

**KENYA'S CONSTITUTION OF 2010: ENHANCED
PROSPECTS FOR GENDER EQUALITY?**

Undertaken on behalf of UNIFEM (Part of UN-Women)

By

Dr. Celestine Nyamu Musembi

Prof. Patricia Kamari-Mbote

Dr. Winfred Kamau

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Introduction

On August 4th 2010 Kenyans voted in a historic referendum to adopt a new constitution, which officially became law on August 27th 2010 following presidential promulgation. The Constitution of Kenya 2010 contains major gains towards gender equality and equity, and the protection of the human rights of all men and women in Kenya. It delivers on many points that have been at the heart of struggles for gender equality in Kenya from the 1980s. While Kenyans through parliament have, since independence, reviewed the constitution, there has been minimum consultation in those revisions. Women have particularly not been consulted and their under-representation inside parliament has meant that their interests have not been well articulated in parliamentary debates on revisions. The new Constitution addresses this shortcoming at Article 100 where it requires that Parliament enact legislation to promote the representation in Parliament of ‘...women...ethnic and other minorities; and marginalized communities.’

The constitution review journey, including the setting up of the review bodies such as the Constitution of Kenya Review Commission and the Committee of Experts, entailed a struggle to ensure gender equality and equity. The review and harmonization processes were crafted to ensure representation of women. Gender activists had for a long time questioned many of the constitutional provisions that did not guarantee women equal rights with men. For example, until 1997, section 82 of the Kenyan constitution dealing with the question of discrimination excluded "sex" as an objectionable ground for discrimination. However, the revision of the Constitution in 1997 included “sex” as an objectionable ground for discrimination in section 82(3) but did not include it in section 82(4) which made the prohibition of discrimination inoperative in matters of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law and customary law. This left women open to discrimination in the very areas where they were most vulnerable.

This report undertakes an analysis of the gains that have been made for gender equality. However, this report differs from other ‘gender audits’ of the 2010 Constitution because it has a very specific baseline for this analysis: it follows onto a report by these same authors based on a study undertaken in 2009, assessing Kenya’s constitutional and legal framework

for compatibility with international and regional standards on women's human rights. The 2009 study made this comprehensive assessment in ten areas of law that are crucial to the attainment of gender equality, namely:

- i. Constitutional law;
- ii. Family relations;
- iii. Labour and social protection;
- iv. Gender-based violence;
- v. Criminal laws and procedures;
- vi. Civil justice systems and alternative dispute resolution;
- vii. Access to financial services;
- viii. Business regulation and licensing;
- ix. Property, environment and natural resources;
- x. Health.

In this report we re-visit the conclusions of the previous study as they related to each of these areas and analyse them in light of the new constitution. We begin with some general observations on the 2010 constitution.

General Observations

The new Constitution of 2010 gives recognition to a number of important general principles relevant to gender equality and that have a general bearing on the thematic areas outlined above. These principles were either not given recognition by the former Constitution or were given inadequate treatment. Article 10 (2) (b) sets out the national values and principles of governance to include, among others, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. The new Constitution has an elaborate Bill of Rights contained in Chapter 4. Article 19 (2) states the purpose of recognising and protecting human rights and fundamental freedoms as being to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. This general proposition is important and relevant to women's struggle for gender equality and gender equity. Further, the Constitution

imposes a positive duty on the part the State and all State organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.¹

Also significant is Article 2 (5) and (6), which provide that the general rules of international law as well as any treaty or convention ratified by Kenya form part of the law of Kenya. Article 21 (4) imposes on the State the obligation to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. These two provisions may be interpreted to mean that international law becomes directly applicable by Kenyan courts, regardless of whether parliament has enacted specific implementing legislation to incorporate the international laws in question. However, whether these provisions actually end up having this effect rests on the meaning of the word ‘ratified’. The word has a double meaning: at one level it refers to the act of depositing an instrument of ratification with the UN Secretary General and becoming a State Party to a treaty (usually performed by the executive branch of government). At the second level it refers to the national process of incorporating the international treaty into the national law by an act of parliament. If the latter meaning is intended then nothing has really changed, as only those treaties that parliament had specifically incorporated at the time of adopting the 2010 constitution will be regarded as legally binding- and CEDAW was not among the treaties specifically ratified by parliament.

Constitutional Law

The previous study assessed Kenya’s constitutional law for compatibility with international and regional standards for women’s human rights with respect to three issues:

- Non-discrimination (full guarantee of gender equality);
- Citizenship
- Political representation.

Non-discrimination

¹ Article 21 (1)

The 2009 study concluded that the old constitution did not provide adequate protection against gender discrimination. Of particular concern was the personal law exemption contained in Section 82(4), which was a claw-back clause on the prohibition of discrimination. This sub-section permitted discrimination justified on custom and religion with respect to matters of personal law (this includes issues concerning marriage and divorce, adoption, inheritance of property and burial). This same sub-section also permitted discriminatory application of a law so long as it only affects members of a defined group to which a particular customary law is applicable. In the 2009 study we observed that Section 82(4) represented a substantial and dangerous claw-back for women because the exemption applied to areas that affect relationships in the private sphere, where women are subject to private power with little say. We argued that the problem with Section 82(4) was that people adversely affected by the application of personal laws (customary and religious laws) were effectively gagged- they were denied even the opportunity of arguing that they had been discriminated against, since the old constitution did not permit constitutional scrutiny.

Perhaps the best news of the 2010 constitution is the demise of the personal law exemption. It is surprising that a clause that had such far-reaching implications for gender equality could be dislodged without contention.

So is it now clearly stated that the constitution makes no exemptions for personal law? Not exactly. Some vestiges of Section 82(4) remain. Article 24(4) of the 2010 constitution provides as follows:

“The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi’s courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.”

An exemption in a modified form does remain for Muslim personal law, but it is much more narrowly tailored than the blank cheque that was Section 82(4). The phrase ‘to the extent strictly necessary’ anticipates a process of scrutiny to determine whether an exemption is warranted in each specific situation. Secondly, the exemption can only relate to a specific case before the Kadhi’s court. It is not a blanket exemption of all Muslim personal law in all forums. When read together with Article 170(5), which requires that in order for the Kadhi’s court to have jurisdiction over a case the parties must be people who profess the Muslim faith and who also *submit to the jurisdiction of the Kadhi’s courts*, it can be concluded that the

constitution of 2010 goes a long way to remedy the gag effect of the previous Section 82(4). The formulation of Article 170(5) gives the possibility of opting out of the Kadhi's courts, while Article 24(4) makes it clear that discrimination is not an automatic corollary of the application of Muslim personal law. This is potentially empowering for Muslim women: they could opt out of the Kadhi's courts, or they could seize upon the opportunity presented by Article 24(4) to challenge discriminatory approaches to the application of Muslim personal law, thereby working for gradual transformation of the institutions that apply Muslim personal law.

Besides the fundamental change that has come about with the demise of Section 82(4), the constitution of 2010 contains a very detailed clause on equality and freedom from discrimination (Article 27). From a gender equality perspective, this clause is commendable on four counts. First, it states explicitly that men and women have the right to equal treatment and equal opportunities in the 'political, economic, cultural and social sphere' (Article 27(3)). Second, the grounds on which the state is not to discriminate are much broader than existed under the old constitution, and they include pregnancy, marital status, health status, disability and dress (Article 27(4)). Third, it is not only the state that may not discriminate- the prohibition of discrimination applies horizontally among all persons (Article 27(5)) Fourth, for the first time there is constitutional provision for the principle of affirmative action, in order to 'give full effect to the realization of the rights guaranteed under this Article' (Article 27(6)). The 2010 constitution therefore recognizes that in order to give full effect to the right to full equality before the law, it may be necessary to take measures to redress past patterns of discrimination, such as those that relate to gender relations.

