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SEPARATING THE BABY FROM THE BATH WATER: WOMEN'S RIGHTS AND THE POLITICS OF CONSTITUTION-MAKING IN KENYA

Patricia Kameri-Mbote* & Nkatha Kabira**

ABSTRACT

This article looks at the process of constitution-making in Kenya from 1990s to 2005 when the proposed new constitution (the product of the process) was rejected in a national referendum held in October 2005. It avers that Kenyan women had succeeded in getting many of the issues that they considered important included in the constitution and should have lobbied to have that constitution adopted. The defeat of the constitution, the authors assert amounted to throwing away the baby with the bath water. It also negated gains that seemed so close to being realised setting the quest for gender equality back considerably.

I. INTRODUCTION

Since the 1985 Nairobi Women's Conference, women in many African countries have organized themselves to participate in the constitution making processes. Women in Eritrea, South Africa, Malawi, Rwanda, Uganda and Zambia among others have negotiated for inclusion in the institutional and legal framework governing the processes. The participation of women in the various African processes entailed influencing the process and its structures as well as the end product. In some cases they have been successful as was the case in Uganda, South Africa and Rwanda where women's rights including affirmative action have been entrenched. In other cases, the efforts at ensuring gender responsive constitutions have collapsed as was the case in Zimbabwe. Kenya is also one of the countries that suffered a setback following the defeat of the Proposed Constitution of Kenya 2005.

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This Constitution was the final product that was produced by the government following discussions, negotiations and legislative amendments that spanned from the 1990s to 2005. This Constitution was expected to represent the aspirations of all Kenyans. Much more importantly, it represented major gains towards gender equality and equity, and the protection of the human rights of all men and women and boys and girls of Kenya. The draft however, was taken through a protracted national referendum pitting campaigners for a 'Yes' and those for a 'No' vote against each other and thereby deeply dividing Kenyans. Against the background of victory for the 'No' vote in November 2005, this article scrutinizes the Constitution with a view to establishing the extent to which it addressed and provided for the various concerns of Kenyan women.

It also needs to be noted that the whole process of Constitution review, including the setting up of the Constitution of Kenya Review Commission in 2000, entailed a struggle to ensure gender equality and equity. Gender activists have for a long time questioned many of the constitutional provisions that were in place from when Kenya gained independence in 1963. They saw the Constitution as not guaranteeing women equal rights with men. For example, until 1997, Section 82 of the Kenyan Constitution dealing with the question of discrimination excluded 'sex' as an objectionable ground for discrimination. However, the revision of the Constitution in 1997 included 'sex' as an objectionable ground for discrimination in Section 82(3) but did not include it in Section 82(4), which sanctioned discrimination on the basis of customary law. This left women open to discrimination in the areas where they were very vulnerable.

This paper follows on earlier work making the case for enshrining women's rights in the Constitution in a bid to engender the legal process¹ and an analysis of the first draft of the Constitution generated by the Constitution of Kenya Review Commission in 2002.² It begins in this introduction with a description of the 'baby' that we are analyzing, namely the key elements in the draft Constitution that were of importance to the struggle for gender equality. Then it describes the streams of the bath water, i.e. the different paths the debate over the draft followed. Part II outlines the background to the proposed Constitution, addressing the context within which the Constitution was arrived at, while Part III of the article presents the jurisprudential framework for the analysis of the proposed Constitution. Part IV assesses the gains of

1. Patricia Kameri-Mbote, *Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process*, in

2. Patricia Kameri-Mbote & Maria Nzomo, *The Coverage of Gender Issues in the Draft Bill of the Constitution of Kenya, 2002: Have the Hens Finally Come Home to Roost for Kenyan Women*, UNIV. NAIROBI L. J. (2004).

women in the proposed Constitution and compares these provisions with those in the current Constitution. Part V highlights the arguments made for a 'Yes' vote and presents the current challenges facing the struggle for gender equality in the wake of the 'No' vote. In Part VI, we conclude the paper by highlighting the salient points that inform the view as Kenyans voted in the referendum in November 2005, the baby should have been separated from the bath water.

A. Describing 'The Baby'

The proposed Constitution represented major gains towards gender equality and equity and in essence delivered on many points that have been at the heart of gender and pro-women movements and struggles in Kenya from the 1980s onwards.³ As it was taken through the referendum, Kenyan women were hopeful that a new Constitution would materialize which provided for gender equity and equality and that mechanisms would be put in place to ensure that women enjoy the rights enshrined in the Constitution.

Considering that the Constitution is the supreme law of the land, it is noteworthy that the proposed draft contained provisions for civil liberties that are at the core of liberal feminist aspirations such as equality of opportunity in education, employment and political spheres. Indeed the Constitution also encapsulated nascent concerns such as equity and socio-cultural rights. With the vote against the proposed Constitution, there is now an urgent need to ensure that we do not throw out the baby along with the bath water. As Kenyan women, we can categorically say that the provisions for gender equality and equity in the proposed Constitution went far beyond what we have in the current Constitution. The proposed Constitution also domesticated many of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁴

During the run up to the referendum, we were concerned that the contestation between the political groupings arguing for or against the proposed Constitution was a battle of the titans. In such a battle, women and all their aims, aspirations and hopes could easily be trampled on. This reminded us of the draft Constitution of Zimbabwe which had taken on women's concerns regarding social, political and economic issues,

3. See, e.g., WANJIKU KABIRA & PETER WASAMBA, *NEGOTIATING CO-EXISTENCE AND GOVERNANCE, ESSAYS ON GENDER AND CONSTITUTION MAKING* 44 (2001). See also, FIDA (KENYA), *SETTING THE PACE: THE 1999/2000 FIDA(K) ANNUAL REPORT ON THE LEGAL STATUS OF WOMEN, THE WOMEN'S RIGHTS MONITORING AND REPORT WRITING PROJECT* (2000).

4. *UN Convention on the Elimination of All Forms of Discrimination Against Women*, reprinted in 19 I.L.M. 33 (1980).

and was thus considered a useful model for other African countries in so far as women's human rights were concerned. A referendum in 2001 led to the rejection of the proposed Constitution. The bone of contention concerned the exercise of executive power. The Zimbabweans thought they were settling the question on this issue but in rejecting the Constitution, all issues in the document were thrown out. The progressive provisions on women's rights remain mere proposals to this day. The tragedy is that while Zimbabweans had begun to internalize the progressive norms in their draft Constitution, the failure to have them enshrined in the supreme law of the land meant that they were anchored on very shaky ground. The political situation in Zimbabwe has progressively deteriorated and with that, the provisions on gender have not yet been promulgated into law and as the country deals with the political crisis, gender considerations may not be the most urgent.

The rejection of the Kenyan Constitution was a major issue in the 2007 elections that were followed by violence.⁵ It is noteworthy that party politics and ethnicity submerged the women's voice which was largely absent from the quest for peace. Further, women had no platform to push for greater representation in the grand coalition cabinet formed between the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) in April 2008. The rejection of the Constitution has indirectly contributed to the fossilization of prejudices against social minorities such as women. This threat is buttressed by the negative press that campaigners for the 'No' vote gave to the provisions on women's rights.⁶

B. *The Streams of Bath Water*

The streams of bath water flow through eight phases that the Constitution underwent.⁷ The first stage involved preparing the CKRC as well as the people for the review. The CKRC conducted civic education with aim of creating public awareness on constitutional issues. The second stage required the CKRC to conduct research studies

5. On 30 December 2007, the declaration of Mwai Kibaki by the Election Commission of Kenya as the winner of the country's election, whose count was considered by both national and international observers as flawed, possibly rigged was followed by violence in different parts of Kenya. Within six weeks, more than a thousand people across the country had been killed, and over 500,000 others driven from their homes or fled in fear.

6. For instance the provision on rights of women to own land, especially married women, was argued in parts of the country to allow for double inheritance perceived to be to the disadvantage of men. It was also argued that such rights would encourage women to desert their matrimonial homes since they had secure land rights in their natal homes.

7. See, III CONSTITUTION OF KENYA REVIEW COMMISSION REPORT (2004).

on constitutional issues whilst comparing the constitutions in Uganda, Rwanda, Germany, South Africa, Tanzania, Ghana and Ethiopia.⁸ This stage was critical in defining the issues. From there, the third stage involved public consultations whereby Kenyans told the CKRC commissioners what they wanted in a new constitution during the process of collection of views in.⁹ Then the next stage required the CKRC to analyze and collate the views that were collected during the third stage. It is during this stage that the first report and draft bill to alter the Constitution was drafted. During the fifth stage, the Commission disseminated the Main Report and the Draft Bill for debate and comments by the public while incorporating peer reviews. The CKRC then prepared an annotated compendium of people's comments which was disseminated to the delegates at the National Constitutional Conference ("Bomas Conference"). During the sixth stage, the CKRC organized and held the Bomas Conference from 2003-2004. In the course of this stage, the delegates debated and made suggestions for amendment to the Draft Bill that was produced during the previous stage. The Bomas Conference sought to make sense of what Kenyans had said during the earlier stages of review.¹⁰ The resulting product was the Draft Constitution of Kenya 2004 (the Bomas Draft).

In our view, the Bomas draft went through a protracted process and in the end represented people's views. Whether the group in Bomas was representative or not of all Kenyans or not is a matter that can be argued either way. Suffice it here to say that this process was never 'Wanjiku's' (the common euphemism for a people-driven process). Rather, various interest groups camped at Bomas to get their issues taken on and replace what Kenyans had told the CKRC commissioners.¹¹ After the Bomas process, the Draft Constitution 2004 went through its eighth stage. In this stage, Parliament considered the contentious issues and facilitate the process of national consensus. Parliament's taking over the Bomas draft in a bid to refine it is similar to what Bomas did to the views of Kenyans as given to the CKRC. To the extent that the Bomas process was sanctioned by law and Parliament's role is to make laws, each group was within its right to look at the draft and give it meaning. Members of Parliament as elected the representatives of the people, and at the same time, all members of Parliament were also delegates at Bomas.

The last and final phase as it is encapsulated in Section 28(1) of the Constitution of Kenya Review (Amendment) Act 2004 involved the publication of the Proposed New Constitution 2005. This particular version of the Constitution was the

8. See, V CONSTITUTION OF KENYA REVIEW REPORT (2004).

9. See, MAIN REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION (2002).

10. FINAL REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION (2004).

11. Cf. *supra* notes 9 & 10.

one that was put to the vote during the National Referendum in November 2005.

