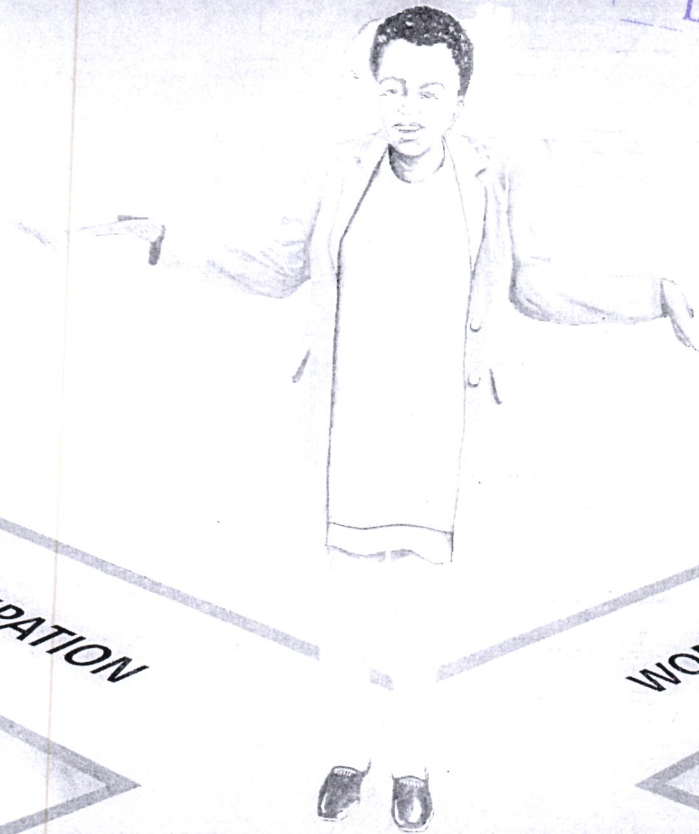


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The opinions expressed by the authors of the various chapters in this Annual Report are the responsibility of the individual authors and do not necessarily constitute the official position of the Federation of Women Lawyers Kenya (FIDA Kenya)

Acknowledgements



Jane Onyango
Executive Director

This report illuminates the social and political conditions which shape the lives of Kenyans, particularly Kenyan women. Our efforts on this front are inspired in large part by the courageous women who have come to FIDA Kenya in their quest for justice. Their experiences are telling examples of the day to day impact of policy and law on women's lives. We wish to express our deeply felt thanks to our clients and the women of Kenya.

We would like to express our deepest gratitude to the authors of the various chapters for sharing their expertise and insight. In particular, we would like to acknowledge Wanyiri Kihoro, Professor Macharia Munene, Immaculate Kassait, Hellen Kwamboka, Eric Ngamau, Davis Malombe, and Dr. Jacinta Muteshi. In addition, we thank Enid Muthoni, Lillian Ohuma, Alice Maranga, Elisa Slattery and Bernadette Albrecht who have tirelessly worked in compilation of the monitoring reports and quarterly Fact Sheets. We also thank the community-based monitors, chiefs, and police whose reporting on women's rights violations is instrumental to the goal of improving the situation of women in Kenya.

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Further, this report would not have been possible without the continued support of our funding partners. We thank them sincerely for their tireless commitment to the cause of advancing women's rights. We wish to acknowledge European Union-DGSP and Inter-Church Organization for Development Cooperation (ICCO) who jointly funded the publication of this year's annual report.

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And finally, we extend thanks to the FIDA Kenya staff for their unflagging efforts to ensure this report's successful publication.

Jane Onyango
Executive Director
FIDA Kenya

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Foreword

It is not often that one gets an opportunity to work in a system, and then work out of it objectively. In the short time that I have served at FIDA Kenya as programme staff, I have been adequately exposed to the magnitude of work and effort that goes into every task on an 'average' day at FIDA Kenya.

The compilation of an annual report, however, is not 'average' by any means!

The fact that I am now an objective party, outside the daily routines of the organization and have been trusted with the enormous but privileged task of editing the FIDA Kenya Annual Report 2004 on the legal status of women, reinforces the belief that once you have been touched by FIDA Kenya, you will always keep coming back! This, I am sure, can be attested to by every woman who comes to FIDA to seek legal assistance. It is also evident in the ever-increasing numbers of women visiting FIDA to seek legal redress.

This year's Annual Report picks up the pace, or 'step', from last year's report "Step by Step: Forwards or Backwards?" The report addresses the recent and current political and socio-economic environment in Kenya and the implications it has had and continues to have on Kenyan women and the access to and enjoyment of their rights.

The report reflects on the Parliament, its accountability to the people and its transition process. Parliament, as a national institution has substantively changed over the years, and the chapter looks at how these changes have evolved into the present-day Parliament as well as the historical transitional ramifications that have arisen. The Kenyan women applaud Kenya's Ninth Parliament for going down in History as the House that has had the highest representation by women. The Beijing Platform of Action, which acts as a pointer to equality between men and women, can only be jointly and fully implemented by a Legislature that is equally representative of men and women. The report highlights the positive attributes of the Ninth Parliament and also explores the various opportunities that it should take along its stride as it continues its transition to a more independent and responsible legislature. We are optimistic that the Ninth Parliament shall take advantage of the great chance it has to build a strong institution and safeguard itself from the fate that befell the First Parliament. Our report also gives an account of the constitutional review process, particularly the final phase of BOMAS and the various initiatives that have struggled to make the constitution-making process bear fruit. We hold on to the hope that in next year's annual report, we shall have moved from reporting about the never ending constitutional review process to discussing the implementation of an already adopted Constitution that incorporates the principles of social justice.



Aasha Hashmy

This year's report has incorporated a pictorial which depicts women's efforts to seek an end to discrimination and illustrates the various obstacles women face in the enjoyment of their rights. This is the first of its kind in a FIDA Kenya Annual Report and seeks to portray the situation on the ground in an engaging manner that would sustain your interest longer than would graphs and tables! We have also given a historical background of the civil society in Kenya, its mandate and the way forward needed to transform the current political and social situation in Kenya following the transition and particularly in light of the review process, a matter that is at the heart of virtually every Kenyan discussion. This report highlights Kenya's obligations under international human rights instruments, to which it is a party to, and the current situation of women vis a vis the fulfilment of those rights. At the core of these are the housing and reproductive health rights that are often sidelined as unimportant in the face of other political and civil rights, but that are nonetheless the most salient issues being grappled with by women on a daily basis, the fulfilment of which is paramount to their well-being.

FIDA Kenya has been monitoring the government's appointments for positions at national level. In this regard, we have incorporated an annexure that gives a summary of the appointment of women to high level positions. Further annexures provide statistics from our legal aid clinics which reflect on the need for a national legal aid scheme. The majority of Kenyan women cannot afford legal services and rely on legal aid services to access justice. Additionally, the data from the media analysis and the monitors' reports reinforce the fact that gender based violence is on the rise in Kenya. It goes without saying that most of these violations are mainly directed towards women, despite their ages. Not a day passes without one reading about a woman whose rights have been violated. We therefore call upon the government to this 'pandemic' and enact laws that are progressive towards women.

This year's Annual Report has a wealth of discussion and debate with regards to these cross-cutting issues that affect all of us, particularly women, profoundly and that are at the epicentre of our very development as a society and a nation.

It is my sincere hope that this piece of information will inform policy and rejuvenate the spirit of women empowerment.

Aasha Hashmy¹

¹ The editor is the immediate former Programme Officer for the Fundraising and Monitoring Programme, under the Rights Team, FIDA Kenya, and is currently pursuing postgraduate studies.



Inter-Parties Consultative Forum on Women's Rights, August 2004.

Parliament in Transition¹

By Professor Macharia Munene²

Introduction

Legislatures play pivotal roles in a country and their importance varies with the political climate in which they operate. When a country goes through a major political transition, its legislative system goes through a similar process and it actually is part of that transition. Two major political transitions have taken place in Kenya. The first transition occurred after a period of roughly 40 years, which began when Kenya was officially declared to be a 'Crown Colony and Protectorate' in 1920, and ended classical colonialism in 1964 when Kenya became a republic. The second transition ended the Kenya African National Union (KANU) political monopoly in 2002, after nearly four decades of grappling with the problems of post-modern colonialism. The parliaments arising from these two changes were transitional parliaments. In both instances, the effectiveness of the legislative system was a concern.

In general, a legislature's effectiveness depends on its philosophical origins. There are three possible origins: from the top, from below, and from a position of relative equality. The first type starts as advisory councils to the Executive and then gradually acquires legislative functions. Essentially subordinate to the Executive, they advise an Executive who holds centralised power. The Executive concedes to give important people in different parts of his realm a role as his advisers who then assist in legislating his wishes. The British legislature had this type of origin and gradually developed to become a relatively effective legislative organ although it does everything in the name of the monarch.

The second type starts with a notion of organized people creating a deliberative body that will look

Legislatures play pivotal roles in a country and their importance varies with the political climate in which they operate

after the welfare of that particular society. It is essentially a council of the community that knows the best interests of that community and tries to figure out the most appropriate way of promoting and defending those interests. It evolves into a legislature representing different strands of that society. This council decides issues and then mandates a select group, the Executive, to implement the decision. The emphasis is on the pre-eminence of the legislature over the individual leader. In such an instance, the Executive is an implementing agent of the legislature's desires. A number of African societies had this type of structure before the onset of colonialism.

The third type assumes that the Executive and the legislature are equally pre-eminent and neither takes precedence over the other. This type entails a clear delineation of each side's functions and powers. The emphasis here is on the separation of powers among state organs that are supposed to be equal, that are jealous of each other, that check on each other, and that are supposed to work together in the interests of the state. In it is a belief that neither organ has a monopoly of wisdom, nor on knowing what is in the best interests of that society and so each needs a constant check and reinforcement from the other. Each side checks the other's excesses and abuses. The Constitution of the United States of America is the most representative of this type of legislature.

Kenya's record with regard to the relationship between the Executive and the legislature is a mixed one: sometimes saying one thing and in reality being another. It started with an emphasis on the pre-eminence of the governor, or the ruler, with legislatures being advisory and subordinate to the Executive.³ At independence, there was an effort to give prominence to the legislature at the expense of the Executive in the *majimbo*⁴ constitutional structure. This effort backfired after the May 1963 general elections that essentially acted as a referendum on the *majimbo* constitution.⁵ Recently, there has been a deliberate effort to make parliament more independent and turn it into a serious policy-making organ rather than a rubber stamp of the Executive. Attention here will be on the First and the Ninth Parliaments that constitute the first and the second transitional parliaments.

The constitution under which independent Kenya operated had tried to combine all three concepts, but in reality the emphasis was on the pre-eminence of the Executive. A legislature was created from which the Executive was supposed to emanate in that the president was required to be a member of parliament but the members of parliament did not decide who the Executive would be. Parliament was said to be independent of the

Executive, but it could not be independent of its most prominent member who was the first among equals and dominated the legislature from within and from without.

The First Transition

On becoming independent, Kenya entered its first transition period and with it came an initially vibrant First Parliament that faced many problems.⁶ Two broad forces seemed to have characterised the first parliament. The first was the desire to fulfil KANU's pledge to dismantle the entire *majimbo* structure, and the second was to deal with KANU's internal frictions by eliminating potential competitors for high office. The KANU Parliament fulfilled this pledge easily by undermining regional governments, thus making them redundant and abolishing the Senate, hence inducing Senators to become members of an enlarged National Assembly.⁷

The second challenge was more difficult than the first given that there were many *prima donnas* within KANU who competed for political supremacy using the parliament. In this competition, the legislature became a forum for all sorts of political rivalries that were ideological as well as personal. One example of this is the rivalry between the then Minister for Constitutional Affairs Tom Mboya and then

Vice-President Oginga Odinga. After winning an ideological bout in 1965 on the viability of scientific socialism in Kenya⁸, Mboya then created *majimbo* vice-presidencies in KANU in 1966 after which Odinga had resigned to form Kenya People's Union (KPU) and thus make Kenya a multi-party state again. The KANU parliament had then frustrated



Kenya Parliamentary Journalism Association at the White Sands Hotel, Septemeber, 2004

Odinga's political ambitions by placing constitutional obstacles along the way and thereby succeeded in driving KPU into political oblivion in 1969.⁹

Other than sidelining Odinga and his KPU, parliament was a theatre for other political intrigues; this time focusing on Mboya's purported ability to mesmerise MPs into making him president in case a vacancy occurred. When Kenyatta suffered a heart attack in 1968, parliament changed the constitutional scheme, which made a sitting vice-president the acting president for a period of three months during which time a presidential election would be held. It barred independent candidates and the parliament also abdicated its power to nominate 12 legislators and bestowed it instead on the president. In addition, parliament empowered the president to detain without trial any person that he considered to be a threat. The removal of the provision for independent candidates ensured that no popular person who was not approved by the KANU machinery would win an election.¹⁰ The first parliament which had started vibrantly ended with a whimper doing the bidding of the Executive.

One thing that is glaringly evident about the first parliament is that there was never any representation of women, not even a single one. Women parliamentarians in Kenya had never exceeded ten in the country's history before the second transition. Before 1992, when the first multi-party elections were held, there were very few women parliamentarians, one or two at a time. In the eighth parliament, only nine out of 220 members were women. This meant that several issues concerning women could at least be initiated and pushed forward, such as the Equality and Affirmative Action Bills. However, the minimum level of awareness of gender issues among the male members of Parliament and government and the consequent lack of support led these Bills to being thrown out of the August House.

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The Second Transition

The second transition is associated with the NARC's rise to power that ended 40 years of KANU, which had controlled the presidency since Kenya became independent from Britain in 1963, and which women had accused of being insensitive to their needs. For these reasons, the 2002 elections offered the best chance for a multi-party system - one that included women - to emerge. However, as far as numbers are concerned, Kenya still compares poorly with the parliaments of its neighbours Uganda (75 women out of 304 members) and Tanzania, (61 women out of 274 Members of Parliament). In its September 2002 report, the Inter-Parliamentary Union, an international union of parliamentarians that monitors the participation of women in government, ranked Kenya 109th out of 122 countries on the percentage of women parliamentarians. In Africa, only Nigeria, Swaziland, Egypt, Niger and Djibouti have a smaller percentage of women in their parliaments.

Prior to the above historical transition, two multi-party elections, in which Moi was declared the winner, in 1992 and 1997, were followed by strange political configurations in which opposition party members sought cooperation with Moi as they turned on other opposition leaders. After the 1992 elections, a disappointed Odinga Odinga, according to the *Kenya Times* in January 1994, had "realised the folly of an opposition party working to antagonise the Government."¹¹ After the 1997 election, Odinga's son, Raila intensified the cooperation that his father had started but his wrath was directed at Kibaki.¹²

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This politically expedient cooperation between Moi and Raila was bound to fail when neither received the expected reward. Its initial focus was to give positions to Raila's followers in NDP in return for NDP's silence over the political killings of anti-KANU people in Laikipia, Njoro and Molo. The expediency then turned to diffusing political activities at Ufungamano House that focused on overhauling the constitution. Subsequently, a Raila-led Parliamentary Committee on Constitutional Review was created that forced through Parliament an Act constituting the Constitution of Kenya Review Commission. Players from the Ufungamano House group were then persuaded by Yash Pal Ghai to join the CKRC as a minority group.¹³

The thrust of the cooperation, whether within Parliament or through CKRC, was on the political benefits that both Moi and Raila could obtain. For Moi, the crucial benefit was the removal of the two-term limit, which he had imposed on Parliament in 1992. This was to enable him to continue as president after 2002. Creating the post of prime minister would reward Raila with substantial political power that he could not get from voters.¹⁴ The failure to achieve these two goals destroyed the cooperation and helped to ensure KANU's

defeat in the 2002 general elections that ushered in the Ninth Parliament.

The Ninth Parliament is the second transition parliament in Kenya, and although it is barely two years old, it has already undergone a lot of scrutiny. It is a vibrant parliament, similar to the First Parliament in its initial stages, but it faces both internal and external problems. Some of these problems are structural and inherent in institutions that have long been stagnant or moribund. Other problems are the normal political intrigues expected of politicians trying to secure their own political space. There are also high public expectations associated with the euphoria of a major change that members of parliament will behave honourably and credibly in protecting and advancing public interests. In addition, there are pressures from external forces of post-modern colonialism pushing their own agenda at the expense of Kenyans.¹⁵ The response to these challenges has met mixed results.

First and foremost, the new parliament needs to understand that its legitimacy will stem from its responsiveness to all segments of the population, including women, who remain woefully under-represented in the parliament. The 2002 general election presented the best opportunity to bridge the ever-growing gap between male and female representation in government. However, the new coalitions that were formed just before the elections, proved harmful to women's campaigns. National interest, which the parties said they were uniting for, meant that other issues as that of women were easily forgotten. The journey to the ninth Parliament for most women candidates has been an uphill task. Lack of funds has remained a major hindrance to women's quest for leadership in Kenya. They lacked and continue to lack the resources to compete with the incumbent, who were usually ahead after earning a parliamentary salary for five years. Personal attacks,

directed to female candidates, were also some of the obstacles which threatened to derail women seeking political office.

Looking at the structural problems, parliament as an institution has been forced to change because change is inevitable. Change, however, can arouse fear in people who derive a sense of security from the status quo. This sense of fear is stoked and perpetuated by the people who benefit from the status quo and who do their best to put obstacles to change. Does this fear of change exist within Parliament as an institution?

A good example of the change within this institution is reflected in the participation and representation of women. While the representation of women has increased from 8 members in the 8th Parliament to 18 members in the current 9th Parliament, the numbers are nowhere near where they should be. Although women constitute over slightly half of Kenya's population, they comprise only 8% of the Parliament. In spite of their small numbers, the women in office have helped to make gender-related issues more visible and have tried to create a regional network of women parliamentarians to resolve border disputes¹⁶ - a highly commendable effort. This is despite the fact that they are part of the Ninth Parliament that started on a bad footing. It is important to note that the development of a strong and respected parliament will depend, in large part, on its ability to adequately represent Kenya as a whole, which must include greater political participation by women. The Beijing Platform of Action, which acts as a pointer to equality between men and women, can only be jointly and fully implemented by a Legislature that is equally representative of men and women.

Within the Ninth Parliament, there is a growing movement to detach parliament from the Executive or to make it less dependent on the Executive for legislative matters. This

In spite of their small numbers, the women in office have helped to make gender-related issues more visible and have tried to create a regional network of women parliamentarians to resolve border disputes.

requires an attitude change on the part of MPs and parliamentary staff. Previously, parliamentary staff was part of the Executive and owed its loyalty to the Executive, however, the creation of the Parliamentary Service Commission (PSC) means that their survival antennas need to be tuned more to the wishes and desires of the parliament than ever before. To do this properly, parliamentary staff needs to know what is, or has been, driving these changes that affect their lives so much. These have included political development from 1963 to 2002, international forces including those of post-modern colonialism, new and assertive Members of Parliament, an increasingly assertive public and inquisitive media and lobbyists pushing particular interests.

The Beijing Platform of Action, which acts as a pointer to equality between men and women, can only be jointly and fully implemented by a Legislature that is equally representative of men and women.

As an institution, Parliament has seemingly gone out of its way to cater for the interests of the Members of Parliament in terms of offices in Nairobi and allowances for their various expenditures. This is mainly the work of the PSC. However, there are still a number of shortcomings that undermine the parliament as an institution. First, it lacks a comprehensive research facility and

information retrieval system that would empower it to perform its duties more effectively. Secondly, it lacks adequate and well-trained support staff in crucial areas. Third, Parliament has not been able to portray itself positively to the public; it is still shrouded in mystery and some of its members' activities constantly bring it into disrepute.

The Ninth Parliament has acquired a special notoriety for political intrigue and squabbling in part because the public had high expectations for the current crop of MPs. In general, the MPs are better educated than ever before and include professionals such as lawyers, accountants, academics and educators who became prominent before joining parliament and were therefore expected to make their contribution count. Being the first woman from Africa to be honoured with the Nobel Peace Prize, Professor Wangai Maathai gave a face lift to the Kenyan Parliament. This was a major boost. In addition, there is collectively more knowledge and experience in public affairs than ever before, given that Members of Parliament include former senior military officers, heads of public institutions, top provincial administrators, and civil society agitators that helped to bring about political change in Kenya. However, the MPs' constant bickering¹⁷, in part, can be explained by the fact that these politicians had joined together in the election as a matter of political expediency¹⁸ and not as a matter of ideology or solid principles.

Although it is perhaps politics as usual that their united front should break down when their common enemy was defeated; normal, however, was the impression that Members of Parliament gave: that they were corrupt, not serious in their work, and that they were united only in greed but not in the promotion of public interests. For example, the MPs united to give themselves hefty salaries and allowances at a time of fiscal crisis,¹⁹ all of

which raised the question of why they could not show the same unity when dealing with matters of public interest.

The perception that members of the Ninth Parliament are greedy, however, is not as bad as the impression that despite their collective education, experience and knowledge, they are irresponsibly ignorant or susceptible to manipulation. The fact that a number of them do not read or scrutinize bills facing passage was vividly splashed in the public arena during the exchanges over the amendment of the CKRC Act or the Consensus Bill. Only after Hon. Raila (Minister for Roads and Public Works) revealed in Mombasa that he had actually tricked his rivals into voting for his version of the Consensus Bill did Members, who had voted for it, start complaining about the bill.²⁰ This episode did not reflect well on those Members and raised the question of how many other Bills, even more dangerous ones, have been passed without careful scrutiny.²¹ In this regard, the Ninth Parliament has disgraced itself.

The passage of badly crafted Bills also undermines public confidence in Parliament. This phenomenon has sometimes been blamed on pressure from the International Monetary Fund (IMF) and 'development partners', which implies that the MPs surrender their duties to foreign forces and then feel beholden to those forces. External pressure is often considered to be applied particularly in the passage of Anti-Corruption Bills since continued aid is often premised on the development of an anti-corruption strategy.

For example, pressure from the IMF, and perhaps the desire to be in good books with the IMF and 'development partners', might explain the passage of a confused and poorly crafted "The Anti-Corruption and Economic Crimes Act, 2003." This Act, argued Habel J. Nyamu of the Electoral Commission of Kenya,

"probably not the work of Kenyan drafters."²² It was actually meant to respond to donor demands before the release of expected assistance to Kenya.²³ As soon as the Parliament passed the Act on April 17, 2003, Hon. David Mwenje, Member of Parliament for Embakasi, asserted: "Since we have now passed the Bill, let the donors not give any other excuse. Let us receive the money tomorrow so that we can provide the free education and all the things that we promised our people during the campaign. I hope they will respond quickly. All those well-wishers of Government should now start bringing the money tomorrow morning so that we can accomplish our promises."²⁴ In contrast to Mwenje's admission, however, other ministers wanted to minimize the impression that the government was under pressure from the donors.²⁵

Key among them was the Minister for Justice and Constitutional Affairs, Kiraitu Murungi, who on January 29, 2003 gazetted the "Anti-Corruption and Economic Crimes Bill"²⁶, a different version of which was later debated and passed by the Parliament in April, 2004. This Act has recently featured in public debate mainly because it reflects Parliament in a bad light of acting under foreign pressure and thereby producing "bad law"²⁷ that gives activists an opportunity to make political capital. This is despite the fact that the Bill that Murungi had gazetted in January 2004 went through some amendments and improvements before it was finally passed as an Act of Parliament on April 17, 2004, given presidential assent on April 30th, 2004 and went into effect on May 2nd, 2004. The problems with this bill

have highlighted both the tensions in the developing relationship between the Executive and legislative branches as well as continued political infighting. This reaffirms that the Ninth Parliament started on a disappointing legislative footing and is not a good image for the Parliament. Furthermore, there are many Bills on Parliament's plate, including the gender Bills such as the Family Protection Bill, the Equality Bill and the HIV/AIDS Bill which are yet to be passed into law. The unnecessarily prolonged time taken to pass these Bills does not bode well for Parliament's credibility.

