



# Research on the Review of the Implementation of Gender Related Laws

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This is a report of the findings of a study meant to review, analyze, critique and propose workable amendments on the gender discriminatory provisions of the law and their application in our society today.

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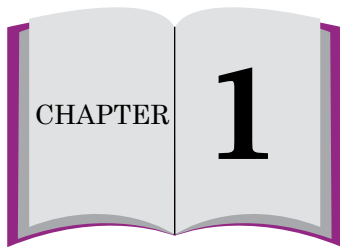
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*Grace Maingi- Kimani*

**Executive Director**



# GENDER DISCRIMINATION: A KENYAN PERSPECTIVE

## 1.0 Introduction

***“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination...”<sup>1</sup>***

The expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, .... or sex, whereby persons of one colour, creed or sex of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description.<sup>2</sup>

<sup>1</sup> Article 7, *Universal Declaration of Human Rights*

<sup>2</sup> Section 82(3), Constitution of Kenya (Revised edition (1998))

<sup>3</sup> American Legal Encyclopedia

<sup>4</sup> Black Laws Dictionary, Eight Edition

Gender discrimination, or sex discrimination, may be characterized as the unequal treatment of a person based solely on that person’s sex. While females have historically laid claim to the cry of unequal treatment, modern civil rights laws banning sex discrimination have been construed to protect males as well.<sup>3</sup> The Black Laws Dictionary<sup>4</sup> defines gender discrimination to mean the same thing as sex discrimination based on gender, especially against women.

The researcher is of the opinion that majority of our legislation though gender neutral in language, has discriminatory effect in its application. Further, most of the discrimination is within the realm of property rights, land ownership and control of resources. It is the researcher’s opinion that although notable steps are being taken to address these discrepancies, a change in cultural attitudes and arrangements of ownership is imperative to allow for equal access and control of resources.

## 1.1 Scope of the Study

The purpose of this study is to:-

1. Review and analyze the gender discriminatory provisions of at least ten pieces of legislation by developing a list of the laws and analyzing and considering the gender related provisions of the law and their application in our society today.
2. Carry out a comprehensive critique on the implementation of those laws using case law and carry out a gender analysis of the effects of those provisions.
3. Propose workable amendments, suggest the repealing of those laws or the making of subsidiary legislation to make them gender responsive.

The study will further explore the observance of provisions of international instruments that Kenya is signatory to that relate to non-discrimination.

## 1.2 Research Methodology and Justification

The aim of this research is to review and analyze at least ten pieces of legislation that have discriminatory provisions either in themselves or as to their effect. The mandate to enact legislation lies with Parliament. In our political set up, majority of the members of Parliament are

men. This has a direct influence on quality of legislation that is enacted and its degree of gender sensitivity. In general, many Kenyan statutes are gender neutral. Indeed, the Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya states at Section 3 (3) that;

*“In every written law, except where a contrary intention appears, words and expressions importing the masculine gender include females”*

In effect, the law presupposes that Parliament in enacting legislation will do so in a gender balanced

manner. This research seeks to investigate if Parliament has followed the spirit of the law in enacting gender discriminatory provisions.

The work is divided into six chapters. Chapter 1 deals with the introduction of gender discrimination dynamics and looks at the different definitions that have been pegged to the word ‘discrimination’ or ‘gender discrimination’.

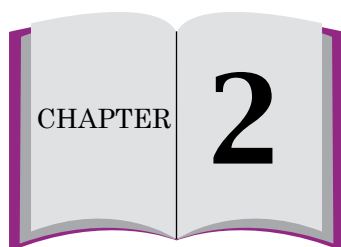
Chapter 2 delves into the role of law in curbing gender discrimination particularly State as well as cultural law. The third chapter looks into some discriminatory provisions of the law in our country and critically looks at the application of those laws in Kenya and how they affect gender relations.

Chapter 4 deals with the application of international instruments in the Kenyan context with regard to gender discriminations. Chapter 5 sheds light on the efforts of the Kenyan government to address inequalities between women and men through legislation and putting policies in place. Chapter 6 gives some recommendations.

This study has been conducted using two methods which relied on secondary data. Firstly, there is a review of existing literature

in the area of human rights for all, particularly the emerging jurisprudence in the area of property rights.

Secondly, there was textual analysis of the legal framework, both municipal and international instruments to which Kenya is a signatory to. The researcher also engaged focus group discussions with researchers who had carried out research in the different areas with regard to discriminatory provisions of the law.



## ROLE OF LAW IN ADDRESSING ISSUES RELATED TO GENDER DISCRIMINATION

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Laws are codified social norms that regulate conduct of members of society, govern relations amongst the members and the State, and between the State and other States. They also define the rights and duties of persons in society and provide a mechanism of remedy for the infringement of those rights.

Legislation is one of the major avenues through which gender discrimination in any society can be addressed. In many instances, law has been used as a social engineer to bring about change by removing racial disparity and segregation in the education sector, as was in the case of *Brown v Board of Education*<sup>5</sup> in the United States. In this case, it was stated that laws that established separate public schools for black and white students denied black children equal educational opportunities and further that separate educational facilities are inherently unequal.

Several jurisdictions have enacted laws addressing gender discrimination. In Australia for instance, the Sex Discrimination Act 1984 protects individuals across Australia from discrimination on the basis of sex, marital status, or pregnancy and in relation to employment, family responsibilities. The Act also makes sexual harassment illegal. Under the Act, individuals can lodge complaints of sex discrimination and sexual harassment with the Australian Human Rights Commission.

Law can also be used to reinforce or give permanence to certain social injustices leading to the marginalization of certain groups of people. In the realm of gender discrimination, discriminatory legal provisions may permanently cause injustice.

<sup>5</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954)

Legal systems can also become obstacles when change is required in laws, procedures and institutions to remove the inequality by the oppressed. One often finds that the legal positions may be gender neutral but in practice, this may not be the case making the law powerless.

There are three issues to be noted with regard to law in its governance of gender relationships. First, statute books contain legal rules and principles which though gender neutral in some cases have a different effect when applied. Two, in many instances, the administration of laws can occasion the subordination of one gender over another. Three, the socio-economic reality in many African countries and the patriarchal ideology of having men as head of households pervading society hinder the translation of abstract rights into real substantive rights.

It is therefore imperative that in dealing with discriminatory laws, one evaluates the nature of State law *vis-à-vis* customary law.

## 2.1 State Law

State law denotes rules promulgated by the State organs such as Parliament. It postulates law as a coherent and unified system of rules enforced through the state court machinery, uniform for

all persons, exclusive of other law and administered by a single set of institutions.<sup>6</sup>

Laws being applied by post-colonial states comprise of statutes of general application<sup>7</sup> which are a codification of customary laws of England and customary law as interpreted by the local courts.

