

# ANALYSEN UND BERICHTE

## Women and the Constitution in Kenya<sup>1</sup>

By *Kivutha Kibwana*

### Introduction

Almost in all known and existing societies, women *en masse* have always constituted a disadvantaged group which is routinely the subject of discrimination. Even in the United States of America, one of the world's most developed countries and practitioners of liberal democracy, the Equal Rights Amendment aimed at formally constitutionalizing the equality of women and men in American society failed to achieve ratification by the requisite state legislatures in order to become law within the required time. Even in countries where gender equality is guaranteed within the legal corpus, *de facto* equality may not exist. Writes Tove Stang Dahl:

"[E]quality under the law today does not preclude the practice of discrimination. Rules on equality of treatment do not, of themselves materialize into equal or just results, either in individual cases or collectively. Often it is just the opposite that the goal of equality demands unequal treatment in order to give weak parties or groups the opportunity for equality and equal worth. In this respect, law can only be properly evaluated if one, in addition to understanding the text of the law and its intention, has insight into the law's consequences for individuals."<sup>2</sup>

She adds:

"Law as an institution to a large degree contributes to the maintenance of the traditional male hegemony in society."<sup>3</sup>

- 1 An earlier version of this paper was presented at the YWCA - AAWORD Kenya Conference on "Sustainable Development With Women: Gender Relations Development and Change" held in Nairobi, Kenya, November 1989.
- 2 Women's Law: An Introduction to Feminist Jurisprudence. Trans. Ronald L. Craig, Oslo, Norwegian University Press, 1989, at pp. 11-12.
- 3 Id at p. 14.

Therefore, one of the potent tools meant to be used in redressing gender inequality may itself perpetuate it.

This paper focusses on constitutional issues regarding the gender question in the Kenyan context. We thus discuss the Constitution and sex discrimination; women's voting and representation; marriage and citizenship; implications of co-existence of multiple systems of family law; women and property; women and human rights and finally women and legal awareness. We explore the extent to which, if at all, law and/or legal lacunae in the constitutional sphere perpetuate(s) the types of inequality that we identify and the possibility and role of activist legal engineering in ameliorating the inequalities.

### **The Constitution and Sex Discrimination**

Some commentators and politicians appear to assume that gender equality is guaranteed under Kenya's constitutional framework.<sup>4</sup> Whereas the fundamental rights and freedoms of the individual contained in Chapter 5 of the Constitution are guaranteed to every person in Kenya under Section 70 irrespective of his/her race, tribe, place or origin or residence or other local connexion, political opinions, colour, creed or sex, Section 82 prohibits any law making of a provision which is discriminatory either of itself or in its effect, defining discrimination in terms of race, tribe, place of origin or residence or other local connexion, political opinions, colour or creed.

Significantly, the Constitution does not bar discrimination based on grounds of sex. Given that in Section 70 'sex' is included as one of the categories which must not be used to disenable any citizen from the enjoyment of human rights, it becomes clear that constitutional language deliberately excludes 'sex' as a category for purposes of barring discrimination. The often advanced argument that sex discrimination was thought to be so objectionable that it was so assumed without an explicit constitutional provision is a weak argument. Given the long history of sex discrimination, it is expected that where reversal of such state of affairs is sought, clear language for this purpose is necessary. Also, courts of law prefer clear language in the law especially where such law has to be relied upon to vindicate rights.

Existing constitutional silence on whether sex discrimination is not allowed ensures that where such discrimination occurs, there exists no clear-cut operative law which can be

<sup>4</sup> See *Wilfred N. Nderitu*, *Inequality Between Sexes: To what Extent is the Statutory Corpus to Blame?*, unpublished LL.B. Thesis, University of Nairobi, 1988, at p. 3.

relied upon to challenge the discrimination.<sup>5</sup> Often governments have felt that clear-cut illegalization of sex discrimination will unleash a flood of suits in countries which are patriarchal and in which women are discriminated against routinely and sometimes as a matter of official policy.

