



International Environmental  
Law Research Centre

# Gender Issues in the Draft Bill of the Constitution of Kenya: an Analysis

Contribution for the  
Constitution Review Commission of Kenya

Maria Nzomo & Patricia Kameri-Mbote

**IELRC WORKING PAPER**  
2003 - 1

*This paper can be downloaded in PDF format from IELRC's website at*  
<http://www.ielrc.org/content/w0301.pdf>

## Table of Content

---

<b>I. INTRODUCTION</b>	<b>1</b>
<b>II. THE REVIEW PROCESS</b>	<b>3</b>
A. Background	3
B. Women’s Proposals for the New Constitution	3
<b>III. ASSESSMENT OF THE DRAFT CONSTITUTIONAL PROVISIONS</b>	<b>9</b>
A. Specific Provisions	9
<b>IV. GENDER GAPS AND INADEQUACIES OF THE DRAFT WOMENS RIGHTS CONSTITUTION</b>	<b>11</b>
A. Chapter 1: Preamble	11
B. Chapter 3: The Republic	11
C. Chapter 4: Citizenship	12
D. Chapter 5: The Bill of Rights	12
E. Chapter 6: Representation of the people	12
F. Chapter 8: The Executive	13
G. Chapter 17: Constitutional commissions	13
H. Affirmative Action/ Principle (AA).	13
<b>V. CONCLUSION &amp; RECOMMENDATIONS</b>	<b>14</b>
A. Prerequisites for Translating Constitutional Provisions into Concrete Rights	14
B. Recommendations on Lobbying & Negotiation Strategy	15
<b>VI. REFERENCE DOCUMENTS</b>	<b>15</b>

## I. INTRODUCTION

Kenyan women have a lot to celebrate as we move towards a new Constitutional dispensation. The draft constitution represents major gains towards gender equality and equity and in essence delivers on many points that have been at the heart of pro-women movements in Kenya from the 1980s. The statement by the Secretary of the CKRC that the Constitution is a political, economic and social Cape of Good Hope is accurate in describing the draft.

Gender activists have for a long time questioned the Constitutional provisions. Firstly, they saw the Constitution as not guaranteeing them equal rights with men. Until 1997, section 82 of the Kenyan constitution dealing with the question of discrimination excluded “sex” as an objectionable ground for discrimination. Further, a number of laws were exempted by Section 82 (4) from the provisions against discrimination. These are laws affecting non-Kenyan citizens; laws of adoption, marriage, divorce, burial devolution of property on death and personal law matters and laws affecting members of a particular tribe or race in matters exclusively concerning them. The laws exempted by Section 82 (4) are in areas that directly affect women and where the enjoyment of rights by women has been less than optimal. This section legitimised the traditional position, which accorded women fewer privileges than men, in matters concerning their families, marriage, divorce and succession. It presented problems for the implementation of progressive statutes such as the Law of Succession Act (cap. 160) which seeks to give both men and women equal rights in matters of succession. Further, it gave no support to such legislative attempts as the Marriage Bill (1985) which sought to give equal rights to spouses in a marriage in matters concerning custody of children, divorce, or division of matrimonial property. This Bill 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. If the Marriage Bill of 1985 was adopted as an Act of Parliament or other laws passed to ensure equality of the sexes for their success, the Constitution would have to be amended to repeal the provisions of Section 82 which advocates for sex based discrimination in matters of personal law, marriage, divorce and succession.

Coupled with Section 82 (3) which omitted “sex” as a basis for discrimination, one finds that women’s enjoyment of the fundamental freedoms guaranteed by the Constitution was severely restricted. Moreover, a woman lacked the Constitutional basis to challenge any discrimination against her on the basis of her gender.

The revision of the Constitution in 1997 included “sex” as an objectionable ground for discrimination in section 82(3) but did not include it in section 82(4). This left women open to discrimination in the areas where they were very vulnerable.

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

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

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

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

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

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

Certain Rules made under the immigration Act (Cap. 172) are indicative of the differential status accorded to men and women. One such rule is that the legal guardian of a child is the father and the mother only becomes such guardian one the father of the child dies. This provision has caused untold suffering to mothers where the father of the child is uncooperative. It is interesting to note that a father can get the name of his children included on his passport without the mother’s consent while the mother has to get the father’s consent. Other rules that require married women to obtain their husbands’ consent before acquiring passports or travelling out of the country are discriminatory against women and should be abrogated to tally with the legal capacity accorded to women under the law. The provisions on equality irrespective of marital status will address these anomalies and provide a basis for more women-friendly immigration provisions.