All is not bleak though. Despite some shortcomings, the Ninth Parliament has some positive attributes. Most evidently, it goes down in history as the House that has had the highest representation by women. Further, it has occasionally played its watchdog role with gusto, especially when it comes to exposing purported corruption and malfeasance in the Executive. In this, it has worked closely with the media, some of which behave as if they have a mission to bring down the government, sanitize some politicians, and to vilify others. Whatever the motivations, the combination of the Parliament and the media, which are often antagonistic to each other, in keeping the Executive on its toes, is commendable. Some of the Parliamentary Committees have increased their investigative role and have brought special problems to the public's attention. Still, other committees remain relatively dormant. The Parliamentary Service Commission has been active in trying to make Parliament more independent than it has ever been. This institutional strengthening is positive and more than welcome.

Despite some shortcomings, the Ninth Parliament has some positive attributes. Most evidently, it goes down in history as the House that has had the highest representation by women

Conclusion

As Kenya's Ninth Parliament continues its transition to a more independent and responsible legislature, it still has a great chance to build a strong institution and safeguard itself from the fate that befell the First Parliament.

First of all, its members should make it their very first priority to enact a new Constitution that secures quantitative and qualitative rights for all Kenyans, especially women. Parliamentarians should ensure that the gains women have secured in the Draft Constitution are not eroded. Earlier on, during the campaign trail, women leaders had demanded that Kenyan legislators vote on an amended constitution that was abandoned at its final stage after Parliament was dissolved in November 2002. That draft constitution provided that 30% of Kenya's Parliament would be women. It would also have allowed everyone, regardless of gender, to own property - just one item of a list of benefits for women. The constant call for equitable distribution of services for women, including quality health care, especially for those affected by HIV/AIDS, free primary education for children, and affirmative action to equalize opportunities for all was also a major feature of it. While free primary education has been implemented in primary schools, a lot still needs to be done to improve the status and livelihood of women and children. This includes, among other things, the passage of gender-sensitive Bills such as the Family Protection Bill and the HIV/AIDS Bill. Furthermore, it is imperative that women be

included in the decision-making processes of political parties. They have to be allowed the opportunity to get involved in, at the time of political transition, either setting campaign agendas or charting out power-sharing mechanisms. It is only when women are fully integrated into the system will Parliament be fully representative of Kenyan's needs.

Additionally, in an effort to strengthen Parliament and promote its credibility, its Members would do well if they minimise petty squabbles on matters of national importance and act as serious public servants serving the larger national interest. Among this would be an understanding and knowledge of what Kenya's national interests are, and the realisation of the danger of over-dependence on foreigners whose interests might be at variance with those of Kenya. This calls for Members of Parliament to empower themselves and to be competent in all areas. This competence must invariably include an understanding of the needs of all segments of the Kenyan population. Moreover, an awareness and commitment to gender issues is, and would be, a vital component of Kenya's overall national interests.

Besides, Parliament can do a number of things to empower itself. It can conduct training of MPs and their staff on various topical issues such as the importance of gender mainstreaming and sensitivity to women's issues in all areas of policy formulation, which should be an essential element in Parliament's efforts, if it is to

First of all, its members should make it their very first priority to enact a new Constitution that secures quantitative and qualitative rights for all Kenyans, especially women.

ensure gender parity. This comprehensive approach would enable MPs to more effectively engage in policy formulation and implementation that fulfils the needs of their constituencies.

Secondly, Parliament should worry about the collapse, or potential collapse, of national institutions, itself being one of them. Such a collapse would lead to the increased likelihood of Kenyans being subdued and poses risks to the country's sovereignty as it receives '*threatening advice*' from foreigners. This *advice* is at times delivered in "unnecessarily vulgar" language or through "inflammatory speech".²⁸ What is worse, the *advice* is in the form of demands that certain individuals, who are primarily answerable to foreigners rather than to Kenyan authorities, be appointed to specific positions. Furthermore, there is an implication that Parliament is irrelevant when it comes to money matters where the Executive can be pressured to enter into deals with foreigners.²⁹

A strong Parliament therefore can help defend Kenya's interests and to do that it needs to give itself the necessary services and facilities that are independent of the Executive and of external forces. It implies avoiding over-dependence on institutions and forces whose primary interest is to keep Parliament in a subordinate condition or dependent on outside largesse. Among the major actions it can take to empower itself is the creation of a comprehensive library for Parliament that would also act as a national reference library for Kenyans, the recruitment of competent researchers, increased support of training and

retraining of parliamentary staff, and the adoption of a reading culture.

In order to achieve both the intellectual exercise of policy formulation and the functionary occupation of implementation, this transitional Parliament needs to be involved at both levels to ensure that Kenya's interests are safeguarded. To do this, Parliament can emphasise its different functions that range from oversight, accountability, the imposition of sanctions, and through collaboration and friendly adversarial interactions with the Executive. At the same time, the legislature should not try to do the Executive's work or unnecessarily hamstring the Executive because such behaviour gives the impression that the Parliament is tyrannical and too irresponsible to be entrusted with matters of national import.³⁰ Parliament should keep the Executive on its toes in protecting and advancing Kenya's interests but not undermine the Executive.

The Ninth Parliament's future is bright in terms of setting up institutional standards. It can redeem its image in the public arena by taking its work seriously. The time for MPs to pass Bills without understanding the implications to the country should be a thing of the past rather than a current occurrence. While the adversarial relationship with the Executive on policy matters is to be encouraged, this should not be allowed to deteriorate into irresponsible hostility between the two national institutions. They should check and balance each other, not destroy each other.

Suggested Readings:

Articles in Journals

Korwa G. Adar, "Assessing Democratisation Trends in Kenya: A Postmortem of the Moi Regime," **The Journal of the Commonwealth and Comparative Politics**,
Vo. 38, Number 3, November 2000, pp. 103-130.

Macharia Munene, "Kibaki's Moment in History: The Election of 2002 and Its Aftermath," **East African Journal of Human Rights and Democracy (EAJHRD)**,
Vol.1, Number 1, 2003, pp.71-89

Macharia Munene, "The Manipulation of the Constitution in Kenya, 1963-1996: A Reflective Essay," **HEKIMA: Journal of Humanities and Social Sciences**,
Vol. II, Number 1, 2003, pp.41-56

Newspapers:

The Kenya Times

The People Daily

The Nation Newspapers

The East African Standard

Unpublished Papers:

Macharia Munene, "Hazards of Postmodern Colonialism in Kenya," **Conference on The Political Economy of Kenya**, Oxford University, May 27-28, 2004, Oxford, United Kingdom.

Macharia Munene, "The Political Highs and Lows of Post-Colonial Kenya, 1963-2002," **Historical Association of Kenya Conference**, Lake Baringo Club, June 10-13, 2004.

Y.P. Ghai and J.B.W.B. McAuslan,
Public Law and Political Change in Kenya: A Study of the Legal Framework of Government From Colonial Times to the Present
(Nairobi:Oxford University Press, 1970).

David Goldsworthy,
Tom Mboya: The Man Kenya Wanted to Forget
(Nairobi:Heinemann, 1982)

Jomo Kenyatta,
Suffering Without Bitterness: The Founding of the Kenya Nation
(Nairobi: East African Publishing House, 1968)

Colin Leys,
Underdevelopment in Kenya: The Political Economy of Neo-Colonialism, 1964-1971
(Berkeley, California: University of California Press, 1974)

Macharia Munene,
The Politics of Transition in Kenya, 1995-1998
(Nairobi: Quest and Insight, 2001)

Kiraitu Murungi,
In the Mud of Politics
(Nairobi: Acacia, 2000).

J.B. Ojwang,
Constitutional Development in Kenya: Institutional Adaptation and Social Change
(Nairobi: ACTS Press, 1990)

S.N. Waruhiu,
From Autocracy to Democracy in Kenya: Past Systems of Government and Reforms for the Future
(Nairobi: Expert Printers, 1994)

Government Documents:

Republic of Kenya, "The Anti-Corruption and Economic Crimes Bill, 2003,"
The Kenya Gazette Supplement No. 5(Bills No. 2) (Nairobi: Government Printer, 2003).

Republic of Kenya, "The Anti-Corruption and Economic Crimes Act, 2003,"
Kenya Gazette Supplement Acts, 2003, No. 41(Acts No. 4), (Nairobi: Government Printer, May 2, 2003).

Republic of Kenya, "The Anti-Corruption and Economic Crimes Bill," **Kenya National Assembly Parliamentary Debates(Official Report): Daily Hansard, Ninth Parliament, Second Session, Volume 1, Numbers 31, 32, 34, 35, 2003**
(Nairobi: Parliament Building, 2003), pp. 937-1129.

Chapters in a Book:

G. Macharia Munene, "Constitutional Development in Kenya: A Historical Perspective," in Yash Vyas, Kivutha Kibwana, Okech-Owiti, Smokin Wanjala, editors, **Law and Development in the Third World**
(Nairobi: Faculty of Law, University of Nairobi, 1994), pp. 51-63

ENDNOTES

- 1 This is the revised paper prepared for the FIDA-KPJA Conference, held at Whitesands Hotel, Mombasa, September 17-19, 2004.
- 2 Professor Munene is a Professor of History and International Relations at the United States International University – Africa (USIU-A), Nairobi and can be reached at gmmunene@usiu.ac.ke.
- 3 Y.P. Ghai and J.B.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government From Colonial Times to the Present* (Nairobi:Oxford University Press, 1970), p. 35.
- 4 The Kiswahili term for regionalism.
- 5 Macharia Munene, "The Political Highs and Lows of Post-Colonial Kenya, 1963-2002," Historical Association of Kenya Conference, Lake Baringo Club, June 10-13, 2004
- 6 Ghai and MacAuslan, *Public Law and Political Change in Kenya*, p. 358
- 7 S.N. Waruhiu, *From Autocracy to Democracy in Kenya: Past Systems of Government and Reforms for the Future* (Nairobi: Expert Printers, 1994), pp. 40-43, 47; J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi: ACTS Press, 1990), p. 115; Macharia Munene, "The Manipulation of the Constitution in Kenya, 1963-1996: A Reflective Essay," HEKIMA: Journal of Humanities and Social Sciences, Volume II, Number 1, 2003, pp.45-47
- 8 Mboya's victory was evident when parliament adopted Sessional Paper Number 10: African Socialism and Its Application to Planning in Kenya. The document made it clear that African socialism meant capitalism with an African twist and that there was no room for scientific socialism.
- 9 Kenyatta's statement on "African Socialism" in Jomo Kenyatta, *Suffering Without Bitterness: The Founding of the Kenya Nation* (Nairobi: East African Publishing House, 1968), p.273; Tony Hall, "Odinga May Have Been Forced to Quit-Mboya," *Sunday Nation*, April 17, 1966; G. Macharia Munene, "Constitutional Development in Kenya: A Historical Perspective," in Yash Vyas, Kivutha Kibwana, Okech-Owiti, Smokin Wanjala, editors, *Law and Development in the Third World* (Nairobi: Faculty of Law, University of Nairobi, 1994), pp. 58-59; Colin Leys, *Underdevelopment in Kenya: The Political Economy of*

ENDNOTES

- Neo-Colonialism, 1964-1971 (Berkeley, California: University of California Press, 1974), pp. 220-224.
- 10 Munene, "The Manipulation of the Constitution in Kenya," p. 49; David Goldsworthy, *Tom Mboya: The Man Kenya Wanted to Forget* (Nairobi: Heinemann, 1982), pp. 182-184; Waruhiu, *From Autocracy to Democracy*, p.48.
- 11 Editorial, *Kenya Times*, January 22, 1994. He had joined Moi in order to punish what he believed was a betrayal, mainly by Matiba. He subsequently succeeded in snatching the post of Leader of the Official Opposition in parliament from Matiba and thereby became chairman of the public accounts committee.
- 12 Macharia Munene, *The Politics of Transition in Kenya, 1995-1998* (Nairobi: Quest and Insight, 2001), pp. 60-63, 89-92; Kiraitu Murungi, *In the Mud of Politics* (Nairobi: Acacia, 2000), pp. 78-80.
- 13 Macharia Munene, "Kibaki's Moment in History: The Election of 2002 and Its Aftermath," *East African Journal of Human Rights and Democracy (EAJHRD)*, Vol.1, Number 1, 2003, pp. 74-76; Korwa G. Adar, "Assessing Democratisation Trends in Kenya: A Postmortem of the Moi Regime," *The Journal of the Commonwealth and Comparative Politics*, Vol. 38, Number 3, November 2000, pp.125-127
- 14 Mukalo Kwayera, "Plot to have Prime Minister Exposed," *The People Daily*, Tuesday, September 5, 2000; Kwendo Oponga, "Should Moi Run Again or Should He Not? Discuss," *Sunday Standard*, April 1, 2001; Dominic Odipo, "Why This Succession Talk Gets Curiouser by the Day," *East African Standard*, Friday, April 13, 2001; William Ochieng', "Allow Moi to Decide Whether to Stand for Presidency," *Sunday Standard*, Commentary, April 15, 2001; Munene, "Kibaki's Moment in History," pp.74-76.
- 15 Macharia Munene, "Hazards of Postmodern Colonialism in Kenya," Conference on The Political Economy of Kenya, Oxford University, May 27-28, 2004, Oxford, United Kingdom.
- 16 Richard Chesos and Peter Ng'etich, "Now Women MPs Want Border Clans Disarmed," *Daily Nation*, August 30, 2004.
- 17 See Cartoon on school children imitating Members of Parliament in violence and bad behaviour, *Saturday Nation*, August 7, 2004; G.G. Kariuki, "NARC is Almost

- Dead, So What Next?" Daily Nation, August 2, 2004; John Oywa and Allan Odhiambo, "Wrangling will soon be Over, Says Kibaki," Daily Nation, July 30, 2004; Muchiri Gitonga, "NARC Rows Spill Over Into Kieni," Daily Nation, September 30, 2004.
- 18 Munene, "The Political Highs and Lows of Post-Colonial Kenya", 2004; Wycliffe Muga "MoUs Were Ill-Conceived, Doomed to Fail," Saturday Nation, July 24, 2004
- 19 The impression arose that they even gave themselves special political campaign funds in the name of Constituency Development Fund which their political opponents would have problems accessing. Murithi Mutiga and Dennis Onyango, "House of Corruption: How Motions are Won and Lost Through Sleaze," Sunday Standard, August 8, 2004; Omusundi Maina, "Voters Should Contain Wasteful Parliament," East African Standard, August 25, 2004; Mutuma Mathiu, "Return of the Tax-Avoiding Freeloaders we Call Our MPs," Sunday Standard, October 3, 2004; Abraham Mutwol, letter to the Editor, "Constituency Development Funds a Recipe for Corruption," Daily Nation, September 29, 2004; John K. Njiraini, "Budget: The Buck Stops with the MPs," Daily Nation, July 22, 2004.
- 20 Editorial, "MPs Passed Bill But They Hadn't Read It," East African Standard, August 11, 2004; Nation Reporter, "Review: Raila Reveals LDP's Secret Weapon", Daily Nation, August 9, 2004; David Mugonyi and Shem Sudia, "Now MPS Protest at New Law They Passed," Daily Nation, August 10, 2004; Philip Ochieng, "Why They Didn't See the Catch," Daily Nation, August 10, 2004.
- 21 See Editorial, "A Terrible Goof by MPs," Saturday Nation, August 14, 2004 on the possibility of MPs mortgaging Kenya by rushing to pass "dangerous Bills to please their masters."
- 22 Habel J. Nyamu, "Kibaki Followed the Constitution, Daily Nation, September 17, 2004.
- 23 Eric Orina, "New Hope for Donor Funds: Lending to Kenya Could Resume in July, Says a Top IMF Official," Saturday Nation, January 18, 2003; Okinyi and Dane Mwirigi, "Anti-Corruption Bill Passed," The People Daily, April 18, 2003.
- 24 Quote in Republic of Kenya, "Consideration of Report and Third Reading: The Anti-Corruption and Economic Crimes Bill," Kenya National Assembly Parliamentary Debates (Official Report): Daily Hansard, 9th Parliament, 2nd Session, Volume 1, Number 35, Thursday, April 17, 2003 (Nairobi: Parliament Buildings, 2003), p. 1126; Okinyi and Mwirigi, "Anti-Corruption Bill Passed."
- 25 See Statements by Kiraitu Murungi, Peter Anyang Nyong'o, and Martha Karua, in Republic of Kenya, "The Anti-Corruption and Economic Crimes Bill," Parliamentary Debates, 9th Parliament, 2nd Session, April 10th, 16th and 17th, 2003, pp. 939, 1055, 1126.
- 26 Republic of Kenya, "The Anti-Corruption and Economic Crimes Bill, 2003," The Kenya Gazette Supplement No. 5 (Bills No. 2), (Nairobi: Government Printer, 2003).
- 27 Kibe Mungai, "Bad Law and the Paradox of Anti-graft Strategies," Sunday Standard, September 12, 2004.
- 28 Quotes from Michael Chege, "Why Kenya is Down in the Dumps," Daily Nation, August 6, 2004.
- 29 Mutuma Mathiu, "Ego Trip: Now Witness the Danger of Dependency" Sunday Standard, July 25, 2004; Kibe Mungai, "Clashing with Clay," Sunday Standard, October 3, 2004.

My Vote, My Voice: The Rising Concern That MPs Account to Their Voters

By Wanyiri Kihoro¹

The demand for an account from all Kenyan MPs

In the first General Election held in Kenya in May 1963, which led our country to long-sought independence, electing a representative was the dominant idea that was topical among all Kenyans, such that the person who was elected became the people's representative to the House of Representatives. He (and I use this word deliberately because no woman was elected to Kenya's First Parliament) did not become a Member of Parliament, as there was no Kenyan Parliament. This is an important distinction, which relates to the question of accountability of those who are elected. If the Kenyan voter does not elect an MP on this basis, then he or she cannot later come round and demand that the MPs account for their actions. However, we do have a Parliament, which is the law-making body in the country.

The Kenyan citizen is increasingly interested in the fact that each and every MP who is elected or nominated to Parliament accounts to the electors, particularly on the special interests that they are supposed to represent and promote in Parliament. This is an important concern which will, more than ever before, dominate the thinking of voters during general elections and indeed even by-elections in future.

Election time, as we know it in Kenya, however prevents serious reflections by the elector on whom they are to elect. The candidates themselves, election fever - sometimes termed the election "wave", electoral alliances, tribalism, sectionalism, fears of certain

outcomes, false hopes, etc dominate the national election scene so much so that there is no time, so to speak, to reflect over such "far-fetched" issues like effective representation and accountability by parliamentarians subsequently.

Many candidates themselves use various machinations and subterfuges like money, friends, brokers, clanism and the like to prevent a critical assessment of their fitness for the job ahead. Suitability of the candidates, in respect of the performance of the work ahead, is conveniently relegated to the background by both the voter and the candidate. In this game of supposed mutual deception, it is the voters who ultimately lose out because of lack of effective and committed representation. In a competitive world, the country loses out in the long run because of the lack of sound decision-making processes in political, economic and diplomatic spheres, to mention but a few.

The Kenyan citizen is increasingly interested in the fact that each and every MP who is elected or nominated to Parliament accounts to the electors, particularly on the special interests that they are supposed to represent and promote in Parliament.

Notwithstanding the above, the electors continue to demand, in public affairs, that their elected representatives account. There are certain matters, which the electors feel, cannot be done within Parliament without the MPs

consulting those who have made them MPs. This can be illustrated through the various issues that have come up since the year 2003, which demonstrate the electors' quest for accountability from MPs. The following are some examples:

- ◆ Electors have demanded that parliamentarians do not raise their salaries in-house, that is single-handedly, without the involvement of and effective consultations with taxpayers and other authorities outside the House.
- ◆ The citizen has demanded that MPs declare their wealth publicly, every year, through an open register and that members of the public be allowed to inspect the register and take notes and photocopies thereof of the returns, for use, for example, in court or for publication. This has resulted in the Public Officers & Ethics Act 2003.
- ◆ The citizen has also demanded that public funds be used to finance the operations of political parties with a certain level of popular-following in the country. This is intended to free multi-party politics in the country from the financial control, domination and manipulation by wealthy politicians.
- ◆ Members of the public have demanded that the new constitution have a provision for recall of non-performing and wayward MPs from their parliamentary duties which are both inside Parliament and outside in their constituencies and also in the country at large.
- ◆ Demands have been made by electors that MPs should not be involved in executive and financial management matters in constituency-based committees where they sit by virtue of being MPs. These include the District Road Committees (DRCs), the Constituency AIDS Control Committees (CACs), the Constituency Development Fund (CDFs) Committees and the like.

Is an MP a representative, a Deputy or a Parliamentarian?

In many countries, in both the West and the East, MPs are called by other names, which bring nearer home the work they are supposed to do. In the West, such as the U.S, an MP is predominantly called a representative, a congressman or a congresswoman. Parliament is also called a House of Representatives or Congress. Those who are elected are the people's representatives to a congress, which decides the affairs of the nation.

In most of the East, for example Russia or Japan, an MP is called a Deputy. He or she is the person who deputises for the citizen; say in the Duma or the Diet, as every citizen cannot realistically be there when important national matters, which affect their everyday lives and their country, are being decided. The least meaningful and descriptive word in the business of representation of the people is a parliamentarian, a word which you have to look for deep into the history of medieval Britain to put sense and meaning to. In the Kenyan context, Parliament is another English word for a high court, which plays to different rules.

A Kenyan citizen's conceptualisation of an MP must go beyond seeing him or her as just a member of the August House and see him or her as a representative, a deputy who is a servant of the people. A man or woman, who works in Parliament in every sense of the word, on taxation of the public, and participates and influences the allocation and spending of tax funds for the welfare of the community.

An MP regulates government through measures like asking probing questions on public affairs, proposing motions to influence government policy, participates in debate on matters of public interest, influences the law and content of existing law, and sometimes proposes legislation through a private Member's Bill, among other duties. A Kenyan MP should therefore be an accountable

delegate to Parliament, who is a contractual representative of the people in the true meaning of this word.

A Kenyan MP should therefore be an accountable delegate to Parliament, who is a contractual representative of the people in the true meaning of this word.

How can we achieve Accountability?

Outline of the members' work using the "Orders of the Day" format

In respect of the core business of Parliament, it is certainly possible to make the MP more accountable. A standard return on the sessional work of every MP to his constituents should be made a requirement. The form could have sections as do exist on the "Orders of the Day" which outlines the daily parliamentary business that is dwelt with in the House. The format of the orders of the day, which starts with a Prayer, is as follows:

1. Administration of Oath.
2. Communication from the Chair.
3. Petitions.
4. Papers.
5. Notices of Motion.
6. Questions (as set out in the appendix).
7. Business of the House, which can take the form of papers, motions, bills, etc.

The daily work of MPs in the House, which involves items from No.3 to 7, can be set out in a national return by Parliament to the constituents who sent the MPs, otherwise the elector will forever remain in the dark about the actual work that is done by the MPs in the House. The assignment of raising the level of

national representation in Kenya is everybody's task. Towards this end, Parliament should make the *Hansard Report*, which is compiled daily by parliamentary staff, citizen-friendly, by suitably summarising members' work output, in respect of petitions; presentation and debating of papers; sponsoring and debating motions; committee work; and contribution to debate on bills, easily readable and available.

There is a national demand for this because continued under-performance and lack of performance by an MP has an immediate bearing on the constituents in question and also on the country at large. Why should, if one may ask, in public life, work paid for not be done? Production and productivity remain the only sound justification for remuneration and the subsequent increase in the same.

Lost In the Parliamentary Crowd Due To Under-Performance

No MP should be allowed to hide in the parliamentary crowd any longer. At the dissolution of Parliament, the sitting members must be scored "Excellent", "Very Good", "Good", "Average", "Bad", and/or "Useless" in a public return to the electors to bring to an end what looks like a conspiracy at the top to keep away from the public glare MPs who have failed to discharge their parliamentary duties.