It will be noticed that whereas western family and succession laws and practices have been entrenched in practice and through legislation, traditional African practices have persisted in certain areas and in the process given rise to a continuum rather than a dichotomy.<sup>8</sup>

In practice, despite the gender neutrality of legal provisions, equal rights and privileges cannot be assumed to have been guaranteed and realized. Gender neutral laws have, in many instances, resulted in 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.<sup>9</sup>*

<sup>6</sup> Anne Griffiths, 'In the Shadows of Marriage: Gender and Justice in an African Community' (Chicago Press, 1997)

<sup>7</sup> Judicature Act, (Chapter 8) Laws of Kenya

<sup>8</sup> Dr. Kameri Mbote, The Law of Succession in Kenya: Gender perspectives in Property Management and Control

<sup>9</sup> Tove Stang Dahl, 'Women's Law: An Introduction to Feminist Jurisprudence' (Oslo, Norwegian University Press, 1987)

In most of the African countries, indigenous women experience discrimination ... from the dominant cultures and laws. The ability to control resources, make decisions, inherit and participate are contained in the law but never practiced. The participation in and receipt of benefit from the formal and informal economic sector is impeded by laws and regulations ... For African indigenous, rural and urban poor women, *their countries' legal systems are either irrelevant to their lives or constitute systems that reinforce constraints...*<sup>10</sup> [Emphasis added].

## 2.2 Customary Law

**W***omen's rights and the discrimination against them that limits the scope of their rights in most countries is not an accident. The causes of women's subordination and unequal gender relations are deeply rooted in history, religions, culture, legal systems, political institutions and social attitudes...*<sup>11</sup>.

<sup>10</sup> Lucy Mulenkei, 'Indigenous Women's Rights in Africa,' 2002

<sup>11</sup> H.E. Dr K.Y. Amaoko; Executive secretary for the Economic Commission for Africa -1997

Culture does influence the relationship between the various groups in society. Some cultural practices, beliefs and traditions have had the tendency to relegate women to second class status in society, thereby not only violating their rights as human beings but also leading to discrimination against women.

Some customs and cultural practices have found their way not only into law but are used as justification for violence and discrimination against women.

Customary law is the law of small scale communities which people living in these communities take for granted as part of their every day experience but it excludes outsiders who, to get any account of it have to either be told about it or read about it.<sup>12</sup>

Despite legal reforms in most of the African countries, women's social and economic status continues to be largely defined by customary rules that are deeply rooted in the specific countries. Women, especially in Africa and particularly Kenya, have relegated to an inferior position throughout the history of mankind. She is regarded as 'the weaker sex' thus not as capable as her male counterpart who is considered 'more able and wiser' and from whom she should rely on for direction, protection and existence.

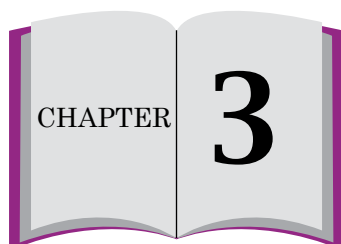
<sup>12</sup> T.W. Bennett, Human Rights and African Customary Law under the South African Constitution (1995)

A key characteristic of African customary law is the dominance of male members over property and women. Allied to this are the centrality of the family as opposed to the individual and the definition of the family to include extended relations which include ascendants and descendants and more than one wife in polygamous unions.

The centrality of customary law in defining women's rights and especially land rights

has led to discriminatory practices against women in the area of ownership, access and control of land.

Furthermore, the fact that customary law is fluid, flexible and dynamic makes it capable of gross manipulation by the main actors in it. It is consequently possible to have a court's pronouncement on customary law that is substantially at variance with the law on the ground.



## SOME DISCRIMINATORY PROVISIONS OF THE LAW

### 3.0 Kenya's Legislative Framework

Kenya's legal framework is based on the common law system having been a colony of Britain. The source and hierarchy of laws applicable is provided by Section 3 of the Judicature Act<sup>13</sup> which states as follows:-

1. The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with: -
  - (a) *the Constitution;*
  - (b) *subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;*

(c) *subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date;*

*but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.*

2. The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases

<sup>13</sup> (Chapter 8) Laws of Kenya

in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

It is discernable from the foregoing that international law is not provided as a source of law. Therefore, international instruments need to be domesticated through the enactment of an Act of Parliament before they are applicable locally as discussed in Chapter 5 below.

### 3.1 The 1963 Constitution

In Kenya, the Constitution is the supreme law of the land and any law that is inconsistent with it is null and void to the extent of inconsistency ...<sup>14</sup> Chapter V of the Constitution guarantees fundamental rights and freedoms of all individuals, both men and women, subject to the rights of others or to the public interest. Despite the Constitution being the primary source of law, some of its provisions are discriminatory as will be detailed later on in this study.

The Constitution is the first law, within the framework of which detailed rules, relationships, and practices are to be laid out. The Constitution has a definite function in the body politic. The guarantee of basic rights and the separation of powers, whether functional or spatial, have served such limits.<sup>15</sup>

What can be noted from the provisions of Chapter V is that the Constitution at the first instance declares the right or freedom and then proceeds to enumerate instances when the right or freedom may be derogated from. As such, we end up with a situation whereby the rights and freedoms guaranteed are 'blurred' by the derogations or 'claw back' clauses.

*"The substance of the right has been closely and carefully qualified and it may well be argued that in consequence little of the substance is left."* (Ghai and McAuslan)

With the substance of the rights and freedoms extensively qualified, there is left very little room for their full enjoyment. Rule of law requires the guarantee of these rights and freedoms with only minimum qualifications as to their enjoyment.

<sup>14</sup> Section 3, Constitution of Kenya (Revised edition 1998)

<sup>15</sup> Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago and London) 1963 p.220

### 3.1.2 The Constitution of Kenya and Citizenship (Chapter VI)

“Discriminating against women, denying or limiting as it does their equality of rights with men is fundamentally unjust and constitutes an offence against human dignity.” (Declaration on the Elimination of Discrimination against Women passed on the 7th November, 1967 by the General Assembly of the United Nations).

Chapter VI of the Constitution of Kenya deals with the issue of citizenship, acquisition and loss thereof. Sections 90 and 91 particularly provide as follows:

*90. A person born outside Kenya after 11th December, 1963 shall become a citizen of Kenya at the date of his birth if at that date his father is a citizen of Kenya.*

*91. A woman who has been married to a citizen of Kenya shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya.*

Section 90 of the Constitution confers citizenship on anyone born outside of Kenya after independence if the **father** of such person is a Kenyan citizen. This section however does not allow women the same rights. A child born outside Kenya to a Kenyan mother and a non Kenyan father does not automatically acquire Kenyan citizenship.

