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GENDER EQUALITY IN THE NEW CONSTITUTIONAL DISPENSATION OF KENYA

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1. Introduction

Gender equality means a social order in which men and women share the same opportunities and the same constraints in the economic, social and political realms of life. There is little doubt that women have historically been accorded less than favourable treatment in these spheres compared with men. This difference has stemmed from mere sexual or biological distinction between male and female; a distinction that has been used as the basis for ascription of roles and entitlements to these sexes. In a patriarchal society the sex-based assignment of roles has projected the spectre of inferiority even unworthiness, over women while casting the characteristic of superiority on to men. While this role-assignment sprung from the inherently patriarchal nature of the Kenyan society, it found good nurturing ground in institutions, such as, and especially the law. If, as it has been argued, law reflects predominant social values, then in a patriarchal society, where man is supreme, law will often re-imprint inherent gender imbalances and reinforce women's exclusion from the mainstream society. Realisation that law had been transformed into a tool of discrimination against women led to various initiatives to change and conform it to aspirations of equality for all citizens regardless of sex. These changes while undoubtedly instigated from within were also significantly informed by drifts in the international field especially with respect to human rights.[1] Reform of the law sought to achieve both formal and substantive equality. The former case involved textual changes in the law to secure the recognition and enforcement of fundamental guarantees of women, such as the constitutional amendment that barred discrimination on the basis of sex.[2] The latter involved the implementation of affirmative action plans designed to increase women's capacity to engage effectively with the social, economic and political processes in the society.[3] These changes formed the foundation for a

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[1] Since the first international women's conference in Mexico in 1975 legal systems all over the world have focused on the inequalities of the sexes and how to remove them. This can be discerned from the many conferences held subsequently and the resultant instruments. Examples include conferences such as the Nairobi Forward Looking Strategies Conference of 1985, the Beijing conference that culminated in the Beijing Declaration and Platform of Action of 1995, and lately Africa's own blueprint conference on the Launch of the African's Women's Decade in Nairobi in 2010. The common theme for these conferences has been the quest for gender equality. In addition many governments, including that of Kenya have signed and ratified or merely endorsed by signature various United Nations conventions and declarations that promote gender equality and mainstream gender perspectives in all spheres of life.

[2] See Act No 9 of 1997, section 9 amending s 82(3) of the constitution (now repealed)

[3] For example s 33 of the repealed Constitution had provided for the mechanism by which political parties nominated their members to be appointed by the President as Nominated Members of Parliament. In 1997 the section was amended to require parties to reserve some of those seats to women. See s 33 (3) constitution (now repealed) providing that "The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, *taking into account the principle of gender equality*." (emphasis added)

fully-fledged restructuring of the law and ultimately the adoption of a new constitutional framework. While many interest groups were represented to varying degrees in the constitutional review process women's participation was very strategic in that they succeeded in tying in their concerns with the new dispensation.[4]

In this chapter we discuss how the new constitution incorporates gender equality within its framework. We examine the approaches that the constitution has taken in a bid to promote the hitherto elusive equality between men and women in the law. We assess whether and the extent to which the new framework has sought to dismantle longstanding legal barriers on women. We determine in our analysis that, as a general premise, the quest for gender equality is synonymous with the struggle for the emancipation of the entire Kenyan society. In the pre-colonial world, women were basically beholden to patriarchal customary norms which treated them less equally with men. In the colonial period, women's marginalisation became more profound because of their subjection to at least two legal norms both of which were debilitating. While customary norms discriminated women, the colonial legal system, itself an inherently exclusionary system reinforced the supposed inferiority of women. Suffice it to say that the colonial legal system was also premised on gendered notions of the roles of men and women in society. Contrary to expectations independence and thereafter saw increased emasculation of Kenyans by rulers who found dismantling the colonial framework of governance to be inimical to their own individual interests.[5] Thus the post-colonial Governments failed in their avowed transformative role. Some few normative changes were made but these did not go far enough in addressing issues of gender equality. For example the addition of sex as one of the proscribed grounds of discrimination was merely a notional gain because other equally debilitating sections of the Constitution were left intact defeating the entire purpose of the change. Suffice it to say that official bureaucracy was blind to the exclusion that women generally faced in the society.[6] Nevertheless many of these changes were a response to the clamour for a more inclusive democratic government.[7]

As Kenya inched towards democracy more legal and constitutional space was opened up for its citizens thus creating room for inclusion of women too. In the quest for further reforms gender equality became an integral aspect to a new and acceptable constitutional order.[8] In this light we argue that the new constitution is a culmination of an evolving, though gradual, process of reform that has sought to recast the legal and social status of women over the years.

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[4] See e.g. CREAW, *Constitution Making-Power Dynamics, Intrigues & Struggles: Kenyan Women Reflect* (2008)

[5] See e.g. P McAuslan, 'Only the name of the country changes: the diaspora of "European" land law in Commonwealth Africa", in C. Toulmin, and J. Quan (eds) *Evolving Land Rights, Policy and Tenure in Africa* (2000) 75-95.

[6] See Act No 9 of 1997, section 9 amending s 82(3) of the constitution (now repealed) (note 2 above)

[7] For example the removal of s 2A of the repealed constitution that had made Kenya *a de-jure* single party state and the passage of s 1A providing that "The Republic of Kenya shall be a multiparty democratic state." See respectively s 2A of the Constitution (now repealed) and s 1A of the constitution (now repealed).

[8] CREAW (n 4 above)

We argue that this constitution attempts to address traditional exclusion that Kenyan women have faced and the attendant "second-class" treatment that that exclusion wrought over them. In its avowed goal of securing social justice for all the constitution seeks to provide a framework that will lead to the inclusion of women in the mainstream Kenyan society. In this chapter we look at how this constitution has attempted to achieve this goal and whether indeed it is possible to actualise its gender equality ideals.

2. Background

A historical analysis of Kenya throughout the pre-colonial, colonial and post independence periods suggests rather distinct patterns with respect to the legal status of women. A general trend however has been either that women have been subtly discounted from the mainstream society or that the law has outrightly discriminated against them in many spheres of life. Women have been less able to enjoy certain rights than men. They have had poor access to education.[9] They have controlled significantly lesser resources than their male counterparts.[10] They have been more vulnerable to social, economic and political shocks.[11] Penal laws have not responded to their specific needs.[12] And they have played lesser roles in terms of exercise of public power.[13]

Nevertheless it appears that as Kenya slowly ambled toward the path of democracy and opening up of the political space certain allowances were made in favour of women. Thus since say the 1990s the legal status of women started changing albeit at a less than desirable pace. Following the re-introduction of multi-partism, women were able to secure a few

[9] A number of obstacles militate against girls' access to education including cultural practices such as child marriages, female genital surgeries prevent from benefitting from educational opportunities; unwanted pregnancies cause girls to drop out while some parents may simply not see the need to put girls through schools. See for example Ministry of Education Science and Technology, *Kenya Education Sector Support Programme 2005 – 2010* p 247 http://planipolis.iiep.unesco.org/upload/Kenya/Kenya%20KESSP%20FINAL%202005.pdf (accessed on 15th November 2010); see also Catherine Kitetu, "Gender in Education: an overview of developing trends in Africa", http://www.ling.lancs.ac.uk/groups/crile/docs/crile54kitetu.pdf (accessed on 15th November 2010).

[10] See for example United Nations Development Programme, *Kenya Human Development Report 2001* (2002) 30; See also Republic of Kenya, *Poverty Reduction Strategy Paper for the Period 2001-2004* (2001) 36.

[11] For example studies have indicated that women and girls suffered disproportionately during the violence that rocked the country following the botched-up presidential elections of December 2007. See CREAW, *Women Paid the Price: Sexual and Gender Based Violence in Post Election Conflict in Kenya* (2008) 45, http://www.preventgbvafrica.org/content/women-paid-price-sexual-and-gender-based-violence-post-election-conflict-kenya (accessed 14th November 2010). See also K Makokha and O Opondo, *In the shadow of death: my trauma, my experience; voices of Kenyan women from the post election violence* (2009)

[12] For a long time the law on sexual offences had been skewed against women. For example while Penal Code had proscribed rape the prosecution of the offence had been bogged down by many deficiencies in the law as well as in the procedure. In addition the law did not respond adequately to cases of physical violence against women. *See for example* W Onyango-Ouma, *et al*, *The making of the Kenya Sexual Offenses Act, 2006: Behind the scenes* (2009)

[13] See for example R A A, Odhiambo, 'Women's access to and participation in politics and decision making in Kenyan local authorities: a case study of Nakuru Municipal Council', Unpublished Masters in Policy Studies thesis, University of Zimbabwe, 2003

concessions from the political establishment and the society at large.[14] Comparatively more concessions were gained in the period following the change of regime in the year 2002.[15] Due to the more open political space civil societies as well as some members of parliament were able to literally engineer certain changes in the law that responded to inequalities engendered by exclusion and discrimination of women.[16] While the politicians were slowly beginning to see the need to make better laws with respect to women, our courts were rather slow in their response, or at best ambivalent. Occasionally courts recognized the inherent inequalities in the laws and practices in the country but largely made decisions that made little positive difference in the quest for gender equality.[17]

Historical anecdotes show that the practises of the communities that occupied the region later to be known as Kenya were as discriminative of women as they were in the colonial period and thereafter.[18] Thus women were generally inferior to men, as were girls to boys. The roles that traditional communities ascribed to women were directly defined by the projection of women as inferior people.[19] In some cultures, women were at the same level as children; in some they were objects, to be owned, used and sometimes even exchanged.[20] Certain cultural practices such as female circumcision, wife inheritance and chastisement were based on the skewed notions about male roles in the society.[21]

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[14] The inclusion of sex as a banned ground for discrimination occurred at this time. See Act 9 of 1997

[15] For example the passage of far-reaching reforms in the law on sexual violence was achieved during this period of greatly opened up democratic space. *See* Onyango-Ouma (n 12 above)

[16] Onyango-Ouma (n 12 above)

[17] Routinely, decisions were made that re-emphasised the prejudices against women whether in criminal matters, in property matters, succession matters and so on. The Court of Appeal for example decided in the case of *Otieno v Ougo* (2008) 1 KLR (G&F) 918 that under Luo customs, a widow had no right to inter her deceased husband as this was a prerogative of the members of her husband's clan. In *Kimani v. Kimani* HCCC No. 1610 of 1999 (unreported) the judge in a simple matrimonial property division case launched a terribly misinformed and thoroughly misogynistic attack on Kenyan women in general. On the issue as to whether the woman in the case was entitled to a share of the property acquired in the course of the marriage the judge saw it fit to disparage the entire women's movement in its quest for equality of the sexes. The judge characterised the woman in the applicant's position thus:

> Many a married woman goes out to work. She has a profession. She has a high career. She is in big business. She travels to Beijing in search of ideologies and a basis for rebellion against her own culture. Like anyone else, she owns her own property separately, jointly or in common with anyone. Her business interest, her property and whatever is hers is everywhere in Kenya and abroad, in the rural, urban and outlying districts. In Nairobi alone her property and businesses, swell through Lavington, Muthaiga, Kileleshwa, Kenyatta Avenue, swirls in Eastlands, with confluents from everywhere. Perhaps apart from procreation and occasional cooking, a number of important wifely duties, obligations and responsibilities are increasingly being placed on the shoulders of the servants, machines, kindergartens and other paid minders. Often the husband pays for all these and more...