We can continue to split hairs over which process was more legitimate but the proposed Constitution should have been assessed on its merits, which was not the case. As Kenyan women, it is our main argument that we should have kept the baby separate from the bath water and voted 'Yes' for the proposed Constitution. The baby here represents those positive provisions in the proposed Constitution outlined below which would have catapulted women's human rights to the pinnacle of law's protection of fundamental rights. The bath water is all those vested interests of different political groups which submerged all other interests catered for in the Constitution.

II. BACKGROUND TO THE PROPOSED NEW CONSTITUTION OF KENYA

A. Establishment of Constitution Of Kenya Review Commission (CKRC)

For over ten years, there was debate on whether or not Kenya's current social contract should be recreated or overhauled.¹² After numerous negotiations among different stakeholders such as political parties, civil society members, and religious groups, a legislative and institutional framework for reviewing the Constitution was agreed on in November 2000. The Constitution of Kenya Review Act (CAP 3A) established the Constitution of Kenya Review Commission and was later gazzetted on November 10, 2000. Before the CKRC was established, a parallel initiative to review the current social contract had already been started by religious groups, civil society and other stakeholders. The Ufungamano Initiative, as it was known, was founded on the premise that the structure and mandate of the CKRC as established by the legislation was not inclusive, comprehensive and people-driven.¹³

Evidently, there was a division in the political environment evidenced by the fact that there was a proposed version of the CKRC and the existence of a parallel People's Commission of Kenya (PCK). The CKRC was seen as an instrument of the

12. In 1997, the Inter Parties Parliamentary Group came up with a number of issues that required constitutional amendments. These included the appointment and powers of the Electoral Commission of Kenya; rules on nomination of members to Parliament within a multi-party era and rights of minority groups including representation of such groups in appointive and elective positions. The results of these deliberations were never promulgated into law and the issues discussed then continue to be debated to-date.

13. During the meetings at Ufungamano, the Parliamentary Select Committee constituted to review the Constitution of Kenya Review Act 1997 was dismissed as "anti people" and undemocratic. Reverend Timothy Njoya of the Presbyterian Church of East Africa commented that the Parliamentary Select Committee 'may have legislative backing, but it lacks moral authority.' See, DAILY NATION, December 17, 1999.

ruling party KANU, while Ufungamano's PCK was viewed as the process opposed to KANU. The negotiations that followed amongst the various stakeholders resulted in a merger between the two commissions in June 2001 to form the current CKRC.¹⁴

B. The Mandate of the Constitution of Kenya Review Commission

The Constitution of Kenya Review Act¹⁵ specifically sets out the mandate of the Commission. The primary mandate is to ensure a comprehensive review of the current Constitution "by the people of Kenya." The Commission was designated as the primary organ of review and consisted of 29 commissioners (of which two, the Attorney General and its Secretary are ex-officio). Commissioners were appointed by the President upon nomination by the National Assembly. The President appointed the Chairperson from among the Commissioners. The Commission was supposed to reflect Kenya's ethnic, geographical, cultural, political, social and economic diversity and the principle of gender equity.¹⁶

The objectives of the review addressed what were generally considered to be the weaknesses of the existing Constitution and the reasons why a new social contract was necessary.¹⁷ Those objectives are binding on all organs of review outlined in Section 3 of the Act. First and foremost, they aimed at guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well being of the people.¹⁸ Secondly, they sought to establish a free and democratic system of Government that enshrined good governance, Constitutionalism, the rule of law, human rights and gender equity. Thirdly, they aimed at promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power. Fourthly, they sought to promote respect for ethnic and regional diversity and communal rights including the right of communities to organize and participate in the cultural activities and the expression of their identities. Fifthly, they aimed at ensuring the full participation of people in the management of public affairs, and finally, they sought to enable Kenyans to resolve national issues on

14. See, <www.iej.org/IMG/pdf/Kenya.pdf> (accessed on 28th May 2008).

15. Cap. 3 A of the Laws of Kenya.

16. *Id.*, s. 6(5).

17. All modern Constitutions have a great deal in common, covering certain standard topics. There is a global consensus on the uses and limits of public power and a growing convergence of views as to how these objectives might be secured through laws and institutions. However, Constitutions must also reflect local cultures and realities.

18. See, Sections 3(a) and 3(k) of the Constitution of Kenya Review Act.

the basis of consensus. For a populace deeply divided along the lines of social and economic classes, ethnicity, religion, gender and generation, the objectives of the review were extremely ambitious. More specifically, the resolution of national issues on the basis of consensus has continued to elude Kenyans.

C. The Context for Women in the Mandate of the Commission

The Review Act provided an expansive agenda for affirmative action and the inclusion of the historically marginalized and minority groups into the national fabric. Section 3 of the Act stipulated that all organs of the review process must ensure that the final outcome guarantees and safeguards the well being of the people of Kenya. In particular, the review process must ensure the following: gender equity; equal citizenship; equality and redress of the discrimination or hardships suffered in the past; respect of human rights and fundamental freedoms; equitable access to national resources; full and inclusive participation in public affairs; and the provision of basic needs to all Kenyans through the establishment of an equitable framework for economic growth. The Review Act gave a high priority to human rights and basic needs and provided for an expansive agenda for inclusion in Constitutional reform. The agenda includes: the protection of human rights and democracy, gender equity and gender parity in the right to citizenship.

D. The Politics of Constitution Making

Constitutions—supposedly enshrining the social contract—have over time become a *tabula rasa* on which new patterns of power, alternative political arrangements, the divisions and defining of power, rights and obligations is being written by the ruled and the rulers. They present the centre for contestation between the rulers and the ruled; among the rulers *inter se* and the ruled *inter se*. In the words of Okoth Ogendo, Kenyans see a Constitution as,

a 'power map' on which framers may delineate a wide range of concerns. The process of Constitution making, which involves, *inter alia*, making choices as to which concerns should appear on that map has become the central question of political discourse.¹⁹

19. H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al eds, 1993), at 67.

Different groups have different reasons for participating in the making of the new Constitution. Some want to protract the process as they appear to promote it so that the absence of a new Constitution can be used as a campaign tool or the existing Constitution can be used for the continued exercise of uncontrolled power. Others may want to gain political power and regional control through new Constitutional rules, which therefore promote personal and sectarian interest. The majority may want a new democratic social covenant which promotes freedom, rights for all, equitable access to resources and opportunity, prosperity, peace and unity among others.

Not surprisingly therefore, the Constitutional review process was characterized by considerable uncertainty due to the role played by politics, ethnic interests and political party interests. The politicization of the review process generated differences that bogged down the process from inception.²⁰ The Constitution is viewed as a political tool for ascendance to and fall from power. As a consequence, the decisions made about the process are not made primarily on merit, but on their political value.

E. Shifting Positions

The initial Constitution of Kenya Review Commission Act of 1997 was severally changed to accommodate consensus or even shifting positions vis à vis the process of Constitution making. Several stakeholders argued that current Cap. 3A as most recently amended through the Constitution of Kenya Review (Amendment) Act, 2004 had problems. For example the Electoral Commission of Kenya (ECK) indicated that the referendum provisions in the Act may be inadequate.²¹ The constitutionality of the law was also an issue, leading to pending litigation.²² A number of court orders were also

20. A. Ali, 'Let the women lead in the way for a new Constitution', a key note address delivered by Commissioner Abida Ali-Aroni, Chairperson, Constitution of Kenya Review Commission, at the Women's Consensus Building Group Consultative Meeting held at the Nairobi Silver Springs Hotel on the 16th day of April 2005.

21. The Referendum provisions in CAP 3A state that a referendum will be held, the question to be voted on in the referendum, required majority in the referendum, the persons who may vote in the referendum and the application of the National Assembly and Presidential Elections Act and the Election Offences Act and facilitation and coordination of civic education on the referendum. However, ECK has argued that in many countries a specific referendum law is enacted. A referendum law would elaborately set out rules and regulations for the referendum without having to adopt those set out in the aforementioned Acts.

22. The Attorney General and several other stakeholders such as the LSK have opined that Section 47 of the Constitution should be amended to include a process of making(not amending) a constitution.

handed down.²³

The Attorney General gave an opinion stating that Section 47 of the Constitution should have been amended to include a process of making (not amending a Constitution). Before the 2002 elections, civil society and the political opposition also argued that a representative constituent assembly for debating and harmonizing Wanjiku's views should be established. Accordingly, Section 47 of the Constitution would have had to be amended to incorporate the making of a new Constitution; and that Kenyans through a referendum must approve the new Constitution. This was informed by the fear that the then ruling Kenya Africa National Union (KANU) could make the new Constitution they wanted if 65% of all elected and nominated Members of Parliament (MPs) did not vote to approve the Constitution. The likelihood existed because there were no provisions in the law on the holding of a referendum. Kenyans were also afraid that 78 MPs (about a third of Parliament) could be mobilized to defeat a new Constitution if Section 47 was changed to demand that a new Constitution be passed by 65% of MPs (excluding the Speaker and the Attorney General).

An analysis of this situation reveals that those who in 2004 advocated for the amendment of Section 47 of the Constitution are the same ones who later turned around and rejected it in the referendum. Paradoxically, those opposed to the amendment were to later speak up in support of it. According to Abida Ali, the shifting of positions reflected the fact that positions are not held on account of their value *per se* but for the sake of the political expediency of the moment.²⁴ Political Polarization at the Bomas Conference.

By the time the Bomas Conference drew to an end, it was so politically polarized that it became impossible to discuss issues on their merits. For this reason for example, a total of 5 chapters were passed within a record three hours, including the chapters on: The Executive, Devolution of Power, Public Finance, the Legislature and Transitional and Consequential Arrangements.²⁵ The seeds for further contestation were thus sown when a Section of the members of Parliament allied to the Government walked out on the Process. Indeed, the failure of the delegates to listen to one another and agree at the Bomas Conference reduced the process to a circus at the expense of Kenyan taxpayers.

23. See e.g. *Njuguna Micheal Kung'u, Gacuru wa Kareng'e & Nicholas Mugo v. The Republic, Attorney General and CKRC*, High Court Misc. Application No. 309 of 2004; *Peter Mwalimu Miwa v. Attorney General and CKRC*, HCCC No 1 of 2004; and the most recent KANU/LDP case, High Court Misc. Application No. 1216 of 2005.

