



International Environmental
Law Research Centre

**THE COVERAGE OF GENDER
ISSUES IN THE DRAFT BILL OF THE
CONSTITUTION OF KENYA 2002:
HAVE THE HENS FINALLY COME HOME
TO ROOST FOR KENYAN WOMEN?**

published in
2/1 University of Nairobi Law Journal 1 (2004)

P. Kameri-Mbote & M. Nzomo

*This paper can be downloaded in PDF format from IELRC's website at
<http://www.ielrc.org/content/a0408.pdf>*

Table of Content

I. Introduction	1
II. Overview of Women’s Concerns in Current Constitution	2
A. Discrimination	3
B. Citizenship	3
C. Women’s memorandum to the Constitution Review Commission of Kenya (CKRC)	4
III. Coverage of Gender Issues in the Draft Bill of the Constitution of Kenya 2002	9
A. Preamble	9
B. Chapter One: Sovereignty of the People & Supremacy of the Constitution	9
C. Chapter Two: The Republic	9
D. Chapter Three: National Goals, Values & Principles	10
E. Chapter Four: Citizenship	10
F. Chapter Five: The Bill of Rights	10
G. Chapter Six: Representation of the People	11
H. Chapter Seven: The Legislature	12
I. Chapter Eight: The Executive	13
J. Chapter Nine: Judicial and Legal System	13
K. Chapter Ten: Devolution of Powers	13
L. Chapter Eleven: Land & Property	14
M. Chapter Twelve: Environment and Natural Resources	14
N. Chapter Thirteen: Public Finance and Revenue Management	15
O. Chapter Fourteen: The Public Service and the Police	15
P. Chapter Fifteen – The Defence Forces and National Security	16
Q. Chapter Sixteen: Leadership and Integrity	16
R. Chapter Seventeen: Constitutional Commission and Constitutional Offices	16
IV. Extent of domestication of CEDAW	17
V. Conclusion and Way Forward: The Hens are yet to Come Home to Roost!	19
A. Beyond Legal Provisions: Some Prerequisites for Translating Constitutional Provisions into Concrete Gains For Kenyan Women	20
Reference Documents	21

I. Introduction

The draft Constitution of Kenya is expected to represent the aspirations of all Kenyans. Much more important, it should represent major gains towards gender equality and equity, and the protection of the human rights of all men and women and boys and girls of this country. The draft constitution, however, is a document that is still under public scrutiny with regard to how best it has addressed and provided for the various concerns of Kenyans. For example, it has been the hope of the women of Kenya, who are 52% of the population, that the new constitution will recognize and protect the rights of women as human rights.

It needs to be recalled that since independence, Kenyans through parliament have reviewed the constitution without optimum consultation, and especially with women. This is much more so because of women's under-representation inside parliament, which has had very few women members of parliament.

It also needs to be noted that the whole process of constitution review, including the setting up of the Constitution of Kenya Review Commission, entailed a struggle to ensure gender equality and equity. Gender activists have for a long time questioned many of the constitutional provisions. They saw the Constitution as not guaranteeing women equal rights with men. For example, until 1997, section 82 of the Kenyan constitution dealing with the question of discrimination excluded "sex" as an objectionable ground for discrimination. However, the revision of the Constitution in 1997 included "sex" as an objectionable ground for discrimination in section 82(3) but did not include it in section 82(4). This left women open to discrimination in the areas where they were very vulnerable.

The draft constitution represents major gains towards gender equality and equity and in essence delivers on many points that have been at the heart of gender and pro-women movements in Kenya from the 1980s. As the draft goes through the motions at the National Constitution Conference, Kenyan women are concerned that a new constitution should provide for gender equity and equality and that mechanisms will be put in place to ensure that women enjoy the rights enshrined in the constitution. This paper follows on an earlier one which made the case for enshrining women's rights in the constitution in a bid to engender the legal process. Considering that the Constitution is the supreme law of the land, it is noteworthy that it contains provisions for civil liberties that are at the core of liberal feminist aspirations such as equality of opportunity in education, employment and political spheres. Indeed the constitution has also encapsulated nascent concerns such as equity. However, to answer the question whether the hens have finally come home to roost for Kenyan women, we need to look beyond the constitution and indeed other laws. The wider context within which laws operate is critical to its efficacy. This is to be considered alongside the perception that law is male and promotes male values making it a challenge for feminism to affect law and for law to transform the quality of women's lives.¹ My argument in this paper is therefore that the apparent coverage and address of women's legal concerns in the draft bill of the constitution is the minimum requirement. The contestation to enforce and implement the rights provided for goes beyond the letter of the law and permeates essentially non-legal terrains. Unless legal change is accompanied by changes in these other spheres, reform of the law alone will not guarantee women enjoyment of their rights.

The setting is the second floor of Kencom House in downtown Nairobi, the offices of the Constitution of Kenya Review Commission (CKRC). Three experts in gender studies have been invited for a meeting at the CKRC office boardroom. The task of the experts is to convince the Commissioners that there is a case to be made for the inclusion of gender equity issues in the constitution of Kenya in explicit and specific terms. The experts know their turf. Surely this is an easy task for them as they have carried out research on women's rights in issues for over a decade and believe that the issues speak for themselves and need not be laboured. They have experience in the political, socio-economic and political dimensions of the issues they are expected to pontificate on. That is an overkill they think. But alas! This is a different audience. There are women commissioners, some of whose task is to ensure that gender equity issues are included and have that as their ticket to CKRC. These are the experts' allies and have worked with the experts in different fields. There are the politically correct commissioners on the way to Damascus: they are not entirely convinced but are open to conviction. There are however commissioners who perceive of gender equity as a threat to the established norms, alien and to be avoided at all costs. These are the ones that experts must convince and convert. They are vocal and are quick to reprimand the experts as having been educated abroad and buying into new and alien ideas of gender equity which are not suited to African communities. The experts have every right to get annoyed but then that would put them exactly where the sceptics want them to be. They decide that there is work to be done and embark on a conversion mission. On the accusation of having bought into alien ideas, they are comforted to note that their accuser is actually dressed in a dark suit, a white shirt and a tie, all ideas of dress totally alien to the African. There may be value in the alien after all if the mode of dress of the people in the boardroom is anything to go by!

Anecdotal Recollection of the Authors

II. Overview of Women's Concerns in Current Constitution

In analysing the draft bill of the Constitution, I look at three issues: Firstly, what is it that required to be changed in the operative constitution to remove the inequalities and inequities present in the law? Secondly, I look at the provisions of the draft constitution with a view to analysing whether and to what extent it addresses the concerns raised with regard to gender. Thirdly, I look beyond the legal provisions at ways of ensuring that the final document provides a vibrant context for the realization of women's rights.

