

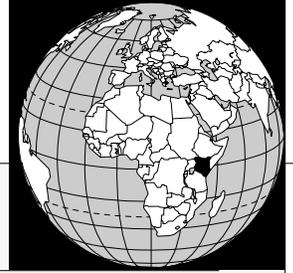


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4. Kenya



Statistics

GENERAL

Population

- The total population of Kenya is 24 million, of which slightly less than half are women.¹ The annual population growth rate is 3.4%;² the median age of the population is 15.1 years.³
- In 1990, the proportion of the population residing in urban areas was estimated to be between 18%⁴ and 24%.⁵

Economy

- In 1993, the World Bank estimated the gross national product (“GNP”) per capita to be U.S.\$270.⁶
- In 1995, the gross domestic product (“GDP”) grew at an estimated rate of 5%.⁷ This growth rate has significantly increased since 1992, when the GDP growth rate was 0.4%.⁸
- The government spends approximately 2% of its GDP on health,⁹ compared to the U.S., which spent approximately 12.7% of its GDP on health in 1990.¹⁰

Employment

- In 1992, 2.1 million persons were employed in Kenya.¹¹ Women account for 25% of the total labor force.¹² In urban areas, 25% of people are unemployed.¹³
- The average annual income of workers is Kshs. 41,196,¹⁴ which is equivalent to approximately U.S.\$752.¹⁵

WOMEN'S STATUS

- The average life expectancy for women is 63 years, compared to 59 years for men. For both sexes combined, average life expectancy is 61 years.¹⁶
- In Kenya, 19.5% of married women (including almost one third of women in their forties) are currently in polygynous unions.¹⁷
- There is a strong gender differential in education. For example, 16.5% of males and 27.1% of females aged six and above have not received any formal education.¹⁸
- Violence against women is a serious problem. Police statistics, released in 1994, showed that in 1992 there were 454 rapes, 136 attempted rapes, 343 indecent assaults, 407 cases of defilement, and 14 cases of incest. However, these statistics probably grossly underreport the true extent of the problem.¹⁹

ADOLESCENTS

- Approximately 49% of the Kenyan population is less than 15 years old.²⁰
- An estimated 50% of women and girls (6.3 million) have undergone female genital mutilation (“FGM”).²¹
- The median age at first marriage for Kenyan women is 18.8 years.²²
- Adolescents account for about one third of hospital obstetrical cases.²³

MATERNAL HEALTH

- Childbearing begins early in Kenya, with the median age at first birth being 19 years.²⁴ The median birth interval is 30 months.²⁵
- From 1990 to 1993, the total fertility rate was 5.4 children per woman,²⁶ a substantial decrease from the 1979 rate of 7.9 children per woman.²⁷
- The maternal mortality rate for 1990 was estimated to be 100 deaths per 100,000 live births.²⁸
- The infant mortality rate is estimated to be between 61²⁹ and 64³⁰ per 1,000 live births. Estimates of the under-five mortality rate range between 96³¹ and 102³² deaths per 1,000 live births.
- In Kenya, 22.6% of pregnant women receive antenatal care from doctors, while 72.3% receive antenatal care from nurses or midwives; 4.2% receive no antenatal care.³³

■ Home deliveries account for 54.6% of births, while 44% of births are delivered in public health facilities or clinics.³⁴ Births are most commonly assisted by nurses or midwives (33%), followed by relatives (23%), traditional birth attendants (21%), and doctors (12%).³⁵

CONTRACEPTION AND ABORTION

■ Contraception is used by 25.9% of all women, including 32.7% of married women.³⁶ While less than 1% of women surveyed named condoms as their method of birth control, nearly 7% of married men and nearly 12% of all men said they currently use condoms as a birth-control method.³⁷

■ More than 1 in 20 married women of reproductive age in Kenya has undergone a sterilization procedure.³⁸

■ Little is known about the overall incidence of abortion in Kenya.³⁹ However, it has been estimated that there are approximately 252,800 terminations of pregnancy among girls aged 15 to 19 each year.⁴⁰

■ An estimated one third of maternal deaths are due to unsafe abortions. At Kenyatta Hospital, one of the largest hospitals in sub-Saharan Africa, complications from induced and incomplete abortions account for approximately 50% of gynecological admissions, totaling 6,000 admissions per year.⁴¹

HIV/AIDS and STDs

■ By August 1993, the Kenya National AIDS Control Programme estimated that 841,700 persons were infected with HIV.⁴²

■ In June 1996, the World Health Organization reported 65,647 cases of AIDS in Kenya, including 35,428 males and 30,076 females (and 143 cases of unknown gender).⁴³

■ Approximately 75% of HIV transmission occurs through heterosexual intercourse. Perinatal transmission accounts for approximately 23% of cases.⁴⁴

■ A 1984 study conducted in a rural area in the Northern Division of Machakos District, Kenya, found that 57% of people below the age of 20 in this region had contracted a sexually transmitted disease.⁴⁵

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12. NATIONAL DEVELOPMENT PLAN, *supra* note 4, art. 10.13, at 207.

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21. NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 25 (Rainb9 1995).

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24. NAT'L COUNCIL FOR POPULATION & DEV., *supra* note 2, at 30.

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29. ECONOMIC REFORMS FOR 1996-1998, *supra* note 7, at 5.

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In 1963, Kenya gained independence from British colonial rule,¹ and a year later it became the Republic of Kenya (the “Republic”). From 1969 to 1982, the Republic was, effectively, a one-party state; in 1983, it became one legally. The only legitimate party was the Kenya African National Union (KANU).² However, in December 1991, a constitutional amendment reinstated a multiparty system.³ The Republic’s first multiparty elections were held in December 1992.⁴

The total population of Kenya is 24 million, of which slightly more than half are women.⁵ The population is comprised of 43 ethnic groups, of which the major groups are the Embu, Kalenjin, Kamba, Kikuyu, Kisii, Luo, Luhya, Maasai, Meru, Samburu, and Taita.⁶ The major religions are Christianity (66% of the population), including Roman Catholicism (28%) and Protestantism (38%), and Islam (6%). Another 26% of the population adhere to traditional religious beliefs.⁷

I. Setting the Stage: The Legal and Political Framework

To understand the various laws and policies affecting women’s reproductive rights in Kenya, it is necessary to consider the legal and political systems of the country. Without this background, it is difficult to determine the process by which laws are enacted, interpreted, modified, and challenged. The passage and enforcement of law often involves specific formal procedures. Policy enactments, on the other hand, are usually not subject to such a process.

A. THE STRUCTURE OF GOVERNMENT

There are three main branches of government in Kenya — the executive, the legislative, and the judicial.⁸ The executive branch of the government consists of the president, who is the head of state and commander-in-chief of the armed forces; the vice-president; and a cabinet.⁹ The president is elected for a five-year term by popular vote for a maximum of two terms,¹⁰ while the vice-president and the cabinet are appointed by the president from members of the National Assembly.¹¹ The attorney general serves as the principal legal advisor to the government and retains the power to institute and undertake criminal proceedings.¹² The country is administratively divided into seven provinces, each of which is governed by a provincial commissioner.¹³ Provinces are subdivided into 48 districts,¹⁴ which are governed by district commissioners,¹⁵ and districts are further subdivided into local government areas administered by local authorities.¹⁶

The Constitution vests the legislative power of the Republic in the Parliament of Kenya, which consists of the

president and the National Assembly.¹⁷ The National Assembly is comprised of a minimum of 188 members directly elected by popular vote on a constituency basis,¹⁸ with 12 additional members nominated by the president.¹⁹ The National Assembly exercises its legislative power by passing bills, which must then be submitted to the president for assent.²⁰ If the president refuses to assent to legislation submitted by the National Assembly, the National Assembly may override this veto by a resolution supported by a special majority of 65% of Assembly members.²¹

Courts both create and interpret law. The judicial system can have a significant impact on legislation, including that affecting reproductive rights, because it is able to enforce the law and deal with complaints from individuals challenging the constitutionality of specific laws. The Constitution creates a hierarchical system of courts in Kenya, comprising a Court of Appeal, a High Court, *Kadhis’* courts, and other subordinate courts established by acts of Parliament.²² The highest court in Kenya is the Court of Appeal, presided over by the chief justice and at least two other judges.²³ The Court of Appeal has jurisdiction to hear appeals from the High Court.²⁴ The High Court, which is presided over by the chief justice and at least 11 associate judges (referred to as “*puisne*” judges),²⁵ has jurisdiction to hear appeals from lower courts and has unlimited original jurisdiction in civil and criminal matters.²⁶ *Kadhis’* courts have jurisdiction to hear questions of Muslim law relating to “personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.”²⁷ Resident Magistrates’ courts and District Magistrates’ courts, established under the Magistrates’ Courts Act,²⁸ have limited jurisdiction in criminal and civil matters, respectively.²⁹

B. SOURCES OF LAW

Domestic Sources of Law

Laws that affect women’s legal status — including their reproductive rights — derive from a variety of sources. Section 3 of the Judicature Act³⁰ (the “Judicature Act”) states that the major sources of Kenyan law include: the Constitution; other written laws; doctrines of equity and statutes of general application in force in England on August 12, 1897; the procedure and practice observed in courts of justice in England at that date; African customary law; and the common law. Customary law is of particular significance to women’s rights and reproductive rights because this body of law governs personal law matters and is indicative of women’s status.

The Constitution declares itself the supreme law of the land. Any law, either written or unwritten, which is inconsistent with its provisions is void to the extent that it is in conflict.³¹ The Constitution explicitly states that “no law shall

make any provision that is discriminatory either of itself or in its effect.”³² However, the grounds of unacceptable discriminatory treatment enumerated in the Constitution are confined to “race, tribe, place of origin or residence or other local connexion, political opinions, colour or creed.”³³ Discrimination based on gender is thus not explicitly prohibited. This nondiscrimination provision also does not apply to matters related to adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law.³⁴

Other written sources of Kenyan law include enactments of the Kenyan Parliament since 1963, and subsidiary legislation in the form of orders, rules, regulations, directives, and local by-laws enacted pursuant to the authority of Acts of Parliament.³⁵ In addition, certain Acts of the British Parliament passed before the establishment of the Republic, which are listed in a schedule to the Judicature Act, are also sources of law in Kenya. Section 3(1) of the Judicature Act further states that the common law, doctrines of equity, and statutes of general application in force in England on August 12, 1897, apply “only so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”³⁶ The extent to which English common law, doctrines, and statutes are applicable in Kenya is a matter for Kenyan courts to decide based upon the facts of each case.³⁷ The specific legislative enactments and, where applicable, judicial decisions relating to reproductive rights are discussed in specific sections of this chapter.

The Judicature Act directs all courts in Kenya to be “guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.”³⁸ Courts are further directed to “decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”³⁹ The areas of customary law that fall within the jurisdiction of the district magistrate courts include: “(a) land held under customary tenure; (b) marriage, divorce, maintenance or dowry; (c) seduction or pregnancy of an unmarried woman or girl; (d) enticement of or adultery with a married woman; (e) matters affecting status, and in particular the status of women, widows, and children, including guardianship, custody, adoption, and legitimacy; (f) and intestate succession and administration of intestate estates, so far as not governed by any written law.”⁴⁰ Customary laws relating to succession have, however, been superseded in large measure by the Law of Succession Act.⁴¹

Until recently, the status of customary law in Kenya’s legal system was unclear. In 1987, however, the landmark case of *Otieno v. Ougo*⁴² provided some guidelines for the application

of customary law and reaffirmed its importance in the Kenyan legal system. The *Otieno* court held that “[t]he place of customary law as the personal law of the people of Kenya is complementary to the relevant written laws.”⁴³ The court further found that if a matter of personal law is not governed by written law, and “if there is clear customary law on this kind of matter, the common law will not fit the circumstances of people of Kenya.”⁴⁴ According to *Otieno*, Kenyan courts should only resort to the English common law if in a particular instance the customs were held to be “repugnant to justice and morality.”⁴⁵

The application of customary law in Kenya continues to be complicated by the difficulty of ascertaining the content of these laws. Many of the ethno-linguistic groups in Kenya have their own systems of customary laws. Some degree of certainty was attained regarding the application of customary laws by the 1968 publication of a restatement of customary laws relating to marriage, divorce, and succession.⁴⁶ However, the restatement is not comprehensive, and the magistrate courts have statutory authority to call for and hear other evidence regarding African customary law applicable to any case before them.⁴⁷

International Sources of Law

Because international instruments are legally binding, they create an obligation on the part of the government to undertake numerous actions, including those at the national level. Although the Judicature Act does not explicitly state that international law is a source of Kenyan law, the government is party to a number of international legal instruments,⁴⁸ including, *inter alia*: the International Covenant on Civil and Political Rights;⁴⁹ the International Covenant on Economic, Social and Cultural Rights;⁵⁰ the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”);⁵¹ the African Charter on Human and Peoples’ Rights;⁵² and the Convention on the Rights of the Child.⁵³ International law can be an additional tool for the advancement of women’s rights and reproductive rights. International legal instruments become enforceable in Kenya after they are incorporated into domestic law by implementing legislation.⁵⁴ Currently, the government has not passed any domestic legislation explicitly incorporating the international human rights instruments to which Kenya is a party.⁵⁵ Nevertheless, it has been argued that in the absence of express legislative intent to the contrary, ambiguities in domestic law should be construed to conform to international treaties to which Kenya is a party.⁵⁶

II. Examining Reproductive Health and Rights

Issues of reproductive health and rights are dealt with in Kenya within the context of the country's health and population policies. Thus, an understanding of reproductive rights in Kenya must be based on an examination of those policies.