24. Ali, *supra* note 20.

25. Between 4.00 pm and 7.00 pm.

F. The Bomas Draft or No Constitution at All

Political polarization also impacted on the Draft Bill. There are those who advocated for the Bomas Draft to be taken for a Referendum despite their own admission that there were outstanding issues. On the other side of the divide were those who thought that the outstanding issues should be identified and an effort made to resolve them. Again, the focus shifted from the quality of the Constitution the country should have had. The insistence on the Bomas draft was almost fanatical with proponents arguing that Bomas reflected the views of Kenyans. In our view, the Bomas process was not perfect. The Bomas Conference changed, sometimes fundamentally, the provisions in the draft Constitution generated by CKRC.

G. The Naivasha Accord

The role of Parliament in the process of review was to ultimately enact changes to the Constitution. The National Assembly according to Section 10 was assisted by the Select Committee on Constitutional Reform. The Parliamentary Select Committee (PSC) formed a subcommittee that deliberated the contentious issues that had emerged from the Bomas Conference. PSC, under the Chairmanship of William Ruto, met in Naivasha on 4-5 November 2004. They came up with what is commonly referred to as the Naivasha Accord. The Accord proposed, among others, the following:

- Scrapping the Senate;
- Collapsing the roles of the regions, districts, locations into the roles of the counties, and
- Rationalization of Constitutional Commissions so that the Public Service Commission, the Parliamentary Service Commission, the Electoral and Boundaries Commission, the Judicial Service Commission and the Commission on Revenue Allocation would be established as Constitutional commissions while the rest would be established by Parliament on a needs basis.

H. The Constitution Review Amendment Act

Later, the entire legislature deliberated the Bomas Draft and the Naivasha Accord in *Kilifi* where they crafted a *Kilifi* Draft. There were 16 women Members of Parliament who took part in the negotiations at *Kilifi*. After passage of the review law to move the process of constitution review forward, divisions again emerged and many groups including civil society organizations began to disassociate themselves with the

'roadmap' provided in the Act and labeling it 'the Kiraitu (then Minister for Justice and Constitutional Affairs) Roadmap.'

1. Conflict of Interest

The process of review was often characterized by a conflict of interest between the women's agenda and the political parties' agenda. All the women at Bomas belonged to a political party. They were therefore obliged to champion the proposals advanced by their respective political parties. This resulted in conflicting interests where the women's agenda was different from that advanced by the political party/ies to which they belonged. Women overcame that challenge and made great gains in the Constitution-making process. The campaigns relating to the Referendum; whether to vote 'Yes' or 'No' were also another major challenge and presented yet another conflict of interest issue for women. The campaigns were divisive of women whose affiliation with ethnicity and political party interests took the front seat while the fact of their being women was relegated to the back burner.²⁶ At play were personal, ethnic and political interests. This contrasted sharply with the case of Somali women, who, upon realizing that they were in danger of being marginalized as the war lords (converted to peace lords) gravitated into their clans based on patriarchal norms, formed the women's clan.²⁷ Likewise, the women of Kenya should have first and foremost been women before being cocooned into their different 'tribes,' parties and other affiliations which would soon forget them and relegate their agenda to the back burner.

III. THE JURISPRUDENTIAL FRAMEWORK FOR THE ANALYSIS OF THE PROPOSED NEW CONSTITUTION

A. The Constitution as a Social Contract

To understand the true meaning of a Constitution, its philosophical foundations must be canvassed. Philosophers such as Jean Jacques Rousseau and Thomas Hobbes have been

26. When the Proposed Constitution was published in 2005, the authors expected that women's groups would rally their support around the Constitution. However, it quickly became clear that women easily rallied around broader issues relating to executive power sharing and much less around gender provisions in the draft. This paper was originally prepared as a gender analysis of the Proposed Constitution but could easily have been dismissed as propaganda for the 'Yes' campaigners.

27. Personal experience engendering the Somali Peace Process. May-August 2005.

credited with providing the context within which Constitutions have been crafted.²⁸ According to their theory of the social contract, citizens enter into a contract of governance with their rulers whose principal rules are laid down in a document, the Constitution, a political and legal framework serving as a compass for a country's destiny. A Constitution can be written (as in the Kenyan case) or unwritten (as in the case of Britain). However, the critical issue is that a Constitution should emanate from the people so that they identify with it and are willing, able and ready to defend and promote its ideals.²⁹

As a social contract between the rulers and the ruled, a Constitution of the state is first and foremost an "agreement or compact among the people."³⁰ It is the consensus amongst the people themselves, their collective wisdom.³¹ The Constitution is therefore more than just a document. It embodies the wishes and aspirations of the country. The subject of the agreement is how the nation should be governed and ruled.³² The agreement constitutes the framework within which public policies are made and implemented and how differences and disputes among the people solved.³³

Any Constitution that does not emerge from widespread consultations with all nationals and interest groups cannot be regarded as legitimate.³⁴ The basis of Constitutional legitimacy must be measured by the extent to which the masses have been part of the process of making the Constitution. John Locke asserts that the social contract can be dissolved and the process to create political society begun anew.³⁵ This is precisely what happened in Kenya between 1990s and 2005. The issue of coming up with a new constitution is on the agenda of the grand coalition cabinet. Indeed, most Kenyans feel that the current social contract has outlived its usefulness and should therefore be re-created in order to reflect the prevailing socio-economic and political

28. C. MULEI & C. ODOE, WHAT THE CONSTITUTION MEANS TO YOU 2 (1997).

29. *Rev. Timothy Njoya & Ors v. CKRC and the National Constitutional Conference*, High Court Misc. Application No. 82 of 2004.

30. YASH PAL GHAI, REVIEWING THE CONSTITUTION: A GUIDE TO THE KENYA CONSTITUTION, THE CONSTITUTION OF KENYA REVIEW COMMISSION (2002).

31. *Id.*

32. The Constitution of a country sets out social, economic and political goals for the country and the values by which people want to live and regulate their affairs. These values include democracy, the protection of individual and collective rights, equal distribution of resources, special assistance to disadvantaged groups, and respect of the law.

33. *See supra* note 30, at 5.

34. *See e.g.*, U Mattei, *Patterns of African Constitution Making*, CARDOZO LAW BULLETIN (2001).

35. J. LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (2003).

order in the country.

From the foregoing, it is clear that the Constitution of a country is the most important legal document. It is the supreme law on which all others are based.³⁶ The supremacy of the Constitution does not derive merely from its saying so. It is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. In the words of Justice Ringera, the Constitution is supreme because it is made "... by they in whom the sovereign power is reposed, the people themselves."³⁷

B. Social Contract Theory and Women

It is precisely the definition and conception of who the people are that an assault on the social contract theory emanates from the point of view of different groups and from the area of Critical Legal Studies. The contemporary critiques of the social contract theory have rejected the idea that the social contract theory is an accurate perception of the way in which a society is constituted. Carole Pateman argues that from a feminist perspective, the social contract theory is flawed.³⁸ Throughout history, Constitutions have been made by men and have been unresponsive to the needs of women.³⁹ Constitutions have been accused of gender blindness because the law was written by men, from a male perspective and did not take into account the experiences of women.

Feminist scholars have argued that the social contract theory which talks of an agreement between equals to form a society has 'a historically located man' in mind. For instance, Locke's theory has an economic proprietor in mind, the Hobbesian Man is an entrepreneur, and Gauthier's is a Robinson Crusoe and so on.⁴⁰ The person depicted in these theories is therefore gendered and not universal, ageless, disembodied, sexless, raceless and classless as it purports to be.⁴¹ It is imperative for women to participate in the Constitution making processes to imbue the social contract with an accurate perception of their lived realities in the various cultural, political, social and

36. As early as 1733, one writer by the name of Boling Broke defined a Constitution as an assemblage of laws, institutions and customs derived from certain fixed principles that compose the general system according to whether the community has agreed to be governed.

37. Timothy Njoya case, *supra* note 29.

38. C. PATEMAN, *THE SEXUAL CONTRACT* (1988).

39. F. MACKAY, A. DOBROWOLSKY & V. HART, *WOMEN MAKING CONSTITUTIONS: NEW POLITICS AND COMPARATIVE PERSPECTIVES* (2003).

40. C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* (1973).

41. C. DiSTEFANO, *CONFIGURATIONS OF MASCULINITY: A FEMINIST PERSPECTIVE ON MODERN POLITICAL THEORY* (1991).

economic spheres. This will both enrich the Constitution as well as ensure that the "face" represented in the agreement will be an amalgamation of all persons including women, and therefore representative of the society at large.

C. Feminism and Feminist Jurisprudence

As we look at women and their gains in the process of Constitution making, it is necessary to locate and contextualize this discussion within feminism and feminist jurisprudence. In order to fully appreciate the strategies and the struggles of women in the process, we need to understand feminism as an ideology and feminist frameworks as a strategic way of organizing thought and informing practice.

D. Understanding Feminism

Feminists believe that women are discriminated against in all spheres on account of their being women. They argue that male-written history has created a bias in the concepts of human nature, gender potential and social arrangements.⁴² Furthermore, the language, logic and structure of the law are male created and reinforce male values. As Lerner Garder has pointed out, in most patriarchal societies, women have been excluded from creating laws that define their contribution.⁴³ She argues that what heightened this contradiction is the invention of writing. Until the last century, when socioeconomic conditions gave women greater access to education and literacy, writing had been a patriarchal domain.⁴⁴ She further argues that writers and recorders have mainly been men. For instance Betty Friedman avers that, many women writers in Europe had to use male pseudo names in order to get published.⁴⁵ Over the past century, the craft and skill of writing has existed, women have only been marginally a part of it.

Njogu Waita asserts that if we follow Lerner's argument to its logical conclusion, what is recorded in law, philosophy and science is mainly what men have done, have experienced and found important. Women's experiences are left unrecorded,

42. J. Kelly, *The Double Vision of Feminist Theory: A Post Script to the Women and Power Conference*, 5 *FEMINIST STUDIES* (1979).