In the area of politics and public participation, women are under-represented in Parliament, in senior government positions and in the private sector. Whilst the rules of engagement in politics are by and large gender neutral, there are structural limitations to women’s participation. It is both necessary to deal with these structural limitations as well as to ensure that the historical impediments that have relegated women to the back seat in all realms are addressed. The provision on a minimum of a third representation by women in different levels of government will take care of these concerns.

In assessing the draft constitution, we look at three things. *Firstly*, what is it that Kenyans wanted changed in the old constitution to remove the inequalities and inequities present in the law? In answering this question we look at some of the presentations made by Kenyans. Our analysis is limited to the background documents, memoranda and reports of workshops held addressing the women’s question. Due to the time constraints, it was not possible for us to access the presentations made at the constituency hearings. Our view is that many of the documents we looked at captured the main thrust of the concerns raised regarding gender.

*Secondly*, we look at the provisions of the draft constitution with a view to analysing whether and to what extent it addresses the concerns raised with regard to gender. We bring our expertise to bear in this analysis, identifying the strong points that women must guard at the national constitution conference and gaps that should be filled in the next stage. *Thirdly*, we give pointers to some ways of lobbying and negotiating for the achievement of the objective of ensuring that the final document provides a vibrant context for the realization of women’s rights.

## II. THE REVIEW PROCESS

### A. Background

The clamour for constitutional review which gained momentum in the 1990s included championing for the rights of marginalized groups including women. The process of collecting views has been by and large people driven. Indeed among the principal tenets of the review process has been inclusion of all stakeholders in the process including women. Indeed among the guiding principles of the review process under the Constitution of Kenya Review Act is accommodation of the diversity of the Kenyan people including gender and respects the universal principles of human rights and gender equity (section 5 (b) and (c)(iii)). The principle of gender equity is integral to the review Act. For instance, Part II on the establishment and composition of the Commission mandates the National Assembly to have regard to the principle of gender equity in nominating persons as commissioners (section 6(5)(b)).

In executing its mandate, the Review Commission was keen to be inclusive. It held a seminar to deliberate on the gender question on 5<sup>th</sup> to 8<sup>th</sup> December 2001 at which papers on diverse aspects of the gender question were discussed. Three main background papers were presented on the legal, political and economic and socio-cultural aspects of the gender question. Alongside these papers were presentations from other jurisdictions that had gone through the review process such as Uganda and South Africa; presentations from national and international scholars on the gender question; members of parliament and of the diplomatic corps.

A number of organizations and individuals also presented memoranda to the Commission and the Commission organized Provincial Women's Consultative Workshops on 12<sup>th</sup> to 13<sup>th</sup> April 2002.

### B. Women's Proposals for the New Constitution

#### 1. Preamble

Most submissions insisted on the need to underscore the commitment to the protection of fundamental rights and freedoms of individuals and inalienability of rights and freedoms, except in accordance with the principles of fundamental justice. They also requested the inclusion of ***equality, non-discrimination, unity and tolerance for diversity, patriotism and inclusiveness, justice and peace*** as **basic principles** that must be clearly stated in the preamble and entrenched in the Bill of Rights.

#### 2. Women's rights

The principle of equality of men and women was insisted on as a basic requirement for the enjoyment of rights. Women insisted on the entrenchment of women's rights in the Bill of Rights. Among the rights echoed by most submissions and memoranda by women's organizations, groups, individuals and resource persons included the following:

- Abolish discrimination under exception of section 82 of the constitution in regard to: marriage, divorce, burial, inheritance, personal law issues, with a view to: (I) removing the cultural concessions made to men in gender relations that uphold tenets of the patrilineal society.
- Eliminate customary and religious laws that violate women's rights and are in conflict with the rights and duties protected under international laws that Kenya has ratified – latter should automatically become part of Kenya's domestic law.
- Women should be given 4 months Maternity Leave.
- Constitution should establish a Domestic/Family Court at District level managed by majority women to deal with domestic violence.
- There should be some mandatory cabinet posts reserved for women.
- Guarantee married women's right to a marriage Certificate.
- Value be put on women's work as family care providers and national builders through formal and informal work.
- Establish Rehabilitation Centres for lactating imprisoned mothers rather than put them in jail.
- Re-introduce the Affiliation Act
- Outlaw retrogressive socio- cultural practices that impede on women's rights to participate, access and control resources.
- Respect for and upholding of cultural, ethnic, regional and communal rights and diversities but outlaw traditional harmful practices e.g. female genital mutilation (FGM) and forced marriages.
- Mandatory but guaranteed testing HIV/AIDS before solemnizing marriage.
- Equal Opportunity Act should be passed, giving women equal access to education and gaining employment.
- Establish a commission for Gender Equality (which some term council for Gender Development) as constitutional an autonomous and statutory body with a framework that will provide for the mandate.
- Women should control their sexual and reproductive lives including the number and spacing of children and termination of pregnancy.
- Women should be entitled to their children and property within and outside marriage.
- Women should be entitled to marry as they please after attainment of majority age and welfare and, maternity benefits should be provided.
- Individual's spouses entitled to own funds, businesses or industries that are not claimable by other spouses.
- Measures be taken to protect women refugees and children as they are the most disadvantaged by wars and displacement.

