



This publication provides an overview of status and trends regarding the constitutional, legislative and administrative protection of the rights of indigenous peoples in South Africa.

This report provides the results of a research project by the International Labour Organization and the African Commission's Working Group on Indigenous Communities/Populations in Africa with the Centre for Human Rights, University of Pretoria, acting as implementing institution. The project examines the extent to which the legal framework of 24 selected African countries impacts on and protects the rights of indigenous peoples.

This report was researched and written by G Wachira Mukundi.

For an electronic copy of the other 23 country studies and the overview report of the study, see www.chr.up.ac.za/indigenous

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the International Labour Organization and the African Commission on Human and Peoples' Rights on
the constitutional and legislative protection of
the rights of indigenous peoples:
Kenya

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KENYA: CONSTITUTIONAL, LEGISLATIVE AND ADMINISTRATIVE PROVISIONS CONCERNING INDIGENOUS PEOPLES

G Wachira Mukundi,
*Kenya: Constitutional, legislative and administrative
provisions concerning indigenous peoples*

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Background to the report

This report combines a desk-top survey and an in-depth study of Kenya's legal framework and the extent to which it protects the country's indigenous peoples. The in-depth study was carried out from 1 - 9 September 2008. The research team engaged with the Ministries of Justice, National Cohesion & Constitutional Affairs, Development of Northern Kenya & other Arid Lands, Finance, Gender and Children Affairs, and Tourism. Consultations were also held with the State Law Office and the Law Reform Commission.

The research team met various representatives of indigenous peoples' communities in Kenya from Narok, Ngong, Wajir, Kajiado, Nakuru, Bogoria, Nanyuki, Samburu and Marsabit. The research team is grateful for the assistance and facilitation of the in-depth study by the Kenya National Commission on Human Rights especially with regard to arranging and co-ordinating meetings with government officials. Focus group discussions with representatives of indigenous communities were held in Nairobi, Nakuru and Laikipia which were facilitated by KNCHR, Ogiek Welfare Council and the Indigenous Movement for Peace Advancement and Conflict Transformation (IMPACT) respectively.

Part I: Introduction to indigenous peoples, the country and its legal system

1 Indigenous peoples in the country – basic situational overview

1.1 Indigenous peoples, criteria for identification, demographic details, main economic sources of livelihood and cultural life style

1.1.1 Indigenous peoples and criteria for identification

The decolonisation processes in most African states transferred state power to the dominant groups in the territory. Certain groups remained vulnerable primarily due to their close attachment to their traditional cultures and reluctance to assimilate and embrace western development paradigms that were adopted by the post-colonial state.¹ It is some of these groups who today self-identify as indigenous peoples and demand recognition and protection of their fundamental rights in accordance with their culture, traditions and way of life.² In Kenya, as in other African countries, these communities fall within two categories identified by the Working Group of Experts on Indigenous Populations/Communities in Africa of the African Commission on Human and Peoples' Rights (African Commission), namely, the pastoralists and hunter-gatherers.³ The pastoralists include the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana and Somali and the hunter-gatherer communities comprise the Awer (Boni), Ogiek, Sengwer or Yaaku.⁴

While the term 'indigenous peoples' is not universally agreed upon, participants in a roundtable meeting of experts on minorities and indigenous peoples' rights in Kenya organised by the Kenya National Commission on Human Rights (KNCHR) in collaboration with the Centre for Minority Rights Development (CEMIRIDE) nominated the following criteria that could be used by Kenya to identify indigenous peoples for the purposes of addressing their human rights issues:

- Having a sense of collectivity / solidarity/belonging;
- Claiming rights to ancestral land in collectivity / common originality;

¹ I Brownlie *Treaties and indigenous peoples* (1992) 56.

² See art 1 ILO's Indigenous and Tribal Peoples Convention, 1989 (169); see also Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa' (Report of African Commission's Working Group of Experts) adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session, 2005, 93.

³ See Report of the African Commission's Working Group of Experts (n 2 above) 92; see also International Work Group for Indigenous Affairs (IWGIA) *The Indigenous World* (2007) 468.

⁴ See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, R Stavenhagen, Mission to Kenya, A/HRC/4/32/Add3, 26 February 2007 (Report of the UN Special Rapporteur on Indigenous Peoples in Kenya) para 10; see also IWGIA (n 3 above) 468.

- Practicing and retaining cultural lifestyle;
- Retaining traditional institutions and social organisation;
- Depending on natural resources in their respective territories;
- Suffering exclusion and discrimination from and by the mainstream systems;
- Possessing unique or common religion and spirituality; and
- Utilising unique means of livelihood and traditional occupation.⁵

These characteristics are similar to those proposed by the African Commission's Working Group of Experts on Indigenous Populations/Communities in Africa⁶ and generally reflect the criteria envisaged in article 1 of the ILO's Indigenous and Tribal Peoples Convention 169 of 1989, which emphasises the principle of self-identification.⁷

According to the African Commission, there are about 14 groups in Kenya who self-identify as indigenous peoples: the Ogiek, Watta, Sengwer, Yaaku, Maasai, Samburu, Elmolo, Turkana, Rendille, Borana, Somali, Gabra, Pokot, Endorois.⁸ The UN Special Rapporteur on Indigenous Peoples similarly identifies indigenous peoples in Kenya as including pastoralist communities such as the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana and Somali, and hunter-gatherer communities such as the Awer (Boni), Ogiek, Sengwer or Yaaku.⁹ He also mentions that he met indigenous representatives of other groups, including the Ilchamus, Elmolo, Burgi, Gaaljecel, Munyayaya, Orma, Rendile, Sabaot, Sakuye and Talai, which could indicate that they are also indigenous.¹⁰

1.1.2 Demographic details

No official statistical information exists on the number or population distribution of indigenous peoples in Kenya. The last official population census in 1999 estimated Kenya's population to be close to 32 million people but gave no specific indication as to the smaller ethnic groups'

⁵ See Report of the Round Table Meeting of Experts on Minorities and Indigenous Peoples in Kenya, Kenya National Commission on Human Rights and Centre for Minority Rights Development, Nairobi, 30-31 October 2006 (Report of the Round Table Meeting Nairobi) 4.

⁶ Report of the African Commission's Working Group of Experts (n 2 above) 90.

⁷ Art 1(2) ILO's Indigenous and Tribal Peoples Convention.

⁸ Indigenous peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa (The African Commission's work on indigenous peoples in Africa) African Commission & IWGIA (2006) 15.

⁹ Report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 4 above) para 10.

¹⁰ As above, para 5.

numbers.¹¹ Further, the state officially states that it recognises 42 ethnic tribes, in effect excluding a number of indigenous groups in the country.¹² For example, despite the fact that the Endorois self-identify as an indigenous community and are also recognised by both the African Commission and the UN Special Rapporteur on Indigenous Peoples' as indigenous peoples, the Kenyan state continues to deny that they are even a tribe.¹³ In written submissions contesting claims by the community before the African Commission, the state disputes 'that the Endorois are indeed a community/sub-tribe or Clan on their own' and demands that the community prove 'distinction from the other Tugen sub-tribe or the larger Kalenjin tribe'.¹⁴

1.1.3 Main sources of economic livelihood and cultural lifestyle

Indigenous peoples in Kenya are mainly pastoralists and hunter-gatherers and as such rely mainly on their traditional lands and territories for their economic sustenance.¹⁵ This is similar to indigenous peoples all over the world whose livelihood, economic sustenance, as well as religious and cultural life are dependent on traditional lands and resources.¹⁶ In Kenya, the pastoralists predominantly inhabit the arid and semi-arid regions of the country.¹⁷ The hunter-gatherers traditionally inhabit forests and rely on hunting, gathering wild fruits and bee-keeping for

¹¹ Kenya 1999 Population and Housing Census puts Kenya's population at about 31 639 091 people. Out of the 42 tribes in Kenya, the 1999 data estimates provided for only seven tribes: Kikuyu 22%; Luhya 14%; Luo 13%; Kalenjin 12%; Kamba 11%; Kisii 6%; Meru 6%. The remaining 35 tribes dubbed "other Africans", which could include indigenous peoples, comprise 15%.

¹² See also Kenya's initial Report on the African Charter on Human and Peoples' Rights, considered during the 41st Ordinary Session of the African Commission on Human and Peoples' Rights, in Accra, Ghana in May 2007 (Kenya's initial Report to the ACHPR) para 5; IWGIA (n 3 above) 468.

¹³ African Commission on Human and Peoples' Rights *Communication 276/2003, Centre for Minority Rights Development (CEMIRIDE) on behalf of Endorois Community v Kenya* Respondents' submissions, para 1.1.5; see also the Report of the UN Special Rapporteur on indigenous peoples in Kenya (n 4 above) para 21, citing the 1989 national census which omits the Ogiek, El Molo, Watta, Munyayaya, Yakuu and other smaller groups from the list of 42 tribes of Kenya.

¹⁴ As above.

¹⁵ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 4 above) para 25.

¹⁶ See Study on Indigenous People and their Relationship to Land by EI Daes, UN Doc.E/CN.4/Sub.2/1999/18, 3 June 1999, para 18. See also J Asiema & F Situma 'Indigenous Peoples and the Environment: The Case of the Pastoral Maasai of Kenya' (1994) 5 *Colorado Journal of International Environmental Law & Policy* 150; R Hitchcock and D Vinding (eds) *Indigenous Peoples of Southern Africa*; IWGIA (n 3 above) 11; General Comment 23(50) *UN Doc. A/49/40*, Annex V, 109 (1994). In its General Comment on art 27, the Human Rights Committee observed that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law'.

¹⁷ n 3 above, 468.

survival.¹⁸ However, due to severe land alienation and a reduction of the traditional territories of most indigenous peoples, some have resorted to small scale farming.¹⁹

The economic livelihood of indigenous peoples in Kenya is severely affected by the lack of an adequate legal framework protecting their traditional lands and resources, as well as policies that mainly favour the dominant economic paradigms.²⁰ In Kenya, like in most other African countries, settled agriculture, mining, and modern development schemes are seen as the preferred way to development.²¹ As a result, certain types of indigenous peoples' means of livelihood, such as nomadic pastoralism, hunting and gathering, are looked down upon, putting their future survival and development in serious jeopardy.²² The sustainability and development potential of their cultural systems are also ignored and are wrongly perceived as being primitive, uneconomic, environmentally-destructive and incompatible with modernisation.²³ The state continues to systematically marginalise indigenous peoples 'on the basis of their economic, social and cultural characteristics, which are inextricably connected to the use of land and natural resources'.²⁴ It also promotes westernised ideals of development, calling upon these communities to discard their rich cultures and ways of life and instead adopt 'modernity'.²⁵ This is usually done in total disregard of the communities' strengths, needs and preferences and is often without adequate consultation and participation of the community.²⁶

In as much as pastoralism has been looked down upon by the state, it is worth noting that Kenyan pastoralists supply a sizable quantity of the meat that is consumed in the country. However, these communities reap little benefit due to the exploitation by dominant communities who act as middlemen and also control the abattoirs and the meat market. The current government has revived the Kenya Meat Commission, a move that is expected will guarantee and accord indigenous peoples better prices for their livestock and in turn improve their welfare.²⁷

¹⁸ Report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 4 above) paras 36 - 41.

¹⁹ As above, paras 25 - 35.

²⁰ As above, 2; paras 82 & 83; n 3 above, 468-470;

²¹ See J Ngugi 'The decolonization-modernization interface and the plight of indigenous peoples in post-colonial development discourse in Africa' (2002) 20 *Wisconsin International Law Journal* 300.

²² See Report of the African Commission's Working Group of Experts (n 2 above) 29; Report of the UN Special Rapporteur on indigenous peoples in Kenya (n 4 above) para 17.

²³ Report of the UN Special Rapporteur on indigenous peoples in Kenya (n 4 above) para 17.

²⁴ As above, para 11.

²⁵ Report of the Round Table Meeting Nairobi (n 5 above) n 33: See also Report of the UN Special Rapporteur on indigenous Peoples in Kenya para 11.

²⁶ The case of the Maasai group's ranches, discussed in part II of this report, is a case in point.

²⁷ n 3 above, 474.

Indigenous peoples such as the Maasai also contribute towards tourism revenue, a major foreign exchange earner in Kenya, through their rich culture which unfortunately has been exploited by the state for tourism purposes. A number of natural resources are also situated in the regions inhabited by indigenous peoples, such as minerals (for example the Lake Magadi soda ash), as well as wildlife and natural habitat attractions such as the Maasai Mara.²⁸ Sharing equitably in these resources and participating in their management and utilisation remain critical areas of concern for indigenous peoples in Kenya. This issue is revisited in Part II of this report.

1.2 Main human rights concerns of indigenous peoples in Kenya

The main human rights concerns of indigenous groups in Kenya are quite similar to those shared by indigenous peoples globally.²⁹ The following is a brief survey of those concerns, some of which will be discussed in further detail in part II of this report during the examination of the legal framework impacting upon and protecting indigenous peoples in the country.

1.2.1 Legal recognition and identity

The post-colonial Kenyan state has pursued a policy of assimilation and integration of numerically-smaller tribes into some dominant ones. For example, indigenous peoples such as the Endorois and others like ‘the Ogiek, El Molo, Watta, Munyayaya, Yakuu ... were not legally recognised as separate tribes’.³⁰ Despite recognition as some of the 42 tribes of Kenya, other indigenous groups such as the pastoralists were also neglected. Perhaps this may be due to the size of these tribes as compared to those tribes that are dominant. As a result they were excluded from and under-represented in the political structures of the state. Kenya’s indigenous peoples have since time immemorial opted to retain and perpetuate their deep-seated cultures and traditions. The indigenous peoples hold onto their distinct economic, social and cultural characteristics, which have also been the basis of discrimination based on the misconception that they hinder development.³¹

The lack of legal recognition of some of the indigenous peoples and the exclusion of others for their refusal to assimilate, integrate and adopt modern ways of living continue to hamper the

²⁸ Country reports Kenya. Sourced from Institute of Security Studies <http://www.issafrika.org/AF/profiles/kenya/Economy.html> (accessed 3 January 2007).

²⁹ See Report of the Round Table Meeting Nairobi 17; see also Report of the UN Special Rapporteur on Indigenous Peoples in Kenya paras 21 - 81.

³⁰ Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 21; see also *CEMIRIDE on behalf of Endorois Community v Kenya* (n 13 above) respondents’ submissions para 1.1.5.

³¹ Report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 4 above) para 11.

realisation of these communities' fundamental human rights and freedoms. For example, groups such as the Ilchamus and the Endorois have been denied equitable and effective political representation leading to inadequate consultation and participation on issues that affect them. Others, such as the Somali and the Oromo, encounter numerous hurdles when accessing legal identity documents. These documents are requisite for the enjoyment of citizenship rights such as voting and participation in elective politics. It also hampers their enjoyment of other fundamental human rights such the freedom of movement within and beyond the country's borders.³²

It is also important to note that there is no specific legislation governing indigenous peoples in Kenya.³³ As such, to espouse indigenous peoples' rights one would have to invoke relevant provisions within the existing legal framework which protects fundamental human rights and freedoms, principally couched in the language of individual rights. However, the individual conceptualisation of rights is rarely compatible with certain claims made by indigenous peoples such cultural rights as well as the protection of collective land and resource rights.³⁴ Part II of this study explores these legal recognition and identity concerns further.

1.2.2 Equality and non-discrimination

Because of the inadequate legal recognition of indigenous peoples, they continuously suffer extreme marginalisation, discrimination and subjugation. As alluded to earlier, the discrimination and unequal treatment suffered by indigenous peoples, including their lack of access or insufficient access to basic socio economic rights, and poor infrastructure in their places of habitat, emanate from their perceived reluctance to assimilate and adopt modernity.³⁵ Further, due to their relatively inferior numbers as compared to dominant communities, they are scarcely in a position to be equitably represented in the political structures of the state, such as Parliament, the executive and the judiciary, save for representation through affirmative action.³⁶ In effect, most indigenous peoples in Kenya lack a strong and influential voice to ensure that resources in the

³² As above, para 21.

³³ n 3 above, 468.

³⁴ As above, 470; see also generally on the question of indigenous peoples' 'strong sense of solidarity that emerges from their inherent need to preserve and retain their culture, way of life and common heritage' in P Thornberry *International law and the rights of minorities* (1991) 331; see also J Anaya *Indigenous peoples in international law* (2004) 141

³⁵ As above, 468 - 469.

³⁶ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya paras 22 - 24.

country are equitably distributed as well as to challenge discrimination.³⁷ This concern is revisited in greater detail in Part II of this report.

1.2.3 Culture and language rights

‘Of the common traits that indigenous peoples share, probably the most notable is the retention of a strong sense of their distinct cultures and traditions’.³⁸ In Kenya, indigenous peoples have a strong attachment to their unique and rich culture and traditions which they make every conscious effort to transmit to future generations.³⁹ However, their cultures and traditions have been misunderstood and subjected to negative stereotyping by dominant groups.⁴⁰ Given that dominant groups due to their numerical strength have occupied the majority of leadership positions in the state, (elections in Kenya are based on universal suffrage where the winner takes all), dominant cultures are promoted and regarded as more ‘civilised’.⁴¹ Some indigenous cultures and languages, particularly those of smaller groups such as the Ogiek, are as a result rapidly becoming extinct.⁴² Part II of this report revisits this issue at greater length.

