The Equal Rights Trust

Submission to the Human Rights Council at the 21st Session of the Universal Periodic Review

Kenya

1. The Equal Rights Trust (ERT) has been involved in promoting improved protection from discrimination in Kenya since 2009, working on a number of projects designed to strengthen civil society efforts to combat discrimination, in partnership with the Kenya Human Rights Commission (KHRC), the Federation of Women Lawyers, the National Gay and Lesbian Human Rights Council and the International Commission of Jurists – Kenya. As a result of research undertaken in the context of these projects, in February 2012, ERT published *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya* (the report) in partnership with KHRC.

2. The report is the first ever comprehensive account of discrimination and inequalities in Kenya. It brings together evidence of the lived experience of discrimination and inequality in Kenya on a wide range of grounds with an analysis of the laws, policies and institutions established to address discrimination and inequality. It is the product extensive research and consultation. This included gathering direct testimony through structured interviews, focus groups and roundtable discussions with both victims of discrimination and experts. ERT reviewed research conducted by others, including national human rights institutions, non-governmental organisations and academics, together with statistical data compiled by government and international organisations. ERT also undertook a detailed analysis of laws and policies relevant to equality and non-discrimination, including the Constitution, specific anti-discrimination laws and non-discrimination provisions in other areas of law.

3. This submission is based on the findings and recommendations of the report, a copy of which is attached as Annex 1 to this submission.[1] In its interpretation of international standards on the rights to non-discrimination and equality, the submission relies upon the Declaration of Principles on Equality, a document of international best practice on equality.[2] The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as "the current international understanding of Principles on

[1] Copies of *In the Spirit of Harambee: Adressing Discrimination and Inequality in Kenya* are also available at: http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf.

[2] *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

Equality".[3] It has also been endorsed by the Parliamentary Assembly of the Council of Europe.[4]

4. Given that the Human Rights Council has stated that "[t]he second and subsequent cycles of the review should focus on, inter alia, the implementation of the accepted recommendations and the developments of the human rights situation in the State under review",[5] this submission focuses in particular on areas where ERT's report brings to light new evidence of discrimination, or provides information on the implementation of recommendations. However, ERT also encourages all states participating in the review of Kenya to consider endorsing the recommendations in the report and in so doing call on Kenya to reform laws, policies and practices to improve protection from all forms of discrimination.

Summary of Findings

5. ERT's report identifies evidence of discrimination and inequality affecting persons in Kenya on a wide range of grounds. It concludes that two factors – poverty and ethnicity – are of overarching importance in most Kenyan people's experience of discrimination and inequality. It also identifies patterns of discrimination and inequality affecting women, sexual and gender minorities, persons with disabilities, persons with albinism and persons living with HIV and AIDS.

6. The report contains evidence of discriminatory laws, such as provisions of the Penal Code which have been consistently interpreted as prohibiting consensual sex between men. It contains examples of discrimination by state agents in carrying out public functions, such as the implementation of development policies which indirectly discriminate against ethnic groups in arid and marginalised areas. It also finds a serious problem with discriminatory violence against certain groups because of their actual or perceived characteristics, including in particular sexual orientation and sex. The report finds evidence of discrimination and inequality in employment on the basis of gender, sexual orientation, gender identity and disability. Moreover, it identifies patterns of discrimination and inequality in access to health and education, highlighting, *inter alia*, regional – and therefore ethnic – disparities in both access and outcomes.

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[3] *Naz Foundation v Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para 93.

[4] Parliamentary Assembly of the Council of Europe, Resolution and *Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380.

[5] Human Rights Council, *Resolution 16/21: Review of the work and functioning of the Human Rights Council*, A/HRC/RES/16/21, April 2011, Annex 1, Para 6, available at: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/126/78/PDF/G1112678.pdf?OpenElement.

7. Thus, the report concludes that there is a clear pattern of lack of realisation of the rights to equality and non-discrimination. It therefore recommends that Kenya needs to increase respect for these rights, through repealing laws which discriminate and ensuring that state agents do not discriminate in the course of their work. It also recommends that Kenya improve legal protections to ensure that all persons in Kenya have adequate protection from discrimination and to improve enforcement and implementation of those laws which already exist.