### 3. *Basic Principles and Values*

- Outlaw discrimination on the basis of gender, class, ethnicity, religion, pregnancy, marital status, age and disability.
- Female and male genders as equal and complementary, hence all appropriate legislative and other measures should be taken to ensure full development and advancement.
- Constitutional and peoples supremacy
- Affirmative action (AA) was echoed in all submissions. The general view was whatever other constitutional provisions are made to ensure or facilitate women's enjoyment of rights as par with men, such equality may not be achieved unless the provision of such rights are reinforced with the provision of the principle AA which would then enjoin the Kenyan society to take special and deliberate measures to correct the inequalities brought about by past gender based injustices that have placed women in a subordinate status to men.
- Violence against women be treated as torture, inhuman, cruel and degrading punishment or treatment.

- Inclusiveness and participatory governance
- Guarantee devolution of power from centre to local level.
- Transparency and accountability
- Representational and Pluralistic Electoral system

A minimum 30% and others up to 50% women's participation and representation in all decision-making positions and employment in both public and private sectors.

- Observance of democratic and human rights as inherent and not granted by law or state. Hence state make commitment to respect and support institutions entrusted with promotion of Human Rights and domesticate all international human rights instruments ratified.
- Civic education as a right.

#### 4. *Other Rights*

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

#### 5. *Citizenship Rights*

- Spouses of Kenya citizens regardless of gender should be entitled to Kenya citizenship.
- A Passport should be issued to every Kenyan as a right.
- Dual citizenship especially for children should be allowed to encourage ease of movement and residence.
- The screen cards and extra forms due to one's religion and ethnic background are removed as a condition for issuance of Identity Cards and Passports.
- Passports and Identity Cards should be issued within 2 weeks of application.
- Single and divorced mothers should unconditionally have the right to have their children endorsed in their Passports.

#### 6. *Duties of Citizens*

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

## 7. *Children's' Rights:*

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

## 8. *Minorities and the Disabled*

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

## 9. *Natural Resources, Property, Succession and Inheritance*

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

## 10. *Education*

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

## 11. *Structures And Processes Of Governance*

### (a) *The Executive-Presidency*

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



### (b) Governance Structures and Processes

The submission in this sector coalesced around the following proposals: -

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

### (c) Local governance

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

### (d) Electoral System and Process

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

### (e) Electoral Commission (EC)

- Members of the EC nominated by President but approved by 2/3 of the members of Parliament from names submitted by political parties, professional organisations, women organisations, and other civil society organisations.
- At least 1/3 of the total number of members elected should be women.
- Electoral Commission should serve maximum terms of 10 years
- Electoral Commission to draw from a consolidated fund to ensure its independence.

### (f) Political Parties

- Principle of party plurality apply but dual membership of Political Parties be disallowed.
- Political Parties adhere to democratic norms in their electoral, recruitment and governance process.
- 35% rule in party structure representation and for women candidates
- Member of Parliament who defects /changes his/her party affiliation loses the seat and any other related public post awarded during his/her tenure.
- All Parties to be funded by the Exchequer and a ceiling for electoral expenditure is put.

- Require all candidates for public office to declare their wealth.
- Equal access to media for all Political Parties is availed.
- Provide for Independent Candidates.
- Provide security for all candidates and criminalize violence.