1.2.4 Land and resources rights

As highlighted in preceding sections, land and resource rights are at the core of indigenous peoples’ survival, as they are mainly dependent on lands and natural resources for their basic survival and welfare.⁴³ In Kenya, however, the recognition of indigenous peoples and the protection of their traditional lands and resources are hampered by the lack of an adequate legal framework that gives regard to their culture, way of life, and preferred mode of economic sustenance.⁴⁴ Instead of protecting their rights, the current legal framework ‘works against the human rights of indigenous peoples in a number of ways as, through evictions or restriction of movement, they deny indigenous peoples access to their resources and primary sources of livelihood’.⁴⁵ Indigenous peoples in Kenya have decried the destruction of their cultures and the dispossession of their lands and territories through ‘the so called development projects such as

³⁷ n 3 above, 468.

³⁸ See EI Daes Study on Indigenous People and their Relationship to Land UN Doc.E/CN.4/Sub.2/1999/18, 3 June 1999 para 18.

³⁹ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 25.

⁴⁰ See Report of the Round Table Meeting Nairobi (n 5 above) 7, 10.

⁴¹ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya paras 22 - 24.

⁴² As above, para 36.

⁴³ n 3 above, 468.

⁴⁴ As above, 468 - 470; see Report of the Round Table Meeting Nairobi (n 5 above) 10.

⁴⁵ As above; see also Report of the UN Special Rapporteur on Indigenous Peoples in Kenya paras 25

mining, logging, oil exploration, privatization of their territories, and tourism'.⁴⁶ The violation of Kenya's indigenous peoples' culture and land 'led to the displacement of whole communities and the destruction of the environment, their traditional economies and other practices which had sustained them since time immemorial'.⁴⁷

Apart from the lack of an adequate legal framework recognising and protecting the land and natural resource rights of indigenous peoples in Kenya, other concerns related to land and resource rights include: resource-related conflicts due to incursions by dominant communities or among themselves and continued dispossessions of scarce resources; environmental degradation and desertification; a lack of consultation and participation in the management of their resources; and continued marginalisation and exclusion from infrastructural and development programmes.⁴⁸ Indeed, the eruption of violence in Kenya after a disputed presidential election in December 2007 highlights underlying issues of conflict among the more than 42 ethnic tribes scattered across the country.⁴⁹ Beyond the electoral dispute, historical land injustices in Kenya emerged as one of the root causes of the violence and related conflicts.⁵⁰ These injustices are aptly captured by the Kenya Draft National Land Policy:

Historical injustices are land grievances which stretch back to colonial land policies and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date. Sources of these grievances include land adjudication and registration laws and processes, treaties and agreements between local communities and the British. The grievances remain unresolved because successive post independence Governments have failed to address them in a holistic manner. In the post-independence period, the problem has been exacerbated by the lack of clear, relevant and comprehensive policies and laws.⁵¹

⁴⁶ See Statement of the Loodoariak Community Land and Development Programme in Kenya at the nineteenth session of WGIP, cited in Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 20.

⁴⁷ As above.

⁴⁸ As above.

⁴⁹ See Kenya General Election 27 December 2007, The Report of the Commonwealth Observer Group, Commonwealth Secretariat (2007) 28; although there could be more than 42 ethnic communities in Kenya, officially the state claims that there are about 42 ethnic communities, see Kenya's initial State Report to the ACHPR pursuant to its obligations under art 62 of the African Charter on Human and Peoples' Rights para 5; see the Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 21, citing the 1989 national census which omits the Ogiek, El Molo, Watta, Munyayaya, Yakuu and other smaller ethnic groups from the list of 42 tribes of Kenya.

⁵⁰ Other causes of the conflict include the inequitable distribution of state resources such as jobs, infrastructure, skewed economic policies that fail to address the needs and demands of the poor and clamour for political power; see P Kagwanja 'Breaking Kenya's impasse, chaos or courts' 2008 (1) *Africa Policy Institute* 1.

⁵¹ See Draft National Land Policy (2006) para 190.

As is discussed later in this report in the section on land and natural resources, it is imperative that Kenya's legal framework on land is overhauled if such conflicts are to be avoided. Most of those land clashes directly affect indigenous peoples in Kenya as they do on other communities as was illustrated during the Kenyan post-election violence.

1.2.5 Other important human rights concerns

Additional human rights concerns of indigenous peoples in Kenya are captured in part II of this report in the examination of the Kenyan legal framework. However, a brief mention of some of the more pertinent concerns for purposes of a general overview of the prevailing situation is important. These include concerns over extreme levels of poverty which adversely affect the right to development and access to socio economic rights such as education, health, housing, water and food. Indigenous peoples' high level of poverty is directly linked to their historical and continued marginalisation, social exclusion and discrimination which results in an unequal distribution of resources. This situation is further exacerbated by natural calamities such as draught without proper mitigating interventions from the state and the imposition of development projects that are often unviable due to a lack of proper consultation and participation of indigenous peoples in their conception and implementation.⁵²

Another key concern includes access to justice which is again hampered by discrimination, illiteracy and a lack of awareness as a result of lack of formal education and the financial means to access legal services.⁵³ The fact that indigenous peoples' cultures and traditions are not recognised or looked down upon, affects indigenous peoples' capacity to engage with the formal legal system. In Kenya, customary laws and traditions are only to a very limited extent recognised and are further constrained by numerous repugnancy clauses and a demand for consistency with written laws and the Constitution, failure which they are often declared null and void.⁵⁴

Having sketched a brief situational overview of indigenous peoples in Kenya, the next section seeks to trace the background to the country in a bid to put these issues in context.

⁵² Report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 4 above) paras 65 – 77.

⁵³ As above, paras 55 - 65.

⁵⁴ As above, para 64.

1.3 Background to the country

1.3.1 Pre-colonial history

Pre-colonial Kenya was mainly inhabited by four main linguistic groups: Bantus, Cushites and Nilotes / Paraniotes, as well as hunter-gatherers.⁵⁵ Each of these linguistic classes may be subdivided according into dialect groups, as shown in the table below.

Bantus	Western	Abaluhya/Luhya, Kisii, Kuria, Gusii
	Central	Kikuyu, Kamba/Akamba/Wa-kamba, Meru, Embu, Tharaka, Mbere
	Coastal	Mijikenda (Digo, Duruma, Rabai, Ribe, Kambe, Jibana, Chonyi, Giriama, Kauma), Taveta, Pokomo, Taita
Nilotes/ paraniotes	Nilotes	Luo
	Teso	Iteso, Turkana
	Maasai	Maasai, Samburu, Njemps
	Kalenjin	Nandi, Kipsigis, Elgeyo, Sabaot, Marakwet, Tugen, Terik, Pokot
Cushites	Somali, Rendille, Galla, Borana/Boran, Gabbra, Orma, Sakuye	
Hunters-gatherers	Boni, Dahalo, El-Molo, Ndorobo/Dorobo, Sanye	

The ‘hunter-gatherers were probably the first people to inhabit what is today modern Kenya and are descendants of the ancient inhabitants of the country. Most of them today are extinct or nearing extinction’.⁵⁶ The ‘Nilotes and Bantus probably moved into Kenya during the first millennium AD. The Nilotes are traced to the north of Africa along the River Nile. The Bantu migrated originally from their homeland in Central Africa, in the area between Shaba Province in Zaire and Cameroon. The Cushites migrated from northern Africa beginning around 2000 BC’.⁵⁷ As such, apart from the hunter-gatherers, the rest of the groups, Bantus, Cushites and Nilotes arrived in what today is Kenya at various times, continued internal migrations and finally settled in different regions based on social, cultural and economic conditions.

⁵⁵ Sourced from <http://www.kenyalogy.com/eng/info/pobla4.html> (accessed 12 January 2006).

⁵⁶ See <http://en.wikipedia.org/wiki/Kenya> (accessed 12 January 2007).

⁵⁷ As above.

Arab traders began frequenting the Kenya coast around the first century AD. Kenya's proximity to the Arabian peninsula led to Arab and Persian settlements along the coast by the eighth century. Swahili, a Bantu language with many Arabic loan words, was developed as a *lingua franca* for trade between the different peoples. Arab dominance on the coast was eclipsed in the sixteenth century by the arrival of the Portuguese, whose domination gave way in turn to that of Oman in 1698. The United Kingdom established its influence in the 19th century, first through missionaries. The first Christian mission was founded in 1846, by Ludwig Krapf, a German missionary of the Church Missionary Society of England, who established himself among the Mijikenda on the coast.

Clans, age-sets and age groups formed the basis of government in the vast majority of Kenyan communities in the pre-colonial period. Government in most traditional Kenyan societies was by a council of elders such as the Kikuyu, the Meru and the Embu. Some communities, however, were ruled by chiefs or kings and spiritual leaders, for instance the Luo, the Gusii, and the Luhya.⁵⁸

1.3.2 Colonial history

The 1884 - 1885 Berlin Conference, dubbed the 'scramble for Africa', resulted in Britain's acquisition of Kenya in terms of the 1886 Anglo-German Agreement. Britain and Germany agreed to recognise the Sultan of Zanzibar dominions.⁵⁹ The 'Sultan handed over the administration of the Coastal strip to the British East Africa Company on a fifty-year concession to administer as well as collect revenue. The Company was granted a Royal Charter by the British Crown in 1888 and became known as the Imperial British East Africa Company (IBEAC). The Company became the principal instrument of British imperial policy beyond the coastal strip'.⁶⁰ In 1895 IBEAC became bankrupt and the British government formally took over the territory from the company and declared itself a protectorate over British East Africa (modern Kenya) in 1896.⁶¹ In 1897, the East Africa Order in Council was formulated, establishing a judicial system and increasing the powers of the commissioner over the natives, while recognising that in law, they were not British subjects and their territory was foreign. Numerous other laws and orders in council were enacted, further entrenching the colonial regime's hold that remained until Kenya

⁵⁸ Sourced at Kenya web <http://www.kenyaweb.com/history/pre-colonialgovt/index.html> (accessed 3 January 2007).

⁵⁹ See generally YP Ghai and JPWB MacAuslan *Public Law and Political Change in Kenya* (1970) 3-25.

⁶⁰ As above.

⁶¹ As above.

gained independence on 12 December 1963. Most of these laws, some still applicable to date and discussed in part II of the report, effectively dispossessed indigenous peoples from their traditional territories and subjected them to modern development paradigms bent on further alienation and subjugation.⁶²

1.3.3 Post-colonial history and current state structure

The current Constitution provides for an executive President. Over the years a series of constitutional amendments have concentrated power in the Presidency. The current head of state is President Mwai Kibaki. He came into office during the December 2002 general elections. The President in Kenya is both the head of state and commander-in-chief of the armed forces of the Republic.⁶³ The President is elected through popular vote for a five-year term and is eligible for a second term.⁶⁴ The last general elections were held in 2007.

There are three branches of government: the executive which includes the Vice-President and the cabinet which are appointed by the President;⁶⁵ the legislature which consists of the President and the National Assembly,⁶⁶ and the judiciary, headed by the Chief Justice who is also appointed by the President.⁶⁷

Kenya is divided into eight administrative provinces⁶⁸ each headed by a Provincial Commissioner appointed by the President. The provincial administration is further divided into districts, divisions, locations and the sub-locations on the lowest administrative level. They are all headed by civil servants within the executive branch of government. However, elected leaders (councillors) represent the lowest levels of local government known as wards. It is at this level

⁶² See SC Wanjala 'Land ownership and use in Kenya: Past, present and future' in SC Wanjala (ed) *Essays on Land Law The reform debate in Kenya* (2000) 25.

⁶³ Art 4 Kenya Constitution.

⁶⁴ Art 9(2) Kenya Constitution. In addition to receiving the largest number of votes in absolute terms, the presidential candidate must also win 25% or more of the vote in at least five of Kenya's eight provinces. Election last held 27 December 2002 (next to be held December 2007).

⁶⁵ Art 15 Kenya Constitution.

⁶⁶ Art 30 Kenya Constitution; see also Kenya's initial Report on the African Charter on Human and Peoples' Rights, due for consideration during the 41st Ordinary Session of the African Commission on Human and Peoples' Rights, in Accra, Ghana in May 2007 (Report to the ACHPR) para 9: The National Assembly represents 210 constituencies spread throughout the 8 provinces and consists of elected members duly elected in national elections, nominated members and ex officio members. The Presiding Officer in Parliament is the Speaker, and is elected by the members. There are 210 elected members, 12 nominated members, 2 ex officio members, namely the Attorney General and the Speaker.

⁶⁷ Art 61 Kenya Constitution.

⁶⁸ The provinces of Kenya are: Central, Coast, Eastern, Nairobi, North Eastern, Nyanza, Rift Valley, Western; see also Kenya Constitution.

that indigenous peoples have the greatest potential of influencing local governance since councillors represent the people at the local level.

1.3.4 Political parties

Kenya has enjoyed a multi-party system of democracy⁶⁹ since the 1991 Constitutional amendment which reinstated the multi-party system. There are numerous registered political parties. However, without the formation of coalitions it is increasingly difficult to achieve electoral success under a single political party which is mainly tribally-based.⁷⁰ The current ruling party is the National Rainbow Coalition Party (NARC), which came into power following the December 2002 general (presidential and parliamentary) elections.⁷¹

1.3.5 Role of the media and civil society

Kenya has a diverse media presence, including the state-owned Kenya Broadcasting Corporation, as well as private broadcasters and print media.⁷² The private print media is dominated by two major publishing houses, the Nation and East African Standard, both of which have substantial broadcasting operations.⁷³ Other media companies include Royal Media Services, print media such as Kenya Times and the People Newspapers. With the liberalisation of broadcasting there is wide coverage of much of the country by private radio and TV networks, including vernacular radio stations targeting specific tribes. The public broadcaster, Kenya Broadcasting Corporation, has launched various slots that broadcast in indigenous languages such as Maasai and Somali. These communities have also launched various community FM-radio stations that broadcast exclusively on community issues. These radio stations have been instrumental in creating awareness and sensitising communities on issues affecting them. Indeed, in recent years most Kenyans rely on the broadcast media, particularly FM-radio stations, for news.⁷⁴ However, the

⁶⁹ Art 2A Kenya Constitution.

⁷⁰ List of Political parties in Kenya sourced from Wikipedia, the free encyclopedia http://en.wikipedia.org/wiki/List_of_political_parties_in_Kenya (accessed 3 January 2007).

⁷¹ Human Rights Watch world report 2003. Sourced from <http://www.hrw.org/wr2k3/africa6.html> (accessed 3 January 2007).

⁷² BBC Country profile: Kenya http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1024563.stm (accessed 3 January 2007).

⁷³ BBC Country profile: Kenya http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1024563.stm (accessed 3 January 2007).

⁷⁴ BBC Country profile: Kenya http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1024563.stm (accessed 3 January 2007).

storming of the offices of the Standard newspaper and its sister television station KTN, demonstrates a 'growing level of political intolerance' in the country.⁷⁵

Kenyan civil society is active, free and independent, but must be registered with the registrar of societies and conform to the laws of the country. There are a number of non-governmental organisations (NGOs) working with or in the area of protecting the rights of indigenous peoples in Kenya. These NGOs include the Centre for Minority Rights and Development (CEMIRIDE), the Indigenous Movement for Peace and Conflict Transformation (IMPACT), the Resource Conflict Institute (RECONCILE), the Endorois Welfare Council, the Ogiek Welfare Council, the Mainyoto Pastoralists Integrated Development Organisation (MPIDO), Kenya Land Alliance, and many others.

1.4 Background to the legal system

1.4.1 Legal system and sources of law

Kenya's legal system is based on the 1963 Constitution, the Judicature Act of 1967, and common law court precedent.⁷⁶ Other sources of law include the English common law, tribal law, and Islamic law.⁷⁷ Customary law is also used to the extent that it does not conflict with statutory law, mainly as a guide in civil matters concerning persons of the same ethnic group.

Currently the country is in a process of constitutional review which has been plagued with a stalemate following a constitutional referendum where the majority of Kenyans rejected a government-backed Draft Constitution.⁷⁸ A constitutional referendum was held on 21 November 2005 on whether to adopt the draft Bill to the Constitution, widely seen as increasingly concentrating power in the executive. Although talks aimed at reviving the constitutional review process are currently underway, the exercise is still marked with suspicion and as such it is not certain if and when the process will be complete. An analysis of some of the progressive provisions in the Wako draft Constitution is undertaken in part II of this report with the hope that they will be retained in the eventual Constitution.

⁷⁵ 'Police raids - watershed for Kenya' sourced from BBC news 3 March 2006 <http://news.bbc.co.uk/1/hi/world/africa/4770784.stm> (accessed 3 January 2007).

