



International Environmental
Law Research Centre

GENDER CONSIDERATIONS IN CONSTITUTION-MAKING

ENGENDERING WOMEN'S RIGHTS IN THE LEGAL PROCESS

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University of Nairobi Law Journal (2003), p. 156.

*This paper can be downloaded in PDF format from IELRC's website at
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I. INTRODUCTION

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

The term "gender" is a neutral term, which accommodates the view that women's issues are part of broad social issues many of which arise out of basic social-class differences as opposed to purely sexual differences. The use of the term "gender" in reference to women has however served largely to mollify conservatives who are more receptive to a discussion on gender than to one on women. Indeed

"the lift to the gender focus may be a strategic move to keep the women issue alive in a period of conservatism...(A) 'gender' focus may be seen as a 'safer' way of looking at the problem without mentioning women explicitly". (Okeyo: 1989:9)

The danger here is that we may ignore the fact that women suffer double jeopardy as social beings in terms of both class and sex.

In this paper, I begin by defining the concept of gender. I then explain how women's issues are carved out of the gender milieu and how different approaches (feminisms) have emerged to address the issue. I discuss the diverse feminist theories to illustrate the different ways in which women have sought historically to address the issue of women's subordination.

The second part of the paper deals with the issue of rights. Moving from general human rights to women's rights, it addresses the notion of equality and equity and how these play out in the relationship between the genders. I use analogies from relationships between states in international law and between differently placed individuals in national settings.

The third part looks at the role of law in promoting women's rights. The main problem that opponents of the women's rights movement have in accepting that there are women's rights is in my view posited in the question: *Against who are these rights enforceable?* Maria Mies in her book *Patriarchy and Accumulation on a World Scale* asks in relation to payment of wages for housework: *Who would pay... the capitalists, the state or the husband?* This pits the genders against one another unduly.

My argument is that we should not worry unduly about *versus who* the rights are enforceable. The starting point is to acknowledge the importance of gender equality and the recognition of women's rights. Need to appreciate first, that is wrong for a person to be subjected to differential treatment by dint of their being male or female just as it is wrong for small nations to be trampled on by big nations in international relations. Second, that we lock up society's potential if part of society is prevented by structural rigidities from contributing to the development of the society and finally that we need to ensure that all members of society contribute to the development of the society.

II. CONCEPTUALIZATION

A. Gender

The term gender means the state of being either male or female. The male and female genders define and characterize all human beings in society. The two genders are distinguished from one another by physical, that is, biological sexual/ reproductive differences.

The term 'gender' has however increasingly acquired a social meaning where the word *gender* defines how the male and the female gender relate in society. The social meaning refers to social characteristics of one's biological sex. These characteristics include gender-based division of labour whereby duties are allocated on the basis one's sex. For example the female gender is allocated duties such as cooking, washing and other domestic chores, which

belong to the private rather than the public sector. The male gender is allocated non-domestic duties such as decision-making, bread winning and others, which belong to the public sector.¹

Thus when one adverts to the issue of gender today, one is not merely talking about the *physical difference* that being biologically male/female would entail. One is also talking about *social constructions of maleness and femaleness* and this often translate into *power relations* between men and women. Sex then is distinguished from gender by what one is born as, that is female or male, and therefore it is a biological concept. Culturally determined patterns of behaviour such as rights, duties, obligations and status assigned to women and men in society (gender roles) are varied even within the same society. Women's studies therefore is a body of knowledge, which analyses the condition of women in the society. When such studies are also directed to the changing of women's condition in the society, then such a body of knowledge is known as feminist studies. Feminism is therefore a political movement, which aims at transforming gender relations, which are oppressive to women.²

Feminist scholars use *gender* as an analytical variable. *Gender* is a relational concept that denotes the manner in which women and men are differentiated and ordered in a given socio-cultural context. Sexuality appears as the interactive dynamic of gender as an inequality. Stopped as an attribute of a person, sex inequality takes the form of gender, moving as a relation between people, it takes the form of sexuality. Gender emerges as the congealed form of the sexualisation of inequality between men and women. So long as this is socially the case, the feelings, acts or desires of particular individuals notwithstanding, gender inequality will divide their society into two communities of interest. The male centrally features hierarchy of control. For the female, subordination is sexualised, in the way that dominance is for the male, as pleasure as well as gender identity as femininity.

B. Feminism

1. Who is a feminist?

According to Rosalind Delmar, "At the very least a feminist is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied and that the satisfaction of these needs would requires a radical change (or revolution) in the social, economic and political order".

There are different images of a feminist i.e. feminism may be linked to the way one dresses, talks, their mannerisms and so forth. Often feminists are seen as people who behave differently and feminism is often discussed within the image of feminists.

The term 'Feminism' is an emotive term, which has generated so much debate concerning the usefulness of the movement. A feminist is a person who is interested in improving the situation of women. Thus a feminist at the very least believes that women suffer discrimination and oppression by virtue of their sex, and that their needs have been negated in different historical periods. A feminist can be either a man or a woman and not all women are feminists.

The feminist movement, which developed in the post industrial revolution era in Europe, is not a unified movement, even though the goals of the movement are one and the same. Thus in the movement there is a plurality of feminist theories, which have different approaches towards addressing women's problems or understanding women's experiences. Each feminist theory seeks to "describe women's oppression, it causes, and consequences and thereafter prescribes strategies for the liberation of women. These theories therefore offer critical explorations of women subordination, through exposure of women's subordination at all stages of their lives. Thus the theories offer an analysis and explanation of how and why women have less power than men and how this imbalance can be challenged or transformed. There is therefore a plurality of feminist theories, which reflects the fact that feminists though having a common problem have different approaches at handling their problems as well as different experiences.

The major feminist theories are **liberal feminism**: - which focuses on equal rights and individual choices. This theory seeks to identify ways in which law could remove the barriers that prevent women's access to, for instance, education, employment, credit, or enjoyment of civil and political rights. **Radical feminists** however focus on the different ways in which men control women's sexuality and reproductive capacities to suit their needs. In addition

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

2 "Feminists Theories and Study of Gender Issues"

this school of thought shows how men use different forms of violence to perpetuate women's oppression. **Marxist feminists:** link women's oppression to the forms of capitalist exploitation of labour and go on to analyse women's paid and unpaid work in relation to its foundation within the capitalist economy.

2. *Liberal Feminism*

Liberal feminists emerged from mainstream often professional, positions, throughout society. Liberal feminism has a long history stretching as far back as the 18th Century. Liberal feminists such as Mary Wollstonecraft questioned those viewpoints about women, which are damaging and discriminatory.

Liberal feminists are of the view that women's subordination is rooted in legal constraints, which prevent the full participation of women in the public sphere. Liberal feminists demanded "equal" opportunities and equal participation in the management of the societies. They sought increase of their participation in the political organs. They then fought for greater participation of women in education and training.³

Libertarian feminists are concerned with the provision and protection by the state of civil and political liberties to enable individuals realise their full potential in any given market. Classical/egalitarian feminists on the other hand are concerned with the provision of certain benefits to disadvantaged groups so as to uplift their bargaining powers to the levels of already advantaged groups.

Liberal feminists worked within state systems to achieve change by focusing on 'gaining equal with American Creed'. For liberal feminists men were the potential allies who were also oppressed by rigid sex roles, which denied them individual choice. They stressed the similarities rather than the differences, between individual women and men as well as the need to increase freedom for all people by eliminating group-based roles and stereotypes.

Emergence of liberal feminism as a theory was the result of the critical socio-economic transformation in the 18th century, namely:⁴

-The Industrial Revolution changes in the methods of production and social relationships;

-Feminist thinking was influenced by the bourgeois revolutions, which had led to the growth of political ideas based on equality;

-Eighteenth century European politics was characterized by confrontation with absolute monarchies, aristocracy and political oppression;

-Democratic political ideas in capitalist USA and France of the 18th century fuelled liberal feminist aspirations for women's political equality with men.⁵

Liberal feminists maintain that education is unfair to females because it limits their access and retention in certain fields. The failure to educate girls can have far-reaching effects on the development of a country, especially in production and health. Liberal feminism also compromised women's rights to access to productive assets and rights to life and liberty for welfare oriented services which nationalist. Governments have been supporting, social welfare services and planning concentrates on the child-rearing roles of women and ignore the gender inequities within the system.⁶

A more radical orientation within liberal feminism has been challenging the "equal opportunity" approach, which ignores the structural gender inequities and demands a more radical transformation of gender relations through the equity approach. This school challenges the existing social injustice and existing discriminatory systems. The equity approach is a reaction to the welfare approach on women issues. It recognizes that women are active participants in the development process but have been marginalized in production and reproduction.

3. *Marxist/Socialist Feminism*

In contrast to liberal feminists, they located the sources of women's oppression in the structure of capitalism and regarded major structural changes as necessary. They stressed the needs, interests and rights of groups more than

3 *ibid*

4 *Supra*, note 3 pp. 17-18

5 *Supra*, note 2 pp. 72-73

6 *ibid* at p.74

those of individual, and “the inextricable links between race, class and gender oppression”. Socialist feminists groups thus focused upon uniting with other oppressed groups in fighting all forms of oppression, rather than organizing or struggling separately to advance the interests of women.⁷

Marxist feminists they present a wide variety of scholars who have attempted to apply dialectical materialism in analysing sources of gender oppression. They locate women’s oppression in social class, race and ethnicity. They consider capitalism, imperialism and sexism as inseparable. Liberation of women is thus linked to liberation of oppressive social class relations. Traditional Marxist feminists, especially those who have been using Engel’s theory of the “Origin of the Family”, located women’s oppression in their inability to participate in the public sphere. It was assumed that the liberation of women from the domestic sphere to the public sphere would have contributed to their liberation.⁸

The concept of mode of reproduction was proposed as antithesis for the more familiar concept of mode of production. This debate links the economy to production and the sexual system to reproduction. The result is that the idleness of either concept is reduced. The formation of the gender identity is an example of production in the gender system. Not all multi-variation of social reproduction can be attributed to the gender system. Gender system is the domain of social life.⁹

The Marxist feminist participate in the reproduction production debate can be summarized in two viewpoints. The first views women’s as a reserve labour force for capitalism. Women’s generally cover wages provide extra surplus to the capitalism employer. Women serve the interests of capitalism through the management of family consumptions. The second viewpoint agrees that there is a relationship between housework and reproduction of labour. Debates on women and housework have revolved round the 5th of other or not housework as productive labour. Housework is not perceived as work by male dominated society because no wage is paid for it.

Educational researchers also use the mode of production/ reproduction approach. The reproduction approach considers school as photocopiers. Schooling in capitalism society is considered as reinforcing social inequities and solidifying social class structure.

Within the southern African context, feminists have taken advantage of what Marxist tradition offers thorough dialectical materialism, and gained from the radical feminist theories which consider gender as a source of power independent of class, and are attempting to provide an analysis, which seeks to empower women through transforming oppressive gender relations.¹⁰

4. Radical Feminism

The radical feminists together with the socialist feminists with their background in the Left and Civil rights movements, began what has become the pre-eminent feminist method; consciousness raising. The technique had originally been used to organize the poor by themselves in order to understand the systematic social cares of their oppression and the need for political solutions. Movement women in America, dissatisfied by the domination of movement men began to use this same technique themselves, and it spread to all forms of feminism in the early years of the second wave.¹¹

Radical feminists identified men as the oppressors and did not consider social discrimination as affecting women and men in similar ways. Like socialist feminists they saw society as in need of major structural changes and were not especially interested in working for incremental change within the system; last their power be dissipated in easy but small victories.

