

***perspectives***  
***on gender discourse***

***gender***  
***and***  
***constitution-making in kenya***

**1/02**

# ***perspectives*** ***on gender discourse***

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# Introduction

The Heinrich Böll Foundation's Gender Programme in the East and Horn of Africa is currently focusing on the civic empowerment of women, with particular emphasis on their legal status.

The Gender Forum is one of the components of the Gender Programme. The idea of the Gender Forum in Nairobi was based on the success of a similar initiative in Ethiopia. The Gender Forum in Nairobi is coordinated and managed by a Gender Forum Coordinator based in the Foundation's regional office for the East and Horn of Africa.

The objectives of the Gender Forum include:

- Creating a medium for reflection, discussion and debate on gender and gender related issues;
- Bringing into the limelight gender experts and providing a forum for exercising their expertise and contributing useful perspectives;
- Creating understanding on the gender perspective and strategy of emancipation;
- Publicizing the deliberations of the various fora; and
- Disseminating the publications of the Forum to the public and others active on gender issues.

Participants in the Gender Forum in Nairobi who include partners from regional countries comprise NGO workers in the fields of gender and development; journalists; students; and government representatives.

A Task Force consisting of experts and organizations working on gender issues was selected to guide the Forum by assisting in identifying topics, and resource persons. The Task Force resolved that the Gender Forum in 2002 should focus on the on-going constitutional review process in Kenya, as this was a pertinent and topical subject of discussion.

At the inaugural Gender Forum held in September 2001, Aseghedech Ghirmazion the Regional Director of the Heinrich Böll Foundation, noted that the Gender Forum is a unique gathering in Kenya, in the sense that it creates a neutral arena for bringing key stakeholders together to air their views and perspectives.

**Anne Nyabera**  
**Regional Gender Coordinator**

# Abbreviations

AAWORD	African Association of Women in Research and Development
AU	African Union
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CKRC	Constitution of Kenya Review Commission
COMESA	Common Market to Eastern and Southern Africa
COVAW	Coalition on Violence Against Women
EAC	East African Community
FIDA	Federation of Women Lawyers
FGM	Female Genital Mutilation
HBF	Heinrich Böll Foundation
HIV/Aids	Human Immuno Virus/ Acquired Immuno Deficiency Syndrome Disease
ICPD	International Conference on Population and Development
IGAD	Inter Governmental Authority on Development
ILO	International Labour Organization
MoH	Ministry of Health
MPs	Members of Parliament
NEPAD	New Partnership for Africa's Development
NFLS	Nairobi Forward Looking Strategies
NGOs	Non Governmental Organisations
STDs	Sexually Transmitted Diseases

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# Editorial

## Seeking Guarantees of Equality

When the independence constitution was negotiated in London, there was only one woman in the delegation. It is not surprising that women's issues were completely ignored in that Constitution, and women continued to be discriminated against in public and private laws.

Numerous amendments to the Constitution have done little to improve the situation of women. It is therefore necessary that the present review should accord the highest importance to gender issues. Fortunately, the Constitution of Kenya Review Act emphasises the participation of women in the review process and commits the commission and other organs of review to ensuring constitutional provisions for gender equity and gender parity.

The Act requires all organs of review to ensure the process:

- accommodates the diversity of Kenya, including gender, and the disadvantaged
- facilitates participation of all in generating and debating proposals to alter the constitution
- is guided by respect for the universal principles of human rights, gender equity, and democracy (references to democracy have been construed to include the full inclusion of women).

These principles are reflected in the composition of the organs of review. In composing the commission, the National Assembly has to maintain the principle of gender equity- at least six commissioners out of twenty-seven had to be women. In reality, seven were appointed.

As only 25 per cent of the commission, women have no reason to rejoice. Still, it represents better female participation than in other public bodies.

As regards the membership of the National Constitutional Conference, the commission is bound to accord priority to gender equity, but the Act specifically requires, as a minimum:

- at least one of the three representatives from each country be a woman; and
- representation of women's organisations as part of civil society.

The commission has facilitated the full participation of women in the process. The commission has encouraged women to organise meetings throughout the country to discuss the process and constitutional reform. It has assisted women's organisations to conduct civic education.

It held a public workshop on gender issues for constitutional reform, to which all leading women's organisations were invited, and at which a number of local and overseas experts made representations. Women have turned up in big numbers in most of the public meetings. More submissions (most of which are excellent) have been received by the commission from women's organisations than any other sector. Women have been so much more energetic than men that the process so far can truly be described as 'women driven'!

The Act requires certain values and principles to be reflected in the new constitution. Two are of particular interest to women: gender equity and parity, and regional and international co-operation to support democracy and rights.

The mandate of the commission includes various aspects which are disposed towards the protection of the rights of women, such as:

- institutions to promote respect for human rights and gender equity as an indispensable and integral part of the enabling environment for economic, social, religious, and cultural development
- the right to citizenship and ensuring gender parity in the conferment of the right
- socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all
- the rights of the child and recommend mechanisms that will guarantee protection thereof
- treaty making and implementing powers and to strengthen the observance of Kenya's obligations under international law (which would cover the Convention for the Elimination of All Forms of Discrimination Against Women, the Beijing Plan of Action, the Convention on the Rights of the Child, and the Copenhagen Declaration on Social Development).

These provisions establish a broad framework within which to pursue the rights of women, including affirmative action and gender political participation of women.

At present, the spouse of a Kenyan woman is not entitled to Kenyan citizenship, but the spouse of a Kenyan man is. Moreover, a child born abroad to a Kenyan becomes a citizen of Kenya only if the father is a Kenyan- mother's citizenship counts for nothing.

These discriminatory provisions are inconsistent with the values prescribed in the Review Act, as they are with international and regional norms. They will have to be removed to give women equal citizenship rights.

Although the Bill of Rights in the present Constitution guarantees equal treatment in the law, women do not benefit fully from these provisions.

Until 1997, it was perfectly lawful to discriminate on the basis of sex. Even the 1997 amendment did not fully protect women against discrimination in public or private employment.

Moreover, guarantees of equality do not apply as regards personal or family law- under which women generally have a subordinate position and suffer from various disabilities and humiliations.

The constitutions of Ghana, South Africa and Uganda provide that when human rights and customary laws and practices conflict, human rights must prevail, and to that extent customary law is modified. The logic of the Review Act requires that a similar rule must be adopted in Kenya.

**Professor Yash Pal Ghai**  
**Chairman, Constitution Review Commission of Kenya**

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# Chapter 1

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## The Conceptualisation of Gender

By **Dr. Wilfred Subbo**

### Introduction

The term gender became popular in the late 1980s as a replacement for women and development. Gender is a social construct that asserts that the expectations and responsibilities of men and women are not always biologically determined. Advocates of the gender approach point out that the term easily accommodates race, class, ethnicity, and male and female power relationships. (Snyder and Tadesse 1995:14).

Gender role differentiation is structurally and culturally defined in ways which create and reinforce relationships of male dominance and female subordination. For instance, ideas of what patterns of behaviour and activities are appropriate or inappropriate for women and men are largely social and cultural in origin and they are acquired through the socialization process. From the time children are born, they are socialized into different roles on the basis of sex. They are rewarded when their behaviour is seen as sex appropriate and ridiculed or reprimanded when they deviate from the established culture norms (Were, 1991:1).

In most African countries, the problems that affect women are largely cultural. The role of women has been spelt out, that is, they are not supposed to be part of the decision-making process. For example, Molokemme (1990) observes that in Botswana it was traditionally said “mosadi ke ngwana wa monna” – a woman is the child of the man, in reference to the fact that women under Tswana customary law always had guardians. Thus, under strict rules of customary law, therefore, women had limited legal capacity, although, in practice, some women were more independent than others, depending on their social and marital status. Unmarried women below marriageable age are like their male counterparts, without full legal capacity, being under the authority of a male guardian – father, an uncle or some

other senior male relative. The main question that we ask ourselves is: how do we change cultures that suppress women in the society? Studies have revealed that often people misinterpret religion to suit their cultural ends. What women in Africa and elsewhere are, therefore asking for is to be treated equally. Secondly, women want to be charged by their ability and not by any other subjective standards. It has also been established that more often than not it is not culture per se that suppresses women but misinterpretations and distortions of people.

It should be emphasized that culture is dynamic and any practices that discriminate against women, are, therefore, subject to change. However, more often than not when people try to ask questions regarding oppressive cultural practices the only reason they are given by parents and other elderly people is that that is how people practised them since time immemorial. In short, some practices have simply not been questioned and have been there for generations.

It is necessary to point out that all live in a gendered world. As children we are either boys or girls and as adults we are men or women. This fact means that we are called upon to think about certain issues and make decisions about them on a continuous basis. Furthermore, many of the issues involve what is called personal life. These usually comprise the activities that a person decides upon on her own, without necessarily consulting anyone, plus those which she considers the views of other people to whom she is related by personalities.

The issues also revolve mainly around education, skills development, economic opportunities and the level of participation in development. The major argument is that despite women's active participation in community activities, they have fewer opportunities in education and skills development and are less represented in powerful positions where decisions are made. In Kenya, for example, all the development plans indicate that women were marginalized despite their contribution being highly acknowledged, especially in food production. Studies indicate that over 70 % of the food in Kenya is produced by women. Orodho (1998:119) observes that, in Vihiga District, men devote a large proportion of their labour in land preparation and planting, while the rest of the more tedious and laborious activities, like weeding, harvesting, processing and marketing of crops, are left to women and children. He points out that these latter activities are considered a female responsibility. The implication of this finding is that smallholder agriculture in Vihiga District basically relies on family labour, of which women contribute the lion's share.

This paper examines the concept of gender from an African perspective, indeed, it aims at highlighting those issues that influence the lives of women and men particularly those that serve as constraints in enabling women and men to realise their full potential. It argues that the concept of gender needs to be redefined. As it is now, gender seems to be associated only with women's issues.

### The cultural construction of gender and personality

We live in a world of symbols that assign meaning and value to what male and female should be. For example some children's toys are targeted for boys and others for girls. These symbols often instil some stereotypes of what roles are suitable for men and which ones are for women in society. Sargent and Brettel (1993) point out that the question we need to ask ourselves is: "To what extent are these stereotypes of men and women and the symbols which they are associated with universal, and, if they are universal, to what extent are they rooted in observed differences about the biological nature of men and women that are made culturally significant?"

It should be emphasised that particular efforts have been made towards the analysis of gender relations, or the status, problems and prospects of women in human society (Ahonsi, 1995:85). Feminists have opined that in practical terms and linguistic manifestations, women are unduly and largely made to be subordinate to men (Onguwale, 1998:103). The imbalance in gender participation in the development process simply confers higher status to men in all facets. The English language also contributes in a number of ways in according the male gender a higher status as compared to the female gender. For instance, the masculine morphemes are made the roots of feminine words such as princess, prophetess and actress to mention only but these. Feminist scholars challenge all relevant culture systems that border on gender relations and status. As a result of these efforts attempts are being made to degenderise the English language in order to desex the thoughts manifested in language structures and uses (Yusuf, 1988:87).

In some African societies, it has been established that language has been used in a manner that degrades women. Ongunwale (1995) argues that among the Yoruba ideas such as hardness, efficiency, toughness, sharpness, resistance, grandeur and similar sorts of qualities are all ascribed to the male of the species.

## Initiation rites and gender

Initiation rituals that prepare girls and boys for their roles as women and men are found in various societies around the world. However, the transition to adulthood is a continuous process of enculturation and socialisation (Sargent 1993). It ought to be recognised that the rites usually leave a permanent mark regarding the gender roles and the status of men and women in society. For example among the Abagusii, male and female roles were explicitly defined in the songs sung during initiation rites.

## Elimination of gender discrimination

The United Nations Charter (1945) states that:

“ We the peoples of the United Nations, determined to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person in the equal rights of men and women of nations, large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of the international law can be maintained.”

In the same breath the Nairobi Forward Looking Strategies for the advancement of Women (UN 1985) observed that:

“ social and economic development should be encouraged to secure the participation of women as equal partners with men in the fields of work, equal access to all positions of employment, equal pay for work of equal value and equal opportunities for education and vocational training...”

The document also made a number of comprehensive recommendations as far as achieving equity is concerned. For instance, it pointed out that there should be a sustained public campaign launched by all governments in close collaboration with non-governmental organisations and other relevant institutions to challenge and abolish all discriminatory perceptions, attitudes and practices by the year 2000. It is, therefore, our duty in this Forum to discuss how far these recommendations have been implemented.

It was also recommended that governments should ensure that all obstacles to the full and equal participation of women in all spheres of society were eliminated within the same period. Specific areas that governments were supposed to focus on were to ensure that there was no discrimination whatsoever on the basis of

gender, ensure that women were accorded opportunity to represent their governments in international fora, to ensure equal representation of men and women in powerful positions where decisions are made, and to ensure that men and women are accorded equal education and training opportunities.

