

Shadow Report to the Committee for Elimination of All Forms of Racial Discrimination (CERD) In Response to the Kenyan Government National Report to CERD under the United Nations International Convention on the Elimination of All Forms of Racial Discrimination

Organisations which participated in the preparation of the Report

- 1. Endorois Welfare Council**
- 2. Garba Tulla Development Organisation**
- 3. Likoni Community Development Programme**
- 4. Merti Integrated Development Programme**
- 5. Minority Rights Group International**
- 6. Ogiek Peoples' Development Programme**
- 7. Regional Centre for Pastoralist Elders**
- 8. Sengwer Cultural Centre**
- 9. Wildlife Clubs of Kenya**
- 10. Woman Kind Kenya**

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Executive summary

In this report, we identify areas where provisions from the Convention on the Elimination of Racial Discrimination (CERD) are not being respected, and ways for the Kenyan state to improve its implementation of the CERD.

Article 1

The government should give equal recognition to Minorities and Indigenous Peoples (MIPs) to ensure equal rights among the whole population in Kenya. Equal rights should be matched by equal representation within society, in independent commissions, such as the Independent Electoral Boundaries Commission, and in the civil service, at both the national and local levels. Political parties, contrary to what is stated in the Political Parties Act, should represent minorities.

Article 2

The new Constitution defines discrimination in line with the CERD and provides stronger protection for minorities. The new Constitution represents a commitment by the State to respect the international Treaties and Conventions it has ratified. The State must now translate these into domestic law and enforce them, thus fulfilling its international human rights obligations.

Article 5 (c)

Protection against discrimination and marginalisation of MIPs should be a priority for the Kenyan Government. The State should ensure equal access for all citizens to identification documents without assimilation within the majority group. The fair issuance of identification documents will then engender equal opportunities in employment, equal access to justice, healthcare and education.

Article 5 (e) (iv), (d)

To ensure equal opportunities, minority quotas in employment and in education should be put in place. Special efforts should also be made to ensure accessible healthcare, such as contraception and HIV/Aids medications, to communities who live in remote areas. This can be done by the allocation of more funds to already existing dispensaries and the establishment of new ones.

Article 5 (a), (d) (iii)

The State should implement without any further delay, the decision by the African Commission on Human and Peoples' rights (ACHPR) in favour of the Endorois community, recognising its ancestral right to the land. The State should also speedily implement the African Committee of Experts on the Rights and Welfare of the Child's (ACERWC) decision against Kenya and in favour of Nubian children to gain Kenyan citizenship. Implementing these rulings will not only show Kenya's compliance with its international human rights obligations and international human rights standards, but it will improve the situation of minority communities in Kenya.

Article 5 (b)

Security, as a prerogative of the State, should be ensured for any member of MIPs. This is valid for the Sengwer community, which suffers from cattle rustling.

Security also includes access to food and the protection against drought and climate change.

Article 5 (d) (vii), (viii), (ix)

Security, on the other hand, should not be a pretext to detain religious minorities in the name of the fight against terrorism, as it is the case for Kenyan Muslims. Religious minorities should also be allowed access to their traditional places of worship and be free to assemble, even in protected national parks.

Article 5 (e), (e) (iii), (iv)

Minorities should be allowed to participate in the management of national parks, where they have always lived and should benefit from any profits from these lands. Such inclusion will also help protect the minority communities' culture, identity, language and knowledge. For years, minority communities have been the only source of sustainability for these lands, an important fact that the Kenyan government should recognise.

Submitting Organisations

This Shadow report was prepared in a consultative and participatory way. This was achieved through a consultative meeting held in Nakuru. The purpose of the forum was to bring the minority people together to tell their story in one voice so as to ensure that they are finally heard and recognised as part of the larger Kenyan society. The organisations which participated from the Rift Valley were Endorois Welfare Council (EWC), Ogiek Peoples Development Programme (OPDP), and Sengwer Cultural Centre. From the Eastern part of Kenya, there were Garba Tulla Development Organisation (GTDO) and Merti Integrated Development Programme (MIDP) representing the pastoralist communities. From the North Eastern Province, there was Womankind which works with pastoralist women and girls. From the Coast was Likoni Community Development Programme (LICODEP). Regional Centre for Pastoralist Elders (RCPE) is a regional organisation working with the pastoralist Elders from the Eastern and Horn of Africa. Among the Minorities and Indigenous Peoples represented at the meeting were: Endorois (pastoralists), Sengwer (pastoralist), Ogiek (hunter gatherer), Kenya Somalis, Sakuye, Borana and Swahili (fisher people). With exception of Kiswahili language which is shared, most of the communities represented by these organisations are also linguistic minorities.

The report has been compiled by the Ogiek Peoples' Development Programme (OPDP) and Minority Rights Group International.

Ogiek Peoples Development Programme

Ogiek People Development Program, was founded in 1999, and registered as a Non-Governmental Organisation (NGO) in 2001 in Kenya. Its aim is to sensitize and enlighten minority/indigenous Ogiek community members on issues pertaining to human rights, socio-economic, environmental and cultural rights, so that they can also participate effectively in democratic governance. It is based in Nakuru County, Kenya.

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Minority Rights Group International (MRG)

MRG is a Non-Governmental Organisation (NGO) working to secure the rights of ethnic, religious and linguistic minorities worldwide, and to promote cooperation and understanding between communities. MRG has a consultative status at the United Nations Economic and Social Council (ECOSOC), and observer status with the African Commission on Human and Peoples' Rights. MRG is registered as a charity in the United Kingdom.

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Introduction

The following minorities participated in the process of writing this report: Endorois, Sengwer, Ogiek, Kenya Somalis, Sakuye, Borana and Swahili. These groups identify themselves as minorities due to their small numbers compared to the general national population.