43. L. GERDA, *THE CREATION OF PATRIARCHY* (1986).

44. D. SPENDER, *FOR THE RECORD: THE MAKING AND MEANING OF FEMINIST KNOWLEDGE* (1989).

45. BETTY FREIDAN, *THE FEMININE MYSTIQUE* (1965).

neglected or ignored.⁴⁶ This means that the social contract, which is supposed to be an agreement between the people, is in fact a pact between men. Women's experiences are disregarded and therefore the laws do not present an accurate picture. Waita's view resonates with that of Carol Smart who documents the ways in which women's reasoning and validation processes have been subjugated in the legal process through the construction of legal method from a purely male vantage point.⁴⁷

E. Goals of Feminism

The goals of feminism have been cast in different ways by different scholars. Shulamith Firestone declares feminism's aim as the overthrow of the oldest, most rigid class/caste system in existence, the class system based on sex,

...a system consolidated over thousands of years, lending the archetypal male and female roles an undeserved legitimacy and seeming permanence.⁴⁸

Kate Millet speaks of the sexual revolution as ending patriarchy by abolishing the ideology of male supremacy and the traditional socialization that promotes women's status and roles.⁴⁹ Bell Hooks says feminism is "...a commitment to eradicating the ideology of domination that permeates western culture on various levels—sex, race, and class, to a name a few."⁵⁰ Ruth Whitney asserts that feminism's goal is to destroy all forms of domination. In her view, ending patriarchy's belief that one group is superior to another and thus has the right to dominate will help stop men's power over women, the rich over the poor and whites over people of color.⁵¹

It is these seemingly combative aims of feminism that have earned it all the criticism and obscured feminism's essence and purpose as very creative and applicable

46. W. Njogu, *Myth and Constitution Making, NEGOTIATING CO-EXISTENCE AND GOVERNANCE STRUCTURES: ESSAYS ON GENDER AND CONSTITUTION MAKING* (W. Kabira & P. Wasamba eds., 2001), at 40.

47. CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989).

48. S. FIRESTONE, *THE DIALECTIC OF SEX* (1970), at 144-145.

49. K. MILLETT, *SEXUAL POLITICS* 62 (1973)

50. See, SHEILA RUTH, *ISSUES IN FEMINISM* 5 (1998). See also, CELESTINE WARE, *WOMAN POWER* 3 (1970); FIRESTONE, *supra* note 48, at 15; MILLETT, *supra* note 49; and ANNE KAEDT, *RADICAL FEMINISM* (1973), at vii.

51. RUTH WHITNEY, *FEMINISM AND LOVE: TRANSFORMING OURSELVES AND OUR WORLD* (1998).

to other realms where domination by one group (including individual states or groups of states) over another for whatever reason exists. Indeed Naomi Wolf's broad definition of feminism encompasses "...every woman and every man who cares about women," any person "...laying claim to our humanity, all of it, not just the scenic parts..." and "...feminism [as] the ultimate human rights movement."⁵²

The Constitutional review process in Kenya presented a golden opportunity to bring in alternative views to the crafting of existing and new structures, because the process of negotiating the new social contract has taken into account the "...serious coherent and universal philosophy"⁵³ of dominance by certain groups and the outcome of the process is a document that in our view incorporates key tenets of creative feminist ideology, namely the inclusion of previously excluded groups. As Germaine Greer aptly points out, male-dominance is a value system and a belief system which is not based on 'facts' and will not be altered by 'facts.'⁵⁴ The challenge for women then is how to change a value system that denigrates them other than by using facts. The answer to this, according to Dale Spender, is by instituting new and different values belief systems.⁵⁵ The current recreation of a new social compact presents a crucial opportunity for women to use the law in order to shape the belief system by introducing new ideas geared at social engineering and to address past discrepancies. The values and belief systems can be anchored on tenets such as: women are human beings; the two sexes are equal in human dignity; the qualities traditionally associated with women are equal in value to those traditionally identified with men, and equality between the sexes needs to be publicly recognized. Indeed, feminists have argued that all our relationships are political and "...what happens in the bedroom has everything to do with what happens in the board room and vice versa,"⁵⁶ and that men are in control in both places.

The institution of new values and beliefs must happen in both the public as well as the private spheres. As Marilyn French argues, "...acceptance of the equality of women and of 'feminine' values is not enough. It is necessary to work for the public recognition of this equality, in both public and private worlds." It follows therefore that the agenda must be necessarily both activist and political, involving public expression of personal ideals. It must be lived.⁵⁷ In our view, the making of the proposed

52. N. WOLF, *FIRE WITH FIRE* (1993), at 95, 120, 132, 151, 232 & 310.

53. Njogu, *supra* note 46.

54. GERMAINE GREER, *THE FEMALE EUNUCH* (1970).

55. SPENDER, *supra* note 44.

56. M. FRENCH, *BEYOND POWER* (1985), at 442-445.

57. *Id.*, at 65 *et seq.*

Constitution and the participation of women at the various stages of Constitution making is feminism in action and feminism lived.

To advocate for women's liberation so as to enter existing male structures and earn rewards from them comprises assimilation into patriarchal structures for personal self-aggrandizement. That amounts to co-option into patriarchy and is a movement away from feminism.⁵⁸ We need to work to eliminate all forms of discrimination and ensure respect, liberty, equality, justice is guaranteed for all women and men. In a nutshell, women's concerns ought to be to replace Patriarchy's love for power as the highest value with the power of real love for all human beings.⁵⁹

F. Feminist Jurisprudence

As previously noted, feminists believe that history was written from a male point of view and therefore it does not reflect women's role in making history and structuring society. Male-written history has created a bias in the concepts of human nature, gender potential, and social arrangements. The language, logic, and structure of the law are male created and reinforce male values.⁶⁰ By presenting male characteristics as the "norm" and female characteristics as deviation from the "norm," the prevailing conceptions of law reinforce and perpetuate Patriarchal power. Feminists challenge the belief that the biological make-up of men and women is so different that certain behavior can be attributed on the basis of sex. Gender, feminists say, is created socially, not biologically. Sex determines such matters as physical appearance and reproductive capacity, but not psychological, moral, or social traits.

The Constitution is a legal document and therefore needs to be analysed from feminists' perception of law. Law can be used to reinforce or give permanence to certain social injustices leading to the marginalization of certain groups of people. Legal rules may give rise to or emphasize gender inequality and legal systems can become obstacles when change is required in legal rules, procedures and institutions to remove the inequality by the oppressed.⁶¹ This necessitates an inquiry into what injustices are intertwined within the legal systems and the extent of their operation.⁶² One often finds that the *de jure* position, which may provide for gender neutrality cannot be achieved

58. *Id.*

59. See, WHITNEY, *supra* note 51.

60. See, SMART, *supra* note 47.

61. AMY TSANGA, TAKING LAW TO THE PEOPLE: GENDER, LAW REFORM AND COMMUNITY LEGAL EDUCATION IN ZIMBABWE (2003).

62. See, Kameri-Mbote, *supra* note 1.

in practice due to the numerous existing obstacles, which make the law powerless for three reasons. In the first instance, statute books may contain legal rules and principles which are or can be seen as a legitimation of the subordination of women to men. Secondly, the structure and administration of laws can occasion the subordination of women to men. Finally, the socio-economic realities and the patriarchal (the ordering of society under which standards—political, economic, legal, and social—are set by, and fixed in the interests of, men) ideology pervading in society prevent the translation of abstract rights into real substantive rights.⁶³ In many instances, Gender neutral laws have 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 ...⁶⁴

Feminist jurisprudence is thus a philosophy of law based on the political, economic, and social equality of the sexes. As a field of legal scholarship, it began in the 1960s as an offshoot of the Critical Legal Studies movement.⁶⁵ It now holds a significant place in American law and legal thought. Through various approaches, feminists have identified gendered components and gendered implications of seemingly neutral laws and practices. These are laws affecting employment, divorce, reproductive rights, rape, domestic violence, sexual harassment, inequality in the workplace, and gender-based discrimination.⁶⁶

G. Feminist Jurisprudence and the Social Contract in Kenya

Feminist Jurisprudence has played a critical role in the review process in Kenya. First, it has done so in negotiating for the law that would govern the process, women ensured that the principle of affirmative action was adopted to guarantee their participation in

63. *Id.*

64. TOVE STANG DAHL, WOMEN'S LAW: AN INTRODUCTION TO FEMINIST JURISPRUDENCE (1987).

65. See, e.g., FEMINIST JURISPRUDENCE (Patricia Smith, ed., 1993), and FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY: CASES AND MATERIALS (Mary Becker et al. eds, 1994).

66. See e.g., JULIA BROPHY & CAROL SMART, WOMEN IN LAW: EXPLORATIONS IN LAW, FAMILY AND SEXUALITY (1985), and CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987).

all the review institutions. Indeed, the principle is ingrained in the legislation regulating the review process. Second, while recognizing that the traditional concept of law is supposed to be gender neutral and the term 'man' is used to mean 'man and woman,' the women negotiated for provisions in the law that would recreate the new social contract in light of the philosophy underlying Feminist Jurisprudence by going beyond gender neutrality. Third, the participation of women in the negotiations of Safari Park 1, 2, and 3 (which provided the blueprint for Constitutional reforms),⁶⁷ ensured that they were included in the process of recreating a new social contract for Kenya. The identity of women from men was achieved through the disaggregation of participants in the laws governing the review process to include "male leaders" and "female leaders," "male experts" and "female experts," thus recognizing the need to demystify and diversify the 'man of law.'⁶⁸ This means that in negotiating for the law that was to govern the review process, there was recognition that different members of different communities would bring richness to the development of the law.

Women also emphasized the need for a law made by the people as opposed to the idea that a team of experts with no interest in the communities should create the social contract.⁶⁹ There were two schools of thought in so far as the negotiation for the law was concerned. The first was that the process of recreating a new social contract for Kenya should be people-driven, which means that the people would drive the process and thus originate the law.⁷⁰ The second was parliamentary driven and entailed the making of law by experts.⁷¹ Women found their space outside the formal institutional

67. Since 1997, women as a group have organized themselves to participate in the process of recreating a new social contract for Kenya. They fully participated in the initial Bomas discussions and Safari Park, I, II, III and IV. During the Safari Park Series of Review Talks, it was agreed that there would be a three-tier framework to be used to review the Constitution. The three tiers included: The District Constitutional Forums, The National Constitutional Consultative Forum and Kenya Constitutional Review Commission. It was during the Safari Park Meetings that the Constitution of Kenya Review (Amendment) Act, 1998 was formulated. During this period, women focused on ensuring their own participation in the processes, implementation of Affirmative Action policy in all structures of the Review Process and negotiating issues with other stakeholders to ensure that they are taken on board in the new social contract.

68. CATHARINE MACKINON, *WOMEN'S LIVES, MEN'S LAWS* (2005).

69. Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Constitution of Kenya Review Commission, held on 10th February 2005.