## Approaches to gender studies

Since the mid 1980s there has been a growing consensus that sustainable development cannot be realised without the full and equal participation of men and women. Towards this end two approaches have been identified to guide gender studies. First, is the Women in Development (WID) approach. This approach posits that the female gender has been neglected and left out of mainstream development processes for centuries and therefore, it is high time that women were fully integrated in the development process. Proponents of this approach argue that this will not only achieve equity but efficiency and eradication of poverty as well. The main focus of this approach is equity, anti-poverty and efficiency. Furthermore, it was widely thought that the WID approach would remedy the unequal gender relations in the development process and, hence, the approach emphasises the economic independence of women.

The anti-poverty approach links the economic inequality of women to poverty rather than simply to female subordination. It mainly targets the low-income cadre of women. In Kenya, a number of income generating projects have been initiated by women groups, non-governmental organisations and donor agencies whose main purpose is to increase the income of women.

The efficiency approach assumes that women are generally an under-utilised labour force and should be better utilised in serving in roles previously reserved for the male folk. The main weakness of the WID approach is that it did not challenge societal structures that are largely determined by males.

In the late 1980s the Gender and Development (GAD) approach assumed prominence. GAD was seen as a more progressive approach to development. It moved the gender debate beyond an economic analysis to include other equally important aspects such as environmental, ethical and cultural aspects of development. This shows that gender issues have had a historical development and the struggle for mainstreaming of women in the development process always calls for new approaches that can adequately address the needs of each generation.

## The Relationship Between the Convention on the Elimination of all forms of Discrimination Against Women and Gender Equity.

The Convention on the Elimination on all forms of Discrimination Against Women is regarded as the main international instrument that emerged from the decade of women (1975-1985). It is considered a milestone in the gender debate in the sense that it advanced the objectives of the GAD approach. Its origins can be traced to the Declaration on the Elimination of Discrimination against Women drawn by the Commission of the Status of Women in 1963 and adopted by the General Assembly of the United Nations in 1967. In Kenya we need to carry out an evaluative study to assess the achievements of the convention since our government is a signatory to this international document.

### Conclusion

It is fairly obvious that a full conceptualisation of the gender debate involves multi-faceted issues revolving around definitions, the cultural construction of gender and personality, the strategies for the elimination of gender discrimination, and the preferred approaches to the achievement of gender equity, most notably the WID and GAD approaches. Furthermore, the historical processes that have had profound impact on the gender debate, such as the Convention On The Elimination Of All Forms Of Discrimination Against Women and the Nairobi Forward Looking Strategies for the Advancement of Women, are worth referring to in any discussion concerning the conceptualization of gender. Finally, gender issues need to be discussed in depth, since they touch on the general welfare of women and men as well as society as a whole. In recent years, governments, donors, non-governmental organisations and indeed all players in the development process, have come to acknowledge the necessity of including gender factors in the design and implementation of their programmes and projects.

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# Chapter 2

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## Gender, Good Governance and Separation of Powers within the Constitution

By Dr. Patricia Kameri-Mbote

### Introduction

The topic of engendering women's issues in the Constitution has already been discussed. There have been fora at which specific issues on women's concerns in Constitution-making have been canvassed. There are concerns about outright legitimization of gender-based discrimination as far as issues such as citizenship are concerned, for instance. There is also concern about the ambivalence of constitutional provisions (give and take), access to resources and violence against women.

There is an assumption that provisions on equality can benefit men and women without compensatory mechanisms for previous disadvantages. To be able to enjoy rights however, women need to be assured of

- Promulgation of rights
- Implementation of rights' provisions
- Effective enforcement mechanisms (**In the Shadow of the Law**).

This raises the need to ensure that gender concerns are mainstreamed in law and policy and addressed by different arms of government: the executive, the legislature/parliament and the judiciary. Good laws passed by the legislature can fail if implementation mechanisms provided in judicial fora are ineffective or blind to gender considerations.

This paper looks at gender concerns in constitution making, specifically with regard to ensuring proper governance through engendering state separation of powers. We begin by defining the terms constitution, governance and separation of powers. We then address gender concerns in constitution-making and make proposals on how these can be addressed through the different arms of government.

## Constitution

A Constitution aggregates and integrates societal values for the benefit of society. It is the overarching document encompassing all aspects of life in a given state. All other laws have to adhere to Constitutional provisions and will be null and void to the extent that they are inconsistent with these provisions.

A Constitution may contain a Preamble stating why the Constitution is being enacted. Further, it may contain directive principles of state policy that comprise a set of values governing the exercise of state power. The current Kenyan Constitution contains neither a Preamble nor a set of Directive Principles.

## Governance

The term 'governance' refers to the way in which countries, cities or provinces are 'governed.' 'Governance' thus refers to complexities entailing a good deal of more than sound management. It comprises many issues including democratic control, transparency, accountability, procedural compliance, capacity and responsiveness of governments, etc.

'Good governance' in Kenya concerns issues such as lack of accountability and transparency, especially with respect to procurement procedures in public service, weak oversight bodies, ineffective accounting and audit procedures, rampant corruption, rent-seeking behaviour and weak local authorities. It is in this context that the Kenyan Government, has since the mid-1990s identified and implemented a set of measures in the area of governance as part of a systematic approach to address the problem (I-PRSP, 2000). 'Governance' thus refers to complexities entailing a good deal of more than sound management.

## Separation of Powers

This is a system whereby different functions of government are performed by distinct entities each with defined roles. It is provided for in the Constitution. There are at least two forms, viz. the 'embryonic form' and the 'pure form'.<sup>1</sup> In its crude form the doctrine of separation of powers merely requires that the persons who have the power to make laws should be independent from those who attend to the execution of the

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<sup>1</sup> This discussion draws from the seminal work of Ojwang, J.B., (1990) *Constitutional Development in Kenya: Institutional Adaptation and Social Change* Acts Press, Nairobi.

laws. Similarly the judicial power should be separated from the legislative and executive. In brief, the same body should not be allowed to exercise the three powers.

The pure form of separation of powers is characterised by strict distinction of the three powers from each other. It requires that the powers be separated and placed in distinct persons. Under this form no person is allowed to hold membership in more than one branch of the government. This pure doctrine is apparently fraught with practical difficulties. A seminal input on the interpretations of the pure doctrine of separation of powers is made by J.B. Ojwang.<sup>2</sup> According to Ojwang, the separation of powers cannot be realised in pure form. He authoritatively cites examples from around the world (including the United States where the highest standards of the doctrine have been applied), which indicate that the three operative arms of the government almost always maintain a significant measure of fusion. Kenyan examples also indicate that we do not apply the principle of separation of powers in its pure form. For instance, the Attorney General exercises powers in the realm of both the legislative and executive branches of government. The Attorney General sits in the Judicial Service Commission, in Parliament and in the Cabinet. In practice therefore, the lack of complete separation may not necessarily be unconstitutional.

In whichever form the principle of separation of powers is applied however, it is primarily geared towards ensuring that the tenets of good governance are realized. It is therefore critical that the interests of all persons including women are realized through the application of this principle.

## Gender concerns in constitution-making

### Gender

The issues of gender and women's rights evoke a lot of sentiments. Some people wonder why gender should be an issue at all. Others wonder what the interface is between gender and women. Indeed most persons perceive the issue of gender as a woman's issue.

The term gender means the state of being either male or female. The male and female genders define and characterize all human beings in society. The two gen-

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<sup>2</sup> *Ibid.* p. 7.

ders are distinguished from one another by physical, that is, biological sexual/reproductive differences. It has however increasingly acquired a social meaning where it defines how the male and the female gender relate in society. The social meaning refers to social characteristics of one's biological sex. These characteristics include gender-based division of labour whereby duties are allocated on the basis one's sex. For example the female gender is allocated duties such as cooking, washing and other domestic chores, which belong to the private rather than the public sector. The male gender is allocated non-domestic duties such as decision making, bread-winning and others, which belong to the public sector.<sup>3</sup>

Thus the term 'gender' is a neutral term which accommodates the view that women's issues are part of broad social issues many of which arise out of basic social-class differences as opposed to purely sexual differences. The use of the term 'gender' in reference to women has however served largely to mollify conservatives who are more receptive to a discussion on gender than to one on women. Indeed "the lift to the gender focus may be a strategic move to keep the women issue alive in a period of conservatism... (A) 'gender' focus may be seen as a 'safer' way of looking at the problem without mentioning women explicitly". (Okeyo:1989:9)

Thus when one adverts to the issue of gender today, one is not merely talking about the **physical differences** that being biologically male/female would entail. One is also talking about **social constructions of maleness and femaleness** and this often translate into **power relations** between men and women. Sex then is distinguished from gender by what one is born as, that is female or male, and therefore it is a biological concept. Culturally determined patterns of behaviour such as rights, duties, obligations and status assigned to women and men in society (gender roles) are varied even within the same society. Women's studies as a body of knowledge analyses the condition of women in the society. When such studies are also directed to the changing of women's condition in the society, then such a body of knowledge is known as feminist studies. Feminism is therefore a political movement, which aims at transforming gender relations that are oppressive to women.

Feminist scholars use **gender** as an analytical variable. **Gender** is a relational concept that denotes the manner in which women and men are differentiated and ordered in a given socio-cultural context. Sexuality appears as the interactive dy-

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<sup>3</sup> Clarion "An Introduction to Gender, Law and Society: Constitutional Debate No. 11," (Claripress Limited, Nairobi 2001) p.2

namic of gender as an inequality. Gender emerges as the congealed form of the sexualization of inequality between men and women. So long as this is socially the case, the feelings, acts or desires of particular individuals notwithstanding, gender inequality will divide their society into two communities of interest. The male centrally features a hierarchy of control. For the female, subordination is sexualized, in the way that dominance is for the male.

## Gender and law

Law can be used to reinforce or give permanence to certain social injustices leading to the marginalization of certain groups of people. In the realm of women's rights, legal rules may give rise to or emphasize gender inequality. Legal systems can also become obstacles when change is required in legal rules, procedures and institutions to remove the inequality<sup>4</sup> by the oppressed. This necessitates an inquiry into what injustices are intertwined within the legal systems and the extent of their operation. One often finds that the **de jure** position which may provide for gender neutrality cannot be achieved in practice due to the numerous existing obstacles which make the law powerless.

Three points to note here:

- Our statute books contain legal rules and principles which are or can be seen as a legitimatization of the subordination of women to men;
- The structure and administration of laws can occasion the subordination of women to men; and
- The socio-economic realities in Kenya and many African countries and the patriarchical (the ordering of society under which standards – political, economic, legal, social- are set by, and fixed in the interests of men) ideology pervading society prevents the translation of abstract rights into real substantive rights.

Women have been systematically excluded from fully participating in the development process despite their active participation in the production processes alongside men. Even where women's legal rights have been provided for, ignorance of such rights exacerbated by illiteracy ensures that they do not benefit from such provisions. The effectiveness of laws in according women equal opportunities with

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<sup>4</sup> Okech-Owiti, 1996.

men depends largely on the society's willingness and ability to enforce such laws. It is at this point of enforcement that one gets caught up in the dichotomies and conflicts of statute law, customary law and law in practice which many a woman find themselves warped up in.

To understand the role of law in women's lives, one needs to understand not only the intention and rationale behind the law but also the consequences of law on individuals. In Kenya, despite the gender neutrality of our legal provisions, equal rights and privileges cannot be assumed to have been guaranteed and realized. Gender neutral laws have, in many instances, resulted in **de facto** discrimination. As Tove Stang Dahl aptly points out.

"As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender-neutral legal machinery . . . meets the gender-specific reality . . ." <sup>5</sup>

## Gender, law and the principle of separation of powers

As pointed out above, the essence of the principle of separation of powers is to ensure proper governance. The challenge is to ensure that women's interests are taken into consideration at all levels of decision-making. Legal rights as contained in the Constitution comprise a cluster of claims, powers and immunities. The fact that a person has a right imposes a duty on another to refrain from interfering with that right. It also entails duties on the state, for instance, to ensure the enjoyment of those rights by its citizenry. Human rights which form an integral part of our constitution are guaranteed as basic for all members of the human race. They include equality of all before the law and equal protection of the law, protection from discrimination on grounds of sex, ethnic origin, tribe, religion among others and protection from torture, cruel, inhuman or degrading treatment, the right to own property and freedom of conscience, expression, movement, religion, assembly and association. Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of all governments.

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<sup>5</sup> Tove Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Oslo, Norwegian University Press, 1987).

## Concrete proposals to ensure women are present in all arms of government

First, It is necessary to domesticate international conventions on women's rights and put in place mechanisms for implementation. As a first step to the recognition of women's rights is the strengthening of the Constitutional guarantee on gender equality including the guarantee of equality of citizenship. Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) defines discrimination as: "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." There should also be recognition of the necessity for representation of women at all levels of decision-making.

Secondly, equality provisions should be interfaced with provisions on equity. Equality between women and men relates to the dignity and worth of men and women, equality in their rights, opportunities to participate in political, economic, social and cultural development and benefit from the results. Equity on the other hand relates to fairness in the treatment of men and women. It adverts to the possibility of inequality between men and women which necessitates the application of differential treatment to get rid of inequality. The limits of the traditional notion of equity in law call for new approaches to the realization of substantive equality. Differential treatment constitutes one of the ways in which the principles of distributive justice can be implemented to foster the realization of substantive equality between men and women.