In spite of Kenya being a signatory to CERD and several other Human Rights Conventions, there still exists a distinction and exclusion, in terms of treatment, against certain communities by the Kenyan government. A number of gaps are evident in the country regarding the understanding and appreciation of minority rights. Historical injustices and marginalisation against minorities in Kenya have not been addressed to date.

The discrimination against these groups can be traced as far back as the Colonial period. This was an era in which the colonial powers alienated the natives' land for their own use, forcing them out of their sources of subsistence and into the periphery. In Kenya, discrimination was institutionalised during the Colonial era. However, even after Kenya obtained its independence, the discriminatory policies persisted. The majority communities were integrated into the country's public affairs but the minorities were excluded from this process. In 1965, the Government adopted the Sessional Paper No. 10. This policy paper divided the country into high and low potential areas. The emphasis of its implementation is on the high potential areas, which de facto excludes and neglects low potential areas such as Arid and Semi-Arid Lands (ASAL), thus further perpetuating marginalization.

In addition to discriminatory Government policies, the minority groups are faced with several other challenges that further disadvantage them. The level of

illiteracy and non-awareness on their rights curtails their ability to challenge the Government. In addition, most minority communities occupy areas that are geographically difficult to reach which means that penetration of essential Government services (e.g. water, roads, and health facilities) is very low.

From the Colonial period most of the minority communities have been pushed out of their ancestral land by the Government with no prior consultation or compensation. For a long time, the Mau Forest was the Ogiek people's only home. However, with an increase in the general population, other communities began to settle in the Forest. This posed a threat to the country's natural resources as the Forest is one of the major water reserves in Kenya. The Government intervened and evicted some of the people living in the forest (the Ogiek live at the periphery of the forest). Although the Government acted in the interest of the Kenyan people, it failed to acknowledge the right of the Ogiek people to remain there as they are the original and genuine occupants of the Forest. The Government failed to provide them with alternative land or compensation. In short, the Government took away the only resources of the Ogiek people who were left to cope on their own. However, this chain of events is not only familiar to the Ogiek people but also to other minority groups in Kenya. The Endorois community, for instance, suffered a similar fate when they were evicted from their land around Lake Bogoria.

Article 1

The term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The State report to the CERD states on page 4 that "Kenya is a multi-racial, multi-ethnic, multi-cultural and multi-religious society. The national language is Kiswahili while the official language is English, though numerous other local languages are spoken. People of African descent constitute about 90 per cent of the population; divided into 42 main ethnic groups". The Government does not recognise the remaining communities who do not fall within these 42 ethnic groups. They are referred to as "others" and this has caused identity crises such as communities identifying themselves with recognised groups in order to gain visibility. A very worrying impact from lack of recognition by the State is that some communities have been forced to assimilate into neighbouring communities. The danger is for the community to slowly lose its identity and its language. This lack of recognition is discriminatory.

As the Government Kenya refers to Kiswahili being the national language and English the official language, though numerous languages are spoken (see above for exact statement), it indicates that the State does not officially recognise other languages. Furthermore, the recognition of only 42 main tribes has contributed to

the deterioration of languages. For example, Ogiek children are no longer able to speak their mother tongue.

In addition, the Kenyan government reported on racial but not indigenous minorities. The UN Special Rapporteur¹ on Indigenous Issues had recommended specific measures to be undertaken to safeguard Indigenous and Minorities interests, values and rights.

Recommendation

Kenya should officially recognise all minorities and indigenous groups equally and institute policy measures to promote and protect all Kenyan languages.

Article 2

Article 2.1 (a)

Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity.

While the government claims in the State report that it has taken appropriate measures to prevent and punish acts of racial discrimination against individuals, groups or institutions, and to ensure that all public authorities and local and national public institutions, act in conformity with this principle, we would like to state that: the government has not acted or shown interest in two landmark rulings one by the Kenyan Court and the other by the African Commission.

- The Endorois Community, through EWC, CEMIRIDE and MRG, instituted litigation at the African Commission on Human and Peoples' Rights (ACHPR) and a landmark ruling was delivered in February 2010 in favour of the Endorois community, finding the Government had violated a number of the African Charter rights in relation to their forced eviction. Among other things, the ACHPR found that the Endorois should have their land returned to them, and be appropriately compensated for their loss. The Government has not yet implemented the ACHPR's ruling in spite of Kenya being a signatory to the African Charter on Human and Peoples' Rights².

¹ http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf

² ACHPR Communication 276/2003, Centre for Minority Rights Development and Minority Rights Group International –On behalf of Endorois - versus Kenya –Decision of February 2010.

- In 2006 the High Court made a judgment recommending the government through the Electoral Commission of Kenya (ECK) to ensure representation of a minority group the Ilchamus in Parliament.³ ECK is the body charged with the creation and distribution of Constituencies. Much like the ACHPR ruling for the Endorois, this judgment has not been implemented either. The State established the Interim Independent Boundaries Review Commission to review the existing administrative and electoral boundaries and make recommendation to the Parliament. IIBRC did not give due attention to minorities and minorities' interests. Instead, it protected the majority communities' interests while marginalizing minorities from representation.

The failure to implement these rulings in our view shows discriminatory attitudes towards minorities.

Moreover, the Constitution of Kenya provides for affirmative action to the minorities and the marginalized (article 56 and 100). What steps are being taken to allow minorities and indigenous people to participate effectively in the implementation of the constitution?

Recommendations

1. The Independent Electoral and Boundaries Commission (IEBC) should ensure that the process of the boundaries review is all inclusive and takes into account the representation of the minorities.
2. The State should ensure full implementation of the ACHPR ruling for the Endorois community and with this in mind, commence negotiation meetings with the community's representatives
3. With the new Constitution defining discrimination in line with CERD and providing stronger guarantees for minority rights, the state should prioritise and focus on enabling a statutory and policy framework that promotes the implementation of the rights in the new Constitution.
4. The Constitution obligates the Government to domesticate and enforce treaties and conventions which Kenya has ratified; the state should

³ Miscellaneous Application No. 305 of 2004 eKLR

take measures to implement these provisions by enacting legislations to fulfil its international obligations on human rights.