A. HEALTH LAWS AND POLICIES

Objectives of the Health Policy

The development of the Kenyan health sector is guided by Kenya's Health Policy Framework, which was adopted by the Ministry of Health ("MOH") in June 1994. The framework details comprehensive reform initiatives, with an overall goal to "promote and improve the health status of all Kenyans through the deliberate restructuring of the health sector to make all health services more effective, accessible and affordable."⁵⁷ An important objective of the Health Policy Framework is to strengthen the central policy-making role of the MOH in all matters pertaining to health,⁵⁸ and to facilitate overall coordination by improving health-management information systems⁵⁹ and strengthening health research.⁶⁰ At the same time, planning, management, and resource utilization functions will be further decentralized to the district level,⁶¹ while the MOH will encourage non-governmental organizations ("NGOs") and private-sector health service providers to offer services not available through the public sector.⁶² Resources for government health services will be prioritized on the basis of their relative capacities to reduce the "burden of disease," as well as their cost effectiveness.⁶³ Cost sharing and other alternative health financing initiatives will also be expanded.⁶⁴ In addition, capital expenditure will be better controlled,⁶⁵ and part of the financial burden of curative care will be shifted from the MOH budget to insurance schemes.⁶⁶

The Health Policy Framework identifies the need to continue to manage population growth as a major strategic imperative⁶⁷ and targets the HIV/AIDS epidemic as an especially severe health problem requiring urgent intervention.⁶⁸ It specifically acknowledges that the HIV/AIDS epidemic imposes a double burden on women, who are both more vulnerable to HIV infection and are adversely affected by the AIDS epidemic in their role as providers of care in the family and community.⁶⁹ The Health Policy Framework also addresses issues affecting women's health and reproductive health care. In particular, the policy intensifies and expands coverage of health care interventions through an "Essential Preventive/Primary Health Care Package" for Kenya. Com-

ponents of this package include: promotion of antenatal and postnatal care; well-baby care; breast-feeding; improved diet and nutrition; health education and family planning in a comprehensive safe motherhood program; and a strengthening of basic community health care activities to enable individuals to assume responsibility for their own health.⁷⁰

Increasing attention has been given to reproductive health matters in Kenyan health policies, and a recent report of the Kenyan Institute for Reproductive Health calls for the preparation of a comprehensive reproductive health policy by the government, together with the review, reform, and improved enforcement of laws affecting reproductive health to ensure a comprehensive package of reproductive rights and reproductive health care.⁷¹

Infrastructure of Health Services

While the majority of health services in Kenya are provided by the government, NGOs and the private sector provide approximately 40% of health services and 33% of in-patient care.⁷² Public sector health facilities are organized in a hierarchical framework consisting of: the Kenyatta National Hospital (which is both a national referral hospital and a teaching hospital); provincial hospitals; district hospitals; health centers; health sub-centers; and dispensaries.⁷³ In 1992, there were 301 hospitals, 477 health centers, and 2,637 health sub-centers and dispensaries in Kenya.⁷⁴ The availability of complex diagnostic facilities and skilled specialists improves as one moves up the hierarchy. Access to treatment at higher level facilities occurs by means of a referral system.⁷⁵ Most of the public sector health care facilities are located in urban areas and are inequitably distributed among and within the country's provinces and districts.⁷⁶

Most family planning and basic reproductive health care services are provided through either maternal and child health or family planning clinics, which have been established in all public hospitals and health centers, and in most dispensaries.⁷⁷ Other curative services for reproductive or gynecological problems are provided through maternity units, gynecology/urology units, and other outpatient clinics within hospitals and health centers.⁷⁸ While sexually transmitted diseases ("STDs") can be treated in most health facilities, only two centers in the country specialize in STD treatment.⁷⁹

Cost of Health Services

In 1990, the government spent approximately 2.7% of its gross domestic product on health, compared to a 2.5% average spent in 1990 by the public sector in the sub-Saharan Africa region.⁸⁰ Government expenditure within the health system is characterized by large administrative expenses and a bias toward curative care at the expense of preventive care.⁸¹ More than 70% of the public health recurrent expenditure is

allocated to staff salaries and allowances, leaving less than 30% for pharmaceutical supplies and other non-wage expenditures.⁸² Further, while hospitals account for a mere 7% of total public sector health facilities, they are allocated some 69% of the recurrent health care budget.⁸³ Increasing attention has been given to preventive and promotive care in recent years, and the MOH has initiated a number of countrywide programs to address specific priority health issues in the country, including family planning and HIV/AIDS.⁸⁴

Health services were provided free in public sector health facilities for many years, but user fees began to be gradually instituted in 1989. Fee exemptions and waivers are available to some people, and for certain services and illnesses.⁸⁵ Specifically, children under five and civil servants below a specified grade, as well as their spouses and unmarried dependent children, need not pay for health services. In addition, health personnel may grant waivers to patients who cannot afford the cost of treatment. Family planning counseling, antenatal and postnatal care, child welfare, and STD clinic services are all exempted from outpatient charges, as is the treatment of tuberculosis, leprosy, AIDS, and antenatal complications of pregnancy. Inpatient fees can also sometimes be exempted, especially for referrals of patients to provincial, district, and subdistrict hospitals.⁸⁶

In 1966, in an attempt to make user charges more affordable, the government established the National Hospital Insurance Fund ("the Fund"), pursuant to the National Hospital Insurance Act (the "Hospital Insurance Act").⁸⁷ This act requires persons who earn above a specified taxable income level,⁸⁸ or their employers, to contribute toward the fund,⁸⁹ which pays for benefits such as allowances for hospital care and other medical treatments as are periodically prescribed in regulations.⁹⁰ In general, benefits paid by the fund include payment for confinement or treatment expenses necessitated by antenatal or obstetric requirements.⁹¹

Regulation of Health Care Providers

Who is legally permitted to provide what types of care? Are there meaningful guarantees of quality control? Because the Kenyan government regulates these issues, reviewing such laws is important. Health professionals in Kenya are regulated by three statutes, namely: the Medical Practitioners and Dentists Act⁹² (the "Medical Practitioners Act"); the Nurses Act;⁹³ and the Pharmacy and Poisons Act⁹⁴ (the "Pharmacy Act"). The Medical Practitioners Act provides for the establishment of a Medical Practitioners and Dentists Board (the "Medical Board")⁹⁵ and for the appointment of a Registrar of Medical Practitioners and Dentists.⁹⁶ The Medical Practitioners Act also provides for the registration of medical practitioners and dentists who meet certain requirements of training and "good

character."⁹⁷ Such registration entitles persons to practice medicine or dentistry only in salaried posts under government health schemes or other institutions that are approved by the Medical Board. Any practitioner who wishes to engage in private practice or to obtain compensation for her or his services is required to obtain a license issued by the Medical Board.⁹⁸ It is a criminal offense for a person to practice or profess to practice medicine, surgery, or dentistry without being registered, licensed, or otherwise granted by the Medical Board the right to render medical or dental services.⁹⁹ The Medical Board is also entitled to inquire into the conduct of practitioners registered under the Medical Practitioners Act and may cancel the registration or license of any person found guilty of "infamous or disgraceful conduct in a professional respect."¹⁰⁰

The Nurses Act establishes the Nursing Council of Kenya (the "Nursing Council").¹⁰¹ The Nursing Council's functions include: the establishment and improvement of standards for the nursing profession; the training of nurses; and the regulation of the conduct of nurses, including such disciplinary measures as may be necessary.¹⁰² Provisions are made for the registration, enrollment, and licensing of nurses, midwives, community health nurses, psychiatric nurses, and pediatric nurses who meet certain requirements of "good character" and training.¹⁰³ It is an offense for any person who is not registered, enrolled, or licensed under the Nurses Act to practice as a nurse in any of the categories mentioned above. The Nursing Council has the power to suspend or cancel the registration, license, or enrollment of any person found to be guilty of negligence, malpractice, impropriety, or misconduct.¹⁰⁴

Pharmacists are regulated by the Pharmacy Act, which makes provision for the establishment of a Pharmacy and Poisons Board (the "Pharmacy Board")¹⁰⁵ and for the appointment of a registrar who has the responsibility of keeping a register of pharmacists.¹⁰⁶ All persons who satisfy the Pharmacy Board that they are suitably qualified are entitled to registration.¹⁰⁷ It is a criminal offense for any person who is not registered to carry on the business of a pharmacist or, in the course of trade or business, to prepare or dispense a drug except under the immediate supervision of a pharmacist.¹⁰⁸ There are two exceptions to this rule. First, it is lawful for qualified medical practitioners, dentists, and veterinary surgeons to supply medicine in the course of legitimate treatment. Second, persons who are not registered as pharmacists may sell "non-poisonous" drugs provided that they are sold in their original condition as received from the suppliers.¹⁰⁹ The term "non-poisonous drug" is not defined. However, poisonous drugs are listed in a schedule to the Pharmacy Act.

Traditional healers are not regulated by Kenyan law. The government is, however, increasingly recognizing the need for greater integration of traditional healers into the health care system. For example, the draft Population Policy for Sustainable Development recognizes that “[the promotion of] women’s health and safe motherhood through ante-natal, intra-natal and post-natal care programmes... should include the training and equipping of Traditional Birth Attendants.”¹¹⁰

Patients’ Rights

Laws also seek to ensure quality health services by protecting the rights of patients. Kenyan law requires medical practitioners to render treatment with “reasonable care” and skill, and with the informed consent of the person undergoing the procedure. Section 240 of the Penal Code provides that a person is not criminally responsible for performing, in good faith and with reasonable care and skill, a surgical operation upon any person for his or her benefit, if the performance of the operation is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case. Section 243(e) of the Penal Code provides that any person who renders medical or surgical treatment to any person whom he or she has undertaken to treat, “in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person,” is guilty of an offense. In the event that a medical practitioner performing a medical or surgical procedure does not use reasonable care and skill, that person “shall be deemed to have caused any consequences which adversely affect the life or health of any person by reason of any omission to observe or perform that duty.”¹¹¹

The requirement of informed consent is an established principle of the English common law, which is applied in Kenya. To constitute valid consent, the person undergoing a medical procedure must both know of the risks involved and willingly consent to undertake these risks.¹¹² By consenting to the procedure, the patient consents to the risks inherent in the procedure, but does not consent to negligence on the part of the surgeon.¹¹³ A client who suffers injury due to the negligence of a medical practitioner may be able to allege a legal claim against the practitioner under tort principles of common law. To succeed in an action for negligence, the plaintiff must prove that the defendant was in breach of the duty of care owed by medical practitioners toward their clients, and that, as a result of the breach of that duty, the plaintiff suffered harm.¹¹⁴ Medical procedures which are performed without a client’s consent may constitute an actionable tort — “trespass” to the client’s person.¹¹⁵

Finally, a client who is aggrieved by the professional misconduct of a medical practitioner may resort to the Medical Board. The Preliminary Inquiry Committee, which consists

of seven elected members, is responsible for receiving and reviewing complaints against a medical practitioner and reporting to the Medical Board whether a disciplinary inquiry should be held. If the medical practitioner is, after inquiry by the Medical Board, found to have been guilty of any “infamous or disgraceful conduct” in a professional respect, the Medical Board may remove her or his name from the register and may cancel any license granted to her or him.¹¹⁶

B. POPULATION AND FAMILY PLANNING

Population and Family Planning Policy

Kenya’s population policy provides the framework within which its family planning services are provided. Since the establishment of the Republic, the government has been concerned with managing population growth.¹¹⁷ Shortly after Kenya’s independence, the government issued a position paper entitled *African Socialism and its Application to Planning in Kenya*, which stated that a “high rate of population growth means a large dependent population, reduces the money available for development, lowers the rate of growth and makes exceedingly difficult the task of increasing social services.”¹¹⁸ As a result, the government committed itself to prioritizing family planning programs from its earliest days.¹¹⁹ The linkages between population issues and development, and the importance of family planning in reducing population growth, have been central tenets of Kenya’s population policies and programs.

