

REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION

VOLUME FIVE TECHNICAL APPENDICES PART TWO

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10TH APRIL, 2003**

PART TWO:

**SECTION ONE: CULTURE, ETHICS AND IDEOLOGY
SEMINAR**

SECTION TWO: GENDER QUESTION SEMINAR

**SECTION THREE: NATIONAL CONVENTION FOR
PERSONS WITH DISABILITIES**

SECTION FOUR: HUMAN RIGHTS SEMINAR

TABLE OF CONTENTS

Page

FOREWORD

SECTION ONE

- 1. Building on the Indigenous in Constitution-making**
Prof. Bethwell A. Ogot
- 2. Culture as a Lived Experience**
A.B.C. Ocholla-Ayayo
- 3. The Heritage Factor in the Constitution**
Dr. Sultan H. Somjee
- 4. Recognising And Respecting Cultural Diversity
In The Constitution**
Dr. Winnie V. Mitullah
- 5. Ethics And Living Values In Constitution**
John W. B. Owigar
- 6. The Ethical And Ideological Basis Of A Constitution**
Prof. Joseph Nyasani
- 7. Culture, Ethics And Ideology In Relation To Gender Equality**
Dr Achola Pala Okeyo
- 8. Culture, Ethics And Ideology: The Gender Implications**
Dr. Ruth N. Kibiti
- 9. Constitution Making – Uganda’s Experience**
Hon. J. F. Wapakhabulo

SECTION TWO

- 10. Gender Considerations in Constitution-making: Making
A Case for the Recognition of Women’s Rights**
Dr. Patricia Kameri-Mbote.

11. **The Socio-Cultural Aspects of the Gender Question**
Prof. Jacqueline Oduol
12. **Christian Feminism**
Prof. Sister Anne Nasimiyu
13. **Islam and Women's Rights**
Ms. Saudah Namyalo
14. **Gender in the African Traditional Context**
Prof. Monica Mweseli
15. **Engendering the Kenyan Constitution: Political and Economic Aspects**
Prof. Maria Nzomo
16. **Models of Affirmative Action for Women**
Dr. Ruth Kibiti
17. **National Experiences and Challenges for Women with Disabilities and Constitution-making**
Hon Josephine Sinyo, MP
18. **Gender Considerations in Constitution-making: Engendering Women's Rights in the Legal Process**
Dr. Patricia Kameri-Mbote
19. **National Experiences on Women and Constitution-making**
Hon. Zipporah J. Kittony
20. **National Experiences on Women and Constitution-making**
Hon. Dr. Julia Ojiambo
21. **Women and Constitution-making in Uganda**
Hon. M.R.K. Matembe
22. **The Evolution of a Gendered Perspective in the South African Liberation Struggle**
Baleka Mbete
23. **Women and Constitution-making: South African Experience**
Hon. Baleka Mbete

24. **Islamic Experiences in Women and Constitution-making**
Dr. Abdullahi Ahmed an-Na'im
24. **Engendering the Kenyan Constitution: Domestication of International Commitments and Building on existing National Gains**
Nyaradzi Gumbonzvanda

SECTION THREE

25. **Opening Remarks**
Prof. Yash Pal Ghai
26. **Human Rights, Gender, Children and Disability: An International Perspective**
Hon. J. Sinyo.
27. **The UN and Persons with Disabilities : United Nations Commitment to Advancement of the Status of Persons with Disabilities.**
28. **Education as a Challenge of Persons with Disabilities in the United States within the Context of the Legal Framework**
Simon I. Guteng
29. **Governance, Constitution-making and Elections vis-à-vis Disability**
Sameul Kabue
30. **Culture, Religion and Media and its effects on Persons with Disabilities**
Hon. Florence Nayiga Ssekabira
31. **Communication and Media: Disability and the Constitution**
Peter Wango Opany
32. **Poverty Alleviation, Economic Empowerment and Employment Opportunity for the Disabled**
Hon. Martha Karua
33. **Memorandum by the United Disabled Persons**

of Kenya

34. **Memorandum by the Kenya Union of the Blind,
Machakos Branch**

SECTION FOUR

35. **The Global Regime of Human Rights** – (Extract from The Commonwealth Human Rights (CWHR)Poverty Report)
36. **The Right to Life and Economic, Social and Cultural Rights** – (Extract from The Commonwealth Human Rights (CWHR)Poverty Report)
Hon. Justice P. N. Bhagwati
37. **South Africa’s Evolving Jurisprudence on Socio-economic Rights**
Sandra Liebenberg
38. **Justifiability of the Right to Housing -The South African Experience**
Prof. Geoff Budlender
39. **Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living**
Miloon Kothari
40. **The Role of Courts in Zimbabwe in Implementing Human Rights with special reference to the Application of International Human Rights Norms** (Extract from The Commonwealth Human Rights (CWHR)Poverty Report)
Hon. Mr. Justice A. R. Gubbay
41. **Enforcement of Fundamental Rights and Freedoms in Kenya: Problems of Accessibility and Availability**
Kathurima M’Inoti
42. **From Administrative Law to Administrative Justice**
Hugh Corder
43. **The Role of Law Enforcement Agents – The Police Force**

Jody Kollapen

- 44. Kenya's Minorities and Vulnerable Groups: The Case of Older People in Kenya**
Tavengwa M. Nhongo
- 45. The Constitutionalization of Ethnicity: the Case for Ethnic Minority Protection in Kenya**
Ekuru Aukot
- 46. Kenya's Religious Minorities: Fears And Prayers**
Mohamed Hyder
- 47. Marginalisation and Alienation of Rights of De-tribalized Kenyans: Muslims and Detribalization**
Memorandum by Hussein I. Sakwa
- 48. Memorandum by the Hindu Council**
- 49. Memorandum by the Nubian Committee on Constitution Review**
- 50. Memorandum by the Ogiek Community**
- 51. Memorandum by the Pokot Community**
- 52. Memorandum by the Shia Ithna-Asheri Muslim Community**

FOREWORD

The Constitution of Kenya Review Commission is pleased to publish this volume of the Commission's report, comprising the technical appendices to the Commission's main report. The contents of this volume are a reproduction of the proceedings of technical seminars held by the Commission. It is presented in five parts as follows:

Part One

Interpretation of the Constitution of Kenya Review Commission's Mandate Seminar
Independence Constitution Seminar

Part Two

Culture, Ethics and Ideology Seminar
Gender Question Seminar
National Convention for Persons with Disabilities
Human Rights Seminar

Part Three

Devolution Seminar
Electoral Systems and Political Parties Seminar
Legislative Reforms Seminar
Judiciary Seminar

Part Four

Economic Sensitisation Seminar
Land Seminar
Constitutional Reform to Fight Corruption Seminar

Part Five

Expert Review of the Draft Bill Seminar

This volume is one of a number, which the Commission has published. It has produced a main report on its work and its recommendations for a new Constitution, a short version of it, a series of reports for each of Kenya's 210 constituencies, and a volume on the Commission's method of work. The authority to prepare and publish these documents is derived from Sections 26 (2) and (7) and 27 (1) of the Constitution of Kenya Review Act (Cap. 3A).

This particular volume has been prepared by the Commission working through the Research, Drafting and Technical Support Committee. The Chair of the Commission, Prof. Y. P. Ghai, and the Chair of the Research, Drafting and Technical Support Committee of the Commission, Prof. H. W. O. Okoth-Ogendo, co-ordinated the work of these seminars. Backstopping assistance by way of research and logistical support was provided by the Technical Staff of the Research, Drafting and Technical Support Department of the Commission.

We wish to acknowledge and thank the local and international experts and professional groups and institutions, who offered their views, opinions and comments freely and sincerely during the Commission's seminars. We also want to thank the individuals and organisations who gave their material and moral support during the exercise. We as Commissioners are pleased to release this volume to the public for perusal and discussion.

1. Prof. Yash Pal Ghai, Chairman
2. Prof. Ahmed Idha Salim, 1st Vice-Chair
3. Mrs. Abida Ali-Aroni, Vice-Chair
4. Prof. H. W.O. Okoth-Ogendo, Vice- Chair
5. Dr. Mohammed A. Swazuri
6. Dr. Charles Maranga Bagwasi
7. Ms. Salome Wairimu Muigai
8. Hon. Phoebe Asiyu
9. Mrs. Alice Yano
10. Prof. Wanjiku Kabira
11. Bishop Bernard Njoroge Kariuki
12. Dr. Abdirizak Arale Nunow
13. Pastor Zablun Ayonga
14. Ms. Nancy Makokha Baraza
15. Mr. John Mutakha Kangu
16. Ms. Kavetsa Adagala
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22. Mr. Keriako Tobiko
23. Dr. Githu Muigai
24. Mr. Isaac Lenaola
25. Dr. K. Mosonik arap Korir
26. Mr. Domiziano Ratanya
27. Dr. Andronico O. Adede
28. Hon. Amos Wako, Attorney-General – *ex officio*
29. PLO-Lumumba, Secretary – *ex officio*

SECTION ONE

**SEMINAR ON CULTURE, ETHICS AND IDEOLOGY: 7TH – 8TH
FEBRUARY 2002 AT THE GREAT RIFT VALLEY LODGE,
NAIVASHA**

List of Presentations and Presenters

1. “Building on the Indigenous in Constitution-making” - Keynote address by Prof. Bethwell A. Ogot
2. “Culture as a Lived Experience” by A.B.C. Ocholla-Ayayo
3. “The Heritage Factor in the Constitution” by Dr. Sultan H. Somjee
4. “Recognising And Respecting Cultural Diversity In The Constitution” by Dr. Winnie V. Mitullah
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BUILDING ON THE INDIGENOUS IN CONSTITUTION MAKING

A Keynote Address By

By Professor Bethwell A. Ogot

Director, Institute Of Research And Postgraduate Studies, Maseno University,
Kenya

In my book entitled *Building on the indigenous* (Kisumu: Anyange Press, 1999), I argued in one of the chapters that the structures, institutions and values of different societies should be the point of departure of a dynamic development instead of regarding them, as we often do, as obstacles to development (p. 142). This is the process I referred to as building on the indigenous, and it is increasingly being regarded as the necessary condition for self-reliant development. It implies that the indigenous should determine the form and content of development strategy and should ensure that development change accommodates itself to these things, be they values, interests, aspirations and social institutions which are important in the life of the people. I concluded that it is only when developmental change comes to terms with them that it can become sustainable. How can the indigenous determine the form and content of the new Kenya Constitution? This is the question I intend to address in this talk.

In the public lecture organised by the Constitution of Kenya Review Commission at Charter Hall, Nairobi on Friday, 17th August, 2001,¹ I raised the question: "How can identity groups interrelate to a common political community at the centre?" I prefaced my answer to that question with the following remarks:

"In terms of practical experience, the view that political accommodation of groups would lead to a break up of the body politic has been widespread in Africa. But it should be remembered that the African nation was an invention by the nationalists and

academics. The State in Africa is constituted on classical liberal principles which wrongly deny the moral claims of groups. The principles revolve around individuals who are taken to be the source of valid moral claims and are viewed as having moral worth deserving equal respect. This is the theory which shaped the development of the modern state in Western Europe. It was specific to culturally homogenous societies which the theorists had in mind. Exported to Africa, this liberal theory produced the idea that the State is culturally and ethnically blind and hence political developments in Africa were premised on the abandonment of primordial loyalties. Political development was disconnected from African cultural specifics and increasingly became alienating as individuals were stigmatised for exhibiting ethnic loyalty.

However, the classical theory of the political community, which has no respect for cultural diversity is now being revised to recognise that the group to which the individual belongs has a moral space which ought to be factored into theory. Consequently, the cultures of minority groups have to be secured to enable their members to exercise the autonomy and freedom, which the majority group members take for granted. Rather than lead to the dissolution of the polity, practical experience has shown that a recognition fosters a sense of belonging and a strong civic bond."

The rest of this lecture should be regarded as an elaboration of this thesis.

In Kenya, practically all the over forty nationalities are hybrid societies. By the end

of the nineteenth century, African societies in the future Kenya were already all contaminated by each other in a complex, interdependent human world. There were no watertight ethnic categories. Numerous clans, lineages and sections of clans expanded and contracted, gaining and losing members. The migration of segments or absorption by other ethnic groups produced considerable complexity. New communities and new languages were often the result. A thorough examination of the traditions of the different Kenya nationalities reveals a lack of narrow cultural nationalism. On the contrary, they stress integration by an ever fruitful mingling and migration.

The researches of Professor Gideon S. Were on western Kenya have revealed, for instance, that between thirty and forty per cent of the Baluhya clans were originally Kalenjin: the Abatachoni, large sections of the Babukusu, Abatarichi, etc. Similarly, but to a lesser degree, several Luhya clans such as the Abashimuli of Idakho, the Abamuli of Bunyore, the Abashisa, Abamani and Abakhobe of Kisa, and the Banyala of Bunyala, are of Maasai origin.

In Central Kenya, for instance, the Kikuyu who regarded Muranga as their heartland had been expanding northwards into Nyeri and southwards into Kiambu throughout the nineteenth century. They completely absorbed the indigenous people such as the Gumba and the Athi and proceeded to forge extensive trade, cultural and family relations with the neighbouring Maasai both in the North where they interacted with the Purko and the remnants of the Laikipia Maasai in the Nyeri plains, as well as in the south where they established extensive contacts with the Maasai of the Kaputie plains. In his authoritative work, "A History of the Kikuyu, 1500 —1900", Godfrey Muriuki has portrayed vividly the intimate relations that existed between the Kikuyu and the Maasai in Mathira, Tetu and Kabete in the 19th century. One important feature of these

contents was the extensive intermarriage that was practised between the two groups. Muriuki estimates that perhaps half or more of the population in Mathira and Tetu is of Maasai origin.

In the South, many Maasai groups and individuals took refuge among the Kikuyu of Kabete during the times of adversity, 1880-1890. One of them, Waiyaki wa Hinga, had even emerged as an eminent Kikuyu leader. Through these contacts, Kikuyu language borrowed almost all the words related to cattle from the Maasai language. The Kikuyu also borrowed basic religious concepts such as Ngai (God from Maasai E'Ngai), initiation rituals and military tactics.

Interdependence and cultural fluidity was even more pronounced along the coastal region of Kenya, in the Tana River area, the Pokomo who had settled in their present homes towards the end of the 16th century had their culture influenced considerably by the Oromo. Today, the Korokoro or the Northern Pokomo speak Oromo and Pokomo dialects. Moreover, many Oromo groups have been assimilated into Pokomo society. The situation was not any different with the other Shungwaya conglomerate: the Mijikenda. Together with the Pokomo they arrived from the north and proceeded southwards to settle along the Kenya coast in nine villages or Kayas: Kwale (Digo), Giriama, Ribe, Jibana, Chonyi, Kambe and later Rabai, Duruma and Kauma, which were located on the hilltops of the coastal ridge. They formed the Mijikenda or the Nine Kayas which has been Swahilised into Mijikenda. During the second half of the 19th century, the Mijikenda people moved out of their Kayas and evolved into the independent ethnic groups we know today.

But the interdependence did not only exist between the different Kayas: it also extended to other groups along the Swahili coast, especially those in Mombasa, the

Oromo and the hunter-gatherers Waata. Each Kaya had a special economic and political relationship with individual Swahili, Oromo and Waata communities. Many of these relationships were consolidated through intermarriage and blood-brotherhood. The Mijikenda rapidly became the middlemen in the trade between the coast and the interior.

The Taveta people of the Kenya coast may be taken as an excellent example of nation-building. Their traditional history reveals that refugee groups comprising the Pare, Shambaa, Kamba, Taita, Chaga and Arusha fleeing from the famines and conflicts of their respective home areas settled in the Taveta forests in the 17th century. By the 19th century this heterogeneous group had developed a distinctive common culture and evolved land-holding clans and central institutions which unified the migrants into a single people. There was also widespread intermarriage between the clans and the adoption of the Pare language by all these clans which greatly assisted in welding them into a cohesive nationality. The role of culture, common central institutions, language and intermarriage in nation-building are clearly demonstrated in the case of the Taveta.

When colonial literature later portrays the Taveta as a "tribe" in the sense of an exclusive barbaric and static society, it was in effect inventing a primitive community whose presumed needs and hopelessness could be used to justify colonialism. This picture can be multiplied across the territory that was to become Kenya in 1920. It emphasises the complex nature of African traditional frontiers and human patterns. There were no pure ethnic groups: the Luo were an amalgam of Luo, Bantu, Kalenjin, Maasai, Karamojong and Teso elements; and the Kipsigis comprised the Ogiek, Maragoli, Gusii, Luo and Maasai. Each group was a dynamic and living unit whose continuity depended less on its purity or

single origin than on its ability to accommodate and assimilate diverse elements. Most of the myths, legends, epics and rituals one comes across in stories of migration and settlement are meant to facilitate the process of integrating people whose origins are diverse. We can thus draw useful lessons about nation-building from the pre-colonial history of Africa.

The drawing of colonial boundaries on a map froze the historical processes whereby dynamic interaction among the constituent elements had constantly produced either new syntheses or cultural differentiations. Individuals could no longer move to new areas nor could people form and reform. Consequently, cultural development was fossilised at a particular time in history, and from then on the anthropologists could only write about "the ethnographic present." Cultural and ethnic purists soon emerged among the local people to stress the uniqueness of each "tribe." They even accepted the concept of a "tribe" as an appropriate appellation.

As far as possible, the Africans were to be governed in their own language units, and district boundaries seldom cut across ethnic frontiers. The effect of this was profound, because it meant that, however much the institution of a "tribe" was transformed and standardised, the modern local government system emerged upon a 'tribal' and linguistic basis. In other words, ethnic exclusiveness was strengthened by the introduction of the new local government institutions. This was not building on the indigenous. Henceforth, the Africans themselves began to promote ethnic consciousness. Furthermore, new and bigger "tribes" such as the Abaluhya, the Kalenjin and the Mijikenda were invented during the colonial period by the Africans themselves to safeguard the interests and welfare of smaller units against possible domination by the larger groups. This kind of balancing action has tended to intensify

ethnic chauvinism and the struggle for the capture of the post-colonial state.

With the support of such converts it was not difficult to introduce the "tribal" concept of local government upon which the colonial power built its subordinate mobilising agencies. District Councils soon became 'tribal' councils where matters pertaining to interests and welfare of particular ethnic groups were discussed and problems resolved. The Samburu, the Turkana, the Nandi, the Giriama, the Embu, Meru, Pokot had to have their councils. The trend continued into the post-independent period. New districts such as Tharaka-Nithi, Kuria, Elgon, Teso and Suba are being established to give those ethnic groups who still lack a geographical base, their districts. Any future restructuring of local government which ignores this 'tribal' factor is likely to fail.

Thus the decision of the post-colonial government of Kenya to retain the colonial district boundaries (which were not indigenous) is making it difficult, if not impossible, for Kenyans to live in multicultural and multiethnic societies (which are indigenous) that would encourage diversity and interaction, promote the co-existence of communities with multiple identities, protect minorities and emphasise intercultural dialogue and tolerance. In short, the ethnic enclaves created by the colonial boundaries and accepted by the post-colonial regimes are hindering the evolution of a democratic framework within which the culture of peace can be developed. This represents one of the major challenges facing the commission in its task of reviewing the Constitution, especially those sections dealing with Local Authorities.

Having accepted colonial borders, the nationalists had to deal with the concrete fact of "nations" consisting of many ethnic groups and nationalities. The nationalist movement saw recognition of Africa's social

pluralism as succumbing to the "divide and rule" tactics of the colonialists and neo-colonialist forces that were bent on denying African independence. Its quest was for a "national consciousness" and inclusion, and any assertion of difference was seen as divisive and treasonable. In other words, in combating "tribalism," the nationalists denied ethnic identity and considered any political or economic claims based on these identities as diabolic, as imperialism, if not worse.

In African countries where "Marxism" became the leading ideology such as Tanzania, class analysis simply rode roughshod over any other social cleavages. They argued that ethnic identities were "invented" by the colonialist or the petty bourgeoisie. They were part of "false consciousness." But "false consciousness," while subjective in its origin, assumes an objective historical essence that can only be dismissed at one's peril, while acknowledging the pluralism of African countries, carved as they were out of "artificial" boundaries, we should not avoid confronting this diversity squarely, largely due to fear that recognition of ethnic division would be misused by those bent on sowing the seeds of division. Nor should we accept arguments for authoritarian or centralised power based on the fear of the fissiparous pressures.

It is, however, interesting to note that while denying the salience of social pluralism and the ubiquity of ethnic identity, the nationalists in power often engage in the politics of "regional balance" that prides itself on ensuring that all ethnic groups are somehow officially recognised.

And so pluralism remains not only "a fact waiting for some institutions," as Kwame Antony Appiah has observed, "but also a reality awaiting theorisation" [Kwame Antony Appiah, 1992, *My Father's House: Africa in the Philosophy of Culture*, London: Methuen].

But this is not a purely African problem. Whereas the international system is made up of about 180 nation-states, it is estimated that there are 8,000 ethnic groups. Most countries are in fact polyethnic nations (or, in some cases, multinational states). The processes of social development and modernisation are based on the assumption that ethnic and cultural differences within nation-states will tend to disappear. It is assumed that social cleavages and mobilisation focus around functional groups (social classes, occupational categories, urban-rural settings, political parties, and interest groups).

However, it is becoming increasingly recognised that many of the developmental "failures" of recent years cannot be traced merely to technical, financial, or economic shortcomings but must also be linked to the cultural and ethnic complexities involved in "nation-building." All over the world in recent years, there has been a resurgence of ethnic and cultural demands by minority or majority peoples who do not control the power of the State. In Sri Lanka, India, Nigeria, Rwanda, Burundi, Sierra Leone, Liberia we have witnessed conflicts with a clear-cut ethnic dimension. In the Arab world and western Asia, religious and ethnic minorities such as the Druse, the Copts, the Baluchi, and the Berbers, attempt accommodation with the dominant culture.

In western Europe, recent years have witnessed a renewed militancy by territorial and national minorities in States that considered such problems as having been solved long ago. The Bretons and Corsicans in France, the Scottish and Welsh in Britain; the Flemish and Walloons in Belgium; the Basques and Catalans in Spain. In the case of Britain, for example, successful reforms reviving and restructuring regional parliamentary systems have been introduced to accommodate Scottish and Welsh nationalisms. This represents an excellent

example of building on the indigenous in constitution making.

In Africa today, there is a new wave of fascination with "identities," ethnic diversities and various forms of locations. In a recent book edited by Thomas Spear and Richard Waller entitled, *Being Maasai: Ethnicity and identity in East Africa*, the authors of these provocative essays make an important contribution to the continuing debate on the process of being, becoming and indeed transforming individual and corporate identities. The book is a study and interpretation of what it means to be a Maasai now and in the past. But even more important historiographically, it offers a serious analysis of the theoretical implications of ethnicity for understanding identity. The Maasai are seen as part of an historically dynamic process whereby "different economic groups, ethnically defined ... participated as a matter of course in a common interdependent regional economy and culture." Their concept of "being Maasai" is basically instrumentalist and the affirmation and negotiation of identities as well as the process of articulation, upholding and disputing moral values are seen here as integral to ethnicity. The book demonstrates that a sense of community has been central to Maasai identity, and that over time this has adapted and evolved according to needs and circumstances. For example, today's Maasai identity is being increasingly contested and redefined under the influence of fundamental shifts in land tenure and the surrounding economy and in the transformation from communal to individual ownership and orientation. It represents a shift in Maasai priorities from that of struggle for control over cattle to one of control over land. There are also new and conflicting responses by Maasai to outsiders. The authors conclude that ethnicity is neither static nor necessarily strictly defined; it can be fashioned and transformed:

In a similar study, the role of the Mijikenda in the development of Mombasa from mid-nineteenth century to the 1930s has recently been examined exhaustively in a fascinating book, "Mombasa, the Swahili and the Making of the Mijikenda" written by Dr. Justin Willis. He focuses on the changing concepts of ethnicity and identity and gives an account of the continuing redefinition of being Swahili and the invention of Mijikenda identity in the 1930s as a dynamic response to the interventions of the colonial state and the perceptions of its local representatives. The study underscores an important point we should bear in mind in discussing our topic of building on the indigenous in constitution making, that is, that ethnic identity is constantly being negotiated and defined, re-negotiated and redefined, in everyday discourse.

From this brief survey, several lessons can be drawn which are relevant to the process of constitution making.

Firstly, it has warned us of the danger of imputing a direct relationship between modernisation and the weakening of ethnic identity. Modernisation theories had assumed that effective national integration will follow from a process of economic development. The spread of communication, increased urbanisation and industrialisation were supposed to lead to the assimilation of the inhabitants of all regions into the mainstream of national life, the transcending of ethnic parochialism, the transference of their loyalties to the State and their eventual fusion into a homogenous nation. That was the theory, and it did not imply building on the indigenous.

Today, we know that modernisation, in itself, is not a sufficient condition for breaking down ethnic identities, if anything, there is sufficient evidence to suggest that in some cases it leads to a strengthening rather than a weakening of ethnic identification. Part of the reason is that often certain

regions perceive that their natural resources are being exploited by a dominant political centre for the benefit of the latter. The Shaba province of the Democratic Republic of Congo, the Cabinda enclave in Angola and Southern Sudan have charged the central government of engaging in discriminatory redistribution. This is one side of the political economy of dissident sub-nationalism. On the other side, are cases where underprivileged regions feel that a state controlled by a "dominant other" is paying too little attention, in economic terms, to the regions. The Luo of Kenya, for example, often complain that their region has been marginalised economically since independence. Hence, given the unequal effects of the modernisation process, ethnic identity may actually be accentuated, resulting in the gradual development of feelings of dissent sub-nationalism.

The second set of lessons that may be drawn from recent international events concerns the limitations of the consociational approach to the problem of multi-ethnic societies. The theory of consociationalism assumes that in societies that are deeply divided along ethnic lines such as Kenya, one should accept these realities as givens. The champions of consociational-type analyses or primordial analyses therefore advocate constitutional solutions founded on the premise that ethnic groups form the basis of social organisation and that their conflicting interests needs to be formally balanced. In order to preserve the territorial unity of the State, the constitutional entrenchment of power-sharing arrangements between the various ethnic groups is advocated. Majority rule is excluded in such an arrangement, because it is interpreted as a dominant ethnic group rule, which would result in discrimination, real or perceived, against other groups.

Ethnic diversity, of course, has serious implications for democratic theory. One of the problems is how to combine majority

rule with minority rights in a plural society. There are potential tendencies towards domination among majority groups in society. Ethnic minorities, for example, tend to be permanent minorities and the ruling groups tend to be permanent majorities. Simple majoritarianism often works against the rights of minorities unless they are specifically safeguarded by devices such as proportional representation, which South Africa adopted, and constitutional provisions such as the right to veto on matters deemed to be of vital interest to these groups.

The principle of consociation may also be expressed in specific arrangements governing relations between central government and States, or regions, or provinces or cantons, often taking the form of loose federal arrangements or confederation, for example, Switzerland, Canada, ex-Yugoslavia and Lebanon.

The most serious problem with consociationalism is that it elevates ethnicity to the status of the primary organising principle of political life for a society. Political science literature suggests that individuals who have loyalties to a variety of different groups will not develop a "total" commitment to any particular one, and will therefore have a personal stake in sustaining an atmosphere of mutual tolerance and cooperativeness. For a democracy to work, therefore, the system must allow cross-cutting factional loyalties. Pluralism enhances democracy where a society is seen as having a high level of integration and consensus among an array of ethnic, economic, and cultural groups. If members of society have multiple, countervailing, group affiliations, these are likely to restrain the intensity of conflict, to channel it through legitimate processes and to diffuse a set of norms and values.

Hence, a constitutional dispensation which depends on ethnic boundaries is poorly

placed to take account of ethnic fluidity or complex, multiple identities in which individuals often choose to locate themselves. Moreover, by giving ethnicity a direct and elevated constitutional expression, the risk of one group trying to destroy another is significantly increased should the fragile basis of cohesion become unstuck.

Furthermore, the question of who defines whom, and the power relations involved in the process, is of crucial importance in the process of ethnic ascription. Who is to decide whether the Basuba are not Luo? Primordialists tend to use the word ethnic as a means of establishing difference or exclusivity. In which case, for consociationalism to work, ethnic groups will have to be statutorily defined. But if we understand ethnicity as a malleable, historically conditioned process, which we should, and reject its use in categorical terms that approximate to race or population as not indigenous, we may be in a position to advance our understanding of Africa's complex societies. In addition, loyalty to one's ethnic group is not necessarily incompatible with loyalty to the State one finds oneself in.

Also, there is the problem of wealth accumulation and the control of political power in a highly diversified society with deep social cleavages. The tendency in such a situation is for groups to attempt to control the existing state or to secede. This is particularly so in Africa where, regardless of ideology, the State has been the primary channel for the accumulation of wealth. The ramifications of this arrangement for ethnicity, nationalism and democracy are serious. As Elliot Abrams emphasised:

"The essential fact is that when the government assumes such extensive power and control over the economic life of a Society, control of the State becomes the sole means of economic

and social advance. This is almost guaranteed to exacerbate ethnic, religious, and tribal tensions. When the State decides where all significant investments will be made and allocates the wealth, then the talent, initiative, and enterprise get channelled into a fight for political power." [Elliot Abrams, "Pluralism and Democracy," in Dov Ronen (ed.) *Democracy and Pluralism in Africa*, Kent: Boulder, c.o. and Sevenoaks, 1986, p. 631.]

In such a situation, political power is often sought for the material advantage it promises and there is therefore an intense struggle amongst various segments of society to control and exploit offices of the State. It is therefore essential that if there is to be an orderly democratic contest of factions, a reasonable distance between the State and the means of accumulation must be established. As Francois Bayart has contended:

"Where there is greater distance between accumulation and power, there develops autonomous indigenous business classes distinct from the bureaucracy and capable of strengthening civil society..... Elsewhere, on the other hand, the State is in total control of channels of accumulation and either uses them for patronage and political manna or simply appropriates them." [Jean-Francois Bayart, "Civil society in Africa," in Patrick Chabal (ed) *Political Domination in Africa: Reflections on the Limits of Power*. Cambridge, 1986, p. 1161.]

In conclusion, I would like to state the following: There have been alternative approaches to the question of ethnicity and constitution making. One approach has been to draw up constitutions which recognise individuals and not communities and which aim at the establishment of a 'civic nation' wherein the notion of the rights and duties of citizens within a liberal democracy play the

unifying role normally assigned to national myths - such as the "melting pot" or a nation with "manifest destiny" found in the U.S.A. The advocates of this approach argue that the normal safeguards of democracy are sufficient protection for minorities - ethnic, cultural, religious or economic. Countries which have adopted this approach - and Kenya is one of them - have not always succeeded in allaying the fears of minorities. In such situations, minorities have often felt that no redress is possible through the constitution and have often been drawn into politics of protest or even violence as is exemplified in the case of the Southern Sudanese, Sri Lanka Tamils, Turkish Kurds, Indian Sikhs and Tibetans. Majoritarian democracy, in such cases, aggravate rather than mitigate ethnic consciousness.

The second approach is where the constitution is built around communal entities, proceeds on the assumption that what ethnic minorities need is not only political protection but power-sharing and participation in decision-making. The federal principle is often invoked to achieve this objective. But this approach is never popular with the leaders of the majority group who see it as setting the stage for the fragmentation of the State. In Kenya and Ghana, for instance, the first constitutional amendments were aimed at dismantling the regional structure adopted at independence. Now that the constitution of Kenya is being revised, it might be a good idea to revisit this approach and see whether there are any lessons of history we can learn from our adoption of the first approach.

In Africa, it was assumed for a long time that ethnicity could be contained politically through the one-party state. It was argued that ethnic parties tend to be rigid; and whereas 'normal' parties compete by trying to cover the middle voter, and so tend to converge, ethnic parties compete for the extremists in their own communities. Attempt were therefore made to regulate the

formation and conduct of political parties. In some countries, it was stipulated that in order to qualify for registration, a political party had to demonstrate that it had the support in several areas of the country. Such rules were designed to encourage parties to have a national outlook, presidential candidates were required to have at least 25 per cent of votes in the majority of the regions. The 1992 Presidential Election Act in Kenya, for example, was meant to achieve this. I hope that in the course of reviewing our Constitution, we would not lose sight of the objectives of such legislation.

But in the majority of African countries, it was argued that since political activity in new, plural states was inherently divisive, their fragmentation can only be prevented by restricting political activity to one party. In other words, the one-party state was justified as a much better mechanism for accommodating diverse ethnic claims. It was further stressed that it enables each community to share in power and therefore offers its own version of democracy more suited to the African condition. This was the one party version articulated by Julius Nyerere and in some sense attempted in Tanzania. It eventually tripped on the inherent contradictions of "one party participatory democracy." The great source of incoherence arose from the failure to reconcile what were obviously socially pluralistic arrangements in terms of class and ethnicity, with political and economic arrangements that were monolithic and highly centralised.

In short, no sooner had the African nationalists come to power than they found reason to discard the liberal democratic institutions that they had fought for and that had eventually brought them to power. The arguments given ranged from the need for strong government and unity, both 'nation-building' and development, to the cultural

inappropriateness of Western institutions to African conditions.

In Uganda, where political party activities have been outlawed since 1986, Yoweri Museveni is still maintaining that a "no-party (read one-party) system is more suitable to the African environment. The Uganda constitution of 1995 allows no political party activities because they would bring political polarisation. For political parties to function properly, there must be social classes and Ugandans, according to Museveni, are of one class - peasants. [Yoweri Kaguta Museveni, *Sowing of the Mustard Seed*, London: Macmillan Publishers Ltd., 1997].

On 10 July, 1997, the Uganda parliament passed a bill making the National Resistance Movement the sole political party of Uganda, "what is crucial for Uganda now," according to Museveni, "is for us to have a system that ensures democratic participation until such time as we get, through economic development, especially industrialisation, the crystallisation of socio-economic groups upon which we can then base healthy political parties." [Ibid p. 1951.] Like the former advocates of the one-party state, Museveni claims to be building Uganda State on the indigenous. But the truth of the matter is that the aim is to consolidate power in the hands of one group indefinitely at the expense of those who have refused to join the movement. It is also a violation of the constitution as it violates the fundamental freedoms of association and assembly.

This brings me to the question of our search for a "usable past." During the struggle for independence, the nationalists such as Nyerere, Kenyatta, Senghor, Nkrumah, sought historical and cultural anchors - or a usable past - for the sustenance of the new nation-states. And in the early years of independence there was a genuine attempt to find new expressions for what was happening, or expected to be deified, in

post-colonial Africa. African scholars, including myself, shared this quest. In a sense, it was an attempt to build on the indigenous. However, we soon discovered that the "usable" pasts we had sought to construct for our leaders could easily be turned into "abusable pasts" in the hands of a growing self-serving political class.

One of the problems we faced was whether our basic research really addressed the key issues and whether, when it borrowed concepts, it was sufficiently sensitive to the specificities of our conditions. The analysis of Africa was (and still is) dominated by others whose purposes for studying us were driven by their own concerns. African scholars became slaves to the intellectual fads of the West. As Kwesi Prah has written:

"For us who have the benefit of middle age and hindsight, we recognise that we have in our formation been subjected to successive intellectual fashions born in the west. The intellectual fads have affected successive generations of African intellectuals and shaped their thinking on Africa and the World, but have hardly provided viable inspirational or ideological sources for transformation which translate into the betterment of the quality of life of African humanity." [Kwesi Prah, 1998, *Beyond the Colour Line*, p. 1601.]

Some commentators have suggested that African intellectuals are no more than the "informed native guide," the comprador in cultural commodities. Kwame Antony Appiah maintains that:

"Postcoloniality is the condition of what we may ungenerously call a comprador intelligentsia: of a relatively small, western-style, western-trained group of writers and thinkers, who mediate the trade in cultural commodities of world capitalism in the periphery. In the West they are known through the Africa they

offer; their compatriots know them both through the West they present to Africa and through an Africa they have invented for the world, for each other and for Africa." [Kwame Antony Appiah, 1992: *My Father's House: Africa in the Philosophy of Culture*, London: Methuen, p. 2401.]

As a comprador intelligentsia, we import all our concepts, paradigms and values. This is intellectual "mitumbaism". The Africa we have invented for the world is not authentic, and whatever institutional construction processes we engage in cannot be regarded as building on the indigenous.

Finally, building on the indigenous should not imply isolationism. Globalisation, which refers to both the actual processes driven by trade, finance and technology and the ideological expressions of such processes, is already proving to be a major challenge to the nation-building project. Africans should be skeptical about processes of integration of their countries into the world market, whether in earlier forms of neo-colonialism, trans-nationalisation or inter-nationalisation or its new guise of globalisation. Quests by Africans for "endogenous" or "self-reliance" or "auto centric" development have been dismissed by the developed countries as unrealistic sloganeering, either as implying a complete break with globalisation or a return to some romantic past of traditional institutions or knowledge.

Our attempts to create autonomous spaces for reflection have been dismissed as insular and provincial, and ultimately doomed to fail due to the ineluctable forces of globalisation. And there is already a new elite in Africa that has emerged in the wake of liberalisation and privatisation that see globalisation as ushering in a new era of freedom - unlimited access to information and knowledge, multiple identities and infinite range of choices, who are already enjoying the fruits of this new order. They

see globalisation as a welcome wind that will sweep away autocratic regimes and their restrictive and suffocating order which they have imposed on Africa.

If globalisation is eroding the State, it is also unleashing powerful localisms that nationalism had so desperately sought to tame. To be able to resist the powerful forces of globalisation, African countries will have to be individually and collectively socially coherent. It is this social cohesion that will determine and firm up the internal strategic necessary to make politically viable and legitimate whatever countries choose. Failure to come up with adequate internal responses to the external challenges will merely expose African countries to misery.

Both internal, institutional and political weaknesses (and that is why we need a new constitution to correct these) and the particular way Africa is being integrated into the global system are likely to lead to this undesirable outcome. The internal problems are the result on the one hand of internal inconsistencies and conflicts and what Africa themselves describe as "betrayal" by the leaders of the promise of independence and on the other of the reverberations of foreign pressures on domestic politics which may not only alter the preferences or ideologies of key actors but also influence the social composition and strength of political coalitions.

Perhaps the most insidious effect of "global talk" has been at the ideological level where it has tended to denigrate national ideologies of social change and to underrate social policy. More specifically, the ideology has tended to suggest that notions of equity and social justice are either old fashioned and "ideological" or simply doomed to be swept aside by the force of globalisation. In this

sense, globalisation has either provided an excuse for those who would want to set aside the agenda for equity and justice, or has served to demoralise or disarm those who have sought to use national policies to address these issues, as these might scare "markets."

True, an attempt to avoid globalisation can easily lead to xenophobia, fundamentalism or nativism. On the other hand, an uncritical embrace of globalisation is bound to result into a blind celebration of the "universal." Africa must avoid both approaches.

The fate of Africa, in my view, lies in a collective rethinking of the continent's unfulfilled humanistic tasks in the light of what has transpired, and the concrete situation today so as to recast them into cornerstones of social justice, solidarity and equality and to enable the continent to reconnect with the rest of the world in a mutually beneficial way. We need many more creative institutional designs - and this is where a new Constitution becomes relevant, for Kenya to respond to the peculiarities of Africa's social pluralism. We may, in the process, have to rethink the attributes of a nation-state in Africa - in terms of a cultural basis and territorial exclusivity - in order to give greater authority to regional arrangements and to strengthen regional self-policing. The turn away from the market frenzy brings us back to the question of the state and development.

