the Constitution further obligates Parliament to enact a law to "regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage" and "to protect the dependents of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land".

In terms of property ownership, Section 7 of the Matrimonial Property Act provides that upon the dissolution of a marriage, parties are

entitled to a share of the property equal to their contribution, whether monetary or non-monetary. The term “contribution” is defined under section 2 of the Act to include domestic work and management of the matrimonial home, childcare, companionship, family business and farm work. The law further safeguards the equality of both spouses, expressly stating that “a married woman has the same rights as a married man to acquire, administer, hold, control, use and dispose of property whether movable or immovable”. Further, a married woman has the right to enter into contracts, sue and be sued in her own name.¹⁰⁹

Section 7 of the Matrimonial Property Act claws back on equality gains under Article 45(3) of the Constitution by providing that “ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved”. The exception to this is if parties enter prenuptial agreements regarding their property rights prior to marriage.¹¹⁰

This clawback legislative action is an illustration of the precarious nature of constitutional and legislative gender equality gains in Kenya, especially in the face of a strongly patriarchal culture and practice at community levels, which also permeate the legislative houses. Section 7 of the Matrimonial Property Act results in indirect discrimination against women. This is because proving monetary and non-monetary contributions to matrimonial property presents evidentiary challenges, as currently there is no formula for quantifying the unpaid domestic work of women as a “contribution”.

In terms of equality in polygamous unions, section 8 of the Matrimonial Property Act, 2013 seeks to safeguard the properties of all wives in unions. The provision prescribes that if the parties in a polygamous union divorce or the marriage is otherwise dissolved, the following two scenarios shall apply:

- a) Matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife.
- b) Matrimonial property acquired by the man after he marries another wife shall be regarded as owned by the man and the wives, taking into account any contributions made by the man and each of the wives.

The law therefore allows a wife in a polygamous marriage to hold her matrimonial property separate from the other wives. However, this provision in practice is prone to similar complications as section 7 to the extent that it is difficult to calculate each wife’s non-monetary contribution, for instance towards a property registered in the man’s name only. In any case, the lack of clarity in valuation of domestic work disenfranchises even more women in polygamous unions than in monogamous unions. The CEDAW Committee in its Concluding Observations in 2017 recommended the repeal of section 7 of the Matrimonial Property Act, 2013.¹¹¹ The Committee also recommended that polygamy be abolished through a two-pronged approach: firstly, by protecting the rights of women in existing polygamous marriages, and secondly, by discouraging future polygamous marriages.¹¹² The CEDAW Committee’s view is consistent with Article 6 of the Maputo Protocol on monogamy and protection of the rights of women in polygamous unions.

Exclusion of Islamic marriages from application of Matrimonial Property Act, 2013

To the extent that section 3 of the Matrimonial Property Act, 2013 provides the option for Muslims to opt out of the application of Article 45(3) of the Constitution, it results in discriminatory outcomes for women. The section stipulates that “a person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property”.

Thus, parties to an Islamic marriage may defer to Islamic law and have their dispute on matrimonial property adjudicated before the Kadhis' court. The Kadhis' court is a subordinate court with jurisdiction to "determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts".¹¹³ The division of matrimonial property at the dissolution of marriage is governed by different principles and frameworks for interpretation under Islamic law.¹¹⁴ Indeed, it has been observed that "Muslim property regimes are negotiated through intersection of custom, religion, family, kinship and the construction of property itself."¹¹⁵ In Kenya, decisions on matrimonial property before a Kadhis' court are made based on the Islamic school that the Kadhi follows, their ethnic and cultural traditions and a variety of personal factors.¹¹⁶ Furthermore, Kadhis' courts are exempted from application of the equality provisions under the Constitution to the extent necessary for the application of Islamic law in matters relating to marriage, divorce, inheritance and personal status.¹¹⁷ The lack of clear rules on how matrimonial property is divided, combined with the fact that women cannot be appointed as Kadhis and the exemption from the equality provision on matters relating to divorce before Kadhis' courts, have resulted in discriminatory outcomes for Muslim women.

In its Concluding Observations to Kenya in 2017, the CEDAW Committee noted with concern that Kenya continues to preserve multiple legal systems, which is in itself discriminatory against women. The CEDAW Committee was concerned that:

"the legal framework in the State party, including exemptions under Article 45 of the Constitution and Article 49 (3) of the Marriage Act of 2014, discriminates against Muslim women and women in customary marriages, including through the explicit exemption of

*the Kadhi courts from constitutional equality provisions and the fact that women cannot serve as Kadhis".*¹¹⁸

The CEDAW Committee recommended that Kenya ensure equality between women and men in Muslim marriages and upon divorce by amending discriminatory provisions under religious and customary laws, codifying Muslim family law in a manner that is compatible with Article 27 of the Constitution and CEDAW, and appointing Muslim women as Kadhis and mediators in the Kadhi court system.¹¹⁹

RECOMMENDATIONS:

Law reform

- Repeal section 3 of the Matrimonial Property Act, 2013, which allows the application of Islamic law in matters relating to matrimonial property, to remove the clawback of the constitutional guarantee in Article 45(3) of the Constitution for the benefit of Muslim women.
- Repeal section 7 of the Matrimonial Property Act to remove the clawback from the Act, and Article 45(3) on equal rights in marriage to restore substantive equality in the division of matrimonial property upon divorce, and to include CEDAW General Recommendation 21 (para 32) on giving equal value to monetary and non-monetary contributions.
- Amend section 6(1) of the Matrimonial Property Act to expand the definition of marital property.
- Amend section 10 of the Matrimonial Property Act to state that liability on any matrimonial property should be commensurate with a spouse's contribution to that liability.
- Amend section 11 of the Matrimonial Property Act to recognize and allow women a share of benefit of ancestral land upon the dissolution of marriage.
- Amend the Marriage Act, 2014 to expressly discourage polygamous unions and

encourage monogamous marriages as the preferred form of marriage, while at the same time providing for protection of the rights of women who are already in polygamous marriages, in line with Article 6(c) of the Maputo Protocol.

- Amend the Matrimonial Property Act to give effect to the concept of spousal equality written into the Constitution by adopting a property distribution model that recognizes the equality of spousal contribution in property acquisition and division.

Policy and program actions

- The judiciary should develop practice directions that clearly allow magistrates' courts to adjudicate matrimonial property rights and other relevant guidance quantifying non-monetary contributions.
- Courts should include the following factors in determining the division of matrimonial property: the economic impact of lost career opportunities; support to the other spouse's career advancement; spousal needs, including future financial circumstances of both spouses; duration of marriage; age and health of the spouses; which spouse is the custodial parent of children; wasteful use of assets; and unfair transfer of property.
- Judicial officers and court-annexed mediators should be trained and sensitized on the matrimonial property and inheritance regimes in Kenya.
- Policy actions and social reforms to mainstream unpaid work into the economy should be undertaken.

Equal responsibility for children within and outside of marriage

In consonance with its regional and international obligations,¹²⁰ Kenya's Constitution provides that every child has the right to parental care and protection, "which includes equal responsibility of the mother and father to provide for the

child, whether they are married to each other or not". The Constitution further goes on to state that "a child's best interests are of paramount importance in every matter concerning the child".¹²¹ Despite this constitutional guarantee, three statutes do not accord this equality and are discriminatory against women regarding equality of responsibility for children within and out of marriage, leaving most responsibility to women as discussed below.

Births and Deaths Registration Act (Chapter 149), Laws of Kenya

The Births and Deaths Registration Act (Cap. 149), a law enacted in 1928 and revised in 1990, is discriminatory against women. Section 12 of the Act provides as follows:

"No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or in accordance with some recognized custom."

The section is discriminatory against women in that there is no reciprocal provision requiring evidence of marriage before the name of an unmarried mother of a child born out of wedlock is entered into the register. This denies women and their children the right to equality before the law and to equal protection and equal benefit of the law. It also denies children their right not to be directly or indirectly discriminated against on any grounds, including sex, birth or marital status, contrary to Article 27(1)(4) of the Constitution and international human rights instruments. Fathers get the leeway to "decide" when to accept parental responsibility. No such discretion is given to mothers.

The High Court has, on diverse occasions, found Section 12 of the Births and Deaths Registration Act (Cap. 149) to violate the Constitution, and it was declared null and void in the case of *L.N.W v. Attorney General & 3 others*¹²² and *NSA & another v. Cabinet Secretary for, Ministry of Interior*

and Coordination of National Government & another.¹²³ However, the provisions are yet to be repealed.

Law of Succession Act (Chapter 160), Laws of Kenya

The Law of Succession Act (Cap. 160) is a statute dating back to 1972, although its application began a decade later. It is the primary framework governing succession and the administration of estates of the deceased in Kenya.

The definition of the term “child” or “children” for purposes of succession under the Act is discriminatory against unmarried women and children born out of wedlock. Sections 3(2) and 3(3) of the Law of Succession Act (Cap. 160) provide as follows:

- 2) References in this Act to ‘child’ or ‘children’ shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
- 3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”

The provisions are in clear violation of Article 53(1)(e) of the Constitution, which stipulates equal responsibility of the mother and father regardless of their marital status. These provisions discriminate against children born out of wedlock and deny their mothers the right to equality before the law, and to equal protection and equal benefit of the law under Article 27(1) of the Constitution. They also deny both the mothers and their children their right to

not be directly or indirectly discriminated against on any grounds including sex, birth or marital status under Article 27(4) of the Constitution and the parallel regional and international rights.

Sections 3(2) and 3(3) of the Law of Succession Act (Cap. 160) were found to be inconsistent with the Constitution and declared null and void by the High Court (Justice Njagi) in *NSA & another v. Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another* (as above).¹²⁴ No legislative action has, however, been taken to repeal them.

The Children Act, 2022 (No. 29 of 2022)

The Children Act, 2022 repealed the Children Act, 2001 (Act No. 8 of 2001), and was assented to in July 2022. While the previous act set the stage for discrimination with regard to the definition of “relative,” parental recognition, and the assumption of financial responsibility for children, the new Act has repealed a majority of these provisions. The new Act also provides for harsher penalties for the offense of child marriage, including imprisonment for a term of not less than three years or a fine of not less than five hundred thousand shillings, or both. However, this penalty has yet to be aligned with those outlined by the Sexual Offences Act.

RECOMMENDATIONS:

Law reform

- Repeal section 12 of the Births and Deaths Registration Act (Cap. 149) to remove discrimination against unmarried women and their children and to bring it into conformity with Articles 27, 53(1)(a) and (e) and 53(2) of the Constitution and in execution of court orders in *L.N.W v Attorney General & 3 others [2016] eKLR*.
- Repeal sections 3(2) and 3(3) of the Law of Succession Act (Cap. 160) to remove

discrimination against unmarried women and their children and to align them with Article 53(1)(e) of the Constitution.

- Align Section 23 of the Children Act, which provides for imprisonment for a term of not less than three years or a fine of not less than five hundred thousand shillings, or both, for the offense of child marriage, with the penalties imposed by the Sexual Offences Act.

Policy and program actions

- Develop rules and forms regarding the notification of births to allow for the names of fathers of children born outside marriage to be entered in the births register and the children's birth certificates and stipulate the time within which such applications are to be made, and allow for notice to the alleged fathers, as well as provision for DNA testing to be undertaken to establish paternity where it is denied.

3.4.2 SUCCESSION AND INHERITANCE LAWS

CEDAW provides for equal rights for both spouses to own, acquire, manage, administer, enjoy and dispose of property.¹²⁵ The Maputo Protocol provides for a woman's right to inherit property from her husband, stating that "[a] widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it."¹²⁶

While the Constitution of Kenya provides for equality before the law and states that "equality includes the full and equal enjoyment of all rights and fundamental freedoms",¹²⁷ the same supreme law goes on to state that in matters relating to personal status, marriage, divorce and inheritance, Muslims are not afforded the full

protection under Article 27 of the Constitution. Instead, such matters are subject to the jurisdiction of the Kadhis' courts.¹²⁸

Law of Succession Act (Chapter 160), Laws of Kenya

The key legislation on inheritance and succession is the Law of Succession Act (Cap. 160). Other relevant laws include the Matrimonial Property Act, 2013, all the land laws, and customary and religious personal laws of communities in the country. The Law of Succession Act was intended to apply universally to all cases of intestate and testate succession. However, the intention of universal application of the Act did not fully materialize since a subsequent amendment¹²⁹ to the Act discontinued application to Muslims. Thus, succession matters involving the estate of any Muslim person are subject to Islamic law,¹³⁰ which is administered by the Kadhis' courts.¹³¹

The Law of Succession Act provides for equality of both men and women in the disposing of property. Section 5(2) states, "A female person, whether married or unmarried, has the same capacity to make a will as does a male person." Notwithstanding, several sections of the Law of Succession Act are discriminatory on the face, while others have discriminatory outcomes against women as discussed below.

Section 2(3) of the Law of Succession Act is discriminatory against Muslims by excluding them from the application of the Act. Muslim women are therefore not protected by the equality provisions. The section provides: "Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law."

Sections 32, 33 and 44 of the Law of Succession Act are also discriminatory against women

in the former districts of West Pokot, Wajir, Samburu, Lamu, Turkana, Garissa, Isiolo, Kajiado, Marsabit, Tana River, Mandera and Narok as they exempt the intestacy and administration provisions of the Act from applying to certain land and assets in those areas, instead subjecting these properties to customary law (which is discriminatory against women in those areas). The provisions read as follows:

- Section 32 provides: "The provisions of this Part shall not apply to – (a) agricultural land and crops thereon; or (b) livestock, in various Districts set out in the Schedule: West Pokot, Wajir, Samburu, Lamu, Turkana, Garissa, Isiolo, Kajiado, Marsabit, Tana River, Mandera, Narok."
- Section 33 provides: "The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be."
- Section 44(1) provides: "The provisions of this Part shall not, in cases of intestacy, apply to those types of property mentioned in section 32."

Sections 35(1) and 36(1) of the Law of Succession Act are discriminatory against widows by providing that the life interest in the residue of an intestate estate that she inherits terminates upon her remarriage, but do not provide the same for a widower who remarries. The provisions read as follows:

- "35(1). Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –
- (a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest

shall determine upon her re-marriage to any person.

- 36(1). Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to –
- (a) the personal and household effects of the deceased absolutely; and
- (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty percent thereof, whichever is the greater; and a life interest in the whole of the remainder: Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person."

Section 39 of the Law of Succession Act is discriminatory against women by giving a father priority over a mother in inheriting where a deceased is not survived by any spouse or children. The section provides:

- "Where intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority – (a) father; or if dead (b) mother; or if dead brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares."

Section 40(1) of the Law of Succession Act further discriminates against women in polygamous unions as it equates each of them to a child in her household for purposes of calculation of the portion of inheritance from a deceased husband. It is also discriminatory against and unfairly penalizes wives who may have chosen to have fewer children or who may have been unable to have any or many children as they would get a lesser share than those with more children. The section provides: "Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the

residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

Besides customary law, there are procedural and administrative hurdles in the implementation of the Law of Succession Act. Key issues facing women are the difficulties in trying to redeem their rights in law. Succession claims can be cumbersome and expensive. Court fees alone can add up to Ksh 8000 (USD 80). Additional issues include obtaining access to an attorney and paying for travel to the courts. There is also an automatic six-month hold put on all succession cases after the claim is filed in court while the applicant investigates all assets and liabilities of the estate and a list of everyone with a claim thereto. So even with no objections, the process takes around a year, during which the widow will have only limited access to her husband’s property. Even if a claimant can make it to court, she will face numerous procedural/administrative hurdles. Such a lengthy and complex court process leaves access to justice for the majority of Kenyan widows out of reach.

Notably, there have been recent attempts to amend the discriminatory provisions against women in the succession law through various bills introduced in the Parliament. The Law of Succession (Amendment) Bill, 2020 included amendments to sections 29 (meaning of dependent), 35 (remarriage) and 39 (equal distribution rights between parents).¹³² However, the proposed law, even after passing through the Senate, stalled in the National Assembly as it was deemed a “money bill”. This refers to a bill that contains provisions dealing with taxes, the imposition of charges on a public fund or the variation or repeal of any of those charges; the appropriation, receipt, custody, investment or issue of public money; or the raising or guaranteeing of any loan or its

repayment. A “money bill” can only be initiated by the National Assembly, and not the Senate.

The Law of Succession (Amendment) Bill, 2019 sought to amend sections 3 and 29 of the Law of Succession Act (Cap. 160) to redefine the terms “spouse” and “dependent”. The object of the Bill, according to its statement of objects and reasons, is “to give legitimate dependents of a deceased person a claim and a right in the deceased’s intestate estate [and] to avoid situations where opportunistic schemers successfully claim a stake in a deceased person’s estate hence disenfranchising the legitimate heirs of the deceased”. At the time of finalizing this assessment, the Bill was at the second reading stage in Parliament.

RECOMMENDATIONS:

Law reform

Amend the Law of Succession Act (Chapter 160), Laws of Kenya, as follows:

- Remove the discriminatory effect of Section 2(3) on Muslim women, and have the law apply to all Kenyans regardless of their religion.
- Repeal the definition of child/children under section 3 so the meaning of child applies equally to unmarried mothers and fathers. Remove the privilege of the father to decide which child he wants to define as his child. This will also allow all children to inherit regardless of the marital status of their parents.
- Repeal sections 32, 33 and 44 to make the Act universally applicable to all Kenyans and all types of property, irrespective of their geographical location or their customary traditions.
- Repeal sections 35(1) and 36(1) so that widows do not lose inherited life interest in a property acquired under the Act in intestate succession after they remarry.
- Amend section 39 to allow net intestate estate (where there are no surviving spouses

or children) to be inherited by parents on an equal basis and remove the privilege of priority currently afforded to the father.

- Amend section 40(1) to remove its discriminatory effect against widows in inheritance in polygamous unions.

Policy and program actions

- Undertake widespread public legal awareness on the equality provisions in the law, and of the detrimental effects of discriminatory customary and religious laws on the lives and economic status of women.
- Intensify efforts to infuse a human rights-based approach into the alternative and traditional justice systems in the country and monitor the same to ensure just outcomes for women on property and other related disputes.

3.4.3 SEXUAL AND REPRODUCTIVE HEALTH RIGHTS

International instruments on sexual and reproductive health rights of women include: International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966); International Convention on the Elimination of All Forms of Racial Discrimination (1966); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); and Convention on the Rights of Persons with Disabilities (2006). At the regional level, there are: the African Charter on Human and Peoples' Rights (1981); African Charter on the Rights and Welfare of the Child (1990); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2003). Others include the Abuja Declaration on HIV and AIDS, Tuberculosis (TB) and Other Related Infectious Diseases (2001); and the Campaign on Accelerated Reduction of Maternal Mortality in Africa (2009).

Through the Cairo Declaration on Population and Development,¹³³ representatives of 197 states additionally underscored the significance of gender equality to national development and committed to putting forth their best efforts to remove barriers to family planning and the provision of reproductive health.

Article 14 of the Maputo Protocol provides comprehensive protections on sexual and reproductive health rights and frames States' obligations in the following terms:

- "1. States parties shall ensure that women's right to health, including sexual and reproductive health, is respected and promoted. This includes:
 - a) The right to control their fertility;
 - b) The right to decide whether to have children, the number of children and the spacing of children;
 - c) The right to choose any method of contraception;
 - d) The right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
 - e) The right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices;
 - f) The right to have family planning education."

Under Article 14(2) of the Maputo Protocol, State parties undertake to:

- "a) provide adequate, affordable and accessible health services, including information, education and communication programs, to women, especially those in rural areas
- b) establish and strengthen existing prenatal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breastfeeding

- c) protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus."

It is important to note that Kenya holds a reservation on Article 14(2)(c) of the Maputo Protocol that allows for medical abortion in certain instances including sexual assault, rape and incest.

The Constitution of Kenya, 2010 in Article 43(1) secures the right "to the highest attainable standard of health, which includes the right to health care services, including reproductive health care". Article 43(2) further provides that "a person shall not be denied emergency medical treatment".

The Health Act, 2017 underscores the importance of prioritizing the needs of vulnerable and marginalized groups in the provision of healthcare. Section 6 guarantees reproductive healthcare for all persons, both men and women. Other relevant laws include: the Sexual Offences Act, 2003; the Children Act, 2022; and the Prohibition of Female Genital Mutilation Act, 2011. There are also several policies and strategies on sexual and reproductive health, including the National Reproductive Health Policy, 2007; the National Reproductive Health Strategy 2009-2015; the Adolescent Reproductive Health and Development Policy, 2003; the National Condom Policy and Strategy (2009-2014); the Contraceptive Policy and Strategy (2002-2006); the Contraceptive Commodities Procurement Plan (2003-2006); the Contraceptive Commodities Security Strategy (2007-2012); the School Health Policy; the Ministry of Health's National Guidelines on the Management of Sexual Violence, 2014; the Ministry of Health's National Guidelines for quality obstetrics and perinatal care; the Ministry of Health Circular on Post-Abortion Care, 2013; the Code of Professional Conduct and Discipline for

Doctors (MPDB 2012); the Code of Professional Conduct for Clinical Officers, 2012; Standards of Nursing Education and Practice; and Code of Ethics and Conduct and Scope of Practice for Nurses in Kenya.

Other important policy frameworks that seek to safeguard reproductive healthcare include the following:

- **The Community Health Policy and the Sessional Paper No. 2 of 2017** on the Kenya Health Policy 2014-2030, which specifically ensures free maternity services.
- **The Kenya Health Sector Policy, 2012-2030**, which focuses on two key obligations on health, namely, "contribution to economic development as envisioned in the Vision 2030; and realization of fundamental human rights as enshrined in the Constitution of Kenya 2010".
- **The National Adolescent Sexual Reproductive Health Policy, 2015** allows for girls to access correct information regarding their sexuality and the enhanced provision of high-quality post-abortion care services to adolescents.
- **The Menstrual Health Management Program** is a three-year program launched in May 2018 by the County First Ladies Association. The program, in partnership with Kenya Red Cross and African Cotton Industries, covers all the 47 counties with the aim of empowering one million girls and one million boys. It is anchored in school retention for girls through a focus on provision of hygienic sanitary towels and dignity packs.¹³⁴
- **The Health Insurance Subsidy Program** is an initiative of both the county and national governments aimed at contributing to a better quality of life, poverty alleviation and human development through meeting the health needs of the population, removing financial barriers to healthcare

and reducing the incidence of catastrophic health expenditures.