A. Discrimination

Discrimination of women has been an issue and had prompted the government to set up a task force to review laws relating to women in the early 1990s and the amendment of the Constitution in 1997 addressed concerns with Section 82 which had excluded sex as an objectionable ground for discrimination. Whilst including sex among those grounds then, a number of laws were exempted by Section 82 (4) from the provisions against discrimination. These are laws affecting non-Kenyan citizens; laws of adoption, marriage, divorce, burial, devolution of property on death, personal law matters and laws affecting members of a particular tribe or race in matters exclusively concerning them.

It needs to be pointed out that the laws exempted by Section 82 (4) are in areas that directly affect women, and where the enjoyment of rights by women has been less than optimal. This section legitimised the traditional position, which accorded women fewer privileges than men, in matters concerning their families, marriage, divorce and succession. It presented problems for the implementation of progressive statutes such as the Law of Succession Act (cap. 160) which seeks to give both men and women equal rights in matters of succession. Further, it gave no support to such legislative attempts as the Marriage Bill (1985) which sought to give equal rights to spouses in a marriage in matters concerning custody of children, divorce, or division of matrimonial property. The Marriage Bill (1985) failed to go through parliament for reasons including objections to interference with a man's rights to chastise his wife; objections to adultery being made an actionable civil wrong, independent of divorce proceedings, and objections to a wife having a right to object to her husband marrying a second wife.

B. Citizenship

Another area where the rights of women were directly impinged upon by Constitutional provisions is citizenship. Various issues have arisen concerning a woman's right to pass on her citizenship to her children and her husband especially where he is a foreigner. If she loses her Kenyan citizenship upon marriage to a foreigner, what is her status should he abandon her? Does she become a stateless person or can she re-adopt her Kenyan citizenship? One position is that she may retain her Kenyan citizenship. Though she cannot pass it on to her husband or to their children who may acquire their father's citizenship. Section 89 of the operative constitution however provides that:

Every person born in Kenya after 11th December 1963 shall become a citizen of Kenya, if at the dated of his birth one of his parents is a citizen of Kenya... (emphasis added).

Exceptions to this are, if the father is an envoy in Kenya, or the father is a citizen of a country that is at war with Kenya and the birth occurs in a place that is occupied by that country. It is clear from section 89, that a Kenyan woman married to a foreigner who does not fit into the two exceptions, can pass on her Kenyan citizenship to the children of such marriage if they are born in Kenya. The same does not happen if the child is born outside Kenya, since such a child acquires Kenyan citizenship only if the father is a Kenyan citizen.

A Kenyan woman married to a foreigner does not pass on her citizenship to her husband, though this applies if a Kenyan man marries a foreign woman. Section 91 entitles "a woman who has been married to a citizen of Kenya ...to be a registered as a citizen of Kenya" upon making an application in the prescribed manner. The effect of this is that her husband remains a second class citizen in Kenya, and may only be granted Kenyan citizenship after application, a process which may take up to seven years.

The citizenship Act (cap 70) gives equal rights to both men and women who wish to acquire Kenyan citizenship. However, one has to apply for citizenship in the prescribed manner, which includes complying with the provisions of the Constitution.

The laws barring a woman from passing citizenship to both her husband and children is discriminatory and contravenes the Convention on the Elimination of Discrimination Against Women of which Kenya is a signatory. If Kenya is to live up to its obligation under the Convention, then it should ensure protection against such provisions, which promote discrimination against women. The draft constitution provides the space for that.

C. Women's memorandum to the Constitution Review Commission of Kenya (CKRC)

Several fora were held by the review commission to receive memoranda from different interest groups. The Commission was keen to be inclusive and with regard to gender interest groups, it held a seminar to deliberate on the gender question on 5th to 8th December 2001 at which papers on diverse aspects of the gender question were discussed. Three main background papers were presented on the legal, political and economic and socio-cultural aspects of the gender question. Alongside these papers were presentations from other jurisdictions that had gone through the review process such as Uganda and South Africa; presentations from national and international scholars on the gender question; members of parliament and of the diplomatic corps. A number of organizations and individuals also presented memoranda to the Commission and the Commission organized Provincial Women's Consultative Workshops on 12th to 13th April 2002. They clearly spelt out the issues that they needed addressed in the new constitution. The issues they canvassed were general as well as specific.

1. Preamble

There was insistence on the need to underscore the commitment to the protection of fundamental rights and freedoms of individuals and the inalienability of rights and freedoms. These were not to be derogated from except in accordance with the principles of fundamental justice. The principles of equality, non-discrimination, unity and tolerance for diversity, patriotism and inclusiveness, justice and peace were proposed as basic parameters to be clearly stated in the preamble and entrenched in the Bill of Rights.

2. Women's Rights

The principle of equality of men and women was insisted on as a basic requirement. Women insisted on the entrenchment of women's rights in the Bill of Rights. Among the rights were:

- * Elimination of discrimination under section 82 of the constitution in regard to: marriage, divorce, burial, inheritance, personal law issues;
- * Proscription of the cultural concessions made to men in gender relations that uphold tenets of the patriarchal societies.
- * Proscription of customary and religious laws that violate women's rights and are in conflict with the rights and duties protected under international laws that Kenya has ratified such as the Convention on the Elimination of All Forms of Discrimination Against Women.
- * Automatic adoption into domestic law of international conventions providing for women that Kenya has signed.
- * Extension of period of maternity leave for women to 4 months from the current sixty (60) days.
- * Constitution should make provision for establishment of a Domestic/Family Court at District level to deal with domestic violence.
- * Provision of ministerial posts for women.
- * Provision for grant of marriage certificates to all married women.
- * Valuation of women's work such as provision of care for the family and other formal and informal work that is currently not taken into account in the event of dissolution of marriage and division of matrimonial property.
- * Provision for establishment of rehabilitation centres for lactating imprisoned mothers rather than putting them in jail.
- * Re-introduction of the Affiliation Act
- * Proscription of retrogressive social and cultural practices that impede on women's rights to participate, access and control resources.
- * Respect for and upholding of cultural, ethnic, regional and communal rights and diversities but outlaw traditional harmful practices such as female genital mutilation (FGM) and forced marriages.
- * Mandatory, guaranteed and corruption free testing HIV/AIDS before solemnizing marriage.

- * Make provision for the promulgation of an Equal Opportunity Act giving women equal access to education and employment.
- * Make provision for the establishment of a commission for Gender Equality as a constitutional, autonomous and statutory body with a framework and mandate that will enable it to mainstream gender in all realms.
- * Women should control their sexual and reproductive lives including the number and spacing of children and termination of pregnancy.
- * Women should be entitled to their children and property within and outside marriage.
- * Women should be entitled to marry as they please after attainment of majority age and welfare and, maternity benefits should be provided.
- * Individual's spouses entitled to own funds, businesses or industries that are not claimable by other spouses.
- * Measures be taken to protect women refugees and children as they are the most disadvantaged by wars and displacement.