Radical feminism emerged as a result of a breakaway of Marxist feminists who were frustrated due to their inability to apply social class in analysing gender oppression. They located women’s oppression in the social institution of gender. They launched a whole scale onslaught against male dominated society and considered men as the enemy. They demanded radical transformation of the oppressive gender relations. This depicts how power as the concept of gender has seen used by its possessors to oppress the minority or the powerless.

7 *ibid* at p. 18

8 *Supra*, note 2 at p.83

9 *ibid* at p. 84

10 *Supra*, note 2 at p. 86

11 *Supra*, note 3 at p.18

Radical feminism puts sexuality and reproduction and patriarchy at the centre of the political arena and changes women's political consciousness. They challenge the conventional assumptions with regard to the place of women in society. In America for example radical feminists often staged public protests such as picketing the 1968 Miss America contest and Sit-ins at the offices of the Ladies Home Journal and Newsweek to forest "the ways in which the media's depiction of women perpetuated old stereotypes of the expense of new realities"¹²

Unlike liberal feminists, radical feminists stressed that women and men have conflicting interests. They tended to favour separatism and emphasized the need to develop a women's culture, rather than building coalitions with men as liberal women did to some extent, radical feminism came to mean feminists who were "women identified" and who analysed oppression primarily in terms of sex, another concept of gender.¹³

Gender, production, reproduction and patriarchy are the four domains of social life for the purpose of differentiating between economic systems and gender systems. Gender systems involve both the relations of production in the biological sense and developed other dimension of reproduction such as labour, employment and technology.

Patriarchy as concept was introduced to differentiate the forces maintaining gender oppression and discrimination from other social forces, such as capitalism socialism. However the concept observes other differences. Patriarchy is a specific form of male dominance based on the powerful role of father head. However, not all forms of gender-stratified systems are based on patriarchy.

From a radical feminist point of view, male supremacy rather than patriarchy is the most appropriate term of description for the social systems where there is rigid division of labour. Whereas liberal feminists fight for equal education opportunities, radical feminists challenge both the quality and the quantity of education being offered to women. Radical feminists in Africa have been demanding education for empowerment. Studies carried out in Botswana and in Tanzania have demonstrated how educational stereotyping is contributing to the marginalisation of women. While demanding for equal opportunities, radical feminists have gone to demand for changes in the curriculum.¹⁴

Radical feminists have also challenged men's control and monopoly over the production and use of knowledge. Gender biases are perpetrated because of the male dominance in media such as radio, TV and newspapers, school curriculum etc. Whereas liberal feminists have been fighting for equal access in health for women, radical feminists have agreed that health services must empower women. Many radical feminists were lesbians. Within radical feminists, however lesbian feminism became an identifiable intellectual approach as well as political strategy.¹⁵

III. GENDER/WOMEN'S RIGHTS

A. Human Rights

Legal rights comprise a cluster of claims, powers and immunities.¹⁶ The fact that a person has a right imposes a duty on another to refrain from interfering with that right. It also entails duties on the state for instance to ensure the enjoyment of those rights by its citizenry. Human rights are guaranteed as basic for all members of the human race. They include equality of all before the law and equal protection of the law, protection from discrimination on grounds of sex, ethnic origin, tribe, religion among others and protection from torture, cruel, inhuman or degrading treatment, right to own property and freedom of conscience, expression, movement, religion, assembly and association. Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of all governments. The Universal Declaration of Human Rights is the basic International statement of the inalienable and inviolable rights of all members of the human family. It is intended to serve as "the common standard of achievement for all people and all nations", in the effort to secure universal and effective recognition and observance of the rights and freedoms it lists? The covenants relating to human rights have provisions barring all forms of discrimination in the exercise of the human rights.

12 Supra, note 2 at p. 75

13 Supra, note 3 at p.18

14 Supra, note 2 at p. 77

15 Supra, note 3 at p. 19

16 Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial reasoning and other Essays*, (Cook, ed., 1922).

Basic international law instruments explicitly provide that the rights provided for in them are to be enjoyed by all human beings. The Charter of the United Nations in its Preamble states

We the peoples of the United Nations determined ...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small... have agreed..."

The Universal Declaration of Human Rights of 1948 states succinctly that "Everyone is entitled to all the Rights and Freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origins, property, birth or other status" (Article 2). Though this declaration was not intended at inception to impose legal obligations on parties, a party adhering to the Charter would be expected to ascribe to its provisions. This would then call for domestication of the provisions of the Charter.

From these two landmark instruments have sprung similar promulgations at international, regional and national levels. At the international level, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for equal enjoyment of all economic, social and cultural rights (Article 3) which include the right to work (Article 6); the right to "just and favourable conditions of work" (Article 7); the right to social security, including social insurance (Article 9); the right of mothers to special protection "during a reasonable period before and after childbirth" (Article 10(2)); the right to education (Article 13); the right to take part in cultural life (Article 15) among others.

In similar vein, the International Covenant on Civil and Political Rights (ICCPR) provides for the "equal rights of men and women to the enjoyment of all civil and political rights..." (Article 3). These rights include freedom from "cruel, inhuman or degrading treatment or punishment" (Article 7); freedom from arbitrary arrest or detention" (Article 9); freedom from "unlawful interference with ... privacy, family, home or correspondence" (Article 17); the right to "take part in the conduct of public affairs, directly or through freely chosen representatives" (Article 26 (a)); the right to "have access on general terms of equality, to public service" among others.

At the regional level we have, for instance, the African Charter on Human and People's Rights, which articulates a number of basic rights and fundamental freedoms and makes them applicable to African states. At Article 18(3) it provides that "[T]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions".

At national levels, many states have entrenched bills of civil and human rights in their constitutions, enabling their citizens to attack laws and decrees which, although lawfully passes, offend civil and political rights which have been declared so fundamental as to require them to be guaranteed forever. Moreover, private entities may be prevented from engaging in discriminatory acts in respect of access to housing, services or jobs by domestic human rights legislation.

B. Women's Rights

The campaign for women rights as Human Rights emerged in the 1960s when women realised that their needs were not adequately catered for in the Human Rights or such rights are often violated hence the need for women to have their rights. Indeed, the idea of *women's rights/human rights of women* has developed as it has become increasingly clear that the enjoyment of human rights purportedly guaranteed for all has not been equal for men and women. What rights are women seeking to have recognised outside the purview of general human rights? Broadly they include political rights, rights to economic independence and equality, access to education, the right to control their sexual and reproductive lives, rights to children and property both within marriage and upon divorce, and the right to safety in the workplace, at home and in public places. To that extent, women's rights address the concerns that liberal, Marxist and radical feminists raised and use law to realise their imperatives.

Women's human rights have been the concern of the United Nations since inception and in 1946, the UN established the Commission on the Status of Women. The UN General assembly and other UN specialised agencies have adopted a number of conventions that address the rights of women. These include:

1. **The Convention on the Political Rights of Women** adopted in 1952 which aims at ensuring the equality of men and women in their participation in public life. States parties undertake to grant women full

political rights such as the right to vote and the right to be eligible for election to all publicly elected bodies, to hold public office and to exercise all public functions on equal terms with men, without discrimination.

2. **The Convention on the Nationality of Married Women** adopted in 1957 whose purpose is to ensure the right of everyone to a nationality as recognized in the Universal Declaration of Human Rights. It acknowledges that this right is affected by laws that impose on women the nationality of their husbands. It provides explicitly that woman and men have equal rights to acquire, change or retain their nationality.
3. **The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages** adopted in 1962 whose purpose is to ensure by national legislation equal rights for both spouses in connection with marriage. Marriages should be entered into with the free and full consent of the spouses, which is to be expressed to the responsible authorities. A minimum age for marriage is to be established and all marriages are to be registered.
4. **The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)**¹⁷, adopted in 1979 and which is the most exhaustive international legal instrument on the rights of women. It provides at Article 3 that

“States parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”.

It contains explicit provisions on the rights of women in the areas of political and public life (Article 7), government representation (Articles 8), nationality (Article 9), education (Article 10), health (Article 12), employment (Article 11), economic and social benefits (Article 13), marriage and family (Article 16), equality before the law (Article 15) and takes into account the situation of rural women (Article 14). It also targets culture and tradition as influential forces in shaping gender roles and family relations.

The Convention Article 1 defines discrimination as: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Article 5 places a duty on states parties to “take all appropriate measures

(a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles of men and women;

(b) to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases”.

Article 11 seeks to eliminate discrimination in the area of employment. Each state party is enjoined to accord women “the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment, the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, the right to protection of health and safety in working conditions including the safeguarding of the function of reproduction; protection from “dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status”; introduction of “maternity leave with pay or with comparative social benefits without loss of former employment, seniority or social allowances” and “provision of the necessary supporting services to enable parents to combine family obligations with work responsibilities”.

Article 12 demands in the field of health “equality of men and women” in accessing “health care services including those related to family planning while ensuring that women get “appropriate services in connexion with pregnancy,

¹⁷ This is the most comprehensive treaty on rights of women.

confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation”

Article 13 deals with elimination of discrimination in the area of economic and social life and in particular seeks to guarantee the same rights to family benefits, bank loans, mortgage and other forms of financial credit”. Article 14 seeks to bring the rural women within the purview of the Convention to ensure their participation and benefits from rural development, health care, social security, training and education, economic opportunities, credit and loans, marketing facilities, housing, sanitation, electricity, water supply, transport and communication”.

Article 15 commits states parties to “accord to women equality with the men before the law ... a legal capacity identical to that of men and the same opportunities to exercise that capacity ... to conclude contracts and to administer property and ... in all stages of procedure in courts and tribunals”. It also enjoins states parties to “accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile”.

Article 16 enjoins states parties to “take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations” and in particular to ensure “the same right to enter into marriage”; the same right to freely choose a spouse and enter into a marriage only with their free and full consent”; the same rights and responsibilities during marriage and its dissolution”; the same rights and responsibilities as parents, irrespective of their marital status in matters relating to their children”; “the same rights to decide freely and responsibility on the number and spacing of children and to have access to the information, education and means to enable them to exercise these rights”, “the rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for valuable consideration”.

UN Specialised agencies such as the International Labour Organisation and the United Nations Educational, Scientific and Cultural Organisation have instruments on women’s rights in the areas of employment and education respectively.¹⁸

C. Equality and Equity

The provisions on women’s rights are predicated on the notions of equality between women and men and equity. Equality between women and men relates to the dignity and worth of men and women, equality in their rights, opportunities to participate in political, economic, social and cultural development and benefit from the results.¹⁹ Equity on the other hand relates to fairness in the treatment of men and women. It adverts to the possibility of inequality between men and women, which necessitates the application of differential treatment (DT) to get rid of inequality.²⁰

1. Equality

It is recognized that gender inequality exists. There are some realms where women are underrepresented or totally absent. The question then is: Do women and men have equal rights and opportunities to participate in that realm? If yes, what are the hindrances to the participation of women? This latter question is one of equity. This raises the issues of formal and substantive equality.

a) Formal Equality

Equality is the main goal in the pursuit for justice. Formal equality gives all individuals the same choices and therefore allows them to maximize their well being.²¹ However, equality premised on equal treatment is difficult to achieve. *De jure* equality can lead to *defacto* discrimination where the consequences of the law are not anticipated.