Citizenship

The 2009 study identified two forms of gender-based discrimination in the area of citizenship. The first was the provision concerning citizenship of children born outside the country. Such children only acquired citizenship if the father was Kenyan. Children born to single mothers abroad could only hope to apply for citizenship upon attaining the age of 21. The second form of gender-based discrimination in relation to citizenship was in the provision that allowed a man married to a foreigner to pass on citizenship to her and to their

children without any minimum residency requirement, but withheld such a right from a woman married to a foreigner, requiring minimum residency of seven (7) years (section 91).

The 2010 Constitution gets rid of these discriminatory provisions. Its provisions on citizenship are very robust, even permitting dual citizenship for the first time in Kenya's history. Article 13(3) makes it absolutely clear that 'citizenship is not lost through marriage or the dissolution of marriage'.

The first form of gender-based discrimination discussed above is remedied vide Article 14(1) which provides: "A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, *either the mother or father* of the person is a citizen."

Gender-based discrimination with regard to marriage to foreigners is remedied vide the gender-neutral language of Article 15(1) which provides: "A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen."

Political Representation

The 2009 study noted that there was no legal basis for affirmative measures to enhance women's political representation. The only provision that came close was in section 33 of the (old) constitution, concerning the procedure to be followed in filling up the twelve seats for nominated Members of Parliament. Under this provision, political parties made nominations according to their numerical strength in parliament. Section 33 urged (not compelled) the political parties to bear in mind the principle of gender equality, but there was no mechanism for verifying that their nominations reflected this at all, and no entity was charged with the responsibility of ensuring that the parties observed this provision.

The report also observed that although a presidential directive issued in 2007 required that at least 30% of all senior public service positions be held by women, the directive remained just that – a directive with no mechanism for implementation, and therefore no hook on which to hold government agencies to account for compliance.

The study also decried the absence of any mechanism for holding political parties to account for gender equality. We noted that the main political parties had pledged to institute quotas

for women in their nomination processes in the run-up to the 2007 election, but none of them lived up to this pledge, and there was no legal mechanism for requiring them to do so. The Political Parties Act of 2007, the first legal framework for the specific regulation of political parties, has little to say on the issue of gender-balanced representation. The only instance in which the Act requires gender balance is with respect to a party's national leadership, which must include one-third of either gender, before a party can qualify for registration. As it turns out, political parties have been allowed to register even without conforming to this provision.

The constitution of 2010 offers a lot more scope for promoting women's political representation. For starters, Article 27(8) elaborates on the equality provisions by requiring the state to enact laws and take other measures to implement the principle that not more than two-thirds of the membership of any elective or appointive body shall be made up of the same gender. Further, the chapter on 'Representation of the People' spells out the principles that the electoral system should comply with. Among these is the principle of gender equality: 'not more than two-thirds of the members of elective public bodies shall be of the same gender.' (Article 81(b)). In addition, as pointed out earlier, the constitution does provide a basis for the adoption of affirmative measures to achieve substantive equality (Article 27(6)), thus providing constitutional under-pinning for affirmative measures to remedy historical under-representation of women in political and other public bodies.

The constitution of 2010 makes special provision to guarantee gender-balanced representation in elective public bodies. The constitution directs parliament to enact legislation for the special representation of certain groups (Article 100): women, persons with disabilities, youth, ethnic and other minorities, and marginalized communities. With regard to women, in both the National Assembly and the Senate, a number of seats are set aside for women candidates - 47 in the National Assembly (Article 97(1)(b)), and 16 in the Senate (Article 98(1)(b)). The National Assembly seats are filled through elections at the county level, in which only female candidates may participate. The 16 Senate seats for women are filled through party-based nomination, according to the proportion of each party's elected membership in the Senate. Article 98(1) provides further room for gender balance in the filling of the seats set aside for youth, and for persons with disabilities. The two nominees representing each of these interests must consist of one man and one woman respectively.

The filling of the 12 slots for nominated members of the National Assembly also provide an opportunity to ensure gender balance. According to Article 97(1)(c), these seats are to be filled through political party nominations, in accordance with each party's numerical strength, to represent 'special interests including the youth, persons with disabilities and workers'. When read together with Article 90(1) and 90(2)(b) which require the use of party lists that alternate between male and female qualified candidates, greater possibilities are opened up for enhanced representation of women in the National Assembly, beyond the 47 seats set aside for elected women Members of Parliament.

Gender balance is also required in the county assemblies (Article 197).

Undoubtedly these provisions are to be celebrated as they represent the first time that Kenya has put in place any measures for special representation- of any group. However, the system chosen has its shortcomings, which we discussed extensively in the 2009 study, undertaken at a time when national debate on this issue was quite contentious. In that study we pointed out that research undertaken in the past had established that political representation of women was most effective in electoral systems based on Proportional Representation (as opposed to First Past the Post), and which also employed party-based quotas (as opposed to reservations). Kenya still retains the First Past the Post system, and has chosen to employ reservations rather than party-based quotas to boost women's political representation.

In the 2009 study we raised the specific issue of the method by which the reserved 'women only' seats would be filled, and the implications of such choice of method. Specifically, we were critical of the Uganda model whereby the 'women only' seats are filled through a special election based on an electoral unit different from (and larger than) that normally used to fill seats in the National Assembly. The 2010 constitution opts for precisely this model: whereas National Assembly seats are filled through constituency level elections, the seats set aside for women are filled through the larger county units. Three potential problems arise: first, the problem of conflicting mandates (i.e. between the female member whose mandate amalgamates several constituencies within the county, and the individual elected MPs representing constituencies within the county); second, the identity dilemma of the women elected will also arise: how are they to balance between being women's representatives and representing their county electorate? Third, it is quite predictable that with these reservations in place, political parties will become even more hostile toward women seeking party

nomination to compete in the ‘mainstream’ - and they will feel justified in this hostility. In strategizing on how to engage with the process of implementing the constitution for gender equality outcomes, it will also be necessary to anticipate these potential problems and craft measures to address them.

On the issue of gender balance in the senior public service, the constitution of 2010 follows up the principle that no gender shall account for more than two-thirds of the membership of a public body with specific provisions stipulating gender balance on specific constitutional bodies. Examples of constitutional bodies with respect to which gender-balanced representation is specifically stipulated include: the Parliamentary Service Commission (Article 127) and the Judicial Service Commission (Article 171). There is therefore an advance compared to the previous era that depended on a presidential directive.

The question of regulation of political parties still presents challenges and calls for further legislation to make political parties truly institutionalized, without which accountability (including accountability for gender equality) will remain elusive. The 2010 constitution indirectly admits that the Political Parties Act of 2007 is deficient, by directing parliament to enact legislation on political parties (Article 92). It also spells out basic requirements for political parties (Article 91), among them two related requirements that parties shall respect the right of all persons to participate in the political process ‘including minorities and marginalized groups’, and that political parties ‘promote human rights and fundamental freedoms, and gender equality and equity’. These constitutional requirements at least lay a foundation on the basis of which political parties may be held to account for the goal of promoting gender equality in the political process.

Family relations

We have already touched on family relations in the discussion above, concerning the personal law exemption clause that was contained in the former constitution. The 2009 study underlined that where the sphere of family relations is exempt from constitutional anti-discrimination scrutiny, it means that the principles of equality and non-discrimination are rendered irrelevant in a sphere that constitutes a major part of social life. Therefore the entire project of pursuing gender equality stands or falls depending on how the law treats the sphere of family in relation to the principle of equality. Arguably therefore, removal of the personal exemption clause (section 82(4)) has far reaching positive implications for the realization of

equality, as discussed above, but also for the realization of human rights, and women's human rights in particular, in the sphere of family relations. Kenya has officially abandoned the inauspicious club of independence-era sub-Saharan African constitutions that accord a 'supra-constitutional' status to customary law, such as Zimbabwe and Zambia. Just in case anyone was under any doubt that this was the intended effect of the 2010 Constitution, Article 2 on the supremacy of the constitution makes this absolutely clear by adding clause (4): 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency...'