3. Basic Principles and Values

- Outlaw discrimination on the basis of gender, class, ethnicity, religion, pregnancy, marital status, age and disability.
- * Recognition of men and women as equal and complementary, hence all appropriate legislative and other measures should be taken to ensure full development and advancement of both genders.
- * Provision for the supremacy of the Constitution.
- * Provision for affirmative action (AA) - The general view being that whatever other constitutional provisions are made to ensure or facilitate women's enjoyment of rights as par with men, such equality may not be achieved unless the provision of such rights are reinforced with the provision of the principle AA which would then enjoin the Kenyan society to take special and deliberate measures to correct the inequalities brought about by past gender based injustices that have placed women in a subordinate status to men.
- * Violence against women is treated as torture, inhuman, cruel and degrading punishment or treatment.
- * Inclusiveness and participatory governance
- * Guarantee devolution of power from centre to local level.
- * Transparency and accountability
- * Representational and plural electoral system
- * A minimum 30% and others up to 50% women's participation and representation in all decision-making positions and employment in both public and private sectors.
- * Observance of democratic and human rights as inherent and not granted by law or state. Hence state make commitment to respect and support institutions entrusted with promotion of Human Rights and domesticate all international human rights instruments ratified.
- * Civic education as a right.

4. Other Rights

- * Freedom of the Media and the right to know and to have access to information.
- * Freedom of expression, association and assembly.
- * Right to privacy.
- * Right to a healthy environment
- * Right to medical care and primary education.
- * Right to legal aid and access to courts.
- * State protection of the family as the natural and basic unit of society.
- * Equal opportunities and access to social services, clean water, shelter, food security, pension and retirement benefits regardless of their race, class, gender, age, religion, ethnicity, physical or mental ability.

5. Citizenship and Related Rights

- * Spouses of Kenya citizens regardless of gender should be entitled to Kenya citizenship.
- * A passport should be issued to every Kenyan as a right.
- * Dual citizenship should be allowed to encourage ease of movement and residence.
- * The requirement of screen cards and extra forms on account of one's religious and ethnic background as conditions for issuance of Identity Cards and Passports be removed.
- * Passports and Identity Cards should be issued within two weeks of application.
- * Single and divorced mothers should unconditionally have the right to have their children endorsed in their Passports.

6. Duties of Citizens

- * Abide by all constitutional provisions.
- * Uphold and protect sovereignty and unity of Kenya without discriminatory practices on basis of gender, class, race, ethnic and religion.
- * Preserve the cultural heritage and promote positive indigenous knowledge.
- * Protect and improve national environment and promote sustainable development of the country.

7. Children's' Rights:

- * Child is defined as girl or boy below 18 years of age.
- * The principle of what is in the best interest of the child should always be applied.
- * Child has right to a name, nationality, survival, non-discrimination, education, health care, shelter, and freedom from torture and privacy.
- * Children's ombudsmen created.
- * The state ensures, recognize and enforce the responsibility of parentage and the security of children and the family unit.

8. Minorities and the Disabled

- * Enabling environment and accessibility e.g. to buildings, roads and other public utilities and social amenities should be viewed as every person's human right, including women, children, disabled and elderly. Public amenities should be friendly in design and in provision of security.
- * National Disability Council is established.

9. Natural Resources, Property, Succession and Inheritance

- * The principle of gender equality is applicable on issues of equal access to, ownership and control of benefits of land and other resources inheritance, administration and management of estates and other properties.
- * All citizens accorded.
- * Squatters are allocated land that they have occupied for over 20 years.
- * Idle land be confiscated by the state without compensation and allocated to the landless.
- * 50% of all bodies managing the environment and natural resources should be: women, to ensure proper consideration of gender issues relating to decision making in regard to environment.

10. Education

- * State guarantee free and equal access for both girls and boys. To primary education and appropriate measures taken to afford every citizen equal access to highest level of education possible.
- * Right to education and information treated as a human right.

11. Structures and Processes of Governance

(a) The Executive Presidency

- President's office should be clearly separated from Parliament and parliamentary process.
- President should not be above the law and an MP have running mate of opposite gender.
- President should have basic minimum academic qualification of at least a University Degree and be committed and uphold constitutionalism and rule of law.
- Maximum of two- 5-year consecutive terms.
- Regime transition process should be 30 days to avoid anxiety, speculation and misuse of power by incumbent.
- There should be provision of impeachment
- Presidential power should be drastically reduced.

(b) Governance Structures and Processes

- * Clear separation of powers.
- * Democratic, accountable, transparent and participatory governance.
- * Popular participation in decision-making.
- * Promoting unity in diversity.
- * Ensure principle of gender equality and equity in appointments in local and national governance: including sub-chiefs, chiefs, councillors, etc.
- * Provide mechanism for free, fair, and peaceful elections

(c) Local governance

- * Uphold the system of devolution of power whereby local authorities have adequate powers and autonomy from the central government to make decisions and manage local affairs.
- * Empowerment of Local Government to provide efficient, effective and quality services, power and control of resources nearer to the people.
- * Principle of 1/3 women representation should apply in local decision-making structures
- * There should be direct elections for all positions and every aspirant should have a running mate of opposite gender.
- * Minimum "O" level qualification plus proven management skills and track record.

(d) Electoral System and Process

- * Mixed Proportional Electoral System should be adopted with the following constitutional principles: 100 members of Parliament selected through party lists of their respective political parties contesting elections according to proportion of total votes cast for each party in general election, with at least 1/3 of these persons being women. Such members will not contest constituency seats in parliamentary election.
- * 35% for women representation apply in the party structures and electoral lists and reserving 35% seats for women in Parliament.
- * Establishing Regional Councils/Committees with minimum 35% women leaders.
- * Establish Electoral Court with similar powers as High Court.
- * Proximity of voter registration centres to target voters and issuance of National and Voter I/Ds is made a continuous process.

(e) Electoral Commission (EC)

- * Members of the EC nominated by President but approved by 2/3 of the members of Parliament from names submitted by political parties, professional organisations, women organisations, and other civil society organisations.
- * At least 1/3 of the total number of members elected should be women.

- * Electoral Commission should serve maximum terms of 10 years
- * Electoral Commission to draw from a consolidated fund to ensure its independence.

(f) Political Parties

- * Principle of party plurality apply but dual membership of Political Parties be disallowed.
- * Political Parties adhere to democratic norms in their electoral, recruitment and governance process.
- * 35% rule in party structure representation and for women candidates
- * Member of Parliament who defects /changes his/her party affiliation loses the seat and any other related public post awarded during his/her tenure.
- * All Parties to be funded by the Exchequer and a ceiling for electoral expenditure is put.
- * Require all candidates for public office to declare their wealth.
- * Equal access to media for all Political Parties is availed.
- * Provide for Independent Candidates.
- * Provide security for all candidates and criminalize violence.