Article 2.2

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them

Pastoralists and hunter gatherers occupy the Arid and Semi Arid Lands (ASALs) of the country. Through the ASALs Policy which is currently at the Cabinet level the land development targeting these communities will not only be participatory but also sustainable. The State reports states that "the ASALs Policy will seek to, among others, ensure that the resources in the ASALs are harnessed not only for these communities to sustain themselves but also to contribute to national economic development. The policy document, prepared through a participatory and consultative process with relevant stakeholders, provides a vision and a practical framework for achieving multiple developmental objectives in the ASALs. It provides a vital link between public policy and the socio-economic needs of ASAL communities. This new vision for hope and prosperity recognizes that the interdependence between ASAL and non-ASAL socio-economic systems is the main driver for sustainable development. To ensure that these measures are realized, the Government has created a Ministry for the Development of the Northern Region, to spearhead efforts to improve development programmes for the region". Formulation of a policy is not new, but the challenge is implementation. The implementation process should be given political goodwill and sustained public support and integration.

While we are in agreement about the new initiatives in ASAL, we believe creating a Ministry is not a sufficient measure. The approach should be holistic, and this willingness to make positive changes in ASAL should have a legal and institutional framework.

Does the state indicate that ASAL does not contribute to the National economic development? It is a known fact that 70% of the livestock are found in ASAL which produces meat and hides. This lack of recognition of the contribution of ASAL is discriminatory. In our view, this is the same reasoning as the one behind the Sessional Paper N0. 10 of 1965. This Policy Paper divided the country into high and low potential areas. The emphasis of its implementation is on the high potential areas, which de facto excludes and neglects low potential areas such as Arid and Semi-Arid Lands (ASAL), thus further perpetuating marginalization of communities living there.

While we appreciate the creation of the Ministry for Northern Kenya and Other Aridlands, it is clear that the Ministry is not in a position to fulfil its mandate because of the resource allocated to it. At the moment the Ministry depends on donor support to run its programmes.

Recommendations

1. The process of formulating the ASAL Policy should be expedited and fast-tracked so that it is implemented to make the beneficiaries benefits from it without shelving it as it has been the case with many other policies in Kenya.
2. A Commission should be formed to sustain and carry on the work of the Ministry of Northern Kenya and other Aridlands.
3. Ministry of Northern Kenya and other Aridlands should be given enough resources for it to execute its mandate.
4. The State should provide data on the contribution of ASAL to the national economic development.
5. The Policy Paper/Sessional Paper No. 10 of 1965 which divided Kenya into high and low potential areas should be repealed. The “low potential areas” are inhabited mostly by minorities and indigenous peoples.

Article 5

Article 5 (a)

Access to justice

Other areas in which the Government is at fault in the fulfilment of its mandate include the fact that in spite of instituting a Truth Justice and Reconciliation Commission (TJRC) to address historical injustices, the composition of the Commission does not include individuals from minorities. The recruitment of staff has not been inclusive enough of minorities. Though this is an important process, Minority and Indigenous Peoples (MIPs) have not been adequately prepared for it. In our view, this is an indication of the report blocking out the issues of Minorities.

In addition, the Government has failed to act on the ACHPR ruling made against it and in favour of the Endorois community. This shows the reluctance of the Government in addressing the issues faced by minority groups.

Concerning the Ogiek case *Joseph Letuya and 21 Others v Attorney General and 5 Others* (number 635/97), the State has been adjourning it since 1997 and during the last hearing, the lawyer representing the State requested more time to get further instructions from the Attorney General. In our view, this delay amounts in effect to a denial of justice as no decision is being taken, let alone implemented. Some other cases filed in the local courts by the Ogiek community in their pursuit of justices include:

- HCCA No. 228/2001: *Joseph Letuya and 21 others Vs the Minister for Environment and Natural resources*

- *Joseph Kimetto Mapelu & Others Vs County council of Narok Civil Suit N. 157 of 2005*

Both these cases have suffered the same fate and remain pending before the Kenyan courts, with little sign of justice being delivered soon.

At the regional level, a Kenyan NGO, the Centre for Minority Rights Development (CEMIRIDE), in conjunction with OPDP and MRG, have taken the Ogiek case to the ACHPR.⁴ Minorities like the Ogiek are finding it difficult to access justice and the determination of the cases takes too long and makes the complainants exhausted financially and morally.

What steps are being undertaken to address the Minority cases in the Courts?

What is the commitment of the State to implement the landmark ruling by the African Commission in favour of the Endorois people?

Recommendations

1. Extend the term of TJRC to complete its mandate to support minority and Indigenous communities to engage with the process.
2. Facilitate MIPs to engage with the implementation of the findings and recommendations of TJRC.
3. The State should fully implement the African Commission ruling on the Endorois case.
4. The State should expedite the determination of the Ogiek cases in the High Court.

Article 5 (b)

On the right to security of person and protection by the State against violence inflicted by government officials, individuals, groups or institutions

There are many incidents where raiders from across the borders of Ethiopia, Somalia and Uganda cross over and rob people of their property, mainly livestock, which can result in deadly violence. The government views these attacks only as cattle rustling while human lives are at stake and total disruption of livelihood. This increases vulnerability for a pastoralist. Those who have livestock are equally vulnerable since one can be “a millionaire in the morning, and a destitute in the evening” after loss of livestock through raids. The State has not prevented citizens from being killed by either people from outside Kenya, nor from within inter-

⁴ CEMIRIDE, MRG & OPDP (on Behalf of Ogiek Community) V Republic of Kenya Communication No. 381/09

community conflicts. These violent conflicts are underrated and are treated as “normal cattle rustling” by the Government which results in its non-intervention in the matter. The most recent example of this violence is the raid by the Merilee community from Ethiopia, who killed over 40 Kenyans at Todonyang village in May 2011.