Further, a Kenyan man who marries a female citizen of another country passes citizenship to her vide Section 91 while a Kenyan woman cannot confer citizenship to a foreign husband along the same rules. The import of this section is that the supreme law of the land – the Constitution, provides that children of Kenyan fathers, but not mothers, are citizens, and that spouses of Kenyan men, but not women, can become citizens. This is discriminatory to women as it denies the women equal privileges as their male counterparts.

Many States have adopted the patriarchal position that women’s legal status is acquired through a ‘significant’ male by relationship – first by her father, then her husband. Within this context, a female receives her nationality from her father by birth, but within the context of marriage, she leaves her father’s patrilineal affinity to join her husband’s. A woman married to a foreigner would therefore be expected to automatically acquire the nationality of her husband. The nationality of the children follows the nationality of her husband.

The nationality of the children takes the line of descent – they automatically acquire their father’s citizenship.

The case of *Republic vs. Ministry of Home Affairs and 2 Others Exparte Leonard Sitamze* is a classic illustration that Kenyan women cannot pass citizenship status to their foreign husbands. The applicant in this case was a Cameroonian and was running businesses here in Kenya. He was married to a Kenyan lady and was about to be deported when his work permit expired. He moved to court to challenge the refusal of renewal of his work permit.

Although the case was not *per se* on citizenship issues, it brought into light the devastating effects of the latent discrimination of the Constitutional provisions regarding citizenship against women.

### 3.1.3 The Constitution And Personal Law

The Constitution of Kenya provides for non – discrimination of all persons in Section 82 which reads:

- (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

Section 82 (4) (a) however contains a ‘claw back’ clause which allows for legislation of discriminatory provisions in relation to matters of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. It is only in 1997 that the Constitution was amended to outlaw discrimination on the basis of sex. The Constitution therefore contravenes Article 2(f) of CEDAW that obliges State parties to take appropriate measures to abolish existing laws, regulations, customs and practices that constitute discrimination against women.

The personal law issues that are stipulated are those that mostly affect women. Several judicial decisions have been pronounced by enforcing the above provision with disastrous results for women. The classic example of application of personal law in total disregard on non-discrimination is the *S.M. Otieno case*.<sup>16</sup> In that case the court ignored the plea of the widow; Wambui Otieno to bury her husband and followed customary law in allowing the Umira Kager Clan to bury the late S. M. Otieno.

<sup>16</sup> Otieno V Ougo & Another [2008]1 KLR 948

Further, the grounds set out in the Constitution for non discrimination do not include non discrimination on the grounds of nationality or citizenship. Section 82 (4) (a) states that:-

(4) Subsection (1) shall not apply to any law so far as that law makes provision -

(a) With respect to persons who are not citizens of Kenya; Section 82 (1) reads that:-

1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect. The effect of this section is that there is nothing prohibiting any public officer to make laws that are discriminatory in nature with regard to nationality or citizenship. Indeed, in the case of Kenya Constitution was raised in the interesting case of *Wadhwa v. City Council of Nairobi*.<sup>17</sup>

The facts of the case were that six Asian stand holders, citizens of the United Kingdom and Colonies, were given notices to quit their stands in the Nairobi Municipal Market following a resolution by the City Council that non-Africans be given notice and that applications for the tenancies of the stands thereby rendered vacant, be invited from suitable Africans.

<sup>17</sup> Incorrectly cited as *Madhwva v. City Council of Nairobi* [1968] E.A.

Subsequently, in correspondence with the plaintiffs' advocates, the City Council restated its intention as being to allocate the stands to "Kenya citizens of African origin."

Four of the Asian plaintiffs had been born in Kenya, but because their parents had not been so born they did not automatically become Kenya citizens under the Kenya Constitution. The Judge held that indeed the City Council of Nairobi had acted in a discriminatory manner since the relevant section of the Constitution contemplates where legislation has been passed affecting non-citizens. In this case, no legislation had been passed to evict non-Asians stand holders and therefore the City Council had acted in a discriminatory manner.

### 3.2 The Law of Succession Act Chapter 160

**M**atrimonial property in African customary law is managed and controlled in a manner that benefits the extended family. The divergence and dichotomy between African and western approaches is so obvious that it has perhaps attracted excessive emphasis and attention. As a result, traditional African practices on succession are always referred to in terms that suggest that they are desuetude.<sup>18</sup>

<sup>18</sup> Dr Kameri Mbote; 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control' *Women & Law in East Africa*, 1995

The Law of Succession Act<sup>19</sup> governs the division of property after one's death either through a will (testate) or without (intestate). To a large extent, The Act provides for the equal inheritance of property between women and men. Section 3 (2) of the Act defines "child" without any discrimination on grounds of gender.

However, under Section 32, the Act does not apply to inheritance of agricultural land and livestock within areas which the Minister may in the Kenya Gazette specify. Section 33 of the Act stipulates that such land shall be governed by the customary law of the community of the deceased. In the case of *Mary Rono v Jane Rone & Another* eKLR, the land in dispute was situated in Uasin Gichu District and therefore the court ruled that customary law did not apply as it was not specified by the Minister. However, the court recognised that African Customary law did apply to those areas specified by Gazette Notice namely: West Pokot, Wajir, Turkana, Garissa, Marsabit, Tana River, Samburu, Lamu, Isiolo, Kajiado, Mandera and Narok.

This means that if a person dies intestate in any of these areas, customary law applies with regard to agricultural land and livestock. The problem here is that the two categories of property excluded may be the only property owned by the deceased person. This means that women in those areas cannot benefit from or seek protection under the provisions on intestacy which if properly implemented could elevate the status of women in property control and management in Kenya. The exclusion of the law of succession to these areas amounts to legitimization of discrimination against women as most of Kenyan society is patriarchal.

However, in some instances the courts have failed to apply the equality provisions provided under the Act. The Court of Appeal in *Mwathi v Mwathi and another*<sup>20</sup>, overlooked Part V of the Act and applied Kikuyu customary law to the estate of an intestate who died in 1987, after the Act came into force. The opinion of the court was that 'the intestate succession of a deceased Kikuyu is governed by Kikuyu customary law'.

Similarly, in the Estate of Njeru Kamanga (Deceased),<sup>21</sup> the daughters of the deceased were disinherited by the magistrate who felt that the daughters, being married, had no right to inherit their father's property.

<sup>19</sup> (Chapter 160) Laws of Kenya

<sup>20</sup> [1995-98] 1 EA 229

<sup>21</sup> Succession Case No. 93 of 1991 (Unreported)

The application of customary law is sanctioned by the Judicature Act<sup>22</sup> which allows for its application if it is not repugnant to justice and morality.