(g) Constitutional Commissions /Offices

- * Commission for Gender Equality
- * Human Rights Commission.
- * Ombudsman office to check abuse of power, corruption and other instances of mal-administration by public officers

(h) Judiciary:

- * Adequate salary should be paid to pre-empt corruption and preserve the integrity and expected impartiality and independence of judiciary.
- * Provide for a Judicial Service Commission observing the minimum 30% women representation.
- * There should be a Supreme Court with at least 9 Judges.
- * Permanent constitutional courts accessible to people should be established.
- * Appointment of Judges should be subject to Parliamentary approval.
- * A Regional Court of Human Rights should be established.
- * The Kadhi's Court should be elevated to the level of Court of Appeal.
- * Foreign Law and Jurisprudence be considered in the interpretation of the Constitution.

(i) International Relations

- * Parliament debate and approve international conventions before government ratifies them.
- * Period between ratification and enactment of a law no more than 90 days.
- * The state should promote world peace, security and stability through the process of democratisation and protection of human rights
- * Foreign law and jurisprudence be considered in the interpretation of the Constitution.

III. Coverage of Gender Issues in the Draft Bill of the Constitution of Kenya 2002

A. Preamble

In the Preamble, the constitution is mindful of women's concerns in protecting and nurturing the well being of the individual, family and community and broadly recognising the primacy of the family as a basic social unit. This is critical to the cause of women's rights given the contradictions that arise in the protection of the family and the community when put against the interests of individual members in a situation where women's rights have come near the bottom. The reference to social justice here further reinforces the concern with furthering the rights of women. It is also gratifying to see a departure from the traditional use of the word men to include women as the Preamble includes both women and men. Given that the Constitution is the supreme law of the land (Section 2) and binds all authorities and persons and also that laws inconsistent with it are void to extent of their inconsistency, the constitution provides a good basis for the realisation of women's rights in Kenya.

B. Chapter One: Sovereignty of the People & Supremacy of the Constitution

The provision on the supremacy of the constitution at section 2 is favourable to women given the extent to which the draft ingrains the rights of women. It provides the context for gender mainstreaming of other laws. Under section 5 dealing with the Laws of Kenya, the draft constitution includes international law as one of the classes of law applicable in Kenya. While it would be good to have a clear rendition of what "applicable in Kenya" means, it is clear that international conventions such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and other international declarations on women's rights, have, by dint of this provision, attained the force of law if "applicable" is interpreted to mean those conventions that Kenya has signed and ratified. A law domesticating CEDAW or inclusion of elements of CEDAW in different laws as appropriate is required to be promulgated within two years of the coming into force of the constitution. It is also important to break the provision in Section 5(1) (g) to clarify that it is the customary law applicable to Kenya, and international agreements signed and ratified by Kenya.

The provision that the constitution shall be interpreted in a manner that avoids technicalities that defeat the purpose of the Constitution is also favourable to women as women are sometimes victims of unfavourable interpretation of laws. It would be useful to have provision of free legal aid for women to ensure that they meaningfully enjoy the rights granted them by law.

C. Chapter Two: The Republic

Declaration of the Republic 6 (2) recognizes and commits Kenyans to respect human rights, fundamental freedoms and the rule of law. The constitution, in turn, as per Article 7 (4) empowers all citizens to defend the republic against any persons who threatens political independence. This, to some extent could be deemed to empower women to guard their rights and the republic within which their rights are being guaranteed.

D. Chapter Three: National Goals, Values & Principles

In Chapter three which deals with the national goals, values and principles, there is recognition of diversity; provision for the participation of people in public affairs and facilitation of sharing and devolution of power at a broad level. More significantly, full participation of women is listed as a national goal, value and principle (Section 14(11)). Further, the principle that one third of members of all elective and appointive bodies should be women is explicitly spelt out (section 14(12)). The recognition and provision for social justice; basic needs of food, shelter, clean water, sanitation, education, health and a clean environment (section 14(14)) which are issues of great importance to women also goes a step towards enhancing the rights of women. Added to this is the recognition of home making and promotion of family life as duties of the citizen. This contributes to the recognition of work that many women are engaged in as work (15 (1) (d) and (i)).

The principle recognising the special responsibilities that the state, society and parents owe to children (14(13)) provides an avenue for easing the onerous responsibilities that women carry in the upbringing and nurturing of children.

These goals and values should inform the implementation of all the constitutional provisions and they are to be applied across the board and in the interpretation of laws and policies. The provisions give women room to challenge policies and customary and statutory laws that are discriminatory to women.

E. Chapter Four: Citizenship

On citizenship, the draft constitution provides for equal rights of citizenship for all citizens (section 16). It also provides that all citizens are entitled to Kenyan passports and any documents of identification issued by the state to citizens. This provision is important as it provides the basis for challenging discretionary powers exercised in the area of immigration and which have the effect of limiting women's rights to get passports and other documents without recourse to males (spouses and fathers). Marriage to a Kenyan entitles one to acquire citizenship upon application whether they are male or female (section 20) "A person who has been married to a citizen of Kenya for a period of not less than three years is entitled, on application, to be registered as a citizen of Kenya". Further, citizenship is not lost through marriage or dissolution of marriage and the foreign husband of a Kenyan woman and widower can reside in Kenya.

F. Chapter Five: The Bill of Rights

Under the Bill of Rights, there is a provision for equality. All persons are equal before the law and have equal protection before the law defined to include the full and equal enjoyment of all rights and freedoms (section 33). This is buttressed by the provision at section 40 which entitles all persons to inherent dignity and the right to have that dignity respected and protected. There is also protection against discrimination by the state or any other person on the grounds of sex, pregnancy and marital status. However, the word unfairly in Section 34(1) should be removed so as to cushion individuals from discrimination. There is also provision for affirmative action at section 34 (3) allowing the state to take legislative and other measures designed to benefit individuals or groups who are disadvantaged whether or not as a result of past discrimination.

The bill of Rights has a section specifically provides for women's rights. Under section 35 (1) women have the right to equal treatment with men, including the right to equal opportunities in political, economic and social activities. Women are also entitled to be accorded the same dignity of the person as men; and women and men have an equal right to inherit, have access to and control property. The provision exempting Muslims from the provisions of the Bill of rights should allow for invocation of the constitutional guarantees should the persons so wish. This would also require an amendment to the Law of Succession Act to allow Muslims to invoke that law should they so wish.

Section 35(4) explicitly states that any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women is prohibited. This statement goes along way towards redressing women's concerns in the area of customary laws and practices, an area that many women have had a major quarrel with. Further under section 35 (5) the state undertakes to protect women and their rights, taking into account their unique status and natural maternal role in society. The recognition of maternity as a social function desirous of constitutional protection is a quantum leap towards the recognition of women's role in society. This coupled with the provision that the State provide reasonable facilities and opportunities to enhance the welfare of women to enable them to realise their full potential will enable women to contribute to all spheres of the nation.