(g) Proposed Constitutional Commission /Office:

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

(h) Judiciary:

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

(i) International Relations

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

## 12. Summary of Gender Proposals

In a nutshell, some of the issues of concern raised by women included:

- Ensuring and enhancing the participation of women in the electoral process
- Enshrine equal access to resources for men and women
- Equality before the law to men and women, boys and girls without discrimination on the basis of gender
- Guarantee security and equal protection by the law to both men and women
- Need to effectuate gender equity in all sectors
- Deal with contradictions and inadequacies of legal framework in the area of gender rights
- Principle of gender balance to be observed in the composition of all offices and governance structures to ensure women's participation
- Guarantee women's rights under the Bill of Rights
- Citizenship laws to be amended to accommodate concerns of women

- Discrimination in the area of personal law to be proscribed
- Entrench principle of affirmative action in the Constitution
- Proportional representation with a third of total number being women in all Constitutional offices, organs and structures including Cabinet, Judiciary, Civil Service and Disciplined Forces
- Gender Commission as an institutional mechanism for the advancement of women's rights
- Domestication of international conventions on women's rights that Kenya has signed/ratified
- Guarantee women's land rights
- Provide for women's rights to healthcare, nutrition and education
- Protection of the institution of the family
- Outlaw cultural practices inimical to women's rights and human rights
- Outlaw customary law and practices that derogate from human and women's rights
- Gender equality in political parties' affairs
- Constitutional provisions to engender national budget

### **III. ASSESSMENT OF THE DRAFT CONSTITUTIONAL PROVISIONS**

Looking at the list above, we are happy to point out that the draft constitution has addressed most of the issues that women raised. It has very progressive provisions that promote the rights of women. We should guard against the removal of these provisions as they provide the context for the realization of the issues that women have been concerned about over the years.

#### **A. Specific Provisions**

##### *1. Preamble*

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

##### *2. Chapters One and Three*

Under section 5 dealing with the Laws of Kenya, the draft constitution includes international law as one of the classes of law applicable in Kenya. While it would be good to have a clear rendition of what "applicable in Kenya" means, it is clear that international conventions such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and other international declarations on women's rights, have, by dint of this provision, attained the force of law if "applicable" is interpreted to mean those conventions that Kenya has signed and ratified.

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

### 3. Chapter Four

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

### 4. Chapter Five

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

The bill of Rights has a section specifically provides for women's rights. Under section 35 (1) women have the right to equal treatment with men, including the right to equal opportunities in political, economic and social activities. Women are also entitled to be accorded the same dignity of the person as men; and women and men have an equal right to inherit, have access to and control property.

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

On the family, the draft constitution recognises the family as the natural fundamental unit of society and exhorts the state to accord it protection (section 38). It goes even further to provide for equal rights of persons over 18 years of age to marry upon free consent and found a family. Parties to a marriage are also accorded equal rights in the marriage, during the marriage and at the dissolution of the marriage.

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

Section 54 provides for the rights of all persons to acquire and own property as individuals or in association with other persons. In similar vein, section 56 provides for the right to social security for all and section 57 for the right to health, health care including reproductive health care which is critical for women. Section 67 provides for access to justice for all and section 73 grants rights to persons to ask the Commission on Human Rights and Administrative Justice or the court to uphold the bill of rights. In a nutshell therefore there is space for enforcement of the rights.

### **5. Chapter Six**

In chapter 6 dealing with representation of the people, one of the general principles at section 76.6 is to ensure fair representation of women. Section 77(2) (a) 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.

On the legislature, provision for women's representation is provided for in both the National Council and the National Assembly. Further, there is a requirement that at least one third of the members of each house of Parliament should be women.

## **IV. GENDER GAPS AND INADEQUACIES OF THE DRAFT WOMENS RIGHTS CONSTITUTION**

Although the draft constitution comprehensively addresses the question of women's rights and broadly responds to the concerns raised in the various submissions, there are some notable gaps and contradictions that need to be revised and rectified at the constitutional conference. These include: -

### **A. Chapter 1: Preamble**

Considering the numerous submissions made by women insisting on the inclusion and affirmation in the preamble and gender equality and the principle of non-discrimination this concern ought to have been responded to, possibly in the 2<sup>nd</sup> paragraph of the preamble. This could have read as follows:

*“COMMITTED to the principle of gender equality and non-discrimination and to nurturing and protection the well-being of the individual, the family and the community within our nation.....within our nation.”*

While we recognise that other sections of the constitution provide for women's and gender rights, the statement of commitment to this principle in the preamble carries the political, legal and psychological value and weight of an oath, with all its implications. It summarises our common vision, purpose and aspirations for the future.