- **Linda Mama's**¹³⁵ free maternity services' goal is to "achieve universal access to maternal and child health services and contribute to the country's progress towards reduction of maternal and child mortality". It covers several public health facilities across all 47 counties.
- **Beyond Zero Campaign**, an initiative of Kenya's First Lady, Her Excellency Margaret Kenyatta, was launched in 2014 to address the high rates of maternal and child mortality and the burden of HIV/AIDS on the health of the population.

Despite elaborate policy and legal frameworks, gaps and challenges remain in law and practice that limit and undermine women's and girls' access to quality healthcare covering all aspects of their healthcare needs. Notably, there is no cohesive legislative framework on sexual and reproductive health and rights in Kenya. More recently, the Reproductive Healthcare Bill, 2019¹³⁶ was met with intense resistance, especially from the clergy. The Bill proposed a legal framework to ensure access to reproductive healthcare, including contraceptive services, health services for pregnancy and the post-natal period, termination of pregnancy, reproductive health of adolescents and assisted reproduction.

The Bill passed the second reading in June 2020 but was put on hold to allow for more consultations following fierce opposition by religious groups, politicians and some civil society groups. The Bill became christened as the 'abortion law', further fueling the opposition to the proposed law.

However, section 6(1) of the Health Act, 2017 secures the protection of reproductive health rights in the following terms:

- "6. (1) Every person has a right to reproductive health, which includes –
- the right of men and women of reproductive age to be informed about, and to have access to reproductive health services

including to safe, effective, affordable and acceptable family planning services

- the right of access to appropriate health-care services that will enable parents to go safely through pregnancy, childbirth and the postpartum period, and provide parents with the best chance of having a healthy infant
- access to treatment by a trained health professional for conditions occurring during pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions."

Data from the Kenya National Bureau of Statistics Economic Survey 2020¹³⁷ shows that the number of registered personnel per 100,000 population rose for all the cadres of registered health personnel. Registered nurses had the highest ratio of 122 per 100,000 population while nutrition and dietetics technicians had the lowest ratio at 2 per 100,000 in 2019. The proportion of medical officers and clinical officers stood at 25 and 46 per 100,000 population, respectively, during the same period. On reproductive health rights, a large portion of Kenyan women have unmet family planning needs, with only 44.2 percent of Kenyan women able to access modern contraceptives.¹³⁸

In its public inquiry report, "Realising Sexual and Reproductive Health Rights in Kenya: A Myth or a Reality?", the Kenya National Commission on Human Rights confirmed that the sexual and reproductive health rights of Kenyans are being violated "in terms of unavailability of essential sexual and reproductive health services, difficulties in accessing these services owing to distance or cost, the high charges levied on the services – making them beyond the reach of [the] majority [of the] poor – the poor quality of the available services and the lack of sensitivity to the cultural norms and beliefs of the people in service delivery".¹³⁹

The public inquiry brought to the fore the fact that “sexual minorities suffer numerous sexual and reproductive health rights violations on the basis of their sexual orientations or behaviour [...] Sexual minorities (gay, lesbian, bisexual, transgender, intersex persons and sex workers) and marginalized and vulnerable groups (people with disabilities, people living with HIV and AIDS, adolescents and youth, internally displaced persons and refugees) were particularly noted as most vulnerable to these violations.”¹⁴⁰ A report by the Government Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding intersex persons in Kenya (2018)¹⁴¹ established the grave violations suffered by intersex children and adults. Besides the lack of recognition and inaccessible healthcare, intersex persons endure violations of their bodily integrity through intrusive hormonal and surgical procedures that are performed without their free and informed consent. In its concluding observations upon the review of the fourth periodic report of Kenya, the Human Rights Committee called on Kenya to, *inter alia*: “Intensify its efforts to eradicate all forms of discrimination, harassment and violence on the basis of sexual orientation and gender identity and provide access to justice and remedies for victims” and to “strengthen measures to end the performance of irreversible medical acts, especially surgical operations, on intersex children who are not yet capable of giving their full, free and informed consent, except in cases where such interventions are absolutely necessary for medical reasons”.¹⁴²

The above categories of people who are marginalized and most left behind need to be considered in line with the State’s obligations under Article 56 of the Constitution (on affirmative programs for minorities and marginalized) and its commitments under the Sustainable Development Goals.

Abortion

Article 14 of the Maputo Protocol requires States to protect the reproductive health rights of women and girls. These obligations include Article 14(2)(c),

which requires States to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus”. Kenya has placed a reservation on Article 14(2)(c) of the Maputo Protocol. The reason advanced for submitting this reservation was that it conflicted with the laws of Kenya on sexual and reproductive rights.

According to General Comment 2 by the African Commission on Human and Peoples’ Rights, Article 14(2)(a), read in conjunction with 14(2)(c), places four general obligations on States, namely, to respect, protect, promote and fulfill the rights outlined.¹⁴³ According to the General Comment, States must, among other things:

- Safeguard against arbitrary arrest or prosecution of any woman who has sought out a safe abortion. This entails educating law practitioners, judges, magistrates and judicial police officials.¹⁴⁴
- Ensure access to family planning/contraception and safe abortion services. Any services provided by the State must be available, accessible, adaptable and of good quality.

Prior to the Constitution of Kenya, 2010, procuring abortion services and providing abortion services was illegal. The Constitution currently permits abortion in some instances. Article 26(4) reads as follows: “Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law”. Article 26(2) clarifies that life begins at conception.

Despite the legal provision afforded under Article 26(4), inconsistencies emanate from the fact that laws and statutes that criminalized abortion in a blanket form before the 2010 Constitution are still in place. The law most starkly criminalizing abortion and contradicting the safe abortion window under Article 26(4) is

the Penal Code (Cap. 63). Sections 158, 159, 160 and 228 of the Penal Code criminalize abortion:

- Section 158 criminalizes attempts to procure abortion: “Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years.”
- Section 160 makes it a criminal offence to supply drugs or instruments to procure an abortion: “Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years.”
- Section 228 criminalizes killing an unborn child: “Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable to imprisonment for life.”

The above provisions contradict the Constitution and are inconsistent with key international frameworks and create a lack of clarity on the law on abortion generally in the country.

The issue of access to abortion and post-abortion care services for women who have been subjected to rape or incest is still rife. According to the Annual Crime Situation Report 2018, there were 979 reported cases of rape in 2018, up from 889 cases reported two years earlier in 2016; 5506 reported cases of defilement, and 319 reported cases of incest.¹⁴⁵ According to *Silhouettes of Brutality*, a report by the Kenya National Commission on Human Rights, with regard to the 2017 electoral violence in Kenya,

201 sexual violence cases were reported, with the most affected being women at 96.26 percent and men at 3.74 percent.¹⁴⁶

The Government’s conflicting policy actions and positions on implementing mechanisms of Article 26(4) of the Constitution undermine access to safe abortions even within the law. The Ministry of Health in September 2012 issued, and later withdrew, Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya,¹⁴⁷ citing the misuse of the guidelines. This created confusion among care providers and the public. The public interpreted the withdrawal as a complete restriction on all abortion services. Providers, having no clarity on the law, began withholding post-abortion care and even legal abortion services. The guidelines were reinstated by the court in *Federation of Women Lawyers (FIDA – Kenya) & 3 others v. Attorney General & 2 others; East Africa Centre for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae)* [2019] eKLR. Notably, in the third cycle of the Universal Periodic Review, Kenya noted (but did not support) the recommendation to “immediately implement the High Court judgement in Petition No. 266 of 2015 by reinstating the standards and guidelines on reducing maternal mortality and morbidity related to unsafe abortion and the training curriculum for medical professionals in public hospitals.”

Kenya does not have a legal framework to govern assisted human reproduction. There have been attempts to enact legislation on assisted reproduction through the Assisted Reproductive Technology Bill, (National Assembly Bill) No. 32 of 2019, which is currently before the National Assembly; the In Vitro-Fertilization Assisted Reproduction Bill, 2014; and the Reproductive Health Care Bill, 2019. Disputes concerning assisted reproduction have been litigated in the courts with varied outcomes.¹⁴⁸

RECOMMENDATIONS:

Law reform

- Amend sections 158, 160 and 228 of the Penal Code (Cap. 63) that criminalize any abortion so as to align them with the Constitution, which permits abortion in given circumstances.
- Enact a reproductive healthcare law to comprehensively address the reproductive health rights of all persons, including those in vulnerable groups.
- Enact legislation to regulate and govern assisted reproduction.
- Lift the reservation on Article 14(2)(c) of the Maputo Protocol, which requires States to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.

Policy and program actions

- Implement the judgment in Petition No. 266 of 2015 to, inter alia, reinstate the 2012 Standards and Guidelines on Reducing Maternal Mortality and Morbidity related to unsafe abortions.
- Conduct capacity-building for medical staff on safe termination of pregnancies in select, legally acceptable circumstances.
- Integrate gender training and patients' rights training in the health training curricula.

3.4.4 ECONOMIC EMPOWERMENT AND LAND LAWS

Women's economic empowerment has been described as relating to the "enhancement of women's capacity for strategic choice and agency in the sphere of the economy and to the possibilities this opens up for change in other spheres of

their lives".¹⁴⁹ It is essential for poverty reduction, human development and elimination of gender inequalities in the division of labor between paid and unpaid work, which often limits women's access to resources and time.

Article 11 of CEDAW requires States to "take all appropriate measures to eliminate discrimination against women in the field of employment". Article 13 requires States to "take all appropriate measures to eliminate discrimination against women in other areas of economic and social life to ensure, on a basis of equality of men and women, the same rights, in particular: (a) [t]he right to family benefits; (b) [t]he right to bank loans, mortgages and other forms of financial credit".

Article 13 of the Maputo Protocol requires States to adopt legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. Article 13(h) also requires States to take the necessary measures to recognize the economic value of the work of women in the home.

Land is a precious resource, and in Kenya, has been an emotive issue. It is a fundamental factor of production. According to a paper by the Working Group on discrimination against women in law and in practice, women own less land and have less secure rights over land compared to men:

*"Women make up on average less than 20 percent of the world's landholders, but make up an estimated 43 percent of the agricultural labor force. Globally, more than 400 million women work in agriculture. In sub-Saharan Africa and South Asia, 60 to 70 percent of employed women work in agriculture. Yet despite women's crucial role in agriculture, food production, and land-based livelihood, there is no consistent national or global data on the full scope of women's land rights or access to land to enable them to monitor and enforce their rights."*¹⁵⁰

Alarming, while women provide 80 percent of Kenya's farm labor and manage 40 percent of the country's smallholder farms, they own only roughly

1 percent of agricultural land and receive just 10 percent of available credit.¹⁵¹

To attain meaningful development in line with its national blueprint, Kenya needs to consciously tap into this resource and place a premium on the informal and domestic work carried out largely by women. Article 40 of the Constitution protects the right to property, providing that “every person has the right, either individually or in association with others, to acquire and own property of any description; and in any part of Kenya”. Article 40(2) forbids Parliament from enacting a law that permits the State or any person to limit or restrict the enjoyment of the right on any of the grounds under Article 27 (which includes sex). Chapter five of the Constitution, which addresses land and environment, expressly guarantees equity and proscribes gender discrimination. Article 60 of the Constitution provides for the elimination of “gender discrimination in law, custom and practices related to land and property in land”, while Article 68 of the Constitution mandates the enactment of laws to regulate the recognition and protection of matrimonial property and the matrimonial home during and upon termination of marriage.

The Land Act, 2012 (No. 6 of 2012) reflects the above principles of land policy in Article 60(1). Elimination of gender discrimination in law, customs and practices related to land and property is one of the key principles governing the administration of land under section 4 of the Land Act. Under section 107(7), the Land Act further provides that compensation when community land or private land is compulsorily acquired is payable to the spouse/s of affected persons as well as to “any person actually occupying the land and the spouse or spouses of such person”.

Article 30(1) of the Community Land Act, 2016 (No. 26 of 2016), underscores the fact that “[e]very member of the community has the right to equal benefit from community land” and Article 30(2) emphasizes that “[e]quality includes full and equal enjoyment of rights of use and access”. To this end, in considering applications for the customary right

of occupancy, a registered community is bound to take into account “equal treatment of applications for women and men” and “non-discrimination of any person on the basis of gender, disability, minority, culture or marital status”.¹⁵² Section 30 is categorical that “women, men, youth, minority, persons with disabilities and marginalized groups have the right to equal treatment in all dealings in community land”. Section 30(5) goes further to emphasize that a man or woman married to a member of the community “gains automatic membership of the community”. Notably, in the event of a divorce after which the woman remarries, or if her husband is deceased and she remarries, then she ceases to be a member of the community.¹⁵³

Section 93 of the Land Registration Act, 2012 (No. 3 of 2012), as amended by the Land Laws (Amendment) Act, 2016, provides that, “Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.”

The National Land Policy, 2009 requires the Government to put in place appropriate laws to ensure effective protection of women’s rights to land and related resources, repeal laws that discriminate against women in relation to land, enforce existing laws that require equality for women, and establish a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources. It also requires the Government to make provisions for joint spousal registration and documentation of land rights and for joint spousal consent to land disposal, applicable for all forms of tenure, and secure inheritance rights of unmarried daughters in line with the practices of the respective communities. In making the connection between land use and poverty, the National Land Use Policy observes that¹⁵⁴ “gender imbalance in the control of productive assets such as land has resulted in women being more vulnerable to poverty among farming

communities”.¹⁵⁵ The policy thus recognizes the need to, among other things, mainstream gender and special interest groups in land use planning and management.¹⁵⁶

The National Housing Policy, 2004 makes provisions for housing programs for vulnerable groups, including the poor, women, children in difficult circumstances, persons living with disabilities, the elderly and displaced persons. It mandates the Government to create credit institutions and lending mechanisms that are accessible to all vulnerable groups, particularly women, those with disabilities and those who are displaced. It also mandates the Government to encourage vulnerable groups to participate actively in housing by strengthening relations with community-based organizations and by promoting the formation of self-help groups.

The other pieces of legislation, namely, the Labour Institutions Act (No. 12 of 2007), the Work Injury Benefits Act (No. 13 of 2007), the Labour Relations Act (No. 14 of 2007), the Occupational Safety and Health Act (No. 15 of 2007), and the Employment and Labour Relations Court Act (No. 20 of 2011) are gender neutral, yet are still of importance in furthering the rights of workers and have contributed to the enforcement of the human rights of women in relation to work. The Labour Institutions Act, 2007 provides for the creation of bodies responsible for advising on and inspecting the conditions and wages of employment. The Labour Relations Act, 2007 provides for freedom of association for both employers and workers. The Work Injury Benefits Act, 2007 provides for compensation for all employees for work. The Occupational Safety and Health Act, 2007 provides for the safety, welfare and health of workers at places of work. The Employment and Labour Relations Court Act, 2011 operationalizes Article 162(2) of the Constitution by establishing the Employment and Labour Relations Court, with the status of a High Court, to determine employment and labor disputes.

Despite these progressive legal and policy frameworks, Kenyan women do not have access to

their land rights compared to men. Customary laws are mostly discriminatory against women in access to land rights, especially ownership. Under the customary laws of many communities in Kenya, women's property rights are limited, but social structures protect both men and women against exclusion from land. In some communities, unmarried women can inherit land from their fathers, although not on an equal basis with their brothers. In others, a married woman does not inherit land from her father as it is expected that her husband should provide for her.

A survey by the Kenya National Bureau of Statistics reveals a dismal percentage in the distribution of land inherited by women from fathers, with only a slight improvement in the percentage distribution of land inherited by women from husbands.¹⁵⁷ Indeed, the Government of Kenya in its 2006 report to the CEDAW Committee acknowledged discriminatory customary inheritance laws by stating: “The area in which most customary laws disadvantage women is in respect of property rights and inheritance. Under the customary law of most ethnic groups in Kenya, a woman cannot inherit land and must live on the land as a guest of male relatives by blood or marriage.”¹⁵⁸ Under customary land tenure, land is allocated to a wife for use for life, but she has no ownership rights and therefore cannot reallocate, as for instance use it as collateral, gift or sell it. Women therefore have no security of tenure under customary law. Women's rights in land are secondary as they have access to land through their relationship to men, either as their husbands, fathers, brothers, or sons who own and control land.

This state of affairs leads to inequitable and unconscionable economic outcomes for women. It has led to women's disenfranchisement in property ownership and limited their participation in investment opportunities. Under the Registration of Business Names Act, Art. 6(1)(h), women are also not able to register a business in the same way as men, limiting their opportunities for financial inclusion and entrepreneurship.¹⁵⁹ According

to the Kenya Institute for Public Policy Research and Analysis, access to financial inclusion has increased to 82.9 percent from 26.7 percent in a decade.¹⁶⁰ There are, however, “significant disparities across counties, gender and the youth”. The study by the institute has established that “there is gender disparity in favour of males (85.6 percent) relative to females (80.3 percent), but this has significantly reduced since 2006 when it was at 12 percentage points, with males at 33 percent and females at 21 percent”.¹⁶¹

In community tenure regimes, despite the non-discrimination provisions enshrined under section 30 of the Community Land Act, 2016, women are still under-represented in land governance structures and excluded from taking part in decision-making processes, hence limiting favorable outcomes and implementation of the law.

Personal laws including the Marriage Act, 2014, the Matrimonial Property Act, 2013, customary and religious personal laws, and relevant provisions in the Constitution contain discriminatory provisions against women’s rights to property, including land rights (see discussion on discriminatory family and marriage laws). Inadequate data on women’s land ownership, coupled with lack of awareness of constitutional equality guarantees and gender equality and non-discriminatory provisions in the laws relating to land by the majority of women, undermine effective implementation of laws and perpetuate discriminatory regimes and economic outcomes for women.

Certain policies and gender-sensitive laws have fostered equality in land ownership and management. The establishment by the Government of the Women Enterprise Fund, the Youth Enterprise Development Fund and the Uwezo Fund (meant to promote business enterprises for youth, women and persons with disabilities) as well as the reservation of 30 percent of public procurement opportunities for women, young people and persons with disabilities are positive initiatives towards women’s economic empowerment.

RECOMMENDATIONS:

Law reform

- Repeal section 7 of the Matrimonial Property Act, 2013 and recognize the principle of equality in all areas of marriage, including property.
- Repeal section 11 of the Land Laws (Amendment) Act of 2016 and reinstate the requirement of spousal consent for any transactions relating to marital property as it was under the Land Registration Act of 2012.

Policy and program actions

- Ensure the effective enforcement of gender equality provisions in all land laws and policies.
- As recommended by the CEDAW Committee upon the review of the eighth report of Kenya in 2017, develop a comprehensive database of all beneficiaries of the above-mentioned funds and of public procurement recipients, with a view to reaching out to women in rural areas and women with disabilities.
- Implement the gender equality commitments in the national land policy.
- Create public awareness of all land laws with a focus on women.

3.4.5 POLITICAL EMPOWERMENT AND DECISION-MAKING

Women’s enhanced participation in governance structures and decision-making is key to remedying gender inequalities in societies.¹⁶² Following the 2017 general election, 3 out of 47 governors were women; 3 out of 47 senators were women; 23 out of 290 members of Parliament were women; and 96 out of 1450 members of county assemblies were women.¹⁶³ Women face a myriad of challenges that hinder their full and effective participation in the political sphere. These include inadequate or lack of a financial base, violence and negative stereotypes targeting women, patriarchy, and socio-cultural beliefs.¹⁶⁴

The participation of special interest groups, including women, in politics is characterized by exclusion and institutionalized discrimination.¹⁶⁵

Legislation on Two-Thirds Gender rule

A decade after the promulgation of the Constitution, Parliament is yet to put in place legislative measures as stipulated by the Constitution to address gender inequality in the political sphere. This is despite several court decisions legally requiring it to do so.¹⁶⁶

The Kenyan legal framework explicitly enables gender equality in political representation and representation in appointive decision-making bodies. Article 27(3) of the Constitution stipulates the right to equal opportunities in the political sphere; Article 27(4) prohibits discrimination, including on the basis of sex; Article 27(6) mandates the State to use affirmative action among other measures to redress the effects of past discrimination on individuals or groups; and Article 27(8) requires the State to take legislative and other measures to implement the principle that “no more than two-thirds of the members of elective or appointive bodies shall be of the same gender”. Article 177(b) provides a mechanism for implementing the rule at the county assembly level. Other key provisions include Article 81(b), which mandates the electoral system to comply with the two-thirds principle; Article 97(b), which creates 47 reserved seats in the national assembly for women; Article 98, which reserves 16 seats for women in the Senate; and Article 100, which mandates Parliament to develop legislation to promote the representation of women, among other marginalized groups, in Parliament. The fifth schedule of the Constitution stipulates a timeline of five years within which Parliament must have enacted the legislation.

Article 172(2) and Article 232(1)(i) of the Constitution mandate the Judicial Service Commission and the Public Service Commission respectively to promote gender equality and inclusion in the hiring of judges and judicial officers and in the promotion and advancement of women in the civil service.

Electoral legislation

Local electoral legislation also contains enabling provisions for gender equality in politics. Article 37(1) of the Elections Act, 2011 makes provision for proportional representation through the use of mixed-member party lists pursuant to the Constitution and by providing that “where a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list”.

The Election Regulations under the Act mandate affirmative action by providing for subsidizing half the nomination fees of all women candidates by parties, hence making it easier for women to offer themselves for party nomination. The Electoral Code of Conduct further affords women greater protections in the electoral environment by outlawing violence and intimidating behavior. The Electoral Offences Act, 2016 also contains several provisions that enable women's participation because of their potential to bring about a peaceful and secure electoral environment.

Despite this elaborate legislative framework, there have been few positive outcomes for women. Kenya has 20.7 percent women among the representatives in the 11th Parliament, which pales in comparison to Rwanda's 64 percent, South Africa's 42 percent, Tanzania's 36 percent, and Uganda's 35 percent. According to the Inter-Parliamentary Union, “the overall percentage of women in parliaments has reached 24.9 percent in 2020, up from 11.3 percent in 1995”.¹⁶⁷ Kenya thus falls below the global average by more than 4 percent.

The main barrier to enhancing women's political empowerment is the lack of legislation to establish affirmative action mechanisms for the Parliament, despite concerted efforts by stakeholders. Even so, existing laws that would boost women's representation in political posts

have remained largely unenforced. For example, the Political Parties Act, 2011, as amended by the Elections Laws (Amendment) Act, 2016, has not been implemented. The provisions aim for comprehensive gender mainstreaming in political parties' regulations and structures and lay the ground for increased women's participation in political parties. Furthermore, the National Gender and Development Policy (2019) provides a basic framework for gender mainstreaming and is an important policy base for the rationalization of gender equality in politics, and especially for affirmative action.