There is need for legislation to ingrain equality provisions. The draft Equality Bill should be aligned with the provisions in the Bill of Rights and presented to parliament to ensure that the provisions in the Constitution are implemented.

On the family, the draft constitution recognises the family as the natural fundamental unit of society and exhorts the state to accord it protection (section 38). It goes even further to provide for equal rights of persons over 18 years of age to marry upon free consent and found a family. Parties to a marriage are also accorded equal rights in the marriage, during the marriage and at the dissolution of the marriage. There is need to revisit the laws on marriage to align them with this provision. On the issue of customary marriages, for instance, Article 38(5)(b) requires that a law be enacted to recognise these marriages. These would provide mechanisms for registration of the marriages and ease the burden placed on parties to such marriages in trying to prove the existence of the marriage.

In the realm of politics, the rights to make political choices such as forming or participating in forming a political party, campaign for a political party, free, fair and regular elections. Further, all persons have a right to stand, on conditions of equality, for public office or political party office and if elected, to hold office.

Section 54 provides for the rights of all persons to acquire and own property as individuals or in association with other persons. Section 55 provides for the right of all to fair labour practices and fair remuneration. In similar vein, section 56 provides for the right to social security for all and section 57 for the right to health, health care including reproductive health care which is critical for women.

Section 67 provides for access to justice for all and section 73 grants rights to persons to ask the Commission on Human Rights and Administrative Justice or the court to uphold the bill of rights. In a nutshell therefore there is space for enforcement of the rights. It is however necessary to comb through the laws on property, social security, education, employment, food, water and health to ensure that they conform to the provisions of the Constitution and are aligned to the provisions of CEDAW which has comprehensively dealt with these issues.

G. Chapter Six: Representation of the People

Chapter 6 generally deals with representation of the people in the political governance structures. One of the general principles at section 76.6 is to ensure fair representation of women in relation to men. Section 77(2) (a), (b) and (c) requires political parties to ensure that at least one third of their candidates for direct elections are women and that 50% of candidates for proportional representation are women, and that the remaining 50% are distributed among persons with disabilities, the youth, ethnic minorities and other interest groups. This a progressive provision that can serve as basis for attaining minimum 1/3 women representation. This if implemented jointly with the MMPR formula provided for in chapter 7 of this draft (discussed below), would ensure the attain of a minimum critical mass of women in both chambers. The challenge is to ensure parties engage in deliberate recruitment of women to fill this quarter and for the latter to proactively seek entry into political parties, not only as rank file members but as key decision-makers in the party hierarchy.

As noted earlier one of the shortcomings in the draft is vagueness and ambiguity and the tendency to lump gender concerns with those of other social categories. A case in point is Part I, section 76(6) on The Electoral system and process, General Principles which states that elections shall ensure "fair" representation of "women, disabled and minorities." This provision is vague as it is not clear what is the measurement of "fair" in this context. Furthermore the lumping together of women, the disabled and minorities tends to perpetuate the old

stereotype, that women's concerns are identical with those of other disadvantaged groups.

Under Part 1 (83) that establishes the Electoral Commission (EC), one notes that the entire section is silent on the gender distribution of the various decision making offices that comprise the EC. And yet the role of EC is so crucial in administering justice, upholding democratic principles and ensuring the freeness and fairness of the key national elections held every 5 years to elect peoples representatives to political governing structures. For this reason, clause 83(1)(a) and (b), should explicitly state that at least 1/3 of the commissioners shall be women. Furthermore, clause 83(3) should provide that, the vice-chairperson shall be female, if the chairperson is male.

H. Chapter Seven: The Legislature

Under the legislature, women's representation is provided for in both the National Council and the National Assembly. It is also significant to note that this chapter does provide for Affirmative Action (AA) at all levels of governance. The Mixed Member Proportional Representation (MMPR) electoral system, provided for under Articles 105, 106, 107 and 109, requires that at least one third of the members of each house of Parliament should be women. In this connection, the MMPR electoral system provides for a formula for implementing AA, by providing for a bicameral parliament totalling 310 members, at least 75 women seats are guaranteed through the new proposed MMPR electoral system and additional seats can be won through the normal competitive elections, as follows:-

Lower House - National Assembly

Two hundred and ten (210) members shall be elected on basis of single Member constituencies and ninety (90) members on basis of party lists. Every alternate name on party list shall be a woman.

Upper House - National Council

Seventy (70) members shall be elected on the basis of single member constituencies (coinciding with District boundaries) and thirty (30) seats will be reserved for women candidates on multi-member constituencies representing the 8 provinces, with 4 representing each of 7 Provinces and 2 representing Nairobi Province.

Jointly with the above MMPR formula, it is also significant to note that clause 109(1) on the *Representation of women*, provides for affirmative action and explicitly states that "...at least one-third of the members of each house shall be women", but the proposed MMPR formula does not arithmetically add up to one-third women representation in either house. In the lower house, under the MMPR formula alone, women would harvest only 21% representation and would have to make up for the difference in some other way. In the upper house, the MMPR guarantees 30% women seats, which falls short of the minimum required 33%. The mute point therefore is that women should harvest some extra seats from the 70 single member constituency slots that are available for both men and women under the regular competitive elections.

Clause 142(1) and (2) on the *Dissolution and prorogation* of the two parliamentary chambers raises some concern and hence should be reviewed. 142(1) states that "*The term of the national council is four years*" and 142(2) states "*Unless sooner dissolved the National Assembly shall continue for a term of five years*". It does not make any logical or technical sense why the upper house should have a shorter life than the lower house. And from a gender perspective it raises special concern due to the fact that as noted above the upper house is likely to be the one where women's voice may be more effective due to their larger proportional representation. Hence the dissolution of the upper house one year before the end of parliamentary life cycle may rob women of critical opportunity of influencing the country's strategic decisions. Our proposal is that the two houses' life cycle should be concurrent. However, for continuity, one house may be established a year earlier.

Under 147(1) which establishes a *parliamentary Service Commission* should explicitly state that the principle of AA would be adhered to in the appointment of the various members of this commission.

In our view the positive constitutional provisions in this chapter should be treated as absolutely basic and essential elements/mechanisms for facilitating effective women's political participation in parliamentary politics and the attainment of gender equality in political decision-making. It is therefore my argument that the enactment of these provisions should be operationalised within the shortest time possible, in the form of relevant legislations.

In this connection, we are of the view that clause 109(2) which provides that the implementation of the principle of one-third women's representation in both houses will be enacted "*within three years of coming into force of this constitution....*" is an area of concern that needs to be reviewed given the importance of this clause for increasing women's parliamentary representation. There does not seem to be any technical reason why the necessary law(s) cannot be processed and enacted within a maximum of a year of the new constitution coming into force.

I. Chapter Eight: The Executive

It will be recalled that women had not only requested for the trimming down of presidential powers but also for the inclusion of a clause to the effect that if the President is male then the Vice president or Prime minister should be a woman, and that rule ought to apply for all elective and appointive decision making position, similar hierarchy.