Article 45(4) gives parliament the power to enact legislation that retains the recognition of "marriages concluded under any tradition, or system of religious, personal or family law" and non-statutory norms and institutions for regulating family relations. However, unlike the old constitution's Section 82(4), these non-statutory norms and institutions are only given recognition "to the extent that any such marriages or systems of law are consistent with this constitution."

This means that any application of such non-statutory norms and the operation of any institution under these systems must be consistent with the constitution, including the bill of rights with its strong provisions on equality and non-discrimination. Parliament cannot enact a law whose effect would be to exempt them from constitutional scrutiny. Article 45(4) is not a door to the return of Section 82(4). What we have ended up with is the South African model, which we argued for in the 2009 study. In South Africa's post-apartheid constitution, customary laws and the exercise of traditional authority are accorded constitutional recognition, but they are expressly subjected to scrutiny for compatibility with constitutional principles.

Also relevant to the issue of personal laws is Article 44 on language and culture. Article 44(3) provides: "A person shall not compel another person to perform, observe or undergo any cultural practice or rite." In view of the myriad rituals that wives and widows are subjected to in the name of culture, such as wife inheritance, this is a very significant provision. The 2010 constitution now provides a legal avenue for challenging these practices before the High Court (which is charged with the responsibility of enforcing the Bill of Rights), which would give any challenge symbolic profile. However, in order for the provision to have this effect, there must be high levels of awareness among those affected or

potentially affected by the practices in question, as well as social support networks to minimize the social cost and stigma that deter the seeking of constitutional protection.

Apart from the personal law exemption, the equality gaps with respect to family relations that we identified in the 2009 study related to:

- 1) Minimum age: there is a contradiction between the Children Act and marriage statutes on minimum age for marriage. Marriage statutes actually anticipate that there will be child marriages (by requiring consent of the guardian), while the Children Act outlaws child marriages.
- 2) Universal marriage registration: absence of a national marriage registration system, resulting in ambiguity as to legal status of the majority of unions, particularly customary ones for which no registration system is set up.
- 3) Precarious cohabitation: In the absence of a law legalizing all cohabitation unions that meet minimum requirements as to duration, women in cohabitation unions face the preliminary hurdle of proving marriage before they can seek court remedies, reinforcing their social and economic vulnerability.
- 4) Marital property: absence of firm principles to govern division of marital property, with contradictory judicial interpretations of the Married Women's Property Act of England (1882). For instance, four decades of court decisions have not established even the basic presumption of equal interest in the matrimonial *home* upon establishing a certain minimum duration of marriage.
- 5) Overt discrimination in the Law of Succession Act: there are two main problems relating to the Law of Succession Act (1981). The first one concerns the blanket exemption of pastoralist areas from the application of the Act, and the second concerns unequal treatment of widows and widowers: widows get only a life interest in their deceased husbands' property, which terminates upon remarriage, but widowers acquire an absolute interest that survives remarriage.

The constitution of 2010 addresses some of these gaps directly, while for others it simply creates the framework within which they might be addressed through further legislation.

The 2010 constitution devotes an entire article to family (Article 45). The article opens with a reproduction of language borrowed from Article 10 of the International Covenant on Economic, Social and Cultural Rights, and Article 23 of the International Covenant on Civil and Political Rights, that the family is the natural and fundamental unit of society and should therefore enjoy the recognition and protection of the state.

Article 45(2) then goes on to state: “Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.” The effect of this clause is to forbid:

- (a) Child marriage (‘every adult’);
- (b) Same-sex marriage (‘person of the opposite sex’); and
- (c) Forced marriage (‘free consent’).

The constitutional prohibition of child marriage and forced marriage lays a basis for resolving the contradiction between the Children Act and the various marriage statutes that anticipate marriage of persons below the age of 18 years. It also lays a basis for questioning the various customary and religious norms and practices that permit or tolerate child marriages and marriages by kidnapping. Both the marriage statutes and the non-statutory systems of marriage must now be brought into conformity with the constitution.

The question of a nation-wide system of registration of marriage to alleviate or put an end to the legal uncertainty that makes women’s rights within marriage that much more precarious has not been addressed directly in the 2010 constitution. Perhaps this is too detailed an issue to warrant a constitutional provision. However, vigilance will have to be exercised in ensuring that whatever law on family relations is enacted pursuant to the constitution, or whatever change is made in order to align current family law with the 2010 constitution, also provides for a system of registration of all marriages. The fact that the 2010 constitution mandates parliament to enact a law to give recognition to systems of marriage and family based on tradition or religion creates an avenue for requiring some form of documentation of marriages conducted under each of the systems so recognised, so that it is possible to ascertain the validity of such marriages.

Similarly, the issue of cohabitation is too detailed and specific to be included in a constitution, so the 2010 constitution does not address itself directly to it. The appropriate

point of engagement on this issue will be the enactment of the implementing legislation for Article 45(4).

Article 40 on the right to property has a bearing on the two remaining gaps identified by the 2009 study, namely the absence of clear legal principles on marital property, and overt discrimination against widows in the Law of Succession Act. Article 40(2) forbids parliament from enacting a law that permits the state 'or any person' to arbitrarily deprive a person of 'property of any description or of any interest in, or right over property of any description', or that restricts or limits a person's property rights on discriminatory grounds. Horizontal application of the prohibition of arbitrary deprivation of property is very significant in the fight against widow disinheritance by in-laws and the denial of spousal property rights upon dissolution of marriage, which tend to happen outside of any legal process.

With regard to property in land, the gaps in the Law of Succession Act will be addressed through legislation enacted to implement Article 68(c)(iv) of the 2010 constitution. That clause requires parliament to enact (within 18 months) legislation aimed at protecting the land interests of the dependants of a deceased person, including those of a spouse who is in actual occupation of the land (but may not necessarily have title to the land).

By requiring widows to give up their interest in their deceased husbands' property upon remarriage, without making such a requirement of widowers, the Law of Succession Act is engaging in overt discrimination and thereby arbitrarily depriving persons of their property rights on grounds of sex and marital status. This provision must therefore be repealed as it violates the 2010 constitution.

The issue of absence of clear legal principles on marital property is addressed directly in Article 68 (c) (iii) which falls within the chapter on land. Article 68(c) (iii) requires parliament to enact legislation 'to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on termination of marriage.' This provision can be read as giving further substance to Article 45(3), which guarantees parties to a marriage equal rights at the time of marriage, during the marriage and at the dissolution of the marriage. We argued in the 2009 study that the absence of minimum principles on marital property means that in any dispute, the field is tilted against the spouse whose name does not appear on the title document, which in most cases is the wife. This means that regardless of the duration of the marriage, this non-titled spouse must prove contribution, a task made more

difficult by a recent shift in the courts toward insistence on proof of monetary (not just in-kind) contribution. Arguably, failure by parliament to legislate for recognition of the legal concept of marital (or matrimonial) property makes it easy for women to be deprived of their right to property within marriage, which is in violation of Articles 40(2) and Article 45(3). The state should not be complicit in this deprivation of property and discriminatory treatment of one party to the marriage, and therefore enactment of a marital property law as required by Article 68(c) (iii) is of utmost importance.

The 2009 study discussed extensively a Matrimonial Property Bill drafted by the Kenya Law Reform Commission and tabled before cabinet for approval in 2009. This bill contains provisions that specify which property shall be termed 'marital property', and stipulate the minimum duration of marriage that will give rise to rights to such marital property. Enactment of a law on marital property should therefore move speedily and smoothly as the bulk of the work (namely drafting and public consultation) has already been done.

Similarly, the law anticipated under Article 45(4) giving recognition to traditional and religious systems of family law would also bring into scrutiny the practices of decision-making forums that decide marital property cases guided by the notion that wives are not entitled to any of the family property after dissolution of marriage. In some cases, these decisions are made in total disregard of evidence of contribution or even single-handed acquisition by wives.