Article 4 of CEDAW gives a basis for differential treatment. It decrees that adoption by states parties of

"temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

The aims of differential treatment in realm of separation of powers are:

1. To adapt the legal system to social and economic realities and empower weaker actors.
2. It recognizes the need to both allocate sufficient minimum amounts to all and to guarantee sustainability in the long term.
3. Given that the standard rule of law applies to all subjects without distinction, differential treatment is in essence about creating distinctions to achieve a goal which formal equality can in many cases not reach.

Positive discrimination does not usually seek to bring about the complete elimination of inequality but to make sure that inequalities are only the result of individual differences, un-complicated and un-burdened by historical handicaps.

The Constitution should provide for a basis for proportional representation in constitutional offices, organs and structures with a requisite minimum being women. Such structures include the legislature, the executive and the judiciary.

Provision should be made for affirmative action in favour of marginalized groups and establishment of an Equal Opportunities Commission to ensure that the principle of affirmative action is given full effect (**...women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom**).

Further, institutional mechanisms should be put place to ensure that the provisions of the Constitution are implemented. For instance, there should be a National Policy on Gender to be implemented by a Gender Commission. The Preamble and Directive Principles should be incorporated in the Kenyan Constitution that gives a framework for the realisation of women's rights to representation in all organs. (**The State shall ensure gender balance and fair representation of marginalized groups on all constitutional and other bodies; the State shall recognise the significant role that women play in society**).

# Chapter 3

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## Women and Access to Justice

By **Raychelle Omamo**

### Introduction

Access to justice by Kenyans is hindered by a myriad of obstacles. <sup>1</sup>These include insufficient funds for legal representation, understaffing of the judiciary and other law enforcement agencies such as the police, leading to a back log of cases and general inefficiency, inadequate infrastructure, public ignorance, lack of experts and corruption.

Sadly, the Kenyan woman, especially the poor Kenyan woman, experiences greater difficulty in accessing justice, than her male counterpart. In Kenya today all public institutions responsible for the administration and interpretation of justice remain heavily underlined by patriarchy, thereby denying women equal rights and access to justice. <sup>2</sup>This is despite an international obligation on the Kenyan Government to ensure that access to justice is availed to Kenyan women. Evidence in practice demonstrates that our national laws, policies and legal procedures tolerate and compel the subordination of women.

The formal justice system, (in which the police and the judiciary are the most visible players) fails to treat women as credible victims, witnesses and litigants. Institutionalised violence through rigid discriminatory laws and gender-biased ethics is a rampant feature of our judicial system. Hence, crimes committed against women are often trivialised or interpreted in a manner that either perpetuates the subservience of women in society or undermines women's rights to equal legal protec-

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<sup>1</sup> Women's property and inheritance rights' in Base-line survey report 2001. International Commission of Jurists (Kenya Section)

<sup>2</sup> Kenya is a signatory to the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW)

tion. In addition, the formal justice system, remains remote, unaffordable and or incomprehensible to the average Kenyan woman.

For these reasons many women, especially those residing in rural Kenya, are often forced to rely on customary and traditional justice systems for the realisation and enforcement of their rights. These systems are inherently male dominated, intolerant and disadvantageous to women, and in some instances serve to deny women rights accorded to them by statutory law or fail to provide them with fair and effective solutions to pressing legal problems.

It is agreed from the onset that a multitude of factors impinge upon women's access to justice in Kenya. Many of these obstacles are inter-related and are anchored in the deficiencies existing in available law enforcement mechanisms. These deficiencies impede the empowerment and advancement of women in society. It is not feasible for the purposes of this paper to discuss every one of these shortcomings exhaustively. Therefore, I shall endeavour to highlight the most rampant obstacles to women's access to justice.

## Cultural biases

Gender biased attitudes and beliefs of the judicial officers, police, prisons and probate departments systematically undermine a woman's right to justice. Justice as seen from the male perspective is a common factor in the judicial system. This is so even though it is generally accepted that women engage the justice system from a position of disadvantage.

<sup>3</sup>A baseline survey carried out by the International Commission of Jurists (Kenya Chapter) on women's property and inheritance rights, revealed that 47 % of the judicial officers interviewed believed that the judicial process did not afford equal treatment to men and women. 40 % of these judicial officers suggested that these inequalities were due to cultural biases, whilst 46% of them attributed women's inability to access justice to ignorance of their rights and the workings of the justice system.

Cultural prejudices play a pivotal role in preventing women from reporting offences committed against them, and from commencing and concluding court pro-

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<sup>3</sup> Women's property and inheritance rights' in Baseline Survey Report 2001. International Commission of Jurists (Kenya Section).

ceedings. Although women form the majority of the population in Kenya, very few female victims of injustice use the court process to seek redress. One prominent cultural impediment is the belief that it is un-natural and disrespectful for a married woman to assert her rights as against her husband. Hence, cases of spousal abuse and property confiscation are rarely reported to law enforcement agencies for investigation and prosecution.

Also shrouded in the mystery of custom, is the unwillingness of women to come forward when they are victims of sexual abuse due to the stigma attached to these assaults. Consequently, victims of rape and incest are habitually viewed with suspicion, negatively stereo-typed, treated with insensitivity, or pressurized into forgetting about these crimes and moving on with the damaged lives.

This unhappy scenario is compounded by the unprofessional and callous behaviour of some the police officers. <sup>4</sup>A survey conducted by FIDA Kenya in 1998 amongst police officers revealed that 80% of the women surveyed, claimed that the Police reacted to reports made by them in an unfriendly, rude and negative manner. A further 86% of the women interviewed indicated that police officers failed to adopt a serious attitude when handling their cases. The dearth of women police officers at police stations was also raised as a matter of concern. Many other women reported that were often instructed to seek alternative means of assistance such as family reconciliation, and therefore felt entirely abandoned by the Police. This flippancy on the part of the some police officers militates against a woman's right to safety, security and access to justice.

Further insouciance and cultural biases are discernible in decisions made by courts in cases involving gender-based crimes. Lenient sentences are often issued even for horrendous violations of the rights of women. <sup>5</sup>**Criminal Case No. 16419/97 R v Dan Ndeda Wamamba**, presents a clear example of this practice. In this case the accused was charged with assault causing actual bodily harm event, the attack against his spouse included assault and rape and was so severe that she was comatose on admission to hospital and did not regain consciousness until a month after the incident. The accused was convicted on his own plea of guilty and fined 10,000 or 4 months imprisonment in default.

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<sup>4</sup> Information obtained from The 1998 FIDA (K) Annual Report on the Legal Status of Kenya Women.

<sup>5</sup> Information obtained from The 1998 FIDA (K) Annual Report on the Legal Status of Kenyan Women. It should be noted that the trial court took into account the fact that accused had been in remand for a period of one year.

Courts have also failed in many instances to interpret statutes and laws to the advantage of victims of violence and abuse. In <sup>6</sup>**Omambia vs R Cr Appeal No. 47/95** a case involving a charge of indecent assault, the accused was acquitted on the ground that on the strict interpretation of Section 144 (1) of the Penal Code, indecent assault had not occurred because the appellant merely touched the complainant's buttocks and put his hand under her blouse!

If access to justice for women is to be enhanced, there needs to be a paradigm shift in the manner in which the judiciary, the police and other parties involved in the administration of justice agencies treat women in distress. Law enforcement agencies must recognise that women are often entrapped in a web of traditions, customs and social biases, which endanger their ability to derive positive results from the justice system.

## Poverty

Poverty is pervasive in Kenya. Poverty impacts negatively on the capacity of persons to use the law and to obtain the protection to which they are entitled. In Kenya today many women have limited access to financial resources and have negligible borrowing power. Hence, many women are unable to pay for legal advice or representation, court fees and travel costs to and from the courts. The survey carried out by ICJ (K) discovered that judicial officers ranked the high cost of litigation as the third highest reason why women did not use the judicial process. The provision of free legal aid and the economic empowerment of women were recommended as key strategies for the alleviation of this problem.<sup>7</sup>

Poverty also places several women on a path to conflict with the law. It has been acknowledged that women are regularly driven by poverty to engage in 'illegal' economic activities. Statistics show that many women languish in prison today for offences such as hawking, selling illicit liquor, vagrancy, and offences relating to property. Most women offenders are single mothers with large dependent families and often plead guilty to charges they cannot understand.<sup>8</sup>

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<sup>6</sup> Information obtained from The 1998 FIDA (K) Annual Report on the Legal Status of Kenyan Women.

<sup>7</sup> 'Women's property and inheritance rights' in Baseline survey report 2001. International Commission of Jurists (Kenya section).

<sup>8</sup> 'Access to justice for the Kenyan woman' a paper presented at the International Bar Association Regional Conference Nairobi December 1994 by Jean Njeri Kamau and Njoki S. Ndungu of FIDA Kenya.

Improved access to justice for women therefore requires a corresponding commitment to the alleviation or reduction of poverty, the reform of laws and regulations which tend to discriminate against poor women or 'criminalize' them in their attempts to uplift the welfare and living standards of their families, and the development of an effective strategy for legal service delivery to indigent persons.

## Logistical obstacles

Even where women desire to redress grievances through the court process, the logistical issues of transport and distance to the nearest police station or local court are usually prohibitive. Women desiring to access courts often have to travel vast distances. In some regions of Kenya roads are impassable during wet seasons making it impossible for willing litigants to reach courts.

These logistical obstacles place unique pressures on the time available to women to engage in court proceedings. The demands placed on women to participate in income generation activities and to manage households leaves them with insufficient time to appear before court regularly. Added to this is the absence of case-management systems in court for expeditious disposal of legal proceedings. This precipitates long drawn out trials which take their toll on women's resources and tenacity. Court procedures are also extremely complex and incomprehensible to the average woman. The intervention of qualified lawyers is therefore often required. <sup>9</sup>Most lawyers in Kenya practice in urban centres far removed from the rural women. Legal representation is therefore usually out of reach.

Access to justice is further compromised by the inadequate distribution of courts throughout the country. For instance, the North Eastern region of Kenya has no High Court hence a litigant from Wajir district wishing to seek justice is required to travel to Meru to file a case in the High court. These distances alone clearly discourage a substantial number of women from even contemplating seeking redress from court.

Thus, if access to justice is to become a reality for the average woman it is desirable that judicial infrastructure be expanded or that community based alternative dispute resolution mechanisms in which paralegals participate, be developed to ensure that justice is brought closer to the citizenry.

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<sup>9</sup> There are approximately 4000 registered advocates in Kenya. The majority of them practice in Nairobi.

## Illiteracy and ignorance

The level of literacy in Kenya is unimpressive and falling. Kenyans are still largely ignorant of their legal rights and of the means of addressing the injustices they face. Even those who are literate and educated remain either ignorant or misinformed about their rights and legal procedures.

Women who are culturally more inhibited than their male counterparts suffer a greater loss. Many women do not understand their rights in the criminal system. In a study carried out in 1994, 42% of women convicts interviewed stated that they were unaware of the existence of bail and as such had not applied for the same. 74% stated that they did not understand their role in court or the role of the magistrate, advocate or prosecutor. Thus they could not challenge any abuse of the law or even appreciate the importance of adducing certain evidence in their favour. 87% of women convicts were single mothers with children whose fate is given little consideration under Kenya's current sentencing policies.<sup>10</sup>

## The absence of a constitutional basis for Legal Aid

Though Section 77 (2) (d) of the Constitution provides that every person charged with a criminal case "shall be permitted to defend himself before the court in person or by a legal representative of his own choice". Section 77 (14) of the Constitution explicitly states that "nothing contained in subsection (2) (d) shall be construed as entitling an person to legal representation at public expense".

There is therefore no real constitutional basis for legal aid in criminal proceedings and certainly no basis at all for legal aid for indigent persons in civil matters.

Though a paupers brief system has been developed by the courts over the years, pauper briefs are not given in respect of all criminal cases and are restricted to murder and treason cases only. The system does not work efficiently and requires improvement and better participation by lawyers.

In civil proceedings, Order XXXII of the Civil Procedure Act provides for the institution of suits in form a pauperis. This is a mechanism for the waiver of court

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<sup>10</sup> 'Access to Justice for the Kenyan Woman' a paper presented at the International Bar Association Regional Conference Nairobi December 1994 by Jean Njeri Kamau and Njoki S. Ndungu of FIDA Kenya.

fees for indigent persons and does not assist a poor person in paying for legal fees for representation or nor does it accord to the pauper free or subsidized legal aid. In the absence of clear constitutional provisions for legal aid and a defined Government policy on legal aid, poor women will continue to be denied access to proper legal representation.

## Comparatives of access to justice and women in eastern and southern Africa

### Zambia

The issue of accessibility to justice for women has been a matter of concern not only for the Zambian Government but to human right groups and civic organisations in Zambia as well. The Law Association of Zambia therefore decided to set up within its umbrella 'The Women's Right Committee' which manages the National Legal Aid Clinic for Women. The Committee represents women in both Subordinate and Higher Courts and also runs programmes to inculcate a sense of awareness in women about their rights. In addition to this it also runs workshops for Local Court Justices and the Police (Victim Support Units). The Annual Report of the Committee in 1997 indicated that the services provided by the Committee were popular with women and the number of clients retained by it had increased from 238 to 467 between 1996 and 1997.