The challenge for Africa is to establish developmental states that are firmly and democratically embedded in their own societies and that are competent to engage the world and respond to the exigencies of the emerging global order. And a new Kenya Constitution should aim at facilitating this process.

CULTURE AS A LIVED EXPERIENCE

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1. Introduction

Culture is man-made, what is not man-made is not culture. By culture we mean an extrasomatic, temporal of things and events dependent upon symboling. Human being made culture and continue to make culture for his/her own survival and comfort. Thus human beings live by culture other than instinct in order to remain a live; but culture that human beings made and continue to make changes and model the behaviour of its makers in some general and specific ways.

2. Culture as a Lived Experience

Culture as a lived experience is invented or created, learnt and borrowed, accumulated and transmitted from one generation to another through learning processes. Although the mind of a human being is capable of imagining new ideas, creating new cultural elements, it is also like empty tablets (tabula rosa) where cultural norms and values, beliefs and knowledge as well as practical skills are implanted to enable a human being become a functional adult.

Culture as a lived experience undergoes changes of content as well as structural form. New elements are being added; old elements are dropped out; some more normative may resist change or change only slowly; others expressing universal ethics and moral rules as well as functions of culture in human society remain always the same in all human societies. They are the cornerstones of a constitution of any human society simple or complex, rich or poor, large or small.

Culture as a lived experience in the sense that its functions are encompassing all aspects of social life in any society .

- Culture as a lived experience in the sense that its functions fulfill both proximate and ultimate ends of human kind.
- Culture as a lived experience in the sense that every society has its own socio-cultural ideologies and ideology of each society stresses certain elements in its social structures more than the others and this form peculiar element of cultural diversity as lived experience.
- Culture is a lived experience in the sense that it is the source of living law, the law which dominates life itself even though it has not been posited in legal propositions.
- Culture as a lived experience from which we measure our limitations and underdevelopment.
- Culture as a lived experience has lessons to be learnt if the right decisions have to be made.
- Culture as a lived experience with propensity to resist.
- Culture as lived experience have lessons that ought to be learned if wrong acts are to be avoided.

- Culture as a lived experience that ought to mark the starting point for our sustainable development.
- Culture as a lived experience from where we can make judgements of what is right and what is wrong.

The mind of a human being, while it is capable of imagining new ideas and concepts is also like empty tablets (*tabula rosa*) where cultural norms and values, beliefs and knowledge, ideologies as well as practical skills are implanted to enable him become a functional adult (Hume and Locke 17th and 18th C philosophers).

Culture as a lived experience undergoes changes of content as well as structural form. New elements may be added; old elements may be dropped out; some more normative resist change or only change slowly; others expressing ethical and moral values as well as functions of culture remain constant from generation to another.

3. The Role Of Culture In Society

A human being takes many years to mature and become a functional adult. It is only through culture that a human being is able to protect and take care of their own infants as they go through the various social and biological development. Culture provides the means of protecting not only the human infants but also the old adults, the widows, the orphans, the handicapped, the sick and the weak ones. The function of culture therefore summarizes all or most of human development as we know them in Africa or any society small or big, simple or complex.

The most generally referred to are:

1. Those cultural elements used to exploit natural resources for human survival and comfort.

2. Those aimed at maintaining biological continuity of members of the society, by imparting norms, beliefs and values of marriage and family life and for regulating heterosexual relations. They define types and forms of marriages, they specify who are permitted or not to enter into marital relations and have children; they define and legitimize status of children; they define what is moral or unethical and should not be permitted, the ethics of customs define their extents, type and form and distance of marriage according to a particular society.

3. Those aspects of culture which are directed towards socializing young members into functional adults by implanting norms, beliefs, values, knowledge and skills, as well as socio-cultural ideologies and social philosophy based on historical background of the people, life as it is lived and the environmental conditions.

4. Those aspects of culture which aim at organizing production, distribution and consumption of goods as well as providing services necessary to life by establishing norms and values for division of labour, social organization based on skills and professions for exploiting natural resources for maintaining security of survival and comfort.

5. Those aiming at maintaining law and order within the society and between societies by establishing social control mechanisms such as legal institutions, arbitrators, council of elders, etc for regulating and maintaining orderly interactions and relationship among members of the society and between its members and different groups and society.

6. Those cultural aspects organizing human population in a culturally defined social order by creating for them common language for communication without which skills and knowledge, moral value as well as other physical and non-physical cultural artifacts may never be realized.
7. Those aspects of culture defining the meaning of life as it is lived in this world and what will happen to man after death, by establishing the institutions (such as religious institutions and medical institutions) for providing hope and comfort for proximate and ultimate ends.

The above functions of culture summarizes all aspects of human development in any society and which must be sustained as a basic in any constitutional development in Africa. In Africa, the essence of sustainable development is the maintenance of security of survival. More basic to this security of survival are health security, food security, shelter, peace, human rights, education among others. A constitution which is not based on the functions of culture is a non starter and its construction will rest on weak foundations.

Today concepts such as "cultural diversity", "cultural freedom" are regarded among the main pillars of democratic state (UNESCO Report, 1996). A culturally based constitution will first of all be directed towards solving security of survival, the very essence of sustainable development. Culturally based constitution will take as first priority what the UN (1985) has defined as basic necessities of life which include "food, shelter, clean water, freedom and human rights, health care, education and social welfare" (ibid, 1985).

In Africa, the condition of life is growing from bad to worse every day, as we drift away from the very basic cultural functions. Even the very elementary sources of security

of survival which our cultures have provided for generations are rapidly declining. Scholars have termed Africa's pathetic situation as inability to provide "proximate ends" while striving more for "ultimate ends" and have singled out "security of survival of mankind as the prima facie end". Other issues are raising the literacy above a critical level, reducing dependency ratios, eliminating starvation and malnutrition, making clean water available to all, increasing sustainable economic development, and improving health and welfare services. Lack of all these constitute poverty in Africa.

4. Kenyan Experience On Culture

4.1 Culture and Behaviour Change

Kenyans have realized how cultural behaviour is difficult to change even in light of HIV/AIDS epidemic and deaths. At some point, it was believed that Kenyans need only to be aware through the awareness campaign in order to change their behaviour. It was thought that if people know that AIDS kills, that AIDS has no cure and that AIDS can kill any person small or big, poor or rich, learned or uneducated, they will change their behaviour. They were even told that 75 percent of HIV infection is transmitted through heterosexual contact so that they may change their sexual behaviour but they did not.

The reasons for not changing are based on two cultural propositions - that culture has developed over a long period of time the mechanisms of dealing with fear of death. Human beings in all societies have lived with death ever since and made death part of their culture, established norms, beliefs and values as well as practices of death. The second is a cultural proposition put forward that "belief and value systems and ethical prescriptions once established by a given population in a given environment, under a historical background tend to generate

customs and traditions, habits and prejudices, loyalties and allegiances as well as practices that can drastically affect efforts to transform this potentially rich Africa and change their social behaviour in light of the AIDS epidemic.

These beliefs and value systems as well as ethical prescriptions once established have strong propensity to resist change. Thus, within a given environment such as rural and urban Africa, traditional values and beliefs of a people tend to remain relatively constant or change only slowly and therefore, it is possible to map them and analyse their impact on socio-economic development in rural and urban Kenya where efforts to control HIV/AIDS have not been so successful and where a number of development programmes are being initiated.

4.2 Culture and Heterosexual Relation

Kenyan perhaps have realized that 75 percent of HIV/AIDS mode of transmission is surrounded by multitude of socio-cultural norms, beliefs, values, religious commandments, ethics of customs, moral rules, acted laws - all trying to control or regulate heterosexual relations but with little success. Although sex is a psycho-biological process in human beings and other animals, in human beings it can be affected, excited, and even suppressed by social, economic, cultural, political and medical actions.

4.3 Culture and Political Unity

Kenyan have experienced how difficult it is within political unity because socio-cultural ideologies are preferred to national "political ideologies", if there is any. Ocholla-Ayayo (2001:4) asserts that political poverty is the lack of national political ideology capable of over-coming cultural ideologies. Political poverty is the lack of common cultural values, norms, beliefs and practices to enrich

democracy; lack of social philosophy required democratic systems within the context of ethnicity Kenya finds itself. The statements such as "it is our time to rule this country"; "we are being finished"; "our land is being grabbed"; "I will make sure that my people also eat when I am in power", etc, are manifestations of propensity of the culture.

4.4 Culture and Adolescence

Every culture is aware that the physical changes of the adolescent not only affect his/her emotional state and open the path to adult sexuality, but also affect the expectations of others and contribute in an important way to emancipation from his/her family -and her/his social status in the community. Unresolved conflicts from earlier experiences surface once more and call for new solutions. Culture had well organized pressure and influence. If left undirected peer pressure has its maximum impact at this age and may misdirect the behaviour of the teenagers. At his stage some may feel out of place and fashion when their peers are engaged in certain activities as drug use, unsafe sex. Their friends urge them to join in the habits lest they be ridiculed, rejected and isolated from their company. Cultural modes of socialization provided solution to these pressure and influence. Without cultural modes of socialization, what do we have in place to deal with these rites of passage? What are the coping mechanisms we have in place for this reality of life which the teenagers pass through?

4.5 Culture and Religiosity

Religion is a product of cultural beliefs, a well-organized system of beliefs. Beliefs implant faith and, faith is the evidence of things that we hope for, things that have not been seen. Kenya in particular consists of a large religious community and could therefore, not skirt religious views. Religions uphold "chastity before marriage"

and "fidelity in marriage". Religion gives hope here and hereafter, and therefore, goes beyond medicine. Thus teaching of religion on social ills, including those conducive to the spread of HIV/AIDS is important. Religious infrastructure encompasses both sexes and age groups, 'its message is grounded on ethical principles of moral rules. This is a normative part of culture which is universal and common in all human societies. The religious call for "chastity before marriage" and "fidelity in marriage" is moral solution to the HIV transmission and containment in this society but this can be achieved only if supported by other functions of culture because culture looks at the totality of social life and lays down other beliefs, norms and values for practical life as it is lived. The core of all cultures in all societies of mankind is grounded on ethical principles of moral rules not only as regards to sex but also for other aspects of social life.

4.6 Culture and Leviratic Marriage

The negative aspect of this cultural practice has surfaced in light of the HIV/AIDS modes of transmission. Kenyans have realized that an attempt to get rid of levirate or widow inheritance - now widower inheritance, has touched a very sensitive part of marriage beliefs and practices. In all cultures, marriage provides stable heterosexual interaction supported by ethics of custom, tradition and moral rules.

Marriage and family life is an institution which today requires careful re-examination. Marital status may be divided into three or more categories, such as:

1. those examining the living laws of the single, the married, the separated, the divorced and the widowed;
2. those examining the living laws of types of marriage, the monogamous, Polygamous, polyandrous, serial Polygamous, disparate Polygamous and

triden, seophone, quadrant serial Polygamous unions;

3. those examining sexual practices of the leviratic union, woman-woman marriage, early and old age marriages, marriage on behalf of a male child and examine not only their exposure to HIV transmission and containment but also their social implications.

4.7 Culture and Female Genital Mutilation

Kenyans are aware how strong the resistance against an attempt to eradicate FGM is. The initiation ceremonies are carried out even in light of the deaths and pains.

4.8 Culture and School Drop-out

The modern cultures have no arrangement for school drop-out in the modern system of education. School drop-out compels girls to early marriages which eventually end up in divorce; or may compel them to enter Polygamous union, or with multiple sex partners; or compel them to enter into marriage with old men who will soon be dead living them widowed.

4.9 Culture and Funeral Ceremonies

Funeral sacrifices and ceremonies after deaths and burials create unprecedented conditions that are contrary to the principle of development, distribution, consumption and saving. In Kenya we everyday witness a large number of people comprised of consanguinal kins and affinal relatives in the kinship network, plus friends and neighbours or clan members, as well as curious onlookers who come to witness the send-off of the deceased members of their community.

Among some ethnic groups, such as the Luhya, Luo, Teso, Abasuba, among others, this is the center of their religiosity. All the

above categories of people come not only to say farewell to their departed beloved ones, but also expect to be fed for the period they are at the funeral. It has so often happened that after the funeral, the bereaved family's savings and money raised for the funeral have been used up within one week of death, children are left without school fees, no transport, no food, no money for house rent, etc. All these are done in the name of culture! But why can't it simply be stopped? Because culture has strong propensity to resist.

4.10 Culture and Kinship Dependency

Kinship and Affinity values is a cultural imperative still strong in most Kenya ethnic groups. In 1986 and 1987 Ocholla-Ayayo, and Aloo Obunga carried out independent studies in Nairobi and Migori respectively. Among the objectives was to find out if urbanization entails considerable socio-cultural and socio-economic autonomy from the rural life commonly practiced by the majority African societies in the rural settings. The empirical findings of Kenyan studies were as follows:

1. A large majority of urban dwellers in the city of Nairobi and Migori town were found to be staying with kins or affines in whatever the nature of dwelling
2. Urban dwellers were found to be supporting the education of their kin or affines, regardless of their income;
3. There were no urban dwellers who did not support in full or in part, the education of a kin or affine;
4. Most urban dwellers have been asked to provide some assistance, either financial or material, for kin or affines;

5. Help in job placement is a common request from kin or affine, one which every urban dweller expects to receive;
6. A kin and affinal relative may be welcomed regardless of whether he or she brought a gift from home;
7. A kin or affine relative may arrive regardless of invitation to come;
8. A clan member is obliged to welcome kins regardless of social or economic status;
9. Kin or affines who come to stay for an extended period with relatives living in the urban area are coming to look for jobs, or are working but have no housing or is going to school;
10. Kinship ties are important as a social and economic security;
11. Members of the kinship group will be the most willing to collect money to transport the body of a deceased clan member, regardless of whatever financial difficulties he or she may have.

These are cultural obligations which are common and the majority of Kenyans have experienced them, some more often than occasional.

4.11 Culture and Malnutrition

The extent to which beliefs and traditional practices explain children's diseases and causes of death planners in rural Kenya, especially to nation where there is no clear cultural policies and women educational level is still low. To an uneducated family, the protein-emerge malnutrition is never recognized by many mothers from traditional beliefs and practices. The symptoms of malnutrition are not perceived as having any causal connection with infant feeding practices.

From the description such as marasmus or kwashiokor, one can find that it is believed that their attacks are due to the transgression of traditional norms and practices or some are labelled as witchcraft and sorcery. Here again, there is enough ground for cultural policy to eradicate ignorance and unscientific traditional beliefs and practices.

4.12 Culture and Agricultural Production

The African families are suffering from "agricultural poverty". Agricultural poverty is the condition of continuous poor harvesting or being without modern equipment necessary for high agricultural production. He refers to it as the state of helplessness, a state where human being depends on natural rainwater for survival, both human and animals simply wait for rain and do nothing to make water available for both crops and human utility.

A state where human being are no better than animals, they use traditional hoes to feed the entire population. It is common to see homesteads scattered all over the fertile agricultural land, which could have been used for agricultural production. Agricultural poverty demonstrates the level of development of the African culture.

4.13 Culture and Poverty

Poverty has been referred to as living in a condition of rudimentary cultural elements, which are ineffective to exploit natural resources growing population. Thus, use of human beings, as a source of energy and the traditional African hoes for food production in the 21st century is an example of low cultural level of development. It also refers to lack of development ideologies necessary for fostering unity for common goals; the ideal of good life and security of survival for all and for bridging the gap between traditional and modern technology of

development. Cultural poverty is experienced in the society, which changes from left to right, aping on other cultural values, beliefs and ethics of customs of other societies.

It is a cultural development gap, intensifying agricultural productivity using African traditional implements such as the hoe and panga, is turning a blind eye to the function of culture, in development culture is learnt, borrowed, accumulated and transmitted from one generation to another. It is now common knowledge that culture can also be a source of poverty if it remains stagnant or static for so long. Culture has propensity to resist change, it may also promote development, if it is adapted as the basis for development. Culture is like an unwilling donkey, however much you may push it, it would not go fast if you are directing it to the wrong direction or pushing it too hard.

4.14 Culture and Cattle Rustling

One of the inter-ethnic discord that has lasted many years is cattle rustling. It takes place between pastoral communities. It is in the name of tradition and custom that a young man has to show bravery as a cultural virtue by raiding for cattle. The Colonial government tried to stop it and failed and left it to Kenyatta government who in turn left the problem to Moi government who is about to hand the problem to the next government! This culture is causing a lot of deaths, displacements and poverty but a solution to it has not been found.

- Although cattle rustling appear a static cultural beliefs and practice, Kenyans have learnt and borrowed many cultural norms, values and beliefs as well as practices from Western cultures many of which have been positive others have brought negative consequences to Kenya society.

- Kenyans have learnt that once a cultural element has been internalised in a social structure and in the people's volition, it becomes difficult to get rid of it even when the people have realized its negative effects.
- Kenyans have learnt that culture has strong propensity to resist change once it has been internalised.
- Kenyans have also felt the impact of cultural values, norms, beliefs and practices in the modern social structures; in social institutions; in religious institutions; in medical institutions; in economic institutions; in political institutions and in legal institutions even though traditional cultures have never been welcomed officially in most of these institutions.

4.15 Culture and Female Genital Mutilation (FGM)

The percentage of the adult female population affected by this practice ranges from 98 percent in the horn of Africa-Kenya included, to only a few groups in some of the other countries. Even though many groups are working to eradicate this cultural practice (FGM) in Africa and in Kenya as well, there are often two groups of women who undergo FGM.:

- Faithful adherents to the beliefs that FGM is an inseparable part of the culture and religion of their people. Consequences of FGM are generally accepted as a price to be paid for preserving cultural integrity and heritage, and
- Those kidnapped and forced against their will to undergo the procedure for the latter group, any resultant illness may be seen as God's vengeance upon a disobedient follower and treatment may be denied such a patient.

4.16 Culture and Widow Inheritance

Many studies have established that in Sub-Saharan Africa, Kenya included, women whose husbands have died may be inherited by their deceased husband's brother or a clan member who stands in that category. He will look after her household, keep her company and even bear his children. This practice, known as levirate marriage has existed for centuries as one of the oldest marriage arrangement. Many health workers fear that widow inheritance is an important factor in spreading HIV in some African communities where the custom is still widely being practiced. If a man has died of AIDS, he may have infected his wife before his death and she in turn risks spreading the virus, not only to the man who inherited her, but also to all other sexual partners. Widow inheritance has a strong influence on the sexual behaviour of the ethnic groups that practices it in Kenya.

4.17 Culture and Child Up-bringing

Culture-implanted norms, which used to guide the youths have suddenly eroded and authority who used to reinforce these norms and values appear to have vanished. When cultural norms and values are changed suddenly, a vacuum is created with serious consequences.

Today morality and ethnical values are not being implanted to the young generation. In 1989 studies, reports found that it is generally assumed that parents and teachers are providing necessary guidance, since young people spend most of their time under their care. The problem centres on what exactly young people are taught, since teachers do not know what parents have or have not taught and what is left for the teachers. Parents do not only assume that teachers are best equipped to teach sexuality, for example, which they rarely teach, but also spend very little time with the

children. In a 1989 study, Ocholla-Ayayo et al, found the majority of the youth 64.8 percent receive their sex education from friends; 15.6 percent from peer groups; 8.3 percent received their sex education from teachers and only 0.7 percent have received sex education, from the church leaders.

Cultural Breakdown

The breakdown in family, parents and community authorities over children, teenagers and the adolescents is seen as the beginning of expressed deviant behaviour, which is reflected in sexual freedom in the disputes between mothers and fathers, each side blaming the other for doing nothing when children are getting out of control. The transfer of traditional authority from elders to central or local government and erosion of norms and values on such issue as virginity at marriage and illegitimacy of children have removed the lifelong stigma, which they carried.

They have created a state of sexual freedom among the Kenyan youths. In 1986 a study at PSRI recorded 67% of mothers who felt that fathers have lost control and guidance over their children as head of household whereas 80% of fathers feel that mothers are the ones who have spoiled their children by either siding with the children whenever they are on the wrong, or mothers accepting gifts daughters bring home from sugar daddies.

4.18 *Culture and the Family*

Culture protects the family because the family is custodian of culture. The family is the basic social order in the society, the unit in which traditional norms and values, skills and knowledge as well as practices are first implanted to the young members of the society for their future survival.

Culture ensures that it is at the family level that the language of communication is

implanted to the young members without which there can be no effective chances of becoming functional adults.

Culture ensures that the family as the basic economic unit maintains production, distribution and consumption for the survival chances of its infants and children, old and disabled adults. Culture ensures that the language necessary for implanting norms and values, beliefs and knowledge, and practical skills begins first at the family unit. The family is also the socio-biological unit that culture ensures its orderly reproductive continuity of human race.

The function of culture is directed towards the family level that a society experiences stresses and strains, shortages and difficulties with all practical problems of social change, and deserves more practical attention and solutions - in a culturally based constitution.

Culture is concerned with the family as a basic social order because it is at the family level that the society feels more acutely the pain of social change and underdevelopment. It is the family, which suffers from food shortages, poor housing conditions, poor health services, lack of clean water, and poor sanitation; the family suffers nutritional deficiency, unemployment and poor living conditions.

Under kinship network, culture tries to provide social security for its unemployed members but with high dependency ratio.

4.19 *Culture and Marriage*

It is the culture that laid down rules, values, norms, beliefs and practices in marriage institution. Culture defines different types and forms of marriages.

(a) Monogamous System

A culture may define marriage between two genders as exclusive, that only one man and one woman are permitted to enter into marriage relationship and have legitimate children or bring forth siblings.

(b) *Polygamy*

A culture may permit one man to marry more than one woman and have rules or beliefs and practices, which must be followed under this union. It is the culture that specify whether a Polygamy is trident, saxophone, hypodermic or quadrant. Polygamy is a marriage social order where culture permits jealousy, envy, fights and constant opposition between and among co-wives. Children born in Polygamous homes come up to be good leaders.

(c) *Woman-Woman Marriage*

A culture may permit an elderly woman without children to inherit her wealth and retain her lineage line, to act as a husband, pay dowry and gets a woman into her home and find a man to co-habit with her and bear children for her.

(d) *Exogamous Marriage*

A culture may formulate a custom that define whether marriage should be endogamous or exogamous. In endogamous marriage customary rules permit an individual to marry within his or her sub-ethnic group or sub-clan provided that the partners are not directly related as first cousins. In exogamous marriage, customary rules of that culture states that all individual males or females must find their partners outside their own sub-ethnic or clan or sub-clan groups, or totemic clans.

(e) *Temporary Marriage*

Some cultures, including a number of them in Kenya, permit a man or a woman to enter a temporary marriage either for a specific

period or open and either of the two partners can leave at will and get married to another - sometimes even to a neighbour next door. A female can move as many times as she wants so long as she is not satisfied with the husband.

(f) *Seroral Marriage*

A culture may accept a man to marry sisters and have children with reason that should death occur from one of the sisters, children of the deceased will remain in safe hand.

(g) *Levirate Marriage*

Many cultures in Kenya are practicing leviratic marriages. It is a custom in which a woman may be inherited or "remarried" to her late husband's brother or any one related to her late husband in that relation. In most cultures, the inherited wife is not traditionally considered as ones own wife, and the inheritor therefore must expect to marry his own real wife.

4.20 *Culture and Rituals*

It is the culture that define rituals, lay down their beliefs, norms and practices, as well as their significance. It is the culture that define initiations and rites and their social, political, economic and cultural significance. Initiation and puberty rites remind us of the important gap being created in the modern cultures and social development. The rites of birth and childhood introduce the child to the corporate community, but this is only the introduction. The child is passive and still has a long way to go. He/she must grow out of childhood and enter into adulthood physically, socially and economically, as well as religiously. "Rites de passage" is to introduce the youth to adult life; they are now allowed to share in full privileges and duties of the community. The initiation rites, such as circumcision, FGM are meant to prepare young people in matters of sexual life, marriage, procreation and family

responsibilities. They learn to live with one another; they learn the secrets and mysteries of man-woman relationship.

4.21 *Culture and Identity*

It is the culture that provide rules of identity by providing female names, and male names and meaning of these names. A culture may develop a system of naming its members. A culture may specify rules of membership to the society. A culture may ascribe or by marriage a culture may approve or disapprove child adoption. A culture may accept orphans and integrate them in the society without discrimination.

5. **Beneficial Cultural Practices**

Although we sometimes think that we have changed, that we belong to the modern civilized world in very many ways, we are far from it. Even in the very modern medical technology, which has saved millions of lives here in Kenya, a great many people still depend on traditional healings. WHO (1997) reported that 80 percent of human population still depends on traditional healing methods other than Western modern medicine.

In Agriculture, the technology of food production and the source of energy are still dependent on traditional hoes and pangas and man and woman power. That is, we are still feeding the population by traditional cultural implements and tools. In the rural areas, a large majority of population still live on traditional housings, even though they are characterized as backward.

Kinship tie is still supporting a large unemployed population, without which our streets would be full of beggars. Today, home-care for the sick is the only alternative left as modern hospitals have run short of beds, personnel, medicine and all that used to make them modern.

Many functions of culture still form the basis for social control mechanisms even though law and order are being reinforced by the modern institution. Many enacted laws have never been heard of in the rural country-side, whereas the population know almost all the mechanisms of social control - the living law.

It is now clear that a population organized on the basis of functions of culture can exist without government enforcing modern law (the Somalia case). Culture still retains traditional languages necessary for communicating skills, knowledge, norms, values and beliefs as well as social control mechanisms to the largest population.

Culture still control family institution even though the institution is not given support it deserves. Without culture, the family institution would have totally collapsed. Children are still brought up some where in the family. They are taken care of with parental love and care even though poverty has limited the parent's ability to provide the children with basic needs.

In as much as culture separates a multi-cultural nation, culture also provides the basis for unity, and development if approached correctly. Culture installs a sense of belonging, and implant personality to a citizen.

Through cultural practices, skills and knowledge are assembled, which individuals and society badly need. Culture accumulate skills and knowledge and pass them to the next generation through learning processes. Learning is a cultural process beneficial to society-socialization, is a cultural process beneficial to the society. Since it is through socialization that norms, values and beliefs are being implanted not only to the young members but also to the adult members of a society.

Religious practices are cultural practices beneficial to the society because here ethics and moral rules are implanted to members of the society. Religion being a cultural institution whose function is to provide hope for suffering mankind - the ultimate ends of humanity.

I have mentioned more than one time, that culture provides the mechanisms of social control, without which human beings cannot live in a large collectivist. Law is, but only one specialized such institution of social control, which finds its mechanisms in culture itself. There are as many old cultural practices and new cultural practices beneficial to the society, just as there are many old and many new cultural practices that are detrimental to the society and ought to be filtered out.

6. Obstacles to Recognition of Culture

One of the main obstacle that mitigate against recognition of culture is not knowing the scope and limit of culture; not knowing that culture is the source of ideologies, social philosophies and general theory of development.

Many people, especially the relatively learned leaders acquaint culture with dance, queer beliefs, rituals, witchcraft, traditional beliefs and such practices they may consider archaic. They look at such culture as detrimental to development. To many leaders, anything that is odd, strange or queer is labeled culture. If it is old it is culture, if it is new, it is a new culture. Whether they are ignorant of what culture is, such ignorance has no defence in the eye of the law. It is just a hangover of colonial mentality of the African ways of life called primitive African culture, the European one was called "modern system", "modern way of life", "modern living".

Anthropology as a discipline that studies culture was labeled "a science study of primitive societies and their culture". And independent African states did not include it among the disciplines or subjects to be studied.

The dynamic nature of culture allows creation, learning, borrowing and transmission of cultural ideas, values, beliefs, knowledge and practical skills as well as functions. This has made culture vulnerable to erosion and rejection especially among the elite populace who ape along modern values.

Religious affiliations and secularism have assumed a common denomination in social economic and political cycles. Whereas religion has been known as a cultural product. Unlike African traditional religion, foreign religions such as Islam, Christianity, Buddhism and Bahai faith have teachings which are against African cultures without supporting other functions of culture, because culture looks at the totality of social life and lays down other beliefs, norms and values for practical life as it is lived.

Migration and mobility by human beings from one region to another for various reasons. In urban affluent environs, any cultural practices, values and beliefs, material culture and ideological are rural based, backward "primitive" and have outlived their intended purpose. Traditional herbal medicine for instance are considered dirty, unhygienic and historic in nature and space. The level of anonymity in new settlements exposes individuals to non-adherence of cultural practices since no one is watching them. In cities and urban dwellings cultural activities are seen as a barbaric reminiscent of dark ages. Increased migration to some level accelerates kinship disintegration and dissolution of both consanguinal and affinal temporarily and at times permanently leading to non-recognition of an individual's cultural rituals

and practices associated with birth and death, are examples among many.

7. Recommendations

1. Cultural values that deter development should be done away with such as kinship/tribal ties in work places, politics, religious institution and other social circles.
2. Anthropology which promotes culture should be recognized as an academic

discipline to enhance understanding and promotion of good, cultural practices such as cultural education, system on reproductive health which is currently ignored in schools/institutions and by parents.

3. Promotion of customary law by merging the civil and customary authority in administrative units. More emphasis on rural environments where civil law is "non-existence" in practice.

THE HERITAGE FACTOR IN THE CONSTITUTION

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1. Background

After almost forty years of independence to talk about promotion of African, or for that matter Kenyan Culture, is a cliché. A cliché that the nationalist discourse used over and over again to gain popularity and power that created a class of politicians who became ultimately masters of the double discourse of theory and practice of African culture. While one side of the double discourse valorised African culture, the other created a culture of violence, fear and suppression of opinion. The post independence culture contradicted and shamed what was promised as protection and promotion of African cultural heritage in the Kenya Constitution and subsequent development plans.

This paper acknowledges the intentions of promoting African culture as stated so eloquently in the first Constitution of Kenya which was drafted at the height of nationalism. We cannot match the clarity, fervour and honesty of that period of cultural liberation and celebration. But the loyalties pledged in the oral and written manifestoes were subverted. Forty years later we must learn from the past and guard against further subversion of the Constitution, be pragmatic and move ahead of what has become the rhetoric of "contribution and promotion" of the Kenyan culture in the national body politic. We must speak of correcting what has gone wrong and work out a reconciliation strategy as a testimony of our commitment to the new Constitution as the way forward. Reconciliation is an essential aspect of African culture and communal well being that takes place at least once a year as a public ritual in many cultures. An example

are the Giriama of the Kenya coast at harvest time. We must look into and fall back on the culture to save the present and leave a brighter future for the next generation. At the *ituoka* ceremony of the Agikuyu which was about handing over of the government to the next generation, one of the reconciliation gestures was to trim the *mui* tree of peace. The sacred tree was trimmed, - not cut or uprooted – because the stem represented the generations and the roots were the stability of the community. The old and decaying foliage was removed not the tree. Then the coming of the new bright leaves in place of the old symbolized recovery and a new age.

I view the new Constitution in the making under multi-party democracy with great hope. The new Constitution of Kenya Review Act, Chapter 3A under section 3(a), (d), (e), (g), and (h) states peace, ethnic and regional diversity, communal rights and rights of communities to organize and participate in cultural activities and expression of their identities and strengthening of national integration and unity as objects for consideration. This paper is about reclaiming peace, recognizing ethnic identities and diversity through expressive cultural activities and gaining national integrity and unity through expressive cultural activities and gaining national integrity and unity through reconciliation.

But first, I wish to recognize and salute the work of those citizens who have been engaged in the process of working out and changing those aspects of the political and politicised culture of Kenya that have been oppressive to the national well being. These

individuals and groups comprise ethnic people who continue to sing the song of how their ancestral land is taken away from them and those who sing how they are reduced to becoming refugees in their own country. These groups and individuals also comprise urban-based dance and drama companies encountering changing social values and political scenes. They belong to citizen managed cultural organizations and institutions.

There are also individual writers and artists in this group who have oriented themselves from 1963 onwards towards an enabling culture that gave expression to the values and aspirations of a free, peaceful and democratic society. They struggled to remain loyal to the Kenya Constitution. True national culture of Kenya supports the Constitution struggling against the anti-national and anti-Constitution and anti-African culture. I salute all those who actively participated in the making of and aspiring for a culture that would allow Kenyans to practice their constitutional rights.

2. National Culture, Kenyan Identity, and Ethnic Diversity

National culture is the total culture of a nation and it encompasses the culture of governance. The culture of the citizens, the ones who are governed, create social values and ethics from their heritage and the joys and difficulties of everyday life. That culture of the citizens should be the guide and it must be able to monitor the culture of governance so that it too follows the ethics of daily life that protect and enhance values of freedom, security and democracy. I shall be specific.

The following are four examples that suggest what the national culture, Kenyan identity and ethnic diversity represents and what need to be captured by the Constitution. It may be noted that these

examples are drawn from four of many other living and contemporary cultures of Kenya. My emphasis in this paper will be on the often ignored but nevertheless significant ethnic cultures of Kenya.

The Munyoyaya of the Tana River is a little known group which has much wisdom to offer. They are agricultural and fisher people of Cushitic background. The *Munyoyaya* animal totem is the tortoise. The tortoise withdraws when disturbed and patiently waits until the danger passes away. Says Mzee Ababuya Afoka, a Munyoyaya elder:

" A wise leader is like the tortoise. He does not appreciate violence and it is this wisdom that has guided the Munyoyaya through their history and they have never been to war with another community. Your belief is your force inside and that inside force is the authority to keep the well-being of the society and preserve life. In every society it is the customs that hold the authority in place and customs change when the authority changes and when people's customs change the authorities need to change ".

The new Kenya Constitution must capture that aspect of the national culture which defines the relationship between the citizens and their government as said by the Munyoyaya elder. Mzee Afoka says simply that the authority must change when the people change and the people need to change to change the authority. The Constitution must help the authority and the people into that process and it must mirror that process of change of which Constitutionalism is a part if not a driving force.

The People of Black Beads is another example whose generations of experience need to be captured in the Constitution. This clan lives among the greater Borana ethnic group of Northern Kenya and Southern Ethiopia. The clan protects the society from

evils of violence and conflict. The work of the people of the Black Beads is to mediate, transform and reconcile when hostilities prevail. They wear their symbolic ornament, which is made of black wooden beads, in a chain around the neck. This is an artefact of wisdom of an elite group. Note that they are the elites of the society because of their virtues and not because of their wealth.

The Constitution must lead us to a non-violent society. I agree conflicts will be there but its how the conflicts are managed that need to change. Lets learn an ancient African way to keep order from the people of the Black Beads.

Another culture of high integrity and ethics for preservation of life is the Akurino of Kenya. They are called the Independent Church of Africa but actually, like the Amish and Mennonite communities of North America whose social systems protect them from insecurities, the Akurino are a reformed group of African Christians. During the last almost eighty years they have developed their own set of social values, material culture and systems for protection against injustice and violence initially of colonialism. The Akurino are an example of how the old and new have been integrated and continue to be reintegrated into the changing structures of social, economic and political life of new African States. There are more than fifty independent churches in Kenya incorporating the old with the new and searching for meaning and order in today's violent society.

Many such social formations as the Akurino mentioned above, have strengthened their community culture across in Kenya in response to injustice, forced imposition of values, violence and damage done to their community structures by centrally administered State. These registered and unregistered faith groups are withdrawing

from the 'mainstream' faiths and disintegrating cultures in pursuit of peace and meaning of life that the State cannot claim to provide. Yet they manifest high standards of social ethics (such as volunteerism, community building and work ethics) that the Constitution must capture so that Kenyans may draw lessons from the histories and lives of these groups. In European history Protestant culture and work ethics grew out of numerous breakaway churches at times when the old religion and governance could no longer hold the centre. I am not suggesting that there is a parallel case in Kenya. Our histories and cultural backgrounds are different but the example provides an insight into how communities reorganize themselves when conditions are adverse to their standard of values.

There is also for example, the Iltoruesh clan of the Ikisongo section of the Maasai of the Kilimanjaro region. The Iltoruesh actually exclude the warrior age set in their social system. After initiation the Iltoruesh young men go through the ritual that cleanses them and consequently allows them to pass over the otherwise compulsory grade of Maasai moranhood to become junior elders. The Iltoruesh are the givers of prayers and rules for maintenance of human security and the social order of the Maasai society. They live close to the sacred mountain Ol Donyo Lengai. Ol Donyo Lengai as the name says, is the Mountain of God.

African spirituality embodies values for enhancement of life and not its destruction that the Constitution must state. After all, the Constitution is an instrument to advance values of life and well being and it sanctions forces that are against values of life and social well being. The Iltoruesh go to settle disputes, not the morans. *Olemal* or peace delegation are formed and resolution sought. This is a long standing Maasai policy for resolution of conflicts within the community. The Constitution must draw

from our peace building traditions and give guidance to formation of a policy for settlement of conflicts within the larger Kenyan community. Policies are based on values. Amazingly, there is no national policy on resolution of conflicts in a country of such a rich heritage of a culture of peace. The result is that when there are conflicts the GSU, the police and the military creates havoc and runs over a civilized nation, looting and raping along the way to conflict resolution. The Itoruesh among other traditional civilizations show us how a culture of violence can be contained. This is what the Constitution needs to recognize.

The four examples given above from diverse Kenyan communities which are incidentally, not connected with each other in any way, reflect on the values of life and well being. These values are peace, spirituality and freedom that citizens of Kenya desire and have deep hope that the new Constitution will be so drafted as to direct the law to provide the mechanisms for them to develop in time to come. Note the diversities in the examples discussed above which is the strength that too needs to be acknowledged as our national heritage. The examples are from Cushitic, Bantu and Nilotic civilizations of Kenya.

3. Promotion of National Culture, Kenyan Identity and Ethnic Diversity in the Constitution.

This section relates to and builds on the previous one. There are 5 areas that the new Constitution may consider for protection and promotion of Kenya's national culture, identity and ethnic diversity.

3.1. Protection of the Kenyan Culture, Identity and Ethnic Diversity from Political Manipulation

The Constitution must protect and give exposure to expression of national ethnic identities in their many forms such as

distinct customs, art forms, languages, dress, music and dance. Protect them from manipulation for political ends, as has been the case during recent years and especially during past elections. Ethnic cultural characteristics and traditions have been used to cause fear, suspicion and ultimately hate by drawing on differences such as between the circumcised and the uncircumcised citizens, as features of ridicule and later turned into reasons for prejudice and hate and even separateness. How easily is our strength turned into our weakness!

During the independence era there were instances such as forced and public removal of Pokot ornaments and dress by the GSU. There was public shaming of the Turkana and Pokot way of adornment and generally of pastoralist lifestyles. It was cultural humiliation. Dissatisfaction of ethnic citizens towards the unfamiliar and unfriendly style of governance and management of their resources was termed either as a revolt or banditry. Conflicts over their resources were often blamed on the people's backwardness and even primitivism. Yet the ethnic communities of Kenya value love for the land, spirituality and in all, hold such a humanistic culture that the Constitution has yet to define. But this is possible through participatory work with the elders of the various groups.

What needs to be protected and promoted in the Constitution is the respect for a pluralist society at the very grassroots. This includes mutual respect for the intellectual, cultural and environmental resources of our many civilizations. The diversity needs to be recognized and promoted nationally in such forms as signboards in regional areas written in ethnic languages and government officers learning and knowing languages of the regions of their work stations. This is one way of giving a face, a visage to a pluralist country.

Enhance and develop all ethnic languages as mother tongues and Kiswahili and English as languages for national unity and advancement. In many regions of Kenya the young population is largely a tri-language. It's the right of the citizens and the children to own their heritage languages. Legalize and acknowledge this fact, and let's be proud of it. In this aspect we are a unique nation.

