

**GENDER AUDIT OF THE HARMONIZED DRAFT CONSTITUTION OF
KENYA**

(LEGAL AND GENDER PERSPECTIVE)

PRESENTED TO RECESSPA

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A. INTRODUCTION

A Constitution is conventionally viewed as the document that embodies the social contract between the State and its Citizens, setting out the structure and organization of the State and spelling out the rights and duties to the Citizens and corresponding duties to the State.

The Constitution captures the aspirations of the people and their core social values. It outlines how different groups are to be represented at national and regional levels and provides managerial mechanisms for the distribution of resources, ownership of property and protection of the rights of individuals and communities.

This audit highlights the deficiencies of the current Kenyan Constitution and gives an assessment of the extent to which those inadequacies have been addressed by the Harmonized Draft Constitution of Kenya hereinafter referred to as “the Harmonized Draft”.¹

Women as a special interest group have historically been victims of social, economic cultural and political discrimination hence the justification for this audit.²

Ideally women as full citizens should expect that their rights will be realized as part of the social contract between the State and its Citizens. The framework for this contract is the constitution under which all

¹ See generally Musembi C. N. & Others Promoting the Human Rights of Women in Kenya : a comprehensive review of domestic laws).

² The Harmonized Draft Constitution of Kenya was launched on the 17th November, 2009. Pursuant to the Constitution of Kenya Review Act, 2008. It harmonizes the earlier drafts namely; Constitution of Kenya Review Commission Draft of September, 2002 (Ghai Draft), the draft that emerged from the National Constitutional Conference on 15th March, 2004 (Bomas Draft) and the PropOsed New Constitution subjected to the Referendum on 21st November, 2005.

Citizens are granted equal rights; however, past experience shows that it has not always been the case.

Once a constitution is in place it ought to be given effect through subsequent legislation and institutional framework. Analyzing the precise nature of deficits that inhibit the realization of gender equality and the extent to which they have been addressed in the Harmonized Constitutional draft is therefore the focus of this audit.

The Harmonized draft Constitution is not only to be tested against the current Constitution but also against the prescriptions of International Instruments.

B. THE CURRENT CONSTITUTIONAL DISPENSATION

The audit will be incomplete if a brief situational analysis of the extent of protection of women's rights in the current Constitution is not undertaken.

The current Constitution is inadequate in its protection of Women's rights and can be described as the fountain of discriminatory legislation that continues to litter Kenya's legal landscape.

Although the Constitution guarantees fundamental rights in the preambular Section 70, subsequent provisions provide a window for discrimination. Section 70 provides thus:-

Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely;

- (a) life, liberty, security of the person and the protection of the law;**
- (b) freedom of conscience, of expression and of assembly and association; and**
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,**

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

However, despite Section 70, Section 82(4) allows discrimination in the application of personal law in the following terms:-

Section 82(4) subsection (1) shall not apply to any law so far as that law makes provision –

- (a) with respect to persons who are not citizens of Kenya;**
- (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.**
- (c) For the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or**
- (d) Whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to person of any other such description, is reasonably justifiable in a democratic society.**

In relation to conferring citizenship to spouses and children, under Section 91 of the Constitution, only men who are Kenya Citizens can confer such citizenship to foreign wives and children born outside Kenya. It provides:-

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

In regard to political representation there is no legal framework concerning gender balance. The only provision closer to this is Section 33 of the Constitution on filling the seats for nominated members which urges political parties to consider gender equality. It provides:-

33 (3) The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality.

It is therefore against the background of an existing Constitutional dispensation that is unfavourable to women that we assess the gains if any that the draft promises in the event that it is promulgated.

C. INTERNATIONAL CONVENTIONS

The Prescriptions of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW]

The United Nations Convention on the Elimination of all Forms of Discrimination Against Women [CEDAW] is the centre piece in the international quest to ensure that women are treated as full Citizens with full rights as a part of the social contract between the State and Citizens.

The reality however is that many governments including the Kenyan have hitherto failed to ensure that women's status as full Citizens is recognized and implemented.

Kenya ratified CEDAW in 1984 but in keeping with its legal traditions has not undertaken legislation to ensure that CEDAW is incorporated into national law apart from piecemeal attempts at addressing the plight of women in a number of sectoral areas.