Labour and Social Protection

Labour

The 2009 study observed that the area of labour relations is one in which significant strides had been made toward conformity with international standards, on account of the enactment of new legislation in 2007. For instance, the Employment Act of 2007 was ahead of the then constitution in its robust prohibition of discrimination. It had included grounds such as pregnancy, disability and HIV status at a time when the constitution did not list these. The constitution of 2010 has caught up with the new labour law in this respect.

The Employment Act was also ahead of the old constitution because it provided for affirmative measures 'consistent with the promotion of equality or the elimination of

discrimination in the workplace' (section 5(6)). On this aspect as well the constitution of 2010 has caught up with the Employment Act, since it provides for affirmative measures under Article 27(6).

The Employment Act of 2007 also embodies the principle of 'equal pay for work of equal value' (section 5(4)). This implements ILO Convention No.100 on Equal Remuneration of Men and Women Workers, which is significant in view of the 'gender wage gap'. Such a principle is central to realization of gender equality. The constitution of 2010 does not state this principle in these exact words. It provides (under Article 41(2)) for every worker's right to fair remuneration. When read together with Article 27(3), which calls for equal treatment of women and men, including equal opportunities in the economic sphere, the principle of equal pay for work of equal value is effectively incorporated.

Overall, the 2009 study concluded that with regard to labour law, the legislative framework instituted in 2007 has the potential to deliver on gender equality, but that the main point of weakness was the absence of provision for the necessary institutions, or the strengthening of existing institutions to ensure implementation.

The constitution of 2010 contains other provisions that are of great significance to the area of labour and social protection generally, and these are discussed below.

To start with, the constitution reproduces the classical protection against slavery, servitude and forced labour, found in both the International Covenant on Civil and Political Rights (Article 8), and the International Covenant on Economic, Social and Cultural Rights (Article 6).

The constitution then devotes an entire article (41) to labour relations. This article simply restates the gist of the Labour Relations Act of 2007- another indication that the labour law reforms of 2007 had got ahead of the constitution at the time. The article guarantees internationally recognized core labour rights, namely fair remuneration for every worker, reasonable working conditions, the right to form or join Trade Unions and the right to go on strike. It also guarantees employers the freedom to form or join employers' organizations, a right that is already contained in the Labour Relations Act of 2007.

Under the Bill of Rights the protection of the freedom of conscience specifically includes protection against denial of access to employment on grounds of one's belief or religion (Article 32(3)).

The 2010 constitution contains provisions that focus on specific social groups with respect to the issue of labour relations. Article 53 (on children) contains a clause (53(d)) that places an obligation on the state to protect children from hazardous or exploitative labour. Article 55 (on youth) places an obligation on the state to take affirmative measures to ensure that the youth access employment (55(c)). The state is also obligated to take affirmative action measures designed to ensure that minorities and marginalized groups are provided with special opportunities for access to employment (Article 56(c)). All these provisions have potentially positive implications for gender equality.

Social Protection

The 2009 study observed that Kenya lacks a legal framework on social protection. A social protection policy was only being drafted then (now adopted). What legal provisions exist are narrowly about 'social security' tied to salaried employment and contributions from self-employment, rather than comprehensive social protection. The study pointed out that due to the focus on salaried employment the majority of women are left out of social security arrangements, since women in Kenya are generally under-represented in the formal sector.

The 2010 constitution does not remedy the absence of legislation on comprehensive social protection. However, some aspects of it provide a road map: The 2010 constitution provides for various economic and social rights, the first time that this category of rights has been given recognition in Kenya. These are contained in Article 43. The constitution requires the state to enact laws and policies and take other measures, including the setting of standards in order to achieve 'progressive realization' of these economic and social rights (Article 21(2)). The 2010 constitution anticipates that in some cases the state might argue that it has not got enough resources to implement economic and social rights, and so it sets some guidelines on how this issue should be approached (Article 20(5)). This clause places the responsibility on the state to prove the unavailability of resources. It also requires the state, in performing its resource allocation role, to prioritize so as to permit the widest possible enjoyment of rights, paying attention to the vulnerability of particular groups or individuals.

Among the economic and social rights provided for is the right to social security (Article 43(1)(e)). Article 43(3) reinforces this general right to social security with an additional provision that places an obligation on the state to ‘provide appropriate social security to persons who are unable to support themselves and their dependants.’

The Article dealing with older members of societies (Article 57) addresses social security of this specific social group. Article 57(d) obligates the state to take measures to ensure rights of older persons to ‘reasonable care and assistance from the family and the state’. The reference to ‘family and the state’ implies that the state will do what is within its power to facilitate the family’s ability to deliver reasonable care to the elderly, but that in cases where a family is unable to do so, the state will fulfil this right to the maximum of its available resources, as anticipated in Article 20 (5) discussed above.

The road map provided by the 2010 constitution will need to be elaborated further in legislation, implementation of the policy, and the necessary budgetary allocations to make social protection a reality, starting with provision for the most vulnerable.

Gender-Based Violence

The 2009 study dealt with gender-based violence under two heads, namely sexual violence and other forms of violence. The review included analysis of several relevant statutes which included the Sexual Offences Act 2006, the HIV/AIDS Control and Prevention Act 2006, penal provisions of the Children’s Act 2001, and the Domestic Violence Bill 2007. The review noted the prevalence of gender-based violence in Kenya which takes many forms, such as sexual, physical, emotional and is particularly rife in the domestic arena where it is often perpetrated by intimate partners. It was also found that the existing legal and institutional measures were inadequate to deal with gender based violence. Notwithstanding the passing of some important pieces of legislation, such as the Sexual Offences Act² in 2006 and the Witness Protection Act,³ the study noted that there are still large gaps that require to be addressed, the key ones being:

² No. 10 of 2006.

³ No. of ...

- i) Non-recognition of marital rape in the Sexual Offences Act,⁴ which amounts to discrimination against married people, particularly wives who are disproportionately the victims of sexual violence.
- ii) Discriminatory provisions of section 38 of the Sexual Offences Act relating to prosecuting or instituting false charges under which any person who makes false charges under the Act will be subjected to a penalty equivalent to the sentence that attaches to the offence complained of.
- iii) Lack of provisions in the Sexual Offences Act for civil compensation for victims of sexual offences.
- iv) Lack of gender specific domestic violence provisions in the penal laws. The Penal Code⁵ has only generalised offences related to assault, murder and manslaughter. These are grossly inadequate to deal with domestic violence.
- v) Lack of remedies tailored toward addressing domestic violence, such as protection orders.

The former Constitution provided for the protection of the right to dignity of the person and freedom from inhuman and degrading treatment. It also provided for enjoyment of fundamental rights without discrimination on the basis of sex, among other grounds.⁶ Those provisions could theoretically have been used as a basis for articulating claims by women and girls against gender based violence. However, the potential impact of those provisions was negated by section 82 (4) (c) and (d) which exempted personal laws from the purview of non-discrimination protections, as discussed above.

The new Constitution in Chapter 4 on the Bill of Rights has much more amplified provisions relating to fundamental rights and freedoms. Apart from recognition of general principles related to respect for human rights, gender equality, non-discrimination,⁷ there are also some more specific rights relevant to the issue of gender based violence. For instance, it is notable

⁴ See section 43 (5).

⁵ Cap. 63.

⁶ Section 82 (1)

⁷ See sections

that that the freedom from torture and cruel, inhuman or degrading treatment or punishment provided in Article 25 (a) is not subject to any limitation. This means that no law or policy can operate to derogate from this right. Article 28 recognizes the inherent dignity of every person and the right to have that dignity respected and protected. Article 29 provides for the right to freedom and security of the person, which includes the right not to be subjected to any form of violence from either public or private sources, to torture in any manner, whether physical or psychological, or to corporal punishment, or to be treated or punished in a cruel, inhuman or degrading manner.⁸

The discriminatory provision of Section 38 of the Sexual Offences Act as well as the exclusion of criminalisation marital rape in the same Act may now be more easily challenged under the equality and non-discrimination clauses of the new Constitution. In the case of the latter, the Constitution clearly outlaws discrimination on the ground of marital status.