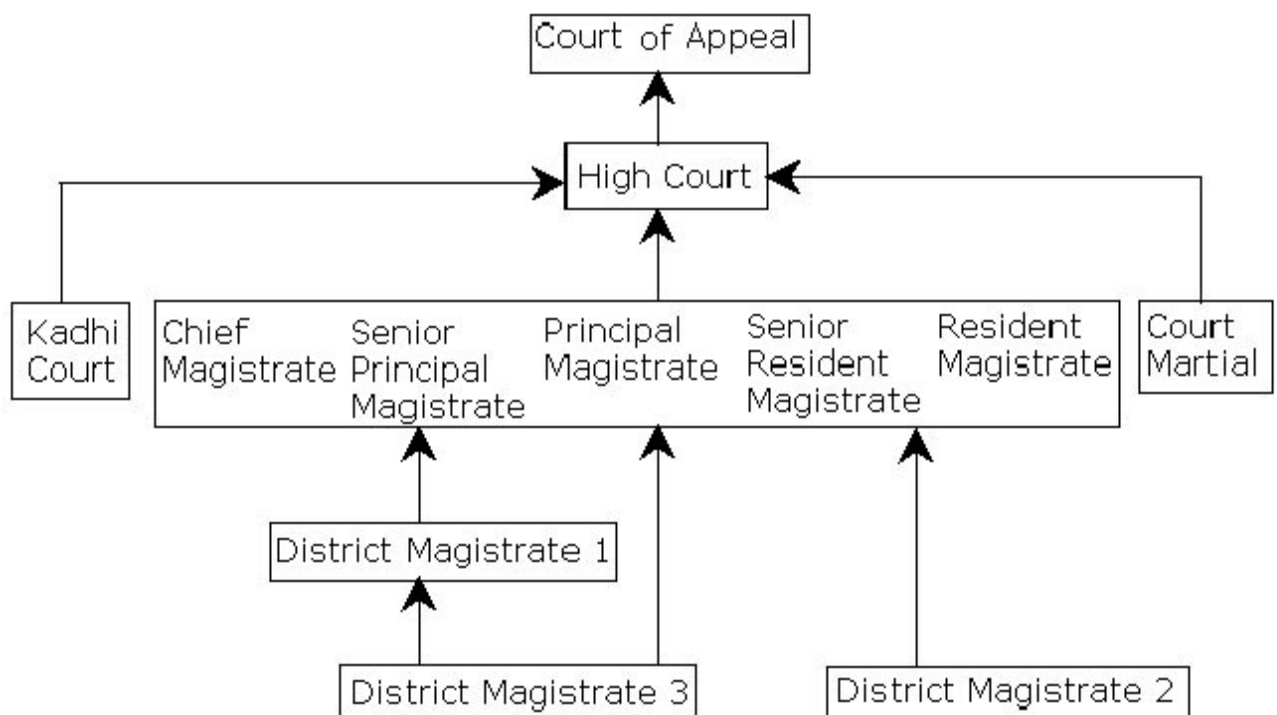
⁷⁶ Art 3 Kenya Constitution.

⁷⁷ Country reports Kenya. Sourced from Institute of Security Studies <http://www.iss.co.za/Af/profiles/Kenya/Politics.html> (accessed 3 January 2007).

⁷⁸ The Proposed New Constitution of Kenya, Kenya Gazette Supplement, 2005 (Wako Draft Constitution) dubbed after Kenya's current Attorney General who published the Bill).

1.4.2 Court structure

The Judiciary is the third branch of government (alongside the executive and the legislature) and is established under Chapter IV of the Constitution of Kenya. It has the fundamental role of checking the activities of other state organs (or branches), thus promoting individual liberties.⁷⁹ Although the Constitution of Kenya provides for an independent judiciary, the president has considerable influence over it as he appoints the Chief Justice as well as High Court judges upon the advice of the Judicial Service Commission.⁸⁰ The courts display the following hierarchical structure:



1.4.3 Status of international law and ratifications

The Constitution of Kenya is silent on the status of international law in Kenya.⁸¹ However, international treaties do not have the effect of law in Kenya unless they have been incorporated into Kenyan law through enactment by Parliament. Only the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child have been fully

⁷⁹ Sourced at <http://www.judiciary.go.ke/c-structure.html> (accessed 10 January 2007).

⁸⁰ Art 61(1) and (2) Kenya Constitution.

⁸¹ C Heyns (ed) *Human Rights Law in Africa* (2004) 1181.

domesticated by promulgation of the Children’s Act (Chapter 586 of the Laws of Kenya).⁸² Although ‘other international human rights instruments (including the African Charter) have not been domesticated through national legislation, it is worth noting that the language of the Bill of Rights in the Constitution of Kenya is similar to that of the ICCPR and African Charter’, apart from the absence of socio economic and group rights.⁸³ However, the United Nations (UN) Human Rights Committee has urged Kenya to ‘allow ICCPR rights to be invoked in domestic Courts’, noting that its provisions had not been domesticated.⁸⁴ Kenyan Courts are also slowly beginning to take account of international instruments that have been ratified but not domesticated. For instance, in *RM and Another v AG*, the Kenya High Court adopted the reasoning of Justice Musumali of the Zambian High Court in holding that:

Ratification of such instruments by a nation state without reservation is a clear testimony of the willingness by the state to be bound by the provision of such (a Treaty). Since there is that willingness if an issue comes before this court which would not be covered by local legislation but would be covered by international instruments, I would take judicial notice of that Treaty or Convention in my resolution of the dispute.⁸⁵

Such a finding is important for indigenous peoples in Kenya who may invoke international standards and comparative jurisprudence to protect their rights, especially where the existing legal framework fails to do so. However, it is important to note that the general principle on the application of international standards and norms in Kenya, as with most other common-law jurisdictions, is that unless international instruments are domesticated they do not have the force of law.⁸⁶

The following are some of the key human rights treaties to which Kenya is party.

Instrument	Date of deposit of ratification/accession
International Covenant on Civil and Political Rights (ICCPR)	1 May 1972
International Covenant on Economic, Social and Cultural Rights (ICESCR)	1 May 1972

⁸² See Report to the ACHPR para 18.

⁸³ As above.

⁸⁴ Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: International Covenant on Civil And Political Rights: Concluding Observations of the Human Rights Committee: Kenya, CCPR/CO/83/KEN (HRC, Kenya 2005) para 8.

⁸⁵ See *Sara Longwe v Intercontinental Hotels Ltd* (1993) 4 LRC 221, cited in *RM and another v AG* 9 (It is worth noting that despite Kenya adopting the position of the *Sara Longwe* case, subsequent jurisprudence in Zambia has departed from that position as emerged from discussions with Prof M Hansungule, Centre for Human Rights, University of Pretoria).

⁸⁶ See *RM and Another v AG, High Court of Kenya Nairobi Civil case no 1351* of 2002, sourced at www.kenyalaw.org (2006eKLR.) (9 accessed 10 February 2008) 9; see also *Okunda v Republic* (1970) EA, 453; *Pattni v Republic*, Miscellaneous Civil Application 322 & 810 of 1999 (consolidated) Kenya Law Reports (2001) KLR 264.

Optional Protocol to ICCPR	-
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	13 September 2001
Art 14 of CERD	-
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	9 March 1984
Optional Protocol to CEDAW	-
Convention on the Rights of the Child (CRC)	30 July 1990
Optional Protocol to CRC- Armed Conflict	28 January 2002
Protocol to CRC - Sexual Exploitation	
Convention on the Prevention and Punishment of the Crime of Genocide	-
Slavery Convention 1927	-
Supplementary Slavery Convention 1956	
Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or punishment(CAT)	21 February 1997
Art 22 of CAT	-
International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (CMW)	
Art 77 of CMW	
Convention on Biological Diversity	26 July 1994

Relevant ILO Conventions

Convention	Date of ratification
ILO 29 (Forced Labour)	13 January 1964
ILO 105 (Abolition of Forced Labour)	13 January 1964
ILO 100 (Equal remuneration)	07 May 2001
ILO 111 (Discrimination in Employment and Occupation)	07 May 2001
ILO 107 (Indigenous and Tribal Populations)	-
ILO 169 (Indigenous Peoples)	-
ILO 138 (Minimum Age)	09 April 1979
ILO 182 (Worst Forms of Child Labour)	07 May 2001

AU instruments

African Charter on Human and Peoples' Rights	23 January 1992
Convention Governing the Specific Aspects of Refugee Problems in Africa	23 June 1992
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	-
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an	4 February 2004

African Court on Human and Peoples' Rights	
African Charter on the Rights and Welfare of the Child	25 July 2000
Cultural Charter for Africa	28 October 1981
Convention on Nature and Natural Resources, 1968	12 May 1969
Revised Version of Convention on Nature and Natural Resources, 2003	-

Status of reporting under the African Charter on Human and Peoples' Rights

Kenya submitted its initial state report to the African Commission on Human and Peoples' Rights (African Commission) in 2007. The report was considered during the 41st Ordinary Session of the African Commission, in Ghana in May 2007.

NEPAD Peer Review Mechanism

Kenya 'acceded to the Peer Review Mechanism of the New Partnership for Africa's Development in March 2003 in Abuja, Nigeria. The country has since submitted its self-assessment report and a Draft National Programme of Action and a Peer Review Panel of Eminent Persons conducted its own assessment'.⁸⁷ A report of the assessment report has since been published. Part II of this report relies upon some of the findings and recommendations made by the APRM.

1.5 Institutional and policy bodies protecting indigenous peoples

One of the main bodies charged with human rights protection and promotion in Kenya is the Kenya National Commission on Human Rights established in 2003 as a statutory and autonomous body that acts as a watchdog to ensure the protection and promotion of human rights in the country.⁸⁸ Other relevant institutions and organs include the Gender Commission; Kenya Anti-Corruption Commission; National Council for Children's Services; National Council on Persons with Disabilities; the Law Reform Commission whose mandate includes reviewing all oppressive laws; the Ministry of Justice and Constitutional Affairs, the Department of Governance and Ethics under the Office of the President, the Attorney-General, the Judiciary and the Police.

⁸⁷ See Country Review Report of the Republic of Kenya, African Peer Review mechanism, May 2006 (APRM Report).

⁸⁸ See Kenya National Commission on Human Rights Act of 2003.

Part II: Legal protection of indigenous peoples in Kenya

A Introduction

This section highlights the legal framework protecting and promoting indigenous peoples in Kenya. The section captures some of the key provisions of the laws that have a bearing on indigenous peoples, particularly constitutional and statutory law. Where applicable, provisions of the proposed Draft Constitution of Kenya⁸⁹ are discussed in a bid to identify potential protection for indigenous peoples' rights. Given that the Draft Constitution has not yet been enacted, the examination of some of its provisions is limited to what could be regarded as progressive provisions that will hopefully be retained when the Constitution is adopted.

1 Recognition and identification

One of the key hurdles facing indigenous peoples in their pursuit to have their fundamental rights and freedoms protected is the lack of official recognition of them as groups with specific needs, cultures and ways of life. In Kenya, the state has maintained that all Kenyans, irrespective of their tribal affiliations, are treated equally and in essence are indigenous to the country.⁹⁰ The lack of official recognition of indigenous peoples as indigenous or as distinct peoples in Kenya has had the effect of deliberate 'exclusion in policy processes, non effective consultation in development and [has caused them to] become victims of assimilation'.⁹¹ However, the state has recently

⁸⁹ See Wako Draft Constitution. Although the Draft had some provisions that were not suitable for indigenous peoples and was indeed rejected by Kenyans during the National Referendum on the Constitution of November 2005, the provisions applied in this report would be what would be termed non-contentious and essentially reflect the Bomas Draft Constitution's provisions. The reference to the Wako Draft Constitution' in this report as opposed to the Bomas Draft Constitution is also made on the basis that the Wako Draft Constitution is the only draft that was officially published in the Government Gazette and as such will always stand out as the official legal document that was presented to Kenyans for adoption or rejection during the referendum. Further, the provisions referred to in this report, if adopted, would indeed protect the rights of indigenous peoples and it is hoped that in the Constitution that will eventually be adopted such provisions will be retained. The Constitution review process in Kenya remains one of the outstanding issues that demands resolution by all Kenyans. 2007 is a general election year and political parties have set in motion a clamour to accomplish reforms to pave the way for a free and fair election and it is hoped that in due time comprehensive reforms will be undertaken that capture the rights of indigenous people. See also n 3 above, 442 on some of the concerns of indigenous people in the Draft Constitution.

⁹⁰ See the opening statement of the state in its response to the African Communication in *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v Kenya* (n 13 above). The state avers that: Kenya consists of more than 42 indigenous tribes occupying different parts of the country. However, with modernisation and improved infrastructure and other extenuating factors, Kenyans have experienced a heightened level of interaction amongst these communities. Therefore, it is very common to find co-existence of different tribes in areas previously known to be inhabited by one or another tribe.

⁹¹ See Report of the Round Table Meeting of Experts in Nairobi; see also Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 11.

acknowledged that, while in the past it did not take any active measures to preserve and protect minorities in Kenya, ‘there has been a gradual acceptance of their status and there are efforts being made to not only recognise these minorities, but also encourage their survival and protection’.⁹²

Official sources state that the country comprises ‘of 42 tribes, omitting many smaller pastoralist and hunter-gatherer communities such as the Ogiek, El Molo, Watta, Munyayaya, Yakuu and such others’.⁹³ The UN Special Rapporteur observes that ‘this situation is derived from colonial policy of promoting assimilation of smaller communities into other dominant groups’.⁹⁴ This has had the effect of reducing the visibility of such assimilated communities or leaving them out of national policy-making and budget allocations.⁹⁵ The UN Committee on Economic Social and Cultural Rights has noted equally that the Nubians and the Ogiek are not recognised as distinct ethnic communities, and called on the state to accord them such recognition as their ‘their right to the preservation, protection and development of their cultural heritage and identity’.⁹⁶ It is imperative, therefore, that the state acknowledges and provides disaggregated data of these groups in a bid to ensure that they are not left at the margins of development policies and programs.

To indigenous peoples, legal identity is very important as,, apart from conferring citizenship rights, it ensures that members of an identified group benefit from government economic policies and programmes. Various laws, including Kenya’s supreme law, the Constitution, address the issue of the identity of Kenya’s citizens. Chapter six of the current Constitution of Kenya provides for citizenship by birth, registration and naturalisation. The Kenya Citizenship Act Cap 170 governs the granting and losing of citizenship. Section 11 of the Children’s Act 8 of 2001 provides that every child shall have the right to a name and nationality and, where a child is deprived of his identity, the government shall provide appropriate assistance and protection with a view to establishing his identity. The Births and Deaths Registration Act Chapter 149 also stipulates that everyone born in Kenya must have their birth registered as well as their death. A birth certificate is issued upon such registration and is associated with the person’s identity.

⁹² Second Periodic Report of Kenya to the UN Human Rights Committee para 212.

⁹³ See also Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 21.

⁹⁴ As above.

⁹⁵ As above.

⁹⁶ See Concluding observation of the Committee on Economic, Social and Cultural Rights on Kenya’s Initial Report on ECOSOC rights at the 41st session Geneva, 3-21 November 2008, E/C.12/KEN/CO/1 para 35.

However, certain communities, especially those living in inaccessible and remote places, often fail to register births and deaths because registration centres are centralised. This is particularly true for babies who are not born in hospital as is the case with most rural people.⁹⁷ A birth certificate is important since it is the document that shows proof of birth place, clan and region, and which eventually is used to acquire a national identity card and passport. The Somali, for example, a group self-identifying as indigenous to Kenya, is a group which has had problems with identity documents. This is usually attributed to the historical marginalisation of the community and its infiltration of Somalis from Somalia. Somalis are therefore denied full citizenship rights, including the right to vote, travel, work and other rights and obligations related to citizens.⁹⁸

2 Non-discrimination

The Kenyan Constitution prohibits discrimination on a number of listed grounds. Section 70 of the Constitution provides that ‘every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest’, to each of the rights listed in section 70 (a) to (c). Section 82 of the Constitution also provides for protection from discrimination. Section 82(3) of the Constitution seeks to expound discriminatory practices by stipulating that the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their description by race, tribe, place of origin or residence or other connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject to or are accorded privileges or advantages which are not accorded to persons of another such description. Section 82(1) further provides that no law shall make any provision that is discriminatory either of itself or in its effect.

However, despite these provisions, ‘post-independence politics in Kenya have been characterised by ethnicity, reflecting patterns of super-ordinate and subordinate ethnic relations and

⁹⁷ Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of The Committee on The Rights of the Child: Kenya, CRC/C/15/ADD.160 (CRC, Kenya 2001) para 31.

⁹⁸ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 21.

inequality’.⁹⁹ Inequality is traced to colonial and post-colonial imbalances of diverting resources and ‘development programmes to certain regions in Kenya, which has perpetuated regional and ethnic inequalities’.¹⁰⁰ The colonialists acquired the most fertile and well-endowed areas in what are referred to as the ‘white highlands’, thereby developing the regions’ infrastructure and social services. Most of these areas were situated in central Kenya, the highlands in the Rift Valley and parts of western Kenya. The rest of the country was marginalised, particularly regions around the plains and the semi-arid areas where most indigenous peoples in Kenya live. This neglect is still evident today, particularly since independent governments have entrenched the colonial policy of only developing the regions with the highest agricultural potential and returns. Sessional Paper 10 of 1966, African Socialism and its Application to Planning in Kenya,¹⁰¹ was the principal policy that formalised inequality.¹⁰² Subsequent laws, policies and state directives did little to attempt to rectify this marginalisation ‘against certain geographically and ethnically aligned communities that were left out of the mainstream development processes’.¹⁰³

Certain communities, particularly those residing in the semi-arid and arid areas of the country, were excluded through what were referred to as the Northern Frontier Districts. The exclusion and discriminatory practices were made official during the colonial regime through, among others, the Outlying Districts Ordinance, the Special Districts (Administration) Ordinance 1934 and the Stock Theft and Produce Ordinance 1933, which were retained by post-colonial authorities. These laws caused economic hardship and increased insecurity, exacerbated by government forces with executions and massacres in those regions.¹⁰⁴ Section 19 of the Kenya Independence Order in Council (Kenya subsidiary legislation, 1963) provided that the Governor-General ‘may, by regulations which shall be published in the Kenya Gazette, make such provision as appears to him to be necessary or expedient for the purpose of ensuring effective government or in relation to the North Eastern Region and without prejudice to the generality of that power, he may by such regulation make such temporary adaptations, modifications or qualifications or exceptions to the Provisions of the Constitution or of any other law as appear to him to be necessary’. Through such orders, any form of insecurity in that region was met with declarations of states of emergency that resulted in mass killings and displacement of indigenous peoples. This

⁹⁹ APRM Report 14.

¹⁰⁰ APRM Report 27.

¹⁰¹ ‘African Socialism and its Application to Planning in Kenya’ Sessional Paper 10 (1966).

¹⁰² APRM Report 46.