A 2018 study by the National Gender and Equality Commission stated that political parties champion gender equality and participation of women at the expense of other special interest groups' rights such as persons with disabilities, youth and the elderly.¹⁶⁸ However, inclusion of women with disabilities, young women and elderly women is essential in confronting intersectional and multiple discrimination to ensure that those who are currently left behind in politics and governance are fully included. In addition, there is no legal requirement obliging political parties to account for 15 percent of the Political Parties Fund that is allocated to promoting the participation of special interest groups.¹⁶⁹

Women human rights defenders

The participation of women in politics and public life through women's organizations and feminist groups has been vital in the recognition of women's rights and their agency in all aspects of their lives.¹⁷⁰ Women continue to promote, individually and collectively, causes around justice, peace, equality and human rights as human rights defenders. They work on overcoming patriarchy, contribute to the fight against harmful cultural practices against women and girls, and promote the rights of girls to access education.¹⁷¹

Women human rights defenders continue to face significant risk in their work. It has been noted that whereas women human rights defenders face the same risks as their male

counterparts, "women defenders often face additional and different risks and obstacles that are gendered, intersectional and shaped by entrenched gender stereotypes and deeply held ideas and norms about who women are and how women should be".¹⁷² In addition to the threats and attacks other human rights defenders face, women human rights defenders face gender-based violence including sexual violence, threats, harassment and defamation campaigns linked to their status as women. A 2017 study by the Kenya National Commission on Human Rights on the status of women human rights defenders in Kenya revealed that state actors account for 56 percent of rights violations committed against human rights defenders.¹⁷³ Community members and politicians were responsible for 24 percent and 13 percent respectively of rights violations committed against women human rights defenders.

The Bill of Rights in the Constitution of Kenya guarantees various freedoms and protections that would ensure a safe and enabling environment for women to defend human rights.¹⁷⁴ The National Gender and Development Policy, 2019 identifies the protection of human rights defenders as a key policy action towards the advancement of gender equality.¹⁷⁵ Kenya, however, lacks a legal framework for the support and protection of human rights defenders. The enactment of national legislation for the protection and promotion of the work of human rights defenders, including women, has been identified as a good practice.¹⁷⁶

RECOMMENDATIONS:

Law reform

- Enact legislation to facilitate the realization of the constitutional two-thirds gender principle by implementing Article 27(8) of the Constitution.
- Fast-track the enactment of the Special Interest Groups (Amendment) Bill, 2019.

- Implement the recommendations for legal reform on violence against women in elections proposed in this report.
- Enact comprehensive legislation recognizing and protecting the rights of women human rights defenders.

Policy and program actions

- In line with CEDAW General Recommendation 23 (1997) on women in political and public life, pursue sustained policies to promote the full and equal participation of women in decision-making at the national and local levels.
- Political parties, the Office of the Registrar of Political Parties and the Independent Electoral and Boundaries Commission should ensure and enforce compliance by political parties with the two-thirds gender rule and with the requirements to include persons with disabilities, youth and the elderly. In line with the CEDAW Committee's previous recommendations, the Government of Kenya should "provide incentives to parties that include an equal number of women and men on their electoral lists and at equal ranks".¹⁷⁷
- In line with the CEDAW Committee's concluding observations on the eighth periodic report, the Government of Kenya should raise awareness among politicians, the media, traditional leaders and the general public of the fact that the full, equal, free and democratic participation of women on an equal basis with men in political and public life is a requirement for the effective implementation of CEDAW, as well as for the political stability and economic development of the country.¹⁷⁸
- Remove barriers to the appointment of women to decision-making positions through affirmative action programs and increase the number of women in such positions.
- Provide capacity-building on leadership skills and campaign financing to women candidates.
- Increase long-term programs to ensure that women can safely run campaigns and vote during elections.
- Establish mechanisms for the implementation of all electoral laws, and strengthen existing ones through capacity building, adequate financing and establishing monitoring systems.
- Ensure that political parties that are not compliant with the two-thirds gender rule and requirements to include persons with disabilities, youth and the elderly are unable to gain access to funds, in line with the Political Parties Act, 2011, and provide incentives to parties that include an equal number of women and men on their electoral lists and at equal ranks.
- Develop targeted measures to address intersectional and multiple inequalities affecting women in the political sphere.

3.4.6 SEXUAL AND GENDER-BASED VIOLENCE LAWS

Kenya has a robust policy and legal framework to address gender-based violence. It has a progressive set of laws that have been passed to deal with gender-based violence cases, which include: the Constitution of Kenya, 2010; the Sexual Offences Act, 2006; the Criminal Procedure Code (Cap. 75); the Children Act, 2001; the Penal Code (Cap. 63); the Prevention of Torture Act, 2017; the Witness Protection Act, 2006; the Victim Protection Act, 2014; the Evidence Act (Cap. 80); the HIV and AIDs Prevention and Control Act, 2006; the Prohibition of Female Genital Mutilation Act, 2011; the Legal Aid Act, 2016; the Counter-Trafficking in Persons Act, 2010; the Employment Act, 2007; the Protection Against Domestic Violence Act, 2015; the Office of the Director of Public Prosecutions Act, 2013; and the International Crimes Act, 2008. Other laws that have a major bearing on gender-based violence either in the prosecution of cases

or in offering protection to victims include the National Police Service Act, 2011; the National Police Service Commission Act, 2011; the National Police Service Standing Orders (revised 2017); the Prisons Act (Cap. 90); the Persons with Disabilities Act, 2003; the Teachers Service Commission Act, 2012; the Marriage Act, 2014; the Matrimonial Properties Act, 2013; the Probation of Offenders Act (Cap. 64); and the Health Act, 2017.

Article 29 of the Constitution guarantees every person the freedom and security of their person. The provision expressly secures the right “[not to be] subjected to torture in any manner, whether physical or psychological” and the right “[not to be] subjected to any form of violence from either public or private sources” or “treated or punished in a cruel, inhuman or degrading manner”. Notably, freedom from torture is one of the rights that may not be derogated from under Article 25 of the Constitution.

The Prevention of Torture Act (No. 12 of 2017) was passed by the National Assembly on 6 April 2017 and took effect on 20 April 2017. The Act seeks to give effect to Articles 25(a) and 29(d) of the Constitution¹⁷⁹ as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Of interest, rape and sexual abuse are classified as acts of torture under section 4 as read with the Schedule to the Act. The offence carries with it a maximum imprisonment term of 25 years or, if the victim dies as a result, to life.

The Constitution of Kenya recognizes gender-based violence as a violation of human rights. Article 28 stipulates that: “Every person has inherent dignity and the right to have that dignity respected and protected”, and Article 29(c) stipulates that: “Every person has the right to freedom and security of their person, which includes the right not to be – (c) subjected to any form of violence from either public or private sources”. Other relevant constitutional provisions include: Article 10(2)(b) on national values and principles including human dignity

and non-discrimination; Article 19(2), which states the purpose of recognizing and protecting human rights and fundamental freedoms; Article 53 on the rights of children, which protects children from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor; Article 54, which protects persons with disabilities and requires that they be treated with dignity and respect; Article 55 on the right of the youth to be protected from harmful cultural practices and exploitation; and Article 57, which guarantees the elderly the right to live in dignity and respect and to be free from abuse.

Reports of prevalence of sexual and gender-based violence

Sexual and gender-based violence has been ranked as the third highest cause of human rights violations in Kenya, at 16 percent right after police brutality and poverty.¹⁸⁰ According to a survey, “sexual and gender-based violence (55 percent) and domestic violence (48 percent) are the most reported violations to the police”.¹⁸¹ According to the National Police Service’s Annual Crime Report 2018, there were 979 reported cases of rape in 2018, a 20 percent increase from the previous year, and 5506 cases of defilement reported, a 36 percent increase over the previous year.¹⁸²

Children Act, 2022

Section 22 of the Children Act, 2022 provides that no person shall “subject a child to psychological abuse or child abuse,” including both civil and criminal penalties for such an offence.

Sexual Offences Act, 2006

Section 11 (1) of the Sexual Offences Act, 2006 provides that any person who commits an indecent act with a child is liable upon conviction to imprisonment for a term of not less than 10 years. Section 15 provides that those who take advantage of their influence over,

or relationship to a child, to procure the child for sexual intercourse or any form of sexual abuse; threaten or use violence towards a child to procure the child for sexual intercourse or any form of sexual abuse or give monetary consideration, goods, other benefits or any other form of inducement to a child or his parents with intent to procure the child for sexual intercourse or any form of sexual abuse are liable upon conviction to imprisonment for a term of not less than ten years.

Section 34 of the Sexual Offences Act protects survivors from questions on their sexual history and then claws the protections of the law right back in exceptions in the same section. Under Subsection 3, the court can grant an application to allow such questions if satisfied that it has a connection to the case; that it is going to be used by the accused person to discredit evidence brought by the prosecutor; that it will explain how semen was found on the complainant or elsewhere; that it will explain how the complainant got pregnant; that it will explain how the complainant got a disease or injury; and that it will not hurt the complainant's self-respect or privacy. These clawback provisions effectively nullify the protection of Section 34(1), as they provide many exemptions to the general principle and therefore many grounds to bring up the complainant's sexual history in a hearing.

Dealing with child sex offenders where both parties are children (under 18 years of age), or one of the parties is slightly above 18 years, and in a boyfriend/girlfriend relationship has been a gray area and subject of debate. Section 8 of the Sexual Offences Act, which deals with the offence of defilement, has had discriminatory outcomes especially against boys. A person who commits an offence of defilement with a child aged 16 to 18 years is liable upon conviction to imprisonment for a term of not less than 15 years. If the child is aged 12 to 15 years, the punishment is an imprisonment term not

exceeding 20 years. Where the child is 11 years or less, the punishment is life imprisonment.¹⁸³

The provision effectively criminalizes consensual sexual activity between minors, regardless of the age difference. There are several cases where one of the minors (usually the boy) in a consensual relationship was charged with defilement (the cases dubbed "Romeo and Juliet") where the boy and girl (both underage) engage in consensual sex. An example of such a case is *C.K.W v. Attorney General & another*,¹⁸⁴ filed in the High Court of Kenya in Eldoret, where an adolescent boy was charged with defilement for having sex with a consenting adolescent girl. In this case, the judge ruled that the section was not unconstitutional, noting that, "In Kenya, the law does not distinguish between the girl and the boy in Section 8 of the Sexual Offences Act. In effect, the law, as enacted, does not discriminate."¹⁸⁵ This situation has led to exploitative situations whereby the parents or guardians of one of the parties (usually the girl child) demand compensation from the boy's side with threats of court action.¹⁸⁶

There have been debates on whether lowering the consensual age for sex to 16 years is the solution to serving the ends of justice in the adolescent Romeo-Juliet situations. This has, however, been met with mixed reactions.¹⁸⁷ A review of laws and policies relating to sexual offences and gender-based violence has commenced under the stewardship of the National Council on the Administration of Justice (NCAJ) Committee.

The Teachers Service Commission Act, 2012

Section 11(f) of the Act provides that the Teachers Service Commission must monitor the conduct and performance of teachers; Section 23(2) provides that "[a] person shall not engage in the teaching service unless such person is registered as a teacher". Section 30 further provides for the Commission's ability to remove teachers from the register, including for the following reasons: a teacher "who has been convicted of a sexual offence or an offence

against a pupil or student”;¹⁸⁸ or, as per Section 30(1) (d), a teacher “who has been convicted of a criminal offence which, in the opinion of the Commission, renders the person unfit to be a teacher”. Under Section 33, the Commission may take disciplinary action against any person registered as a teacher. Section 30(4) provides that, “Where the name of any teacher is removed from the register under this Act, such name shall not be reinstated except by direction of the Commission.” Disciplinary offences set out in Schedule 3 of the Act include “sexual harassment or flirtation”.

The effectiveness of these provisions in redressing sexual violence has nonetheless been hampered by various other challenges as follows:

- There are an inadequate number of children's courts, including lack of sufficient equipment. The Children Act stipulates that proceedings involving children should be conducted in a children's court.¹⁸⁹ However, there are few local children's courts in the counties, and absence of guidelines on adaptation of adult court practices to ensure they are appropriate for cases involving children. Proceedings take place in adult courts and magistrates' chambers due to a lack of children's courts. Children and alleged perpetrators (who are out on bond) sit in the same waiting areas as they wait for the hearings to commence.
- The procedure for restorative justice under section 15(1) of the Victim Protection Act, 2014 is protracted and discourages many victims. Although the Act provides for restorative justice, it is limited to civil proceedings. This means that a victim of crime seeking reparations must present their case to a civil court as well as file a criminal case. This is a deterrent for most survivors as it involves a new court case, leading to significant costs in time and money. There is a victims' protection trust fund, established under the The Victim Protection (Trust Fund) Regulations, 2020, but this is not a viable option as the Fund does not have sufficient resources.¹⁹⁰

- Lack of fully fledged gender complaint desks in most police stations and sociocultural perceptions of gender-based violence lead to the cases reported to the police and other administrative officers not being handled seriously. This is a violation of the law under Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1)(d) of the Constitution of Kenya, 2010 as was ruled in *C.K. (A Child) through Ripples International as her guardian & next friend & 11 others*.¹⁹¹
- Lack of access to legal aid services is also a barrier to prosecution and survivors' access to justice.

RECOMMENDATIONS:

Law reform

- Amend section 15(1) of the Victim Protection Act, 2014 to streamline the procedure for restorative justice and make it easier for survivors to access it.
- Amend section 34 of the Sexual Offences Act, 2006 to remove permissibility of evidence on a survivor's sexual history.
- Amend section 30(4) of the Teachers Service Commission Act, 2012 to provide that when the name of any teacher is removed from the register for sexual abuse of a learner under section 30(1)(c), such name shall not be reinstated into the register under section 30(4).
- Expand the Teachers Service Commission Act's definition of “sexual abuse” to include additional inappropriate sexual conduct between a teacher and a learner.

Policy and program actions

- Fully operationalize the sexual offenders' register.
- Fully operationalize the victim's protection trust fund.
- Fully operationalize the Legal Aid Act, 2016 to boost access to justice for sexual and gender-based violence victims, who are often indigent.

- Provide age-appropriate sexual education and psychosocial counseling for adolescents.
- Establish safe houses in every county for victims of sexual and gender-based violence. Offer sensitization on the prevention and management of sexual and gender-based violence.
- Implement the Teachers Service Commission Act, 2012 by maintaining a register of teachers permitted to teach in Kenyan schools. A teacher may not teach in Kenya unless they are registered with the Commission.
- Issue comprehensive and user-friendly standard operating procedures on reporting instances of sexual abuse of a learner.
- Require compulsory teacher training on the key Teachers Service Commission documents aimed at protecting learners from sexual abuse, including the prohibitions, mandates and reporting procedure.

Domestic violence

Article 29 of the Constitution provides that every person has the right to freedom and security of their person, which includes the right not to be “subjected to any form of violence from either public or private sources”, or “to any form of torture whether physical or psychological” or “treated or punished in a cruel, inhuman or degrading manner”. Article 53 protects children from “abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment, and punishment and hazardous or exploitative labor”.¹⁹² The Protection Against Domestic Violence Act, 2015 and the Victim Protection Act, 2014 criminalize domestic violence.

Domestic violence is defined under section 3(2) of the Protection Against Domestic Violence Act as “violence against that person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship”. Violence is defined under section 3(1) of the Act to constitute, inter alia:

“[...] abuse,¹⁹³ damage to property; defilement; economic abuse, emotional or psychological abuse; forcible entry into the applicant's residence

where the parties do not share the same residence; harassment; incest; intimidation; physical abuse; sexual abuse; stalking; verbal abuse; or any other conduct against a person, where such conduct harms or may cause imminent harm to the safety, health, or well-being of the person”.

While the Protection Against Domestic Violence Rules, 2020 are in place, further amendments are necessary to ensure women and girls' full protection.

Whereas the Constitution guarantees personal security and the Protection Against Domestic Violence Act criminalizes domestic violence and provides stringent measures in punishing perpetrators, the legislation contains gaps in terms of protection of survivors. Kenya lacks adequate state-sponsored safe houses or shelters for survivors or threatened persons.

The Protection Against Domestic Violence Act has little focus on the plight of survivors as the offence is perceived as being against the State. The focus is mostly on investigation and prosecution, without a corresponding obligation to alleviate the conditions of the survivor. Initial proposals in the Act provided for the development of standards to ensure that shelters established or recommended pursuant to the Act were registered and run in accordance with the values and principles of the Constitution.¹⁹⁴ This was, however, left out of the final version of the Act.

The Sexual Offences Act, 2006 does not provide for marital rape as a criminal offence. Section 45(3) of the Act explicitly excludes persons who are lawfully married from application of the Act. The only offence that comes close is that of sexual violence within marriage, listed under section 3(2) of the Protection Against Domestic Violence Act. The only remedy for victims of marital rape is a protection order under Part II of the Act with no criminal proceedings against the perpetrator. The CEDAW Committee in its General Recommendation 35 on gender-based violence has called on State parties to CEDAW to ensure that “the definition of sexual crimes, including marital and acquaintance or date

rape, is based on the lack of freely given consent and takes into account coercive circumstances”.¹⁹⁵

RECOMMENDATIONS:

- Amend the Protection Against Domestic Violence Act, 2015 and the Victim Protection Act, 2014 to include provisions for the protection of survivors, including establishment of state-run shelters and standard procedures for their operation.
- Amend the Sexual Offences Act, 2006 and the Penal Code (Cap. 63) to include the crime of marital rape.

Female genital mutilation

The CEDAW Committee's General Recommendation 31 on harmful practices, jointly prepared with the Committee on the Rights of the Child¹⁹⁶, elaborates on the duties of State parties under CEDAW and the Convention on the Rights of the Child to eradicate gender-based violence against women and violence against children, including female genital mutilation. These legal duties include the obligation “to plan and adopt appropriate legislation, policies and measures and ensure that their implementation responds effectively to specific obstacles, barriers and resistance to the elimination of discrimination that give rise to harmful practices and violence against women”.¹⁹⁷ Furthermore, Sustainable Development Goal 5, target 5.3, calls for the elimination of “all harmful practices, such as child, early and forced marriage and female genital mutilation”.

Article 5 of the Maputo Protocol calls on States to “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women” and to “[...] take all necessary legislative and other measures to eliminate such practices, including: [...] through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them”.

Legislation to address harmful practices such as female genital mutilation should not be implemented in a vacuum. The CEDAW Committee and the Committee on the Rights of the Child emphasized the importance of a comprehensive strategy: “The effective prevention and elimination of harmful practices require the establishment of a well-defined, rights-based and locally relevant holistic strategy that includes supportive legal and policy measures, including social measures that are combined with commensurate political commitment and accountability at all levels.”¹⁹⁸ The CEDAW Committee and the Committee on the Rights of the Child also emphasized the importance of coordination across¹⁹⁹ education, health, justice, social welfare, law enforcement, immigration and asylum, and communications and media, as well as traditional and religious leaders.²⁰⁰

State parties have also been called upon to include in their periodic reports to the Committee the measures being taken to eradicate female genital mutilation in their jurisdictions under Articles 10 and 12 of the Convention.

In its most recent recommendations to Kenya, the CEDAW Committee noted with concern “the lack of accurate data, relatively low level of prosecutions and continued impunity of perpetrators, as well as reports according to which medical practitioners are now carrying out the procedure (the ‘medicalization’ of female genital mutilation)”.²⁰¹

The CEDAW Committee called on Kenya to:

- “a) Ensure that the Prohibition of Female Genital Mutilation Act is widely known and implemented, and that perpetrators of female genital mutilation, including medical practitioners, are prosecuted and adequately punished.
- b) Take measures to eradicate female genital mutilation, including through increased awareness-raising among religious and traditional leaders and the general public, in cooperation with civil society, about the

criminal nature of the procedure, its adverse effect on the human rights of women and the need to eradicate it and its underlying cultural justifications.

- c) Update the 2010 female genital mutilation policy.”²⁰²

Female genital mutilation is a harmful practice that is embedded in complex sociocultural systems, and therefore addressing it effectively is a sensitive issue. Although the Constitution does not explicitly refer to female genital mutilation, Article 29 provides the right not to be “subjected to any form of violence from either public or private sources”²⁰³ or “treated or punished in a cruel, inhuman or degrading manner”.²⁰⁴ Article 44(3) states that “a person shall not compel another person to perform, observe or undergo any cultural practice or rite”. In addition, Article 53(1) (d) protects every child from “abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment”.

The Prohibition of Female Genital Mutilation Act, 2011 stipulates harsh sentences for those who are convicted, including a prison term of not less than three years or a fine of not less than Ksh 200,000 (USD 2000). The penalty is life imprisonment where a crime of female genital mutilation results in the death of the victim.²⁰⁵ The Act has been lauded as one of the most comprehensive laws against female genital mutilation in Africa. Section 3 of the Act establishes the Anti-Female Genital Mutilation Board with the mandate to, inter alia, “design, supervise and co-ordinate public awareness programmes against the practice of female genital mutilation” and “design programmes aimed at eradication of female genital mutilation”.²⁰⁶

Challenges militating against the effectiveness of the anti-female genital mutilation campaign include medicalization, and the difficulty in enforcing laws across Kenya’s borders with neighboring countries, two issues that are sometimes linked. Kenya is a party to the Declaration and Action Plan to End Cross-border Female Genital Mutilation, adopted on 17 April 2019.²⁰⁷ In what

was seen as a shocking move, a petition was filed in the High Court seeking to legalize female genital mutilation. One of the grounds advanced for the petition was the right of willing adult women to participate and enjoy their culture.²⁰⁸ The court dismissed this argument.²⁰⁹

A worthy move, Kenya recently adopted the revised National Policy on the Eradication of Female Genital Mutilation, 2019.²¹⁰ The Policy aims, inter alia “to strengthen multi-sectoral coordination and networking, partnership and community participation towards eradication of FGM”.

The Prohibition of Female Genital Mutilation Act did not adequately contemplate the emerging patterns of medicalized female genital mutilation. The practice in Kenya continues to be carried out predominantly by traditional circumcisers, but there is concern over its increasing medicalization in recent years. Cross-border female genital mutilation also challenges implementation of the Act. In its Second Voluntary National Review, 2020, the Government of Kenya acknowledged medicalization of the practice and cross-border female genital mutilation as some of the hindrances to realizing Sustainable Development Goal 5.²¹¹

According to Kenya’s National Policy for the Eradication of Female Genital Mutilation, 2019, “at least 15 percent of medical professionals perform FGM in total disregard to the professional code of conduct *Do No Harm* and the relevant laws”.²¹² Use of medical professionals as opposed to traditional circumcisers is preferable by some communities, “to supposedly reduce pain, bleeding and infection”.²¹³

When Kenya enacted the Prohibition of Female Genital Mutilation Act, the practice became clandestine, including through moving it to countries bordering Kenya, such as Somalia, South Sudan, Tanzania and Uganda. Laws, and enforcement of laws, relating to the practice vary widely across these countries. The movement of families across borders to perform female genital mutilation

remains difficult to prevent or punish even though sections 21 and 28(1) of the Act criminalize it. Kenya is a party to the Declaration and Action Plan to End Cross-border Female Genital Mutilation, which identifies actions towards ending cross-border female genital mutilation.