18 See, e.g., ILO Convention No. 41 concerning Employment of Women during the Night (revised 1934); ILO Convention No. 89 concerning Night Work of Women Employed in Industry (revised 1948); ILO Convention No. 103 concerning Maternity Protection (revised 1952); ILO Convention No. 45 concerning Employment of Women on Underground Work in Mines of all Kinds (revised 1935); ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1953); ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation (1960).

19 Joy Asiema, 2000.

20 *Id.*

21 Mary Becker, et al, eds *Feminist Jurisprudence: Taking Women Seriously, Cases and Materials* (1994) 68-81.

For instance the legal mandate of equal treatment is interpreted as the treatment of likes in a similar manner and unlikes in unlike manner. In the realm of gender such a distinction fails to take into account the distinctions that are the result of social constructions rather than difference as such.²² In such cases, the application of laws without discrimination may in essence result in discrimination.

b) Substantive Equality

Substantive equality seeks to address the shortcomings of formal equality and seeks to ensure that equity is achieved. The quest for substantive equality will lead to some form of discrimination or differential treatment. This is justified on account of levelling the playing field, it being recognized that equal rights will not deal with past injustices occasioned by formal equality that does not take into account structural distinctions. Indeed even if national laws on participation in political life provide for equal treatment of women and men, women will continue to be relatively disadvantaged on account of historical impediments to their entry into the political realm. As Aristotle points out,

if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares. Further, this is plain from the fact that awards should be ‘according to merit’; for all men agree that what is just in distribution must be according to merit in some sense.²³

Differential treatment is allowed under Article 4 of CEDAW, which decrees that adoption, by states parties of

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

The discussion below indicates that there are areas where the law has explicit discriminatory provisions, which need to be done away with. It also points to the need for differential treatment on account of sex differences to enable Kenyan women to fully enjoy rights provided for under the law.

IV. WOMEN’S RIGHTS AND THE LAW IN KENYA

A. Women and the Law

Law can be used to reinforce or give permanence to certain social injustices leading to the marginalisation of certain groups of people. In the realm of women’s rights, legal rules may give rise to or emphasize gender inequality. Legal systems can also become obstacles when change is required in legal rules, procedures and institutions to remove the inequality²⁴ by the oppressed. This necessitates an inquiry into what injustices are intertwined within the legal systems and the extent of their operation. One often finds that the *de jure* position, which may provide for gender neutrality cannot be achieved in practice due to the numerous existing obstacles, which make the law powerless.

Three points to note here:

1. Our statute books contain legal rules and principles which are or can be seen as a legitimization of the subordination of women to men;
2. The structure and administration of laws can occasion the subordination of women to men; and

²² Catharine A. MacKinnon, *Feminism Unmodified* (1987), 32.

²³ ARISTOTLE, *THE NICOMACHEAN ETHICS* (trans. David Ross, revised by J.L Ackrill & J.O. Urmson, 1991) quoted in Philippe Cullet, *Differential Treatment in International Environmental Law: A New Framework for the Realisation of Sustainable Development*, (Ann Arbor, MI: UMI Dissertation Services, 1998).

²⁴ Okech-Owiti, 1996.

3. The socio-economic realities in Kenya and many African countries 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 prevent the translation of abstract rights into real substantive rights.

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. It is at this point of enforcement that one gets caught up in the dichotomies and conflicts of statute law, customary law and law in practice which many a woman find themselves warped up in.

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

As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender-neutral legal machinery ... meets the gender-specific reality...²⁵

The end of the women's decade in 1985 culminated in the World Conference in Nairobi at which the "Nairobi Forward Looking Strategies" were drafted. These provided a framework for the elimination of obstacles to the advancement of women and gender-based discrimination. In the area of law, the ratification and domestication of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) was identified as an important first step to removing obstacles in this area. Revision of laws of countries taking part in the conference was also seen as crucial to the endeavour. Laws have a part to play in the process of eliminating barriers in the way of women's advancement. The test of effectiveness of such laws, however, lies largely in their implementation. It is consequently imperative that implementation mechanisms be engrained into the specific pieces of legislation if they are to benefit Kenyan women.

Another crucial area of concern is awareness by women of their rights. A right whose content is not known by the holder is at best a paper right. Legal awareness should be part of the task of achieving change in the legal status of women. Education of women on the content of their rights and modes of exercising those rights is a must if law reform is to achieve its stated objectives.

B. The Legal Framework

1. Legal Pluralism Versus Legal Centralism

Studies on gender and legal change in former African colonies have to take into account that the lives of women and men are affected by a plurality of norms. Legal centralism and legal pluralism are analytical frameworks that provide different understandings of the law. While the former denotes a unified system of rules, which are enforced through state machinery, the latter describes a system where the tiered and interactive normative systems operate within a system either within or without the formal state legal system.

Legal centralism starts from the standpoint that state law or state recognized and enforced law is the most important normative order and all other norm-creating and enforcing social fields, institutions and mechanisms are either illegal, insignificant or irrelevant.²⁶

Legal pluralism may be divided into two namely, juristic and diffuse. Juristic legal pluralism arises in situations where the official legal system recognizes several other legal orders and sets out to determine which norms of these legal orders will apply. Thus, the official legal system provides an operating environment for the plural legal

²⁵ Tove Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Oslo, Norwegian University Press, 1987).

²⁶ Pursuing Grounded Theory in Law ???

orders. For example, a constitution may provide for the operation of certain religious, or customary laws for particular ethnic or religious groups. In juristic legal pluralism, which is common in colonial and post-colonial Africa, state law is the ultimate authority and it dominates other plural legal orders. Diffuse legal pluralism arises where a group has its own rules regulating social behaviour whose operation is neither sanctioned nor emanates from state law.

a) State Law

Rules promulgated by the state. Law as a coherent and unified system of rules enforced through the state court machinery, uniform for all persons, exclusive of other law and administered by a single set of institutions.²⁷

Laws being applied by post-colonial state comprise of imported European substantive and procedural law and customary law as interpreted by the courts. For many women, the fact that they are trapped within the state's interpretation of the construction of families, its assumptions about the status of women in customary law has been a barrier to advancement even when the broader areas of the law have been reformed for the benefit of women.²⁸

b) Customary Law

Customary law is the law of small scale communities which people living in these communities take for granted as part of their everyday experience but it excludes outsiders who to get any account of it have to either be told about it or read about it.²⁹ Whether read about or narrated, customary law is once removed from the source. Thus the written accounts there are of customary law are not direct accounts of community practice but the work of informants each of whom, in recounting a particular rule brings to bear on the subject his/her preconceptions and biases. It would be easy to understand the ramifications of customary law if it was only one. However, there are as many customary laws as there are tribal communities and despite the general consensus on certain fundamental principles, there are nuances in each that only one well versed with the community's way of life can identify.³⁰

The hallmark of African customary law is the dominance of older male members over property and lives of women and their juniors. Allied to this is the centrality of the family as opposed to the individual and the definition of the family in expansive terms to include ascendants and descendants and more than one wife in polygynous unions. An outsider looking at these societies' structures may aver that women have no rights under customary law. It has, however been contended that women were better off under customary law than they currently are because they were accorded great protection as mothers and assured of a share of and access to resources even where they did not exercise political leadership of the community.³¹ The women-unfriendly customary law has gradually developed as African societies have undergone change most of which can be seen arising from colonisation and privatisation. The battle of the sexes at customary law is in one sense therefore a struggle over scarce resources and power as overlords in the form of colonial powers and states in modern African states have assumed control over all aspects of the lives of Africans, prompting the African males to consolidate the one bastion of their authority, namely customary law. In some cases, notions of customary law such as the concern for women have been dropped making women very vulnerable. The removal of protection has not been accompanied with fewer roles for women within the community. Their roles of reproduction and production have remained intact (rural women in Africa contribute substantially to food production).

c) Religious Law

Islamic, Christian, Hindu, African religion

d) Intersections between different laws and normative orders

Women find themselves situated in the intersection between different systems of laws and a plethora of normative orders that influence the choices that she can make and the decisions that are reached about her life by others. Thus

27 Griffiths, 1986:3).

28 Ncube & Stewart et. al., 1997.

29 T. W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION (1995).

30 At about the end of the nineteenth century when colonialism began, it is recorded that Kenya had as many as 64 tribes. See D. T. ARAP MOI, KENYA AFRICAN NATIONALISM (1986).

31 See Alice Armstrong, Customary Law in Southern Africa : What Relevance for Action, Newsletter Vol. 7 No. 1.

legal pluralism takes on a new meaning, recognising that there are regulatory and normative systems other than formal law that affect and control people's lives.

2. International Law

In looking at the legal status of women in Kenya, one has to look at both the international and domestic dimensions. Kenya is a signatory to many international legal instruments that have a bearing on the legal status of women. She also has domestic laws touching on this issue. Kenya is a member of the United Nations and would therefore have an international legal obligation to provide for equal rights to men and women as provided for in the UN Charter and the Universal Declaration of Human Rights. Kenya is also a signatory to the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the Political Rights of Women and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (1979). There is no shortage of obligation in the area of equality of the sexes in international law. That many of these have not found their way into the Kenyan domestic legal regime and remain largely in the realm of the ideal points to the impotence of international legal obligations. Domestication of such obligations is imperative if they are to be realized.

At the 1985 World Conference on Women held in Nairobi the domestication of CEDAW was singled out as an important step toward implementation of the basic strategies formulated at the conference at the national level. Issues of equality in the areas of political participation, education, employment, civil codes pertaining to family law, ownership of property, availability of credit, health and social security, to name but a few were also identified as crucial intervention points. The 1990 "Abuja Declaration on Participating Development: The Role of Women in Africa in the 1990's" amplified the same thematic issues. It is interesting to look at the domestic scene to gauge how far if at all these international instruments have influenced law reform in Kenya.

International legal obligations are expressed in general terms. For them to form part of Municipal Law, there has to be specific legal enactment encompassing the international legal obligations. There exists a well-established principle of international law that all states parties must organize and regulate their domestic jurisdictions to abide by international legal obligations. In the *Free Zones of Upper Savoy and District of Gex Case* ((1932) PCIJ, Series A/B No. 46) the Permanent Court of International Justice said

"It is certain that France cannot rely on her own legislation to limit the scope of her international obligations" (page 167).

However international law is characterized by weak enforcement machinery and unless a state enacts municipal law to fulfil international obligations, its subjects are unlikely to benefit from such international obligations.

3. Domestic Law

a) Constitutional Provision on Fundamental Civil Rights and Discrimination

On the domestic scene we have a plethora of laws touching on the status of women. The primary legal document in this arena is the Constitution. The Constitution at chapter five provides for the fundamental rights and freedoms of the individual. These rights include the protection of the right to life, protection of the right to personal liberty, protection from slavery and forced labour, protection from inhuman treatment; protection from deprivation of property; protection against arbitrary search or entry; provisions to secure protection of the law; protection of freedom of conscience; protection of freedom of expression; protection of freedom of assembly and association; protection of freedom of movement and protection from discrimination on grounds of race.