¹⁰³ APRM Report 47.

¹⁰⁴ The infamous Wagalla massacres of North Eastern province are a case in point.

situation was only changed through the 1997 Inter-Parliamentary Parties Group (IPPG) Reforms, aimed at creating a level playing field for the general elections of that year.

Various acts of Parliament have sought to provide for equality but, as noted earlier, these provisions are not reflected in the policies and practices of the state. The Education Act Chapter 211, and the Employment Act Chapter 226, for example, provide for equality and equal opportunities for boys and girls; men and women. In its concluding observations on Kenya's initial report to the UN Committee on Economic Social and Cultural Rights, the Committee praised Kenya for adopting legislation to eliminate discrimination against disadvantaged and marginalised individuals and groups.¹⁰⁵ Although the legislation in question relates to refugees, asylum seekers¹⁰⁶ and persons with disabilities,¹⁰⁷ it is an indication that Kenya could adopt specific legislation, if there is the political will to do so, to redress the historical marginalisation of indigenous communities.

Section 37(1) of the Wako draft Constitution adds more grounds to those enumerated in the current Constitution, to include culture, ethnic or social origin as well as language and religion. Section 38 of the draft Constitution further provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social activities.

3 Self management

The Preamble to the ILO Convention 169 recognises the aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages, and religions, within the framework of the states in which they live. Kenya's political history and the entrenchment of a centralised system of government have had the effect of denying indigenous peoples the right to manage their own affairs in accordance with their own traditions, customs and ways of life.¹⁰⁸ Kenya is a unitary state with a powerful central government in accordance with the Constitution. Attempts to provide for devolved (federal) government in the ongoing constitutional review process caused

¹⁰⁵ See Concluding observations of the Committee on Economic, Social and Cultural Rights on Kenyas Intial Report on ECOSOC rights at the 41st session Geneva, 3-21 November 2008, E/C.12/KEN/CO/1 (Concluding observations of ECOSOC Committee) para 5.

¹⁰⁶ Refugees Act of 2006.

¹⁰⁷ Persons with Disabilities Act.

¹⁰⁸ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya paras 22 & 23.

considerable controversy. Moreover, in the final document presented to the Kenyan people to ratify during the national referendum the issue was amongst the most contentious issues.¹⁰⁹ The envisaged devolved government supported by most Kenyans is a system where ‘the authority to make decisions in one sphere of public policy is delegated by law to sub-national territorial assemblies (such as local authorities)’.¹¹⁰ Incidentally, at independence Kenya was a constitutionally-devolved (Majimbo state).¹¹¹ The country at independence was divided into semi-autonomous regions namely, the Coast, Eastern, Rift Valley, Nyanza, Western, and the Nairobi regions. A Regional Assembly existed, consisting of elected representatives. Each region was further divided into local authorities with elected members at the local level. The regions were abolished by means of constitutional amendments in 1964 -969, which included removing the powers of Regional Assemblies, removing the administrative and financial autonomy of the regions and finally merging the two national houses of assembly, namely, the Senate and the House of Representatives to form a unicameral House.¹¹²

Today the central government in Kenya is accorded extensive powers in the administration of the country. The eight provinces and local authorities are controlled by the executive. The President (head of the executive) appoints all the Provincial Commissioners who are civil servants. Given that the provincial administrators are not direct representatives of the population, they have limited say in how provincial affairs are managed. The executive, through the provincial administration, retains control of the provinces through the allocation of budgets and the implementation of centrally-derived policies. Although composed of locally-elected leaders, local authorities are governed by clerks who are civil servants, in most cases implementing central government policies and directives.

Traditional leadership is not formally recognised in Kenya and the state-appointed provincial administrators are often out of touch with the people’s needs. Elections to the National Assembly

¹⁰⁹ See Wako Draft Constitution presented during the National Referendum in November 2005 (it was the present government’s supported draft as opposed to the Bomas Draft which provided for devolved government and which was endorsed by delegates during the National Constitutional Conference). The Wako Draft was eventually opposed by the majority of Kenya and to date a new Constitution is yet to be adopted and the country is still functioning in terms of the Independence Constitution of 1963 with numerous amendments that have given immense powers to the executive and the central government.

¹¹⁰ See The Report of the Constitution of Kenya Review Commission vol 1 (the main report) (2003) (CKRC Report) 273.

¹¹¹ CKRC Report 279.

¹¹² CKRC Report 281.

and local authorities (councillors)¹¹³ do not always reflect the interests of indigenous people and minorities because the Kenyan electoral system is based on universal suffrage and the majority vote wins the elections. In the absence of express provisions and special measures of representation, indigenous peoples and minorities continue to be marginalised in elective politics. This situation has been acknowledged by the High Court in the case of *Rangal Lemeiguran & Others v Attorney-General & Others (Il Chamus Case)*¹¹⁴ discussed below.

It is therefore important that the question of the devolution of powers is comprehensively addressed through constitutional and legislative reforms. It is hoped that in the ongoing constitutional review negotiations parties will agree to recognise the need to give local communities the capacity and power to manage their affairs according to their culture, traditions and way of life as long as it is not contradictory to the Bill of Rights.

4 Participation and consultation

Participation and consultation entail, among other things, political participation, consultation in decision-making and in the design and implementation of projects affecting indigenous peoples. While there are no express provisions in the Constitution on indigenous peoples' participation and consultation in decision-making, the Constitution guarantees political participation through provisions in the Bill of Rights, such as the right to assembly, association and expression, as well as the conduct of regular elections. The protection of freedom of assembly and association are also enshrined in section 80 of the Constitution of Kenya, which also provides for situations under which a restriction of the right is permissible. Provisions regulating the exercise of the right are further contained in the Public Order Act, Chapter 56. The freedom of expression is protected in section 79 of the Constitution.

Section 42 of the Constitution establishes the Kenya Electoral Commission. This body is charged with the supervision and staging of elections by secret ballot every five years. Kenya is divided into electoral units known as constituencies which at present number 210 with such boundaries as determined by the Electoral Commission of Kenya. However, indigenous peoples' views and needs are not always represented through this process, as was highlighted in the *Il Chamus* case.¹¹⁵ The Il Chamus community sought a declaration from the Constitutional Court (High

¹¹³ See the Local Government Act (Cap 265) of the Laws of Kenya.

¹¹⁴ *IL Chamus* Miscellaneous Civil Application No 305 of 2004; 2008 3 KLR (EP) 325.

¹¹⁵ *IL Chamus* case (n 114 above).

Court) that the statistical chance of an Il Chamus candidate being elected a member of parliament in the present Baringo Central Constituency¹¹⁶ is in practice so minimal as to effectively deny them any chance of ever being represented in the National House of Assembly (as it has been the situation in the past 40 years). This, they claimed, contravened their fundamental rights, including their freedom of expression and freedom of conscience as protected under section 70 of the Constitution of Kenya. They therefore prayed for a constituency to be created that would cater for them and reflect their needs and aspirations and the nomination of one of their representatives in Parliament to articulate their issues.

In a landmark decision for indigenous peoples and minorities in Kenya, the High Court held that ‘minorities such as the Il Chamus have the right to participate and influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves. For a political system to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress and thereby lay a sure base for deliberative democracy. Only then would a [n]ation such as ours, truly claim to be a rainbow democracy’.¹¹⁷ This decision has been heralded as marking a positive turn for the recognition of indigenous peoples’ rights and it is hoped that the state will implement the decision by either creating a special constituency for the Il Chamus and other marginalised communities, or by nominating their representatives to Parliament. However, the state has as yet not complied with the decision, which is further evidence of the lack of political will to redress indigenous peoples’ rights in Kenya.

Efforts have been made by the current government to enhance community participation and consultation in development agendas through their constituencies and local authorities. Community participation and consultation are, for example, envisaged through the Constituency Development Fund Act and the Local Authority Transfer Fund Act of 1999 ‘which promote pro-poor identification and implementation of development projects at the local level’.¹¹⁸ The Local Authority Transfer Fund Act enjoins the involvement of local communities in determining priority action programmes. However, while noble, these initiatives, which are aimed at community participation in development projects and decision-making, have been controlled by

¹¹⁶ See above. Baringo District has three ethnic communities: the Pokot, the Il Chamus and the Tugen. It has three constituencies for which the boundaries are such that the Pokot are adequately represented through Baringo East Constituency and the Tugen through Baringo Central and Baringo North. The Il Chamus, it was claimed, have no proper representation through any of these constituencies.

¹¹⁷ *Il Chamus case*.

¹¹⁸ APRM Report 57.

politicians without adequate prioritisation and consultation with the targeted fund beneficiaries. There is a lack of adequate measures and actions for effective decentralisation and capacity to manage these resources for the sole benefit of the communities that are targeted.¹¹⁹

Indigenous peoples in Kenya have in recent years employed ingenious processes to ensure that they participate in issues of national importance. According to representatives of indigenous communities who participated in round-table focus group discussions with the research team for this report, indigenous communities have taken the initiative to be included in processes such as the constitution review process, the drafting of the national land policy and the formulation of a national human rights action plan.¹²⁰ These initiatives include intense lobbying and advocacy amongst groups self-identifying as indigenous peoples in Kenya in a bid to draw attention to their predicament, coupled with constructive engagement of state processes to ensure inclusion in the national processes.¹²¹ While these initiatives have not always originated from state structures, the fact that they have eventually included indigenous peoples - albeit through a conscious effort - is an indication that there is a window of opportunity for the involvement of indigenous peoples in issues of national importance as well as those that affect them.

A number of civil society organisations and the Kenya National Commission on Human Rights show an interest in protecting and promoting the rights of indigenous peoples in Kenya. This has spurred indigenous peoples on to agitate and demand their inclusion and consultation on issues that affect them.¹²² However, despite such self-initiated developments, and support from some institutions, indigenous peoples decry the fact that they still have to fight to be included to participate and to be consulted on issues that affect them, whereas this happens automatically for most of the mainstream communities.¹²³ For instance, the Ogiek community of the Mau and

¹¹⁹ APRM Report 75.

¹²⁰ Deliberations during focus group discussions with members of indigenous communities in Nairobi, Nakuru and Nanyuki with the research team.

¹²¹ As above.

¹²² The Kenya National Commission on Human Rights, in collaboration with indigenous peoples' organisations, has held round-table discussions on the issues faced by indigenous peoples in Kenya that have resulted in increased visibility of these issues on the national human rights agenda. See, for example, Report of the Round Table Meeting of Experts on Minorities and Indigenous Peoples in Kenya, Kenya National Commission on Human Rights and Centre for Minority Rights Development, Nairobi, 30-31 October 2006. It is instructive that the Kenya National Commission on Human Rights facilitated and co-ordinated the in-depth study mission to Kenya and also hosted the Nairobi Round Table discussions with indigenous peoples with the research team for this report on 5 September 2008.

¹²³ Deliberations during focus group discussions with members of indigenous communities in Nairobi, Nakuru and Nanyuki with the research team.

Mukogodo forests currently face the risk of evictions from their ancestral lands through unilateral decisions that completely failed to consult them.¹²⁴

5 Access to justice

The Constitution of Kenya grants direct access to the High Court to anyone whose fundamental human rights and freedoms have been violated. Section 84 of the Constitution provides in part that ‘where a person alleges that [his fundamental right] is being or is likely to be contravened in relation to him, that person may apply to the High Court for redress’. Section 66 of the Constitution also provides for the establishment of a High Court of Kenya, which is a superior court of record and has unlimited jurisdiction in civil and criminal matters, and such other jurisdiction and powers as may be conferred to it by the Constitution or any other law.

However, in practice, most Kenyans do not have access to the formal justice system, owing to the complex and formal nature of the process and high cost. In September 2008, the government launched a pilot legal aid scheme, which, once it is rolled out in the entire country is likely to assist indigent Kenyans, the majority of whom are indigenous peoples.¹²⁵ The pilot legal aid scheme is a partnership of the executive, the judiciary, Law Society of Kenya, School of Law, national universities and the private sector.¹²⁶ For the first three years, the scheme will focus on three main issues, children rights, capital offences and gender issues, which means that for the foreseeable future, indigenous peoples’ issues - most of which revolve around land disputes - are unlikely to benefit from the scheme.¹²⁷ In the past, free legal aid in Kenya was only available to persons charged in the High Court with capital offences. The few NGOs that provide some form of legal aid, such as Kituo cha Sheria, Federation of Kenyan Women Lawyers, Center for Minority Rights Development, are a drop in the ocean when balanced with the large number of people whose rights are violated and who seek and deserve constitutional protection.

Due to poverty and a limited knowledge of the law, indigenous peoples mainly rely on lawyers willing work on a *pro bono basis*. Unfortunately, most *pro bono* briefs are not always allocated adequate resources,, resulting in cases taken up on a *pro bono* basis being inadequately prepared.

¹²⁴ Deliberations during focus group discussions with members of indigenous communities in Nakuru with the research team; see also <<http://www.ogiek.org/>> (accessed on 12 October 2008).

¹²⁵ Discussions with officials of the Ministry of Justice, National Cohesion and Constitutional Affairs in Nairobi, in September 2008.

¹²⁶ As above.

¹²⁷ As above.

In the *Francis Kemai and Others Versus the AG (Ogiek)* case¹²⁸ Justice Samuel Oguk and Richard Kuloba went to great lengths to decry the fact that they were not presented with documentary evidence to prove certain key allegations by the applicants.¹²⁹ While the failure to submit relevant evidence may not necessarily be blamed on the applicants' lawyers, it illustrates the fact that fundamental information that might have influenced the final determination of the suit was not made available. In jurisdictions where court proceedings are adversarial, such as Kenya, the failure to present sufficient evidence and proof is fatal to one's case.

Access to courts for indigenous peoples in Kenya is also hampered by a limited number of courts and judicial officers, especially in the regions and areas they inhabit. Corruption, lack of technical assistance, low performance, lack of accountability, over-centralisation, and a biased application of the law have been identified as impediments to the effective enforcement of law and order in Kenya with serious negative ramifications on indigenous peoples' claims.¹³⁰ The protection of indigenous peoples' rights in Kenya through the courts is also adversely affected by instances of judicial interference and a perceived lack of independence from the executive. According to Kenya's Constitution, judges are appointed by the President upon the advice of the Judicial Service Commission.¹³¹ Members of the Judicial Service Commission are all appointees of the President and although they are required by the Constitution not to be subject to the direction or control of any other person or authority, the reality is sometimes different.¹³² Parliament, for example, does not scrutinise or endorse these appointments and, indeed, in the past there have been widespread instances of the President appointing persons who have attracted public criticism because of their lack of qualifications, past character and ethical standards.¹³³ The Kenyan

¹²⁸ *Francis Kemai and Others v The AG and others HCC 238/1999 (Ogiek case)* sourced from www.ogiek.org (accessed on 15 December 2006). The Ogiek considered indigenous peoples had launched the case in the High Court espousing their rights to lands contending that the state continued to sanction a series of efforts to dispossess them of their land besides seeking to exterminate, assimilate and impoverish them through constant evictions and disruption of their traditional lifestyles. See also TJ Kimaiyo *Ogiek Land Cases and Historical Injustices 1902-2004*, vol 1, Ogiek Welfare Council (2004).

¹²⁹ *Ogiek case*, paras 41, 46, 49, 59, 60 and 63.

¹³⁰ See HRC, Kenya 2005 para 20; see also APRM Report (n 87 above) 68; see also Concluding observations of ECOSOC Committee (n 105 above) para 10.

¹³¹ Art 61(2) Kenya Constitution.

¹³² Art 68 Kenya Constitution.

¹³³ See K Waiganjo 'Administrative and institutional reforms in the Kenyan Judiciary' in B Sihanya and P Kichana (eds) *Judiciary Reform in Kenya, 1998-2003*, Kenya Section of the International Commission of Jurists (ICJ) (2004) 1 *Judiciary Watch Series* Cap 4. Retired President Moi is on record as having appointed a former Chief Justice who had prior to his appointment been declared bankrupt, pardoned by the President and later appointed to head the Electoral Commission and finally the judiciary. Others have been persons in the judiciary whose legal qualifications in terms of the Constitutional requirements are wanting.

executive is also known for disregarding the decisions of the courts when it suits them. For example, President Mwai Kibaki and members of his cabinet have since assuming power on several occasions blatantly disregarded the rule of law by ignoring court orders.¹³⁴ The UN Human Rights Committee has expressed concern over the frequent failure to enforce court orders and judgments.¹³⁵

Indigenous peoples also rely on traditional justice systems which apply African customary laws and traditions. However, 'with the exception of Kadhis (Islamic Courts) there is only a limited recognition of traditional or customary justice systems'.¹³⁶ Kadhis courts are popular in North Eastern Kenya where the Somali indigenous peoples are resident. See the discussion on culture and language rights below, on the extent to which customary law applies in Kenya

6 Cultural and language rights

The current Constitution of Kenya does not have express provisions addressing cultural rights. Some cultural rights may, however, be derived from section 78 of the Constitution which provides for the protection of freedom of conscience. The freedom of conscience includes 'freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone, or in community with others, and both in public and in private to manifest and propagate his religion or belief in worship, teaching, practice and observance'.¹³⁷ This may be interpreted to mean that an individual or community has the right to cultural practices, religious and spiritual practices. However, such practice must be consistent with the Constitution and any other law reasonably required in the interests of defence, public safety, public order, public morality or public health as well as in protection of the rights of others.¹³⁸

¹³⁴ See 'A press statement by the Kenyan section of the International Commission of Jurists on the repossession of illegally/irregularly acquired public land' July 6, 2005 sourced at <http://www.icj-kenya.org/news.asp> (accessed 7 July 2007); see also <www.ogiek.com/news/news-post-05-11-5.htm - 16k> (accessed on 7 July 2007). Ruling on an application brought under a certificate of urgency, Musinga J barred the Commissioner of Lands from issuing the deeds until the suit is settled. A week later the President went ahead to issue the title deeds www.eastandard.net (accessed 17 October 2005). A report by a NGO, The Centre for Law and Research International (Clarion) also named members of the cabinet, Amos Kimunya, William ole Ntimama, Raphael Tuju, Ali Mwakwere and Karisa Maitha (deceased). It additionally named Mr Kalonzo Musyoka and Raila Odinga as asking retired President Moi to ignore orders asking him to appear before the Goldenberg Commission of Inquiry <www.eastandard.net> (accessed 22 June 2005).