Secondly at another level, the largely oral and visual peoples of Kenya need to see and listen to each other which would be a start towards building a national culture of a pluralist Kenya. That is cultural enhancement that would allow the removal and putting aside of the politically motivated suspicion and fear that we have of each other. Moreover it would help to concentrate the emotions and intellectual energy of Kenyans to creativity and provide the encouragement to build the new community driven force of a culturally diverse nation. A culture which guarantees freedom of expression, association and thought can yet be restored and take shape in a people to people communication mode in rural as well as in context of urban settings. The government must trust its people. The government must trust its Constitution.

The Constitution can facilitate people to people communication in three ways. One is to locate and strengthen the commonalities among the many ethnic peoples of Kenya. The second is to respect the differences in an appreciative way. Build on the inherited positive experiences that Kenyans have always had which is respecting the variety of regional customary practices. That is our tradition and our strength. The third is to adopt the unique traditions of some communities that express social values in such a creative and uniquely African way that we can all be proud of and it becomes a part of our national expression.

The process of developing the national ethic begins with first describing and

understanding the multiplicity of ethnic and community ethics which includes both faith and cultural knowledge. There are community ethics such as respecting the consensus of the elders, respect for life and the dead, sacredness of the earth, spirituality in the traditional belief systems and the sense of aesthetics.

The Maasai dress and adornment is proudly dawned by Miss Kenya, Miss Tourism and by young Kenyan urbanites at the Carnivore and Safari Park Hotel irrespective of their faith and ethnic backgrounds. We see the Maasai beads incorporated into modern African fashion. The Constitution can help to promote such similar symbolic elements of a rich national heritage of decor and social functions. The Maasai attire and ornament has become symbolic of a national culture and it projects such a visually powerful Kenyan National Identity through one ethnic feature and mode of beauty, decency and pride. The Kenyan youth is searching for a Kenyan identity to own and project in this era of globalization where the youth feels culturally marginalized. One reason for the numerous and violent school strikes, high levels of substance abuse and falling morals of the youth may be due to the loss of touch with social values and identity. The new Constitution of the current generation set has the responsibility to restore that identity.

3.2. Empowerment of Ethnic and Civil Institutions to Sustain a Pluralist Society

Social evolution is often viewed from the primordial to a nation state democracy on an evolutionary linear scale of political structural models mainly from the histories of Northern Hemisphere. While the fact remains that the security of African people lies in myriad patterns of intricately connected and well integrated social structures of ethnic groups, clans, sub clans and families. The State outside the cities

(and nowadays in some areas of the cities as well) neither provides administration nor security. When I go to Marsabit from Nairobi, I must fly or take an armed escort because between Isiolo and Marsabit there is little or no government.

Yet, across Kenya there are assemblies of elders who strive for communal security and peace in spite of the violence of colonization, nationalism and the modern State, the GSU and military in regions such as the Rift Valley and North Eastern Provinces. The elders strive to fulfil their responsibility to keep the inherited order of their society. There have been instances when the ethnic elites in the name of representing their ethnic community interests have in actuality been representing their class-interests resulting in disruption of the social order of their communities. Ethnic politicians take over the functions of the elders and incite or bribe young men to violence. This is level at which the state versus ethnic dichotomy manifests. The politicians do not follow the traditional rules for making war and misuse traditional structures. The result is that the traditional reconciliation procedures are also not observed leading to chaos left to the mercy of Kenya's ruthless GSU to wreck further violence in the name of bringing peace. The 1990s clashes in Narok district were the result of incitement by ethnic politicians which greatly angered the Maasai elders.

For sustaining democracy and the social ethic the Constitution needs to inculcate the spirit and sense of justice, order and peace as it is manifested especially among the elder-managed communities. The Justice system need to be culturally constructed and justice done must be culturally accepted. Empower the community institutions that do have the authority and wisdom to rule well. This means that the African State of Kenya must rule with the elders so that ethnic diversity, Kenyan cultures, customary law and the national identity can be protected

and promoted. The State and ethnic dichotomy may be addressed by the wisdom of the Agikuyu reconciliation concept of Waragania which is to make both parties equal and not make a conqueror of one or the other.

The elders of the community councils hold the authority through consensus to rule at the grassroots in a way that the modern State cannot claim to have in many parts of Africa. When the elders meet memory is evoked. The elders and the living dead hold memory of peace, security and justice. Sometimes it is called the wisdom of the elders of Africa. Memory is history recalled. Oral history and literature of Kenya hold codes of ethics of a largely non-literate society. Ethnic languages invoke metaphors and symbols of social values and wisdom of good governance. These languages must be maintained and developed to uphold wisdom for the generations to come. When the Constitution serves the elders, it empowers them to better serve their communities and the government.

Kenya is a mosaic of ethnic people struggling to keep together their fragile protective and caring community owned institutions for sustaining life against violence of the State organs and some politicians. This is a fact that the new Constitution must accept and deal with and hence protect the people-based institutions. When the government fails to provide that what choice do we have? What institutions do we have in place to hold up? In absence of government mechanisms for fair justice and protection of property and life, disintegration of surviving ethnic and civil institutions would result in further loss of self-esteem and community's capabilities for self-preservation and propagation of even the basic human values. The national culture of Kenya, her identity and her diversity lies in the multiplicity of peoples of culture who hold a bonding relationship with their

ancient lineages, the ever-present ancestral beings and the environment.

3.3 Promotion and Protection of the Environment

In Kenya, memory that refers to social values is harvested from ancient features of the environment such as the sacred trees, mountains and waters. The elders present themselves to the peace trees and features of the earth in openness to receive communal with spirituality that fosters the humanistic character of their societies.

When we are destroying our forests, we are in the process also destroying our social and spiritual heritage. This is the heritage of human values known to us through the people who live or have lived close to the earth and the trees. Neither modern school education nor the modern State has the capacity to give or replace the quality of this heritage. As far back as 1932, Paramount Chief Wambugu told the colonial government that forests of Mt. Kenya were a gift that God had given the community. He was talking about the country's spiritual and social heritages, which are closely tied. It is the twin heritage of human values that is fundamental to the sustenance and development of the spirit and ethics of a civil society.

In Kenya we did not write manuscripts to preserve the thoughts of the forefathers. Our visual and oral traditions are passing away with new spoken languages and literacy based on a European legacy. Sacred (or peace) trees are the last remaining symbols of a memory that fostered well-being among the communities and peace and well being with the environment. These trees also fostered civil values in a variety of contexts. Migration paths of the three great traditions of Kenya land-marked sacred trees across the continent. Today there are groups within the Bantu conglomerate of cultures originating from West Africa, the Nilotic

from the Nile corridor and Cushitic groups from the Red Sea region that evoke names of trees such as the Olive Tree, the Fig Tree and the Acacia in their prayers.

Among many ethnic communities of Kenya, relationship is linked to peace with nature and the earth. People pray under the trees, use foliage of peace trees during rites of passage and they inhale the smoke of the sacred wood in blessing rituals. They bless the earth with branches dipped in water, milk and honey. Today clergy of the Catholic Church in Ukambani, Embu and Pokot region dip leaves of the sacred tree into the holy water and bless the congregation and the earth with the spray. Last year, the church at Othaya blessed four African peace trees that were planted to heal the earth at a mass graveyard of a Mau Mau concentration camp. Four thousand people came to witness healing of the earth and planting of the peace trees.

Recently Pokomo women of the Tana riverine forests at Mnazini and Baomo protested against the presence of scientists on their land. One of their concerns was the fear for loss of their communal trees. They have experienced this threat before to the loss of their trees like many other citizens of Kenya such as the Itoita of The Forest of the Lost Child in Narok and the Mijikenda of the sacred Makaya at the coast. The Pokomo, Munyoyaya and Wailwana depend largely on beehives and other products of the forests for subsistence as well as for maintenance of their social order, ethics and spirituality. Among these groups, beehives, and not cattle, are counted as bride price and there are trees in the forests that listen to their souls, mediate disputes and bring blessings of peace and prosperity. When riverine trees are cut, the community's fundamental values for maintenance of their economy and the security of their spirituality and unity are uprooted. The waters that supply them with fish and plants for building boats and baskets then begin to fall

in level. Pacifist Munyoyaya and Waata who prefer not to fight, need the forests to shelter when the enemy attacks. Non-violence is an ethic of these humble people and the tortoise is the tribal totem for the animal best expresses the community lifestyle. The Constitution must protect the cultures, languages and customs of these minorities.

Celluloid images on TV, computer screens and mobile cinemas are powering over our native imagery and emotions connected to the natural landscapes and all the metaphors of knowledge, languages and sensitivities that have been preserved for what may be called the being in us. We are losing that touch with land and how to work the earth. Legends are no longer told in Central Province that Agikuyu have a deep historical connection with Mukuyu (*Ficus Sycomorus*), the tree after which ancestor Gikuyu was named for he was the great Mukuyu himself. But Mukuyu today must exist if the society is to exist in kinship with other trees of the mountain of God such as *Muiri* (*Prunus Africana*) and *Mutamaiyu* (*Olea Africana*) and in kinship with the forests, waters, animals, the mountains and people of the earth so that we may live in peace and prosper.

The fact that few Agikuyu today know that their community is named after the sacred tree, Mukuyu, testifies how rapidly we are losing our identity and values that emerge from an identity of a people whose birth was from Mother Nature.

Globalisation will not consider African sensitivities for we did not invent the tools of literacy and the electronic media. Our intelligence cannot be stored electronically and our spirituality cannot be sensed by artificial intelligence. The media that can honour early memories comprise the environment, the mountains, the plains, skies, waters and the trees. These features are all protected by the forests, the cloth of God and by ethnic visual and oral traditions

which are an integral to our identity. The new Constitution is the Great Law, and the great law has to guard the source of life which are the forests of the land. The Great Law must also protect the yet to be researched and documented sources of Africa's knowledge.

3.4. Protection and Promotion of the National Aesthetic

Protection of elder institutions, the forests and community's social order and security is supported by and linked to the domain of aesthetics in ethnic societies. Colors and patterns are power symbols of peace and order in many societies. Ethnic aesthetic systems encompass beauty, sacredness of the land and life. There are often women-made bead patterns of the order of beauty, metaphors associated with social integrity, and there are accompanying songs and narratives of beauty, peace and relationship building. These stylized expressions affirm life and the order of living in communities. For example, the Maasai word for beauty is "osotua". It's also a metaphor for close social relationship and the umbilical cord. It means peace as well and most important, it means a gift out of friendship. The Constitution must protect our national aesthetic values from destruction and oblivion even before they are understood and documented for generations to come-for they must know what a bead, a colour and pattern meant to the African people of Kenya.

Let me elaborate further. Beauty in Maa is osotua and like sidai, it is also greeting for the goodness, well-being and prosperity for it is the mother's umbilical cord that we all once shared. Peace is out of respect of the original relationship that all humans and animals of this earth began life in the womb, a woman's gift of life and the gift of motherhood. The earth is the mother.

In pastoralist civilizations there are different symbols of keeping social order. The Constitution is fundamentally about keeping the social order by affirming the values of life and security that we cherish. Ethnic order among the contemporary societies of the vast northern regions of Kenya is expressed in imagery of patterns on animals and in the colours of material culture and the environment. They are the visual expressions of social protective and care giving structures that support community pro-life and justice systems.

The meticulously constructed and disciplined patterns of beauty are given thought and expression in ornamentation types made by mainly women consciously and mathematically calculated to compliment functions of the administrators and protectors of their rights and values. For this reason there should be no tax on importation of beads and other art material. Today beads are heavily taxed as luxury goods like diamonds and BMWs. But coloured beads are material for expression of a national aesthetic. Protect and enhance the people's sense of beauty, the joy of life and peace. The Maasai say where there is no beauty there is no peace. And peace is the highest quality for maintenance to regulate society and that the Constitution is drafted to guarantee that we have it.

3.5. *Protection and Promotion of the Material Culture of Kenya*

Everyday there is massive exportation of Kenya's material culture. The previous part directly discussed the importance of beaded ornaments to the Kenyan identity and national culture. The ornaments are just one category of material culture. We have other categories such as containers and furniture. All these are important for promoting and projecting our image of who we are and where are we coming from. The Constitution must allow and facilitate appreciation of our own self-images, our art,

history and sense of aesthetic pleasure derived from our ancient artefacts, the environment, rituals and the earth. And for this to happen, we must have time to first understand and know the yet unknown visual traditions of function and decor such as the diversity of aesthetic systems of Kenya. The material culture of Kenya carries the collective intellectual property of ethnic cultures and especially of women of these communities. For example Kenya's ethnic ornaments such as the magnificent *emankiki* have colours and patterns which are unique. Ethnic visual art reflects the interactions of a community with the environment and shows how they perceive beauty in nature and how they give meaning to their social systems, law and sense of comfort and security. Ethnic history and legends are closely related to their art. For example in Maasai history there is the homestead of the black cow and red cow. Environmental features and social groups are named after colours. Women have developed certain ways of using hues and shades of colours in combinations and ratios which are not only distinct but follow clear aesthetic and design principles. This requires skills and intellect.

Lets take another example. Luo women make a series of pottery which collectively is called *agulu* or earthenware. There is for example *dak* for storage, *dapi* for water and the fish pot called *ohigla*. All the pots are of distinct designs. The art of pottery is a heritage of a lineage, handed over in a careful and protective way from mother to daughter or from an aunt to a niece. The Kenyan law must protect such unique traditional social designs that have survived because of the high respect bordering on sacredness that the community accords to the ancestry of the makers of their items of material culture. The Luo women potters who work the sacred earth in secrecy are the keepers of art of the female domain of the Nilotes. The sense of beauty, social order and spirituality is entwined. Such a

regulating force expressed through clan women's ancestral art reinforces a community security structure.

4. Discriminatory Aspects of Culture

The new Constitution must deal with the pain of humiliation, collective trauma and fear that the people have suffered during the post independence times due to the discriminatory aspects of culture of governance. The fact that in ethnic Kenya there is no governmental policy on ethnic clashes reflects on the lack of attention that ethnic diversity has received in the Constitution. Ethnic consciousness is the basis of the identity of this nation of a mosaic of cultures and all issues arising from that national consciousness must be addressed with great respect by the State. We ought not to leave conflict resolution and reconciliation to the numerous NGOs guided by foreign donors and church groups. It is a national concern that the government must address in the right contexts of a variety of reconciliation traditions and cultures of peace of Kenya. The new Constitution must attend to the resolution and reconciliation policy vacuum for the sake of national unity.

To deal with discriminating aspects of culture, the Constitution must first recognize the wrong that has been done by the State to the citizens of Kenya. Healing of the humiliated Kenyans is a process towards making of the new Constitution that promises the practice of a culture that it stipulates in statements about rights of the citizens. Without trust and justice which can only come from reconciliation with the past, the new Constitution will be viewed as yet another document of hypocrisy. Constitution must allow in every region a body of elders to deal with tribalism first, of their own people to heal the relationships with the 'other', the earth and the State. The elders must be allowed to deal with the State-

instituted crimes. In this way, give the citizens the opportunity to own the Constitution. In a nation where the written word called the Law is in a foreign language posited in an unfamiliar medium, the Constitution process and content have got to be in the cultural medium of the majority of Kenyans in both its form and content.

Healing through reconciliation is a universal human phenomenon that different cultures perform as their own community owned rites for peace keeping. Feelings of humiliation can lead to bitterness and hate resulting in extension of the already existing gap made by differences due to post independence ethnicised politics. Healing is necessary for correcting the wrongs, the discrimination and preparing the ground for reconciliation which is a step towards national unity that the Constitution seeks as one of its major goals.

Kenya is a nation in mourning after four decades of a violent history. Kenya's map is dotted with sites of massacres and killings. The new Constitution must help by giving protection to reconstruct a depressed culture and our national self-esteem. The Kenyan nation needs to come to terms with the past especially the recent past since independence which is a painful living memory for many. The nation must reconcile with itself and make peace with justice. Culture changes and brings about changes. The new Constitution is a part of that change in the process to bring about changes.

Western values that reflect on the evolution of a democratic pluralist society such as equal inheritance rights for women, freedom to expression, of diversity, of intellectual traditions and right to refuse a discriminatory traditional custom are certainly worthy of consideration for commenting on, modifying and building of the national ethic. As is the case with other nations of the world there is both the

universality and specificity in adopting constitutional principles. The specificity comes from unique cultural experiences which this paper emphasizes.

The nationalist discourse prior to and post independence enabled venting of anger and pain against racism and mistreatment of the black subjects of the colony of Kenya. It also enabled restoration of self-esteem and trust in the making of the new nation, the new Constitution and the new leadership. Praise songs, monuments and legends celebrating *uhuru* reclaimed our national pride and gave expression to a national culture that in turn supported the new Constitution and leadership. The new Constitution of independent Kenya was to provide a facility for expression and healing of humiliations of the past. That was a parallel step towards developing a culture of change but it failed because of the rise of dictatorship. As a general rule, dictatorship suppresses development of a national culture and often national unity. China and the USSR were aware of this phenomena and prescribed new national cultures which the people ultimately rejected. As amply illustrated by the Kenyan example, dictatorship functions through divide and rule. The outcome was ethnicisation of politics and politicization of ethnicity. One of the first examples was how the rich tradition of the Agikuyu *nyakinyua* women's age group was changed from celebrating themselves to dancing and singing praises of politicians and the ruling political party. On national days the manifestations of ethnicisation of politics could be concretely seen in the formation of parades where ethnic women line up with the military to demonstrate their loyalty. Thirty years later the result was ethnic clashes of unprecedented scale.

Today we need a Constitution that can provide Kenyans to help de-ethnicise politics so that we can work without fear towards a culture that would allow us the

freedom to handle an unresolved and a hurting era of the last forty years. Many questions will be asked because of suspicion and betrayal by the past parliaments. That's part of the healing process, the right to questions, to correct the wrong and learn from the mistakes. That is a process to deal with discrimination and a process to making of the new Constitution to restore the confidence of the nation so that creativity of a suppressed people can be harnessed to develop a healthy nation. The Great New Law must help thoughts, intellect, creativity and emotions of the nation to be shared and appreciated without fear and with freedom and trust, first in ourselves and then in the leadership representing us.

European nations came to reconstruct their culture after the destruction caused by the World Wars by first holding massive healing ceremonies in the churches and at graveyards. Then came building of memory monuments and museums to the violence. These were physical and tangible manifestations of a new culture protected by the new laws. Germany and Austria turned concentration camps and execution sites into national museums that would educate and remind the people of the mistakes of the past and especially of the State's violence against her citizens. Their new constitutions provided freedoms of expressions that worked towards healing of the nations. The Americans built the Vietnam Wall in Washington to heal the nation mourning the deaths. The Americans built the Peace Garden in Nairobi at the place of the 1998 bomb blast of the American embassy while at the same time constructing the new embassy on Mombasa Road.

The process of making a new Constitution of Kenya is itself a process of making a new culture. It is a struggle against anti-Constitution forces which we have been witnessing since the work of the Commission started. There are more examples.

The new South African constitution came into being with support of the Peace and Justice Commission. The South African Commission had an important role to play during the interim period so that the public could accept the new Constitution. Perhaps we need to do the same. Rwanda and Burundi are working towards support of their citizens for their new constitutions through the Peace and Justice Commission dealing with a discriminatory culture that led to favouring one ethnic group against another. The failure of the International Court in Arusha to deal with crimes of genocide is a lesson for us. Rwanda and Burundi have finally reverted to the elders' councils to deal with the pain and humiliation of the citizens misled by tribalism and the lack of law to protect the cultures from being manipulated for political ends. The elders courts are called *Gachacha* which literally means grassroots.

The new Great Law of Kenya, the Constitution, must allow an expression for the healing of the nation in all its aspects and for all its people from the 1960s massacres of the of the Mau Mau freedom fighters in Meru, the Samburu elders at Wamba, and the massacres of Borana, Sekuye and Somalis during the first decade of independence. The North Eastern Province must be allowed to tell the nation of the tragedies of the large concentration camps of Merti and Garba Tula. The nation must above all, hear the most recent 1990s killings of the Pokot, the Bukusu, the Agikuyu of the Rift Valley, the Mijikenda and the Luo in Likoni. These events are national and they need to be given national acknowledgement through mourning and healing in forms appropriate to the cultural norms of the citizens, the majority of the affected, so they can see and hear and heal and finally accept the new Constitution as a worthy document that will protect their right to life and security. Funeral rites and bereavement processes are very important

aspects of African culture that the New Constitution must acknowledge as the people would like to see them acknowledged. These rights are founded partly in the belief in the ancestors. In South Africa reburial of the executed and fighters against apartheid who were killed, were termed as rituals for the right to ancestry. The reburials are an important aspect to one of the greatest reconciliation events in the history of Africa.

There was forced denuding of Pokot mothers of their skin garments and beads which were later burned by the GSU on the airstrip at Orwa in 1978. There have been atrocities by the Kenya Police and GSU in the slums of Nairobi, Mathare Valley in 1982, Kibera in 2001. The GSU and riot police who gazed upon the self-denudation of their age set mothers in early 1990 at Uhuru Park was a public shameful event, which needs to be cleansed in an equally public ceremony for the cursed ones. We are Africans and we must work out the legitimate grievances in an African way. That is an event that reflects supremely well on the national culture of Kenya at the time and it needs to be given the visibility in an African customary way. The Constitution must recognize, legitimate and promote such cleansing rites for the good of the Nation.

The Constitution can deal with the discriminatory aspects of culture by providing for the performance of rites and exhibitions to make discrimination in all its aspects public and transparent. There is as great a diversity of types of discriminations as there is a diversity of cultures of Kenya. Every ethnic group has been made a stereotype to the other. Discrimination coming from the authority means selectively promoting one (e.g. ethnic group) and denigrating another. It is profiling typecasts and justifying ethnic killings, which is the worst form of discrimination.

The history of public performances and exhibiting cultures has passed through phases reflecting the development and changes in human thought and society. This is a natural evolution. We have lived through the phase when the colonial performances was the dominating images both at home and abroad. It was the display of the others, exhibited as they were looked upon from the vantage view of the one at the top. During the post-colonial time it was mainly the stage and not cultures exhibitions that represented reconstruction of social identities due to the damage done to the image of Africa and her people. But with the changing perspectives in the scholarship of African Studies, and anthropology, performances and museum displays, have changed as well.

Hence, plays such as *Luanda Magere* and *Wangu wa Makeri* were about reclaiming a suppressed social identity while others such as *Ngahika Ndenda* and *Maitu Njugira* in ethnic languages, and *Mekatilili* in Kiswahili presented alternative views of the stereotyped native. In 1997, the exhibition at the National Museums of Kenya on peace making traditions of the Maasai, Samburu, Pokot, Turkana, Rendille, Gabra, Somali and Borana dispelled the falsely constructed image of the pastoralists as warriors cherishing a culture of conflict and violence.

What has yet to emerge is the public viewing of the social history of Kenya in the formation of postcolonial civil society, and especially now, during the post one party State, so that the multiple histories in the making of Kenya's political social compositions and the civil societies independent of the State, can be viewed through the prism of its many patterns of colour. Selectively told and performed culture and history of Kenya is a form of discrimination that the Constitution must sanction. Ultimately, discriminatory information gets reproduced in school books

and the curriculum. The cycle of misinformation gets reinforced.

Historically speaking, the phases of stage and museum performances are situations in tensions and transitions, between traditions and modernity, ethnic and religious practices, civil societies and styles of governance. However, what is of significance is not how different we are in terms of our customs, languages and beliefs, that map us out as exclusive societies, each unable to integrate and form one non-tribal fellowship of citizens; but how and when social identities of the diverse and distinct peoples of Kenya become complementary to one other in the evolution of a national cause and a civil society rooted in its own varied cultural and economic resources. In that, we have to know first where we are coming from and what we have to offer each other as a people, and as a nation of people, whose ancestors walked down the Nile, and from the Red Sea; from West Africa, and those who sailed on the Ocean harnessing the Trade Winds to come to the Mombasa, Lamu and Malindi.

In order to deal with State propagated discrimination, permit the Constitution to make known the history that Kenyans know, they know it for sure in their hearts. Let the torture chambers of the Nyati House be turned into a museum to allow the public to see what they already know. Let what we have done to each other be on display for reflection and healing so that the present and future generations to come can learn from our history on public display. That is national culture. Put together exhibitions on corruption, torture and illegal imprisonment to travel nationally. That is a good forum for civil education. The new Constitution ought to develop a national cultural education forum that is not a one time event before the elections but a continuing lifelong educational process. Give the law a chance to avoid further violence and discrimination. Suppressed anger, humiliation and pain are

dangerously volatile. Give the new Constitution a chance to provide and foster national unity through ownership of it by the people. And the people can only own it if it is in the medium that is also owned by the people.

5. Conclusion

In a historical perspective, the present State and the parliament is a passing phase. The new Constitution is obliged to reflect as correctly as it is possible, the Kenyan reality and aspirations of her people. In absence of culturally appropriate mechanisms to gather opinions and feelings of a diversity of communities, one has to rely on expressions of national sentiments such as gatherings at Kamukunji, stories and songs for justice and peace, riots and protests. These is the expressive culture of this particular historical moment. We must listen to it. It is the best of the national culture that one can get at this moment to build the Great Law and help us to come in touch with the values, especially African humanistic traditions, to be inherited and be fashioned in constructing a new culture of peace, devoid of fear, suspicion and violence. That is the path to the future and we make that path by walking. We make the new culture by walking with the new Constitution. The citizens must walk with the Constitution so that the Constitution helps the Government to walk with the people. The fundamental concept of Constitutions comes from the traditions of the citizens and is often manifested through the arts, especially in Africa.

The venues that allow national cultural expressions are in forms of dance, drama, languages, dialogues and visual arts. And there area diversity of artistic and linguistic forms. The venues can also be in form of monuments and museums commemorating the living memories of discrimination and injustices. When there are deep feelings of

suffering, human suffering, ethnic suffering, individual family suffering, they are all Kenyan suffering. These can be sufferings because of disagreement with the State or one ruling party or an elite group or even an individual. When the law cannot protect the rich and the poor, the rulers and the citizens alike, then it is discriminating. When the Constitution cannot or will not promote correction of the injustices, it is discriminatory. Discrimination is a sign of a dysfunctional government and a Constitution that cannot protect a people.

The cultures of Kenya can guide us to know how reconciliation with the past can be accomplished. In Kenya reconciliation events have been practiced for many generations and they continue to be practiced. Reconciliation is a living culture of Kenya. Support the Constitutional right of freedom of conscience and expression of thought and association to be manifested to work out a democracy in practice. The vast majority of people of Kenyan are visual and oral in manufacturing, understanding and transmission of knowledge. These three aspects of knowledge of a largely visual and oral society are articulated in the arts of the society forged by both the colonial and post colonial struggle to free the spirit from the injustices of the times. Culture is about the human spirit. Nationalists in Kenya rode on the back of culture to achieve freedom. At the University of Nairobi in two decades following Kenya's independence, we even said that political nationalism was in fact cultural nationalism. We must do the same to fortify the new Constitution and the processes of Constitutionalism with a life long process of developing a national culture on the foundation of ethnic diversity and the changes that happen within that diversity as worded so elegantly by Mzee Ababuya Afoka, a Munyoyaya elder:

“Your belief is your force inside and that inside force is the authority to keep the well-being of the society and preserve life. In every society it is the customs

that hold the authority in place and customs change when the authority changes and when people's customs change the authorities need to change"

Such a philosophy will not allow subversions of both the Constitution and Constitutionalism once again.

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Appendix I

'Priest seeks police help over sacred tree threat'

Daily Nation Monday, January 7, 2002
[Article Text Follows]

A church minister wants police to protect him after he was threatened with death for leading his followers in cutting down and burning a sacred tree. The Rev Dominic Kiloku of the Assemblies of God Church in Laikipia District yesterday said elders in Mukogodo division had threatened to kill him after he declined to atone for his alleged desecration of a sacred tree traditionally used by the residents for spiritual rites.

The destroyed tree was located at Kantana village in Makurian location. A meeting convened by Makurian location chief, Mr Elen ole Legei, resolved to have the preacher atone for his alleged offence by offering the elders a goat and local brew before they could cleanse him.

But in his defence, the preacher reached for his Bible, opened it and started reading it. He was shouted down as elders protested that he was making fun of a serious issue, with some of them walking out of the meeting.

The priest was later condemned and cursed through traditional chants. The defiant preacher later told journalists that he would neither apologise for his actions nor offer any appeasement.

"It is my God-given duty to stop my people from worshipping objects. They have been slaughtering and praying under the tree for rain and other things which is contrary to Christian teachings. They had to be stopped," he said.

He said he believed in God and trusted that no curses would affect him or his family. He said: "However, they have now made my work very difficult. I cannot go preaching to families in their homes I fear for my life".

Many of them have also warned their wives and children not to come to church," he added. He said he had requested the police and the provincial administration to protect him from the traditionalists. During the previous three years of severe drought which killed thousands of livestock, several offerings were performed by elders under the fig tree - locally called Oreteli. The last rites were performed last October.

The Mukogodo community, largely made up the Maasai and the Dorobo, still practise most of their traditional spiritual and cultural values. They are recognised by the United Nations as among the world's few remaining but threatened indigenous and tribal communities.

RECOGNISING AND RESPECTING CULTURAL DIVERSITY IN THE CONSTITUTION

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1. Introduction

One of the most fundamental characteristic of the increasingly widened political space in Kenya is not so much the *plurality* but the *polarity* of ideas by the many and varied contending social forces. This polarity corresponds quite naturally to the socio-cultural diversity that is the Kenyan nation-state. *Polarity* need not necessarily be a negative development in the socio-political process. However, to derive a useful value from this development, there need to be a conscious effort at creating institutional mechanisms that not only acknowledge its existence but also emphasize the underlying consensual values and principles as the basis of the state. Such an opportunity, potentially exists in the ongoing constitution-making process.

This paper addresses the broad problematic area of cultural and ethnic diversity and how they can be given a positive role in the institutional structures likely to emerge from the current constitutional review process. In this regard, it is to be noted from the onset that cultural and ethnic diversity face different constraints and opportunities in different institutional contexts. These differences are however, not absolute and can be positively mediated by conscious constitutional engineering. A task which the CRP should endeavour to attain. The section below provides some direction on definitional and conceptual issues.

2 Definitional and Conceptual Issues

Culture refers to the customs, civilisations and achievements of a particular people. The multicultural nature of African states including Kenya, has been attributed to the arbitrary process of creating nation-states in Africa by Europeans in late 19th century. Some scholars have argued that because colonial overlords did not pay due attention to cultural uniformity in creating the nation-state in Africa, they laid the basis of political instability that continues to bedevil the continent. But whether or not cultural uniformity is a safe guarantee of political stability remains a matter of great contention. In any event, the great pre-colonial kingdoms of Africa such as the Zulu and Mali were essentially multicultural and yet were able to consolidate political stability quite considerably. More recently, the cultural uniformity of Somalia did not stop the nation-state from unravelling with ferocious intensity¹. What is in little doubt however, is that ethnicity in a culturally diverse state often leads to great political instability.

Ethnicity has been defined as the conscious mobilisation of ethnic identity and interest by elites to make political and economic demands on the state in order to secure their constitutive interests in competition with

¹ For a more detailed discussion of the dynamics of politics in precolonial Africa see for example Walter Rodney, *How Europe Underdeveloped Africa*. Nairobi: East African Educational Publishes, 1989

members of other ethnic groups². It is thus a political process whereby people form groups in order to differentiate themselves from other groups by appealing to the idea of ineluctable cultural differences³.

In its concrete manifestation, ethnicity is underpinned by suspicion, competition, rivalry and often conflict. Additionally, ethnicity entails obscurantist and self-exalting attitudes in which from the perspective of the conscious ethnic group, it is the other ethnic group(s) who practice ethnicity and therefore impede its economic and political aspirations. Critical to understanding ethnicity therefore, is the ingroup/outgroup dynamic. An ethnic group can only be so identified amongst other groups who do not belong and whose objectives and interests are perceived to be incompatible⁴. The essence of ethnicity is therefore ethnic exclusiveness

But ethnic identity, the supposed basis of ethnicity, is itself largely a social construct. Many scholars have observed that ethnic identity and behaviour are only partly determined by genetics, they are also shaped by context and choices. Language, a myth of common ancestry and history may be important ascriptive *raison de'tre* of ethnic identity but so are religion, rituals, values etc. Ethnic groups have thus been characterised by some scholars as imagined communities⁶.

2 Okwudiba Nnoli, "Ethnic Conflict in Africa", *Working Paper 1/89*. Dakar: CODESRIA, 1989.

3 John Sharp and Emile Boonzaier, eds, *South African Keywords: The uses and abuses of political concepts*. Cape Town: David Philip, 1988

4 See for example, James G. Kellas, *The Politics of Nationalism and Ethnicity*. London: The Macmillan Press, 1991., Gerhard Mare, *Ethnicity and Politics in South Africa*. London: Zed Books, 1993.

5 For a more detailed discussion see, Donald Horowitz, *Ethnic Groups in Conflict*. Berkeley: University of California Press, 1985, Okwudiba Nnoli, op.cit. James G. Kellas, op.cit.

6 Benedict Anderson, *Imagined Communities: Reflections on the origin and spread of Nationalism*. London Verso, 1983.

Because of the nature of the ethnic group as a social identity, ethnic boundaries although fairly stable, change over the course of time⁷. Horowitz has however, correctly observed that the artificial nature of the ethnic group does not in any way vitiate its significant political role. Ethnic conflicts continue to afflict various parts of the world with devastating negative consequences. Ethnicity itself shows no sign of receding in political discourse and interactions⁸.

Max Weber in an earlier study, suggested that " ethnic membership does not constitute a group; it only facilitates group formation of any kind, particularly in the political sphere. On the other hand, it is primarily the political community (no matter how artificially organized), that inspires the belief in common ethnicity"⁹ People do not form groups for simple reasons of shared ancestry or common language, but should they want a political community, then the question of a cultural difference from other groups will become expedient and if such differences do not exist, they will be invented.¹⁰

In Kenya, ethnic social engineering for political objectives has been a significant feature of politics. For example, the movement for political independence from British colonialism was played out with fairly explicit ethnic manoeuvrings. As political independence got close, a clear

7 Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided society*. Berkeley: University of California Press, 1991., Eghosa Oshaghae, "Ethnicity in Africa or African Ethnicity: The Search for a Conceptual Understanding", in Himmerlstrand, U. et al. eds. *African perspectives on Development*. London: James Currey, 1994, PP. 137 – 157.

8 Donald Horowitz, op.cit., 1991.

9 Max Weber, "Thnic Group", in Parsons, T, et al eds. *Theories of Society foundations of Modern Sociological theory*. New York: Free Press, 1965, P306.

10 John Sharp, op.cit., 1988.

schism developed in the African leadership between groups representing the so-called 'minority' interests and the 'majority' groups. The majority groups were identified as the Kikuyu and the Luo. These two communities, for historical reasons were the most predominant African groups in the colonial economy. They thus constituted the most politically active and articulate groups in the nationalist movement. This also translated into what seemed a disproportionate representation of the two groups in the emerging African political class.

The other groups such as the Bukusu and the Kalenjin-speaking communities in the Rift Valley, the Maasai and Coastal peoples, had just been incorporated in the political economy of the colony. They therefore lacked not only the material infrastructure but also the level of political sophistication necessary to compete effectively vis-à-vis the Kikuyu and the Luo. Perhaps in appreciation of this context, there developed a view among the political leadership of the latter group that the Kikuyu and Luo were likely to be the greater beneficiaries of the 'fruits' of independence. Moreover, it was argued that the benefits accruing to the dominant groups would concomitantly curtail those of the 'minority' groups.

These fears conformed to extant widely held apprehensions that the Kikuyu, especially, known to be quite land-starved, would use their dominant political position to acquire land in the former white Highlands in the Rift Valley. This was to be at the expense of the Maasai and the Kalenjin groups who believed they were the original owners of the Highlands, and therefore had a more legitimate claim to the land after the white settlers left

In order to counterbalance this presumed 'hegemonic project' of the Kikuyu and the Luo, the leading political players from non Kikuyu-Luo groups, notably, Masinde

Muliro, Ronald Ngala and Daniel Moi resorted to the expedience of ethnic mobilisation. In the late 1940s and 1950s, Daniel Moi was able to galvanise disparate communities occupying the Rift valley province of Kenya into a new ethnic group called the Kalenjin. Similarly, Masinde Muliro, appealing to some shared ancestry among an assorted Bantu-speaking groups in the western province of Kenya rallied a Luhya community, hitherto nonexistent. These groups merged to found a political party, the Kenya African Democratic Union (KADU) in 1960. Although the party never won the 1961 and 1963 pre-independence elections, it was an effective surrogate trade union for pushing the economic and political demands of its constituency. After some time, changing political exigencies in the post-colony made it possible for the leading representatives of the 'minority' groups to be incorporated into the mainstream of the ruling elite.

Moi, Muliro and Ngala became cabinet ministers in the Kenyatta government after the dissolution of KADU in 1964 and the creation of a de facto one party system controlled by the Kenya African National Union (KANU). Moi's career and political future grew to dizzying heights when in 1967 he rose to the position of Vice President, and in 1978 he succeeded Kenyatta as the president of Kenya. Since the political contest in the post colonial Kenya has not necessarily assumed a framework of a dichotomy of interests definable in terms of Kikuyu-Luo versus the 'minority' groups, 'ethnic balancing' remains an enduring element of the country's politics.

What underlies ethnicity are competitions for scarce resources and social goods and the struggle to control the state apparatus seen as critical to the authoritative allocation of such resources and social goods. Control of state apparatus often assumes many forms. In its extreme manifestation, it can

take the assumed ethnic group in the direction of 'self determination'. But sometimes, the cost of achieving this final goal is too costly and as a result sober political calculation counsels other alternatives such as seeking political dominance within the context of a heterogeneous state. Where this latter option is pursued, it matters a great deal what kind of political structures are in place. For example, when authoritarian political structures are captured by a politicised ethnic elite, they are often more effective in ensuring ethnic dominance than democratic structures. Democracies are however, not immune to ethnic manipulation. Since numbers count in democracies, the success of an ethnic project lies in the ability of the ethnic elite to mobilise the mass of the people (the ethnic group) who have been made sufficiently dissatisfied with the status quo.¹¹ The success of exclusive ethnic politics in a democratic framework will additionally be contingent on historical and structural factors which vary a great deal across democratic political systems. It should be noted too, that whereas a democratic system hypothetically opens avenues of political interactions, it is equally capable of igniting fragmented and particularistic politics.

3. Culture and Ethnicity in Theoretical Perspective

The empirical and historical origins of ethnicity, its constituent elements as well as the relationships among these elements has been a subject of much polemical contestation. The 'ethnicity discourse' itself is quite varied, but essentially coalesces around two broad intellectual traditions: the 'primordial' and the Marxist and/or critical schools. The earliest view of ethnic groups and ethnicity can be found in the so-called

'tribal paradigm'. This perspective, first popularised by missionaries and colonial anthropologists propagated the view that Africa and other 'backward' societies consisted of groups defined as 'tribes'. The 'tribes' referred to a number of discrete cultural-linguistic groups which were seen to have remained unchanged into the present times. These groups were 'backward' and 'primordial' in their social organization and behaviour. They thus represented an earlier stage in human social evolution.¹²

The notion 'tribe' was used as a social category not just to refer to the people who lived in the 'backward' societies, but also to differentiate two societies; those who were 'tribal' as were found in Africa and other Third World societies, as opposed to the 'modern' societies predominantly based in Western Europe and North America. The social and political significance of this category was that the former were seen as primitive and barbarous while the latter were modern and progressive. This perception viewed such societies as doomed to extinction by ethnocide, the primary focus being the evocation of the savage as distinct from western civilization.