8. The assessment of Kenya's legal and policy framework concludes that there have been a number of major improvements in recent years. Notably, the Constitution of Kenya, promulgated in 2010, has a strong focus on equality. The right to non-discrimination is broader in scope than that provided under the previous Constitution, there are special provisions on the protection of rights for particular groups vulnerable to discrimination and the Constitution provides for the establishment of more powerful bodies on human rights and equality, which were themselves established in 2011. These improvements to the legal framework follow the enactment of the Employment Act 2007, providing strong equality rights in employment, and the National Cohesion and Integration Act 2008, prohibiting racial and ethnic discrimination in a range of areas of life.

9. However, the report finds that a number of serious problems persist. First, as noted above, a number of discriminatory legal provisions and provisions which are open to discriminatory interpretation remain in force. Second, there are gaps in legal protection, both with regards to the absence of legislation prohibiting all forms of discrimination on particular grounds – such as sex and age – and the absence of provisions prohibiting discrimination on all grounds in particular areas of life – such as provision of education or health services. Third, there are a number of inconsistencies between provisions in different laws, notably in the field of employment. For example, the scope of the protection from discrimination on grounds of race or ethnicity in employment differs under the National Cohesion and Integration Act and the Employment Act, giving rise to uncertainty for both employers and employees. To some extent, the new Constitution fills gaps and resolves inconsistencies, by extending protection from discrimination to a wide range of grounds and prohibiting discrimination by both public and private actors. However, the lack of specific and comprehensive anti-discrimination law providing protection in relation to all relevant grounds means that there is an absence of legislation giving clear definitions of important concepts and providing clarity about the scope of protection and its operation. Finally, there is a persistent problem with the poor implementation and enforcement of existing laws.

Recommendations

10. Based on its comprehensive review of both the lived experience of discrimination and inequality and the legal and policy framework, the report makes recommendations for reforms to laws, policies and practices to ensure Kenya can meet its obligations to respect, protect and fulfil the rights to non-discrimination and inequality.

11. Principal among the report's recommendations is that Kenya adopts comprehensive equality legislation, preferably through a single equality Act. ERT recognises that harmonisation of equality law can be achieved either through the adoption of a single equality law or through the development of a system of individual laws which, together, would provide comprehensive protection. Nevertheless, ERT's assessment of the extant system of laws in Kenya and our extensive consultations with stakeholders indicate that the adoption of a new single equality law is the preferable solution in Kenya.

12. The report recommends the adoption of a comprehensive equality law, which should reflect agreements in a "Statement of Principles for Equality Law" and "Legislative Map for Equality Law" developed and endorsed by civil society actors in 2010-2011. Such a law should prohibit direct and indirect discrimination, harassment and failure to make reasonable accommodation, on all grounds recognised by international law and in all areas of life governed by law. It should require positive action to address patterns of past disadvantage. It should contain the necessary provisions to ensure effective access to justice – including rules governing the transfer of the burden of proof – and provide for remedies and sanctions which are effective, proportionate and dissuasive. ERT urges all states participating in the review of Kenya to endorse and adopt this and the other recommendations made in the report (see Annex 2).

13. In addition, in keeping with the express wishes of the Human Rights Council, below ERT highlights areas where its findings indicate that recommendations made at the last Universal Periodic Review have not been implemented:

14. **Reform national legislation to fully respect the principle of non-discrimination:** The Czech Republic recommended that Kenya review its national laws to ensure that it fully upholds the principle of non discrimination.[6] As noted above, while the 2010 Kenyan Constitution provides substantially improved protection from discrimination, ERT's analysis has identified a significant need for legal reform. First, the report identifies discriminatory laws affecting a number of

[6] Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Kenya*, A/HRC/15/8, 17 June 2010, Para 101.40.

groups. For example: women are subject to discriminatory laws, and laws which are applied in a discriminatory manner, in respect of tax, succession, marriage and sexual offences;[7] consensual sex between men remains criminalised;[8] and several laws discriminate against persons with mental and intellectual disabilities.[9] While many of these laws may be unconstitutional, no steps have been taken to undertake an audit of laws to identify and amend those laws which discriminate. Second, as noted above, beyond the Constitution, protection in legislation falls short of the standards required by international law. Kenya has a patchwork of protections, leaving gaps in terms of both particular grounds and particular areas of life, creating inconsistencies between different instruments and leaving critical concepts undefined. The Committee on Economic, Social and Cultural Rights,[10] the Committee on the Elimination of Discrimination Against Women,[11] and the authors and signatories of the Declaration of Principles on Equality,[12] have all recognised that in order to provide effective protection from discrimination, states must adopt specific anti-discrimination legislation. ERT urges states to recommend that Kenya (a) conduct an audit of its laws to identify and amend laws which discriminate; and (b) enact specific, comprehensive anti-discrimination laws, consistent with the requirements of the Declaration of Principles on Equality.