In 1967, the government launched the National Family Planning Programme, through which family planning services are still provided as part of the national health-care delivery system.¹²⁰ This program was integrated with the maternal and child health division of the Ministry of Health (“MOH”).¹²¹ The growing number of agencies involved in population-related activities prompted the government to establish an umbrella body — the National Council for Population and Development (“NCPD”) — to coordinate and support the activities of these agencies, and to develop an overall population policy framework. Created in 1982, the NCPD’s functions include, *inter alia*:

- to determine priorities in the fields of family planning and population development activities;
- to advise the government on a national population policy;
- to plan, supervise, and coordinate an interagency multimedia information and education program;
- to promote public understanding and acceptance of family planning; and
- to promote research into contraceptive technology and into social, cultural, and economic aspects of population planning and development.¹²²

In the period since 1982, the NCPD has fallen within the jurisdiction of various ministries, most recently the Office of the Vice-President and the Minister for Economic Planning and National Development.¹²³ Membership of the NCPD is drawn from government ministries and NGOs that deal with population programs and have an expertise in population matters.¹²⁴ The NCPD Secretariat coordinates and monitors the activities of 14 NGOs, 11 government ministries, and various other government agencies. It also collaborates with over a dozen external donor agency groups.¹²⁵

The NCPD prepared the Population Policy Guidelines (the "Guidelines"),¹²⁶ which are the primary framework for Kenya's population policy. The Guidelines describe intersectoral programs and activities to be carried out by government agencies and NGOs under the coordination of the NCPD, clarify the leadership structure, and define the role of education, clinical services, and the mass media in promoting population policies. The Guidelines further establish demographic, educational, and clinical services goals — to guide policy and program planning subject to certain "ethical considerations." For instance, the Guidelines stipulate that no individual should be coerced to practice any family planning method contrary to his or her moral, philosophical, or religious beliefs, and that sterilizations should only be performed voluntarily and with informed consent.¹²⁷ While the Guidelines underscore the coordinating and supportive role of the NCPD in meeting these goals, they also promote the importance of decentralizing leadership and planning population activities at the community level. In accordance with a "District Focus" on rural development, the Guidelines state that leaders at the local level will be involved in population and family planning work through local development committees.¹²⁸

The most important demographic goal identified in the Guidelines is the reduction of population growth, which is supplemented by subsidiary goals of promoting small families, reducing fertility rates and child mortality, and motivating Kenyan men to use birth control.¹²⁹ Educational goals include: improving the status of women through equal access to and opportunities for higher education; training and ensuring remunerative employment; and providing Kenyan youth with information and education concerning population matters.¹³⁰ Clinical services goals include ensuring the availability of contraceptive services and adequate counseling, examination, and follow-up.¹³¹

Apart from the Guidelines, various other policy documents reflect a concern for population issues. The Health Policy Framework, for instance, identifies the management of population growth as a major strategic imperative of the MOH and lists specific strategies for the MOH to undertake

in order to meet this imperative. These strategies include increasing the number of family planning service delivery points, diversifying the range of available family planning services, and promoting safe motherhood and higher maternal literacy rates.¹³²

Kenya's development plans¹³³ also reflect a concern with the relationship between population management and national development. The 1989–1993 Development Plan states that the government policy on population management rests on two premises. First, neither the absolute level of population nor its rate of growth per se is seen as the major concern; rather, the critical issue is the inability of Kenya's natural resource base and industry to sustain rapid growth of the labor force. Second, family planning activities ought to emphasize the benefits of smaller families by providing programs that offer the prospect of a better family life.¹³⁴ The 1994–1996 Development Plan confirms that the major goals of Kenya's population policy are to control population growth and distribution and to reduce the imbalance between population size and resources available to the country. It also specifically reaffirms certain principles, such as: encouraging adequate counseling for natural methods of family planning; increasing access to family planning advice and supplies in rural areas; enhancing family life programs in teacher training institutions; and reconsidering the problem of adolescent pregnancies.¹³⁵

Most recently, the Republic of Kenya has prepared a draft National Population Policy for Sustainable Development¹³⁶ to succeed the Guidelines. The draft document addresses a wide variety of issues, including: the environment; gender; poverty; the elderly; the disabled; youth; and HIV/AIDS. It also outlines demographic,¹³⁷ health services,¹³⁸ and social services goals,¹³⁹ which are to guide the implementation of population programs until the year 2015. A notable inclusion in this draft is its emphasis on the empowerment of women, as well as on the improvement of women's social status and role in development, and the elimination of all forms of discrimination against women and girls. The draft has yet to be adopted by the government.

Government Delivery of Family Planning Services

There are currently more than 1,000 government service delivery points in Kenya providing family planning services.¹⁴⁰ The MOH coordinates the supply of contraceptives to service delivery points by means of the MOH logistical management system for contraceptive supplies, which is a semi-autonomous function of the Medical Supplies Coordinating Unit in Nairobi.¹⁴¹ The 1993 Demographic and Health Survey found that 68.2% of current users of modern contraceptive methods — including 72.5% of pill users, 36.6% of condom users, and 70.5% of users of injectable con-

trajectories — cited government hospitals, health centers, or dispensaries as their most recent source of supply.¹⁴² Furthermore, 63.9% of female sterilizations and 68.9% of intrauterine device (“IUD”) insertions are performed in government facilities.¹⁴³ These providers have introduced fees for the provision of most types of contraceptives, although condoms continue to be distributed free of charge.¹⁴⁴ Male and female sterilizations are also provided free of charge in government health facilities, although legal abortions are subject to the usual fees for surgical procedures.¹⁴⁵ The government’s National Family Planning Programme also includes an abundance of information, education, and communication (“IEC”) materials and messages; however, Kenya has no comprehensive IEC policy, strategy, or program framework.¹⁴⁶

C. CONTRACEPTION

The most widely used contraceptive methods in current use among women are the pill (7.5%), followed by injection (5.5%), rhythm (4.3%), female sterilization (3.9%), IUDs (2.8%), and condoms (0.9%). Less than 0.5% of women use other methods such as diaphragms, foams, jellies, NORPLANT®, natural family planning, withdrawal, or other traditional methods such as abstinence, herbs, and breast-feeding.¹⁴⁷ Men reported the most common methods of contraception in current use to be the rhythm method (17.3%) and condoms (11.8%).¹⁴⁸

Legal Status of Contraceptives

Kenyan law does not restrict the use of contraceptives. However, several laws potentially impact the supply and manufacture of contraceptives through restrictions imposed in the interests of public health. The Pharmacy Board has primary responsibility for exercising control over pharmaceuticals within Kenya. Sections 43 and 44(1)(d) of the Pharmacy Act grant the Minister of Health wide powers to prohibit, regulate, or restrict the sale of pharmaceutical drugs and medical devices.¹⁴⁹ Several other provisions of the Pharmacy Act also affect the supply of contraceptives to consumers. For example, when regulating the sale and dispensing of drugs, the Pharmacy Act makes a distinction between “non-poisonous” drugs and drugs that are listed as poisons in schedules to this law. It is not unlawful for any person to sell any “non-poisonous” drug, provided that it is sold in its “original condition as received by the seller.”¹⁵⁰ Spermicidal foams, jellies, and non-hormonal creams may therefore be sold over the counter without a prescription, as long as they have not been tampered with in any way by the seller. On the other hand, drugs that are listed in Part One of the Poisons List Confirmation Order¹⁵¹ (“Part One Drugs”) may only be sold by a pharmacist or other authorized dealer.¹⁵² Part One Drugs include “steroid compounds with androgenic or estrogenic or prog-

estational activity,” as well as natural and synthetic hormones and “any preparations, admixture, extract or other substance containing any proportion of any substance having the action of any hormone.” Hormonal contraceptives delivered as oral pills, implants (including NORPLANT®), or injectables (including Depo-Provera®) are considered Part One Drugs. Pharmacists may only sell these drugs to members of the public in possession of a prescription from a duly qualified medical practitioner.¹⁵³ Medical practitioners may, however, supply or dispense a Part One Drug directly to a client for the purpose of medical treatment, provided that the drug is distinctly labeled with the name and address of the person by whom it is dispensed, and that records are kept of the supply of the drug in accordance with the Pharmacy Act.¹⁵⁴ Furthermore, it is an offense for any person to sell a Part One Drug by means of a vending machine.¹⁵⁵

A variety of other legal provisions exist to ensure the safe supply of contraceptives and other drugs to consumers. The Food, Drugs and Chemical Substances Act¹⁵⁶ (the “Food Act”) makes it an offense for any person to sell, prepare, preserve, package, store, or convey for sale any drug or device¹⁵⁷ under unsanitary conditions,¹⁵⁸ or to sell to “the prejudice of” the purchaser any drug that is not of the nature, substance, or quality of the article demanded by the purchaser.¹⁵⁹ It is also an offense for any person to sell any drug that “(a) is adulterated; or (b) consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased substance or foreign matter.”¹⁶⁰

The Pharmacy Act requires all medicines to be clearly labeled in the manner prescribed by that law and by the rules enacted thereunder.¹⁶¹ It is an offense to label, package, or sell a drug or device in a manner that is false or misleading as regards its “character,” value, composition, merit, or safety.¹⁶² Any person who sells a device that may cause injury to the health of the purchaser or user of the device when used in accordance with directions either on the label or contained in a separate document delivered with the device and under such conditions as are customary or usual is also guilty of an offense.¹⁶³

Pursuant to Section 44(1)(d) of the Pharmacy Act, the Minister of Health may, after consultation with the Pharmacy Board, make rules with respect to prohibiting, regulating, or restricting the manufacture of drugs, pharmaceutical preparations, and therapeutic substances. For example, Rule 16, issued pursuant to Section 44(1)(d), makes it an offense to manufacture without a license a drug that will be sold and is or may be used for the treatment of any human or animal ailment. It further stipulates that in any establishment in which drugs are manufactured, the drugs must be manufactured by,

or under the supervision of, a registered pharmacist or a person with either a Fellowship or Associateship from the Royal Institute of Chemistry or an equivalent qualification recognized by the Pharmacy Board.

Finally, the MOH may, after consulting with the Pharmacy Board, make rules with respect to importation and exportation of drugs,¹⁶⁴ and may prohibit or control the manufacture of any secret, patent, proprietary, or homeopathic medicine, preparation, or appliance.¹⁶⁵ The government has promoted the supply of contraceptives for family planning activities in Kenya by means of tax exemptions on imported contraceptives. The Minister for Finance and Planning has exempted from sales tax all contraceptives (including contraceptive pills, creams, jellies, foaming tablets, foam in tubes, diaphragms, IUDs, injectables, and condoms) and pregnancy test kits imported into Kenya to be used for family planning activities.¹⁶⁶ Similarly, the Minister for Finance and Planning has exempted from import duty all contraceptives and pregnancy test kits imported into Kenya to be used exclusively for the purposes of family planning activities.¹⁶⁷

Regulation of Information on Contraception

The dissemination of information about contraceptives, both in the form of commercial advertising and in family planning education campaigns, is subject to various legal restrictions set forth in the Pharmacy Act, the Food Act, the Penal Code, and the Films and Stage Plays Act (the "Films Act").¹⁶⁸

The Pharmacy Act confers wide powers on the MOH with respect to prohibiting, regulating, or restricting the advertising of drugs and medical devices.¹⁶⁹ Section 39 provides that no person shall take part in the publication of an advertisement¹⁷⁰ referring to a drug, medicine, medical appliance, or similar article in terms that the Pharmacy Board considers to be "extravagant" and that bears little or no relation to the pharmacological properties and action of the ingredients or components thereof.

Explicit graphics or descriptions demonstrating the use of contraceptive drugs and devices are in danger of contravening the Films Act and the Penal Code. The Films Act provides for the establishment of a Board of Censors,¹⁷¹ which has the power to examine films and posters to decide whether they should be approved for exhibition.¹⁷² Section 16(4) of the Films Act provides that the Board of Censors shall not approve a film or poster that "in its opinion tends to prejudice the maintenance of public order or offend decency, or the public exhibition or display of which would in its opinion for any other reason be undesirable in the public interest."¹⁷³ Section 181(1) of the Penal Code makes it an offense for any person who "for the purpose of or by way of trade or for the purpose

of distribution or public exhibition, makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects, or any other object tending to corrupt morals."¹⁷⁴ Courts have the power to order the destruction of any obscene matter or thing to which this section relates.¹⁷⁵

Finally, the Minister of Justice has the general power to prohibit the printing, publishing, importation, sale, supply, advertisement, distribution, or reproduction of any publication, if this action appears to be reasonably required in the interests of "defence, public safety, public order, public morality or public health and to be reasonably justifiable in a democratic society."¹⁷⁶

D. ABORTION

Legal Status of Abortion

Although the Penal Code contains restrictive provisions relating to abortion, the scope of these laws remains unclear. Section 158 of the Penal Code states that "[a]ny person who, with intent to procure miscarriage of a woman...unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony..."¹⁷⁷ A similarly worded provision makes it an offense for a woman to do anything with the intent to unlawfully "procure her own miscarriage."¹⁷⁸ Furthermore, Section 160 makes it unlawful to "suppl[y] or procure for any person or thing whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman."¹⁷⁹ The application of these criminal provisions is made uncertain by the vagueness of the "intent" requirement and by the absence of definitions for key terms such as "poison," "noxious thing," and "miscarriage."

The Penal Code provides for limited circumstances in which a pregnancy may lawfully be terminated. Section 240 of the Penal Code states that a "person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon...an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case."¹⁸⁰ Surgical abortions are therefore legal when the procedure is performed in good faith for the preservation of the life of the mother.

Despite the apparently limited grounds for lawful abortions provided by Section 240 of the Penal Code, legal scholars have suggested that Kenyan courts may recognize English legal practice as it existed before the passage of the Abortion Act, 1967 (England).¹⁸¹ Pursuant to English legal practice at

that time, abortions could be performed either to save the life of the mother or to preserve the mental or physical health of the woman.¹⁸²

Requirements for Obtaining Legal Abortion

Section 22(1) of the Medical Practitioners Act makes it a criminal offense for any person other than a registered or licensed medical practitioner to practice medicine or surgery in Kenya. Any lawful procedure involving the termination of a pregnancy may therefore be performed only by a medical practitioner registered or licensed under the Medical Practitioners Act. According to principles of informed consent pursuant to the English common law,¹⁸³ the woman on whom the procedure will be performed must consent to the procedure. Kenyan law does not, however, require spousal consent for abortions.

Penalties

The Penal Code prescribes severe penalties for the performance of unlawful abortions. Any person who contravenes Section 158 of the Penal Code by using any means with the intent to unlawfully procure the miscarriage of a woman is liable to imprisonment for 14 years. A person who is convicted of unlawfully supplying an abortifacient, pursuant to Section 160 of the Penal Code, may be sentenced to three years of imprisonment. These penalties apply irrespective of whether or not the woman was, in fact, pregnant. In addition, a woman convicted under Section 159 of the Penal Code of using any means to unlawfully procure her own miscarriage is liable to imprisonment for seven years.