More serious research however, reveals that early African population though not culturally and linguistically homogenous, was nonetheless marked by rapid change and incorporation rather than static and bounded units.¹³ Thus the notion of a permanent, immutable tribe did not represent any empirical reality and was therefore of a limited conceptual and analytic value.

¹¹ Michael Hetcher, *Internal Colonialism: The Celtic Fringe in British National Development 1536-1966*. London: Routledge and Kegan Paul, 1975, Eghosa Oshaghae, op.cit., 1994.

¹² Peter Skanlik, "Tribe as a Colonial Category", in John Sharp and Emile Boonzaier eds. Op. cit., 1989. Additionally, the term tribe or tribalism is quite commonly used by Kenya's political commentariat to mean ethnic groups. This however, is a misnomer since tribe strictly speaking, refers to pre-institutionalised social groups.

¹³ Peter Skanlik, op.cit.

Marxist and Neo-Marxist scholars have similarly disputed this approach arguing that the notion of 'tribe' and 'tribalism' is not only an anachronistic misnomer which impedes cross-cultural analysis by drawing invidious and highly suspect distinction between Africans and other peoples of the world, but that it also oversimplifies, mystifies and obscures the real nature of economic and power relations among Africans themselves and between them and others.¹⁴

Two contending tendencies need to be noted in the primordialist approach. First, there were those like the colonial anthropologists and missionaries who though subscribing to the 'primitive' culture view, placed considerable hopes on Christianity, western education and urbanization to transform the village man into a modern man. This view, underpinned the theory, widely held in Africa in the 1960s and 1970s that the 'nation-building' project would eventually create a cosmopolitan citizen, removed from parochial tendencies such as 'tribalism'. Conceptually therefore, whereas this approach highlighted the 'backward' nature of Africans and their societies, it was also optimistic and modernist.

The second tendency within the general primordialist school views 'tribe' and 'tribalism' as a historical given, a static identity rooted in a historical past. It emphasises cultural and psychological aspects of group identity seeing them as natural, rather than as acquired from social interaction.¹⁵ If ethnicity is seen in this context, then institutions can do little beyond reflecting differences.

The primordialist perspectives can be useful in alerting us to the persistence of ethnicity. However, its second variety especially underemphasizes the significance of

common institutions and cross-cutting relationships which develop in the contact between sections.

Moreover, as cultural pluralists point out, ethnic diversity and interests are likely to be permanent features of the modern political system. In their view however, the stability of heterogeneous societies is threatened not by communalism per se, but by the failure of national institutions to recognize and accommodate existing ethnic divisions and interests. Consequently, cultural pluralists recommend instead, political arrangements which accord all communal groups a meaningful role in national life and which are able to keep communal conflicts within manageable bounds.¹⁶ The significant implication of this view is that if ethnic ties are not easily transformable, the negative aspects of ethnicity can nonetheless, be mitigated by carefully crafted institutions.

Additional dilemma to the first conception of the primordial school include research findings which demonstrate that ethnicity is neither irrational nor ephemeral. From the perspective of the ordinary people, ethnicity appears no less sensible a basis for political mobilisation than other social cleavages (race, religion, class, gender etc). Secondly, ethnicity is not as originally assumed transitory. It is a modern and not an atavistic phenomenon. Indeed ethnicity has grown since the turn of the twentieth century along with uneven development and individual competition for increasingly scarce resources. There is no sign that it is on the wane. On the contrary, in many parts of the world, ethnic conflict is actually on the rise.¹⁷

Cultural pluralists, as already noted, have been the other critical participants in the

¹⁴ See for example Archie Mafeje, "The ideology of Tribalism" in *Modern African Studies*. Vol. IX, No.2, 1977 PP. 253-262.

¹⁵ D. P. Van Berghe, *Race and Racism*, New York, John Wiley, 1967.

¹⁶ Donald Horowitz, op. cit., 1991.

¹⁷ For a detailed discussion, see for example, Richard Sandbrook, *The Politics of Africa's Economic Stagnation*. London: Cambridge University Press, 1985, Donald Horowitz, op.cit., 1985. 1991.

'ethnicity discourse. Van de Berghe, for example, has summed up theories of cultural pluralism as referring to a property or a set of properties of societies wherein several distinct social and/or cultural groups coexist within the boundaries of a single polity and share a common economic system that makes them interdependent, yet maintain a greater or lesser degree of autonomy and a set of discreet institutional structures in other spheres of social life.¹⁸

Specific opinions on the requisite form and content of institutional arrangements which would accommodate ethnic diversity, however vary in the cultural pluralists school. At abroad level consensus seems to revolve around spatial and corporate devolution mechanisms within a democratic framework in the form of consociationalism of one type or another depending on the particular circumstance of the polity.¹⁹

The position of the cultural pluralists is strongly reinforced by a strong current of consensus among Africa's political and economic commentariat that the democratisation transition in Africa must avoid the politics of exclusion. All relevant political players should be allowed a share of executive power in order to increase collective stake in the transition. However, some critics of the culturalist pluralist school point to the failure of the institutional accomodationist measures to ameliorate ethnic conflict in Africa. Okwudiba Nnoli for example, has cited the failure of the federalist structure in Nigeria, ethno-regional balance in Burundi, Kenya and Uganda at specific periods, and the failure of the proportionality principle in Ghana under Jerry Rawlings.²⁰

Needless to say, Nnoli's apprehensions betray an inability to differentiate form from content. In all the cases he cites, the regimes embraced symbolic accomodationist measures while at the same time subverting and diluting their content.

Marxist and Neo-Marxist scholars criticize cultural pluralists on the premise that the approach tends to see cultural cleavages as permanent within the society and the mere existence of plurality seems to account for conflict. The pluralists in their opinion, thus downplay the economic and political aspects of ethnicity. Other schools have pointed out that cultural pluralists allow ethnicity and ethnic conflicts to play themselves out in a social vacuum. Ethnic identity is thus given primacy over all other forms of identification.²¹

The Marxist approach itself links the emergence of ethnicity to a stage of economic development, namely; the rise of modern industrial or capitalist state. The argument is that social and political behaviour can be reduced to economic interests particularly those of classes, sections and groups. Ethnicity in this context is seen as "a disguised economic interest or 'false consciousness' which stops people from pursuing their class interests."²² Priority research focus is therefore mainly directed on the types of ethno-class linkages developed at various stages in the evolutionary process. Scholars in this orientation note that in Africa, the political class uses ethnicity for purposes of consolidating power by diverting from class questions to ethnic questions. Intra-class, rather than inter-class relations are dominated by ethnic questions arising from social relations of production.

18 D. P. Van Berghe, *The Phenomenon*. Westport: CT: Greenwood Press. 1981.

19 Lijphart, A., *Democracy in Plural Societies*. New Haven: Yale University Press. 1977, donard Horowitz, op.cit., 1991.

20 Okwudiba Nnoli, op. cit., 1989.

21 Akin Magubane, "Political and Conflict Situation in Africa: A New Look", *African Social Research*. Vol. VII, no. 2, June 1969, Cheryl Hendricks, op.cit., 1997.

22 James G. Kellas, op.cit., 1991. P. 36.

On political competition, the argument is that the political class engages in inter-ethnic competition for political power through the strategy of intensive and extensive mobilisation of ethnic support for ethnic political parties for both electoral and non-electoral purposes. Furthermore, such power is used to weaken the influence of 'real' and 'substantive' issues in political competition.²³ This activity obscures horizontal stratification through ethnic populism in order to advance class interests of the elite. Thus, according to Marxists and NeoMarxists, ethnicity is an ideological weapon at the service of the elite in economic and political competition. Nnoli emphasizes this position by asserting that "we cannot fully comprehend the ethnic phenomenon in Africa without an adequate understanding of its historical origin and class character".²⁴ Ethnicity in this conceptualisation does not exist outside class.

Critics of the Marxist approach point to its inadequacy in understanding the nature of the social configuration of African societies and the social relations of production and therefore its inability to explain the relationship between ethnicity and class in political mobilisation.

African societies were, until recently, overwhelmingly peasant not capitalist, even though the rate of urbanization has been very high, social stratification has not yet crystallised sharp class contradictions.²⁵ Although there is a small sector of capitalist production mainly in the cities, however, the modern capitalist classes envisaged in Marxism—the bourgeoisie and the proletariat, are only in nascent formation.

A number of factors make the reproduction of classes extremely difficult; First, sharp class contradictions are sublimated by the indirect, and impersonal mechanisms through which economic surplus is extracted from the peasantry and urban workers. Second, glaring inequalities in landholdings, historically important in the awakening of the masses, are few. The landed class is invariably tiny and geographically concentrated. Third, and perhaps more importantly, kinship ties serve to ameliorate contradictions in the social relations of production whenever they exist. The rich often assist their poor relations which in turn makes the status quo if only a little tolerable.

4. Culture and Ethnicity in Context: Understanding the Impasse

Developments in the post-colonial Kenyan state largely vindicates critics of the Marxist analysis. In the 1960s and 1970s for example, there was optimistic speculation that there was indeed a chance that classes could emerge in Kenya. Colin Leys for example, argued that when favourable conditions such as control of political power would permit, an indigenous African bourgeoisie in concert with foreign capital would be at the helm of capitalist development.²⁶ Similarly, Nicola Swainson envisaged an African merchant class in Kenya, "poised for a move into large-scale capitalist production."²⁷

But whereas it is true that in the 1960s and 1970s, a political elite which was in control of state power rapidly accumulated capital, it had a very fragile base of mere appendage of state structures. Thus the fortunes of this 'indigenous bourgeoisie' changed

23 Crawford Young, "Ethnicity and the post-colonial state in Africa", in Paul Brass ed. *Ethnic Groups and the State*. London: Croom Helm, 1985, PP. 57-93.

24 Okwudiba Nnoli, op.cit., 1989, P. 14.

25 Some discussion of this in relation to ethnicity is contained in Richard Sandbrook, op.cit., 1985.

26 Coline Leys, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism, 1964-1971*. London

27 Nicola Swainson, *The Development of Corporate Capitalism in Kenya, 1918-1977*. London: Heinemann, 1980, P.286.

dramatically once the state withdrew support.

The local 'indigenous bourgeoisie' that gave much hope to Leys and Swainson was an ethnic-based bourgeoisie. It consisted mainly of Kikuyu politicians and businessmen who used their proximity to the President and fellow Kikuyus, to acquire state loans and assistance to further their economic aspirations mainly in real estate and manufacturing. Richard Sandbrook has indeed pointed out the incongruence of this indigenous bourgeoisie since political power allowed it to build economic power and not the other way round. Class relations in this context were determined by relations of power rather than relations of production. A relation of power which was in any case circumscribed not only by its recent origin but also by a very narrow social base.²⁸

Predictably then, when Daniel Moi, a non-Kikuyu assumed power in 1978, he built new alliances around the so-called 'minority' ethnic groups and excluded the Kikuyu from the levers of power. This effectively removed the patronage upon which the 'bourgeoisie' was based and it easily toppled. The Kikuyu bourgeoisie and indeed the typical Kenyan bourgeoisie thus simply designates a dominant class which aspires to become a bourgeoisie. But the aspiration means little more than using the privileges of unfettered political power and not the development of the entrepreneurial behaviour normally associated with the bourgeoisie.

If the bourgeoisie is at best embryonic in Kenya, the growth of the proletariat is equally problematic. What can be called the working class is small and only partially proletarianised. They are not wholly dependent on their jobs for survival. Many people retain rights to land, even if they work in the urban areas until their

retirement. The implication of this 'straddling' is that the workers' attention is equally divided between rural emotional ties and the normal urban concerns. Moreover, the fact that in many cases workers still get food provisions sent to them by their relations in the rural areas serves to seriously undercut the development of a proletarian ethos. Tom Lodge has observed that in case of both South Africa and Kenya, labour industrial action is problematic because worker class consciousness is tempered by rural connections. The quintessential 'working class' strike for example, is thus marked by eclectic influences and generally inchoate socio-political grievances.²⁹

The peasantry is itself clearly not homogenous. Within the peasantry there are considerable disparities in terms of landownership, capitalisation and technology. Moreover, the 'straddling' observed in the case of the working class replicates itself in the case of the peasantry. An individual can be simultaneously a salaried worker and an independent producer depending on the farming calendar or the time of the week. Some scholars have even suggested that, 'peasantisation'-a peasantry in the process of creating itself, is perhaps a more appropriate term.³⁰

In the context of the foregoing, a simplistic transposition of the Marxist class analysis into the African situation more generally, and in the particular case of Kenya might not be illuminating. For example, because of the shadowy lines of class cleavages in Kenya, there is a vast area of shared experience. Other scholars have noted that ethnicity and class function on different levels. Gerhard Mare for example, notes that

²⁹ Tom Lodge, "Political Mobilisation during the 1950s: an East London case study", in Shula Marks and Stanley Trapido eds. *Op.cit.*, PP. 310-335.

³⁰ A further discussion of this is to be found in Jean Francois Bayart, *The State in Africa: The Politics of the Belly*. London: Longmann, 1993.

²⁸ Richard Sandbrook, *op.cit.*, 1985.

class is to be situated and indeed has a structural location in the social relations of production. It has to do with the differentiated control over the means of production. The logic of the capitalist mode of production he argues, is that those who control the means of production, extend such control to the instruments of production which gives them enormous leverage over those who only own their labour. This is the basis of class formation and it is also what determines the antithetical interests that classes come to assume. However, this fact does not mean specific classes will in all their relations assume a single class identity.³¹

Because ethnic groups do not exist outside social identity, there is no structured position in society that determines an individual membership to an ethnic group in the way that class membership does. Many scholars have thus noted that, while everyone belongs to a class, the lived relationships of everyday life are not in themselves class relationships. The crucial point then is that while everyday life is indeed moulded by and delimited by social structure, it does not in itself simply express this social structure.³² Beyond the various contestations and scholarly debate on ethnicity and the ethnic group, there seems an emerging consensus that ethnicity, being in part a social construct, is a situational variable that acquires political salience in the competition for political and economic goods in the state. Ethnicity is thus shaped by the environment, and the threats and opportunities it affords.³³ Constitutional engineering has to address this issue.

Ethnicity is determined by institutional context. It is the overarching structures organized within the state that confer constraints and privileges to ethnicity. These

state institutions include not only the formal institutional structures such as the structure of the government and that of the economy, but also the nation's normative order and associational life. But most available theories that touch directly or indirectly on the issue of the relationship between ethnic groups and the state have missed a proper appreciation of the role of the state in relation to internal struggles of control in ethnic communities and in relation to competition between ethnic groups. One recurring problem, as Paul Brass has pointed out, concerns the treatment of the state. That is, whether it is to be seen as an instrument of a class or of ethnic group? As a relatively autonomous force? A distributor of privileges? A promoter of justice and equality among groups? An impartial arena for conflict resolution or a partial intervener in societal conflicts?³⁴

Brass has further observed that the state is a great prize and resource [commodification of the state], over which groups engage in a continuing struggle especially in societies that have not developed stable relationships among the main institutions and centrally organised social forces. It is also a distributor of resources, which is nearly always done differentially.³⁵ The state in such a case can be captured by particular groups or segments for periods of time to serve their own interests. By definition, the state then comprises a complex set of persisting institutions over which social groups are engaged in a struggle for control.

Seen in the context of Africa, it has been argued that the colonial state invested an antidemocratic ethos that continues to pervade politics to the present day. Crawford Young has argued that the post-colonial state in Africa inherited "structures, its quotidian routines and practices, and its more hidden normative theories of

³¹ Gerhard Mare, op.cit., 1993.

³² ibid

³³ John Sharp and Emile Boonzaier eds. Op. cit., 1988.

³⁴ Paul Brass, *Ethnic Groups and the State*. London: Croom Helm, 1985.

³⁵ Paul Brass, op.cit., 1985.

governance" from its colonial predecessor.³⁶ The colonial state in Africa had a pervasive impact on patterns of subsequent cultural identity and conflict through the unequal development of its territorial space. The role of differential access to modernisation is well studied; the locus of major urban centres, the routes chosen for major axes of communication, road and rail, the siting of major centres of cash employment, the distribution of post-primary education facilities, the production zones for the export crops encouraged or imposed by the colonial administration: all these factors facilitated ascension into higher social roles of relatively large numbers of some ethnic communities while marginalizing others.³⁷

Closely related to the group differentials in access to social mobility through uneven spread of colonial agencies was another form of categorisation: this time a consequence of stereotypical qualities imputed to entire ethnic groups. Ethnic categories were perceived as receptive or refractory towards the colonial presence. Relationships with the former were cultivated, while the latter, in the formative colonial years, had to be neutralised. Many authors have pointed out that important policy consequences flowed from these group images. Missions, with very limited resources in the early years, were anxious to sow their seeds in fertile soil; the groups viewed by the Europeans as "open to civilisation" were favoured targets. The mission in turn brought the schoolhouse, and "receptivity" became a self-fulfilling prophecy. Labour recruiters concentrated their efforts amongst groups believed to be "industrious", and amenable to industrial discipline. A generation later, this meant relatively strong urban representation, and

thus favoured access to the more abundant agencies of mobility concentrated in towns.

Mahmood Mamdani recently observed that the stratified nature of the colonial state was to be discerned more in the mode of rule which resulted in the creation of a 'bifurcated' state: divided between a customary law-run native authorities and civil law-run central state. The former corresponded to ethnic groups, however arbitrarily defined, and was characterised by coercive power at the service of colonial economic objectives. The latter emphasised civil rights and associated regime of rights which applied to the colonial citizenry as opposed to the native subjects in a racially defined polity. In his view, the failure of democratisation to rise above particularistic tendencies in Africa is a function of the failure of the post-colonial state to fundamentally restructure the 'bifurcated' state.³⁸

It would do well however, to appreciate with Crawford Young that the interaction between the state and ethnicity in Africa, is multidimensional and varied. To begin with, the enormous scope of state action characteristic of the modern post-World War II polity places high stakes on control of the state by elites. The interventionist, regulatory, and statistic policies which were the norm in much of this period, reoriented the state very much as the authoritative site for the distribution of societal resources, itself a process of high visibility and prone to careful and continuous calculation of cultural as well as other group benefits. Further, the imperative of modernisation undergirded in theory and practice the expanding edifice of the state. If the state is seen as the midwife of progress, then its enhancement in the face of multi-cultural reality becomes a pre-eminent objective of the ruling elites.³⁹

³⁶ Crawford Young, *The African Colonial State in Comparative Perspective*. New Haven: Yale University Press, 1994, P. 41.

³⁷ See for example, Crawford Young, op.cit., 1985, Richard Sandbrook, op.cit., 1985.

³⁸ Mahmood Mamdan, *Citizen and Subjects*, 1996.

³⁹ Crawford Young, op.cit., 1985.

4.1 Interpreting the Ethnic and Cultural Impasse

The general institutional hallmark of the Kenyan state and perhaps in tandem with the continental pattern has been one in which rational-legal institutions have always cohabited with 'big man' politics. Political rule is highly personalised, despite the official existence of a written constitution. In the one party system under which the country was ruled for almost three decades of its post-independent life, the President ruled with minimum legal encumbrances. His personal wishes were equated with official policy, with the consequent result that his whimsical proclamations became the basis upon which the lives of the citizenry was ordered. He alone exercised such prerogatives as the appointment of individuals to important public positions, a discretion which he was not averse to use to shore up political support.

Public sector jobs were used solely as sinecures for prebends and economic rents for favoured sections of the political elite, which invariably included those related to him by blood and members from his ethnic group. Incipient primitive and unproductive accumulation on the part of an elite, ever so insecure, soon ensured a pattern of use of private office for private accumulation. Indeed under the one party system, politics in Kenya was a cottage industry of private expropriation. Politicians who supported the regime were able to make ill-gotten wealth in short spans of time. Inevitably, this process led to a pervasive atrophy of state institutions and an elaborated general state of poverty for the average citizen.

But if this kind of politics led to a fairly predictable economic decline, it equally entrenched intangible but enduring institutional values. Perhaps the most important of which is that as the state squandered its vertical and horizontal

legitimacy, the citizenry withdrew into smaller but reliable social networks of clans and ethnic groups. These, alongside other structural factors, were to prove a major impediment to the subsequent democratisation process the country engaged in from the early 1990s.

On cursory appearance though, the process of democratisation in Kenya has made a significant effect on the socio-political configuration. Since late 1991, a multi-party political system has been put in place and many political parties now exist in competition with the ruling party and theoretically offer alternative governments. Political life itself is relatively more relaxed, civil liberties generally guaranteed and associational life has witnessed a phenomenal vibrancy marked with a buoyant civil society that is ever keen to point out the mistakes of the ruling elite. Moreover, the country has undergone two multi-party general elections-in 1992 and 1997, and will soon have a third multi-party general elections this year.

But a more nuanced view of the process of change in the country would reveal that democratisation in Kenya has not fundamentally changed the contours of Kenya's politics. To begin with, political liberalisation in the country was forced down upon a recalcitrant ruling elite determined to hang on to power by all means. Internal protest against the authoritarian government of Daniel Moi had a long history, but basically peaked in the 1980s after receiving considerable boost from the prevailing international trend towards a generalised collapse of single-party systems. It is significant though, that even against the evidence of a 'Third Wave' the Moi regime had expected to hold out. It was, therefore, not until western countries withheld aid to the regime that Moi relented to the demands for a multi-party system, but continued to profess his antipathy to the system.

Politicised ethnicity, a prominent characteristic of the one-party state in Kenya, easily fed into the democratisation in a number of ways. For example, for the Kalenjin - Moi's ethnic group and the favoured community, institutional transformation as entailed in democratisation represented a great threat to extant political and economic privileges. They were thus least predisposed to support reform measures. On the other hand, ethnic outgroups embraced democratisation mainly as an opportunity to overturn a system, widely perceived as antithetical to their political and economic aspirations.

Quite predictably then, the Kalenjin supported the ruling party, KANU, while the new opposition parties were enthusiastically embraced by the ethnic outgroups, but especially by the numerically significant Kikuyu, Luo and Luhya. Within the opposition itself, ethnic fracturing was not long in coming. The main opposition movement, the Forum for the Restoration of Democracy (FORD), which had been the vanguard in the fight for democracy collapsed under the weight of ethnic divisions as the outgroups repositioned themselves into various ethnic factions since electoral victory seemed near and predictable.

In the context of a fairly polarised political environment, the Moi regime which still enjoyed such advantages of incumbency as control of the instruments of force and other resources of the state, managed to stay in power. The two multi-party general elections referred to above, had fairly questionable but predictable outcomes in which the Moi government is widely believed to have extensively bribed voters to rig the elections. In the 1992 general elections, the regime printed huge amounts of money, for electoral bribery, which later caused massive inflation in the country. The regime was also implicated in ethnic murders of people it believed supported the

opposition.⁴⁰ But of perhaps even greater significance is the fact that the institutional expression of multiparty politics in Kenya whether in terms of political party formation or informal political alliance and lobbying, expresses itself purely on ethnic lines. Political parties invariably represent specific ethnic groups.

Typically, a party is headed by an ethnic patron who engages with the electorate chiefly through the recruitment of clients. The parties themselves have very limited social appeal as they are generally characterised by shallow social roots, authoritarian leadership and inarticulate political programmes and policies.

Voting patterns in both the 1992 and 1997 elections confirm that ethnicity is the primary form of political organisation and that presidential candidates and political parties get support predominantly from their ethnic regions

40 Michael Bratton and Nicholas Van de Walle, *democratic Experiments in Africa: Regime Transitions in Comparative Perspective*. United Kingdom: University of Cambridge Press, 1997, P. 204.

Table 1: 1992 Presidential Election Results by Province and Candidate.

Province	Moi KANU	Matiba FORD-A	Kibaki DP	O. Odinga FORD-K	Total Vote
Nairobi	62,402 (16.6%)	165,533 (44.1%)	69,715 (18.6%)	75,898 (20.2%) :	375,574
Central	21,882 (2.1%)	621,368 (60.1%)	372,937 (36.1%)	10,765 (1.0%)	1,034,016
Eastern	290,494 (36.8%)	80,515 (10.2%)	398,727 (50.5%)	13,064 (1.7%)	789,232
North East	57,400 (78.1%)	7,440(10.1)	3,297 (4.5%)	5,237(7.1%)	73,460
Coast	200,596 (64.1%)	35,598 (11.4%)	23,766 (7.6%)	50,516 (16.1%)	312,993
Rift Valley	994,844 (67.8%)	274,011 (18.7%)	111,098 (7.6%)	83,945 (5.7%)	1,467,503
Western	217,375 (40.9%)	192,859 (36.3%)	19,115 (3.6%)	94,851 (17.9%)	531,159
Nyanza	111,873 (14.4%)	26,922 (3.3%)	51,962 (6.4%) •	609,921 (74.7%)	816,387
Total	1,962,866	1,404,266	1,050,617	944,197	5,400,324

Source: Daily Nation, 5 January 1993, p. 1

Table 1:2: Distribution of Parliamentary Seats by Province in the 1992 Elections.

Province	KANU	FORD K	FORD A	DP	KNC	KSC	PICK	TOTAL
Nairobi	1	1	6	0	0	0	0	8
Central	0	1	14	10	0	0	0	.25
Eastern	21	1	0	9	1	0	0	32
North Eastern	8	1	0	0	0	0	1	10
Coast	17	2	0	1	0	0	0	20
Rift Valley	36	2	4	2	0	0	0	44

Western	10	3	7	0	0	0	0	20
Nyanza	7	20	0	1	0	1	0	29
Total	100	31	31	23	1	1	1	188

Source: Throup, D. and Charles Hornsby, Multi-Party Politics in Kenya. London: James Currey, 1998 p.443

Table 1:3: Results of 1997 Presidential Election in Kenya

Province	Moi (KANU)	Kibaki (DP)	R. Odinga (NDP)	Wamalwa (FORD K)	C. Ngilu (SDP)
Nairobi	20.56%	44%	16.23%	6.82%	10.85%
Coast	61.05%	13.4%	6.07%	2.97%	10.85%
N/Eastem	73.08%	18.60%	0.33%	7%	0.58%
Eastern	35.87%	28.81%	0.75%	0.68%	32.35%
Central	5.5%	88.73%	0.68%	0.31%	2.95%
Rift Valley	69%	20.9%	2.19%	6.22%	0.69%
Western	44.67%	1.38%	1.19%	48%	—
Nyanza	23.52%	15.05%	56.55%	1.59%	1.57%

Source: Ajulu, R. 'Kenya's democracy experiment: the 1997 elections in Review of African Political Economy Vol. 25 Iss: 76 1998 p 283

Table 1:4: Distribution of Parliamentary seats by Party and Province in the 1997 elections

Province	KANU	DP	NDP	FORDK	SDP
Nairobi	1	5	1	0	1
Coast	18	2	0	0	0
N/Eastem	9	0	0	0	0
Eastern	14	8	0	1	10
Central	0	17	1	0	5
Rift Valley	39	7	0	3	0
Western	15	0	0	9	0
Nyanza	8	0	19	4	0
Total	104	39	21	17	16

Source: Ajulu, R. 'Kenya's democracy experiment: the 1997 elections in Review of African Political Economy Vol. 25 Iss.76 1998 p283

The tables above disaggregate the 1992 and 1997 Presidential and Parliamentary election results by the leading candidates and also by Provinces. The political parties headed by these candidates are included next to their names. To understand the ethnic accent of these results however, one needs to have some basic information on not just ethnic groups in the country but also on ethnic coalition patterns. Moi, the KANU candidate who won both presidential elections in 1992 and 1997, is from the Kalenjin community, who occupy most parts of the Rift Valley province but are also to be found in parts of the Western Province. His 'homeboy' status thus largely accounts for the massive support he received mainly in the Rift Valley and in Western province. The second candidate in the 1992 elections, Matiba, a Kikuyu, also drew huge support from the heavily Kikuyu populated provinces of Central and Nairobi. A large number of Kikuyu diaspora is also to be found in the Rift Valley which accounts for Matiba's equally impressive support from the province. In the case of Western province, Matiba's good performance was as a result of choosing Martin Shikuku, a native of the region, as his running mate. To some extent, the same argument explains Kibaki's, another Kikuyu presidential candidate's, varied fortunes in the provinces; Similarly, Oginga Odinga, a Luo, received majority support from the Luo-dominated Nyanza province.

In the 1997 presidential elections, the ethnic voting pattern was repeated with little changes if any. Two presidential candidates in 1992, Oginga Odinga and Matiba, were absent for reasons of death and voluntary withdrawal respectively, thus Kibaki, the only Kikuyu candidate came second to Moi, but took majority votes in the traditional Kikuyu provinces. The new entrants Kijana Wamalwa and Charity Ngilu of Luhyia and Akamba ethnic group respectively, received wide support from their home provinces. And with the demise of Oginga Odinga, his

position was taken by his son, Raila Odinga, who was the most widely supported presidential candidate in the Luo province of Nyanza. Moi's votes largely came from the same sources explained for 1992 presidential results.

An important variable from ethnicity but not entirely unconnected to it, is the fact that the 'home' provinces of Moi and KANU, inordinately enjoy a large portion of parliamentary seats. For example in 1992, Rift Valley had 44 parliamentary seats which were increased to 49 by 1997 and in both cases, KANU, got most of them. This obviously tremendously increased the party's total tally and eventual parliamentary strength vis-à-vis other parties. This state of affairs is mainly a result of constituency gerrymandering by KANU, in which its traditional constituencies were allotted more parliamentary seats. Additionally, Moi's apparent popularity in the Eastern, North-Eastern and Coast provinces in both elections is explained by a not too subtle use of a combination of carrot and stick in those provinces - indeed an expected advantage of incumbency on both occasions.

In the context of the above analysis, it would appear that ethnicity and ethnic voting is firmly rooted in the politics of the country. This being the case, it would be an expensive oversight to fail to seek to accommodate Kenya's ethnic diversity in a more positive manner in the new widely anticipated political dispensation.

5. Towards A Praxis: Managing Culture and Ethnicity in the Constitution

The view proposed in this paper is that to the extent that the broad contours of political and economic relations in a democratic state are determined by a pluralistic constitutional process, social formations, whether defined as ethnic groups or other categories, have a leverage in the kind of state the constitution

creates and patterns. Thus, though the role of the constitution ought not be overemphasised, it is not merely a policy-outlining process, balancing different notions of equality against each other; nor an instrument for class domination but a relatively autonomous process that potentially can act to arbitrate conflicts arising from divergent interests of extant social forces.

The constitution creates and structures the various institutions that finally determine the form and content of political and economic relations in a polity. Institutions hereby referring to "sets of constraints on behaviour in the form of rules and organisations; a set of procedures to detect deviations from rules and regulations, and a set of moral, ethical behavioural norms which define the contours that constrain the way in which the rules and regulations are specified and enforcement carried out."⁴¹

The institution-creating role of the constitution thus assigns a mediating role to the constitution in political change in the way that it structures relations of power among contending groups. Given the dialectical and conflict-based trajectory of state evolution, the state is in nearly all cases characterised by tenacious partisan contention. It is the underlying role of the constitution to constantly configure and reconfigure the state.

In the context of our preceding analysis of the continuing problematic engagement of ethnicity in Kenya's politics, a critical area of investigation should be on how to positively manage and reorient cultural and ethnic diversity in the new constitution for common good.

Marina Ottaway has observed with other scholars that one of the critical challenges to democratisation in Africa is how to create

institutional mechanism to give positive meaning to ethnic diversity in the various polities in the continent. She has opined that African countries remain generally reluctant to accept that at least some of the demands by ethnic groups are legitimate and that in any case, efforts to outlaw ethnicity are futile. In a large sense, democratisation in multi-ethnic societies requires not the suppression of ethnic identities, but their accommodation.⁴²

In agreement with this latter argument, which in any case, is the predominant view among many other democracy scholars, watchers and practitioners, the last part of this paper attempts a cursory overview of some of the trodden paths in recognising ethnic diversity in democratic dispensations. This is in appreciation of the fact that while there definitely obtains unique and particular circumstances in many a democratising polity, the general principles underlying positive management of ethnic diversity is now well established and there might be no need to reinvent the wheel.

5.1 *Citizenship Rights: Jus Soli or Jus Sanguinis*

Citizenship rules in Africa are especially important as boundary mechanisms; they determine who is and who is not a citizen and therefore attempt to give meaning at the level of the individual and the community to the cadastral boundary lines originally created by Europeans.

Jeffrey Herbst has observed that nationality laws are critical in defining the shape of the nation, since the institutions of the state anchor the nation in historical continuity.⁴³ And since the purely emotive ties between populations and African states are not

⁴¹ Michael Bratton and Nicholas Van de Walle, op.cit., 1997. P.40.

⁴² Marina Ottaway, *Democratisation and Ethnic Nationalism: African and Eastern European Experience*. United States, 1994.

⁴³ Jeffrey Berbst, *States and Power in Africa: Comparative Lessons in Authority and Control*. Princeton University Press, United States, 2000.

obviously strong in most cases, the nationality laws themselves can be understood as reflecting critical aspects of the citizenship ideal in Africa.

Citizenship laws can be put in two general categories; *jus soli* and *jus sanguinis*. *Jus soli* ascribes and assigns citizenship to all those born in the territory, irrespective of the nationality of the parents. *Jus sanguinis* on the other hand, emphasises citizenship through descent irrespective of the location of birth.

Jus sanguinis are attractive to those who want to promote a heightened sense of nationality. Citizenship laws based on *jus sanguinis* are often designed to retain at both a factual and a symbolic level, to keep a people together and to prevent certain groups from becoming citizens even if they were born within the national territory. Critics have pointed at that inevitable cost of allocating citizenship based on criteria more complicated than location of birth is to exclude individuals and whole groups who are physically located in a state but who cannot claim descent from ancestors who were nationals. Such citizenship regulations may generate more intense levels of identity because states are able to screen potential citizens to see if they meet whatever set of desired characteristics leaders believe are central to national identity. The result will almost always be some number of people who are in the polity, but not of the polity because the location of their birth was not enough to qualify them for citizenship. Potentially, this can have far reaching destabilising consequences for the polity. Moreover, the costs of exclusion are likely to be very high in ethnically heterogeneous polities.

In general, citizenship laws in Africa bear a close, but not absolute, connection to the practices of their colonisers at independence. For example, all the francophone countries follow the French practice of relying

principally on citizenship by descent but they have also been influenced by the British practice of granting citizenship to anyone born in the territory. Given the noted dangers and pitfalls of *jus sanguinis* citizenship regulations, Kenya would be well advised to maintain its *jus soli* status quo in the new constitution

5.2 *Group and Minority Rights*

The defence of individual rights, which is an indispensable aspect of a democratic system is not by itself a guarantee of minority rights. In highly differentiated societies there is therefore a strong case for protection of group rights, if just to defuse ethnic tensions.⁴⁴ The protection of minority rights cover a wide terrain and may take various forms, some of the forms might be necessary to entrench in the constitution while others can be policy derived. The exact content of these rights will in most cases be determined by the exigencies of existing situations but must be supported by a large constituency of the polity.

Kenya's experience shows that demands for protection of minority rights emanate from two broad categories of social formations: ethnic constituencies and an array of groups that transcend specific ethnicities. The former group composes those groups who consider themselves historically less privileged in terms of access to opportunities and resources within the state. The latter group includes a disparate array of groups such as women, children, the aged, and the disabled among others. The position of the marginalized groups is a function of institutional inequity reproduced in the state starting from the colonial and into the post-colonial times. Attendant issues to these demands have been discussed in a generalized way in an earlier part of this paper.

⁴⁴ Marina Ottaway, op.cit., 1994, P.4.

It should not be assumed however, that demands for minority or group protection enjoys unanimous support in the country. Some social critics have argued that just any group can justifiably claim a "marginalized" status if sufficiently mobilised. The definition of marginalisation they aver, is nebulous as to include just any group. More fundamentally, it has been pointed out that protection of collective rights often conflicts with individual rights which is a critical basis of a democratic dispensation.

Establishing a balance between group rights and individual rights thus, requires a delicate compromise by the major parties to the conflict. Ottaway has suggested that a workable solution, however, can be greatly assisted by the development of principles and a set of institutional models that seek and enjoy support from the broad array of forces from both sides of the divide.⁴⁵

But even before this is attempted, there does exist in Kenya today a general acknowledgement across the board of political players that the rights of such groups as the women, children and the disabled require special legislative attention that will seek to equalise the playing ground for them in the politics and economics of the country. Thus, though there is contention on specific measures and mechanisms to achieve this goal, a body of opinion seems to be converging on affirmative action regime of laws. Public opinion in the country will however, still have to be educated that affirmative measures are by definition short-gap interventions to ameliorate extant inequities and therefore need not be seen as permanent. Perhaps such an education will help salve considerable agitation from assorted apprehensive groups. The issue of protection of ethnic constituencies or groups is even more vexed and problematic. There is a strong case however, for greater local autonomy as a

away of giving groups control over their affairs. Such initiatives will perhaps counsel greater devolution of political and economic powers than already exists in the current constitution.

5.3 Federalism as a Mechanism of Group Protection

There is an ongoing debate on the federal option in Kenya as a way of protecting group interests. By and large, the debate has been useful even though very unstructured and convoluted. By way of providing an 'objective' trajectory to the arguments and considering its general usefulness to the whole question of group protection, we hereby attempt a quick summation of the pros and cons of federalism.⁴⁶ As a constitutional form of government, federalism is the system in the middle-conceptually sandwiched between a more decentralised confederate system and a more centralised unitary system. In a federal system both national and sub-national governments have constitutionally defined powers. Both typically have the power to regulate individual behaviour and to make laws. Each level of government has a complete set of legislative, executive and judicial institutions. An alteration in the constitutional powers of either level of government typically requires the approval of both levels through the constitutional amendment process.

(a) The Advantages of a Federal System

1. Federalism presumably brings government closer to the people by creating constitutionally defined state governments which cannot be arbitrarily abolished or rendered powerless by a

⁴⁶ The populist perception of federalism in Kenya known in local parlance as *Majiboisim*, associated with ethnic purity and expulsions of so-called foreigners, however, does not conform to any realistic experimentation of a federal system of government.

⁴⁵ Marina Ottaway, op.cit., 1994. P. 54.

capricious national government. State governments cover a smaller geographic territory than does the broader and bigger central government. The small size of the state governments make state officials more easily accessible to the average citizen than national officials. Additionally, where state governments correspond to homogeneous ethnic groups it is often assumed that they would be more attuned to the interests of the people

2. Federalism provides multiple points of access to citizens since they have many avenues of entry—two levels of government have more access points than does a single central government. Additionally, each level has a complete set of government institutions. And Citizens who fail to achieve satisfactory resolution of an issue or problem in one branch of state government may turn either to other branches of the same government or to institutions at the federal level.
3. A federalist structure of government invariably has more checks and balances than a unitary system of government. For example, multiple governments reduce the probability that one political party or faction can capture the entire governmental machinery and act arbitrarily and whimsically. A federal system more than a centralised one, provides the opportunity for electoral success for opposition parties and therefore reduce the chance of single party hegemony.
4. Sub-national governments provide an opportunity to experiment with unproven policies before adopting the policies at the national level
5. Not only does a federal structure allow different policies to be adopted in various parts of the country, but

federalism also confers policy diversity which is desirable and even necessary to meet differing local needs. Since the country is not uniform, it is only natural that government policies reflect that diversity. Moreover, the application of rigid national standards obfuscates local cultures which is not necessarily a good thing.