Under Part 1, 148(1) and (2) on *The Principles of Executive authority* it is important to add a new principle which should be 2(c) "*takes into account the principle of AA in appointments to various public offices*".

J. Chapter Nine: Judicial and Legal System

In chapter 9, the provision that justice shall be done to all irrespective of social or economic class addresses the problems that women face in trying to access the judicial and legal system for violations that occur within the family. Rights provided for by law can be negated by ineffective enforcement machinery. A working judicial and legal system is therefore integral to the implementation of rights provided for by national constitutions.

There is concern here about the representation of women in the judicial and legal system. While one of the national principles is that at least a third of all members of elective and appointive bodies should be women, it is not clear that this principle applies here. Further, the participation of women in traditional and local tribunals with limited jurisdiction in issues of local significance needs to be addressed given the fact these tend to be predominantly male. This is a major problem since the first point of call for women with matrimonial, succession and property issues that need to be resolved. If there is no representation of the interests of women, these issues may be resolved unfairly at this level and this would mean that the constitutional provisions are rendered inoperative.

K. Chapter Ten: Devolution of Powers

This chapter purports to uphold the system of devolution of power whereby Local Authorities have adequate powers and autonomy from the Central Government to make decisions and manage local affairs: to provide efficient, effective and quality services, and bring power and control of resources nearer to the people. This chapter provides in some sections for 1/3 women representation in local decision-making structures.

However, under Part I, 213(1) on *Principle and objectives of devolution* and Part II on *The organisation of Devolution of devolved government* it should be explicitly stated that the Principle of minimum 1/3 representation at all levels of local governance would be adhered to. It is not enough to propose as suggested under clause 230 that the act of parliament when enacted "*shall ensure that one-third of the composition of the province, district, location and village councils shall be women*" (230(3)(i)). Similarly under 218(2) the provision for

district council members should read “*the District Council shall consist of no less than 20 or more than 30 members, one-third of whom shall be women.*”

Finally, 230(3)(i) and 230(3)(j) that requires “*appropriate constitutional commissions and constitutional office holders to establish offices in every District...*” should be invoked at the time of drafting an appropriate registration, to ensure that the proposals suggested are translated into law.

L. Chapter Eleven: Land & Property

This chapter articulates the principle of gender equality on issues of equal access to, ownership and control of benefits of land and other resources, in inheritance and the administration and management of estates and other properties. The provision requiring the state to ensure both equitable access to land and associated resources and security of land rights for all land holders, users and occupiers (section 232(2) (a) and (b)) provide the basis for protecting women’s rights to agricultural and other land that they occupy without ownership rights. The laws on land should be amended to reflect this fact. Section 30 of the Registered Land Act should include women’s user and occupancy rights as overriding interests to which the rights of the absolute proprietor are subject especially where the woman has invested her time and energy on the land for a period of time.

It is notable that the draft bill provides for the promulgation of law to protect the dependants of deceased persons holding interests in any land and the interests of spouses in actual occupation of the land (section 235(2)(a)(iv)). While the provisions of the Law of succession provide for the rights of widows and all children, including female children, to inherit the property of the deceased, the provision on protection of spouses in actual occupation of the land will protect widows who have invested their time and energy on land from eviction by relatives of the deceased especially where the land in question is ancestral land. It will also ensure that attention will be given to the nine gazetted areas in Kenya where customary rules of intestacy are allowed to continue to apply even when they exclude women from inheriting agricultural land and livestock which comprises the main means of production in those areas.

Further, the provision requiring a law on the recognition and protection of matrimonial property and the matrimonial home during and at the termination of the marriage (section 235(2)(a)(iv)) is a monumental step towards the realisation of a woman’s rights to property in a marriage situation. The law would give impetus to judicial pronouncements on the rights to women to half of the matrimonial property upon dissolution of marriage.

It is important to point out that gender-neutral laws on property ownership have not resulted in more women owning land because of structural barriers such as access to credit and general lack of resources to purchase land. The proposed law should explicitly provide for women’s rights to own land and go further to provide for ways of assisting women to raise capital to purchase land and other property. There should be a presumption of spousal co-ownership of matrimonial property and specific provisions protecting spouses from sale of jointly occupied land without their knowledge and consent and protecting women’s interests in the allocation of land. More generally, laws regulating the registration of land and other property rights should be amended with a view to simplifying the procedures and making them more accessible to women.

Women should be represented in land bodies from the national level to the lowest levels of land administration. The principle of at least a third representation of women in elective and appointive bodies should be applied in the National Land Commission proposed at section 237. Land laws should be reviewed with a view to operationalising this principle in all realms.

M. Chapter Twelve: Environment and Natural Resources

Women have a very close relationship with the environment and natural resources and have an interest in the integrity of these resources. While the chapter provides the rights for all persons to participate in the management of the environment, special attention should be paid to the situation of women and the structural handicaps they face in their quest to participate in decision-making. In the carrying of environment impact assessments

for instance, the ability and availability of women to travel to venues where hearings are conducted should be given special attention. The Environment Management and Coordination Act (EMCA) provides for public participation in environmental decision-making but in reality only a handful of persons participate meaningfully owing to distances to meeting venues and inappropriate media of communication of intended hearings.

The principle of at least a third representation of women in elective and appointive bodies should be applied in the National Environment Management Commission proposed at section 240. Environmental laws such as EMCA, the Forest Act, the Mining Act, the Wildlife Act and the Water Act should be reviewed with a view to operationalising this principle of representation in all realms.

N. Chapter Thirteen: Public Finance and Revenue Management

Principles and objects of public finance and revenue management aims at ensuring efficient and effective generation of revenue for the purposes of promoting and safeguarding the well being of the people of Kenya. Issues of enhancing participation and equitable sharing of revenue raised have been held as an ideal.

However while Article 243(e) says that adequate consultation will be conducted in the allocation and distribution of national revenue, it is not clear:

- a) how much is adequate consultation
- b) what form it will take
- c) Who will be consulted?

The article should clarify how much is adequate consultation in terms of the fora to be used. The fora should be spelt out in such a way women are also included.

The Affirmative Action policy should also be recognized in the Economic and Social Council established at Article 257 which consists of twenty-one persons, appointed by the president by applying the principle of at least a third women representation or appointment. It is noteworthy that Article 257(4)f required the Council to advise the government on the attainment of equity in the generation and expenditure of revenue, while recognizing the Affirmative Action Policy in respect to the disadvantaged groups. However the article should clarify specific categories of the disadvantaged to include women, people living with disabilities, pastoralists, and the landless and street families. Article 257(4) i deserves special mention as it recognizes women's work, mostly in domestic services, and provides that it shall be taken into consideration.