In contradistinction to the above Kenyan position, in a few African countries gender equality is unmincingly provided for in the Constitution. Art. 39 of the Algerian Constitution (1976) for example provides that all citizen are equal in rights and duties. Further, Art. 42 guarantees all political, economic, social and cultural rights of the Algerian woman while Art. 81 provides she must participate in the development of the country. Such provisions clearly establish gender equality.

In the Kenyan context then, women and their organizations have to lobby for constitutional gender equality. Once such equality is achieved, women would have to demand 'affirmative action'. Women could point out that due to centuries of discrimination, they clearly lag behind men. In allocation of business licences, loans, educational opportunities, land in settlement schemes, business plots, managerial jobs etc. women would have to be consciously considered.<sup>6</sup> Preferably, the government could even be prevailed upon to establish certain basic quotas to be reserved for women regarding the above and other allocations.

Further, pursuant constitutional gender equality, women would have to creatively use the courts to ensure that any discrimination - especially subtle discrimination - is litigated. Women's organizations would have to take a principal role in women's public interest litigation.

### **Women's Voting and Representation**

Women in the political process are acutely underrepresented although in most countries, the women component of the population surpasses that of men. Moreover, as a rule, women constitute the dominant voter segment in society. Culturally and politically women seem to

5 See *S.B.O. Gutto*, The Status of Women in Kenya: A Study of Paternalism, Inequality and Under-privilege, IDS, University of Nairobi Discussion Paper No. 235, 1976, at p. 5 where he writes: "It should be noted that the Kenyan Constitution outrightly excludes the sex attribute as one of the descriptions covered by the term 'discriminatory' under S. 82(3). This means there is no law in Kenya that can give protection in case of sex discrimination."

6 Art. 4(1) of the Convention on the Elimination of all Forms of Discrimination Against Women supports such affirmative action. It provides, in part, "Adoption by State Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination..." Kenya agreed to be bound by the Convention in 1984.

have been conditioned to believe that political representation is a man's affair. As a result in Kenya historically, very few women have been members of parliament (MPs) or leading party representatives.<sup>7</sup>

In several countries in Africa, women's representation is specifically provided for and a deliberate policy of appointing women in top political leadership is being pursued. Under Egypt's 1979 Constitution, women's representation was deliberately increased by preserving a legislative seat for a woman in 30 constituencies. Under section 66(1)(c) of Tanzania's Law of Fifth amendment, 1985, 15 MPs are appointed by the National Assembly from women individuals recommended by the Federation of Tanzanian Women and accepted by the party's National Executive Council. In other countries such as Kenya, the Chief Executive uses nomination papers to appoint one or two women into the legislative body.

In Kenya two national women's organizations exist. Such a reality may indicate negative factional division in the women's movement. Maendeleo Ya Wanawake, "Development of Women" (now KANU Maendeleo Ya Wanawake), has been incorporated into the party. Often women organizations in Africa are appended to the sole party thereby, although not necessarily always, impairing their independence and efficacy. The organizations' identity and personality are often lost as party leaders use the organizations to mobilize women around certain party issues. The agenda of the women's organizations may therefore be deemphasised or even departed from entirely. It is therefore not surprising that some citizen who recently appeared before the Kenya National African Union (KANU) committee on constitutional reform suggested that both Maendeleo Ya Wanawake and Central Organization of Trade Unions (COTU) should be deaffiliated from KANU.

Although KANU Maendeleo endeavours to reach grassroot women, it can be argued that KANU Maendeleo and the National Council of Women of Kenya leadership is essentially rooted in middle and upper class. As a result, sensitivity to working women's problems may enjoy low status in the two national women's bodies.