Muslim women who had equal rights to inherit under the Law of Succession Act were removed from that bracket through an amendment.<sup>23</sup> No one has so far challenged the constitutionality of the said provisions which are clearly against the tenets of the Constitution.

The Act is also discriminatory in its provision for a widow acquiring a life interest in the net estate. Section 37 provides as follows:

1. Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –
  - (a) the personal and household effects of the deceased absolutely; and
  - (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow that interest shall determine upon her re-marriage to any person.

A life interest is defined by the Black Law Dictionary as interest in real or personal property measured by the duration of the holder or another named person's life.

A widow or widower who has a life interest cannot exercise the freedom of managing the property without the consent of the Court. The life interest of a widow determines on her remarriage. This is so irrespective of the widow's contribution to acquiring of the property during the life time of the partner. This provision does not apply to a widower. This is pure discrimination on basis of sex. Indeed, Section 37 of the Law of Succession Act states as follows:

*A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:*

*Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.*

With regard to division of matrimonial property under the Married Women's Property Act 1882, the jurisprudence of ownership of matrimonial property has taken a different interpretation with the recent case

<sup>22</sup> (Chapter 8) Laws of Kenya

<sup>23</sup> Act Number 21 of 1990

of *Peter Mburu Echaria V Priscilla Njeri Echaria* [2007] eKLR. In this case, the Court of Appeal held that a woman has to prove direct financial contribution to purchase of matrimonial property. This is a departure from the jurisprudence enunciated in *Kivuitu v Kivuitu*<sup>24</sup> case in which the court held that the husband and wife were entitled to the property in equal shares. In the *Kivuitu* case, the Court rightly held that women are honourably employed and are no longer chattels as was the past. The court also observed that the wife must have contributed both in cash and kind in the purchase of the property.

In the *Echaria* case, the court looked at the direct financial contribution of the husband and the wife and ignored any other indirect contribution made by the wife in respect of clothes, food and home upkeep. The wife was given only a small share, a quarter of the property of the suit property. This decision is by the highest court of the land, the Court of Appeal and is precedent setting. It puts women at a disadvantage since women offer non-monetary crucial support to their partners in raising children, keeping a home to enable the husbands work and buy property.

This moral contribution should therefore be taken into account and monetary value attached to it to keep women at the same footing.

### 3.3 The Land Disputes Tribunal Act No. 18 of 1990 and the Land Adjudication Act Cap 284

The Land Disputes Tribunal Act and Land Adjudication Act Cap 284 provide for the ascertainment and recording of land rights in trust lands. Section 20 (a) of the Land Adjudication Act recommends that the Committee should apply recognized customary law when dealing with matters of land. Customary law is biased against women in respect to land rights. Women access to land according to African customs is not as a result of direct mandate but rather through male members of their families (husbands, sons, brothers, or fathers).<sup>25</sup>

The Land Disputes Act provides that Districts Land Disputes tribunals shall settle disputes according to customary law which as mentioned before generally discriminates against women.

<sup>24</sup> [1991] 2 KAR, 241

<sup>25</sup> Eugene Cotran, Casebook on Kenya Customary Law

The tribunals under the Land Disputes Tribunal and Land Control Act are expressly stated to constitute of elders. The term 'elders' refers to persons in the community or communities to which the parties by whom the issue is raised belong, and who are recognized by custom in the community or communities as being, by virtue of age, experience or otherwise, competent to resolve issues between the parties which in most instances refer to men. This is discriminatory on women who do not get representation in the composition of the tribunals.

### 3.4 The Penal Code Chapter 63

The Penal Code contains all the offences that are punishable by law in Kenya. It criminalizes abortion which is a procedure only required by women. Women resort to clandestine and unsafe abortions due to unwanted pregnancies resulting from sexual violence, incest and failure in contraceptives. Kenya has a high mortality rate resulting from unsafe abortions. The maternal mortality and morbidity is estimated at 414/100,000.<sup>26</sup>

<sup>26</sup> Kenya Demographic Health Survey, 2003

A research carried out on the magnitude of unsafe abortions in 2004 by Ipas and Ministry of Health found that over 300,000 abortions are carried out in Kenya every year.<sup>27</sup>

Section 158 of the Penal Code provides as follows:

*“Any person who, with intent to procure miscarriage of a woman, whether she is or is not with a child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years”.* [Emphasis mine]

Section 159 provides:

*“Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to her self any poison or any noxious things, or uses any force of any kind or uses any other means whatever, or permits any such a thing or means to be administered or used on her is guilty of a felony and is liable to imprisonment for seven years”.*

<sup>27</sup> A National Assessment of the Magnitude and Consequences of Unsafe Abortion in Kenya; IPAS, FIDA and Ministry of Health, 2004

Further, Section 160 criminalizes the supplier of any instruments or drugs to help procure an abortion and reads as follows:

*“Any person who unlawfully supplies to, or procures for any person any thing whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or not with a child, is guilty of a felony and is liable to imprisonment for three years.”*

Naturally, only women become pregnant. The provisions as stipulated by the law above hinder the freedom of women to choose the time and spacing of their children. By criminalizing abortion, the law affords differential treatment to women since they are the only ones who would require the procedure. The right to choose when to have children as enshrined by the Protocol to the African Charter on Human and Peoples’ rights on the rights of Women in Africa (Maputo Protocol) is not enforceable in Kenya even though she is a signatory.<sup>28</sup>

Similarly, Kenya is a signatory to the International Conference on Population and Development (ICPD) platform of Action which provides at Article 7.2.0 *Governments should make it easier for couples and individuals to take responsibility for their own reproductive health, by removing unnecessary legal, medical, clinical and regulatory barriers to information and to access to family-planning services and methods.*

It is a point of reference for the National Population Policy for Sustainable Development which outlines the population and development goals, objectives and targets to guide its implementation up to the year 2010 in the country. Broad goals and objectives included are among others in the area of; reproductive health and reproductive rights, adolescents reproductive health, gender perspectives, and HIV/AIDS.

The Penal Code also at Section 153 and 154 criminalizes both men and women who live on the earnings of prostitution and states as follows:

Section 153. Every male person who –

- (a) Knowingly lives wholly or in part on the earnings of prostitution; or
- (b) In any public place persistently solicits or importunes for immoral purposes, is guilty of a felony.

<sup>28</sup> Kenya has not yet ratified the protocol

*154. Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, is guilty of a felony.*

However, most cases that are prosecuted in court are against women. Men are rarely arrested and charged with offences relating to prostitution.