Section 82 of the Kenyan constitution deals with the question of discrimination. Section 82 (1) provides that no law shall make provision that is discriminatory "either in itself or in the effects" and neither should a person be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of functions of a public office or public authority" (Section 82 (2)). Under Section 82 (3) discrimination is defined as "affording different treatment to different persons attributable wholly or mainly to their ...race, tribe, place of origin or other local connexion, political opinions, colour, creed or sex ...". (Section 82(3).

A number of laws are 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 and personal law matters; laws affecting members of a particular tribe or race in matters exclusively concerning them

and such an action is seen as justifiable in a democratic society. The laws exempted by Section 82 (4) are in areas that directly affect women. One therefore finds that women's enjoyment of the fundamental freedoms guaranteed by the Constitution is severely restricted.

In most patriarchal states, there is a fear that illegalization of sex discrimination may lead to countless court suits by women. (Kibwana: 1990:2-3). This fear has therefore meant that women, who are most likely to be affected by such provisions, are denied Constitutional protection from sex discriminatory laws. While Section 82 (3) gives women protection from discrimination on the basis of sex generally, Section 82 (4) denies them protection in their communities and homes. The effect is that at no time are women guaranteed protection from sex-based discrimination.

Section 82 (4) legitimises the traditional position, which accorded women fewer privileges than men, in matters concerning their families, marriage, divorce and succession. This presents problems when we seek to apply statutes such as the Law of Succession Act (cap. 160), which seeks to give both men and women, equal rights in matters of succession. Other than this, the Marriage Bill (1985) gives equal rights to spouses in a marriage in matters concerning custody of children, divorce, or division of matrimonial property. This Bill has failed to pass 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. If the Marriage Bill of 1985 is adopted as an Act of Parliament or other laws passed to ensure equality of the sexes for their success, it is imperative that the Constitution be amended to repeal the provisions of Section 82 which advocates for sex based discrimination in matters of personal law, marriage, divorce and succession (Kabeberi Macharia, Kameri-Mbote and Mucai-Katambo: 1992)

b) Laws of 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 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. (Ibid).

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 passing of citizenship one's child or spouse is governed by the Law of Domicile Act (Cap. 37). The Act primarily concerns itself with the conferring of a domicile status by parents to their children. A child born within wedlock acquires the domicile of its father but if born outside wedlock such child acquires the domicile of its mother.

An abandoned child acquires the domicile of the place where the child was found. According to the Constitution, a child acquires the father's citizenship, but if such child is born outside wedlock, it acquires the mother's domicile (as per law of Domicile Act). This may present problems should the mother marry a man of a different citizenship than that of the father.

The laws barring a woman from passing citizenship to both her husband and children discriminatory. In Attorney-General of Botswana vs. Unity Dow CA No. 4/91 it was held that this provision is discriminatory contravenes the

Convention on the Elimination of Discrimination Against Women. If Kenya is to live up to its obligation under the Convention, then it should remove such provisions as this, which promote discrimination against women.

Certain Rules made under the Immigration Act (Cap. 172) are indicative of the differential status accorded to men and women. One such rule is that the legal guardian of a child is the father and the mother only becomes such guardian one the father of the child dies. This provision has caused untold suffering to mothers where the mother of the child wants to acquire travel documents for the child and the father of the child is uncooperative. It is interesting to note that a father can get the name of his children included on his passport without the mother's consent while the mother has to get the father's consent. Other rules that require married women to obtain their husband's consent before acquiring passports or travelling out of the country are discriminatory against women and should be abrogated to tally with the legal capacity accorded to women under the law.

c) Women and the Political Process

The law with respect to participation in the political process is gender neutral. This equality is however evident in practice. Women constitute more than 50 per cent of the Kenyan population.

It is clear that women are majority of the voter population though eventually they turn out to be under-represented in elective bodies. Women have been socialized into believing that the political arena is for men only. Thus their participation in the political and elective office is at low levels. Although some women have attempted to enter the political field, the numbers of women members of parliament are still very few. It is therefore important that

“Participation of women in political and public decision making is viewed as critical to the actualisation of sex equality because women must command real political power if their concerns are to be prioritised and meaningfully included in the national agenda”.³²

Representation of women should also be effective at the district and vocational levels, as well as in the country, town and municipal councils. In the “Blue Book” on district focus on rural development (1987), full participation of the local community planning and implementation of development activities is emphasized.

This means that both women and men should participate in the development of their communities. Unfortunately, participation of women is low and ineffective. The poor representation in local councils has changed since 1985 especially after the 1992 Multi Party Elections, but not significantly. This is reflective of the position of women hold in the entire political field.

Deliberate moves can be undertaken to ensure that women are well represented in the government by appointing women to top leadership posts. Legislation may facilitate this by deliberately reserving a certain number of seats in parliament or in the party for women. The same can similarly be provided for in the local councils. In Tanzania and Uganda for instance such provisions have been enacted. This is not tokenism since it is an appreciation of the inequity, which needs to be corrected before women, and men can compete on an equal basis.³³

Women being the majority of the voters can, if properly mobilized vote in candidates who are sensitised to their needs. However, studies have shown that even though women are aware of such candidates, they are either manipulated by other candidates or by their husbands giving them no free choice in the voting. This makes a case for provision, in the interim, for a specified number of seats for women.

d) Civil Law

1. LEGAL CAPACITY

According to the Age of Majority Act “a person is deemed to have full legal capacity on the attainment of eighteen years”. Full legal capacity to enter into legal transactions presupposes that the person is of sound mind. The act does not discriminate between men and women and therefore upon attainment of eighteen years a woman sheds all legal disabilities and may enter into legal transactions in her own right. This is a shift from the pre-independence society where men were more advantaged than women in contractual matters (Maina, Mucai, Gutto: 1976). However, it is noteworthy that English common law principles of “agency of necessity” and “presumed agency” have been

³² Kabebere-Macharia and Kibwana 1992.

³³ Kameri-Mbote & Kibwana 1992.

received in Kenya and are applicable to women. These are based on the notion that women are chattels and have no proprietary capacity (*Best V. Samuel Fox and Co. Ltd.* (1954) 2 All E.R. 394 which regarded the husband as having a proprietary right in his wife).

The “agency of necessity” principle entitles a married woman to pledge her husband’s credit for necessities of life commensurate with their normal standard of living. This power may be exercised by a woman during a separation pending a court order for maintenance. Its application is reserved for desperate situations.

Thus, where a woman has adequate means of maintenance she cannot pledge her husband’s credit. Moreover, the presumption of authority to bind the husband can be rebutted if the husband proves that the wife has well provided for, or that he had warned her against pledging his credit, or that he had warned the supplier against supplying the necessities claimed.

The principle of “presumed agency” does not depend on separation of spouse and a woman is entitled to bind her husband to a contract for necessities of life.

There are few reported cases on the application of these principles, which implies that there are few controversies on the matter. Alternatively, women may be ignorant of the right or they are constrained from invoking them due to a variety of reasons including threats by husbands.³⁴

2. RIGHTS RELATING TO MARRIAGE

a) Right to retain family name

There is no legal provision in Kenya regulating what name parties should adopt after marriage. The prevalent is for the wife to take on her husband’s name retaining her name in brackets if she wishes. Parties to a marriage should have the right to decide which names to keep after marriage and public authorities should desist from insisting that women change their names after marriage.

b) Other Rights During Marriage

Personal matters pertaining to marriage are governed by different laws, which are recognized by the constitution and accorded equal importance. There are four systems of marriage namely; Customary Law, Moslem Law, Hindu Law and Civil Law which embodies the English philosophy of life and Christian doctrine. Two of the systems (Civil law and Hindu) only recognize monogamous marriage and the other two (customary and Moslem laws) recognize polygamous unions as well. Marriages under marriage act, the African Christian marriage and Divorce Act the Islamic and Hindu laws are evidenced by registration and issuance of a marriage certificate if they satisfy the requirements of those legislations as to formality and procedure. Customary law marriages are not thus evidenced and couples that are customarily married either marry again under statute or swear affidavits to the effect that they are married under customary law.

A monogamous marriage may be contracted under the Marriage Act (Cap 150), the Hindu marriage and Divorce Act (Cap 157) and the African Christian Marriage and Divorce Act (Cap. 151). A spouse, who contracts another marriage while the first one is still subsisting under any of these acts, commits the offence of bigamy under the Penal Code.

The requirements for a valid marriage at customary law are not uniform for all ethnic communities. They include payment of dowry or bride price and some ceremony signifying the union of the individuals concerned. It is not uncommon for these processes to take a protracted length of time before completion. Dowry for instance may take more than the couple’s lifetime to clear and oft times, it is never fully paid. It is consequently difficult to say with certainty whether a person is married or not while the processes are going on. When one of the parties to a customary marriage dies or if the man seeks to throw out the woman, the issue as to whether a customary marriage is in place becomes crucial. The parties here may be at some stage along the route of marriage, which under customary law is a process rather than an act. Whether such stage is interpreted as marriage or not depends on the interpreter. It would be desirable to have registration of all customary marriages to avoid the kicking out of women who all along believed themselves to be married and acted as such.

³⁴ (Kabeberi-Macharia; Kameri-Mbote and Mucai-Kattambo: 1992)

Customary law allows a man to marry as many wives as he wishes while Islamic law (Cap 156) allows as many as four wives at any given time. The offence of bigamy does not apply to polygamous unions under these two systems. This underlines an element of inequality whence a man is deemed capable of looking after many wives while polyandry (a situation where a woman has more than one husband) is not a practice discernible or even acceptable. While Islamic law enjoins a husband to provide equally for his wives, customary law does not. In fact reports received by the commission looking at the law of marriage from many traditionalists indicated that polygamy ensured that a man had a large labour force to tend his farm.

The rights and duties of spouses are by and large dependent on the system of marriage applicable to the system of marriage. In most systems of marriage dowry is payable. This has been viewed as "wife purchase" and augurs badly for equality of the sexes. The idea behind payment of dowry was good, that is, providing a forum for cordial relations between the families of the persons marrying. This practice has however been abused and does not serve its intended original purpose.

c) Capacity to Marry

Capacity to contract a monogamous marriage is set out in statutory law. Under the Marriage Act, the man and woman must have attained the age of 18 years. Under Hindu law, the bridegroom must have attained the age of 18 years and the bride 16 years. If the bride is between 16 and 18 years, the consent of a guardian or the High Court must be sought. Consent to marriage is an important legal requirement in a monogamous marriage and lack of it nullifies marriage under the Matrimonial Causes Act (Cap 152).

Capacity to contract marriage under customary law and Islamic law is linked to circumcision and puberty and is not subject to statutory regulation. Puberty may be attained as early as 11 or 9 years, which in effect means that a child could enter into a contract or marriage. Under Islamic law, a contract of marriage may be concluded by a guardian on behalf of a child who is below the age of puberty.

Child marriages have been the subject of much controversy in recent times and a major focus of women and children's rights advocates. As early as 1967 a Commission on Marriage and Divorce appointed by the President to review family law, and recommend a comprehensive uniform code of marriage and divorce deliberated on this question. (Kabeberi-Macharia, Kameri-Mbote and Mucai-Kattambo: 1992).