Legal aid in Zambia is governed by the Legal Aid Act, which is implemented by the Directorate of Legal Aid. The scheme of Legal Aid under the Act is available in both criminal and civil matters before the High and Subordinate Courts. The High court issues a Legal Aid certificate for any accused person unable to engage a legal practitioner due to insufficient means. In civil matters, the Directorate of Legal Aid may grant legal aid subject to the 'means test' being carried out. If therefore the Directorate finds that the applicant would benefit from the services of a legal practitioner in any civil case or has insufficient means to obtain such services, Legal Aid may be granted. Legal Aid is also available in appeals from the Subordinate Court to the High Court and High Court to the Supreme Court.<sup>11</sup>

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<sup>11</sup> 'Women and access to justice, legal aid, independence of the judiciary and judicial training' by C. L. Muncie presented at the December 1998 'Access to justice and fair trial' International Commission of Jurists (Swedish section) and National Association of Democratic Lawyers Consultative workshop, South Africa.

## Tanzania

In Tanzania the Women's Legal Aid Centre has undertaken the duty to improve women's access to justice. The Women's Legal Aid Centre in Tanzania strives to attain a just and respectable society, which observes and respects women and children's rights. Most of the Tanzanian citizens cannot afford legal services and women are particularly disadvantaged because of their higher exposure to poverty. The Centre's volunteers offer free legal advice, counselling and court representation to women and children in need.

The Centre provides legal aid services to needy women through legal advice, counselling, reconciliation and mediation, legal drafting and court representation. Major legal issues encountered at the clinic concern child custody and maintenance, matrimonial issues, inheritance, probate and administration matters. From January to December 1999 a total of 2579 women and children were assisted at the legal aid clinic.<sup>12</sup>

## Malawi

According to a recent study co-ordinated by Women and Law in Southern Africa Research Trust (WLSA) many women in Malawi do not access the formal justice delivery system because of tradition, poverty and the system's insensitivity to gender issues. Following this study WLSA is offering free legal advice, human rights education and lobbying for reform in the justice delivery system in Malawi to ensure that both women and men have equal access to it.<sup>13</sup>

## South Africa

It is estimated that 40-45 % of the South African population lives in poverty. Income inequality is one of the highest in the world, leading to serious social problem such as crime, labour conflict, economic instability, domestic violence and land conflict. With more than 12,000 practising lawyers, serving a population of over 40 million, access to justice is not easily gained. Most lawyers work in urban areas, making access particularly difficult for rural people, who are the most impoverished and marginalized segment of the population.

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<sup>12</sup> 1999 Annual Report, Women's Legal Aid Centre, Tanzania

<sup>13</sup> 'MALAWI - Taking human rights issues to people's homes', in Women as leaders second issue IPS.

In South Africa strategies for improved access to justice have been formulated, and the administration and provision of legal services have been under pressure to transform. A need was felt in legal and government circles to broaden the scope of legal aid and to provide a range of services in civil and other matters to those who could not afford to pay legal fees.

A milestone in the efforts to make access to justice a reality was the National Consultative Forum on Legal Aid, convened in January 1998. The Forum opened up an important debate regarding the recognition and regulation of paralegal practitioners, and emphasized the role of community based legal service providers in the future legal aid system. The Forum reached consensus on the need for change and diversification of legal aid service delivery, through State justice centres, legal aid centres, university clinics, and advice offices. Using these facilities, lawyers as well as paralegals would provide services in criminal and civil cases including advice and mediation.

Since then several reforms have been initiated to draft new legislation, establish an alternative delivery system for legal aid, and strengthen the paralegal movement. These steps were undertaken as both the Department of Justice and the Legal Aid Board, responsible for these reforms, have been undergoing restructuring.<sup>14</sup>

## Recommendations of the State Bar of California regarding the delivery of legal services

The report from the State Bar of California offers recommendations for consideration by leaders in both the public and private sectors on how to improve access to justice. They are as follows:

- Paramount is the recommendation that it should be a government's legal obligation to ensure that all people receive access to justice.
- Creation of a Commission on Access to Justice.
- Development of new methods to deliver quality legal services at affordable prices to larger numbers of moderate-income citizens for example Legal Aid Clinics.
- Development of promising approaches to simplifying the law and the evaluation of their impact on access to justice.

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<sup>14</sup> 'Access to Justice in South Africa' - legal aid transformation and paralegal movement report

- The study, development, and improvement of programs that assist litigants in representing themselves in court proceedings until adequate legal representation can be provided to all who need it.
- The development of effective public education programs on understanding legal rights and responsibilities and finding affordable legal assistance.<sup>15</sup>

## Recommendations for Kenya

It is imperative to note that the recommendations tendered below will require a multi-sectoral approach to the question of access to justice. The input of the government, the judiciary, the Law Society of Kenya, legal non-governmental organisations and the entire legal fraternity in Kenya. Total commitment and partnership from all relevant stakeholders is required to improve access to justice for all Kenyans.

## Engendering the constitution

The protection and promotion of women's equality and empowerment must be specifically enshrined in the Constitution. A cursory perusal of the contents of Article 33 of the Ugandan Constitution demonstrates how easily this can be achieved. Article 33 enlist six fundamental principles as follows:

- Women shall be accorded full and equal dignity of the person with men.
- The State shall provide facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement .
- The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society .
- Women shall have the right to equal treatment with men and that right shall include equal opportunities in political economic and social activities.
- Without prejudice to article 32 of this Constitution women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.
- Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited by this Constitution.

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<sup>15</sup> State Bar of California Web Site

## Legal aid to be a basic constitutional right

Section 77 of the Constitution should be amended to place a duty on the State to provide legal representation advice and education to all indigent persons at public expense.

## The establishment of a constitutional commission on Legal Aid and National Legal Aid Scheme

A constitutional commission on access to justice should be established to provide ongoing leadership and guidance on ways to improve access to justice. The commission would be mandated to monitor the activities of a National Legal Aid Scheme and explore new sources of funding for it. It would also look into ways of improving legal delivery methods. The commission would oversee the provision of legal services in Kenya in conjunction with the Law Society of Kenya. The commission would include members appointed by the Bar, the judiciary, the business community and non-governmental organizations.

Kenya already has in place a number of non-governmental organizations providing free legal aid for example, the Federation of Women Lawyers- Kenya (FIDA Kenya) and Kituo Cha Sheria. However there is the need for the government to make it its legal obligation to ensure that all people receive access to justice. This may be achieved by creating a National Legal Aid Scheme to streamline and monitor the provision of free or subsidized legal aid in the country by organizations, paralegals and advocates. The establishment of this Scheme should be enshrined in a National Legal Aid Act, which would outline the Scheme's mandate, guidelines and procedures. Funding for the Scheme may be acquired from the national budget and supplemented with donor funds until the Scheme is able to sustain itself.

## Alternative dispute resolution mechanisms and the improvement of traditional justice systems

New methods should be developed to deliver quality legal services at an affordable cost to majority of the population living below the poverty line. This may include exploring the feasibility of a nation-wide prepaid legal insurance plan available to all citizens and continuing efforts to develop alternative methods of dispute resolution such as community based mediation that increase access without decreasing the quality of justice. In addition, traditional justice systems should be improved through the training and gender sensitization of elders and chiefs, the

provision of paralegal representation, and the promotion of the participation of women in traditional justice proceedings as decision makers.

## Self-representation strategies

Research should be carried out to explore the possibility of developing strategies to simplify the law. Evaluation of the impact of these strategies on access to justice should also be assessed.

The universities and Kenya School of Law under the auspices of the commission should spearhead studies into the development and improvement of programs that assist litigants in representing themselves in court proceedings until adequate legal representation can be provided to all who need it. The research could examine the development of programs designed to make courts more “user friendly” to illiterate and poor individuals. For example, a small claims court should be instituted to provide increased access to low- and moderate-income clients –many of whom are women. In all cases any initiatives should be carefully evaluated and monitored.

## Public education

Effective national public education programs on the comprehension of legal rights and responsibilities and access to affordable legal assistance should be developed by the commission and the Ministry of Education. These programmes should then be factored into the education syllabus for both adult and child education. More importantly the nation-wide legal education programmes should be tailor-made to change societal attitudes towards women’s rights and sensitize women on their constitutional rights. The manuals developed as a result of the programmes should be made available for all community-based organizations operating in the rural areas for dissemination to the people.

## Simplification of laws and procedures and implementation of case management procedures

Courts must be encouraged to dispense justice expeditiously. Case management mechanisms which are sensitive to the needs of women must be developed to clear case backlogs and to procure speedy justice. More consideration should also be given to the simplification of court processes, laws, rules and regulations, and the translation of statutes and court documents into local languages.

## Gender sensitization of judicial and law enforcement of officers

Cultural sensitivity training to civil and criminal justice personnel and those working in justice-related services such as the Police, Prisons and Probation Department should be incorporated into their career training and regular compulsory refresher courses carried out.

## Conclusion

Women's access to justice within the Kenyan context has been and remains an area of neglect. As a signatory of the Convention on the Elimination of all Forms of Discrimination Against Women and other conventions advocating for equality, the Kenyan government has an obligation to ensure that its organs and state institutions are well equipped and aware of their responsibility. Though the women's movement has sought to challenge the failure of the Government to implement such conventions, their work alone is insufficient. A national reform ingrained in the constitution is required to overcome the obstacles to justice faced by Kenyans.

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# Chapter 4

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## Do Customary Issues Have a Role to Play in a Modern Constitution?

By *Jacqueline Adhiambo Oduol*

### Introduction

Women make up about 52% of the Kenyan population and most of them are found in rural areas. Despite the fact that there are over forty ethnic communities with diverse socio- cultural traditions, norms and practices in this country, women are bound together by certain common features that affect their lives.

Firstly, in most communities, they are socialised to be subservient to men to the extent that the roles assigned to men are of a higher status than those given to women. In essence, what this means is that in these communities, men have more rights and privileges than women. It also means that in these communities, women cannot ascend to positions of leadership. In addition, this asymmetrical pattern of power relations implies that at the family level, the ownership and inheritance of basic resources remain solidly the preserve of men. It is this state of affairs that is responsible for what Amita Sen describes as the many faces of gender inequality between women and men in all spheres of life.

In many parts of the country, male migration to urban areas in search of paid employment has placed the responsibility of small-scale farming activities in the hands of women. However, customary and social practices governing land and livestock ownership, access and control of resources and benefits from agricultural production severely constrain the capacity of women to increase production.

Access to education has resulted in positive differences in women's lives. Although the country has achieved near parity in the education of boys and girls at primary school level, the enrolment figures taken in isolation are unreliable since they are

at variance with completion rates, particularly for higher levels. (Republic of Kenya: National Development Plan, 1997-2001) At tertiary level, while it is true that many women now enrol for university education, they are still a minority in the technical –scientific fields.

It is not the intention in this paper to present an overview of existing gender disparities in the country. Rather, the intention is to present the backdrop against which a selection of customary practices and subsequent issues can be examined in relation to the subject of women and the modern constitution.

Given the wide range of issues that can be labelled as **customary**, it becomes necessary to focus on a selection of issues that stand out as roadblocks in efforts aimed at protecting women's rights and empowerment, and which therefore deserve attention in a modern constitution. The defining characteristic of these issues is their linkage to existing social structures, values, norms and attitudes. Viewed in isolation, they constitute cultural and social characteristics, roles and responsibilities assigned to a particular sex, female or male by one's culture. Viewed in the context of the modern constitution they constitute fundamental violations of human rights. In this perspective, the customary issues reflect socially constructed relationships of inequality, where the cultural differences between women and men represent the use of power by one group over the other, and where socializing people into these differences maintains the unequal power relationships.

The issues in question can be derived from the following realities:

- Women and girls continue to be discriminated against in the ownership of assets and in access to social and economic services;
- The prevalence of a multitude of traditional laws and practices coupled with statutory laws makes the identification and enforcement of women's rights difficult;
- Statutory laws and customary norms and practices are not necessarily compatible. A relevant example is the 1981 Law of Succession Act, which failed to have the desired effect of giving women equality in succession matters. Another example can be drawn from the fact that although the Constitution of Kenya forbids discrimination against women, such discrimination is still prevalent because of the simultaneous existence of different types of laws such as civil and statutory law, African customary law and Islamic law;

## Do customary issues have a role to play in a modern constitution?

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- Traditional beliefs, taboos and cultural practices have had a negative impact on the health of women;
- In the sphere of power relations, many societies have social structures through which men are expected to control women in most aspects of social relationships. For this reason, men determine when and to whom a girl or a woman will get married, sometimes when and how she will have sexual relations and at other times when and how many children she will have. This type of male power often reinforces community norms that assert that male relatives must assume authority over widows leading to the practice of wife inheritance.
- Persisting traditions are partly to blame for the considerable gender bias in many aspects of Kenya's system of education and training.