Regulation on Abortion Information

Section 38 of the Pharmacy Act makes it an offense for any person to take part in the publication of any advertisement referring to any drug, appliance, or article in terms that are calculated to lead to the use of the drug, appliance, or article for “procuring the miscarriage of women.”¹⁸⁴ However, such advertisements may legally appear in a publication of a technical character intended for circulation among: medical practitioners, dentists, and veterinary surgeons, or students of these professions; pharmacists or student pharmacists and authorized sellers of poisons; or persons carrying on a business that includes the sale or supply of surgical appliances.¹⁸⁵

E. STERILIZATION

Kenyan law does not explicitly regulate sterilization, leaving the performance of such procedures subject to the same legal provisions that apply generally to surgical and medical procedures. For a discussion of these provisions, see the section on Patients’ Rights, above. While both male and female sterilizations are provided free of charge in government health facilities,¹⁸⁶ the majority of female sterilizations are performed in such facilities.¹⁸⁷

F. FEMALE GENITAL MUTILATION/ FEMALE CIRCUMCISION

There is currently no law explicitly prohibiting female genital mutilation (“FGM”) — also referred to as female circumcision. The prevalence of FGM in Kenya is estimated to be 50%.¹⁸⁸ In 1990, the Assistant Minister for Cultural and Social Services announced that the government had officially banned FGM,¹⁸⁹ although the legislature did not pass any laws prohibiting it.¹⁹⁰ Nevertheless, FGM may conceivably give rise to criminal actions under any one of the provisions of the Penal Code that criminalize assault or the infliction of bodily harm to any person.¹⁹¹ The practice of FGM may also give rise to civil actions under the general law of tort.¹⁹² For further discussion regarding FGM see the section on adolescents below.

G. HIV/AIDS AND SEXUALLY TRANSMITTED DISEASES

Examining HIV/AIDS issues within a reproductive health framework is essential insofar as the two areas are interrelated from both medical and public health standpoints. Hence, a full evaluation of laws and policies affecting reproductive health and rights in Kenya must examine HIV/AIDS and sexually transmitted diseases (“STDs”). The first diagnosis of AIDS in Kenya was made in 1984. By 1993, 39,000 cases of AIDS had been reported, and it was estimated that 841,700 people in Kenya were infected with HIV.¹⁹³ In June 1996, the World Health Organization reported 65,647 cases of AIDS in Kenya, including approximately 35,428 males and 30,076 females.¹⁹⁴

Laws Affecting HIV/AIDS

In July 1987, the MOH declared AIDS to be a “notifiable infectious disease,”¹⁹⁵ pursuant to powers conferred upon it pursuant to Section 17(2)(a) of the Public Health Act.¹⁹⁶ Thus, Section 18(1) of the Public Health Act imposes notification requirements on certain persons if they are inmates of any building, other than a hospital that receives patients with notifiable infectious diseases, who are suffering from a “notifiable infectious disease.”¹⁹⁷ Any person who fails to comply with the notification requirements in this provision is guilty of an offense and is liable to be fined.¹⁹⁸ Although AIDS, but not HIV, has been classified as a “notifiable infectious disease,” both AIDS and HIV fall within the definition of an “infectious disease” in the Public Health Act,¹⁹⁹ which contains potentially drastic provisions for the control of infectious diseases. Medical officers of health may enter and inspect premises in which inhabitants may have been exposed to an “infectious disease” and may medically examine persons during such inspections.²⁰⁰ Medical officers of health also have

wide powers to order the cleansing and disinfecting of buildings and to direct the destruction of any building or thing that has been exposed to infection.²⁰¹ Where a medical officer of health is of the opinion that a person who is suffering from, or may be a carrier of an “infectious disease” is not being properly accommodated or treated, the person may be removed to a hospital or other place of isolation and detained there until it is determined that the person no longer constitutes a danger to the public health.²⁰² If a person who is suffering from an “infectious disease” willfully exposes herself or himself in public without proper precautions, or enters any public conveyance without previously notifying the owner, conductor, or driver of her or his condition, that person is guilty of an offense and is liable to a fine or to imprisonment.²⁰³ Any owner or driver of a public conveyance who fails to immediately disinfect the vehicle after it was knowingly used to convey a person suffering from an infectious disease is guilty of an offense.²⁰⁴ Similarly, it is an offense “to let for hire” any premises in which a person has been suffering from an infectious disease without first disinfecting the premises.²⁰⁵

The Penal Code also contains several other provisions that, while not directly related to HIV/AIDS, may be used to penalize the behavior of people who are infected with HIV or AIDS. Section 186 of the Penal Code makes it an offense for any person to unlawfully or negligently undertake any act that the person knows or has reason to believe to be likely to spread the infection of any disease dangerous to life. This provision may be applied to any range of activities that might promote the spread of HIV infection, including, for example, risky sexual behavior, sharing of used hypodermic needles, or improper disposal of medical waste. Persons who know themselves to be infected with HIV but who nevertheless engage in unprotected sex, and thereby transmit the HIV virus to another person, could conceivably also be charged with manslaughter or murder pursuant to Sections 202 and 203 of the Penal Code.²⁰⁶ However, since the time lag between infection with HIV and subsequent death due to AIDS-related illnesses is typically longer than one year, conviction for murder or manslaughter under these circumstances may be precluded by Section 215 of the Penal Code, which states that a “person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.”²⁰⁷

Laws Affecting STDs

The Public Health Act contains measures to combat the spread of the following STDs:²⁰⁸ syphilis, gonorrhea, gonorrheal ophthalmia, soft chancre, venereal warts, and venereal

granuloma.²⁰⁹ Under the statute, every person who knows or has reason to believe that she or he is suffering from an STD must immediately consult a medical practitioner and submit to medical treatment.²¹⁰ Similarly, parents or guardians who know that their child is suffering from any such disease are legally required to ensure that the child receives medical treatment.²¹¹ Failure to comply with the provisions of this law constitutes a punishable offense.²¹²

The Public Health Act enables the Minister of Health, after receipt of a report by a medical officer, to issue an order requiring the medical examination of a person whom the Minister of Health has reason to believe is suffering from an STD.²¹³ Alternatively, if a government medical officer or district surgeon knows or has reason to believe that a person is suffering from an STD in a communicable form, and that the person is not under medical treatment or is not receiving treatment regularly, the officer must notify the person of the relevant requirements of the Public Health Act. If the person still does not comply with these requirements, the medical officer or district surgeon must report the matter to a magistrate.²¹⁴ On receipt of such a report, the magistrate may make or institute such inquiries, orders, or proceedings as may be necessary for the proper enforcement of the relevant provisions of the Public Health Act.²¹⁵

In addition to the duty to seek medical treatment, persons suffering from an STD have a duty to protect other people from infection. It is an offense for a person who knows or should reasonably have known himself or herself to be suffering from an STD in a communicable form to accept or continue in employment in any capacity that entails the care of children or the handling of food or food utensils intended for consumption or use by other persons. It is also an offense for an employer to hire or continue to employ a person in such a capacity when the employer knows or should reasonably know that the employee is suffering from an STD.²¹⁶ More generally, a person who willfully or by culpable negligence infects any other person with an STD, or permits any act likely to lead to the infection of any other person, is guilty of an offense.²¹⁷

The Public Health Act also contains various provisions that affect the dissemination of information regarding the treatment of STDs. Section 45 of the Public Health Act imposes a duty on medical practitioners to provide information to their clients regarding the nature and treatment of STDs. Pursuant to this section, medical practitioners who attend to any patient for STD-related care are required to: inform the patient of the infectious nature of the disease and of the penalties arising from infecting another person; warn the patient

against contracting marriage until cured of the disease or until it is no longer infectious; and give the patient printed information supplied to the medical practitioner by the Medical Department regarding the treatment of STDs and the duties of persons suffering from STDs.²¹⁸

Other means of dissemination of information regarding the treatment of STDs are specifically regulated by Section 55(1) of the Public Health Act, which prohibits the publication of any advertisement or statement “intended to promote the sale of any medicine, appliance or article for the alleviation or cure of any venereal disease affecting the generative organs or functions, or of sexual impotence, or of any complaint or infirmity arising from or relating to sexual impotence.”²¹⁹ This ban does not, however, apply to publications by the Medical Department or any municipal council, public hospital, or other public body in the discharge of its lawful duties. The section also does not apply to publications by any society or person acting with the authority of the MOH, or to any books, documents, or papers published in good faith for the advancement of medical science.²²⁰

Policies Affecting Prevention and Treatment of HIV/AIDS

In 1984, in response to the emerging HIV/AIDS epidemic, the government created a National AIDS Committee to advise it regarding the control and prevention of AIDS.²²¹ Three years later, the Kenya National AIDS Control Programme (“KNACP”) was launched,²²² and the AIDS Programme Secretariat was created to coordinate HIV/AIDS prevention activities and manage the KNACP in accordance with five-year medium-term plans for AIDS control.²²³ In early 1996, the KNACP was replaced by the National AIDS and Sexually Transmitted Diseases Control Programme.²²⁴ A new policy paper on AIDS, which outlines future government policy and describes the roles of various agencies involved in HIV/AIDS prevention activities, has been incorporated into a sessional paper that was to be submitted to the Kenyan Parliament by December 1996.²²⁵

The government’s HIV/AIDS policies have three primary objectives: to prevent infection, to reduce the personal and social impact of HIV infection, and to mobilize and unify national and international efforts against AIDS.²²⁶ A variety of strategies have been identified to reduce transmission of HIV/AIDS in Kenya, including: dissemination of information regarding methods to prevent infection with HIV/AIDS; early detection and treatment of STDs; promotion of “universal precautions” among health care workers; and provision of facilities for the voluntary testing and counseling of pregnant women.²²⁷ The government has also committed itself to providing humane care to people infected with HIV/AIDS,²²⁸ and to ensuring that HIV/AIDS prevention

programs do not stigmatize or discriminate against people infected with HIV/AIDS.²²⁹ In addition, government policy dictates that the coverage afforded by social security and health insurance schemes to people with HIV/AIDS should be equivalent to that provided to people with other diseases.²³⁰

III. Understanding the Exercise of Reproductive Rights: Women’s Legal Status

Women’s reproductive health and rights cannot be fully evaluated without investigating women’s status within the society in which they live. Not only do laws relating to women’s legal status reflect societal attitudes that will affect reproductive rights, but such laws often have a direct impact on women’s ability to exercise reproductive rights. The legal context of family life, a woman’s access to education, and laws and policies affecting her economic status can contribute to the promotion or the prohibition of a woman’s access to reproductive health care and her ability to make voluntary, informed decisions about such care. Laws regarding the age of first marriage can have a significant impact on a young woman’s reproductive health. Furthermore, rape laws and other laws prohibiting sexual assault or domestic violence present significant rights issues and can also have direct consequences for women’s health.

A. RIGHTS WITHIN MARRIAGE

Marriage Law

Kenyan law recognizes four regimes of marriage — statutory, Islamic, Hindu, and African customary laws of marriage.²³¹ The various laws contain different provisions with respect to matters such as minimum age of marriage, consent, registration, and grounds for divorce.²³² Customary laws in particular have numerous variations, due to the large number of ethnic groups.

Statutory marriages are governed by the Marriage Ordinance²³³ and the African Christian Marriage and Divorce Ordinance²³⁴ (the “African Christian Marriage Ordinance”). The Marriage Ordinance stipulates that a statutory marriage is invalid if either party is already married by customary law to any person other than the person with whom the statutory marriage is contracted.²³⁵ In addition, a person who is married under statutory law cannot enter into a customary marriage for the duration of the statutory marriage.²³⁶ However, Section 37 of the Marriage Ordinance recognizes customary marriages by providing that “nothing in this Ordinance

contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”²³⁷ The African Christian Marriage Ordinance provides for the marriage of African Christians and for the dissolution of such marriages. This ordinance allows persons already married by customary law to convert their union into a statutory marriage.²³⁸ The African Christian Marriage Ordinance also provides that any African woman married under this ordinance or under the Marriage Ordinance is deemed to have attained “majority” status upon widowhood and has a right to receive support for herself and her children from the brother or other relative of her deceased husband without having to cohabit with that person.²³⁹

Other religious marriages are also recognized. Marriages performed according to Hindu rites and ceremonies are recognized by the Hindu Marriage and Divorce Ordinance²⁴⁰ (the “Hindu Marriage Ordinance”), whose general effect is to confer upon Hindu marriages substantially the same status as a monogamous marriage under the Marriage Ordinance.²⁴¹ Hindu marriages may not be solemnized if either party is already married.²⁴² The Mohammedan Marriage, Divorce and Succession Ordinance²⁴³ (the “Mohammedan Marriage Ordinance”) provides for the recognition of marriages contracted under Islamic law,²⁴⁴ while the Mohammedan Marriage and Divorce Registration Ordinance²⁴⁵ (the “Mohammedan Marriage Registration Ordinance”) makes provision for the registration of such marriages. It is a criminal offense for a person to contract an Islamic marriage while that person is already married in accordance with the Marriage Ordinance, the law of any Christian country, or African customary law.²⁴⁶ There is, however, no statutory restriction against polygamous marriages conducted under Islamic law.

Marital customs and practices vary among the more than 40 ethnic groups in Kenya. In order for a marriage to be validly constituted, the customary laws of every ethnic group require the bridegroom to make payments of livestock or other property to the father or guardian of the bride.²⁴⁷ All systems of customary law permit men to enter into any number of marriages simultaneously, while prohibiting women from entering into a subsequent marriage during the continuance of a prior marriage.²⁴⁸ While the prior consent of both spouses is now essential to the validity of marriage under all systems of customary law, the consent of the first or senior wife is not required before the husband takes a subsequent wife.²⁴⁹ Special types of marriage, including levirate unions²⁵⁰ and widow inheritance,²⁵¹ are still practiced among some ethnic groups.²⁵² For a discussion on marriage and adolescents see section on adolescents below.