70. *Id.*

71. *Id.* Note that the Parliamentary process established a Parliamentary Select Committee to determine what instruments would be necessary for a comprehensive review of the social compact. The Parliamentary Select Committee comprised of 27 members who were selected by the House Business Committee. Of the 27 members appointed only two were women. For a further analysis of the Parliamentary processes, see REPUBLIC OF KENYA/NATIONAL ASSEMBLY EIGHTH PARLIAMENT-FOURTH

framework and thus worked with the people-driven approach. This was due to the fact that women challenged the very nature of the law that was governing the country. They asserted that women should have an equal opportunity to make their own choices owing to the fact that they are just as rational as men.

The people-based approach encouraged inclusivity and recognized the importance of the development of a social contract with all sectors of society and different groups and societies including minorities, women, socio-cultural groups and religious organizations. Finally, the negotiation for the adoption of the one-third representation principle was designed to secure a critical mass of women whose voice could influence the process ensuring that women were both seen and heard.⁷²

H. Values and Philosophies Guiding Women in the Process

It is important to identify the philosophies that have guided women's participation in the process of constitution-making so as to contextualize them within the framework and ideology of feminist theory and feminist jurisprudence. These include: the desire to end discrimination; the promotion of gender equity; occupation by woman of their rightful place in society; creation of a more democratic and healthy nation; ensuring maximum participation of women and men in decision making; and equal access to opportunities and resources. With regard to the process, women have been instrumental in ensuring that they are included in the institutional and legislative framework governing the review process through the principle of affirmative action. This explains their insistence on gender mainstreaming in all the stages of Constitution making.

These values and philosophies are reflected in the nature and content of the proposals presented by women to the Constitution of Kenya Review Commission (CKRC). These included: one third representation in Parliament and other elective and appointive posts; equal access gender equity; equal rights of citizenship irrespective of marital status; equality and redress of the discrimination or hardships suffered in the past; respect for human rights and fundamental freedoms for all; equitable access to resources; full and inclusive participation in public affairs; and the provision of basic needs to all Kenyans through the establishment of an equitable framework for economic growth.

SESSION, REPORT OF THE PARLIAMENTARY SELECT COMMITTEE REVIEWING THE CONSTITUTION OF KENYA REVIEW ACT (1997).

72. W. Kabira, *Negotiating the Double Covenant: Women and Constitution Making*, in NEGOTIATING CO-EXISTENCE AND GOVERNANCE STRUCTURES: ESSAYS ON GENDER AND CONSTITUTION MAKING (2001).

I. Feminist Framework Guiding the Women in the Process

Kenyan women's struggle for participation falls within the liberal feminist framework. Women preferred a selection process and structures that were based on a bottom-up approach as opposed to a top-down one as a means of carving out space for them in the recreation of the new social contract. So far, the review process has dealt with a normative framework and has not tried to deal with institutional reform. It is hoped that the actualization of these norms—particularly gender equity and equality—will result in institutional changes and present opportunities for women to perform in local governance structures, Constitutional commissions, the legislature, the judiciary, the executive and the public service. The normative framework is critical to allow women to get into the institutions and transform them from being the bastions of male power and authority.

It is apparent that certain aspects of the women's struggle to participate in the review process would be contextualized under the radical feminist framework owing to the fact that in the debate for recreating a new social contract for Kenya, the women's agenda has consisted of negotiating two contracts.⁷³ The first contract sanctions patriarchal leadership of men. It subordinates women to men and to a large extent utilizes domestic violence to legitimize its hegemony and reproductive and other gender roles. Radical feminists tend to expose the patriarchal nature of the Kenyan state and how it is oppressing to women.

Women in the process used collective bargaining and the commonality of their cause to leverage support for their cause. They brought different categories of women together including: Women at the National Constitution Conference at Bomas; women parliamentarians, women Constitution Review commissioners and other allies at all levels in a bid to come up with a common position on the women's agenda. There was a clear linkage between women parliamentarians, women organizations and women at the grassroots. The points of convergence were brought to the fore and any potentially divisive issues such as religion, ethnicity and political party membership were downplayed.

The way in which the women of Kenya developed a common agenda is impressive if the record of previous attempts to unite the women's movement is anything to go by. From the public consultations to the first sessions of civic education, to the women Constitution Review commissioners to the women at Bomas and back again to the women commissioners, to the women Parliamentarians, and to the women

73. *Id.*, at 67.

of Kenya, one sees a common women's agenda. Indeed the ball has gone full circle and is now with all the people of Kenya. Women comprise a big percentage of these people and it is up to them to complete this daunting and bruising race commenced in earnest in 1997. Women have been battered and bruised in the battle but they have not been broken.

J. The Feminine Mystique

For many years, the Kenyan culture of socialization has taught women to blame themselves for their own troubles and to deny any connection between these troubles and the patriarchal system. According to Smith the dominant mythic structure or worldview shared by members of a culture gives them the belief that their social order is legitimate and therefore natural.⁷⁴ Kabira asserts that this belief makes men in a predominantly patriarchal structure argue that:

- "Our culture must remain intact for peace and order to reign."
- "We need to keep what is good in our traditions."
- "We must hold on to those things that have always held us together."
- "Our traditions must be respected."⁷⁵

She argues that for many who fear change and fear that the structures they have valued for years will collapse, any person who seems to promote new ideas becomes a threat. This person is questioning ideas and structures that have been tested by time and have the authority of tradition. They are legitimate and, therefore, whoever goes against these structures is an "enemy of the people."⁷⁶ This belief in the legitimacy of tradition rests basically on social myth, which is very fundamental to the understanding of Kenyan culture, and how men and women relate and behave.

For a long time, the myth-making process promoted the disempowerment of women and prevented their development to full potential. In the process of legitimizing the social order that lays its claim on tradition, the Kenyan woman adapts what Betty Freidan calls the "feminine mystique." This means that despite the fact that the woman may have problems based on the patriarchal ideals such as the inability to inherit property, the sexist myths based on her "feminine mystique" are created to justify this and the social order is legitimized by traditions that claim that "...things have always

74. J.C. SMITH, *PSYCHOANALYTICAL ROOTS OF PATRIARCHY: THE NEUROTIC FOUNDATIONS OF SOCIAL ORDER* 50 (1990).

75. W. Kabira, *The Road to Empowerment*, FEMNET, Nairobi (1994).

76. *Id.*

been the way they are and that is why we are 'happy,' 'peaceful' and 'prosperous.'⁷⁷ Betty Freidan gave the problem that has no name a name and dissected it.⁷⁸ Her arguments on the feminist mystique are becoming increasingly relevant in defining the problem with the Kenyan woman today.⁷⁹ Kenyan culture is full of sexist myths.⁸⁰ These myths illustrate Freidan's feminine mystique contextualized in the Kenyan political situation and include:

- "You are only married and not born here so you cannot represent us."
- "You are not married and when you marry, you will go with the seat we give you."
- "You are married, you should not be in politics."
- "You are educated, you do not understand our women at the grassroots."
- "You have not gone to school, so you do not understand the complexities of politics."⁸¹

Therefore, as Betty Freidan argues, the woman's ultimate destiny is in being the perfect wife and mother. The Constitutional review process has presented a crucial opportunity for women's issues to be taken on board and for them to defy the mystique. The fact that women have taken their issues very seriously has contributed greatly to the consideration of their proposals which were previously neglected or unheard of.

K. Breaking through the Feminine Mystique

One of the most salient departures from the earlier law making processes in the current process of recreating a new constitution for Kenya is that men have not been the source of public knowledge about women. During the entire process, women have formulated their own agenda and made pronouncements among themselves at all levels and mainly at the grassroots to the public and proffered their own advice on how women should

77. See Freidan, *supra* note 45.

78. Freidan called it "the problem that has no name" because women were blamed then for a lot of problems—not getting the kitchen white enough, not pressing the husband's shirt smooth enough and the husband's ulcers. But there was no name for a problem that had nothing to do with the husband, children, home and sex—the problem that so many women have is undermining their husband's masculinity and their own femininity and neglecting their children. See *id.*

79. This woman is probably arguably from the rural areas and poor, who form the bulk of the women population in Kenya.

80. See e.g., KAVETSA ADAGALA & WANJIKU KABIRA, KENYA ORAL NARRATIVES (1984).

81. Freidan, *supra* note 45, at 13.

live their lives. Women formulated their own agenda and developed and pushed for it.⁸² The women generated their own ideas, chose the women they wanted to represent them and determined the criteria for appointment and adopted strategies to ensure that their minimum agenda would be taken on board. There is indeed indisputable evidence that women have spoken in one voice which came in the name of data from every constituency. The women named the world for themselves.

This is a dramatic departure from the formulation of the current Kenyan Constitution which was negotiated at Lancaster House in England and where only one woman took part.⁸³ That law was written by men and from a male perspective. It did not take into account the female vision and therefore discounted, disqualified, neglected and left ignored women's experiences. This is arguably the reason why the law cannot ingest and process what is not reflected in the masculine law that was created.

The process of renegotiating a new social compact for Kenya represents a turning point in the history of Kenyan society. There has been great awakening in the area of awareness of women's issues and rights coming from women and in their own voices.⁸⁴ In this way, women have carved out their space and taken the place of men in shaping their own destiny. The influential role of men in shaping women's lives from a patriarchal standpoint has been challenged and debunked. Women in Kenya are breaking through the feminine mystique to their own political and economic participation and empowerment in the mainstream of society. They are expressing in

82. This is in consonance with the revolution that Betty Freidan helped to start when she went and talked to women about their lives. This might not appear to be a dramatic move but it was an unusual departure from the practices of the time in America. In the late 1950s in America, men were the sources of public knowledge about women. It was men who formulated the theories about women, who made pronouncements, and proffered the advice on how women should live their lives. See *id.*

83. Ms. Priscilla Abwao was one of the representatives from western Kenya.

84. In this context it was very rare for women to get an opportunity to speak for themselves and when the Constitutional Review Commission went round the country, what women had to say came as something as a shock, for if you were to believe the public image (the Kenyan Feminine Mystique) about women, you would have expected to find behind every door a housewife devoted to her role as wife, mother, homemaker, a woman who was supremely happy and fulfilled, enjoying an unprecedented, perfect life. But if such women indeed existed, they were few and far between. The views obtained elicited a very different story. There was a realization that a great gulf separated the well-established understanding about women from the private and remote understanding generated by individual women as they lived out their lives. This has served as a breakthrough for women in that their participation in the process of recreating a new theory of justice in the form of the Constitution. The process has opened the door on women's experiences, and focused on some of the most galling features of some women's lives which had previously gone unnoticed. The process has paved way for women to move from silence to expression; by giving voice to women's experience. See, Kabira, *supra* note 75.

the public sphere some of the values that used to be expressed or allowed only in the private nurture of the home. Through civic education, the review process has enlightened women and society at large and has brought some level of awakening to many women. The people's views during the process have highlighted this.⁸⁵

IV. ANALYSIS OF THE COVERAGE OF WOMEN'S RIGHTS ISSUES IN THE PROPOSED NEW CONSTITUTION

In analyzing the proposed Constitution, we start from the existing Constitution and then look at the CKRC draft (which was the first draft, and in our view, constituted of what Wanjiku really said) and the Bomas draft with a view to excavating the extent of coverage of women's rights' in the two documents. This will allow for an objective assessment of the degree to which the proposed new Constitution would have addressed issues of concern to the struggle for gender equality.