There have been significant changes in social norms and behaviour patterns in Kenya's post-independence period. The forces of education, migrations from rural to urban areas and technological advancement have partly influenced these changes. Their effect has been to question, modify and even destroy some aspects of traditional practices as part of our **development**.

People react to social changes differently: when such changes are viewed as contributing to **development** on the basis indices such as UNDP's Human Development Index (HDI) measures<sup>1</sup>, the term has a positive connotation; on the other hand, the changes brought about by development may be viewed negatively especially by cultural nationalists who may choose to display opposition to change for populist reasons that are simple attempts to romanticise the past. A typical example of such romanticism is evident in the following interpretation of the African traditional understanding of gender.

" The African understanding of gender roles is that men and women played distinct roles which were complementary. Nowadays women want to play the role of men thereby destroying the role of the man in society... Traditionally, there were four ways of making a living: through farming (i.e. agriculture); keeping of animals (i.e. nomadic pastoralism); the combination of farming and keeping of animals (i.e. agro-pastoralism) and hunting

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<sup>1</sup> The key measures include: longevity as measured by life expectancy at birth; educational attainment as measured by a combination of adult literacy (two thirds weight) and combined primary, secondary and tertiary gross enrolment ratios (one third weight); and standard of living which is measured by GDP per capita on the basis of purchasing power parity.

and gathering...Kinship embodied the African essence of UTU (Humanity). It is an essence that provided us with our cultural identity...Because the traditional African society operated on UTU, the result was that, we had no prisons, no detention laws, no slums, no street children and the sort of crimes we are now witnessing." (Mweseli, 2001: 25)

The ambivalent attitude to change illustrates the context that governs discussions on the place of customary issues in a modern constitution. The context can be hazy and confusing especially when customary issues are equated with the notions of **tradition**, **African culture**, and **cultural self-determination**. A sense of clarity appears however when these notions are pegged against the following propositions:

- Inheritance and marriage rules are heavily weighted in favour of men;
- Customary gender norms and values in Kenya have resulted in political, legal, economic and educational inequalities that perpetuate women's lack of access to resources, control over decision-making, and participation in public life;
- The lower value assigned to women and girls places them in a subordinate position;
- Titles to land are by custom vested in men.

Once this is done, the next step entails responding to the following questions:

- What customary values, norms and practices derived from our collective experiences should we include a modern Constitution?
- How should the reality of ethnicity be dealt with in this Constitution since it is intrinsically linked to customary issues?
- What level of tolerance for imbalances created by customary practices should the Constitution allow, because of inconsistencies emanating from the multiple and divergent nature of customary practices?

Appropriate answers to these questions should take into account the implications of the following milestones for modern constitutions:

- a) The establishment of the Commission on the Status of Women in 1947 to monitor the status of women and to prepare recommendations and reports on promoting women's rights in the political, economic, social and educational fields;
- b) The convening of the 1975 first World Conference on Women that had the aim of creating global awareness of women's rights;
- c) The adoption of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) by the UN General Assembly in

1979. Article 2 of CEDAW to which Kenya is a signatory requires states to:

- embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
- adopt appropriate legislation and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
- take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- repeal all national penal provisions which constitute discrimination against women.

These implications are the reasons behind Gazette Notice No. 4820 of October 1983 that mandated a 'Task Force to Review Laws Relating to Women' in Kenya. The findings of the Task Force provide useful insights on how customary issues can be handled in a modern constitution.

## Customary issues in a modern constitution: the case of the Kenya constitution

Section 70 of the Constitution of Kenya commits the State to ensure non-discrimination in public issues. However, Section 82 of the same Constitution points out that there are certain exceptions to the general rule such as the following:

- Gender discrimination is permissible where it takes place with reference to matters of personal law, such as adoption, marriage, divorce, burial or inheritance, and where there is a statutory basis for such discrimination.

- A statute may permit the application of customary law, in relation to a particular matter, to one tribe or race, rather than another.
- A statute may authorise discriminatory practices in the approval of transactions in agricultural land.

These exceptions are the cornerstone of the customary practices that discriminate against women in the country. They are closely associated with the primary institutions of the family, the clan and the tribe as well as the rituals associated with child fostering, marriage, divorce, burial and inheritance. To “make such customs and practices the centre of exceptions to constitutional guarantees of gender equality, is to legitimise the continued practice of gender inequality on a large scale.” (Task Force Report, p.24)

Specific examples in support of this conclusion are readily available. In this connection, the legal system of Kenya recognises customary and statutory law. The problem of customary law is that it varies according to the requirements of each ethnic group. This factor explains why marriage customs under customary law vary in appreciable ways from tribe to tribe. Among the Kipsigis for instance, a couple’s consent is necessary before a marriage can take place. For the Turkana and Pokot however, the girl child is betrothed to a boy from childhood. The situation is different in the case of the Gusii and Luo. In these communities, it was up to the man in traditional settings to arrange for the girl to be kidnapped by his age mates as part of the marriage custom.

It is apparent from these examples, that when partners are from the same ethnic group, customary marriages are at the surface level not a matter for concern, but the situation changes when the couples are from different tribes. In these situations, the man’s traditions are the ones that govern the marriage ceremony. Furthermore, where “ a dispute is taken to court, the judgement of the court tends to be based on the customs of the man’s tribe that were followed to effect the marriage.” (ECWD 1999:14)

Although the legal system of Kenya recognises both customary and statutory law, there has been increasing awareness that some aspects of customary law are untenable since our worldview is shaped not only by our customs, but also by a whole range of other factors such as education and technology that should make us aware of the consequences of our actions in matrimonial arrangements. Under custom-

ary law, there is no written law on matrimonial causes<sup>2</sup> that arise out of customary marriages<sup>3</sup>. Where a customary marriage has been contracted to be followed up as an example by a Christian marriage under the Marriage Act or a Civil marriage under the Marriage Act, there is the potential for discriminatory practices to arise since individuals can register marriages under different systems and remain undetected. Such actions have attracted national attention in recent years in the form of court battles following the deaths of prominent people. The Task Force report recommends that the way forward is to harmonise the substantive law of marriage to bring together the five<sup>4</sup> systems that currently fall under one statute.

Another customary issue that stands out in considerations of modern constitutions is the extent to which communities are prepared to give married women the capacity to own property. In this country, Section 1(1) of the Married Women's Property Act " provides that a married woman shall be capable of acquiring, holding and disposing by will or otherwise of any real and personal property. Section 17 further states that if a wife is to claim an interest in property, the title which is in the name of her husband, then she will, like any other person, have to show that she contributed towards the purchase of the property." (Ibid 76)

This Act gives married women the fundamental right to own property. By way of comparison, under customary practices, married women tend to have only user rights over matrimonial property and are thus unable to dispose of such property without the permission of the husband. African customary practices are even more discriminative towards women on the issue of matrimonial property when the matter at stake is divorce. Among certain communities (such as the Maasai, Luhya and Kisii) upon divorce, the wife has no right to take any property even though such property may have been acquired through her own efforts. Other communities (such as the Kikuyu, Kamba, Tharaka, Kuria, Taita, Elgeyo Marakwet and Tugen) are however more progressive and allow the wife on divorce to take some of her personal effects.

Since customary practices relating to matrimonial property are not uniform, legal provisions must be in place to protect women's right to enjoy full rights over prop-

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<sup>2</sup> The Matrimonial Causes Act provides five grounds upon which divorce may be granted. These are adultery, cruelty, desertion, unsoundness of mind and sodomy/bestiality.

<sup>3</sup> It is also significant that since customary marriages are not registered, it is difficult to prove the existence of such marriages in world documentary proof is so important for certain transactions. Additionally, changing lifestyles make it difficult to determine the rights and obligations that operate under customary law.

<sup>4</sup> The other systems are the Hindu marriages under the Hindu Marriage and Divorce Act, and Islamic marriages under the Mohammedan Marriage, Divorce and Succession Act.

erty. The following proposals from the Task Force report are consistent with this viewpoint: (Ibid P. 78)

- There is need to enact a matrimonial property law to govern the issues of matrimonial property, joint registration and co-ownership of matrimonial property.
- The law should expressly recognise the non-monetary contributions of wives, in the assessment of contributions to the acquisition of matrimonial property.
- The law should provide that where, in the course of a marriage, property is purchased in the name of husband or wife, the rebuttal presumption should be that it is his or hers absolutely and where it is purchased in their joint names, that it is theirs in equal shares, and is held in joint tenancy.

The next customary issue is the status of equality<sup>5</sup> and equity<sup>6</sup> in gender relations. In Kenya, there is an unequivocal commitment by the State to treat men and women in the same way since "...no law shall make any provision that is discriminatory either of itself or in its effect." (Section 82 [1] of the Constitution) The reality however is that this commitment is often diluted by certain customary practices.

A case in point is the practice governing land rights. In this country, women tend to enjoy use rights<sup>7</sup> as wives and mothers; but they generally lack transfer rights<sup>8</sup> due to customary reasons. This is a significant dis-empowerment element, since while transfer rights are protected legally, use rights are not enforceable. The implications of this position are certainly discriminatory.

They imply firstly that although a large proportion of the labour force in the agricultural sector consists of women, they have no legal rights over the land they work on. This explains why in Kenya, women own only 1% of the land although they make up 75% of the labour force in the agricultural sector. They further

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<sup>5</sup> Gender equality refers to the enjoyment of rights, privileges and life opportunities regardless of whether one is male or female. Gender equality objectives should thus be directed towards the "equal enjoyment by men and women, socially valued goods, opportunities, resources and rewards." (DAC Guidelines, 1998)

<sup>6</sup> Gender equity concerns issues of asset sharing. It seeks to ensure equal access, by both men and women, to economic resources, including land, credit, science and technology, vocational training, information, communication and markets. (Beijing PfA)

<sup>7</sup> Use rights include for instance the right to grow perennial and annual crops, bury the dead, collect firewood and graze animals.

<sup>8</sup> Transfer rights include the right to register, sell, give, mortgage, lease, rent and bequeath.

imply that in Kenya's agriculturally based economy where land is the primary form of collateral through which there can be economic empowerment, this essential requirement is unavailable for women. Thus, they cannot benefit from credit facilities in contexts where land can be used as collateral to secure loans.

The final implication concerns the customary practice of granting land ownership to male rather than female offspring. According to the Task Force Report, "it is probable that the provisions of Section 82(6) of the Constitution will operate to the prejudice of women, in a situation of gender competition. (Therefore, this) potential discrimination should be removed through constitutional amendment." (p.25)

My final example of a customary issue that cannot be wished away in dealing with the topic of women and the constitution, especially from a customary perspective, is the issue of widow inheritance. The major problem with the practice is "that in some cases the woman is put in a position of subservience whereby she is treated as a chattel without any rights whatsoever. It has even been argued that a widow lacks capacity to marry and can only be inherited. Where such inequality holds it is untenable in law and ought to be abolished." (Task Force report, p.50) Not surprisingly therefore, the proposals for reform in relation to this customary issue include these:

- All wife inheritance should be abolished by law except where the widow expressly consents.
- The widow must have the final say on who is to inherit her.
- A man wishing to inherit a widow must have capacity to do so, i.e. must have been married polygamously or potentially polygamously.
- Existing wife or wives should give consent to the inheritance.
- All parties willing to participate in the process of widow inheritance must be compelled to undergo an HIV/AIDS test.

## Summing up comments: women and the constitution

The Constitution serves as the supreme law of the land or the mother of all laws. Thus, in the event of a law or practice contradicting the constitution, the constitution has to override that law or practice. The supremacy of a Constitution as a basic set of agreed-upon rules for governing relationships within a nation requires that it has to spell out the rights and obligations for the common good of the

inhabitants of the nation. These foundation rules and building blocks, while respectful of customary issues and practices, assign greater prominence to issues that are of common benefit to all. This factor accounts for the commonly cited reasons for reviewing the Kenyan Constitution namely:

- To heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights;
- To lay a foundation for a democratic society in which the government is based on the will of the people and every citizen is equally protected by the law;
- To improve the quality of life of all the citizens and free the potential of each person;
- To build a united Kenya.

Over the last two years, when the matter of reviewing the Kenya Constitution has taken centre stage in national discourse, there has been a consensus that democratic values, social justice and fundamental human rights are critical to the Constitution. The consensus is based on the premise that the Constitution as the supreme law of the land, should serve as a road map that clearly indicates the parameters within which human dignity, justice, the rights and freedoms of all women and men, young and old, those with disability and other minority or special interest groups- are protected. Consequently, it should be the basis for guaranteeing every Kenyan protection and security from any injustice or discrimination- deliberate or accidental, subtle or blatant, direct or indirect. If there are customary practices that are in harmony with these expectations, then obviously they have a right to influence the contents of a modern constitution.

Many of us would take the position that although customary practices represent an important part of our cultural heritage, they nevertheless represent important challenges given their diversity in efforts aimed at reaching a common collective goal that can bind us as Kenyans.<sup>9</sup> Such a goal can be reached through a constitution that has been created through the process of negotiation and compromise. After all, Kenyan's must co-exist in spite of their different customary practices. The uniting element for this co-existence is the constitution because in essence, customary practices are the bedrock of intricate dimensions in perception that often prevent us from acting in unison.