(b) The Disadvantages of a Federal System

1. Diversity in state laws creates chaos, unfairness and inequities.
2. Federalism may result in excessive decentralisation and duplication of service provided by the various levels of government. Both federal and state governments are involved in and sometimes overlap in the areas of education, transportation, health etc. Critics charge that much of the service duplication in federalism is needless and wasteful
3. Even when federal and state governments coordinate to provide a common service rather than duplicate efforts, filtering services through multiple layers diminish accountability and cause slow and wasteful delivery.
4. Wealthier regions of the state have greater resources to deliver higher levels of services more effectively. By decentralizing financing of government services to the regional and local level, federalism fails to correct these inequalities in resources and wealth.
5. Federalism also fails to correct inequities among the service levels provided by regions, thereby making national standards difficult to develop and administer.
6. Because federalism provides two levels of government, it by definition entails a

double taxation to the citizenry, which makes it more expensive than a unitary centralised system of government.

7. Further, it should be noted that there are no one type federal systems. Some federal systems confer greater overriding and veto powers to the national government as in the case in the United States of America while others vest disproportionately more powers in the region as in the example of Canada. With specific regard to a federal system orientated to providing ethnic or group protections, it should be noted that it is only viable in places where ethnic groups occupy proximate spatial returns in the country.

6. Concluding Remarks

The thrust of the argument in this paper has been that the multi ethnic character of the Kenyan nation-state is a fundamental fact which cannot just be wished away. In

designing a durable constitutional dispensation, there is not only a need to acknowledge this fact, but also a conscious effort should be made towards tapping the positive values of this diversity. One way of doing this would be to entrench certain rights within the new constitution which can act to deepen a healthy cohabitation of the various groups.

For the reason that the general debate on the subject is only in the formative stages, this paper has been, indeed, duly reticent in providing explicit directions. This also is in cognisance of the fact that the final decisions on these weighty matters must of necessity emerge from a democratic process involving very pluralistic and varied participation. This paper would thus have achieved its objective if the ruminations included herein, are considered more as 'roadmaps' meant to generate more structured debates rather than strict stipulations.

ETHICS AND LIVING VALUES IN CONSTITUTION

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1. Introduction

1.1 Definition Of Ethics

Ethics is a moral law of human conduct or behaviour considered from the point of view of good or evil. It is an action, which is morally good or morally evil. If some behaviour is according to moral law, it is ethical. Every person has a right to be treated in a dignified manner at every stage of his life from conception, infancy, childhood, adolescence, adulthood and old age. Since there is no stage at which he ceases to be human, any mistreatment towards him is always a serious matter and it is considered morally bad.

The word ethics is derived from the Greek noun *ethos* meaning "the customs and conventions of a given community". There is a similarity of the origin of the two words: ethics and morality. Ethics is therefore often used as a synonym of morality as when we speak of religious ethics, social ethics, personal ethics, professional ethics. Within this context, ethics stands for set of norms guiding human conduct. In this way, religious ethics refers to the norms for religious living, governing behaviour as acceptable by religious people.

Central to ethics are the norms which serve as moral standards we use to evaluate human conduct, or human behaviour in terms of right or wrong, morally good or morally bad. For all practical purposes, these norms or standards reflecting moral principles and values are often expressed in the form of laws, rules and regulations. Take for example the basic traffic rule that a bus

should not travel beyond 85 km per hour. If a bus driver allows the bus to travel at 100 km per hour, he/she is not simply breaking a traffic rule or law. His/her behaviour violates the norms of responsible driving by endangering the lives of the passengers in the bus. The traffic rule merely expresses what responsible driving demands-not to drive faster than is permissible. There are three sources of morality: religion, society and the human person, i.e. religious ethics, social ethics and personal ethics.

Religious Ethics:- There is a supernatural source of moral standards for the believer. Religious ethics finds expression in the laws of God, as found in sacred writings such as the Bible, Quran, Tora e.t.c. and in religious traditions. For a religious person stealing or killing is wrong because God forbids it, caring for one's neighbour is morally right, because God commands it. Knowledge of divine laws is required above all-no further argument seems necessary.

Social Sources of Morality :- These include family and parental authority, the clan and the authority of the elders but also the school, neighborhood, the peer group. There is further the wider community, which expresses its norms through customs and conventions through public opinion, through national and international laws.

1.2 Definition of Living Values

Living Values is re-discovering human potential (values) and developing them for a better living. Human values is an expression of internal state of self worthiness of a person, or recognition of inherent worth of a

person; the value of human life. Noting that each human has potential for a peaceful, loving life, we train our minds to see only good in people or the value of their living. What we think, so we become. If we think evil, we become evil, if we think good we become good. The knowledge of Living Values help us to focus our minds on the potential or positive side and worth of humanness.

Focusing on reaffirming faith in the dignity and worth of the human person, the individual can uncover a capacity to stretch his mind beyond the limits of the current reality and recognizes his or her full potential not only in relation to self but also to others. A person who really understands his or her own inherent worth and respects that of others will come to know that worth is not something assigned by external forces, but rather comes from a source that is universal. Living Values education helps us to touch the source, guiding the learner toward a more profound understanding of the true nature of self worth, the uniqueness and the dignity of man, created or made by one God for a purpose on earth.

1.3 Concerns about Ethics And Values

Growing number of educators around the globe and various governmental and non-governmental organizations have been working on ways to introduce values-based education. This is in response to the increase in all societies of violence, suicide, various forms of addiction and child abuse. There is an increasing recognition that there is a missing dimension in the educational system around the world, which is the lack of focus on the affective domain skills development.

Mr. Jaques Delors in his Report: *Learning: The Treasure Within Cities*, documents the fundamental role of education in personal and social development and the necessity of building the awareness and ability to operate

within the humanistic values we all share. This report to UNESCO of the International Commission on Education for the Twenty-First Century by Jacques Delors and other leading educators served to invigorate a debate on the future of education. The report was the idea of Prof. Federico Mayor, director - general of UNESCO who strongly believed in education as a means of creating peace and International understanding.

A UNESCO conference in Australia in march of 1998 was organized around four pillars: learning to do, learning to know, learning to live together, and learning to be. While the first two are quite expected in the field of education, the latter two are not. They were explored as a result of the work of the Commission and its concern with crises of social cohesion. We must also "Learn to Be" and "Learn to Live together". Lifelong learning and the rekindling of the Humanistic values was a focus for educators gathered from around the world.

The United Nations is a universal International Organization created to maintain world peace and security and to work for social progress. United Nations is a forum for all Nations, represents the highest aspirations of the world people for a world free of war, poverty, repression and suffering. The Universal Principles of the United Nations charter - faith in fundamental human rights, social progress, peace and development - these values and concepts have remained as valid today as when they were enshrined many years ago. The United Nations is a success story of the value of cooperation.

In values-based education, the child is recognized as an individual, a whole person who functions as a complete being with other beings. Each aspect of personality is linked with another; the cognitive domain cannot be separated from the effective domain. The living values educational programme provides tools for educators to

introduce a values-based educational approach.

Around the globe there are newspaper articles blaming educators for declining test scores and problems with today's youth. The negative view is such a contrast to the picture that is seen in reality. We see dedicated educators, working hard at school, caring for students, striving to motivate and teach. We see teachers as those who continually respond to the needs of youth and the needs of the society. Yet, there has been a tremendous difference in the last 20 to 30 years in terms of overall student attitudes and behaviour. The difference is not in the determination of professionalism, nor the care of teachers; the difference is in the preparation of children who enter the school system at the state of our society.

In recent years, two trends have especially increased the challenges of raising and educating children-growing materialism and violence in films. These have greatly impacted on families, diverting time and focus always from traditional pastimes and the transmission of cultural and spiritual values. There is profound influence of violence in films on youth. And for many children, there is far more time in front of the television than in front of their parents. One parent recently said that the American Basketball star, Michael Jordan, had more effect on his children's values than he did! More than four hours of television a day actually diminishes the development of children's psychomotor, language, and social skills.

Values have traditionally been transmitted by parents and the communities within a society. The call for values in education is actually once again asking educators to be heroes - to fill the void within society. The call is asking educators to be leaders in recognizing that technology and materialism is not enough. As we start the 21st Century, I feel we must tap into the creative energy

and universal values that each human being holds within. Not only must we renew efforts to educate our children, parents and ourselves, but also to utilize our hopes and dreams for children and the world to provide the emotional impetus. As educators we have the power to facilitate the development of universal values - to reconnect with the values of our culture(s) and the universal values that unite us all.

Living values - an education programme provides a means for educators around the world to collaborate - creating, sharing and dialoguing as they introduce a whole series of value-based educational experiences. This cooperative partnership has produced positive results in a variety of educational settings. The proposals are based on different types of contributions. Some are reflections, others are activities within school curricula and other educational contexts. Each explores optimizing educational action that have values at their core. Some of these ideas create situations of simultaneous teaching and learning where values become tools for building, sharing and integrating - where learning is effective and an expression of what we believe in and what we live for.

This programme provides an important alternative that allows children and young adults to explore and understand values while immersed in their daily school experience. In this process, it is vital to understand the underlying idea. There is understanding that each human being has the potential for peaceful, loving attitudes and actions. When we as educators create open, flexible, creative, and yet orderly values-based environments, students will naturally move closer to understanding their own values and develop their own way of thinking. Children and young adults can perceive, understand, and act in a way that promotes peace, justice and respect for diversity. This program does promote a vision of a world free of exclusions, a vision

of respect and dignity for each person and culture.

In the globalised world, and the myriad forces and trends within it, are putting pressure as never before on individuals, society and social structures and systems. Amongst others, educationalists worldwide are tackling the challenges of preparing the next generation for a world that is not only very different from the one they grew up in but is also in many ways less safe, secure and caring. Each day brings news of events somewhere in the world - if not in our neighbourhood - that highlight a lack of personal, moral and social values. So it is heartening that educationalists are seeking to address this crises in our social fabric with education programmes and materials such as Living Values.

Yet notwithstanding the clear need for a renaissance of values within society, there are some who resist such moves. Perhaps this sensitivity - or even reluctance sometime to touch the topic at all - indicates an awareness of its complexity but also the importance of an issue that touches the fundamentals of human life and the very spirit of our being. For values relate to who we are and how we choose to live and let live.

And it is an understandable reluctance, given for example, the attempts over the years of some individuals and institutions to insist that others share the values they endorse. For no matter how well-intentioned such efforts may be, such imposition on others amounts to a moral bullying that fails to recognize and respect the individuality of others and their right, and ability, to judge for themselves and form their own opinions, beliefs and values.

But if the dangers of dogmatic indoctrination, or absolutism, are apparent, so are the pitfalls of a cultural relativism that suggests that anything goes and that there is

no such things as right and wrong, good and bad, when it comes to values and value choices. Is there an alternative to such extremes, or to inaction based on awareness of the risks they involve? Is it possible, without creating polarities of constructive and responsible and leading to more desirable consequences than others? Living Values attempts to offer a viable alternative to the troubled routes of extremes or inaction while also indicating a way forward with regard to the latter question. Thus while some may feel that to speak of certain values as being universal is presumptuous, it is certainly possible to identify values which attract very widespread endorsement and acceptance.

We live in a fast changing world - peaceless, restless, friendless, often ugly, sometimes volatile, and almost always unhappy. Indeed, it seems from our daily fare of news around Kenya, Africa, and the rest of the world that there is hardly any good news. Our headlines are dominated by personal violence, drug abuse, marital conflicts, poverty and the arrogance of power. In this atmosphere families bring up their children, uncertain of their future prospects; schools battle children and sometimes their teachers, on matters they fail to resolve amicably in their own school environment; and citizens watch as they see the traditional citadels of psychic, peace moral values, the churches, temples and synagogues, gradually dissolving into internecine bickering and doctrinaire conflicts.

Yet, the school, catering for our children up to the age of 18 or thereabouts, has become in reality the agent of the contemporary society for providing learning prospects, the inculcation of eternal values for lifelong living, and the demonstration of the power of communal life and teamwork at this young age.

From what we can perceive from real-life evidence of the situation of our schools, and

the statistics of the performance in society of our graduates, as well as the practical evidence of a large and swelling roll of dropouts, the transformational mission of the school system is not being fulfilled. It was a primary target of the subjects of "Social Studies and Ethics" and "Religious Knowledge" in our school curriculum to provide a foundation upon which an integrated, self-aware, self-confident, socially-cooperative young personality can emerge to being an adult life, in whatever capacity, in an assured, positive frame of mind.

Kenya just as all other countries of the world do, need to develop a new thrust to address this crisis in a practical, real-life situation within the school in close collaboration with the parents of the children - and to do so without overloading the curriculum and co-curricular activities.

2. Learning of Human Values

There is a great deal of anxiety among some educationist that our rapid progress in control and adoption of our material world has not been marched by corresponding advances in the development of human character, and/or values. Many observe that moral values are disintegrating on all fronts, in both public and personal life.

The very survival of our society and the world in general, depends upon a widespread renewal of individual commitment to an active moral life. Human kind must rediscover his values and recapture a feeling of dedication to noble ideals. The Living Values educational programme is founded in the belief that such a renewal is possible. Teaching of Living Values encompass a developmental -vision of human potential that the pursuit of the divine values will lead to right action from the individual and this will promote a better world to live in.

2.1 *Human Values in the Mind*

We are endowed with five (5) senses in our brain. Our eyes use light, which is an electromagnetic energy to see the material world. Our ears are sensitive to many gases in the air. We taste substances with our tongues and underneath our skin are thousands of nerve ends which tell us when we come into contact with other things.

2.2 *Conscious Mind*

It is our conscious mind that registers impressions relayed through one or more of the five senses. When we see or hear something, or one of our other senses has message to pass to us, it is the conscious mind that interprets the information. Good Ethical or moral behaviour is something to do with how we use our bodies positively. It is these positive actions that we perform, which result from thoughts coming from our conscious mind.

The most important sense organs are eyes, and ears, it is through these organs that most of our learning process is achieved and these learning achievements determine our behaviours. When the conscious mind receives information from one of the senses, it immediately sends the message through the nervous system to the subconscious mind, the information is stored in the sub-conscious mind. There are millions of impressions from our past experiences, a whole life time of events, good or bad which are in the sub-conscious mind. The sub-conscious mind stores the information and then compares the message it has received from the conscious mind with other information or impressions stored there. If the first impression are favourable positive response will result. If the past impressions are not positive a negative response will be passed back to the conscious mind.

Our sub-conscious minds are full of positive and negative emotions. One moment we are happy but the next moment we are unhappy

or depressed. The answer is to try to iron out the high and the lows so that we attain even - mindedness. If we obtain peace within, we shall be able to control our emotions. Self-control can be achieved, when we have peace within, inner calm will prevent an emotional reaction from the sub-conscious mind, from affecting our conscious mind.

2.3 *Super Conscious Mind*

The super conscious mind is the home of our intuitions, the understanding of our humanness, our conscience, and our inbuilt feelings about what is right and what is wrong. It is our connection with the divine. It is a part of our personality that is under-developed in most people, although generally women's intuitive powers are more developed than the male of our species. If we are to raise the consciousness of the human race, we have to work on bringing the super conscious mind into play in our daily life.

Most of scientific discoveries and innovations have been made not through concentration of the logical powers of the conscious mind, neither by sitting with paper and pencil or a computer, but when the super conscious mind or the Higher mind is engaged, when the conscious mind is still and peaceful. The famous example of this truth, was the discovery of the laws of gravity by Sir Isaac Newton. He had worked long hours on the problem, but it was not until he was sitting quietly in the garden and an apple fell from the tree that he suddenly understood the laws governing the movement of bodies in the universe.

By calming our conscious minds and seeking to raise our awareness, putting us in touch with our super conscious mind, we can discover the truth about our selves and about our place in this worldly drama. William Shakespeare said 'No man is an island', each one of us is an integrated part

of the universe. The divine energy that sustains us is the same energy that pulsates through all life. We cannot exist in isolation from our environment. Everything we think, speak or do has an effect on others around us. When we are peaceful, loving people, we feel that peace and love radiating to us, on the other hand if we are close to someone who is angry or full of negativity we shall be disturbed by his vibrations.

Some educational psychologists, used to talk about instinctive behaviour, but many studies have shown that there is no human behaviour that does not rely on interaction with the surrounding environment i.e. family (home) community, school and the society. (Marshall S.T, Educational Psychology) During the first decades of the last century, the concept of instinctive or innate behaviours was rejected by many of the early educational psychologists on scientific grounds.

It was realized that the innate behaviour of man (i.e. the behaviour that is present at birth and that interacts with learning environment through life) did not achieve prominence until early recently through studies of early behaviour in human babies and social behaviour in adults. This means that learning is necessary in order to achieve the appropriate or desired behaviour in humans.

It has been established by educational psychologists that human modes of thinking, acting (attitudes) and interest are acquired, learned and developed during early life or school days. These acquired, learned and developed behaviours may become permanent remaining effective and observable during the person's life time. These attitudes and interests influence lives of individuals and determine what a man says in particular situations, what he enjoys or dislikes, his approach to other people. Attitudes and interests provide patterns of behaviour.

Inculcating attitudes and interests and aiding their growth is an important part of education. The home, the family, the community, the school and the wider society, all have their part to play in the inculcation of attitudes and interests. If the society has to remain stable, then there has to be some consistency of attitudes and interests and behaviour required from generation to generation. Kelman (1962) took the view that if a person could be induced to act in some particular way, then there was a possibility that he would change his opinions so as to bring his opinions into line with his actions.

2.5 *The Power Of Thoughts*

When motives are based on right values, in accord with fundamental and natural laws, we think, speak and act in ways which guarantee success, accomplishment and peace of mind.

To some degree or another, we have all experienced delivering a message we did not truly believe or becoming part of a gossip session against our inner-most wishes or doing or saying something which did not support our values. And whether the reason was to be politically, socially, or culturally correct, to avoid hurting our selves or someone else, to fulfill others expectations of us, or to say or do it because we felt like it; such impure or untrue thoughts, words or actions have an effect on someone concerned.

We experience consequences not only as disharmony and conflict within but also in connections and relationships. Stress increases, peace decreases, and the world become less a better place. By aligning thoughts, word and actions with universal and divine principles governing human nature and conduct, will automatically reduce tension, because we are operating from a pure place. When motive are based

on right values in accord with those fundamental and natural laws, we think speak and act in ways which guarantee success, accomplishment and peace of mind. There are natural and spiritual laws and the knowledge of such truths exist at the core of each human soul - they are concepts such as fairness and patience, honesty, integrity, benevolence, respect, accuracy and flexibility and the divine virtues which are part of our highest potential. While individuals may practice these principles in varying degrees or may disagree on how such truths can be manifested, there is universal agreement that such laws exist.

Change begins with the individual's consciousness. To take personal responsibility for one's thoughts, words, and actions is to take control of the driving wheel and set the process of change in motion. The individual would steer thoughts in accurate and worth while directions, would apply brakes to hurtful words before they are emitted, would know when to stop the motion and avoid hurting some one else.

Negative intentions among others include proving oneself right by suppressing others, manipulating others, expecting respect from others without giving respect to them, being dependent on others due to incompleteness, or insecurity within. Some of these motives, are grossly apparent to the self or to others. Some intentions may be hidden to the self and require deep examinations to be pinpointed, understood and changed.

Positive intentions on the other hand, can be recognized when the individual naturally and automatically gives respect and benefits to others, sees uniqueness and positive qualities in each person, and gives people the freedom to be themselves. Even when one must say something to others which may be perceived as bitter medicine as when giving feedback on in inappropriate behaviour or about something which may affect someone's life, the words should be

said directly and honestly, with humility and with regard for the sensitivities of the other. When the recipient of feedback is treated with dignity and respect, is listened to with empathy and is involved in decisions about change, the discussion can be experienced as positive, opening doors to opportunity and giving that person the power of attainment. Positive intentions encourage the instrument or the giver of feedback to remain clean and up-front even when delivering a delicate message. It is important to note that for every action, there is an equal and opposite reaction (Sir Isaac Newton's Laws of motion)

When one re-discovers and practices his/her innermost values, the value principles you choose will determine the direction of your life. At every step you make value judgments, it will be according to the priority you have placed in certain values identifying and choosing and your practicing values, will clarify what you stand in life.

2.6 The Significance of the Interpersonal Dimension

Placing the Interpersonal Dimension at the hub of the wheel underpins the understanding that:

- All actions emanate from ourselves, whether bodily, environmental, logical, musical, interpersonal, verbal, or visual.
- We all have the capacity to develop in each of the dimensions to varying degrees of success according to effort and opportunity.
- All learning, thinking, and actions begin with a thought in ourselves and are owned by ourselves.
- Time to be still within ourselves, to chum over ideas and reflect, is just as important as being practically active.

- The love of learning, love of one's subject, the pursuit of happiness, and the love of humanity begins within ourselves.
- The door to new eras of opportunity and future possibilities hinges on understanding ourselves and,
- At the heart of all learning is the capacity to understand and develop our core qualities so that we can relate to one another with decency, honesty, mutual respect, responsibility, and tolerance.

The model offers the opportunity for each individual to develop according to his or her own capacity, effort, and preferred learning style where all dimensions and avenues of knowledge are given equal value and equal weighting on all spokes as well as the hub.

As the person recognizes and develops his or her unique qualities and spirituality, so too, will be the knowledge at the very center of one's own interpersonal wheel intensify and radiate into an ever-shining living example of how to unlock and fulfill one's potential through thought, word, skill, and talent. Living-Values, an Educational Programme, opens the door of understanding and offers personal strategies for action in the interpersonal dimension of learning.

One of many models to help identify human qualities and human potential is Howard Gardeners Multiple Intelligences. The model suggest that there are eight interrelated dimensions of learning that help identify skills, abilities and behaviours in us all. They are: -

- The body/kinesthetic dimension; as related to physical movement and sports.
- The environmental/Ethical dimension as related to our relationships and caring for the living environment.

- The Logical/Mathematics dimensions; as related to logical and abstract reasoning skills.
- The Interpersonal dimension; as related to person to person relationships and communication.
- The Interpersonal dimension; as related to self-reflection, how we think and awareness of our physical, mental, spiritual and social status.

2.7 *Divine Virtues/Values*

Divine virtues are those qualities, which are universally recognized as supremely good. We have the freedom to choose our behaviour. We can be the ones whose behaviours come under the influence of the atmosphere. By modeling virtues, exercising powers, and letting innermost values guide us, we become the embodiment of those virtues, powers, and values. In other words, by demonstrating those positive attributes and beliefs through our behaviours, we feel that experience within and serve as an example to others. The greatest authority is experience, as that has the capacity to effect others, which, in turn, can subtly influence the atmosphere in a powerful way.

3. *Living Values*

An orphaned child feels insecure, unloved, and unwanted. A person without a life of values feels the same. Values are our parents. The human soul is nurtured by the values it holds; a sense of security and comfort comes through values in one's life. A life filled with values is a life of self-respect and dignity.

Values are the treasures of life, making humans feel enriched. Values are friends, bringing happiness in life. The soul develops the ability to discern truth and to follow the path of truth. Values thus bring

independence and freedom. They expand the capacity to be self-sufficient and liberate one from external influences.

Values offer a person protection and one who experiences this is able to share this protection with others. Values bring empowerment, and it becomes possible to remove weaknesses and defects. As the innate goodness of the individual concentrated on values, the link with God becomes stronger and clearer. Service is then rendered to others through thoughts, words, and actions, but remains stable in the unlimited. Values open the heart and transforms human nature so life is filled with compassion and humility.

3.1 *Hierarchy of 12 Core Values*

There is universal recognition of a hierarchy of values which ascends from the lower material values to those higher spiritual values such as peace, love, care, selflessness, and generosity. Such higher order values transcend the uniqueness of humanity's richly diverse cultural, philosophical, and social heritage, forming a common bedrock on which to build not only friendly international relations but also mutual benefit in one-on-one interactions.

The 12 higher values are described as: Cooperation, Freedom, Happiness, Honesty, Humility, Love, Peace, Respect, Responsibility, Simplicity, Tolerance and Unity - they are core values, fundamental to the well being of humanity as a whole. They will touch the core of the individual, perhaps inspiring positive change which can contribute to world transformation. The world will automatically become a better place when each individual becomes a better person.

3.2 *Living Values Message*

The Living Values Message is for the Individual, as well as the collective, to find

the way back to the original divine roots through;

- i) The process of learning, and
- u) The conscious exercises of choices; Such a process and exercise embraces the real meaning and purpose of spiritual, ethical and moral education.

3.3 Living Values-Based Educational Programme

This Living Values Based Educational Programme seeks to promote peace, freedom and democracy of both the individual and the society, through the learning of tolerance, integrity, respect for each other, and a responsibility to one another. We all cherish a world where there is happiness, honesty, love and humility; we seek co-operation between the races and the faiths, so that we can build a sense of unity. As the United Nations plaque says, "To the glory of God and in the prayer for peace on earth.

The United Nations, reaffirmed its faith in fundamental human Rights ,the dignity and the worth of human person, in the equal rights of men and women and of all nations large and small. At the birth of the United Nations in Francisco in the United States of America on 26th June 1945, the organisation declared to:

- Practice tolerance and live together in peace with one another as good neighbors .
- Unite (Unity) their strength to maintain international peace and security.

All these declarations were made in the charter of United Nations-the preamble is shown on page 17 of this paper. The value of Peace, Love, Respect and Unity is paramount for us to gain happiness and live as one nation.

3.4 Preamble, Charter Of The United Nations

With The Peoples Of The United Nations Determined-

- To save succeeding generation from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- To promote social progress and better standards of life in large freedom,

And For These Ends-

- To practice tolerance and live together in peace with one another as good neighbours, and
- To unite our strength to maintain international peace and security, and
- To ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- To employ international machinery for the promotion of the economic and social advancement of all peoples,
- Have resolved to combine our efforts to accomplish these aims.

Accordingly, our respective Governments, through representatives assembled in the City of San Francisco, who have exhibited

their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

(Signed on June 26, 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization.)

Living Values - in adopting the tenet in the Preamble of the Charter of the United Nation - focuses on reaffirming faith in the dignity and worth of the human person. Within that active growth process, the individual can uncover a capacity to stretch beyond the limits of current reality and recognize his or her full potential, not only in relation to the self but also to the wider world.

Human dignity is the external expression of an internal state of self-worth. A person who really understands his or her own inherent worth and respects that of others will come to know that worth is not something assigned by external sources, but rather, comes from a source that is universal and eternal. Living-Values helps touch that source, guiding the reader toward a more profound understanding of the true nature of the self. That Nation, of course, has been the object of much contemplation and discussion, but at its essence is the dignity and worth of the individual and the sacredness or divine nature of human life. With such at the core of Living Values, the message throughout is for the individual and the collective to find the way back to original divine roots through a process of learning and the conscious exercise of choice. Such a process embraces the real meaning and purpose of spiritual and moral education: not to impose an ideology of particular set of values, but rather, to draw out or to educe the best from within the individual. At the same time, a complementary structure would need to be

created to allow for ample expression of such living values.

In choosing or becoming aware of values we adopt as the motivations for our behaviours, we assign worth or importance to an aspect of life, which, in turn, influences how we approach life. Today, the majority of people are largely influenced and define their true worth by material values such as social position, monetary worth, external appearance, or personal possessions. That misrepresentation of the source of true worth creates cultures of accumulation, possessiveness, selfishness, and greed and is the root cause of conflict, exploitation, poverty, and tension in the world.

These Values do not belong to any one religion, race or nationality. They are universal. All the great masters who ever lived taught love and compassion. They exhorted their followers to live noble lives, to follow a codes of conduct and to live in peace with their neighbours. Human Values are what make us human. They are inherent in all human beings, deep down inside every one of us. If we do not act in accordance with these values, we should not call ourselves Human. Animals live by instinct. In everything they do, they are driven by a force, which they do not question. This instinct drives them to find food and shelter, to procreate. They cannot rise above this instinct.

Human beings, on the other hand, have the ability to question, to make choices. We make decisions many times a day. These decisions not only affect us but other people as well. All human beings are basically good but sometimes we behave in ways contrary to our humanness. It is for this reason that we need to reconnect with our inner selves by re-establishing Values in our lives.

Most people would agree that the world today is in a sorry state. Despite the advances in Science and Technology and in

spite of the fact that we as a race and we are more educated now than ever before, peace and happiness have eluded us. Selfishness is rife, the family unit is breaking down, nations fight nations, there is racial and religious intolerances, crime and violence is on the rise everywhere, television video games are poisoning the minds of our children, there is widespread corruption in the society, the safety and habitability of our planet is under threat from environmental pollution, scientists are playing God by tampering with the building blocks of life and in the midst of all this, millions of our brothers and sisters are living in dire poverty.

Modern education concentrates on the mind or intellectual developments and, to lesser extent, on the whole person but gives little attention to the spirit. Our education systems have ignored the fact we are made up of physical, spiritual, mental and social dimensions. Education should develop holistic personality rather our mental or cognitive domain. Students' heads are filled with more and more facts, most of which are forgotten soon after leaving school. Children are groomed to pass examinations so that, in this highly competitive world, they can secure jobs. Such things as respect of teachers and parents, concern for the welfare of Society and love for our world are neglected

In a world ravaged by contradictions, indignities and gross denials of our very humanity-human rights and corresponding responsibilities - are increasingly clamouring for attention on the agendas of people of all walks of life the world over. Recent years have also seen ever-greater recognition of the place that must be accorded to values at the heart of the individual, of society, our learning and life. The implications of all this for educators are immense and lay before them a tremendous challenge.

Education fails if its outcome is an individual who is intelligent, skilled and knowledgeable but unable to live, work and get on with others. We must not just learn about respect and understanding but to be respectful of and understanding others and their rights and freedom.

In this context, the Universal Declaration of Human Rights offers us a timely reminder of the fundamental human standards which we all want, and need, to live by. Its simple truths constitute a basic blueprint for daily life, reminding us of fundamental rights but also responsibilities. Recognition of these rights and responsibilities is the foundation of freedom, justice and peace in the world.

The vision of what we want to achieve - the universal observance of these fundamental rights and freedoms is clear. It is a vision that has now been endorsed by governments, championed by organizations and claimed by individuals worldwide. And yet notwithstanding the universality of the Declaration, its standards are often relegated to the back - seat of social progress, leaving exploitation, violence and injustice to prevail in one form or another. It is as if the link between aspiration and action, between principle and practice, has been severed, exposing a gap between what we believe and accept as correct and what we actually do.

This raises the question of what we are unable to do and that which we want to do: to implement clear and cherished aspirations that make for a better quality of life for all. The aspirations may be high but are they really beyond our reach? They are certainly not physically or financially impossible and they have widespread political acceptance; they embody a way of life, and values, which we all believe in and identify with. So how can we implement the values that make up the common standards of achievements set out in the Universal Declaration of Human Rights?

Education must undeniably be at the heart of our efforts in this regard, along with other components of such education, it is suggested that there should be a greater focus on the value system that is the framework around which the Declaration has been crafted. We cannot truly understand rights and responsibilities without first understanding the values on which they are based.

True quality education must help individuals identify, and adopt, personal and social values that they can call on to guide the decisions they make, their relationships, work and life as a whole. It must help them develop a depth of character and a clear sense of their own identity, integrity and what they believe to be important in life. We must learn about the values that will guide us towards desirable, fulfilling and worthwhile outcomes in our actions and daily life as individuals in our own rights, the masters of our own selves, but also as citizens of the world community.

Given the universality of human values and rights, it follows that education can no longer limit itself, whether by content, gender bias or age cut-off-it, must transcend these frontiers. Education must become an inclusive, universal, lifelong learning process that embraces the family and community, as well as the classrooms places of learning. In a world where rights are too often abused, leading to poverty, deprivation and insecurity of many kinds, the maximization of all inner personal resources is essential. A values-based and rights-based approach to education requires that all within society are engaged in learning, for themselves and others -a true learning society.

We must learn, and keep learning, about the rights we have as individuals but also about the responsibilities that will go with them. To do so effectively, we must embrace the

values that are the building blocks and the very essence of rights and responsibilities

Yet notwithstanding the clear need for a renaissance of values within society, there are some who resist such moves. Perhaps this sensitivity - or even reluctance sometimes to touch the topic at all - indicates not just an awareness of its complexity but also the importance of an issue that touches the fundamentals of human life and the very spirit of our being. For values relate to who we are and how we choose to live and let live.

And it is an understandable reluctance, given, for example, the attempts over the years of some individuals and institutions to insist that others adopt the values they endorse. For no matter how well-intentioned such efforts may be, such imposition on others amounts to a moral bullying that fails to recognize and respect the individuality of others and their right and ability to judge for themselves and form their own opinions, beliefs and values.

3.5 Purpose Of Living Values Education Programme

To provide guiding principles and tools for development of the whole person, recognizing that the individual is comprised of physical, intellectual, emotional, and spiritual dimensions. All these human dimensions need to be developed in a holistic manner to achieve the desired behaviours. The educators must recognize the four pillars of education as recommended by the Delors Report, i.e. learning to know, learning to be, learning to do and learning to live together, thus all aspects of cognitive, psychomotor and affective domains.

(a) Aims

- To help individual think about and reflect on different values and the

practical implications of expressing them in relation to themselves, others, the community, and the world at large.

- To deepen understanding, motivation, and responsibility with regard to making positive personal and social choices.
- To inspire individuals to choose their own personal, social, moral, and spiritual values and be aware of practical methods for developing and deepening them; and
- To encourage educators and caregivers to look at education as providing students with a philosophy of living, thereby facilitating their overall growth, development, and choices so they may integrate themselves into the community with respect, confidence, and purpose.

(b) Three Core Assumptions

- Universal values teach respect and dignity for each and every person. Learning to enjoy those values promotes well-being for individuals and the larger society.
- Each student care about values and has the capacity to positively create and learn when provided with opportunities.
- Students thrive in a values-based atmosphere in a positive, safe environment of mutual respect as capable of learning to make socially conscious choices.

3.6 Living Values Outreach

Living Values Educational Programme is meant to provide the guiding principles and tools for the development of the whole

person and has been conceived by Global Educators in consultation with Representatives from UNICEF's Education Cluster and the Brahma Kumaris. The Living Values is a product of the Outreach Phase of the Project "Sharing of values for a better world" launched by the Brahma Kumari World Spiritual University (BKWSU), in September, 1996 in celebration of the 50th Anniversary of the United Nations. From that Project was produced "Living Values: guidebook" which has been translated into 7 languages and has been a catalyst for this World - World Project "Living Values: an Educational Programme 740 different sites in 71 different countries have received the Living Values Educational Programme in their schools and institutions. Some foreign countries have fully integrated the Living Values in their Schools' Curriculum - an example being the Mauritius which is committed to pursuing and promoting this important neglected dimension in Education.

4. Living Values Statements

4.1 Freedom

- People want the freedom to lead a life of purpose, to select freely a lifestyle in which they and their children can grow healthily and can flourish through the work of their hands, heads and hearts.
- Freedom can be understood mistakenly to be a vast and unlimited umbrella, which gives permission to "do what I like, when I like, to whomever I like." That concept is misleading and a misuse of choice.
- True freedom is exercised and experienced when parameters are defined and understood. Parameters are determined by the principle that everyone has equally the same rights. For example, the rights to peace, happiness, and justice regardless of religion, culture, or gender -are innate.
- To violate the rights of one or more in order to free the self, family, or nation is

a misuse of freedom. That kind of misuse usually backfires, eventually imposing a condition of constraint, and in some cases, oppression - for the violated and the violator.

- Full freedom functions only when rights are balanced with responsibilities and choice is balanced with conscience.
- Inner freedom is to be free from confusion and complications within the mind, intellect, and heart that arise from negativity.
- Freedom is an ongoing process. How can we create and maintain it?
- Self-transformation begins the process of world transformation. The world will not be free from war and injustice until individuals themselves are set free.
- The most potent power to put an end to internal and external wars - and to set souls free - is the human conscious. Any act of freedom, when aligned with human conscience is liberating, empowering, and enabling.

4.2 *Peace*

- Peace is more than the absence of war.
- Peace begins within each one of us.
- Peace is an energy, a qualitative energy, it is a pure force that penetrates the shell of chaos, and by its very nature automatically puts things and people into balanced order.
- The self is a reservoir of vital resources, one of which is peace.
- Peace is inner silence filled with the power of truth.
- Peace consists of pure thoughts, pure feelings, and pure wishes.
- To stay peaceful requires strength and compassion.
- Are human beings by nature violent or non-violent?
- Authenticity of action depends on authenticity of persons
- Peace is the prominent characteristic of what we call "a civilized society."

- Serenity is not the absence of chaos, but peace in the midst of it.

4.3 *Respect*

- Every human being has innate worth.
- Part of self-respect is knowing my own qualities.
- Respect for the self is the seed that gives growth to confidence.
- When we have respect for the self, it is easy to have respect for others.
- To know one's natural worth and to honor the worth of others is the true way to earn respect.
- Those who give respect will receive respect.

4.4 *Love*

- In a better world, the natural law is love.
- When there is lots of love inside, anger runs away.
- Universal love holds no boundaries or preferences; love emanates to all.
- Love is not simply a desire, a passion, an intense feeling for one person or object, but a consciousness which is simultaneously selfless and self-fulfilling.
- Love is caring.
- Love is sharing.
- Love is being kind.
- Love makes me feel safe.
- Love means I want what is good for others.
- Love can be for one's country, for cherished aim, for truth, for justice, for ethics, for people, for natures.
- Love is the principle which creates and sustains human relations with dignity and depth.
- Love is the basis for a belief in equality and goodwill towards all.
- Love is catalyst for change, development, and achievement.
- Love is viewing each one as more beautiful than the next.

- Real love ensures kindness, caring, and understanding and removes jealousy and controlling behaviors.

4.5 *Happiness*

- Give happiness and take happiness.
- When there is a feeling of hope, there is happiness.
- Having good wishes for everyone gives happiness inside.
- Happiness naturally comes with pure and selfless actions
- When one is content with the self, happiness comes automatically.
- Happiness of mind is a state of peace in which there is no upheaval or violence.
- The warmth and comfort of happiness is hidden within the self.
- When my words "give flowers instead of thorns," I create a happier world.
- Happiness follows giving happiness, sorrow follows giving sorrow.
- Happiness cannot be bought, sold, or bargained for.
- Awareness and application of universal truths provide a true source of happiness.

4.6 *Honesty*

- Honesty is telling the truth.
- When I am honest, I feel clear inside.
- A person worthy of confidence is honest and true.
- Honest means there are no contradictions or discrepancies in thoughts, words, or actions.
- Honest thoughts, words, and actions create harmony.
- Honesty is the awareness of what is right and appropriate in one's role, one's behaviour, and one's relationship.
- With honesty, there is no hypocrisy or artificiality which create confusion and mistrust in the minds and lives of others.

- Honesty makes for a life of integrity because the inner and outer selves are a mirror image.
- Honesty is to use well what has been entrusted to you.
- There is a deep relationship between honesty and friendship.
- Greed is sometimes at the root of dishonesty.
- There is enough for man's need, but not enough for man's greed.
- An honest person knows that we are all interconnected.
- To be honest to one's real self and to the purpose of a task earns trust and inspires faith in others.

4.7 *Humility*

- Humility is based on self-respect.
- Humility removes insecurity and allows acceptance of the self.
- A person with humility will listen to and accept others.
- Humility is staying stable and maintaining power on the inside and not needing to control others on the outside.
- Humility is to let go and let be.
- Humility eliminates possessiveness and narrow vision which builds walls of arrogance.

One word spoken in humility has the significance of a thousand words. Humility allows one to be great in the ears of others. Humility creates an open mind and recognition of the strengths of the self and others. Arrogance damages or destroys valuing the uniqueness of others, and hence is a subtle violation of their fundamental rights. The tendency to impress, dominate, or limit the freedom of others in order to prove yourself actually diminishes the inner experience of worth, dignity, and peace of mind.