One of the most critical developments in the women's movement in Kenya is the genesis and proliferation of women's groups. Such grassroot organizations which concentrate on economic improvement of women are multipurpose. Currently these groups are registered under the Ministry of Culture and Social Services. It is not clear if such registration gives the groups legal status or any recognizable rights and duties under the law. Since groups must conduct business under a co-operative society or a partnership or a company, it would be expected that a women's group should embrace one of the above business forms or be

<sup>7</sup> See *Maria Nzomo*, The Impact of the Women's Decade on Policies, Programs and Empavement of Women in Kenya, ISSUE: A Journal of Opinion XVII/2, 1989, at pp. 15-16.

registered under the Societies Act or under a new Act dealing exclusively with women's groups.

Because of the uncertain legal status of women's groups, misappropriation of their funds can and does occur without prompt or any rectification.

In our view on the question of representation, women in Kenya should lobby for:

- the establishment of a minimum quota of women's representatives in Parliament and the Party (particularly at constituency, district and national levels);
- the passage of a law to specifically address women's groups;
- the creation of an Association of Women's Groups in Kenya.

Further, it is critical that the national women's organizations should explore the possibility of combining their efforts. If such a break-through was achieved, it would show that the women's movement in Kenya has entered maturity. The women's organizations have to raise women's consciousness so that more women come forward to seek elective posts and women voters vote for such women. Women have to realize that they hold immense inchoate political power since through voting they can determine the content of political leadership. Women can therefore use the vote to elect women representatives sensitive to women's needs and also elect men who are committed in advance of elections to actualization of women's programmes. A creative women's leadership could re-direct women's voting patterns to achieve the above.

### **Citizenship**

A Kenyan man who marries a foreigner is able to pass on his citizenship to her under Section 91 of the Constitution. The law, as it now stands, does not enable a Kenyan woman who marries a foreigner to bequeath him and the issues of the marriage with her citizenship. Where the married couple wishes to live in Kenya, the foreign man and children would have to enjoy a status inferior to that of a citizen with the relevant accompanying dangers.

To become citizen, both foreign man and children would have to undergo naturalization. It is thus necessary for women to lobby for an amendment of Section 91 to ensure that both Kenyan men and women can pass on their citizenship to their foreign spouses and issues of the marriage.

## Application of Different Systems of Family Law

Four systems of family law exist in Kenya. Their existence is sanctioned by Section 82(4)(b) and (c) of the Constitution. These systems are Christian/statutory, Hindu, Islamic and African customary law. The existence of several systems of family law, each of which caters for a culturally defined and different group, is not itself a negative matter. Such legal diversity may be an answer to cultural diversity. However, difficulties with legal plurality in family laws arise when the different systems give unequal rights to spouses in the same country. As a result, it is often perceived as an advantage to marry under one of the systems or to convert one's marriage from one system to another. Some disadvantages suffered by women due to marrying under a particular system are as follows:

1. Both the African customary law and Islamic systems are polygynous or potentially polygynous. There is no way a woman can ensure monogamy within these systems.
2. Under African customary law, registration of marriages does not occur. Where parties must prove the existence of a marriage, "affidavits" are often resorted to. Hence a statutory form is resorted to to prove existence of a marriage under customary law.
3. The conversion of marriage from African customary, Islamic and Hindu systems to the Christian/statutory or English type system is allowed. A conversion *vice versa* is not permitted. This indicates a superiority of the English type marriage.
4. Customary, Islamic and Hindu marriages are, to a large extent, arranged by parents. Individual autonomy is de-emphasized. Individual choice is, at least theoretically, at the centre of statutory marriages.
5. Under customary law, the bride may be of any age, including infant age. Under Islamic law, the bride can similarly be a minor.
6. Many types of marriages are allowed under customary law in which the woman is not necessarily consensual (e.g. levirate, surrogate, widow inheritance, woman to woman and forcible marriages).
7. Dowry or more appropriately brideprice is paid only for women under African and Islamic laws. Under Islamic law, the dowry (Mahr) is meant to belong to the married woman. In today's monetary economies, men prefer to understand such payment as giving them control over their wives.
8. Under customary law where a wife commits adultery the husband can sue the man involved. Where the husband commits adultery the wife has no remedy.