¹³⁵ HRC, Kenya 2005 para 9.

¹³⁶ See report of the UN Special Rapporteur on Indigenous Peoples in Kenya (n 4 above) para 64.

¹³⁷ Art 78(1) Kenya Constitution.

¹³⁸ Art 78(5) Kenya Constitution.

Some recognition of cultural rights may be inferred from the current Constitution's reference to customary law in chapter nine with regard to trust land. Section 115(2) of the Constitution provides that 'each county council shall hold trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may be vested under the African customary law in any tribe, group, family or individual'. However, the extent to which customary law is applicable is limited by the 'repugnancy clause' as envisaged by sub-section 115(2) of the current Constitution which states 'no right, interest or other benefit under customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law'. The repugnancy clause therefore subordinates and deprecates culture or customary law. Although the Constitution provides that customary law shall apply in the determination of the rights accruing to individuals and communities in trust land, and as such would be regarded as a recognition of culture, customs and traditions of a people, its application is limited by the repugnancy clause.

Kenyan statutory law recognises customary law 'for the determination of matters of adoption, marriage, divorce, and burial, devolution of property on death or other matters of personal law'.¹³⁹ The Judicature Act (Cap 8), for example, provides that jurisdiction of courts must be guided by customary law as far as it is applicable and not repugnant to justice and morality or inconsistent with any written law. The Law of Succession Act (Cap 160), which came into effect in 1981, also recognises customary law in succession matters.

Indigenous peoples' cultures are also linked to spiritual freedom.¹⁴⁰ Culture 'may include ancestor worship, religious or spiritual ceremonies, oral traditions and rituals'.¹⁴¹ As earlier indicated, in section 78 the Kenyan Constitution guarantees freedom of religion, by implication including indigenous peoples' spiritual practices and forms of worship. Apart from the domestic legal framework, Kenya is a party to the ICCPR.¹⁴² Article 27 of the ICCPR provides that 'in those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own

¹³⁹ See Second Periodic Report of Kenya to the UN Human Rights Committee, *CCPR/C/KEN/2004/2* 27 September 2004 para 29.

¹⁴⁰ See ILO *Convention on Indigenous and Tribal Peoples A Manual* (2003) 24.

¹⁴¹ As above.

¹⁴² International Covenant on Civil and Political Rights, 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171 (ICCPR) (Kenya ratified this Convention on 1 May 1972).

language'.¹⁴³ Kenya is therefore obliged to uphold its international law obligations by giving effect to this provision, which has been interpreted by the UN Human Rights Committee to include 'economic and social activities which are part of the culture of community' to which indigenous peoples belong.¹⁴⁴

The Wako Draft Constitution devotes a full chapter (chapter five) to Culture. It recognises culture as the foundation of the nation, the cumulative civilization of the Kenyan people and communities, and the bedrock on which all spheres of individuals and collectives are based.¹⁴⁵ The Draft Constitution provides for some progressive provisions with regard to indigenous peoples' rights generally, and issues of culture in particular. It further establishes a National Commission on Culture.¹⁴⁶

The Draft further provides for the right to language and culture in the Bill of Rights.¹⁴⁷ It provides that 'a person belonging to a cultural or linguistic community shall not be denied the right, with other members of that community to enjoy that person's culture and use that person's language; or form, join and maintain cultural and linguistic associations and other organs of civil society'.¹⁴⁸ The Draft, in recognition of some forced practices of certain customary rites such as female circumcision (Female Genital Mutilation), prohibits any person from compelling anyone to perform, observe or undergo any cultural practice or rite.¹⁴⁹

The Ministry of Gender, Sports, Culture and Social Services is currently charged with the responsibility of promoting culture. However, like most state organs, the Ministry has given eminence to the mainstream communities in all sectors and culture is no exception. The cultures of some indigenous peoples have only been seen in the light of the lucrative tourism industry where the culture and traditions of the Maasai, for example, have been exploited to earn the state revenue.

¹⁴³ Art 27 ICCPR.

¹⁴⁴ *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, Communication 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (1990) para 32.2.

¹⁴⁵ Sec 26(1) Wako Draft Constitution.

¹⁴⁶ Sec 27(1) Wako Draft Constitution; see some critique in IWGIA (n 3 above) 442.

¹⁴⁷ Sec 68 Wako Draft Constitution.

¹⁴⁸ Sec 68(2) Wako Draft Constitution.

¹⁴⁹ Sec 68(3) Wako Draft Constitution.

Culture is mainly transmitted through language given that most customs, traditions and cultural expressions find meaning in oral traditions. However, the current Constitution of Kenya does not specifically provide for language rights. The only reference to language in the Constitution is section 53(1), with regard to the official languages of the National Assembly which are Swahili and English. The business of the National Assembly is to be conducted in either or both languages. However, since independence English has been given prominence and indeed is the *de facto* official language.¹⁵⁰ It has been argued that the fact that there is too much ethnic and linguistic diversity prompted the decision not to choose any or some of the local languages over the others.¹⁵¹ It was hoped that ‘neutral’ languages like English and Swahili would enhance national unity and avoid ethnic rivalry. Unfortunately this has not been the case and indeed ethnicity and inequality among the various tribes in Kenya are major issues identified as being hindrances to realising its development objectives.¹⁵²

Section 9 of the Wako Draft Constitution formally provides for Swahili to be the national language of Kenya.¹⁵³ It further recognises English and Swahili as official languages. Although the Draft does not make official any of the other languages of the diverse tribes in Kenya, including indigenous peoples’ languages, it does provide for the right to language and culture in the Bill of Rights.¹⁵⁴ The section provides that every person has the right to use the language and to participate in the cultural life of their choice. Although these provisions do not provide for the development and promotion of the use of diverse Kenyan languages, it would be a positive development in that it provides for the right to use a language of one choice. It is therefore hoped that a new constitution will retain these draft provisions and possibly provide for the development and promotion of all Kenyan languages, including indigenous peoples’ languages.

7 Education

The right to education is not included in the current Kenya Constitution. The Education Act (Cap 211) regulates education in Kenya. However, in 2003 universal and free primary education was introduced, improving access to the education system for most Kenyan children including indigenous children who would otherwise have been locked out of education due to its cost. However, implementation remains a challenge due to the urgent need for expansion of resources

¹⁵⁰ See CKRC (n 110 above) 161.

¹⁵¹ CKRC Report 162.

¹⁵² APRM Report 14.

¹⁵³ Sec 9(1) Wako Draft Constitution.

¹⁵⁴ Sec 68(1) Wako Draft Constitution.

such as classrooms, books and materials and related supplies with increased demand on the secondary school and tertiary institutions.¹⁵⁵

Of particular concern to indigenous peoples is the fact that access to alternative education models appropriate for children of pastoral and nomadic groups is still not provided by the state. Indeed, the UN Committee on Economic Social and Cultural Rights noted ‘with concern that children from poor families, pregnant girls, children living in remote rural areas and in informal settlements, nomadic children . . . have limited access to education’, and as such recommends that Kenya...‘ensures adequate access for nomadic children to mobile schools, including in the North Eastern Province . . .’¹⁵⁶

The lack of appropriate and relevant education for indigenous children hampers their access to primary education as well as higher education. Therefore, despite the provision of free and compulsory education to all children, ‘there is no comprehensive strategy that ensures that the curriculum and the education system is relevant to the livelihood situation of pastoralists and hunter gatherers’.¹⁵⁷ If free and compulsory primary education is to make sense and add value to these communities, the curriculum needs to be ‘relevant, flexible and appropriate for the specific communities; in the case of the pastoralists on animal husbandry’.¹⁵⁸ A local NGO in Kenya, the Shepherd Education Project, for example, has broken new ground through an innovative program that addresses pastoralists’ children’s needs. ‘The project provides learning classes in the afternoons and evenings at strategic points of easy access to the shepherds. Classes are also provided on holidays when formal schools are closed and the children attending formal schools can relieve their brothers and sisters of domestic herding work’.¹⁵⁹ Similar programmes and initiatives specific to indigenous children could be instituted by the state in other districts and regions where indigenous peoples reside. In a welcome and positive development, the government has established a desk for non-formal education at the Ministry of Education that is intended to harmonise and facilitate access to non-formal education that is hoped will include culturally-appropriate education for indigenous children.¹⁶⁰

¹⁵⁵ APRM Report 77.

¹⁵⁶ See Concluding observations of ECOSOC Committee (n 105 above) para 34.

¹⁵⁷ ILO *Handbook on combating child labour among indigenous and tribal peoples* 24.

¹⁵⁸ As above, 26.

¹⁵⁹ As above, 27.

¹⁶⁰ Discussions during a focus group meeting with indigenous peoples in Nanyuki, Kenya in September 2008.

Beyond primary education, secondary and higher education are unfortunately too costly for most indigenous peoples, further marginalising their children. Although the government has launched the Constituency Bursary Fund, the Fund is still insufficient to address indigenous peoples' needs, especially considering that constituencies do not provide for special measures and means to award bursaries to indigenous people. In 2008, the government introduced free secondary education but limited it to the payment of tuition fees. Indeed, the United Nation Committee on Economic, Social and Cultural Rights noted with appreciation that Kenya had introduced free compulsory primary education and free secondary education.¹⁶¹ However, a waiver of tuition fees in secondary schools alone will do little if anything to address the needs of indigent indigenous peoples given that the high cost of secondary education is not necessarily because of tuition fees, but due to the cost of books, accommodation and other related levies, especially for the better equipped schools that guarantee quality education. The state needs to address this concern through a properly-considered legal and policy framework which could include aggressive affirmative action interventions targeting indigenous children, so that the cycle of poverty and marginalisation of indigenous peoples can be redressed.

Section 26(2)(c) of the Wako Draft Constitution calls upon the state to promote research and an education policy that enhances culture and cultural values as well as promotes all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications and libraries.

8 Lands, natural resources and environment

The Kenyan government has acknowledged that issues of minorities (this is the term Kenya seems to prefer to address indigenous peoples' issues) are closely linked to land rights and claims that it is taking proactive measures to address these issues.¹⁶² However, it has been noted that 'Kenya is faced with landlessness on a large scale and with recurrent land disputes among individuals and between communities'.¹⁶³ Land in Kenya is an emotional issue due to the inequality in ownership and the history of dispossessions of indigenous peoples by some mainstream communities with the support of the colonial and post-colonial regimes. This has resulted in resource-based conflicts, mainly due to the 'politicization of land ownership and land rights, arbitrary allocation of community land, scarcity of land for pasture and crop farming,

¹⁶¹ See Concluding observations of ECOSOC Committee (n 105 above) para 7.

¹⁶² As above, para 213; discussions with officials of the Ministry of Justice, National Cohesion and Constitutional development in September 2008.

¹⁶³ APRM Report 24.

struggle for access to and use of water resources, and depletion of limited water'.¹⁶⁴ For example, 'disputes over water usage have threatened the peace of some communities, aggravating ethnic hostilities such as the Maasai/Kikuyu conflicts in Maai Mahiu that occurred in January 2005 in the Rift Valley over the use of River Ewaso Kedong, resulting in the death of 16 people'.¹⁶⁵ The UN Committee on Economic Social and Cultural Rights has noted with concern that 'disparities in the enjoyment of economic, social and cultural rights, including access to land, have led to inter-ethnic tensions and post-election violence during which at least 1,500 persons were killed early in 2008'.¹⁶⁶ The Committee recommends that Kenya address these disparities '... which particularly affect poor people in urban areas and minority and communities in rural areas, eg by adopting the Draft National Land Policy, establishing land inspectorates to monitor discriminatory allocation of land, and implementing the recommendations of the Ndung'u Commission of Inquiry into Illegal/Irregular Allocation of Public Land'.¹⁶⁷

Since colonial times, laws have been employed to dispossess indigenous peoples of their traditional lands. This dispossession is said to have been legalised through the enactment of the Crown Lands Ordinance of 1915.¹⁶⁸ Subsequent colonial land laws and policies were aimed at further disinheritance and marginalisation of Africans.¹⁶⁹ Eventually, through the RJM Swynnerton Plan of 1955, local authorities decided to individualise land tenure, a policy that was adopted and retained by the independent government.¹⁷⁰ On the attainment of independence, the new regime retained the colonial property laws and policies principally through the Registered Land Act (RLA) of 1963.¹⁷¹ The RLA legalised individual land tenure in Kenya.¹⁷²

In 1968, in a bid to address group rights particularly in the semi-arid areas where pastoral and nomadic lifestyles demanded collective land rights, the Land (Group Representatives Act) of

¹⁶⁴ APRM Report 62.

¹⁶⁵ APRM Report 49.

¹⁶⁶ See Concluding observations of ECOSOC Committee (n 105 above) para 12.

¹⁶⁷ See Concluding observations of ECOSOC Committee para 12.

¹⁶⁸ Sec 5 Crown Lands Ordinance, 1915; see Ghai and Mac Auslan (n 59 above) 28.

¹⁶⁹ See, for example, the Native Lands Trust Ordinance 1930, Native Lands Trust (Amendment) Ordinance 1934; Crown Lands (Amendment) Ordinance 1938; native Lands Trust Ordinance 1938; Kenya (Natives Areas) Order in Council 1939 and Kenya (Highlands) Order in Council.

¹⁷⁰ HWO Ogendo *Tenants of the Crown, Evolution of the Agrarian Law and Institutions in Kenya*, (1991) 70.

¹⁷¹ Registered Land Act of 1963 (Cap 300) Laws of Kenya.

¹⁷² Wanjala in Wanjala (n 52 above) 34; See also SC Wanjala 'Problems of land registration and titling in Kenya' in Wanjala (n 52 above) 97.

1968 was enacted.¹⁷³ This was meant to facilitate pastoral communities to own and operate group ranches. The group ranches scheme eventually failed, leading to the sub-division of most of the ranches and it is argued that the group ranches scheme was possibly a deliberate effort by the establishment through conception, legalization and eventual sub-division to open up Maasai territories to the mainstream communities.¹⁷⁴

The current Kenya Constitution deals with land as property, protected by section 75 of the Constitution and as Trust Lands. Section 75 of the Constitution provides that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except under stipulated grounds which include public interest. It further provides for the payment of full and prompt compensation in the event of such acquisition. Land, being property, is thus protected under this provision. However, it could be argued that the land protected under this provision is land registered under the RLA since the Act confers upon an individual absolute title to the land owner.¹⁷⁵

Chapter nine of the Constitution relates to trust lands. The Chapter makes provisions for trust lands managed by the County Council within whose area of jurisdiction it is situated for the benefit of the persons ordinarily resident on that land and gives effect to such rights, interests or other benefits in respect of the land as may, under African customary law, vest in any tribe, group, family or individual.¹⁷⁶ The administration of trust land by the County Council is regulated by the Trust Lands Act.¹⁷⁷ However, entrusting the management and control of such lands to local authorities in many instances has been a recipe for appropriation of community lands by individuals and corporations in total disregard of the rights of local residents. The authority of customary law and the viability of customary tenure are also limited by the Constitution through the repugnancy clause.¹⁷⁸ The clause uses the words ‘no right, interest, or other benefit under

¹⁷³ Land (Group Representatives) Act (cap 287) Laws of Kenya.

¹⁷⁴ See generally Ngugi (n 21 above); I Lenaola, HH Jenner and T Witchert ‘Land tenure in pastoral lands’ in C Juma and JB Ojwang (eds) *In land we trust, environment, private property and constitutional change* (1996); ‘Kenya Land Alliance The National Land Policy in Kenya, Addressing Historical Injustices’ Issue paper 2 (2004); E Mwangi ‘The transformation of property rights in Kenya’s Maasai land: Triggers and motivations’ *International Food Policy Research Institute CAPRI Working Paper 35* (2005); JG Galaty ‘The Land is yours: Social and Economic factors in the privatisation, sub-division and sale of Maasai ranches’ (1992) 30 *Nomadic peoples*.

¹⁷⁵ Secs 27 and 28 Registered Land Act 1963 (Cap 300 Laws of Kenya).

¹⁷⁶ See secs 114 and 115 Kenya Constitution.

¹⁷⁷ Trust Lands Act (Cap 288) Laws of Kenya.

¹⁷⁸ Sec 115(2) Kenya Constitution.

customary law shall have effect...so far as it is repugnant to any written law'.¹⁷⁹ This limitation severely restricts the applicability of communal land tenure which is essentially based on customary law, since most of the Kenyan land laws give eminence to individual land tenure. This is despite the fact that Kenya is a party to the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁸⁰ and is therefore obliged to recognise indigenous peoples' customary land tenure laws. According to the Committee on CERD, the failure to recognise and respect indigenous customary land tenure is a form of racial discrimination incompatible with the Convention and it has therefore called upon states 'to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories'.¹⁸¹

Courts of law have issued conflicting decisions when adjudicating land matters in reference to customary rights to land. On certain occasions the courts have held that registration extinguishes customary rights to land and vests in the registered proprietor absolute and indefeasible title.¹⁸² On other occasions the courts have held that the registration of title was never meant to disinherit people who would otherwise be entitled to their land.¹⁸³ Such conflicting rulings from the same courts begs the question of the extent to which the land laws in the country disinherit and affect peoples diverse rights to their lands. Cases that have come before Kenyan courts seeking to espouse indigenous peoples' land rights without success include the *Ogiek* case,¹⁸⁴ discussed earlier, and the *Endorois* case,¹⁸⁵ currently before the African Commission on Human and Peoples' Rights.¹⁸⁶

¹⁷⁹ As above.