The unstated position has always been that women's issues would be addressed comprehensively under a new constitutional dispensation.

In a paper commissioned by UNIFEM titled **Promoting the Human Rights of Women in Kenya: A Comparative Review of Domestic Laws**, the authors identify ten areas of law to be tested against CEDAW and the African Protocol on Women's Rights (2005). The ten areas are:-

- 1. Constitutional law and gender equality.**
- 2. Family relations**
- 3. Labor and social protection**
- 4. Gender based violence**
- 5. Criminal laws and procedure**
- 6. Alternative dispute resolution and civil justice systems**
- 7. Access to financial services**
- 8. Business regulation and licensing**
- 9. Property, environment and natural resources**
- 10. Health**

In the audit however we do not go to the details as set out in the paper under reference. Our mandate is restricted to an audit of the draft constitution of Kenya in order to determine the following;

1. **Whether it recognizes women as equal Citizens?**
2. **Whether it allows affirmative action to redress historical injustices?**

In order to determine the draft's inadequacy the audit will be predicated upon the provisions of Article 2 of the CEDAW which provides: -

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: -

- (a) **To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;**
- (b) **To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;**
- (c) **To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;**
- (d) **To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;**
- (e) **To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;**
- (f) **To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;**

(g) To repeal all national penal provisions which constitute discrimination against women.

D. THE HARMONIZED DRAFT CONSTITUTION

The Harmonized Draft Constitution of Kenya marks another milestone in Kenya's quest for a new constitutional dispensation.

The Harmonized Draft, released on the 17th day of November 2009 was prepared by the Committee of Experts [CoE] pursuant to its mandate under the Constitution of Kenya Review Act of 2008.

The draft is appropriately called the Harmonized Draft because it is based on previous constitution making efforts most notably the work of the Constitution of Kenya Review Commission [CKRC] which was created under the Constitution of Kenya Review Act of 1997 and subsequently amended in 1998, 1999 and 2001 and released a draft on the 19th September 2002 [the Ghai Draft]. It is also based on the Constitution published on the 15th of March 2004 by the National Constitutional Conference [the Bomas Draft] and the Proposed New Constitution released on the 22nd of August 2005 [the Wako Draft].

Throughout the constitution making process the mandate of the constitutional making bodies has always included the requirement that women's issues be given their pride of place to ensure that their status as equal Citizens is firmly predicated upon the Constitution and further to give effect to the letter and spirit of relevant International Treaties notably **CEDAW** whose *raison d'etre* is captured in the preamble as follows:-

...Noting that the charter of the united nations reaffirms faith in fundamental human rights in the dignity and worth of the human person and

the equal right of men and women...and every one is entitled to all the rights and freedoms set forth without distinction of any kind including distinction based on sex...the full development of the potentialities of women in the service of their countries and of humanity... for that purpose to adopt the measures for the elimination of such discrimination in all its forms and manifestations,...

A close scrutiny of the Harmonized Draft reveals specific gains in the following areas: -

- 1. The Preamble.**
- 2. Chapter 1: Supremacy of the Constitution**
- 3. Chapter 3: National Values, Principles and Goals**
- 4. Chapter 4: Citizenship**
- 5. Chapter 6: Bill of Rights**
- 6. Chapter 7: Land and Property**
- 7. Chapter 9: Leadership and Integrity**
- 8. Chapter 10: Representation of the People**
- 9. Chapter 11: Legislature**
- 10. Chapter 12: Judiciary**
- 11. Chapter 14: Devolved Government**
- 12. Chapter 16: The Public Service**
- 13. Chapter 18: Commissions & Independent Offices**

1. THE PREAMBLE

The draft in a departure from the past is set out in the preambular which provides: -

We, the People of Kenya—

ACKNOWLEDGING the supremacy of the Almighty God of all creation:

HONOURING those who heroically struggled to bring freedom and justice to our land:

PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:

RESPECTFUL of the natural environment that is our heritage, and determined to sustain it for the benefit of future generations.

COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation:

RECOGNIZING 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: (emphasis added)

EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution.

ADOPT, enact, and give to ourselves and to our future generations, this Constitution.