The commissioners considered the marriages wrong in principle and contrary to the best interests of Kenya. They recommended minimum ages for marriages to apply to all communities - 18 years for males and 16 years for females. This recommendation found its way into a marriage bill, which is yet to become law.

Thus, the vulnerability of female children in communities, which practise these marriages, is real and has negative implications for the general status of the Kenyan women. Not only do these marriages undermine the educational opportunities of the girls who are forced out of school but also pose threats to their health and that of their offspring.

Advocacy on this matter has linked this problem to child abuse, as many of the minors involved are forced to become adolescent mothers with the accompanying risks of early pregnancy and health risks to the children brought forth. Health personnel have cited increasing incidents of cancer of the cervix among young age groups and exposure to sexually transmitted diseases, as husbands of the children are usually older people who may have had several sexual partners. (Ibid.).

There are however signs of change and acceptance that child marriages are contrary to the interests of women and must be discouraged at all costs. Recent reported incidents in parts of the country, which are notorious for child marriages, have highlighted the role of chiefs and other administrators in curbing the practice by invoking the Chief's Authority Act (Cap 128).

By exercising powers under the Act, chiefs have been able to restore back to school, girls who have been forcefully removed for purposes of marriage. However, intervention under this Act lack adequate legal basis and therefore concrete solutions are expected from the review of child law under the auspices of the Kenya Law Reform Commission.

Other customary practices that may engender inequality of the sexes are woman to woman marriages, sororate unions and levirate unions practised among certain ethnic communities marriages a widow who has no children or has reached menopause makes dowry payment to the parents of a young woman who comes to her home to bear children sired by a selected male relative of the deceased husband of the widow. The children thus born are regarded as children of the deceased (Otega; 1985).

Sororate unions entail the replacement of a deceased wife by her sister as wife to the widower where the deceased died without issue or without male issue. The underlying consideration here is that dowry has been paid by one family to the other and rather than refund such dowry, the deceased's family provides a wife.

Levirate unions are a form of widow inheritance. When a man defies his wife goes into cohabitation with the brother or a male relative. While such woman remains a wife to the deceased, she has a conjugal relationship with a living person. Widow inheritance, *stricto sensu* entails the taking over of a widow by a relative of her deceased husband who could be a brother or even a son (Ibid.). The idea behind these practices is to ensure that the widow and her children are looked after within the family of the deceased husband and father. Emphasis here ought to be placed on the assumption of the protective and supportive roles of the deceased rather than on the sexual relationship. A woman should be able to choose who to inherit her or to opt out of such arrangement altogether.

Relationships in all the above marriages and unions have a purpose to serve in certain contexts. However, they are based on the inequality of the sexes, While proscribing them may not be the best approach, it is necessary, through education, to seek a gradual mode of discouraging their prevalence. There is evidence that they are not as common today as they were due to considerations such as cost of living, health (Acquired Immune Deficiency Syndrome) and the desire to maintain small family units.

d) Property Rights

Kenya's legal system has since 1971 established the principle that spouses have equal rights in ownership of property. This principle was enforced in the case of *I V I* (1971) E.A. 278) in which the court applied the English married property of 1882. The act has since become a statute of general application and has been invoked to deal with matrimonial property disputes. This has contributed to the general advancement of women in relation to ownership of property.

Section 1 (1) of the Act provides that a married woman is capable of acquiring, holding and disposing by will or otherwise of movable or immovable property as her separate property, in the same manner as if she is a single woman (*femme sole*). Sub-section 2 of this section of the act provides that a married woman may sue or be sued in respect of her separate property either in contract or tort as if she were a *femme sole*. A married woman carrying on business separately from her husband is subject to the law of bankruptcy in respect of her separate property.

Although the parties in *1 v 1* were not subject to customary law, the Married Women's Property Act has been extended to parties married under customary law, for example in *Karanja v. Karanja*. (1976) K.L.R. 307). The implication of the decision in *Karanja's* case is that the Act is applicable to all the systems of marriage recognized under Kenya Law, and has the potential of removing inequalities experienced by women especially within the context of customary law. It should be recognized however that the continued application of the English act shows that the Kenyan legal system is wanting. It has yet to be decided with certainty whether relevant developments in English law should be applied in Kenya.

Moreover, there are practical problems in the application of the principle of equality of sexes in the matrimonial context. During the dissolution of a marriage, questions arise as to which spouse owns which property where the property is registered in the name of one spouse and the other spouse claims an equitable interest therein or where it is registered in the names of both spouses but the exact amount of contribution of each is not ascertained. The question as to whether a wife can be deemed to have contributed to matrimonial property by looking after children and attending to other domestic chores also arises.

With regard to the issue of registration of property in the name of the spouses, it has been established that where such property is registered in the name of the husband, a wife who claims an interest therein must show that she contributed some money towards the purchase of the property. It has also been established that where the spouse holds the title to the matrimonial home, the other spouse may gain an interest in the property by making substantial improvements to such property.

In the absence of local legislation, Kenyan courts have yet again to resort to English law. English rules of equity and common law are applicable in Kenya "so far only as the circumstances of Kenya and its inhabitants permit and subject to qualifications as those circumstances may render necessary". Under rules of equity, where property is purchased by the husband and is transferred to the wife, there is a rebuttable presumption of a resulting trust in favour of the wife.

Where a wife and husband have a joint bank account they are presumed to be entitled to it in equal shares. Where investments are made out of the joint account in the name of the husband, he will be held to be a trustee for his wife, who would be entitled to a half share. This position was succinctly stated in *Karanja v. Karanja* as follows: -

“The fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust nor preclude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held on trust for them both”. Where a woman contributes to the purchase of the matrimonial home, spouses are entitled to it in equal shares irrespective of whether the contributions of the wife are smaller than those of the husband and vice versa (Kabeberi-Macharia, Kameri-Mbote and Mucai-Kattambo: 1992).

Where the woman is unemployed our law is silent on the value of her non-monetary contribution to the matrimonial kitty. The Tanzania Court of Appeal was seized with the opportunity of determining whether or not the domestic services of a housewife amounted to a “contribution” in acquiring matrimonial assets in the case of *Hawa Mohamed v. Ally Sefu* (Unreported Civil Appeal No. 9 of 1983) and it observed.

“On examination of the Law of Marriage Act 1971, and the law as it existed before its enactments one cannot fail to notice that the mischief which the law ... sought to cure or rectify was what might be described as oppression by reducing the traditional inequality between them and their husbands in so far as their respective domestic rights and duties are concerned.”

This thinking is also to be found in justice Omollo’s decision in *MaryAnne Matanu Kivuitu v. Samuel Mutua Kivuitu* (1991) KAR 241 where he was of the view that non-monetary contribution by the housewife in preparing for the family and keeping the family going generally constituted contribution to the acquisition of matrimonial property. Such progressive thinking should form the basis of legislation with regard to matrimonial property. The practical application of such principles in favour of women raises questions in view of the fact that resolution of conflicts is largely dependent on legal counsel and access to courts. Legal services are out of reach of a majority of Kenyan women implying that special legal aid arrangements are necessary to enable them challenge discriminatory practices inherent in personal laws. For example under customary law, there is a general principle, that the husband should manage the wife’s property except for movables such as personal effects and there are divergent practices on the position of the woman as regards her property rights on dissolution of marriage as noted above.

Although this situation is changing through liberal judicial intervention and increasing advocacy on women’s rights, specific policy interventions and legislative measures are necessary to ensure that women are empowered to have access to property. More training and employment opportunities are but examples of the necessary interventions. Legislation is also necessary to address rights of women involved in situations of cohabitation for a considerable number of years without going through a ceremony of marriage. Courts in Kenya have had to grapple with disputes emanating from associations that do not neatly fit into any of the four systems of marriage. The parties to these relations may be those who are on the road to customary marriages not having completed the process or persons who come to live together outside a formal marriage. In the event of such cohabitants acquiring property together or bringing their individually owned property to the union questions as to property rights to such are bound to occur in the event of death or the relationship turning sour.

Faced with such disputes, courts seek to determine whether in fact the cohabitation constituted a marriage for purposes of allocating property rights. Proof of existence of marriage always tends to be disadvantageous towards a woman who has to prove her status as wife before the court. In *Mary Njoki v. John Kinyanjui and others* (Unreported Civil Appeal Case No. 71 of 1984) the appellant’s claim to the deceased’s property was rejected despite her cohabitation with him. The court was of the view that cohabitation and repute alone were not enough to constitute a marriage. It was necessary in the court’s view, that such cohabitation be accompanied by an attempt to carry out some ceremony or ritual required for any marriage or by customary law.

e) Parental Rights and Duties

The principal legislation regarding maintenance and custody of children is embodied in the Guardianship of Infants Act, (Cap 144); the Children and Young Persons Act, (Cap 141); the Matrimonial Causes Act; the Subordinate Courts (Separation and Maintenance) Act, (Cap 153). Parental rights and duties with regard to children born within wedlock arise from this legislation, which also provides sanctions in addition to a penalty under the Penal

Code for failure to provide a child with necessities of life. In all matters pertaining to the rights and duties of children born within wedlock courts treat men and women equally. Courts must however have the welfare of the infant as the first and paramount consideration. In the absence of exceptional circumstances courts confers custody of young children in the mother (See Joyce Muthoni Githunguri v. Stanley Munga Githunguri (1988) KAR 9).

The responsibility to care for the child born out of wedlock is placed squarely on the mother who has to provide for its education and other necessities of life. This state of affairs arose out of the repeal of the Affiliation Act (Cap 142) in 1969. The Act had been enacted by the colonial government to ensure that putative fathers cared for their children. The Act enabled the mother of an illegitimate child to apply for a court order against the putative father which would require him to make financial contributions towards the expenses incurred in respect of the birth of the child, its education - so long as the child was under 16 years old and its death.

The repeal, introduced a major discriminatory element in the responsibilities of biological parents to care for their children. An unwed mother has no remedy save for pregnancy compensation, which is recoverable by her parents under customary law. An action may be brought under the Magistrates' Court Act (Cap 10). The compensation of Kshs. 1000/- currently sanctioned by the law is contemptuous to say the least and would not even go halfway to defray medical expenses related to the child's birth. In any case it is recoverable by parents for the lost honour of their daughter and not necessarily for the maintenance of the child.

The problem of legitimacy is of topical interest and formed an important aspect of the review on child law, under the auspices of the Kenya Law Reform Commission. Legislative efforts to grapple with the problem since the repeal of the Affiliation Act have yielded an interesting innovation embodied in the Law of succession. The Law of Succession Act (section 3 (2) confers a right of inheritance to a child born out of wedlock if evidence can be adduced to show that the putative father (deceased) recognized the child or assumed permanent responsibility over him. (Kabeberi-Macharia, Kameri-Mbote and Mucai-Kattambo: 1992).

Whereas this provision rightly responds to the material needs of an illegitimate child, it may be the source of distress to an unsuspecting widow who is suddenly confronted with the reality of her late husband's infidelity. Why not hold the man responsible while he is still alive? It is expected that the child review exercise aforesaid will deal with this problem.

f) Separation and Divorce

The law on separation and divorce provides differential treatment for men and women. Women who are married under a monogamous system of marriage, have the exclusive right to seek separation and maintenance in speedy and inexpensive proceedings in magistrates' courts under the Subordinate Courts (Separation and Maintenance) Act. A woman may also petition for judicial separation and maintenance under the Matrimonial Causes Act.