¹⁸⁰ International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention), Jan. 4, 1969, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (Kenya ratified the Convention on 13 September 2001).

¹⁸¹ UN Committee on the Elimination of Racial Discrimination General Recommendation XXIII: Rights of Indigenous Peoples U.N. Doc. A/52/18 Annex V (Aug. 18, 1997) para. 5.

¹⁸² See *Wanjala* (n 52 above); see *Obiero v Opiyo* (1972) EA 227; and *Esiroyo v Esiroyo* (1972) EA 388.

¹⁸³ *Wanjala* (n 52 above); See *Muguthu v Muguthu* HC Civil case 377 of 1968 (unreported).

¹⁸⁴ *Francis Kemai and Others v The AG and Others* HCC 238/1999.

¹⁸⁵ High Court Misc Civil Case 183 of 2002. In the case the Community argued before the High Court in Nakuru that, by creating a game reserve on their communal land without consulting them and subsequently evicting them and barring them from accessing the lands, the Baringo county council was in breach of their fundamental rights and freedoms as well as the constitutional provisions on trust land. The High Court of Kenya in Nakuru ruled against the Community.

¹⁸⁶ *CEMIRIDE (on behalf of the Endoris) v Kenya* Communication 276/2003.

The statutes on Kenyan land laws are inordinately complex and inconsistent.¹⁸⁷ Indeed, it is suggested that the only possible way to solve the current land regime quagmire is by resolving the problems between statute law and cultural rights to land that are accommodated by law.¹⁸⁸

On a positive note, the government has put together a Draft National Land Policy, published in December 2005¹⁸⁹ which seeks to address some of the critical issues related to land rights in Kenya, such as access to land, land use, tenure, planning, redressing historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, an outdated legal framework, institutional framework and information management. The Draft Policy is important for indigenous peoples in that it recognises the rights and forms of land tenure of pastoral communities and other marginalised groups.¹⁹⁰ However, the Draft Policy has been faulted for not going far enough in addressing the question of collective land rights as sought by indigenous peoples.¹⁹¹ According to the 2007 IWGIA Report

while some sections of the draft [National Land Policy] are sensitive towards issues relating to land and resources (issues touching directly on the livelihoods of indigenous peoples), it falls short of recognising collective rights, a main concern for many indigenous peoples. This is because there is a strong move to individualise land titles and insufficient examples and precedents as to how security of tenure and development can be achieved when resources are held collectively.¹⁹²

The current Kenyan Constitution makes sparse reference to natural resources. However, in accordance with the law, natural resources which include all minerals, wildlife, water bodies, and national forests, vest in the state under the control of the President as the guardian of the resources.¹⁹³ Various statutes regulate access to as well as the control and utilization of natural resources in Kenya.¹⁹⁴ As mentioned before, Kenya is a party to ICCPR. Article 27 of ICCPR has

¹⁸⁷ 'Reassessing Kenya's Land Reform' *The Point Bulletin of the Institute of Economic Affairs* 40 (2000) 3; see also Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2004) 190. The Report states that there are more than 40 different statutes dealing with aspects of land administration, ownership and use in Kenya. Some examples of Kenyan land law are: Transfer of Property Act of India of 1882; Land Control Act (Cap 302); Land Consolidation Act (Cap 283); Government lands Act (Cap 280); Land Acquisition Act (Cap 295); Land Titles Act (Cap 282); Land Control Act (Cap 302); Government Lands Act (Cap 280); Land Adjudication Act 1968 (Cap 284); Registered Land Act (Cap 300); Land (Group Representatives) Act (Cap 287); Trust Land Act (Cap 288).

¹⁸⁸ 'Reassessing Kenya's Land Reform' (n 187 above) 3.

¹⁸⁹ Kenya Draft National Land Policy (2005).

¹⁹⁰ As above.

¹⁹¹ See IWGIA (n 3 above) 470.

¹⁹² As above.

¹⁹³ See sec 115(1) Constitution of Kenya.

¹⁹⁴ Such legislation include the Wildlife (Conservation and Management) Act (Cap 376), Petroleum (Exploration & Production) Act (Cap 308), Environmental Management and Coordination Act 8 of 1999,

been interpreted by the UN Human Rights Committee so as to give meaning to indigenous peoples' land and resource rights.¹⁹⁵ The state is therefore obliged to give effect to its international law obligations which include ensuring that its legal framework is in consonance with international standards as expounded by the Committees' General Comments. However, Kenya is yet to address some of the concerns of indigenous peoples with regard to their land and resource rights, including the issue of consultation in the utilisation and sharing of resources present in the areas they inhabit.

Natural resources currently situated in the territories of indigenous peoples include national parks, game reserves and mining resources. Indigenous peoples demand to be consulted and involved in the management of these resources and in sharing the benefits derived there from. Apart from the Maasai Mara 'where 19 per cent of the revenue collected is said to be invested in favour of the Maasai community', most indigenous peoples claim that they are not involved and that the state does not share the proceeds of the resources within their territories.¹⁹⁶ According to a report of the UN Special Rapporteur on Indigenous Peoples on the impact of large-scale projects on indigenous peoples' rights, Kenya's indigenous peoples complained that 'the creation of national parks or game reserves has forced people off their land'.¹⁹⁷ The report cites the example of the Borana who have 'testified that four reserves created in Isiolo had been annexed affecting important grazing and watering points previously used by pastoralists'.¹⁹⁸ These communities call upon the state to recognise their special circumstances and needs owing to the fact that they are mainly dependent on these natural resources for their basic survival and, as such, the need for adequate legal protection of these resources for the benefit of the communities.

The Wako Draft Constitution addresses land and property rights in chapter seven. Section 81 of the Draft provides for the protection of community lands. Section 85, in turn, establishes a National Land Commission. In accordance with section 81, community land shall vest in and be

Forest Act 7 of 2005, Water Act 8 of 2005, Kerio Valley Development Authority Act (Cap 441), Lake Basin Development Authority Act (Cap 442), Tana and Athi Rivers Development Authority Act (Cap 443), Agricultural Development Corporation Act (Cap 444), Ewaso Ng'iro South River Basin Development Authority Act (Cap 447), Ewaso Ng'iro North River Basin Development Authority Act (Cap 448) and the Coast Development Authority Act (Cap 449).

¹⁹⁵ See *Chief Bernard Ominyak and the Lubicon Lake Band v Canada* (n 145 above) paras 32-33; see also UN Human Rights Committee General Comment 23(50): The Rights of Minorities (Article 27) UN Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 6, 1994) paras. 6-7.

¹⁹⁶ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya paras 48-54.

¹⁹⁷ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya on the impact of large scale projects, para 23.

¹⁹⁸ As above.

held by communities identified on the basis of ethnicity, culture or community of interest. These lands shall include among other forms lands lawfully held, managed or used by specific communities as community forests, grazing or shrines; land lawfully transferred to a specific community by any process of law as well as ancestral lands traditionally occupied by hunter-gatherers communities. The Draft does recognise and provide for both individual and collective land ownership.¹⁹⁹

The current constitution does not make express provisions for the protection of the environment. A number of laws, however, regulate the environment and are indeed considered adequate, although it is acknowledged that there is a need to empower and build the capacity of the institutions charged with environmental protection.²⁰⁰ Key institutions entrusted with safeguarding the environment under the Environmental Management and Co-ordination Act 8 of 1999 are the National Environmental Management Authority (NEMA), municipal councils, government departments and the Kenya Bureau of Standards. Other relevant laws include the Forest Act 7 of 2005 and the Water Act 8 of 2005. The Environmental Management and Co-ordination Act has a few innovative provisions that protect cultural sites including forests, and this may lend support to security of tenure for certain indigenous groups.²⁰¹ Kenya is also a party to the Convention on Biological Diversity which calls upon state parties to ‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices, and encourages the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.’²⁰² Knowledge of and utilisation of the domestic and international standards by indigenous peoples to protect their resources and environment remain inadequate. The NEMA, municipal councils and other state agents charged with the mandate of environmental protection are challenged to disseminate the environmental legal framework in Kenya to all, particularly to indigenous peoples in a bid to ensure that their rights are adequately protected.

¹⁹⁹ See sec 81(4) Wako Draft Constitution.

²⁰⁰ APRM Report 20.

²⁰¹ See for instance secs 3 (entitlement to a clean and healthy environment); 42 (protection of rivers, lakes and wetlands); 43 (protection of traditional interests); 44(protection of hill tops, hill sides, mountain areas & forests); 48 (protection of forests); 50 (conservation of biological diversity); 72 (water & pollution prohibition).

²⁰² Art 8(j) UN Convention on Biological Diversity, June 5, 1992, 31 ILM 818, Kenya ratified the Convention 26 July 1994.

Section 67 of the Wako Draft Constitution provides for the right to an environment that is safe for life and health. It further provides for environmental protection for the benefit of present and future generations, as well as compensation for damages arising from violations of the rights under the article.

However, despite the existence of a legal framework protecting the environment, evidence of threats to indigenous peoples' habitat, territories and environment is rife in Kenya. The UN Special Rapporteur, for instance, documents various causes of environmental degradation affecting indigenous people in Kenya such as 'hydro-electric dams, draught due to inadequate government responses to privatization of water points, gem mining, military bases and training camps'.²⁰³ He therefore calls upon the state to adopt practical measures to restore the environment and prevent further degradation.²⁰⁴ These measures include consulting indigenous peoples on the most viable means of restoring and protecting the environment based on their experiences and knowledge.

9 Socio economic rights (housing, health, social welfare, intellectual property, traditional economy, employment and occupation)

The current Constitution is silent on socio-economic rights. The state alleges that these rights are not justiciable.²⁰⁵ Unfortunately information available so far does not reveal any attempt to challenge this position, possibly due to the fact that most communities who would otherwise attempt to do so lack the capacity to do this. The UN Committee on Economic, Social and Cultural Rights has urged Kenya to 'include economic, social and cultural rights in its new constitution, with a view to incorporating the Covenant rights into domestic law and ensuring their direct applicability in the courts'.²⁰⁶ It is important to note that socio-economic and cultural rights have been incorporated in the Wako Draft Constitution.²⁰⁷

The general socio-economic development in Kenya is inhibited by a lack of a proper infrastructure which is particularly worse in areas inhabited by indigenous peoples who often live

²⁰³ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya paras 42-47.

²⁰⁴ As above, para 97.

²⁰⁵ See Report to the ACHPR para 14.

²⁰⁶ See Concluding observations of the ECOSOC Committee para 9.

²⁰⁷ Secs 59 -69 Wako Draft Constitution.

in inaccessible, remote and underdeveloped regions due to years of marginalisation and discrimination.²⁰⁸

In a bid to stimulate economic growth and to address the inequitable distribution of resources, the current government has adopted the Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation (IP-ERS) from 2003 to 2007. The government has also adopted two strategy papers: the Economic Recovery Strategy (ERS) 2003 to 2007, and the Strategy for Revitalization of Agriculture (SRA) 2004 to 2014. The ERS is a broad development framework to revive the economy, create jobs and reduce poverty. ERS recognises agriculture as a critical sector for economic recovery.

SRA is a comprehensive approach aimed at addressing the problems of agriculture in Kenya, including an unfavourable macro-economic environment; terms of trade shocks; an inadequate legal and regulatory framework; frequent droughts and floods; a lack of capital and access to credit; ineffective extension services; poor governance and corruption in key institutions supporting agriculture; inadequate market infrastructure and information; high and multiple taxes; low and declining fertility of land; multiple pests and diseases; poor physical infrastructure (especially rural access roads); a lack of storage and processing facilities; insecurity in various parts of the country; dependence on rain-fed agriculture; as well as an increasing incidence of HIV/AIDS, malaria and waterborne diseases. The government plans to address these problems in a comprehensive approach.

‘Both the Economic Strategy and Poverty Reduction Strategy include specific lines of action to improve equality and reduce poverty in arid and semi arid areas which will have a direct bearing on indigenous communities’.²⁰⁹ In 2004, for example, the government published the Economic Recovery Programme for the North-eastern Province, and Isiolo, Marsabit and Moyale. The government has committed Kshs 10.7 billion of development expenditure between 2004 and 2007, primarily in security, roads, water, livestock, electricity, education, health, local government and credit.²¹⁰ A report has since been published, entitled Development Projects Implemented by the government between 2002/03 and 2005/6 in North-eastern Province, Upper-

²⁰⁸ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 16.

²⁰⁹ As above, para 68.

²¹⁰ APRM Report 261.

Eastern Province and Upper Rift Districts.²¹¹ The creation in 2008 of a Ministry of Northern Kenya and Other Arid Areas is another significant step that is aimed at addressing the continued under-development of that region where a number of indigenous communities live - mainly the pastoralists.²¹² The Ministry, in co-ordination with other government ministries such as that of Special Programmes, is seeking to design specific interventions which include an increased allocation of resources that are essential to redress the rampant poverty in arid areas.²¹³

Indigenous knowledge systems and economies have not been given eminence in Kenya's economic development policies. This has hindered the protection of the intellectual property (IP) rights of indigenous peoples, such as their folklore, art and traditional medicinal plants and herbs. Some of the existing laws designed to protect IP, such as the Copyright Rights Act 12 of 2001 and the Trademarks Act Cap 506, have thus far not benefited or protected the IP rights of indigenous peoples. The Kenya Industrial Properties Institute (KIPI), established under the Industrial Property Act 3 of 2001, is the state organ mandated to give effect to IP rights in Kenya. However, the KIPI has not been vigilant or proactive in protecting the rights of indigenous peoples. Apart from a lack of capacity, KIPI only protects IP rights from applicants and, as such, needs to be aware of the existing legal framework and procedural technicalities of seeking such protection which is not always available to indigenous peoples. This is partly due to their remote location and even a lack of information and resources because of high poverty levels.

The state seems to have realised this gap. In 2006, in consultation with various stakeholders, it developed a Draft policy on Traditional Medicine and Medicinal Plants, aimed 'at the conservation of medicinal plants, sustainable use of related biological diversity and equitable sharing of benefits for the prosperity of the nation'.²¹⁴ Noting that 'indigenous communities rely very much on biodiversity for food and medicine, and thus have a very specialised knowledge within this field, the adoption of this draft policy paper would potentially provide mechanisms for protecting the intellectual property rights of indigenous peoples'.²¹⁵ While the policy is still being developed, indigenous peoples fear that the deliberations taking place on the adoption of the

²¹¹ The Report lists projects undertaken by each of the 24 districts in the regions amounting to Ksh 11.35 Billion as follows: Education (3.3b); Water(1.6b); Health (487m);CDF/Special (2.2b) Roads/Public Works (3.1b);Livestock/Agriculture (331m) and Local Government (342m).

²¹² Discussions with the Minister of Northern Kenya and other arid areas with the research team in Nairobi, Kenya, September 2008.

²¹³ As above.

²¹⁴ See IWGIA (n 3 above) 471.

²¹⁵ As above.

policy are skewed towards the protection of indigenous knowledge that is national in character. Experience has shown that this favours or reflects dominant communities' knowledge systems.²¹⁶ However, according to the 2007 IWGIA report 'indigenous knowledge is culture-specific and not national in character' and, as such, 'it is not clear how the draft policy can be finalized and implemented'.²¹⁷

Mainstream agriculture in Kenya is the main foreign exchange earner, especially tea and horticulture which are advanced and supported more than the traditional economic sources of livelihood of the majority of indigenous peoples. The current government has nevertheless revived the Kenya Meat Commission as established by the Kenya Meat Commission Act Cap 363, which processes meat for domestic and export purposes and it is hoped that indigenous peoples, especially pastoralists, will benefit from this industry.²¹⁸ Another possible industry that could benefit indigenous peoples is tourism (although the state retains exclusive powers to regulate the industry due to its lucrative and economic benefits to the country). Indigenous peoples should be able to utilise provisions within the legal framework regulating the industry such as the Tourist Industry Licensing Act Cap 381, and the Kenya Tourist Development Corporation Act Cap 382, to reap more benefits than what they currently enjoy, given that most of the resources that attract tourists are situated in regions inhabited by indigenous peoples.

The Wako Draft Constitution recognises the role of indigenous knowledge and IP rights and seeks to support, promote and protect them.²¹⁹ Section 26(2)(g) of the Draft further provides for the enactment of legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage. Indigenous peoples' culture and way of life - especially that of the Maasai - have for generations been exploited for tourism with little if any acknowledgement of their worth by the state, and payment of appropriate compensation of revenue so earned.

Despite the HIV/AIDS pandemic, the right to health is not provided for in the Kenyan legal framework. However, a HIV/AIDS Prevention and Control Bill has been drafted for consideration and review and it is hoped it will be enacted into law soon.²²⁰ Public health care in

²¹⁶ As above.

²¹⁷ As above.

²¹⁸ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 67.

²¹⁹ Sec 26(2)(f)-(h).

²²⁰ Second Periodic Report of Kenya to the UN Human Rights Committee para 16.