Sengwer community live in the Cherangani area and rely on pastoralism for their sustenance. However, they frequently have to deal with attacks by cattle rustlers from the Pokot community. Unfortunately, in spite of the frequency of the attacks, the community has been unable to get security forces to help them ward off attackers. The government has failed to reinforce the security forces on the ground, and the ones that serve in the area listen to the voice of the majority community which leaves the group to defend itself. For instance, the Cherangani area has no police post despite the security threat.

The communities living around forests and national game parks are often seen as a threat to the flora and fauna and yet they have taken care of this environment and lived with them for centuries. In addition, forests have evolved into conflict areas between human beings and wildlife and there is need to strike a balance between the interests of the two. If the communities do not benefit from these resources then a situation of them versus us will evolve such that the community sees the resources as the property of Government and this can easily degenerate into resource based conflict. The Forest Act and Wildlife Management Act have been amended to recognise community participation in management but the implementation of this community participation has never taken place hence need for enforcement.

The pastoral communities are in constant conflict amongst themselves over resources. Most conflicts result in human losses, the destruction of natural resources and other community resources. The neighbouring Pokot and Turkana communities are a good example. They often fight each other, causing suffering and death and increasing poverty levels. In some cases the conflict has resulted in the deaths of government security personnel.⁵

The State has generally left pastoralists on their own, with little or no government presence in some areas and thus making pastoralists defend their own using illegal arms. The arms trade has spread into many parts of the country and has created an important security challenge. Providing security is however a state prerogative.

Recommendation

1. The State should provide security for its citizens and put in place sustainable peace building initiatives for the communities to live together in peace.

⁵ *Daily Nation*, 22.11.2011, “Turkana killings ring alarm bell”, www.nation.co.ke.

2. The state should enforce a policy for fair management of natural resources so that the communities living nearby forests and game parks are allowed to benefit directly since these are their only resources.

3. The Forest Act and Wildlife Management Acts should be implemented accordingly so that the communities benefit from these resources

4. The level of compensation due to destruction, loss of property and life is inadequate. There is an urgent need for review to cushion people against losses.

Article 5 (c)

Political rights

Most minority communities are too small in number hence are not able to front their own candidates for elective offices. They are not considered as a special interest group. This can be attributed to the fact that these groups have not obtained any recognition at the national level. For example the Ogiek and Endorois have been forced to migrate to other places for survival and so remain a minority anywhere. Their numerically small population works to their disadvantage as it hampers their bargaining power. They cannot count on majority voting by their own community to push forth their agenda, but have to rely on the goodwill of other communities.

They are also discriminated against by their neighbours and consequently are not involved in the constitution of bodies like Constituency Development Fund Committees and other Devolved Funds. As a result they are left out in the distribution of resources at the grassroots level.

Political Parties are owned by individuals, and therefore are not accommodating to women and MIPs. Because of their small number and fragmentation, minorities do not provide large numbers of voters for political parties to target during campaigns. There has also never been a unity of purpose and a unifying forum.

Recommendation

The Political Parties Act should be amended to allow for Political Parties to represent minority issues and for national institutions to be accessible for minorities.

Right to participate in Elections

While minorities have a right to participate in elections most often they are not in possession of identification documents required to participate in elections. In spite of the High Court Ruling that the Ilchamus be represented in Parliament, the Interim Independent Boundaries Review Commission (IIBRC) did not take it into consideration. Instead, the Ilchamus were put together with another minority-the Endorois. According to the new Constitution there are 80 new constituencies and yet there are no constituencies created for the minorities. For example the Ilchamus

were left out. The Gabra Community were denied an additional Constituency in spite of the huge land mass and the aridity and no infrastructure. North Horn Constituency has a land mass equivalent to four provinces of Central, Nairobi, Western and Nyanza. Constituencies are important in Kenya because they have been used as a unit for resource allocation.

Recommendation

1. The process for acquiring identification documents should be effective and be made accessible to all Kenyans.

2. The State should give support to initiatives by minorities to form political parties to increase their representation and participation in the governance at both National and County levels.

Participation in public services and public affairs

Employment in government and public services

In Kenya, the government is the biggest employer. It is then only fair to expect that employment in public service should reflect the ethnic makeup of Kenya. Instead, minorities continue to be marginalised especially as there is no government administration in charge of their protection and their representation. In most cases, MIPs who are employed are at the lower level and in Ministries which are not well resourced. A government agency, National Cohesion and Integration Commission⁶, carried out an assessment on the profile the composition of the civil service. The report concluded that there are racial and ethnic inequalities in the way civil service is currently constituted. Only 20 out of over 40 listed Kenyan communities are statistically visible in the civil service in April 2011. Some 23 communities have less than 1% presence in the civil service. Kikuyu and Kalenjin make close to 40% of the entire civil service; there have been presidents elected only from these two majority groups.

Opportunities available to minorities are limited in terms of employment. This is directly related to the low levels of education and the high illiteracy level amongst them as well as lack of identification documents especially for the youths.

What steps are being taken to address discrimination of minorities within the Public Service Commission? How many minorities have been employed and promoted to date?

The State report says that there are various Commissions which have been constitutionally created and specifically charged with the task of ensuring adequate and effective participation of the public in government and ensure participation in the conduct of public affairs. While the representation of different interests groups in the Commissions is effective, the same is not true for minorities. For example the Truth Justice and Reconciliation Commission (TJRC) does not have a minority in their key programme staff.