### **B. Chapter 3: The Republic**

#### **10(1),(2),(3) State and Religion**

Whereas this section clearly states that state and religion should be separate and that the state shall treat all religions equally, this provision is contradicted by chapter 5 paragraph 31(4) under Limitation of Bill of Rights which states that: *“The provisions of this chapter on equality shall be qualified to the extent strictly necessary for the application of Islamic law to the Muslim faith in relation to personal status, marriage, divorce and inheritance.”* Apart from the inherent contradiction between these two provisions, we are concerned that Chapter 5 not only privileges one religion over others but also it sets a different standard for exercise of fundamental

rights by those of Islamic faith. We are further of the view that this religious standard is likely to increase the possibility of abuse of women's (and men's) rights, especially as applied to personal law, where traditionally women have been vulnerable to some of the worst abuses of their human rights.

### C. Chapter 4: Citizenship

Whereas section 23(i) permits "dual citizenship under the laws of Kenya" section 23(3) takes away that right when it states that "a person who loses citizenship as a result of acquiring citizenship of another country is entitled on renunciation of the citizenship of that other country, to regain the same citizenship which the person formerly enjoyed. The inconsistency and apparent contradiction between paragraph 23(1) and 23(3) needs to be removed. Otherwise it is likely to compromise women's and men's enjoyment of dual citizenship rights.

### D. Chapter 5: The Bill of Rights

The provisions on women's rights are satisfactory save for the lack of clarity, preciseness and forthrightness in some aspects. For example under Paragraph 35(5)(a) and (b) that outlines state responsibility to the advancement of women's rights, it is noted that "*The state shall provide reasonable facilities and opportunities to enhance the welfare of women.*"

It is not clear what "reasonable" means in this particular case perhaps a more specific term such as "adequate" would be more precise.

We note the same vagueness under section 34(1) and (2) in the use of the word "unfairly" in reference to the freedom from discrimination. How exactly and in what circumstances does one distinguish between "fair" and "unfair" discrimination? Can, for example, discrimination against women justified under Islamic faith qualify as "fair" discrimination? What indeed is "justifiable" or "fair" discrimination, where do you draw the line between "reasonable" and "unreasonable" facilities and opportunities?

It is noteworthy that this vagueness and lack of clarity in respect to provisions in women's rights is absent and disabled. For example in regard to state responsibility in respect to children's rights, the Section 37(8) is explicit and unambiguous as it states as follows: "*the state has the obligation to steps to implement in law and administration the provisions of the constitution and of International Instruments and standards on the rights of the child.*"

Similarly, in reference to the rights of disabled. For example Section 39(2)(f) and (g) provides that the state shall "*remove from official usage in any language, words that are demeaning when applied to persons with disabilities, and to require the same private use of language (and) provide for the participation of disabled in decision making at all levels*"

### E. Chapter 6: Representation of the people

Here again the problem is the vagueness of women's right to participate in decision making.

For example, Section 76 on General Principles article (6) states that elections shall ensure "*fair*" representation of "*women, disabled and minorities.*" What percentage is "*fair*"?

## F. Chapter 8: The Executive

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

## G. Chapter 17: Constitutional commissions

As noted above, women had specifically insisted on an independent Commission for Gender Equality to monitor and review progress in the implementation of gender equity law and policies, and peruse existing national development policies, and programs and recommend amendments to make them consistent with a gender sensitive democratic agenda.

It is noteworthy that the draft constitution makes provision for a *Constitutional Commission on Human Rights and Administrative Justice* among whose *ten or so* commissioners, one is a **Gender Commissioner, who is expected to perform at least nine highly loaded functions listed under section 288(3)(c) of the draft constitution. Indeed, among the Commissioners in the Commission on Human Rights and Administrative Justice, the Gender Commissioner has the longest list of tasks.** Such a Commission would be optimal in a situation where gender equity is accepted as a guiding principle, not just in law but also in *social practice*. This is not the case in Kenya and having the Commissioner for Gender along with others may still result in less than optimal results in implementation of constitutional provisions. The task of effectuating the progressive provisions is mammoth. It is going to be a contestation as the old is required to give way to the new way of doing things. **Furthermore, past experience has shown that when gender concerns are lumped with others, that's the surest way of gender issues being marginalized or lost altogether.** This then calls for an independent and strong gender Commission to effectuate the necessary changes. If the rights provided for in the Constitution are to be realized, we think that an independent Commission for Gender Equality should be established. We are aware that there may be resource constraints in the operationalization of the Commissions but in our view, the issue of resources should not deter the promulgation of a vibrant context for the implementation of constitutional rights.