9. Under customary law a husband has a right to chastise his wife for adulterous behaviour, practising witchcraft, failure to carry out her duties etc. Under the other systems, wife chastisement is not provided for.
10. Divorce both under Islamic and African customary law can be extra-judicial. One party can unilaterally bring about divorce without a court hearing the dispute. Under the other two systems the court must be involved. As a result, divorce under the first two systems can be relatively easy. However, it is harder for women to initiate the divorce.
11. Under customary and Islamic law, upon divorce, the man has no duty to maintain his former wife. Under the two other systems, the reverse is the case.
12. A muslim woman must marry a muslim man, otherwise the marriage will be null and void. A muslim man can marry a non-muslim who subscribes to a divine book (e.g. the Bible).
13. Women married under customary and Islamic laws are not entitled to the property of the marriage. Where there is divorce, they may not get any property. Under Islamic law, however, the divorced woman is entitled to her Mahr, jewellery that her husband bought for her and other property that was specifically given to her.
14. Under customary and Islamic laws, on the whole children go to the father upon divorce. Under customary law, usually the father must pay all dowry before he can get the children.

Because for example men who are married under customary law have decidedly an upper hand, even middle class and upper class men prefer to marry under customary law initially. Such a marriage is treated as a trial marriage. If the marriage works to the satisfaction of the man and if sons have arrived, the man converts the marriage into a statutory/Christian marriage because under such regime inheritance is well secured for since the man can write a will.

Obviously, since the four family law systems are situated historically in different cultural backgrounds, they must give different rights. The African customary law system developed in primitive communal societies, the Islamic and Hindu in feudal times and the English type marriage during Europe's mercantilism - the beginning of capitalism.

It is critical that women lobby for the introduction of a common comprehensive family law in Kenya. Both in 1976 and 1979 the Marriage Bill was defeated in Parliament.<sup>8</sup> Men MPs in a bid to protect the existence of patriarchy were responsible for the non-passage of the bill. In both the two times, MPs stopped acting as representatives of the people and let self-interest carry the day.

In my view, the uniform comprehensive family law that Kenyan women should lobby for must make provision for, *inter alia*, the following:

- the annulment of future polygamy: one women must be equal to one man in marriage;
- that spousal chastisement must be made a specific criminal offence punishable more severely than an ordinary assault;
- the recognition as ground of divorce of irretrievable breakdown of marriage;
- a proper definition of the elements of common law marriage (marriage by habit and repute) and marriage under customary law through elopement;
- clear provision for the rights of parties in a man/mistress situation and under cohabitation and in single families;
- the recognition of women's household work as a contribution where spouses are dividing property acquired during marriage after divorce.

We are aware that some of the above suggestions appear radical and indeed some of them were responsible for the stalling of the Marriage Bill. However, it should be understood in the women's movement that the above aspects form basic tenets of most modern family law systems globally.

## Women and Property

By virtue of Section 75 of the Constitution and the English Law Reform (Married Women and Tortfeasors) Act 1935 (a law applicable in Kenya), women can acquire, own and

<sup>8</sup> See *Phoebe M. Asiyo*, 'Gender Issues and the Legislative Process in Kenya', in: *Mary Adhiambo Mbeo / Oki Ooko-Ombaka* (Eds.), *Women and the Law in Kenya*, Nairobi, Public Law Institute, 1989, pp. 41-52. See also *Lynn M. Thomas*, *Contestation, Construction, and Reconstitution: Public Debate Over Marriage Law and Women's Status in Kenya, 1964-1979*, unpublished M.A. Thesis submitted to the John Hopkins University Baltimore, Maryland, 1989.

dispose of property as they wish. However, apart from few middle class and upper class women, women on the whole do not acquire and own property. Culturally, women are not expected to own property. Indeed, under customary law, women do not own property such as land. Normally one uses property to acquire more property. Because women generally lack tangible security, they cannot mobilize loans to enable them to buy property. Moreover, where a married woman wants to buy property, she will normally buy it through her husband to ensure, *inter alia*, 'domestic tranquility'.