⁶ <http://www.nairobistar.com/national/national/20064-kikuyukalenjin-dominate-civil-service>

In order for minorities to participate in the governance of the State, they need information. The minorities are found in the rural and isolated areas. Most often the medium of communication for reaching the grassroots communities have been short of denying the MIP the right to participation. This has not taken into account the language, terrain and distance. For example, during the recent hearings by the Taskforce on the Devolution, the taskforce puts adverts in the national daily papers in English). There were 50 questions and citizens were expected to give their views. Most minorities who do not have access to the Newspapers and are not able to read English could not participate in the survey.

Lack of recognition of minority groups by the State translates into exclusion of these communities in the formulation of government policies. A good example of this is the Forest Act, whereby communities living in the forests were not involved in the formulation of the law, yet they are affected by it. It also results in suppression of their culture as they are forced to adopt new lifestyles, thus making their way of life no longer sustainable or available. It also alienates minorities when it comes to the celebration of national heritage and culture as they are not considered independent entities, but sub-communities. The government has left them out of its programmes aimed at preserving and celebrating the culture of various communities in the country. With time, as their numbers diminish, these communities are faced with extinction.

Recommendations

1. There should be new criteria for representation which recognises the need to include the under-represented groups.
2. In order to respond to imbalances in the Civil Service, the State should put in place affirmative action measures to benefit minority communities, with minority quotas.
3. Sensitise the public servants to understand minority issues as Kenyan issues.

Equal access to public services

The national identity card is an essential document, which every citizen from the age of eighteen years is expected to have as per the law and as an instrument for accessing government services and also for employment. However, the Government has instituted discriminatory practices when it comes to the issuance of this vital document to persons from marginalised and minority groups.

For instance, minority groups do not have Identification (ID) Code numbers allocated to their groups as is the practice when it comes to the 'majority' communities. As a result persons from these communities seeking to be registered are assimilated into the majority groups by being registered under ID code numbers allocated to the 'majority' groups. This not only results into a loss of identity for persons from such groups but also lowers their dignity as Kenyan citizens.

Another point worth of note is the fact that communities from the North Eastern Province and Upper Eastern part are subjected to a rigorous and lengthy process whenever one seeks to obtain an identity card or Passport. Unlike other Kenyans, persons from these areas have to fulfil sixteen requirements before one can finally obtain an identity card. One of these requirements involves appearing before a vetting committee comprising of the area Officer Commanding Police Station (OCS) and representatives from the National Security Intelligence Service (NSIS) for an interview to prove that one is actually Kenyan. In addition, persons from the same regions are subjected to interviews when applying for passports, a practice to which other Kenyans are not subjected to.

As much as the Government would argue that such precautions are justified on security grounds, it should strive to enact a process that does not lower the dignity of the very citizens it seeks to protect.

Recommendations

1. The State should provide identification documents to all Kenyans based on the same procedure.
2. The state should take immediate steps to address discrimination and bias against issuance of scholarships and Identity cards to minorities and ensure that policies are developed in this regard to ensure equality in service delivery. This can be achieved through ratification of ILO convention 169 by Kenya.

Article 5 (d)

Other civil rights

Article 5 (d) (iii)

The right to nationality

Kenyan Nubians were not included within the census, their community has been subjected to extraordinary discriminatory measure. Their children have to prove that they are Kenyan while their parents have their identity documents which they were given since 1979. The Nubian community challenged the government policy through an application to the High Court which was not helpful. The Nubian Children are stateless in their own country. The effort of the local courts to resolve their issues have not been handled well such that they had to resort to the intervention of the

African Court in The Gambia. The community, having exhausted all domestic recourses, took the case to the African Commission and to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

In the view of the ACERWC, Kenya violated the African Charter on the Right and Welfare of Children which Kenya ratified. It is vital to note that in March 2011, the ACERWC announced its preliminary decision on communication 002/09 *Nubian Children in Kenya v Kenya*. The Institute for Human Rights and Development in Africa (IHRDA) brought this case on behalf of Nubian children in Kenya jointly with the Open Society Justice Initiative (OSJI). The ACERWC found Kenya in violation of its obligations under the African Charter on the Rights and Welfare of the Child (ACERWC) as it did not grant Nubian children nationality at birth. Nubian children have a right to Kenyan nationality and citizenship at birth.

Moreover, after being in Kenya for over 100 years, they live on temporary occupation land tenure. They have not been politically represented by one of their own since 1975.

In order to accommodate the needs of the MIPs, the government should ensure through Parliament that the implementation of Article 100 and its promotion of the representation of marginalised groups are participatory and accommodative.

The young people from the Somali community have been denied Identification Cards under the pretext of national security. Unlike most Kenyans, Nubians, Somalis, Boran, Sakuye and other minority communities are subjected to vetting in order to obtain Kenyan identity documents. In fact, this process regularly requires additional proof of identity and submitting to questioning before a vetting committee. Long delays in vetting effectively contribute to further marginalization and poverty of the minorities in Kenya. Some never receive proof of citizenship. Without a national Identity card, access to health care, education, employment and all other rights attached to citizenship, is severely restricted, if not altogether barred. The Citizen TV (one of the national TV stations) recently showed news coverage on the plight of the youths from North Eastern Province (NEP) “Agony of Identification: Youths miss Opportunities”

Recommendations

1. The State should implement the ACERWC decision on the nationality of Kenyan Nubian children at the earliest, rather than delay it as is the case for the Endorois ruling by the ACHPR.

2. The Kenya National Human Rights and Gender Commission should create a desk or department to deal with minority issues, which will feed into government policies and legislations
3. The State should legalise ownership of land by the Nubian community in Kibera (Nairobi-Langata) and other areas.
4. The State should find an alternative form of identification for the youths, so as not to deny them access to employment and other opportunities

Article 5 (d) (vii), (viii) and (ix)

Right to freedom of thought, conscience and religion; the right to freedom of opinion and expression; and the right to freedom of peaceful assembly and association

The Government states that it is protecting the various religions, while it destroys the traditional habitat of minorities through concessions for logging. This has interfered with traditional shrines and places of worship. For the Ogiek, their places of worship are in the Mau Forest while for the Endorois community they are at Lake Bogoria and yet they do not have access and are denied interaction and connection with their ancestors which is an important part of their way of life.