O. Chapter Fourteen: The Public Service and the Police

The first part of this chapter sets out provisions guiding the establishment and management of the public service. We recognize that Public Administration's values and principles in administration incorporate the need for:

- (a) Impartial, fair and equitable provision of services Article 258 (c);
- (b) Encouragement of participation in the process of policy making Article 258 (d);
- (c) Prompt and timely response to people's needs Article 258(e); and
- (d) Provision of adequate and equal opportunities for training and advancement of men and women equally and members of all ethnic groups Article 258 (i).

However, Article 258 (d) on the encouragement of people's participation in policy making does not specify the expected participation (numbers, type, and the level) which we recommend should be specified as follows: "Ensure equity in the participation of people in the process of policy making at all levels".

Article 259 (1) establishes the Public Service Commission within the public administration system. It is our suggestion that in Article 259 (2) there be provided for the application of the Affirmative Action principle in the composition of the members so that at least one third shall be women.

Part II of the chapter establishes the Kenya Police Service. Under the Principles and Objects, there is provision for avoidance of bias or discrimination with regard to political groups or any other sections of society Article 264 (2) c. However, the categories of other sections of society should be clarified for the avoidance of doubt and the Affirmative Action Policy applied in the appointment of the Deputies so that women are represented.

P. Chapter Fifteen – The Defence Forces and National Security

While we acknowledge that the national security council is composed of occupants of specialised offices within the security organs, it is our recommendation that Article 272 (i) should have a provision that in the event that officers mentioned in “a” to “m” are all men, then at least six (6) suitably qualified women be appointed to sit in the council. This will ensure at least a minimum of a third women representation. It will also ensure representation of women in this important state organ.

Q. Chapter Sixteen: Leadership and Integrity

The chapter provides for a code of conduct and ethics for public officers. The chapter is gender responsive and recognises that such officers may be men or women.

R. Chapter Seventeen: Constitutional Commission and Constitutional Offices

This chapter provides for the establishment of constitutional commissions and constitutional offices to protect the sovereignty of people, and human rights through ensuring the maintenance of constitutionality. Significantly, we appreciate inclusion of the Affirmative Action on the membership of commission, as per Article 281(i).

With regard to the Commission on Human rights and Administrative Justice, we recognize the establishment of three constitutional offices to safeguard human rights including women’s rights. These are provided for in Article 288 (b) (c) and (d) as:

- Human rights Commissioner
- The people’s Protector
- The Gender Commissioner

However, it is difficult to visualize how issues of gender and women’s human rights will adequately be addressed within the purview of all the other human rights issues under the commission on Human Rights and Administrative Justice. There is the danger of marginalisation. The task of the Gender commissioner is to mainstream gender in all realms and also to ensure that the spirit of this far-sighted draft constitution permeates all policy, legal, economic, social and political levels. It is also the body that will advise the government on all matters pertaining to gender. Such work requires an independent full-fledged Gender Commission. .

IV. Extent of domestication of CEDAW

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)², adopted in 1979, is the most exhaustive international legal instrument on the rights of women. In evaluating the extent to which the draft bill of the Constitution of Kenya 2002 has responded to women's concerns, it is logical to test the provisions of that draft against the provisions of CEDAW. UNIFEM has developed a matrix that assists in this kind of assessment and we have adopted it below.

This matrix helps demonstrate the extent of domestication of CEDAW in the draft constitution³

Proposed provisions in the Draft Kenya Constitution	Provision in the Old Kenya Constitution (one being reviewed) ⁴	Relevant CEDAW Provision	Extent to which CEDAW is incorporated in the draft constitution	Recommendation for Domestication
Chapter 1 Sovereignty of the People and Supremacy of the Constitution	Sections 1-4		- Avoidance of technicalities that defeat purpose of constitution helpful to women's realization of rights granted	Need for legal aid for women
Chapter 3 National Values and Principles		Preamble, article 2,3,4	- no specific mention of promotion of gender equality, - inclusion of affirmative action	Include specific value/commitment to gender equality Strengthen section 14(12)
Chapter 4 Citizenship	Sections 89-93	Article 9,15	-Equal rights to citizenship granted for men and women	Need for law to effectuate provisions
Chapter 5 Bill of Rights	Sections 70-71; 77 & 82	Articles 1, 2, 3, 4, 5, 10, 11, 12, 13, 14, 15	Equality; Elimination of discrimination; abrogation of cultural practices that undermine women's dignity	Need for direct provision on affirmative action Need for facilitating mechanisms to ensure rights are realized Need to revise family laws to align with provisions
Chapter 6 Representation of the people	Chapter III	Articles 7, 8, 4	Provision for women's representation (at least a third) Need for affirmative action	Mechanisms to ensure representation is achieved

Proposed provisions in the Draft Kenya Constitution	Provision in the Old Kenya Constitution (one being reviewed)⁴	Relevant CEDAW Provision	Extent to which CEDAW is incorporated in the draft constitution	Recommendation for Domestication
Chapter 7 The Legislature	Chapter III	Articles 7,8,4	Provision for women's representation (at least a third) Need for affirmative action	Mechanisms to ensure representation
Chapter 8 The Executive	Chapter II	Articles 7,8,4		Mechanisms to ensure representation
Chapter 9 Judicial & Legal System	Chapter IV	Articles 3, 11,4	Provision for representation of women Need for affirmative action	Mechanisms to ensure representation
Chapter 10 Devolution of Powers		Articles 7,8,4	Need to have definitive provisions on women's representation Need for affirmative action	Provisions for representation Mechanisms to ensure representation
Chapter 11 Land and Property	Section 75	Preamble, Article 1, 2,,3,5,11,13,14,15	Rights to land and property including matrimonial property	Mechanisms to ensure implementation
Chapter 12 Environment and Natural resources	Section 71	Article 14	Right to a healthy environment and to environmental information	Mechanisms for implementation
Chapter 13 Public Finance and Revenue Management	Chapter VII	Article 1,2,3,4,11,13,14,15	Allocation of resources	Need for affirmative action Mechanisms for gender mainstreaming of national budget
Chapter 14 Public Service and Police Force	Chapter VIII	Article 1,2,3,4,1	Need for representation	Need for affirmative action Mechanisms for implementation
Chapter 15 Defence Forces and National Security		Article 1,2,3,4,11	Need for representation in national security council	Need for affirmative action Mechanisms for implementation

Proposed provisions in the Draft Kenya Constitution	Provision in the Old Kenya Constitution (one being reviewed)⁴	Relevant CEDAW Provision	Extent to which CEDAW is incorporated in the draft constitution	Recommendation for Domestication
Chapter 17 Constitutional Commissions		Article 1,2,3,4,5,11	Need for full fledged gender commission	Implementation mechanisms

V. Conclusion and Way Forward: The Hens are yet to Come Home to Roost!

The mileage that women have covered towards the draft bill's provisions cannot be overstated. The incident recounted by the authors in Box 1 above illustrates the point at which many Commissioners in the Constitution of Kenya Review Commission were at the start of the process on the issue of gender. The authors were among the experts in that setting and are heartened to see the draft bill with many provisions that are favourable to women. They however recognize that these need to be actualised through legal and other mechanisms. Indeed the work on the draft is far from over as the discussions in the National Constitution Conference are still ongoing. It is however noteworthy that many of the provisions are in the draft and are not contested. For instance, the President recently assented to a bill establishing a Gender Commission and appointments to government that have been made in the last year have been sensitive to the need to have women appointed unlike in the past. While we may not have got to the point where a third of all appointees are women, there is indication that we are headed that way. We can say that the draft bill of the constitution principles are slowly taking root and that is indeed a necessary precondition for the old giving way to the new.