In the area of land ownership, since registration was based on land ownership under customary law which exclusively vested land in men, the law ensured that women were on the whole made landless since it was not feasible to have land registered in their names unless exceptional circumstances prevailed. It is only in instances of land-buying companies or co-operatives, settlement schemes, and purchase of land by middle class and upper class women where women acquire land. Also, since women do not participate in the most senior and renumerative jobs, they cannot save enough money to buy land and/or acquire other means of production. Hence, women hardly participate meaningfully in big business particularly in the corporate world.

In this section, we are interested more in how matrimonial property is divided upon divorce. Under both customary and Islamic laws where divorce is extra-judicial, the women usually end up not getting any property unless they go to court subsequently for division of such property. We have noted *supra* that, under Islamic jurisprudence, some limited property given to the woman by her husband may be retained by her.

In Kenya, division of matrimonial property occurs in accordance with the Married Womens Property Act 1882 (an English statute applicable in Kenya).<sup>9</sup> It applies to marriages under all of the four systems, although the majority of women married under customary and Islamic laws are ignorant of this fact. Under the above law, property upon divorce can be divided in the following ways.

- Where property is owned under common proprietorship, each spouse owns an agreed percentage of such property. Upon divorce each spouse takes his/her percentage.
- Where property is owned under joint proprietorship, each spouse owns half a portion. Upon divorce each spouse takes his/her half portion. If one spouse dies, the other takes over the portion of his/her spouse.

<sup>9</sup> For a fuller treatment of the subject see *Githu Muigai*, Women and Property Rights in Kenya, in: *Mary Adhiambo Mbeo / Oki Ooko-Ombaka* (Eds.), *supra* fn 8, at pp. 113-122.

- Where property is registered in the name of one spouse, such a spouse has the sole legal interest unless the other spouse
  - (i) has directly contributed money to the purchasing of the property,
  - (ii) has made substantial improvements on the property.
- Where a wife gives her salary to the husband who saves his income for buying property, the courts will count her surrender of salary as a direct contribution to the purchase of the property.

The major problem in division of matrimonial property is that the domestic services of a housewife are not, as yet in Kenya, counted as a contribution towards the purchase of matrimonial property. Although the wife gives emotional and psychological support and cooks and provides for the man and children, such work is not recognised by the law as a contribution by her in the home. It is still irrelevant if the woman resigned from a paying job to take care of the family.

We feel strongly the Kenyan law must recognize the work women undertake at the domestic level. Such work should be viewed as a direct contribution by the woman in the home for purposes of sub-division of matrimonial property where divorce occurs. In our opinion, present law on sub-division of property upon divorce to the extent that it does not recognise the woman's contribution flowing from her domestic work is unconstitutional. It is unconstitutional because the woman's property rendered in domestic work is deprived of her without prompt and full compensation within the meaning of section 75 of the Constitution. This is a point women lobbyists should grasp.

### **Women and Human Rights**

Denial of human rights in any society impacts more on women as compared to men because men themselves are instrumental in negating women's human rights. Hence women are denied human rights doubly by the state, organizations and individuals on the one hand and also by men *en masse*. The above assertion can be illustrated by examining how some human rights guaranteed by Kenya's Constitution are denied women. Such analysis, as has been hinted to above, can be dichotomized between women's human rights as they are affected by the acts and policies of the state sector on the one hand, and by the behaviour and activities of the male sector of society on the other hand.

On the face of it, the state sector to a large extent appears to absolve itself in terms of the constitutional and legal provision of human rights for women. Especially chapter 5 of the Constitution grants political and civil rights (with the exception of freedom from discrimination) to all individuals in Kenya, thereby encompassing women. Furthermore, the country

has ratified the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.<sup>10</sup>

In terms of immediate violation of women's human rights then, the male sector is the visibly dominant culprit. We now proceed to demonstrate this by examining the constitutional text.