Another issue lies in the wake of 9/11. Since then, the Muslim community has been under blanket accusation of being sympathetic to terrorists. In some cases their privacy has been violated and some arbitrarily arrested. Hon. Najib Balala, the Minister for Tourism on one occasion claimed that “Muslims had since independence suffered in the issuance of Passports, national Identification cards, employment, access to quality education and arbitrary arrests in the fight against Terrorism”.⁷ Through petitions by Muslim Leaders, the Government of Kenya formed a Presidential Action Committee on the Specific Concerns of the Muslim community to address any form of discrimination against Muslims. While the Committee did its work and submitted a report to the Government in July 2009, the report has not been released to the public.

In 2003, the Government published the Suppression of Terrorism Bill. Many observers, including the National Council of Churches of Kenya (NCCK), found the bill objectionable on human rights grounds, arguing that it contained provisions that violate the Constitution. Muslim leaders argued that the Bill specifically targets their community. In June 2004, the Council of Imams and Preachers of Kenya, referring to the arrest of 30 Muslims on terrorism charges, accused the Government of targeting Muslims and applying the Bill as if it were law. The Bill was shelved due to an outcry from the Muslim community who found the bill discriminatory. While the State has the obligation to protect the Kenyans against terrorism, it should not be done under a double standard. Muslims should not be subjected to discrimination under laws of

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http://www.kenyanewsagency.go.ke/index.php?option=com_content&task=view&id=84&Itemid=50

prevention against terrorism. Terrorism is an international issue and Kenya has suffered from it in the past. However, this should not give the State mandate to arrest Kenyans based on their religion.

It should also not give the State the right to take Muslim Kenyan prisoners to be detained in other countries. Abdulmalik Muhammad was arrested in Kenya and transferred to the prison of Guantanamo Bay in the United States of America⁸. On August 5, 2010 three Kenyans were arrested in Mombasa by the Anti Terrorism Police unit. Mr. Hassan Hussein, Mohamed Adan Abdow and Idris Magondu were extradited to Uganda to face charges for the terrorist attack in a Kampala restaurant during the final match of the World Cup 2010.⁹ These are examples of cases where Kenyan Muslims were unlawfully removed from Kenya to foreign countries without conforming to a legal process. In fact, Kenya has been sued by the East African Law Society for the unconstitutional extradition of Kenyan citizens to Uganda to face charges related to terrorism attacks in Kampala in July 2010.¹⁰ The case is now at the East African Court of Justice based in Arusha, Tanzania.

Recommendations

1. The State should ensure that minorities can access and be allowed to assemble at their traditional places of worship.
2. The State should formulate an all inclusive policy and legislation on fighting terrorism which treats all Kenyans equally.
3. The State should give a report on the condition of all Kenyans being held in other countries and facilitate their return and be charged in Kenya if they have committed any crime.
4. The report on the Presidential Action Committee on the Specific Concerns of the Muslim Community should be released to the public to ensure discussion and ownership of the report by the Kenyan Public.

Article 5 (e) Economic, social and cultural rights

The Kenya State report states that poverty remains a major impediment to both the fulfilment of basic needs and the realization of the life plans of many Kenyans, particularly women and children. The State report says that currently, approximately 56 per cent of Kenyans live below the international poverty line of less than \$1 per day. This is partly due to the negative impact of the post-election violence witnessed in the country at the beginning of 2008 and the global economic crisis. We agree with this position, but it must be added that the State report fails to mention the situation of minorities.

⁸ <http://www.islamkenya.com/bulletin/FridayBulletin274.pdf>

⁹ http://www.hiiraan.com/news2/2010/aug/kenya_extradites_three_terror_suspects.aspx

¹⁰ <http://allafrica.com/stories/201106101047.html>

The poor economic situation of minorities can be explained by the fact that although resources are allocated for infrastructural development in areas where most minorities are found, these minorities do not benefit from them. Indeed, although lands belonging to minorities have been converted to national assets, the revenue collected from, for instance Mau Forest, Lake Bogoria, and Lake Baringo, do not benefit the local minorities. Moreover, the areas occupied by minorities lack effective road network and means of communication, which further contributes to an increasing exclusion and poverty.

The Government has not taken any tangible actions to implement the Endorois decision. One example of this is the recent nomination of Lake Bogoria as a UNESCO World Heritage site, which was submitted entirely without the Endorois' free, prior and informed consent. The ACHPR ruling has not been respected.

The land, which has been identified highly potential by the government, has been over exploited and the government is now looking to ASAL for new economic endeavours. The current Kenyan development blue print, *Vision 2030* envisages a just, equitable and prosperous nation with a focus on three pillars: economic, political and social. *Vision 2030* acknowledges the special circumstances of previously marginalised communities. In this respect *Vision 2030* offers a chance to respond to imbalances in regional development, and to reduce poverty and inequality. While we agree with the vision and the intention to develop these areas and also to create wealth, investments and projects should take into account the negative impacts on the way of life and production systems of the people who have lived in those areas.