Divorce and Custody Law

Like marriage, divorce is regulated by various laws. The Matrimonial Causes Ordinance²⁵³ governs the dissolution of statutory marriages. According to this Ordinance, a person may only petition a court for divorce after three years of marriage, except in the case of “exceptional hardship” or when her or his spouse has been guilty of “exceptional depravity.”²⁵⁴ After three years of marriage, either spouse may petition for divorce on the grounds of: adultery; desertion without cause for at least three years immediately preceding the petition; cruelty; or incurable unsoundness of mind.²⁵⁵ In addition, the wife may petition for divorce on the ground that her husband has, since the celebration of the marriage, been guilty of “rape, sodomy, or bestiality.”²⁵⁶ The Matrimonial Causes Ordinance also makes provision for decrees of judicial separation or nullity of a marriage in specified circumstances.²⁵⁷ A husband may, in a petition for divorce or separation, claim damages from any person on the ground of adultery with his wife,²⁵⁸ but no similar relief is available to wives whose husbands have committed adultery.

Parties to a Hindu marriage may petition for divorce on any of the grounds listed above, together with certain additional grounds peculiar to Hindu marriages. A petition for divorce may, for example, be presented to the court on the grounds that the respondent has converted to another religion or has “renounced the world” by entering and remaining in a religious order “apart from the world” for at least three years immediately preceding the petition.²⁵⁹ Petitions may also be made under the Hindu Marriage Ordinance for decrees of judicial separation or to nullify a marriage.²⁶⁰

Islamic divorces are governed by Islamic law,²⁶¹ although the Mohammedan Marriage Registration Ordinance makes provision for the registration of such divorces.²⁶² In a suit for divorce, the burden of proof of the applicable principles of Islamic law rests on the party bringing the action.²⁶³ The principal forms of Islamic divorce are *talaq*, the unilateral repudiation of the marriage by a husband, and *khula*, the seeking of marital dissolution by a wife by giving consideration to her husband for her release.²⁶⁴

A divorce under customary law may be granted either by the elders of the community with the assistance of the families of the spouses or by a court.²⁶⁵ Customary law typically does not enumerate a fixed list of grounds for divorce, although it is possible to identify certain matters that normally constitute grounds for divorce.²⁶⁶ Among Kikuyu and Luo people, for instance, divorce is typically granted to either spouse due to: refusal of sexual intercourse without just cause; witchcraft; habitual theft; willful desertion; incest; or excessive

physical cruelty.²⁶⁷ Among the Luo, a man may divorce his wife for her “habitual adultery” with any man, although a wife may divorce her husband for his “habitual adultery” only if the woman with whom the husband had adulterous relations was married.²⁶⁸ Among the Kikuyu, even a single act of adultery by the wife is a ground for divorce by the husband, while adultery is never a ground for divorce by the wife.²⁶⁹ Among both the Luo and the Kikuyu, the impotence or infertility of a husband may be grounds for divorce by the wife, while a wife’s barrenness is not a ground for divorce by the husband.²⁷⁰

Child custody and maintenance following the dissolution of a marriage are addressed by a number of statutes, including the Matrimonial Causes Ordinance,²⁷¹ the Guardianship of Infants Ordinance²⁷² (the “Guardianship Ordinance”), and the Subordinate Courts (Separation and Maintenance) Ordinance²⁷³ (the “Separation and Maintenance Ordinance”). In a judicial separation granted under the Separation and Maintenance Ordinance,²⁷⁴ the court may make an order granting legal custody of any children of the marriage under 16 years of age to the wife.²⁷⁵ In proceedings for divorce, judicial separation, or nullity, Section 30 of the Matrimonial Causes Ordinance provides that the court may make such provision regarding the custody of children as it considers just.²⁷⁶ In making an order as to custody of and access to children of the marriage, the welfare of the child is always the first and paramount consideration.²⁷⁷ The court must also consider the parents’ conduct and wishes.²⁷⁸ While both parents have equal rights to apply for custody,²⁷⁹ in practice the court normally awards custody of children below the age of seven to the mother on the basis that mothers are best able to look after young children who are still wholly dependent on adults for survival.²⁸⁰ Where the court awards custody of a child to the mother, it may order the father to pay to her such weekly or other periodical sum as the court, having regard to the means of the father, considers reasonable for maintenance of the child.²⁸¹ In addition, in any suit for divorce, judicial separation, or nullity, the court may order that the husband pay the wife such annual, monthly, or weekly sum of money for any term, not exceeding her life, as the court may deem reasonable.²⁸²

Custody of Hindu children is governed by the statutory law described above,²⁸³ as are issues of maintenance.²⁸⁴ Rules of custody differ among various schools of Islamic law, although custody of boys under seven and girls under nine is generally with the mother, and above those ages with the father.²⁸⁵ Upon divorce, a Muslim wife is only entitled to maintenance for the period of her *iddat*,²⁸⁶ which is normally three months.²⁸⁷ Under customary law, the father is normally entitled to custody,²⁸⁸ and wives are not usually entitled to maintenance upon separation or divorce.²⁸⁹

B. ECONOMIC AND SOCIAL RIGHTS

Property Rights

The Registered Lands Act²⁹⁰ and the Law of Succession Act²⁹¹ (the “Succession Act”) are the primary statutes governing ownership and use of agricultural land in Kenya.²⁹² Once title to a portion of land has been registered, the Registered Lands Act vests absolute title to that property in the registered owner, while removing all other claims to the land that might exist.²⁹³ Although this statute grants women an equal right to register title to land, the law was enacted in a context in which women traditionally could not own land and inheritance of land occurred by male lineage.²⁹⁴ When the Registered Lands Act was passed men rushed to register land,²⁹⁵ and the passage of the statute did not permit subsequent alteration of the register, thereby precluding many women from changing the register to accommodate their interests.²⁹⁶

The Succession Act,²⁹⁷ which took effect in 1981, sought to provide uniformity to an area of law that had been governed according to four legal regimes²⁹⁸ — African customary law, statutory law, Hindu law, and Islamic law. Two elements of the statute — an exemption for Muslims²⁹⁹ and a provision stating that the inheritance of livestock and agricultural lands continue to be governed by customary law³⁰⁰ — have undermined the attempt to achieve uniformity. In addition, although Section 35 grants the surviving spouse a life interest in an intestate estate, that right terminates for a widow upon remarriage;³⁰¹ no similar restriction is placed on the rights of widowers. (This provision remains somewhat of an anomaly in a statute that also grants women the same capacity to make a will as men,³⁰² and grants men and women equal rights to inherit from a parent or sibling.)

Despite the removal of formal legal impediments to equal inheritance rights for women, as a consequence of testamentary freedom, the Succession Act imposes no obligation on fathers to provide for their daughters. Fathers continue the customary practice of transferring land to their sons on the assumption that a daughter will marry and gain access to land through her status as a wife.³⁰³ Furthermore, customary laws of inheritance, which preclude a daughter’s right to inherit land, are still highly respected even though they are not legally enforceable.³⁰⁴ These practices are able to continue because most inheritance issues do not come before the courts,³⁰⁵ or court opinions are not available. Furthermore, current property laws continue to be interpreted and applied in a conservative manner.³⁰⁶ In the case of *Estate of Njeru Kamanga*, for instance, the daughters of the deceased were disinherited by the magistrate, who felt that they had no right to the father’s property because they were married — despite the unequivocal provisions of the Succession Act.³⁰⁷

Labor Rights

The Employment Act,³⁰⁸ the primary statute governing employment in Kenya, has been criticized for failing to address issues of gender inequality and job discrimination on the basis of sex, including sexual harassment.³⁰⁹ The Employment Act also contains certain provisions that, although designed to protect women, also restrict their employment opportunities. Subject to certain exceptions,³¹⁰ women may not be employed in industrial undertakings at night.³¹¹ Women are also generally prohibited from being employed in underground work in a mine.³¹² The Minister of Labor also has the power to prohibit the employment of women in any other specified trade or occupation.³¹³ The position of women in the workplace is further compromised by restrictive provisions regarding maternity leave. While Section 7(2) of the Employment Act provides that women employees are entitled to two months maternity leave with full pay, this provision is subject to the restriction that a woman who has taken two months maternity leave shall forfeit her annual leave for that year.³¹⁴ Furthermore, in 1985, the president of Kenya announced that no civil servant who had more than four children would be eligible for paid maternity leave.³¹⁵

Various other legal restrictions affect the financial security of women employees. Kenyan pension law provides that a widow loses her work pension upon remarriage, whereas a man does not.³¹⁶ Furthermore, the terms of civil service for women state that they are not entitled to a housing allowance.³¹⁷

Rules Governing Credit

Although Kenyan law does not restrict women's access to credit services, most credit institutions require collateral in the form of immovable property.³¹⁸ This mandate greatly restricts the number of women who qualify for loans, considering that women have traditionally been excluded from land ownership.³¹⁹ In addition, most banks require women borrowing money to have a male guarantor or their husband's permission.³²⁰ In recognition of the difficulties that women experience in gaining access to credit, the 1994 to 1996 National Development Plan commits the government to promoting agricultural production through the establishment of special credit schemes for women who belong to women's groups.³²¹

Access to Education

Kenyan law does not explicitly restrict women's access to education. At higher levels of education, however, significant discrepancies remain in the ratio of male to female students.³²² The 1994 to 1996 National Development Plan recognizes that women continue to be disadvantaged in education and outlines steps to remedy the problem.³²³ For a further discussion regarding education, see section on adolescents below.

Women's Bureaus

Women's issues are addressed officially under the auspices of the Women's Bureau within the Ministry of Culture and Social Services.³²⁴ The main functions of the Women's Bureau are to: assist women to improve their economic status; create an awareness of women's contributions to development; promote women's interests in the design and implementation of development projects; and conduct research on women.³²⁵ Since its establishment in 1975,³²⁶ the Women's Bureau has facilitated the creation of about 250 women's NGOs and agencies, which serve more than 17,000 women's groups.³²⁷

C. RIGHT TO PHYSICAL INTEGRITY

Rape

The Penal Code prescribes severe penalties for persons convicted of rape and other forms of non-consensual sexual intercourse.³²⁸ The Penal Code states that a person is guilty of rape if he has sexual intercourse with a woman or girl without her consent, or if she is coerced or deceived in some way into giving her consent.³²⁹ Despite the seemingly broad language of the Penal Code, it has traditionally been accepted that husbands cannot be convicted of raping their wives, as consent to sexual intercourse is considered to be implied in marriage; if the parties are judicially separated, the husband may be convicted of rape.³³⁰ The penalty for both rape and attempted rape is life imprisonment with hard labor, with or without corporal punishment.³³¹ Any person who has sexual intercourse with a woman or girl knowing that she is an "idiot or imbecile" is liable to imprisonment with hard labor for 14 years, with or without corporal punishment.³³²

Various other sexual offenses are contained in Chapter XV of the Penal Code, including *inter alia*: abduction of a woman of any age against her will for the purposes of marriage or sexual relations;³³³ "indecent assault" of any woman or girl;³³⁴ procurement of women or girls for the purpose of prostitution;³³⁵ inducement of sexual intercourse through duress, fraud, or the administration of overpowering drugs;³³⁶ and detention of any woman against her will for the purposes of sexual intercourse.³³⁷ Chapter XV also identifies several offenses in relation to unlawful sexual intercourse with minors. In particular, Section 145 of the Penal Code provides that unlawful sexual intercourse with any girl under the age of 14 years constitutes an offense, irrespective of whether or not she consented to sexual intercourse.³³⁸ It is, however, sufficient defense to such a charge of statutory rape that the accused had reason to believe, and did in fact believe, that the girl was 14 years or older, or that the girl was his wife.³³⁹ For further discussion on sexual offenses against minors, see the section on adolescents below.

Domestic Violence

Wife-beating is fairly prevalent in Kenya.³⁴⁰ The continuation of this practice may be attributable to the fact that every regime of customary law in Kenya grants husbands the right to “chastise” their wives for “misconduct.”³⁴¹ Under Kenyan customary laws, only “unjustified or excessive beating” by the husband would be sufficient ground for divorce or for the wife to return to her family.³⁴² Nonetheless, violence against a wife might constitute an offense under any one of the provisions of the Penal Code criminalizing assault, which is defined as the unlawful infliction of bodily harm to any person or the intent to unlawfully harm another person.³⁴³ Assault or battery may also be grounds for civil actions in tort.³⁴⁴

Sexual Harassment

Both physical and verbal sexual harassment constitute criminal offenses under Section 144 of the Penal Code. An act of physical sexual harassment may constitute an offense under Section 144(1) of the Penal Code, which provides that any person who “unlawfully and indecently assaults any woman or girl” is guilty of a felony punishable by imprisonment with hard labor for five years, with or without corporal punishment.³⁴⁵ A Kenyan court made the following significant observations in relation to what constitutes “indecent assault”: “An assault accompanied by utterances suggestive of sexual intercourse is an indecent assault, as also an assault by touching. . . . The simple issue usually is whether the assault was intentional and whether it was indecent. Utterances suggestive of sexual intercourse could change an otherwise simple assault into an indecent assault. . . .”³⁴⁶ Verbal sexual harassment may also be grounds for a criminal charge pursuant to Section 144(3) of the Penal Code, which provides that any person who, “intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intending that the word or sound shall be heard, or that the gesture or object shall be seen, by the woman or girl, or intrudes upon the privacy of the woman or girl,” is guilty of a misdemeanor.³⁴⁷

iv. Focusing on the Rights of a Special Group: Adolescents

The needs of adolescents are often unrecognized or neglected. Given that approximately 26% of the Kenyan population is between the ages of 10 and 19,³⁴⁸ it is particularly important to meet the reproductive health needs of this group. The effort to address issues of adolescent rights, including those related to reproductive health, is important for women’s right to self-determination, as well as for their health.