The woman's personal liberty - particularly that of the married woman - is compromised by the culturally and socially established relationships between men and women. Women, on the whole, are expected to arrange their lives and programmes so as to enable men to monitor and control them. For many married women, professional and other salaried women included, their husbands must know their whereabouts at any given time. Patriarchy, male ego etc. combine to ensure eternal surveillance of women. Also, most married women do not have the liberty of retaining their maiden names since men expect their wives' personalities to be merged with theirs. Further, married women are not expected to identify premises to serve as the matrimonial home, as such task falls to the man even where the premises are of a lower calibre than those the woman inhabited before marriage. Also, since a married woman is not ordinarily eligible for housing allowance from the government and other employers, she is as a consequence unable to rent premises and thereby ensure that the family lives where she chooses. Moreover, if we characterize abortion as a necessary procedure to enable a woman terminate an unwanted pregnancy when it is medically safe in order to restore physical wellbeing and personal liberty, forcing the carrying of pregnancy to full term comprises denial of the woman's personal choice and liberty. It is common knowledge that within marriage, men still wish to make the decision whether a pregnancy which seems to jeopardize the health of their wife should be terminated or not. Often they are so overwhelmed by the prospect of receiving progeny that they overlook the health and well-being of the wife. Where the woman is unmarried the responsible man denies responsibility or withholds money to procure abortion. In the area of abortion, the state sector is implicated to the extent that Kenya has illiberal laws which do not condone necessary abortion intended to enhance the health, personal liberty and dignity of the woman.

Section 74 deals with protection from inhuman treatment. The general condition of women being treated by men as inferior and inconsequential constitutes, especially psychologically, inhuman treatment. Treatment of women as sex objects is also inhuman treatment. Prostitution is certainly inhuman treatment to the woman victim. Clearly violence - domestic or otherwise - against women is inhuman treatment. Such violence takes many forms, e.g. forced marriages, spousal chastisement, women circumcision, rape, defilement, indecent

10 The Convention entered into force as an international treaty on 3 September 1981 after 20 countries had ratified it.

assault, sexual harassment, imposition of single parenthood on women without adequate affiliation support, prescribing formal dress for women only particularly when they are non-consenting etc.

Where a woman is forced to marry according to the religious law and rites of her intended husband or where she is forced to change her religion to accommodate her husband's religious preference, her freedom of conscience as guaranteed by Section 78 is negated. Also, many women are routinely deprived of their freedom of expression. First, women's educational and socialisation processes ensure that most women do not develop independent and critical thinking. Most women who express their view-points strongly are mistrusted by men and stigmatized as unsuitable marriage partners. Desire for marriage by women - in which the woman is usually the junior partner - seems to subdue most strong spirited women.

Most women cannot enjoy freedom of movement as guaranteed by Section 81. As we pointed out earlier, men prefer to keep women under strict surveillance. Also freedom of assembly and association is severely restricted for women. Men usually choose family friends. They also ultimately determine whether their wives will join organizations such as women's groups or even enter politics. Because of the woman's back-breaking workload, she is deprived the time to participate in organizations and generally in public life. Currently, political activity is restricted to men thereby de-emphasizing women participation. There are also fewer organizations catering for women in comparison to men.

We can now briefly touch on human rights of women as they are affected by the state sector. We have seen the Constitution allows discrimination on account of sex.<sup>11</sup> This is a provision which can be easily amended but has remained intact despite constant lobbying for its withdrawal. Up to this stage also, the state does not have a sound and well articulated policy on women issues particularly embodied in one document.<sup>12</sup> Due to the multiple existence of family laws which the state could have harmonized, different and unequal rights in marriage are afforded to different sections of citizenry in the country. Particularly under customary law and Islamic law regimes in Kenya, women's rights do not equal those of women married under modern type English law. Both customary and Islamic laws do not seem to have developed significantly in today's Kenyan changing society. Even the Marriage Bill, 1991, which is yet to be tabled in Parliament seeks to preserve aspects of the

11 See also *Marsha A. Freeman*, Measuring Equality: A Comparative Perspective on Women's Legal Capacity and Constitutional Rights in Five Commonwealth Countries, *Commonwealth Law Bulletin*, Vol. 16, No. 4, October 1990, pp. 1418-1443, especially pp. 1423-1425.