A. Women's Human Rights in the Current Constitution

Three issues are the subject of the ensuing analysis of the existing Constitution, viz., discrimination, citizenship and property relations. It is noteworthy that most of the provisions of the existing Constitution are couched in gender-neutral terms. Gender neutrality however must contend with the gendered reality of people's lives which nuance people's experiences of different normative provisions. Over the years, feminists have challenged the division between the private/reproductive realm and the

85. For instance, women in Kenya seem to have given the problem that had no name, a name. This is demonstrated by what the people said regarding women. These included the following:

- Women are poorly presented in governance and other areas of decision-making.
- Women are rated 2nd class citizens since they cannot be cleared to travel abroad without the husband's consent.
- Women are weak physically and thus should be given special treatment.
- Some cultural beliefs and customs discriminate women.
- Married women are restricted to family matters hence less participation in governance.
- Women should be involved in governance through the quota system.
- 1/3 of all public servants in all areas should be women.
- The government fund women groups for women to be taught their rights and obligations in governance.
- Women should be accorded 50/50 participation in all areas of governance.
- A department should be established to deal with women affairs.
- Women should be given incentives for economic and political participation.

See, MAIN REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION, *supra* note 9.

public/productive realm. Indeed the argument by feminists that the personal and the private are political is informed by this challenge.⁸⁶ Kenya's current Constitution however maintains this distinction by saving personal laws from the constitutional guarantees of equality and non-discrimination. The current Kenyan Constitution has been criticized for its lack of gender responsiveness in a number of areas.⁸⁷

Discrimination of women in Kenya has long been an issue of concern and prompted the government to set up a task force to review the laws relating to women in the early 1990s.⁸⁸ A constitutional amendment in 1997 addressed concerns with Section 82 which had excluded sex as an objectionable ground for discrimination. While including sex among those grounds then, a number of laws were exempted by Section 82 (4) from the provisions against discrimination. These are laws affecting non-Kenyan citizens; laws of adoption, marriage, divorce, burial, the devolution of property on death, personal matters and laws affecting members of a particular tribe or race in matters exclusively concerning them.

It needs to be pointed out that the laws exempted by Section 82 (4) are almost exclusively in areas that directly affect women, and where the enjoyment of rights by women has been less than optimal. Section 82(4) legitimized the traditional position which accorded women fewer privileges than men in matters concerning their families, marriage, divorce and succession. It presented problems for the implementation of progressive statutes such as the Law of Succession Act which seeks to give both men and women equal rights in matters of succession.⁸⁹ Further, it gave no support to such legislative attempts as the Marriage Bill (1985) which sought to give equal rights to spouses in a marriage in matters concerning the custody of children, divorce, or the division of matrimonial property.⁹⁰

The principle of equality of men and women has not been realized. The saving of the laws on marriage, divorce, burial, inheritance and other personal law issues from the provisions on the elimination of discrimination under Section 82 has perpetuated

86. MARIA MIES, PATRIARCHY AND ACCUMULATION ON A WORLD SCALE: WOMEN IN THE INTERNATIONAL DIVISION OF LABOUR (1986).

87. See, Kameri-Mbote, *supra* note 1.

88. GOVERNMENT OF KENYA, REPORT OF THE TASK FORCE TO REVIEW LAWS RELATING TO WOMEN (1996).

89. See, Cap. 160 of the Laws of Kenya.

90. GOVERNMENT OF KENYA, REPORT OF THE COMMISSION ON THE LAW OF MARRIAGE (1985). The Marriage Bill (1985) failed to go through Parliament for reasons including objections to interference with a man's rights to chastise his wife; objections to adultery being made an actionable civil wrong, independent of divorce proceedings, and objections to a wife having a right to object to her husband marrying a second wife.

cultural concessions made to men in gender relations and entrenched critical tenets of patriarchal societies. In this regard the application of customary and religious laws that violate women's rights has continued to conflict with the rights and duties protected under international laws that Kenya has ratified such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Given that such international conventions require domestication before they become part of national law and also in light of the general lack of awareness of the provisions of the conventions among law administration organs, the protection that is availed to women under their provisions has not been realized. The proposed new Constitution outlaws sex as a basis for discrimination and also outlaws all customary practices that allow for the discrimination of women.

Another area where the rights of women were directly impinged upon by Constitutional provisions is citizenship. Various issues have arisen concerning a woman's right to pass on her citizenship to her children and her husband especially where the latter is a foreigner. If a Kenyan woman 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, although she cannot pass it on to her husband or to their children who may acquire their father's citizenship.⁹¹ Section 89 of the existing Constitution provides that:

Every person born in Kenya after 11th December 1963 shall become a citizen of Kenya, if at the date of his birth one of his parents is a citizen of Kenya ...⁹²

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. Furthermore, a Kenyan woman married to a foreigner does not pass on her citizenship to her husband, even though this applies if a Kenyan man marries a foreign woman. Section 91 entitles "...a woman who has been married to a

91. Victoria Mucal-Kattambo et al., *Law and the Status of Women in Kenya*, in *WOMEN, LAWS, CUSTOMS AND PRACTICES IN EAST AFRICA: LAYING THE FOUNDATION* (Janet K. Macharia ed., 1996).

92. KENYA CONST. (1982), § 89 (emphasis added).

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 gives equal rights to both men and women who wish to acquire Kenyan citizenship.⁹³ However, one has to apply for citizenship in the prescribed manner, which includes complying with the provisions of the Constitution. The laws barring a woman from passing citizenship on to both her husband and children, is obviously discriminatory and contravenes CEDAW to which Kenya is signatory. If the country is to live up to its obligation under the Convention, then it should ensure protection against such provisions which promote discrimination against women. On the other hand, the proposed Constitution specifically provided for the equal rights of citizenship for men and women and also provided for dual citizenship. In this proposed draft, the mother can pass citizenship on to her children even where she is married to a foreigner under the proposed new Constitution.

Under the current Constitution women can acquire, own and dispose of property as they wish. However, under customary settings, women did not own property such as land.⁹⁴ The Constitution's clawback clauses contained in Section 82 sanction discrimination and allow the application of Customary Law, and this can be used to deny women the right to own property. As land is the most accepted form of security to acquire credit and because women generally lack land they cannot mobilize loans to enable them buy property. Kenya has no local legislation on matrimonial property and courts apply English law applicable at the time that Kenya got independence in 1963.⁹⁵ While judicial decisions on the matter have increasingly recognized a spouses' rights to matrimonial property, the absence of firm anchorage for the positive provisions has resulted in conflicting judicial decisions.⁹⁶ It would assist if the principle of entitlement for spouses is enshrined in the Constitution in order to provide a firm grounding for claims to entitlement to a share of that property. The proposed Constitution provided for the protection of the rights of spouses to

93. Cap. 70 of the Laws of Kenya.

94. The laws on property such as the Registered Land Act Cap. 300 of the Laws of Kenya are gender neutral, implying that both men and women can own land.

95. United Kingdom Married Women's Property Act (1882).

96. Both *Karanja v. Karanja* (1976) K.L.R. 307 and *Kivuitu v. Kivuitu* (1991) KAR 241 conceded to the right of a woman to matrimonial property on account of her non-monetary contribution. However, the Court of Appeal in *Icharia v. Icharia* KAR (2006) opined that in the absence of a definitive law on matrimonial property, the High Court, in previous decisions was going beyond its mandate in granting women half of the matrimonial property at dissolution of marriage.

matrimonial property and disallowed the application of discriminatory customary laws.⁹⁷

The current law in Kenya does not distinguish between male or female heirs or between married and unmarried heirs.⁹⁸ However, culturally, women did not inherit from their fathers, more so married women.⁹⁹ Furthermore, where a husband dies, his brother and parents in most cases will disinherit the widow. Many cases are pending in court where in-laws have lied to the court that their son had no wife or children. Some communities even practice widow inheritance and if a woman has property, then there was no way she can be allowed to inherit another person's property.¹⁰⁰

Further, the law allows a woman to claim inheritance as a wife of the deceased even though the deceased has a subsisting monogamous union with another woman.¹⁰¹ The proposed Constitution provides that the parties to a marriage are entitled to equal rights in relation to the marriage at the time of the marriage, during the marriage and at the dissolution of the marriage. According to the proposed Constitution, a child's parents whether married to each other or not have a duty to equally provide for and take care of the child.¹⁰² The Constitution disallows violence. However, there is a lot of violence against women and girls in our country today, including rape, battery, defilement and rape. The current Constitution does not have much on national values and principles of state policy. What is available is only a brief statement proclaiming Kenya as a sovereign Republic and a multi-party democracy.¹⁰³ The proposed Constitution has one broad Section covering the national values principles and goals, which—among other issues—deals with the promotion of: participation, equality and equity for all.¹⁰⁴

The current Bill of Rights guarantees the right not to be discriminated against on the basis of sex under Section 82, but there is no automatic domestication clause with respect to international instruments. The proposed Constitution on the other hand presents elaborate rights on gender and equality and also provides for a mechanism for domesticating international norms and treaties.¹⁰⁵ The current Constitution does not provide for Affirmative Action as a principle in the representation of members of

97. Article 35 of the proposed Constitution.

98. The Law of Succession Act, Cap. 160 of the Laws of Kenya.

99. WINNIE MITULLAH ET AL., WOMEN INHERITANCE LAWS AND PRACTICES (2002).

100. *Id.*

101. Section 35 of the Law of Succession Act, Cap. 160 of the Laws of Kenya.

102. Draft Article 41(5).

103. *See*, Section 1 A.

104. *See*, Article 13.

105. *See*, Section 3.