4.8 *Responsibility*

- Responsibility is doing your share.
- Responsibility is accepting what is required and carrying out the task to the best of your ability.
- A responsible person fulfills the assigned duty by staying true to the aim.
- Duties are carried out with integrity and a sense of purpose.
- If we want peace, we have the responsibility to be peaceful.
- If we want a clean world, we have the responsibility to care for nature.
- When one is responsible, there is the contentment of having made a contribution.
- As a responsible person, I have something worthwhile to offer - and so do others.
- A responsible person knows how to be fair, seeing that each gets a share.
- With rights there are responsibilities.
- Responsibility is not only something that obliges us, but is also something that allows us to achieve what we wish.
- Each person can perceive her or his own world and look for the balance of rights and responsibilities.
- Global responsibility requires respect for all human beings.

4.9 *Simplicity*

- Simplicity is natural.
- Simplicity is learning from the earth.
- Simplicity is beautiful.
- Simplicity is relaxing.
- Simplicity is staying in the present and not making things complicated.
- Simplicity is enjoying a plain mind and intellect.
- Simplicity teaches us economy - how to use our resources keeping future generation in mind.

- Simplicity is giving patience, friendship, and encouragement.
- Simplicity is appreciating the small things in life.

4.10 *Tolerance*

- Peace is the goal, tolerance is the method.
- Tolerance is being open and receptive to the beauty of differences.
- Tolerance recognizes individuality and diversity while removing divisive masks and defusing tension created by ignorance. It provides the opportunity to discover and remove stereotypes and stigmas associated with people perceived to be different because of nationality, religion, or heritage.
- Tolerance is mutual respect through mutual understanding.
- The seeds of intolerance are fear and ignorance.
- The seed of tolerance is love; its water is compassion and care.
- Where there is lack of love, there is lack of tolerance.
- Those who know how to appreciate the good in people and situations have tolerance.
- Tolerance is also an ability to face difficult situations.
- To tolerate life's inconveniences is to let go, be light, make others light, and move on.
- Through understanding and open-mindedness, a tolerant person attracts someone different, and by genuinely accepting and accommodating that person, demonstrates tolerance in a practical way. As a result, relationships bloom.

4.11 *Cooperation*

- Cooperation exists when people work together toward a common goal.

- Cooperation requires recognizing the value of everyone's part and keeping a positive attitude.
- One who cooperates creates good wishes and pure feelings for others and the task.
- When cooperating, there is a need to know what is needed. Sometimes we need an idea, sometimes we need to let go of our idea. Sometimes we need to lead and sometimes to follow.
- Cooperation is governed by the principle of mutual respect.
- One who cooperates receives cooperation.
- Where there is love there is cooperation.
- By staying aware of my value, I can give cooperation.
- Courage, consideration, caring, and sharing provide a foundation for cooperation.

4.12 Unity

- Unity is harmony within and among individuals in the group.
- Unity continues by accepting and appreciating each person and his or her contribution.
- Unity is built from a shared goal, hope, or vision.
- Unity makes big tasks seem easy.
- The greatness of unity is that everyone is respected.
- One note of disrespect can cause unity to be broken.
- Unity creates the experience of cooperation, increases enthusiasm for the task, makes the atmosphere enabling.
- Unity creates a sense of belonging and increases well-being for all.

4.13 Global Vision Of A Better World

In a Better World :-

- All people celebrate the joy of life.

- Human Rights are respected and upheld and the dignity and integrity of all people is assured.
- People live in ways that preserve nature's ecological balance in an environment that is beautiful and clean.
- The planet's natural and abundant resources are shared equitably and the basic human needs of all people are provided for.
- All people have equal opportunities to realize their potential through an educational process that has human, moral and spiritual values at its heart.
- Life within the immediate family is loving, caring and fulfilling and is the foundation for harmony within the broader human family.
- There is respect, understanding and tolerance in all human relations.
- People communicate openly and in a spirit of equality and goodwill
- Social, economic and political justice is ensured through honesty, responsibility and respect for the rule of law.
- Governments, as representative of their people, are committed to their well-being. People participate co-operatively in efforts for a secure and peaceful world.
- Science serves humanity and appropriate technology is applied to ensure sustainable development and enhance the quality of life.
- All people enjoy freedom of expression, movement and belief while respecting the liberties and rights of others.

Source: The Global Vision Statement is excerpted from *Vision of a Better World, a UN Peace Messenger Publication*, Copyright © 1993 by Brahma Kumaris World Spiritual University (UK), ISBN 0-9637396-8-9.

5. The Role of Ethics in a Constitution

A Constitution of a country should have a vision. A vision is a description of what the

country will look like if it succeeds in implementing its constitutional recommendations and achieves its full potential of a peaceful and a better country. The constitutional recommendations should strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political principles shall form all parts of institutions goals in the nation. Ethics is a moral law of doing good or bad. Every person has a right to be treated in a dignified manner at every state of his life. It is the duty of principles fundamental in the governance of the country to secure social order for the promotion of the welfare of the people.

The country's constitution should have clauses that guide the behaviour of the people in social relations and in any other human interactions. Professional bodies, individual companies, Non-Governmental Organisations e.t.c. should be required by law to outline their ethics and give ways in which they will ensure that members of these organizations will strictly follow these ethical rules or regulations or code of conducts and the consequences of not following them.

The Constitution should ensure that:

- Operations of the legal system promotes justice on the basis of equal opportunities for all.
- Men and Women equally have a right to adequate means of livelihood.
- There is equitable distribution of natural resources of the country
- Those who rule or have power, have respect for the rule of law.
- The country should discuss and determine minimum basic ethical standards for the society with particular reference to meeting basic human needs i.e. individual right to own land, shelter, employment, to enjoy natural wealth, right of conscience, food, education

good health (free medical services), respect and dignity, right to be listened to, right to private prosecutions, right to live anywhere in the country.

- Right to life, right of protection, and good health.

6. The Role of Living Values in a Constitution

Including Living Values Principles in the constitution is reaffirming the acceptance of the dignity and worth of the individual and sacredness or divine nature of human life.

The Constitutional team should explore the skills for the creation of Living Values based atmosphere or ethos, when drawing up principles of management of public affairs.

Living Values such as Peace, Love, Unity (President Moi's Ideology), Cooperation (Harambee) Freedom (Uhuru) have been adopted by our political leaders; i.e. President Daniel, Arap Moi is a living model in practicing other values such as Honesty, Humility, Simplicity, Respect, Responsibility, and Tolerance, in the management of our public affairs. The Constitution of Kenya Review Commission should enshrine these values in form of our national ethos, Philosophy, Ideology, Mottos, Slogans, National Anthem e.t.c. Values should form the bedrock or a charter of our national behaviour, they should guide our daily activities.

7. Ethics and Values to be Incorporated in a Constitution

(a) The 12 Core Values: Cooperation, Freedom, Happiness, Honesty Humility, Love, Peace, Respect, Responsibility, Simplicity, Tolerance, and Unity should be the fundamental guiding principles in the Governance of the country and the Constitution of Kenya Review Commission

should apply these values - principles in Constitutional making.

(b) The Core Values, when applied in making our constitution should promote the welfare of the people by securing, as effectively as possible the social order in which justice, social, economic and political policies will be based. These value principles will strengthen the constitutional role in enactment of universal human rights provisions in our laws.

(c) The Kenya Constitution should protect the nation from unethical values such as those which are likely to destroy the country i.e.

- Uncontrolled use of natural resources.
- Destruction of the environment, poor disposal of dangerous wastes, pollution of the air, water and the soil.
- Land grabbing
- Haphazard planning of our towns and rural areas.
- Inequitable distribution of resources .
- Improving the achievements of human needs in daily life, eradication of poverty, ignorance, and disease.
- Promoting individuals rights to know the truth, right to work, right to live together, right to speak ones mind (conscience) without ridiculing authority and others, right to physical and moral integrity.

(d) Strengthen the education of ethics social, spiritual and work ethics in our institutions. Ethics or Moral Laws is the guide of man's actions in the form of imperative reasoning powers, commanding us to do certain things and to refrain from doing others. Moral Law is the light of natural reason by which we discern what is good and what is evil. Ethics and values need to be taught in all our education and training programmes in the country.

(e) The Constitution should provide checks and balances for statements, through the

media, which are likely to have negative effects on our moral values.

(f) Look at the role of informal education from the mass media, regarding unethical advertisements and entertainment. The Constitution should provide protection from immorality and thus, avoiding damaging our cultural values, universal human values, and people's moral integrity.

8. Recommendations for Constitutional Review

(a) There is need to establish National Ethical Code of Conduct for:

- Public Servants
- Politicians
- Professional organizations
- Non-Governmental organizations
- Companies
- Business people

(b) There is need to draw up an accepted National Policy, Ideology, Motto, Spirit, Anthem , Poems, Songs which should cherish the fundamental freedoms, social justice, equity, cultural beliefs, to guide the principles of running or managing the country, (e.g. Ujamaa in Tanzania), (Harambee, Love , Peace and Unity in Kenya)

(c) Social Ethics and Living Values be introduced in the curriculum of our schools, colleges and universities.

(d) Constitution of Kenya as a subject should be taught in schools, Tertiary Institutions (collages) including Universities.

(e) The constitution must have a well-written vision and objectives to reflect what type of country we want and the strategies or how to achieve those dreams.

(f) The constitution should try to address the problem of basic humans needs, achievement or need satisfaction, which will engender enjoyment of living within our borders.

(g) Teaching of living values based education programme

Let us take a cue from the Convention of the Rights of the Child, which was adopted by the United Nations General Assembly on 20th November, 1989. Article 29 states in part that:

".....the education of the child shall be directed to the development of the child's personality, talents, and mental and physical abilities to their fullest potential...." And "the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin...." As well as "the development of respect for the natural environment."

Furthermore, the convention reaffirms its conviction on what the United Nations states as "their faith in fundamental human rights and in the dignity and worth of the human person....."

Within this context together with Kenyan newly enacted Children's Rights Act it is vital to carefully design leaning strategies that should succeed in making the values being targeted to be fully integrated into the living, working, and thinking environment of the child. Five strategies suggest themselves:

Demonstration by example, activity, and stories, the fundamentals of developing a Self-respecting personality, confident thereby respecting others, including authority and the Supreme Soul-self-realization; the existence of the individual

uniqueness; and the empowerment of the individual to choose their own set of values.

Practical demonstration and involvement, through one-on-one learning experience, of the process of self-discovery-through contemplation, and silence and medication, within the school environment as well as outside (for example, in church, home Sunday school).

Basing the inculcation of Living Values Education on real-life situations - by trying to evolve viable tactics for resolution of conflicts, isolation tendencies, and of going it alone, as examples.

Developing training methods for teachers so as to make them become capable of integrating Living Values Education into the soon-to-be-revised curriculum, with the teacher's target being to prepare the children for lifelong living, while he himself adopts the attitudes of listening, being accessible, flexible in terms of detailed delivery, and willing to learn along with the children.

How to ensure that the impact of the teachers and parents as role models for the values which are positive and helpful.

The thread that runs through this set of 5 categories of learning strategies is that we want to ascertain that the lessons of the Living Values are internalized as the student moves from the lower primary to the upper levels of the High School step-by-step. This is being accomplished in an atmosphere of live involvement, through individual reflection and contemplation, group discussion and debate, through the telling and acting of stories and allegories, through drama and music, through activity and practice of each living value in turn.

9. Conclusion

I have attempted to show in this paper that education can mould, reform, and change individuals attitudes, interests and behaviour. Character is a product of education process. With carefully selected learning or teaching contents prepared to develop cognitive, psychomotor and affective domains should bring up the required values.

It is possible to develop appropriately these three aspects of personality. Our education. Formal, Non-formal, Informal and Self-education systems should strive to develop all human's multiple intelligences i.e, Logical/Mathematics, Body/Kinesthetic, Environment/Ethical, Verbal, Visual, Interpersonal, Intra-personal abilities. Our children should learn to know, learn to do, learn to be and learn to live together.

I have also tried to show in this paper that creating value based learning environment is very important in our educational institutions. Learning environment determines our future behaviour. Learning Living Values, will enable us to see the abundant potential in humanity, let us promote and bring out these positive skills for a better Kenya.

The Constitution of Kenya should stipulate fundamental principles of better governance. It should draw up the states obligations to the citizens and the citizens responsibilities to enable the populace to enjoy living together.

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THE ETHICAL AND IDEOLOGICAL BASIS OF A CONSTITUTION

Prof. Joseph Nyasani

1. Relevance of Morality in Law

Morality and law are inseparably bound together in their prime objectives as they both reinforce each other in the consolidation of those principles and values upon which, ultimately, the humanity and humaneness of the society thrive and depend and also for the realization of those social and political ideals which compel the society to enter any form of social covenant.

Since every society in its own peculiar way must be a moral one at least in the pursuance of certain fundamental principles or even in the vague general pursuits of vaguely perceived ethical values and norms, law cannot be indifferent or irrelevant to this natural and ontologically grounded reality since, to do so, it would stand out like a foundationless law with no practical and motivating scintilla. Since moreover any morality must inevitably envisage or aim at the realization of social harmony, mutual tolerance, (social equipoise in a sense), law cannot be an indifferent spectator to this process because it too aims at the realization of harmony, social tolerance and cohesion as well as respect for all fundamental rights as articulated by moral codes or moral norms and values wherever it is found to operate.

The relationship between morality and law is a complementary one and one that is founded upon the principle of mutual reinforcement and fecundation especially considering that law cannot entrench itself satisfactorily where morality is either declining or is at its lowest ebb. Indeed, law and morality must be intimately related in the sense that the relationship must strictly thrive on the presuppositions and principles of necessity because, apart from the fact that there would be no law where morality is at

the crossroad of decline and decadence, it would make no sense at all instituting a legal regime. Such a project would be totally devoid of a fundament since it would neither be confirming nor declaring nor even explicating anything in this curious symbiotic relationship.

Indeed where morality relates over and above the province of propriety, rectitude, righteousness and probity of conduct, it must also *ipso facto* extend to the whole spectrum of those intrinsic values, norms and cultural practices whose observance makes life livable, tolerable and reasonably self-regulated. As it is, the observance of this range of so-called axiological normatives, must be complemented by an established legal regime or legal mechanism to oversee the exercise of its enforcement in order to guarantee the promotion and improvement of the quality of social life. In this sense then, law is effectively a penumbral representation of values, usages and virtues of the society especially in as far as they (usages) constitute tacit and passive deontological conditions for those who freely choose to subscribe to them.

Again, since the object of any legal system is the promotion and protection of the society's positive values and norms, no law can claim any meaningful validity, social impact or regulatory force where the institutions of social morality appear to be crumbling because it would clearly be devoid of *ratio existendi* (reason for its existence). Indeed, because law is the presumptive regulator of the conduct of all rational beings, these same beings also happen to claim an interest in the existence of a rational mode of living one towards the other even long before the appearance of the law. In this sense, law must be said to

complete the project which man starts rather spontaneously and sometimes without relating it to the regime of sanctions or threats. What this in effect means is that law and morality are not only compatible but also convertible at least in their material object.

It is even possible to argue that no morality, particularly public morality, can be sustainable and indeed purport to posit as a reality in the total absence of some viable legal institution or some form of loose conventional arrangements with some kind of inherent recipe of threats or social sanctions. This is particularly the case considering that the legal regime is like an embodiment and channel for the furtherance of those norms and principles that the society generally regards as tenable, just and reflective of its natural morals and behaviours.

In the general above sense, law must act as the facilitator of a favourable and conducive environment for the observance of the already identified positive customary morals even if only doing so under the pressure of the rules of equity and natural justice. Similarly in this sense it should be equally argued that a good law should not appear to stifle or oppress some positive custom or usage even where it does not incorporate it or even where such a custom does not enjoy legal protection provided it is not in any way morally reprehensible or openly subversive of legal authority.

Functionally speaking, both public morality and public order act as guarantors for the facilitation of a humane society and for the perpetuation of the efficacy and effective superintendence of the legal regime. In other words, they act as what scholasticism calls *conditio sine qua non* for the successful operation of the laws and their general cognisance.

Law or the existence of law effectively becomes the outward expression of the natural moral impulse that is naturally the inextricable reality of human nature more so because the intrinsic characteristics of human nature is to strive to be moral or rather to be concerned with the behaviour that typically touches on life's aspects of good and bad or right and wrong. And as long as man pursues the course of attaining and enjoying some good, the more the need arises to institute an effective mechanism to guarantee this positive disposition. Obviously this positive effective mechanism is no other than the formal institution of some legal system that is founded upon the general assumptions of some consentaneous will of the public sensitive to and facilitative of, the efforts to attain the society's declared or undeclared social ideals.

The law in the above scenario acts like a crowning process in this seeming panoply of vague desires to maintain and sustain what is perceived as a social good or even as an ideal social desideratum. In this sense, law cannot be regarded as another extraneous or imposed alchemy or creature but rather as a natural offshoot of the human nature's natural and ineluctable character in the overall scheme of human self-unfolding. In this sense, we may even go to the extent of averring that in the heart of moral or moral desires, there is always a flickering scintilla of the basic desire to establish a legal order in whatever form. Again as a corollary, moral order and legal order are not only compatible but also complementary and, in effect, mutually fecundative.

Because of moral compulsions or moral dictates to attain some good or to safeguard certain social values, a superstructural legal edifice must be presupposed to effectuate and guarantee this and, in this way, create a situation whereby morality and law are set at very intimate, contiguous and functional rapport. Hence there has to obviously exist both the element of compatibility and

complementarity between any humane legal system and any treasured positive moral patrimony of a people in this regard.

Furthermore, law and morality are related on the basis of their primary target or object, namely, the facilitation and promotion of “justiciary” institutions and norms always foreshadowed by the natural conscience of the indiscriminate dispensation of the principles of justice and by the vague sense of wanting to accomplish acts of equity and natural justice. And as long as man therefore harbours the consciousness of the principles of justice, the law must be said to operate in pursuance of and actual attainment of this important social ideal that we call justice.

The consideration of wanting to execute justice therefore seems to motivate human beings to take a further step towards the institutionalization of an effective mechanism for guaranteeing fairness and equality of treatment. This effective mechanism is obviously the legal institution itself. Again as a matter of corollary, if law is about justice and the promotion of justiciary institutions, ideally no law should display qualities of injustice. Maybe, it was for this reason that the immortal St. Augustine was compelled to remark that there has never been a law that was never just (*non videtur esse lex quae iusta non fuerit*).

In conclusion to this section, we may safely aver that morality even in its inchoate and primitive stages, is ultimately responsible for the emergence of legal institutions or any other formal conduct-restraining social mechanism and, as such, the relationship between them (law and morality) is really an obvious one. Indeed, law and morality cannot be dichotomous but effective complements and natural bedfellows. They indubitably share an intimate relationship and actually converge in many respects both functionally and in their material object.

Moreover, we must affirm the proposition that it is perfectly natural for all human beings to claim an interest or some right be it natural, ontological or acquired as long as they are condemned to the reality of social existence. And if indeed it is true that the right or interest must be protected out of the natural instinct of sheer deontological human disposition character born out of the natural obligation or duty to assert and defend this instinctual endowment, it must be *ipso facto* be the case that an effective mechanism is created to protect and guarantee this natural urge which primarily posits as a primordial instantiation of morality. This mechanism, in human social relationships, is no other than the institution of the law. Hence morality and law must be assumed to go hand in hand both as concomitant realities and as inevitable compatibles even if only as a vague crystallization or elaboration of one or the other. Hence we can safely assert that morality actually or presumptively, projects and promotes the idea of law and the law likewise, affirms, confirms, consolidates, secures and crystallizes the social sense of morality.

Finally, to understand the purpose, social utility and function of the law in society, it is imperative to understand and appreciate the aim and role of embracing and practising morality within the society. This, in my view, should be the greatest challenge to the Commission as it goes round the country disseminating civic education and soliciting the views of the public about matters related to their moral sensitivities. A clear inventory of popular reactions therefore needs to be made and preserved as critical background information while drafting the new constitution avoiding as much as possible the danger of offending people's sensibilities and their perceived rational beliefs and values as we shall see later in this expose. This is an exercise that should be conducted with a maximum sense of circumspection and prudence.

2. Ideological Basis of a Constitution

As we grapple with the problem of trying to crystallize the idea of producing a good constitution, it must be fairly imperative to equally outline some of those principal ideas that go into the structural edifice of such an important document as the constitution. Such ideas are obviously diverse and sometimes inherently disparate but viable enough to claim a place of some prominence in the theoretical construction of a people's worldview. Whatever the case, a body of such critical and central ideas that appropriately reflects the belief system, concerns, interests and sometimes apprehensions of a people may amount to the general concept of ideology and specifically so if they happen to be an integrated subsumption of some co-ordinated scheme that acts as a driving force for social, political and economic endeavours on a collective basis.

Indeed, this body of co-ordinated tribal or even national interests, beliefs and concerns helps shape the people's thinking in a certain peculiar way as to predispose them towards adopting a common philosophy or common approach to issues affecting them even though perhaps for the wrong reasons at times. It is for the latter reason that philosophy has come to designate ideology in a rather pejorative manner as an idea or set of ideas that may be intrinsically false, sometimes misleading and not infrequently cherished for the wrong reasons but ultimately controlling in belief assumptions as being absolutely irrefutable and irresistible.

What the above means in essence is that an ideology of whatever shade or description seems to be an agent for galvanization for good or bad reasons and often a reliable buttress of the people's

resolve to perform, achieve or simply pursue a certain course of action resolutely. It is implicitly a *conditio sine qua non* (necessary condition) in the whole scheme of the people's social awakening and subsequent unfolding in whatever direction provided it is in conformity with their social and political configurations.

An ideology that is all-encompassing and one that is not distraught, seasonal or inconsistent can act not only as a mere uniting force but also as a motivating factor even to the extent of rekindling those flickering impulses necessary for spontaneous action and for undertaking personal initiatives that the community so desperately needs to realize some of its significant aims in the society. Even in this sense alone, we can say that in the absence of a firmly established and acknowledged ideology very little in the nature of social mobilization and affirmative action can take place and even less so in the field of social and juridical empowerment.

In very simple terms and following from the above, no individual can feel fully empowered if he/she is not backed by some consensual arrangement that emerges from a common philosophy of general purpose and intent. Call this philosophy what you may, it must ultimately boil down to a relatively elaborate sketch loosely referred to in some civilizations as a comprehensive *Weltanschauung* or the philosophy of man's empathization with the world or simply as a philosophy of life and man's destiny in the universe all amounting to an ideology in the final analysis.

As a matter of fact, something very fundamental seems to lie behind this simple notion of ideology in the nature of the spontaneous loyalty to oneself and one's fatherland. It is possible to assume that an individual passionately committed to his/her national ideology is likely to put this commitment above everything else in

discharging those duties that lie to him both as an enlightened individual and as a member of the corporate society hopefully driven on by an ideology.

Where indeed an ideology serves as a driving force of the society, there can be no doubt that certain of its elements reflected in the constitutional document can fail to equally serve the same purpose or at least confer some degree of impetus upon the general will of the people in the direction of respecting and obeying it (constitution) not so much for its own sake but more for the sake of social and political harmony and mutual tolerance.

Very tortuously therefore, an ideology acts as something of a marshalling agent of the public's good will to respect not only the constitution as such but also to develop a sense of cognizing the import and benefit of observing the rule of law. Again, an ideology is like a remotely lurking social conscience which finds an expression in such overt acts as patriotism or patriotic redresses, self-denial, allegiance to state authority and amenability to the country's established order and institutions, the execution of national duties in the spirit of transparency and accountability and all acts intended to enhance the state of national salubrity and security.

Thus very remotely, an ideology provides an orientation, a vague vision and a determination to sketch and map out a desirable course that the nation may be assigning itself and in the process and additionally offers some kind of mechanism for execution and forbearance. Ideology in this sense is a kind of *vade mecum* shadow of political rectitude and patriotic conduct. Now these characteristics of ideology, seem to speak for its desirability as an effective tool for marshalling the necessary public awareness towards certain fundamental, social, legal and political responsibilities that the society faces on daily basis in order

for it to accomplish its mundane objectives in the spirit of its already declared intents embodied in the social covenant. It is for these reasons that the commission should place much premium upon the reality of developing a clear-cut concept of a national ideology capable of accommodating an effective forward- looking vision and also of producing a mechanism for restraining legal, social, political and economic excesses. Ideally this kind of ideology should evolve out of the cultural and moral realities of this nation and this is an exercise that ought to be undertaken with maximum judiciousness and along the lines of conducting a thorough investigation and identification of national values that I have extensively discussed in the subsequent sections.

3. Development of National Vision and Philosophy in Constitution

In order to develop and incorporate a national vision and philosophy into the draft document of the constitution, the most important task to be undertaken, in my view, should be inevitably concerned with the task of clear identification, delineation and crystallization of the country's common values which must feature as the galvanizing elements of that structural edifice that can appropriately envision the cultural reality and at the same time be capable of outlining the critical temporal and historic circumstances of those unforeseen changes that may be found to overwhelm the society from time to time. This is in effect to say that the final document of the new constitution must, as far as possible, exhibit qualities of relative objectivity and palpable sense of detachment from possible narrow interests that may threaten to creep into it through the backdoor.

In as much as the bonafide drafters are entrusted with the crucial task of tempering and attenuating partisan or sectarian

ideologies and are committed to their task, they must be expected to conduct themselves in a manner that does not betray the trust invested in them by, for example, appearing to bend the rules in favour of some partisan interests or in favour of some tramontane ideologically prompted, induced or prodded interests from any quarters. This, of course, should not mean that the drafters must be expected to turn themselves into acrobats, automatons or insensitive characters to the spirit and aspirations of the general public that calls for the re-writing the constitution. On the contrary, the team should be robustly sensitive to the public constitutional recommendations and concerns without however reducing itself to the status of a mere instrument or rubber stamp of automatic implementation without weighing the short and long-term implications of the public's sensitivities and anxieties against the background of national interests in the global political realities of the modern era.

Whereas, therefore, there may be certain overwhelming national interests to be safeguarded by a constitution that is appropriately reflective of the country's and people's aspirations and preferences, and whereas this may generally pose as the reasonable middle ground for the public opinion, the drafters may sometimes rise against the spirit of automatic public expectation relative to the wholesale reproduction of the public's recommendations and sentiments in the new constitution if, in their judgement it is found to merely serve short-term, ephemeral and frivolous interests and then quickly fall short of adequately safeguarding and promoting certain other supervening and possibly countervailing more permanent interests and concerns that may mature within a reasonable flux of time dictated by developments on the global scene. In other words, the drafters, aside from being regarded as the bona fide custodians of the people's trust in this momentous exercise,

they must also betake and in fact regard themselves as the people's advisers and never as mere agents of real, inconspicuous and unobtrusive power-wielders or power-brokers behind the stage.

Somewhere along this indeterminate conspectus of the people's views and anxieties there must be points not only of accidental convergence and commonality but also points of substantive and earnest concern as well as points of moral philosophical inquietude or those of general value decline in the society. These may of course have to do with value instabilities and social drifts, deviance and other perverse modes of existence. Now these deficiencies, in my view, should be quickly identified and subjected to some thorough systematic analysis as possible fodder or raw materials for forging some kind of archival collection of serious national views that could be treated as the liminal or threshold material of the nation's conscience and consequently the first building block for a national vision or loosely, philosophy.

Having collected a wide-ranging corpus of views of relative convergence, agreement or qualified consensus, the next step, in my view, should be for the Commission to make a concerted effort to undertake a critical appraisal or even re-evaluation of the hitherto state of the geographical, historical and occupational processes of the different communities in order to establish areas of concern, phobias, complexes and interest. In this way, the Commission should be able to glean or at least have a qualified glimpse into each community's psyche with regard to its possible psychological obsessions or reticence which may hamper the possibility of spontaneous openness and accommodation under the present circumstances of psychological and legal reforms now underway.

It is my firm persuasion that unless communities are either given a chance to

speak out what lies deep down in their subconsciousness or at least made to open up through psychological inducements which the present euphoric climate seems to portend, it may be impossible to conceive and propose an authentic philosophy or vision that adequately captures and reflects the general conscience of the communities across Kenya. Again, in my opinion, the Commission will have failed in one of its most important objectives of forging or trying to forge a common vision or philosophy as the underpinning stabilizer of the people's constitution if it were to merely rely on the usual assumptions such as those mostly inspired by the mutually tolerated tribal, ethnic, clan or racial prejudices.

Underpinning the success of this fresh re-appraisal, must always be an approach that is humane, compassionate and sensitive to the ethical perceptions of the community or group targeted. Again, this cannot be realized easily without regard to the state and level of adherence to the community's values and culture. Indeed no amount of academic or even vulgar assumptions can either allay or heal the entrenched psychological crisis brought about by tribal or clan or village prejudices and other irrational belief systems without taking a deliberately conscientious account of the ethical and ideological concerns of each individual group. Where this is ignored, even the most elaborate document that the Commission may come up with, may never stand the test of time because it may ultimately be disowned by those whose value interests may never have been adequately explored and expressed.

The above situation is really the delicate tight rope walking that the Commission may be forced to undertake and to do so successfully before it can boast of having discharged its duties with diligence, impartiality and fairness. This exercise is particularly critical because the current state of lamentations against the current

constitution or rather the independence constitution and the inability to fully identify with it, is based on the fact that it is not people-owned or that it is not fully reflective of the actual Kenyan social and political environment. This is really to mean that the social and political environment that is being clamoured for cannot be the urban one with its stilted and assuming attitudes towards the rural folk. Rather, it must be expressive and reflective of the general morphology and typology of things treasured out there and which ultimately constitute their system of values and cherished beliefs.

Again with regard to the modalities of identifying these common values and incorporating them into the constitution, certain major presuppositions need to be taken into account: one, where a value is taken to mean a rational attachment to some object, idea, belief or phobia that has gained some reasonable currency and acceptance among a people over a considerable period of time or has been found to work well or to benefit the community under review without causing injuries or negative effects to third parties or where it has been tolerated over a long period of time by the third parties out of indifference to it, chances are that such a value may not simply be dismissed as frivolous and irrelevant but should be scrutinized and rationalized carefully in order to make a judgment as to whether or not it may be of national interest for the enhancement of the constitution of Kenya. Two, where a value is unilaterally regarded as an adventure or entertainment cultural practice which may be offensive to the neighbouring community - and here I am thinking of the proclivity among some communities towards pillage - such a practice that may have matured into a tribal value and culture must resolutely and unequivocally be denied access to the constitution of Kenya for the simple reasons that it inherently produces negative effects on third parties and therefore a source of friction and tribal disharmony.

However even this practice should not be rejected downright without proffering some rational explanation as to the reasons for its rejection. This exercise, in my opinion, should be conducted by the civic education bodies and the public administration organs at grass-root level. The Kenya Constitution Review civic education experts must possess some qualities of tact, diplomacy and some modicum of social compassion and understanding as they conduct this vital exercise among the civil populations. It is they who will eventually help heal the wounds of social attachment to certain irrational phobias and practices. In my honest view, this exercise should never be left to some motley rag-tag group of self-styled experts in civic education. On the contrary, it should involve people of acknowledged social and moral probity with a reasonable streak of psychological education or knowledge and who are prepared to employ psychological methods of approach and persuasion.

Thirdly, there will be certain positive ways of the people's manifestations which may not fall directly under value appraisal category but which nonetheless may robustly hold sway to the behaviour pattern of certain communities. These gentle and otiose ways of manifestations may in fact be so overwhelming in some communities than mere cultural and social values that they may even occupy a very critical place in their whole social ontology and external behaviour. I am particularly thinking and specifically referring to the so-called emotional pathology, make-up and psychological equilibrium or disequilibrium which hold certain sections of humanity prisoners of their own emotions and psychology in the most inadvertent fashion. What the constitution experts should be concerned about in this respect is not to encourage these nondescript and possibly retrogressive excesses but to appraise and rationalize them especially where they may

accidentally have some vague bearing on the conduct of strangers.

Emotional psychological excesses may not always strike a negative chord or be an alienating factor in the general social relations. On the contrary, certain psychological moods and emotions within one community can have a cascading and sometimes a reverberating effect on the neighboring communities to make them more responsive to certain social stimuli or socially sensitive impulses to their own local predicament and in this way to facilitate and develop the strategies for coping with them.

In a very general sense, constitutional drafters must fully explore both the phenomenology and typology of the emotional and psychological make-up of the target community in order to prepare a rational groundwork for proposing an acceptable system of common values in Kenya. Emotional and psychological social phenomena and their distinctive peculiarities may ultimately be the values that the Commission is seeking to articulate in the new constitution without necessarily highlighting their negative aspect.

Once again a good preamble cannot fail to encompass and articulate these otiose values, which seem to lurk in a very implicit way in people's sub consciousness and seem to manifest themselves only when there is psychological or emotional outburst hatched under conditions of the so-called psychic contrariety in the self. As it happens ever so often, the effects can be far-reaching and devastating if this does not receive a pre-emptive provision under a humane and sensitive legislation.

It must be borne in mind that part of the problem and maybe the main problem, stems from the psychologically irrational fear or phobia people in different communities harbour against one another. This mutual phobia and suspicion is deeply

rooted in the traditional culture of blind prejudice and tribal profiling and stereotyping that have thrived and actually been perpetuated as a psychological defence mechanism against all other communities.

I am not of course advocating the view that the Commission and its apparatus should be transformed into a drilled class of psychologists. I am merely pointing out that certain very fundamental aspects of psychological behaviour not infrequently responsible for certain outlandish and eccentric manifestations of community ethos, may go unnoticed and unredressed unless some deliberate effort is made by the Commission to comprehend and appreciate their implications and ramifications in the forging of a common philosophy based on some realism that touches on the mutual re-discovery of the whole range of explicit and implicit social values.

There are certain values which human beings cherish quietly, subconsciously and inadvertently without actually explicating them in their daily practical life. Some of these values may even be universally shared but at varying degrees and earnestness. In my view, this typology of values should not be ignored merely because it may not directly fit into the natural project or scheme of constitution making. On the contrary, certain of these values should be incorporated into our constitutional value corpus even if only to fecundate it or enhance its viability as a document of reasonably stable duration. Such values may very well have to do with certain very fundamental virtues that have significantly transformed other societies in their social, political and economic evolution having been declared either as central national driving force or crucial policies for positively engaging national consciousness.

Fundamentally and basically such values are founded on such virtues as discipline, patriotism, transparency, incorruptibility,

mutual spontaneity and openness, tolerance and mutual acceptance as well as the observance of the principle of the work ethic. Now these may appear fairly frivolous, peripheral, parenthetical and possibly irrelevant to our constitutional making task and yet the truth of the matter is that their cruciality may be indisputable especially with regard to taking into account the practical objectives any good constitution sets out to achieve particularly the creation of a humane state sensitive to the genuine concerns of its citizens and the spontaneous reciprocation of the citizens to the state's institutional demands and responsibilities accruing to them as responsible and amenable to the dictates of the nation's juridical order.

In invoking and exploiting these virtues/values for the enhancement of our constitution, the drafters should clearly bear in mind their practical utilities and move on to explicate the benefits they are known to bring in the overall scheme of attaining the society's social ideals and objectives - tranquility and relative happiness. In very broad terms then if our society must realize these two fundamental goals, our constitution should clearly spell out broad modalities of tapping the more practical benefits that can also launch our society on the path to adopting relative universal norms of behaviour and accountability. This general awareness should ideally sharpen and inspire the constitutional drafters in the cogitation of a reasonably broad and inclusive legal framework necessary for engendering and facilitating an ideal climate that accommodates a sense of spontaneity in respecting the rule of law.

The importance of self-discipline and rational self-restraint and indeed transparent conduct in matters of general social concern cannot be over-emphasized. For these are virtues of absolutely cardinal and virtues of the *conditio sine qua non genre* and always and everywhere crucial in the realization of

the wide-ranging panoply of social projections and aims. More so because no social covenant would subsist in the state of uncontrolled and conflicting interests completely unrestrained either by voluntary imposition of an ethic of self-discipline, mutual consideration or by a relative exercise of the general sense of social fairness and common decency and equity based on the articulate or inarticulate, declared or undeclared principle of reciprocity generally exercisable in all instances of human associations.

4. Procedure of Determining Commonality of Values

Having expounded the possible areas of search for values, the next critical step remains that of determining whether or not they may be common, central and critical to our social and political cohesion and how they can best be articulated in the constitution to the satisfaction of the cross-section of more or less all the communities claiming the right of citizenship to this country. This is really the litmus test for the eventual success of this enormous exercise of constitution writing.

In my view, to determine or establish the commonality of values and norms under this enormous diversity of community practices, belief systems and sometimes entrenched biases, it is imperative to subject them to two distinct criteria of rationalization and evaluation: one, do they constitute or even introduce an accidental dimension for the community in question in terms of its established morality or moral conduct and perceptions generally; two, do they cut right into the substantial aspect of its morality and positive belief system as to likely alienate or alter its attitude in a radical manner vis-à-vis other communities. These are two critical situations which, in my opinion, ought to be handled very cautiously and delicately as the Commission undertakes this rather disparate

sampling of values and ethical belief systems among target communities.

It is fairly self-evident that human values or other related normative social guidelines cannot be ranked consistently and equally and, indeed, in propinquity with each other without regard to their actual social effect and utility. It goes without saying that the social effect significantly determines people's level and intensity of adherence to some social norm or practice. Indeed a value grows in its significance and importance and produces a meaningful emotional attachment almost in the same degree it produces a palpable social impact, result or effect. To establish the importance the community attaches to any value at all so as to constitute an appreciable level of crucial moment for it, a search must be conducted into the whole phenomenological spectrum of the community's overt acts especially as they relate to its psyche, sense of pride, its sense of aesthetic values and, I dare say, its positive ethnic ambitions and aspirations.

The above, in my view, are the more positive and obvious indicators of ethnic value repository and they must be treated as such in any rational evaluation or integration. What this in essence means is that if the Maasai community, for example, earnestly believes that the use of ochre or the piercing of their ears constitutes their sense of aesthetic value and identity, this, in my view, should not be ignored because it may be an important indicator of a very vital value or values as far as the Maasai community is concerned. Even where this aesthetic value may not find a suitable basis for incorporation or cognizance, it must never be openly suppressed or deviously outlawed on any rational grounds. Instead the unenthusiastic constitutional drafters might rather treat it with indifference or at best with a *per incuriam* stance.

With regard to accidental values, it is not difficult to recognize them on the basis of their insignificant impact they make in the

life of the community concerned especially in as far as they do not conduce to any fretful or turbulent mood or disquiet upon their breach. In a sense, these are really quasi values and something of distraught social practices which the community cherishes *secundum quid* (relatively speaking) and without paying too much attention to any detailed or meticulous observance.

As is often the case, quasi values or norms do not often enjoy credible and settled stability since many of them have to undergo a constant change or find themselves either fluctuating or literally succumbing to the circumstantial temporal flux. Indeed, such values never seem to steal or claim either the psychological or emotional persona of the community to cause any meaningful consternation when ignored or suppressed. They are mainly but marginally regulatory and hardly declaratory and even less so mandatory in their binding force. Such then would be the procedure in attempting to identify and evaluate the values to be incorporated in the constitution of a reawakened Kenya.

Having clearly established which values are of critical importance to each community not necessarily on a *pari passu* basis in terms of taking cognisance, it would be necessary, as a further step, to compile them according to both substantive and striking similarities and also according to the overriding interest they are found to serve in the cross-section of the Kenyan society. This is perhaps the most critical phase in the whole constitutional exercise because the eventual product of ownership of and identification with the final document will largely depend on the extent to which each community's intimate value perception, articulation and expression is mirrored in it or even marginally reflected so as to cause some degree of positive acquiescence or compelling persuasion in its favour. Indeed, it is the minimum goodwill that the

Commission should be striving for where it cannot quite win overwhelmingly. In a society such as ours, even a scrappy or rather an infinitesimal goodwill in my view, must be better than none especially considering the popular negative lamentation undercurrent accompanied by an equally negative attitude towards the independence constitution currently noticeable here in Kenya.