2. CHAPTER 1: SOVEREIGNTY OF THE PEOPLE AND SUPREMACY OF THE CONSTITUTION

Recognition of the values of human rights, equality and social justice among other values lays a good foundation for women in search of a place in the details of the constitution. This is recognized at the early parts of the Harmonized draft at Article (2) (4) which provides:

(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency and any of the omission in contravention of this Constitution is invalid.

This Article is critical for women because aspects of customary law has impacted negatively in the search for gender equality the past.

- (5) A person, or a group of persons, may bring an action in the appropriate court for a declaration that any law, act of omission is inconsistent with, or is in contravention of, this Constitution.**

This article allows intervention on behalf of the many women who do not have the capacity to challenge the law by themselves

Article 3: Defence of the Constitution

- (2) Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful**

This provision ensures that unless the numbers of women in the appropriate levels of government are met, then such action may be declared unconstitutional.

3. CHAPTER 3: THE NATIONAL VALUES, PRINCIPLES AND GOALS

Under Article 13, the Draft recognizes the participation of women as a special group in the political, social and economic life of the nation.

The Article states the need for membership of all elective as well as nominative bodies having not more than two thirds of its members being of the same gender.

Article 13: The National Values, Principles and Goals

(i) Ensuring full participation of women...and all Citizens in the political, social and economic life of the nation;

(j) implementing of the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender

(k) Ensuring progressive implementation of the principle that at least five per cent of the members of public elective or appointive bodies shall be persons with disabilities.

4. CHAPTER 4: CITIZENSHIP

It has always been the case that a Kenyan woman married to a foreigner does not pass on her citizenship to her husband upon application, and

only a woman married to a male citizen of Kenya is entitled to be registered as a citizen of Kenya. Section 91 of the Constitution provides: -

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

The result is that Kenyan women are constitutionally treated as second-class Citizens because they cannot bestow citizenship on their foreign spouses and children born outside the country as is the case for Kenyan men. Section 92 (2) provides thus: -

...Provided that a person who has not attained the age of twenty-one years (other than a woman who is or has been married) may not himself make an application under this subsection, but an application may be made on his behalf by his parent or guardian.

The Draft however seeks to remedy this situation. At **Article 17** which provides: -

17(i) every person born in Kenya is a citizen if at the date of the persons birth either the mother or the father of the person is a Kenyan citizen.

(2) a person born outside Kenya is a citizen if at the date of the person's birth either the mother or the father of the person is a citizen-

***[a] who was born in Kenya; or
[b] by registration or naturalization.***

This article recognizes the situations where either parent may have died before a child was born and accords citizenship rights accordingly.

Marriage to a Kenyan for a period of at least seven years entitles one to acquire citizenship upon application whether they are male or female as recognized under **article 18 [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.

- 1 **Article 20 (2)** Allows a child adopted by a Citizen of either gender to become a Kenyan Citizen

- 2 **Article 23 [1]** grants entry and residence to foreign wives, widows as well as foreign husbands and widowers of a citizen and their children. The provisions in the Draft mark a positive shift from the discriminatory provisions of the current Constitution.

3 Responsibilities of a citizen

Article 24 (1): Promote family life and welfare and act responsibly in the context of the family.

5. CHAPTER 6: BILL OF RIGHTS

Under the aegis of the United Nations as early as 1948, the Universal Declaration of Human Rights recognized that equality of all men irrespective of their gender. However, beyond the Declaration in many societies women continued and still continue to suffer discrimination even in the face of CEDAW. The Harmonized draft attempts to solve the problem of discrimination through the following innovative provisions.

Article 28: The purpose of the recognition “... and protection of human rights and fundamental freedoms is to preserve the

dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.'

Article 30 (5) requires all State organs and public organs to understand and equip themselves to deal with the needs of special groups within society including women...

Article 36 (1) provides that: - Every person is equal before the law and has a right to equal protection and equal benefit of the law.

Article 37: allows for affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination.

Article 38: provides that: - Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social activities.

1 Children

Article 41 (3): All children whether born within or outside wedlock, are equal before the law and have equal rights under this constitution.

(5) The child's father and mother, whether married to each other or not, have an equal responsibility to protect and provide for the child.