[18] See e.g. J Kenyatta, *Facing Mount Kenya: the traditional life of the Gikuyu* (1938)

[19] See Odhiambo (n 13 above)

[20] Wife sharing is a cultural practice accepted among the Maasai where members of the same age-set are allowed to have sexual relations with each other's wives. See for example P Spencer, *The Maasai of Matapato: a study of rituals of rebellion* (1988) 25, 39; See also "Sex, partner swapping, HIV and the Maasai" *Afrik News*, http://www.afrik-news.com/article15079.html (accessed on 15th November 2010).

[21] Odhiambo (n 13 above)

The colonial legal order exacerbated an already bad situation. When colonialists took effective political control they passed laws with a much wider geographical reach.[22] These laws were steeped in the same cultural prejudices that women endured locally. They were mired in Victorian notions that objectified women, and cast upon them the characteristic of weak, brittle items that would never survive but for the wardship of men. For example until the repeal of certain provisions of the Penal Code rape was categorised under "offenses against morality"[23] suggesting that violating a woman's chastity was a crime against the society and not a violation of individual rights. This denial of personhood to women was at the core of patriarchy and formed the basis of women's exclusion.[24] If women were prejudiced in the pre-colonial time the new legal order doubly reinforced their exclusion.

The decade following independence saw little change in the foundational attributes of the law and therefore women's status remained the same. Women were still under the triple yoke of local culture, foreign law and the European cultural values. A popular adage is that when colonialists left, the people who replaced them were only different from them by their skin colour.[25] Otherwise they imbibed the same ideals as the European colonisers; they glorified the same power as the colonisers; they lived the same life as Europeans; they took over the property that was left behind by departing Europeans; they had the same elitist views as the colonialists. As a result of their training and education, a lot of the post independence leaders, had acquired a taste for power and authority and were aware of the personal advantages that such power brought.[26] Thus rather than implement social reform strategies such as fair land redistribution, the ruling elite embarked on a journey of accumulation of property and monopolisation of power. Many of the constitutional safeguards against abuse of power were dismantled through numerous amendments. As they consolidated power the post-independence governments became less responsive to the needs of the people and averse to dissenting political views. They resorted to both police and judicial powers to deal with perceived oppositionists. However Kenyans continually agitated for an overhaul of the system of government, a quest that culminated in the new constitutional order in 2010. For women an open and democratic society that paid significant premium to the rule of law and respect for human rights was far better because it would likely respond to their specific needs and attempt to redress their exclusion from the mainstream society. We now look at the specific ways in which the pre-2007 legal facilitated and reinscribed the poor status of women.

3. Gender and law in the pre-2007 constitutional dispensation

[22] Y P Ghai & J P W B McAuslan, *Public law and political change in Kenya: a study of the legal framework of government from colonial times to the present* (1970) chapter 1 generally
[23] See section 139 (now repealed) of the Penal Code
[24] See Onyango-Ouma (n 12 above)
[25] McAuslan (n 5 above)
[26] McAuslan (n 5 above)

3.1 Political decision-making

In spite of the historical prejudices that women faced in the society, the constitution was expressed in gender blind terms-it treated every person as equal.[27] In view of their exclusion from the mainstream society women could not take advantage of any of the available opportunities to serve in political positions. Women were ever under-represented in positions of public power.[28] There were fewer of them in parliamentary, civic and other elective positions.[29] The patriarchal set-up of the Kenyan society meant that women were relegated to less public roles.[30] This exclusion also meant that fewer women were part of the elite which formed the pool of political leaders.[31] Women were often unable to command the financial resources that would enable them compete effectively with their male counterparts.[32] The political culture in Kenya is defined by male experiences and hence does not respond to or accommodate the peculiarities of women.[33] The vicious often violent confrontation in the political landscape effectively locked out women from politic contests.[34] The legal framework in its part did not facilitate effective engagement by women in politics.[35] The often male-dominated political parties gave few or no opportunities for women leadership.[36] Until 2008 there was no comprehensive legal framework governing political parties.[37] They were constituted as voluntary organisations under the Societies Act and as such could be organised in any which way the members pleased.[38]

3.2 Property relations

Acquisition and ownership

On the face of it the constitution protected the right of everyone to acquire and own property of whatever description.[39] Acquisition and even protection of one's property requires that one has command of the necessary resources. The systematic exclusion of women from the mainstream society limits women's access to education and subsequent employment.[40] Even for those engaged in informal trade, lack of or poor access to capital means that they are

[27] See s 70 of the Constitution (now repealed)
[28] Odhiambo (n 13 above)
[29] Odhiambo (n 13 above) 2
[30] Odhiambo (n 13 above) chapter 4
[31] Odhiambo (n 13 above) 51-52
[32] Odhiambo (n 13 above)
[33] Odhiambo has noted that "the socialization process has implanted in people's minds stereotype ideas about the roles of men and women in society culminating in not only men barring women from taking part in political affairs but also in women themselves not believing in their capacity to be leaders." Odhiambo (n 13 above) 52
[34] Odhiambo (n 13 above) 62, 63
[35] For example s 34 of the repealed constitution provided that a person must have belonged to a political party to qualify for election into the National Assembly. See s 34(d) of the constitution (now repealed)
[36] CREAW, *Running for political office: a handbook for women candidates* (no date), www.creawkenya.org/pdf/running_for_political_office.pdf (accessed on 10th November 2010)
[37] The Political Parties Act 2007, provided for a framework for governing political parties but it only came into force on 1st July 2008.
[38] CREAW (n 36 above)
[39] S 75 of the constitution (now repealed)
[40] See Institute of Economic Affairs-Kenya, *Profile of women's socio- economic status in Kenya* (2008) 30

unable to raise funds that would then give them the opportunity to acquire property.[41] The constitutional right was the proverbial paper right insofar as Kenyan women were concerned.[42]

Inheritance

In both testate and intestate succession Kenyan law routinely reinforced gender discriminative cultural practices.[43] In the former case a court might be called upon to interpret the same in case of a dispute among the beneficiaries. However to the extent that the constitution allowed individuals to elect to be governed by personal law in matters such as inheritance, such individual might rely on their customs and exclude female children from the estate.[44] In some communities a married woman would only have a life's interest that ended as soon as she remarried.[45] Even though courts interfered with a testator's discretion in the division of the estate they often followed applicable customary practices.[46]

In intestate succession s 36 of the Law of Succession Act provides that where the deceased was survived by a spouse and a child or children, the surviving spouse inherits absolutely the personal and household effects of the deceased but only acquires a life interest in the residue of the estate. However if the surviving spouse is a woman then if she remarries, then life interest ends. There is no such termination if the surviving spouse is a man who remarries hence the section is directly discriminatory against women.[47] In terms of section 39 if no spouse or child(ren) survive the deceased, the property devolves first to the father of the deceased and to the mother only if the father is dead. Where the intestate was polygamous (invariably a man, in this respect) the Act states that the personal and household effects shall devolve to all the houses proportionately to the number of children in each house except that the surviving wives will also be included as "an additional unit to the number of children." The personal and household effects will then be distributed within each house in accordance

[41] Institute of Economic Affairs-Kenya (n 40 above)
[42] See P W Karanja, (1991) 'Women's land ownership rights in Kenya', *Third World Legal Studies* 110
[43] The Law of Succession Act cap 160
[44] See for example Kenyatta (n 18 above) (describing inheritance patterns among the Gikuyu)
[45] Kenyatta (n 18 above)
[46] *In the Matter of the Estate of Mutio Ikonyo (deceased)* Machakos High Court Probate and Administration Number 203 of 1996 (unreported), the court held that a married daughter of the deceased was not entitled to a share of the estate. According to Mwera J the married daughter, being a Kamba, ought to have known that under Kamba customary law only unmarried daughters or those divorced (and dowry returned) could claim to inherit. Before the court of appeal intervened in the case of *Rono v Rono* a female judge had invoked customary law to deprive the deceased's daughters from inheriting their deceased father's estate on equal footing with their brothers. See *Rono v Rono* Eldoret High Court Probate and Administration Cause No. 40 of 1998 (unreported); see also the court of appeal decision of *Mary Wanja Gichuru v Esther Wach Gachuhi* Civil Appeal No 76 of 1998 (unreported) where the court affirmed the Kikuyu custom of patrilineal inheritance.
[47] It amounts to "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by ... sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description." See s 82(3) of the repealed Constitution and s 27(4) of the new Constitution

with the rules of intestate succession in section 35 to 38. The remaining estate will also be subject to the same rules of distribution.

3.3 Customary law and practices

Customary law and practices have both a constitutional and statutory basis.[48] While the old constitution purported to guarantee the right to equal treatment and non-discrimination it limited that right with respect to "personal law." Section 82(1) provided that "no law shall make any provision that is discriminatory either of itself or in its effect", subsection 4 of the same section exempted laws that made provision "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of *personal law*." Further the subsection excluded laws that provided "for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons." The above two provisions were given statutory fiat by the Judicature Act which directed that the courts

> shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.[49]

Considering that customs have been the locale of women's discrimination in Kenya, their constitutional and statutory bases simply legitimise the gender biases inherent in them. This has more significant ramifications in a legal system infused with a culture of judicial restraint, because instead of becoming liberators, courts become instruments of subjugation. The case of *Otieno v Ougo & Another*[50] shows how courts straddled the chasm between a debilitating customary law principle and a liberating human right ideal. The appellant was the widow of one S.M. Otieno, a sometime prominent Nairobi lawyer. A tussle ensued between her and her husband's relatives as to who had the right to bury the deceased and where such burial was to be conducted. The appellant claimed she had such a right to bury her deceased husband on the basis *inter alia* that she was his wife. The respondents, in this case, the appellant's in-laws, argued that as members of the clan from which the deceased had hailed, they had such right based on the principles of customary law applicable to them. Under that custom the clan took responsibility of burying its deceased members. The court agreed and held that the appellant did not have such right because she never became the head of the family when her husband died. The court stated that "the appellant as the deceased's wife has to be considered in the context of all wives married to Luo men irrespective of their lifestyles who become subject to the customary laws." The effect of the holding was that a woman married to an

[48] S 82(4) of the constitution (now repealed) and s 3(2) of the Judicature Act
[49] S 3(2) Judicature Act (n 48 above)
[50] *Otieno v Ougo* (n 17 above)

African man was subjected to the customs of her husband and, specifically as the court suggested, was wholly subsumed into her husband's culture. In the present case custom dictated that a wife lost her autonomy and had no power to make decisions relating to the burial of her husband since customs ordained that the clan should take over. The court rejected any insinuation that such practice was discriminatory on the ground that section 82(4)(b) allowed the application of customs in situations where they would otherwise be discriminatory. In the case of *Gichuru v Gachuhi*[51] the court affirmed and applied the Kikuyu custom of inheritance which it expressed to be patrilineal that only sons inherited their father's land. The Court of Appeal relied on a previous decision in determining the applicability of the custom, that of *Wambugu v Kimani*[52] where the court upheld the Kikuyu custom that a married woman could not inherit her father's property. In both the cases a principle of custom was applied to prevent a woman from inheriting her father's property. Such rule was discriminative because it never applied to married sons.