With the new project coming up in the pastoralist areas like the Geothermal project in the Lake Bogoria, Wind Power in Marsabit (Chalbi) and Sugar Plantation in the Tana River Delta, pastoralism will be greatly undermined. Indeed, these projects will need great surface of land and will impact negatively on the fragile ecosystems with direct negative impact on the pastoralist way of life and production systems. The survival of the pastoralist Orma community who depend on the Tana River Delta for their prime grazing land has felt threatened by the Sugar Plantation and have since moved to the High Court to restrain the Government and the investors from implementing the project. Another example of this is among the Borana people of Merti. When the government commissioned for exploration of oil in Isiolo, a Chinese Company forcefully acquired land within 21 kilometres radius and the pastoralists who were using the land were prevented to live on their own ancestral grazing land. The people were not given alternative land to settle in nor were they given any compensation. In addition, there was no prior consultation with the inhabitants of the area on the way forward subsequent to the discovery.

The grazing land is decreasing, drought is more frequent and the land capacity to sustain the livestock population is already a big challenge. The pastoralists continue to lose livestock every year. The government has not come up with sustainable policies to cushion the pastoralists against the drought. The negative impact of Climate Change is causing suffering not only for the pastoralist but for agriculturalists, the current food shortage in the country and increase in food prices are indication of the negative impact of the Climate Change and yet there are

no policy interventions by the State. The silence of the government has prompted a debate and Kenyans are now voicing their concerns in the Newspapers.¹¹ The minorities who mostly depend on the natural resources either directly or indirectly are feeling the real impact of the Climate Change and changing weather pattern.

Recommendations

1. The State should provide disaggregated data on the social and economic situation of minorities such as poverty, health and education indexes.
2. The State should protect livelihoods especially for pastoralists who are under serious threats from Climate Change. The State should start an all inclusive process of legislation on Climate Change to be expedited and implemented accordingly. Most minorities are dependent on natural resources and rainfall.
3. Drought and recurrent food shortage: deaths in Turkana County and other pastoral areas is an embarrassment to the Kenyan State. There should be a comprehensive food security and disaster management policy. It is not enough to declare ad hoc “National Disaster”; a legal and institutional framework is needed.

Article 5 (e) (iii) The right to housing

The report says “the landless squatters are being resettled and given title deeds so as to enable them to settle in places of their choice” This is far from the truth. Are Ogiek and Endorois part of these beneficiaries? Not much has been done. The Dorobo in this part of the country are landless in their ancestral land. The lower segment of the society there lives by the roadsides. Others who are lucky rent houses from nearby trading centres. The majority of the population lives in abject poverty because they live in marginal areas without water and food. The majority of the Ogiek are squatters in their own ancestral territories as in Uasin Gishu County, and most live in road reserves. Those in Nakuru County are still waiting for the government to resettle them in their ancestral lands which was previously allocated to powerful or well connected individuals of the former government. Others living in Narok County are being dispossessed of their land which was originally their ancestral land.

Recommendation

The state should urgently investigate, prosecute, and punish land grabbers in areas of Mau forest complex and consider resettling the Ogiek people who have been left landless by human settlement.

Article 5 (e) (iv) The right to public health, medical care, social security and social services

¹¹ “Shield Tea Industry from Climate Change”, *Daily Nation*, 22.06.2011, www.nation.co.ke.

The effort of the government is commendable but the situation of MIP is below standards of other areas and so calls for more attention.

The government states that infant mortality rate is high in Kenya. Indeed, there are, for example, two under-equipped dispensaries and health facilities in Mau serving more than 100,000 patients including approximately 20,000 Ogiek people. These facilities greatly lack staff. Moreover, the data on infant mortality rate available does not show the proportion of minorities within this rate.

In the Mau Forest, the community has witnessed a great loss of productive members of the community due to HIV/AIDS scourge. This has been compounded by lack of awareness in safe sex. In addition, other diseases like Meningitis have claimed the lives of many members of the community. The Ogiek community has lost many people to water-borne diseases like typhoid due to unclean and unsafe drinking water.

What steps are being taken to ensure that healthcare facilities (Sogoo and Nessuit dispensaries) are adequately equipped to provide quality, hygienic maternal healthcare services and provide respectful, quality care?

Kenya's new Constitution guarantees the right to high standards of health, which includes the right to healthcare services, including reproductive health care. How does the government plan to implement this right for minority groups? If legislation is part of the measures that the government intends to take, when will this comprehensive legislation be introduced? How will the legislation be made participatory and consultative?

Recommendations

1. National Hospital Insurance Fund (NHIF) should be restructured to make health care accessible and affordable to the MIP.

2. The state should enact a legal and policy framework for minimum state provision of primary health care; allocate more resources to the dispensaries. The state should ensure that Dispensaries waive medical bills for those who cannot meet their medical costs.

3. The government should demonstrate its commitment to improve dispensaries and other health care infrastructure within the minimum.

4. The state should make concerted efforts to ensure an adequate and consistent supply of contraceptives, including emergency contraception, to address the prevalence of stock-outs; monitor healthcare providers to prevent the practice of charging formal and informal user fees even when contraceptives should be free.

5. The State should initiate campaigns to tackle the stigma and discrimination faced by women and adolescents trying to access contraceptives.

6. The State should establish a Trust Fund to sustain the fight against HIV/AIDS to cushion the citizens (minorities) against the risk of donor dependence.

Article 5 (e) (v)

Right to education and training

The Government prides itself in having effectively put in place a system of Free Primary Education (FPE). However, it fails to evaluate the efficiency of this program and the impact it has had on the intended recipients.

For instance, in spite of the fact that there are schools on the shores of Lake Bogoria, the area occupied by the Endorois people, the teacher-pupil ratio is greatly unbalanced. The reality on the ground is that there is a serious shortage of teachers in these areas, such that one teacher has to deal with a class of about two hundred pupils. This raises questions on the efficiency of this program and its benefit to the marginalised groups in the country.

Another issue relating to education is the quota system whereby the Government claims that it has adopted a quota system so as to ensure that students from marginalised areas are included in admission to national and regional schools. However in implementing the policy, the Government fails to use a clearly set out mechanism so as to ensure that minorities in these areas also benefit from the policy. The result is that most of the beneficiaries of the quota system are drawn from the majority groups in these areas.