(6) (d) Be protected from discrimination, harmful cultural rites and practices, exploitation, neglect or abuse;

(i) (iv) To be treated in a manner and be kept in conditions, that take account of the child's disability, if any, gender and age.

Family

Article 42 (4): 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.

(5) Parliament shall enact legislation that recognizes---

(a) Marriages concluded under any tradition, or system of religious, personal or family law; and

(b) Personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that such marriages or systems are consistent with this constitution

These provisions will protect women who are married under these systems

Persons living with disabilities

Article 41 (3): The State shall take legislative and other measures, including special provisions for women, to ensure that persons with disabilities enjoy all the rights referred to in clause (2).

Many times women with disabilities are unable to find protection under

the patriarchal disability movement or the gender movement. This Article is meant to enhance or create their visibility.

Freedom and Security of the person

Article 46: Every person has the right to freedom and security of the person, which includes the right -

- (c) to be free from all forms of violence from either public or private sources**
- (d) not to be subjected to torture in any manner, whether physical or psychological; and**
- (e) not to be subjected to corporal punishment or to be treated or punished in a cruel, inhuman or degrading manner**

The human integrity of the woman is protected by these provisions.

Article 62 (1) which provides that **‘Every person has the right to health which includes the right to health care services including the reproductive health’** is also an innovative avenue for women’s concerns.

It is noteworthy that Article 23(4) qualifies the provisions of the Chapter on the Bill of Rights in the following terms: -

- (4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance.**

This provision is important for Muslim women whose interests are catered for under Islamic law.

Part 3: Human Rights and Gender Commission

Human Rights and Gender commission

Article 76 (2): The human Rights and Gender Commission consists of: -

(b) the Gender Commissioner

(4) Subject to any express provision in respect of other commissions, the functions of the Commission are to-

(i) receive complaints about abuse of power, unfair treatment based on gender discrimination or otherwise, manifest injustice, and corrupt, unlawful, oppressive or unfair official conduct;

6. CHAPTER 7: LAND AND PROPERTY

Land has always been at the centre of Kenya's socio-economic cultural and political discourse. Indeed, in many Kenyan communities, women do not enjoy the same rights of access to land as men do. The Harmonized draft ameliorates this situation through several innovative provisions.

2 Article 77 (2) which provides: The national government shall define and keep under review a national land policy ensuring the following principles-

(f) elimination of gender discrimination in laws, regulations, customs and practices related to land and property in land;

Legislation on land

Article 85: Parliament shall enact land legislation to-

- e) regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and after the termination of the marriage;**
- (k) Protect the dependants of the deceased persons holding interests in any land including the interest of spouses in actual occupation of land;**

7. CHAPTER 9: LEADERSHIP AND INTEGRITY

Conduct of State officers

Leadership and integrity is at the heart of democratic governance. The violence and corruption that has been the bane of Kenyan leadership has precluded and disadvantaged many women who desire to serve in the public sector. Under the Chapter on leadership and Integrity, this is addressed in many ways as captured in Article 94 (2) which sets out the guiding principles of leadership and integrity to include: -

- (a) Selection on the basis of integrity, competence and suitability, or election in free and fair elections;**
- (b) Objectivity and impartiality in decision making and in ensuring that decisions are not influenced by nepotism, favouritism or other improper motives;**
- (c) Selfless service based solely on the public interest, demonstrated by –**
 - (i) honesty in the execution of public duties; and**
 - (ii) the declaration of any personal interest that may conflict with public duties;**

- (d) accountability to the public for decisions and actions;
and**
- (e) discipline and commitment in service to the people.**

Further, Article 96 (2) which requires public Officers to conduct themselves with decorum is also germane particularly Article 96(2) which provides: -

A State officer shall not-

- (e) use the influence of office to sexually or physically abuse any person, or to attempt to obtain sexual favours or other undue advantage from any person.**

8. CHAPTER 10: REPRESENTATION OF THE PEOPLE

The Draft Constitution creates a platform upon which the right to representation of special classes of people including women in various sectors of governance is premised. Women are specifically recognized and their rights provided for in the Draft in a dramatic departure from the Current dispensation.