At the dissolution of Parliament, the sitting members must be scored "Excellent", "Very Good", "Good", "Average", "Bad", and/or "Useless" in a public return to the electors to bring to an end what looks like a conspiracy at the top to keep away from the public glare MPs who have failed to discharge their parliamentary

MPs should be made to produce an annual report in respect of their duties, some of

which are statutory and other that is related to work in the constituency. If no work has been done, then the MP should admit this. For example, there should be MPs returns in respect of the distribution of education bursary funds, which are public funds. The returns should show who were the recipients of the money, which schools they were attending, the amount of money awarded, by whom and why. The MP should also account, in the same way, on the spending of the Constituency Development Funds, which are supposed to be applied to certain projects as approved by the National Management Committee of the CDF.

An MP should also report administrative and governance activities he or she has taken within and outside the constituency. Accountability of MPs must be taken beyond Parliament and the constituency to the People of Kenya. A good example is that of attending public and political functions in other constituencies, which open up the MP's horizons to the national work and agenda, which he or she must nevertheless attend to in Parliament.

Parliament should itself help in enhancing the accountability of MPs. An executive summary of each member's work should be produced at the end of each session to enable constituents and Kenyans at large to have a full view of what has transpired in the August House. A certificate of performance, and if need be, non-performance should be issued to every MP's dissolution baggage as he returns home to seek a new mandate.

Parliament Should Introduce a Code of Conduct for All MPs

The traditional doctrine of Sovereignty of Parliament has been used to give MPs a free reign inside Parliament, not in order to promote a hardworking ethic, but in order to cover up for work not done by some. That some members can dismally fail in the representation of their constituents and still

continue as parliamentarians and draw salaries from taxpayers' funds for doing no work, is offensive in the extreme to honesty and common sense.

Parliament owes a duty to Kenyans to make its work as proximate to the people as possible. It should be able to summarise the *Hansard Reports* into an outline of each member's parliamentary activities and thereby present the voters with a reliable and undistorted view of the actual activities conducted by Members inside the House. Short of this, the voter will always, during elections, be grappling in the dark about the ability and quality of Members. This information is what the voter is expected to take into account before returning or withdrawing a Member from the House.

Parliament itself should have an enforceable Code of Conduct such that Members who have "no business" in the House can be weeded out at least next time round. There must be standards that are set and enforced by Parliament in respect of its work. It is clear that under-performance by some Members makes them suffer prejudice, suspicion and dishonour from members of the public.

Parliament Must Be Truly National In Representation

Parliament must be representative of the whole population of Kenya, meaning men, women and children. No sector of the Kenyan population should be left behind. Where legislation is lacking in respect of any major group, then Parliament should take a leading role in providing the legislation. The last Parliament in Kenya enacted the Children's Act in this spirit and it is hoped that the current one will legislate in respect of the Family Protection law, which will secure our homes from unwarranted domestic violence.

Towards the above, FIDA Kenya has been at the forefront in making parliamentarians not only active legislators, but also informed and

all-embracing in their legislative endeavours. In furtherance of this, FIDA Kenya has organised several seminars, workshops, and meetings to assist MPs in having a common approach to legislative work.

Some bills, which advance the cause of women's rights and which have already come up in FIDA Kenya's seminars are the Family Protection Bill [previously titled the Domestic Violence (Family Protection) Bill]; the Children's Bill, which was enacted by Parliament in 2001; the National Commission on Gender and Development Bill, which has also been enacted as the Gender Commission Act; and the Equality Bill, which has not yet been debated by Parliament. During these workshops, MPs have also had the opportunity of discussing amendments to the Penal Code through the Criminal Law Amendment Bill 2001 in order to harmonise certain provisions in the Code with provisions in the Children's Act 2001. This has been very commendable as we struggle towards achieving a Parliament that truly represents our national interests.

Recall of an MP as A Remedy to the Voter

Clause 112 of the Draft Constitution had provided for the recall of MPs following a public petition initiated by at least 30% of the registered voters in the constituency. In the final bill, which was however made at the end of BOMAS III, the provision was excluded not in the least because of the hostility of the MPs who comprised 1/3 of the delegates, but because of the vagueness of what could constitute "a recallable offence". This however has not defeated the demand that MPs account to the electorate in terms of work.

A meaningful demand for account from MPs must have a sanction. What would happen to those MPs who fail midterm to account for their actions? Even if the recall option was there, this would entail a round of elections. There would have to be the first round which is the constituency-wide petition to decide whether to recall the MP, and if successful, a second round which would have to be an election to elect the new MP. Hence, time and resources would be wasted in an effort to remedy what is patently past electoral failures.

Conclusion

In light of the above, it is clearly evident that electors in every constituency have a national duty in every election to examine the candidates who present themselves for election to Parliament with a fine brush. It is the candidate who is being elected at the constituency level, who will subsequently become a minister, a prime minister and possibly even the president of the country. The electorate should therefore be able to live with their choice in all the circumstances which might arise, if the election is not flawed and/or fraudulent.

The expensive recall option is not always a desirable option to take. It certainly cuts both ways in that, as you recall an elected MP, you are also undermining the sovereignty of the voter and the potency of the vote, which should endure for five years. It is the voter who should think twice or thrice before casting his or her vote for a dodgy candidate. The voter has a prime duty to vote wisely and not just blindly because there is a remote possibility that the winner might be recalled in the future.

ENDNOTES

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- 1 Wanyiri Kihoro was the Nyeri Town MP 1997-2002. He is an advocate of the High Court of Kenya as well as a Land Economist and has worked in Public Service both in Kenya and the United Kingdom. He is the author of 3 books in Public Affairs including *"A Vision of the Future from the Past - Essential Public Documents in the Making of the New Kenya Constitution"*.

ABANTU for Development 2002.

REFERENCES

The Kenya Constitution

The National Assembly and Presidential Elections Act Revised Edition 1998 (1992) Draft Constitution Bill of the Constitution of Kenya Review Commission 2004. Yawezekana Bomas III Special Issue 28th June 2004.

Constitutional Guide to the Review Process - A joint publication by ABANTU for Development & The Federation of Women Lawyers (FIDA-Kenya), June 2002.

National Assembly - Standing Orders

A Copy of the Orders of the Day
Thursday 15th November 2001.

Workshop Report on the Role of Parliamentarians in the Implementation of the International Treaties and Conventions.

Paper on functioning of the Kenya Parliamentary Committees presented by Hon. Wanyiri Kihoro at the workshop on Developing Linkages in Legislative Advocacy held in February 2001 at the Great Rift Valley Hotel, Naivasha.

Parliamentary Survey Report for the Federation of Women Lawyers in Kenya ≤September 2004 by Okumba Miruka (Draft One)

Kenya National Assembly Parliamentary Debates, Weekly Hansard, 11th April 2000 to 13th April 2000, in respect of the motion by Hon Beth Mugo on the need for Affirmative Action.

A New Constitution for Kenyans: An Empty Promise?

By Immaculate Kassait¹

Introduction

In this paper, I will discuss the past year in terms of the constitutional review process and propose a way forward with an emphasis on the vital role that civil society must play in guaranteeing the passage of a constitution that embraces the principle of social justice and one that will be enacted when consensus is reached by the various stakeholders. First, I will review the final leg of the National Constitutional Conference and the challenges and lessons learnt that continue to affect the review process and how it eventually led to a walk out by some government officials. Next, I will discuss how an independent pressure group of activist delegates continued to agitate for a new constitution and how the pressure was short-lived as they were co-opted by political interest and thus lost direction. This discussion will be followed by the conflict between the Judiciary and the Legislature which has contributed to the current stalemate in the review process. Finally, I will survey the work of the Coalition for Safeguarding Women's Gains in the Draft Constitution as an example of a civil society initiative that seeks to ensure that the Constitution represents the interests of all members of society, and especially women.

"The constitutional review process is at a crossroads. It is trapped in legal and political uncertainty. We, my fellow Kenyans, have the capacity to move the process forward and in harmony. We have so far been wounded in the process, but all this must now come to an end and let sanity prevail."² Indeed this phrase characterizes the review process in the last one year. Yet, five months after the Vice President made that passionate appeal, there has been no significant change.

The history of the constitution-making process is an area of discourse that has been highlighted by this Annual Report in the previous years and continues to be addressed. The irony is that while many other countries³ have either enacted or reviewed constitutions in the last ten years, Kenya continues to drag its feet in constitutional reforms. The question, therefore, is for how long shall we continue to demand for the enactment of a new constitution? Are we doing enough as civil society to ensure that our demands are met? Or have we reached a dead end? Or, should we take the cynical approach, as some politicians have done, and state that a new constitution will not add bread to our tables?

The bottom line is that the current constitution allows institutions and individuals to continue abusing power and institutionalising corruption. As much as a new constitution may not necessarily translate to bread on the table, it will provide 'Wanjiku' with an opportunity to demand for the provision of socio-economic and cultural rights.

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The process to the enactment of a new constitution is clearly spelled out in the Constitution Review Act 2001⁴ which stipulates four stages of the constitution review process:

visiting all constituencies in Kenya; compiling reports of the constituencies; holding a National Constitutional Conference, and drafting a Bill to be presented to Parliament. The whole process was anticipated to take a maximum of 24 months. Yet, over three years after the process started, there seems to be no hope at the end of the tunnel. This seemingly straightforward process has been hijacked and marred with political intrigues, court battles and suspicion. The constitutional review process remains a circus and an avenue for misuse of state resources. The process has already cost billions of shillings and yet we are not nearing the end. The question remains, when and whether we shall have a new constitution as expressed by the Parliamentary Commission on the Constitution.

The last leg of the National Constitutional Conference: the intrigues that continued to affect its sanity

The closure of BOMAS II in September 2003 was inevitable as Parliament had to resume discussing crucial Parliamentary motions that had been kept on hold due to the National Constitutional Conference. BOMAS was however expected to resume in November of the same year, with extensive deliberations and, hopefully, a new constitution was to be enacted by December 2003. However, following consultations with key stakeholders including the CKRC (even though its chairperson was away) BOMAS III was postponed to January 2004. This decision was clearly unpopular with some commissioners and delegates at large and led to a bad relationship getting worse.

The Commission was divided into two wings: those that were pro the then chair Professor Yash Ghai, and those that were viewed as being anti-Ghai. Clearly, to an observer, the principle of collective responsibility was non-existent in this same Commission that had been entrusted with the responsibility of facilitating the process towards a new constitution. With such clear

divisions, one wonders how it was possible to unite the delegates. It is no wonder that delegates took every opportunity to attack the commission, and in some cases were successful. For instance, delegates accused the rapporteurs of the Transitional Committee of having doctored some sections of the report and asked them to leave.⁵ This characterised the acrimony and suspicious relationship between the commissioners and delegates. The results were predictable: the chair led a protest during the day scheduled for the re-opening of BOMAS, while others stayed home and watched from a distance. What was commendable about this act was that the chair and some delegates stood out to express discontent about how the constitutional review process was interfered with by other players, including Parliament.

In January 2004, several significant things happened that affected the constitutional review process. The Ufungamano Initiative, acting in good faith and disillusioned at the slow pace of the review process, was determined to infuse a new dimension to the review process and launched an alternative draft.⁶ This was the straw that broke the camel's back. There was a lot of suspicion and hostility from delegates. The action led to district delegates organising themselves as a unified block. Thus, once the conference was re-opened, delegates marched in solidarity to defend a people-driven constitution and oppose the Ufungamano Draft.

In the meantime, politicians were trying to reach a consensus under the auspices of the Coalition of National Unity (CNU). This initiative largely involved Members of Parliament across the political divide.⁷ However, the initiative was viewed with suspicion by other delegates, who sidelined the process and quickly organised themselves to attend a Kilifi consultation that was being held at the same time as the CNU-Safari Park talks on 10th January 2004, thus pouring cold water on the consensus-building process. The process was faced with issues of ownership and legitimacy, and due to sabotage, the

initiative collapsed.⁸ The Ufungamano Draft and the CNU initiative were, in a way, blessings in disguise because a wake up call was sounded for delegates who were now aware that their credibility and commitment to the constitutional review process was on the line. As a result, BOMAS III was the most focused session of the review process, recording a high turn up of delegates who worked from dawn to dusk.

The final leg of the National Conference (BOMAS III) therefore took place in a climate of heightened political suspicion and tension. In an effort to infuse goodwill and trust, the CKRC initiated a consensus-building process that brought together different delegates and organisations in what came to be known as the 'Sulemeti Consensus Initiative'. However, after weeks of deliberations, the resolutions of the consensus group were neither discussed nor adopted at the plenary of the constitutional conference. Instead, a lot of lobbying took place two days before the report was presented and thus no one was given an opportunity to discuss the report. Instead, it was rejected in total disregard of the conference's rules and procedures.

As a result of the rejection of the report by the consensus group, some delegates expressed frustration and indeed went on to file an application for judicial review in the High Court of Kenya, challenging the legal validity of the procedure in adopting chapters 11, 12, 14, 15 and 21. Their application was granted and thus when the NCC received the final draft on 23rd March 2004, it did so in contempt of the court⁹. On the other hand, some government officials walked out on the fateful evening of 15th March 2004. The walk-out had a serious impact on the constitutional review process as decisions made on that night were not based on any legal justification but were as a result of the existing acrimony; it was a battle field, the concept of you against us and the lines were drawn. Delegates' true colours were seen as they voted with their emotions and not their conscience nor as

representatives of the 'wanjiku' whose name they always called out in defense of the constitutional review process.

Hence, in the record time of less than a day, five key chapters of the constitution were passed!¹⁰ One wonders if indeed the constitution could be passed in such a short time. Why then had delegates taken over a year to deliberate on the constitution? Would it be true to infer that money, more than commitment, was what drove the process?

Without reaching any agreement or consensus as it has commonly been known, the fight at BOMAS was shifted to Parliament. Parliamentarians were now determined to put each other down as to who had won the battle at BOMAS.

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The Re-awakening of Activism in the Constitution-Making Process

Once BOMAS ended, most delegates who had fought so hard to ensure that a new constitution for Kenyans was drafted, were determined to see it through and thus formed a pressure group comprising of former delegates who were sympathetic to the provisions of the draft 2004. The group set out objectives towards agitating for the enactment of a new constitution and gave a timeline for when they expected a new constitution, which was set for 30th June 2004.¹¹ Indeed this was seen as a new way of approaching the constitutional review process, and for a while, the group was focused and seemed determined to stay away from the ruling class' politicians. However, in light of what is commonly said that 'there is no gathering that can escape politicians'; the group was eventually subsumed after the politicians (Members of Parliament) struck a deal in the parliamentary committee.

However, the questions that most people ask and continue to ask include why the leader of the Katiba Watch pressure group swore that they were an independent body that was agitating for change and yet they allowed themselves to be subsumed. Whose interests were they advancing? These questions remain un-answered and continue to demand that civil society or groups agitating for change must have a vision and an agenda that will guide them towards achieving their goals.

Court cases: Crossroads in the Constitutional Review Process

The three arms of government, namely the executive, legislature and parliament, are meant to play complementary roles and respect the principle of separation of powers. However, in the current setting, there seems to be a serious conflict between the legislature and the judiciary, especially in the constitutional review process.

This highlights the question about why people resorted to the courts instead of resolving all the contentious issues amicably. A constitutional making process, by virtue of its nature as a social contract, is supposed to reflect the view of citizens and their relationship with the governor. I submit that part of the problem is due to the frustration experienced by individuals who have felt excluded during the constitutional review process. They were locked out of the BOMAS process when the Ufungamano Initiative and Inter Parties Parliamentary Group merged. In addition, their role at BOMAS was as observers and they could not make any interventions since delegates did not give them an opportunity to express themselves. They felt that the representation was not adequate. On the other hand, some delegates and their pleas to express their views were ignored, yet the Act emphasised that all discussion will be by consensus.¹²

What then, are the implications of the court rulings? In terms of the court process, the ruling in the infamous case of Njoya¹³ raised fundamental questions related to the review

process. The ruling in these cases proposes that: the Draft Constitution has to be subjected to a referendum. While the idea of a referendum may be a fantastic one that will ensure that the people of Kenya validate the Constitution of Kenya that represents their issues, fundamental questions on the process arise. Our concern is that, given the social, cultural and political trends in this country, subjecting the gains for women in the Draft Constitution to a referendum would result in a backlash and thus erode the gains so far achieved. Our recommendation under this therefore is that if indeed a referendum is held, women's gains shall not be subjected to the voting process. In addition, a referendum must be accompanied by massive awareness and education around the country.

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The Court also ruled that the role of Parliament should be limited to the enactment of enabling Legislation. This ruling goes a long way in re-emphasizing the principle of separation of powers. However, parliament disregarded the ruling and went on to validate the Zero- Draft that came out of BOMAS despite the ruling that the composition of BOMAS was defective. This has serious repercussions and can be construed to be disobeying court orders.

The Constitution of Kenya Amendment Bill 2004 does not mandate the parliamentary committee to collate views on contentious issues; however, this does not stop the select committee to do so in allowing them to compile a report to give recommendations to Parliament.

The Court also ruled that the representation at the BOMAs of Kenya was in violation of Section 82 of the current Constitution. While it has been proposed that one of the remedies to this problem constitutes a constituency assembly that will be empowered with drafting and which must be elected directly, my question is, will this be another expensive exercise that will not guarantee a constitution at the end of the seating? My challenge is to the Attorney General, who, in his wisdom and as a matter of public interest related to the cost, should have challenged this decision. The only other option is for all parties to resolve this dispute amicably.

Justice Ransley, in the case filed by Martin Shikuku & Others, granted a stay to their application barring the Attorney General from receiving all altered versions of the Draft Constitution¹⁴.

The Coalition¹⁵

The Coalition was again hard at work throughout BOMAS III. Its role in the women's caucus was recognised and throughout the constitutional review process, its presence was felt at BOMAS. Coalition partners also took it upon themselves to use every opportunity available to advance women's gains in the Draft Constitution, especially during Tuesday and Thursday women's caucus meetings at BOMAS.

The Coalition enjoyed widespread recognition as most of the proposals that it advanced were adopted in the final Draft. However, it also faced deep

resistance to some key proposals. At the beginning of the campaign, the Coalition made it clear that it supported Mixed Member Proportional Representation (MMPR), a position that it advanced in its bi-weekly newspaper *Yawezekana*. Furthermore, the introduction of model proposals that offered an alternative to the Draft Constitution was treated with a lot of suspicion. Indeed, some of the women delegates went on record¹⁶ attacking the model proposals, stating that the Coalition had taken women backwards in proposing ideas that had already been rejected since they were elitist. Despite these attacks, the Coalition did not give up and instead took up every opportunity to explain to the delegates why MMPR was a higher version to the district seats which were already being subjected to a litmus test in neighbouring countries. This highlighted the fact that the need for strong institutions in a system that enhances political parties cannot be underscored enough. Another contentious issue was the concept of a two-chamber House. In the model proposals, the Coalition expressed the view that the country needs one chamber and that its devolution

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The Coalition enhanced its position through *Yawezekana* a bi-weekly newspaper produced during BOMAS I, II, III.

should be at three levels. The rationale behind this is based on efficiency and not bureaucracy and expense.

The importance of the gains in the draft constitution cannot be underestimated. This can be attributed to hard work by women before us and the diligence by the women caucus during the constitutional Review process and in particular BOMAS. The gains can be summarized as:

Chapter	Gains in the draft constitution	Losses
Chapter One Sovereignty of the People and Supremacy of the Constitution	<ul style="list-style-type: none"> • reaffirm commitment to democracy, social justice, constitutionalism and the rule of law. 	<ul style="list-style-type: none"> • The Draft 2004 addresses "Gender/"people" instead of "Women".
Chapter Two & Three Republic National Values, Principles and Goals	<ul style="list-style-type: none"> • Effective measures to eradicate all corruption. • Access of the people to independent, impartial and affordable institutions of justice. • Ensuring full participation of women, persons with disabilities, marginalized communities and all other citizens in the political, social and economic life of the country. • The principle of not more than two-thirds of the same gender (Coalition's campaign) for elective and appointive bodies. • At least 5% of all elective and appointive bodies shall be people with disabilities. 	
Chapter Four & Five Citizenship Culture	<ul style="list-style-type: none"> • Acquisition of citizenship by birth, registration or citizenship by birth if either the mother or fathers is a citizen of Kenya • Citizenship by marriage if married for a period of seven years. • Home-making as part of contribution to national building. 	
Chapter Six Bill of Rights	<ul style="list-style-type: none"> • The state shall not discriminate on the basis of sex, race, pregnancy, marital status, health, age or disability. • Recognition of diverse SOCIAL, ECONOMIC and CULTURAL Rights. 	<ul style="list-style-type: none"> • Right to life begins at conception- • Women managing land and not controlling it. • Death penalty not abolished. • The treatment of victims of domestic violence.
Chapter Seven Land and Property Rights	<ul style="list-style-type: none"> • Protection of spousal property during the continuance of the marriage and termination. 	
Chapter Eight The Environment and Natural Resources	<ul style="list-style-type: none"> • Joint responsibility between the state and citizen in protecting the environment • Protection of utilisation of natural resources. 	<ul style="list-style-type: none"> • Non recognition of the role that women play in the protection of the environment. • Repossession of gazetted forests is not captured.
Chapter Nine & Ten Leadership & Integrity Representation of the People	<ul style="list-style-type: none"> • Establishment of an Ethics Commission, members to be drawn across the board. • 1/3 principle as a methodology of mainstreaming gender. • The establishment of district seats and boroughs as electoral units 	<ul style="list-style-type: none"> • MMPR (Coalition's major Campaign)

Chapter	Gains in the draft constitution	Losses
Chapter Nine & Ten Leadership & Integrity Representation of the People <i>(continued)</i>	<ul style="list-style-type: none"> The inclusion of all marginalized groups. Political parties' entitlement to state funding. (The Coalition had proposed to only fund parties that nominated women). 	
Chapter Nine & Ten Legislature Executive The Judicial and Legal Systems	<ul style="list-style-type: none"> The right of the citizens to petition the National Assembly Bi-cameral legislature that will embrace the one-third (1/3) principle The establishment of a Supreme Court Retention of Kadhi's Court. Services Commission. The office of a Public Defender established. 	<ul style="list-style-type: none"> Removal of function of the Judicial Service Commission as promoting gender equity.
Chapter Fourteen Devolved Government	<ul style="list-style-type: none"> Two women elected from each region by an electoral college consisting of all elected members of District Councils within the region. Ten members to represent marginalised groups. 	
Chapter Fifteen & Sixteen Public Finance & Revenue Management Public Services	<ul style="list-style-type: none"> Fund for holding public money. A Public Services Commission established. Establishment of Kenya Correctional Services. Protection of public servants from arbitrary treatment. 	
Chapter Seventeen National Security	<ul style="list-style-type: none"> Defense forces should be answerable to Parliament. Kenya Police Service should respect human rights and dignity. 	
Chapter Eighteen & Nineteen Constitution Commission Amendment of the Constitution	<ul style="list-style-type: none"> The establishment of a Commission for Human Rights and Administrative Justice, The People's Protector Gender Commission established Consensus on the principles of social justice, at least one third representation, fair representation and Affirmative Action. 	<ul style="list-style-type: none"> Chapter 19 is important because it addresses the dilemmas that we are currently facing in regard to the current constitution. The issue on community policing as proposed by the coalition was lost.
Chapter Twenty & Twenty-One General Provisions Transition	<ul style="list-style-type: none"> The Constitution shall be interpreted in a manner that: Promotes its purpose, value and principle; Advances Human Rights and Fundamental Freedoms and rules of law; Permits the development of the laws; Contributes to good governance; <i>Status quo</i> remains until the draft comes into effect; The Ethic and Integrity Commission comes into effect within ninety days of the effective date. 	

Furthermore, as a way of holding delegates accountable, at the end of BOMAS III, the Coalition conducted an audit¹ on the views that Kenyans had expressed and compiled in the Commission's report and compared this with the Draft Constitution, the Coalition's Model Proposals and the final Zero-Draft 2004. It was clear from the Audit that Kenyans had expressed the need for a less powerful president and a devolved government. Women, people with disabilities and marginalised groups also expressed a need for embracing the principles of social justice, gender mainstreaming and affirmative action. The Wanjikus of Kenya did not explain the extent of devolution but they did not express implementation of an expensive constitution as is proposed by the Draft 2004. The shift of priorities during the review process is clearly evident and is reflected in the current impasse.