Under the Subordinate Courts (Separation and Maintenance) Act, a woman may seek separation on the grounds that the husband is a habitual drunkard, drug taker, is infected with a venereal disease; he has subjected her to prostitution; has been convicted of a crime under the Penal Code for having caused her actual bodily harm by causing her to take noxious substances, by unlawfully wounding her, or by assisting her or if he has failed to provide the necessities of life to her and the children.

The Matrimonial Causes Act also entitles a wife to petition for judicial separation where the husband who has been found guilty of the offence of rape, sodomy or bestiality. These grounds may also form the basis for divorce. In addition to granting a divorce, courts are empowered to order the husband to pay alimony to the wife, the court is also empowered to exercise discretion with due regard to the wife's fortune, if any, the ability of the husband, and the conduct of the parties.

The above grounds are not available to men and in this regard the law has leaned heavily towards the protection of women. It be noted however that the wide protection provided in the above legislation is limited to monogamous unions. The position of the women is insecure under both Islamic and customary law.

A Muslim husband is empowered to unilaterally terminate marriage by pronouncing three talaks, which mean (I divorce thee, I divorce, thee I divorce thee). The wife lacks power to divorce her husband in this way and once divorced a woman loses her right of maintenance on expiry of three months.

Divorce under customary law involves clan elders and families of the spouses since marriage is basically a union between clans. A divorced or separated wife is not entitled to maintenance. The duty of spouses to maintain each other is reciprocal and to this end, law has recognized the equality of the sexes. However, unwed mothers still bear a heavier burden of maintaining their children as noted above. The other problem in this area is means of enforcing maintenance orders where they are forthcoming. Enforcement is heavily dependent on the courts, which tends to protract the process and make it expensive. The recently established family courts are expected to ameliorate this situation.

e) The Law of Succession Act

The key legislation in this area is the Law of Succession Act passed in 1972, with the main objective of unifying the law of succession under different personal laws. It applies to both testate and intestate succession. It does not however apply to Muslims (Act No. 21 of 1990 which came into effect in January 1991).

Muslims, in making a case for exclusion from the provisions of the Act, argued that the Act embodied secular principles and was contrary to Islamic faith. To this extent, they contended, the law was unconstitutional in so far as it compromised their freedom of religion and worship as embodied in section 78 of the Constitution. In fact section 82 (4) (b) of the Constitution permits the enactment of discriminatory legislation on matters of "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law".

Critics of the 1990 concessional amendment argued that Islam should not be regarded as special. They conceded that the Act also compromised principles that were crucial to Christians, traditional Africans, Hindus and atheists.

What this means is that the system of inheritance of fixed shares where females get less than males under Islam still persists. Muslims apart, the Act "has universal application to, all cases of intestate and testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons". (Section 2 of Cap 160).

The commission presented its report in 1968 and their draft Bill (with some amendments) became the Law of Succession Act coming into effect on 1st July 1981. The Act sought, in addition to unifying the laws, to correct the defects of the previously applicable regimes. The Commission's proposals on testate succession sought to improve the status of women, whether as daughters or widows. They observed that tribal sanctions engrained in rules of succession no longer obtained and stricter controls of administration procedure were needed (Maina: 1992).

1. TESTATE SUCCESSION

On testate succession, sections 5ff make detailed provisions relating to capacity to make wills, construction and formalities among others. The sections are gender-neutral using such terms as "every person" or "any person". Capacity of women to make wills has been specifically provided for. The fact that women can now own property seems to be the guiding force behind this provision. Section 5 (2) ordains, "A female person, whether married or unmarried, has the same capacity to make a will as does a male person". Such female person ought to be an adult of sound mind and the will may be written or oral. She can only make a will in respect of property that she owns. While this is a step in the right direction, the tendency of family property to be registered in the husband's name only even where both parties have contributed to its acquisition, leaves many a woman at the mercy of the man upon the dissolution of the marriage. Safeguards are needed to ensure joint property is considered as the property of both spouses even where evidence of direct financial contribution is lacking (See *Kivuitu v. Kivuitu* (1991) KAR 241). It is perhaps not surprising that more men than women make wills. This may be explained on the basis of the continuum of customary law whereby the man owned all property. Also notable is the fact that wills made by men tend to favour male heirs. (See for instance *Wanjau Wanyoike and four others v. Ernest Wanyoike Njubi and the Public Trustee* in Cotran: 1987: 323). The property dealt with here mostly includes land, houses, cars, and other capital goods. This denies women heirs a share or even access to such property.

While such practices may have a lot to do with attitudes and cultural considerations, it is here contended that under customary law, whoever inherited property was enjoined to access it to other members of the family men and certain categories of women. The reason behind males inheriting was the notion that they remained within the families while the daughters got married and left. Since this is not always the case and even where the daughters get married, they have been known to maintain close ties with their families, attitudes ought to take cognisance of the current trends and allow women to inherit their parents' properties.

For any disposition of the deceased's estate under the Act, whether that disposition is effected by will, gift in contemplation of death or by the law relating to intestacy, or by the combination of will, gift and law, if it is deemed unreasonable by the court, such court could order the reasonable provision for any dependant out of the deceased's estate (Section 26). The court in making such reasonable provision is vested with discretion (Section 27) and guidelines for the exercise of that discretion (Section 28) are clearly laid out.

A "dependant" is widely defined to include the wife or wives or former wife or wives and children of the deceased whether or not maintained by him immediately prior to his death; deceased's parents, step-parents, grandparents, grandchildren, step-children whom the deceased has taken into his family as his own, brothers, sisters, half-brothers, half-sisters as were being maintained by the deceased prior to his death (section 29). This section takes into account the African concept of the extended family. A husband would be the wife's dependant where she was maintaining him immediately prior to her death. This is a recognition of the capacity of a woman to hold property independently of her spouse and apply it for her maintenance, her spouse's maintenance and that of her children.

2. INTESTATE SUCCESSION

Part V of the Act deals with the rules of intestacy. Section 32 exempts certain gazetted areas from application of these rules in respect of agricultural land and livestock. These areas include Wajir, West Pokot and Turkana. Tana River, Kajiado, Garissa, Marsabit, Isiolo, Mandera and Lamu. If a person dies intestate in any of these areas, customary law applies with regard to agricultural land and livestock. The problem here is that the two categories of property excluded may be the only property owned by a deceased person. This means that women in those areas cannot benefit from or seek protection under the provisions on intestacy which if properly implemented could elevate the status of women in property control and management in Kenya.

The Act at section 35 denominates a surviving spouse in a monogamous union as the most suitable person to take charge of a deceased's property. This is a departure from African customary and Hindu practice of favouring the eldest male issue. It is however, remarkable that the surviving spouse gets only a life interest in the property and where that is the woman (widow) the interest determines upon her remarriage.

Indeed women's interests in matrimonial property are clearly provided for under the Act. Under Section 29 the wife ranks high among the dependants of the deceased husband while the husband only becomes a dependant of the wife if she maintained him prior to her death. The implication here is that a husband takes a life interest in the net estate like the wife in the event of his death. The man cannot, however, apply to the court under section 26 unless he satisfies the provision on having been maintained by the wife even if no reasonable provision is made for him.

Section 36 of the Act clarifies the issue on dealing with a surviving spouse who has no children. The spouse here is entitled to the personal and household effects of the deceased absolutely; either the first Kshs. 10,000/- or twenty per cent of the net intestate estate and a life interest in the whole remainder so long as, in the case of a woman, she does not re-marry.

Succession to the property of a polygamous person who died intestate having married under a system of law permitting polygamy is to be effected in terms of houses and is dependent on the number of children in those houses (section 40). Any wife who survives the husband is regarded as an extra unit to the number of children in the household.

The Act talks of "children" without differentiating between male and female children. The spirit behind this provision is to make allowances for all the children, male, female, married, unmarried depending on their means and needs. This is also the case for the grandchildren (see sections 29, 35, 36, 37, 38, 39, 40, 41).

The Law of Succession Act has made big strides in the way of eliminating discrimination of female persons in matters of succession. The practice however still seems tilted against women. In the case of the *Estate of Njeru Kamanga* (Deceased) Succession Case No. 93 of 1991 (Unreported) Maina: 1992) the daughters of the deceased were disinherited by the magistrate who felt that the daughters, being married, had no right to the father's property. This was notwithstanding the clear provisions of Cap 160.

In the Matter of the Estate of Richard Martin Kibisu (Deceased) High Court Miscellaneous Application No. 272 of 1985 the deceased had made a will providing that his land should not be divided into pieces but that it be cultivated by any of his children able to do so. A daughter of the deceased petitioned the court saying that the will

indicated the wish and intention of the deceased that the land should be sub-divided and demarcated equally among all the children of the deceased. The petition was opposed by the sons contending that the provision against sub-division made the will null and void and the deceased should be considered as having died intestate. This would mean that the estate be divided according to the deceased's customary law in this case Luhya customary law. Under this law the right of daughters to the estate of their father is to be maintained by the deceased's estate if they were single or without other support. If such law were applied none of the daughters qualified to inherit. It was held that the deceased's intention should be followed as closely as possible and the court favoured a construction avoiding intestacy; that the land was intended to go to all the deceased's children, sons and daughters and that the condition restricting partition, and not the whole will, is void as contrary to the law. Such condition, in the court's view, was made after the gift had vested in all the children and being unenforceable, was void.

Many inheritance disputes pertain to land. The 1981 Magistrates Jurisdiction (Amendment) Act (Cap 10 of the Laws of Kenya) removed jurisdiction of certain land disputes from magistrates transferring it to panels of elders. It was not stipulated what law these panels should apply but the implication was that they apply customary law. The position of daughters and widows then would be as at customary law in disputes over land before such panels.

The effect of section 35 would seem to be that women married to men who had initially transacted a monogamous marriage and the children of such women could not inherit from or succeed the man. The Act was subsequently amended by Act No. 10 of 1981 and addition of section 3 (5) to the Act, which enables subsequent women (wives and their children) to inherit. It provides that

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act”.

This provision has been lauded by many as reflecting the reality of Kenyan life where many Africans contract Christian or civil marriages but relapse back to traditional African practices or contract Christian or civil marriages along with the performance of customary marriage rites. In this latter case, it is difficult to categorize the marriage as either Christian or customary (Kuria: 1978).

On the other hand, it is felt that the amendment denies women security in marriage, which they seek by transacting monogamous marriages. They realize later that matrimonial property has to be shared with persons who have disrupted the monogamous marriage or persons not known to the monogamous marriage wife and her children before the husband/father died.

In the Matter of the Estate of Reuben Mutua Nzioka Probate and Administration Cause No. 843 of 1986 (High Court), the deceased, Mutua, married Teresia in 1961. The marriage was conducted under ACMDA. When Mutua died in 1986, a lady called Josephine claimed to be his wife, allegedly married to him under Kamba customary law in 1980. She also claimed that her three children were Mutua's children and contested his will in this Cause because she and her children had been omitted while they were legally entitled to some part of the estate as dependants. It was held that Mutua lacked the capacity to marry customarily while his marriage with Teresia still subsisted. It was therefore not necessary to prove that a subsequent marriage was genuinely customarily undergone as “it is not relevant under these circumstances”.