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<sup>9</sup> Four important aspects of the complexity of Kenyan society are, the poly-ethnic character of the country, its socially differentiated nature, its pluralistic nature and finally the fact that the country's women do not constitute a homogeneous social category (See UNIFEM 2001).

## Do customary issues have a role to play in a modern constitution?

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Given this factor, a modern constitution should create space within which all people, irrespective of their customary practices and belief systems can develop and exercise their full capabilities for their own benefit and for the benefit of society as a whole. It should create conditions through which all people—men and women, boys and girls—will be offered opportunities to meet their material needs, have access to means of production, and participate in decision making at all levels at some point in their lives. Above all, “the cardinal aspiration of the constitution (must be) to aggregate and integrate societal values... (and act as a) consensual site (for harmonizing) disparities and other competing interests.”<sup>10</sup> (UNIFEM 2001: 2)

The attainment of these goals is dependent on the following key considerations:

- The incorporation of clauses in the constitution to protect women from certain disadvantages. These would particularly be important with regard to three specific issues: (a) customary/religious laws and their conflict with statutory law, (b) inadequacy of existing legal regimes that govern women’s socio-economic rights and (c) a wide range of divergence between **de jure** laws and actual practice;<sup>11</sup>
- The development of a sense of collective action by women to overcome inequality through mobilization and organization. Gender imbalances in the current constitution should be identified as a basis for bringing about changes in institutional practices and social relations.
- The development of an alternative vision for the future where all Kenyans are considered equal and truly protected at a national level irrespective of their gender.

Specific strategies for achieving this goal include:

- Ensuring that the preamble to the constitution includes women’s concerns and issues and defines gender equality as a specific objective;
- Mainstreaming gender into civil laws;

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<sup>10</sup> This is evident in the Constitution of the Republic of South Africa. The Equality clause of the Constitution in the Bill of Rights guarantees equal treatment for all South Africans. Thus, the State cannot discriminate unfairly against anyone on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. This ban on all forms of discrimination has meant that legislation, programmes and projects had to be transformed to eradicate oppression against women. It is also significant that all legislation that is passed has to be gender sensitive.

<sup>11</sup> Gender and Law: Eastern Africa Speaks—a World Bank Publication of a sub-regional conference of gender law held in Addis Ababa, October, 1997.

- Eliminating claw-back clauses that exist in the legal framework of the constitution;
- Developing consensus over the legal rights of women through a process of negotiation and compromise. This should be clearly covered under the declaration of rights in the constitution;
- Spelling out affirmative action as an implementation strategy;
- Ensuring that the declaration of rights is gender sensitive in relation to the protection of civil and political rights;
- Ensuring that the constitution can facilitate the domestication of international laws by eliminating claw-back clauses that limit the application of fundamental rights and freedoms of all individuals, male and female;
- Providing more functional mechanisms for enforcing rights and obtaining remedies for offences, especially the gender related ones;
- Outlawing gender discrimination in a systematic and holistic manner that is not negated in the areas of family law, marriage, divorce, inheritance and customary law.

In effect, these strategies entail paying attention to women's minimum requirements or standards. These have on numerous occasions been presented in women's meetings on the subject of constitution making. They are summarised below:

- Clearly stated commitment to gender equality between women and men;
- Promulgation of laws which protect the rights of women and ensure that all past injustices against women are eliminated;
- Guaranteeing of access to all resources including property and land;
- Abolition of cultural and religious practices which directly or indirectly discriminate against women;
- Legislative protection of women from all forms of violence;
- Proportional representation of women in all institutions of governance;
- Guaranteeing education and training for the girl child and women;
- Instituting measures to protect women's health, reproductive and sexual rights especially in the light of the HIV AIDS pandemic which has been declared a national disaster;
- Automatic incorporation into domestic law of all International Conventions signed and ratified for the promotion of human and women's rights;
- Establishment of practical implementation mechanisms and affirmative action programmes to ensure the achievement of the desired goal of true equality between women and men.

## Concluding remarks

Customary issues are an area of concern for modern constitutions because of the need to reconcile cultural practices and women's rights in law or in practice. The issue of claw-back clauses, which inhibit the achievement of women's rights in most African countries mainly, revolves around issues of culture. Thus, in this country for instance, the law is still silent on socially sanctioned matters of personal interest such as wife beating, marital rape and other cases of sexual and domestic violence.

Although the Constitution of Uganda provides for all human rights equally between women and men, and is considered truly gender sensitive by many standards, it has not managed to escape from the clutches of patriarchy. The Ugandan Constitution upholds affirmative action in favour of women and girls in the critical areas of concern such as education, leadership and decision-making. In practice, however, patriarchal attitudes and practices continue to prevail and to constrain women from fully benefiting from the good constitutional provisions. It has been reported that men have beaten their wives for a variety of reasons (including for holding a different political point of view and for exercising their democratic right by voting for the candidates of their choice) with impunity. A recent media report clearly indicates that even the Vice - President of Uganda, the second in command in the country is not spared. It is clear that such men operate from the vantage point of tradition and custom that designate a man as the custodian of the woman.

The Constitution of Sudan only treats issues relating to women in Article 15. Even then, it only talks about married women and is silent on issues relating to all other categories of women (widowed, women with disability). The constitution further stipulates that Islamic law shall apply to Sudanese people in total disregard of the needs of non-Muslims.

From these, and other examples, we can see that in most African countries men enforce the law through either religion or customary provisions in their dealings with women. In fact, in a number of these cases, governments refer women's legal complaints and disputes to customary or religious law. The threat posed to women's rights by this state of affairs is evident from the fact that it is men who preside over customary and religious courts such as the Sharia courts. The testimonies given by

women at the emerging structure of 'The Court of Women' show that women's victimization tend to arise from the society's interpretation and construction of a **woman** as less than or as secondary to a **man**.

Thus, it can be seen that both culture and religion, in reality remain a male strong hold in many African countries that have been used as tools for the social control of women. Traditional myths and proverbs reinforce women's subordinate position and in a number of cases trivialise women's social standing.<sup>12</sup> It is for this reason that women's rights must be enshrined in modern constitutions. If this does not happen, given the prevailing attitudes, beliefs and value systems about women, then the women who find themselves imprisoned by cultural and religious laws will have no recourse to justice.

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<sup>12</sup> The female in African society (woman) is captured through some very negative traditional belief systems such as "naturally cunning, wicked, sexually immoral, sinful, untrustworthy and unintelligent". As an example see *The Source of All Evil* by Mineke Schniper.

# Chapter 5

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## The Right to Bodily and Psychological Integrity: are Reproductive Rights a Constitutional Issue?

By Dr. Charles Okumu

### Introduction

#### Overview and context

Twenty-two years ago, the Alma-Ata Declaration set the year 2000 as a landmark year for attaining the global goal of “**Health For All by the year 2000**”. The Declaration defined health as “a state of complete physical, mental and social well-being.” Subscribed in this goal was the affirmation that enjoyment of the highest standard of health is a fundamental human right. This definition has been widely adapted by many United Nations member states including Kenya.

In 1999, the World Health Organization declared that while significant improvements in people’s health had been made vis a vis life expectancy and infant and child mortality; gross inequities existed. Those inequities have persisted in the third world where death rates remained several times higher than those in the developed world. While maternal death rates for the developed world were between 6 per 100,000 live births for the lowest and 26 per 100,000 live births for the highest, in Africa, the rates are still as high as between 91 per 100,000 live births for the lowest and 1800 per 100,000 live births for the highest. (1)

### Definitions

The International Conference on Population and Development (ICPD) in 1994 defined health as “the right to bodily and psychological integrity”. This definition encompasses the following:

- Reproductive rights of a woman include her right to:
  - decide how many children to have and their birth intervals
  - have access to information about reproductive health to enable her make free and informed choices in all areas of her life
  - have equality and equity with her men folk(2)
- Sexual Rights include the right of all people to:
  - decide freely and responsibly on all aspects of their sexuality
  - be free of discrimination, coercion or violence in their sexual lives and all sexual decisions
  - expect and demand equality, full consent mutual respect and shared responsibility in sexual relationships
- Sexual and Reproductive Health encompasses the following main issues:
  - Violence against women
  - Safe motherhood
  - Unwanted pregnancy and abortion
  - Adolescent sexual and reproductive health
  - STDs/HIV/AIDS
  - Fertility/Infertility
  - Climacteric Menopause
- Sexual and Reproductive health care includes:
  - family planning information, counseling and services
  - prenatal, postnatal and delivery care
  - healthcare for infants
  - prevention and treatment of sexual transmitted diseases (STDs) and reproductive tract infections (RTIs)
  - safe abortion services and management of abortion related complications
  - prevention and treatment of infertility.
  - information, education and counseling on human sexuality reproductive health and parenthood

According to ICPD, women's rights to the enjoyment of the highest standard of health; including their reproductive health, sexual and reproductive rights must be secured within the framework of rights and must be consistent throughout the

woman's life span from infancy and childhood through adolescence to reproductive years and into her post-reproductive years (2).

## The current situation on reproductive rights in Kenya

Issues surrounding reproductive rights in Kenya are tackled within the framework of the country's health and population policies. The country's Reproductive Health Policy frameworks of 1994 and 1997 have the overall objective of promoting and improving the health status of all Kenyans through the deliberate restructuring of the health sector to make all health services more effective, accessible and affordable (3). The Health Policy framework of 1994 states, inter alia, that the resources of 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. Additionally, part of the financial burden of curative care will be shifted from the Ministry of Health budget to insurance schemes. The Framework also targets the HIV/AIDS epidemic as a major health problem requiring urgent intervention. It also 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 the community.

With regard to women's health and reproductive health care, the Policy Framework contains an "Essential Preventive/Primary Health Care Package", whose components include: promotion of ante-natal and postnatal care; well baby care; breast-feeding; improved diet and nutrition; health education and family planning. Those components comprise the safe motherhood program. Under this program, the following services were to be offered free of charge; family planning, child welfare, STD clinic services, AIDS and ante-natal services. However, hard economic times have forced the government to introduce cost sharing in most services.

The Reproductive Health Policy of 1997 does not give any definition of reproductive health or reproductive rights. It only gives components of reproductive health and family planning and the guidelines for achieving these. Even after the Beijing Plus Five Review Conference, the Kenya Government Population Policy of the year 2000 does not specifically address issues in reproductive rights especially for women. This Population Policy does not define what reproductive rights are.

In a general way, the policy makes reference to international and national laws that are

recognized in relation to reproductive rights. It also makes general reference to reproductive rights in terms of HIV/AIDS, Sexually Transmitted Infections (STIs), Safe Motherhood and issues to do with spousal consent in case of married women.

Not only is Kenya ambivalent on the question of Reproductive Rights, it does not consider or see reproductive rights for all the diverse categories of women except for women in married life. It has provided a definition of Reproductive Health as:

“A complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes”.

The following excerpt better reflects Kenya’s position concerning reproductive Rights:

“Reproductive rights, embracing certain human rights that are already recognized in our laws and international human rights documents and other consensus documents have emerged as a separate area of concern requiring attention that encompasses a number of issues. These include the right of a married couple to receive adequate information about family planning and determine responsibly and freely the number of children they should have and how to space them. They also include the right to HIV/AIDS infected individuals to receive health care and not to be discriminated against because of their state and the right of the spouse or partner to know that their consort is infected. In addition, reproductive rights embrace the medical protocols regarding spousal consent and confidentiality.

There is no specific Article on health or reproductive health in the current Constitution of Kenya. Provisions are made in general terms in a section known as Duties relating to preservation of life and health.

It would appear that the government of Kenya is more comfortable in discussing and addressing **reproductive health** and not **reproductive rights**.

## The current Kenyan laws on selected issues in reproductive rights

### Violence against women

This section is limited to rape. The definition and punishment of rape are covered in the Penal Code. However, the Penal Code has serious gaps at many levels. In case of rape of infants, children and other minors, the offense is classified and considered as defilement.

Secondly, the onus is on the victim/survivor to prove rape. For very many reasons as has been established through the work of the Federation of Women Lawyers-Kenya (FIDA Kenya), the Coalition on Violence Against Women (COVAW), and many other NGOs working extensively on issues of rape and other sexual and gender based violence against women, proving rape is very difficult and many offenders go scot free. In case of rape of minors, infants, and children, the offense is considered and classified as defilement and only carries a maximum of a 14-year jail term which is too lenient. Rape of minors, which is as serious as the rape of an adult, should be considered in the same category as murder or robbery with violence offenses. It should carry a mandatory maximum jail sentence if not the death penalty.

Clearly, the human rights and dignity of women is seriously violated in relation to rape and it is not only clear but urgent that adequate legislation is long over due. There is therefore urgent need for the Kenyan Constitution to make provisions for reproductive rights and enshrine them in the Bill of Rights.

## Abortion

Abortion is illegal under section 158, 159, 160 of the Penal Code and carries a prison term of up-to 14 years. Under section 240, abortion could be performed to save the life of the mother or to preserve the mental or physical health of the woman.