Kenya is of poor quality and the majority of the population (mainly indigent indigenous peoples) have no access to private health care.²²¹ To address this situation the government has launched the Health Sector Strategic Plan, containing a five year investment programme for the health sector. The Plan aims at promoting preventive care, basic health services that will benefit the poor, the involvement of other service providers under a sector-wide arrangement and an increased budgetary allocation towards the health sector.²²²

However, the HIV/AIDS pandemic has further complicated the already-stretched facilities in the health sector. The epidemic was declared a national disaster, this culminating in the setting up of a Cabinet Committee on HIV/AIDS, chaired by the President, as well as establishing a National AIDS Control Council (NACC). The NACC's awareness campaigns have decried the high rate of deaths resulting from HIV/AIDS and unequal access to appropriate treatment for those infected with HIV.²²³ Sessional Paper 4 of 1997 provides a policy framework within which AIDS prevention and control efforts may be undertaken. A third strategic plan for the Kenya National HIV/AIDS and Sexually Transmitted Diseases Control program (1999 - 2004) was released in August 1999. Voluntary HIV counselling and testing centres have been set up in all eight provinces, and measures have been put in place to reduce the cost of antiretroviral drugs.²²⁴ The NACC has also facilitated the establishment of AIDS Control Units in every government ministry to raise awareness.²²⁵

Laws dealing with the issue of health in Kenya are, for example, the Public Health Act (Cap 242), the Mental Health Act (Cap 248), and the Malaria Prevention Act (Cap 246). A Traditional Medicine Action Plan 2004 has also been adopted with the aim of recognising and protecting traditional healers and medicine. When adopted and possibly passed as an act of Parliament, the plan will yield important legal protection for indigenous peoples who rely on traditional medicine. The UN Special Rapporteur on Indigenous Peoples, in his mission to Kenya, urged the state to ensure access to adequate health care services for indigenous peoples. He suggested that the 'system of mobile clinics in pastoralists areas should be reinforced, and the use of traditional medicines and health related knowledge should be encouraged and legally recognised'.²²⁶

²²¹ See Report of the Special Rapporteur on Kenya paras 16, 75 & 76.

²²² APRM Report 264.

²²³ Second Periodic Report to the UN Human Rights Committee para 15.

²²⁴ As above para 17.

²²⁵ As above para 65.

²²⁶ UN Special Rapporteur on Indigenous Peoples in his mission to Kenya para 117.

Apart from providing for the right to health in the Bill of Rights, section 61 of the Wako Draft Constitution seeks to support and promote the appropriate application of modern and traditional medical practices.²²⁷

Although the current constitution does not provide for the right to work or other labour provisions, there exists a myriad of laws that govern labour.²²⁸ Indeed, the UN Committee on Economic Social and Cultural Rights has praised Kenya's adoption of legislation designed to strengthen labour standards and trade union freedom.²²⁹ An inspectorate in the Ministry of Labour is charged with the role of employee protection. Of major concern to indigenous peoples is the lack of labour protection in the informal sector where most of them operate.²³⁰ The problem is aggravated by the lack of social security in these sectors which further increases poverty levels amongst indigenous peoples. Kenya is a party to a number of ILO Conventions that relate to labour and conditions of workers, however, a lot remains to be done to implement these international standards.²³¹ Child labour remains a matter of grave concern in Kenya. In its Country Self Assessment report to the APRM, Kenya admitted that child labour was a challenge

²²⁷ Sec 26(2)(d) Wako Draft Constitution.

²²⁸ See, for example, Trade Union Act (Cap 233); Industrial Training Act (Cap 237); Regulation of Wages and Conditions of Employment Act (Cap 229); Employment Act (Cap 226); see also APRM Report 171 'The Ministry of Labour has recently completed a review of the labour laws in Kenya. The revisions to the labour laws include regulation on labour disputes, workplace discrimination and harassment. Parliament has not yet enacted the revised laws drafted by the Ministry of Labour in consultation with its tripartite partners – unions and employer representatives. The revised laws include provisions to enforce rulings by the Industrial Court, which are currently challenged at the High Court by employers'.

²²⁹ See Concluding observations of ECOSOC Committee para 6. Some of the laws mentioned in the concluding observations include:

(a) The Employment Act (2007) which strengthens minimum terms and conditions of employment, prohibits forced labour and child labour, sexual harassment and discrimination and provides for 21 days annual leave and three months maternity leave;

(b) The Labour Institutions Act (2007) which establishes and strengthens institutions dealing with administration and management of labour relations such as the National Labour Board and Court;

(c) The Labour Relations Act (2007) providing for freedom of association, recognition of trade unions, collective agreements and dispute resolution;

(d) The Work Injury Benefits Act (2007) extending insurance coverage to all categories of workers and ensuring adequate compensation for injury and work-related diseases irrespective of the employer's solvency; and

(e) The Occupational Health and Safety Act (2007) prohibiting the employment of children in workplaces where their health is at risk and encouraging entrepreneurs to set achievable safety targets for their enterprises.

²³⁰ See APRM Report 105.

²³¹ See APRM Report 8.

to the country that demands multi-dimensional interventions, including legislative, policy, administrative, budgetary and judicial measures.²³²

Social welfare and social security are also not addressed by the current constitution and laws in Kenya. The National Social Security Fund Act (Cap 258) and the National Hospital Insurance Act (Cap 255) are the two main statutes that are geared towards some form of social security. However, they only cater to employees in the formal sector. As earlier stated, most indigenous peoples practice traditional economies and livelihoods and as such are beyond the scope of this legal framework - a situation that warrants review. A comprehensive legal framework for social protection in Kenya, irrespective of form and mode of economic sustenance, is necessary to govern the needs and welfare of the large number of poor people who have no means of economic sustenance (particularly indigenous peoples during national calamities such as droughts which affect their economic sources of livelihood). The government is said to have set in motion an ambitious plan to establish a 'more comprehensive national insurance pension plan. Under a draft NSSF Act Amendment Bill, eligibility will extend to any person with a monthly or seasonal income. The National Health Insurance Fund (NHIF) is also to be restructured to provide universal compulsory social health insurance coverage for every citizen'.²³³

10 Gender equality

Although section 82 of the current Constitution provides for protection from discrimination on a number of listed grounds, including on the basis of sex, women in Kenya continue to suffer discrimination.²³⁴ The UN Human Rights Committee has decried the fact that 'systematic discrimination against women persists in Kenya, both in law and fact'.²³⁵ The Constitution discriminates against Kenyan females married to non-Kenyan men. Under section 91 of the Constitution, a female adult Kenyan citizen does not confer her nationality on her spouse through marriage, yet the converse is true. The Wako Draft Constitution has a proposed clause that, if passed, will grant equal rights to both men and women to confer citizenship to their spouses upon marriage. Article 17 of the Wako Draft Constitution provides that a person who has been married to a citizen of Kenya for a period of at least seven years is entitled, on application, to be registered as a citizen. The Committee on the Elimination of Discrimination Against Women

²³² APRM Report 107; see also Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 77.

²³³ APRM Report 228.

²³⁴ HRC, Kenya 2005 para10.

²³⁵ As above.

(CEDAW Committee) has called on the state to ‘reconcile its citizenship laws with provisions of the draft constitution and article 9 of CEDAW in order to eliminate all provisions that discriminate against women in area of citizenship and nationality’.²³⁶ This provision, while applicable to all women in Kenya, generally is important to indigenous peoples, particularly those living along and close to border areas and who may elect to marry non-citizens.

Discrimination against women in Kenya is largely attributed to cultural values and attitudes that favour patriarchal structures.²³⁷ While women generally are discriminated against in Kenya, including those who hold political positions and who are employed, discrimination is much worse among indigenous women - most of whom do not have formal education or have limited opportunities, due to a lack of awareness. Indeed, the UN Committee on Economic Social and Cultural Rights has noted with concern the low representation of women in Parliament, in senior government positions and in the posts of Court of Appeal or High Court judges.²³⁸ The Committee recommend that Kenya adopt positive measures, with a view to raising the representation of women in those sectors of society and ‘intensify[ing] its efforts, especially in rural and deprived urban areas, to . . . take special measures to increase employment opportunities for women’.²³⁹

Traditional practices, such as FGM, widowhood rites, women inheritance, and limited rights of property inheritance, are some of the issues that serve to deny women, particularly from indigenous communities, their basic rights as Kenyan citizens.²⁴⁰ For example, although under Kenyan law women can acquire, own and dispose of property, customary laws and traditions prevent them from inheriting land and or property.²⁴¹ However, Kenyan indigenous women’s main problems are marginalisation and discrimination. ‘The African indigenous woman has not been given the chance to make any decisions on issues affecting her life. These range from health, education and decision-making to owning property and legal rights’.²⁴² The source of this discrimination is primarily the cultural and traditional patriarchy which bars indigenous women in

²³⁶ Report of The Committee on the Elimination of Discrimination Against Women, 28th Session (13-31 January 2003) [And] 29th Session (30 June-18 July 2003),A/58/38(SUPP) (CEDAW, Kenya 2003) para 217-218.

²³⁷ As above, paras 209; 223; see also HRC Kenya 2005 para 10.

²³⁸ See Concluding observations of ECOSOC Committee para 15.

²³⁹ As above, para 16.

²⁴⁰ As above; see also APRM Report 83; Report of the UN Special Rapporteur report on Kenya, paras 78-81.

²⁴¹ As above; sec 39 of the Law of Succession Act.

²⁴² L Mulenkei ‘African Indigenous Women in the 21st Century’ (2000) 3 *Indigenous Affairs* 42.

Kenya from positions of community leadership.²⁴³ The state has the capacity - if willing - to change such cultural and traditional discriminatory practices through the enforcement of the myriad of laws highlighted earlier that prohibit gender discrimination and consciously put in place measures that recognise the role of women in society. CEDAW has in fact called upon the state to develop a plan of action, including public awareness campaigns, and to create an enabling environment for effective law-enforcement aimed at eradicating harmful cultural practices, especially FGM.²⁴⁴ The UN Special Rapporteur on Indigenous Peoples, in his mission to Kenya, similarly called upon the Kenyan government to ‘enforce its efforts to achieve the effective eradication of FGM in all communities, by helping promote culturally appropriate solutions such as alternative rites of passage’.²⁴⁵ The UN Committee on Economic Social and Cultural Rights has called on Kenya to ‘amend article 82(4) of the Constitution that exempts...customary law applicable to certain tribes, from the constitutional prohibition of discrimination’ since, in effect, women - especially indigenous women - are discriminated against on the basis of certain customary traditions.²⁴⁶

The judiciary in Kenya has on several occasions recognised the right of women to own and inherit property by passing judgments that favoured the rights of spouses to property upon death and divorce. The cases of *Karanja v Karanja*,²⁴⁷ and *Obuya v Obuya*,²⁴⁸ while not strictly dealing with indigenous women, set useful precedents that apply to indigenous women as well. The cases laid down the principle that a wife is entitled to a share of the property acquired by a husband during the subsistence of the marriage. Payments by the wife need not be direct payments towards the purchase of the property, but may be indirect, such as the meeting of household and other expenses which the husband would otherwise have had to pay. These cases demonstrate that the judiciary is a useful forum to adjudicate matters dealing with the property rights of women, including indigenous women, despite customary laws and customs to the contrary.²⁴⁹ The UN Special Rapporteur on Indigenous Peoples, in his mission to Kenya, called upon the state to

²⁴³ As above.

²⁴⁴ CEDAW Kenya 2003 (n 238 above) paras 208-214.

²⁴⁵ Report of the UN Special Rapporteur on Indigenous Peoples in his mission to Kenya para 118; Concluding observations of ECOSOC Committee para 23.

²⁴⁶ Concluding observations of the ECOSOC Committee para 14.

²⁴⁷ *Karanja v Karanja* Kenya Law Reports 1976 307.

²⁴⁸ *Obuya v Obuya* High Court Civil Case 178 of 1982.

²⁴⁹ CEDAW Kenya 2003 para 207.

review existing discriminatory laws and regulations affecting the property rights of indigenous women, particularly those of widows and divorced women.²⁵⁰

The recognition of a marriage is also useful where some indigenous women end up living with their men without some of the formalities envisaged by the law or customary law that recognises African customary marriages. The courts in Kenya have presumed marriage to subsist if the couple cohabit and present themselves to the world as husband and wife. The following cases upheld that presumption: *Peter Hinga v Mary Wanjiku*;²⁵¹ *Hortensia Wanjiku Yawe v Public Trustee*;²⁵² and *Stephen Mambo v Mary Wambui*.²⁵³ However, espousing such rights demands an awareness of the law and the means to put in motion such claims in court. This, unfortunately, is in limited supply as far as indigenous women are concerned, owing to dire poverty levels and related constraints. The state owes these communities a duty to promulgate effective laws and policies and particularly to ensure the implementation of existing favourable norms that would look into the particular circumstances of indigenous women. This could be through their own institutions and representatives which would in effect empower them to take charge and contribute to their welfare and realise their rights.²⁵⁴

The government has admittedly taken some steps in an effort to address a few of the gender inequalities in Kenya. This has been done mainly at the national level which, unfortunately, does not percolate to the local level where indigenous women reside. These efforts include the creation of a Ministry of Gender, Sports, Culture and Social Services in 2003 and a National Commission on Gender and Development. The Ministry of Gender, Culture, Sport and Social Services has embarked on plans to establish units in all the ministries to guide the mainstreaming of gender parity in all the development programmes initiated by the government.²⁵⁵ The National Commission on Gender and Development Act of 2004 sets up the National Commission on Gender and Development. Under section 6(2)(d) of the Act, this Commission is empowered to formulate programmes and advise on the establishment and strengthening of institutional mechanisms which promote gender equity in all spheres of life, and in particular in education, employment and access to national institutions.

²⁵⁰ Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 119.

²⁵¹ *Peter Hinga v Mary Wanjiku* Civil Appeal 94 of 1977.

²⁵² *Hortensia Wanjiku Yawe v Public Trustee* Civil Appeal 13 of 1976.

²⁵³ *Stephen Mambo v Mary Wambui* Civil Appeal 3 of 1976.

²⁵⁴ Mullenkei (n 244 above) 42-45.

²⁵⁵ APRM Report 128.

Despite these efforts, government policies do not yet reflect a clear target to reduce inequalities between men and women, or to empower women. The Economic Recovery Strategy, for example, does not incorporate ‘the gender dimension into the development programmes in the ERS Plan of Action, with regard to basic social services, access to infrastructure, productive and employment-generating activities, protecting women at the work-place and reducing the time burden for women’.²⁵⁶ Indeed, clear evidence of gender discrimination and marginalisation is seen in their under-representation in Cabinet, Parliament and in local leadership institutions.²⁵⁷ CEDAW has also decried the fact that, despite the presence of institutions such as the ‘National Commission on Gender and Development, it lacks the means to effectively coordinate among different mechanisms related to gender’.²⁵⁸

Domestic violence among Kenyan women - and indigenous women in particular - is of serious concern.²⁵⁹ The Domestic Violence (Family Protection) Act of 2006 has been adopted to address the problem of domestic violence. A Police department has also been established, called the Spider Squad, ‘to help abused women as well as the setting up of special hospitals to deal with cases of sexual assaults and abuse, and training in the Police force on sensitivity to gender related crimes’.²⁶⁰ There are other Bills drafted awaiting debate and possible adoption that will enhance the protection of the rights of women and improve equality rights: the Affirmative Action Bill, the National Gender and Development Bill, the Equality Bill, and the Gender and Development Policy Bill.

However, these laws and institutional structures are yet to reflect and counter violations of women rights, as evidenced by the dire statistics that are indicative of the fact that women and girls are still facing abuse. For example, the commercial exploitation of women, including indigenous women, due to poverty, remains a matter of grave concern. The ILO Committee of Experts has observed that ‘it is estimated that 10 000 to 30 000 children (mainly girls) are engaged in prostitution.’²⁶¹ Although there are no available statistics that would show the number

²⁵⁶ APRM Report 248.

²⁵⁷ Currently, there are only two women cabinet members out of 26 members and only 18 women out of 222 members of the National Assembly. There are also relatively fewer senior women in the civil service than men.

²⁵⁸ CEDAW Kenya 2003 para 225.

²⁵⁹ As above, para 211. See also Mulenkei (n 244 above) 42 - 45.

²⁶⁰ APRM Report 102.

²⁶¹ CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention, 1999 (182) Kenya (2006) (Iolex) 092006KEN182.

of indigenous girls that would be involved, such figures are worrisome, particularly in light of the economic pressures that face indigenous peoples.

Another precarious concern pertaining to the question of gender equality is the situation of the girl child amongst indigenous peoples in Kenya. The girl child remains at serious risk, particularly due to discriminatory practices that favour the boy child.²⁶² According to the UN Special Rapporteur on Indigenous Peoples,

[among] Kenya's Maasai community, indigenous girls occupy a transitional position between their parents' family and that of their husbands. Here the need to educate girls is not considered to be very important, since many families feel that there is no point in making an economic investment in a woman's education if the fruits of the investment are to be enjoyed by her husband's family. Most families prefer for women to remain at home to carry out domestic chores and take care of children and siblings. Because of these duties girls cannot attend schools that in most cases are located hours away from their communities.²⁶³

While some of these community preferences are social problems that would need advocacy and sensitisation tools to address them, the state has generally failed to put in place effective measures to guarantee gender equality that targets the girl child amongst indigenous communities. Such measures include building capacity and affirmative action policies specifically targeted at the education of the girl child, using culturally-appropriate curricula amongst indigenous peoples as a way of dealing with the said discriminatory trends, while respecting and retaining the dignity and traditions of the communities.²⁶⁴

Section 38 of the Wako Draft Constitution provides expressly for gender as a right. The Draft provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social activities. It further provides for equal rights to inherit, access and manage property, and prohibits any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women.