In light of the above, the Coalition has been involved in various initiatives in its efforts to end the deadlock. In May 2004, the Coalition was represented at the consensus building meeting in Mombasa¹⁹ where it took the opportunity to highlight some of the problems that had affected the constitutional review process. In addition, in light of the deadline of the mandate of the constitution review process, the Coalition undertook an analysis of the scenarios facing the constitutional review process. These scenarios were shared with several stakeholders, including the Consensus Initiative and the Parliamentary Departmental Committee on Justice and Constitutional Affairs.²⁰ The intervention witnessed the extension of the term of the Constitution of Kenya Review Commission.

Moreover, the Coalition has undertaken an analysis of the constitution review process and has shared the findings with the Parliamentary Select Committee on the Constitution²¹. Finally and more recently, the Coalition submitted a memorandum on contentious issues to the PSC²². The memorandum

highlighted 3 issues: MMPR, access to land and the right to life.

Recommendations

Political Good will

For any progress to be made in the Constitution Review process, the government needs to demonstrate political good will in the review process. This must be evidenced by commitment to end the deadlock and respect for an all inclusive constitutional review process.

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Government officially, especially the president, MUST provide political leadership in the review process.

Parliament

Parliament must overcome their hung over of usurping the powers of the people, the executive and the court. As the representative of the people and the body mandated with the responsibility to enact legislation, they must awaken to the changes in society and become more representative of the people and limit their quest for power. Parliamentarians must read documents and analysis scenarios in the constitution review process. They must move from a developing parliament to a legislative body by changing the discourse on the role of parliament at the local level. It is vital that they recognise that freedom of expression is a fundamental right that enhances democracy but it is also one that comes with responsibility and should not be used to fuel tribal hatred. They must also recognize that the society has moved from a passive to a more participatory society that is demanding answers. The Constitution Amendment Bill must be amended to conform to the High Court ruling to avoid conflict in the two arms of government and to embrace the role of Parliament as legislator.

Civil Society

Civil society must awake from the deep sleep that it is currently in. Civil society has allowed itself to get subsumed in the narrow agenda of both the government and politicians. There is no longer dialogue or serious activism. We seem to forget our role as watch dogs. The challenges have come knocking at our door and we must rise to the occasion and be counted. The involvement of younger leaders in civil society is one way of reawakening activism. This we must take on as a challenge as the older generation is often in an uncomfortable dilemma because their friends in the movement have moved on to the government. Re-organizing ourselves is the sure

way of asking questions that are not popular yet important in safeguarding the interest of women and the common Mwanachi.

Responsibility of the media

The media must awaken to the fact that they have a social responsibility in reporting facts. The media has often been challenged for reporting sensational in the pretext of hard news and targeting what sells. However, little time is taken to reflect on their responsibility. As much as the media is a weapon for democracy, their role in the review process has been more of fuelling the deadlock than offering solution. The media must reflect and reawaken monitoring bodies within themselves in advancing the democratic cause.

Conclusion

The constitutional review process is a delicate and emotive issue that needs to be handled with a lot of care through consultation of various stakeholders. The process calls for the involvement of all the stakeholders in negotiation of and consensus towards ending the current constitution review deadlock. In this context, the civil society must embrace the opportunity to discuss the issue at length with the aim of finding a breakthrough.

It is my hope that in the next annual report we shall move from reporting on a constitution review process to discussing the implementation of the constitution.

Further, the role of Parliament must be limited to the enactment of the Constitution and facilitation of the review process. The court, in addressing concerns raised in the constitution review process, should continue to offer solutions that are taken into consideration due to the social and economic aspect of the constitution making process.

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ENDNOTES

- 1 The author is the Assistant Programme Officer in the Rights Team, FIDA Kenya, and has been the project co-coordinator of the activities of the Coalition for Safeguarding Women's Gains in the Draft Constitution throughout the Constitutional Review Process.
- 2 See the Vice President, Moody Awori's speech at the Consensus Building meeting at Whitesands Hotel, Mombasa, May 15-16, 2004.

ENDNOTES

- 3 These countries include Uganda, South Africa, Ethiopia and many others.
- 4 Constitution of Kenya Review Act, Sec 26 (2). Revised Edition 2001(2000) Government Printer, Nairobi.
- 5 See 'Delegates reject two Attempt to Kick out rapporteur nullified', East Africa Standard, January 15, 2004.

ENDNOTES

- 6 See Sunday Nation, Ufungamano Initiative 'Proposed Draft Constitution of the Republic of Kenya Draft Constitution Nation Newspaper'.
- 7 See 'CNU Role in Constitution Review', East Africa Standard, Jan 17, 2004, and 'CNU in Bid to save talks', East Africa Standard, Jan 23, 2004.
- 8 See Kiragu, Jane, 'The Legal Dilemma: Overview of The BOMAS Process', FIDA Kenya; Consensus Building Report: Meeting of Parliament on the Constitutional Impasse in Kenya Consensus Building, Whitesands Hotel, Mombasa 15th -16th May 2004.
- 9 See "Draft Bill to Provide for the Democratic Comprehensive Review of the Constitution By the People of Kenya and Memorandum of Objects and Reasons," prepared by International Center For Constitutional Research and Governance (ICCRG).
- 10 The chapters included Chapter 11 (regarding the legislature), Chapter 12 (the Executive) Chapter 14 (Devolution of powers) Chapter 15 (Public finance) and Chapter 21 (transitional arrangements).
- 11 This was the deadline given by the president.
- 12 Opt. cited. Sec 27 (5) of the Review Act.
- 13 Rev. Dr. Timothy Njoya and Six Others against the Hon. Attorney General and the Constitution of Kenya Review

ENDNOTES

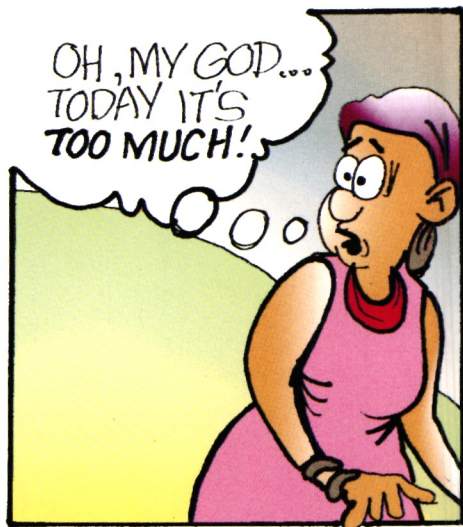
(continued)

- Commission (CKRC) Misc App 82 of 2004 (O.S).
- 14 See Monoria, Evans, "Judicial Decisions and their Impact on their Process".
- 15 The Coalition on Safeguarding Gains for Women in the Draft Constitution comprised of FIDA Kenya, the Institute for Education and Democracy, the League of Kenya Women Voters and the Kenya Human Rights Commission. In June 2004, it expanded its membership to include the Urgent Action Fund.
- 16 See Yawezekana: Bomas Agender, February 24 – March 1, 2004, pg 4.
- 17 Presentation made by Immaculate Njenge at the Coalition Meeting at Pan Afric Hotel.
- 18 See National Constitutional Conference Audit Report: BOMAS of Kenya, April 2003- March 2004 KHRC, IED, LKWV and FIDA Kenya, 2004
- 19 Opt cit. Jane Kiragu, Presentation at the Consensus Building meeting.
- 20 See Scenarios for the Constitutional Review Process, presented at the meeting with the Departmental Committee on Administration of Justice & Legal Affairs, June 21, 2004.
- 21 See Coalition's 'Communiqué to the PSC'.
- 22 See Memorandum to the Parliamentary Select Committee on the Constitution, submitted August 2004.

RAPED? SPEAK-OUT!!



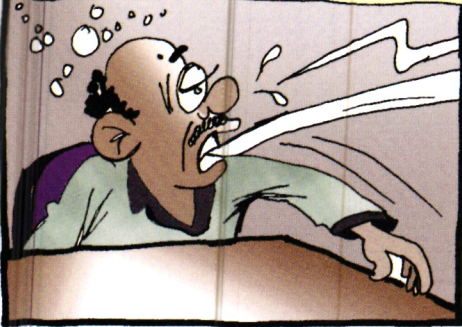
REPORT THE VIOLATIONS, HELP SAVE LIVES!



THIS IS THE STORY OF MAMA KOKO'S
ENOUGH IS ENOUGH!

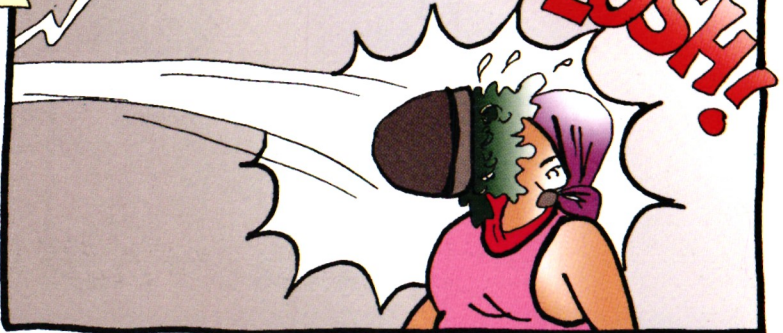
SCRIPT AND ARTWORK BY GAMMZ ©2004.

WHAT FOLLOWS NEXT IS A ROUTINE OF EVERYDAY SINCE THEY MARRIED TEN YEARS AGO...



STUPID WOMAN! CHAKULA GANI HII?!

SPLASH!



HOW DARE YOU GIVE ME SUKUMA WIKI?

PWAF!



THE BEATING GOES ON AND ON...

WOU!!

HELP!

UNTIL HE GETS TIRED AND FALLS ASLEEP...

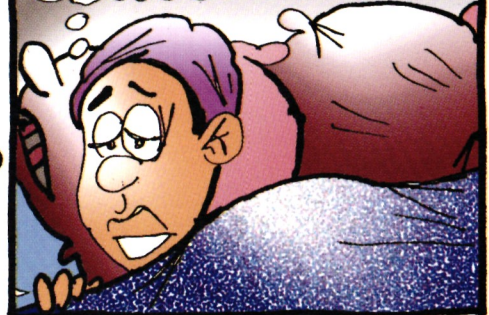


SIX O'CLOCK FOLLOWING MORNING...

HE'S ALREADY GONE, ... HE DIDN'T EVEN SAY ANYTHING ...

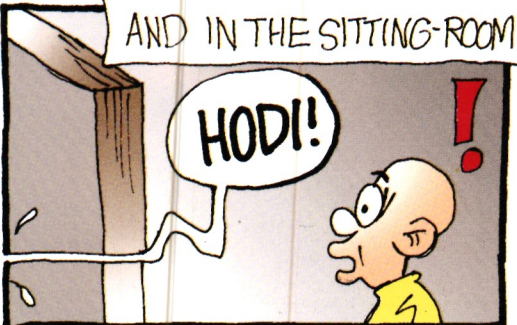


NO BREAK-FAST, NO MONEY LEFT...



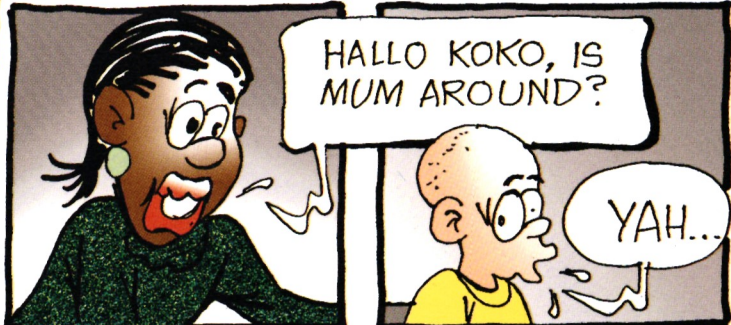
AND IN THE SITTING-ROOM!

HODI!

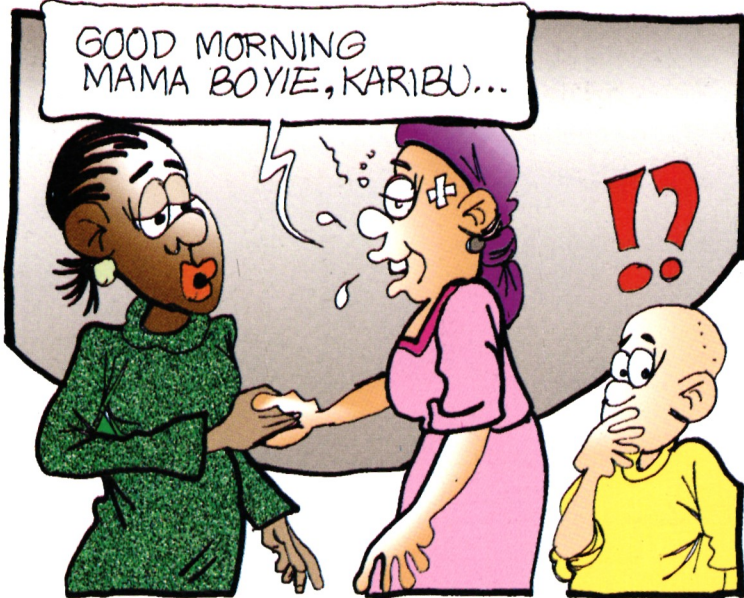


HALLO KOKO, IS MUM AROUND?

YAH...



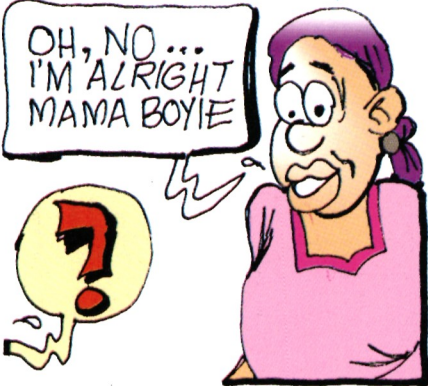
GOOD MORNING
MAMA BOYIE, KARIBU...



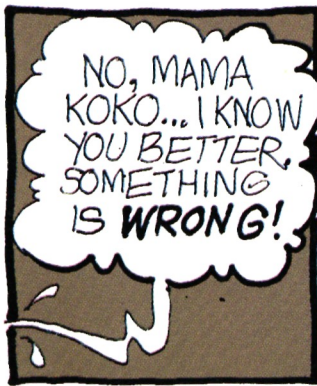
GOOD MORNING MAMA
KOKO. EH, IS EVERYTHING
OKAY, YOU LOOK MMM...
TROUBLED...



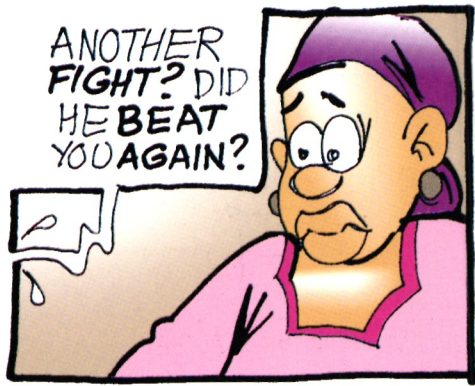
OH, NO...
I'M ALRIGHT
MAMA BOYIE



NO, MAMA
KOKO... I KNOW
YOU BETTER,
SOMETHING
IS WRONG!



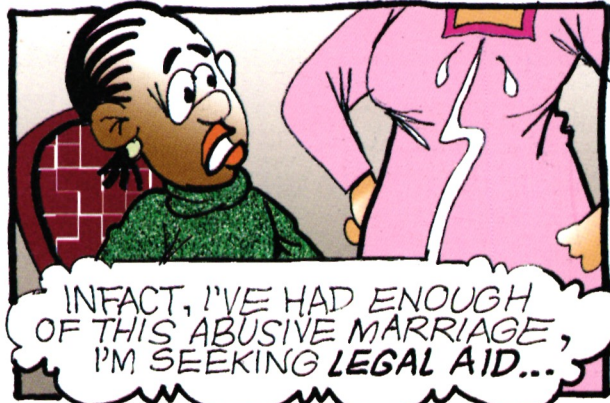
ANOTHER
FIGHT? DID
HE BEAT
YOU AGAIN?



YES... AND
EVERYDAY IT
GETS WORSE!



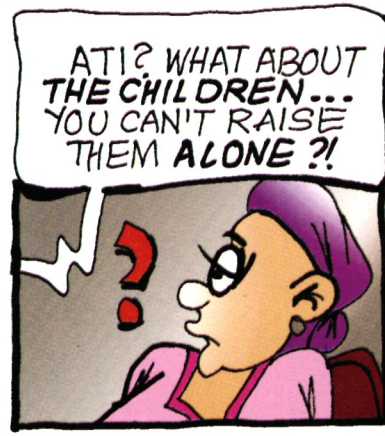
INFAC, I'VE HAD ENOUGH
OF THIS ABUSIVE MARRIAGE,
I'M SEEKING LEGAL AID...

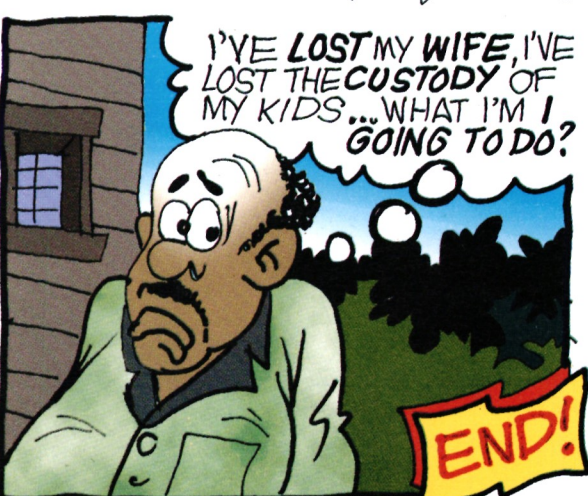
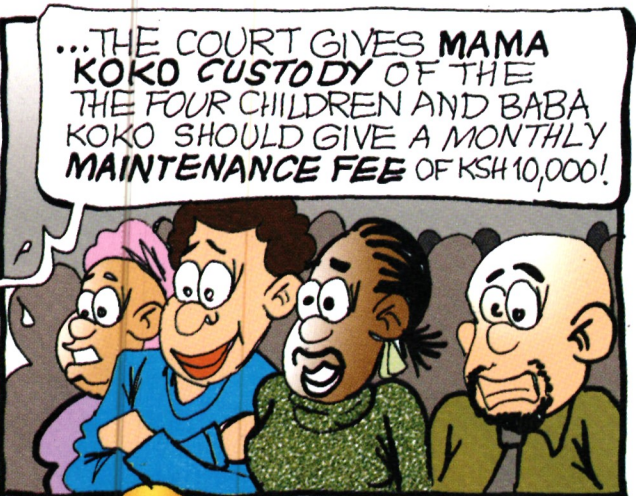
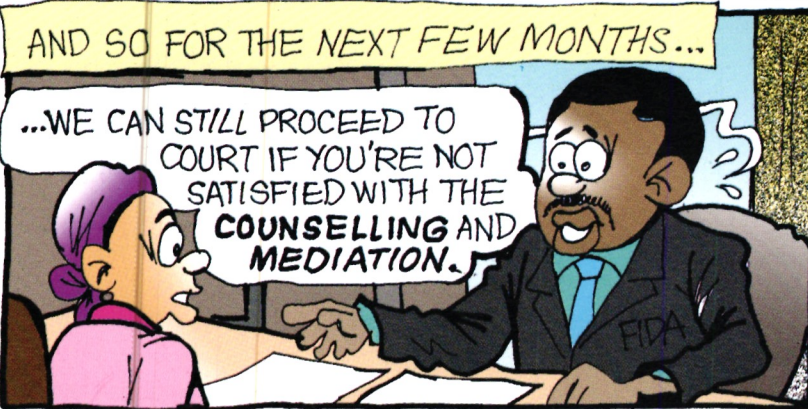
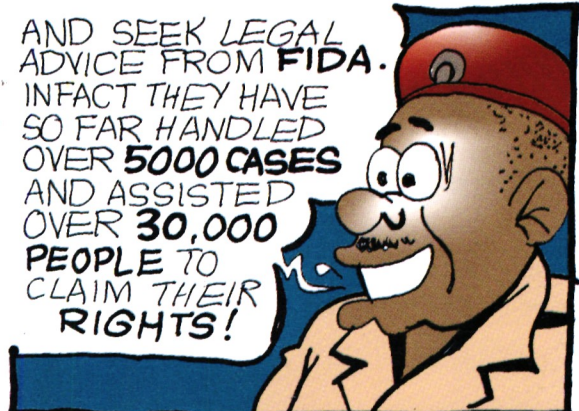
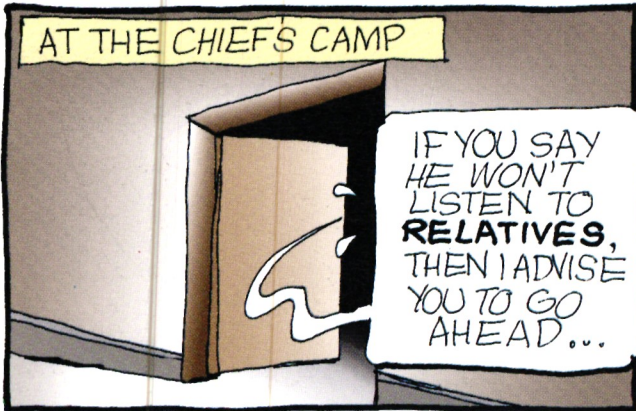


I'VE GOT TO PROTECT
MY RIGHTS, EVEN
IF IT MEANS
SEPARATION!



ATI? WHAT ABOUT
THE CHILDREN...
YOU CAN'T RAISE
THEM ALONE?!





STOP DOMESTIC VIOLENCE BEFORE IT DESTROYS YOUR FAMILY!

Civil Society and Transforming the Political Terrain in Kenya

– A Missed Opportunity?

By Davis Malombe¹

“All citizens are independent and feeble, they can do hardly anything by themselves.... They all therefore, become powerless if they do not learn voluntarily to help one another ... for political purposes ... If they never acquired the habit of forming associations in ordinary life, civilization in itself would be endangered.”²

A. The Ambiguity of the Civil Society

Many questions have been raised concerning the definitional and operational nature of the civil society. The ambiguities arise “from the different ways in which civil society has been applied in various times and places” and “also the elusive character of the relationship between “civil society” and democratic governance.”³

♦ Defining the civil society

Civil society entails the conglomeration of all the popular initiatives – associations and activities that create a conducive environment for social and political transformation. Such associations may comprise community-based organizations, women’s groups and organisations, religious groups, professional associations, the business community, trade unions, co-operative movements, human rights groups, and welfare/pressure/interest groups, etc. at all levels in the society.

♦ Who makes up the civil society?

There is always a tendency and fallacy to confine the civil society to groups that are self-organised and autonomous of the state, especially non-governmental organisations engaging in human rights and policy advocacy. However, the civil society has a broad-based composition of the elite, the citizenry and to some extent, the government. According to Harbeson, there are instances whereby clearly identifiable individuals or

groups may surface, whereas in other cases, the participants and their relationships to each other may be far more diffuse and distant. Thus, “the visibility and circumstances of the identifiable participants may vary greatly across time and space. There may be complicated differences between public perceptions of who the participants are and those who are so in fact”⁴.

The relationship between the elite and the citizenry in the civil society is complementary depending on the interests at hand. The bourgeoisie in the corporate, political and professional classes, being politically informed, materially endowed and ideologically aggressive, bring ideas and resources for power and extrinsic interests. On the other hand, the citizenry comprising of the popular constituencies of peasants and lumpens come handy with their resilience and vibrancy – a critical force in building a powerful social movement in pursuit of welfare and rights. As acknowledged by Sam, “Peasant organizations are...one of the... responses to protect people from economic, political crises, and a potential force in a possible indigenous movement for alternative forms of developments”.⁵

Therefore, the way in which the civil society is re-organised after political transition depends greatly on how the interests of the two classes are addressed by the emerging state in particular and the political society in general.