It should also be noted that in Article 2, which deals with supremacy of the Constitution, it is explicitly stated that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any action or omission in contravention of the Constitution is invalid. This section clearly subordinates customary law to the Constitution and removes the ambivalence in the former Constitution with regard to customary and religious laws in the realm of personal law. It will now not therefore be possible to defend gender based or other forms of discrimination on the basis that they are permissible under the Constitution. Hence customary practices such as spousal beating (“chastisement”), female genital surgeries and widow inheritance may be challenged on constitutional grounds. Other relevant constitutional provisions relate to the right of access to information granted by Article 35 under which every citizen has the right of access to information held by the State and information held by another person which is required for the exercise or protection of a right or fundamental freedom. This would lay a constitutional basis for demanding access to information which under the Sexual Offences Act is required

⁸ Article 29 (c) – (f) inclusive.

to be maintained such as a register of sexual offenders. Such access would serve to enhance the protection of women victims of sexual offences.

Article 21 (3) provides for the recognition of women as a category of vulnerable groups while Article 50 (9) requires Parliament to enact legislation providing for the protection, rights and welfare of victims. This lays a firm basis for women to demand the passing of regulations relating to victim impact statements as provided by the Sexual Offences Act.

Criminal Laws and Procedures

Criminal law and procedure is a very broadly defined area, and therefore the 2009 study organized the discussion through an issue-based or thematic approach as follows:

- Lack of accountability;
- Under-representation of women in the police force;
- Criminalization of feminised poverty;
- Alternatives to incarceration;
- Barriers to women's access to criminal justice.

Kenya's criminal laws and procedures are not rights-based but have an overwhelming "law and order" orientation. There is a narrow conception of criminal justice, where a crime is treated as simply a violation of a legalized social norm that carries a penal sanction without consideration of the underlying social context and power relations. Hence the bulk of criminal law is gender blind and there is no attempt at gender mainstreaming of the criminal process. Further, the criminal justice system in Kenya is characterized by high levels of discretion vested in police officers and other law enforcement agents, with no effective mechanisms for holding Kenyan law enforcement agencies accountable hence creating room for abuse of power. Women also suffer from gross underrepresentation in the police force and other law enforcement agencies. Women have generally been excluded from the main policy and decision-making institutions and forums, which has meant that women's needs and interests have not featured in policies governing the police force. In the Kenyan context the criminalisation of feminised poverty is manifested in the use of the criminal justice

system to punish such offences as prostitution, petty theft, and the brewing of *chang'aa* or traditional liquor whose underlying cause of many of these crimes is poverty. In addition, Kenyan penal statutes are overwhelmingly skewed in favour of imprisonment (or fines in the alternative) punishment for criminal offences and little room is left for non-custodial forms of punishment, which has negative implications for women, particularly in view of their role as primary care givers and, increasingly, as sole breadwinners. Further, the right to legal aid was expressly excluded by the former Constitution.

Thus, the 2009 study listed the following as the key gaps in this area of law:

- i) Discretion given to police force and other law enforcement agencies is too wide. There are inadequate accountability mechanisms.
- ii) Under representation of women in police force and other law enforcement agencies. Likely to persist in view of increasing militarization, even of auxiliary services such as the Kenya Wildlife Service and the newly created Kenya Forests Service.
- iii) The Penal Code's handling of prostitution and of the category of 'non-cognizable' offences amounts to criminalisation of feminized poverty. It does not reflect equal protection before the law.
- iv) Over-reliance on imprisonment and fines as punishment. No requirement on magistrates to apply non-custodial sentencing.
- v) Unwelcoming, and sometimes openly hostile attitude of the police towards women, especially victims of gender-based crime or crimes of a sexual nature.
- vi) Lack of an effective national state-funded legal aid scheme, yet Section 77 of the former Constitution expressly excluded legal aid as a component of the right to a fair trial.

We discuss below the extent to which the 2010 Constitution addresses each of these gaps:

1. Abuse of discretion and power by the police force

Article 238 (2) sets out principles in accordance to which national security in Kenya shall be promoted and guaranteed. One of the principles, among others, is that national security shall

be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.⁹ This principle can be used as a basis for holding the police accountable to citizens so as to ensure that the police are respectful of human rights and freedoms while carrying out their duties.

Further, Article 244 sets out the objects and functions of the National Police Service. It stipulates that the National Police Service shall strive for the highest standards of professionalism and discipline among its members; prevent corruption and promote and practice transparency and accountability; comply with constitutional standards of human rights and fundamental freedoms; train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and foster and promote relationships with the broader society. These are laudable objects and provide the basis for restructuring the police force with a different orientation. The latter object is particularly significant in view of current hostile interactions of the police with the public and public perceptions of police.

However, an important omission is that there is no provision in the Constitution for any specific mechanisms for oversight of the police to ensure that police service functions in accordance with its objects and the police force and other security agencies are kept in check.. This would be important in order to tame rampant corruption, misuse of power and discretion, e.g. powers of arrest, seizure etc. Although the Constitution in Article 240 establishes the National Security Council which is mandated to exercise supervisory control over national security organs,¹⁰ this supervisory function does not seem to include oversight of security organs to ensure that they are operating in a manner that gives effect to the principles stated in Article 238. The Council's functions are more concerned with efficiency and coordinated effort rather than with ensuring proper use of power.¹¹ It should be noted that the composition of the Council is entirely made up of high ranking government

⁹ Article 238 (2) (b).

¹⁰ Article 240 (3).

¹¹ See Article 240 (6) which stipulates that the Council shall (a) integrate the domestic, foreign and military policies relating to national security in order to enable the national security organs to co-operate and function effectively; and

(b) assess and appraise the objectives, commitments and risks to the Republic in respect of actual and potential national security capabilities.

officials.¹² There is no representation by persons outside government and neither is there any specific requirement for gender representation, although gender balance could be justified on the basis of the principle in Article 27(8), namely that membership of any public body should not comprise of more than two-thirds of members of the same gender. Further the Council only covers the defence forces, national intelligence services and national police force but not the auxiliary security forces, such as the Kenya Wildlife Services and Forest Service. This omission is regrettable in view of the increasing militarisation of these auxiliary forces.

There is some limited measure of accountability to the citizenry through the requirement, under Article 240 (7), that the Council should report annually to Parliament on the state of the security of Kenya.

ii) Underrepresentation of women in the police force and other national security organs

The Constitution does not have explicit provisions to deal with this issue. Art 238 (d), one of the principles of national security is that recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions. While there is no mention of gender representation, the term “diversity” could be more broadly interpreted to mean gender diversity, among others. This could form the basis of claims for more equitable women’s representation in the force, particularly in decision making positions.

iii) Criminalisation of feminised poverty

The Constitution does not have any specific provisions dealing with this issue. However, the more general provisions dealing with equality before the law and the right to equal protection and benefit of the law, as well as those dealing with equal rights of men and women could possibly be used to challenge penal provisions that are overtly discriminatory and have the effect of criminalising poverty among women, with a view to repeal of such provisions.

¹² See list set out in Article 240 (1) comprises the President, the Deputy President, the Cabinet Secretaries responsible for defence, foreign affairs and internal security, the Attorney-General, the Chief of Kenya Defence Forces, the Director-General of the National Intelligence Service and the Inspector-General of the National Police Service.

iv) Over-reliance on imprisonment and fines as punishment

There are no specific provisions dealing with this. The more general provisions relating to access to justice and recognition of the values of human dignity may possibly, though rather tenuously, provide some basis for demanding change in the general orientation of penal sanctions. The new Constitution also contains provisions relating to the promotion of use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms may open the way for developing other less punitive and more restorative forms of justice.

v) Unfriendly and hostile attitude of police to women, especially victims of gender-based crime or crimes of a sexual nature.