The compiling and eventual possible incorporation of these relatively similar values, should be undertaken judiciously and, if need be, in stages on a draft form tentatively made available to the local committees for scrutiny and eventual approval or disapproval and then a revised final form for the general conference. It is important to strictly adhere to this procedure even if it might require an unexpectedly reasonable but protracted period to obtain a representative consensus from across the country.

As a matter of fact the above procedure will obviate trivial situations of sectional disaffection and make the constitutional making exercise enjoyable, secure and decisive. Indeed, with a secure panorama of positively identified national values, the articulation in the final document of the constitution should merely be a routine formality exercise in which the Commissioners themselves should actually derive much pleasure, pride and relatively gratifying euphoria in having to discharge such a momentous task for and on behalf of the people of Kenya. Indeed the exercise should even be more fulfilling if it is undertaken in the spirit of clinical professionalism and without temptations of interested deviations or prompted doctoring for whatever reasons.

5. Democratic Principles for Inclusion

In my candid view, a search and identification of democratic principles suited for inclusion should be undertaken in the same manner as values but on two distinct categories of general appraisal: first, it should be ascertained just like values, if there are principles which are peculiarly unique to each ethnic group on the totality of the community's worldview and in line with traditional belief systems and tribal or ethnic ethos generally. Secondly, it should be ascertained which democratic principles are derived from and based on the reality of modern and universally accepted practice of nations that can be of practical utility to us. Now, these two levels of search, in my view, should find some concrete expression in our constitution for obvious reasons that, if appropriately and satisfactorily documented, they cannot be found to be in diametrical opposition of each other under the current circumstances of globalization, relative effort for harmonization and cross-fertilization of values quietly going on in the world today.

There is little doubt about the democratic principles which modern civilized nations cherish and promote since they constitute vital ingredients of the underpinning doctrine of international norms of behaviour and the conduct of international relations as well as the preservation of the principles of general amity. Again, as it is also the case with all fathomable democratic principles or tenets, they too are born out of national values which accidentally happen to find similarities and practical utility in other cultures and civilizations. As a matter of fact, they may even start out as national ideological impulses or even as disparate and possibly incoherent philosophies which gradually gain a settled currency, momentum and recognition in the rest of the world as to ultimately mature into guiding principles of civilized behaviour among nations.

However, a clear-cut and possibly neat identification may not always be so readily available in respect of those principles generally regarded as democratic within an ethnic social parameter and less so within a setting of highly competing and sometimes conflicting interests as may easily be the case here in Kenya. Indeed, it is sometimes not absolutely unfair to assume that what may constitute a democratic bedrock for one cosmological reality of a community's democratic conscience especially in terms of its social and political conduct, may be at variance with another's depending on the interactive or non-interactive forces or processes going on between communities or tribes.

In the above case, the identification and appraisal may prove to be intractable and elusive since, unlike the domain of values and tribal beliefs whose end-effect is intrinsically immanent in character, the democratic suppositions, perceptions and assumptions may easily burst out of the immanent scope and actually inundate that kind of social scope that involves not only the fellow co-ethicists but also members of other communities with equally their democratically distinct social and political world-view and conceptions. For, it is fairly self-evident that what impels one community to behave in the way it does, may be firmly lodged in its political ethos and ultimately in its ethnic value imbuement and idiosyncratic loyalties rather than anything else. To this extent then, it may rightly be argued that the display of any democratic instinct within a tribal boundary or setting, is really the critical overt and proximate demonstration of how that community wishes to be perceived and treated.

Indeed, this is one area that is very sensitive because it involves the expression of the externality (external reality) and basically conveys the value image and all the lurking ingredients of value motivations. In essence,

the democratic expression or manifestation is really nothing less than the assertiveness of values in the external world or, as Plato rightly pointed out: virtue once externalized is virtue in action meaning thereby that it will also manifest itself in a variety of ways including democratic behaviour.

Democratic assertiveness eventually manifesting itself as the people's culture whether confined to tribal or ethnic perceptions, seems to entail a curious emotional resolve and sometimes a reckless characteristic whenever it is extended to others outside its natural social gamut. An adequate, early and opportune realization of this as far as the Commission's work goes, should, in my view, forestall possibilities of grievances and interminable grumbles from communities purporting to be ignored or sidelined.

Again in my candid opinion, this is one area, albeit intractable and elusive in terms of placating and allaying anxieties, that need not be mind-boggling in its pragmatic appraisal and pacification since each community can be prevailed upon to acknowledge the practical futility as well as the social and political contradictions that may ensue if each community insists on the wholesale adoption of its democratic culture package. Indeed, through rational and compassionate persuasion (or is it elegant brinkmanship?) it should not be too difficult to inject a relatively diffusible sense of give and take among the stakeholders for the sake of social compromise and equitable deal.

The choice of such utilizable democratic principles, in my view, should strictly be made to follow what may be regarded as the ritualistic utilitarian criterion and strictly in the spirit of John Stuart Mill's contention that the only justifiable criterion of any virtue (and in this case democratic practice or virtue in action), must lie in its utility. This is really to mean that where some democratic culture available within one community may be found to serve well the

rest of the Kenyan society particularly in its declared objectives of attaining social and political reconciliation and harmony, it could be considered for adoption and eventual incorporation into the constitutional document. Indeed good judgment and other patriotic considerations should be exercised by the Commission to take this bold gamble on behalf of the corporate Kenyan society.

6. Culture of Respecting the Constitution

Finally, we come to the issue of cultivating the culture of respecting the constitution which, to me, is really nothing but a truistic reiteration for several reasons: one, the whole idea of a constitution and its existence must presuppose some vague or elaborate state of the meeting of the minds which freely decree an arrangement that can regulate and affect the people's lives and social conduct and other interactive processes going on between them. To this extent then, it may be superfluous to even suppose that such freely entered agreement could be questionable in terms of its adherence and commitment to it.

The above ironical expectation, it would seem to me, makes sense only on some vague hypothetical grounds and subjunctively so but hardly on any spontaneous or unequivocal grounds. What this in essence means is that where the constitution is written as an unwavering document reflective of the people's will, it cannot ideally speaking, envisage a situation of hypotheticality or conditionality amounting to 'if this then that' situation. Its relative finality as a document should never be made to depend on the people's fickle moods or expedient desires or idiosyncratic preferences. Again, it should excel as a document of relative finality that, presumptively speaking, has taken account of the people's desires, aspirations and projections over a reasonable period of time.

The second reason why the constitution should claim an automatic respect and obedience would seem to lie in the fact that this document is no ordinary document but a special and unique document in the sense

that it has invariably to pose as a subsumption of everyone's will now regarded as culminating in an objective instrument called covenant.

CULTURE, ETHICS AND IDEOLOGY IN RELATION TO GENDER EQUALITY

Dr. Achola Pala Okeyo

1. Introduction

As a Kenyan anthropologist and feminist, I feel most privileged for the opportunity to provide some inputs into to the critical thinking around the important process of grounding the national constitution of Kenya. The process of democratic self-government and the exercise of sovereignty in this age, presents both a critical challenge and an enormous opportunity to us in contemporary Africa. At the core of this process is the fashioning of key economic, political and social instruments and the ethics and behaviour that resonate with and validate our way of life first and foremost as Africans (i.e. as opposed to the English or French or Portuguese way of life). Yet we must not bury our heads in the sand and ignore the enormous changes that are occurring around the world at this time and their implications for our business here today.

But first things first. I am sure many of you would agree that while we, as a people have come from a diversity of autonomous social-economic formations (mistakenly called "tribes"- a word we should abolish from our vocabulary altogether) we carry a history of interdependence and mutual respect as evidenced by cross-border trade, bilingualism and multilingualism and voluntary intermarriage along borders. We are a people with a common social, political and economic heritage under one nation, bound together under one constitution. Over the years of political independence, we have evolved a sense of Kenyan-ness, which is not simply based in law but in the recognition of shared values and common patterns of behaviour. For instance, there has

been a huge increase in fish farming and fish and ugali eating around the country in a way that suggests strongly that we can learn from each other, do learn from each other and enjoy to use what we learn from one another, public perceptions to the contrary.

Thus, the cosmic significance of national constitution making cannot be underrated. The stability of our land depends a great deal on the culture we create around the common instruments of development management including the capacity to create a credible constitution, undertake the necessary steps for a broad consultation, and the ability to apply its letter and live by it as the basis of our nationhood.

For those of us who came of age following national independence, the issue of managing political change in the context of a composite, diverse and rapidly changing cultural environment is especially important in spite of its fragility. And, since we have witnessed many instances of conflict and civil strife and failed states around us, the sovereignty of Kenya and its ability to protect the people of the country within a common set of ideas, beliefs and practice grounded in the respect of our peoples regardless of their ethnicity, gender and ethical affiliations, is something we guard very jealously.

It is therefore with deepest gratitude and humility that I have accepted the challenge to share some thoughts around the rather complex and even difficult yet critical area of discourse, namely, culture, ethics and ideology as these relate to gender equality in the substance of the Kenyan constitution.

The guidelines provided by the CRKC for this panel, ask that we focus attention on three critical questions:

- The role of culture in gender relations;
- The Kenyan experience on culture and gender; and
- Ensuring gender equity while recognizing culture.

In a way it is rather difficult to discuss these core issues in the language of another person because they are often context-specific and depend for their wider interpretation on the wider cosmology and economic and political definitions within different communities. I'm therefore constrained to make general statements and draw on my mother tongue for specific examples. I would request that your comments bring in other dimensions, or critique my presentation by adding from your own cultural base.

2. Culture.

Defined very broadly culture may be seen as "a people's way of doing things". Within this very broad definition are included a number of ideas, beliefs and actions. These encompass the way we cook, farm, marry, spend money, raise our children, and bury our dead. They also include our indigenous technical knowledge {such as our understanding of the environment, local ecologies, astronomy, plant, crop and animal science etc} as well as our education systems and practices, music and dance, games and all branches of the arts as well as all forms of worship and cosmic belief systems. Culture has a material and ideological aspects. While material culture tends to be factual and concrete, the purpose of ideology is to reaffirm a position, belief or perception. The role of ideology is to reinforce a perspective by asserting the primacy of certain ideas without necessarily basing in fact, the assertion or the conclusions to which such an assertion may lead. Thus ideology about the position of

women can, is and is often misinterpreted as fact and even referred as "customary law" without real analysis of the facts that are implied by this ideology. A good example of this comes from the issue of land tenure. In several parts of the country, women have been disinherited from land ownership (the law of inheritance notwithstanding) because collective landholding which conferred the guardianship over lineage of lands to men, in many cases came to be interpreted as exclusive ownership right and as such many women defined as "the other" did not have the same right conferred on to them.

These are the concepts and perceptions we live by. And while we cherish these ideas and actions and sometimes are willing to go to court and even war over them, culture is typically filled with contradictions, paradoxes and ambiguities. Somehow in the day-today workings of our cultures these incongruities are often worked out but not without peril to some groups who are less endowed with the power to decide over key economic resources (especially land) and decisions over large stock and the direction of society. All over the country, groups falling under this category tend to be persons perceived as "outsiders" in the sense that they do not hold control over such resources, are often from "another place" and with few exceptions, almost always include women and children and other ethnic groups living on borrowed land.

Side by side with this notion of other directedness, we find deep respect for human life in some societies and in others a rather perfunctory treatment of human life and this varies by gender. In my culture the notion of person, a human being has no gender. It is a concept that is often used to highlight the difference in rights between human beings and other animate and inanimate objects. In the days gone by, killing a human being was prohibited on the grounds of humanity and regulated personal

behavior regarding the license to kill. And even in wartime, wanton killing of prisoners of war was considered quite unacceptable.

Today many of our communities have sometimes amplified this notion of "the other" and reinvented "otherness" as powerlessness and embedded it in the money economy. Thus there is often confusion, in the minds of many, between monetary income and its putative conferral of power over personhood. I am sure many of you have heard utterances like "I have money therefore I have power over you, to beat, maim, hurt verbally and even inflict fatality because I happen to have money and you do not". This has been a major cause of domestic violence and women and children have often fallen victims to this equation than have men. Moreover, the problem has been carried over at times with the result that ethnic violence has followed in its wake and has been justified by some as permissible because it is perpetrated against the "Other".

I will come back to this notion a little later.

3. Gender

As gleaned from the work that has been within the Africa region and globally culminating in the Beijing Platform for Action (PFA) and in a recent study that I had the pleasure to coordinate, gender has been defined as a relational concept that refers to "attributes and opportunities of being male or female and the relationship between boys and girls, between women and between men" The study goes on to say that "these attributes, opportunities and relationships are socially constructed and are learned through socialization processes

I want to suggest strongly that gender is not a mathematical concept. It is not a measurement of equality and should not be interpreted in an abstract, overly referred fashion.

What do I mean by this? I mean that you cannot weigh equality between people in the same way that you use a scale to weigh sugar or salt nor is it a monetary value, which can be put on the head of or in place of a person. This misrepresentation of human value has been at the heart of the age-old anthropologist's debate over "dowry" and bride-wealth." In fact in the African context (and this is a point over which international consensus has glazed over rather fast) custom and customary law has been referred at the expense of women with the result that positive aspects of our cultures have often been submerged and new definitions of womanhood have been inserted in our midst leaving the impression of weakness and submission-that are not born out by the strength of the African woman. When we look further a field in the Americas, we find a further distortion of the position of African women under slavery and its carryovers into the contemporary national economies. This has come about first because of the nature of cultural studies which were first dominated by western male anthropologists and later by patriarchal notions carried by African men and some women who frequently refer our culture in order to accommodate western Christian and Victorian notions that have been imparted through school education. These and similar sorts of misrepresentation of facts and misinterpretations have led to inadequate reflection and provision for equality in the most important body of ideas, custom and practice, such as the constitution.

3. Ensuring Gender Equality while Recognizing Culture

Gender equality refers to a situation in which men and women have equal opportunities, equal access to the same rights and benefits. These notions are now buried in many instances in customary law, which is not well documented or analyzed in the present context. In fact many a time the colonial interpretation of law and custom in

Africa is what came to define the situation of women at law often to the exclusion of positive elements and no due attention to the introduction of corrective measures that might be needed to support gender equality.

Interrogating each article of the constitution to answer the following question may solve this problem: how do women and men benefit by the letter of this article? Furthermore, if women do not benefit how can that imbalance be redressed? And in the latter instance, additional remedy such as affirmative action should be provided for in order to correct the imbalance.

First, we may need to turn to African countries with comparable situation and history for best practices. For example, looking at the experience of South Africa which would be close to Kenya—a history of gender and racial discrimination, reified patriarchal ideology and a multi-ethnic, multi-cultural setting. In this instance, the construction of a women's charter has been instrumental in providing a unified analysis of the situation of women and ensuring the effective inclusion of women's views in the constitution. This of course requires a strong unified women's lobby that has, for Kenya, been a challenge.

Second, drawing on the experience of Rwanda, which has just adopted a gender-sensitive constitution, as with South Africa, a number of institutional structures are put in place to support policy development and monitor progress.

These include a strong women's ministry with suitable leadership and resources, combined with a women's desk in parliament and a Women's parliamentary forum, and the use of women's rights instruments namely the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW already ratified by Kenya) and the application of the Vienna Declaration and Programme of Action

adopted by the 1993 World Conference on Human Rights which addresses the central issue of violence against women including the respect for women's bodily integrity. These types of legal recourses will of course not be enough unless bolstered by strong leadership among women and unified civil society and parliamentary coalitions across parties and ethnicities and social classes. Lack of transparency and adequate coalition between diverse groups of women will tend to undermine the process.

By way of conclusion and advice, I wish to reiterate a few points that have emerged over the women's debates on engendering national constitution in Africa in the context of the Beijing review. I believe they are very pertinent for our discussion this morning.

As the road to democracy opens up in post-independence period, African women are identifying the space they need to put into practice a new vision of society. They are organizing for representation in decision-making positions and in national constitutions.

At the core of the growing discourse on women's leadership and empowerment in Africa is a fundamental hypothesis that women, given the chance, would bring about a new type of qualitative change and systems, which will support and institutionalize equality as a basic principle of the emerging state in Africa. All over the region, women are formulating a critique of the inadequate performance of current governance structures and practices. Through individual and collective action, women are engaged in the struggle to build a future state based on shared power between citizens and shared responsibility between men and women as the basic building blocks for democracy and social justice.

Existing evidence demonstrates how women's empowerment can benefit their communities more broadly. For example,

studies have shown that money in the hands of women gets invested in children and family well being much more frequently and with greater consistency than when the same money gets into the hands of men.

These findings strongly support the conviction that women's leadership and empowerment will promote values of fairness and social justice and that increased political power enshrined in a national constitution will make this a reality.

Thus for women, the emerging definition of governance goes beyond the normative structural focus on the rule of law to one based on empowerment. Coming out of a history of struggle for equality, women see governance as a system of authority that operates on democratic principles with institutions and procedures that stress social justice, transparency, accountability and people's participation as the core of its ethical culture. Such a system would be based on leadership styles that are inclusive, and committed to a deep appreciation of diversity.

Throughout the globe, women are challenging the uneven distribution of power in society, both in the household and outside. They are calling for a new culture of governance in all institutions of the state that will ensure that women will influence policies, programmes and legislation that affect their lives.

From their own life experiences and ethical values, women are introducing a new dimension of social thought and action based on the principle of a violence free society, demilitarization, respect for diversity, and the promotion of a culture of peace and development with dignity. All these acts serve to challenge the norms of male dominance and reaffirm the principle of equality throughout society. These perspectives are coalescing into a new paradigm that seeks to challenge the status

quo in many African countries today. The paradigm shift is coming about in several ways.

First, an increasing presence of women in public office whether by affirmative action or open competition is creating a new type of legitimacy for women's leadership and empowerment in public policy regardless of political ideology or party affiliation,

Second, a substantial number of women who enter politics have demonstrated principled commitment and accountability to their electoral communities and constituencies by bringing about tangible development in practical and cost-effective ways. Therefore, it may be concluded that for women, an engendered constitution would go along way to promote their leadership and efforts to deliver tangible benefits to their local communities.

Third, women parliamentarians, as group, have pioneered the parliamentary caucus model on development and equity issues across party lines which gives them a stronger voice and capability in organizing for desired legislative changes for the promotion of gender equality. In this connection parliamentarians are relying more and more on research and analysis provided by women research and media groups and other civil society organizations locally and globally. By recognizing the value of research and analysis for their work, women parliamentarians are working to promote networking between them and women researchers. This increasingly legitimizes the use of research as a transformative force in the women's movement and helps to close the gap between theory and practice and reduces the threat of fragmentation based on ethnicity, party affiliation and religion. The great catalyst for knowledge and networking for women is, of course, the Internet and new information technologies.

Fourth, women parliamentarians are responding to the demand from grass roots women leaders and organizations: this coalition, still in its early stages, has the potential for closing the elite-grassroots gap and expanding voter consciousness in support of women's political candidatures. Finally, in situations of conflict as in the case of Somalia, Rwanda or Burundi, women leaders have taken some risks. They have quickly recognized the power of collective action focused on community empowerment, the promotion of peace and human security.

Time and again, women have demonstrated courage and leadership in promoting these values even when such actions pose a danger to their own lives. In the wake of the HIV/aids epidemic that is ravaging the region, women leaders are focusing on practical community action to deal with the impact of the epidemic. They are not waiting for policy and new macrostructures to "manage" the epidemic. They are working with local communities to increase awareness and local capacity to cope.

4. Conclusion

These are the perspectives that underpin women's strategies toward engendering leadership, governance and the development agenda. They are all matters that should inform constitution making and such reviews of the constitution as may be undertaken periodically.

During the post-Beijing review period from 1998 to 2000, I have had the privilege to work closely with African women from Kenya, Rwanda, Tanzania, Uganda, Ethiopia, Zambia and South Africa. UNDP Regional Bureau has sponsored three workshop dialogues for Africa on the role of women in constitution making under my coordination. The workshops were held in Nairobi (April, 1999), Addis Ababa (November, 1999) and New York (March 2000). They have been very illuminating in terms of efforts and strategies that women have applied to the issue of gender in constitution making in the Africa region and can be of assistance to us in the thinking around our own constitutional process.

CULTURE, ETHICS AND IDEOLOGY: THE GENDER IMPLICATIONS

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1. Introduction

Culture is a universal phenomena in human society which is complex and dynamic in nature. It provides an identity to both women and men as members of a society. The concept of culture has been defined variously by social scientists but its general meaning remains the same. In this paper, the concepts of culture and gender will be defined to provide a common understanding of the two. The focus of this paper will be to explain the relationship between culture and gender. The paper will also examine some aspects of the cultural definition of gender roles and responsibilities, and how cultural interpretation of biological differences between women and men affect their gender relations. The rest of the paper will focus on three areas:

- The role of culture in gender relations ,
- The Kenyan experience on culture and gender
- Ensuring gender equity while recognizing culture

The paper will provide some recommendations to enrich the Constitutional review process.

2. Definition Of Concepts

2.1 Culture

At the general level, culture may be defined as the totality of a peoples ways of life. This includes its beliefs, attitudes, values, norms, customs, behaviour patterns, symbols, myths, language, food, artifacts (objects of all kinds) and other skills which members of society or community share as a framework for interpreting the social world, including patterns of gender roles and

relationships (Ember & Ember 1990, Suda 1999). In addition, Edward B. Tylor in his *Primitive Culture* (1861) defined culture as that "complex whole which includes knowledge, belief, art, law, morals, customs and all other capabilities and habits acquired by man as a member of society" (Edward B.Tylor 1861).

From this definition, it is clear, culture is the backbone of any community in the World. In fact, culture comprises inherited artefacts, goods, technical processes, ideas, habits, and all the integrative forces such as religion. It encompasses all the physical objects and shared products which women and men create, give meaning to the roles and responsibilities of women and men in society. Culture comprises the way of behaving, the way we do things and is a means by which we do things. Therefore, culture determines or conditions gender roles and relations of a given society. Gender, seen from this perspective is property of culture. Culture provides the basis to understand the gender systems.

2.2 Gender

Gender does not refer to women or men as is often misused and misinterpreted. The concept of gender is generally used to refer to the socially constructed roles ascribed to women and men in society. Gender is a relational concept which refers to the relationship between women and men and the cultural symbolic valuation of the roles and responsibilities of women and men in society. Gender, in a nutshell refers to the cultural interpretations of the biological and symbolic differences between women and men. Gender roles, relations and identity are socially constructed through the process

of socialization. Through this process, cultural values, beliefs, norms, attitudes, behaviour and customs are transmitted and learned by members of a cultural group. Therefore, gender as an analytical category and a social process describes all the social attributes, roles, activities and responsibilities connected to being female or male in a given society. Gender is also a relational concept. Indeed as Stolen has correctly stated, "gender is an all inclusive concept which not only entails what women and men do and how they relate in society, but also embraces cultural ideas about 'maleness' and 'femaleness' and the structural inequalities which emanate from those differences" (Stolen 1991: 4). Gender is different from sex in the sense that sex has to do with the biological differences between women and men. The gender identity of individuals would determine how they are perceived, and how they are expected to think and act as either women or men.

In this discussion of culture, gender and ideology, I would consider culture as the ideology, which provides justification for the oppression of women, creates justification for their exploitation, and create adequate space for male domination and control over women. This becomes problematic especially when culture defines and confines women to the domestic sphere of reproductive activities. This means that culture as an ideology devalues women and works in favour of the men reflected in various cultural rituals and celebrations such as childbirth and rites of passage. Therefore, the new Constitution should identify mechanisms to deconstruct culture to make it more responsive to the needs of women and men in society. This means that all negative cultural symbols, ritual practices and beliefs should be banned Constitutionally to allow women and men to enjoy their full human rights. This also

applies to other aspects such as the role of culture in defining gender relations.

3. The Role of Culture in Gender Relations

Gender relations refers to the social relationships between women and men. March et al (1999: 18) suggest that, "gender relations are simultaneously relations of co-operation, connection and mutual support, and of conflict, separation and competition, of difference and inequality". Gender relations are concerned with how power is distributed between women and men. They define the way in which responsibilities, entitlements and claims are allocated and the values attached to them. Gender relations are also influenced by other social relations such as class, disability, race, and ethnicity among others. In addition, gender relations are also relations of domination: men dominate women. This form of domination is worse given the fact that one can be only one gender, never the other or both. Thus, culture reinforces gender relations through the established culturally defined practices and institutions such as the family. At the level of the family, which are mostly patrilineal, patrilocal and with strong patriarchal traditions, women experience some form of subordination/domination. This domination extends to the economic, political and social areas.

Gender relations between women and men is influenced by the cultural requirements during marriage; which include the payment of bride-price, bride- service, and dowry among others. Perhaps the new Constitution should create maximum opportunities to enable women to decide freely on what works well for them at the relational level.

Gender relations at the level of the household is also influenced by the cultural

definition of access, control and ownership of property be it land, animals or even equipment. Gender relations are also affected in terms of participation in all forms of decision-making. Only men, in some cultures were culturally recognized as members of the council of elders which made decisions for the whole community. The new Constitution should encourage both women and men to participate in the leadership of their country. The new Constitution should provide special arrangements to accommodate women in the leadership process of the State of Kenya. Once this is achieved, gender relations between women and men would improve significantly and would also enhance the process of achieving gender equality in the country.

4. The Kenyan Experience on Culture and Gender

Kenyans have not been exposed to adequate opportunities, challenges and constraints in the field of culture. Kenya has not yet developed a national cultural policy. The new Constitution should put in place mechanisms to facilitate the process of developing a national cultural policy.

Gender is another area that Kenya again lacks a well-defined policy to give direction on gender related issues and activities. The new Constitution should provide some Constitutional mechanisms to facilitate the process of a gender policy formulation with adequate implementation strategies. The new Constitution should recommend the formation of a gender Commission, which should be centrally located in the office of the President with adequate financial and human resources to implement the gender policy.

Kenyans have been learning rapidly new concepts in the field of gender. However, there is need for significant improvement

both in terms of technical skills and policy to facilitate the process of gender mainstreaming. Gender mainstreaming as a strategy for achieving gender equality will be sustained by positive cultural attributes, norms and values.

5. Conclusion

Several recommendations are proposed here.

5.1 Cultural Practices

The new Constitution should criminalize and ban all cultural practices, which undermine, stigmatize, belittle and interfere with women's full attainment of their human rights. A few examples would suffice here:

- Forced child marriages involving young (under age) girls to old men.
- Forced/arranged marriages between young (under-age) girls and young boys below the age of recognised adulthood.
- Engagement of infants/young under age girls to adult males without their knowledge and consent.
- Forced/arranged female circumcision/genital mutilation which violate women's human rights and exposes women/girls to severe health hazards including HIV/AIDS, and untold miseries and sufferings.
- All forms of widow inheritance: widows should be Constitutionally allowed to remarry whenever they wished to do so. Widows should have the freedom to choose a new spouse to live with. Marriage arrangements and gift exchange
- All commercialized forms of marriage exchange either in the form of gifts either cash, kind or services which may interfere with the process of gender equality between the spouses should be banned Constitutionally.

5.2 Property Ownership

The new Constitution should deconstruct the concept of property ownership in marriage by encouraging joint property ownership especially property which women as wives help to create in marriage. Such property should be jointly owned through some Constitutionally approved format.

5.3 Custody of children

Husbands (men) and wives (women) should have equal opportunities for the custody of children including children with physical

disabilities which in the past was undertaken mainly by women.

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CONSTITUTION-MAKING : UGANDA'S EXPERIENCE

Hon. J. F. Wapakhabulo

1. Introduction

Uganda has undergone a turbulent constitutional history having in effect four constitutions since independence. The constitution making process has not always followed the rules of the book as concerns democratic representation, causing as a result, non-observance of or at worst complete abrogation or disregard of the constitutions and in effect leading the country into turmoil.

The 1995 constitution, the supreme law of the land, is by far the most democratically made constitution having undergone a process that began in August 1988 and ended in October 1995. This might seem long to any non-actor in the process but considering the instability resulting from previous constitutions and the many issues at stake, it was anything but long.

I shall first delve into Uganda's past experiences in constitution making so as to bring to light the background upon which the present constitution was made.

2. Independence Constitution

Uganda gained independence in 1962 under a constitution drafted in London under the auspices of the British. The constitution distributed powers between the center and the regions though in a disproportionate manner. More powers were given to Buganda Kingdom under a quasi-federal arrangement. Similar powers but on a lower scale were given to the other kingdoms of Toro, Ankole, Bunyoro and the Territory of Busoga. The remaining districts were not given quasi-federal status. With regard to the election of Members of Parliament the constitution provided for direct elections under universal suffrage except for parliamentarians from Buganda who were indirectly elected through the *Lukiiko* (Council) of Buganda. Members of the *Lukiiko* and of District councils

were to be directly elected under a universal suffrage system¹. This constitution was a highly compromise one and as Kanyeihamba pointed out:

“That the Uganda delegates did not object to these provisions is politically defensible. What was wanted was independence. The British Government could impose any terms it wished but once we were our own masters we would treat the constitution with the respect it deserved”².

Needless to say, Parliament was handicapped by the federal powers that were granted to the four kingdoms and the territory of Busoga.

3. 1967 Constitutional Arrangements

In 1966 Milton Obote, the Prime Minister of Uganda, abrogated the 1962 constitution and declared himself President under an interim constitution of 1966³. The Parliament whose term of office had just expired was constituted into a Constituent Assembly to draft a new constitution for Uganda. The 1967 constitution was born out of this process. The 1967 constitution apart from extending the life of the Parliament, also declared the President then in office the President of Uganda for a term of 5 years. It also introduced major changes to the constitutional arrangements in the country. The Kingdoms were abolished⁴.

¹ See Articles 2, 3, 4, 73, 74, 75, 76 and the schedules to the 1962 Constitution of Uganda.

² G. W. Kanyeihamba, *Constitutional Law and Government in Uganda*, Pp65.

³ Milton Obote ousted Sir Edward Mutesa (then King of Buganda) from the presidency causing him to go into exile from where he never returned.

⁴ Article 118 (10) 1967 Constitution

Whereas under the 1962 constitution the Prime Minister had to be a Member of Parliament leading a Party with the largest number of members in the House, the President under the 1967 constitution was elected indirectly. The constitution provided that the leader of any political party whether or not that leader was a member of Parliament became the President of Uganda if his or her party obtained more than 40% of the seats in Parliaments. The election of Members of Parliament was by direct universal suffrage across the entire country⁶. Apart from the election of the president, this arrangement seemed to have some democratic semblance although in actual practice the democratic principles of a free and fair election were hardly observed. Membership to the district and town Councils was by nomination by the central government⁷.

With regard to the Civil Service, the 1967 Constitution transferred all the appointing powers from the independent Public Service Commission to the President. The Public Service Commission became purely advisory⁸. The same arrangement was extended to employees of Local Government Councils. They, too, were appointed by the President. This centralization of power coupled with large-scale nationalization of private enterprises, including the cooperative movement, made the presidency and therefore the state extremely powerful. The state became the prime mover and the sole source of patronage. This ensured political loyalty to, and domination at all levels by, the ruling party, the Uganda Peoples Congress (UPC). Domination in the Army and the Police was ensured through purging officers from the southern part of the country, withholding promotion or giving them

innocuous assignments. Other political factions such as the Democratic Party (DP) were banned and their leaders imprisoned following an attempt on Obote's life in 1969. Because of these measures, it was not found necessary to formally declare Uganda a one party state. The Uganda Peoples Congress became the sole actor in the political arena. But within the UPC itself there was no internal democracy. Because of the challenge he had experienced at the Gulu general congress of the party in 1964⁹, necessitating his having to print new cards to disenfranchise accredited delegates opposed to him so as to impose a secretary-general of his own choice, Obote effected changes to the party constitution. Constitutional changes were made to provide that only the office of the President of the party would be elective. All the other positions on the party executive were to be filled by a person hand-picked by the party President. These arrangements were however disturbed in 1971 when Obote lost his grip on the military in a dogfight with Idi Amin in which the latter emerged victorious¹⁰. Idi Amin removed the semblance of constitutional governance left in the 1967 constitution and carried out a reign of terror over the people of Uganda.

The fall of Idi Amin and the eventual re-emergence of Milton Obote in 1980 as the head of the UPC government did not help matters. Although political party activity was allowed this time, the centralized state continued and centralization of politics was carried out further through intimidation of the opposition and bribery. Many opposition Members of Parliament crossed to the UPC thereby in effect, recreating a one party state. Some of the vocal opposition who defied the request to cross over to UPC such as late Professor Kyesimira were locked up on trumped up charges. Professor Kyesimira was released from jail in 1985 when Obote fell again.

⁵ Article 26 (1) 1967 Constitution.

⁶ Article 40 1967 Constitution

⁷ Article 81 (b) 1967 Constitution

⁸ Article 101 (1) and (2) 1967 Constitution

⁹ See Kanyeimba *Constitutional Law and Government in Uganda*, Pp81

¹⁰ Chief of Army Staff, later Chief of Defence and after the Army coup, President of the Republic

These developments were inevitable because at independence Uganda:

- a. did not have a native middle class strong enough to guide the affairs of the state in accordance with accepted democratic principles;
- b. did not have civil society institutions strong enough to constitute a check on the arbitrariness of state power;
- c. was experiencing a fight for state power through factions of the elite divided on the basis of ethnicity and religion but calling themselves political parties. These factions tended to act in a desperate and most autocratic manner.

Soon after independence, the UPC having gained power by tricking the Baganda into joining it in an alliance, proceeded to “cleanse” some areas of the country so that those areas became its primary power centers. Between 1962 and 1970 Milton Obote using ethnicity succeeded in destroying the Democratic Party in the northern part of the country from where he hailed, more particularly in the central north districts of Lango and Acholi. Having achieved this, Obote then through local chiefs and trickery in such areas as Teso, Bugisu, Ankole, Bukedi and Kigezi, was able to rule the country in disregard of such hostile areas as Buganda and Busoga. These two previously friendly areas had become hostile to Obote following the abolition of their kingdoms and the exiling or imprisonment of their leaders¹¹.

The DP on its part took advantage of the extreme dislike of Obote by Baganda and the dominance of the Catholic faith in this area to also create a ‘safe’ center in Buganda for itself. It has always been a strategy of the DP that with Buganda as a core it need to add votes from few areas outside Buganda on account of Catholicism to take power. These two elite factions have always remained at odds except

when their existence is threatened that they come together¹².

4. The National Resistance Movement

The National Resistance Movement (NRM) emerged on the scene as a result of this over centralization of power and the application of undemocratic practices particularly under Obote’s second regime. The 1980 elections which the DP was slated to win were massively rigged by the UPC. The NRM took up arms in protest. A fight took place on Buganda soil and Milton Obote and his allies were eventually removed from power in January 1986¹³. The NRM on coming into power, realized that while it had the military might it lacked administrative and political arrangements across the country. A number of measures were put in place and among these, three deserve special mention.

- a. A broad based government encompassing all elements of the Uganda political spectrum was established. This was intended to bring in people who if left out would create problems for the fledging administration. There was also the desire to create an atmosphere of reconciliation very crucial in a divided country.
- b. The election throughout the country of local councils from the village level to the district level was through participation by the people in the process. This created new power centers removing away power from the chiefs who were the sole source of authority in the villages and in the towns. This popular participation was seen as a revolutionary change as against the previous arrangement where councils at all levels were appointed by the government.

¹² In 1980, UPC and DP came together and destroyed the Uganda National Liberation Front. In 1996 they formed an alliance to fight Museveni and his National Resistance Movement during the Presidential and Parliamentary elections held that year.

¹³ NRM took over power from the short lived Lutwa government (1985-1986)

¹¹ Supra note 3

- c. The establishment of a constitution making process based on principles of consultation with and participation by, the population; a measure that was both populist and revolutionary.

5. Constitution-making Process

The National Resistance Movement had a programme of work contained in what is referred to as the Ten Point Programme. One of those points was that on taking power the NRM would establish a mechanism that would enable the people of Uganda prepare a new constitution for themselves. To the NRM the political problems of the country were traceable to the unilateral abrogation by Obote of the 1962 constitutional arrangements and the imposition by him of arrangements that were not acceptable to a large and influential section of the population particularly the Buganda. In 1986 on taking power the NRM issued Legal Notice No 1 of 1986. This legal notice formed the constitutional basis for the NRM government. Under it, it was provided, with regard to constitution making, that the constitution was to be debated and finalized by the National Resistance Council (NRC)¹⁴ working together with the National Resistance Army (NRA)¹⁵. However, this arrangement was subsequently varied through a recommendation of the Constitutional Commission.

The constitution making process can be divided into a number of stages.

1. the establishment and operations of the Constitutional Commission under Mr. Justice Ben Odoki.
2. the preparation for and conduct of elections to the Constituent Assembly (CA).
3. the operations of the CA to the point of promulgation of the Constitution.

6. The Constitutional Commission

¹⁴ Legislative arm of the NRM

¹⁵ The military wing of the NRM

As a follow up to the provisions of Legal Notice No. 1 of 1986, the Constitutional Commission Statute¹⁶ was enacted by the NRC. A Constitutional Commission consisting of 22 members was established by this Statute. It was chaired by Mr. Justice Benjamin Odoki, a Judge of the Supreme Court of Uganda, the highest court of the land. It was charged with the duty of gathering information from the people as to the form of governance they would like to have, analyzing the views so gathered and preparing a draft constitution as a basis for the final preparation of a constitution for Uganda. After touring the country, interviewing many people and receiving written memoranda the Commission made an interim report. In this report the Commission advised the government that a majority of the people of Uganda preferred that a Constituent Assembly be elected directly by them. Indeed, in the final report of the constitutional commission, it was reported that:

“...the body to officially debate the draft constitution should be as fully representative of the people as possible..we recommend.. a new body, the Constituent Assembly, composed mainly of directly elected delegates plus representatives of some interest groups to carry out those roles on behalf of the people.”

This recommendations were accepted by government and Legal Notice No.1 of 1986 was accordingly amended to provide for this. A statute providing for the establishment of, and elections to, the Constituent Assembly as well as the powers and functions of that Assembly was also enacted.

The Statute provided for the composition of the Constituent Assembly. The Constituent Assembly consisted of 284 delegates representing 214 electoral areas designated, through a population quota, by the Commissioner for the Constituent Assembly.

¹⁶ Uganda Constitutional Commission Statute

The NRA, the National Organisation of Trade Unions, the old parties which took part in the 1980 elections, National Youth Council and the National Union of Disabled People were also represented. Also included among the delegates was one woman delegate from each of the 39 districts. The 214 delegates representing electoral areas were chosen by universal suffrage through secret ballot. The rest were elected by electoral colleges. The purpose of extending representation to these other interest groups was to ensure that all stakeholders participated in this exercise which was crucial of the future of the country.