One of the main issues that women raised in their presentations to the Commission was the need to domesticate international instruments on women's rights such as CEDAW. This seems to be a generally acceptable principle in the draft constitution's provision at section 5. However, it would be clearer if an addition was made to section 35 as follows:

*"The state has the obligation to take steps to implement in law and administration the provisions of the constitution and of international instruments and standards on the rights of women."*

## H. Affirmative Action/ Principle (AA).

While we acknowledge that the draft constitution provides in various sections measures that can be viewed as tantamount to Affirmative Action, nowhere does the draft explicitly state its commitment to the principle of Affirmative Action. In this regard it would have been most appropriate if this commitment to AA was acknowledged in either Chapter 3 on National Goals, Values and Privileges or under Chapter 5 on The Bill of Right. Instead in chapter 3(12) an indirect reference to AA is made to the effect that: *"The state shall implement the principle that one third of the members of all elective and appointive bodies shall be women"*



In our view, our new constitution should be as explicit as possible on this important principle, which are not only of benefit to women but to all disadvantaged sectors of our society. A good example to emulate in this regard is the Uganda Constitution which provides in Section 33 on fundamental human rights that: “*Without prejudice to article 32 of this constitution, women shall have the right to Affirmative Action for the purpose of redressing the imbalances created by history, tradition or custom.*”

## V. CONCLUSION & RECOMMENDATIONS

Looking at the provisions of the draft constitution, it is clear that it makes very bold steps towards effectuating women’s rights. Indeed looking at the list of issues of concern raised by women during the review process, the draft accommodates most of these issues and goes a step further in some respects. It needs to be underscored here that the provisions now in the Draft should be treated as a minimum agenda and should be guarded from any encroachment. The challenge therefore is firstly, to ensure that these progressive provisions remain in the constitution when it is finalised. Secondly, it is imperative that the provisions are implemented to benefit Kenyan women. These two imperatives call for strategic measures on both the part of the delegates to the National Constitution Conference and the Kenyan women generally.

### A. Prerequisites for Translating Constitutional Provisions into Concrete Rights

#### 1. Social Engineering

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

#### 2. De jure Equality, De Facto Discrimination

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



## B. Recommendations on Lobbying & Negotiation Strategy

Constitution making is all about lobbying and negotiating. Lobbying entails getting a person/s to support or adopt a point of view that in your view has been left out or may be left out. Negotiating on the other hand involves positive engagement of parties on opposing sides to ensure that each side achieves optimally on an issue. In our case we will be lobbying the delegates at the National Constitution Conference to ensure that the provisions outlined above which are favourable to women are not thrown out of the document. We will also be seeking to see whether we can get something more along the way such as a full-fledged Gender Commission. Indeed the presentation of views and drafting of the constitution and draft report entailed intensive lobbying and negotiating by different groups with differing interests some convergent and others divergent. It would be useful to hear from the Commissioners, for instance, how they lobbied and negotiated. It would be helpful to ask them how they achieved consensus given the divergence of views, what were the pitfalls, what issues were most contested and which were readily acceptable.

Of essence to a **lobbying and negotiation strategy is clarity of mind** on what it is one wants to get out of the entire process. Clarity entails **defining both a minimum agenda and a best-case scenario**. It is important in this endeavour to anticipate what opposition there might be to your point of view and to devise different scenarios as outcomes of the process. This will enable one to know the lowest point of negotiation that they can get to without losing totally in the negotiation. Along the same lines, it is also critical that one **identifies one's allies** and gets them to understand the **issues that are at stake for you and the minimum and maximum position**. In and out of conference lobbying is critical as “corridor diplomacy” may carry the day on specific issues.

The other thing the delegates need to understand is the mode of conduct of business at the NCC. They need to familiarise themselves with the **rules of engagement** to ensure effective participation. If an issue is not contested for instance, delegates should not open it up for discussion by making it a point of contestation. But if any party seeks to reopen any of these minimum gains, we should find a quick way of closing the debate before it becomes a major issue of bargaining. Furthermore, it is also important that the delegates operate as a team and have a strategically designed division of labour. In this regard, for example, they need to agree in advance who are going to be their “*champions*” (to speak on the various issues of concern) Others can serve as drafters while others engage in the art of negotiation and bargaining. The delegates therefore have to do their groundwork by familiarising themselves with the material for discussion and the rules of engagement at the NCC.

Further, one needs to ensure that they have **back up** from their constituents outside the negotiation forum to bounce ideas back to and get help should it be needed. A **help desk** outside the NCC venue can serve this purpose.

## VI. REFERENCE DOCUMENTS

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