A. REPRODUCTIVE HEALTH AND ADOLESCENTS

Although Kenya’s laws and policies do not explicitly restrict the provision of services to adolescents, the government does not provide reproductive health programs or services specifically geared towards their needs.³⁴⁹ Kenya’s Health Policy Framework does, however, identify the need for “[p]romotion of fora to examine the sensitive issue of youth contraceptives. . . .”³⁵⁰

B. FEMALE GENITAL MUTILATION AND ADOLESCENTS

Despite repeated condemnation by the executive branch of government in recent years, the practice is still as prevalent in Kenya today as it was at the beginning of the century.³⁵¹ In 1982, President Moi issued an official statement against FGM after the deaths of 14 girls from complications of excision³⁵² and instructed the police to pursue murder charges against people who carry out the procedure with fatal results.³⁵³ The Director of Medical Services also ordered that no health official should carry out the procedure without the office’s specific permission.³⁵⁴ In December 1989, President Moi called upon Kenyan communities who still practice FGM to stop the practice immediately.³⁵⁵ Six months later, the Assistant Minister for Cultural and Social Services announced that the government had officially banned female genital mutilation.³⁵⁶ Despite this commitment of the executive to outright prohibition of FGM, the legislature has not been forthcoming in passing any laws banning the practice.³⁵⁷ In November 1995, a proposal to outlaw the practice was defeated in the Kenyan Parliament.³⁵⁸ It is conceivable, however, that FGM may be reported as a criminal action pursuant to any one of the provisions of the Penal Code that bar assault or the infliction of bodily harm to any person.³⁵⁹ It may also give rise to civil actions under tort law.

C. MARRIAGE AND ADOLESCENTS

The minimum age at which persons may be married in Kenya differs according to the marital regime under which the marriage is solemnized. The Marriage Ordinance requires parties to a statutory marriage to be at least 16 years of age.³⁶⁰ If either party, other than a widow or widower, is under 21 years of age, the legal guardian of that party is required to give her or his written consent to the marriage.³⁶¹ Under Hindu law, the minimum age for marriage is 18 for the bridegroom and 16 for the bride.³⁶² Women who wish to marry between the ages of 16 and 18 require the consent of a guardian.³⁶³ Neither the Mohammedan Marriage Ordinance nor the Mohammedan Marriage Registration Ordinance specifies a minimum age for first marriage for persons married in Kenya

under Islamic law, and the issue of whether the Quran permits child marriage has proved to be contentious.³⁶⁴ Nevertheless, it appears that, while Muslim girls may be given in marriage by their guardians even before puberty, they have the option of accepting or rejecting the marriage upon reaching puberty.³⁶⁵ None of the customary laws in Kenya specify a minimum age at which persons become legally capable of entering into marriage. In general, however, female genital mutilation is a prerequisite to marriage, although many ethnic groups no longer apply this requirement. Certain ethnic groups, including the Kikuyu, also require women to have passed their first menstrual period before marriage.³⁶⁶

D. EDUCATION AND ADOLESCENTS

The gender ratio of female to male students in educational institutions has generally improved in recent years, although significant discrepancies remain at higher levels of education. In primary schools, the female-to-male ratio has increased from 75 to 100 in 1972 to 97 to 100 in 1992. Female-to-male enrollment ratios in secondary schools rose from 45 to 100 in 1972 to 75 to 100 in 1992, while the ratio for first-year intake in universities dropped from 42 to 100 in 1989 to 37 to 100 in 1992.³⁶⁷ Women's access to education is not limited by legislation, but rather by limited opportunities due in part to customs, social attitudes, and financial constraints.³⁶⁸

The 1994 to 1996 National Development Plan recognizes that "females are disadvantaged at all levels of education in terms of access, participation, completion and performance."³⁶⁹ The Development Plan therefore outlined remedial steps, which include: improved collection of data regarding the educational status of girls in Kenya; "community mobilization and sensitization in support of the Girl Child"; follow-up with adolescent mothers who leave school, to facilitate their return to school; gradual removal of sexual stereotyping of gender roles in educational materials; and improvement of the learning environment of girls.³⁷⁰ The government has also stated its intention to introduce a bursary program directed toward girls at primary school level in rural and low-income areas.³⁷¹

E. SEX EDUCATION FOR ADOLESCENTS

Sex education is not explicitly included in school curricula in Kenya, although issues of sex and sexuality are addressed in subjects such as social ethics, biology, anatomy, and physiology.³⁷² The government has also acknowledged the need for teachers, parents, and community leaders to reinforce "traditional health promoting values and policies," particularly in the light of the HIV/AIDS epidemic.³⁷³

F. SEXUAL OFFENSES AGAINST MINORS

Various provisions of the Penal Code address the issue of sexual offenses committed against young persons. Section 145 of the Penal Code makes it an offense to commit, or attempt to commit, unlawful sexual intercourse with any girl under the age of 14 years, irrespective of whether or not she consented.³⁷⁴ Sections 144 and 164 criminalize indecent assault committed on girls and boys under the age of 14 years, respectively.³⁷⁵ For a girl under 14 years old, consent is no defense for indecent assault or sexual intercourse, unless the accused had reason to believe, and did in fact believe, that the girl was 14 years or older, or that the girl was his wife.³⁷⁶

Sections 149 and 166 of the Penal Code contain provisions that affect girls under the age of 13 years.³⁷⁷ Section 149 makes it a felony for the owner, occupier, or manager of premises to induce or knowingly permit any girl under the age of 13 years to be upon the premises for the purpose of sexual intercourse with any man.³⁷⁸ While the penalty for incest is ordinarily imprisonment for five years, Section 166(1) of the Penal Code increases this penalty to life imprisonment if the incest is committed with a girl under the age of 13 years.³⁷⁹

ENDNOTES

1. Kenya Independence Order in Council S.I. 1968 (1963).
2. 14 COLLIER'S ENCYCLOPEDIA 49 (1994).
3. WEBSTER NEW WORLD ENCYCLOPEDIA 582 (College ed.1993).
4. NAT'L COUNCIL FOR POPULATION & DEV., CTR. BUREAU OF STATISTICS [KENYA] & MACRO INTERNATIONAL INC., KENYA DEMOGRAPHIC AND HEALTH SURVEY 1993, at 1 (1994).
5. U.N. POPULATION FUND (UNFPA), PROGRAMME REVIEW AND STRATEGY DEVELOPMENT REPORT: KENYA, at v, U.N. Doc. E/1,000/1993 (1993) [hereinafter UNFPA].
6. NAT'L COUNCIL FOR POPULATION & DEV., *supra* note 4, at 1.
7. WEBSTER NEW WORLD ENCYCLOPEDIA, *supra* note 3, at 582.
8. KENYA CONST. §§ 4-69.
9. *Id.* §§ 4, 15, 17.
10. *Id.* §§ 9 (1), (2). The restriction on the term of office of the President was introduced by an amendment in 1992. Act No. 6, § 5 (1992), cited in KENYA CONST., margin note.
11. *Id.* §§ 15 (1), 16 (2).
12. *Id.* §§ 26 (2), (3)(a).
13. CHARLES MWALIMU, THE KENYAN LEGAL SYSTEM: AN OVERVIEW 14 (1988).
14. NAT'L COUNCIL FOR POPULATION & DEV., *supra* note 4, at 1.
15. MWALIMU, *supra* note 13, at 14.
16. *Id.*
17. KENYA CONST. § 30.
18. *Id.* §§ 32, 42(2).
19. *Id.* § 33.
20. *Id.* §§ 46 (1), (2).
21. *Id.* § 46 (5).
22. *Id.* §§ 60 (1), 64 (1), 65 (1), 66.
23. *Id.* § 64.
24. *Id.* § 64 (1).
25. *Id.* § 60 (2).
26. *Id.* §§ 60 (1), 65.
27. *Id.* § 66(5).
28. LAWS OF KENYA, Ch. 10, §§ 3, 7.
29. *Id.* §§ 4, 9.

30. LAWS OF KENYA, Ch. 8, § 3.
31. *Id.* § 3.
32. *Id.* § 82 (1).
33. *Id.* § 82 (3).
34. *Id.* § 82 (4)(b).
35. MWALIMU, *supra* note 13, at 23.
36. LAWS OF KENYA, Ch. 8, § 3 (1).
37. Eugene Cotran, *The Future of Customary Law in Kenya*, in THE S.M. OTIENO CASE 148, 149 (Jackton B. Ojwang & Jesse Ndwiga Kanyua Mugambi eds.).
38. LAWS OF KENYA, Ch. 8, § 3(2).
39. *Id.*
40. LAWS OF KENYA, Ch. 10, § 2.
41. LAWS OF KENYA, Ch. 160, § 2.
42. Otiemo v. Ougo, Civil Appeal No. 31 of 1987, reported in Eugene Cotran, CASEBOOK ON KENYA CUSTOMARY LAW 331 (1987). The Otiemo case involved the burial of a prominent Nairobi lawyer. The deceased's eldest brother claimed that the body should be buried on the land of his patrilineal Luo ancestors, in accordance with Luo customary law. The deceased's widow contended that the body should be buried near Nairobi, in accordance with the wishes of the deceased, expressed while he was alive. The court found in favor of the deceased's brother, and denied the widow the right to dispose of the body. *Id.* at 332.
43. *Id.* at 339.
44. *Id.* The court also stated that, at present, "there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal." *Id.* at 336.
45. *Id.* at 339.
46. EUGENE COTRAN, [I: THE LAW OF MARRIAGE AND DIVORCE] RESTATEMENT OF AFRICAN LAW: KENYA (1968) [hereinafter RESTATEMENT I]; EUGENE COTRAN, [II: THE LAW OF SUCCESSION] RESTATEMENT OF AFRICAN LAW: KENYA (1968).
47. LAWS OF KENYA, Ch. 10, § 17.
48. Mumbi Mathangani, *Women's Rights in Kenya: A Review of Government Policy*, 8 HARBARD HUM. RTS. J. 179, 179-80 n.4 (1995).
49. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entry into force Jan. 3, 1976) (ratified by Kenya on May 1, 1972).
50. International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3, (entry into force Jan. 3, 1976) (ratified by Kenya on May 1, 1972).
51. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 13, (entry into force Sept. 3, 1981) (ratified by Kenya on March 9, 1984).
52. African Charter on Human and Peoples' Rights, adopted June 26, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M. 59 (1982) (entry into force Oct. 21, 1986) (ratified by Kenya on Feb. 10, 1992).
53. Convention on the Rights of the Child, opened for signature Nov. 20, 1989, G.A. Res. 44/25, U.N.G.A.O.R., 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, reprinted in 28 I.L.M. 1448 (entry into force Sept. 2, 1990) (ratified by Kenya on July 30, 1990).
54. See Mathangani, *supra* note 48, at 191.
55. Memorandum from Jane Kiragu, Project Manager, International Federation of Women Lawyers (FIDA) Kenya Chapter (Sept. 20, 1996) (on file at The Center for Reproductive Law and Policy).
56. Mathangani, *supra* note 48, at 191.
57. MINISTRY OF HEALTH, GOV'T OF KENYA, KENYA'S HEALTH POLICY FRAMEWORK 26 (1994).
58. *Id.* at 31-33.
59. *Id.* at 45-47.
60. *Id.* at 48.
61. *Id.* at 35-36.
62. *Id.* at 36-37.
63. *Id.* at 33-34.
64. *Id.* at 38.
65. *Id.* at 39.
66. *Id.* at 39-40.
67. *Id.* at 28.
68. *Id.* at 42.
69. *Id.* at 17.
70. *Id.* at 34.
71. See JAPETH K. MATI, STRATEGY FOR REPRODUCTIVE HEALTH CARE IN KENYA: A CONSULTANT REPORT (THIRD DRAFT) (Feb. 1996) (Unpublished report on file at The Center for Reproductive Law and Policy) (noting a commitment to an integrated approach to avoid a duplication of services).
72. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 to 1996, art. 11.39, at 231 (Republic of Kenya 1994).
73. AGENDA '94: PEOPLE, ECONOMIC AFFAIRS AND POLITICS 253-54 (Institute of Economic Affairs [Kenya] 1994) [hereinafter Agenda '94].
74. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 to 1996, *supra* note 72, art. 1.102, at 33.
75. AGENDA '94, *supra* note 73, at 254.
76. *Id.*
77. REPUBLIC OF KENYA, NATIONAL POPULATION POLICY FOR SUSTAINABLE DEVELOPMENT 13 (Oct. 1995) (Draft on file with The Center for Reproductive Law and Policy) [hereinafter NATIONAL POPULATION POLICY].
78. *Id.* at 14.
79. *Id.*
80. WORLD DEVELOPMENT REPORT 1993: INVESTING IN HEALTH, tbl. A.9, at 210 (World Bank 1993).
81. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 to 1996, *supra* note 72, art. 11.35, at 230 (Republic of Kenya 1994).
82. AGENDA '94, *supra* note 73, at 254.
83. *Id.*
84. POPULATION AND HUMAN RESOURCES DIV., WORLD BANK, REPORT NO. 13152-KE, KENYA POVERTY ASSESSMENT 75 (1995).
85. *Id.* at 82.
86. *Id.*
87. LAWS OF KENYA, Ch. 256.
88. Persons over the age of 18 years are liable to pay the standard monthly contribution if their income exceeded 1,000 shillings in the preceding month, 3,000 shillings in the preceding three months, or 12,000 shillings in the preceding 12 months. LAWS OF KENYA, Ch. 255, § 5(3).
89. *Id.* §§ 5-6.
90. *Id.* § 10(1).
91. However, no benefits shall be payable for these purposes if the expenses arose within six months of the date of payment of the first contribution for a year, unless the contributor had contributed to the Fund throughout the entire preceding year. LAWS OF KENYA, Ch. 255 [Subsidiary], Reg. 9.
92. LAWS OF KENYA, Ch. 253.
93. LAWS OF KENYA, Ch. 257.
94. LAWS OF KENYA, Ch. 244.
95. LAWS OF KENYA, Ch. 253, § 4(1).
96. *Id.* § 5.
97. *Id.* § 11(1).
98. *Id.* §§ 15(1), 17.
99. *Id.* § 22(1).
100. *Id.* § 20(1).
101. LAWS OF KENYA, Ch. 257, § 3.
102. *Id.* § 9.
103. *Id.* §§ 12-17.
104. *Id.* § 25.
105. LAWS OF KENYA, Ch. 244, § 3.
106. *Id.* § 5.
107. *Id.* § 8.
108. *Id.* §§ 19(1)-(2).
109. *Id.* §§ 19(4)-(5).
110. NATIONAL POPULATION POLICY, *supra* note 77, at 28.
111. LAWS OF KENYA, Ch. 63, § 218.
112. TUDOR JACKSON, THE LAW OF KENYA: AN INTRODUCTION 185 (2nd ed. 1978).
113. *Id.*
114. *Id.* at 208.
115. See *id.* at 197 (discussing "trespass to the person" generally).
116. LAWS OF KENYA, Ch. 253, § 20(1); see also *supra* notes 92-110 and accompanying text (regulation of health personnel).
117. Census data were collected even before independence. The first complete census was conducted in 1948, with censuses being conducted regularly every 10 years since then. U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, II WORLD POPULATION POLICIES 103, U.N. Doc. ST/ESA/SER.A/102/Add.1, Sales No. E.89.XIII.3 (1989). The most recent census was conducted in 1989. UNFPA, *supra* note 5, at 11.
118. AFRICAN SOCIALISM AND ITS APPLICATION TO PLANNING IN KENYA NAIROBI ¶ 86, at 31 (Republic of Kenya 1965).