The *Kenya Medical Training College Act, Regulations 14.11.4* provides for the expulsion of a female student who engages in prostitution. There is no similar provision relating to men.

Section 211 of the Penal Code Chapter 63 provides that where a woman convicted of an offence punishable with death is found in accordance with the provisions of Section 212 of the same Act to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment for life instead

of a sentence of death. The male prisoner with an unborn child is accorded no such exemption when convicted of a charge that carries capital punishment. The law creates a distinction between man and woman and deems fit that the woman should be spared and not the father of the child.

Further, the Penal Code criminalizes homosexuality and those who practice what it calls unnatural offences since they have a different sexual orientation. It provides at Section 165 that those males who have sex or perform indecent acts with other males are guilty of a felony and are liable to conviction for 5 years.

The section reads;

*Any male person who, whether in public or private commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years, with or without corporal punishment.*

This amounts to discrimination against sexual minorities.

### 3.5 The Children Act No. 8 of 2001

No child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, color, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.<sup>29</sup>

The Children's Act was passed in 2001 to consolidate the law relating to rights of children. Although it is one of the most comprehensive piece of legislation dealing with the rights of the child, it has some discriminatory provisions such with regard to parental responsibility where a child is born out of wedlock.

Section 25 of the Children's Act requires that where the mother and father were not married, parental responsibility falls due only on application by the father. It reads thus:

25. (1) Where a child's father and mother were not married at the time of his birth:-

- (a) *The court may, on application of the father, order that he shall have parental responsibility for the child; or*
- (b) *The father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.*

The standard of proof required by the Act is that of beyond reasonable doubt which puts at disadvantage unmarried women who cohabited with men who then dispute paternity of the children. The DNA tests that may be used are expensive and may be out of reach of many women.

Section 24 (3) of the Act provides that (3) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other ;

- (a) The mother shall have parental responsibility at the first instance;
- (b) The father shall subsequently acquire parental responsibility for the child in accordance with the provisions of Section 25.

<sup>29</sup> Section 5, The Children Act (No. 8 of 2001)

This section is discriminatory to children on the basis of their status of birth.

The question of the discriminatory nature of this section was decided in the case of *Rose Moraa (Suing thro' Next Friend) Josephine Kavinda Cradle (The Children Fund) Millie & G.A. Odhiambo v Attorney General*.<sup>30</sup> In the above case, the minor suing through the next of friend and a non-governmental organization (CRADLE) sued the Attorney General for a declaration that the provision of Section 24 (3) of the Children's Act is discriminatory in that it discriminates against children born out of wedlock and it places a higher degree of parental responsibility on the mother than the father. In the above case, it was contended that the section contravenes the Convention on the Rights of the Child and the Convention of Elimination of all Forms of Discrimination Against Women (CEDAW).

The court applied the Bangalore principles in the application of international conventions to local situations. The court found that the section examined in totality is constitutional since its purpose is to locate the first instance or the initial of parental responsibility for children born out of wedlock which rests with the mother of the child.

With respect to the Court's decision, in my view, a father may also have a first initial parental responsibility of the baby he has fathered. It is my opinion that despite the courts ruling, the provision is still discriminatory. There is no reason why a father of a child within or without wedlock may not have initial responsibility. Parliament ought to have taken judicial notice of paternity disputes in Kenya where when a woman gets pregnant, the trend is to deny responsibility and put the woman to task to prove that the man is responsible for the pregnancy.

Section 20 of the Children's Act creates an offence for any one who subjects a child to certain rites and states as follows;

***14. No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.***

This section only protects children and not women over 18 years of age. This discrepancy leaves women of over 18 years vulnerable to being forced to undergo the rite without any protection under the law.

The Children's Act at Section. 158 (2) provides that single men and women may

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Civil Case 1351 of 2002

not adopt children who are of the opposite gender. This is discriminative against single persons by having a provision which bars single men or women to adopt children. The law presupposes that a child can only be raised properly in an environment with two parents and thus denies single women and men to have children.

### 3.6 HIV and AIDS Prevention and Control Act No. 14 of 2006

The HIV and AIDS Prevention and Control Act<sup>31</sup> was enacted to provide measures for the prevention, management and control of HIV and AIDS, to provide for the protection and promotion of public health and for the appropriate treatment, counseling, support and care of persons infected or are at risk of HIV and AIDS.<sup>32</sup> The Act came into operation on the 30<sup>th</sup> March, 2009, except for sections 14, 18, 22 and 39<sup>33</sup> which are yet to be given a commencement date. Section 14 of the act deals with consent to HIV testing and underscores the fact that a person should not be tested for HIV without their informed consent. It reads as follows;

<sup>31</sup> Act No. 14 of 2006

<sup>32</sup> HIV and AIDS Prevention and Control Act, (Act No. 14 of 2006)

Preamble

<sup>33</sup> Legal Notice No. 34 of 2009

1. Subject to subsection (2), no person shall undertake an HIV test in respect of another person except-

- (a) With the informed consent of that other person;
- (b) If that person is a child, with the written consent of a parent or legal guardian of the child:

Provided that any child who is pregnant, married, a parent or is engaged in behaviour which puts him or her at risk of contracting HIV may, in writing, directly consent to an HIV test;

- (c) if, in the opinion of the medical practitioner who wishes to undertake the HIV test, the other person has a disability by reason of which he appears incapable of giving consent, with the consent of-

- (i) *A guardian of that person;*
- (ii) *A partner of that person;*
- (iii) *A parent of that person; or*
- (iv) *An adult offspring of that person;*

Provided that a medical practitioner may undertake the HIV test if the persons referred to in paragraphs (i), (ii), (iii) and (iv) are either absent or are unwilling to give consent;

- (d) Where the person is required to undergo an HIV test under the provisions of this Act or any other written law.

2. Notwithstanding the provisions of subsection (1)-

- (a) A person who offers to donate any tissue shall be deemed to have consented to the HIV test required under Section 9;
- (b) A person who offers to donate blood shall be deemed to have consented to the HIV test required in respect of such blood under Section 10;
- (c) A medical practitioner responsible for the treatment of a person may undertake an HIV test in respect of that person without the consent of the person if-
  - (i) *The person is unconscious and unable to give consent; and*
  - (ii) *The medical practitioner reasonably believes that such a test is clinically necessary or desirable in the interest of that person.*

3. Subject to Section 17, a medical practitioner who undertakes an HIV test on a person under this section shall, if the person so requires, disclose the results of the HIV test to that person.