3.4 Inequalities in marriage

The claw-back clause in section 82(4) allowed the application of personal law in marriage among other matters. This coupled with the statutory framework on marriage made for the simultaneous operation of multifarious regimes of marriage laws in Kenya. There was civil marriage, Hindu marriage, Islamic marriage and customary marriage. Some of the marriage types provide a platform for the perpetuation of various discriminative practices against women. Theoretically the law sees the parties to a marriage in equal terms but in reality and depending on the regime in question the parties may not be in equal terms during the marriage.[53] Bride price is central to the formalisation of marriages in many Kenyan communities. However it has been shown that quite often bride price no longer represents an important formal step in a marriage but rather is a source of an imbalance in the relationship of the parties to the marriage. Evidence suggests that there is likelihood that payment of bride price imbues in men a false sense of ownership over the bodies of their wives.[54]

In a study conducted in Nakuru town, it was clearly established that some men physically abused their wives because they believed that the fact of payment of bride price entitled them to do so.[55] The imbalance created in such a situation also means that women are often powerless in terms of sexual relations in the marriage meaning that they cannot make decisions consistent with protection of their reproductive health. Customary law marriages are potentially polygamous. So too are Islamic marriages. Polygamy quite often breeds

[51] Civil Appeal No 76 of 1998 (unreported)
[52] [1988-1992] 2 KAR 292
[53] For example a system that allows polygamy potentially exposes women to certain distinct imbalances that may result in discrimination.
[54] CREAW, *Bride-price: is it modern day slavery?* (no date)
[55] See for example Ruth Aura Odhiambo, 'Intimate terror: a case study of the law versus the lived realities of battered wives among the Luo community living in Nakuru, Kenya.' Unpublished PGD dissertation, University of Zimbabwe, 2000

inequalities.[56] First off, the fact that it is men who are free to marry more than one woman and not the other way round is in itself a function of the socially defined gender roles in the society. A man having multiple marital partners appears acceptable in the society but not the other way round. Thus polygamy subordinates women and creates a situation where women are treated as less than equal members of the society.[57] They appear not to have the right to engage in the same practices that men do yet they are equally human.[58] Coupled with the institution of bride price polygamy merely accentuates the gendered power imbalances.[59] Because of patriarchy women in polygamous relationships are less likely to be engaged in formal employment or otherwise gainfully employed. The result is likely to be a dependency on the husband for sustenance. With limited shared source of income, such women are not adequately provided for hence exacerbating the inequalities that already exist in the family.

In certain cultures, women do not choose their partners in marriage in contradiction to their right of freedom of association. An example would be the practice of widow inheritance prevalent among, say, the Luo of Western Kenya.[60] It is cultural that if a woman's husband dies a male relative takes upon the responsibility of the dead husband by marrying the widow.[61] Often the widow has no choice over whom she gets into that relationship with the decision being made by other, often male, members of the family.[62] Not only does the practice infringe on a widow's freedom to choose but also exposes her to various risks such as HIV infection.[63] Widows are usually powerless in many of such situations because a refusal to accept to be inherited would likely spell doom to their social security.[64] The repercussions might include being ostracised from the community with the attendant inability to access or use property left behind by her deceased husband.[65] To secure their interests and that of their children widows would be forced to agree to such levirate institutions.[66]

3.5 Matrimonial property

Kenyan law has been unclear on the rules for division of matrimonial property hence providing an opportunity for replication of gendered stereotypes. The lack of a statute

[56] T Brooks, (2009) 'The problem with polygamy' 37 (2) *Philosophical Topics, 109-122* (noting that "Polygamy… fails to treat wives as equals with their husbands, denying women the same rights, liberties, and opportunities available to men. Therefore, polygamy represents an unjustified asymmetry of power between men and women: polygamy should be banned"; see also S Nakitto, 'Polygamy in the Domestic Relations Bill 2003: A Barrier to the Women's Human Rights in Uganda?' Unpublished LLM thesis University of Nottingham 2007
[57] Brooks (n 56 above)
[58] Brooks (n 56 above)
[59] Brooks (n 56 above)
[60] CREAW, *Wife inheritance: a death sentence behind the mask of culture* (2008) 6
[61] CREAW (n 60 above)
[62] CREAW (n 60 above)
[63] CREAW (n 60 above) 3
[64] CREAW (n 60 above) 3
[65] CREAW (n 60 above) 3
[66] CREAW (n 60 above) 3

spelling out applicable principles meant that courts had to fashion some form of guidelines.[67] Being in a common law jurisdiction Kenyan courts had to import English law for assistance.[68] The English Married Women Property Act ("MWPA") of 1882 was imported as a statute of general application to fill in the lacuna.[69] The MWPA affirmed a married woman's capacity to own property in her own name separately from her husband.[70] It granted power to the court to consider the respective shares of the parties to the property following a divorce.[71] Using the MWPA and applicable English cases Kenyan courts developed a set of principles to be applied in matrimonial property matters. Progress had been incremental but measured. Until recently, following a Court of Appeal decision it would have been possible to argue that the law had developed in response to the specific problems faced by women in matrimonial property matters. Through a careful pruning of English cases, and use of principles of contract and equity, Kenyan courts had laid down the rules that would be applicable generally in matrimonial property issues.[72]

Generally where a party came into the marriage with their own separate property then unless there had been some conveyance of the same to the other party the property remained singly owned at the dissolution of the marriage.[73] However property acquired during the subsistence of the marriage would have to be apportioned between the parties. The first consideration would be whether a claimant made a financial contribution towards acquisition. Such financial contribution might be direct or indirect. It would be direct when a party put in money directly into its acquisition in which case the court would simply have to determine the proportion of that contribution. It would be indirect if one of the parties spent money in other matters that the acquirer of the property would otherwise have had to cater for. The principle of indirect financial contribution was characterised in the case of *Karanja v Karanja*[74] as follows:

> *[P]ayments by the wife need not be direct payments towards the purchase of property, but may be indirect such as the meeting of household and other expenses including expenditure on clothing for the wife and children and the education of the children which the husband would otherwise have had to pay...*[75]

The *Karanja* case stood for the principle that in division of matrimonial property the court would look to the financial contribution made by the parties whether directly or indirectly to

[67] Kenyan courts long ago decided that they would use the English Married Women's Property Act of 1882. In the case of *I v I* (1971) EA 278 Justice Trevelyan held that the said statute was applicable in Kenya as statute of general application as ordained by s 3 of the Judicature Act. Since then Kenyan courts have resorted to the Married Women's Property Act particularly s 17 thereof as the statutory basis for determining the respective entitlements of parties in a failed marriage. See e.g. *Karanja v Karanja* (1975) KLR 307.

[68] Kenyan courts have relied on a long line of English decisions to develop their own jurisprudence on the division of matrimonial property. See e.g. the *Karanja* case (n 67 above)

[69] See the case of *I v I* (n 109 above)

[70] Married Women's Property Act 1882 s 1

[71] Married Women's Property Act s 17

[72] See the *Karanja* case (n 67 above) (discussing several English cases on matrimonial property)

[73] Ordinary principles of contract would apply in such a case.

[74] (n 67 above)

[75] Emphasis added

the acquisition of the property. Indirect contribution would include the wife's expenditure in maintaining the home, educating the children or paying for other expenses such as food and clothing for the family hence relieving the husband from shouldering that burden and perhaps applying his earnings to the acquisition of property.

Subsequent cases recognised that in the case of women, proving financial contribution whether direct or not might be problematic. In view of the fewer opportunities that women got in a patriarchal society, they were less likely to be suitably educated for a market oriented economy. Fewer opportunities for gainful employment meant that women would not likely have a source of income necessary to prove financial contribution. What would be left then would be to look at other forms of contribution that might be made by a woman to the family; the sort of work that a wife might do at the home that indirectly contributes to the acquisition of the property. This point was explored and accepted by the Court of Appeal in a number of cases. For example in *Nderitu v Nderitu*[76] the issue was whether a court would be entitled to take into account the domestic and mothering chores of a wife in the home in determining her respective share in the matrimonial property. In holding for the appellant the court held that the indirect contribution by a spouse need not be monetary. Justice Kwach relied on earlier Court of Appeal decision in *Kivuitu v Kivuitu*[77] which, in his view, set out the law on indirect contribution. Thus "running of the house" in the case of an urban housewife or "tilling the family land and producing either cash or food crops" in the case of a rural wife were the types of indirect non-monetary contribution that a court would have to look at and "assess the value to be put on the wife's non monetary contribution." Justice Kwach recognised that a wife's contribution especially in Kenya will more often take the form of "a backup service on the domestic front rather than direct financial contribution." In effect therefore a court would have been perfectly entitled to take into account any form of contribution whether direct or indirect, monetary or non-monetary.

This position was favourable to women as it recognised the special circumstances that Kenyan women found themselves in when they get into a marriage. However the Court of Appeal has since "clarified" the law on the issue of indirect non-monetary contribution. Following the decision of a five-judge bench in *Echaria v Echaria*[78] the law is that a court was not entitled to look at non-monetary contribution of a spouse because that rule as purportedly created in the case of *Kivuitu v Kivuitu*[79] was not applicable in Kenya. In fact the Court of Appeal held that the rule that a court can look at the non-monetary contribution of a wife such as child-bearing roles was not part of the ratio in the *Kivuitu* case but was a statement made *obiter*.

[76] Civil Appeal No 203 of 1977 (unreported)
[77] [1991] KLR 248
[78] Civil Appeal No 75 of 2001; [2007] eKLR
[79] See the *Karanja* case (n 67 above)

3.6 International human rights standards

Prior to the 27th August 2010[80] the sources of law on Kenya were, as set out in the Judicature Act: the constitution; acts of parliament; some specified UK statutes; where no written law exists, the substance of the common law, doctrines of equity and statutes of general application in force in England on 12th August 1897; and finally customary law.[81] Kenyan courts had held for a long time that no legal principles outside this framework would be applied as a source of law. In particular it had been decided in the case of *Okunda v R*[82] that international law and principles did not form part of Kenyan law unless they were domesticated. The principle that international law only applies upon domestication, i.e. the dualist principle of international law, is one that has faithfully been affirmed and re-affirmed by Kenyan courts over time.[83]

However Kenyan courts appeared to have been relaxing the restrictive approach to international legal principles particularly in the field of human rights. The court's *obiter dicta* in the *Echaria* case certainly recognised the need to rely on principles of international law especially those set out in treaties ratified but not yet domesticated, and specifically so in women's rights issues. The court was rather emphatic on this issue in the case of *Rono v Rono*,[84] a dispute over inheritance of the estate of an intestate polygamous man where a High Court had apportioned more property to the sons as opposed to the daughters. On appeal the Court of Appeal stated that while the constitution outlawed discrimination on the basis of sex, this protection was taken away by the very constitution allowing the application of discriminatory personal and customary laws. The question was whether this was proper within the circumstances of the case and the country's constitutional law framework in general. The court determined that it had to consider the applicability of international law in determining the issue of distribution. It noted that Kenya had ratified without reservation a number of international treaties that outlawed discrimination on the basis of sex. In particular the *Convention on the Elimination of all Forms of Discrimination against Women* and the *African Charter on Human and People's Rights* were instruments that were very categorical about the obligation of all state parties' to eliminate practices and laws that discriminated against women.[85] The court noted that having ratified these instruments Kenya had amended its constitution to include sex as one of the grounds of discrimination that was not allowed. But the instruments had not yet been domesticated into the Kenyan legal system. The issue

[80] This is the date when the new constitution came into force. See Legal Notice No 133 of 2010 on the promulgation of the new constitution.
[81] See s 3 Judicature Act
[82] (1970) EALR 18
[83] The *Echaria* court deliberately eschewed the inconvenience of having to decide whether or not to apply international law even after recognizing that the various instruments ratified by Kenya showed that they "are progressive notions and a useful pointer to the future."
[84] Civil Appeal 66 of 2002; [2005] eKLR
[85] *Convention on the Elimination of all Forms of Discrimination against Women* GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980), entered into force Sept. 3 1981 arts 2 and 3; *African Charter on Human and People's Rights* adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, art 18(3)

then became whether international law treaties ratified by Kenya but not domesticated could nevertheless be applicable as a source of law in view of the provisions of section 82(4) of the constitution and section 3(1) of the Judicature Act. The court held that "both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation."[86]

Thus by 27th August 2010 the law as it stood was that courts in Kenya could resort to international treaties to which Kenya was a party and where no reservations had been entered. The decision was a significant milestone insofar as the enforcement of human rights was concerned. International principles could be used as a standard for local law by courts involved in the determination of disputes over rights. Laudable as it was the position was still tenuous because first there had to be a judicial determination on a policy or decision to weigh its legality. Secondly, courts could not necessarily be relied on to develop uniform standards on the applicability of international law having regard to the rigours of litigation. The process of developing jurisprudence on the application of international legal norms especially those that had not been reduced into treaties would be rather slow and perhaps uneven. There was always a need for a definitive constitutional statement on the issue to guide both private and public actors when dealing with human rights and particularly the rights of women.