Social and legal effects on survivors and potential victims alike are also barriers to eradicating the practice. Women forced into female genital mutilation by intense pressure from society are criminalized by the Prohibition of Female Genital Mutilation Act, hence suffering double jeopardy. Section 24 of the Act provides: "A person commits an offence if the person, being aware that an offence of female genital mutilation has been, is in the process of being, or intends to be, committed, fails to report accordingly to a law enforcement officer." The law does not exempt victims of female genital mutilation from prosecution under section 24. This means victims of the practice can be liable for prosecution when they fail to report the occurrence of the offence to a law enforcement officer.

RECOMMENDATIONS:

Law reform

- Amend section 19 of the Prohibition of Female Genital Mutilation Act, 2011 to proscribe all forms of female genital mutilation in line with the judgement of the High Court in *Tatu Kamau v. Attorney General & 2 others*.²¹⁴
- Amend section 24 of the Act, which provides for the offence of failure to report an act of female genital mutilation. The section is likely to affect victims of female genital mutilation for failure to report the offence.
- Amend the Act to charge doctors and health workers as well as penalize institutions that accommodate female genital mutilation on the premises.
- Develop offence-specific sentencing guidelines for female genital mutilation to ensure that sentencing meets the goals of the criminal justice system.

Policy and program actions

- The State should ensure that the Anti-Female Genital Mutilation Board is properly resourced to effectively carry out its mandate.
- The State should also intensify public education and awareness campaigns, especially in areas where female genital mutilation is prevalent, to encourage change of attitude.
- Develop a clear guide on alternative rites of passage.

Encourage medical professional bodies to take vigorous action to ensure that medical professionals are aware of their duties not to undertake female genital mutilation, and that those involved in the practice face professional sanctions

Trafficking in persons

Kenya is a source, transit and destination country for victims of trafficking. Many victims are subjected to forced labor and sexual exploitation.

Although trafficking affects women, men and children, it is a gendered phenomenon as most trafficking victims are women and girls, both in Kenya and globally. Traffickers primarily target women, especially for sexual exploitation. Women are easy targets because, among other things, they are disproportionately affected by poverty and discrimination, factors that impede their access to employment, educational opportunities and other resources.²¹⁵ Trafficking therefore needs to be considered, assessed and programmed for in the wider context of gender inequality.

According to the National Plan of Action for Children in Kenya (2015-2022), about 17,500 Kenyans are trafficked annually for domestic work, forced labor and commercial sexual exploitation.²¹⁶

National legal framework on trafficking in persons

The key legislative framework is the Counter-Trafficking in Persons Act, 2010, which provides for the offence of trafficking in persons in line with Kenya's obligations under the United Nations

Convention against Transnational Organized Crime, particularly its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Act further provides for mechanisms to protect victims of trafficking and creates an advisory committee on counter-trafficking to guide government efforts in combating trafficking in persons. Moreover, Kenya has established an administrative National Referral Mechanism, a multi-agency body that provides a forum for coordination, collaboration and information sharing towards combating trafficking.

The Penal Code (Cap. 63) does not expressly create the offence of trafficking in persons. The Act nevertheless has an elaborate list of criminal activities that relate to trafficking, smuggling and similar illegal activities, including kidnapping from Kenya; kidnapping from lawful guardianship; abduction; and kidnapping or abducting with intent to confine. Notably, other Acts of Parliament that are relevant with regard to trafficking include the Extradition Acts (Chapters 76 and 77 of the Laws of Kenya), which can be used to prosecute traffickers whose offences are connected with Kenya, wherever they are, by requesting the country in which they reside for the time being to surrender them to Kenya, and the Fugitive Offenders Pursuit Act (Chapter 87 of the Laws of Kenya).

The Witness Protection Act, 2006 establishes the witness protection program, a mechanism to protect and assist witnesses of crime from being threatened, intimidated or harmed by criminals for cooperating with law enforcement and prosecution authorities. Protective measures provided under the witness protection program include in-court procedural protections, police protection and change of identity and relocation.

The Sexual Offences Act, 2006 criminalizes acts of child trafficking and trafficking for sexual exploitation. The Act also creates related offences of child sex tourism, child prostitution, child pornography and exploitation for prostitution.

Gaps in Counter-Trafficking in Persons Act, 2010

Sections 3(5) and 3(6) of the Counter-Trafficking in Persons Act criminalize trafficking in persons (including for purposes of labor or sex) and prescribe a stringent sentence, but give the option of a fine, hence undermining the intended goals of prosecution.

Section 3(5) provides: “A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.”

Under section 3(6), the offence of sexual exploitation attracts a penalty of 30 years imprisonment or a fine of not less than Ksh 30 million (USD 296,300), or both. This punishment is lenient compared to that prescribed under the Sexual Offences Act for the offences of rape and child prostitution. The minimum penalty of 10 years imprisonment that is prescribed under sections 14 and 15 of the Sexual Offences Act for child sex tourism and child prostitution is more lenient than that provided for under the Counter-Trafficking in Persons Act.²¹⁷ This lack of alignment amongst laws undermines the stringency of the sentence and hence prevention and prosecution efforts.

Besides the letter of the law, various challenges hamper the implementation of the Counter-Trafficking in Persons Act, including the following:

- Lack of consolidated and reliable data and reporting on trafficking in Kenya. It has been recorded that “the government’s overall data collection and reporting on anti-trafficking law enforcement efforts remained weak”.²¹⁸ There is no body of complete research work on incidence, prosecution, protection and prevention of trafficking in persons in Kenya by the State. One of the functions of the Counter-Trafficking in Persons Advisory Committee under section 20(2)(g) of the Counter-Trafficking in Persons Act is the “compilation and documentation of data

and information on cases of trafficking in persons for purposes of policy formulation and program direction”.

- Institutionally, the anchorage of the Counter-Trafficking in Persons Secretariat in the Ministry of Labour, Social Security and Services under the Department of Children Services instead of in the Ministry of Interior and Coordination of National Government, which is responsible for matters relating to security and immigration, has been seen to affect seamless operations.
- Delay in the operationalization of the National Assistance Fund for Victims of Trafficking in Persons, contrary to Part V of the Counter-Trafficking in Persons Act, undermines protection. Part V acknowledges the need to financially assist victims of human trafficking. There is currently no information on how much money the Government has allocated to the fund in previous financial years. There is also no guideline for the collection, utilization and even auditing of the funds that will be allotted.
- Non-implementation of section 15(1) of the Counter-Trafficking in Persons Act has resulted in inadequate protection services for victims of trafficking. As reported in the United States Counter-Trafficking Report, 2020, protective services provided to victims were insufficient, with non-governmental organizations stepping in to provide the services where unavailable. The lack of protection and victim-support services affect women disproportionately.²¹⁹
- Even though the Government began tracking law enforcement data digitally and collecting it monthly from local police offices to ensure its statistics were accurate, complete and represented all 47 counties in Kenya, this data is not readily available.
- The limited capacity of criminal justice practitioners makes it a challenge to properly identify cases and victims of human trafficking. In the National Plan of Action

(2013-2017), the Government committed to the capacity-building of 900 criminal justice practitioners and duty bearers, including Children’s Officers as well as Judiciary and Immigration Officers, but there is no available data on this training.

- Corruption among law enforcement agencies has undermined prevention and prosecution efforts.²²⁰
- There is no framework to guide the Government in combating trafficking in persons, which undermines implementation of the laws. The National Plan of Action to Combat Human Trafficking (2013-2017) expired and there is currently no framework to guide the Government and the key stakeholders in the prevention and response to trafficking in persons.²²¹ The National Plan of Action on Children in Kenya (2015-2022) clubs child trafficking with all other categories of children’s rights violations without distinguishing or differentiating the various harms. There is also no clear monitoring framework as far as child trafficking is concerned.
- Kenya has not ratified the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography or the Communications Procedure. Both protocols create a vital enabling framework to fight child trafficking and a mechanism for seeking redress by individuals or a group of individuals whose rights are protected under the Convention.
- Misidentification of victims leads to their treatment like criminals and creates a cover for traffickers, as they know that victims will not report the crime for fear of being arrested themselves for immigration offences. Failure to properly screen victims of trafficking early enough has led to them being treated as criminals, particularly women engaged in sex work.²²² This situation compounds the violations of the human rights of the victims. The Refugee Act, 2006 (No. 13 of 2006) provides that refugees, even upon illegal entry, are

precluded from being declared prohibited immigrants, detained, or penalized in any way, provided they declare their intentions by appearing before the commissioner immediately or within 30 days of entry. Such intention may also be made to an authorized officer who will forward it to the commissioner. Where no report is filed, the refugee is liable to a fine not exceeding Ksh 20,000 (USD 200) or imprisonment for a term not exceeding six months or both. The above requirement results in criminalization of persons trafficked into Kenya who, because they are in the detention of their trafficker, are unable to appear before the commissioner or his authorized officer and hence become liable to prosecution and, if found guilty, subject to the penalty above.

RECOMMENDATIONS:

Law reform

- Amend section 11(3) of Refugee Act, 2006 to include an exception for the requirement to notify the commissioner for persons trafficked into Kenya so they are not penalized under the provision.
- Amend sections 16, 17 and 18 of the Sexual Offences Act, 2006 to remove the loophole in the more lenient sentences for child pornography, prostitution and trafficking for sexual exploitation and to align them with the more stringent sentencing under the Counter-Trafficking in Persons Act, 2010.
- Amend sections 3(5) and 3(6) of the Counter-Trafficking in Persons Act to remove the option of a fine, which undermines the stringent sentence and the intended deterrent effect of the statute.
- Ratify key relevant international human rights instruments, including the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol to the Convention on the Rights of the Child on Communications Procedure.

Policy and program actions

- Implement section 15(1) of the Counter-Trafficking in Persons Act by formulating standard guidelines for the protection of victims; establishing shelters for survivors with standard operating procedures; and providing additional training to front-line responders.
- Establish the International and Organized Crimes Division in the High Court to prosecute human trafficking cases.
- Conduct research to establish corruption patterns and cartels that facilitate trafficking in persons.
- Develop national and regional monitoring frameworks to monitor in-country and cross-border movements of people and detect trafficking in persons.
- Research the demand side, including mapping international crime networks operating in the country, and the nexus between trafficking in persons and violent extremism, to inform law reform.
- Collect data on the prevalence of trafficking to inform government action on trafficking in persons.
- Address the root causes of trafficking and exploitation of women and girls by implementing the Sustainable Development Goal 5 target to “undertake reforms to give women equal rights to economic resources”.
- Raise public awareness on the Counter-Trafficking in Persons Law, particularly in rural communities.
- Anchor the Counter-Trafficking in Persons Secretariat within the Ministry of Interior and Coordination of National Government, which has the relevant enforcement resources.
- Expand the human resource capacity of the Counter-Trafficking in Persons Secretariat and decentralize it to the counties.
- Advocate for more funding for the National Assistance Trust Fund for Assisting Victims of Trafficking to facilitate the protection,

dignified repatriation and reintegration of both young and adult victims.

- Strengthen the National Coordination Mechanism for enhanced referral and management of trafficking in persons cases, including anchoring it in law.
- Implement Part V of the Counter-Trafficking in Persons Act by operationalizing the National Assistance Trust Fund for Assisting Victims of Trafficking and gazette the regulations on the fund.
- Incorporate the Counter-Trafficking in Persons Act in the basic curriculum for law enforcement agencies, the Office of the Director of Public Prosecutions, the Judiciary and Correctional Facilities.
- Develop programs for training of prosecutors to ensure that trafficking cases are prosecuted under the Counter-Trafficking in Persons Act and not the more lenient labor and immigration laws.
- Enhance bilateral, regional and international cooperation to combat trafficking, including by harmonizing legal procedures to prosecute traffickers.

Violence against women in elections

Violence against women in elections refers to any sexual, psychological or physical harm or suffering to women, including threats of such acts, in the context of elections.²²³ It has been defined as:

*“Any harm or threat of harm committed against women with the intent and/or impact of interfering with their free and equal participation in the electoral process during the electoral period. It includes harassment, intimidation, physical harm or coercion, threats, and financial pressures, and it may be committed in the home or other private spaces, or in public spaces. These acts may be directed at women in any of their roles as electoral stakeholders (e.g., voters, media, political actors, state actors, community leaders, or electoral officials).”*²²⁴

Kenyan elections have historically and consistently seen violence being meted out to women by the community, media and male leaders who seek to discredit women candidates in the eyes of society or intimidate women voters.

Women face the same types of violence as men associated with elections in addition to experiencing certain types of violence unique to women, such as economic and financial intimidation, harassment regarding perceptions of sexual or moral purity, threats of divorce, and other familial and social sanctions. Women experience electoral violence in public and private spaces, including at home and online.²²⁵ In the public sphere, women are targets of sexual violence, sexual slurs or harassment, and being physically attacked at political/campaign rallies.²²⁶ Women with political ambitions or those engaged in political activism experience verbal harassment in public and in the online space by a variety of actors that defame women with claims regarding sexual “purity” or “impurity”, their religious convictions, their “femininity”, their marital status or place in the home as a woman, or their domestic abilities.²²⁷

The laws relevant to violence against women in elections are the same as those relevant to other forms of gender-based violence, including the Constitution, the Sexual Offences Act, the Penal Code and the Prevention of Domestic Violence Act. More relevant to the context of elections are the Elections Act, 2015 and the Electoral Offences Act, 2016.

Schedule II of the Elections Act contains the Electoral Code of Conduct. The Code prohibits violence but has no specificity with regard to gender-based violence. Rule 6(c) provides: “All those bound by this Code shall, throughout an election period – (a) publicly and repeatedly condemn violence and intimidation and avoid the use of hate speech, language or any kind of action which may lead to violence or intimidation, whether to demonstrate party strength, gain any kind of advantage, or for

any other reason; (b) refrain from any action involving violence or intimidation.”

As violence against women in elections in Kenya is highly prevalent, rule 6(c) needs to specifically include certain forms of violence against women, including sexual harassment and other forms of sexual violence. The Kenya National Commission on Human Rights expressed concern that sexual violence during the 2017 general elections was used as a “weapon of electoral conflict”.²²⁸ The violence that took place across the country aimed to frighten opponents and supporters, hence unnecessarily inflaming the political contest.²²⁹ The Commission documented 201 cases of sexual violence against women reported to have occurred in 11 counties during the 2017 general elections in Kenya.²³⁰ It noted that the actual cases in all 47 counties were likely much higher, that the numbers were “just a fraction” and that “many survivors [were] still hurting in silence and required medical care, counselling and restoration of their sources of livelihoods”.²³¹ Additionally, the Independent Electoral and Boundaries Commission needs to incorporate violence against women in elections considerations into their other rules, regulations and voter education curriculum to guarantee the safety of women during elections.

Section 11 of the Election Offences Act, 2016, on use of force or violence during elections, is general and narrow regarding violence against women as it does not adequately define violence to include all the dimensions of violence during elections that women may experience. It provides:

- “A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person –
- (a) so as to induce or compel that person to support a particular candidate or political party;

- (b) on account of such person having voted or refrained from voting; or
- (c) in order to induce or compel that person to vote in a particular way or refrain from voting,
- commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.”

Women experience different kinds of violence during elections, such as sexual violence, sexual harassment and verbal harassment in campaigns, on social and mainstream media, including attacks on their morality, their appearance and “femininity”, and marital status, which are excluded from the definition of violence under section 11 of the Election Offences Act.

Section 11 of the Act prescribes sentences that are far more lenient than those prescribed by other laws, such as the Penal Code (Cap. 63) and the Sexual Offences Act, for crimes such as sexual violence and grievous harm. For instance, section 234 of the Penal Code (Cap. 63) provides: “Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life”. Sentences for rape under the Sexual Offences Act range from 10 years to life imprisonment, depending primarily on the age of the victim, and are also higher for gang rape or abuse by persons in positions of trust or authority. In comparison, section 11 of the Election Offences Act prescribes a penalty of six years imprisonment or a fine of Ksh 2 million (USD 20,000).

Violence against women in elections is a distinct form of gender-based violence, and program activities must go beyond the immediate electoral period, and beyond observation and reporting. Programs must be mapped on the electoral cycle and the different types of violence experienced by women in each phase, and in different spaces, for example, nominations within parties, voter registration, etc.

The focus should also broaden beyond violence meted out against women candidates to include violence against the supporters of women candidates and voters, women campaign workers, and women election workers, especially those in key positions of the election management body, such as returning officers.

There is also a need to explicitly incorporate sexual violence as an offence in the Election Offences Act and provide for stringent sanctions. This is in recognition of election-related sexual violence as “a unique manifestation of sexual violence requiring specific investigation and prosecution, especially in cases of targeted, widespread, or systematic sexual violence”.²³²

RECOMMENDATIONS:

Law reform

- Amend rule 6(c) of the Electoral Code of Conduct to add some specificity to the definition of violence against women in elections and incorporate certain forms, including sexual harassment and other forms of sexual violence.
- Review the Election Offences Act, 2016 to incorporate sexual violence as an offence with stringent sanctions.
- Amend section 11 of the Election Offences Act to broaden its scope and introduce specificity in the description of “violence” to include violence against women and to define violence against women in elections and include its different forms.
- Amend section 11 of the Election Offences Act to align its provision on sentencing with the sentencing prescribed in the Penal Code (Cap. 63) and Sexual Offences Act for similar offences, such as sexual violence.
- Amend the Election Offences Act to make linkage with the Sexual Offences Act so as to guide the investigation and prosecution of forms of sexual violence outlined under the latter, which could be perpetrated and manifest as election-related sexual violence.

- Amend both the Sexual Offences Act and the Election Offences Act to provide a definition of election-related sexual violence so as to identify and treat it as a unique manifestation of sexual violence requiring special investigation and prosecution approaches.

Policy and program actions

- The Independent Electoral and Boundaries Commission should incorporate violence against women in elections considerations into their other rules, regulations and voter education curriculum to guarantee the safety of women during elections.
- Mainstream violence against women in elections in long-term gender-based violence programming and expand the scope of focus of violence against women in elections beyond candidates to include women campaign staff, supporters and elections workers.

3.4.7 LABOR AND EMPLOYMENT LAWS

Article 27 of the Constitution guarantees equality and non-discrimination. Article 41 provides that “(1) Every person has the right to fair labor practices. (2) Every worker has the right – (a) to fair remuneration; b) to reasonable working conditions; (c) to form, join or participate in the activities and programs of a trade union; and (d) to go on strike.”

The Employment Act, 2007 is the key legislation on employment rights. Section 4(1) provides against forced labor. Section 5 provides protection against discrimination within employment with respect to training, recruitment, promotion, terms and conditions and termination. It also stipulates equal remuneration for work of equal value and criminalizes discrimination. Section 6 prohibits sexual harassment. Other labor laws include the Labour Relations Act, 2007; the Labour Institutions Act, 2007; the Work Injury Benefits Act, 2007; and the Occupational Safety and Health Act, 2007. The Government has, through several

laws, set out the framework for promoting social security and social protection, including through the National Social Security Act and the National Hospital Insurance Act. The Public Officer Ethics Act, 2003 safeguards against sexual harassment in the workplace.

Despite this elaborate legal framework against discrimination, however, discrimination against women is pervasive in the labor market.

Maternity leave

Section 29(1) of the Employment Act entitles female workers to be fully paid for three months' maternity leave. This is below the standard mandated by the ILO, who call for a minimum maternity leave period of 14 weeks and recommend increasing it to at least 18 weeks to ensure an adequate rest and recovery time for the mother. Kenya is also yet to ratify the ILO Maternity Protection Convention, 2000.²³³ Section 29(8) also entitles male employees to take up to two weeks paternity leave with full pay. This tends to encourage childcare responsibilities disproportionately on the mother. Section 5(3)(a) of the Constitution protects female employees from harassment and discrimination by the employer on the basis of being pregnant. In its Concluding Observations on the eighth periodic report in 2017, the CEDAW committee highlighted concern around the issue of direct payment of maternity benefits by employers, that it may lead to discrimination against women applicants, and that mothers who adopt children or who suffer miscarriages or give birth to stillborn babies are not covered by the Employment Act of 2007.

Pre-adoptive leave for parents

Section 29A of the Employment Act, 2007 [as amended by the Employment (Amendment) Act, 2021 (No. 2 of 2021)]²³⁴ provides for a one-month pre-adoptive leave with full pay for parents (regardless of gender).

Kenya has made a declaration concerning Article 10(2) of the International Covenant on Economic,

Social and Cultural Rights. Article 10(2) binds State parties to provide special protection, including paid leave or leave with adequate social protection, to mothers during a reasonable period before and after childbirth. The declaration purports to exclude the Kenyan Government from taking legislative action to provide for protection for mothers before and after childbirth. Though the declaration has been overtaken through section 29 of the Employment Act, it ought to be removed to signal Kenya's commitment to the principles of equal protection before the law and equality. The Committee on Economic, Social and Cultural Rights, in its review of Kenya's combined second to fifth periodic report, has called upon the Government to remove the reservation under Article 10(2) of the International Covenant on Economic, Social and Cultural Rights.²³⁵

Recognition of domestic work

The country's economic policies do not recognize and provide for compensation for domestic care work. Care work done by women across the country is unrecognized as an economic contribution, and is not valued or compensated in any way.²³⁶ A study carried out by OXFAM in five informal settlement areas in Nairobi shows that men spent 1.5 times more time in paid work in comparison to women.²³⁷ This state of affairs is connected to a lack of resources to hire caretakers, insecurity and a lack of access to health services, clean water and sanitation, which force women to forgo paid work and undertake unpaid care work of children, the elderly and the sick.²³⁸

RECOMMENDATIONS:

Law reform

- Remove the declaration concerning Article 10(2) of the International Covenant on Economic, Social and Cultural Rights on maternity leave protection.

Policy and program actions

- Conduct research to measure and value the unremunerated work of women, in

line with the CEDAW Committee's General Recommendation 17 (1991) on measurement and quantification of the unremunerated domestic activities of women and its recognition in the gross national product.