4. A person who contravenes the provisions of this section commits an offence.

The fact that this section has not been operationalised means that a medical provider may test one's HIV status without their consent and the aggrieved party would have no recourse. This is one of the issues that arose in the case of *JAO vs. Homepark Caterers Ltd & 2 others*<sup>34</sup> where the former employers tested an employee for their HIV/AIDS status and proceeded to fire her for being HIV positive. The parties in this matter settled the matter out of court and the court therefore did not have an opportunity to comprehensively address the issue of non discrimination on the basis of one's HIV status.

Section 35 of the Act is discriminatory in nature for giving insurers a window to use to deny cover to persons who test HIV positive. It states as follows:

*Where a proposer elects to undergo an HIV test pursuant to subsection (3) and the results thereof are positive:*

- (a) the proposer shall, at his own expense, enter into such agreed treatment programme with the insurer as may be prescribed by the Minister in consultation with the Commissioner for Insurance; or

<sup>34</sup> High Court Civil App. No. 38 of 2003, [2004] eKLR

- (b) The insurer may impose a reasonable additional premium or lien to the benefits ordinarily purchased; or
  - (c) The insurer may decline granting the cover being sought.
5. A person aggrieved by a determination as to what is reasonable for the purposes of this section may appeal to the Commissioner of Insurance in accordance with such procedure as may be prescribed in regulations and the Commissioner of Insurance shall make a determination on the basis of statistical and actuarial principles and other relevant considerations.
  6. A person aggrieved by a determination made under subsection (5) may appeal within thirty days to the Tribunal and the decision of the Tribunal shall be final.

The insurance companies have used this clause to deny many patients who cannot afford high insurance premium covers. This is discriminatory in itself, contrary to the provisions of Section 82 of the Constitution which is the primary source of law. It is clear that no other laws shall be promulgated to have discriminatory provisions in themselves or in their effect.

In seeking for a non-discrimination policy in education of children with HIV and AIDs, the Nyumbani Children's Home sued the Ministry of Education and Attorney General

in requesting for a declaration from the High Court requiring public schools to permit HIV positive children to enroll in their programme.<sup>35</sup> Nyumbani Children's Home was representing over 91 children who had been denied enrolment into public schools due to their HIV status. The issue that was to be canvassed was whether the prohibiting of HIV-positive children from enrolling in public schools programs was against the law. Before the court could hear arguments on the case, the parties settled the matter privately and the schools agreed to admit the children to school.

### 3.7 Births and Deaths Registration Act Chapter 149<sup>36</sup>

The Births and Deaths Registration Act was enacted to provide for the notification and registration of births and deaths and other matters incidental thereto.

Section 12 requires that the father agrees with the mother for his name to be put in the register and one has to provide evidence of marriage for the father of the child to be entered in the register. Section 12 provides;

<sup>35</sup> Nyumbani Children's Home v The Ministry of Education & Attorney General, HCCC in Nairobi, no. 15 of 2003

<sup>36</sup> Chapter 149 Laws of Kenya

*No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.*

This provision of the law is discriminatory against women in that it shifts the burden of proving the father of one's children to the mother. The provision does not take into account the nature of customary unions or the cohabiting couples where no marriage ceremony has taken place. The provision therefore requires that there be proof that the woman was either married to the father for the name of the father to be included.

A married woman cannot change her name from her husband's name. A recent article carried by the *Daily Nation* on Thursday the 15<sup>th</sup> October 2009 shows the frustration that a woman married under customary law and later divorced wished to change her name has been taken round in circles for the last 30 years.

### 3.8 The Government Financial Management Act No. 5 of 2004<sup>37</sup>

The Government Financial Management Act was enacted to provide for the management of government financial affairs, to make certain provisions with respect to the exchequer account and the Consolidated Fund, to provide for persons to be responsible for government resources and to provide for other related matters.<sup>38</sup>

However, The Government Financial Management (Women Enterprise Fund) Regulations, 2007 which are rules made under the Act are discriminatory in themselves and in their effect since they exclude men from obtaining credit to advance their business by expressly stating that only women enterprises can access the fund money.

Regulation 4 states as follows:

*The object and purpose of the Fund is to;*

- (a) Provide loans to credible micro-finance institutions (MFIs), registered non-governmental organizations (NGOs) involved in micro financing, and savings and credit co-operative organisations (SACCOs) for on-lending to women enterprises;*

<sup>37</sup> Act No. 5 of 2004

<sup>38</sup> Government Financial Management Act No. 5 of 2004, Preamble

- (b) *Attract and facilitate investment in micro, small and medium enterprises oriented infrastructure such as business, markets or business incubators that will be beneficial to women enterprises;*
- (c) *Support women oriented micro, small and medium enterprises to develop linkages with large enterprises;*
- (d) *Facilitate marketing of products and service of women enterprises in both domestic and international markets; and*
- (e) *Support capacity building of the beneficiaries of the Fund and their institutions through Divisional Women Enterprise Fund Committees.*

Although economic inequity affects women more severely, the effects of the regulations are to bar men from accessing the funds to develop their own enterprises. One may argue that men may access funds from the youth fund but the youth fund has age limitations of 18-35. The women fund has no age limitation and therefore a woman of any age is eligible to obtain credit.

### 3.9 Evidence Act

The Evidence Act was enacted for the purpose of declaring a law on evidence. Some of its provisions are discriminatory with regard to the prosecution of offences relating to prostitution. Section 163 states as follows:

*163. (1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him -*

Section 163 (d)

- (d) *When a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.*

This is so despite the provisions of Section 34 of the Sexual Offences Act which provides that the sexual history of a rape victim is immaterial unless it forms a fundamental defence of the accused person. This provision has actually hindered the enforcement of the sexual offences due to its nature of intimidating victims of sexual violence if the case is not proved.

### 3.10 Other Discriminatory Provisions of Law

- A. **The Employment Act No. 11 of 2007.**  
With regard to maternity and paternity leave, Section 29 of the Employment No. 11 of 2007 provides that a female employee is entitled to three months maternity leave and a husband is entitled to two weeks paternity leave. This is express discrimination against men.

**B. The Matrimonial Causes Act Cap. 152**

at Section 25 (1) provides that in any suit under the Act, the wife may apply to the court for alimony pending the suit, and the court may thereupon make such order as it may deem just.

The same Act in Section 26 (1) provides that where a husband has been guilty of willful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation. This is discriminative against men since the Act has no provisions for alimony or maintenance for men.