Justice Aluoch refused to give a literal interpretation to the subsection, which would have favoured Josephine. She said that the provision was intended for women married under customary law who were either neglected or abandoned by their husbands during their lifetime. Regarding the words in the section, “previous or subsequent” she said

“From my reading of the amendment, I would say that the words used in this amendment are meant to make it comprehensive otherwise the meaning of it which is important is what I have already given it”

In the Matter of the Estate of Duncan Kiiru Karuku (Deceased) Succession Cause No. 74 of 1987 it was held that for purposes of intestate succession, although the first marriage was conducted under statute, the other wives and their children were wives and children of the deceased and were entitled to inherit (reference made to section 29 of Cap 160 and direction given that sections 40-42 of the Act be referred to for guidance on the mode of distribution. this appears to be a literal interpretation of section 3 (5).

Section 3 (5) sanctions adultery and bigamy while undermining the institution of marriage and encouraging the breach of the marriage contract. It also redefines marriage making nonsense of specification of a marriage as a monogamous one since such a union can be adulterated and the parties of adulteration covered by this curious provision.

The section also undermines the widow's property rights. In *Karanja v. Karanja* cited above the court recognized the fact that a wife could help her husband acquire property through direct financial contribution. The contribution of a wife as a housekeeper is no less important. Her duties of taking care of the husband and the children are a significant contribution that should not be overlooked (See also *Kivuitu v. Kivuitu* and *Hawa Mohamed v. Ally Sefu*).

While we appreciate the needs of women and children anticipated at section 3(5), we think that if the practice of contracting customary marriages when a monogamous marriage subsists is to be discouraged, the provision should be abrogated. Other ways of supporting such women and children without disrupting the marriage institution should be sought. An Affiliation Act may be one way of providing this support. Such an Act ought to be well thought out to avoid its being thrown out again as happened to Cap 142 in 1969. To ensure self-censorship on the part of men, adultery should be made both an actionable civil wrong apart from divorce and a crime. There have arisen many disputes over a deceased person's estate owing to this provision (See also *In the Matter of the Estate of John Nyagado Okach (Deceased)* High Court Probate and Administration Cause No. 787 of 1988; *In the Matter of Thoithi Kirogoi (Deceased)* High Court Succession Cause No. 701 of 1984 which deal with administration of estates where the deceased was polygamous and had died intestate).

In certain cases where a woman seeks to bring herself within the protection of section 3 (5) the court considers whether the formalities of marriage have been complied with.

The few reported disputes show clearly that the Kenyan society, especially rural communities, are unprepared for the revolutionary aspects of the Law of Succession Act in so far as wives' and daughters' rights are concerned. The judicial approach has tended to lean towards recognition of daughters' and wives' rights but at the same time distinction has been drawn between the rights of married and those of married daughters. It has been argued and held that married daughters are not entitled to inherit. It can be argued that the liberal approach of the court is beneficial to only those women who have access to legal counsel and that many may be suffering in silence as relatives deny them a source of livelihood. Indeed, this poses important considerations regarding the statement of the law and its application.

The 1992 situational analysis on women and children conducted by the Government of Kenya in collaboration with UNICEF linked the disadvantaged position of women and children in urban centres, to possibilities of implication of the Law of Succession Act especially in rural areas. The analysis records the increasing number of women-headed households in urban centres who are exposed to extreme poverty, crime, overcrowding, unemployment and health hazards. It notes that the most significant feature of the women is that they migrate to towns and cities with their families.

The situation has prompted the conclusion the law of Succession Act has not necessarily changed the position of women; "In practice" states the report, "women have rarely inherited land and other property in their rural homes. This is the reason why more female household heads move to the urban areas in search of employment as they lack other means of production and survival".

The same report refers to a study done on street children in Kenya which showed that 31% of the children interviewed, lived with a single parent. This led to the conclusion that a substantial number of street children can be associated with single parenthood.

The same study revealed that 34% of the women never got married, 18% were separated, 16% divorced and 19% widowed. These women had been involved in illegal economic activities which had resulted in them being jailed at one time or another. This is illustrative of the ripples of inequalities on succession and their negative consequences to the society at large.

The exemption of Muslims from the provisions of the Act is a potential source of controversy on the extent to which gender equality can be achieved through its provisions. Although marriage under Islamic law creates mutual rights of inheritance, there is evidence of differential treatment between male and female heirs. Each heir takes a fixed share laid down in the Quran. Widows are treated differently depending on whether one has children and vice versa.

One of the fundamental defects in Islamic law identified by the commission on the law of succession was its application without regard to reforms introduced in several Islamic countries such as North Africa, Middle East and Asia. It can be argued that the said exemption is a major drawback in efforts to achieve uniformity in personal law and consequently to alleviate technicalities that do not justify the law. It begs further consideration not only because it reinforces and endorses differential treatment of males and females, but also because it endorses and justifies stagnation of principles that may have been modified elsewhere to reflect modern thinking and practices.

The above scenario indicates that problems affecting women are interwoven and often, property ownership is a very important underlying factor. There is need to discover linkages between these problems and other problems of disadvantaged groups and to thereafter, devise integrated approaches to tackle all the dimensions of the problems.

It is significant and noteworthy that female household heads are considered to be with a category of women regarded as being in difficult circumstances who appear more vulnerable than others. The number of “women in difficult circumstances” is said to be increasing. Apart from the household heads other “women in difficult circumstances” include the disabled, adolescent mothers, women living in abject poverty, pastoralists and nomads, victims of abuse and prisoners.

The creation of the term “women in difficult circumstances” underscores the need for special focus and indeed thorough investigations to see how law can respond to the needs of these women.

(f) Women and Criminal Law

Criminal law is basically gender-neutral. Both men and women are subjected to the same protections of the law as accused persons and also to similar penalties for the same offences except in few instances. For example, a pregnant woman cannot be sentenced to death. Some offences such as rape, defilements and indecent assaults, can only be committed by males. Section 19 of the Penal Code (Cap 63) provides a special defence for woman in all offences (except treason and murder) where she shows that the criminal act was committed in the presence of her husband and under his coercion. Prostitution, the practice whereby the woman submits herself to sexual intercourse with a man in exchange of money (Otega: 1985) is not defined in the Penal Laws. Prostitution is itself not described as an offence and it is only for living on the earnings of prostitution that one can be indicted under sections 153 and 156 of the Penal Code. The way the offence is couched means that more men than women are indictable for the offence though this is not to say that no men live off the earnings of prostitution. The swoops carried out to flush out prostitutes exclusively nets women as culprits.

A striking conclusion drawn from crime statistics has been that increase in female criminality “is due more to the socio-economic vulnerability of women than to anything else”. It has been argued that crime statistics for the period 1975 to 1985 demonstrated that 75% of all the women admitted to prison had been engaged in marginal economic activities involving hawking, sale of African liquor, and offences under the Chiefs’ Authority Act (Cap 128).

A further scrutiny of the same statistics also showed that 75% of all the women admitted to prison were between the ages of 14-40 years which are the most productive years of women’s life. Other revelations were that most of the women had children. A survey conducted in 1986 showed that most of the women convicts (76%) were mothers, and were unemployed or self-employed before convictions. There was therefore a strong implication that the Kenyan woman prisoner is basically young, has little or average education, is a rural urban migrant and is likely to be a single parent.

Concern regarding women prisoners has been gaining momentum and was brought to the forefront by child rights activities. Indeed, fora where critical issues of female criminality have been raised have been basically workshops organized on child rights issues. The sharp interest by child rights advocates was provoked by the fact that many women prisoners are also mothers.

Children, especially those of single parents have been known to undergo untold suffering as they accompany their mothers throughout the harsh and indifferent criminal justice process. The process, which takes them through police cells and eventually prison exposes children to many forms of abuse including stress and diseases. Those who are left behind are often forced to fend for themselves in streets, market places, private homes and other places where they provide cheap labour and are often abused.

So far, suggestions to deal with the plight of women offenders have leaned heavily towards more use of non-custodial sentences in the interest of the welfare of the children and of society in general. Extra-mural penal employment, conditional discharge and probation have found favour with most activists.

Sentiments regarding more humane treatment of offenders have been expressed by many including the head of State. They have also found their way into Development Plan which reflecting progressive thinking on the treatment of offenders. There is emphasis on rehabilitation of offenders within the community, which is a more realistic measure in coping with criminality in general.

However, in so far as women offenders are concerned, and as pointed out by Dr. Muli-Musiime: "The most lasting measures will lie in recognizing the status of women in a changing socio-economic and political situation, the equitable distribution of resources, and planning for the woman in the nation's development strategies. Social programmes aimed at eradicating or minimizing the factors that lead to women's criminality need to be created". This implies providing support systems for those categories of women considered most vulnerable, such as the single mothers and the unemployed.

(g) Violence against Women

Violence here refers to both physical and psychological use of force to brutalize women. It includes domestic violence such as wife battering, marital rape, incest, sexual harassment in and out of the work place, rape, defilement, indecent assault, female genital mutilation to name a few. A reading of our local press indicates that violence against women is on the rise. Because of the nature of the violations, many cases still go unreported.

Despite the stiff penalties for offences such as rape and defilement, these still abound pointing to the inadequacy of the legal provisions available to deal with the problem. While seeking legal reforms, it is important to conduct public education campaigns to discourage gender based sexual violence. Such campaigns should also seek to redress attitudinal biases and cultural practices that justify such violence. That the maximum penalty for rape, that is, life imprisonment, has not deterred would be rapists underscores the need of social alongside legal reforms. This can be achieved through public education.

Women should be educated to understand that being victims of violence is not at all their fault; they should also be encouraged to report incidents of violence instead of guarding such as their own secrets.

There is no provision for marital rape in our laws. Looking at the definition of rape however, namely having:

"carnal knowledge of a woman or girl, without her consent or with her consent if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act...."

Rape can occur in the context of marriage. This is in the instances where the woman is forced into having sex with her spouse. In Kenya, the consent of the woman is deemed to be ever present during the continuance of the marriage, which is not the case. It is necessary to seek legal reforms to discourage marital rape if the woman's dignity is to be upheld.

In so far as apprehension, interrogation and confinement of women offenders are concerned, several reports of violence by law enforcement officers have been unreported. Insertion of bottles and other gadgets in women's private parts is a common method used by police officers in interrogation. This is assault. So is rape in custody and other common manhandling of women suspects while in custody. These should be viewed as serious offences under a Sexual Offences Act bearing in mind that their perpetrators are supposed to be custodians or enforcers of law and protectors of the citizenry.

It is also important for law to address cultural practices that are harmful to the cultural practices of women and girls. In this respect, female genital mutilation should be looked at. Outlawing it may prove more harmful as the practice may well continue underground. An important first step may be to encourage its carrying out in hygienic conditions and then educating communities that practice it on the harmful effects it has on girls and women. Outlawing it should then come as a last stage after education. Forceful circumcision of women by in-laws or others should be treated as aggravated assault and duly dealt with under penal law.