3.4.8 NATIONALITY LAWS

The Maputo Protocol safeguards a woman's right to retain her nationality or to acquire the nationality of her husband.²³⁹ It further guarantees that "a woman and a man shall have equal rights with respect to the nationality of their children, except where this is contrary to a provision in national legislation or is contrary to national security interests."²⁴⁰ Article 9 of CEDAW reaffirms that laws and practices that treat women differently than men in terms of nationality constitute discrimination against women. Article 9 of CEDAW aims to safeguard the rights of women to a nationality by protecting them from losing their nationality upon marriage. Similarly, the provision aims to enable women to confer citizenship status to their children.

Article 9 of CEDAW stipulates thus:

- "States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
- States parties shall grant women equal rights with men with respect to the nationality of their children."

A report by the Working Group on the Issue of Discrimination Against Women in Law and in Practice notes that discrimination against women on issues of nationality causes multiple harms. The Working Group's thematic report in 2013 focused on women's equal participation in political and public life and noted the negative

ripple effect of unequal citizenship laws on the enjoyment of other rights:

*"Elimination of discrimination against women in political and public life necessitates reform of discriminatory nationality laws. Women's capacity to participate in political and public life is defined by their citizenship and nationality, but nationality laws [d]iscriminate against women, particularly when they require a single nationality in a family and the wife's nationality is treated as dependent on her husband's."*²⁴¹

The Constitution of Kenya, 2010 remedied a long-standing legal inequality and practice where women were not allowed to pass their nationality to children born overseas with non-Kenyan fathers. The right of women to pass their nationality to their children (even though born overseas with a non-Kenyan father) is reiterated in the Citizenship and Immigration Act, 2011. The Act and the Constitution also recognize the right of women to pass their Kenyan nationality to non-national spouses.²⁴² The provisions are a departure from the pre-2010 constitutional and legal framework that denied Kenyan women the right to pass their nationality to non-national spouses. This is a progressive move from the previous Constitution, where only men could confer such status to their wives. The Constitution provides that citizenship is not lost through marriage or dissolution of a marriage.²⁴³

Nonetheless, there lie various challenges to this, including inadequate implementation of section 15 of the Citizenship and Immigration Act, which occasions statelessness for various groups of persons. Section 15 provides that:

- "A person who does not have an enforceable claim to the citizenship of any recognized state and has been living in Kenya for a continuous period since 12 December, 1963, shall be deemed to have been lawfully resident and may, on application, in the prescribed manner, be eligible to be registered as a citizen of Kenya if that person –

- a) Has adequate knowledge of Kiswahili or a local dialect.
- b) Has not been convicted of an offence and sentenced to imprisonment for a term of three years or longer.
- c) Intends upon registration as a citizen to continue to permanently reside in Kenya or to maintain a close and continuing association with Kenya.
- d) The person understands the rights and duties of a citizen."

Foreign women who marry Kenyan men, including women asylum-seekers and stateless women, often have difficulties in securing Kenyan citizenship for themselves and their children, despite the permissive sections of the Citizenship and Immigration Act. In the inverse, Kenyan women who marry stateless or non-national spouses continue to face difficulties in conferring their nationalities to their spouses. This state of affairs is attributed to administrative barriers and the lack of awareness by decision-makers, especially at the local level, of the changes in legislation that provide for equality between the genders in conferring nationalities.²⁴⁴

Some women are unable to exercise their citizenship rights under section 22(1)(g) of the Citizenship and Immigration Act. Section 22 of the Act provides that: "Every citizen is entitled to the rights, privileges and benefits and is subject to the limitations provided for or permitted by the Constitution or any other written law including the entitlement to any document of registration or identification issued by the State to citizens."

RECOMMENDATIONS:

Law reform

- Ratify the 1954 Convention relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness.

Policy and program actions

- Implement and enforce section 15 of the Citizenship and Immigration Act, 2011 and ensure, in line with the CEDAW Committee's concluding observations, that all refugee and stateless women married to Kenyan nationals may obtain citizenship and confer it on their children without administrative barriers.
- Implement section 22(1)(g) of the Citizen and Immigration Act and facilitate the provision of official documents and registration of marriages, especially in rural areas, including through increased resources, technological capacity, and the geographical spread of Huduma centers (public service centers).



4

PART IV
GROUNDBREAKING
JUDGMENTS ON
GENDER EQUALITY AND
EMPOWERMENT OF
WOMEN AND GIRLS IN
KENYA

Kenya's judiciary has played a significant role in defining the rights of women and girls in various dimensions. In the area of political participation and public life, for instance, the courts have vehemently upheld the principle that no more than two-thirds of the members of both elective and appointive bodies are to be of the same gender. These progressive decisions are, however, yet to translate into the much-needed substantive equality in women's representation. As seen in Part III above, there have been positive interpretations around the Children Act, 2001 (since repealed), the Law of Succession Act (Cap. 160), as well as the Births and Deaths Registration Act (Cap. 149), whereby the courts have invalidated several sections of the law on the basis of discrimination against unmarried mothers and children born out of wedlock. In their judicial pronouncements, the Kenyan courts have also advanced access to justice for victims of sexual and gender-based violence by applying liberal and purposive interpretations of the Constitution to impose obligations on the State with regard to victims of violence, who are mostly women and girls. In other spheres such as the sharing of matrimonial property and inheritance, however, there have been notable inconsistencies in the interpretation and application of the various provisions, which has occasioned more uncertainties and inequalities, especially for women. More needs to be done to establish a firm jurisprudence on these matters.

4.1 POLITICAL PARTICIPATION AND PUBLIC LIFE

In terms of participation in political and appointive posts, the Kenyan courts have taken significant steps to uphold the equality provisions of the Constitution. Just before the first general elections under the Constitution, the Attorney General of Kenya sought an advisory opinion from the Supreme Court on whether the gender provisions with respect to the two-thirds rule were to take effect immediately, in the first general elections under the new Constitution

scheduled for 4 March 2013, or progressively.²⁴⁵ The proponents of immediate application of the provisions relied on the mandatory connotation of the term "shall" as applied in Article 81(b) of the Constitution, which states, "not more than two-thirds of the members of elective public bodies shall be of the same gender". The court drew a comparison to Article 7 of CEDAW,²⁴⁶ and remarked thus:

*"We have asked ourselves whether the use of the word 'shall', in that instrument, can by itself eliminate discrimination against women in the political and public life immediately. Even though the word 'shall' has been used (sic), it is clear to us that the objectives to be attained through State action are of such a nature that they can only be realized progressively. Indeed, the Convention places a duty on the State Parties, in their regular reports to the managing committees, to announce the measures which they have taken over a certain period of time, for the purpose of attaining the specific goal."*²⁴⁷

Thus, by a majority decision²⁴⁸ delivered on 11 December 2012, the Supreme Court *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*²⁴⁹ advised that the Constitution envisioned a "progressive realization" of the two-thirds gender rule, as opposed to immediate implementation. The court, however, gave Parliament until 27 August 2015 to enact legislation to enable the implementation of the constitutional imperative.²⁵⁰

Although for many gender equality enthusiasts this decision of the Supreme Court was a missed opportunity to reap the gains of a transformative Constitution and a retrogressive step to ensuring women's participation in political spaces, it set in motion a series of diverse cases in the High Court of Kenya, followed by the unprecedented move by the Law Society of Kenya to occupy Parliament, and the then Chief Justice's advice to the President to dissolve Parliament. Besides the final outcome, the Supreme Court advisory made significant edicts with regard to gender discrimination and equality, which remain a

landmark and point of reference in gender jurisprudence in the country. At para. 47, the Supreme Court observed:²⁵¹

“This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society.”

In the dissenting judgment, then Chief Justice Mutunga reflected:²⁵²

*“[T]he Constitution's view to equality, as one of the values provided under the Constitution, in this case is not the traditional view of providing equality before the law. Equality here is **substantive**, and involves undertaking certain measures, including affirmative action, to reverse negative positions that have been taken by society. Where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive. For example, when after struggles for universal suffrage Kenyans succeeded in getting that right enshrined in the Bill of Rights of the 1963 Constitution, nobody could be heard to argue that we revert back to the colonial pragmatic progressive realization of the right to vote!”*

Following the failure by Parliament to adhere to the Supreme Court timeline of 27 August 2015, two other petitions were subsequently filed in the High Court: *Centre for Rights Education & Awareness (CREAW) v. Attorney General & another*²⁵³ and *Centre for Rights Education and Awareness & 2 others v. Speaker of the National Assembly & 6 others*.²⁵⁴ In the former, the High Court (Lady Justice Mumbi Ngugi), in a judgment dated 26 June 2015, gave Parliament 40 days to prepare “the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as

read with Article 100 and the Supreme Court Advisory Opinion dated 11th December 2012 in Reference Number 2 of 2012”. In the latter, about two years later, on 29 March 2017, the High Court (Justice Mativo) yet again ruled that “the failure by Parliament to enact the legislation contemplated under Articles 27(6) & (8) and 81(b) of the Constitution amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the Constitution”. The court compelled Parliament to enact the required legislation within 60 days from the date of the judgment and to report the progress to the Chief Justice. The National Assembly appealed from the latter decision in *Speaker of the National Assembly v. Centre for Rights Education & Awareness & 7 others*.²⁵⁵ In its judgment delivered on 5 April 2019, the appellate court agreed with the High Court and dismissed the appeal in its entirety.

Perhaps the biggest push in the quest for enactment of legislation for implementation of the two-thirds gender rule was through the six petitions presented to then Chief Justice David Maraga, asking for the dissolution of Parliament for failure to adhere to the High Court directives. In an advisory dated 21 September 2020 addressed to the President, the former Chief Justice advised His Excellency the President to dissolve Parliament pursuant to Article 261(7) of the Constitution.²⁵⁶

Noting the centrality of political parties as vehicles for democracy, the Kenyan courts have upheld the role of political parties in ensuring that the two-thirds gender rule is observed right from the party lists. The petition in *Katiba Institute v. Independent Electoral & Boundaries Commission*,²⁵⁷ which was filed prior to the 2017 general elections, was premised on the grounds that “women in Kenya have been disadvantaged, and only given limited opportunities in political participation as members of Parliament; that despite creation of 47 elective positions exclusively for women as members of Parliament, only 19 percent of the members of National Assembly

are women, while the Senate has only 27 per cent, that still fall short of the minimum of 33 percent for elective posts in both houses, which is a contravention of the Constitution”.²⁵⁸ The High Court (Justice Mwita) in its decision of 20 April 2017 ruled that political parties were bound by equality provisions, including the two-thirds gender rule. Further, the court observed that the electoral management body was mandated to reject political party nomination lists that did not comply with the two-thirds gender rule. The High Court directed political parties and the electoral body as follows:

*“To take measures to formulate rules and regulations for purposes of actualizing the two-thirds gender principle during nominations for the 290 constituency-based elective positions for members of National Assembly and 47 county-based elective positions for the members of Senate within six months from the date of this judgment. In default, the respondent, the Independent Electoral and Boundaries Commission, shall devise an administrative mechanism to ensure that the two-thirds gender principle is realized among political parties during nomination exercises for parliamentary elections. For avoidance of doubt, and in order to avoid disruption, this order shall not apply to the General Elections due on 8th August 2017.”*²⁵⁹

Notably, the High Court postponed application of the order to the 2022 general elections. The High Court holding resonated with the earlier Supreme Court observation:

“Parties are an integral part of the electoral system and their party lists must ensure that they comply with the 2/3 rule. Parties are the only vehicles through which candidates for parliamentary seats are established. If party lists do not contain any/insufficient female candidates, no/insufficient female candidates will be elected. As such, it is important for political parties to establish internal mechanisms through which to ensure that not more than 2/3 of the entire list comprises of one gender. The [Independent Electoral and Boundaries

*Commission] is mandated by dint of the same provision to ensure that these party lists comply with this provision.”*²⁶⁰

In addition to elective posts, the two-thirds gender rule applies to appointive posts as well. Article 27(8) of the Constitution underscores this fact. This position was emphasized by the High Court (Justice Onguto) in *Marilyn Muthoni Kamuru & 2 others v. Attorney General & another*.²⁶¹ In its judgment of 20 December 2016, the court found that the action of appointing Cabinet Secretaries by the President as well as approval by Parliament was unconstitutional for failure to adhere to the two-thirds gender rule. The court, however, suspended the declaration for a period of eight months.

4.2 SEXUAL AND GENDER-BASED VIOLENCE

The Kenyan courts have enhanced access to justice for victims of sexual and gender-based violence through pronouncements that have extrapolated the obligation of the State with regard to victims of violence. In *Legal Resources Foundation Trust v. Attorney General & 2 others*,²⁶² the petitioner argued that the levying of charges for P3 forms at Ksh 300 to 3,000 (USD 3 to 30) at police stations curtailed access to justice for the very vulnerable in society. A P3 form is “a Medical Examination Report Form used by the police to make request for examination in medical facilities for victims of crime. The P3 form is used as evidence in criminal and sexual offence cases to support allegations of a victim that injuries were sustained in the course of the commission of the alleged crime”.²⁶³ The High Court sitting at Embu (Muchemi J.) agreed with the petitioner and on 4 April 2019 issued an order barring the Government, including the police and medical facilities at the national and county levels of government, from levying fees for issuance or filing of the P3 forms.

About six years earlier in *C K (A Child) through Ripples International as her guardian & next friend & 11 others v. Commissioner of Police/*

Inspector General of the National Police Service & 3 others,²⁶⁴ the High Court at Meru elucidated on the obligation of investigative agencies toward victims of defilement, holding that the State has a duty to protect all citizens and ensure their security of person. The petition was brought on behalf of 11 minors who were victims of defilement and other forms of sexual violence and child abuse on diverse dates between 2008 and 2012. It was argued that despite making reports to various police stations within Meru County, the police officers neglected or refused to conduct prompt, effective investigations or take any steps to apprehend the perpetrators of the crimes, who roamed freely. This occasioned grave physical and physiological trauma to the victims. In the landmark decision of 27 May 2013, the High Court at Meru (Justice Makau) pronounced itself thus:

"I find the police failure to conduct prompt, effective, proper, corruption free, and a professional investigation into petitioners' complaints of defilement and other form of sexual violence amounts to discrimination contrary to the expressly and implied provisions of Article 27 of the Constitution of Kenya, 2010, and contrary to Article 244 of the Constitution of Kenya, 2010.

Further to the above the police failure to effectively enforce Section 8 of the Sexual Offences Act, 2006, infringes upon the petitioners right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010, and further by failing to enforce existing defilement laws the police have contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.

In the circumstances the respondents are responsible for violation of the petitioners' rights under Article 27 of the Constitution of Kenya, 2010."

The High Court in the landmark case *Coalition on Violence Against Women & 11 others v. Attorney General of the Republic of Kenya & 5 others*²⁶⁵ concerning sexual and gender-based violence

during the post-election violence ruled that the failure by investigative and prosecutorial authorities to conduct effective investigations and prosecutions was in violation of the duty of the State. Four of the petitioners were each awarded Ksh 4 million (USD 40,000) as compensation. The court ruled that various rights of four of the petitioners, including "the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality and freedom from discrimination; and the right to remedy", were violated by the failure of the Government to protect them. In arriving at the decision, the court made reference to the obligations under CEDAW:²⁶⁶

*"132. As for the right of access to justice, the Committee on Elimination of Discrimination against Women expounded on the State's responsibility to provide remedies for human rights violations in its **General Recommendation No. 35 on Gender-Based Violence against Women**. The Committee recognizes that the State may be liable for the acts and omissions of both State actors and non-State actors where the State fails to abide by its due diligence obligations including the obligation to investigate, prosecute, punish and provide reparations for acts and omissions which result in gender-based violence against women."*

4.3 SEXUAL AND REPRODUCTIVE RIGHTS

On sexual and reproductive health, the courts have adjudicated on the rights of women who are subjected to sexual violence and their right to access abortion within the constitutional framework. The High Court of Kenya in the case of *Federation of Women Lawyers (Fida – Kenya) & 3 others v. Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR*²⁶⁷ adjudicated a petition filed by JMM, the mother to a daughter who died as a result of a botched abortion following her defilement. The abortion was procured at a time when the Director of Medical Services

had arbitrarily withdrawn the 2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion issued pursuant to section 36(5) of the Sexual Offences Act, 2006. The withdrawal caused uncertainty on the legal status of abortion and discouraged medical service providers from providing abortion services for fear of prosecution. In determining the case in favor of the petitioner, the High Court held:

“372. In our view therefore, women and girls in Kenya who find themselves pregnant as a result of sexual violence have a right, under Kenyan law, to have an abortion performed by a trained health professional if that health professional forms the opinion that the life or health of the mother is in danger. Health, in our view, encompasses both physical and mental health. While Kenya made a reservation to Article 14(2)(c) of the Maputo Protocol, it is instructive that the words of the Article mirror in some respects the words used in the Constitution:

‘Article 14.2 c): the right to safe abortion in cases of sexual assault, rape, incest and when the pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.’

Further, Kenya is also a signatory to the CEDAW Convention. In its recommendations adopted after its 11th General Session in 1992, the Committee requires States to, among other things, enact and enforce laws and policies that protect women and girls from violence and abuse and provide for appropriate physical and mental health services. It also requires that healthcare workers should be trained to detect and manage the health consequences of violence against women.”

The court further declared that women and girls have the right to the highest attainable standard of physical and mental health, which includes its broadest interpretation, encompassing mental and social well-being as well as physical – right to non-discrimination, right to life, the right to information, and the right to benefit from scientific progress.²⁶⁸

The court pronounced that:

“It is thus evident that women and girls, as contended by the petitioners, have rights, in common with every other citizen, guaranteed to them under the Constitution. However, because of their sex, they are also guaranteed rights that are specific to them, the reproductive rights guaranteed under Article 43(1)(a) of the Constitution. Since the State has an obligation under Article 21(1) to ‘observe, respect, protect, promote and fulfil’ the rights guaranteed under the Bill of Rights, and to ‘take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43’, then any action that limits or diminishes this right is a violation of the Constitution.”²⁶⁹

The judgement is of significance given that abortion is one of the leading causes of maternal deaths in Kenya.²⁷⁰

4.4 UNLAWFUL DETENTION OF WOMEN RELATED TO MATERNAL HEALTH SERVICES

The case of *Millicent Awuor and Another v. the Hon Attorney General and 4 Others*²⁷¹ brings to the fore the challenges women face with regard to accessing the right to health, which is guaranteed to all persons under Article 43 of the Constitution. In particular, the case interrogated violations of human rights suffered by indigent women occasioned by their detention in public hospitals because of their inability to pay hospital fees for delivery. It was averred that during their period of detention, the petitioners stayed in unsanitary conditions, were forced to sleep on the floor and did not have access to sufficient food. The petitioners further pleaded before the court that their dignity had been violated following mistreatment by nurses and hospital officials in the course of their treatment.

The court ruled that the detention of women for their inability to pay hospital fees amounts to arbitrary detention and violates the right to freedom of movement. The court found that

the detention of the women in unsanitary conditions and without access to sufficient food and healthcare as well as separation from their children and families amounted to cruel, inhuman or degrading treatment or punishment. In finding that the petitioners were subjected to discrimination, the court stated as follows:

“We have not, as a society, clearly internalized the fact that denial or neglect to provide interventions that only women need is a form of discrimination against women. As such, the lack of state provision or facilitation of access to affordable maternal healthcare, including delivery and post-natal care, is a facet of discrimination against women.”

The judgment sends a powerful message that denying women essential maternal care and detention of women due to their inability to meet costs of health services is a serious human rights violation.

4.5 HARMFUL CULTURAL PRACTICES: FEMALE GENITAL MUTILATION

In March 2021, the Kenyan High Court dismissed a petition seeking to have female genital mutilation legalized, in the case of *Tatu Kamau v. Attorney General & 2 others*.²⁷² In this matter, the petitioner, a medical doctor, challenged the constitutionality of sections 5, 19, 20, 21 and 24 of the Prohibition of Female Genital Mutilation Act, 2011. It was the petitioner’s line of argument that criminalizing what the petitioner termed as female circumcision (not genital mutilation) denied women the right to enjoy their culture. The petitioner submitted before the court that “no particular culture is superior to another” and as such, “willing adult women from circumcising communities should be allowed to undergo the rite under a trained medical practitioner”. The petitioner contended that by proscribing qualified medical doctors from undertaking the practice, section 19(1) of the Prohibition of Female Genital Mutilation Act infringed on the right of willing adult women to the highest attainable standard of health. In dismissing the petitioner’s

argument, the three-judge bench of the High Court at Nairobi pronounced itself as follows:²⁷³

“210. The Constitution grants the freedom to exercise one’s culture. However, that freedom has to be carried out in line with the other constitutional provisions. From the law we observe that culture entails various modes of expression. Therefore, what is limited is any expression that will cause harm to a person or by a person to another person. FGM/C falls into the latter category.

214. The evidence before us demonstrates that the practice of FGM/C implicates not only the right to practice cultural life but also the right to health, human dignity and in instances when it results in death, the right to life. The provisions of international treaties reproduced hereto are also clear that not all traditional practices are prohibited, but only those that undermine international human rights standards.

215. In sum there is no doubt that FGM/C was central to the culture of some communities in Kenya including the Kikuyu to which the petitioner belongs. However, from the medical evidence, and as discussed earlier, we are left in no doubt about the negative short-term and long-term effects of FGM/C on women’s health. We have also discussed the absence of consent by victims who undergo the rite which violates Article 44(3) of the Constitution. We are not persuaded that one can choose to undergo a harmful practice. From the medical and Anecdotal evidence presented by the respondents, we find that limiting this right is reasonable in an open and democratic society based on the dignity of women.”

The court directed the Attorney General to initiate amendments to section 19 of the Prohibition of Female Genital Mutilation Act, with a view to prohibiting all harmful practices of female genital mutilation.²⁷⁴

4.6 SURROGACY

The absence of clear regulation in this field has left the practice unsupervised, causing

uncertainty regarding the rights and responsibilities of the parties involved, particularly the rights of women who act as surrogates, and the rights of commissioning parents, especially those not genetically linked to the surrogate child. The jurisprudence emanating from the courts on this area is also foggy.