119. *Id.*
120. DEVELOPMENT PLAN 1989–1993, art 9.14 (Republic of Kenya 1989), in 18 ANN. REV. OF POPULATION L. 230, 232 (Reed Boland & Jan Stepan eds., 1993).
121. NAT'L COUNCIL FOR POPULATION & DEV., *supra* note 4, at 3.
122. NAT'L COUNCIL FOR POPULATION & DEV., *Population Policy Guidelines*, Jan. 1986, THE WEEKLY REVIEW [NAIROBI], 24 Jan. 1986, at 17, Appendix I, in 13 ANN. REV. OF POPULATION L. 269, 280–81 (Reed Boland & Jan Stepan Eds., 1989) [hereinafter *1986 Population Policy Guidelines*].
123. NATIONAL POPULATION POLICY, *supra* note 77, at 33.
124. U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, *supra* note 119, at 103.
125. UNFPA, *supra* note 5.
126. 1986 Population Policy Guidelines, *supra* note 122.
127. *Id.* art. 7.3(e), at 280.
128. *Id.* art. 7.1(d), at 279.
129. *Id.* art. 5.1, at 271.
130. *Id.* art. 5.2, at 271.
131. *Id.* art. 5.3.
132. MINISTRY OF HEALTH, *supra* note 57, at 28.
133. A formal system of development planning has existed since 1965. U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, *supra* note 117. The most recent plan is the Development Plan covering the period 1994 to 1996. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72.
134. The 1989–1993 Development Plan also commits the government to expanding antenatal care to enable expectant mothers to attend at least one prenatal health session before the birth of each new baby and to providing postnatal care, including infant immunization, education on the use of oral rehydration salts, and nutrition monitoring. DEVELOPMENT PLAN 1989–1993, *supra* note 120, art 9.14, at 233.
135. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72, art. 10.37, at 212.
136. NATIONAL POPULATION POLICY, *supra* note 77.
137. Specific demographic targets are envisaged for reduction of rates of infant mortality, child mortality, maternal mortality, crude death, total fertility, and population growth, as well as for increases in life expectancy and contraceptive prevalence rates. *Id.* at 20–21.
138. Health service targets are envisaged for immunization coverage, professionally attended deliveries, and primary health care coverage. *Id.* at 21–22.
139. Social service targets call for increases in literacy rates, educational attainment levels for both sexes, and availability of sanitary facilities. *Id.* at 22.
140. MATI, *supra* note 71, at 1. There are also approximately 800 NGO and private service delivery points in Kenya. *Id.* The Family Planning Association of Kenya (“FPAK”) accounts for about 60% of the oral contraceptives reported to have been distributed through community-based distribution services. UNFPA, *supra* note 5, at 50.
141. UNFPA, *supra* note 5, at 48.
142. NAT'L COUNCIL FOR POPULATION & DEV., *supra* note 4, at 49.
143. *Id.*
144. Memorandum from Jane Kiragu, *supra* note 55.
145. *Id.* (citing interview with Claire Obare, Programme Officer, *Association of Voluntary Surgical Contraception, Nairobi Office*).
146. UNFPA, *supra* note 5, at 12.
147. NAT'L COUNCIL FOR POPULATION & DEV., *supra* note 4, at 39–40.
148. *Id.* at 147.
149. LAWS OF KENYA, Ch. 244, §§ 43, 44(1)(d).
150. *Id.* § 19(5).
151. The Poisons List Confirmation Order is attached as a schedule to the Pharmacy Act.
152. *Id.* § 25(2)(a).
153. *Id.* § 29(2)(a).
154. *Id.* § 31(1).
155. *Id.* § 35.
156. LAWS OF KENYA, Ch. 254.
157. “Device” is defined in section 2 of the Food, Drugs and Chemical Substances Act to mean “any instrument, apparatus or contrivance, including components, parts and accessories thereof, manufactured, sold or represented for use in the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or the symptoms thereof, in man or animal.” *Id.* § 2.
158. *Id.* §§ 12, 19.
159. *Id.* § 11.
160. *Id.* § 8.
161. LAWS OF KENYA, Ch. 244, § 41.
162. LAWS OF KENYA, Ch. 254, §§ 9, 17.
163. *Id.* § 16.
164. LAWS OF KENYA, Ch. 244, § 44(1)(fa).
165. *Id.* § 43(1). Contraceptive devices, including IUDs, are appliances, and would therefore fall within this provision.
166. The Sales Tax (Remission) Order, No. 17 (1984).
167. The Customs and Excise (Remission) Order, No. 19 (1984).
168. LAWS OF KENYA, Chs. 63, 222, 244, 254.
169. LAWS OF KENYA, Ch. 244, §§ 43(1), 44(1)(d).
170. “Advertisement” is defined broadly in section 2 of the Pharmacy and Poisons Act to include “a notice, circular, label wrapper or other document, and an announcement made orally or by means of producing or transmitting light or sound.” *Id.* § 2.
171. LAWS OF KENYA, Ch. 222, § 11(1).
172. *Id.* § 15.
173. *Id.* § 16(4).
174. LAWS OF KENYA, Ch. 63, § 181(1).
175. *Id.* §§ 181(3), (4).
176. LAWS OF KENYA, Ch. 244, § 52; see also LAWS OF KENYA, Ch. 63, § 53 (making it a crime to possess such publications).
177. LAWS OF KENYA, Ch. 63, § 158.
178. *Id.* § 159.
179. *Id.* § 160.
180. *Id.* § 240.
181. U.U. UCHE, LAW AND POPULATION GROWTH IN KENYA, MONOGRAPH SERIES NO. 22, at 17 (1974).
182. *Id.* at 17 (citing *R v. Bourne* [1938] 3 A11 E.R. 615, [1939] 1 K.B. 687).
183. JACKSON, *supra* note 112, at 185.
184. LAWS OF KENYA, Ch. 244, § 38.
185. *Id.* § 40(3)(b).
186. Memorandum from Jane Kiragu, *supra* note 55.
187. NAT'L COUNCIL FOR POPULATION & DEV., *supra* note 4, at 49.
188. NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 25 (Rainb9 1995).
189. Sharon Ladin, International Women's Rights Action Watch (IWRAP), *Kenya*, in 1993 IWRAP TO CEDAW COUNTRY REPORTS 11, 12 (1992).
190. JACQUELINE SMITH, VISIONS AND DISCUSSIONS ON GENITAL MUTILATION OF GIRLS: AN INTERNATIONAL SURVEY 119 (1995).
191. LAWS OF KENYA, Ch. 63, §§ 231, 234, 250, 251.
192. For a general discussion of tort law in Kenya, see JACKSON, *supra* note 112, at 182–225.
193. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72, at 261.
194. WORLD HEALTH ORG., WHO AIDS SURVEILLANCE REPORT: KENYA (June 18, 1996) (unpublished document on file at The Center for Reproductive Law and Policy).
195. Notice of the Minister of Health (July 23, 1987), Gazette Notice No. 3539, THE KENYA GAZETTE, July 31, 1987, at 1110.
196. LAWS OF KENYA, Ch. 242.
197. LAWS OF KENYA, Ch. 244, § 18(1). Where a medical practitioner has not attended to the patient, either the head of the patient's family, a relative, or an occupier of the building must notify the nearest medical officer of health that the person is suffering from a notifiable infectious disease. In any case in which a medical practitioner has been called in to attend to the patient, that practitioner is required to submit to the nearest medical officer of health a certificate detailing particulars of the case. The medical practitioner must also inform the head of the household, or the occupier of the premises, or any person in attendance on the patient, of the infectious nature of the disease and the precautions to be taken to prevent its conveyance to others. Similar notification requirements apply to medical practitioners who become aware that a person has died of an infectious disease. *Id.*
198. LAWS OF KENYA, Ch. 244, § 18(2). Medical practitioners in private practice have an added incentive to comply with the notification requirements because Kenyan health authorities are required to pay them a fee of four shillings for each certificate duly sent by them in accordance with the provisions of the PUBLIC HEALTH ACT. *Id.* § 19.
199. Section 2 of the Public Health Act defines “infectious disease” to mean “any disease (not including any venereal disease except gonorrhoeal ophthalmia) which can be communicated directly or indirectly by any person suffering therefrom to any other person.” *Id.* § 2.
200. *Id.* § 21.
201. *Id.* §§ 22, 23.
202. *Id.* §§ 26, 27.