Performance of the education sector

The Gross Enrolment Ratio (GER) at public primary level peaked during the early 1990s to stand at 105.4 percent but declined to 87.6 percent in 2002. Similarly, GER at the public secondary level declined from 30 percent to 22 percent over the same period. However, following the implementation of FPE, there has been an upsurge in enrolment in public primary schools, resulting in a GER of 99 percent in 2003 (102 percent for girls and 97 percent for boys). Every effort is, therefore, required to sustain the current enrolment and address the key issues of improved access, equity and quality.

However, the government has failed to appreciate the fact that this vital sector is struggling with structural corruption. The Department for International Development of Britain had made a follow up of the use of the funds it provided for FPE, use which amounted to only 5% of the total. The audit report revealed huge abuses of the resources. The big question is what has become of the remaining 95% from taxpayers?

Recommendations

1. The State should put in place effective mechanisms for safeguarding the use of FPE funds.

2. While increased access is welcomed, there is still a need to invest more to enhance the quality of the services which will benefit schools in marginalised areas where most of the minorities live.

Article 5 (e) (vi)

Right to equal participation in cultural activities

The State report points out the fact that the number of licences issued to vernacular radio stations has been on the rise. However a point worth noting is the fact that, none of these stations represents a minority community. The process for getting the licence is long and the costs are also high.

Recommendation:

The government should make the process of getting the licence for radio stations affordable and make it easy so as to ensure that the minorities can sustain their languages and cultures.

Article 7

Measures taken in the fields of teaching, education, culture, and information with a view to combating prejudices which lead to racial discrimination and promoting understanding, tolerance and friendship among nations and racial or ethnic groups as well as propagating the purposes and principles of the United Nations Charter and the Universal Declaration of Human Rights, the United Nations declaration on the elimination of all forms of racial discrimination and the International Convention on the Elimination of All Forms of Racial Discrimination

Education and teaching

The State report states that "despite effort of the Government, education in pastoralist areas is characterised by low enrolment rates, high rates of attrition, gender disparities in enrolment and performance, as well as low transition rates". For example, Net Enrolment Rate (NER) in North Eastern Province, a predominantly pastoralist area, for 2008, was 30.9 percent; 35.9 for boys and 25.7 for girls. Projections for the NEP indicates that by 2010, the NER for the province will be 38.6 percent compared to the national projected rate of 94.8 percent. According to UNESCO Institute of Statistics (2008), 18% of Children of primary school age are out of school. Most of these are pastoralist children.

Affirmative action for minority groups and indigenous peoples

The State report says "Admissions to national secondary schools are pegged on a quota system which permits admissions from marginalized areas". This is however not accurate. There is no known data to support this claim. Admissions to national secondary schools are pegged on a quota system for each district, and there is no provision for marginalised areas. Also, children of rural minorities are in public schools and deserve national schools as the public schools do not perform well in national examinations.

The report says that the State is laying great emphasis on the education for the girl-child in accordance to the International Convention on the Elimination of All Forms of Racial Discrimination concerns about exacerbation of racial discrimination on account of gender. However again, there is no data to show that the MIP girls are benefiting. In addition, cultural barriers as a result of illiteracy have seen some of the communities remaining marginalised. In the Pokot areas, for instance, it is hard to provide services as the locals are resistant. These services include educational facilities for both girls and boys. Education is not considered a necessity for the girl child as they are married off as early as at the age of twelve.

The report says that the Constituency Bursary Schemes and Constituency Development Fund (CDF) support needy school children's access to education. However, because the MIPs are politically excluded, they are not members of these committees and thus do not get the support. The CDF has been used to develop and expand education facilities including schools. The allocations per constituency are based on poverty indices. Despite the good intention underlying this scheme, the MPs have the power to appoint individuals to the committees which manage these funds and MIPs are not included in these appointments. Therefore, their plight remains unknown.

The State has made an effort to introduce mobile schools and boarding schools in pastoralist areas supported by the Government. Not much has been done to invest in mobile schools; instead the policy is aimed at settling pastoralists hence undermining their livelihood and production system. The settlement also reduces the land available for pasture.

There are few educational institutions and the ones available are underdeveloped in Ogiek land, such as the Nessuit and Mariashoni primary schools. The community still uses old structures set up during the Colonial era. The communities have few professionals; this is because parents are forcing their children to look after cattle and women remain at home to perform house chores.

Recommendations

1. The MIP should be included in the committees managing Devolved Funds.
2. The State should establish Minority Fund to specifically address the minorities' problems.

3. The State should invest in mobile schools and ensure that pastoralist children get quality education in their own natural environments and that education provided does not stand in the way of pastoral livelihood and production system.

Culture

The Government states that it has been involved in the promotion of culture among communities in the country. However, it has not involved minority groups in this promotion. The report further articulates how the Government has been involved in the retention of culture. Minority groups dispute this assertion as they have systematically been pushed out of their natural habitat, forcing them to abandon their culture and adopt new ways of life.

It is common to find, in Kenya, majority communities organising a party in Nairobi where they show case their culture in terms of dressing, music, food etc. While these actions are positive, the government has yet to show interest in promoting the cultures of the MIP through such forums.

We agree with the effort of the Government in promoting a culture that fosters national integration and in taking measures to promote a culture that fosters racial integration. However, the cultures of some minorities will die with older generations since young people are not keen to take up their place, and since the Government gives them no incentive to.

The MIP should be allowed to have access to forests and other lands important to communities for culture and religious purposes; such as the access to sites and shrines. This is already emphasised previously under the right to freedom of peaceful assembly and association.

Recommendations

1. The government should create a cultural institute with a mandate to ensure that the cultures of minorities are protected and promoted for the good of the country.

2. There should be an inventory for all Kenyan languages and mechanisms put in place to promote and protect them.

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