In Eastern Africa, 20% to 50% of maternal mortality is related to unsafe abortion (4). There are 30 unsafe abortions per 1000 women in the reproductive age groups of 15-29 years (5). An estimated 10,000 women die each year as a result of unsafe abortion (4). Hospital based studies show that abortion accounts for 30% of maternal morbidity and mortality (4,5). 50% of all gynecological admissions countrywide result from abortion related complications. This figure is 60% for Kenyatta National Hospital. (6)

## HIV/AIDS

HIV/AIDS is a notifiable disease under the present Kenya Health Policy. Under the Penal Code (Section 186), it is 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 infection of any disease dangerous to life.

Under sections 202 and 203, such an individual could be charged with murder, but such a charge may be precluded by section 215 which states that a person is

not deemed to have killed another if death does not take place within a year and the day of the cause of death.

The current government HIV/AIDS policy has three objectives as follows:

- To prevent infection
- To reduce the personal and social impact of HIV/AIDS
- To mobilize and unify national and international efforts against HIV/AIDS

Mention has been made about inadequate enforcement of existing laws due to lack of appropriate mechanisms, an enabling environment and deficiency of qualified personnel. Infants, children, adolescent girls and mature women of all categories are experiencing deliberate and circumstantial infection. Secondly, there are no adequate gender responsive services for these victims. If they do not have sufficient funds to access treatment from specialized sources, they carry the morbidity and possible death from HIV/AIDS. In practice, there are wide gaps between policy provisions, actual access and benefit from medical programs.

## Specific recommendations on HIV/AIDS

- Statutory laws should remove the prevailing burden of proof, and the resultant secondary victimization and embarrassing procedures that women pursuing legal recourse to rape are subjected to.
- Statutory laws should be amended to provide for diversified diagnostic signs to include mental state and exclude trauma to genitalia, recovery of spermatozoa and culture of STI pathogens.
- The statutes should be amended to exclude the state of articles of apparel and especially the underwear.
- Laws need to be harmonized under the new constitution so that the current sentence for defilement is substituted with a sentence similar to that of rape.

## Female Genital Mutilation (FGM)

Female Genital Mutilation violates bodily and psychological integrity and the right to full enjoyment of good health as defined by the World Health Organization (WHO).

FGM is one of the cultural practices that has continued to challenge the Kenyan female and male activists opposed to it. Despite high public condemnation and repeated calls by the Executive Branch of Government to end FGM, this wide spread and deeply rooted practice persists in Kenya. FGM affects most, adoles-

cent girls (9-19 years of age). However in Kenya, FGM has been known to be forcefully undertaken on women as old as 60 years of age.

In 1982, President Moi publicly condemned FGM following the death of 14 girls country-wide and instructed the police to institute murder charges against perpetrators of FGM where the act resulted in death(7). The Ministry of Health banned the practice in hospital. An official ban was announced by the then Ministry of Culture and Social Services in 1990. This was followed by a motion in Parliament in 1995 seeking to outlaw FGM but this motion was defeated. In December 2001, a Presidential Decree against FGM was issued by President Moi (8).

There are no Constitutional or specific legal provisions on FGM. Currently, therefore, FGM may be pursued as a criminal act only under the provisions of the Penal Code covering assault and infliction of bodily harm. These may be challenged under customary law. Secondly, due to its criminalization without an effective legal framework and effective enforcement mechanisms, the practice has gone underground.

Attempts to eliminate FGM have failed mostly because of strong cultural impetus for it and lack of specific legal provisions for addressing it.

Specific recommendations on FGM include:

- FGM should be Constitutionally outlawed through guarantees on the integrity of the person.
- The Constitution should make provisions for civic education on human rights for all citizens, women and men, boys and girls within and without formal and informal learning institutions
- The Penal Code should be amended to treat and pursue FGM as a specific criminal offense.
- Medical practitioners should be especially trained on how to effectively manage the FGM cases they encounter in health facilities.

## Adolescent health

The youth are defined as those aged between 10-24 years. These include pre-adolescents (9-12 years old), adolescents (13-19 years old) and young adults (20-24 years old). Over 50% of Kenya's population is aged below 15 years. One third of adolescents with no education, are either mothers or have begun child bearing. Twenty six per cent (26%) of those in primary school and 8% of those in secondary

school have become mothers. It is estimated that 60% of new HIV/AIDS infections among women and 40% among men in the next five years will occur among those aged under twenty years of age. According to data from the Ministry of Education, about (20%) of youth aged 15-19 mainly from secondary school are infected with HIV/AIDS. 11% of girls aged 15-19 who terminated education in primary school did so due to pregnancy. According to the Kenya Demographic Health Survey of 1998, most adolescents commence sexual activity by about 16.2 years for boys and 16.8 years for girls (9 - 14).

The curriculum on sex education addresses human biology and not sexuality education. Specifically, the curriculum does not address safe sex.

Recommendations on Adolescent Health include:

- Health and educational policies should be more explicit, comprehensive and informative on sexual matters to the youth
- Parents, teachers, religious institutions and other social organizations should take up the issue of sexuality.
- Parents should be given adequate support including training with their children from infancy to adult age.

## Prostitution

Prostitution is covered by the Penal Code under 'Offences Against Morality'. Section 154 may be paraphrased as follows: "Every woman who knowingly lives wholly or in part on the earning of prostitution or watches over a prostitute is guilty of a misdemeanor."

Here are some facts about prostitution:

- Commercial sex workers also known as women in the male hospitality industry cannot operate without a male partner.
- Currently only women are targeted by law enforcement agencies.
- The definition of commercial sex worker is quietly extended to include women who go to social places without the company of a man. This has led to women being expelled from hotels and restaurants under dubious pretexts.
- The fact that commercial sex is outlawed has contributed to the gloomy scenario of unwanted pregnancy, unsafe abortions and increased STD/HIV/AIDS rates.

## Specific recommendation on prostitution

- Amend the Penal Code to legalise, license and regulate commercial sex.
- Educate Commercial Sex Workers on the dangers of this trade, and train and reorient them into safer income generating activities.

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# Chapter 6

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## Women and Citizenship Rights

By Betty Kaari Murungi<sup>1</sup>

This paper will not catalogue the coterie of inequalities and inequities that women suffer in relation to their rights (or absence thereof) as citizens<sup>2</sup>. Rather, I will seek to highlight what I consider to be the reasons **why** these inequities exist and point out the consequences of the denial of such rights on the basis of gender<sup>3</sup>. I take the view that 'gender' refers to the social construction of power relations between women and men and that such relations are historically, geographically, politically and culturally specific. What it means to be a woman or man may change over time and any analysis of the way in which gender (as opposed to biological sex) shapes the experiences of women people as citizens must of necessity contextualise those experiences.<sup>4</sup>

I contextualise this discussion on prevailing circumstances in our region to include war, genocide, conflict, poverty, dictatorship, anarchy and bad governance. Women's experiences as citizens are shaped by these experiences. Women's experiences of discrimination in attaining full rights of citizenship are informed by **interalia** class, race, culture, sexuality, age, marital status, ethnicity and so on. The reality of a gendered discussion on rights is central to all contemporary cross cutting debates

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<sup>1</sup> Advocate of the High Court of Kenya, Legal Advisor, Women's Human Rights Program, Rights and Democracy, Montreal Canada.

<sup>2</sup> See Mucai, K, Kabebere- Macharia and P Kameri Mbote *Law and The status of Women in Kenya* in Women, Laws and practices in East Africa-Laying the Foundation. WLEA, 1995 p 80 and Atsango Chesoni FIDA Kenya Annual Report 1996 *Second Class Citizen*, Atsango Chesoni FIDA Kenya 1997 Annual Report *Bado Mapambano*, Anne Muragu Nyabera FIDA-Kenya 1998 *Institutional Gains Private Losses*, Anne Muragu Nyabera, Aliya Mawani and Wanja Ngari FIDA-Kenya 1999/2000 Annual Report *Setting The Pace* and Nancy Kanyago FIDA -Kenya Annual Report 2001 *Beyond the Door* for full and excellent reports on the laws and statistics affecting and relating to the status of women in Kenya.

<sup>3</sup> See P.Kameri- Mbote, *Gender, Governance and Separation of Powers within the Constitution*, paper presented at Heinrich Böll Foundation's Gender Forum January 2002 for definitions of gender.

<sup>4</sup> See Jacqueline Adhiambo Oduol. *Do customary issues have a role to lay in a modern constitution?* Paper presented at the Heinrich Böll Foundation's Gender Forum March 2002 for a fuller discussion on gender roles under customary and constitutional practices and the discriminations that ensue under both systems.

and citizenship rights is just one of these. It is impossible to address the citizenship question separate and apart from other discriminations that women suffer daily. The context may differ but the rule is the same. Hence, the notion that women elsewhere, say in Uganda or the United States are in any better or superior situation in the enjoyment of their citizenship rights needs to be dispelled. Women the world over continue to be second class citizens, constitutional protections notwithstanding. Women suffer because they continue to lack three basic freedoms ordinarily enjoyed by men under most constitutional democracies<sup>5</sup>. These are:

- freedom from inferior legislative constitutional or juridical status, (includes political and civil rights) ;
- freedom from personal, cultural, and family discrimination ( includes freedom to make choices as to her reproductive rights);
- freedom from fear.

Male notions and definitions of citizenship have focused primarily on equal protections under the law and have included such rights as the right to vote, right to equal pay for equal work and so on. These type of definitions obscure the problem and in some instances are the problem, limiting women's demands to the 'safe' issues such as paper citizenship, access to education and health services whilst excluding the sensitive ground of political participation, right to reproductive choices, safety in the home, and personal law issues. In my view the only analysis of this situation that makes sense is a feminist analysis based on a human rights framework. I will limit my discussion to women's lack of these three freedoms and suggest some strategies that the women's movement in Kenya might employ to advance the struggle against these multiple oppressions.

## Inferior status under the law

In Kenya, it is permitted by the constitution to discriminate against women on the basis of personal laws. By the 1997 IPPG constitutional amendment, discrimination on the basis of sex was disallowed. However, the discrimination is so entrenched in other sections of the same constitution (s90 and 91), customary<sup>6</sup> and statutory laws<sup>7</sup>, that this belated amendment has had little advantage for women since 1997. Succession and inheritance laws, labour laws, citizenship laws, mar-

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<sup>5</sup> Joan Hoff, *Citizenship and Nationalism*, Journal of Women's History Volume 8 Number1

<sup>6</sup> see Oduol, *supra*

<sup>7</sup> see Mucai, et al *supra*

riage laws and property laws routinely discriminate against women in fact, interpretation and application.

Other countries in the region that are in step with so called democratic principles of equality and have laws that protect such rights include Rwanda and Uganda. The Rwandan law which now confers ownership rights on women was partly as a consequence of the genocide of 1994. Uganda, which has excellent laws, still grapples with the concept of co—ownership. These laws notwithstanding, women continue to be marginalized in the enjoyment of their property and employment rights largely because of a failure to implement the stated provisions of the law. Access to justice mechanisms<sup>8</sup> proves to be another stumbling block limiting enjoyment of these rights. The experiences of women in post genocide Rwanda provides a stark example of how women’s concerns are marginalized in the formal justice systems, including at the international level.<sup>9</sup> Crimes that are committed against women have historically been ignored, trivialized, or mischaracterized. Cultures and traditions that oppress women also make it impossible for them to access these mechanisms.<sup>10</sup>

The laws relating to marriage, custody of children, divorce and separation, succession, and citizenship all provide differential treatment for men and women with men having choice and advantage and women being subjected to traditional and customary practices in instances where the law cannot conceive a choice being exercised by the woman. Polygamy, wife inheritance, and burial disputes provide numerous examples of these inequalities under statutory law.<sup>11</sup>

## Political Participation

Women’s political rights have been perceived minimally as right to suffrage and candidacy. Whilst these are necessary, they are not sufficient. Women’s citizenship rights today extend to more than just the right to vote. In the Horn and the Great Lakes region, which includes Kenya, women have had the right to vote since independence.

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<sup>8</sup> See Raychelle Omamo, *Women and access to justice: Are our law enforcement agencies gender friendly?* Heinrich Böll Foundation’s Gender Forum, February 2002.

<sup>9</sup> See Betty Murungi ‘Prosecuting Gender Crimes at the International Criminal Tribunal for Rwanda’, *AFLA Quarterly*, April-June 2001.

<sup>10</sup> See the International Commission of Jurists (ICJ) Kenya report, *Women’s Property and Inheritance Rights 2001* and FIDA Kenya Annual Reports for details and statistics.

<sup>11</sup> Mucai et al, *supra*.

But the right to vote must be substantive rather than rhetorical. Whilst I do not in any way propose that this right is unimportant, women's votes should not just be important for supporting men's political aspirations as often happens. Women rarely have the choice of voting for a woman candidate<sup>12</sup>. The political structures including those in multi party states such as Kenya create some of the biggest impediments to women's political participation. Political parties do not nominate women to run for elective positions and therefore women are generally absent from legislative and governance bodies. The absence of women in political debates distorts the appreciation and importance of women's interests. Such interests cannot have never been and will never be fully articulated by male representatives because they do not possess adequate knowledge or interest in them.