In the case of *JLN & 2 others v. Director of Children Services & 4 others*,²⁷⁵ the first petitioner (surrogate mother) entered into a surrogacy agreement with the second and third petitioners (genetic and commissioning parents) and gave birth to twins at a hospital. Following delivery of the twins, a question arose as to whose names should appear in the official birth notification document as required under the Births and Deaths Registration Act. The hospital sought the direction of the Director of Children Service, who proceeded to place the twins under the care of a children's home as they were deemed to be in need of care and protection. A case was filed in court against the Director of Children Services to prevent the twins from being placed under adoption. The court, finding in favor of the petitioner, reasoned that the actions of the director in taking the twins away from the surrogate and genetic parents was an infringement of their rights as parents. The court affirmed that the rights of a child born out of a surrogacy arrangement were no different from the rights of any child.²⁷⁶ The court further decried the lack of legislative framework to regulate surrogacy, noting that the Government had a responsibility to enact such legislation stemming from the constitutional right to the highest attainable standards of health and health services, including reproductive healthcare [Article 43 (1) a)] and the right to recognition and protection of the family [Article 45(1)].

In the case of *AMN & 2 others v. Attorney General & 5 others*,²⁷⁷ the court ruled that the surrogate mother was the legal mother of the born twins and hence it was her name that should appear in the birth certificate. Additionally, since Kenyan law was silent on parental orders pertaining to

surrogacy, the only viable option was adoption. The birth certificates were therefore cancelled and issued in the name of the surrogate mother.

4.7 RIGHTS OF INTERSEX PERSONS

The High Court has also pronounced itself on the rights of intersex persons in Kenya. In the case of *Baby 'A' (Suing through Mother E.A.) & another v. Attorney General & 6 others*²⁷⁸ [2014] e KLR Petition Number 266 of 2013, E.A., the mother of the first petitioner gave birth to a baby who was born with both male and female genitalia. The hospital (second respondent) then inserted a question mark in the column indicating the child's sex, resulting in non-issuance of a birth certificate. The petitioners claimed that the entry of a question mark on the child's medical and treatment notes, which resulted in non-issuance of a birth certificate, offended the child's rights to legal recognition, eroded its dignity and violated the right of the child not to be subjected to inhuman and degrading treatment as provided under the Constitution of Kenya.

The High Court, in deciding that petitioner "Baby A" had not been discriminated against as the mother had not applied for a birth certificate, held that the protections in the 2010 Constitution further extended to intersex persons. The court concluded that it did not have the power to order that a third sex category be included in the birth certificate. However, the court noted that:

*"It is the duty of the State to protect children born as intersexual by providing a legal framework to govern issues such as their registration under the Births and Deaths Registration Act, examinations and tests by doctors, corrective surgeries etc. It is on this basis that it behooves upon me to direct the Government towards an appropriate legal framework governing issues related to intersex children based on internationally acceptable guidelines."*²⁷⁹

To enhance protection of the rights of intersex persons, including with regard to corrective surgeries, the court ordered the Attorney General

to submit, within 90 days of the judgement, information regarding: the organ responsible for collecting data and keeping data related to intersex children; and the status of a statute regulating the place of intersexuals as a sexual category and guidelines and regulations for corrective surgery for intersex persons.

The pronouncements in the “Baby A” case resulted in the Attorney General forming a Taskforce on Policy, Legal, Institutional and Administrative Reforms.²⁸⁰

The Taskforce, which completed its work in 2018, presented a report with recommendations calling for amendments to the law to define an intersex person and facilitate expeditious registration and provision of registration documents to intersex persons.²⁸¹ In addition, the Taskforce made a recommendation to the Ministry of Health to formulate comprehensive treatment guidelines for intersex persons.²⁸²

4.8 MATRIMONIAL PROPERTY

This is one area where there have been divergent opinions by the courts handling matrimonial property disputes. Under the Matrimonial Property Act, 2013, matrimonial dispute cases are to be heard by the High Court. However, the magistrates’ courts also handle matters based on their pecuniary jurisdiction, and this has bred confusion even in terms of the appropriate forum.²⁸³ This has exacerbated the confusion occasioned primarily by the fact that there is no guidance on the manner of quantifying non-monetary contributions.²⁸⁴ While the law on the face of it recognizes both monetary and non-monetary contributions, the lack of clarity on proof of non-monetary contributions has left many women disenfranchised. Thus, the various court decisions that have considered non-monetary contributions have done little to offer reprieve to women whose contributions in marriage are largely non-monetary.²⁸⁵ A recent study by Human Rights Watch and FIDA Kenya established that there is no clear guidance on how to proceed with non-monetary contributions: “Compounding the ambiguity over documentary

evidence on contribution is a lack of a consistent system or valuation methodology across any of the courts, for proving and calculating contributions. Some judges recognize women’s unpaid care and domestic work, while others do not, and there is no High Court or Ministry of Justice guidance on which course to follow leaving lower court judges unsure how to proceed.”²⁸⁶

The emerging jurisprudence currently reflects a shift from the initial approach of equal division adopted by the courts from 2010 to 2015,²⁸⁷ towards more determinations that result in discriminatory outcomes for women. Cases such as the *Federation of Women Lawyers (FIDA) and Another v. Attorney General*²⁸⁸ and *U.M.M. v. I.M.M. [2014] eKLR*²⁸⁹ have rejected the 50:50 sharing of matrimonial property and taken the stance that each spouse should walk away with what they deserve. Thus, distribution is determined on the basis of “proven” contribution by each spouse to the acquisition of matrimonial property.

In the case of *U.M.M. v. I.M.M. [2014] eKLR*,²⁹⁰ the High Court sitting in Busia pronounced itself that, “at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary”. The court then went on to state that, “But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property.”

Similar sentiments were expressed by the Court of Appeal in *P.N.N. v. Z.W.N. [2017] eKLR*²⁹¹ in holding as follows:

“Thus it is that the Constitution, thankfully, does not say equal rights ‘including half of the property’. And it is no accident that when Parliament enacted the Matrimonial Property Act, 2013, it knew better than to simply declare that property shall be shared on a 50:50 basis. Rather, if set out in elaborate manner the principle that division of matrimonial property

between spouses shall be based on their respective contribution to acquisition.

...

Our new constitutional dispensation is no safe haven for those spouses who will not pull their weight. It cannot be an avenue to early riches by men who would rather reap from rich women or women who see in monied men an adieu to poverty. What the Matrimonial Property Act has done is recognize at Section 2 that contribution towards acquisition of property takes both monetary and non-monetary forms which essentially opens the field of contribution to both spouses without distinction on the basis of remunerative employment, especially so in an urban setting."

The Appellate Court in *M.B.O. v. J.O.O.* [2018] eKLR appears to somewhat differ on the issue of quantifying indirect contribution.²⁹²

Matrimonial property is one area in which legal reform and practice directions are urgently needed to clearly define quantification and formulate concrete judicial guidance on how to interpret and quantify contributions.

4.9 SUCCESSION

In matters of succession and burial rights of spouses, the courts have made progressive interpretations that have insisted that daughters have equal rights to inherit as sons, whether married or unmarried. That notwithstanding, negative cultural underpinnings have prevented women and girls from enjoying equality in communities. Most customary laws bar married daughters from inheriting their father's estate. It has also been observed that "widows are still disinherited, including being evicted from family homes and land, with serious consequences for them and their children, in some Sub-Saharan African countries, including [...] Kenya. In rural areas of Kenya where residents have limited access to justice, discriminatory traditional practices operate by default".²⁹³

Fortunately, there are numerous progressive decisions with regard to the rights of married

daughters to inherit their deceased father's estate. Whenever called upon to adjudicate disputes pitting sons and daughters or daughters-in-law against the family of a deceased husband, the Kenyan courts have often upheld equality provisions while frowning upon retrogressive customary practices concerning inheritance. Even before the promulgation of the 2010 Constitution, some courts had begun the application of international law as a persuasive authority to hold that daughters have an equal right to inheritance as sons. For example, in the case of *Mary Rono v. Jane Rono*,²⁹⁴ the Court of Appeal refuted arguments made by the sons of the deceased that girls have no right to inherit their father's estate under the Keiyo customary law. A similar pronouncement was made by the Kenyan High Court in the case of the *Estate of Lerionka Ole Ntutu (Deceased)* (2008),²⁹⁵ where it was argued that daughters' rights to inherit from their deceased father's estate was not recognized under Maasai customary law. The court relied on the *Rono v. Rono* decision in its own, noting in particular that Kenya, as a state party to CEDAW, recognized women's equal rights to inheritance. In *Re Estate of Solomon Ngatia Kariuki (Deceased)*,²⁹⁶ the High Court at Nyeri observed as follows:

"The Law of Succession Act does not discriminate between the female and male children or married and unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. [...] It is my considered view that a daughter whether married or not is entitled to inherit her father's estate as a daughter. It matters not that she is married and that she may inherit as well from her husband's side. [...] To deny a daughter inheritance merely because of her marital status is being naive and flies in the face gender equity and equality."

In upholding this decision, the High Court at Migori in *Thomas Tito Nyachawo v. Judith Akinyi Ndege*²⁹⁷ stated:

"Section 29(a) of the Act in recognizing 'children' of the deceased as dependents does not classify

those children as sons, daughters, married or unmarried. However, that distinction happens to be in the Luo Customary Law on inheritance. To that extent therefore the Luo Customary Law on inheritance discriminates between the male and female children of a deceased person and as such it is a retrogressive custom which cannot supersede the Constitution and the law.”

Other similar decisions include *Peter Karumbi Keingati & 4 others v. Dr. Ann Nyokabi Nguthi & 3 others*²⁹⁸, wherein the High Court at Nairobi concluded in finality as follows: “This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head, to be forever buried.”

4.10 EQUAL RECOGNITION OF CHILDREN BORN OUTSIDE MARRIAGE AND RIGHTS OF UNMARRIED WOMEN

Article 53(1)(e) of Kenya’s Constitution provides that every child has the right to parental care and protection, “which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not”. The Constitution further goes on to state that “a child’s best interests are of paramount importance in every matter concerning the child”.²⁹⁹ Despite this constitutional guarantee, the Births and Deaths Registration Act (1928) does not accord this equality and is discriminatory against women regarding equality of responsibility for children within and outside of marriage, leaving most responsibility to women as discussed below. The constitutionality of the Births and Deaths Registration Act, particularly section 12, has been the subject of litigation before the High Court in Kenya, with progressive pronouncements by the court. Section 12 provides that: “No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according

to law or, in accordance with some recognized custom.”

In the case of *L.N.W. v. Attorney General & 3 others* [2016] eKLR,³⁰⁰ the court held that section 12 of the Births and Deaths Registration Act amounts to discrimination on the grounds of birth. In noting the discriminatory effect of section 12, the court stated as follows:

“The petitioner has alluded to the stigma and discrimination that children born outside marriage are subjected to. They have no relationship with their, often unknown, fathers, and cannot expect parental care from them. She notes the ridicule and stigma that such children suffer when the question of their fathers’ names or identity comes up. This is what our Articles 27 and 28, on non-discrimination and right to dignity, seek to avoid in according children born outside marriage the same right to equality and dignity as children born within marriage.”

The court, in refuting arguments that the purpose of section 12 of the Births and Deaths Registration Act was to ensure accuracy of records and protect men from accepting responsibility for children they have not sired, noted that:

“[T]hese constitutional aspirations, in so far as they apply to children born outside marriage, far outstrip in importance the need to keep official records, or the desire to ‘protect’ men from ‘unscrupulous’ women, assuming that one accepts that this was the purpose that section 12 was intended to serve. This is more so given the fact that there are less restrictive means of achieving these purposes. Thus, in my view, insofar as the section requires that the name of the father of a child born outside marriage shall be entered in the register of births only with the consent of the father, that provision is unconstitutional and in violation of Articles 27, 28 and 53 of the Constitution [...]

*The second alleged purpose, protecting the putative father from the alleged machinations of unscrupulous women is, in my view, based on an **unapologetic but unacceptable patriarchal***

mindset that wishes to protect men from taking responsibility for their actions, to the detriment of their children (emphasis added). In my view, balancing the two interests, that of the men and the rights of children, I see no contest. I need not add that such a stated purpose, the alleged protection of men from unscrupulous women, is premised on a negative, discriminatory stereotyping of women as dishonest people who will latch onto a man for child support with no basis. In any event, there are clear safeguards in the Act to prevent the entry of false information in the Register.”

The court further held that section 12 of the Births and Deaths Registration Act affords different treatment to women who are married compared to those who are not married, and hence amounts to discrimination.

In 2019, the High Court in the case of *Njagi in N.S.A. & another v. Cabinet Secretary for Ministry of Interior and Coordination of National Government & another* [2019] eKLR³⁰¹ similarly declared section 12 of the Births and Deaths Registration Act as unconstitutional. Additionally, the courts found sections 27, 94, 102 and 158 of the Children Act, 2001 and sections 3(2) and (3) of the Law of Succession Act as unconstitutional on the basis that they contravene Article 53(1) of the Constitution providing for equal parental responsibility and the right to freedom from discrimination provided in Article 27. Section 27(2) of the Children Act provided that the father can only take up responsibility after the death of the mother “if he has acquired parental responsibility [...]”. The court noted that the section contravened Article 53(1)(e) of the Constitution on equality of parental responsibility. The court further noted that the “section is therefore discriminatory to unmarried mothers on grounds of marital status contrary to the provisions of Article 27(4) of the Constitution”.

Section 94(1) of the Children Act provided guidelines on the circumstances that a court has to consider before making an order for financial provision for a child by a step-parent or the father of a child born out of wedlock. Specifically, section

94(1)(i) provided that the court shall be guided, inter alia, by “whether the respondent has assumed responsibility for the maintenance of the child and if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period during which he has met that responsibility”. The court found that the section contravened Article 53(1)(e) of the Constitution, which provides for equal responsibility of the mother and father to provide for a child whether they are married to each other or not, as it implies that the father of a child born outside wedlock has to first assume responsibility before he is ordered to pay maintenance toward his children.

On Section 102(1) of the Children Act, the court noted that it contravened Article 53(1)(e) of the Constitution to the extent that it requires a father of a child born out of wedlock to acquire parental responsibility of a child for him to take up responsibility of the child upon the death of the mother. The court further reiterated that the parental responsibility of a child is not up to the discretion of the father or mother, rather, it is automatic upon the birth of the child.

The court also found sections 3(2) and 3(3) of the Law of Succession Act unconstitutional on the grounds that a father has to have assumed parental responsibility for a child born out of wedlock for the child to benefit from the estate of the deceased father.

This section provides key legal reform and policy recommendations by theme for all domestic laws analysed under Section III. The seven themes are as follows: marriage and family relations; succession and inheritance; political and public life; labor and employment; sexual and reproductive health; sexual and gender-based violence; and nationality.



5

PART V

SUMMATION OF
RECOMMENDED
REFORMS

Marriage and Family Relations

Law reform

- Repeal Article 24(4) of the Constitution, which qualifies the application of the equality provisions under the Constitution to persons professing the Muslim faith in matters of personal status, marriage, divorce and inheritance.

Child marriage

- Amend Article 27 of the Constitution to include a definition of discrimination in line with Article 1 of CEDAW and Article 1 of the Maputo Protocol.
- Repeal sections 3 and 49(1) of the Marriage Act, 2014, which exclude the application of the equality provisions to Islamic marriages.
- Repeal section 5 of the Kadhis' Courts Act (Cap. 11).
- Align Section 23 of the Children Act, which provides for imprisonment for a term of not less than three years or a fine of not less than five hundred thousand shillings, or both, for the offense of child marriage, with the penalties imposed by the Sexual Offences Act.

Matrimonial property

- Repeal section 3 of the Matrimonial Property Act, 2013 to remove clawback of the guarantee in Article 45(3) of the Constitution for the benefit of Muslim women.
- Repeal section 7 of the Matrimonial Property Act to remove the clawback and Article 45(3) on equal rights in marriage to restore the measure of equality in division of matrimonial property upon divorce and to include CEDAW General Recommendation 21 (para 32) on giving equal value to monetary and non-monetary contributions.
- Amend section 6(1) of the Matrimonial Property Act to expand the definition of matrimonial property.
- Amend section 10 of the Matrimonial Property Act to state that liability on any matrimonial

property should be commensurate to a spouse's contribution to that liability.

- Amend section 11 of the Matrimonial Property Act to recognize and allow women a share of benefit of ancestral land upon the dissolution of marriage.
- Amend the Matrimonial Property Act to give effect to the concept of spousal equality written into the Constitution by adopting a property distribution model that recognizes the equality of spousal contribution in property acquisition and division.

Policy and program actions

- The judiciary should develop practice directions that clearly allow magistrates' courts to adjudicate matrimonial property rights and other relevant guidance on quantifying non-monetary contributions.
- Courts should include the following factors in determining the division of matrimonial property: the economic impact of lost career opportunities; support to the other spouse's career advancement; spousal needs, including future financial circumstances of both spouses; duration of marriage; age and health of the spouses; which spouse is the custodial parent; wasteful use of assets; and unfair transfer of property.
- Judicial officers and court-annexed mediators should be trained and sensitized on the matrimonial property and inheritance regimes in Kenya.
- Policy actions and social reforms should be undertaken to mainstream unpaid work into the economy.

Polygamy

- Amend the Marriage Act, 2014 to expressly discourage polygamous unions and encourage monogamous marriages as the preferred form of marriage, while at the same time providing for protection of the rights of women who are already in polygamous marriages in line with Article 6(c) of the Maputo Protocol.

Equal responsibility for children in and out of marriage

- Repeal section 12 of the Births and Deaths Registration Act (Cap. 149) to remove discrimination against unmarried women and their children and to bring it into conformity with Articles 27, 53(1)(a) and (e) and 53(2) of the Constitution and in execution of the court orders in *L.N.W v. Attorney General & 3 others* [2016] eKLR.
- Repeal sections 3(2) and 3(3) of the Law of Succession Act (Cap. 160) to remove discrimination against unmarried women and their children and to align them with Article 53(1) (e) of the Constitution.

Sexual and gender-based violence

Sexual violence

Law reform

- Amend section 15(1) of the Victim Protection Act, 2014 to streamline the procedure for restorative justice to make it easier for survivors to access it.
- Amend section 34 of the Sexual Offences Act, 2006 to remove permissibility of evidence on a survivor's sexual history.
- Amend section 30(4) of the Teachers Service Commission Act, 2012 to provide that where the name of any teacher is removed from the register for sexual abuse of a learner under section 30(1)(c), such name shall not be reinstated into the register under section 30(4).
- Expand the Teachers Service Commission's definition of sexual abuse to include additional inappropriate sexual conduct between a teacher and a learner.

Policy and program actions

- Fully operationalize the sexual offenders' register.
- Ensure prompt and effective investigations, prosecutions and redress of all sexual and gender-based violence cases.

- Fully operationalize the Legal Aid Act, 2016 to boost access to justice for victims of sexual and gender-based violence, who are often indigent.
- Establish safe houses in every county for victims and survivors of sexual and gender-based violence. Offer community sensitization on the prevention and management of sexual and gender-based violence.
- Provide age-appropriate sexual education and psychosocial counseling for adolescents.
- Issue comprehensive and user-friendly standard operating procedures on reporting instances of sexual abuse of a learner.
- Implement the Teachers Service Commission Act by maintaining a register of teachers permitted to teach in Kenyan schools. A teacher may not teach in Kenya unless they are registered with the Teachers Service Commission.
- Require compulsory teacher training on the key Teachers Service Commission documents aimed at protecting learners from sexual abuse, including the prohibitions, mandates and reporting procedure.

Female genital mutilation

- Amend section 19 of the Prohibition of Female Genital Mutilation Act, 2011 to proscribe all forms of female genital mutilation in line with the judgement of the High Court in *Tatu Kamau v. Attorney General & 2 others*.³⁰²
- Amend section 24 of the Prohibition of Female Genital Mutilation Act, which provides for the offence of failure to report an act of female genital mutilation. The section is likely to affect victims of female genital mutilation for failure to report the offence.
- Amend the Prohibition of Female Genital Mutilation Act to charge doctors and health workers as well as penalize institutions that accommodate female genital mutilation on the premises.
- Develop offence-specific sentencing guidelines to ensure that sentencing for female genital mutilation-related offences meets the goals of the criminal justice system.

Policy and program actions

- Ensure that the Anti-Female Genital Mutilation Board is properly resourced to effectively carry out its mandate.
- Intensify public education and awareness campaigns, especially in areas where female genital mutilation is prevalent, to encourage a change of attitude.
- A clear guide on alternative rites of passage should be developed.
- Medical professional bodies must be encouraged to take vigorous action to ensure that medical professionals are aware of their duty not to undertake female genital mutilation, and that those involved in the practice face professional sanctions.

Trafficking in persons

Law reform

- Amend section 11(3) of Refugee Act, 2006 to include an exception for the requirement to notify the commissioner for persons trafficked into Kenya to prevent them being penalized under the provision.
- Amend sections 16, 17 and 18 of the Sexual Offences Act, 2006 to remove the loophole in the more lenient sentences for child pornography, exploitation of prostitution and trafficking for sexual exploitation and to align them with the more stringent sentencing under the Counter-Trafficking in Persons Act, 2010.
- Amend section 1(6) of the Counter-Trafficking in Persons Act to remove the option of a fine, which undermines the stringent sentence and the intended deterrent effect of the statute.
- Ratify key relevant international human rights instruments, including the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2002) and the Optional Protocol to the

Convention on the Rights of the Child on a Communications Procedure (2014).

Policy and program actions

- Implement section 15(1) of the Counter-Trafficking in Persons Act by: formulating standard guidelines for protection of victims; establishing shelters for survivors with standard operating procedures for them; and providing additional training to front-line responders.
- Establish the International and Organized Crimes Division in the High Court to prosecute human trafficking cases.
- Conduct research to establish corruption patterns and cartels that facilitate trafficking in persons.
- Develop national and regional monitoring frameworks to monitor in-country and cross-border movements of people and detect trafficking in persons.
- Research the demand side, including mapping international crime networks operating in the country, and the nexus between trafficking in persons and violent extremism, to inform law reform.
- Collect data on the prevalence of trafficking to inform government action on trafficking in persons.
- Address the root causes of trafficking and exploitation of women and girls by implementing the Sustainable Development Goal 5 target to “undertake reforms to give women equal rights to economic resources”.
- Raise public awareness on the Counter-Trafficking in Persons Law, particularly in rural communities.
- Anchor the Counter-Trafficking in Persons Secretariat within the Ministry of Interior and Coordination of National Government, which has the relevant enforcement resources.
- Expand the human resource capacity of the Counter-Trafficking in Persons Secretariat and decentralize it to the counties.
- Advocate for more funding for the National Assistance Trust Fund for Assisting Victims of

Trafficking to facilitate the protection, dignified repatriation and reintegration of both young and adult victims.