Therefore, the way in which the civil society is re-organised after political transition depends greatly on how the interests of the two classes are addressed by the emerging state in particular and the political society in general.

◆ Role of the civil society in general

Civil society organizations play diverse roles in determining the parameters of the society in political, economic, legal and policy reforms among others. It is the social formation under which these frameworks are organised and harmonised within the larger society. Here, the normative purpose of the society and the mechanisms for moderation are defined by having the civil society as the able, indispensable intermediary between the state/political society and the larger society. Therefore, enhancing democratic transitions and sustainable development remain the primary function of the civil society.

In his analysis about the "civil society as a bridge between society and polity,"⁶ Harbeson noted the following as the key functions of the civil society:

- (i) Buffer against government and society;
- (ii) Broker between government and society;
- (iii) Symbol of actual political norm setter;
- (iv) Agent of change;
- (v) Regulator of processes of participation in societal norm setting;
- (vi) Integration of groups articulating political interests;
- (vii) Representative of particular interests; and
- (viii) Midwife of regime change.

How far the civil society in Kenya has lived up to these tasks is the subject for our discussion.

B. Nature and Role of Civil Society in Kenya

The operational and structural nature of civil society in Kenya can only be conceptualized from the social, political and economic developments dating from the colonial past to date. The modern idea of civil society as a creation of people is a western concept credited to Thomas Hobbes. For him, *civitas*, or common wealth, is founded in the readiness of each individual to forgo his or her individual preservation and mutually or voluntarily agree with each other to forgo that quest individually or to appoint an individual or government to provide security to all.⁷

In pre-capitalist Africa, there was no need for a civil society since the civil, polity and state aspects of life were taken care of in the egalitarian and communal setting. Here, social and political order was sustained and coordinated through shared customs, agreed norms and cherished moral codes.⁸

The civil society in Kenya began in 1895 as a liberation movement against colonial conquest and repression. Since then, the civil society has gone through five phases in search for political space and economic revival. The more limiting the democratic space, the more vibrant and resistant the civil society has been and vice versa.

These phases are:

1. **1895 – 1920:** which witnessed massive resistance to British invasions and occupations among the Nandi, Maasai, Taita, Kamba, Kikuyu and other communities.
2. **1920 – 1963:** Here Kenya was declared a colony and attempts to institutionalise colonial authority met unrelenting rebellion.⁹ Remarkable civil society camps and initiatives in this phase are inter alia:

- The Independent **schools** mainly run by Africans in Central Kenya;
- Independent **churches** such as the African Independent Church of Africa (AIPCA) and the Dini ya Msambwa in Central and Western Kenya respectively;
- **Youth movements** such as the Young Kavirondo Association;
- **Welfare Associations** such as the Taita Hills Welfare Association;
- **Labour** and **Mau Mau** movements which emerged as the most formidable liberation movements during the state of emergency in the 1950s; and,
- **Ethnic** and **regional** movements, which were harmonised to form KANU and KADU, the political parties that led Kenya to independence in 1963.

3. Late 1960s – 1970s: The subtle Kenyatta government applied covert and overt means to either co-opt and or silence the civil society and the political society. The state disenfranchised the majority of citizens and banned national movements, but the basis of civil society's infrastructure was nourished within the struggle for positive change through the backbenchers, journalists and academicians.

4. 1980 – 1990s: This marks the period of resurgence of the civil society as the new and initially populist government led by President Moi resorted to despotic tendencies. University students and lecturers, media, religious and professional groups, human rights and women's organisations, in conjunction with political parties in the opposition, became the progressive forces in agitating for political, legal, administrative and constitutional reforms in Kenya.¹⁰

5. 2000 – 2004: As the country wallowed in deeper political and economic corruption, the civil and political society swallowed its pride to form a pro-democratic force against KANU. In December 2002, NARC, a coalition of 14 political parties and civil society organisations came into power. A new dawn was anticipated as the political transition brought new power relations, opportunities and challenges between the polity and the civil society.

Emerging political scenarios after transition

Political transitions come with alternating contraction and expansion of state and civil power, hence the emergence of new roles and challenges. According to Allan Fowler, the relations between a state and its citizens require two types of political functioning; the coercive ability to obtain its citizen's compliance balanced by a consensus on when and how compliance can be enforced.

"The state provides the former...' (with) the 'politics of force' and the civil society provides the realm of 'the politics of consent', both co-exist, are not static and evolve in varying degrees of tension with each other."¹¹

The NARC government has significantly broadened political incorporation and participation of the citizenry to the extent that this has affected the capacity of the civil society to effectively offer critical support to the government and the actors in the political society. The leader of official opposition, Mr. Uhuru Kenyatta, is concerned that the trend is so worrying since NGOs, as the brains behind the opposition politics, have decided to either stay away and not assist the opposition, or to join friends who have taken their seat in the government¹².

Kuperus Tracy relates this with what happened in Zimbabwe and South Africa after their

independence in 1980 and 1994 respectively. Describing it as co-opted or consensus - driven, Kuperus notes that in Zimbabwe, the state worked closely with the civil society in order to build national unity, strengthen development, political stability, legitimacy and ideological credibility. Moreover, "the new era of liberal democracy in South Africa will see proliferation of civil society institutions, some of which are likely to develop intense loyalty to the state because of links with political leaders who used to comprise the liberation movement, while others remain silent and take a decidedly apolitical stance, and still others present a vocal, 'independent voice...'"¹³.

The never-ending rifts within NARC between the National Alliance Party (NAK) and the Liberal Democratic Coalition (LDP) coupled with the recent government and opposition of 'national unity' has made the political society lose identity and philosophy. However, novel efforts such as the appointment of reformists in the government as ministers and technocrats; resuscitation of the constitutional review process, formation of the Ministry for Justice and Constitutional Affairs, a radical purge in the judiciary, formation of the Kenya National Commission for Human Rights, appointment of various taskforces,

commissions and other regulatory agencies to make attempts on past human rights violations and economic crimes are indicators of either a reformist or populist government. This distorted and indistinct political environment puts the civil society in a very delicate and complex situation for an animated engagement in national affairs.

Notwithstanding this dilemma, the civil society retains its legitimacy as the custodian of the rights and interests of the citizenry. What varies is the agenda and the strategies of engagement with the government and the political society in general.

Reforms in the civil society and strategies for new engagement

In order to cope with the emerging scenario, many civil society organisations (CSOs) have adopted new approaches in their advocacy. Some of these are:

- ◆ *Community-based approach*: This is the bottom-up process whereby communities are targeted and strengthened into advocacy networks for informed and popular engagement with various actors in their struggles.
- ◆ *Results-based approach*: This is a Results Based Management (RBM) system whereby



Chiefs Training

organizations establish performance management standards and targets based on viable and tangible strategic planning, and the qualitative operational milestones, outcomes and outputs of each activity in the components of their respective programs / projects.

- ◆ **Rights-based approach:** This is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in fair distribution of benefits resulting therefrom.¹⁴
- ◆ **Policy advocacy approach:** This involves lobbying and strategic advocacy in policy formulation and implementation processes as opposed to abrasive and confrontational activism in pointing out the policy gaps and the possible options in relation to societal needs and issues.
- ◆ **Multi-faceted approach:** This demands application and involvement of various strategies and actors in dealing with one or related issues in governance and development. In this approach, CSOs would combine all the above approaches and engage the various stakeholders involved in the issues at hand.

These approaches have enabled the civil society to retain its legitimacy and credibility in the next phase of engagement with the political society and the private sector. However, we need to ask, whose legitimacy?

Whose legitimacy?

Civil Society Organisations (CSOs) draw their authority and mandate to engage in the state-society relations from the fact that:

- ◆ CSOs comprise the citizenry in its diverse social – economic demography hence the true reflection of the society;

- ◆ They are the avenues through which the voice of reason and conscience of the society is expressed;
- ◆ Civil society forms the non-state public realm, hence connecting the society with the government;
- ◆ Civil society represents the collective and civic action towards shared societal norms and goals; and,
- ◆ CSOs provide the framework for citizens to define community needs, assert claims of their rights and accept social obligations.

“Therefore, a vibrant civil society must exist as a key animator of democratic life.”¹⁵

Too Many Expectations and Missed Opportunities to Lead the Reform Agenda!

In an attempt to determine the areas and terms of engagement with the NARC government, the secular civil society comprising the organisations working on human rights, governance, development, constitutional reform and gender issues organised a two-day retreat on 23rd -24th January, 2003.

Among other things, the CSOs managed to assess the emerging scenario to inform their strategies for the future. In this analysis, four possible scenarios were predicted namely:

- (i) A wildly optimistic scenario
- (ii) A cautiously optimistic scenario
- (iii) A slightly pessimistic scenario, and
- (iv) An outrightly pessimistic scenario

In this context, CSOs settled on (ii) as the possible scenario and developed a plan of action based on that.¹⁶ However, the emerging situation has been that of a composite scenario of (iii) and (iv) with the following as the major issues of national importance not yet acted upon:

- ◆ Enactment of the new constitution;
- ◆ Realisation of a human-centered governance and culture;
- ◆ A policy on redistribution of land;
- ◆ A comprehensive transitional justice agenda to address past wrongs;
- ◆ Cohesion and internal democracy in the ruling NARC coalition;
- ◆ Fostering economic growth and development;
- ◆ Incidences of insecurity, poverty and unemployment still rampant;
- ◆ De-concentration of power with the provincial administration still intact;
- ◆ Corruption, further entrenched, with past economic crimes not yet addressed; and
- ◆ Social injustices with discrimination against the youth, people with disabilities, women and other disadvantaged groups and persons being prevalent.

Gender-Based Injustices and the Role of Civil Society

Women comprise over 51% of the total population in Kenya, yet they are systematically discriminated against in the allocation of national resources and opportunities!

Discrimination against women is well explained in the World Bank Report analysing the power dynamics of gender-based discrimination in the so-called Traditional Gender Paradigms.¹⁷ This is premised on the perspective that man is the sole breadwinner, a 'code of modesty' for women and the unequal balance of power in the private sphere affects women's access to the public sphere.

Ali Tripp corroborates this in his argument that the participation of women is shaped primarily by their collective experience of exclusion on the basis of gender from formal economy¹⁸. This is simply a move to exclude women from participation in activities of the civil society.

John Locke defines civil society as an exclusive male outfit by arguing: "Wherever, ... any number of men so unite into one society as to quit every one his executive power of the law of nature, and to assign it to the public and there only is a political or civil society."¹⁹

However, although this relates to societal realities, women in Kenya are known for their charisma and tenacity in leading the liberation movement since civil society took up to struggles in 1895. Syokimau, Morara and Mekatilili Wa Meza are famous for fiercely agitating the Kamba, Abagusii and Giriama ethnic communities respectively against the injustices of colonialism.²⁰ During the ensuing phase of engagement for democracy, women's groups, women's organisations, lobby groups, and women's wings in political parties and government departments/ministries have been critical lobbyists and advocates for the rights of women and justice in the society.²¹

However, although this relates to societal realities, women in Kenya are known for their charisma and tenacity in leading the liberation movement since civil society took up to struggles in 1895.

Progress made so far:

The progress made so far is evident in the following achievements:

- ◆ The creation of widespread awareness on the issues affecting women and the girl-child;
- ◆ Advocacy on the legal, policy and institutional framework repugnant to women's rights;
- ◆ Proliferation of many groups in the political and civil societies to address the plight of women from the context of social justice, governance, human rights, development, micro-finance, welfare, reproductive health, media and electoral representation among others;

- ◆ Influencing the political, policy and constitutional review processes in Kenya. For instance, Charity Ngilu and Martha Karua, the Ministers for Health and Water Development respectively, have been instrumental in the realization of democratic transition in Kenya from 1998 to date. The Coalition²² on “Safeguarding the Gains of Women in the Draft Constitution” has been at the forefront in lobbying various actors to ensure that the principles of gender equity, equality, affirmative action and social justice are captured in the Draft Constitution;
- ◆ Having the office of the First Lady in the current government. As a result, Her Excellency Lucy Kibaki has been playing an important role in various issues of national importance;
- ◆ The adoption and enactment of the National Commission of Gender and Development Act, 2003. According to Section 6 (2) (1-j) of the Act, the Commission shall be involved in formulation of national policy on gender and development; lobby and advocate for legal reforms on institutions, practices and customs that are detrimental to the dignity of women among other functions relating to the promotion of gender equity and equality in all spheres of life;
- ◆ Progressive amendments of the statutes which have always perpetrated repression to women as reflected in the Criminal Amendment Bill;
- ◆ Appointment of women to high profile jobs in the government such as ministers, judges, ambassadors and permanent secretaries; and
- ◆ The emergence of more women executive directors in the Civil Society.²³

Despite these gains, there are several hurdles to overcome.

The Major Challenges in Mainstreaming Gender in the Emerging Scenario

- ◆ Ignorance and resistance to change due to lack of adequate information on gender and governance;
- ◆ Poverty resulting to inadequate resources for informed political empowerment and engagement by all genders;
- ◆ Policy and legal regimes which are not responsive to the rights and needs of women and the girl-child in Kenya;
- ◆ Absence of a competent institutional framework responsible for gender and social justice issues; and,
- ◆ Gender insensitive society as a result of patriarchy, values, practices and attitudes repugnant to the social and political advancement of women in the society

The Ideology, Agenda and Strategies for the Civil Society during the Transition

The space available for the interaction between the civil society and the government is limited to three major patterns of political transitions namely:

- (a) The introduction of democracy as a result of a revolutionary struggle or civil war against oligarchic, traditional and patrimonialistic dictatorships;
- (b) Democratic transition without revolutionary struggles, or civil wars; and
- (c) The consolidation of democratization in the sense of deepening and widening of the political process to embrace the broad population.²⁴

The political transition in Kenya is typical of the third scenario with a dire need for an ideology. The NARC government came to power with a very progressive reform agenda but without a clear policy and ideological framework.

Ideologies provide objectives, principles and values of what people stand for at individual and collective levels. However, it is the ideological inspiration that provides the nation with a vision to realize democratic transition. This would involve:

(a) Ideological Framework

The quest for internalisation of *substantive democracy* should be the ideological infrastructure for Kenya to attain sustainable development and social transformation. *Substantive democracy* is a procedural and deliberate governance process of liberalising the society in all dimensions. It is, as a fundamental transformation of the whole society and rebuilding of a developmental model with new relations between the economy and state, the reinforcement of social integration (and improvement of) the quality of democratization by ensuring citizens' participation in and satisfaction with decision-making at local, regional and national levels.²⁵

This model is based on the practices of good governance.²⁶ Good governance demands that citizens be involved in the management of the country's social, cultural, economic and political affairs at all levels of the society. According to the United Nations Development Programme, good governance as an exercise ... comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their...rights, meet their obligations and mediate their difference.²⁷

For transitional societies to nurture the ideals of good governance,¹ the civil society must strengthen its position on the emerging issues of public interest and collaborate with progressive state and non-state actors at the national, regional and international frontiers. In this endeavour, the civil society should not be dogmatic but instead adopt what Makau calls "a nuanced and strategic approach". Under such: "Its primary role should be that of a watchdog, to critique, expose and chastise the state. But civil

society must also support and collaborate with the state in select areas where such a strategy would strengthen respect for human rights.² A clear agenda for the government is long overdue.

(b) The Agenda of the Civil Society to State and Non-State Actors.

For the civil society in Kenya to capture the political terrain in Kenya, it must identify the existing opportunities and adopt an agenda for empowerment and transformation of the society at national and international fronts.

(i) Local and National Agenda

Civil society organizations, being the agents of democratisation, should stir up the society towards the following issues of national interest:

♦ **Enhancement of Human Rights-centered Governance**

through the inculcation of values and practices that enhance the enjoyment of human rights by all and reverse the culture of impunity. CSOs should liaise with the competent authorities within and outside the government to realise positive actions towards the protection and promotion of rights. Citizens need to be empowered to demand and also respect other people's rights through human rights education and outreach projects. The business community (as part of the civil society) needs to embrace the values of corporate social responsibility and enhance the enjoyment of rights related to labour. Emphasis should be placed on addressing violations targeted at vulnerable groups such as children, women, people with disabilities, the poor, informal traders, workers, squatters, victims of mob violence and arbitrary arrests among others.³⁰

♦ **Transparency and Accountability**

Corruption and lack of openness in the society is viewed as one of the major impediments to good governance and sustainable development in Kenya. CSOs need to engage further in concerted efforts to

support the government in its spirited campaign against corruption and bad ethics in all sectors of the society. Attempts to re-invent or abet corruption and misallocate or misappropriate public resources should be condemned and resisted. This move calls for more vigilance in the civil society as the public watchdog and positive collaboration with the private sector to address corruption in all its manifestations. Efforts must be made to strike a balance between the legal and moral mechanisms in enhancing transparency and accountability.³¹

◆ **Participatory Governance or Civic Governance**

It behooves the civil society to develop programming systems to foster the involvement of the citizenry in decision making in all sectors and at all levels. This ensures that the interests of the citizens are incorporated in project planning and implementation and that they (the citizens) develop a sense of duty and ownership in all the processes.

◆ **Commitment to Legal, Policy and Constitutional Reform Advocacy**

The civil society should sharpen its skills and expertise and provide appropriate leadership in the reform agendas of this country.

With regards to the constitutional review process, it would be a positive move for civil society³² to take part in the consensus-building process and monitor the entire process as both a player and an umpire. CSOs should provide objective positions of the so-called contentious issues, lobby for withdrawal of the cases in court and provide sanity to contending forces in the political society while protecting all the positive gains safeguarded in the Draft Constitution of Kenya 2004.

On policy reforms, the civil society should strengthen its lobbying and advocacy skills to effectively participate in the technical and

political phases of policy formulation, implementation and evaluation. To ensure a proper administrative framework, the civil society must also renew the state in terms of personnel while revitalizing itself for effective checks and balances. According to Makau Mutua, the KANU bureaucracy cannot undo its handiwork and reform the state!³³

◆ **Transitional Justice Agenda**

A comprehensive justice agenda enables the country to address past human rights violations and economic crimes through a Truth, Justice and Reconciliation Commission. Such a mechanism creates the basis for democratic development and economic revival after a political transition³⁴. While the civil society has been supportive of the efforts by the current government to address past human rights abuses and economic crimes, much has been said than done.

With regards to the constitutional review process, it would be a positive move for civil society³² to take part in the consensus-building process and monitor the entire process as both a player and an umpire.

A Report³⁵ by the Task Force seeking to investigate into the viability of a Truth Commission in Kenya said that more than 90% of Kenyans who made their submissions called for a TJRC before June 2004. Since the submission of the Task Force Report in August 2003, the government has only been rhetorical about the TJRC.³⁶ The civil society needs to replenish the caucus hosted by the statutory Kenya National Commission for Human Rights (KNCHR) to lobby and pressurise³⁷ the government to establish a TJRC. Moreover, critical issues like the resettlement of internally displaced persons³⁸ and the prosecution of those involved in economic crimes should be addressed as matters for urgent action without necessarily having the truth commission in place.

♦ **Economic Development and Service Delivery**

Seen in the dynamics of participation, transformation and sustainability, development must be guided by the social and political realities at national and global levels.

The civil society needs to adopt the rights-based approach to development and be at the centre of development programming in the private and public sector.³⁹ This level of engagement should lead to social development with eradication of poverty and un-employment levels with gender, income and generational inequalities in the country being the major indicators of output.

CSOs must provide input and critique to the government by monitoring its budgetary allocations and spending to see whether it is at par with the felt needs of the citizenry. Citizens must be actively involved in designing, implementing and reviewing projects where resources are administered by local authorities, members of parliament and other public institutions⁴⁰.

♦ **Civility and National Integration**

Given its diverse membership, the civil society needs to develop a system of identification and recognition based on dignity derived from one's humanity or membership in the national community. There is need to inculcate a culture of patriotism and nationalism for Kenya to transform socially, morally and politically.

♦ **Gender Agenda**

Gender cuts across all the above-mentioned issues. For this to be realised, there is need for a new agenda regarding gender to enhance social justice and equity in the society. The civil society should advance campaigns based on two critical pillars of gender-sensitive good governance:⁴¹ These are to create inclusiveness of women in decision-making and to create a more gender egalitarian environment in economic and social spheres as well as enhance greater accountability of constitutions to advance fairness and equality. The civil society should

therefore continue in the advocacy for review of the legal and institutional infrastructures affecting the rights of women, engage in campaigns to end all forms of discrimination and violence against women and overall, ensure a gender-responsive society. Lobbying for the institutionalisation of the National Commission on Gender and Development and enactment of the Draft Constitution of Kenya 2004 shall provide a viable framework for legal and policy change.⁴² The principles and values of social justice, equity, equality and parity should be the hallmark of all the decisions and practices in the society.⁴³

(ii) **Regional and international agenda**⁴⁴

These involve the following:

- ♦ Ensuring that the processes of globalisation are not detrimental to national development;
- ♦ Acquiring membership to international human rights organizations;
- ♦ Enhancing accountability among state and non-state actors using relevant regional and international organisations and instruments;
- ♦ Together with state and other non-state actors, address the issue of global insecurity in the light of terrorism without violating fundamental rights and freedoms;
- ♦ Lobbying the government to ratify major international human rights instruments and further domesticate and enforce them;
- ♦ Addressing the HIV/AIDS scourge as a global human rights and developmental issue;
- ♦ Enhancing fair trade compliance to human rights standards by international investors at all levels;
- ♦ Creating regional and international networks of civil society actors for rapid response over emerging issues of global importance;
- ♦ Giving prominence and critical agenda to international human rights days and events;
- ♦ Organising and participating in regional and international conferences to share experiences on pertinent issues at those levels; and,

- ◆ Strengthening regional and global networks among women and human rights activists and organizations.

(c) Modes of engagement⁴⁵

During the articulation of the aforesaid agenda at the local and international levels, the civil society should strive to achieve the following values and strategies:

- ◆ **Legitimacy:** by remaining people-driven and in touch with societal issues, civil society needs to strengthen the base of its membership by actively involving other constituencies at all levels as opposed to being an urban-based club of human rights and religious organizations.
- ◆ **Accountability:** Citizens representing the above broad constituencies should always provide the agenda and hold CSOs accountable.
- ◆ **Credibility:** Being the voice of reason, civil society should remain accepted and acknowledged at all levels over the positions taken.
- ◆ **Neutrality:** Remain non-partisan but take concrete positions as guided by democratic and human rights tenets.
- ◆ **Objectively** provide candid positions and directions to national and global issues
- ◆ **Autonomy:** Remaining independent and avoiding co-option into the private and public sectors.
- ◆ **Focused:** Be issue-oriented in the articulation and intervention of issues of their mandate or critical issues of national importance.
- ◆ **Creativity:** CSOs should always re-invent their visions, missions, objectives and strategies as situations demand.
- ◆ **Vigilance:** Being eternally cautious when engaging political society actors as populist regimes and legislators tend to fall back to autocracy and impunity.
- ◆ **Pro-actively** set and influence the reform agenda in the society.
- ◆ **Leadership renewal:** The civil society risks a leadership crisis if it does not renew its ranks to replace personnel lost to the government and other sectors.
- ◆ **Expertise:** Provide technical and political solutions in legal, policy and institutional reforms.
- ◆ **Resilience:** Democratization is a process and a struggle requiring consistent intervention mechanisms, therefore demanding flexibility.
- ◆ **Strategic:** Knowing when to apply what tactic, where and how.
- ◆ **Synergy:** Collaboration with like-minded forces to effect positive and progressive change.
- ◆ **Financial security:** Mobilisation of adequate resources to enhance sustainability and implementability of projects in place.