203. *Id.* § 28(a).
204. *Id.* § 29.
205. *Id.* § 30(1).
206. Section 202(1) of the Penal Code provides that “[a]ny person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.” LAWS OF KENYA, Ch. 63, § 202(1). Section 203 of the Penal Code provides that “[a]ny person who of malice afterthought causes the death of another person by an unlawful act or omission is guilty of murder.” *Id.* § 203.
207. *Id.* § 215(1); see also Robert P. Wasson, Jr., *The Aids Crisis As An Impetus to Law Reform in the United States and Kenya*, 17 SUFFOLK TRANSNATIONAL LAW REVIEW 1, 45–46 (1994).
208. STDs are referred to as “venereal diseases” in the Public Health Act.
209. LAWS OF KENYA, Ch. 242, § 43. All references to STDs in the discussion of the provisions of the PUBLIC HEALTH ACT below refer to these six diseases.
210. *Id.* § 44(1).
211. *Id.* § 46(1).
212. *Id.* §§ 44(2), 46(2).
213. *Id.* § 51(1).
214. *Id.* § 48(1).
215. *Id.* § 48(2). An order made by the magistrate may require the person to furnish a medical certificate stating whether or not the person is suffering from an STD, or to submit to medical treatment at a specified time or place. The magistrate may also order the detention of the person in a special hospital for the duration of treatment. *Id.* § 48(3).
216. *Id.* § 47.
217. *Id.* § 49.
218. *Id.* § 45.
219. *Id.* § 55(1). For the purposes of § 55 of the Public Health Act, “advertisement” and “statement” include any paper, document, or book containing any advertisement or statement prohibited under the section. *Id.* § 55(3).
220. *Id.* § 55(4).
221. MINISTRY OF HEALTH, REPUBLIC OF KENYA, AIDS CONTROL PROGRAMME, 1987–1991 MEDIUM TERM PLAN: END OF TERM REVIEW 8 (1992).
222. *Id.*
223. *Id.* Two five-year medium term plans for AIDS control have been implemented since then: a 1987–1991 Plan and a 1992–1996 Plan. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72, Arts. 12.11, 12.15, at 263–64.
224. Memorandum from Jane Kiragu, *supra* note 55.
225. *Id.*
226. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72, art. 12.16, at 264.
227. *Id.* arts. 12.19, 12.21, 12.27, 12.28, at 265–70.
228. *Id.* art. 12.29, at 268.
229. *Id.* art. 12.24, at 266.
230. *Id.* art. 12.29, at 268.
231. MWALIMU, *supra* note 13, at 28.
232. RESTATEMENT I, *supra* note 46, at 8.
233. LAWS OF KENYA, Ch. 150.
234. LAWS OF KENYA, Ch. 151.
235. LAWS OF KENYA, Ch. 150, § 35(1).
236. *Id.* § 37.
237. *Id.*
238. LAWS OF KENYA, Ch. 151, § 9 (1).
239. *Id.* § 13 (1).
240. LAWS OF KENYA, Ch. 157.
241. JACKSON, *supra* note 112, at 46.
242. LAWS OF KENYA, Ch. 157, § 3 (1)(a).
243. LAWS OF KENYA, Ch. 156.
244. *Id.* § 3(1).
245. LAWS OF KENYA, Ch. 155.
246. LAWS OF KENYA, Ch. 156, §§ 5, 6.
247. See, e.g., RESTATEMENT I, *supra* note 46, at 13, 26, 38 (discussing the practice among the Kikuyu, Meru and Tharaka).
248. See, e.g., *id.* at 16, 28–29, 40–41.
249. See, e.g., *id.* at 23, 35.
250. When a husband dies, his widow may remain living at his home and have sexual relations with a male relative of the deceased — usually the younger brother of the deceased who is next in order of seniority — in order to have children. This is termed a “levirate union.” *Id.* at 13.
251. The widow may choose to be inherited by a brother or other male relative of the deceased and become his wife for all purposes. *Id.*
252. For a detailed restatement of the customary law of marriage and divorce of each ethnic group of Kenya, see *id.*
253. LAWS OF KENYA, Ch. 152.
254. *Id.* § 6(1).
255. *Id.* § 8(1).
256. *Id.*
257. *Id.* §§ 13–19.
258. *Id.* § 23.
259. LAWS OF KENYA, Ch. 157, § 10.
260. *Id.* §§ 11–12.
261. LAWS OF KENYA, Ch. 156, § 3(1).
262. LAWS OF KENYA, Ch. 155, § 9.
263. LAWS OF KENYA, Ch. 156, § 3(4).
264. UCHE, *supra* note 181, at 24–25.
265. MWALIMU, *supra* note 13, at 32.
266. See, e.g., RESTATEMENT I, *supra* note 46, at 20, 43 (discussing the Kikuyu, Meru and Tharaka).
267. *Id.* at 20, 179.
268. *Id.* at 179.
269. *Id.* at 20.
270. *Id.* at 20, 179.
271. LAWS OF KENYA, Ch. 152.
272. LAWS OF KENYA, Ch. 144.
273. LAWS OF KENYA, Ch. 153.
274. An order for judicial separation may be granted to a wife pursuant to the provisions of this Ordinance if the husband: has been convicted of committing one of various offenses against her; the husband deserted her; was guilty of persistent cruelty to her or her children, or has neglected to maintain them; insisted upon having sexual intercourse with her while knowing that he had a sexually transmissible disease; compelled her to submit herself to prostitution; or is a habitual drunkard or habitual drug-taker. *Id.* § 3(1).
275. *Id.* § 4(b).
276. LAWS OF KENYA, Ch. 152, § 30(1).
277. LAWS OF KENYA, Ch. 144, § 17.
278. *Id.* § 7(1).
279. *Id.* § 6.
280. JANET KABEBERI, THE CHILD: CUSTODY, CARE AND MAINTENANCE 22 (1990); see also Githunguri V. Githunguri (1982–88) 1 KAR 9 (1979).
281. LAWS OF KENYA, Ch. 144, § 7(3).
282. LAWS OF KENYA, Ch. 152, § 25.
283. KABEBERI, *supra* note 280, at 27.
284. LAWS OF KENYA, Ch. 157, § 7(4).
285. REPORT OF THE COMMISSION ON THE LAW OF MARRIAGE AND DIVORCE, 114 (Republic of Kenya 1968).
286. “Iddat” means “[t]he period counted by a divorcee or a widow from the termination of marriage through divorce or death, during which she cannot re-marry.” JAMAL J. NASIR, THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION 144 (1990).
287. REPORT OF THE COMMISSION ON THE LAW OF MARRIAGE AND DIVORCE, *supra* note 285, at 107.
288. *Id.* at 114.
289. *Id.* at 107.
290. LAWS OF KENYA, Ch. 300.
291. LAWS OF KENYA, Ch. 160.
292. Mumbi Mathangani, *The Triple Battle: Gender, Class and Democracy in Kenya*, 39 HOW. L.J. 287, 301 (1995) (discussing the Registered Lands Act, LAWS OF KENYA, Ch. 300).
293. LAWS OF KENYA, Ch. 300, §§ 27, 28.
294. Mathangani, *supra* note 292, at 302.
295. Ladin, *supra* note 189, at 13.
296. Perpetua W. Karanja, *Women's Land Ownership Rights in Kenya*, in THIRD WORLD LEGAL STUDIES—1991: REALIZING THE RIGHTS OF WOMEN IN DEVELOPMENT PROCESSES: WOMEN'S LEGAL ENTITLEMENTS TO AGRICULTURAL DEVELOPMENT AND FINANCIAL ASSISTANCE 109, 130–31.
297. LAWS OF KENYA, ch. 160.
298. THE LAW OF SUCCESSION IN KENYA: GENDER PERSPECTIVES IN PROPERTY MANAGEMENT AND CONTROL 15–22 (Patricia Kameri-Mbote, ed. 1995).
299. *Id.* at 22 (citing Act No. 21 (1990), which came into effect in January, 1990). Muslims successfully argued for this exemption on the basis that the Act infringed upon their freedom of religion as embodied in § 78 of the Constitution. *Id.* at 23.

300. LAWS OF KENYA, Ch. 160, §§ 32, 33.
301. *Id.* § 35(1).
302. *Id.* § 5(2).
303. Karanja, *supra* note 296, at 131.
304. *Id.* at 128.
305. U.S. Dep't of State, *Kenya Human Rights Practices, 1994*, 1994 HUMAN RIGHTS REPORT (1995), available in LEXIS, World Library.
306. Karanja, *supra* note 296, at 130.
307. Succession Case No. 93 of 1991 (Maina 1992), *unreported case cited in* THE LAW OF SUCCESSION IN KENYA: GENDER PERSPECTIVES IN PROPERTY MANAGEMENT AND CONTROL, *supra* note 298, at 27. The government has recognized that the problem of discriminatory inheritance practices persists and has committed itself to take measures to address the problem. The 1994 to 1996 National Development Plan states that "[o]wing to land inheritance patterns which favour males over female offsprings [sic], policy measures will be taken to encourage joint decision making on land utility and its accruing benefits between spouses." NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72, at 254.
308. LAWS OF KENYA, Ch. 226.
309. Mathangani, *supra* note 48, at 185.
310. Between the hours of 6:30 pm and 6:30 am women may only be employed where: there was an unforeseeable emergency; the work involves perishable goods that would certainly perish if left overnight; the work is not normally manual and is of a managerial nature or otherwise involves health and welfare services; special permission is granted by the Minister of Labor; or the Minister of Labor suspends the restrictions in the public interest during an emergency. LAWS OF KENYA, Ch. 226, §§ 28, 29.
311. *Id.* § 28(1).
312. *Id.* § 30. Exceptions to this rule include where the work entails non-manual management services, health or welfare services, or a period of training in the course of studies. *Id.*
313. *Id.* § 56(1)(j).
314. *Id.* § 7(2).
315. 12 ANN. REV. OF POPULATION L., 1985, at 101 (Reed Boland & Jan Stepan eds., 1988).
316. U.S. Dep't of State, *supra* note 305.
317. Memorandum from Jane Kiragu, Project Director, International Federation of Women Lawyers (FIDA) Kenya Chapter, March 23, 1996 (on file at The Center for Reproductive Law and Policy), *citng* Pub. Serv. Dept., Personnel Guide.
318. WAHIDO SHAH, KENGO POLICY STUDIES SERIES NO. 3, COMMUNITY PROBLEM SOLVING FOR SUSTAINABLE DEVELOPMENT: A REVIEW OF KENYAN GRASSROOTS WOMEN'S INITIATIVES 30.
319. Mathangani, *supra* note 292, at 309.
320. *Id.*
321. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72, art. 7.59, at 128.
322. *Id.* art. 1.98, at 33.
323. *Id.* arts. 11.161-11.163, at 255-56.
324. Mathangani, *supra* note 48, at 186 n.44.
325. A GUIDE TO POPULATION ACTIVITIES IN KENYA (Abigail Krystal & Anne Schneller eds., 1987) (unpublished report on file at The Center for Reproductive Law and Policy). *Id.*
327. UNFPA, *supra* note 5, at 13.
328. LAWS OF KENYA, Ch. 63, §§ 140-167.
329. *Id.* § 139.
330. JACKSON, *supra* note 112, at 114. In April 1994 the Attorney General remarked that Kenyan men who have non-consensual sexual intercourse with their wives could soon be charged with rape; this remark was made in the Attorney General's opening address at a Gender Violence Workshop, hosted by the Kenya Chapter of the International Federation of Women Lawyers: THE STANDARD NEWSPAPER, Apr. 19, 1994, at 1.
331. LAWS OF KENYA, Ch. 63, §§ 140, 141.
332. *Id.* § 146.
333. *Id.* § 142.
334. *Id.* § 144(1).
335. *Id.* § 147.
336. *Id.* § 148.
337. *Id.* § 151 (1).
338. *Id.* § 145.
339. *Id.*
340. Ladin, *supra* note 189, at 11.
341. See, e.g., RESTATEMENT I, *supra* note 46, at 28, 41.
342. See, e.g., *id.*
343. LAWS OF KENYA, Ch. 63, §§ 231, 234, 250, 251.
344. Jackson, *supra* note 112, at 197.
345. LAWS OF KENYA, Ch. 63, § 144(1).
346. Gitau v. Republic, (1982-1988) 1 KAR 148, 149 (1983). On the facts in this case, the Court of Appeal found that the act of stripping a woman naked constitutes indecent assault, and marching a woman naked in a street aggravated the indecent assault.
347. The penalty for this misdemeanor is imprisonment for one year. LAWS OF KENYA, Ch. 63, § 144(3).
348. Approximately 16% of the population is between 10 and 14, and 10% is between 15 and 19. NAT'L COUNCIL FOR POPULATION & DEV., *supra* note 4, at 7.
349. Memorandum from Jane Kiragu, Project Director, International Federation of Women Lawyers (FIDA) Kenya Chapter, June 17, 1996 (on file at The Center for Reproductive Law and Policy).
350. Ministry of Health, *supra* note 57, at 28.
351. Smith, *supra* note 190, at 119. It is believed that more than three quarters of the ethnic groups in Kenya practice FGM. MAENDELEO YA WANAWAKE ORGANIZATION, A REPORT ON HARMFUL TRADITIONAL PRACTICES THAT AFFECT THE HEALTH OF THE WOMEN AND THEIR CHILDREN IN KENYA 2 (unpublished report on file at The Center for Reproductive Law and Policy).
352. Hope Lewis, *Between IRUA and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 40 (1995).
353. 13 ANN. REV. OF POPULATION L., 1986, at 225 (Reed Boland & Jan Stepan eds., 1989).
354. *Id.*
355. *Moi: Stop Girl Circumcision*, KENYA TIMES, Dec. 30, 1989, at 1.
356. Ladin, *supra* note 189, at 12.
357. SMITH, *supra* note 190, at 119.
358. *Bid to outlaw female circumcision defeated*, DAILY NATION, Nov. 14, 1996, at 16 (Kenya).
359. LAWS OF KENYA, Ch. 63, §§ 231, 234, 250, 251.
360. LAWS OF KENYA, Ch. 150, § 35(2).
361. *Id.* § 19. In the absence of a person having lawful custody residing in Kenya and capable of consenting to the marriage, substitute consent may be given by the Minister, a judge of the Supreme Court, or a Provincial Commissioner. *Id.* § 21. If any person whose consent to a marriage is required refuses to consent, the Supreme Court may, on application being made, consent to the marriage. *Id.* § 22.
362. LAWS OF KENYA, Ch. 157, § 3(1)(c).
363. *Id.* § 3(1)(d).
364. ASGHAR ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 110 (1992).
365. *Id.* at 110-11.
366. RESTATEMENT I, *supra* note 46, at 10.
367. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72, arts. 1.92, 1.94, 1.98, at 30-31, 33.
368. Florida A. Karani, *Educational Policies and Women's Education*, in WOMEN AND LAW IN KENYA 23, 27 (Mary Adhiambo Mbeo & Oki Ooko-Ombaka eds., 1989). Some of the reasons advanced for the low rate of girl's secondary school enrollment include: child marriage; adolescent pregnancy; a failure of most technical facilities to provide boarding facilities for women; school fees at secondary level, which often exceed the income of the average family; and household responsibilities. *Id.* at 26; Ladin, *supra* note 189, at 12.
369. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72, art. 11.162, at 255.
370. *Id.* art. 11.163, at 255-56.
371. GOV'T OF KENYA, ECONOMIC REFORMS FOR 1996-1998: THE POLICY FRAMEWORK PAPER 35-36 (1996).
372. Memorandum from Jane Kiragu, *supra* note 349.
373. NATIONAL DEVELOPMENT PLAN FOR THE PERIOD 1994 TO 1996, *supra* note 72, art. 12.20, at 266.
374. LAWS OF KENYA, Ch. 63, § 145. A person convicted of unlawful intercourse with a girl under the age of 14 years is liable to imprisonment with hard labor for 14 years together with corporal punishment, while a person who attempts to have unlawful sexual intercourse with a girl under the age of 14 years is liable to imprisonment with hard labor for five years, with or without corporal punishment. *Id.*
375. *Id.* §§ 144, 164.
376. LAWS OF KENYA, Ch. 63, §§ 144(2), 145(2).
377. *Id.* §§ 149, 166.
378. *Id.* § 149. A similar offense committed against a girl above the age of 13 and under the age of 16 years constitutes a misdemeanor. *Id.* § 150.
379. *Id.* § 166(1).