Article 13[2] requires that women are taken care of in the political, social and economic life of the nation and that *the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender is always applied.*

The provisions recognize the special place that women occupy in society and provide opportunities for them to participate in national policy and decision making processes in an effort to grant them the opportunity to

uphold and defend their rights.

Women's interests are also contained in the provisions that deal with **Political Parties**, **Political Parties Fund**, and **Affirmative Action**. The Kenya provisions are : -

- Article 114(1) which enjoins every political party to respect and promote human rights and fundamental freedoms and gender equality and equity.
- Article 118 (2) which establishes a Political Parties Fund in its application at Article 119 (3) confers a benefit on women by providing that a **“Party shall not be eligible for financial support from the Fund if more than two thirds of its registered national officials are of the same gender.”**
- **Article 119 (4)(b)** also confers a gain to women by providing that: -
 - (4) Parliament shall enact legislation to provide for the equitable allocation of funds to registered political parties taking into account –**
 - (a) the number of votes secured by each party in the previous presidential parliamentary and county elections including subsequent by-elections; and**
 - (b) the number of women and members of marginalized groups elected through each party in that election.**

Chapter 11: The Legislature

The Legislature is an important arm of Government, yet women's presence in it has always been wanting.

The Draft provides for the devolution of government with the major aim of providing forum to the people to fully participate in key decision making and governance processes.

One approach to devolution is through the creation of a Senate whose role is to provide an Institution through which the devolved governments share and participate in the formulation and enactment of national legislation and protect the interests of the devolved governments.

In order to achieve the right of representation for women the Harmonized draft makes provisions for special seats to be reserved for women in the senate.

Article 125(1)

The senate shall consist of-(...)

[b] women elected, two each by the regions, the elected members of the county assemblies in each region acting as the electoral college.

This provision creates sixteen (16) seats under the proposed structure which has eight (8) regions

In addition to the special recognition of women for purposes of representation they are allowed to participate in the democratic process and may run for any or any additional seats or offices. This gives women a grand opportunity to participate in governance and decision making.

Further, in the National Assembly women have a total of seventy four (74) reserved seats based on direct Election. Article 126 (1) provides that the National Assembly shall consist of women elected one each by the counties, each county comprising a single member constituency.

Parliamentary Service Commission

Article 154 (1) provides: -

There is established a Parliamentary Service Commission which shall consist of:

- (a) seven members appointed by Parliament from among its members of whom--**
 - (i) four shall be nominated equally from both houses by the party or coalition of parties forming the national government of which *at least two shall be women***
 - (ii) three shall be nominated by the parties not forming the national government, at least one of whom shall be nominated from each house *and at least one of whom shall be a woman and***
 - (iii) *one man and one woman* appointed by Parliament from among persons who are not Members of Parliament and are experienced in public affairs.**

9. CHAPTER 13: JUDICIARY

The Judiciary is an integral part of State and it is noteworthy that the Harmonized Draft seeks to mainstream women within its ranks under Section 211 (2) which provides: -

In the performance of its functions the Commission shall be guided by the following;

- (2) (a) competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary.**
- (b) promotion of gender equality**

The provisions relating to Kadhis Courts at Article 209 (6) which confers Jurisdiction of Kadhi's Courts to the determination of questions of Muslim Law relating to personal Law, Marriage, Divorce or inheritance where both parties profess the Muslim Religion is a boon for Muslim Women.

10. CHAPTER 14: DEVOLUTION

Devolution is given prominence in the Harmonized Draft as one of the ways designed to ensure democratic and accountable exercise of sovereign power and to foster national unity by recognizing diversity.

The Chapter contains the following provisions which benefit women: -

- Article 214: Devolved government established by the Constitution reflect the following principles**
- (c) no more than two thirds of the members of the representative bodies in each devolved government shall be of the same gender**

Part 2---Regional governments

Regional Assemblies

Article 216 (3): In electing delegates, a county assembly shall take into consideration ethnic and other diversities, including gender represented in the County.

Members of the County Assembly

Article 222 (b): such number of special seat members, in proportion to the votes received by each political party under clause (1) (a), as to ensure that no more than two-thirds of the membership of the party under clause (1) (a), as prescribed by Act of Parliament.