Parliament. On the other hand, the proposed Constitution provides that no one gender should hold more than two thirds of elective or appointive positions.¹⁰⁶

B. Juxtaposition Between the CKRC and Bomas Drafts

1. *Coverage of Gender Issues in the CKRC Draft Bill of the Constitution of Kenya 2002.*—This part of the article examines the provisions of the CKRC draft (which was discussed and changed at Bomas) and isolates the provisions that were favorable to women, starting with the Preamble, which demonstrated that the draft Constitution was mindful of women's concerns in protecting and nurturing the well being of the individual, the family and the community. The Preamble broadly recognized the primacy of the family as a basic social unit. There was also a departure from the traditional use of the word 'men' to include 'women.' The provision on the supremacy of the Constitution outlined in Section 2 of the draft favoured women given the extent to which the draft ingrained the rights of women. It provided the context for the gender mainstreaming of other laws. Under Section 5, which refers to the Laws of Kenya, the draft Constitution included International Law as one of the classes of laws applicable in Kenya. International conventions such as CEDAW and other international declarations on women's rights, have, by dint of this provision, attained the force of law. A law domesticating CEDAW or the inclusion of elements of CEDAW in different laws as appropriate is required to be promulgated within two years of the coming into force of the Constitution.¹⁰⁷

Chapter three details the national goals, values and principles of the state, and also recognizes diversity; and makes provision for the participation of people in public affairs and facilitation of sharing and devolution of power at a broad level. More significantly, full participation of women is listed as a national goal, value and principle.¹⁰⁸ Furthermore, the principle that one third of the members of all elective and appointive bodies should be women is explicitly spelt out.¹⁰⁹ The recognition and provision for social justice; basic needs of food, shelter, clean water, sanitation, education, health and a clean environment which are issues of great importance to women, also goes a step towards enhancing the rights of women.¹¹⁰ Added to this is the recognition of homemaking and the promotion of family life as duties of the citizen.

106. Article 13(1)(j).

107. *See*, Section 3.

108. *See*, Section 14 (11).

109. *See*, Section 14 (12).

110. *See*, Section 14(14).

This contributes to the recognition of work that many women are engaged in as work.¹¹¹ The principle recognizing the special responsibilities that the state, society and parents owe to children provides an avenue for easing the onerous responsibilities that women carry in the upbringing and nurturing of children.¹¹²

On citizenship, the draft Constitution provides for equal rights of citizenship for all citizens.¹¹³ It also provides that all citizens are entitled to Kenyan passports and any documents of identification issued by the state to citizens. This provision is important as it provides the basis for challenging discretionary powers exercised in the area of immigration and which have the effect of limiting women's rights to secure passports and other documents without recourse to males (either spouses, brother or fathers). Marriage to a Kenyan entitles one to acquire citizenship upon application whether they are male or female. According to Section 20, "A person who has been married to a citizen of Kenya for a period of not less than three years is entitled, on application, to be registered as a citizen of Kenya." Furthermore, citizenship is not lost through marriage or the dissolution of marriage and the foreign husband or widower of a Kenyan woman would be permitted to reside in Kenya.

The Bill of Rights of the draft constitution contains a provision on equality. All persons are equal before the law and have equal protection before the law, which is defined to include the full and equal enjoyment of all rights and freedoms.¹¹⁴ This is buttressed by Section 40 which entitles all persons to inherent dignity and the right to have that dignity respected and protected. There is also protection against discrimination by the state or any other person on the grounds of sex, pregnancy and marital status. Section 34 (3) allows the state to take legislative and other measures designed to benefit individuals or groups who are disadvantaged whether or not as a result of past discrimination—the principle of affirmative action. Under Section 35 (1), women have the right to equal treatment with men, including the right to equal opportunities in all political, economic and social activities. Women are also entitled to be accorded the same dignity of the person as men, and both women and men have an equal right to inherit, have access to and control property.

Section 35(4) explicitly states that any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women is prohibited. This statement would go a long way towards redressing women's concerns in the area of customary laws and practices, an area that many women have had a major quarrel with.

111. See, Section 15 (1)(d) & (i).

112. See, Section 14 (13).

113. See, Section 16.

114. See, Section 33.

Furthermore, under Section 35 (5) the state undertakes to protect women and their rights, taking into account their unique status and natural maternal role in society. The recognition of maternity as a social function desirous of Constitutional protection is a quantum leap towards the recognition of women's role in society. Coupled with the provision that the State shall provide reasonable facilities and opportunities to enhance the welfare of women to enable them realise their full potential will enable women to contribute to all spheres of the nation.

On the family, the draft Constitution recognises the family as the natural fundamental unit of society and exhorts the state to accord it protection (Section 38). It goes even further to provide for equal rights of persons over 18 years of age to marry upon free consent and found a family. Parties to a marriage are also accorded equal rights in marriage, during the marriage and at the dissolution of the marriage. On the issue of customary marriages, for instance, Section 38(5) (b) requires that a law be enacted to recognize these marriages. This would provide mechanisms for the registration of the marriages and ease the burden placed on parties to such marriages in trying to prove the existence of the marriage.

In the realm of politics, the right to make political choices such as forming or participating in forming a political party, campaigning for a political party, and for the holding of free, fair and regular elections are all provided for. All persons have a right to stand, on conditions of equality, for public office or political party office and if elected, to hold office. Section 54 provides for the rights of all persons to acquire and own property as individuals or in association with other persons, while Section 55 provides for the right of all to a fair labour practices and fair remuneration. In similar vein, Section 56 provides for the right to social security for all and Section 57 for the right to health, health care including reproductive health care which is critical for women.

Section 67 provides for access to justice for all, while Section 73 grants rights to persons to ask the Commission on Human Rights and Administrative Justice or the court to uphold the bill of rights. In a nutshell therefore, there is space for enforcement of the rights. It is however necessary to comb through the laws on property, social security, education, employment, food, water and health in order to ensure that they conform to the provisions of the Constitution and are aligned to the provisions of CEDAW which has comprehensively dealt with these issues. Chapter 6 of the draft generally deals with representation of the people in the political governance structures. One of the general principles enshrined in Section 76.6 is to ensure fair representation of women in relation to men. Section 77(2) (a),(b)and (c) requires political parties to ensure that at least one third of their candidates for direct elections are women and that 50% of candidates for proportional representation are women, and that the remaining

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

Women have a very close relationship with the environment and natural resources and have an interest in the integrity of these resources.¹¹⁷ While the draft chapter provides the rights for all persons to participate in the management of the environment, special attention should be paid to the situation of women and the structural handicaps they face in their quest to participate in decision-making. In the carrying out of environment impact assessments for instance, the ability and availability of women to travel to venues where hearings are conducted should be given special attention. The Environment Management and Coordination Act (EMCA)¹¹⁸ provides for public participation in environmental decision-making but in reality only a handful of persons participate meaningfully owing to distances to meeting venues and inappropriate media of communication about intended hearings.

However, despite the many progressive features of the draft, it is difficult to visualize how issues of gender and women's human rights would have been adequately addressed given all the other human rights issues under the Commission on Human Rights and Administrative Justice. The formulation in the draft thus raised the danger of marginalization. The task of the Gender Commissioner under the CKRC draft was envisaged as mainstreaming gender in all realms and also to ensure that the spirit of this far-sighted draft Constitution permeates all policy, legal, economic, social and political levels. It is also the body that would advise the government on all matters pertaining to gender. Such work requires an independent, fully-fledged Gender Commission.

2. *Coverage of Gender Issues in the Bomas Draft Constitution of Kenya 2002.*—Although the Bomas Draft was arguably achieved through a flawed or imperfect framework of Constitution making, it substantially represents a collation of

117. See, *GROUNDWORK: AFRICAN WOMEN AS ENVIRONMENTAL MANAGERS* (Shanyisa A. Khasiani, ed., 1992).

118. Act No. 8 of 1999.

Kenyan's position on the future Constitution. It thus reflects in large measure the content of a new social contract for governance. We will here address those aspects of the Bomas draft that were omitted in the proposed Constitution. Suffice it here to say that the Affirmative Action principle remained firmly entrenched in the Bomas Draft. A number of articles in the draft address this issue and therefore recognize the Constitution as a tool for social engineering. The affirmative action articles include the ones on national values, citizenship, bill of rights, freedom from discrimination, gender, family, health, and principles of land policy among others. There are however, a number of provisions favorable to women in the Bomas Draft that were left out of the proposed Constitution, which we look at in the sections that follow.

Draft Article 101(3) and 102(3)(b) decreed that elections shall be such as to ensure fair representation of women and men, persons with disabilities, workers, older members of society, youth and other marginalized groups and communities. It further provided that eight and one-half per cent of the seats in the Senate would be reserved for persons with disabilities, older members of society, workers and marginalized groups and communities, so that at least one-third of the seats go to women. Underscoring the special locus women are accorded in the elective decision making bodies of the State, Article 114(5) prescribes that the method of distribution of the Political Parties Fund shall take into account the number of women candidates and members of marginalized groups and communities elected through the party at that election. In the spirit of affirmative action, Article 122(1) (b) provides that representation in the Senate shall consist of two women elected from each region, to represent the region, by an electoral college consisting of all the elected members of district councils within the region. To ensure that at least one-third membership of the council comprises women; Article 219(1) (b) provides that there shall be such number of special seat members, all of whom are women. Article 224(2) requires that elections to locational councils shall be in a manner that ensures that an equal number of men and women are elected. Furthermore, Article 228A(1) provides that at any time, not more than two-thirds of the members of any assembly, council or executive committee constituted under any of the devolved governments are to be of the same sex.