As already mentioned, under the new Constitution, the objects of the National Police Service include, among others, compliance with constitutional standards of human rights and fundamental freedoms; training of staff to the highest possible standards of competence and integrity, respect for human rights and fundamental freedoms and dignity, and fostering and promoting relationships with the broader society. The latter object is particularly significant in view of current hostile interactions of the police with the public and negative public perceptions of the police. These objectives provide a basis for training and sensitisation of the police on gender issues and instituting measures to ensure that women, particularly victims of gender based or sexual crimes, are treated with dignity and with the highest levels of professionalism and competence.

vi) Lack of an effective national state-funded legal aid scheme

While the former Constitution contained comprehensive provisions relating to protection of the law and the right to a fair trial, including the right to a fair hearing within a reasonable time by an independent and impartial court established by law, it expressly excluded the right to public legal aid as a component of the right to a fair trial.

The new Constitution provides for access to justice by stating that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not

impede access to justice.¹³ However, this provision does not articulate the means by which such access to justice shall be procured. Under Article 50 (h), the right to a fair trial includes the right to have an advocate assigned to an accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right. This provision, while falling short of granting a general right to State funded legal aid, does contain the seeds for a limited right to such aid at least in criminal cases where a window is opened for an accused to make a claim for a State funded advocate if the accused can show that substantial injustice would otherwise result. This will have far-reaching implications for access to justice among Kenyans, including women.

Civil Justice and Alternative Dispute Resolution

The justice system in Kenya often fails to play its umpire role effectively. In several ways it embodies bias against women or fails to take gender into account, resulting in lack of protection for women from the arbitrary use of public and private power. Women in Kenya face many difficulties in the formal justice system (comprising state courts and tribunals) due to the problems of access to justice previously identified in the 2009 study, namely limited geographical access, financial cost, social cost and inapproachability of the institutions in question. In addition the inefficiency and corruption endemic in the court system often leads to delays and denial of justice (Government of Kenya 1998). Court procedures are complex and incomprehensible and the court environment is often intimidating. Cultural attitudes towards women surface in the formal justice system, especially in cases related to personal law matters such as marriage, divorce and inheritance. There is little investment in legal aid or gender sensitive court processes.

The 2009 study identified the following specific gaps:

- i) High financial and social costs, and limited geographical access
- ii) Complex and expensive court procedures
- iii) Lack of legal awareness
- iv) Complexity and formality of arbitration procedures

¹³ Article 48.

v) No legislative framework for mediation

The new Constitution contains comprehensive provisions related to access to justice. First, it provides for the right to equality before the law and to equal protection and equal benefit of the law.¹⁴ Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. There are also more specific provisions regarding administration of justice which are relevance to the issue of access to justice.

For example, Article 159 sets out some guiding principles for courts and tribunals to use in their exercise of judicial authority. One of these is that justice shall be done to all, irrespective of status. This could be interpreted to include social status, and would therefore encompass the social status ascribed to women. Other principles are justice shall not be delayed, and justice shall be administered without undue regard to procedural technicalities, and that the purpose and principles of the Constitution shall be protected and promoted.¹⁵ This principle has important implications for the administration and delivery of justice as delay has been in completion of cases has been one of the main barriers to access to justice.

Under Article 172, one of the main functions of the Judicial Service Commission is to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. To this end the Commission is mandated to, among others, prepare and implement programmes for the continuing education and training of judges and judicial officers and to advise the national government on improving the efficiency of the administration of justice. Continuing judicial education and training is important for women's access to justice as a more informed judiciary is more likely to make fair decisions. Further, it will be possible to incorporate training on gender equality as part of the judicial education and training programme. In the performance of its functions, the Commission is to be guided by two principles, namely, competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality. The latter can be interpreted to cover gender equality in terms

¹⁴ Article 27 (1).

¹⁵ Article 159 (a) – (e) inclusive.

of women's representation in the judiciary and also in terms of judicial outcomes that promote gender equality.

An important innovation in the new Constitution is the recognition of alternative forms of dispute resolution. One of the principles set out in Article 159 provides for the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Use of traditional dispute resolution mechanisms is, however, subject to clause (3) which expressly states that traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality, or is inconsistent with the Constitution or any written law.¹⁶ These limitations on the use of traditional dispute resolution mechanisms are important for women, as women often face discrimination and marginalisation in traditional dispute resolution forums. These provisions remove the ambivalence previously created by section 82 (4) of the former Constitution which allowed for discrimination in customary law matters in the family realm.

Article 50 provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Further, in Article 60 communities are encouraged to settle land disputes through recognised local community initiatives consistent with this Constitution. These provisions are further indications of the recognition of forms of dispute resolution that are outside the conventional litigation model.

By virtue of Article 22 which deals with enforcement of the Bill of Rights, the hitherto strict rules of legal standing (*locus standi*) have been considerably relaxed, with wider rules of representation, removal of court fees and a reduction of technicality of the proceedings. The effect is to open up access to the court and to make it possible for any person to enforce their constitutional rights under the Bill of Rights. This is of major significance for women as they

¹⁶ The latter provisos replicate the wording in Article 3 (2) of the Judicature Act.

have in the past been faced with stiff hurdles in enforcement of their rights under the Constitution.

Article 47 provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, where a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Parliament is mandated to enact legislation to give effect to these rights. Such legislation shall provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal and shall promote efficient administration. This provision hence requires fair and expeditious action from all administrative officials or institutions, which would include those at the local level such as chiefs, DOs and DCs, Land Control Boards. This is important to women, particularly those in rural areas, whose main interaction with officials is at the local level, and who are often negatively impacted by the decisions of such officials. The provisions also provide an important linkage between formal courts and the more informal local administrative structures.

All the above provisions have important implications for enhancement of access to justice for the following reasons:

1. They lay the foundation for the establishment of less formalistic, complex and technical forums for dispute resolution, such as small claims courts.
2. The recognition of non-formal and traditional dispute resolution mechanisms would improve access to justice as they are less costly, speedier, more decentralised. The constitutional limitations on the use of these forums provide safeguards against gender discrimination.
3. There is now a constitutional basis for alternative dispute resolution (ADR) processes such as mediation, conciliation and arbitration. This provides more avenues for resolution of disputes beyond the conventional litigation model. This is important in view of the general recognition that some ADR mechanisms such as mediation are more suitable for matters where the parties have a continuing relationship, e.g. family law matters.

4. The provisions provide a basis for claims for efficiency and fairness in the administration of justice, and improved access to justice in general..
5. They provide a basis for demands for fair and efficient administrative action.

Laws Relating to Financial Services, Business Registration and Licensing

Women experience considerable barriers in accessing financial services mainly due to poverty, lack of know-how and a legal and institutional environment that is not conducive to women entrepreneurs. The regulation relating to registration and licensing of business is saddled with bottlenecks which add to the cost and time of procuring licences. In the case of registration of business names, the rules regulating such registration are overtly discriminatory to married women.

The 2009 study identified the following key gaps in this area of law:

- Lack of harmonized legal framework for securing non-land assets
- Lack of effective credit referencing system
- Weak accountability and doubtful sustainability of Women's Enterprise Fund.
- Lack of women's participation and representation in decision making and regulatory bodies
- Over-centralization of business and company registration in Nairobi
- Complexity, rigidity and high costs of registration process; onerous regulatory requirements for small companies
- Discrimination against married women by requiring them to indicate marital status and give name of husband on business registration forms
- Advocates' monopoly on company registration
- Multiplicity of mandatory business licenses; onerous and costly requirements for annual renewal of licenses

To what extent, if at all, does the 2010 Constitution address these gaps?

The former Kenya Constitution did not have any provisions for protecting social and economic rights. The only exception was the protection of the right to own property (section

75). The new Constitution provides for some social and economic rights under Article 43, namely the right to health, housing, food, clean water, social security and education.