Gender balance and diversity

Article 240 (1): No more than two thirds of the members of any assembly constituted under this chapter are to be of the same gender.

This provides for affirmative action at the Devolved Governments.

Values and Principles of public service

Article 272 (j): adequate and equal opportunities for appointment, training and advancement of *men and women* and members of all ethnic groups.

(k) representation of Kenya's diverse communities, men and women, members of all ethnic groups, and minorities and marginalized groups, including persons with disabilities, in public service at all levels.

11. CHAPTER 15: PUBLIC FINANCE

The Harmonized draft's sensitivity to gender equity is further implicitly manifested in this Chapter, for example Article 261 (2) provides : -

An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal may be implemented and shall provide for all or any of the following: -

- (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination.**

12. CHAPTER 16: THE PUBLIC SERVICE

The Harmonized draft retains its gender sensitivity in this Chapter by providing at Article 272 (1) (k):-

The values and principles of Public Service Commission.

Representation of Kenya's diverse communities, men and women, members of all ethnic groups, and minorities and marginalized groups including persons with disabilities, in the public service at all levels.

13. CHAPTER 18: COMMISSIONS AND INDEPENDENT OFFICES

Commissions have received prominence in the Harmonized draft and contains women-friendly provisions at Article 297 (4) which requires that appointments to commissions and independent offices shall take into account the principles of Article 13 (2) (1) – (k).

The essence of Article 13 requires among other things that women be granted opportunity to fully participate in the affairs of the Country.

RECOMMENDATIONS FOR IMPROVEMENT

A proper assessment of the Harmonized Draft reveals numerous bold provisions that upon its promulgation and implementation will enhance the status of women.

A few gaps may however be filled in the Chapter dealing with Culture (Chapter Five) to make it explicit that cultural practices harmful to women will be outlawed.

Further, improved drafting and clear choice of electoral system is desirable for the Counties and Regions. Indeed, there is a case for proportional representation.

The women view the County as an electoral college with concern, borne of historical experience. Organisations that work in gender and women empowerment would play a facilitative role to ensure that the elected women are accountable directly to the women that they represent. The role of civil societies in governance is envisaged in National Values, Principles and Goals – Chapter Three.

Women are not homogenous. It makes strategic sense to unpackage women in their differentials while at the same time celebrating their shared womanhood. This would include:

- (i) The Young Women (The Youth)
- (ii) Women with Disabilities
- (iii) Women Workers
- (iv) Women from Marginalised Communities

Lastly, there is need to place a timeframe to the commencement and review of the Affirmative Action. It should commence within one year and be revised after 50 years (which means 10 Parliaments).

E. CONCLUSION

This Draft more than any other law expresses a clear intention to recognize women's rights and protect them in accordance with CEDAW which was ratified in 1984, the African Charter on Human and Peoples Rights Article 18(3), the Additional Protocol to the African Charter, (the African Protocol on Women's Rights) that calls on member states to ensure the elimination of all forms of discrimination against women.

REFERENCE MATERIALS

A. CONSTITUTION AND ACTS OF PARLIAMENT AND DRAFT CONSTITUTION

- 1 Constitution of Kenya Revised Edition 2008[2001].
- 2 Harmonized Draft Constitution of Kenya published on the 17th November 2009.
- 3 The Constitution of Kenya Review Act 1997 reviewed in 1998, 1999 and 2001.
- 4 The Constitution of Kenya Review Act 2008.
- 5 Draft Constitution, 2004 [Bomas Draft].
- 6 Proposed New Constitution, 2005 [Referendum Draft].
- 7 Political Parties Act, 2007.

B. TREATIES AND PROTOCOLS

1. The United Nations Convention on the Elimination of all forms of Discrimination against Women [**CEDAW**] - 1979.
2. The **African Charter on Human and Peoples rights - 1986**.
3. The Additional Protocol to The African Charter on Human and Peoples Rights [**The African Protocol on Women's Rights**] - 2005

C. ARTICLES

A paper commissioned by **UNIFEM** titled **Promoting the Human Rights of Women in Kenya- A Comparative Review Of Domestic Laws By Dr. Celestine Nyamu Musembi – RFP/XXX/2009**.