3.7 Sexual and gender-based violence

Women and girls bear the brunt of violent conduct in the Kenyan society.[87] The causes are varied as a study in Nakuru established.[88] Cultural and social stereotypes contribute in no small way to physical and sexual violence against women and girls.[89] Wife chastisement is a cultural practice that receives endorsement from a significant portion of Kenyan men and some women.[90] Apparently it is the husband's role to "straighten up" his wife whenever she steps out of the way.[91] Abuse of alcohol and drugs has also been identified as a source of such violence. Economic imbalances in the family may lead to violent confrontations.[92] For example, when a husband is the bread earner with a wife solely dependent on the husband's largesse, there may be a tendency for the husband to control use of what is given out for use in

[86] At least one high court considered and followed the reasoning in the Rono case. *In Re the Estate of Lerianka ole Ntutu* Succession Cause No 1263 of 2000; [2008] eKLR the court considered the applicability of international law in the face of contradictory constitutional and statutory law provisions. Here the sons to a deceased intestate sought to exclude their sisters from a share in their father's estate on the ground that Maasai customary law governed the inheritance and based on its provisions, daughters were not entitled to inherit their father's property. The court disagreed. It had to consider the effect of the claw-back clause of s 82(4) on the ban on discrimination on the basis of sex imposed by s 82(3) of the then constitution. Drawing inspiration from the *Rono* case, the court held that s 82(4) could not have been meant to allow discrimination on the basis of sex as defined in s 82 (3).

[87] See for example *Report of the commission of inquiry into post-election violence* (2008) 237

[88] Odhiambo (n 55 above)

[89] Odhiambo (n 55 above) 19

[90] Odhiambo (n 55 above)

[91] Odhiambo (n 55 above) 20-21

[92] Odhiambo (n 55 above) 23

the family. Incidences have been reported where a man would chastise his wife for supposedly misusing the resources.[93] Sexual and gender-based violence revolves around patriarchal notions about the roles of men and women in society by which the man is in control and the woman is the subject beholden to the whims and wishes of the man.[94] Since patriarchy imbues a notion of superiority of man over woman, the violence directed towards women may easily be rationalised as normal. For example wife chastisement may be explained simply as a manifestation of the man's natural leadership role.[95] Sexual violence such as rape may be rationalised as a means of disciplining a woman or girl for dressing provocatively.

The significance of gendered power relations is that they also determine official response to violence against women. Wife battery is relegated to the realm of the "private" or "domestic"; a matter to be resolved within the confines of the bedroom or if grave, within the extended family structure or at worst using non-formal interventions like the church, elders etc.[96] Official structures, themselves influenced by the all too familiar gendered stereotypes, become indifferent to women's reports about violence perpetrated on them.[97] The law on its part either simply ignores women's and girls' plight or creates a purportedly neutral framework that does not appreciate the unique experiences that women face in our society. Studies in Kenya seem to vindicate this argument. For example a study on the institution of bride price in marriages indicated that very often women experienced some form of violence related to its payment or non-payment.[98] Unfortunately the inappropriate responses by the official structures discouraged complaints by the victims.[99] Violence against women is routinely misrepresented as a non-concern for the police resulting in cases being processed through other non-formal mechanisms that then reproduce prejudices against women.[100]

While the Sexual Offences Act sought to respond to the specific challenge of sexual violence there is as yet no targeted measure that seeks to deal with other forms of violence against women and girls.[101] The SOA consolidated the law relating to sexual offences in Kenya. It redefined the offense of rape to remove the ambiguities that existed in the then applicable law, the Penal Code.[102] It also clarified other offences that were up till its passage not clear or poorly defined hence less effectively enforced. In addition it created a whole new set of

[93] Odhiambo (n 55 above) 23
[94] Odhiambo (n 55 above) 19
[95] Odhiambo (n 55 above) 19
[96] Odhiambo (n 55 above)
[97] Odhiambo (n 55 above) 40
[98] CREAW (n 54 above)
[99] Odhiambo (n 55 above) 40
[100] Odhiambo (n 55 above) 40
[101] See the Sexual Offences Act No 3 of 2006 the preamble of which provides that it is an Act of Parliament meant to "make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes."
[102] For example s 3(1) defined rape in a much broader manner than the Penal Code provisions it repealed.

offences and basically revolutionised the entire regime of law on sexual offences.[103] It enhanced the sentence in the case of certain offences and provided a framework for effective implementation of the law on sexual offences.[104] Many of the new provisions were intended to be a response to the inadequacies in the law on sexual violence on women; recognising that women and girls bore the greater brunt of sexual violations in Kenya.

3.8 Social and economic rights of women

Kenya's constitution did not recognise socio-economic rights as a distinct category of rights capable of not only being defined but also enforced in the country. The focus was political and civil rights. However the link between civil and political rights on the one hand and the social and economic status of citizens is not fictional.[105] Indivisibility of human rights means that all rights are intertwined.[106] The right to life for example means little if the subject is unable, through official action or inaction, to access basic needs such as food, clothing and shelter.[107] Likewise that right is hollow if the official action or inaction compromises the health of citizens e.g. through non-provision of health care services personnel, institutions, implements, personnel and so on. Where citizens do not access educational opportunities they will not be able to apply themselves usefully in a society where technology quite often defines lifestyles. If social and economic rights mean nothing for the Kenyan society as a whole, then for women and girls, the situation is bleaker. Women and girls face disproportionate social and economic burdens that are broadly traceable to age-old stereotypes that prevent women from accessing opportunities for advancing themselves. Government statistics have consistently established that of the number of poor people in Kenya, majority are women.[108] Women's poverty simply exacerbates the inequality they face generally in the community.

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[103] For example sexual assault, s 5; attempted rape, s 4; compelled or induced indecent acts, s 6; gang rape, s 10; child trafficking s13; child sex tourism s 14; child prostitution s 15; child pornography s 16 etc.

[104] Rape attracts imprisonment of between 10years and life s 3(3); Sexual assault 10 years imprisonment that can be enhanced to life, s 5; Indecent assault- 5 years or less, s 6; Defilement of a child 15 or 20 years or life depending on the circumstances, s 8; attempted defilement, 10 years, s 9; gang rape, 15 to life, s 10 etc

[105] See for example Z Celumusa 'The extent, if any, to which socio economic rights are enforced in South Africa: lessons from the judgments of the constitutional court', 1 *OIDA International Journal of Sustainable Development* 71-75 http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html (accessed on 10th November 2010); see also S Fredman, (2009) 'Engendering Socio-economic rights' 25 South African Journal of Human Rights http://ssrn.com/abstract=1631765 (accessed on 11th November 2010); Eric C. Christiansen, 'Adjudicating non-justiciable rights: socio-economic rights and the South African constitutional court' http://ssrn.com/abstract=999700 (accessed on 11th November 2010)

[106] O A Oladimeji, 'Economic, social and cultural rights: rights or privileges?' http://ssrn.com/abstract=1320204 (accessed on 10th November 2010) ("the distinction between civil and political rights and economic, social and cultural rights on the ground of economic resources is untenable as all human rights require substantial part of the state resources for implementation.")

[107] Oladimeji (n 103 above)

[108] J Kiringai et al, 'The feminisation of poverty in Kenya: is fiscal policy the panacea or achilles' heel?' *A paper presented during the 5th PEP Research network general Meeting June 18-22, 2006, Addis Ababa, Ethiopia*, http://www.pep-net.org/fileadmin/medias/pdf/files_events/5th_ethiopia/Kiringai.pdf (accessed on 25th November 2010).

The pre-2010 constitutional framework did not recognise socio-economic rights at all. For women, with their historical exclusion from the mainstream society, this failure had significant consequences. While the constitution seemingly gave leeway for the implementation of corrective measures such as affirmative action, the amelioration of the socio-economic status of women required more than a mere exception to the general bar of discrimination in the constitution. There was need for a more detailed framework of law that specifically called on institutions to take positive measures to rectify the imbalances that have resulted in the historical exclusion of women from the mainstream society. Sectoral interventions that were effected in education for example required a firm constitutional backing rather than non-binding policy statements.[109]

4. Gender equality in the new Constitution

4.1 General framework

The search for a new constitutional framework in Kenya has been a long one.[110] Starting minimally from immediately after independence the struggle reached a crescendo during the regime of Daniel arap Moi, Kenya's second president.[111] While Kenyans suffered generally from bad governance and a lack of respect for the rule of law, the plight of women was worse. Studies have indicated that in regimes that habitually abuse human rights women bear the greater burden of effects of poor governance.[112] Thus in a non-democratic system, women are doubly disadvantaged in political decision-making. Where the government habitually and violently puts down political dissent, the frequency of sexual and physical assaults on women goes a notch higher. Where law disregards social and economic rights the system cannot shield the poor, majority being women, from the ravages of poverty.[113] Politically repressive regimes stifle the democratic space, do not allow for alternative ideas and generally limit the enjoyment of civil and political rights. Women are less likely to have political representation in such a regime. Where women's voices are locked out of the political decision-making process they cannot influence the development of policies in a way that responds to their unique needs and caters for their specific interests. Thus legal and policy frameworks will likely be discriminative against women. The drive towards a new constitution was thus as much a struggle for the emancipation of women as it was of the country as a whole.

[109] For example the Ministry of Education has implemented an affirmative action policy whereby girls get admitted to university with lesser points than boys. See Ministry of Education Science and Technology (n 9 above) 249

[110] See generally W Mutunga *Constitution making from the middle: civil society and transition politics in Kenya*, 1992-1997 (1999); see also Committee of Experts on Constitutional Review *Final report of the committee of experts on constitutional review* (2010)

[111] Mutunga (n 116 above)

[112] See for example UNDP, *Women and Political Participation: 21st Century Challenges*, (2000)

[113] The repealed constitution made no provision for socio-economic rights.

The 2010 constitution is arguably the most pro-citizen framework that Kenya has or will probably ever have. It encapsulates principles of social justice and inculcates a culture of respect for human rights.[114] While it disperses executive and legislative power to many institutions at the national and local levels to prevent abuses and enhance a democratic culture, it also places citizens at the centre of governmental decision-making.[115] The Constitution requires that service to the public be the focus of bureaucratic decision-making processes.[116] It frowns upon misuse of public power for private gain and seeks to open up governance to public scrutiny if not participation.[117] But fundamentally the 2010 Constitution includes a bill of rights with a rather expanded list of fundamental rights and freedoms.[118] The bill of rights transcends the classical notions of human rights that were limited to civil and political rights only and embraces the concept of social, economic and cultural rights.[119] Such an expanded list of entitlements clearly responds to the specific needs of women. For women and girls, there is even more to celebrate. The Constitution charts out rather targeted measures that deal with the traditional exclusion Kenyan women have hitherto endured. It requires affirmative action measures to be taken at various levels to ensure that women are included in decision-making processes.[120] It sets aside a number of slots in political institutions which should mandatorily be filled by women.[121] It variously exhorts public institutions and agencies to avoid taking measures that discriminate against women and girls.[122] In addition it sets up various institutions that should oversee the implementation of the new gender responsive framework. In the next part we discuss the specific provisions of the Constitution and assess how they might change the lot of Kenyan women so far as gender equality is concerned.