**C. The Registration of Documents Act Chapter 285**

is an Act of Parliament enacted to provide for the registration of documents. In its regulations particularly the Registration of Documents (Change of Name) Regulations, Regulation 3 (2) provides that;

*If the relevant person is a woman she shall be described in the document as a spinster, a married woman, a widow or (if her marriage has been dissolved) a feme-sole, as the case may be.* Further, regulation 4 provides as follows;

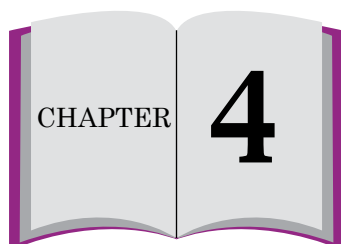
The following further evidence shall be produced to the registrar in relation to the relevant person -

- (a) *In all cases, a certificate of birth, unless the birth was not registered;*
- (b) *If a married woman, her certificate of marriage, or other evidence of her marriage if it was not registered, together with -*
  - (i) *the written consent of her husband to her change of name, the consent being endorsed on the document evidencing the change of name and witnessed by an advocate; or*
  - (ii) *a certificate from an advocate that she is living separate from her husband in such circumstances that the separation is likely to be permanent;*

*(c) if a widow, her certificate of marriage, or other evidence of her marriage if it was not registered, together with the certificate of death of her husband;*

*(d) if a feme-sole, her certificate of marriage, or other evidence of her marriage if it was not registered, together with the decree absolute or certificate of divorce.*

These requirements are only required from married women and not married men. This is express discrimination.



## THE APPLICABILITY OF INTERNATIONAL INSTRUMENTS IN LOCAL CIRCUMSTANCES

The place of international law in the Constitutions of the African commonwealth States has been influenced in part by English common law doctrines:

“The prerogative power of the Crown to conduct foreign relations, and the practice of basing constitutional arrangements upon custom, convention and judicial decision, rather than upon a single statute”.<sup>39</sup>

“The problem of the relationship between international law and municipal law has in the past been bedeviled by the doctrinal controversy between the monist and dualist doctrines. Distinction has also been repeatedly drawn between the “adoption” and “transformation” principles as a method for the introduction of international law into the municipal sphere.”<sup>40</sup>

Under the Judicature Act, it is clear that international law is not provided as a source of law. Therefore international instruments need to be domesticated through the enactment of an Act of Parliament before they are applicable locally.<sup>41</sup>

Kenya is a state party to various conventions which relate to human rights and which prohibit discrimination and violence against women. Though these instruments at the date of the Constitution had no legal force, they can certainly not be disregarded as influences upon legislative policy:-

<sup>39</sup> Fawcett, *The British Commonwealth in International Law* (1963), p.19

<sup>40</sup> *ibid*

<sup>41</sup> Kenya is a dualist state

### 4.1.1 Convention on the Elimination of Discrimination against Women (CEDAW)

In 1984, Kenya became a state party to the UN Convention. Kenya made no reservations to the Convention. **Article 9 (1)** states that “States’ Parties shall grant women equal rights with men to acquire change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife whilst **Article 9 (2)** further provides that “States’ Parties shall grant women equal rights with men with respect to the nationality of their children.”

### 4.1.2 International Covenant on Civil and Political Rights

**Article 2** of this Convention prohibits discrimination on the basis of sex. **Article 3** guarantees “the equal right of men and women to the enjoyment of all rights set forth in the covenant.” **Article 7** prohibits torture and other cruel, inhuman treatment or punishment whilst **Article 9 (1)** protects the right to liberty and security of a

person and **Article 24** guarantees protection to every child by the State without any discrimination to birth or sex.

### 4.1.3 African Charter on Human and People’s Rights

**Article 3** of this Convention provides that each person is equal before the law and must be protected equally by the law.

**Article 5** guarantees every individual the right to the respect of the dignity inherent in a human being and prohibits torture, cruel, inhuman or degrading punishment or treatment.

### 4.1.4 Universal Declaration of Human Rights

**Article 7** of the Convention stipulates that: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Article 2 clearly states: ‘everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...’

There is no shortage of international instruments that protect women against violence or discrimination. However, these are not directly applicable in Kenya. The obligations have to be domesticated into municipal law. Nevertheless, their importance and influence to national statutes especially in interpretation cannot be overemphasized: In the words of Justice Michael Kirby:

“What is the position of the convention in our English law? I would not depart in the least from what I said in the recent case of *Birdi v Secretary of State for Home Affairs*. The Court can and should take the convention into account. They should take into account whenever interpreting a statute which affects the rights and liberties of the individual....”

*“...in the function of Courts in giving meaning to a written Constitution to legislation on human rights expressed in general terms or even old precedents inherited from judges of an earlier time, there is often plenty of room for judicial choice. In that opportunity for that choice lies the scope for drawing upon each Judge’s own notions of the content and requirements of human*

*rights. In doing so, the Judge should normally seek to ensure compliance by the Court with the international obligations of the jurisdiction in which he or she operates. An increasing number of judges in all countries are therefore looking to international developments and drawing upon them in the course of developing the solutions which they offer in particular cases that come before them.”<sup>42</sup> [Emphasis added]*

Recent jurisprudence shows that the Kenyan Courts are applying the Bangalore Principles which were extensively quoted by Justice Nyamu in the *Republic vs. Ministry of Home Affairs and 2 Others Ex parte Leonard Sitamze*.<sup>43</sup> The Bangalore principles provide that the ratified instruments can be applied locally in so far as they are not inconsistent with any local law.

In addition, in *Rono v Rono*<sup>44</sup> the court made elaborate reference to international law, including The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the African Charter on Human and People’s Rights, in finding that the daughters of the deceased were entitled to a share of the deceased’s estate. The court stated *inter alia*:

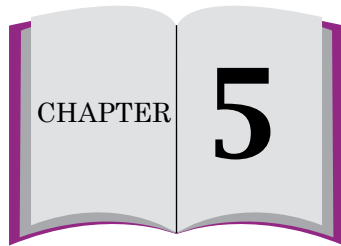
<sup>42</sup> Hon. Justice Michael Kirby, “Developing Human Rights Jurisprudence, Commonwealth Secretariat, London September, 1988, p. 78

<sup>43</sup> HCCC of Kenya in Nairobi, Civil App. 1652 of 2004

<sup>44</sup> (2008) KLR (G&F) 803

the current thinking of common law theory is that both international customary law and treaty law can be applied by state courts

where there is no conflict with existing state law, even in the absence of implementing legislation.



## GOVERNMENT EFFORTS TOWARDS CURBING GENDER DISCRIMINATION

Although there are still many gender related challenges facing the country, the government has taken notable strides in the form of ratification of international conventions, policy developments and enactment of key legislation geared towards gender equality.

A Task Force was established in 1993, to among other things review the national laws to ensure non-discrimination against women and to initiate statutory reforms with regard to gender discrimination.<sup>45</sup>

In 1997, the Kenya Constitution was amended to include a specific prohibition of discrimination on the grounds of gender. (However as discussed, this is still qualified hence lessening its impact).