12 An ongoing UNICEF sponsored study on women in Kenya seeks to provide the research basis for such a comprehensive policy articulation by the government.

above mentioned inequality e.g. polygamy for the man as well as enabling a man to convert a monogamous marriage into a polygamous one.

Although anybody can own property in Kenya, the state has not yet supported women sufficiently in terms of creating for them a sound financial and credit basis to acquire property. Even within marriage, we have seen that the laws give men greater power and access over jointly acquired property than women. The state also has not created the requisite environment to ensure that women participation in politics is substantial.<sup>13</sup> We saw that the women's national body was incorporated into the ruling party. Major decisions taken on behalf of KANU Maendeleo ya Wanawake presumably emanate from party quarters. Indeed this body perceives itself as non-political.<sup>14</sup> We have seen that the male sector is able to easily negate human rights of women as guaranteed by Chapter 5 of the Constitution with impunity.

The state sector has a hand in facilitating this. Chapter 5 does not strictly speaking recognize human rights of women *qua* women, but of women as part of the broad and general citizenry. Chapter 5 is therefore not sufficiently sensitive to women's human rights as would be a specific piece of legislation or constitutional amendment translating the women's rights Covenant into municipal law in Kenya. Moreover, the state seems to allow law which seeks to protect women to continue being ineffectual. It thus appears that the state uses or suffers the male sector as an alibi in the negation of women's human rights. The state could do more to ensure that itself and the male sector respect and are sensitive to women's human rights.

In the present context then, the available women's human rights as a legal feature do not apply to provide gender equality and thereby stable social, economic, political etc. relations between men and women. The above is made worse because by and large a conscious culture towards gender equality cannot be said to have started developing in earnest which could in turn be the foundation of constitutional and legal principles and precepts which later could form the basis of legislation. It is a fact that in Kenya, as in many African countries, middle and upper class women - not to mention under class women - are still substantially marginalized as a function of patriarchy and male hegemony.

The discussion in this sub-section so far has illustrated that although Chapter 5 of the Constitution grants political and civil rights (with the exception of freedom from discrimination) to all individuals in Kenya, nonetheless in practice, women are usually denied

<sup>13</sup> *Maria Nzomo* has comprehensively tackled the question of women participation in politics in her recent controversial paper "Women in Politics and Public Decision Making", paper presented at the AAWORD (Kenya) Workshop Nairobi, August 31, 1991.

<sup>14</sup> The Standard, September 16, 1982, pp. 12-13.

enjoyment of such rights through the agency of the male sector and the silent (and sometimes not so silent) support by the state. To further strengthen the position of human rights for women in Kenya, lobbyists should pressurize for the adoption into municipal law of the Convention on the Elimination of All Forms of Discrimination Against Women. Although Kenya ratified this Convention in 1984, she has not up to date submitted any reports showing "the legislative, judicial, administrative or other measures which (she) has adopted to give effect to the (Convention's) provisions".<sup>15</sup> Such reports were due in 1985 and 1989. The only report submitted is yet to be discussed by the Committee on the Elimination of Discrimination Against Women (CEDAW).

The Convention establishes an international bill of rights for women together with a corresponding agenda for action aimed at the realization of the rights. It generally covers civil rights and the legal status of women, reproductive rights and impact of cultural factors on gender relations. Its adoption into Kenya's municipal law would, in theory, ensure that women in the country can enjoy the greatest quantum of human rights possible for women yet.