4.2 Fundamental values of the state

The 2010 constitution is steeped in the values of social justice and respect for rights. Thus the preamble recognises that Kenyans aspire "for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:" Some of the standards recognised as forming the national values and principles include "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised."[123] Of course the preamble and national principles generally do not create justiciable rights but they point out the fundamental values that underlie the Kenyan constitutional dispensation.[124] Specifically however all state organs, state officers and public

[114] See for example Constitution of Kenya, Preamble
[115] Constitution of Kenya, chapter 11
[116] Constitution of Kenya s 232
[117] See Constitution of Kenya chapter 6
[118] Constitution of Kenya chapter 4
[119] Constitution of Kenya s 43
[120] See discussion below
[121] Constitution of Kenya chapter 7
[122] Constitution of Kenya s 27
[123] Constitution of Kenya s 10
[124] It may be argued that to the extent that the preamble and the national values and principles correspond with many of the rights in the constitution then they may at the very least be used to interpret certain provisions of the

officers and every other person are required to have regard to the national values and principles of government whenever they apply or interpret the constitution, or enact, apply or interpret any law or when they make or implement public policy decisions.[125] Thus those principles may also inform the interpretation of laws by the court in the event of a lacuna. In some jurisdictions such principles are expressed as directive principles of state policy and are explicitly unenforceable in courts. In India it has been argued that such values and principles are the goals that the state institutions should strive to achieve while observing fundamental rights and freedom.[126] In Kenya the national principles and values of governance are not specifically excluded from enforcement by the courts. Either way inclusion of such values in the constitution allows for a wholesome construction of constitutional rights and entitlements not to mention their standard-setting function.[127]

4.3 The bill of rights

Generally

The bill of rights is more nuanced and expansive than what has hitherto been the norm. It provides for a very wide array of rights and entitlements, a good number of which were alien to the previous constitutional order.[128] While there are general provisions that apply evenly to all, the constitution makes specific references to women in many of its provisions.[129] This is very significant as it does away with the hitherto applied gender blind language in many legal provisions. At any rate the bill of rights is very clear on its prohibition of discriminative acts and decisions.[130] Importantly the bill of rights, indeed the entire constitution, encapsulates within it the concept of social justice[131] essentially imposing obligations that require the political bureaucracy and private individuals where appropriate to think about the effect of their actions on the society as a whole.[132] Thus when Government agencies implements a policy decision they must as a matter of constitutional fiat have regard to the consequences of that decision on all, including the vulnerable marginalised portions of the society.[133] Fundamental too is the recognition that human rights inure to individuals by virtue of their being human and that the role of the state is simply to provide mechanisms for their

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law. in any event the Kenyan constitution does not explicitly state that the national values and principles may not be the subject of litigation. Comparatively the Indian Constitution provides that its directive principles of state policy shall not be enforceable in court. See Constitution of India article 37

[125] Constitution of Kenya s 10(1)

[126] See M P Singh and S Devya (2005) 'The constitution of India: symbol of unity in diversity', 53 *Jahrbuch des Offentlichen Rechts der Gegenwart* [Yearbook of Public Law, Germany] 649-686

[127] In India it has been held that the directive principles of state policy though not directly enforceable in court define and inform the content of fundamental rights and hence cannot be ignored when interpreting or applying the constitution. See Singh & Devya (n 132 above) 663

[128] For example social and economic rights under s 43

[129] For example the phraseology in s 27(3) of the Constitution leaves no doubt as to its intended beneficiaries.

[130] Constitution of Kenya s 27

[131] See Constitution of Kenya s 19(2)

[132] See for example s 10(2) provision on national values and principles of governance:

[133] Constitution of Kenya s 10(2)(b)

protection.[134] Thus where the government fails to avail the tools necessary for the realisation of human rights, it fails in its general obligation under the law.

Non-discrimination

Anti-discrimination principles are perhaps the most effective bulwark against oppressive public and private action. They provide the standard against which the legality of certain actions and decisions are measured. Thus it is that the constitution provides fundamentally that "every person is equal before the law and has the right to equal protection and equal benefit of the law."[135] This equality includes "the full and equal enjoyment of all rights and fundamental freedoms."[136] For the avoidance of doubt it provides that: "Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres."[137] This is clearly intended to reverse the historical exclusion that women have endured in the society.

But merely providing for equality is not sufficient for, as it has been said, there is nothing more unequal than the equal treatment of unequal people.[138] More practical measures need to be effected in this equality is to be meaningful. For this reason the constitution in s 27(6) imposes an obligation on the state to "take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination." In terms of political representation s 27(8) provides a numerical benchmark in that "the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender." The state is thus under an obligation to ensure that historically marginalised groups like women will firstly, be free to participate in mainstream society including political leadership, and secondly, that certain positions will be reserved for them so that they do not have to suffer the rigours of unequal political competition. This is simply to allow them to "catch up" with those who have been in the game for a while and have had a head start. To "ensure greater certainty" as far as the obligations of the State are concerned Part 3 of chapter 4 provides for the "specific application of rights" of certain of the rights in the bill of rights to certain groups of persons. Section 56 is expressed to apply to "minorities and marginalised groups." While it offers no definition for "minorities" the constitution defines a "marginalised group" to mean "a group of people who because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)."[139] Since

[134] Constitution of Kenya s 19(3)
[135] Constitution of Kenya s 27(1)
[136] Constitution of Kenya s 27(2)
[137] Constitution of Kenya s 27(3)
[138] A quote attributed to Thomas Jefferson, 3rd President of the United States (1743 - 1826), see *Quotation Details*, at http://www.quotationspage.com/quote/34758.html (accessed on 30th October 2010)
[139] See Constitution of Kenya s 260

women have traditionally been discriminated by "laws or practices" the affirmative action programmes defined by the section should equally apply to them.[140]

To free women and make them participate in the public life the constitution bars discrimination even in the private sphere.[141] The family for example has been identified as the location where the seeds of inequality are sown.[142] The roles assigned to boys and girls simply reinforce societal perceptions about men and women. In private companies, employers are likely to craft discriminatory contractual terms. Equality in the private and public sphere makes for a more robust and just society. Thus while the State is barred from discriminating "directly or indirectly against any person on any ground, including,...sex, pregnancy, marital status, health status,... disability,... dress", private persons are also under the same obligation. The ban on discrimination extends to acts, laws, decisions and policies that are either themselves discriminatory or otherwise produce discriminative consequences when applied. Thus the ambit of activities is transcends legal provisions and will capture the day to day public and private decisions.[143]

These obligations apply likewise in labour relations. In addition to guaranteeing the rights of employees set out in s 41, employers must comply with the general non-discrimination clauses of the constitution. This section must also be read together with the Employment Act which has more elaborate provisions to guide employment relations. This Act requires the relevant government officials and institutions to promote fair labour practices in all sectors of employment. Further it bars discrimination of any employees. Hence the s 3(3)(a) provision that "No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status." Exempted from this are affirmative action plans that are "consistent with the promotion of equality or the elimination of discrimination in the workplace." The Act also proscribes acts of sexual harassment against women recognising that this is a problem that has continuously dogged women at the workplace.[144]

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[140] Section 56 provides that:

> The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—
> (*a*) participate and are represented in governance and other spheres of life;
> (*b*) are provided special opportunities in educational and economic fields;
> (*c*) are provided special opportunities for access to employment;
> (*d*) ...
> (*e*) have reasonable access to water, health services and infrastructure.

[141] Constitution of Kenya s 27(5)

[142] Odhiambo (n 13 above)

[143] See Constitution of Kenya s 20(1) providing that "The Bill of Rights applies to all law and binds all State organs and all persons."

[144] See s 6(1) of the Employment Act relating to sexual harassment

Provisions on citizenship under the repealed constitution directly discriminated against women in matters of citizenship. Section 91 of the repealed law stated that "A woman who has been married to a citizen of Kenya shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya." However there was no corresponding entitlement for a non-Kenyan man married to a Kenyan woman. The effects of this discrimination were profound. Firstly the wife could not confer citizenship status to her husband.[145] Secondly, the children of the marriage might not assume their mother's citizenship especially if they were born out of Kenya. If they were born in Kenya they might choose to assume the citizenship of their father's country. This might introduce more complications in cases of separation or divorce between the couple as the father might chose to impose his nationality on the children hence making it difficult for the wife to access them. If the couple live out of the country and assuming the children have non-Kenyan passports as they are more likely to, it would that every time the family visited the country the children would be treated as aliens, much like the husband and would thus be subjected to certain legal restrictions. For the children to live for longer periods in the country they would require formal authorization from the immigration officials such as residence permits in addition to being placed to certain additional legal disabilities that non-Kenyans face. The residence permits might in turn require to be renewed periodically. In the meantime their mother would have to undergo anxious moments every time the authorities had to determine her children's applications for entry and residence. Further should the authorities decline their application for one reason or another necessitating their deportation or removal the mother might be required to accompany them to their father's country.

The inconvenience placed on a mother is such a position is not only debilitating but also unfair. It produces a discriminative effect especially in view of the fact that the same treatment is not meted on a Kenyan man married to a foreign woman. It is discrimination based on sex simpliciter. It is denying women privileges and immunities accorded to men for no reason than that they are women. It is discrimination that has a cultural background that unfortunately finds expression in the law. The cultural notion is patriarchal. In many of Kenyan cultural practices a woman literally leaves her parents' home and moves into her husband's home. From then on she assumes her husband's identity and has none of her own. Having no identity she cannot pass any to her children.[146] Lineage being patrilineal her children assume her husband's identity. Conversely to a woman, a Kenyan man married to a foreign woman had the power to confer the right to apply for citizenship to his wife. He would not have to suffer the same hardship as a woman. His children would assume his citizenship automatically if born in Kenya. This lineage practice is what found expression in s 91 of the repealed constitution.

[145] See the Botswana case of *AG of Botswana v Unity Dow,* Civil Appeal No. 3 of 1991 (n 70 above)
[146] See for example the case of *Otieno v Ougo* (n 17 above).

The new dispensation ensures that this differential treatment of men and women based on their sex does not continue. Thus it makes elaborate provisions on citizenship seeking to redress discrimination of women. Marriage does not affect citizenship, whether subsisting or dissolved. Importantly though, s 14 allows both a mother and a father to confer citizenship status on a child whether that child is born in Kenya or not. Further s 15 is neutral insofar as it allows any person (with no distinction as to sex) who is married to a citizen (again with no distinction as to sex) for a period of seven years or more to apply to be registered as a citizen.[147] Thus the disability imposed on women previously by the repealed constitution no longer applies. Significantly subsection (5) provides for a retrospective reckoning of the time and other conditions for grant of citizenship.[148] Thus while the relevant time is the effective date i.e. 27th August 2010, citizenship may be granted even when the relevant conditions were fully or partially satisfied before the said date.