The country has ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the African Charter on Human and People's Rights.

Some key domestic legislation enacted include the Sexual Offences Act;<sup>46</sup> and the National Gender and Development Act.<sup>47</sup> The Marriage Bill which seeks to harmonize the marriage laws in Kenya is currently up for discussion at the Cabinet. The Equal Opportunities Bill, The Family Protection Bill, the Matrimonial Bill have been drafted and are awaiting Cabinet approval.

The launch of the National Policy on Gender and Development and a Presidential Decree of 30% affirmative action on formal appointments to public posts are further efforts towards 'leveling' the playground, for both the men and women.

<sup>45</sup> UN Doc. CEDAW/C/KEN 3-4, p.3

<sup>46</sup> Act No. 6 of 2006

<sup>47</sup> Act No.13 of 2003

The Equal Opportunities Bill 2007 provides for non discrimination and establishes an Equality Board and prohibits discrimination of any form. The Bill makes it an offence for a person to practice any form of discrimination.

The Matrimonial Property Bill 2007 is one of the bills before cabinet for discussion. It attempts to remove discrimination against women in the area of matrimonial property. In its preamble, it's described as an Act of Parliament to make provision for the rights of spouses in relation to matrimonial property.

The passing of the Constitution is a major milestone in enhancing gender equality. Under the *Constitution of Kenya, 2010* unlike the 1963 Constitution:

i) there is no discrimination on issues of citizenship as both a man and a woman can pass citizenship to a foreign spouse as long as he/she has been married to a citizen for a period of at least seven years and makes the requisite application for registration. Furthermore, either a mother or father passes citizenship to a child born outside so long as either the mother or father is a Kenyan citizen.<sup>48</sup>

ii) The new Constitution establishes a *Human Rights and Gender Commission* whose functions include the promotion and protection of human rights in the Republic and to *“receive complaints about abuse of power, unfair treatment based on gender discrimination or otherwise...”*<sup>49</sup>

iii) On the issue of land and property, the Constitution tasks the government to keep under review a national land policy ensuring among other principles *“elimination of gender discrimination in regulations, customs and practices related to land and property in land.”*<sup>50</sup>

iv) The Constitution of Kenya 2010 provides under Section 2 (5) that international law will become part of the national law.

Despite the above efforts, much more needs to be done to root out gender discrimination since discrimination goes beyond legislation and paper work to implementation.

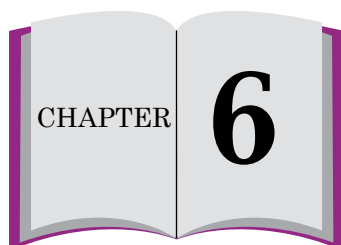
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<sup>48</sup> See Articles 17 & 18 of the Constitution of Kenya (2010) as contrasted with Sections 90 & 91 of the 1963 Constitution of Kenya

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<sup>49</sup> See Article 76(4) of the Constitution of Kenya (2010)

<sup>50</sup> Article 77 of the Constitution of Kenya (2010)



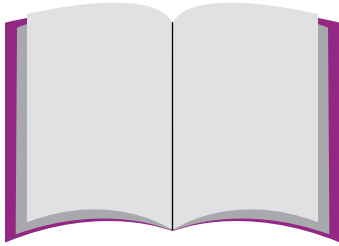
## RECOMMENDATIONS

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The following recommendations may be proffered;

1. Parliament should amend:
  - (a) The Law of Succession Act which gives not only a life interest but freedom to use the property in ways that benefit the children. Further, women should not lose what they have inherited just by virtue of having remarried since they contributed to the acquisition of the property in issue during the life time of their partners.
  - (b) Remove the exception in the Law of Succession Act sections 32 and 33 allowing discriminatory customary law to apply to agricultural land and livestock in certain gazetted areas.
  - (c) The Sexual Offences Act by deleting Section 38 which negates the whole spirit of reporting crimes of rape by having a provision that intimidates women to silence in case law enforcers come to a conclusion that one is lying about the rape.
  - (d) Parliament should amend the Land Disputes Tribunal Act to include a provision which expressly requires that Land Tribunals when constituted should have a certain percentage of women.
3. The Government should improve the female representation in institutions that adjudicate land disputes for instance, the district land disputes tribunals by stipulating a minimum number of women who should sit at the tribunal at any one given time.

4. Parliament should strive towards counteracting harmful customary practices that lead to the spread of HIV and AIDS through legislation that criminalizes practices such as widow inheritance, ritual cleansing and female genital mutilation.
5. The judiciary needs to be more flexible in addressing issues of discrimination by taking a 'liberal' approach in interpretation of the law to ensure that the widest degree of protection of fundamental rights and freedoms of its citizens is realized.



## CONCLUSION

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**W**hilst the government has put effort in ensuring gender equality, more still needs to be done. The Government needs to practically demonstrate more will and commitment towards elevating the status of women in the country. Mere legislation is inadequate.

A state cannot be said to be democratic and independent when more than half of its population is denied its fundamental rights and freedoms, and it is still bound by archaic chains of custom and discrimination. There is need to do away with traditional beliefs and stereotypes as to the different gender roles and the status of women in society which has ultimately found its way into legislation.

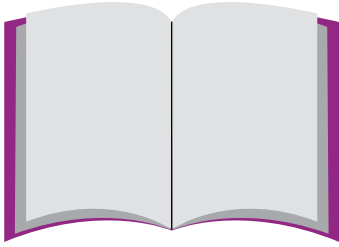
And to tackle the root problem, we should start from the base by changing the mindsets concerning gender roles particularly the

status of the woman in society. There is need for attitude changes from both men and women as to the gender roles otherwise legislation will remain just that – words on paper.

The society needs to be made to understand (perhaps through civic education at grass roots levels) that women rights are human rights and discrimination against any one gender is a violation of human rights in general. For:-

*Without the progress in the situation of women, there can be no true social development. Human rights are not worth the name if they exclude the female half of humanity. The struggle for women's equality is part of the struggle for a better world for all human beings, and all societies.*

[Boutros Boutros-Ghali, United Nations Secretary-General]

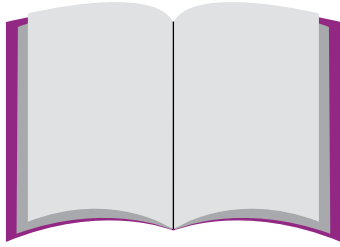


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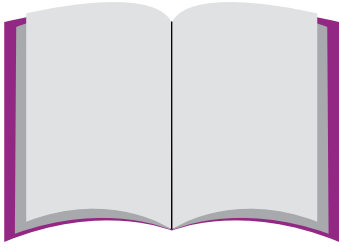
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