²⁶² Report of the UN Special Rapporteur on indigenous people, R Stavenhagen, E/CN.4/2005/88, 6 January 2005 (Report of UN Special Rapporteur on Indigenous peoples on education systems: Human rights challenges) para 38.

²⁶³ Report of UN Special Rapporteur on Indigenous peoples on education systems: Human rights challenges para 38.

²⁶⁴ As above, para 44.

11 Indigenous children

The current Constitution does not address children's rights. However, Kenya has ratified a number of ILO Conventions relevant to addressing children rights, such as the Convention on the prohibition of forced labour.²⁶⁵ It has also enacted legislation that addresses children's rights and the prohibition of discrimination against children such as the Children Act 8 of 2001. The Act domesticates the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Section 5 of the Children's Act stipulates that no child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. The Act also prohibits child marriages and female circumcision, issues that have often brought tension with some indigenous peoples who still insist on practicing female circumcisions and early marriages. Section 4(3) of the Children's Act requires all judicial and administrative institutions and all persons acting in the name of these institutions where they are exercising any powers conferred by the Children Act to treat the interest of the child as the first and paramount consideration.

Apart from legislation, the state has also embarked on a number of interventions geared towards improving the welfare of the child as well as the protection of their fundamental human rights. These include the National Poverty Eradication Programme and a Draft National Child Labour Policy.²⁶⁶ Kenya has also established an institutional framework for the protection of children's rights that include the National Council for Children, the Department of Children's Services, located in the Vice President's Office, local authorities and children's courts.²⁶⁷ Despite the establishment of these institutions and the enactment of the Children Act and recently the Sexual Offences Act 2006, the CRC has decried the fact that implementation of the laws still falls shorts of international standards.²⁶⁸ The CRC Committee expressed concern that 'discrimination against certain groups of children still persists in policy as well as in practice, particularly with regard to girl child, children of certain minorities such as pastoralists and hunter gatherers'.²⁶⁹

²⁶⁵ See the table of ILO Conventions that Kenya is a party to in Part I of this report.

²⁶⁶ CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention, 1999 (No 182) Kenya (2006) (ilolex) 092006KEN (CEAR: Individual Direct Request Kenya) 182.

²⁶⁷ APRM Report 108.

²⁶⁸ Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: KENYACRC/C/KEN/CO/2 (CRC, Kenya 2007) para 24.

²⁶⁹ As above.

Child labour in Kenya continues to be one of the root causes of child abuse, including the worst forms of child labour, such as prostitution and child pornography.²⁷⁰ This is despite the fact that the Children's Act and the Employment Act prohibit child labour.²⁷¹ However, according to section 25(1) of the Employment Act, the prohibition of work is with regard to work performed in industrial undertakings. This could be interpreted to mean that any other work by children would be legal and acceptable which would be in breach of Kenya's international law obligations in accordance with ILO Conventions. Indigenous children in Kenya have been and are still engaged in other forms of work, such as tourism, the private security industry and even illegal sex trade. This legal uncertainty is exacerbated by the fact that section 10(5) of the Children's Act defines child labour as 'any situation where a child provides labour in exchange for payment'. In the situation where the majority of indigenous children engaged in certain labour practices are often not paid for their services or work in conditions akin to slavery, this limited definition poses serious challenges.²⁷² This situation is confirmed by statistics provided by the government to the ILO Committee of Experts in its report which stated that:

Child labour affected 1.9 million children between 5 and 17. Only 3.2 per cent of these children attended a secondary school education while 12.7 per cent had no formal schooling at all. The Employer members maintained that although the Kenyan Government had taken steps to improve the situation of children by providing free primary-school education, implementing programmes to feed children at school, reaching children in remote areas and discouraging the practice of female genital mutilation, there was still much to be done and much to be concerned about.²⁷³

In practice the country faces the challenge of enforcing children's rights, especially those pertaining to child labour and the prohibition of harmful cultural practices.²⁷⁴ As noted by the ILO Committee of Experts, FGM continues to negatively affect indigenous girls. The state has been urged to enforce laws that prohibit FGM (Children's Act, section 14) since the practice is still widely practiced, especially amongst indigenous communities as well as other harmful traditional practices such as early and forced marriages.²⁷⁵ The CRC has called upon Kenya to take legislative and awareness-raising measures to prohibit those practices that are harmful to the health, development, survival of children.²⁷⁶ The state has also been urged to 'adopt specific anti-

²⁷⁰ CEACR: Individual Direct Request Kenya 182.

²⁷¹ See sec 10(5) of the Children's Act of 2001; sec 25(1) of the Employment Act of 1976 (Ch 226) sec 25(1) read together with sec 2, however, only prohibit employing children under 16 years.

²⁷² See generally CEACR: Individual Observation Concerning Minimum Age Convention, 1973 (138) Kenya (2006).

²⁷³ ILCCR: Examination of individual case concerning Convention 138, Minimum Age, 1973 Kenya (2006), (ilolex) 132006KEN 138.

²⁷⁴ See ILO (n 158 above) 4; CRC, Kenya 2001 para 60; see also HRC Kenya 2005 para 25.

²⁷⁵ HRC Kenya 2005 para 12; CRC Kenya 2001 paras 47 - 48.

²⁷⁶ As above.

trafficking legislation, including for protection of human rights of victims, and actively investigate trafficking offences'.²⁷⁷

High levels of poverty - especially among indigenous peoples - have forced some of their children to engage in child labour, sometimes at the expense of getting an education.²⁷⁸ The problem of child labour is further compounded by the lack of capacity to enforce these laws due to a lack of adequate personnel to effectively monitor the situation.²⁷⁹ The Committee of the Rights of the Child has expressed grave concern over the problem of street children in Kenya.²⁸⁰ While there are no available statistics on the number of indigenous children on the streets, one of the causes of the street children phenomenon in Kenya is poverty which is also encountered and growing out of proportion among indigenous peoples. It is therefore possible that, if not a problem already, it could eventually become one and urgent measures are required to arrest the problem and prevent further deterioration due to their particular vulnerability to sexual and economic exploitation.

Indigenous peoples in Kenya have indeed decried the increased rise in 'child labour in commercial herding, domestic work and prostitution, as well as in tourism, private security sector, commercial resource extraction and commercial agriculture'.²⁸¹ Apart from poverty, child labour among indigenous children has been attributed to 'aggravated land loss, pressures on customary livelihoods, lack of basic services, HIV/AIDS, gender discrimination and poor governance'.²⁸² National Consultations in Kenya by the ILO revealed that 'policy recognition of herding rights and investments in pastoralism could substantially reduce the marginalisation and decrease the number of impoverished households, especially female-headed households which are hiring out children'.²⁸³

The state has identified the youth as a huge human resource and important in the development of the state. However, the country is faced with a lack of formal employment opportunities to absorb the country's huge population of youths and has insufficient resources to engage in alternative

²⁷⁷ HRC Kenya 2005 para 25.

²⁷⁸ See Report of the UN Special Rapporteur on Indigenous Peoples in Kenya para 77; CRC, Kenya 2001 para 51.

²⁷⁹ Second Periodic Report of Kenya to the UN Human Rights Committee para 85.

²⁸⁰ CRC Kenya 2001 paras 57-61.

²⁸¹ ILO (n 158 above) 4.

²⁸² As above, 4.

²⁸³ As above, 6.

means of economic sustenance. In 2003, the Ministry of Youth Affairs was established. A National Youth Policy has also been passed and a Youth Development Fund been launched to address some of the concerns of the youth, especially on employment and lack of financial and material resources.²⁸⁴

The Wako Draft Constitution expressly provides for the rights of children and the youth. Section 41 of the Wako Draft Constitution provides that children occupy a special place in society. It also confers the duty to nurture, protect and educate children on parents, the family and the state. Apart from enumerating the rights of the child, the Constitution also states that the state shall domesticate international instruments and standards on the right of the child. Section 40 of the Draft Constitution acknowledges that the youth constitute an integral part of society and calls on the state to take legislative and other measures, including but not limited to affirmative action policies and programmes, to promote the welfare of the youth.

From the foregoing it is clear that, despite the existence of a legal framework on children, indigenous children are still faced with daunting challenges. These range from a lack of basic services, suitable education that is in line with their cultural and social needs, child labour and socio-political marginalisation. The state is therefore urged to adopt and implement appropriate national policies and legal frameworks that are sensitive to the needs of indigenous children.²⁸⁵ The CRC has for instance called upon the state to ‘pay particular attention to rights and needs of children in implementation of the poverty eradication plan, poverty reduction strategy and all other programmes intended to improve the standard of living in the country’.²⁸⁶ This would inevitably include indigenous children whom the CRC identified as one of the groups facing widespread poverty and who are not enjoying the right to an adequate standard of living in Kenya.²⁸⁷ The CRC further urged the state to ‘implement laws, policies and programmes that guarantee the principle of non-discrimination and full compliance with article 2 of the CRC

²⁸⁴ See ‘Sh 1 Billion Youth Fund Launched as President promises more’ in <www.eastandard.net> (accessed on 3 June 2007); the official website of the Youth Affairs Ministry at www.youthaffairs.go.ke.

²⁸⁵ See CEACR: Individual Observation concerning Minimum Age Convention, 1973 (138) Kenya (2006); ILCCR: Examination of individual case concerning Convention 138, Minimum Age, 1973 Kenya (2006), (ilolex) 132006KEN 138; CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention, 1999 (182) Kenya (2006) (ilolex) 092006KEN 182.

²⁸⁶ CRC Kenya 2001 paras 51-52.

²⁸⁷ As above.

particularly as it relates to vulnerable groups of children and traditional tribal customs, practices and rituals'.²⁸⁸

12 Indigenous peoples in border areas

Section 81(1) of the Constitution of Kenya provides and guarantees that no citizen of Kenya shall be deprived of his freedom of movement throughout Kenya, the right to reside in any part of Kenya, the right to leave Kenya and immunity from expulsion from Kenya. This freedom may be restricted by law in the interests of defence, public safety or public order, public morality, public health, or in enforcing a court order. By virtue of this provision, indigenous peoples in Kenya, like all other Kenyans, have the liberty to reside and move from place to place in accordance with the law.

Travel beyond the Kenyan borders and into Kenya is within the purview of the Immigration Act. It provides for entry into the country of immigrants from all countries of the world on an equal basis. Section 4 of the Immigration Act governs the admission of aliens into Kenya and requires the possession of valid travel documents issued by recognised governments, valid entry permits or passes issued by the government of Kenya, and valid visas where required. Once legally in Kenya, non-citizens enjoy the same rights to move and reside anywhere in the country as citizens. However, some of these regulations have on a number of occasions hindered the free movement of indigenous peoples in border areas such as the Maasai in Kenya and Tanzania and the Somali, especially when the border is closed as happens often on the border between Kenya and Somalia.

²⁸⁸ As above, 25.

Part III: Conclusions and recommendations

1 Conclusions

It is important to note that the legal framework identified thus far in the report is not exhaustive and merely reflects some of the existing provisions that are available generally and could be useful in protecting and promoting indigenous peoples' rights in Kenya. The issues identified thus provide a basic framework that will be useful in conducting a further investigation of the legal framework. However, as already identified, most of the legal framework is not specific on groups' self-identifying as indigenous peoples and, as such, one would have to read in relevant provisions from the existing general laws and policy.

From the foregoing it is also evident that the rights of indigenous peoples are not adequately provided for in the current legal framework of Kenya. The current Constitution, for example, misses very vital provisions relating to indigenous peoples' rights, such as communal land tenure, culture and generally most of the themes discussed in the report. The Wako Draft Constitution, on the other hand, contains some very useful provisions that would give meaning to indigenous peoples' rights. It is hoped that the ongoing constitutional reform negotiation will retain and adopt these provisions in an effort to give effect through the supreme law of the land provisions protecting indigenous peoples' rights.

Granted, the government has endeavoured to address the historical marginalisation and concerns of indigenous peoples. New institutions have been establishment, such as the National Human Rights Commission, the National Gender Commission and policies such as the Economic Recovery Strategies, and Governance, Justice, Law & Order Sector (GJLOS) Reform Programme. It is hoped that the state will retain the momentum and provide further and concrete mechanisms to protect indigenous peoples' rights. The Kenya National Commission on Human Rights, in collaboration with civil society organizations, has for instance ignited debate on the issue of indigenous peoples in Kenya.²⁸⁹ A Draft Land Policy and a Draft Policy on Traditional Medicine and Medicinal Plants in Kenya are also but some of the efforts which, if implemented, would give meaning to some of the key demands and aspirations of indigenous peoples in Kenya. It is envisaged that much more will result from continued engagement, consultation and

²⁸⁹ See Report of the Round Table Meeting Nairobi (n 5 above).

negotiations facilitated through the democratic space currently enjoyed in the country. It is hoped that these efforts will yield positive results for Kenyans to appreciate the situation of indigenous peoples in the country and, by extension, to ensure recognition and facilitate adequate legal protection of their rights.

2 Recommendations

The recommendations hereunder are not exhaustive and it is envisaged that, during the in-depth research, specific interventions will further be identified on a possible effective legal framework protecting indigenous peoples in Kenya.

- The recognition and respect for the unique identity of indigenous peoples by the state are crucial to the realisation of their fundamental human rights and freedoms. It is therefore essential that Kenya's legal framework reflects and protects indigenous peoples. This entails the provision of appropriate identity documents. The supreme law would be the starting point and as such the Constitution and relevant legislation should reflect the diverse Kenyan indigenous peoples and not just the 42 tribes the state has continued to insist as forming its ethnic population. Up-to-date demographic data should reflect indigenous peoples and their population, as well as specific needs and vulnerabilities in the state's effort to address them holistically, particularly where affirmative action is required. In this way other rights, such as to their unique cultural identity, language rights, rights to their traditional lands and resources, self-management, including effective political participation, and other socio-economic rights, will be guaranteed.
- The importance of a new Constitution that reflects the views and aspirations of all Kenyans can therefore not be overemphasised. It is crucial that a new constitution is enacted as soon as possible, reflecting provisions protecting indigenous peoples, some of which have been identified in the course of this review. Of key importance are provisions that give indigenous peoples and other marginalised communities equal access to state resources and, more significantly, the rights of access, control and management of their lands and natural resources in accordance with their culture, way of life and aspirations.
- Kenya's legal framework falls short in various aspects in guaranteeing the rights of indigenous peoples. Given that there are no specific laws aimed at addressing indigenous peoples' issues in the country, it would be ideal if the country would adopt and implement the international standards developed to protect indigenous peoples. This would include the ILO Convention I69. Ratification of this important treaty would go a long way to giving impetus to the adoption of a suitable domestic legal framework that is in tandem with international

ation on the Rights of Indigenous Peoples by the General Assembly as soon as possible.

- To address the historical injustices and inequalities of the various ethnic tribes, the state should establish a Truth, Justice and Reconciliation Commission as proposed by the Task Force set up to establish whether the country needed one in 2003. The Commission has the potential to bring to the fore pertinent issues and concerns amongst Kenyans, including indigenous peoples, and to identify holistic interventions - legal and otherwise - that would redress their discrimination, marginalisation and exclusion. The government should therefore take immediate legal and administrative steps to remove all forms of legal and social discrimination prevailing in Kenyan society through legislative mechanisms and institutional and social frameworks, including education. The policy of assimilation that have thus far been favoured by the state to deal with indigenous peoples' concerns should be abolished in fact and in law. Instead, the government should pursue a framework that respects unity in diversity through empowering and giving these communities the capacity to determine and manage their own affairs according to their desired way of life.
- The land issue should be addressed with greater political determination, going beyond a merely legalistic approach. Apart from constitutional and legal reforms, the state should adopt and implement redistribution and reallocation policies to enforce equitable access to and use of land, as well as the recognition and protection of communal land tenure. Kenya should enact laws and policies aimed at land restitution and adequate compensation for indigenous peoples' traditional lands, whenever they are appropriated for public interest purposes or due to any adverse environmental impact on their land and natural resources. The Draft National Land Policy should, for instance, be adopted and its provisions should be reflected and inspire legislative reforms of the myriad land laws that have favoured the country's dominant communities.
- The progressive realisation of economic, social and cultural rights should be addressed through the Constitution, legislation as well as in all state policies and directives. These include the right to education, health, labour rights, the right to development and IP rights.
- The state should endeavour to enhance the capacity of indigenous peoples through poverty alleviation programs and other interventions and through the effective participation and consultation of indigenous peoples in the running of their own affairs. Such measures would include institutional capacity-building and programmes that take into account indigenous

governance structures.

- Gender mainstreaming should be factored in in all state spheres, including political leadership for indigenous peoples that promote the involvement and participation of indigenous women in development and in the improvement of community welfare. The capacity of institutions working towards achieving gender equality should therefore be promoted, especially at the grassroots level, in order to give meaning to gender equality among indigenous peoples. Such institutional and legal frameworks should comprehensively address indigenous women's concerns over discrimination, gender violence and harmful practices such as early child marriages, wife inheritance and FGM.
- The state should facilitate indigenous children's access to free primary education through affirmative action measures that include the provision of appropriate educational curricula that are in tandem with indigenous peoples' culture and distinct ways of life. Access to higher education should be encouraged through policy and facilitated through affirmative action if necessary. Means to access and retain indigenous children - especially girls - in institutions of higher learning - should be developed. The state should promote and protect children's rights through the implementation of the Children's Act and other relevant legislation and international standards, particularly in the elimination of the worst forms of child labour.
- Territorial autonomy/devolution should be provided for in the new Constitution and the legal framework in order to give regard to indigenous traditional leadership and structures so that indigenous peoples have control over their affairs and resources.
- The state should design and engage in conflict resolution mechanisms to reduce factional frictions, build consensus on crucial national issues, defuse ethnic tension and promote tolerance amongst all Kenyans.

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