4.4 Civil and Political Rights

In terms S 28 every person has inherent dignity and the right to have that dignity respected and protected. Dignity has been defined in the dictionaries as ‘‘the quality or state of being worthy of esteem or respect.”[149] Dignity has to do with a person’s self-worth, how they fell about themselves. Dignity is inherent, it is in-born. Like many other human rights, self-worth inures in all human beings by virtue of their being human. It is neither created nor granted by the state or other humans. To treat someone with dignity means to respect that person as a human being regardless of their situation. Patriarchal cultures have tended to objectify women. They have reduced women into near-nothingness, people not deserving the privileges and advantages that exist in the society. In some traditions women occupy the status of children if not worse.[150] In a study conducted in Nakuru it men thought that they had a God-ordained responsibility to discipline their wives if they “strayed.”[151] Certain cultures decree that women cannot partake of certain foods. Others do not allow women to express their thoughts in public and so on. Such de-personalisation of women has at times found expression in the law. The Law of Succession Act in limiting a widow’s right to inherit her husband’s when she remarries sees women as something less of human beings. This objectification of women is at the core of women’s lower status in the society. The starting point for rectifying the inequalities women endure is to begin seeing as human beings, persons with their own individual existence and with a right to be respected as such. The constitution legitimises this entitlement hence providing a ground for legal redress in case of a violation. The right to dignity ties in with the right to freedom and security of the person as well as the right to privacy. Freedom and security of the person includes inter alia “the right not to be subjected to any form of violence from either public or private sources.” S 31 protects the

[147] See s 15
[148] S 15(5)
[149] *The American Heritage Dictionary of the English Languag*e 507 (4th ed. 2000). See also description of use in Wikipedia, “Dignity is a term used in moral, ethical, and political discussions to signify that a being has an innate right to respect and ethical treatment. ...” en.wikipedia.org/wiki/Dignity, accessed 30th October 2010
[150] Spencer (n 20 above)
[151] Odhiambo (n 55 above)

right to privacy. The section is broadly crafted hence privacy may include many other situations not contemplated in the section.

The violence that women sometimes face is traceable to cultural notions about the personhood of women. When women are not accorded personal dignity, they will be subjected to violence and humiliating or degrading treatment. It is for this reason that the same s 29 includes the right not to be treated in "cruel, inhuman or degrading manner." Respecting every person's dignity means that their privacy will also be protected. If someone is accorded respect based on their humanity then even their bodily integrity will be respected. Hence violence of whatever form should not be visited upon them. The Constitution has made it clear that not being subjected to violence is now a right and not a mere statutory injunction. Violations will thus create a right to seek redress.

Sometimes women are vilified as a group rather than singly. Certain publicly expressed opinions may be degrading to women-folk as a whole. Politicians in Kenya have time and again been caught on camera making either direct or metaphorical references to women's supposed inferiority.[152] While the freedom to express opinions is guaranteed under s 33 of the constitution the same is limited when it relates to advocacy of hatred that constitutes inter alia "vilification of others" or is based on any of the grounds of discrimination specified in the constitution, of course including sex.[153]

4.5 Property relations including matrimonial property

Even though the previous constitution purportedly provided for the right to property that right was never affirmatively proclaimed. In s 75, the then constitution merely circumscribed conditions under which an individual's property might have been acquired for public use.[154] The new Constitution affirmatively declares that "every person has the right, either individually or in association with others, to acquire and own property" of any description and anywhere in Kenya.[155] Subsequent provisions limit the Government's exercise of its eminent domain powers and circumstances under which an individual's use and ownership of property may be limited.[156] While this right is said to available to everyone it is obvious that its mere expression on paper has never been be sufficient. Under the old constitution every person presumably had the right to own and acquire land. But this bare provision never protected

[152] One Mr Kiraitu Murungi denounced European donor conditions on corruption by boldly proclaiming on TV that the US decision to freeze assets of public officials was "like raping a woman who is already too willing." See E Wax 'Kenya is buffeted by graft scandals: public confidence low after official resigns' *Washington Post* February 13, 2005; A21, available at http://www.washingtonpost.com/wp-dyn/articles/A19790-2005Feb12.html (accessed on 15th November 2010)
[153] Constitution of Kenya s 33(2)
[154] That section set out conditions under which the Government might acquire private property for public use.
[155] Constitution of Kenya s 40(1)
[156] Constitution of Kenya s 40(2)-(6)

women especially widows and divorced women albeit women in marital situations often found themselves at the receiving end of property rights violations by their spouses.[157] It was earlier shown that cultural patterns of inheritance generally prefer men over women. Patterns of property ownership suggest that men are more in control than women. They are either the registered owners of family property or the determiners of usage. Rules relating to division of property after divorce clearly favour men, a fact affirmed by none other than a bench of 5 (male) judges of the hitherto highest court of the land.[158] The fact that these biases persist to date means that there needs to be additional interventions that specifically respond to women's experiences.

With respect to family property the Constitution provides for rights of equality of a husband and wife "at the time of the marriage, during the marriage and at the dissolution of the marriage."[159] This equality of rights while encompassing many other matters should similarly apply to the parties' entitlement to matrimonial property. Thus it is anticipated that courts would adopt a different view with respect to the nature of women's contribution to matrimonial property. The court of Appeal in *Echaria v Echaria*[160] decried the supposed legislative non-responsiveness to the inequalities posed by the matrimonial property regime. The constitutional provision of equality of the parties even on dissolution of marriage should provide a starting point for the courts to fashion a more equitable matrimonial property rights regime. In addition such provision should also be useful in defining each party's claims while the marriage is subsisting. Thus, while a husband's name may appear in the register as the proprietor of family property courts should be able to use this equality requirement to stop any dealings intended to dispose of the property or limit the wife's access or use of the property or any interest arising therein. With respect to inheritance of land or other property the general anti-discrimination clauses should be used to strike down any law or practices that discriminate against women. Portions of the Law of Succession Act that treat women differently must now be measured against the standards of the current law.

Beyond these general provisions the Constitution has set out specific obligations that apply to land ownership and practices related to it. Thus in terms of s 60 land shall be held, used and managed on the basis of principles including equitable access, security of rights and importantly for women, "elimination of gender discrimination in law, customs and practices related to land and property in land." These principles should be implemented through a *national land policy* developed and reviewed regularly by the national government and through *legislation*."[161] The national land policy is to be developed by a National Land Commission established under s 67 while the legislation is Parliament's mandate. S 68

[157] See R A Odhiambo 'Strategies for civic education to promote land provisions in the constitution women's land rights' paper presented at a workshop on women and land rights, Sirikwa Hotel, Eldoret, UNIFEM 2010
[158] The *Echaria* case (n 77 above)
[159] S 45 (3)
[160] The *Echaria* case (n 77 above)
[161] Emphasis added

requires Parliament to "revise, consolidate and rationalise existing land laws", "revise sectoral land laws in accordance with the principles set out in Article 60(1)", and enact legislation to inter alia, "regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage." Parliament thus has a clear mandate to legislate to govern matrimonial property during and after marriage. Since the mandate entails "recognition and protection" of matrimonial property Parliament will have to devise principles that take into account the interests of the parties in the marriage and protect them. An opportunity has been availed for the State to frame laws that will ensure the abolition of discriminative practices on land. In addition that legislation or any other should "protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land." This should enable parliament protect those widows who are at risk of being disinherited by their husband's relatives for various reasons such as that they are are not culturally entitled to inherit the land in question.

The existing National Land Policy framework neatly fits into the broad framework of the constitution especially as regards women's rights to land. For example it has taken cognizance of gender equity principles in land issues as well as matrimonial property.[162] To anchor women's rights in the new dispensation on land and other productive resources and taking into account the fact that women are disadvantaged in land matters, the policy recommends certain measures that should inform any legislative initiatives on land including: enactment of appropriate legislation to ensure effective protection of women's land rights and other related resources; repeal of existing laws, regulations, customs and practices that discriminate women in relation to land; establishing a clear legislative framework to protect rights of women in issues of inheritance to land and land based resources; the requirement that legislation governing matrimonial property should make a provision for joint spousal registration of land rights, and for joint spousal consent to land disposals, applicable for all forms of land tenure; the requirement that legislation governing division of matrimonial property should also replace the Married Women's Property Act of 1882 with regard to women's property rights; the making of specific provisions to secure inheritance rights of unmarried daughters; legislation to ensure proportionate representation of women in institutions dealing with land at all levels; review of succession, matrimonial property and other related laws to ensure that they conform to the principle of equality between women and men; and appropriate legal measures to ensure that men and women are entitled to equal rights to land and land based resources during marriage, upon dissolution of marriage and after the death of a spouse.[163]

4.6 Political representation

Generally

[162] See Sessional Paper No. 3 of 2009 on National Land Policy paras 220-223 ; 224- 225
[163] See Odhiambo (n 163 above)

In addition to guaranteeing the political rights of everyone, the constitution has made very categorical pronouncements on women's participation in elective and other forms of politics. In s 21 the State is saddled with the "duty to address the needs of vulnerable groups within society, including women..." This obligation arises out of the recognition that women have been "disadvantaged by discrimination"[164] for a long time "because of laws and practices"[165] that have been in operation or are still in operation in the society. To fulfil this obligation the state will be required to implement practical measures to facilitate women's participation in the public life, inclusive of politics.[166] Seats will have to be reserved for women and certain quota requirements will have to be met. Women and other vulnerable groups will have to be facilitated by the State to enjoy the political rights enunciated in the constitution. For example the right to make political choices and to freely participate in elections based on universal suffrage will be more meaningful for women when the state implements additional practical measures that remove the barriers to women's participation in politics.

Many factors hinder women in political matters. In a study of women civic leaders in the Rift Valley it was established that women frequently have no financial bases sufficient to enable them mount vigorous campaigns when vying for political posts.[167] In addition women are frequently subjected to violence so as to intimidate them into giving up the quest for political office.[168] Coupled with patriarchal notions about the suitability of women to lead (sometimes expressed by women themselves) it is clear that the hurdles for women are a lot more than mere lack of opportunity. The constitution has made further elaborate provisions that will ensure that the State and public officials respond to the need to ensure fairness and equality in political decision making. These include provisions on representation in various institutions at the county and national level.[169] These must be read together with the entitlements in the bill of rights and will be discussed below.

Principles of the electoral system

Women's experiences in politics have been defined by the generally patriarchal make-up of the Kenyan society as a whole.[170] Deep-seated cultural beliefs and practises suggest that women should neither aspire to nor hold public offices.[171] The way in which the Kenyan society reacts to women's quest for political leadership betrays an age-old negative socio-cultural notion that women are only good performing nurturing roles within the home.[172]

[164] Constitution of Kenya s 260
[165] Constitution of Kenya s 260
[166] Constitution of Kenya s 27(6)-(8)
[167] Odhiambo (n 13 above)
[168] Odhiambo (n 13 above)
[169] Constitution of Kenya chapter 11 generally
[170] CREAW (n 36 above) 7
[171] Odhiambo (n 13 above) 52 notes that women are themselves beholden to these cultural stereotypes about their own abilities
[172] Odhiambo (n 13 above) 52

Women who venture into politics have to navigate significant obstacles propped up not only by their opponents but also by the society. Women have to react to demeaning and insulting language from their male and sometimes female opponents.[173] Coupled with that is the rather uneven playing field that poses inordinate burdens on women. For example, large sums of money are needed to mount political campaigns.[174] Women are generally incapable of raising capital that would be sufficient to mount credible campaigns.[175] Campaigns for political office are routinely violent affairs, physically and verbally, even for men.[176] The violence that women experience emanates from two levels; first from a generally violent political culture and secondly, from a patriarchal society that does not believe in leadership by females. The political rules of engagement, formulated as they are by men, reflect and respond to men's experiences thereby locking out women.[177] Unless the law tackles the structural and institutional barriers that prevent women from effectively engaging in politics no equality will be achieved.