- Strengthen the National Coordination Mechanism for enhanced referral and management of trafficking in persons cases, including anchoring it in law.
- Implement Part V of the Counter-Trafficking in Persons Act by operationalizing the National Assistance Trust Fund for Assisting Victims of Trafficking and gazette the regulations on the fund.
- Incorporate the Counter-Trafficking in Persons Act in the basic curriculum for law enforcement agencies, the Office of the Director of Public Prosecutions, the judiciary and correctional facilities.
- Develop programs for training of prosecutors to ensure that trafficking cases are prosecuted under the Counter-Trafficking in Persons Act and not the more lenient labor and immigration laws.
- Enhance bilateral, regional and international cooperation to combat trafficking, including by harmonizing legal procedures to prosecute traffickers.

Violence against women in elections

Law reform

- Amend rule 6(c) of the Electoral Code of Conduct to add some specificity to the definition of violence against women in elections and incorporate certain forms including sexual harassment and other forms of sexual violence.
- Amend section 11 of the Election Offences Act to broaden its scope and input specificity in the description of “violence” to include violence against women and to define violence against women in elections and include its different forms; and align its provisions on sentencing with the sentencing prescribed in the Penal Code and Sexual Offences Act for similar offences, such as sexual violence.
- Amend the Election Offences Act to make linkage with the Sexual Offences Act to guide

the investigation and prosecution of forms of sexual violence outlined under the latter, which could be perpetrated and manifest as election-related sexual violence.

- Amend both the Sexual Offences Act and the Election Offences Act to provide a definition of election-related sexual violence to identify and treat it as a unique manifestation of sexual violence requiring special investigation and prosecution approaches.

Policy and program actions

- Mainstream violence against women in elections in long-term gender-based violence programming and expand the scope of focus of violence against women in elections beyond candidates to include women campaign staff, supporters and elections workers.
- The Independent Electoral and Boundaries Commission should incorporate violence against women in elections considerations into their other rules, regulations and voter education curriculum to guarantee the safety of women during elections.

Domestic violence

Law reform

- Amend the Protection Against Domestic Violence Act, 2015 and the Victim Protection Act, 2014 to include provisions for the protection of survivors, including the establishment of state-run shelters and standard operating procedures for their operation.
- Amend the Sexual Offences Act and the Penal Code (Cap. 63) to include the crime of marital rape.

Sexual and reproductive health

Law reform

- Enact a reproductive healthcare law to comprehensively address the reproductive health rights of all persons, including vulnerable groups.

- Enact legislation to regulate and govern assisted reproduction.
- Amend sections 158, 160 and 228 of the Penal Code, which give a blanket criminalization of abortion, to align them with the Constitution, which permits abortion in certain circumstances, and the Health Act, 2017.
- Lift the reservation on Article 14(2)(c) of the Maputo Protocol, which requires States to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.
- The State should also conduct capacity-building for medical staff on safe termination of pregnancies in the select, legally acceptable circumstances.
- Implement the judgment in Petition No. 266 of 2015 to, inter alia, reinstate the 2012 Standards and Guidelines on Reducing Maternal Mortality and Morbidity related to unsafe abortions.
- Withdraw the reservation on section 14(2c) of the Maputo Protocol to ensure the right to the highest standard of healthcare.
- Amend the Health Act, 2017 to prohibit detention of patients for non-payment of bills, including post-delivery detention of women.
- Amend the Health Act, 2017 to ensure that women in need of delivery services are not turned away because they cannot pay a fee or deposit.
- Amend the Health Act, 2017 to require all public and private healthcare facilities to establish formalized complaint mechanisms as part of their licensing requirements.

Policy and program actions

- Establish formalized internal complaint mechanisms in all health facilities, as well as external mechanisms that enforce ethical and professional standards of care.

- Conduct public legal awareness programs to educate patients about their rights.
- Revise ethical codes to provide sanctions for all violent and discriminatory practices against women in health facilities and ensure that these provisions are widely publicized.
- Integrate gender training and patients' rights training in the health training curricula.

Economic empowerment

Law reform

- Amend the Constitution to include an overriding provision proscribing discrimination under any law or practice, including customary and religious laws. This would relax the hold of discriminatory customary and religious laws on administration of land in the country.
- Facilitate the access of rural women to land, repeal customary laws and practices that impede their equal access to land and establish a clear legislative framework to protect their rights to inheritance and land ownership.
- Repeal section 7 of the Matrimonial Property Act and recognize the principle of equality in all areas of marriage, including property.
- Repeal section 11 of the Land Laws (Amendment) Act of 2016 and reinstate the requirement of spousal consent for any transactions relating to marital property as it was under the Land Registration Act of 2012.

Policy and program actions

- Mobilize the effective enforcement of all gender equality provisions in all land laws and policies.
- As recommended by the CEDAW Committee upon the review of the eighth report of Kenya in 2017, develop a comprehensive database of all beneficiaries of the above-mentioned funds and of public procurement recipients, with a view to reaching out to women in rural areas and women with disabilities.

- Take measures to ensure that the catalytic funds are accessible to all women, including rural women, through awareness-raising and the introduction of clear criteria for, and the facilitation of, applications.
- Implement the gender equality commitments in the National Land Policy.
- Create public awareness on all land laws with a focus on women.

Inheritance and succession laws

Law reform

- Amend Section 2(3) of the Law of Succession Act (Cap. 160) to remove its discriminatory effect on Muslim women, and to have the law apply to all Kenyans regardless of their religion.
- Repeal the definition of “child/children” under section 3 so the meaning of child applies equally to unmarried mothers and fathers and to remove the privilege of the man to decide which child he wants to define as a child. This will also allow all children to inherit regardless of the marital status of their parents.
- Amend section 28(1) to remove the discriminatory elements against widows in polygamous marriages.
- Repeal sections 32, 33 and 44 to make the Act universally applicable to all Kenyans and all types of property irrespective of their geographical location or their customary traditions.
- Repeal section 35(1) and 36(1) to remove discriminatory elements so that widows do not lose inherited life interest in a property acquired under the Act in intestate succession after they remarry.
- Amend section 39 to allow net intestate estate (where there are no surviving spouses or children) to be inherited by their parents on an equal basis and remove the privilege of priority currently afforded to the father.
- Amend section 40(1) to remove its discriminatory effect against widows in inheritance in polygamous unions.

Policy and program actions

- Undertake widespread public legal awareness on the equality provisions in the law, and of the detrimental effects of discriminatory customary and religious laws on the lives and economic status of women.
- Intensify efforts to infuse a human rights-based approach into the alternative and traditional justice systems in the country and monitor the same to ensure just outcomes for women on property and other related disputes.

Labor and employment

Law reform

- Remove the declaration concerning Article 10(2) of the International Covenant on Economic, Social and Cultural Rights on maternity leave.

Policy and program actions

- Conduct research to measure and value the unremunerated work of women, in line with the CEDAW Committee’s General Recommendation 17 (1991) on measurement and quantification of the unremunerated domestic activities of women and its recognition in the gross national product.

Political empowerment and decision-making

Participation of women in appointive and elective bodies

- Enact legislation to facilitate the realization of the constitutional two-thirds gender principle by implementing Article 27(8) of the Constitution.
- Fast-track the enactment of the Special Interest Groups (Amendment) Bill, 2019.
- Implement the recommendations for legal reform on violence against women in elections proposed in this report.
- In line with CEDAW General Recommendation 23 (1997) on women in political and public life, pursue sustained policies to promote the full and equal participation of women in decision-making at the national and local levels.

- Provide capacity-building on leadership skills and campaign financing to women candidates.
- Increase long-term programs to ensure that women can safely run campaigns and vote during elections.
- Ensure that political parties that are not compliant with the two-thirds gender rule and requirement to include persons with disabilities, youth and the elderly are unable to gain access to funds, in line with the Political Parties Act of 2011, and provide incentives to parties that include an equal number of women and men on their electoral lists and at equal ranks.
- Remove barriers to the appointment of women to decision-making positions through affirmative action programs and increase the number of women in such positions.
- In line with the CEDAW Committee's concluding observations on the eighth periodic report, the Government of Kenya should raise awareness among politicians, the media, traditional leaders and the general public of the fact that the full, equal, free and democratic participation of women on an equal basis with men in political and public life is a requirement for the effective implementation of CEDAW, as well as for the political stability and economic development of the country.³⁰³
- Establish mechanisms for the implementation of all electoral laws, and strengthen existing ones through capacity-building, adequate financing and establishing monitoring systems.
- Develop targeted measures to address intersectional and multiple inequalities affecting women in the political sphere.

Women human rights defenders

Law reform

- Enact comprehensive legislation recognizing and protecting the rights of human rights defenders.
- Amend the Penal Code and the Public Order Act to ensure compliance with provisions of the Constitution on peaceful assemblies.

Policy and program actions

- Implement the Bail and Bond Policy Guidelines in addressing the punitive bail terms against human rights defenders.

Nationality law

Law reform

- Ratify the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

Policy and program actions

- Implement and enforce section 15 of the Citizenship and Immigration Act and ensure, in line with the CEDAW Committee's Concluding Observations (2017), that all refugee and stateless women married to Kenyan nationals may obtain citizenship and confer it on their children without administrative barriers.
- Implement section 22(1)(g) of the Citizenship and Immigration Act and facilitate the provision of official documents and registration of marriages, especially in rural areas, including through increased resources, technological capacity, and the geographical spread of Huduma centers (public service centers).



6

PART VI
CONCLUSION

Kenya's progressive Constitution affords women and girls vast protections as far as equality and empowerment are concerned. Kenya also enjoys a robust and extensive legislative and policy framework to ensure the empowerment of women and girls. But there is a deep divide between the existing provisions and the formal equality secured by them and substantive equality on the ground. Even so, there are many discriminatory legal provisions, inconsistencies and tensions in the laws, and gaps that are expressly or indirectly discriminatory against women exist in legal frameworks governing family and marriage, sexual and gender-based violence, economic empowerment of women, women's political empowerment and nationality and citizenship. The Constitution itself contains some clawback provisions that exclude part of the country's population – Muslim women – from these same provisions. Furthermore, customary traditions and religious influences remain a major obstacle to the realization of the full potential of women and girls in the social, political and economic spheres.

Some of the challenges engendering discrimination and disempowerment of women include the conflict between the formal legal system and the customary and religious systems within the context of the broader pluralistic national system, de jure discriminatory provisions, and women's limited awareness of the law, policy and procedures for enforcing their rights or leveraging government initiatives meant to benefit them. These gaps are further exacerbated by inadequate policy implementation mechanisms and a lack of translation in practice, with insufficient technical and financial capacity to facilitate application of gender equality laws.

This legal assessment has proposed a range of legal and policy recommendations. The report recommends that the explicitly discriminatory provisions in the law be amended immediately as a matter of urgency, as these cannot be subject to progressive realization. Some of the laws need to be aligned with the Bill of Rights under

the Constitution of Kenya. Parliament and the Office of the Attorney General must focus on the reform of relevant laws to align them with the Constitution and CEDAW. Finally, increased efforts need to be channeled into enforcement and creating a conducive environment for implementation of the various legislative and policy frameworks for equality in line with Kenya's regional and international commitments. Specific policy and program actions by duty bearers will enable the full implementation of the provisions in the law and equal enjoyment of rights by women and girls in practice. Efforts to influence social and behavioral change at the community level, including of retrogressive customs and practices, will also need to be stepped up and sustained. A comprehensive matrix of recommendations on law reform is provided in Appendix 1 to this report.

APPENDIX 1:

MATRIX OF RECOMMENDATIONS

Amendment or revision

| Law under consideration | Action to be taken |
|--|--|
| Constitution of Kenya, 2010 | Amend Article 27 to include a definition of discrimination in line with Article 1 of CEDAW and Article 1 of the Maputo Protocol. |
| | Amend to include an overriding provision proscribing discrimination under any law or practice, including customary and religious laws. |
| Children Act, 2022 | Align Section 23 which provides for imprisonment for a term of not less than three years or a fine of not less than five hundred thousand shillings, or both, for the offense of child marriage, with the penalties imposed by the Sexual Offences Act. |
| Counter-Trafficking in Persons Act, 2010 | Amend sections 3(5) and 3(6) to remove the option of a fine, which undermines the stringent sentence and the intended deterrent effect for the offence of trafficking in persons. |
| Election Offences Act, 2016 | Amend both the Sexual Offences Act and the Election Offences Act to provide a definition of election-related sexual violence so as to identify and treat it as a unique manifestation of sexual violence requiring special investigation and prosecution approaches. |
| | Amend the Election Offences Act to make linkage with the Sexual Offences Act so as to guide the investigation and prosecution of forms of sexual violence outlined under the latter, which could be perpetrated and manifest as election-related sexual violence. |
| | Amend rule 6(c) of the Electoral Code of Conduct to add some specificity to the definition of violence against women in elections and include certain forms, including sexual harassment and other forms of sexual violence. |
| | Amend section 11 to broaden its scope and introduce specificity in the description of “violence” to include violence against women in elections and to define it and include its different forms. |

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| | Amend Section 11 to align its provision on sentencing with the sentencing prescribed in the Penal Code and Sexual Offences Act for similar offences such as sexual violence offences. |
| Prohibition of Female Genital Mutilation Act, 2011 | Amend section 19 of the Act in line with the judgment of the High Court in <i>Tatu Kamau v. Attorney General and 2 others</i> . |
| | Amend section 24, which provides for the offence of failure to report an act of female genital mutilation in so far as it affects victims of the practice for failure to report the offence. |
| | Amend the Act to charge doctors and health workers as well as penalize institutions that accommodate female genital mutilation on the premises. |
| | Develop offence-specific sentencing guidelines to ensure that sentencing for female genital mutilation-related offences meets the goals of the criminal justice system. |
| Health Act, 2017 | Amend to require all public and private health care facilities to establish formalized complaint mechanisms as part of their licensing requirements. |
| | Amend the Act to ensure that women in need of delivery services are not turned away because they cannot pay a fee or deposit. |
| | Amend the Act to prohibit detention of patients for non-payment of bills, including post-delivery detention of women. |
| | Reform the law to create consistency and alignment between constitutional provisions on the right to life and abortion with the Penal Code (Cap 63) sections 158, 159, 160 and 228. |
| Land Registration Act, 2012 | Amend the Act to reinstate the requirement of spousal consent for any transactions relating to marital property. |
| Law of Succession Act (Cap 160), Laws of Kenya | Amend sections 3(2) and 3(3) to remove discrimination against unmarried women and their children in the inheritance of a deceased's estate and to align them with Article 53(1)(e) of the Constitution. |
| | Amend section 2(3) to remove its discriminatory effect on Muslim women, and to have the law apply to all Kenyans, regardless of their religion. |
| | Amend section 28(1) to remove the discriminatory elements against widows in polygamous marriages. |
| | Amend the definition of "child/children" under section 3 to have the meaning of child apply equally between unmarried mothers and fathers and remove the privilege of the man to decide which child he wants to define as a child. |
| | Amend section 40(1) to remove its discriminatory effect against widows in inheritance in polygamous unions. |

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| Marriage Act, 2014 | Amend the Marriage Act to expressly discourage polygamous unions and encourage monogamous marriages as the preferred form of marriage, while at the same time providing for protection of the rights of women who are already in polygamous marriages in line with Article 6(c) of the Maputo Protocol. |
| Matrimonial Property Act, 2013 | Amend section 6(1) to expand the definition of matrimonial property. |
| | Amend section 10 to state that liability on any matrimonial property should be commensurate to a spouse's contribution to that liability. |
| | Amend section 11 to recognize and allow women a share of benefit of ancestral land upon the dissolution of marriage. |
| | Amend the Act to give effect to the concept of spousal equality written into the Constitution by adopting a property distribution model that recognizes the equality of spousal contribution in property acquisition and division. |
| Penal Code (Cap 63), Laws of Kenya | Amend sections 158, 160 and 228, which criminalize abortion, so as to align them with the Constitution, which permits abortion in given circumstances, and with the Health Act. |
| | Amend the Penal Code to include the crime of marital rape. |
| | Review the Penal Code to ensure compliance with provisions of the Constitution on peaceful assemblies. |
| Public Order Act (Cap 56), Laws of Kenya | Review to ensure compliance with provisions of the Constitution on the freedom of peaceful assemblies. |
| Refugees Act, 2006 | Amend section 11(3) to include an exception for the requirement to notify the commissioner for persons trafficked into Kenya to prevent them from being penalized under the provision. |
| Sexual Offences Act, 2006 | Amend sections 16, 17 and 18 to remove the loophole in the more lenient sentences for child pornography, exploitation of prostitution and trafficking for sexual exploitation and to align them with the more stringent sentencing under the Counter-Trafficking in Persons Act. |
| | Amend to include the crime of marital rape. |
| | Amend the Sexual Offences Act and the Election Offences Act to provide a definition of election-related sexual violence to identify and treat it as a unique manifestation of sexual violence requiring special investigation and prosecution approaches. |
| | Amend section 34 to remove the permissibility of evidence relating to a survivor's sexual history. |
| | Continue the process that has commenced under the stewardship of the National Council on the Administration of Justice (NCAJ) Committee to review laws and policies relating to sexual offences and gender-based violence. |

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| Teachers Service Commission Act, 2012 | Amend section 30(4) to provide that where the name of any teacher is removed from the register for sexual abuse of a learner under section 30(1)(c), such name shall not be reinstated into the register under section 30(4). |
| | Expand the Teachers Service Commission's definition of sexual abuse to include additional inappropriate sexual conduct between a teacher and a learner. |
| Victim Protection Act, 2014 | Amend the Protection Against Domestic Violence Act and the Victim Protection Act to include provisions for the protection of survivors, including the establishment of state-run shelters and standard operating procedures for their operation. |
| | Amend section 15(1) to streamline the procedure for restorative justice to make it easier for survivors to access it. |

Repeal

| Law under consideration | Action to be taken |
|--|--|
| Births, Deaths and Marriages Act (Cap 149) | Repeal section 12 to remove discrimination against unmarried women and their children and to bring the Act into conformity with Articles 27, 53(1)(a) and (e) and 53(2) of the Constitution and in execution of the court orders in <i>L.N.W. v. Attorney General and 3 others [2016] eKLR</i> . |
| Constitution of Kenya, 2010 | Repeal Article 24(4) of the Constitution. |
| Kadhis' Court Act (Cap 11), Laws of Kenya | Repeal section 5, which in effect removes women who profess the Islamic faith from legal protections on equality guaranteed under Article 27(1) of the Constitution of Kenya, 2010. |
| Land Laws (Amendment) Act, 2016 | Repeal section 11 and reinstate the requirement of spousal consent for any transactions relating to marital property as it was under the Land Registration Act, 2012. |
| Law of Succession Act (Cap 160), Laws of Kenya | Repeal sections 3(2) and 3(3) to remove discrimination against unmarried women and their children and to align these provisions with Article 53(1)(e) of the Constitution. |
| | Repeal sections 32, 33 and 44 to make the Act universally applicable to all Kenyans and all types of property, irrespective of their geographical location or their customary traditions. |
| | Repeal sections 35(1) and 36(1) to remove the discriminatory elements, so that widows do not lose inherited life interest in a property acquired under the Act in intestate succession after they remarry. |

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| Matrimonial Property Act, 2013 | Repeal section 3 to remove clawback of the guarantee in Article 45(3) of the Constitution for the benefit of Muslim women. |
| | Repeal section 7 to remove the clawback from the Act to restore the measure of equality in division of matrimonial property upon divorce, and to include CEDAW General Recommendation 21 (para 32) on giving equal value to monetary and non-monetary contributions. |
| Sexual Offences Act, 2006 | Repeal section 45(3), which excludes persons who are lawfully married from application of the Act as it is presumed that sexual acts within a marriage are lawful even if coercive. |

Enactment of new laws

| Thematic area | Proposed action |
|---|--|
| Sexual and reproductive health | Enact a reproductive healthcare law. |
| Assisted reproduction | Enact legislation to regulate and govern assisted reproduction. |
| Gender equality in political representation | Enact legislation to facilitate realization of the constitutional two-thirds gender principle by implementing Article 27(8) of the Constitution. Fast-track the enactment of the Special Interest Groups (Amendment) Bill, 2019. |
| Anti-discrimination | Enact a comprehensive anti-discrimination law in line with the Constitution and recommendations by various treaty/charter body mechanisms. |
| Child rights | Ratify the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure. |
| Statelessness | Ratify the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. |
| Human rights defenders | Enact comprehensive legislation recognizing and protecting the rights of human rights defenders, including women human rights defenders. |

APPENDIX 2:

RATIFICATION TABLE FOR KENYA'S CORE REGIONAL AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

| | Name of treaty | Date of ratification or accession |
|-----|---|--|
| 1. | Convention on the Elimination of All Forms of Discrimination Against Women | 9 March 1984 |
| 2. | Convention on the Rights of the Child | 30 July 1990 |
| | Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict | 28 January 2002 |
| 3. | Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment | 21 February 1997 |
| 4. | Convention on the Rights of Persons with Disabilities | 19 May 2008 |
| 5. | International Convention on the Elimination of All Forms of Racial Discrimination | 13 September 2001 |
| 6. | International Covenant on Economic, Social and Cultural Rights | 1 May 1972 |
| 7. | International Covenant on Civil and Political Rights | 1 May 1972 |
| 8. | African Charter on Human and Peoples' Rights | 23 January 1992 |
| 9. | Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) | October 2010 |
| 10. | African Charter on the Rights and Welfare of the Child | 25 July 2000 |

APPENDIX 3:

SAMPLE RECOMMENDATIONS OF THE CEDAW COMMITTEE TO KENYA DURING REVIEW OF ITS EIGHTH PERIODIC REPORT

| ISSUE | CEDAW CONCERN |
|---|--|
| Discriminatory religious and customary laws (Para. 8) | The CEDAW Committee noted that the preservation of multiple legal systems is in itself discriminatory against women, and expressed concern that the legal framework, including exemptions under Article 45 of the Constitution and Article 49(3) of the Marriage Act of 2014, discriminates against Muslim women and women in customary marriages, including through the explicit exemption of the Kadhi courts from constitutional equality provisions and the fact that women cannot serve as kadhis, as well as the legalization of polygamy. |
| Absence of anti-discrimination law (Para. 10) | The CEDAW Committee noted with concern the lack of comprehensive anti-discrimination legislation in the State party, including the absence of clear and complete protection against intersectional discrimination in the Constitution, and the fact that homosexual acts remain criminalized. |
| Women human rights defenders (Para. 12) | The CEDAW Committee noted its concern about the shrinking space for civil society in the State party, expressed, inter alia, by threats to the lives, security and work of women human rights defenders, including during the electoral process, as well as limitations on foreign funding and administrative limitations imposed on civil society organizations. |