15. **Withdraw laws criminalising sexual relations between consenting individuals of the same sex and enhance legislative provisions ensuring equal treatment of LGBTI**. Responding to recommendations made by the United States of America, Netherlands, the Czech Republic and France at its last review,[13]

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[7] For a detailed discussion of laws and legal provisions which discriminate against women, see: The Equal Rights Trust, *In the Spirit of Harambee: Adressing Discrimination and Inequality in Kenya*, 2012, Section 2.3, pp. 93 to 100, available at: http://www.equalrightstrust.org/ertdocumentbank/In_the_Spirit_of_Harambee.pdf.

[8] Penal Code 2009, sections 162, 163 and 165. For further discussion of these provisions, see immediately below.

[9] See, for example, the Mental Health Act 1991, which provides for both voluntary and involuntary treatment of persons with mental and intellectual disabilities, and Article 83, 99 and 193 of the Constitution of Kenya, which restrict the rights of persons with mental and intellectual disabilities to participate in elections.

[10] Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2009, Para 37.

[11] Committee on the Elimination of All Forms of Discrimination Against Women, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 2010, Para 31.

[12] See above, note 2, Principle 15, p. 12.

[13] See above, note 6, Para 103.5.

Kenya stated that "same-sex unions were culturally unacceptable in Kenya" and rejected the recommendations.[14] Sections 162 and 165 the Kenyan Penal Code, while not making explicit reference to sexual conduct between males, have consistently been interpreted as criminalising same-sex intimacy between men.[15] These laws continue in force today. The Human Rights Committee has repeatedly stated that laws criminalising same-sex relations between consenting adults violate the right to privacy and the right to non-discrimination as provided in the ICCPR,[16] and in 2005, it specifically called upon Kenya to repeal section 162.[17] Section 2.4 of ERT's report argues that discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons is a serious problem in Kenya and one which is legitimised and perpetuated by the continuation in force of these provisions. Though there have been few prosecutions under any of these Penal Code provisions in recent years,[18] gay men interviewed by ERT reported being harassed by police seeking to blackmail or extort money from them. Moreover, while same-sex conduct between women is not interpreted as prohibited under the Penal Code, lesbians – like gay men – face considerable prejudice and discrimination, in part because of stigma associated with the criminalisation of same-sex relationships. In addition, testimony gathered by ERT indicated that the LGBTI community experience discrimination in accessing healthcare, education and employment, with the continued existence of these laws again being a key causal factor. ERT urges states to recommend that Kenya (a) repeal sections 162 and 165 of the Penal Code; (b) conduct an audit of other laws and policies which discriminate directly or indirectly on the basis of sexual orientation and gender identity; and (c) provide explicit protection from discrimination on the basis of sexual orientation and gender identity.

16. **Protect the rights of the indigenous communities.** In its response to recommendations made by Mexico and Malaysia,[19] Kenya indicated that it does not accept the term "indigenous peoples" as all Kenyans of African descent were indigenous to Kenya.[20] Nevertheless, ERT's research found many examples of

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[14] *Ibid*., Para 108.

[15] Penal Code 2009 (revised), Sections 162, 163 and 165.

[16] See, for example, Human Rights Committee, *Concluding Observations on Chile*, UN Doc. CCPR/C/79/Add.104, 1999, Para 20; Human Rights Committee, *Concluding Observations on Cyprus*, UN Doc. CCPR/C/79/Add.88, 1998, Para 11.

[17] Human Rights Committee, *Concluding Observations on Kenya*, CCPR/CO/83/KEN, 2005, Para 27.

[18] See, for example, US Department of State, *2009 Human Rights Report: Kenya,* 11 March 2010, which states that no prosecutions were undertaken in 2009.

[19] See above, note 6, Paras 103.6 and 103.7.

[20] *Ibid*., Para 109.

ethnic groups wishing to define themselves as indigenous, both as a result of unique connection to a particular area or way of life, and as a result of persistent discrimination. ERT found that, despite the differences between them, certain patterns of disadvantage were consistent. ERT found that many indigenous communities have been alienated from their traditional lands, in the past as a result of annexation and relocation, and more recently, as a result of government conservation policies.[21] In addition, ERT's research in the Turkana[22] and Wajir[23] districts highlighted the far-reaching impact which direct discrimination in the process for obtaining identity cards, and the consequent undercounting of population, can have both on political representation and the allocation of development funds, where this is undertaken on the basis of population size. In these same areas, ERT found that indigenous communities are not active in the formal economy and lack access to basic services such as education and healthcare. ERT urges states to recommend that Kenya take measures to ensure the enjoyment of the right to non-discrimination by persons identifying as members of indigenous communities, including through the adoption of equality legislation and through the development of appropriate positive action measures.