The Constitution has fundamentally altered the system of government, and with it, the politics of the country. In terms of s 81 the electoral system is required to comply with *inter alia* the principles that "no more than two-thirds of the members of elective public bodies shall be of the same gender."[178] This guide ties in with the myriad affirmative action obligations imposed on the state.[179] The electoral system should also be based on free and fair elections which are "free from violence, intimidation, improper influence and corruption."[180] The Constitution contemplates a framework in which women will be able to vie for elective posts without fear for their physical and psychological well-being. It thus calls for the setting up of structures that would ensure women's safety in electioneering time.[181] Moreover it will be possible to hold accountable those who choose to use violence against women as a political tool.[182]

Political party framework

Hitherto political parties have been the vehicles through which Kenyans seek political office at all levels whether presidential, parliamentary or civic.[183] A prospective candidate had first

[173] See for example National Election Monitoring Unit, *The multi-party general elections in Kenya 29 December 1992: the report of the National Election Monitoring Unit* (1993) 82 ("without exception, all women candidates we observed were harassed by their male political opponents.")
[174] See CREAW (n 36 above) 8
[175] CREAW (n 36 above) 7
[176] National Election Monitoring Unit (n 179 above) 82
[177] CREAW (n 36 above) 10
[178] Constitution of Kenya s 81(b)
[179] See Constitution of Kenya s 27(6)
[180] Constitution of Kenya s 81(e)
[181] Constitution of Kenya s 81(e)(ii)
[182] Constitution of Kenya s 81(e)(ii)
[183] The repealed constitution required that a person had to belong to be nominated by a political party to qualify to vie for a post. See CREAW (n 80 above) and Odhiambo (n 13 above)

to secure nomination by a political party. However political parties in Kenya have generally tended to be undemocratic unaccountable outfits that sometimes exist for convenience. It is true that the Political Parties Act[184] sought to streamline political parties but it is questionable whether parties really complied with its requirements. Political parties are male dominated institutions. They are gendered. While some have included women within their structural ranks often this is no more than mere tokenism intended to camouflage the real powers behind them.[185] Those that have women as their chairs are few and far between.[186] Thus the avenue for entry into politics is restricted in the very first instance owing to the usual prejudices against women. The process of nomination often is as gruelling as the real elections if not worse. Routinely political parties shut out women through their nomination process either by requiring exorbitant nomination fees or failing to provide a nomination system devoid of favouritism, intimidation and harassment.[187]

To foster a culture of democracy and hence inclusiveness the constitution provides a basic framework for political parties.[188] Thus parties must meet certain constitutional standards if they are to participate in elections. In addition to representing a national character and upholding democratic principles through regular and free elections,[189] political parties must "respect the right of all persons to participate in the political process, including minorities and *marginalised groups*"[190] and more importantly for women they must "respect and promote human rights and fundamental freedoms, and *gender equality and equity*."[191] This creates a positive obligation on the promoters of political parties to address the gendered imbalances within their ranks. In addition all parties should promote the "objects and principles" of the constitution while upholding the rule of law.[192] Moreover a political party that seeks to confine its membership to a particular gender is prohibited. Similarly, a party that "engage[s] in or encourage[s] violence by, or intimidation of, its members, supporters, opponents or any other person" is proscribed under the constitution.[193] Where it is shown that a political party through its officials visit violence on other people or even tolerate violence meted out by its supporters then there will be ground for intervention under the Constitution.[194] It is contemplated that the Independent Electoral and Boundaries Commission will establish a code of conduct to govern political parties over and above any framework legislation that will be passed by Parliament.[195] Both of these frameworks should further refine the nature of political parties and their obligations in terms of promotion of women's roles in elective politics.

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[184] See Political Parties Act 2007
[185] CREAW (n 36 above) 7
[186] CREAW (n 36 above) 9; See also Odhiambo (n 13 above) 2-3
[187] CREAW (n 36 above); Odhiambo (n 13 above)
[188] Constitution of Kenya s 91
[189] Constitution of Kenya s 91(1)
[190] Constitution of Kenya s 91(1)(e)
[191] Constitution s 91(1)(f) (emphasis added)
[192] Constitution of Kenya s 91(1)(g)
[193] Constitution of Kenya s 91(2)(a)
[194] Constitution of Kenya s 91(2)(b)
[195] Constitution of Kenya s 92

There is an important innovation in the new constitution that should serve to ameliorate some of the difficulties fomented by political party frameworks. In terms of s 85 a person who is not a member of a political party or has not been such a member for at least 3 months before an election shall be free to stand as independent candidate. That person should of course satisfy other minimum requirements for election to the relevant body e.g. in case of election to the National Assembly, the support of at least 1,000 registered voters, and in case of election to the Senate, the support of at least 2,000 registered voters.[196] Should the political party prove impervious to a woman candidate it seems that she might take advantage of this opportunity to offer herself for election to a political position. The independent candidature offers women the opportunity to have a stab at a elective position without having to succumb to the gruelling demands that come with political party nomination. If she can raise the capital necessary to run a campaign or if she can be supported by organisations then it is possible that a woman candidate can vie for a political post on terms that are at least less restrictive than those presented by political parties. A similar opportunity has been created with respect to the county assembly.[197]

Structures of political representation

S 93 establishes legislative representation at the county and national level, through the Senate and National Assembly respectively. While each of them has its own competencies they together constitute the Kenya Parliament.[198] The National Assembly is made up of representatives of the 290 constituencies in the country who are elected directly by voters.[199] In addition, each of the 47 counties shall elect one woman to represent it in the National Assembly meaning that 47 seats are reserved for women.[200] Further, political parties are allowed to directly nominate 12 members to the National Assembly "to represent special interests including the youth, persons with disabilities and workers."[201] The quota system is also adopted for Senate which shall consist of 47 members directly elected by voters in the counties each county being a single member constituency together with 16 women representatives, two youth representatives, a man and a woman, two disabled persons representatives, a man and a woman, and the speaker.[202] Unlike in the National Assembly where the 47 women representatives are elected, the 16 in the Senate are nominated by political parties on the basis of the proportion of the seats held by their members in the Senate.[203] It is not clear whether the four members representing the youth and persons with

[196] Constitution of Kenya s 85
[197] Constitution of Kenya s 193(1)(c)(ii)
[198] Constitution of Kenya s 93
[199] Constitution of Kenya s 97
[200] Constitution of Kenya s 97(1)(b)
[201] Constitution of Kenya s 97(1)(c)
[202] Constitution of Kenya s 98
[203] Constitution of Kenya s 98(1)(b)

disabilities are nominated or elected but it would appear that nomination is preferred except that again it is not clear who does the nomination.

The creation of the two levels of government is intended to decentralise power down to the local level. The devolution process is itself subject to requirements of equality. Thus under article 174 it is said that among the objects of devolution include the promotion of democratic and accountable exercise of power.[204] One of the principles of devolved government is said to be gender parity.[205] Devolution is to be effected through a county government consisting of a County Assembly and County Executive.[206] The County Assembly is made up of representatives of the various wards elected directly by voters in the respective wards in addition to "the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender."[207] The latter should be nominated by political parties in proportion to the seats received by them in the county elections.[208] Executive authority in the county is to be exercised by an Executive Committee headed by a County Governor elected in the general elections.[209]

The general thrust however is that the Constitution deliberately seeks to ensure that women are included in political decision-making positions. Of course women would also be free to offer their candidature for direct elections to the National Assembly and Senate.[210] In such a case the framework under the new constitution anticipates that her candidature will not be bogged down by the structures, institutions and people involved in the whole election gamut. Thus political parties will be required to support her candidature or at least not frustrate it on grounds of sex. The party will be required to facilitate a nomination process that is free from undemocratic practices and violence. The national electoral structures should themselves provide a safe and level playing field as indeed contemplated in the Constitution. Suffice it to say that the Constitution as a whole imposes a general obligation o every person to respect its principles such inclusiveness, equality, democracy, open government, respect for others, respect for the rule of law and so on. Ultimately it is hoped that these new initiatives combined will result in an increase in women's representation in political offices which in turn should fundamentally alter the character of political decision-making in Kenya. This is moreso when it is considered that Parliament has a very specific constitutional mandate to pass legislation to promote the representation in Parliament of women among others.[211] This should provide an opportunity to refine the Constitutional requirements further.

[204] Constitution of Kenya s 174
[205] Constitution of Kenya s 175 and 197(1)
[206] Constitution of Kenya s 176
[207] Constitution of Kenya s 177(1)(b)
[208] Constitution of Kenya s 177(2)
[209] Constitution of Kenya s 179 and 180
[210] Constitution of Kenya s 97(2) and s 98(3)
[211] Constitution of Kenya s 100

Representation in appointive bodies

Flowing from the general obligation to ensure inclusion of both men and women in public positions[212] the Constitution has also elaborated the numerical requirements for the institutions it has established within its framework. For example article 127 establishes the Parliamentary Service Commission consisting of the speaker of the National Assembly as chairperson, a vice-chairperson, seven members appointed by parliament but nominated by the specified political parties at least three of whom shall be women.[213] Two other persons, at least one of whom should be a woman are then appointed by parliament to complete the structure of the PSC.[214] Another example is the Judicial Service Commission (JSC) which is responsible for among other things the efficient running of the Judiciary. Its composition is also expressed to include women representatives i.e. one of the two representatives of the Judiciary should be a woman.[215] One of the two persons representing the Law Society of Kenya should also be a woman.[216] Finally one of two non-lawyer members appointed by the President should be a woman.[217] One of the principles guiding the JSC in the performance of its functions is "the promotion of gender equality."[218] Another important body established is the Public Service Commission whose function relates to the creation and administration of public bodies and offices. While its composition is not specifically apportioned in terms of gender,[219] some of the principles that it should foster include fair competition and merit in appointments and promotion subject to "affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service" of men and women.[220]

4.7 Application, limitation, enforcement and interpretation of the bill of rights and the constitution

The constitution does not distinguish between the public and the private insofar as the bill of rights is concerned. In the previous dispensation there was a tendency to treat the rights in the bill of rights as entitlements against the state and public authorities only. The assumption always has been that the bill of rights is a bulwark between the government with its enormous powers and subservient citizens. The problem with this assumption was that it masked violations occurring in the private sphere as not being of concern by the constitution. The Constitution obliterates this private/public dichotomy and stresses that the bill of rights in particular "applies to all law and binds all State organs and all persons." The previous constitution not only lacked this injunction but also exempted personal and customary law from its anti-discrimination clauses.