C. *Provisions Dealing with Women's Rights in the Proposed New Constitution*¹¹⁹

The proposed new Constitution is the document that the Attorney General published

119. The proposed New Constitution of Kenya, Kenya Gazette Supplement, 2005, drafted and published by the Attorney General pursuant to the Section 27 of the Constitution of Kenya Review Act, Cap 3A of the Laws of Kenya.

through the Government Printer. To appreciate the value of the proposed Constitution, it would be important that they have an understanding of how it addresses their specific concerns, within the larger context that required a careful and delicate balancing of interests. It is only through this perspective that they would appreciate the scheme of the Constitution as a negotiated document. As such, the gains of women must be analyzed within the context of women as part of the larger Kenyan Community and of women as a special group. At the outset, we must point out a number of issues that are relevant to this analysis. In the first instance, what was voted for in the referendum was the proposed new Constitution of Kenya, 2005. It was neither the CKRC draft or the Bomas draft. Secondly, the rejection of the proposed new Constitution of Kenya, 2005 did not automatically lead to the adoption of the Bomas draft. That draft will need to be renegotiated by different interest groups. Third, an analysis of the new Constitution of Kenya, 2005 must be conducted against the provisions of the current Constitution. If voted for, the proposed Constitution would have replaced the current one. Following the vote against the proposed constitution, Kenya remains are governed under the current Constitution which most Kenyans agree needs to give way to a new one.¹²⁰

D. Women as Part of the Larger Kenyan Community

Women as part of the larger Kenyan community made gains in the proposed Constitution. This is because the draft responded to the governance and human rights concerns of the people by laying down some fundamental values and principles. The proposed new Constitution restored all Constitutional authority in the people and embellished their dignity and identity by recognizing their diversity of culture.¹²¹ Secondly, a new value system was set out in which the responsibilities of government were enumerated and in where the tenure of public officers was tied to integrity.¹²² Thirdly, it secured the value and integrity of all Kenyans and provided for the justiciability of all rights including economic rights, and the rights of special and marginalized groups through the Bill of Rights.¹²³ Fourthly, it protected and advanced the rights of minorities and marginalized groups and communities through the principle

120. KENYA CONST. (1982) as amended in 1997. The Constitution was further amended in 2008 to provide for the post of Prime Minister and Deputy Prime Minister, and to pave way for the formation of the grand coalition cabinet. See, Constitutional Amendment Act, 2008.

121. Article I(1) of the proposed new Constitution, 2005.

122. Chapter Three on National Values, Principles and Goals of the proposed New Constitution of Kenya, 2005.

123. Chapter Six on Bill of Rights, *id.*

of affirmative action which it enshrined as a fundamental Constitutional principle for the allocation and application of resources and opportunities.

Moreover, the proposed Constitution sought to protect and safeguard the natural environment and resources to ensure the sustainability of all the peoples of Kenya.¹²⁴ It also provided for an elaborate system of representation and participation at all levels of government through a system in which the diversity of all Kenyans is placed into consideration, and the right to be voted into office as an independent candidate is upheld. The proposed new Constitution also provided a robust system of checks and balances throughout all organs of government and secured the right of citizens to raise complaints.¹²⁵ Furthermore, it strengthened the role of representative bodies to monitor powers located in the executive arm of Government, and more particularly by establishing a comprehensive regime of Constitutional commissions and offices to provide further oversight in the fight against the abuse of power.

In addition, the 2005 draft provided for an efficient justice system which emphasizes the substantive and accessible justice delivered by qualified and highly esteemed judicial officers, and in which the dignity of those in conflict with the law is defended. It also provided for the devolution of powers sought to facilitate increased participation and representation of the peoples, greater mobilization and control over the resources, the possibility for a needs-based development and allocation of resources and increased citizens' responsibility in government processes as well as the management of public affairs. The proposed Constitution put in place a more rational, efficient, accountable and transparent fiscal management system that emphasizes the equitable allocation of resources across all regions and priorities of the people.

V. WHY THE BABY SHOULD HAVE BEEN SALVAGED FROM THE BATH WATER

A. Women as the Mother and the Constitution as their Baby

The women of Kenya shared with the members of the CKRC what they wanted included in the new Constitution. What followed was a reframing of these issues by different groups which have effectively removed the Constitution from Wanjiku. Many of these groups arrogated to themselves the duty to make a Constitution. Looking at the Bomas Conference, it would be interesting to analyze the profiles of the delegates

124. Chapter Eight on Environmental and Natural Resources of Kenya, *id.*

125. Chapters Eleven and Twelve on the Executive and Legislature, *id.*

in a bid to determine whether those present were actually representing Wanjiku. The process was also populated by positivist lawyers who sought to rigorously enforce the law no matter what. Finally, there were the politicians in Parliament arguing for and against the Constitution.

Within this general milieu, women owed it to themselves to look at the document as women and decide whether they were better off where they were or where the proposed Constitution sought to take them. The current of the bath water in the form of politics, legal positivists, the Christian Right and village elites who were Bomas delegates should have been avoided in the best interests of both 'mother' and 'baby.' The bath water also included some of the issues in the proposed new Constitution that could impact negatively on the rights of women such as the entrenchment of religious courts and the losses from Bomas and CKRC drafts. These formed the basis for the 'No' vote campaigners in rallying women to reject the draft.¹²⁶

B. The Case for a 'Yes' Vote

Having looked at the proposed new Constitution, we were of the view that a 'Yes' vote gave women the basis for beginning the process of ingraining women's rights in law and the various other processes mandated thereby. The proposed Constitution provided the minimum that gave legal sanction to engage other laws and the broader context within which laws operate. More specifically, women's rights' advancement is closely intertwined with a new Constitutional dispensation. Kenyan women have clamored for this for a long time and it was very close to realization. The Constitutional review process presented women with opportunities to bring their views to bear on the product. There were positive gains that would have been made as well as some losses. On balance however the gains were more than the losses. The proposed new Constitution provided women with the opportunity to debunk patriarchal thinking. As pointed out above, men were previously the source of public knowledge about women. During the Constitution review process however, women formulated their own agendas and made pronouncements and offered their own advice on how women should live their lives. The proposed new Constitution contained ideas generated by women.

In a nutshell, Kenyan women had come a long way, traveling through rugged terrain to get where they were with the proposed Constitutional draft of 2005. The proposed new Constitution was a milestone for women in that it consolidated most of

126. See, for instance, the proposal for Christian courts as subordinate courts provided for at Article 179(3)(a) of the proposed New Constitution.

the women's efforts and took care of their core concerns. The coverage of women's legal concerns in the proposed Constitution in whatever form, was the minimum requirement. All things being equal, we fully endorse Amy Tsanga's sentiments on the Zimbabwean draft:

when one takes a realistic starting point of what was and remains contained in the present Constitution and what the draft Constitution had to offer, there is no doubt that the draft presented real and significant opportunities for change.¹²⁷

The provisions in the proposed Constitution on gender equality and equity were extremely symbolic and critical in removing the shackles of domination that Kenyan women have lived with over the years. Indeed, the contestation to enforce and implement the rights provided for would have gone beyond the letter of the law to permeate essentially non-legal terrains. Indeed, unless legal change is accompanied by changes in these other spheres, reform of the law alone would not have guaranteed women the full enjoyment of their rights. Reform of the law at the level of the Constitution is however a critical step towards the attainment of the goals of gender equality and equity.

C. What 'No' Means for Women

The 'No' vote in the referendum negated all the gains that women would have achieved through the process of Constitution-making. It took us back to the negotiation table. Given the posturing of law as male and promoting male values, any fresh negotiation for equality will elicit responses from the bastions of male authority such as patriarchy coming up to challenge women's voices seeking to affect law and seeking the transformation of the quality of women's lives.¹²⁸ The lessons from the Zimbabwean process are worth noting in this regard. Tsanga, speaking as one who chose to engage in the Zimbabwean still-born Constitution-making process when most women's lobbies stayed away, notes that, "...given the fact that the lobby for Constitutional reform by civil society continues, only time will tell whether the sacrifice of a certain good for an uncertain better was worth the gamble."¹²⁹

127. Personal communication with Amy Tsanga in Harare, August 2005.

128. See, Smart, *supra* note 47.

129. See, *supra* note 127.

The gains in the proposed Constitution were certain and it was up to Kenyan women to decide whether giving up the bird in the hand in the hope of catching the many in the bush was a worthwhile stance to adopt. History is replete with instances where women have given up their personal gains for a greater good, joining others to get specific outcomes. It might be argued that this is what women did in voting against the proposed Constitution. Once the perceived greater good of all is attained, however, the women's agenda has ceased to be part of the agenda of the current guardians of that greater good as their attention centers on capturing top national offices. Indeed, history is again replete with examples of women being relegated to the back seat as soon as the greater good is attained. The women's rights movement in Kenya had gained some momentum which might have been lost. Renegotiating space is likely to be a long and winding process because the issue of women's rights tends to be very divisive.

A 'No' vote meant that women will have to contend with all the handicaps they have sought to eliminate in the current Constitution. In essence, discrimination in the areas of property, citizenship and other realms subsist and the claw-back provisions in the current Constitution continue to deny women the opportunities to access resources where customary personal law is applicable. *De jure* equality in the form of gender-neutral laws continues to result in *de facto* discrimination with no redress available in law. Similarly, historical injustices sought to be remedied through the principle of affirmative action in the proposed new Constitution will continue as injustices for the affected groups. Women will continue to be denied the opportunity to invoke favorable provisions of international conventions that Kenya has ratified since international law will not be a part of Kenyan law. Indeed the domestication of such covenants will continue to take a long time.

VI. CONCLUSION

Kenyan women demystified the feminine mystique and participated in the process of making the Constitution. They participated in the different aspects and phases of Constitution making and succeeded in garnering many provisions that promoted their cause. To throw this away should have been on the basis of a guarantee of a much better outcome. The referendum was Kenyan women's constitutional moment. The draw back from the 'No' vote takes us back to the drawing board. We are convinced that the gamble involved in rejecting the proposed Constitution was not worth whatever greater good was promised. While gender divisions in our country and communities are very entrenched, the provisions in the proposed Constitution went beyond those divisions and catered for women's concerns in a fundamental way.

The aspiration for inclusivity was a major challenge. This challenge can be traced from 1997 reforms, through to the Ufungamano Initiative, the Bomas draft, the Naivasha Accord and culminating with the Kilifi draft. These stages have involved a negotiation and balancing act as different interest groups gave and took to get the process to move forward. At each stage—and especially until the amalgamation of the joint review Commission comprising of the People's Commission and the Government nominees—all parties were willing to separate the baby from the bath water. Indeed the entanglement of the baby with the bath water is most evident through the Bomas process and what came after it.

Certainly, the proposed new Constitution contained provisions that had been agreed to after negotiations of many and varied views presented by Kenyans. Kenyan women needed to understand this reality as they participated in the referendum. They should also have realized that the course for a new Constitution and the course for the advancement of their rights are closely intertwined and voting 'No' would essentially mean that women will take longer to realize the gains they had toiled for over the years, many of which were enshrined in the proposed Constitution. It is important to note that there were further provisions in Article 283 of the proposed Constitution on amendment through Referendum. We reiterate the view that it would have been best for women to have voted 'Yes' for the proposed Constitution and have opted for the amendment of certain contentious issues relating to the Executive and Religious Courts after their gains were secured. By so doing, we will have separated the proverbial baby from the streams of the bath water in which it was engulfed.