Conclusion

Kenya is taking longer than expected to metamorphose from regime change to a democracy. It is worrying that the civil society has either decided to relax or be patronized by the government, when the polity is in a transitional crisis and national issues are at large. It is the responsibility of the civil society to reflect about its gains since 1895 and adopt the ideology, agenda, values and strategies identified to lead Kenya to democratic transformation and sustainable development. This process requires the increased empowerment and involvement of the citizenry

and the partnership with appropriate and strategic state and non-state actors from local, national, regional and international forums.

In the words of Fowler, "The greater the number, size, autonomy, resourcefulness, variety and democratic orientation of popular organisations in civil society, the greater will be the prospects from some kind of movement from rigid authoritarianism, and for subsequent movement towards semi-democracy and democracy."⁴⁶ The above process should hopefully result in this.

ENDNOTES

- 1 Davis Malombe is an Assistant Programme Officer in the Kenya Human Rights Commission's Research and Advocacy Programme and a consultant in human rights, gender, constitution, governance, policy and transitional justice issues.
- 2 Tocqueville, Alexis de, *Democracy in America*, Vol. II, (New York: Vintage Books, 1959), P.115.
- 3 Forey Michael W and Edwards Bob, 'The Paradox of Civil Society' in the *Journal of Democracy* 7.3 (1996) Pp.38 – 52.
- 4 Harbeson, John W, 'Civil Society and Political Renaissance in Africa' in Harbeson John W, Rothchild Donald and Chazan Naomi (eds.), *Civil Society and the State in Africa* (London: Lynne Rienner, 1994), P.21
- 5 Moyo, Sam, 'Peasant Organizations and Rural Civil Society in Africa: Introduction' in *Peasant Organizations and the Democratization Process in Africa*, (Dakar: CODESTRIA, 2002).
- 6 Harbeson – Ibid Pp.22 – 23
- 7 Hobbes, Thomas – Ibid (New York: Dutton, 1950); Taylor Charles, 'Modes of Civil Society', Public Lecture 3, 1 (1990)
- 8 See Wachira Maina in 'Civil Society and the Aid Industry'
- 9 For details see Ogot, Bethwell A (ed.), *Politics and Nationalism in Kenya-Hadith 4*, (East Africa Publishing House: Nairobi, 1972), pp.1-252; Hopley, Charles W, *Kenya: From Chartered Company to Crown Colony-Thirty Years of Exploration and Administration* (2nd ed), (Frank Cass: London, 1970); Cyprian Nyamwamu, 'Social Priorities of Civil Society in Kenya: From Relief to Transformation of the Social Condition within a Changing Environment' in *Step by Step: Forwards or Backwards; The 2003 FIDA Kenya Annual Report*
- 10 Mutunga Willy, *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992 – 1997* (Harare: Sareat / Mwengo, 1999)
- 11 Fowler Allan 'Non-Governmental Organisations as Agents of Democratisation: An African Perspective,' in the *Journal of International Development: Vol. 5 No.3*, 325 – 339 (1993)
- 12 Daily Nation, Tuesday, April 20, 2004; 'Uhuru Censures NGOs: They Quit Opposition Politics after Election, he says
- 13 Kuperus Tracy 'Building Democracy: An Examination of Religious Associations in South Africa and Zimbabwe' in *The Journal of Modern Africa Studies*, 37, 4 (Cambridge University Press: 1999) PP.643 - 668)
- 14 UN Declaration on the Right to Development.
- 15 Kibwana Kivutha 'Guiding Principles on which to Build Kenya's New Constitution: Some Thoughts,' in Mute L.M and Wanjala, S (eds.), *When the Constitution Begins to Flower* (Vol. I): *Paradigms for Constitutional Change in Kenya* (Nairobi: ClariPress, 2002) P. 7.
- 16 A Report of the Civil Society Strategy Meeting on the Transition in Nanyuki, Kenya, January 23 – 24, 2003
- 17 The World Bank, *MENA DEVELOPMENT REPORT: Gender and Development in the Middle East and North Africa! Women*

ENDNOTES

- in the Public Sphere; (Washington: 2004) P.12
- 18 Tripp Ali Mari 'Rethinking Civil Society: Gender Implications in Contemporary Tanzania' in Harbeson, Rothchild and Chazan, Ibid Pp.149 – 168
- 19 Locke John, *Two Treatises of Civil Government* (Dent and Sons: London J.M., 1955) P. 160
- 20 Ndumba Habel, *Out of My Rib: A View of Women in Development*; (Development Horizons: Nairobi: 1985) pp.197 – 198
- 21 According to the National Report Prepared for the Fourth World Conference on Women, 4 – 15, September, 1995; Beijing China, there were 23,614 grassroots-based women organisations registered in 1990 with a membership of 968,941.
- 22 The Coalition was made up of four organizations, namely FIDA Kenya, Kenya Human Rights Commission, Institute of Education in Democracy (IED) and The League of Kenya Women Voters.
- 23 These are in FIDA (K), KHRC, IED, Kenya Medical Women Association, Legal Resources Foundation, Association of Media Women in Kenya (AMWIK), Transparency International, Refugee Consortium of Kenya, Center for Rehabilitation and Empowerment of Abused Women (CREAW), CRADLE, The League of Kenya Women Voters, Kenya Women Political Caucus, and Kenya Women Political Alliance among others. There are tendencies in organizations traditionally run by men to be resistant to women whenever they are given top positions.
This chauvinistic attitude demotivates and disempowers women in their positions of leadership both in the civil and political society.
- 24 'Introduction: Nature of the Discourse on Transition in Kenya' in Mute Lawrence M, Kioko Wanza and Akivaga Kichamu (eds.).
Building an Open Society: The Politics of Transition in Kenya (Nairobi – ClariPress, 2002) Pp 1 – 59.
- 25 Brabant Koeraad Van, *Civil Society and Substantive Democracy: Governance and the State of Law in Belgium*, Vol. 8, Number 4-1998; Hildegard Lingnau, 'Democratisation Processes in Developing Countries and Options for Democratization Assistance by Political Foundations', ECDPM working Paper No.33, June 1997.
- 26 Transparency International and UN-HABITAT, *Tools to Support Transparency in Local Governance: Urban Governance Tool kit Series* (Nairobi: 2004) P.7.
This defines governance as involving government, city society and the private sector.
- 27 UNDP (1997) *Governance and Sustainable Development* (New York), PP. 2-3
 - Gender and generational equity and parity
 - Social development and transitional justice
 See also: Malombe Davis 'Introduction' in *Quarterly Human Rights Report*, January 2004 (Nairobi; Kenya Human Rights Commission);

- Shirji Issa G, (Professor of Law, University, of Dar es Salaam, Tanzania – 'Key Note Address to the 5th Plenary Session of the National Convention Assembly of Kenya (NCA) on 19th January, 2001 Pp 1- 9.
- 29 Mutua Makau 'Letter from London: Civil Society's Relevance in the Age of Narc,' Nairobi: Sunday Nation, January 4 2004), P.15. Makau Mutua is a Professor of Law at the State University of New York, at Buffalo and the Chairperson of Kenya Human Rights Commission. See also Kenya Human Rights Commission, Eyes on the Prize, Nairobi – KHRC).
 - 30 Kenya Human Rights Commission, Quarterly Human Rights Report – Vol. 6 No.1 (Nairobi – KHRC, 2004), Daily Nation, September 19 2002; The Legal Resources Foundation, Teaching Our Rights: Vol. I (Nairobi: LRF, 1997); Kenya Human Rights Commission, Exposing the Soft Belly of a Multinational Beast: The Struggle for Workers' Rights at Del Monte Kenya, (Nairobi: KHRC 2002); Amnesty International, 2004 Report. The Constitution of Kenya Review Commission, National Constitutional Conference: The Draft Constitution of Kenya 2004 (Nairobi: CKRC 2004), Articles 28 – 119; The Government of Kenya, Laws of Kenya: The Constitution of Kenya (Nairobi; GOK, 1992).
 - 31 Transparency International and UN-HABITAT, *ibid*; see also media reports following failure by the government to appoint Julius Rotich as the Deputy Director of the Kenya anti-Corruption Commission on the basis that he is alleged to have been involved in past economic crimes (September 8th – 20th 2004)
 - 32 See Kibwana Kivutha, 'Wanjiku's Hopes for a New Constitution' in Sunday Nation, September 12, 2004 P 11.
 - 33 Mutua Makau – *Ibid*
 - 34 Kenya Human Rights Commission, Eyes on the Prize, (Nairobi – KHRC).
 - 35 A Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission presented to Honourable Kiraitu Murungi, M.P. Minister for Justice and Constitutional Affairs – 15th October 2003.
 - 36 The written address by His Excellency the Vice President and Minister for Home Affairs, Hon. Moody Awori during his opening remarks to the international workshop on the operationalisation of a TJRC, from 3rd to 4th of June 2004, he indicated the government's support of this process. The Minister for Justice and Constitutional Affairs Hon. Kiraitu Murungi, to whom this docket falls under, has made remarks in various public forums in support of a TJRC.
 - 37 As a way of strengthening the caucus during the above conference, the KHRC, FIDA Kenya and the KNCHR were mandated to provide leadership in the technical / political sub-committee. This committee deals with developing the strategic information and game plans critical in guiding the awarenessness and advocacy committees and lobbying the relevant political and civil society actors to support and push for the formation of a TJRC. To date, the KNCHR and the like-minded members of the Kenya Human Rights Network are planning a 6- month national campaign to mobilise citizens and build political pressure for a TJRC!
 - 38 The civil society comprising the human rights, religious and development organizations launched the stockholder's forum in March 2004 to lobby and pressurize the government to resettle the IDPs in Kenya. Since then, the government has indicated the prospects of giving IDPs the first priority in its resettlement programme. See Daily Nation, Wednesday, May 26, 2004, 'Clash Victims to be Settled on ADC land' P.7
 - 39 Several Civil Society Organisations in human rights and governance have already adopted this approach and partnership with the state and non-state actors. The private sector under the auspices of the Kenya Association of Manufactures and the Nairobi City Central Business District Association are actively engaged in influencing public and private sector's policies. See Kenya Association of Manufacturers: Annual Report July 2003 – June 2004.
 - 40 Such involves projects under the Local Authority Service Delivery Fund, Local Authority Transfer Fund, Constituency Development, Bursary and Aids Funds among others. See the debates on 'A Working Nation' and 'An Owning Nation' in Daily Nation, Wednesday, August 25, 2004 (Isaiya Kabira) and Sunday Nation, August 29, 2004 (Mutahi Ngunyi) respectively. Ngunyi, a political scientist and columnist in Sunday Nation has been critical of the government's reform agenda while Kabira, the Director of the Presidential Press Service, is a staunch supporter of it.
 - 41 The World Bank, MENA (Middle East and North Africa) Development Report: Gender and Development in the Middle East and North Africa – Women in the Public Sphere (Washington: 2004) p 12.
 - 42 The National Commission on Gender and Development Act 2003 and The Draft Constitution of Kenya 2004 have progressive provisions on the legal, policy and institutional mechanisms for the enhancement of gender equity and social justice. The institutionalization of the Gender Commission has stalled as a result of vested interests among the actors in the civil and political societies on the appointments of the commissioners.
 - 43 Republic of Kenya, National Report – Prepared for the Fourth World Conference on Women 4 – 15, September, 1995, Beginning China (May, 1994); FIDA (K) et al, Safeguarding Women's Gains under the Draft Constitution: Delegates Handbook (Nairobi: 2003); Kenya Human Rights Commission and Women and Land Rights Commission, Women and Land Rights in Kenya, (Nairobi: KHRC, 1998); FIDA Kenya, Succession Law: Women's Hand book.
 - 44 Steinberg Natalie, 'Background Paper on GONGOs, QUANGOs and Wild NGOs,' December, 2001; The Economist, January 29, 2000, 'Sins of the Secular Missionaries'; Choudry Aziz, GATT Watch, January 5, 2002: "All these 'civil society' Talk Takes us Nowhere"
 - 45 Mutua Makua, *Ibid*; Mute, Kioko and Akivaga, Building an Open Society ...*ibid*; Fowler Alan, Journal of International Development Vol. 5...*ibid*;
 - 46 Fowler Allan, *Ibid* P. 328.

Fulfilling Women's Social, Economic and Cultural Rights: Rights To Housing and Reproductive Health

By Jacinta Muteshi. Ph.D.

Preamble

Human rights and fundamental freedoms are inherent in all human beings and their promotion and protection is the first responsibility of their government. Kenya is a signatory to international conventions and instruments that protect the rights of women, including the Convention for the Elimination of all forms of Discrimination against Women (CEDAW); the International Convention on Economic, Social and Cultural Rights (ICESCR); the International Convention for Population and Development (ICPD) and the African Charter. These human rights instruments all affirm the importance of ensuring the universality, inter-dependence and non-selectivity of human rights. Of particular interest to this chapter is the ICESCR.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Several articles within the Covenant specifically relate to the issues discussed in this paper. Under *Article 1*, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *Article 2* makes it the duty of each State, with the benefit of international help, to achieve "progressively the full realization of the rights". It further makes it incumbent on the State to guarantee these rights without discrimination of any kind. *Article 3* provides a gender provision requiring States "to ensure the equal rights of men and women to the enjoyment of all economic, social and

cultural rights". *Article 10* states that, "The widest possible protection and assistance should be accorded to the family..." *Article 11* compels the State "...to recognize the right of everyone to an adequate standard of living...including adequate food, clothing, housing¹, and to the continuous improvement of living conditions. *Article 12* guarantees the "...right of everyone to the enjoyment of the highest attainable standard of physical and mental health."²



Inter-Party Consultative Forum on women rights, August 2004.

Kenya and the Covenant

International treaties, even if ratified, are often not enforceable. They do not in themselves have legal standing but depend on the country's commitment, goodwill and a desire to be part of the community of nations to ensure compliance. Countries thus have to incorporate the declarations of the various treaties and covenants into national laws. Thus, states such as Kenya that are parties to these conventions commit to achieving the realisation of rights. While Kenya has produced some reports³ with respect to other treaties and conventions that address human rights issues, despite having been a signatory to the ICESCR since 1976, Kenya was noted in the Committee's 1993 observations as never having submitted a report on its implementation of the Covenant.⁴⁴ Ibid, p. 38.

The reality is that, in Kenya, the enjoyment and fulfilment of the rights espoused in many of the afore-mentioned documents has remained challenged by the absence of political will; state actions and laws that interfere with these rights; decreasing investments for achieving and realising these rights; and an unawareness on the part of the majority of Kenyan citizens of their rights and the obligations of their state.

Current investigations and analysis of the implementation of women's rights in Kenya suggest that women in Kenya encounter innumerable barriers to full equality and advancement. Such challenges reflect a context where women lack control over and access to resources or are discriminated in the allocation of resources that subsequently and directly violates the fulfilment of their economic, social and cultural rights.⁵ Women also face additional barriers to enjoyment of these rights when their social class positions them in vulnerability and disadvantage, creating a lack of knowledge and recognition of their human rights as well as the obstacles of their class in gaining access to information or the recourse mechanisms.

This chapter therefore explores how far the Kenyan state has met its obligations to women as articulated in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) in respecting, protecting and fulfilling the enumerated rights specifically around the right to housing and the right to reproductive health. "Elements of these rights create an immediate duty on the part of the state. There is also a minimum core content with regards to each economic, social and cultural right that states are obligated to fulfil and there are now guidelines that place on the state the burden of proving that it is unable to carry out its obligation."⁶

"The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus the right to housing is violated if the state engages in arbitrary forced evictions. The obligation to protect requires the state to prevent violations of such rights by third parties. ...The obligation to fulfil requires States to take appropriate legislative, budgetary, judicial and other measures towards the full realisation of such rights. Thus the failure of States to provide essential primary health care to those in need may amount to a violation."⁷

Therefore, even where available resources are inadequate, the obligation remains for the State to ensure the widest possible enjoyment of the relevant rights under prevailing circumstances.⁸

Specifically, this chapter will therefore seek to highlight existing violations of the rights to housing and reproductive health and to share proposals to address the possible enjoyment of these rights.

A. The Right to Adequate Housing

The right to adequate housing is universally viewed as one of the most basic human need as outlined in the ICESCR. Article 11.1 of the Covenant declares that:

The State parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions. The States will take appropriate steps to ensure the realisation of this right.

Adequate housing for everyone is gaining increasing attention as rapid expansion of urban populations in Kenya have begun to have a serious impact on the living conditions of many of the poorer and marginalized segments of the population. This rising population of "housing poor" is denied a basic component of the right to adequate standard of living that includes access to drinking water and adequate sanitation facilities as additional basic needs associated with housing. The indivisibility and inter-dependence of all human rights are especially clear through the right to housing. Hence, "the right to human dignity, the principle of non-discrimination, the right to adequate standard of living, the right to freedom to choose one's residence, the right to freedom of association and expression, the right to security of person and the right not to be subjected to arbitrary interference with one's privacy, family, or home are indispensable for the right to adequate housing to be realised."⁹ At the same time, having "access to adequate, safe and secure housing is a foundation from which other legal entitlements can be achieved. For example, the adequacy of one's housing and living conditions is closely linked to the degree to which the right to environmental hygiene and the right to the highest level of mental and physical health can be enjoyed."¹⁰ Rising public awareness in Kenya about housing rights has pushed housing issues forward placing them firmly on the human rights agenda.¹¹

Housing rights are for everyone, without distinction, to equality and enjoyment of the

right to housing. Equality of treatment is therefore the basis on which women are accorded the right to housing. However, for Kenyan women, the discrimination faced with respect to land, property and inheritance, and their denied access and control over these valued resources, has a direct and negative impact on their right to adequate housing.

Poverty also challenges the right to housing. Women have, along with children, disproportionately carried the burden of increasing levels of poverty and its attendant ills. "Women might suffer from poverty even when their husbands didn't."¹² Between 1990 and 2001, the number of poor people in Kenya is estimated to have risen from 11 million to 17 million.¹³ Inadequate livelihoods have meant poor, small, makeshift housing, devoid of security; unhygienic and cramped

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conditions that create insecurity, are prone to fires given their building materials, subject to infections, lack privacy, lack water and sanitation services and tenants are in a state of constant fear that they will be brutally evicted. In the case of rural women, they face the challenge of not being able to own agricultural land even though they work hard to develop that home and land. The risks of polygamy, or death of a husband or the ending of the marriage can leave a rural woman without a home or the resources to fend adequately for herself and her children.

Violations of the Right to Adequate Housing

The NARC government invited the UN Special Rapporteur on Adequate Housing to carry out an assessment of Kenya's commitment to progress on housing rights. The Rapporteur acknowledged in his report¹⁴ that the new Draft Constitution has brought a clear recognition to the right to adequate housing and a commitment to the reporting obligations of the Kenyan government with regards to all its international human rights treaties. However, the constitutional review process has stalled and there is the gender equality bill that has remained pending for two years.¹⁵ There is however positive evidence of emerging policies on land, housing, water and gender issues and the establishment of new statutory bodies such as the Kenya National Human Rights Commission and a Gender Commission.

The Rapporteur nevertheless, noted that the developing policies are not based on the human rights obligations of Kenya, in that they remain uninformed by the extensive data on the specific needs and locations of the most marginalized, the most poor and the most discriminated, especially women. There is also continuing evidence that the new Kenyan state has not respected nor protected the rights of housing and land, including access to essential services, especially for the poor, the majority of whom have been women. There are current actions by the state that fail to respect the rights of poor communities, for example, slum upgrading has not taken into adequate consideration the housing alternatives that the poor want nor have the planned relocations been enabling for those communities' ability to sustain their livelihoods. Tenants, especially those perceived as squatters, slum dwellers, or the internally displaced have been faced with immense challenges in realising their rights to housing. This is more so because current laws and administrative regulations have totally neglected the very specific needs of such groups. In urban centres in Kenya, land cartels have engaged in illegal land practices that have seen illegal

allocations, the disappearance of public land and the contravening of land laws such that investment in housing is a risk that has heavy costs for most Kenyans and more so for the poor.

The necessity of enforceable laws is particularly key for slum dwellers as it has been stated that, "...The ones without sufficient political patronage are subjected to demolition or evictions, while others are left in relative peace. The highly politicised situation is not based on the law, and leaves squatters, especially urban slum dwellers, without security of tenure."¹⁶ Finally and most seriously, the State is engaged in forced evictions that have not followed adequate procedures that keep in mind the rights of those affected. For example, evictions are conducted without prior warning, the perpetrators use policemen or hired thugs who employ brute force and destroy property, the evictions occur at night-time leaving the occupier of the dwelling helpless in the dark and with nowhere to go,¹⁷ with severe consequences for women and children. The UN Committee on Economic, Social and Cultural Rights in its General Comment no. 7 has been very clear about forced evictions and states that "it is incumbent upon the relevant authority to ensure that they are carried out in a manner warranted by law which is compatible with the Covenant and that all the recourses and remedies are available to those affected."

Gender and the Right to Adequate Housing

The complexity of land laws, coupled with inconsistent laws governing women's property rights and women's lack of knowledge with regards to their statutory rights, makes engaging in property ownership a minefield for women. Land Reform, as undertaken by the Njonjo Commission with the goal of formulating a National Land Policy, will be ineffectual without a gender analysis. Yet, on-going reporting in the media on the policy has not highlighted gender as a key part of the reform. The Minister, Mr Kimunya, has given June 2005 as the deadline

for the policy, following a countrywide consensus-seeking exercise. "...immediately we have the policy, we will embark on updating land laws to conform with the policy...", adding that implementation of the laws will take place post 2007 elections.¹⁸

There is need to undertake a woman-focused approach as the laws in their current construction undermine women's abilities to be self-sustaining and enjoy the same rights to property that men enjoy. The changing roles of women in society with the increase in female-headed households demands that such changes be instituted without further delays. Women's contribution needs to be recognised for the equivalent monetary value it provides so that on dissolution of a marriage, laws that govern the sharing of matrimonial property, which are based on spousal contributions, do not diminish the value of women's work. There are three issues of concern explored below concerning addressing women's needs with regards to adequate housing. These are: female-headed households and security of tenure; access to credit and women slum-dwellers, and access to education for women and decision-making around property acquisition.

♦ **Female-headed Households and Security of Tenure**

In Kenya, women are increasingly taking on greater responsibility for their households, be it as *de jure* or *de facto* heads. While there has been a marginal increase in the number of female-headed households nation-wide from 1989 to 1999, the increase in urban female-headed houses is more noticeable. In 1989, 15.6% of urban households had female heads rising to 19.5% in 1999.¹⁹ Given that households headed by women are considered to be the poorest, this has implications for where these women are able to live and the consequences to them of insecurity of tenure. Thus far, census compilers, although recognising the need to provide separate statistics on informal settlements, have yet to do so.²⁰ Nevertheless, we

can surmise that the poverty levels of women force them to live in slum dwellings, which consistently are subject to demolitions. The 1994 *Kenya Country Gender Profile* showed that while "Men owned the majority of [building] structures, the highest proportion of women (32.8 per cent) owned shanties. Shanty settlements are usually associated with slums and are often demolished by the City Council without notice."²¹

The effect of loss of dwellings on women increases their vulnerability and that of their dependants leading to a downward spiralling of their rights. Insecurity of tenure makes women more desperate and decreases their bargaining power in all spheres of life: work; housing; education; economic; personal security and health. It makes women subject to the vagaries of predatory and self-seeking behaviours of others; increases their susceptibility to sexual coercion and the attendant sexual risks that that carries; it undermines their ability to care for their children and families and ultimately destroys their human dignity.