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| <p>Temporary special measures (Para. 16)</p> | <p>The CEDAW Committee was concerned that, seven years after the adoption of the new Constitution, the rule that no more than two-thirds of representatives of elective public bodies are to be of the same gender (the two-thirds gender rule) was still not being implemented.</p> <p>The CEDAW Committee was also concerned that temporary special measures are not sufficiently applied as a necessary strategy to accelerate the achievement of substantive equality between women and men in all areas covered by the Convention, especially in the case of women and girls with disabilities and rural women.</p> |
| <p>Stereotypes and harmful practices (Para. 18)</p> | <p>The CEDAW Committee was concerned about the persistence of discriminatory stereotypes with regard to the roles and responsibilities of women and men in the family and in society, as well as harmful practices such as child and forced marriage, female genital mutilation, polygamy, bride price and widowhood rites such as widow inheritance. It was particularly alarmed by the practice of raping girls, known as “beading”, which is prevalent among the Samburu people and justified as a cultural practice, and its consequences, including unsafe, forced abortions.</p> |
| <p>Female genital mutilation (Para. 20)</p> | <p>The CEDAW Committee was concerned that this harmful practice continues to be common in some communities. It noted with concern the lack of accurate data, the relatively low level of prosecutions and the continued impunity of perpetrators, as well as reports detailing that medical practitioners are now carrying out the procedure (the “medicalization” of female genital mutilation).</p> |
| <p>Gender-based violence against women (Para. 22)</p> | <p>The CEDAW Committee was concerned about the high level of gender-based violence against women and girls and the widespread incidence of sexual violence, including rape, in the private and public spheres. It was also concerned about under-reporting by victims, owing to, among other things, law enforcement and medical staff illegally charging victims for reporting forms, especially in the case of disadvantaged groups of women and women in informal settlements, and the low prosecution rate in cases of gender-based violence against women.</p> |
| <p>Gender-based violence against women during the election process (Para. 24)</p> | <p>The CEDAW Committee was concerned about reports of election-related gender-based violence, including of a sexual nature, such as gang rapes, against women during the elections in 2017. It was equally concerned about reports that the majority of perpetrators were police officers or members of other security forces and by the lack of reparations provided to victims. It noted with concern the delays in prosecuting perpetrators and providing redress to the victims of such violence and the State party’s apparent lack of commitment in that regard, notwithstanding the recommendations of the Commission of Inquiry into Post-Election Violence of 2007/2008.</p> |

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| <p>Trafficking (Para. 26)</p> | <p>The CEDAW Committee noted with appreciation the efforts made by the State party to combat trafficking in persons and protect victims of trafficking, including the adoption of the Victim Protection Act of 2013 and capacity-building for diplomatic staff. However, it was concerned that women and girls, including in refugee camps, remained at risk of trafficking for purposes of sexual exploitation or forced domestic labor. It was also concerned about the low level of prosecution of traffickers, particularly under the Counter-Trafficking in Persons Act of 2010.</p> |
| <p>Participation in political and public life (Para. 30)</p> | <p>The Committee regretted that, notwithstanding the constitutional two-thirds gender rule and the presidential decree on affirmative action of 2006, gender parity had not been achieved for elected or appointed offices. It was concerned about barriers that prevented women from participating in political and public life on an equal basis with men, including threats and violence at all levels of political and public life.</p> |
| <p>Nationality (Para. 32)</p> | <p>The CEDAW Committee expressed concern that many women and girls in the State party remain stateless or face challenges in the enjoyment of their right to nationality, including the fact that:</p> <ul style="list-style-type: none"> (a) Asylum-seeking and stateless women who marry Kenyan men face difficulties in obtaining citizenship for themselves and their children. (b) Customary marriages need to be registered in order for an applicant to obtain a passport. (c) Many women, particularly rural women, face difficulties in obtaining official documents. |
| <p>Education (Para. 34)</p> | <p>The CEDAW Committee expressed concern about the large number of children out of school, and gender disparity in schools, including the lower completion rate for girls compared with boys, owing to, among other things, early pregnancy, female genital mutilation, child and/or forced marriage and a lack of sanitary towels. The Committee was also concerned about the lower number of women attending university compared with men and the lack of data on the disciplines that they pursue, and about the prevalence of sexual violence and harassment directed against girls and adolescents, including those with disabilities, in schools by male teachers and pupils.</p> |

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| <p>Employment (Para. 36)</p> | <p>The CEDAW Committee raised concerns over the following:</p> <ul style="list-style-type: none"> • Poor working conditions faced by women domestic workers, including low pay, long hours, exploitation, physical and sexual abuse, and their lack of awareness of complaint mechanisms. • The situation of women working in agriculture, including on flower farms, and, in particular, their exposure to chemicals and the adverse effects that the latter have on their fertility and reproductive functions, as well as reports of abuse and longer working hours than men with no additional remuneration. • The high level of unpaid and unrecognized work done by women. • The fact that legislation prohibiting sexual harassment applies only to employers who hold public office and persons in positions of authority. |
| <p>Health (Para. 38)</p> | <p>The CEDAW Committee expressed concern about the lack of access to high-quality healthcare for many women, including women with disabilities, women in prostitution and rural women. It also noted with concern the high maternal mortality rate, in part owing to unsafe abortions, and that the State party's restrictive and unclear legal framework on abortion led women to seek unsafe and illegal abortions. The Committee was further concerned about the practice of post-delivery detention of women and girls who cannot pay medical bills and the high rates of HIV, particularly among women and girls.</p> |
| <p>Economic empowerment of women (Para. 40)</p> | <p>The CEDAW Committee expressed concern about practical barriers preventing women from benefiting from economic empowerment initiatives, citing reports indicating that the Uwezo Fund³⁰⁴ is difficult to access and lacks clear criteria.</p> |
| <p>Women and girls with disabilities (Para. 46)</p> | <p>The CEDAW Committee expressed concern about the failure to protect the health, sexual and reproductive rights of women with disabilities and their lack of access to justice, limits on their legal capacity and ability to own property, and violence against them, including the practice of forced sterilization.</p> |

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| <p>Marriage and family relations (Para. 50)</p> | <p>The CEDAW Committee had the following concerns:</p> <ul style="list-style-type: none"> • The fact that the Marriage Act is not in conformity with the Constitution, in that it recognizes polygamy in the context of customary and Muslim marriages. • The requirement to prove contribution to marital property under the Matrimonial Property Act of 2013, which discriminates against women who face challenges in proving the existence of and quantifying non-monetary contributions. • The removal of the requirement of spousal consent for transactions relating to marital property. • Discriminatory inheritance laws, including rules governing intestate succession that directly discriminate against women and girls, and the fact that the Law of Succession Act of 1981 renders a widow's inheritance rights void if she remarries, with no parallel provision for widowers. • Discrimination against women married under Islamic law, including the right of men to divorce their wives unilaterally, and reports of abusive behavior, including the withholding of divorce certificates and forced concessions in return for the divorce certificate. • The requirement under the Marriage Act for all marriages to be registered, failing which they are considered invalid, the strict timelines set for registration, the requirement of consent by both spouses to register and the detrimental effects that that has on the rights of women, including those in polygamous marriages. • Women's lack of access to justice, including upon divorce, owing in particular to their limited resources. |
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APPENDIX 4:

KENYA'S COMMITMENTS UNDER THE 3RD CYCLE OF THE UNIVERSAL PERIODIC REVIEW RELATING TO EQUALITY AND EMPOWERMENT OF WOMEN AND GIRLS³⁰⁵

| THEME | RECOMMENDATION(S) NUMBER | TEXT OF THE RECOMMENDATION(S) |
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| Political participation and decision-making | 142.166 142.165 142.63 142.60 | Establish mechanisms to increase the participation of women in political and public life and in decision-making positions, and make efforts to eradicate gender stereotypes that result in violence against women. Increase efforts to promote women's political participation. Implement a comprehensive policy to ensure gender equality, particularly in enhancing the participation of women in decision-making. Strengthen gender equality by implementing the two-thirds gender principle in all elective or appointive bodies in a timely manner. |
| | 142.67 ³⁰⁵ | Ensure that women, especially rural women, are meaningfully engaged in the development and implementation of climate change and disaster risk reduction legislation and policies. |

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| <p>Sexual and gender-based violence</p> | <p>142.64 142.110 142.111 142.113 142.227 142.228 142.229 142.231 142.235 142.236 142.237 142.238 142.239 142.240 142.241 142.242 142.256</p> | <p>Amend discriminatory laws against women and eliminate harmful practices and gender-based violence against women and girls.</p> <p>Ensure a strong multi-sectoral response to combat violence against women with capacity to investigate cases and enhance access to justice for survivors.</p> <p>Continue to take measures to eradicate the harmful practice of female genital mutilation and other sexual and gender-based violence.</p> <p>Actively implement positive measures to end gender-based violence and harmful practices, including through recent legislative frameworks, a pledge to end female genital mutilation, and the commitment to reduce maternal deaths.</p> <p>Continue the fight against discrimination and violence against women and children, including trafficking, forced labor and domestic abuse, and improve reporting and the bringing to justice of perpetrators of such acts.</p> <p>Increase efforts to prevent and combat sexual and gender-based violence, including in camps for internally displaced persons and refugees.</p> <p>Continue to implement the inclusive national framework on preventing and addressing sexual and gender-based violence.</p> <p>Undertake further measures to protect vulnerable groups, in particular women, persons with disabilities and children.</p> |
| <p>Violence against women in elections</p> | <p>142.136 142.168</p> | <p>Intensify efforts to secure redress for survivors of sexual violence following the 2007 and 2017 Presidential elections and establish mechanisms to ensure such crimes are never repeated.</p> |
| <p>Equality in education; economic empowerment of women</p> | <p>142.221 142.224 142.225 142.232 142.233 142.234</p> | <p>Continue efforts to address inequalities between men and women in education. Take further measures to ensure the empowerment of women in all spheres. Continue to develop the national machinery for the advancement of women, strengthen coordination between various executive bodies and provide them with adequate resources. Further promote women's empowerment and gender equality. Continue efforts to improve the rights of women. Take measures aimed at ensuring the economic and social rights of women and increase their employment.</p> |

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| Trafficking in persons | 142.170 142.171 142.172 142.173 142.174 142.175 142.229 142.258 | <p>Accelerate efforts to combat trafficking in persons.</p> <p>Provide sufficient protection for victims of trafficking.</p> <p>Establish and implement minimum standards for the protection and rehabilitation of victims of trafficking.</p> <p>Adopt a policy to end sex trafficking.</p> <p>Prosecute perpetrators of trafficking in persons.</p> |
| Sexual and reproductive health rights | 142.197 142.202 | Continue strengthening HIV prevention and education policies and programs in the health sector. |
| | 142.195 142.111 | Improve maternal and child healthcare by redoubling investments in line with International Conference on Population and Development commitments. |
| Economic and land rights | 142.23 | Guarantee women access to land by, inter alia, ensuring the full implementation of the constitutional provisions giving women equal rights to land ownership as men as well as the execution of the Marital Property Act and other women's land rights. |
| Non-discrimination | 142.61 | Continue collecting and analyzing disaggregated data on women to combat discrimination based on religion, ethnic background, age, health, disability and sexual orientation. |

ENDNOTES

- 1 The text was updated to reflect legislative changes related to the Children Act, 2022; the Protection against Domestic Violence Rules, 2020; and the Matrimonial Property Rules, 2022.
- 2 Chapter is often abbreviated to “Cap”. The chapter referencing system applies to certain laws with a long history.
- 3 Concluding observations on the eighth periodic report of Kenya, CEDAW/C/KEN/CO/8, 17 November 2017.
- 4 Article 24(4) of the Constitution of Kenya, 2010.
- 5 High Court of Kenya, Federation of Women Lawyers (FIDA – Kenya) & 3 others v. Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR, Petition No. 266 of 2015, Judgement, 12 June 2019, available at: <https://kenyalaw.org/caselaw/cases/view/175490/>.
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- 7 Kenya, Kenya Institute for Public Policy Research and Analysis, Kenya Economic Report 2020 (Nairobi, 2020), available at: <https://kippra.or.ke/download/kenya-economic-report-2020-2/?ind=3124&filename=Kenya-Economic-Report-2020.pdf&wpdmdl=3692&refesh=603f96a6e573a1614780070> p 218.
- 8 Article 14, Constitution of Kenya, 2010.
- 9 Concluding observations on the eighth periodic report of Kenya, CEDAW/C/KEN/CO/8, 17 November 2017, para. 33(a).
- 10 High Court of Kenya, Tatu Kamau v. Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) [2021] eKLR, Constitutional Petition No. 244 of 2019 (Formerly Machakos High Court Petition No. 8 of 2017), Judgement, 17 March 2021, available at: <http://kenyalaw.org/caselaw/cases/view/209223/>.
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- 17 Kenya, Kenya National Bureau of Statistics, Kenya Population and Housing Census Volume III: Distribution of Population by Age and Sex 2019 (Nairobi, 2019) pp. 11, 14.
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- 19 Article 6(2), Constitution of Kenya, 2010.
- 20 Articles 94 and 185, Constitution of Kenya, 2010.
- 21 Article 109(2), Constitution of Kenya, 2010.
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- 34 Ibid., p. 3.
- 35 Ibid.
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- 40 CEDAW Committee, General Recommendation 25 on temporary special measures (2004) para. 8.
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- 97 CEDAW Committee, General Recommendation 21 on equality in marriage and family relations (1994) (Document No. A/49/38), para. 16.
- 98 Article 6(a) and (b), Maputo Protocol.
- 99 See the High Court decision upholding constitutionality of sections 162 and 165 of the Penal Code in *E.G. & 7 others v. Attorney General; D.K.M. & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2019] eKLR, Petition No. 150 and 234 of 2016 consolidated, Judgment, 24 May 2019, available at: <http://kenyalaw.org/caselaw/cases/view/173946/> "<http://kenyalaw.org/caselaw/cases/view/173946/>".
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- 120 Article 16(1)(d) of CEDAW provides for equality of spouses and guarantees "The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount". Under Article 13(l) of the Maputo Protocol, State parties undertake to "recognise that both parents bear the primary responsibility for the upbringing and development of children". Furthermore, Article 3 of the Convention on the Rights of the Child provides for the upholding of the best interests of the child and to care and protection of the child. Articles 4 and 20 of the African Charter on the Rights and Welfare of the Child uphold parental responsibility and the best interests of the child.
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The first issue was phrased by the Attorney General thus: "Whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116 and Article 125 of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March, 2013?"
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- 247 Supreme Court of Kenya, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, Advisory Opinion No. 2 of 2012, Advisory Opinion, 11 December 2012, para. 63, available at: <https://kenyalaw.org/caselaw/cases/view/85286>
- 248 Then Chief Justice Willy Mutunga dissented from the majority, holding that: "I believe the immediate implementation of the two-thirds gender principle is reinforced by values of patriotism, equity, social justice, human rights, inclusiveness, equality and protection of the marginalized. Such values would be subverted by an interpretation of the provisions that accepts progressive realization

- of this principle.” [para. 11.6] The former Chief Justice then concluded, “It is my opinion, therefore, that the answer to the Attorney General’s first question is that the two-thirds gender principle be implemented during the General Election scheduled for March 04, 2013.”
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- 250 At para. 79, the court remarked, “We are of the majority opinion that legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August 2015”. The date of 27th August was significant as being the period within which five years would have lapsed since the promulgation of the Constitution. Parliament was duty-bound to enact certain laws, including those contemplated under Article 100, within five years in line with Article 261(1) as read with the Fifth Schedule to the Constitution.
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 “261(1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.
 [...]
 (5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.
 (6) The High Court in determining a petition under clause (5) may – (a) make a declaratory order on the matter; and (b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.
 (7) If Parliament fails to enact legislation in accordance with an order under clause (6)(b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament”.
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Compile comprehensive data regarding the number, distribution and challenges of intersex persons.
Undertake a comprehensive literature review based on a comparative approach to the care, treatment and protection of intersex persons.
Examine the existing policy, institutional, legislative, medical and administrative structures and systems governing intersex persons.
Recommend comprehensive reforms to safeguard the interests of intersex persons.
Develop a prioritized implementation matrix clearly stating the immediate, medium and long-term reforms governing intersex persons.
Undertake any other activities required for the effective discharge of its mandate.
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- 282 Ibid.
- 283 Human Rights Watch and FIDA-Kenya, Once You Get Out, You Lose Everything: Women and Matrimonial Property Rights in Kenya, (Human Rights Watch, 2020) p. 22, available at: <https://www.hrw.org/report/2020/06/25/once-you-get-out-you-lose-everything/women-and-matrimonial-property-rights-kenya>.
- 284 See section 2, Matrimonial Property Act, 2013, on definition of "contribution".
- 285 See for instance the case of M.W.G. v. T.K.G. [2016] eKLR wherein the court observed in part as follows:
"I am also persuaded that though she may have made both monetary and non-monetary contributions in improving Title No. Mweiga/Block 2/Ikumari/[particulars withheld] her extent of contribution towards the said improvements has not been established on a balance of probabilities considering that no evidence at all was produced to demonstrate the value of the improvements. The plaintiff's claim on this property fails on this score. Her claim on movable assets or personal effects would also fail because there was no evidence that those assets still exist".
High Court of Kenya, M.W.G. v. T.K.G. [2016] eKLR, Civil Case No. 15 of 2014, Judgement, 30 September 2016, available at: <https://kenyalaw.org/caselaw/cases/view/126405>.
- 286 Human Rights Watch and FIDA-Kenya, Once You Get Out, You Lose Everything: Women and Matrimonial Property Rights in Kenya, (Human Rights Watch, 2020), pp. 5, 14, available at: <https://www.hrw.org/report/2020/06/25/once-you-get-out-you-lose-everything/women-and-matrimonial-property-rights-kenya>.
- 287 See for instance High Court of Kenya, E.N.K. v. J.N.K. [2015] eKLR, Civil Suit No. 11 of 2007, Judgment, 2 October 2015, whereby the judge, in upholding 50:50 sharing remarked as follows (para. 19): "The Christian notion of marriage, the type of marriage the parties before me got into, is that upon celebration thereof the man and the woman became one unit, one flesh. Whatever the man does, he does for the woman; and vice versa. This would mean that whatever property he acquires during the marriage, he acquires for himself and for the woman, for the two are one. Therein too should lie the answer to the question, what should happen to property acquired by parties to a Christian marriage upon divorce?", available at: <http://kenyalaw.org/caselaw/cases/view/114869>.
- 288 High Court of Kenya, Federation of Women Lawyers Kenya (FIDA) v. Attorney General & another [2018] eKLR, Petition No. 164B of 2016, Judgement, 14 May 2018, available at: <http://kenyalaw.org/caselaw/cases/view/152142/>.

- 289 High Court of Kenya, U.M.M. v. I.M.M. [2014] eKLR, Civil Suit No. 39 of 2012, Judgement, 12 February 2014, available at: <https://kenyalaw.org/caselaw/cases/view/94613/>.
- 290 Ibid.
- 291 Court of Appeal of Kenya, P.N.N. v. Z.W.N. [2017] eKLR, Civil Appeal No. 128 of 2014, Judgement, 3 March 2017, available at: <http://kenyalaw.org/caselaw/cases/view/132157/>.
- 292 Court of Appeal of Kenya, M.B.O. v. J.O.O. [2018] eKLR, Civil Appeal No. 81 of 2017, Judgement, 23 February 2018. In holding that the matrimonial house be distributed 50:50 as opposed to 30:70, the court stated at para. 18: "It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. [...] we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30 percent of the house she has been in occupation and a mere 20 percent of the rental units which are in the same premises".
- 293 Juliana Nnoko-Mewani and Najma Abdi, "Securing Women's Property Rights in Kenya", (Human Rights Watch, 7 March 2020), available at: <https://www.hrw.org/news/2020/03/07/securing-womens-property-rights-kenya>.
- 294 Court of Appeal of Kenya, Mary Rono v. Jane Rono & another [2005] eKLR, Civil Appeal No. 66 of 2002, Judgement, 29 April 2005, available at: <http://kenyalaw.org/caselaw/cases/view/11233>.
- 295 High Court of Kenya, In Re The Estate of Lerionka Ole Ntutu (Deceased) [2008] eKLR, Succession Cause No. 1263 of 2000, Ruling, 19 November 2008, available at: <http://kenyalaw.org/caselaw/cases/view/52304>.
- 296 High Court of Kenya, In Re Estate of Solomon Ngatia Kariuki (Deceased) [2008] eKLR, Succession Cause No. 48 of 1997, Judgement, 28 November 2008, available at: <http://kenyalaw.org/caselaw/cases/view/53521/>.
- 297 High Court of Kenya, Thomas Tito Nyachawo v. Judith Akinyi Ndege [2016] eKLR, Succession Cause No. 451 of 2014, Judgement, 12 May 2016, para 12, available at: <https://kenyalaw.org/caselaw/cases/view/128247>.
- 298 High Court of Kenya, Peter Karumbi Keingati & 4 others v. Dr. Ann Nyokabi Nguthi & 3 others [2014] eKLR, P&A No. 1140 of 1990, Judgement, 31 July 2014, available at: <https://kenyalaw.org/caselaw/cases/view/100670>.
- 299 Articles 53(1)(e) and 53(2), Constitution of Kenya, 2010.
- 300 High Court of Kenya, L.N.W. v. Attorney General & 3 others [2016] eKLR, Petition No. 484 of 2014, Judgment, 26 May 2016, available at: <http://kenyalaw.org/caselaw/cases/view/122371/>.
- 301 High Court of Kenya, N.S.A. & another v. Cabinet Secretary for Ministry of Interior and Coordination of National Government & another [2019] eKLR, Petition No. 17 of 2014, Judgement, 7 February 2019, available at: <https://kenyalaw.org/caselaw/cases/view/170405/>.
- 302 High Court of Kenya, Tatu Kamau v. Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) [2021] eKLR, Constitutional Petition No. 244 of 2019 (Formerly Machakos High Court Petition No. 8 of 2017), Judgement, 17 March 2021, available at: <http://kenyalaw.org/caselaw/cases/view/209223/>.
- 303 Concluding observations on the eighth periodic report of Kenya, CEDAW/C/KEN/CO/8, 17 November 2017, para. 31(g).
- 304 A fund created to empower enterprises led by women, persons with disabilities and youth at the constituency level.
- 305 The Outcome Document for the third cycle review of Kenya and matrix of recommendations, available at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/kEIndex.aspx>.