Should the draft bill of the Constitution adopt most of the provisions that are favourable to women, there will be need to comb through all the laws to align them to the Constitution as the Constitution only provides the framework. It is clear from the women's proposals that they had issues to pick with marriage laws, property laws and laws on citizenship. These laws and others need to be revised along the lines of the draft bill. The Gender Commission and the Attorney-General's Chambers have work cut out for them.

The legislature will need, on the recommendation of the Commission and the Attorney General, to enact laws that clearly set out the ways in which provisions in the bill of rights, on citizenship, representation and ownership of property are to be actualised. Clear rules regarding, for instance, matrimonial property should be promulgated to make it easier to know what principles to apply when the courts are faced with a dispute in a particular system of law. Community of property could be considered as a means of ensuring equality in the ownership of matrimonial property.

Obsolete laws, like the provision in the Indian Transfer of Property Act which states that "a transfer of property to or for the benefit of a woman... may contain a provision preventing her during her marriage from transferring or charging it," should be repealed. The Married Women's Property Act, 1882, also needs to be reviewed. It should be noted that this statute has undergone radical transformations in England where it originated. Section 12 provides *inter alia*, that a married woman has the capacity to sue in order to protect property she is in possession of. This includes only action against outsiders and not her husband. Spouses may only sue each other where there is breach of contract and not in tort. This section calls for amendment as it implies that a spouse would have no recourse to the courts in civil action where the other destroyed his or her property. Section 11 purports to give married women security of tenure in matrimonial homes and the right to benefit from her

husband's assets which he specifically mentions in his insurance policy are for the benefit of herself and/or their children. This section ought to be amended so that the protection of inheritance rights in a matrimonial home does not depend entirely on an insurance policy.

It is noteworthy that the 1968 report on the Commission on the Law of Marriage and Divorce contains proposals that could be used to implement the provisions of the draft bill in the realm of marriage and divorce. These proposals should be revisited and reviewed to take on board those that promote the objectives of the bill. Recommendation 61 in the report, for instance, was that the new law on marriage and divorce should provide that: "no husband or wife should, without the consent of the other, be permitted to sell, give away, mortgage, lease or otherwise dispose of the house they occupy as the matrimonial home or its curtilage." This would protect matrimonial property in line with section 235 of the draft bill.

Over and above these proposals, there are bills, which lapsed with the Eighth Parliament. These include the Equality Bill, the Affirmative Action Bill and the Family Protection Bill which would promote the implementation of the provisions of the draft bill. These should be revisited with a view to aligning them to the provisions of the draft bill.

A. Beyond Legal Provisions: Some Prerequisites for Translating Constitutional Provisions into Concrete Gains For Kenyan Women

Looking at the provisions of the draft constitution, it is clear that it makes very bold steps towards effectuating women's rights. Indeed looking at the list of issues of concern raised by women during the review process, the draft accommodates most of these issues and goes a step further in some respects. It needs to be underscored here that the provisions now in the draft should be treated as a minimum agenda and should be guarded from any encroachment. The challenge therefore is firstly, to ensure that these progressive provisions remain in the constitution when it is finalised. Secondly, it is imperative that the provisions are implemented to benefit Kenyan women. There are challenges in the way of realizing the rights provided for in the draft bill which go beyond legal provisions. These include social- engineering and education.

The fact that statutory law competes with customary law whose hallmark is the dominance of male members points to a contestation in the way of meaningful realization of constitutional rights by women. The mere prescription of customary laws and practices that are based on the superiority or inferiority of one gender will not eliminate these laws and practices which are within the very fabric of society.

Social Engineering

Whilst the draft bill has pro-women provisions, is clear on the principle of equality and allows for differential treatment to correct past and existing inequalities, it is important to appreciate the fact that administration of laws can also occasion the subordination of women to men. Juridical power has been singled as a formidable obstacle to women's rights.⁵ Indeed one of the greatest problems for Kenyan women has been the quest to operationally legal rights that do not *per se* discriminate against them. The socio-economic realities in Kenya and the patriarchal (the ordering of society under which standards – political, economic, legal, social- are set by, and fixed in the interests of men) ideology pervading society stands in the way of swift and effective translation of abstract rights into real substantive rights. The provisions in the draft constitution may remain paper rights for women unless real efforts are made to operationally them. So far, women have been systematically removed from fully participating in the development process despite their active participation in the production processes alongside men. Even where women's legal rights have been provided for, ignorance of such rights exacerbated by illiteracy ensures that they do not benefit from such provision. The effectiveness of laws in according women equal opportunities with men depends largely on the society's willingness and ability to enforce such laws. This requires broad-based campaigns to educate society on the benefits of gender equality and to diffuse tensions between the genders as well as legal education on the substance of the rights and procedure to enforce the same.

De jure Equality, De Facto Discrimination

At present, despite the gender neutrality of our legal provisions, equal rights and privileges cannot be assumed to have been guaranteed. Gender neutral laws guaranteeing women equal rights with men have, in many instances, resulted in *de facto* discrimination. This is because law does not operate in a vacuum. It operates in a social, economic and political context and that context in Kenya, has not been very supportive of gender equality and equity. Certain norms of customary law are so ingrained in people's minds that to deal with them necessitates a robust strategy. There is need for aggressive campaigns to ensure that past and current injustices that have constrained women's participation are addressed in practice. We should not stop at enshrining the rights in the Constitution, we need to ensure that the constitutional provisions inform law and practice. In this regard, it is clear that our work is only just beginning. It is still too early to celebrate and the hens have not yet come home to roost!

Reference Documents

1. Background documents prepared by experts
2. Memoranda from organized women groups
3. Current Constitution and CKRC Review Act
4. Draft Report and Bill of the Constitution
5. Reports of workshops organised by the CKRC

Endnotes

- ¹ CAROL SMART, *FEMINISM AND THE POWER OF LAW*, London , New York : Routledge, 1989, repr. 1991.
- ² This is the most comprehensive treaty on rights of women.
- ³ Template developed by Nyaradzai Gumbozvada, UNIFEM, East and Horn of Africa Region
- ⁴ Constitution of Kenya 1963, revsd 1982, 1997.
- ⁵ See Smart, *supra* n. 1