♦ **Access to Credit and Women Slum-dwellers**

Easier access to credit is particularly of grave concern for women, especially the poor, as traditional financial institutions ignore them, and micro-finance institutions (MFIs), set up as alternatives, have been found to overcharge them. There is necessity of credit for slum-dwellers to enable them to upgrade their own homes for example, the Kenyan based Akiba Mashinani Trust, a savings group that acts as the financial arm of the Muungano wa Wanavijiji (slum-dwellers union), attempts to replicate a successful Indian-based credit scheme that loans women money who then use 50 percent of it to upgrade their slum homes.²²

If the Kenyan government, through its Minister for Lands and Housing, Mr. Amos Kimunya, at the WUF says, "It is not our role as government to build houses but to facilitate the process,"²³ then, the government needs to ensure that the

facilitation process is clearly laid out with specific guidelines, procedures and timelines for the achievement of their stated goals. Failure of the government to deliver on its promise to build "15,000 housing units in urban areas and a further 300,000 in rural areas each year"²⁴ makes this process of "facilitation" of even more paramount importance, particularly in light of the 2004 demolitions which were undertaken under the premise of alternate housing for slum dwellers. It is not clear at this point if a gender perspective was fully incorporated into the Draft *National Housing Policy* published in April 2000, but the importance of doing so cannot be overstated given the importance of housing and its unique effects on women.

♦ **Access to Education for Women and Decision-making around Property Acquisition**

Access to credit, while important, is not sufficient in itself to ensure that women's rights to housing and ownership of property are upheld. The 2003 DHS survey shows that since 1998, the number of women who say that they have total decision-making power over how their earnings are used has increased from 55% to 66%. While this is a welcome improvement, decisions on large household purchases were taken predominantly by men (61%)²⁵. This would suggest that men would also predominantly make decisions regarding the purchase of housing or land. Given that current practices deny most women of their rights to own property, it is another key area where policies are needed to bring about a gendered approach to property ownership. In this respect, education may also play a key role, particularly at higher levels of education where greater gender discrepancies become apparent and only three women for every four men have access to secondary school education or above.²⁶

While certain affirmative action steps have been put in place with the slight lowering of requirements for female applicants to public institutions of higher learning,²⁷ the government

will still need to do more to ensure equitable access to education. It is only through education that women can develop the knowledge and confidence that will enable them to make informed decisions that will provide them with greater control over their lives and make them more productive members of society. Paralegals have been shown to play a significant role in educating women on their land rights in communities and the government would do well to allocate more resources to the training of these groups.

State Obligations to the Right to Adequate Housing

Legislation will be indispensable, but there is also need for administrative, judicial, economic, social and educational steps to be taken by the Kenyan government. First important steps such as understanding the housing situation have begun with the new NARC government but their gender analysis requires further strengthening if women's needs in their diversity are to be appropriately addressed within this right.

Disadvantaged groups and women in vulnerable conditions can and must be protected by the adoption of low-cost housing programs because the failure to do so would mean that Kenya is failing to perform its obligations under the Covenant. The current housing policy will need to spell out more clearly what remedies are being provided for the violation of the right to adequate housing, especially for female headed households. The Kenyan government must also refrain from actions that prevent people from satisfying the right for themselves such as its current practices of arbitrary evictions. Simultaneously, the government must protect its citizens from third parties such as land cartels, developers and landlords who have and continue to infringe upon the rights of tenants. Actions that would help are conferring legal title to secure tenure; legislative measures against discrimination and harassment and to ensure access to land for disadvantaged groups like women; having housing costs that are

commensurate with the low income levels of many of its citizens; and, the regulation of land and housing markets.

All such interventions by the Kenyan State would go a long way in ensuring that women, men and children would enjoy the right to adequate housing as enshrined in international human rights laws.

B. The Social Reality of Reproductive Health²⁸

In Kenya, motherhood remains a high-risk activity. Current studies estimate maternal mortality rates, that is, the number of women who die in pregnancy and childbirth in Kenya, at "1,300 for every 100,000 live births"²⁹. "Maternal deaths represent 15% of all deaths of women aged 15-49."³⁰ While the number of prenatal deaths in Kenya is 40 out of 1,000 births³¹, no accurate figures are available for those infants who do survive birth but are killed or simply go missing within a few days of being born as a consequence of being unwanted. "Unplanned pregnancies are common in Kenya. Overall, 20 percent of births in Kenya are unwanted, and 25 percent are mistimed or wanted later."³² The number of unsafe abortions annually (30-40% of maternal mortality rates) stands at 300,000. On the whole, births to unmarried or young adolescents in Kenya are unintentional, yet, 1 out of every 200 adolescent girls is also likely to die from complications of motherhood and unwanted pregnancies³³. For this same group of adolescents, 106 out of every 1000, single or married, have already begun childbearing. Compounding these issues is the fact that even after a safe delivery, poor women are unable to provide the children they give birth to with the resources that those children need in order to live and have healthy lives. There are heavy costs to maternal illness and death as it threatens the health and survival of families and the larger community.

A mother's death means the loss of both her non-monetary and monetary contributions to her

family and the nation.³⁴ A mother's death also increases the likelihood of economic, social and psychological harm to her children; while it increases the burden on her survivors to take care of her children and home³⁵. The right to the highest attainable standard of physical and mental health is meant to ensure that women are not further burdened by societal, cultural or economic morays that affect their ability to ensure their own healthfulness. For women, their most important health issues often centre on their reproductive roles. As such, this is the single most important health right that women need protection over.

Throughout Kenya, women who face poor reproductive health do so because of economic poverty and discrimination that can be located within practices of gender inequalities. Such conditions of inequity have created limited access for females to social resources such as education, resulting in lower literacy rates which in turn leads to less frequent use of reproductive health services and less knowledge on the importance of reproductive healthcare. The heavy work burden that falls upon women provides women with little time or space for the self, thus discouraging health-seeking behaviour because of the time it would take away from household work, market work, community obligations, and agricultural work. Furthermore, for most rural Kenyan women, the nearest clinics tend on the whole to be a daunting six kilometres away. If and when women or men do get to the clinic, they will face other disabling factors such as an inordinate amount of waiting time, given the increasingly strained health infrastructures, further decreasing the likelihood of male participation in particular.³⁶ At the clinic, women often find themselves faced with staff attitudes and behaviours that can be discouraging. One example is that clinics will provide maternal and family planning programs narrowly and mainly offer services to women who are married and or are pregnant adult women.

The value placed on women also determines their health-seeking behaviour. When less value is placed upon females because they are women, they will not seek out healthcare, particularly among the poor where seeking it will require spending family income. Concurrently, the low social status of women often means that they lack autonomy over their own bodies. They are therefore often denied the power to make decisions or negotiate with men on matters such as if and when they will have sex or even if contraception will be used, thus constraining them not only from the point of view of women's procreative power, but also their sexuality. This unequal power relationship in sexual relationships exposes women to sexual violence, sexually transmitted infections and unwanted pregnancies.

Women's reproductive health is however challenged or unattainable if inadequate attention is directed at involving men in promoting women's health, or if men's own reproductive health needs remain un-addressed or de-linked from women. Our concepts of masculinity which include risk-taking; unreasonable expectations that men should endure pain or ill-health; and the idea that reproductive health concerns are a woman's affair all lead men to delay seeking reproductive health care, therefore increasing the gravity of their illness or even leading to death. Thus, while the burden of reproduction still falls upon women, yet women lack decision making power, concrete actions are yet to be taken that will encourage and enable men to shoulder responsibility for their sexual and reproductive behaviour given the consequences on social and family roles.

The recognition of indigenous customs as the personal laws of Kenyan ethnic communities has an impact on women's general and reproductive health. For example, wife inheritance presents the new health hazards of HIV/AIDS especially when sexual contact is demanded; while the development of various forms of "adapted"³⁷ polygamous unions

that we are now seeing presents new threats of sexually transmitted infections. Even when customary harmful practices such as female genital mutilation and early and forced marriages are declared illegal under current Kenyan statutes and the Children's Act, these harmful practices still thrive. Hence, although statutes may legally enable a Kenyan woman to act, she will find that culturally she has no authority to act in a context of strong masculine values or in a context where the Kenyan state continues to significantly give constitutional recognition to patriarchal customary laws thus undermining its very own statutory prohibitions against certain cultural traditions that harm the reproductive health of women. Reproductive health risks are however not the same for all Kenyan women. Rather, risks are defined by where women live, their age, ethnicity or race, economic status, whether they are in formal or informal employment, and their educational levels.³⁸ For Kenyan women living in poverty or in disadvantaged circumstances, for example, women living in remote communities, pastoralist nomadic women and internally displaced women the demand and access to affordable, accessible and quality reproductive health care and services remains difficult or unfulfilled even when health facilities exist.

Reproductive Rights

Reproductive rights are absent from the ICESCR, therefore interpretations of the ICESCR's right to health finds guidance from subsequent international human rights instruments such as CEDAW and ICPD that explicitly define reproductive health rights.

Reproductive health rights imply the following:

- ◆ The freedom for women and men to decide when, how and if to have children;
- ◆ The provision of and access to information and services that enable both women and men to meet their reproductive health needs;
- ◆ The provision of antenatal, post-partum and post-abortion care so that women can safely

experience pregnancy and childbirth. (This is a matter of right to life and survival for women as met by the fulfilment of two things - access for all women to facilities that can provide emergency obstetric care³⁹ and access to affordable, effective and safe methods of family planning.)

- ◆ Access to knowledge and care to enable awareness and prevention of sexually transmitted infections including HIV/AIDS as well as Anti-retroviral treatment for pregnant women;
- ◆ Individual control over one's own sexuality;
- ◆ The right to liberty and security for women that can only be ensured through strong support for the abandonment of cultural practices that harm women's health;
- ◆ The right to make decisions that are free from discrimination, violence and coercion; and,
- ◆ The right to obtain the highest standard of sexual and reproductive health.

Kenya has developed a variety of policies to address the health status of women. The National Implementation Plan for Family Planning Program 1995-2000;⁴⁰ the Reproductive Health and Family Planning Policy guidelines 1997;⁴¹ and the National Reproductive Health Strategy 1997-2003⁴² are key policies calling for the investment in women's health. There is also the National Development Plan⁴³ Ministry of Planning and National Development, Government of Kenya, (1997) and Poverty Reduction Strategy Paper for 2002-2003⁴⁴ that prioritise the provision of health services, laying emphasis on the needs of women and children. More recently, the Millennium Development Goals (MDGs) have placed far-reaching responsibilities on governments and the Kenyan government has committed to reducing by three-quarters, between 1990 and 2015, the maternal mortality rate.⁴⁵ This means that the Kenyan government must "offer total political commitment and provide capacity building for delivery of quality health care; provision of minimum of 15 percent of annual budget to

health with at least 20 percent of that to reproductive health; free delivery of services to women and health systems that build around emergency obstetric care."⁴⁶

These policy initiatives helped launch the Safe Motherhood drive in Kenya, a world-wide endeavour that aims to reduce the number of deaths and illnesses associated with childbirth. They further recommended the strengthening of district level hospitals to ensure the reach of reproductive health services across all regions. International standards and policies notwithstanding, the Kenyan state has remained constrained in its ability to deliver on its reproductive health sector policies, thereby failing to provide remedies against the human rights violations that persist. Thus, policy instruments such as the Safe Motherhood initiative have sporadic impacts and have not improved the reproductive health of Kenyan women given the persistently high rates of maternal mortality and morbidity.

Furthermore, the needs of Kenyan adolescents remain unmet, while the dilemmas of abortion continue to bedevil us. The criminalising of abortion has resulted in women and girls being subjected to unsafe abortions contributing to an estimated 300,000 deaths per year, or 30-40 percent of maternal mortality rates⁴⁷. Non-fatal resultant complications in turn place a very heavy burden on Kenya's healthcare systems whose obstetric budget is then needlessly spent on attempts to remedy these avoidable consequences. The HIV pandemic on the other hand, continues to challenge the provision of healthcare, especially for Kenya's poor. In general, the constraints that the Kenyan health sector faces in deploying resources can be partially attributed to insufficient national funds further compounded by government allocations that have failed to direct increased resources to reproductive health when deciding priorities for the national budget. The World Health Organisation (WHO) has set a global target of a minimum of five percent of GNP for health

expenditures, in a contest of scarce resources "these funds need to be directed at public health, primary health, and preventative services."⁴⁸

Securing Reproductive Rights for Kenyan Women

There are specific actions that the Kenyan government in collaboration with NGOs and private sector employers can undertake to secure and increase women's access, throughout their life cycle, to appropriate affordable reproductive health care, information and services. An important first step is for the state to ensure that no measures of any kind are being taken with the intention of eroding reproductive health rights. This state obligation to recognise and protect would also seek to reform, promote and enforce Kenyan laws to reflect a commitment to women's health by ensuring compliance with human rights statutes⁴⁹ while at the same time assessing the degree to which this right remains unmet.

To fulfil the right to reproductive health, particular interventions are required. The state must create accessible and equitable reproductive and sexual healthcare for women, giving particular attention to maternal and emergency obstetric care as agreed to in the ICPD Programme of Action. In keeping with ICPD, abortion should not be promoted as a method of family planning, instead the government is urged to deal with the health impact of unsafe abortion and reduce recourse to abortion through expanded and

improved family planning services.⁵⁰ Every attempt should be made to eliminate the need for abortion and women must have access to quality services for the management of complications arising from abortion.

In order to promote a culture of human rights and respect for the health rights of women, steps to be taken will include educating the public about the health aspect of women's rights and human rights in general. More specifically, educational programmes must seek to enable women to acquire knowledge to make decisions, achieve mutual respect in matters concerning sexuality and emphasising the abandonment of harmful practices and attitudes. Adolescent sexuality must also be acknowledged and awareness education and service directed at their specific reproductive needs. Such programmes will require establishing collaborative networks encompassing women, civil society organisations, health professionals and policy makers to disseminate needed information and to monitor and enforce reproductive and sexual health rights.

Finally, the state needs to pursue economic, social and development policies that strengthen women's equality and empowerment and to provide financial and material support to NGOs to strengthen them to improve the health of women.

ENDNOTES

- 1 The Committee that monitors the ICESCR explains the right to adequate housing to include: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy from Marjolein Benschop, *Rights and Reality: Are Women's Equal Rights to Land, Housing and Property Implemented in East Africa*, United Nations Human Settlements Programme, April 2002", p. 23
- 2 International Covenant on Economic, Social and Cultural Rights as reproduced in Appendix 1 of Marilyn Waring's, *Three Masquerades: Essays on Equality, Work and*

ENDNOTES

- Human Rights University of Toronto Press Incorporated, 1996, pp. 164-169
- 3 Marjolein Benschop, *Rights and Reality: Are Women's Equal Rights to Land, Housing and Property Implemented in East Africa*, United Nations Human Settlements Programme, April 2002", p. 39. States that the Kenyan government has submitted a report to the Committee on the Elimination of Discrimination against Women (CEDAW).
- 5 Jacinta Muteshi, "Reproductive Health in Kenya: A Matter of Social Justice" *New Directions in African*

ENDNOTES

- Education. Ed. Nombuso Dlamini, University of Calgary Press (forthcoming) and Marjolein Benschop, (2002) *Rights and Reality: Are women's equal rights to land, housing and property implemented in East Africa*. United Nations Human Settlements Programme.
- 6 Audrey Chapman, (2002) "Core obligation related to the right to health." In *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. eds. A. Chapman and S. Russell. Intersentia, Antwerp, p. 5, 6, 7.
 - 7 Para.5, The Maastricht Guidelines formulated in 1997, by a group of experts convened by the International Commission of Jurists, the Urban Morgan Institute of Human Rights and the Centre of Human Rights of the Faculty of Law of Maastricht University. These guidelines have de facto status within the Committee on Economic, Social and Cultural Rights and have been widely incorporated into the general comments of this same Committee.
 - 8 UN (1994) *Compilation of General Comments HRI/GEN/1/Rev.1*. para. 10. (General comment No. 3: The Nature of States Parties Obligations, 5th session (1990), CESCR)
 - 9 www.inhchr.ch/housing
 - 10 www.unhchr.ch/housing
 - 11 The Kenya Human Rights Network (K-HURINET) a network of local human rights NGOs
 - 12 Naila Kabeer, *Gender Mainstreaming in Poverty Eradication and the Millennium Development Goals: A Handbook for Policy-Makers and Other Stakeholders*, Commonwealth Secretariat, International Development Research Centre (IDRC), Canadian International Development Agency (CIDA), 2003, p. 128
 - 13 Central Bureau of Statistics (CBS), Ministry of Health (MOH) [Kenya], and ORC Macro. 2004, *Kenya Demographic and Health Survey 2003*, Calverton, Maryland, MOH, and ORC Macro. p. 2
 - 14 Miloon Kothari, the UN special Rapporteur on Adequate Housing carried out his assessment in February 2004 and presented his findings at a press conference in Nairobi on 21st February, 2004 and thereafter the report was submitted to the UN Commission on Human Rights (UNCHR), and its Committee on Economic, Social and Cultural Rights (CESCRs).
 - 15 "The Equality Bill seeks to prevent and prohibit discrimination faced by various marginalized groups, and to address and eliminate the imbalances and inequalities as a result of discrimination. It provides for the establishment of an Equality Board and an Equality Tribunal that would deal with claims of discrimination...it includes health issues, sexual harassment, nationality, access to credit, rights and responsibilities during marriage, distribution of property acquired during marriage, inheritance...property." M. Benschop, (2002)
Rights and Reality: Are women's equal rights to land, housing and property implemented in East Africa. United Nations Human Settlements Programme.
 - 16 Marjolein Benschop, *Rights and Reality: Are Women's Equal Rights to Land, Housing and Property Implemented in East Africa*, United Nations Human Settlements Programme, April 2002", p. 151
 - 17 SINA Newsletter April 2004.p.3.
 - 18 Daily Nation, October 6, 2004, p. 12
 - 19 Central Bureau of Statistics (CBS), Kenya 1999 Population and Housing Census: Volume XI Analytical Report on Gender Dimensions, Ministry of Finance and Planning, August 2002, p. 7
 - 20 Central Bureau of Statistics (CBS), Kenya 1999 Population and Housing Census: Volume XI Analytical Report on Gender Dimensions, Ministry of Finance and Planning, August 2002, p. 50
 - 21 Royal Netherlands Embassy, Nairobi, Kenya, Kenya Country Gender Profile, African Centre for Technology Studies, 1994, p. 43
 - 22 Ibid
 - 23 Ibid
 - 24 Ibid
 - 25 Central Bureau of Statistics (CBS), Ministry of Health (MOH) [Kenya], and ORC Macro. 2004, *Kenya Demographic and Health Survey 2003*, Calverton, Maryland, MOH, and ORC Macro. p. 42
 - 26 Central Bureau of Statistics (CBS), Ministry of Health (MOH) [Kenya], and ORC Macro. 2004, *Kenya Demographic and Health Survey 2003: Key Findings*. Calverton, Maryland, USA: CBS, MOH and ORC Macro. p. 2
 - 27 Women's Bureau, "Republic of Kenya - Kenya Review and Appraisal: Final Report on the Implementation of Beijing Platform for Action (Beijing +10) (1994-2004)", Ministry for Gender, Sports, Culture and Social Services, June 2004, p. 6
 - 28 Jacinta Muteshi, "Reproductive Health in Kenya: A Matter of Social Justice." In *New Directions in African Education*, ed. Nombuso Dlamini. University of Calgary (forthcoming).
 - 29 Rebecca J. Cook, Bernard M. Dickens, and Mahmoud F. Fathalla (2003) *Reproductive health and human rights: Integrating medicine, ethics and law*. Oxford press, New York, p. 410-411.
 - 30 Central Bureau of Statistics (CBS), Ministry of Health (MOH) [Kenya], and ORC Macro. 2004, Kenya

Demographic and Health Survey 2003, Calverton, Maryland, MOH, and ORC Macro. p. 237

- 31 Rebecca J. Cook, Bernard M. Dickens, and Mahmoud F. Fathalla (2003) *Reproductive health and human rights: Integrating medicine, ethics and law*. Oxford press, New York, p. 410-411.
- 32 Central Bureau of Statistics (CBS), Ministry of Health (MOH) [Kenya], and ORC Macro. 2004, *Kenya Demographic and Health Survey 2003: Key Findings*. Calverton, Maryland, USA: CBS, MOH and ORC Macro. p. 4
- 33 Khama O. Rogo (1995) *Summary of research findings on women and health in Kenya: developing an action agenda*". In *Women and Autonomy in Kenya*. ed. K. Kibwana. Claripress, Nairobi, p. 70. These may be underestimated figures given adolescent experiences with the Kenyan health care system.
- 34 UNFPA (2000)
The State of World population 2000: Lives together, worlds apart, men and women in a time of change. UNFPA, New York
- 35 UNFPA (2000)
The State of World population 2000: Lives together, worlds apart, men and women in a time of change. UNFPA, New York
- 36 Esther Muia, Joyce Olenja, Violet Kimani and Ann Leonard (2000), *Integrating men into the reproductive health equation: Acceptability and feasibility in Kenya*. Population Council, Nairobi. In this study undertaken in hospital settings in Kenya urban areas of Nairobi (capital city) and Kakamega (provincial town), focus group discussions highlight that structural and attitudinal constraints at health facilities keep men away, and that employed men are usually present at time of delivery when payments need to be made or necessary items purchased for the mother.
- 37 Tola Olu Pearce (2000) "Death and maternity in Nigeria." In *African Women's health*. ed. M. Turshen. Africa World Press, Inc. Trenton New Jersey and Asmara, Eritrea, p. 11 This study points to the development of various new forms of polygamy and behaviors towards marriage that have begun to appear not only in Nigeria but across modern day Africa.
- 39 Lynn Freedman (2003) "Strategic advocacy and maternal mortality: moving targets and the millennium development goals" *Gender and Development* Vol. 11, No. 1, pp 100-101. Freedmen noted that 80% of maternal deaths are caused by five direct obstetric complications: hemorrhage, infection, hypertensive disorders, obstructed labour, and unsafe abortions. Freedmen outlines that with the exception of deaths due to abortion, all the other four complications cannot be predicted or prevented. Emergency obstetric care (EmOC) can however ensure that all births have a skilled attendant at hand to save lives and that all women with complications can get to it.
- 40 Ministry of Health, Government of Kenya (1995) *National Implementation Plan for Family planning 1995-2000* Government printers, Nairobi
- 41 Ministry of Health, Government of Kenya (1997) *Reproductive Health Strategy 1997-2010*, Government printers, Nairobi.
- 42 Ministry of Health, Government of Kenya (1999), *National reproductive health strategy Implementation plan 1999-2003* Government printers, Nairobi.
- 44 Ministry of Finance and Planning, Government of Kenya (2002), *Interim Poverty Strategy Paper for the period 2000-2003*. Government printers, Nairobi.
- 45 World Health Organization, (2003) *Family and Reproductive Health: Making a Difference through the life span*, WHO, Brazzaville, p. 9. Some of the proposed indicators include the maternal mortality ratio and the proportion of births attended by skilled health personnel.
- 46 World Health Organization, (2002) *Family and Reproductive Health: Making a Difference through the life span*" WHO Regional Office for Africa, Brazzaville. p. 32
- 47 Ibid
- 48 Audrey Chapman, (2002) "Core obligation related to the right to health." In *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. eds. A. Chapman and S. Russell. Intersentia, Antwerp, p. 211
- 49 A local project that is currently underway is the *Reproductive Health Advocacy Project (RHAP)* that is designed to seek change and review Kenya reproductive health policies and laws and create awareness about unsafe abortions in Kenya. It was initiated by a collaboration between the *Federation of Women Lawyers-Kenya Chapter (FIDA)*, *IPAS* and *Kenya Medical Association (KMA)*.
- 50 In general, Kenyan women continue to confront strong political challenges in articulating their needs and concerns with regards to reproductive health rights. Current ongoing constitutional review discussions and the opening up of political space to raise human rights issues has not enabled Kenyan women leaders seeking to open up public discussion on the issues of abortion to be able to do so. Rather, the provisional draft constitution shows that abortion will be constitutionally prohibited, and furthermore, there is a legal recognition of a foetus' status.