However, there are no direct provisions in the new Constitution on women's access to financial services. This falls short of the requirements of CEDAW and the African Protocol on Women's Rights which contain specific provisions for rights of women to access credit.¹⁷ Nevertheless, the Constitution does contain some broad provisions relating to equality of opportunities, right to participation and representation and to decentralized services. These provisions are relevant to the issue of women's access to financial services. Article 27 (3) provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. In order to give full effect to the realisation of the rights guaranteed under this Article, the State is required to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.¹⁸ Any such measures should make it clear that any benefits are to be on the basis of genuine need. This would cover women who are economically marginalised, especially from rural areas. The affirmative action provisions are significant as they can be used as a basis for claims by women for the State to institute programmes and policies to address their economic marginalisation, including favourable credit opportunities. Hence, this provides a constitutional basis for proper institutionalisation and accountability of such initiatives as the Women's Enterprise Fund.

In addition to affirmative measures, the State is required to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Implementation of this provision would ensure more equitable representation of women in key decision making forums related to finance, thus enhancing women's participation as decision makers and in turn ensuring that women's interest are more adequately taken into account.

¹⁷ See Article 15 of CEDAW and Article 19 of the African Protocol.

¹⁸ Article 27 (6).

It should also be noted that one of the functions of the Kenya National Human Rights and Equality Commission, established under Article 59, is to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development. This also provides the impetus for development of policies that are favourable to women, including in the financial services sector.

The Constitution contains provisions related to devolution of government which are of some relevance to the issue of women's access to financial services. Among the objects of devolution set out in Article 174 the following are pertinent: to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; (d) to recognise the right of communities to manage their own affairs and to further their development; (e) to protect and promote the interests and rights of minorities and marginalised communities; (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; (g) to ensure equitable sharing of national and local resources throughout Kenya; (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.¹⁹ Decentralisation of services would have the effect of bringing services and institutions closer to the people and would thus reduce the time, expense and inconvenience currently experienced by women.

Further, under Article 175 county governments established under the Constitution should reflect the principle that such governments shall be based on democratic principles and the separation of powers and that (c) no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. This provision is important as it will ensure that women are more equitably represented in governance bodies, including those that make decisions regarding access to financial services and business regulation. This is especially pertinent as it is very likely that county governments will be responsible for licensing of businesses. The women representatives in these bodies would thus have the

¹⁹ Clauses (c) - (h) inclusive.

opportunity to articulate women's interests in ensuring a more conducive environment for women entrepreneurs in Kenya.

Under Article 227 (1) relating to procurement of goods and services by a State organ or any other public entity contracts for goods or services, there is a requirement that such procurement must be done in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Further, An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for categories of preference in the allocation of contracts and the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination. This provision is relevant for women as it lays the basis for procurement policies that are fair and equitable, hence giving women better chances to participate and benefit from procurement opportunities.

Property, Environment and Natural Resources

The 2009 study had identified the following as the key gaps in this area of law:

- Outright discrimination against married women in section 29 of the Transfer of Property Act, which limits rights of individual ownership of land.
- Interests in land for most women are unregistered and therefore vulnerable in the face of dominant judicial pronouncements that such interests are extinguished by registration. Interests of wives also socially precarious as they are derivative of husbands' rights.
- Land rights of women in pastoralist communities are little understood, and therefore the impact of contemporary changes remains unassessed, and therefore there are no policy responses to address possible adverse consequences.
- Gross under-representation of women on decision-making bodies dealing with land and natural resources.

In the area of property, environment and natural resources, new developments have been brought about by the adoption of a National Land Policy, in addition to the enactment of a new constitution. Therefore this discussion will also refer to changes relevant to gender

equality brought about by the National Land Policy. There are provisions in the 2010 Constitution that are generally facilitative of gender equality in this area. In the preamble to the Constitution, ‘the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law’ is underscored. This provides the context for gender equality and the respect for the rights of all Kenyans. With respect to the environment, the preamble also underlines the need to be ‘respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations’.

Property (Primarily Land)

Gender-neutral laws on property ownership have not resulted in more women owning land or other forms of property because of structural barriers such as access to credit and general lack of resources to purchase land. Women are under-represented in institutions that deal with land, their rights under communal ownerships and group ranches are not defined and this allows men to dispose of family land freely. Few have land registered in their names and lack of financial resources restricts them from entering the land market. Advocates of gender equality have been of the view that to deal with male dominance in land matters, law should explicitly provide for women’s rights to own land and go further to provide for ways of assisting women to raise capital to purchase land and other property. In matrimonial contexts, women have argued for a presumption of spousal co-ownership of matrimonial property and specific provisions protecting spouses from sale of jointly occupied land without their knowledge and consent and protecting women’s interests in the allocation of land. Women have also demanded that laws regulating the registration of land and other property rights should be amended with a view to simplifying the procedures and making them more accessible to women.

The Constitution of Kenya deals with land in Chapter 5. It states land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles of land policy:

- (a) Equitable access to land;
- (b) Security of land rights;

- (c) Sustainable and productive management of land resources;
- (d) Transparent and cost effective administration of land;
- (e) Sound conservation and protection of ecologically sensitive areas;
- (f) Elimination of gender discrimination in law, customs and practices related to land and property in land; and
- (g) Encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.²⁰

These principles provide a crucial anchorage for gender equality. There is explicit mention of ‘elimination of gender discrimination ...’ which provides an important entry point for engendering land reform. The resolution of land disputes through local community initiatives is important as it makes justice accessible. It however needs to guard against gender and generational exclusion.

The Constitution links these principles to the National Land Policy by providing that the principles shall be implemented through a national land policy developed and reviewed regularly by the national government.²¹ Under article 61, it is provided that all land in Kenya belongs to the people of Kenya as a nation, as communities and as individuals. The protection of private land and community land within a context where gender equality is a guiding principle is welcome. There is need to ensure that gender considerations inform land reform particularly as regards community land where women’s rights may not be realised unless specific measures are taken to target them.

As discussed under the family relations section above, the new constitution specifically provides at Article 68 (c) (iii) for the enactment of laws recognizing and protecting the matrimonial property especially the matrimonial home. This is in response to women’s pleas that their interest in the matrimonial home be secured from abuse by spouses who may be the title holders. Article 68 (c) (vi) also provides for the protection of dependants in actual occupation of land in the event of the death of the owner of land. This protects widows and their children with un-registered interests in land from eviction from their homes, as happens

²⁰ Article 60(1)

²¹ Article 60(2)

in some cases, and has become more common where the deceased succumbs to HIV and AIDS related ailments.

The principle of at least a third representation of women in elective and appointive bodies will facilitate women's representation in land administration bodies from the National Land Commission to the county and lower levels of land administration.

The National Land Policy was drafted in anticipation of a new constitutional dispensation and it identified the need for constitutional provisions on equitable access to land and the protection of human rights for all, especially women, minorities and children in matters of access to and ownership of land. For this reason, we discuss the policy below.