(h) Nutrition, Health Care and Reproductive Rights.

1) RIGHT TO FOOD AND NUTRITION

Women as a group are at a greater risk of nutritional deficiencies than men due to their reproductive role.

2. VOLUNTARY STERILIZATION (TUBAL LIGATION)

This is treated as surgery in the Penal Code (Cap 63) and it is an offence if it endangers the life and health of the client. The practice is to operate only on women who are over 35 years and it takes place in health institutions. A woman is expected to show spouse consent before she can have the operation. This requirement is limiting in that a woman who has made choice for it based on full information and want of pressure may be prevented from exercising her right by the spouse (Khasiani: 1993).

3. PREGNANCY TERMINATION OR ABORTION

This is on the increase in Kenya. The data on it is obtained mainly from hospital studies where victims of induced abortion usually end up. The Penal Code (Cap 63) makes it an offence for any person other than the mother herself to administer poison or noxious matter or to use any other means or physical force on a woman with the intention of causing her to miscarry.

It is immaterial whether or not the woman is pregnant if the intention is proved to exist. A woman herself, is guilty of an attempt to procure her own abortion when she administers or allows someone to administer to her poison or drugs, to perform operations or to use force as detailed above. Liability in the case of a woman is dependent on the fact of her being pregnant.

4. HIV-AIDS

One cannot address the issue of health care without looking at issues related to AIDS. AIDS is an acronym for the Acquired Immune Deficiency Syndrome. Women suffer as AIDS patients and as persons charged with caring for such patients as mothers and spouses.

There is as yet no known cure for the malady and persons afflicted can only control the situation by taking various medication to prevent the disease from reaching an advanced stage. This is expensive and puts further strain on already overstretched household budgets. Since control of the disease underlines in most cases the choice between life and death, household food and other basic needs are likely to be overlooked in favour of medication to control AIDS.

Law and/or policy address the issue of AIDS with a view to exhaustively dealing with the issues relating thereto and protecting rights of persons affected.

In conclusion, there is also need for a comprehensive statement of law in the area of reproductive health giving women rights over their reproduction process generally and sexuality in particular.

(i) Education

Education is treated as a basic need by the Government, and as such the Government is committed to the position of equal educational opportunities for all persons in Kenya. Since independence, the primary school enrolment has increased from 892,000 to 5.5 million in 1990; 30,000 to 614,161 in secondary schools and 517 to 40,000 in universities in 1990. With the increase in educational opportunities for all, women's education has significantly improved and as of 1991, the enrolment of girls in primary schools was almost 49% of the total enrolment rate giving a near gender parity. (Kabeberi-Macharia, Kameri-Mbote and Mucai-Kattambo: 1992).

Despite these there are regional and district imbalances especially in areas where girls are married at an early age. Unfortunately about 60% of these girls enrolled in primary schools are unable to complete their primary education, which means that they may eventually slip back to illiteracy.

In the secondary schools, due to high wastage rates of girls in primary schools, one finds that the enrolment of girls is low. Due to poor performance at the primary level, most girls are enrolled in schools where the drop out rate is very high. A number of reasons are given for the high rates, and these include early marriage, pregnancy, and lack of tuition fees or poor facilities.

The Education Act (Cap 211) does not make education a right for all Kenyans although current policy makes it compulsory. Women's education is often curtailed by factors such as pregnancies, discrimination and cultural practices. The current practice of expelling pregnant schoolgirls has had far reaching consequences for the education of women.

Whereas we do not condone adolescent pregnancies, these girls should be allowed to resume their studies after giving birth. In this way they may acquire some education or skills, which would later help them in maintaining their children. It is discriminatory against women to expel a pregnant schoolgirl and do nothing to the father of her child. Bearing in mind that affiliation laws are non-existent in Kenya, deliberate measures should be taken to ensure that adolescent mothers are given the opportunity to further their education. The integration of family life education into the curriculum at an early stage is important in a bid to curb early and unwanted pregnancies that are detrimental to the health of young girls.

The educational materials used in various institutions have been criticised for failing to depict women as role models. In a 1980 analysis it was found that whereas women accounted for 50% of the population, their representation in the school textbooks was only 17.5 %. Thus schoolgirls are deprived of female adult role models with whom they can naturally identify with (See Obura: 1992).

Thus, as the books progress, one finds continues use of masculine words, illustration and content; women where portrayed in schoolbooks, are often known as mothers, cooks, nurses or teachers. Most books fail to show them in technical positions, which would mean associating them with the physical sciences.

In adult literacy programmes, one finds that women are often a majority of the "students" even though illiteracy amongst women remains very high. Currently 55% of the women in Kenya are illiterate in comparison with 37% of men. Increased participation of women in adult literacy programmes should be encouraged.

(j) Employment

Women are a significantly low percentage of the total number of employed persons in Kenya. Between the years 1970 and 1983, the number of female employees increased from 14% to 20% of the total number of persons engaged in any form of employment. A number of reasons are given for women's low participation in employment, and these include lack of equal education and skills training with men, cultural attitudes about women working, or family obligations.

Kenya's employment law is provided by the Employment Act (Cap 226), which does not specifically provide for employment as a right. There is an underlying implication that it is however gender neutral. Bearing in mind that the Constitution condones sex discrimination, one can see that the gender neutrality of the employment law may be undermined by such a provision.

Often it is in the workplace that women face discrimination by virtue of their sex even though there is no explicit law allowing for such practices. This often happens when the law is put into practice. In such situations, many employees feel that they do not have any means of legal redress.

The Employment Act does make provision for specific working hours for women, as well as forms of employment that they can undertake. It is argued that these provisions are in line with international Labour Organization conventions on the focus of employment and working conditions of women. The Act provides that no woman or juvenile can be employed in an industrial undertaking between 6.30 p.m. and 6.30 am, unless firstly, where working in unforeseen emergencies which are not of a recurring nature.

Secondly, where the nature of their work involves raw materials, which may deteriorate, if not preserved immediately. Thirdly women managers, or medical personnel are exempted from the provisions of this section. Other than prohibiting women from working in mines at all hours and in industrial taking (at certain hours) the Act fails to consider protection of women in other fields of employment. Such protective provisions militate against free choice of career and could shrink employment opportunities for women.

An area that is raising concern is the export processing zones, which provide work for women. In these zones women are often preferred due to the nature of work, but studies have shown that they are underpaid and overworked. Also, there are no trade unions permitted in such zones, which makes labour very cheap and working conditions fairly poor. Considering that Kenya is establishing EPZs, it is very important that laws to protect workers from

exploitation in these zones are enacted, and conditions for their work place determined, before the zones become fully operational.

One area that continued to generate a lot of bitterness amongst women employees and the Government and public sectors is the issue of house allowance. Government civil service regulation for a long time excluded married women from earning house allowance unless they could show they were sole supporters of the household. A Presidential directive passed in December 1992 ruled that all women should get house allowance. While many women have been able to claim house allowance thereby a good number are still excluded by virtue of their husbands being civil servants or being housed by the Government.

Women employees are also guaranteed maternity leave for two months though they are supposed to forfeit their annual leave the year they take up maternity leave. Maternity has often been used as an excuse to deny women appointment to certain posts for the simple reason that it will be uneconomical to employ them. Some employers therefore prefer women who are past child bearing or who do not intend to have children. The appreciation of maternity as a necessary social function would entail a longer period of maternity leave and an atmosphere conducive to such function.

Although Kenya's employment laws are gender neutral, one finds that in practice women have not been effectively catered for. Deliberate measures are therefore important to ensure that practices, which tend to promote sex discrimination, are eliminated. The provision in the Factories and other places of work Act (Cap 514) for sitting facilities of women engaged in work which entail standing could lead to discrimination of women as they require extra provision at places of work. The Act at section 55 also provides that the Minister can make special provisions for women as a gender, which gives leeway for progressive gender-informed provisions.

The fact that women are mainly engaged in informal employment means that they cannot benefit from National Social Security provisions as can people in formal employment. Ways of bringing women within Social Security Provisions even where they are not in formal employment should be sought given the number of women headed households. The Pensions Act (Cap 189) contains discriminatory rules on who can be the beneficiary of a pension. A widow, for instance, cannot be the beneficiary of a pension if she does not remain unmarried and of good conduct. Widowers are not affected by this provision (Sections 15 A (b) and 17). Similarly a female child loses her entitlement to benefit from a pension once she gets married.

The Provident Fund Act (Cap 191) at section 16 provides that a married woman is not a qualified contributor to the fund. She can only make such contribution with the Minister's permission.

The Income Tax Act (Cap 470) treats working men and women differently by virtue of their marital status. A married woman draws the same relief as a single person whereas a married man draws family relief, which is more than the single relief.

(k) Legal Literacy of Women in Kenya

Legal literacy refers to the awareness of one of his or her rights as enshrined in the Constitution and other laws. Legal literacy is generally low in Kenya. Kituo Cha Sheria, the legal Education and Aid Programme of the Kenya Adult Education Association (LEAP-KAEA) and the International Federation of Women Lawyers (FIDA) who actors in legal education campaigns admit that legal literacy of the populace is far below the requisite minimum. If education levels are indicative of some level of legal literacy then women fall below men's levels. The main levels of imparting information (print and broadcast media) are not freely available to women. Women rarely have time to sit down and exchange views due to their enormous workload and this medium benefits men more than women consequently.

Statistics of the number of women who are legally literate are hard to get since most women despite legal awareness shy-off from the courts while others are discouraged by the cost of legal services. It is a truism that if women are to benefit from legal reforms they should know the content of laws meant for their benefit and also be enabled to use those laws. Legal aid and education are imperative tools in raising the legal status of women if their rights are not to remain largely paper rights. The dependence of legal awareness on trained lawyers greatly militates against its effectiveness given the number of lawyers and considering the entire population. The concentration of lawyers in Nairobi and some major urban centres with few or none elsewhere ensures that professional support for legal literacy can only be availed in such urban centres. This underlines the need for training of para-legal workers

within the community to reach the people where they are. Any law reform has to consider legal awareness and accessibility of services if it is to fully benefit women as I have variously pointed out above.

V. CONCLUSION

If women are to fully participate in policy making and implementation it is important that impediments, which prevent their participation, are eliminated. A number of these arise from societal attitudes on the role and place of women. Others can be found in roles, which place barriers to the advancement of women.

This therefore necessitates further research into those constraints and practices, in order to pinpoint where the problem lies. One such area that cries for research is women and law. A variety of laws have been looked at above and requisite changes recommended therein. Law reform should ensure equal rights for men and women eliminating *de jure* and *de facto* discrimination where it exists. The dichotomies that characterize non-effectiveness of legislative changes should also be addressed such as the socio-economic inequalities determining women's knowledge of and access to the law; lack of the ability to exercise full legal rights without fear of recrimination or intimidation from male relatives and spouses and the community in general, and lack of or inadequate dissemination of information on women's rights and the available recourse to justice which hamper the achievement of expected results from such legislative changes.

A thorough understanding of the relationship between existing legal systems is also imperative if law reform is to be fruitful. Many women are still largely affected by customary and religious laws and any law that ignores customary and religious legal tenets will be observed more in breach than in observance. The challenge for the Constitution Review Commission is to ensure that the potential of the country's women does not remain locked up due to legal constraints.

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