Annex 1

Women in leadership roles; new additions for 2004 ¹

FIDA Kenya has been monitoring the government's appointments for positions at national level. The following list gives a summary of the appointments of women to high level positions:

A woman was appointed to be:

- ◆ Chairperson of the Constitution of Kenya Review Commission.
- ◆ Registrar-General under the Constitution of Kenya.
- ◆ Chairperson of the Land Rent Arbitration Tribunal.
- ◆ Chairperson of the Land Acquisition Compensation Tribunal.
- ◆ Director of the National Anti-Corruption campaign Steering Team.
- ◆ Chairperson of the Business Premises Rent Tribunal.
- ◆ Chairperson of the Kenya Industrial Property Institute.
- ◆ Assistant Registrar of Societies under the Societies Act.
- ◆ Managing Director of the Kenyan Post Office Savings Bank.
- ◆ Chairperson of the Restrictive Trade Practices Tribunal.

The following list gives a summary of newly appointed members in some exiting board, commissions, councils and committees at national level:

Board, Commission, Councils, Positions	Number of newly appointed female members	Number of newly appointed male members	Percentage of newly appointed women
Technical Committee on Terms and Conditions of Service of the National Security Intelligence Service	1	5	25.0
Kenya Institute for Public Research and Analysis Board	2	3	40.0
Land Rent Arbitration Tribunal	1	4	20.0
Land Acquisition Compensation Tribunal	1	4	20.0
National Social Security Fund Board	1	0	100.0
Industrial Property Tribunal	2	3	40.0
National Council for Children's Services	2	0	100.0
Kenya Tourist Development Corporation Board	1	4	20.0



International Women's Day celebrations

Board, Commission, Councils, Positions	Number of newly appointed female members	Number of newly appointed male members	Percentage of newly appointed women
Kenya Medical Research Institute Board of Management	1	6	14.29
From the Judicial Service Commission appointed chairpersons to seek Anti Corruption cases in Provinces	6	0	100.0
From the Judicial Service Commission appointed Deputy Registrars	2	0	100.0
From the Judicial Service Commission newly appointed Resident Magistrates and Deputy Registrars	7	17	29.2
From the Judicial Service Commission newly appointed Senior Principal magistrates	3	2	60.0
From the Judicial Service Commission newly appointed Principal magistrates	8	3	72.72
Newly appointed acting Puisne Judges	1	2	33.3
From Gender Commission ten commissioners chaired by a woman			

Occupying some high level positions did some progress. Yet, in general the government is still appointing fewer women than men to become member of policy-making institutions and to

occupy high level positions. We shall continue urging the government to embrace the principle of gender mainstreaming by ensuring that at least 1/3 of all the appointments are of women.

¹ Compiled by Bernadette who is interning with the rights team.

Annex 2

Case Analysis at the Legal Aid Clinics

The total number of clients that were attended to at the Nairobi clinic were 7,302, of which 1,979 were new clients. 1,103 files opened and 143 cases files in court.

The table below is a break down of cases attended to from January 2004 to 27th October 2004.

Maintenance	5,141
Succession	1,285
Domestic Violence	247
Civil	181
Division f Mat. property	134
Rape	41
Divorce	76
Sexual Harrament	4
Defilement	11
Dismissal from employment	28 of these 4 were dismissed due to pregnancy.
Accident	10
Custody	58
Assault	49
Forced marriage	1
Attempted rape	1
Seperation	15
Adoption	1
Complaint against Advocates	2
Harrassment	7
Criminal- charged with damaging property and other cri. activites	10

Knowledge of Fida Kenya	
Friends	804
Media	538
Relatives	277
NGOs	97
Gorvenment agencies	138 - <i>These are Childrens' Dpt, Chiefs, Ag's office, Police and MPs.</i>
Fida Monitors	8
Old fida Clients	43
Advocates	7
Hospitals	23
Neighbours	26
Fida Kisumu	5
Church pastors	4
Sierra Leone Embassy	1
Village Elders	4
Employer	3
Social worker	1

From the date above, maintenance cases continue to lead on cases reported to FIDA Kenya followed by succession cases.

The defilement cases reported this period are worrying. These are cases of between 1 year and three months to five years.

Another notable case that was reported is of a 72 year old grandmother

Friends continue to be the highest source of information about Fida Kenya followed by media.

FIDA needs therefore to lobby the parliamentarians for the enactment of the sexual offences Bill.

FIDA Kisumu Office

Total subsequent clients attended to January - October 2004

NATURE OF CASE	NUMBER
Maintenance	826
Custody	55
Custody and maintenance	98
Succession	447
Divorce	126
Land	136
Matrimonial property	87
Domestic violence	173
Separation	91
Rape/Defilement	07
Employment issues	16
Murder	03
Total	2065

New clients attended to January - October 2004

NATURE OF CASE	NUMBER
Maintenance	309
Custody	42
Custody and maintenance	57
Domestic violence	171
Separation	40
Mat property	36
Rape/Defilement	57
Succession	110
Employment issues	24
Land	51
Divorce	18
Forced marriage	01
Trespass	01
Complaint against advocate	08
False arrest	01
Defermation	01
Debt	04
Total	931

Annex 3

Annual Report Media Analysis 2004

The following is a breakdown of most prevalent forms of gender based / reflective violations / incidents as reported in the mainstream print media comprising two daily newspapers; Daily Nation and The Standard. The analysis is an

indication of incidents that frequently occur in a given month, the manifestations or consequences of suffering the same and areas where the incidents taking place are most rampant.

Month	Nature of Incident	Consequences	Prevalent Area of Occurrence
January	Physical abuse	Scars, Bruises	Western, Nyanza
	Psychological abuse (verbal/shouting), Deprivation of basic needs	Emotional trauma	Central, Eastern
February	Physical abuse	Death, Bodily harm	Coast, Rift Valley
	Rape / Attempted rape	Murder, Hospitalization	Nyanza
	Defilement	Psychological trauma, pregnancies, school drop-outs	Central, Western, Rift Valley
March	Rape during robbery & carjacking	Murder, haemorrhage, bodily injury	Nairobi, Central
	Defilement	Physiological harm, psychological trauma	Central, Nyanza
	Murder	Fatal injuries leading to death	Nairobi, Central
April	Defilement	Psychological trauma, Drugging	Nyanza, Central
	Murder	Fatal injuries leading to death	Central, Rift Valley
	Neglect of parental responsibility	Absenteeism from school due to non-payment of school fees	Eastern, Central
May	Defilement	Grievous injury, Psychological trauma	Rift Valley, Central
	Murder		Rift Valley
June	Rape	Physiological harm, Psychological trauma & stress, Birth of illegitimate children, Gross sexual imposition	North Eastern
	Defilement	Compensation from suspects to victims family in kangaroo courts, STD infection, Sexual exploitation, Serious bodily harm	Rift Valley, Coast

Annexures

Month	Nature of Incident	Consequences	Prevalent Area of Occurrence
	Abortion	Failed backstreet abortions impact on victim's future reproductive health, Increase in numbers of street children, Insecurity, and Escalation of poverty, Want of review of legislation on abortion	Nairobi
	Reproductive Health Rights	High cost of sanitarium leading to their inaccessibility by poor Women Exposure to unsafe deliveries and increase in infant mortality rate due to rising home deliveries in rural areas and inaccessibility of necessary infrastructure	Western, Nyanza
	HIV/Aids	Increase in number of Aids patients, Increase in number of Aids orphans and lack of school fees arising from death of their parents, Risk of lack of impact of ARVs on individual patients	Nyanza, and country wide generally
	Children's Rights & Child abuse	Drug abuse, Denial of right to education, Conceptions arising from incestuous relationships, Caning leading to serious injury	Central, Nyanza, Western, Coast
July	Defilement	Sexual assault, Serious physiological injury, Threat of STD transmission	Central, Coast
	Rape	Sexual assault, Mental and Psychological torture	Nyanza, Rift Valley, Central
	Assault	Mutilation of genitals, Hospitalization, Burns, Death	Nyanza, Rift Valley
	Reproductive Health Rights	Unrealistic denial of sexual rights through call for abstinence, Inaccessibility to contraceptives resulting to loss of lives through Aids, Increased unwanted pregnancies and in effect increase in population growth rate	Kenya in general
	HIV/Aids	HIV/Aids awareness on need to know one's status and its effective management, Shortages of primary school teachers, Orphan hood, Risk of overwhelming Government with demand for ARVs, Risk of more women contracting Aids due to widow inheritance inability to negotiate for condom use, request abstinence, rape experience, et al.	Nyanza, and country wide generally

Month	Nature of Incident	Consequences	Prevalent Area of Occurrence
August	Early marriages / Child pregnancies	Poor performance in examinations, Girl child backwardness in education, School drop-outs	Nyanza, Rift Valley
	Rape	Violation of a woman's body and dignity, Humiliation, Hospitalization	Nairobi, Central
	Murder		Rift Valley, Central, Nyanza
	Child trafficking		Nairobi - London
	FGM		Rift Valley, Eastern
September	Physical abuse	Injuries, Hospitalization, Death	Rift Valley, Nyanza
	Rape and Defilement	Pregnancy, Trauma, Physical injury	Rift Valley, Nyanza
	Psychological abuse	Trauma	Nyanza, Central
October	Rape and Murder	Trauma, Pregnancy, Death	Rift Valley, Nairobi
	Defilement	Trauma, Injury	Rift Valley
	Physical abuse	Injuries, Hospitalization, Death	Rift Valley, Nyanza



Laikipia and Samburu rape cases. FIDA Kenya fact finding tour, March 2004.

Annex 4

Monitoring Women's Rights Violations

Community Level Trends

November 2003 - January 2004

FIDA Kenya conducts community based monitoring of women's rights violations in Nairobi, Western and Nyanza provinces. The following highlights the trends analyzed from data received from a total of 115 reports during the months from November 2003 to January 2004. Women's rights violations continue to increase in the community despite sensitization efforts conducted.

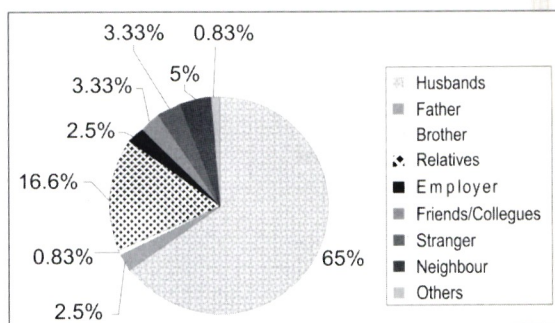
The data shows the extent to which women continue to suffer violations at the hands of men and other violators.

Details of the abused

- ◆ 51.3 % of the women violated were married, making up more than half of those violated, followed by 16.52% who were separated and 13.04% who were single, reflecting that most violations occur in the domestic sphere.
- ◆ 84.35% of the victims reported having children while those without made up 15.65% of the victims. Women with children were therefore more prone to violence than those without, making them more vulnerable.
- ◆ A majority of those violated, 53.04% were unemployed while 4.35% were students showing that women who are not economically empowered are highly susceptible to violence than those who have an income of some kind, 40.87%. This can be attributed to the fact that women who do not rely financially on others and who contribute towards the costs of the family, which includes their husbands, are less prone to violence.

Who is responsible?

- ◆ Domestic violence is the single most prevalent form of violation that women experience. Most violations occurred in the domestic sphere whereby the perpetrators know the victims and there is an existing relationship between the two as shown below:



The Nature of Violations

- ◆ A majority of women experience violations that are linked to their matrimonial lives. This is evident from the increased number of cases related to matrimonial desertion and physical abuse. The number of cases of physical abuse reported reflects the degree of violence that is common place within homes in the society today. Furthermore, the high number of sexual violence cases reported shows that sexual violence is still on the increase, particularly rape, and that women and girls are thus at a high risk especially in light of the deadly HIV/AIDS virus affecting women, making households highly vulnerable.

The Consequences

- ◆ The manifestation of the violence reflected is a severe violation of women's well-being and bodily integrity exposing them to serious health implications.
- ◆ Consequences of the sexual abuse reported included 41% cases of pregnancy, 29.5%

cases of infection with STDs, 17.7% cases requiring hospitalization, 5.9% of cases each resulting in miscarriage and infection with HIV/AIDS.

Where and How often did they occur?

- ◆ 70.43% of the time, violations occurred in the home, reporting 81 cases taking place in the domestic sphere, followed by 12 cases reporting other areas and 9 cases in public places.
- ◆ Most violations happened for the first time, accounting for 29.57% of the reported cases while 24.35% of the cases reported had never happened before but the threat of them occurring had been present. 20.87% of the cases were reported as occurring frequently while 12.17% reported the violation as occurring occasionally. Only 3.48% of the cases reported the violation as never having happened before.

Reporting mechanisms

- ◆ Circumstances following the violation showed that 39.13% of the cases were reported immediately while 20% of the cases were reported within 3 days and 13.04% of the cases were reported between 3 days and 1 week. 15.65% of the cases were reported after a week and 8.7% of the cases have not yet been reported.
- ◆ 52.05% of the cases were reported by the survivors themselves while 13.01% of the cases were reported by family or relatives. 10.27% of the cases were reported by FIDA Kenya monitors. This shows that although a majority of the survivors were brave enough to report the violation, others were still hesitant to report the same. This is also true in cases whereby women had to seek assistance in light of severe injuries.
- ◆ The reasons for not reporting violations immediately included 36.29% citing fear or threat of repercussions, while 17% cases reported they did not know what to do. 24%

reported private reasons that they did not want to disclose while 13% reported that they thought the violation would end. 4% cited that no one would believe the survivor while 1.7% of the cases were not reported immediately due to the deterrence from injury. This shows that women still hesitate to take the step to report violations and suffer in silence either due to fear of the consequences or due to the hope that the situation will improve or simply because they do not want to expose the situation since it is regarded as a private affair by society. Additionally, a majority of the women are still not aware of their rights and therefore do not know where to turn to seek help.

Where reported?

- ◆ A majority of the cases were reported to the chiefs, followed by family relatives. "Others" includes teachers, paralegals, FIDA Kenya monitors and other community based organizations (CBOs). Some cases were reported to more than one place and is understandable as women may discuss the problem with more than one person in order to gain maximum guidance and counselling. However, the data reflects that women are still hesitant in taking legal actions and would rather report to other authorities than report to the police. This may also be explained due to the fact that they feel they would be ridiculed for reporting a matter that is 'domestic'. There is therefore a need for continued awareness on women's rights and how they can access them.

Why Continue Suffering?

- ◆ A majority of women, 29.13% cited children as the main reason for not leaving, 18.9% expressed hope that the violation would end, 14.96% stayed due to economic reasons and 9.45% cited cultural barriers while 15.75% did not respond.
- ◆ Cultural reasons make women stay longer as they are expected to make the relationship

work and particularly safeguard the institution of marriage. The fact that a considerable number of women did not want to respond to

the question also shows that women are still not willing to discuss affairs that are regarded as highly private.

Conclusion

The monitoring of women's rights violations at the community level provides first hand information on the magnitude of suffering experienced by women on a daily basis and that women are still discriminated against and their human rights continuously violated.

The data reveals trends that women's rights violations are on the increase and that domestic violence is the most prevalent form of violation with physical abuse, verbal abuse and intimidation featuring the most. Sexual violations are also on the rise, exposing women and girls

to serious health problems. The data further reveals that although there is increased reporting of women's rights violations due to the sensitization conducted by FIDA Kenya and other existing organizations, there is still an urgent need to address the high occurrence of violations reported through increased sensitization on women's human rights and the avenues for seeking justice when those rights are violated. It is important to note the significance of reporting violations and seeking assistance when one's rights have been violated in order to access justice.

Community Level Trends February - April 2004

FIDA Kenya conducts community based monitoring of women's rights violations in Nairobi, Nyanza and Western Provinces. The following trends are analyzed from data received from a total of 164 reports during the months of February - April 2004. They show an increase of women's rights violations regardless of awareness creation.

It shows the extent to which women continue to suffer violations at the hands of men and other violators.

Details of the abused

- ◆ 64.5% of the women violated were married which is far much higher percentage of violations, followed by 10% who were separated, 8.2% who were single and widows respectively. 1.8% were divorced and others among the violation amounted to 7.3%, reflecting that most violations occur among couples.

- ◆ 85.5% of the victims reported having children and 14.5% without children. Women with children are more vulnerable to violations.
- ◆ 62.7% of those violated were unemployed, 26.4% were employed and 9.1% were students while 1.8% were minors showing that women who are not economically empowered are highly inclined to violence than those who have an income of their own. This can be ascribed to the fact that women who are economically empowered are less prone to abuse.

Who is responsible?

Domestic violence is the most widespread form of violation that women experience. Most violations occurred in the domestic sphere whereby the perpetrators know the victims and there is an existing relationship between the two as shown below:

The Nature of Violations

- ◆ A high number of women experienced psychological abuse followed by physical, matrimonial and economical. This can be attributed to the poverty level in the society. Increase in sexual violence put girls and women at high risk of infection of STDs and HIV/ AIDS.

The consequences

The effects of the violence reflected is a severe violation of women's well-being and bodily integrity exposing them to serious health implications.

Among the highest consequences of abuses were scars/ bruises.

Manifestation of Sexual Abuse Reported

Where and how often did they occur?

- ◆ 75.1% of the violations occurred in the home, reporting 125 cases taking place in the domestic area, followed by 4.9% cases reported in public and work place respectively. Other reporting places were 20%.
- ◆ Most violations occurred for the first time, accounting for 30.2 % of the reported cases. 17.1% of the cases happened more than once. Frequent occurrences cases were 19.7%. 17.1% of the cases were reported as having never happened before but there had been threats. 5.2% reported the violations as occurring occasionally. Others accounted 10.7%.

Reporting Mechanisms

- ◆ Status shows that 24.5% cases were reported after one week while 22.9% cases were reported immediately. 28.4% cases were reported within three days. 3.6% cases were reported between three days and one week. 20.6% cases were not reported anywhere.

- ◆ 61.5% of the cases were reported by survivors themselves while 14.9% of the cases were reported by the relatives or family. 9% cases were reported by FIDA Kenya monitors. Neighbours reported 3% and 1.2% cases were reported by unspecified people while friends reported 4.7% and 6.2% did not respond. Most of the survivors were hesitant to report the cases. Most women seek assistance in case of severe injuries.
- ◆ 24.2% cases were not reported immediately because of threats and fear. 35.5% of survivors did not know what to do. 0.9% thought the violations would end. 8.5% did not want to disclose their sufferings. 25.3% gave other reasons for not reporting while 1.9% did not report because of injury. 3.7% thought that no one would believe them. This shows that most women are still not aware of their rights as well as they fear reporting because of the repercussions.

Where reported

- ◆ 27.2% of the reports were reported to the chiefs, followed by 33.6% cases reported to family/relatives and police respectively. Cases reported to churches amounted up to 10%. Most women reported the cases to more than one organization hoping to get redress. 29.2% of other cases were reported to various organizations including monitors, paralegals and community based organizations.

Why Continue Suffering?

- ◆ 28% of the women did not want to quit the relationship citing children as being the reason. 20.7% of the women thought the situation would change and 16.5% cited economic reasons for not leaving, 11% women were bound by culture as a reason of not leaving and they wanted to safeguard the institution of marriage. 5.5% cited other reasons for staying while 18.3% women did not want to discuss their family issues as they regarded them private.

Conclusion

Monitoring violations at the community level provide first hand information on violations and the degree of violations. A majority of women are violated on daily basis and are discriminated upon. They are not ready to share about their suffering due culture and considering family issues private.

The data show that women's rights violations are on the increase, domestic violence being

on the lead. Sexual violence is widespread which exposes women to other health and psychological problems.

FIDA Kenya and other organizations have a big role to play in sensitizing women on their rights and seeking for their justice. There is need to change the laws that violate women's rights. It is important to report violations in order to realize justice.

Community Level Trends

May – July 2004

FIDA Kenya conducts community based monitoring of women's rights violations in Nairobi, Western, Nyanza and Coast Provinces. The following highlights the trends analyzed from data received from a total of 168 reports during the months of May - July 2004. Women's rights violations continue to increase in the community despite sensitization efforts conducted.

The data shows the extent to which women continue to suffer violations at the hands of men and other violators.

Details of the Abused

- ◆ 59% of women violated were married which is a higher percentage of violations, followed by 11.5% single women, 11.3% widowed while 10.3% were separated and 2% were divorced. 5.9% were among other categories. Married women were more violated making up more than half of the abused women. This shows that most violation occur in a domestic setup.
- ◆ 89.3% women violated reported having children as compared to 10.7% women without children. This can be attributed to the economic hardships of taking care of children that lead to violence.

- ◆ 60.7% women violated were unemployed, followed by 26.8% employed women. 10.1% students were violated and 0.6% minors while 1.8% did not state their status. Women who do not rely on others financially are less violated.

Who is Responsible?

Husbands are responsible for most of domestic violence as shown above.

Nature of Violations

Matrimonial violence is the most prevalent violence in women's lives. Psychological violence makes up the highest percentage of nature of violation to women. This can be linked to the dependant syndrome of women to men. Sexual violence is in the increase that puts women at high risk of contracting HIV/AIDS and STDs.

Consequences

Amputations	2.6%
Breaks and fractures	6.1%
Deformities	2.6%
Scars/bruises	54.4%
Loss of hair	5.3%
Loss of teeth	2.7%
Miscarriage	3.5%
Hospitalization	15.8%
Others	1.7%
No response	5.3%

The manifestation of violence reflected above is a sign of violation of women's well-being and bodily integrity exposing them to serious health implications.

Where and how often did they occur?

- ◆ 77.98% of the cases occurred at home, this shows most violence occur in the domestic sphere. 6.5% occurred in public while 5.9% cases occurred at work place. 9.4% happened at other places while 1.1% did not state the occurrence area. This shows that most violations occur in homes.
- ◆ The frequency of violence shows that first time violation was leading with 31.6% while 20.3% of the cases reported had never happened before though there were threats of them occurring. 18.4% of the violations occurred frequently while 4.8% reported violations occurring occasionally. 22% of the cases were reported to have happened before, while 2.9% did not state frequency.

Reporting Mechanisms

- ◆ The survivors reported 65% cases, while family and relatives reported 5.1% of the cases. FIDA Kenya monitors reported 6.4% cases and neighbours reported 2.6% cases. Friends reported 18.5%, others reported 0.6% of the cases while those who did not respond were 1.8%. As much as the survivors were ready to report, most women were hesitant to report and the cases were reported through other people.
- ◆ The reasons for not reporting violations immediately were cited as not knowing where to report to, accounting to 34.5%. 21.8% feared threat and repercussions. 3.5% thought no one would believe them while 1.5% thought violations would end. 3.5% were deterred from reporting because of injury. 21.8% gave other reasons for not

reporting the violations, while 13.4% did not give any reason. Women still do not report violations immediately due to injury, consequences or they keep hoping that things will change. Women think that family affairs are private matters. Hence most women are not aware of their rights.

Where reported?

Not reported	11.1%
Chiefs/Assistant chiefs	26.6%
Police	13.1%
Church/Community elders	9.4%
Family	23%
Others	16%
No Response	0.8%

Many of the cases were reported to the chiefs followed by family/relatives. Other cases were reported to CBOs, paralegals, and FIDA Kenya monitors. Women feared reporting to the police because of ridicule by the police and other authorities. There is need for continued awareness on women's rights and how they can access them.

Why Continue Suffering?

- ◆ 21.4% women continued to hang on to abusive relationship because they are not economically empowered. 41.8% cited children as the main reason why they were not leaving, while 20.5% thought the violations would stop. Culture which is 5.9% is another factor which contributed to women suffering because they are expected to make the relationship work in times of happiness and sufferings. A big number of women were not ready to respond to the questions, accounting for 5.2% which shows that they regard family matters private. 5.2% represented others.

Conclusion

Monitoring women's rights violations at the community level is an effective way of getting trends of violations because women do not have access to organizations that they can report to and if they do they are threatened and fear repercussions. Women are continually being discriminated and violated.

The data trends reveal that domestic violence is the most prevalent violence women

continue to suffer. Psychological abuse leads in women's human rights abuse. Sexual violence is in the increase that leads to increase of HIV/AIDS and STDs. Even though there is an increase in the reporting trends of violence, still FIDA Kenya needs to respond to the high occurrences of violations. Women need to know when, where, how and to whom to report violations.

Seek redress for violations for justice to be realized.

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