Women's Wings and Gender Desks in political parties are separate structures in most political parties which often create obstacles to women's participation. Separate and undemocratic<sup>13</sup> they ensure that women are never part of the mainstream political activity. In Kenya, Maendeleo ya Wanawake served for a long time as the unofficial women's wing of the ruling party KANU. Often it has acted against the interests of women and resisted women's advancement<sup>14</sup>. Although this is a huge organization with more than 3 million members countrywide, it has been unable to advocate effectively for the political participation of women, partly because of its inability to include women of different political allegiances and its inability to embrace civil society actors and its pandering to the male ruling party agenda.

The single most important piece of legislation related to women's political participation is the women's convention CEDAW. Kenya and most other states in our region have ratified this instrument (166 states worldwide have ratified). The convention entered into force in 1981 and obliges all states that are signatory to adopt measures to eliminate discrimination against women in the nation's private and public life. Specific to political participation, CEDAW guarantees:

- The right to be eligible for candidacy in all organisations whose members are chosen through public election;
- The right to participate in the formation of governmental policy and its implementation;

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<sup>12</sup> Charity Ngilu broke this pattern in 1997 when she ran for president in Kenya.

<sup>13</sup> Maria Nzomo. USAID gender and democracy workshop. Washington DC 1995.

<sup>14</sup> Recall the debate on membership of women to the East African Legislative Assembly and the position taken by Maendeleo's top leadership.

- The right to occupy public posts, as well as exercise all public functions at all levels of government;
- The right to represent government at international level; and
- The right to participation in the work of international organisations in equal conditions with men.

CEDAW like most other international human rights instruments has helped to raise awareness in our region but it has not of itself eliminated gender discrimination. It has not ensured the equal access to citizenship rights by the women of our two regions. Part of the reason has to do with a lack of implementation at the local level. Lack of domestication of these international instruments arises out of lack of political will by our states.

National legislation has not formulated a juridical framework that would guarantee women real and effective participation in the political processes even in countries that have institutionalized affirmative action. The question of the universality of the rights enshrined in the international human rights regime of international /regional and sub-regional instruments needs to be claimed by women. We can use these instruments as tools of advocacy very effectively by litigating the rights enshrined therein.

In the famous case of *Attorney General v Unity Dow* (1992) 103 ILR 128 a Botswana woman challenged the citizenship laws of Botswana that denied her children by her foreigner husband citizenship. Dow claimed that her constitutional rights and human rights were violated by the applicable Citizenship Act. Further, she claimed that Botswana was in violation of international law, having acceded to many international conventions, including CEDAW. Unity's case went all the way to the Court of Appeal where she won the battle. Her children were granted citizenship and the offending law was declared unconstitutional. This case is a trailblazer in Africa and illustrates how international instruments can be used innovatively to challenge sexist laws that are used to relegate women to second class citizenship.<sup>15</sup>

It is clear therefore that women do not enjoy full rights under the law or in practice. Their situation is exacerbated in situations of conflict and post conflict reconstruction where their roles have been reversed, destroyed or turned upside down. Women who

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<sup>15</sup> See Sylvia Tamale. *Think Globally, Act Locally: using international treaties for women's empowerment*, 2001.

have been combatants in countries such as Eritrea, Uganda, and Rwanda now find themselves having to conform to traditional roles. Women therefore face challenges of a different nature. In demilitarization processes in these states that are coming out of armed conflict, programs to reintegrate women are almost always lacking thereby denying them the rights of citizens that are accorded the men. Reversal of gender roles in conflict situations results in discrimination against women.

## Freedom from fear

### Violence against women

Violence against women in all its manifestations is one of the most important factors in ensuring the perpetual relegation of women as second-class citizens. Women cannot exercise their full rights as citizens if they live in fear of violence in their homes and communities. The proliferation of wars and conflicts in the region subject women to constant violations. Currently, the Kenyan parliament is debating a law seeking to introduce a law to protect families from domestic violence. The fear of the male establishment came out very clearly in the statements of MP's. According to some of them, women needed to remain under constant threat of violence to ensure family unity and discipline. Debate degenerated to personal attacks on women members of parliament and judicial officials as well as on their part, FIDA Kenya members. The loss of control that the male establishment in Parliament felt would ensue from such a law coming into effect is instructive. What difference would a constitutional provision that declares all persons equal in citizenship and other rights make, if we are unable to enact laws that ensure implementation of such provisions? Women's access to justice mechanisms is crucial to the enjoyment of rights. If because of poverty, lack of education or absence of information, women are unable to access justice mechanisms to claim and defend their rights as citizens, then their position is as if these rights did not exist.

### Reproductive rights and sexual rights<sup>16</sup>

Women's right to control their reproductive choices is limited, first by the laws, custom or religion and secondly, by the circumstances of violence that exist and the failure of the justice, social, and political systems to protect them

- **Female Circumcision/Female Genital mutilation**- torture of young girls and women.

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<sup>16</sup> See Charles V. Okumu, *The right to bodily and psychological integrity: are reproductive rights a Constitutional issue*, Heinrich Böll Foundation's Gender Forum, April 2002, for a full discussion on reproductive rights.

- **Early marriage**-freedom to choose whom and when to marry is curtailed.
- **Abortion**- mortality rates for abortion related deaths are between 20%-50% in the Great Lakes region.
- **Sexuality**- it is still against the law to be gay in this country.
- **Violence against women**- in conflict areas, genocide, sexual slavery, trafficking, forced prostitution, and enforced pregnancies are rife.
- **HIV/AIDS**- inability of women to protect themselves adequately from infection.

## Refugees and internally displaced persons

The circumstances that give rise to the existence of internally displaced persons and refugees has to do mainly with bad governance, international and civil wars, ethnic animosities often provoked by irresponsible political actions or utterances, and failure to manage diversity of religion and culture among others.

According to UNHCR, Africa hosts the largest number of refugees and internally displaced persons: 3.5 Million Refugees and 1.7 internally displaced persons. The O.A.U. convention expanded the definition of who constitutes a refugee. The Convention similarly makes very progressive provisions against refoulement and has very beautiful language regarding the duty of African states to assist refugees and other states that are willing to take on the refugees in the spirit of 'African Solidarity'. The African Commission on Human and Peoples Rights has held on several occasions that the State is under obligation to protect its citizens. Of these refugees and internally displaced persons, a large majority reside in the great Lakes Region. 80% are women and children. The vast majority does not enjoy any citizenship rights<sup>17</sup> and are subjected to the most egregious violations of their rights as human beings.

## The role of regional and sub regional institutions: the African Union (AU)/the New Partnership for Africa's Development (NEPAD) initiative

Women have not participated in the formation of this important political organization which comes fully into effect in July 2002, neither have they had any input in the NEPAD document concluded in Abuja Nigeria on 21<sup>st</sup> October 2001. It is

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<sup>17</sup> See Kenya Human Rights, *Haven of fear: The plight of women refugees in Kenya*. 1998.

likely that they will be absent at the formulation of the rules that will establish the nine organs of the Union. This limits their participation as citizens of their Continent in a way that does not apply to the men who are well represented at the all the decision-making bodies. The Constitutive Act of the AU does not specifically address the issue of citizenship but commits itself to achieving greater unity and solidarity between African Countries and the peoples of Africa. Among its stated principles is the promotion of gender equality. Citizenship **per-se** is not addressed. The NEPAD document makes gratuitous references to women and its commitment gender equality. It does not go far enough. The absence of a gender perspective in these discussions and initiatives is crucial and will inform the failure of such processes.

### Role of sub-regional institutions

The Common Market to Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Inter Governmental Authority on Development (IGAD), are some of the sub-regional institutions that should address questions of the citizenship rights of women . How have women engaged in these processes? How do these regional institutions treat the issue of cross border regional citizenship? Is it real or a mirage?

### Taking the bull by its horns

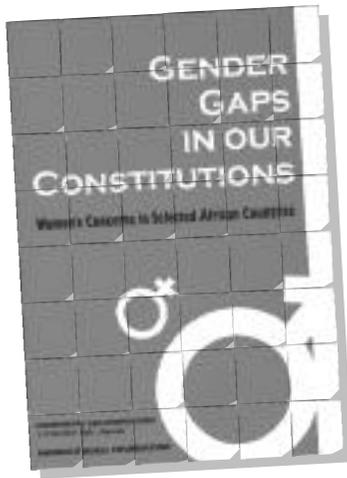
Who is to be held accountable? What tools are available to women to hold states accountable?

We must recognize that citizenship rights come with the entire territory of rights. They are not limited to those rights and obligations that are stated in the Citizenship Act. Women do not want to become like men. They want to have rights that transform their lives and uplift them. There has to be a shift in thinking about rights. Women do not want to be given this or that. They demand rights as part of their basic humanity. The right to full and equal citizenship rights is just one of these rights. This was the sense that the women came to in Vienna in 1993, by locating their struggles within a human rights framework.

In addition, women demand the following:

- Respect and implementation of international norms and standards.
- Respect for democratic institutions.

- Healthy practice of constitutionalism which is not the same as having a perfect constitution.
- Poverty reduction.
- Inclusion of women in regional initiatives.
- Inclusion of women in decision-making positions and processes.
- Innovative use of international and regional instruments.
- Development of policies that are responsive to women.
- Political participation at all levels, including peace negotiations, peace-building, and post-conflict reconstruction activities.

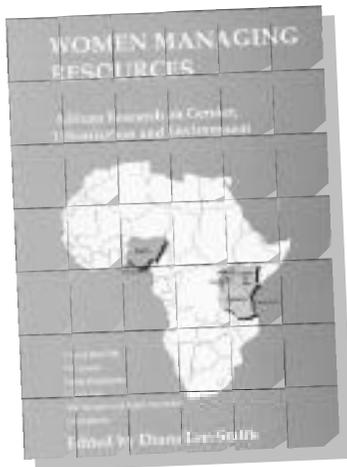


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### Gender Gaps in our Constitution

Although most African countries have written constitutions which guarantee all persons equal rights before the law and prohibit any discrimination on the grounds of sex, religion, or nationality the social life of women is largely shaped by customary laws and practices and most disputes are resolved outside the court system. Women often neither know of their rights and entitlements nor dare to claim them due to adverse effects such as a move would bear on them in given social contexts. As such, customary practices that discriminate against women on inheritance, wills, divorce, property provision, child custody and maintenance are still embodied in the civil law.

This was the logic behind the Conference that brought together women to look at various constitutions with the aim of strategising on how to intervene in implementation processes in order to ensure that laws practiced guarantee equal rights to women. The Conference also enabled them to exchange experiences and share ideas on how to challenge the existing negative laws.

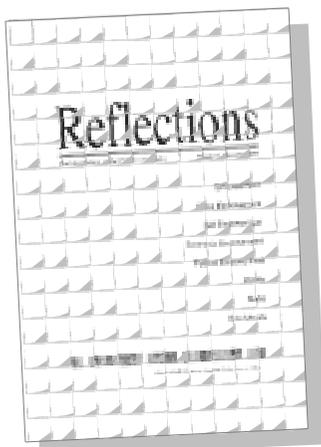


*Mazingira Institute*

### Women Managing Resources African Research on Gender, Urbanisation and Environment

ISBN 9966-9876 - 9 - X

The book is the outcome of a small grants research programme of Mazingira Institute in Nairobi that aims to promote the growth of a network of knowledge on gender and urbanization in the region. The six studies, from Kenya, Nigeria, Tanzania and Uganda, are substantial pieces of work in their own right and represent the start of a longer term collective effort to define an area of research. The book examines and elucidates the critical changes brought about through urbanization and how they affect both women and men.



*Heinrich Böll Foundation*

### Reflections

Reflections is a publication of the Gender Forum in Addis Ababa, Ethiopia. The Gender Forum is currently managed by Panos Institute, and has focused on the critical issues of the personal, institutional and political empowerment of women.

The Gender Forum, initiated in 1997 has tackled a wide range of topics, including violence against women; the impact of conflict on women; the role of women in development and the feminization of poverty.

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# Heinrich Böll Foundation

The Heinrich Böll Foundation, affiliated with the Green Party and headquartered in Berlin, is a legally independent political foundation working in the spirit of intellectual openness. The Foundation's primary objective is to support political education both within Germany and abroad, thus promoting democratic involvement, socio-political activism, and developmental cooperation. Its activities are guided by the fundamental political values of ecology, gender democracy, solidarity, and non-violence.

## The Foundation in the East and Horn of Africa

Since 1991, the Heinrich Böll Foundation has been supporting development projects in Ethiopia and Eritrea. In 1999, the Foundation expanded its activities to Somaliland and Djibouti. Since 2001, the Foundation's activities have spread to many countries in the region including Kenya, Sudan and Uganda. We mostly work in cooperation with project partners who focus on raising awareness on ecology, gender democracy, conflict and dialogue, democratization and cultural identity.

The overall goal of the Foundation's engagement in this region is strengthening Civil Society. As a result, most of the program activities in the East and Horn have been in partnerships with non-governmental organizations working in the environmental field, gender issues and conflict.