### **Women and Legal Awareness**

In society there always exists a gap between rights as they exist in law and rights as they are enjoyed by citizen. Citizen on the whole do not know their rights. In the Kenyan context, it has been shown that women more than men are ignorant of their rights. The few existing program which attempt to educate citizen on their rights concentrate on all citizen. Only recently have organizations such as the Public Law Institute, Women Bureau and Women's Legal Education Task Force tried to develop specific programs for improving women's awareness in some areas.<sup>16</sup>

The above program e.g. on violence against women, are extremely limited. The whole movement regarding raising legal awareness in Kenya is in its infancy. Both the Legal Advice Centre and the Public Law Institute are the major voluntary actors.

Women organizations will have to emphasize legal awareness program among women. Before effective lobbying for the issues we have suggested and others can be achieved, women leaders have to show political leadership that women generally have been mobilized around those issues. It will thus be necessary to create models for securing legal awareness and general mobilization of women, particularly grassroot women. For example,

<sup>15</sup> Article 18 (1).

<sup>16</sup> See generally *Janet W. Kabeberi-Macharia, 'Kenya'*, in: *Women, Law and Development in Africa* WILDAF: Origins and Issues, Washington D.C., OEF International, 1990, at pp. 37-49.

the women group can be used adroitly for purposes of engendering legal awareness and other conscientization. The government should also explore strategies for ensuring that citizen know the law. Indeed citizen - including women - should have a constitutional right to know the law and rights under the law.

## Conclusion

Constitutional silence sanctions sex discrimination in Kenya. For this anomaly to be removed, the Constitution should be amended appropriately. Women are politically under-represented in Kenya although they form the bulk of voters. Consequently women should, for a start, mobilize to have representational quotas set aside for them as regards parliament and the higher echelons of the party. The country is overdue for unification of family laws. Continued existence of multiple family laws which give parties unequal rights is obviously discriminatory. Present law on division of matrimonial property heavily favours men. Amendment of such law to ensure that a woman's domestic work is recognized as a contribution towards acquisition of matrimonial property is germane so that upon divorce such property can be shared equitably. Although Kenya's Bill of Rights provides for political and civil rights to all individuals in the country, women's enjoyment of such rights is hampered particularly due to social and cultural constraints associated with male hegemony in patriarchal society. Translation of the Convention on the Elimination of all Forms of Discrimination Against Women into domestic law is likely to significantly enhance women's rights in Kenya. Finally, if women - and generally all citizen - are to fight for their rights, they must know those rights. Program of legal awareness must be prioritized by women's organizations. More co-ordination among women's organizations in Kenya is mandatory for effective lobbying to be achieved.

# ABSTRACTS

## **Women and the Constitution in Kenya**

By *Kivutha Kibwana*

This paper focuses on constitutional issues *vis a vis* the gender question in the Kenyan context. It discusses the Constitution and sex discrimination; women's voting and representation; marriage and citizenship; implications of the co-existence of multiple systems of family law; women and property; women and human rights and finally women and legal awareness. It explores the extent to which, if at all, law and/or legal lacunae in the constitutional sphere perpetuate(s) the types of inequality that are identified and the possibility and role of activist legal engineering in ameliorating the inequalities.

The Kenyan Constitution does not bar discrimination on account of sex. Although the Constitution and other laws grant women substantial rights, including human rights, women do not adequately enjoy them due to male sector negation of these, state sector condoning of continued existence of ineffectual law and a dominant culture of patriarchy and male hegemony.

## **Local Government and Political Participation in Latin America: Processes of Decentralization and Electoral Change**

By *Detlef Nolte*

There are principally two reasons for a growing journalistic and scientific interest on the subject of "local government and political participation": (1) profound processes of political decentralization have taken place in the majority of the Latin American countries, which resulted in a revaluation of local politics; (2) recently in some countries of the region there have been some very surprising results of municipal elections, where the dominant parties (in the national government) lost and the left and political outsiders scored important victories. The article describes both processes, analyzes their interrelation and discusses the perspectives for a profundization of democracy in Latin America.