[212] Constitution of Kenya s 27(8)
[213] Constitution of Kenya s 127 (2)(c)
[214] Constitution of Kenya s 127(2)(d)
[215] Constitution of Kenya s 171(2)(d)
[216] Constitution of Kenya s 171(2)(f)
[217] Constitution of Kenya s 171(2)(h)
[218] Constitution of Kenya s 172(2)(b)
[219] Constitution of Kenya s 233
[220] Constitution of Kenya s 232(1)(g) and (i)

In addition the Constitution gives significant leeway to courts to expand the reach of any other law to give effect to a fundamental right and freedom. Thus if a statute appears to be partially limiting a right in a manner not contemplated under the constitution a court would have a clear mandate to develop that statute to remove the inconsistency if possible and extend its application to the right consistently with the bill of rights.[221] Added on to that is the mandate that courts should adopt an interpretation that "most favours the enforcement of a right or freedom."[222] Furthermore, when interpreting the bill of rights, a court, tribunal or other authority is required to promote "the values that underlie an open and democratic society based on human dignity, equality, equity and freedom..."[223] Specifically with respect to women all state organs and all public officers have a duty "to address the needs of vulnerable groups within the society, including women..."[224] Even without a specific obligation the government and its officials are required to identify the special needs of women and implement measures that will alleviate the results of a history of women's marginalisation.[225]

While the Constitution provides a whole host of rights and entitlements citizens are unlikely to take any steps to enforce them if they do not have the resources to interact effectively with the court system. Thus the rules of enforcement of fundamental rights have been liberalised such that the most vulnerable members (and women are a vast majority of these) can invoke the court system to enforce their rights. It is not just the person claiming the right who has locus in the courts; other persons may approach the court on behalf of the victim of a violation.[226] Besides the Constitution has a very elaborate mechanism for limitation of rights.[227] The old constitution had a series of "claw-back" effects on many of the rights it provided for.[228] These "claw-back" clauses in the constitution had the effect of taking by one hand what they had given with the other.[229] A notorious example of course was s 82 which while purporting to outlaw all forms of discrimination based on categories including sex nevertheless exempted from the ban the application of personal and customary laws.[230]

The Constitution has changed the normative framework in terms of the hierarchy of laws. At the top the Constitution itself stands supreme.[231] Beneath it are all other laws including Acts

[221] Constitution of Kenya s 20(3)
[222] Constitution of Kenya s 20(3)
[223] Constitution of Kenya s 20(4)(a)(b)
[224] Constitution of Kenya s 21(3)
[225] Constitution of Kenya s 21(3)
[226] Constitution of Kenya s 22
[227] Constitution of Kenya s 24
[228] See generally K M'Inoti, 'The reluctant guard: the High Court and the decline of constitutional remedies in Kenya' *Nairobi Law Monthly* July 1991
[229] M'Inoti (n 234 above)
[230] Section 82(1) of the repealed constitution
[231] Constitution of Kenya s 2

of Parliament, county law, customary law and cases.[232] Of significance though is the introduction of general rules of international law as well as treaties as part of the normative system in Kenya.[233] It is important to note that the constitution is not saying that these latter two legal norms can only be used as aids to interpretation. Rather the constitution is unequivocally stating that customary rules of international law on the one hand and treaties ratified by Kenya on the other are part of Kenyan law. Another important distinction to note is that as regards these two sources, customary international law can be applied without qualification. Treaties must have been ratified by Kenya to apply. Even in the latter case it does not mean that a court cannot use a non-ratified treaty to interpret the law. It must be recalled that a trend had emerged even before the effective date of using provisions of ratified treaties to interpret the law especially where there were gaps.[234] The possibility that courts will use any treaty for gap-filling purposes is real especially if the treaty presents progressive jurisprudence in a given area. Many principles of law of specific relevance to women are developed in the international arena. Many treaties have been concluded that advance women's rights in one way or the other. The constitution has thus opened a whole new field of law that can be used to protect Kenyan women. it should also be recalled that Kenyans have for decades been unable to circumvent the strictures of the dualistic approach to international law inherited from the colonial legal system. Significant room has now been created for the direct application of international law on women's issues. Already the courts have been called upon to determine the applicability of international law in Kenya and they have ruled that in accordance with the Constitution treaties when ratified by Kenya are directly applicable.[235]

5. Gender equality in context

It cannot be doubted that the constitution has created a framework of law that responds in a very direct and unequivocal manner to the age-old discrimination against women in Kenya. It thus provides a tremendous opportunity for mainstreaming women into the wider Kenyan community. It attacks both public and private acts and decisions that have been used to exclude women from important aspects of life. While it makes general pronouncements that should apply across the board it also allows for women-specific interventions such as affirmative action and numerical quotas in public institutions thus recognising the insufficiency of bare formal equality. Merely providing for gender neutral laws may obscure the structural inequalities that women may face when they attempt to take advantage of the opportunities provided by the law. For example merely saying that every person regardless of sex is free to aspire and vie for a political post ignores that women may lack the necessary

[232] Constitution of Kenya s 2(4)
[233] Constitution of Kenya s 2(5)(6)
[234] See the *Rono* case above
[235] See *In Re The Matter of Zipporah Wambui Mathara* [2010] eKLR, available at http://kenyalaw.org/Downloads_FreeCases/77605.pdf (the High Court in this case considered the applicability article 11 of the International Covenant on Civil and Political Rights and stated that: " by virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law."

resources to engage effectively with the political processes. It is blind to the fact that women are continually bogged down by cultural practices that undermine their leadership capacity. It would also be oblivious to the fact that the violence and intimidation that generally accompanies Kenya's electoral process makes it hard for women to choose politics as a career.

So is there cause to celebrate? Have women "arrived" in terms of the quest for gender equality? The answer to the first is a definite yes. On the whole, the constitution is definitely a new beginning for women's rights in Kenya and the future should be bright. Without detracting from the generally woman-friendly trajectory of the dispensation one might mention some inconsistencies that may yet prove significant. In terms of appointment of certain public officials the constitution is silent on whether any gender concerns ought to be taken into account. For example in the run-up to an election for President and Governor, the prospective candidates are not obliged to choose a person of the opposite sex as a running mate. Hopefully candidates will deem it appropriate to consider this fact when running for the relevant office always remembering that the thrust of the constitution is equality and equity in gender representation. A similar concern may be raised with respect to certain appointive positions in both the national and county governments. Appointments of cabinet secretaries do not have to comply with any gender requirements. It might be said that the Constitution provides a generalised obligation that cuts across the board. But it must also be remembered that the neutrality in law is not necessarily neutrality in practice. The appointments of the Attorney General, the director of public prosecutions, the chief justice and deputy chief justice appear not to be directly amenable to equity requirements. The Commission on Revenue Allocation and the Salaries and Remuneration Commission appear to have escaped scrutiny insofar as equality requirements are concerned. Significantly though, the principles on public finance as well as those on equitable sharing of revenues pay more premium to regional and group equity on the assumption that the anticipated trickledown effect will ensure the relevant economic benefits reach women.

There are other provisions will likely present ambiguities if not difficult challenges in terms of application and interpretation of the bill of rights and other constitutional guarantees. While on the one hand the Constitution bars discrimination based on any cultural or religious practises[236] it on the other hand recognises "culture as the foundation of the nation and the cumulative civilization of the Kenyan people."[237] In addition the state is obliged to "promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and

[236] Constitution of Kenya s 33(4) provides that "A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion." S 44(3) provides that "A person shall not compel another person to perform, observe or undergo any cultural practice or rite."
[237] Constitution of Kenya s 11(1)

other cultural heritage."[238] While this section has a wider application the question would be whether it obligates the state to recognise cultural expressions that may produce discriminatory consequences. It will be pointed out that s 2 will subordinate such culture to the constitution. However, read together with other provisions courts will be hard pressed to weigh between the cultural identities of groups and the need to enforce human rights. For example s 44(1) allows every person "the right to use the language, and to participate in the cultural life, of the person's choice." Moreover a person belonging to a cultural or linguistic community has the right with other members of the that community to enjoy his or her culture and use his or her language or form, join and maintain cultural and linguistic associations and other organs of civil society.[239] Courts and public officials will have to contend with the claim by cultural groups for their identity as against the claim of individual members thereof to enjoy the civil and political rights. This represents the classical dilemma between cultural relativism and universalism of fundamental rights. Coomaraswamy notes this dilemma thus:[240]

> For many women, their sense of identity arises as a result [of] their experience as women, living within groups primarily governed by men. Though their sense of self and dignity comes from how the wider society treats women, they often have to face discrimination within local groups. They may have to submit to discriminatory practices and laws, as well as engage in rituals, customs, and habits that reinscribe the subordinate status of women within the hierarchy of their religious, ethnic, or tribal identity. Many women acquiesce because they see their group identity as the most important aspect of their lives. Others resist, only to be branded as traitors or "bad women" who bring the group into disrepute.

A more ambivalent and hence problematic provision that is perhaps reminiscent of the claw-back clauses in the old order is the exception under article 24(5) which applies to persons prophesying the Muslim faith. That section provides that:

> The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

This section clearly hacks back to the "personal law" exception in the repealed constitution.[241] It must be recalled that this exception is what formed the basis for the application of discriminatory customary law and practices. If the personal law exception was removed with respect to customary laws retaining the same with respect to Muslim law is hardly justifiable especially since it applies to the family which quite often is the focal point of inequality.

[238] Constitution of Kenya s 11(2)(a)
[239] Constitution of Kenya s 44(2)(a) and (b)
[240] R Coomaraswamy (2002) 'Identity within: cultural relativism, minority rights and the empowerment of women' 34 *George Washington International Law Review* 483, 484
[241] See s 82(4) of the repealed Constitution

When this exception is coupled with the s 32 "right to freedom of belief, religion, thought, belief and opinion" enforcing the equality provisions of the constitution becomes rather problematic. It then appears like the constitution is giving a right with one hand and taking it away with the other. It makes it difficult for public officials let alone courts to determine the threshold at which they intervene. While such intervention may be relatively easy when a person is being forced to participate in some cultural or religious ritual the applicable standards become elusive when such participation is seemingly voluntary.

6. The way forward

Defining rights on paper is one thing, making them real is a different ball game altogether. Recalling always that the ultimate objective is to mainstream women into the wider Kenyan fabric, there is need to build on the foundations laid by the Constitution. A legal framework that clearly addresses gender inequality is now in existence. However if the goal of equality is to be meaningful further steps will have to be taken. For instance the Constitution contemplates the passage of various pieces of legislation to flesh out some of the rights it provides for. These include legislation on citizenship, culture, leadership, representation of marginalised groups, land, political parties. To the extent that these pieces of legislations affect women there will be need to ensure that they are in consonance with the Constitution. Women, their representatives, members of Parliament and civil society organisations must guard against the risk of dilution of the rights enshrined in the basic law by the expected legislation.

In addition there are many statutes that are clearly contrary to the spirit and intendment of the new constitutional framework. The Law of Succession Act is one such law that perpetuates inequalities between men and women. While the transitional clauses under the Constitution provide that the all the laws in force before the effective date shall be "construed with the alterations, qualifications and exceptions" necessary to bring them into conformity with the Constitution such construction can effectively be done by the courts. Having in mind the broad *locus standi* provisions it is possible that the non-conforming laws may be interpreted and clarified through public interest litigation launched by civil society organisations, individuals or even groups representing women. Such an eventuality should allow the courts to exercise the wide interpretative jurisdiction granted to them under the Constitution.

A major drawback in the Constitution is the s 24(4) exception relating to persons professing the Muslim faith. The assumption that equality assumes a different character in the face of religion does not seem to be justified. In any event the qualification is not clearly spelt out as it is expressed to apply to "the extent strictly necessary for the application of Muslim law." It seems to give significant leeway for the application of religious laws in matters of "marriage, divorce and inheritance." These matters falling within the realm of personal law will likely

give room for perpetuation of past practices of discrimination against women. This exception does not seem to comport with the values and aspirations encapsulated in the various provisions of the Constitution envisaging an egalitarian society that treats men and women equally. Considering that the s 82(4) personal law exception in the previous constitution was never retained it is not clear why another personal law exception had to be created under s 24(4) of the new Constitution.

For rights to be meaningful the subjects must be able to claim them. To claim them the subjects must not only know of those rights but also understand them. This calls for legal literacy-a process by which citizens, in this case women, are made aware of the rights obtaining under the new framework and are empowered to claim them. The civic education that facilitated the referendum process will have to be sustained except that this time it will have to focus on women. It will be recalled that the Government took very specific measures that included public education and dissemination of the proposed constitution. The Government can show the same commitment in educating women of the entitlements under the Constitution. This should be done through the Government agency in charge of gender matters (either a minister or cabinet secretary when constituted).