The National Land Policy

The need for a holistic land policy reform process has been felt in Kenya for a long time. And it is gratifying to note that the national land policy formulation process started in 2004 was successfully completed in 2009. Among the guiding principles in the policy formulation process were: participation; inclusion; and gender sensitivity. These provided a basis for bringing on board provisions on gender equity in land ownership and use. Some of the facilitative Policy provisions are:

- Land policy principles on equitable access to land for subsistence, commercial productivity and settlement; intra- and inter- generational equity; gender equality; secure land rights; Effective regulation of land development; Sustainable land use; Access to land information; Efficient land management; Vibrant land markets; and Transparent and democratic administration of land. (Part 1.5.1). Among the policy's guiding values are participation, gender sensitivity, inclusion and transparent and good democratic governance of land (Part 1.5.2);
- Protection of human rights for all Kenyans and specifically protection against laws, customs and practices that discriminate against women (Paragraph 39 h);
- The recognition, protection and registration of community rights to land and land based resources taking into account multiple interests of all land users, including women Paragraph 66 d i);
- Ensuring that the rights of women in pastoral areas are recognized and protected (Paragraph 183 e);

- Putting in place appropriate legislation to ensure effective protection of women's rights to land and related resources (Paragraph 223 a);
- Repealing existing laws and outlawing regulations, customs and practices that discriminate against women in relation to land (Paragraph 223 b);
- Enforcing existing laws and establishing a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources (Paragraph 223 c);
- Making provision for joint spousal registration and documentation of land rights, and for joint spousal consent to land disposals, applicable for all forms of tenure (Paragraph 223 d);
- Securing inheritance rights of unmarried daughters in line with the practices of the respective communities (Paragraph 223 e);
- Facilitating public awareness campaigns on the need to write wills to protect dependants in the event of death (Paragraph 223 f);
- Carrying out public education campaigns to encourage the abandonment of cultural practices that bar women from inheriting family land (Paragraph 223 g); and
- Ensuring proportionate representation of women in institutions dealing with land at all levels (Paragraph 223 h).

The policy identifies the land rights of women as requiring special intervention ((Paragraph 171) and also points out the difficulties HIV and AIDS places on women (Paragraph 213), proposing that the principle of non-discrimination be adhered to and enforced to ensure that these cross-cutting issues are adequately dealt with.

On Matrimonial Property, the Policy proposes the following measures to secure the rights of spouses:

- Review of succession, matrimonial property and other related laws to ensure that they conform to the principle of gender equity (Paragraph 225 a);
- Enactment of specific legislation governing division of matrimonial property to replace the Married Women's Property Act of 1882 of England (Paragraph 225 b);

- Protection of the rights of widows, widowers and divorcees through the enactment of a law on co-ownership of matrimonial property (Paragraph 225 c);
- Appropriate legal measures to ensure that men and women are entitled to equal rights to land and land-based resources during marriage, upon dissolution of marriage and after the death of the spouse(Paragraph 225 d); and
- Mechanisms to curb selling and mortgaging of family land without the involvement of the spouses (Paragraph 225 e).

These provisions are fortified by Article 45 (3) of the Constitution, discussed under the family relations section above, which provides that ‘Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage’.

Under the Fifth Schedule in the new Constitution, a list of the laws required to operationalize the provisions of Chapter Five on land and environment is provided with a time-frame given for the promulgation of each of these laws or effecting of changes to existing laws. The laws are required to be passed in a period ranging from 18 months to five years.²²

Natural Resources and Environment

With regard to natural resources, the provisions are still largely gender neutral. However there are provisions that provide anchorage for engendering natural resource management. These include Article 42 which provides for the right to a clean and healthy environment to be protected for the benefit of present and future generations. Article 43 (1) (b) and (d) provide for the right of every person ‘to accessible and adequate housing, and to reasonable standards of sanitation’ and to ‘clean and safe water in adequate quantities’ respectively. The principle of equality, including gender equality that undergirds the constitutional provisions

²² Legislation on land (Article 68) is required to be in place within eighteen months of the promulgation of the

Constitution while that on community land (Article 63) and regulation of land use and property (Article 66) is required to be in place in five years; Legislation relating to natural resources (Article 71) is required to be in place in five years; Legislation regarding the environment to be in place in four years; and Legislation providing for devolved government is required to be in place within a time frame of between one and three years.

should be read into Article 69 of the Constitution dealing with the environment. More specifically:

- ensuring ‘sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits’ (Article 69 (1) (a);
- protecting and enhancing ‘intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities’ (Article 69 (1) (c);
- encouraging ‘public participation in the management, protection and conservation of the environment’ (Article 69 (1) (d);
- establishing ‘systems of environmental impact assessment, environmental audit and monitoring of the environment’ (Article 69 (1) (f);
- eliminating ‘processes and activities that are likely to endanger the environment’(Article 69 (1) (g); and
- utilization of ‘the environment and natural resources for the benefit of the people of Kenya’(Article 69 (1) (h).

Health-related Laws

The key gaps identified in the 2009 study in relation to health were:

- Absence of constitutional recognition of the right to health.
- HIV and AIDS (Prevention and Control) Act potentially protects women from wilful and reckless infection by sexual partners. However, the marital rape exemption in the Sexual Offences Act (see section on gender-based violence above) greatly undermines this protection.
- The law takes a penal approach to abortion regardless of circumstances, except in very narrow situations. This drives up deaths and health complications from unsafe abortions.
- Barriers to access to health care, primarily financial cost. Women’s poor access is compounded by inadequate public funding of sexual and reproductive health care.

The 2010 Constitution has addressed only some of these gaps. We now have recognition of the right to health, including right to reproductive health care. Article 43 (1) (a) provides that ‘Every person has the right to the enjoyment of the highest attainable standard of health, which includes the right to health care services including reproductive health care’. It also recognizes and guarantees other specific rights related to health and access to health care. These include: right to life (Article 26), right to education (Article 43 (1) (f), access to information (Article 35), human dignity (Article 28), equality and freedom from discrimination on the basis of among other things, health status (Article 27), freedom and security of the person (Article 29), and privacy (Article 31) particularly with regard to information and communications which could include health records. Under Article 45 (2), the Constitution provides that a person shall not be denied emergency medical treatment.

While the marital rape exemption has not been addressed, important ground has been covered with respect to HIV/AIDS. Discrimination on the ground of health status is now expressly forbidden under Article 27. The provision that a person shall not be denied emergency medical treatment also has relevance for protection of HIV infected persons.

The penal approach to abortion regardless of circumstances appears set to remain in place. In the run up to the referendum, sexual and reproductive health related rights provided for in the Constitution were some of the most contentious issues. The provisions relating to the right to life even prompted certain interest groups such as sections of the Christian Church to oppose the constitution and urge their faithful to follow suit. They claimed that the Constitution did not contain any meaningful restrictions on abortion, despite legal recognition of the overtly Christian moral principle that life begins at conception (Article 26 (2)).

The right to life is provided for in Article 26 (1). Abortion is prohibited under Article 26 (4) “unless in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger or if permitted by any other written law.”

This clause, in the opinion of those who campaigned against the Constitution, allows for abortion on demand. They were particularly aggrieved by the responsibility given to the trained health professional and argued that this can be virtually any person. It is likely that the implementation of the Constitution on this particular issue will raise contentions because the

church continues to agitate, albeit from the sidelines, for the amendment of the clause to expunge Article 26 (4) on permissible abortion. If no new legislation is implemented, then the largely penal approach will remain, with the narrow exception provided for under section 240 of the Penal Code, which permits termination of pregnancy on medical grounds to save the life of the mother.

The issue of prohibitive cost which deters women from seeking health care, and the lack of investment in reproductive health care are not issues that the constitution can settle with finality. However, the general provisions on economic and social rights (Article 43), and the provisions requiring that state allocation of resources must reflect the goal of seeking the widest possible enjoyment of rights, paying attention to the particular vulnerabilities of marginalized groups gives a broad framework within which to bargain for greater investment to facilitate women's access to health care.

Conclusion

It is truly remarkable that in all of the ten areas that we reviewed in the 2009 study, the Constitution of 2010 has enabled very significant progress in the realization of gender equality. Even where the Constitution does not directly address the specific issues, as with the issue of access to financial services, the clear elaboration of crucial principles such as equality and non-discrimination, the supremacy of the constitution, participation and accountability provides solid anchorage upon which very specific struggles for gender equality may be based. Women and proponents of gender equality have reaped many gains from the constitutional review process. The next stage of the struggle is even more crucial- the implementation agenda. This calls for very strategic engagement of a proactive nature, so as to secure all of the gains made. That is why this audit will be followed by a detailed program of action for engagement in the constitutional implementation process to secure gender equality.