17. **Continue the current policy vis-à-vis Somali refugees, based on solidarity and the protection of fundamental human rights.** Kenya accepted a recommendation by Somalia recommended that it continue its policy regarding Somali refugees.[24] Unfortunately, in 2011-12, ERT found numerous reports indicating that the situation for Somali refugees was worsening, with evidence of considerable overcrowding and poor sanitation and hygiene,[25] malnutrition, high levels of infant mortality and disruption to the distribution of food.[26] ERT also found evidence of increasing intolerance towards refugees in the face of an influx in 2011: new legislation was proposed to make registration for refugees more difficult, though this was not enacted.[27] ERT also found that Kenyan Somalis face

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[21] For prominent examples of indigenous communities suffering alienation from land, see the cases of the Ogiek (*Kemai & 9 others v Attorney General & 3 others*, Civil Case 238/1999 (OS)) and the Endorios (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission for Human and Peoples' Rights, Comm 276/2003).

[22] See above, note 7, Section 2.3, pp. 59-60.

[23] *Ibid.*, p. 60 and 73.

[24] See above, note 6, Recommendation No. 101.115, p. 20.

[25] "UN Officials Voice Concern over Poor Camp Conditions for Somali Refugees in Kenya", *UN News Centre*, 3 April 2011.

[26] *Ibid.*

[27] Lindley, A., "Unlocking protracted displacement: Somali case study", *Working Paper Series No. 79*, Refugee Studies Centre, University of Oxford, August 2011, p. 25.

significant difficulties, in part because of association between them and the refugee population. ERT conducted interviews with Kenyan Somalis in Isiolo and Wajir, during which interviewees testified to the application of different criteria and conditions when Kenyan Somalis apply for identity documents, allegedly as part of a deliberate policy to deny voting rights to those of Somali origin.[28] Those interviewed by ERT in Wajir also stated that the security forces arbitrarily arrest Kenyan Somalis.[29] ERT urges states to recommend that Kenya take measures to fulfil its obligations towards Somalis seeking refuge in the country and to ensure the enjoyment of the right to non-discrimination by Kenyans of Somali origin.

18. **Strengthen efforts to combat violence against women.** Australia, France, Brazil and Malaysia recommended that Kenya strengthen efforts to combat gender-based violence, recommendations which Kenya accepted.[30] ERT's research identified that violence against women remains prevalent and that the legal and policy framework remains inadequate. Thus, while the Sexual Offences Act 2006 introduced stronger penalties for rape and attempted rape,[31] section 43(5) states that all acts described in the Act as unlawful and intentional "shall not apply in respect of persons who are lawfully married to each other", while section 38 provides that any person making false allegations of any of the offences under the Act will be liable to punishment equal to that provided for commission of the alleged offence itself. ERT urges states to recommend that Kenya (a) strengthen its efforts to combat all forms of violence against women; and (b) review and amend the Sexual Offences Act, in order to ensure that it provides the highest standard of protection from sexual violence.

19. Finally, ERT would reiterate its call for all states participating in the review of Kenya to strongly consider endorsing and adopting the recommendations from the report in full. As noted, ERT has focused above on those past recommendations where its report identifies that implementation has been absent or poor. Given the nature of these prior recommendations, some important issues – such as the need to implement positive action measures – have been omitted from this list.

20. Moreover, it should be noted that the recommendations from the *In the Spirit of Harambee* report are the product of a comprehensive assessment which reflects

[28] See, for example, ERT Interview with C., 21 March 2011, Isiolo, Eastern Province.

[29] ERT Interviews in Wajir, March 2011, North Eastern Province.

[30] See above, note 6, Recommendation No. 101.47, 101.48. 101.49. 101.50, p. 16.

[31] Sexual Offences Act 2006, Sections 3 and 4. Under these provisions, the minimum prescribed penalty is ten years for rape and five years for attempted rape.

an approach based on the unified human rights framework on equality. This approach brings together inequalities based on different grounds and in different areas of life, emphasising the overarching aspects of these different strands of inequality. We therefore urge states to consider adopting the broader, more comprehensive language of the recommendations, in particular in areas where previous recommendations focused on one particular ground of discrimination.