The decision to finalise and promulgate the constitution through an elected body was considered more appropriate than the previous arrangement contained in Legal Notice No. 1. Although the membership to the NRC had been expanded in 1989 to include elected members, those members were elected indirectly through colleges. This was considered not to be sufficiently representative of the people. It was also felt that a constitution coming out of the deliberations of directly elected delegates would enjoy greater legitimacy than would otherwise be the case. As defined in the Black's law dictionary, a delegate is a person who is delegated or commissioned to act in the stead of another. In light of this, members of the Constituent Assembly were to speak only for what the people who voted him in wanted. They were to consult members of the constituents for their views about the issues under discussion and not to rely on their own emotions. It was nevertheless feared by some people that the CA delegates might tailor the constitution to suit their future political ambitions. Suggestions were made that CA delegates should be disqualified from standing for election to Parliament in the first elections to Parliament under the new constitution. This suggestion was not accepted. To some degree, these fears were later justified. For example the CA failed to resolve the land question; a sensitive issue that has existed in Uganda since 1900 when the British took land away from the

communities and vested it in a few individuals. It was the hope of the majority of Ugandans that the popularly elected CA would through constitutional provision resolve conclusively the question of feudal land holding and absent landlords. The delegates shied away from making a bold decision regarding these matters for fear of losing votes at the ensuing parliamentary elections. They instead chose to leave the issues to be resolved by the first Parliament elected under the new constitution.

Similarly, for populist reasons delegates from areas of the country where land is held communally sought to protect this type of land holding which does not favour modernization of agriculture. As a result land distribution was transferred to tribal land boards. This is likely to negate the provisions of the constitution which say that a Ugandan is free to reside in any part of the county. The same populist approach with an eye to future elections motivated the delegates into making it difficult for the central government to access land for purpose of industrialization.

The Constitutional Commission submitted its final report to the President on 31 December 1992 – the last day of its mandate. The report of its findings were accompanied by a draft Constitution.

7. The Constituent Assembly

The Elections to the Constituent Assembly took place in March 1994. Candidature was open to any registered voter who inter alia, did not have a criminal record and was able to raise the required nominators and financial deposit. Political parties were prohibited from fielding or sponsoring candidates. The stress was on personal merit. To do otherwise, it was argued, would be to invite the old political squabbles and draw away people's attention from the noble cause of constitution making. Notwithstanding these restrictions on political parties, the reality on the ground was different. Many candidates identified themselves during

the campaigns either with the Movement or with given political parties. At campaign meetings the electorate sought to know from candidates whether if elected they would support extension of the movement form of governance or introduction of multi party politics. The electorate got to know who supported what. As a result, in the central region of Buganda where multipartism was portrayed as a return of Obote, the overwhelming majority of those returned supported movement politics. In most of the north where Obote's UPC remains strong, the majority of those returned supported multi partism. In the western region from where President Museveni hails, all the delegates except one supported movement ideas. In the East where UPC used to be strong in some areas, multi partists made a substantial showing though a majority of the delegates from there supported movement politics. All in all out of the 284 delegates roughly 220 supported movement politics. Differences existed among the movement supporters on some issues such as land and federalism but these were either smoothed out through caucuses or were resolved in accordance with the decision making mechanism in the rules of procedure.

The Assembly first met on 12 May 1994 under the chairmanship of the Chief Justice as required by the Statute establishing it. The Chief Justice supervised the swearing in of delegates and the election of the Chairman and Deputy Chairman. These meetings took place at the Kampala International Conference Centre, a sizeable conference center which had adequate space to house the Plenary, committees and the secretariat although in terms of planning, this was supposed to be temporary home. The Commissioner for the Constituent Assembly had sought financing from the Treasury to renovate the parliamentary conference room within the precincts of Parliament to accommodate the Constituent Assembly. This 198 meetings of the Constituent Assembly were therefore held in the Conference Centre. This was a blessing in disguise because no other place within Kampala would have been as

convenient in terms of meeting space and catering facilities. The Constituent Assembly Statute provided that the Assembly completes its work within a period of 4 months. This time frame turned out to be extremely inadequate and extensions had to be sought from the NRC on a number of occasions leading to promulgation of the Constitution after 17 months. The time allowed under-estimated the volume of work and the diversity of opinion that was to emerge. The procedures of the CA were contained partly in the CA Statute and partly in the rules that were made by the Assembly. The Rules of Procedure were first prepared by a smaller committee appointed by the Chairman from among the members. The draft rules were debated extensively by the CA and eventually agreed upon. These rules were additional to those contained in the Statute.

The procedure applied in the CA fell into three broad categories. As follows :

7.1 Rules for the Management of the Meetings of the Assembly

With minor differences these rules were designed very much on the lines of the rules applicable in parliaments of the Commonwealth. To facilitate work in this regard the rules provided for Standing Committees. There was a Standing Committee on Rules and Orders. The primary function of this committee was to keep under review the rules applicable in the Assembly, to suggest daily agenda to the Chairman and to suggest amendments to the Statute where necessary. There was the Legal and Drafting Committee whose functions was to provide legal advice to the Assembly and its committees on issues referred to it either by the Assembly or the Committees, to consider proposed amendments to the draft constitution at all stages and to liaise with the Technical Committee. The Technical Committee was a Committee of experts in legislative drafting supplied by the Attorney General as required by the CA Statute.

The Standing committee on Privileges, Discipline and Welfare had the function of looking into complaints of contempt of the Assembly, cases of indiscipline referred to it by the Chairman and finally to make recommendations regarding facilitation of delegates and staff of the Assembly.

Care was taken to ensure that membership of these Committees consisted of all shades of political opinion in the CA. For instance, strong critics of movement politics were appointed to the Legal and Drafting Committee. This was significant, taking into account that membership of these committees was by election by the Assembly through secret ballot. Deputy chairmanship of this Committee went to a strong multiparty supporter. This reflected a desire on the part of the Assembly to have the constitution drafted by a broad based body as a way of ensuring credibility and acceptability. Chairmanship of the Rules and Orders Committee went to a delegate who was strongly opposed to the idea of movement politics. This again showed the desire on the part of the Assembly to keep the idea of consensus alive.

7.2. Rules for Management of Business before the Assembly

In this area, the Assembly took two approaches. Firstly, a Business Committee under the chairmanship of the Chairman of the Assembly was established. Because of its important role in the work of the Assembly the membership of this committee consisted in addition to the Chairman of the Assembly, the Deputy Chairman, 39 delegates one from each district, 17 delegates representing special interest groups in the Assembly and the Chairman of all the other committees. The role of this committee was to prepare and keep under review the work plan of the CA, monitor progress of the constitution writing process generally and coordinate the work of all the other committees. Its sittings were not open to the public like it was the case with all the other committees. It was from the regular review of the progress of

the work and the monitoring of the work plan that recommendations were made to the NRC through the Minister responsible for constitutional affairs asking for the extension of time.

The second approach was the detailing, in the Rules, of the various stages to be followed in the preparation of the constitution. It was agreed that work on the draft constitution would commence by way of a general debate followed by a Consideration Stage and then a RE-consideration Stage. During the general debate, each member was allowed 30 minutes to comment on the general principles of the draft constitution and to deliver a message from his or her constituency. The Consideration Stage provided opportunity for detailed discussion of the provisions of the draft constitution, while the Re-consideration Stage was for revising some provisions agreed upon in the Consideration Stage as well as fine tuning the text. Other stages were Enactment, Certification and Notification. Enactment constituted the formal adoption of the text agreed upon in the Consideration and Reconsideration States. Under the Rules, enactment was to take place not earlier than 72 hours from the date of the laying on the table the final text. Upon enactment, the rules required that the draft constitution be certified by the Chairman, witnessed by the Deputy Chairman, the Commissioner for the Constituents Assembly, the Clerk to the Assembly and any delegate who wished to do so. Delegates were under no obligation to sign the text. This was a significant provision because withholding signature by a member, as eventually 40 or so did, was not detrimental to the validity and effectiveness of the constitution. The rules required the Chairman to immediately after enactment, notify the President in writing through the Minister of that fact so that the President may fix a date for promulgation of the constitution. Under Section 19 of the Statute the President was required to fix by statutory instrument, a date for the Promulgation of the Constitution. The day appointed for this

purpose was to be not more than 60 days after the day on which the Assembly enacted the Constitution.

The decision to provide for general debate was extremely important in the work of the Assembly. Members were elected from across the entire country and many hardly knew each other. Many were new to the “parliamentary practice” and therefore lacked confidence. There was an air of political suspicion and polarization. The general debate which lasted over one month relaxed the atmosphere and imbued confidence among many. But this approach was also significant in developing information groups and caucuses as delegates discovered the political inclinations of each other. With regard to the Consideration State, the general opinion at the beginning was that the Assembly would in plenary, consider the draft constitution article by article. The idea of subject committees found no favour particularly among those opposed to the movement type of politics. There was a feeling that each delegate’s views should be expressed on each article of the draft constitution. This approach was quickly found to be very slow and extremely time consuming. This realization was discussed in the Business Committee and a recommendation was made that Select Committees should be established to handle subsequent chapters in the draft constitution. To this end, five select committees were established to handle specific areas as follows :

Committees Chapters (Topics)

- I Public Service
 - Inspectorate of Government
 - Leadership Code
 - Boundaries of Uganda
- II Legislature
 - Executive
 - Judiciary
- III Defence and National Security
 - Amendments to the Constitution

Oath of Allegiance
 Presidential Oath
 Finance

- IV Republic
 - Citizenship
 - Local Government
 - General & Miscellaneous
 - Traditional Leaders
- V Representation of the People
 - Transitional Period
 - Plenary
 - Directives of State Policy

Upon allocating work to these committees the Assembly went into recess and reconvened only to receive reports of the committees. Consideration now shifted from the text of the draft constitution to the reports of the committees which included recommendations as to what should be included in the constitution. Many minority reports were presented on issues considered in committees. The approach in the plenary was first considered in committees. The approach in the plenary was first to consider minority reports on any issue and if adopted the minority position was to replace the majority view. Otherwise the majority view would hold unless successfully amended on the floor of the Assembly. In due course, amendments to the recommendations of the Committees became so many and so time consuming that the Business Committee had to come in.

It was decided in the Business Committee and adopted by the whole Assembly that the Legal and Drafting Committee should first consider and synchronise all the amendments proposed on any particular provision of the report of a committee. This way many amendments were removed and only those considered of substance were brought to the plenary. The only exception to this rule related to the determination of the political system. Multiparty supporters in Committee 5 had reported to the chair that the Chairman of that Committee had adopted a procedure which had

made it difficult for them to present their views effectively. Because of this they had walked out of the Committee, boycotting its proceedings. After listening to both sides, the chair ruled that in the interest of credibility and acceptability of the final product, the issue would be reopened in the plenary as if it never went before the Committee.

7.3. *Rules Providing for Decision-making in the Assembly*

Because of the need to ensure maximum acceptability of the matters agreed to, the quorum was set by the Statute at not less than 2 of the total number of delegates. This did not apply to the motion for adjournment. This turned out to be very cumbersome. It was not always easy to raise 142 delegates. This was aggravated by the fact that 101 delegates were members of NRC and some of these were Ministers including the Vice President and the Prime Minister. On many occasions the Chairman had to threaten disciplinary action as a way of enforcing due attendance. The rules also drew a distinction between decisions on procedural question as against decisions on the substance of the draft constitution. Firstly, the rules provided that every decision of the Assembly was to be by consensus. The Chairman was to determine whether or not consensus had been obtained by putting the question to the Assembly on the voices. The ruling by the Chairman could be challenged by 50 or more members and if so successfully challenged a division would be conducted. More importantly though the Statute and rules provided that with regard to decisions affecting the provisions of the draft constitution or any amendment to those provisions the motion would be carried only after it obtained the majority of not less than 2/3 of the delegates voting (subject of course to the requirements of quorum). On the other hand the motion would be lost if it was supported by less than the votes of the majority of the delegates voting. The matter would however be regarded as contentious if, upon voting, the motion was

supported by the majority of the delegates but did not obtain the support of 2/3 of the delegates voting. Where a matter became contentious the rules required that a recess of not less than one week would be taken to enable the members to consult their constituents before a second vote is conducted. If, upon the second vote the matter was again found to be contentious, then a referendum would be held.

The purpose of these provisions as regards decision making was to ensure that the substance of the constitution was arrived at by a decision of as many delegates as possible. At the same time it was tailored to protect the views of a substantial minority by giving them another chance apart from bringing in the population through consultation or referendum. The rules also provided that before promulgation, the President could if he disagreed strongly with any provision agreed upon in the CA, call a referendum so that the matter is decided by the voters. As it turned out the Assembly was sent to consult only once on the question of the national language. No referendum was occasioned either by the Assembly or the President.

8. The Contentious Issues

A majority of the decisions relating to the provisions of the draft constitution were reached by consensus except on the following:

- (a) National Language
- (b) Land
- (c) Federalism
- (d) The Political system

8.1 *The National Language*

A proposal was made that while English should be the official language of the country, as recommended by the Odoki Commission, Swahili should be the national language of Uganda. This proposal received mixed response. There were those who were extremely opposed to the adoption of Swahili

particularly the delegates from Buganda who felt that acceptance of Swahili would marginalize Luganda. The middle ground was occupied by many who did not have strong views either way. A majority of the delegates from Buganda were not prepared to sacrifice their future parliamentary careers because of Swahili. The matter was subject to division and the result was contentious. A second vote was taken after consultations and the proposal was lost. A compromise was finally adopted which provided that English shall be the official language of Uganda but that any other language may be used as a medium of instruction in schools or other educational institutions or for legislative, administrative or judicial purposes as may be prescribed by law. This in effect left it to Parliament to decide whether Swahili can be used in Uganda as a medium of instruction or as official language in Parliament, government offices or in the courts.

8.2 Land

Land has always been a sensitive issue in Uganda since 1900 when the colonial administration took away land from Baganda peasants and gave it to collaborating chiefs. Part of Bunyoro was taken away and given to the Baganda who fought on the side of the British against King Kabalega of Bunyoro. In these cases the peasants became landless squatters on land. Successive administrations including Idi Amin tried to resolve this question but without success. It was considered by many that the CA provided the opportunity to resolve the issue. Views were expressed that a provision should be included in the Constitution revesting the land in the squatters. The Constitution would mandate the central government to pay compensation to the dispossessed landlords. Those supporting the position of the landlords took the view that a law should be enacted enabling landlords to collect rent from the peasants under leasehold arrangements. The proposal to dispossess the landlords in favour of the squatters was defeated upon a division. The general mood in the CA

was for land reform in favour of the squatters. However, the lobby by landlords who either own or have access to public media seems to have played a significant role in making the delegates take a cautious approach. Also, apart from the effects of the impending parliamentary elections, many of the delegates are now large scale land owners through purchase. Some kind of compromise was agreed upon whereby the matter was left to be resolved by the incoming Parliament within a period of two years from the first sitting of that Parliament. It was further provided that until Parliament makes such provision the squatters should not be disturbed.

8.3 *The Restoration of Traditional Rulers and Federalism*

Before the Constituent Assembly came into place, the NRC passed a Statute restoring to the Baganda their kingdom. It is argued in some quarters that this move was opportunistic and designed to ensure for the NRM majority votes in the Constituent Assembly election from the Baganda. This though was not the reason for the decision made by the NRC. There was a lot of pressure on the NRC by the Baganda. The Baganda had always viewed the institution of the kingship as a unifying factor and a symbol of their right to culture. Now that Obote was out and the NRM had acquired power, they demanded this with a vengeance such that it seemed quite clear that all they would lobby for in the Constituent Assembly was a restoration of their kingdom and in turn effectively give second best to other issues to be discussed in the house. The NRM took the view that the kings should be restored where the people so wished but without executive powers – to avoid power-centre conflicts. The NRM though, was wrong in thinking the Baganda would be satisfied with just that – they wanted more. There was a strong lobby by a number of delegates from Buganda that Uganda should adopt the federal structure which existed under the 1962 constitution. In this, they were supported by multipartists who seized the opportunity to embarrass the NRM which favoured

decentralization. The UPC also saw this as an opportunity to gain favour in Buganda. The motion to introduce a federal structure was hotly debated in the Assembly. This motion divided Movement supporters. Many Movement delegates from Buganda, because of the campaign pushed by the Kabaka and his traditionalists, favoured federalism which with regard to Buganda, would in effect give the Kabaka executive power. The majority of Movement delegates from outside Buganda, favoured decentralization under a system that devolved powers and functions to the districts and beyond. The motion was defeated on the voices. This was because the motion had been moved by a UPC delegate. Because of suspicion among the NRM delegates from Buganda as to the hidden motives behind UPC sponsoring the motion-even the Baganda traditionalists abandoned it. Attempts to challenge the ruling of the chair failed to attract the required numbers. The Assembly proceeded to provide for a decentralized system of government with power distributed between the center and the districts. The districts constituted the primary units of local government. As a compromise to federalists it was provided that two or more districts could come together under a charter on account of cultural identity or to share services.

8.4 *The Political System*

At independence in 1962 Uganda was governed under a multiparty system. This was eroded by the practices of UPC as a ruling party such that by 1970 Uganda was all but in name a one party state. Following the removal of Idi Amin, multiparty politics was reintroduced in 1980. But when the elections of that year were massively rigged and the DP, the victim, elected to collaborate with elections “thieves”, many Ugandans became cynical about political parties. It is on this basis that Yoweri Museveni opted for “no party” or otherwise known as “movement politics”. This is a type of politics where no one is denied the right to stand for any political office of his or her choice. Political

parties are not allowed to sponsor candidates – personal merit is the rule of the game. This is to be contrasted with a one-party state under which one’s political rights are frozen unless one belongs to the membership of the only legal party. Justice Odoki’s Commission sought to know from the population whether the new constitution should introduce multiparty politics or extend the movement type of politics introduced by the NRM. The majority view was that political parties were divisive and the freeze on their activities should be continued - some said for as long as twenty-five years, while others preferred a freeze of 10 years. There was also the overwhelming view that the right to form political parties should be guaranteed and that Uganda should never be declared a one party state. The draft constitution recommend that the movement type of politics should be extended for another 5 years and that a referendum be held at the end of each 5 years to decide which of the two systems to be adopted. In the CA there were those who strongly supported this recommendation. Others took the view that the movement should be extended for a period of 5 years once and for all and thereafter, multi parties should be brought in. There were, on the other hand, multiparty supporters who were totally opposed to the inclusion of movement system in the constitution. As it was earlier pointed out this matter was hotly debated in Select Committee 5 and committed to the whole Assembly by the Chairman. In the plenary the matter was again debated and the decision was made by division. Those in favour of the reintroduction of political party activity were 68 and those against it were 199. The members present at the time of decision were 269. The motion was therefore defeated. Those in support of multiparty politics walked out and refused to take part in the proceedings relating to the political system. However, there were enough delegates in the house to continue proceedings. At the end of it all some kind of compromise was agreed upon between the “moderates” and the “fundamentalists” within the movement camp. The compromise was that the movement type of

governance was to be extended for another 5 years but that at the end of 3 years following the holding of elections under the new constitution, public debate for and against movement politics would be held. At the end of the 4th year a referendum would be held to give the people of Uganda a chance to choose between the two systems. The two systems were entrenched in the constitution as two forms of governance available to the people of Uganda to choose from and procedure was established in the constitution to enable them do this from time to time.

9. Informal Groups

Along the way, and as members got to know each other's political biases and views, interest groups began to develop. These developed outside the established procedures. There was one such group known as the National Caucus for Democracy (NCD) which grouped together 70 or so delegates. These believed in the reintroduction of multiparty politics and the prevention of the inclusion, in the constitution, of movement form of governance. This group was chaired by the senior member of the Democratic Party (DP) Mr Sebaana Kizito with a senior member of the Uganda Peoples' Congress (UPC) Mr Sam Kasajja Byakika as his deputy. Prof Dani Nabudere a member of neither of these two parties but a strong critic of the movement form of politics was secretary though in practice, he was the real brain behind this caucus. This caucus played a significant role in bringing together the various political tendencies other than movement supporters and in lobbying the diplomatic community. Indeed the American Embassy and the British High Commission were bold in their opposition to the entrenchment of movement politics in the Constitution. They also expressed their dislike for the idea of a referendum to decide whether to have multipartism or the movement system. The other European Union countries particularly Germany and France expressed disapproval of the same but said it was acceptable only as a transition to multipartism. The NCD became so

effective in its work that the movement supporters were also forced to establish themselves into some form of caucus to counteract the effectiveness of the NCD.

There was another group put together by women delegates. This caucus coordinated the work of women regardless of political inclinations as well as championing the interests of other marginalized groups such as the disabled and the youth. The effect of this caucus can be seen in the fact that the draft constitution was changed to increase minimum women representation in the Parliament from 15 to 39. The membership of the youth, the disabled and the workers was also guaranteed in the future Parliament. There were some regional and tribal caucuses which chose to push regional or tribal issues but these were not very effective. The caucuses applied their own internal rules and some of them were useful in refining and concretizing proposals for consideration by the Assembly. The diplomatic community, particularly the envoys from the western countries, brought a lot of pressure to bear on the CA against adopting a one-party type of governance. To them, the movement idea was a one party state in disguise. Their moves were strongly resisted by NRM stalwarts who marshalled their troops in the CA to carry the day.

10. The Role of the Chairman and the Deputy Chairman

The Statute and the Rules of Procedure entrusted the Chairman and the Deputy Chairman with the responsibility of managing the affairs and proceedings of the Constituent Assembly. This was a very important responsibility given the diversity of opinion and delicate nature of the task at hand. To ensure that the Chairman and his Deputy enjoyed the widest form of acceptance the Statute required that the Chairman and his Deputy be elected by not less than 2/3 majority of all the members of the Assembly from a list of 5 nominations presented by the President. For Chairman, I was

elected on the first ballot with the required majority. For the Deputy Chairman, a second ballot was necessary and Prof. Victoria Mwaka was elected Deputy Chairperson.

During my address to the Assembly before the ballot was taken, I made it clear that though I subscribe to movement politics, the future of Uganda was so important that I would exercise fairness and impartiality. I must say I stuck to this promise and by the end of the exercise virtually the total membership including multiparty supporters supported my leadership. I presume it is on the basis of this that I was elected unopposed as Speaker of the current Parliament of Uganda.

11. The Secretariat

The secretariat of the CA consisted of the Commissioner for the Constituent Assembly and his two deputies one in charge of administration and the other in charge to technical matters. A Clerk to the Assembly responsible for the day to day running of the Assembly was appointed. The secretariat working hand in hand with the Technical Committee provided a very effective managerial and professional team. They facilitated the work of the Assembly with impartiality. A Research team of over 20 professionals was appointed to carry out research on behalf of the members in various areas of interest. This also helped many delegates in providing educated and researched views.

12. The 1995 Constitution

The Constitution was promulgated on the 8th October, 1995. This Constitution differed greatly from the arrangement that was contained in the Obote Constitution of 1967. Its main features are that a whole range of powers are shared between the President, Parliament and some other constitutional institutions. For example, the President appoints his Vice President and Ministers with approval of the Parliament. The same applies to the

appointment of Judges, senior government officials such as the Inspector General of Police, the Commissioner General of Prisons and heads of Commissions such as the Human Rights, the Judicial Service and Public Service Commission. There is potential for conflict between the President and the Parliament in built with the Constitution. The President is elected to serve a term of five years unless he sooner dies or is impeached by Parliament on various specified ground or is removed for incapacity. The Parliament is elected for a term of five years. The President is elected for a term of five years. The President has no power to dissolve Parliament. Where, in the area of legislation there is a stalemate, Parliament can over-ride the presidential veto by two-thirds absolute majority. But as to what happens if Parliament does not marshal 2/3 majority, the Constitution does not say. The Constitution seems to assume that the two sides would act responsibly. This predicament may become more pronounced when multi-party politics is adopted. The presidential power of appointment of civil servants is limited to Permanent Secretaries and heads of departments but in any case, such appointments must be made upon the recommendation of Public Service Commission.

The Public Service Commission has responsibility of appointment of all other civil servants. The Judicial Service Commission is responsible for the appointment of all judicial officers other than Judges of the High Court, Court of Appeal and the Supreme Court. Previously all these powers were vested in the President and the Commissions were purely advisory. The President exercises no power in the appointment of local government civil servants. The District Councils through their district service commissions have responsibility for that.

The powers of the executive to borrow money have been restricted such that borrowing must first be approved by the Parliament. The provisions related to decentralization of powers and functions have been strengthened and

entrenched. The chairmen of districts who are also the chief executives of those districts are to be elected by universal suffrage through secret ballot in their respective districts. The power of the central government to suspend a local government duly elected is extremely restricted. In fact, it can only be exercised in extreme circumstances involving gross corruption and abuse of power.

This constitution is also a modern one. It addresses current concerns such as the right of the child, gender, the disabled and the environment. It does not only entrench the rights already known to many constitutions, it creates and recognizes new ones such as the right to shelter, education and clean environment. The constitution guarantees the right to form political parties and out laws creation of a one party state. This is nevertheless criticized by many who say that a ban on political party activity until Parliament has enacted a law providing for registration and administration of political parties constitutes a breach of the right of association and assembly. Movement supporters argue that this was a recommendation of the majority of the people and is a necessary measure to phase in political party activity as the population become more confident. In the area of human rights, the constitution establishes a Human Rights

Commission with extensive powers including powers to release detainees and to order compensation against individuals and the state for breaches of human rights. In this regard it entrenches availability of *habeas-corpis* even during a state of emergency.

13. Conclusion

All in all therefore, the constitution making exercise in Uganda has been an exercise to heal past wounds, to re-establish democracy, the rule of law and to place limits on arbitrariness of state power. These are still but ideals. It is hoped that these ideals shall be anchored as our society modernizes. Uganda has economic potential that has yet to be exploited. Uganda's problem all along has been bad politics. The NRM through the constitution has, in my view, addressed this issue. The new agenda now is reconstruction and development. The indication so far is that this too is moving in the correct direction. Ugandans, unless they choose to disrupt themselves again, are confidently building what is bound to become in ten to twenty years from now, a truly modern state. Out of all this we hope to have a powerful and influential civil society which will under-pin the democratic measures provided for by the Constitution of 1995.

SECTION TWO

SEMINAR ON THE GENDER QUESTION : 5TH – 8TH DECEMBER, 2001 AT THE SAFARI PARK HOTEL, NAIROBI

List of Presentations and Presenters

10. “Gender Considerations in Constitution-making: Making a Case for the Recognition of Women’s Rights” by Dr. Patricia Kameri-Mbote.
11. “The Socio-Cultural Aspects of the Gender Question” by Prof. Jacqueline Oduol
12. “Christian Feminism” by Prof. Sister Anne Nasimiyu
13. “Islam and Women’s Rights” by Ms. Saudah Namyalo
14. “Gender in the African Traditional Context” by Prof. Monica Mweseli
15. “Engendering the Kenyan Constitution: Political and Economic Aspects” by Prof. Maria Nzomo
16. “Models of Affirmative Action for Women” by Dr. Ruth Kibiti
17. “National Experiences and Challenges on Women with Disabilities and Constitution-making” by Hon Josephine Sinyo, MP
18. “Gender Considerations in Constitution-Making: Engendering Women’s Rights in the Legal Procces” by Dr. Patricia Kameri-Mbote
19. “National Experiences on Women and Constitution-making” by Hon. Zipporah J. Kittony
20. “National Experiences on Women and Constitution-making” by Dr. Julia Ojiambo
21. “Women and Constitution making in Uganda” by Hon. M.R.K. Matembe
22. “The Evolution of a **Gendered** Perspective in the South African Liberation Struggle” by Baleka Mbete
23. “Women and Constitution making: South African Experiences” by Baleka Mbete

24. “Islamic Experiences in Women and Constitution-making” by Dr. Abdullahi Ahmed an-Na’im
25. “Engendering the Kenya Constitution: Domestication of International Commitments and Building on Existing National Gains” by Nyaradzi Gumbonzvanda

GENDER CONSIDERATIONS IN CONSTITUTION MAKING: MAKING A CASE FOR THE RECOGNITION OF WOMEN'S RIGHTS

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1. Introduction

The issues of gender and women's rights evokes a lot of sentiments. Some people wonder why gender should be an issue at all. Others wonder what the interface is between gender and women. Indeed most persons perceive of the issue of gender as a woman's issue.

The term "gender" is a neutral term which accommodates the view that women's issues are part of broad social issues many of which arise out of basic social-class differences as opposed to purely sexual differences. The use of the term "gender" in reference to women has however served largely to mollify conservatists who are more receptive to a discussion on gender than to one on women. Indeed,

"the lift to the gender focus may be a strategic move to keep the women issue alive in a period of conservation... (A) "gender" focus may be seen as a 'safer' way of looking at the problem without mentioning women explicitly".

The danger here is that we may ignore the fact that women suffer double jeopardy as social beings in terms of both class and sex.

In this paper, I begin in Part 2 by defining the concept of gender. I then explain how women's issues are curved out of the gender milieu and how different approaches (feminisms) have emerged to address the issue. I discuss the diverse feminist theories briefly to illustrate the different ways in which women have sought

historically to address the issue of women's subordination.

Part 3 of the paper deals with the issue of rights. Moving from general human rights to women's rights, it addresses the notion of equality and equity and how these play out in relationship between differently placed subjects of law. I use analogies from relationship between differently placed subjects of law. I use analogies from relationships between states in international law and between differently placed individuals in national settings and make a case for differential treatment for differently placed subjects of law.

Part 4 looks at the role of law in promoting women's rights in Kenya. I look at the legal framework and raise the main legal issues that arise in an analysis of the application of law to women. I problematise the application of plural legal systems to the same person in a situation where it is assumed the there is only one organized and predictable system of law (legal centralism).

The main problem that opponents of the women's rights movement have in accepting that there are women's rights is in my view posited in the question: *Against who are these rights enforceable?* Maria Mies in her book *Patriarchy and Accumulation on a World Scale* asks in relation to payment of wages for house work: *Who would pay..... the capitalists, the state or the husband?* This pits the genders against one another unduly.

My argument is that we should not worry unduly about *versus who* the rights are enforceable. The starting point is to

acknowledge the importance of gender equality and the recognition of women's rights. We need to appreciate first, that it is wrong for a person to be subjected to differential treatment by dint of their being male or female just as it is wrong for small nations to be trampled on by big nations in international relations. Second, that we lock up society's potential if part of society is prevented by structural rigidities from contributing to the development of the society and finally that we need to ensure that all members of society contribute to the development of the society. Third and finally we need to ensure that different systems of law lead to an aggregate results of promoting women's rights rather than assuring them in one domain and leaving them ambivalent in other domains as happens when we have plural systems of law which apply alongside one another. This is the challenge in endangering women's rights in the constitution-making process.

2. Conceptualization

2.1 Gender

The term means the state of being either male or female. The male and female genders define and characterize all human beings in society. The two genders are distinguished from one another by physical, that is, biological sexual/reproductive differences. The term 'gender' has however increasingly acquired a social meaning where the *gender* defines how the male and the female gender relate in society. The social meaning refers to social characteristics of one's biological sex. These characteristics include gender-based division of labour whereby duties are allocated on the basis of one's sex. For example the female gender is allocated duties such as cooking, washing and other domestic chores, which belong to the private rather than the public sector. The male gender is allocated non-domestic duties such as

decision making, bread-winning and others, which belong to the public sector.¹

Thus when one adverts to the issue of gender today, one is not merely talking about the *Physical differences* that being biologically male/female would entail. One is also talking about *social constructions of maleness and femaleness* and this often translates into *power relations* between men and women. Sex then is distinguished from gender by what one is borne is female or male, and therefore it is a biological concept. Culturally determined patterns of behaviour such as rights, duties, obligations and status assigned to women and men in society (gender roles) are varied even within the same society. When study as a body of knowledge analyses the condition of women in the society. When such studies are also directed to the changing of women's conditions in the society, then such a body of knowledge is known as feminist studies. Feminism is therefore a political movement, which aims at transforming gender relations, which are oppressive to women.²

Feminist scholars use *gender* as an analytical variable. *Gender* is a relational concept that denotes the manner in which women and men are differentiated and ordered in a given socio-cultural context. Sexuality appears as the interactive dynamic of gender as an inequality. Gender emerges as the congealed form of the sexualization of inequality between men and women. So long as this is socially the case, the feelings, acts or desires of particular individuals notwithstanding, gender inequality will divide their society into two communities of interest. The male centrally features in the hierarchy of control. For the female, subordination is sexualized in the way that dominance is for the male, as pleasure as well as gender identity and femininity.

¹ Clarion, *An Introduction to Gender, Law and Society: Constitutional Debates No. II*, Claripress Limited: Nairobi 2001, p.2

² *Feminists Theories and Study of Gender Issues*

2.2 *Feminism*

(a) *Who is a feminist?*

According to Rosalind Delmar, “At the very least a feminist is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied and that the satisfaction of these needs would require a radical change/or revolution in the social, economic and political order”.

The term ‘Feminism’ is an emotive term which has generated so much debate concerning the usefulness of the movement. A feminist is a person who is interested in improving the situation of women. Thus a feminist at the very least believes that women suffer discrimination and oppression by virtue of their sex, and that their needs have been negated in different historical periods. A feminist can be either a man or a woman and not all women are feminists.

The feminist movement which developed in the post industrial revolution era in Europe, is not a unified movement, even though the goals of the movement are one and the same. Thus in the movement there is a plurality of feminist theories, which have different approaches towards addressing women’s problems or understanding women’s experiences. Each feminist theory seeks to “describe women’s oppression, its causes and consequences and thereafter prescribes strategies for the liberation of women. These theories therefore offer critical explorations of women subordination, through exposure of women’s subordination at all stages of their lives. Thus, the theories offer an analysis and explanation of how and why women have less power than men and how this imbalance can be challenged or transformed. There is, therefore, a plurality of feminist theories which reflects the fact that feminists though having a common problem have

different approaches at handling their problems as well as different experiences.

The major feminist theories are *liberal feminism* which focuses on equal rights and individual choices. This theory seeks to identify ways in which law could remove the barriers that prevent women’s access to for instance, education, employment, credit, or enjoyment of civil and political rights. *Radical feminists* however focus on the different ways in which men control women’s sexuality and reproductive capabilities to suit their needs. In addition, this school of thought shows how men use different forms of violence to perpetuate women’s oppression. *Marxist/Socialist Feminists* link women’s oppression to the forms of capitalist exploitation of labour and go on to analyze women’s paid and unpaid work in relation to its foundation and role within the capitalist economy.

(b) *Liberial Feminism*

Liberal feminists emerged from mainstream often professional, positions, throughout society and questioned those viewpoints about women which are damaging and discriminatory. The emergence of liberal feminism as a theory was the result of the critical socio-economic transformation in the 18th century, namely:³

- The Industrial Revolution and related changes in the methods of production and social relationships;
- The bourgeois revolutions which led to the growth of political ideals based on equality;
- Eighteenth century European politics characterized by confrontation with absolute monarchies, aristocracy and political oppression; and
- Democratic political ideas in capitalist USA and France of the 18th century which fuelled liberal feminist aspirations for women’s political equality with men.⁴

Liberal feminists are of the view that women’s subordination is rooted in legal constraints

³ Supra, note 3 pp. 17-18

⁴ Supra, note 2 pp. 72-73

which prevent the full participation of women in the public sphere. Liberal feminists demanded “equal” opportunities and equal participation in the management of the societies. They sought increase of their participation in the political organs, then fought for greater participation of women in education and training.⁵

One group of liberal feminists, the liberation feminist, are concerned with the provision and protection by the state of civil and political liberties to enable individuals realize their full potential in any given market. Classical/egalitarian liberal feminists on the other hand, are concerned with the provision of certain benefits to disadvantaged groups so as to uplift their bargaining powers to the levels of already advantaged groups.

Liberal feminists worked within state systems to achieve change by focusing on ‘gaining equal with American Creed’. For liberal feminists men were the potential allies who were also oppressed by rigid sex roles which denied them individual choice. They stressed the similarities rather than the difference, between individual women and men as well as the need to increase freedom for all people by eliminating group-based roles and stereotypes.

Liberal feminists maintain that education is unfair to females because it limits their access and retention in certain fields. The failure to educate girls can have far-reaching effects on the development of a country, especially in production and health. This in turn compromises women’s rights to access productive assets and their rights to life and liberty even in welfare oriented states.

A more radical orientation within liberal feminism has been challenging the “equal opportunity” approach, which ignores the structural gender inequities and demands a more radical transformation of gender relations through the equity approach. This school challenges the existing social injustice and

existing discriminatory systems. The equity approach is a reaction to the welfare approach on women issues. It recognizes that women are active participants in the development process but have been marginalised in production and reproduction.

(c) *Marxist Feminism*

In contrast to liberal feminist, they located the sources of women’s oppression in the structure of capitalism and regarded major structural changes as necessary. They stressed the needs, interest and rights of groups more than those of the individual, and “the inextricable links between race, class and gender oppression”.

Marxist feminists present a wide variety of scholars who have attempted to apply dialectical materialism in analyzing sources of gender oppression. They locate women’s oppression in social class, race and ethnicity. They consider capitalism, imperialism, and sexualism as inseparable. Liberation of women is thus linked to liberation of oppressive social class relations. Traditional Marxist feminist, especially those who have been using Engel’s theory of the “Origin of the Family”, located women’s oppression in their inability to participate in the public sphere. It was assumed that the liberation of women from the domestic spheres to the public sphere would have contributed to their liberation.⁶

The concept of mode of reproduction was proposed as antithesis for the more familiar concept of mode of production. This debate links the economy to production and the sexual system to reproduction. The result is that the idleness of either concept is reduced. The formation of the gender identity is an example of production in the gender system. The mode of reproduction is perceived of in two senses, namely, the propagation of the human species through reproduction and the reproduction of the relations of labour where the worker continues to sell his labour to earn a living.

⁵ *ibid*

⁶ *Supra*, note 2 at p. 83

The Marxist feminists participation in the reproduction/production debate can be summarized in two view points. The first views women as a reserve labour force for capitalism. Women's unpaid work provides extra surplus to the capitalist employer. Women thus serve the interests of capitalism through the management of family consumptions. The second viewpoint agrees that there is a relationship between housework and reproduction of labour. Debates on women and housework have revolved around whether or not housework is productive labour. Housework is not perceived as work by male dominated society because no wage is paid for it.

(d) *Radical Feminism*

The radical feminists together with the socialist feminists began what has become the preminent feminist method – consciousness raising. The technique had originally been used to organize the poor by themselves in order to understand the systematic social cares of their oppression and the need for political solutions.

Radical feminists identified men as the oppressors and did not consider discrimination as affecting women and men in similar ways. Like socialist feminists, they saw society as in need of major structural changes and were not especially interested in working for incremental change within the system; lest their power be dissipated in easy but small victories.

Radical feminists demanded radical transformation of the oppressive gender relations. They put sexuality, reproduction and patriarchy at the centre of the political arena and changes women's political consciousness. They challenge the conventional assumptions with regard to the place of women in society. In America for example radical feminists often staged public protests such as picketing the 1968 Miss America contest and sit-ins at the offices of the Ladies Home Journal and Newsweek to protest "the ways in which the

media's depiction of women perpetuated old stereotypes at the expense of new realities".⁷ Unlike liberal feminists, radical feminists stressed that women and men have conflicting interests. They tended to favour separation and emphasized the need to develop a women's culture, rather than building coalitions with men as liberal feminists. Thus to some extent, radical feminism came to mean feminists who were "women identified" and who analyzed oppression primarily in terms of sex.⁸

From a radical feminist point of view, male supremacy rather than patriarchy is the most appropriate term of description for the social systems where there is rigid division of labour. Whereas liberal feminists fight for equal education opportunities, radical feminists challenge both the quality and the quantity of education being offered to women. Radical feminists in Africa have been demanding education for empowerment. Studies carried out in Botswana and in Tanzania have demonstrated how educational stereotypes is contributing to the marginalisation of women. While demanding for equal opportunities, radical feminists have gone on to demand for changes in the curriculum.⁹

Radical feminists have also challenged men's control and monopoly over the production and use of knowledge. Gender biases are perpetrated because of the male dominance in media such as radio, TV and newspapers and school curriculum. Whereas liberal feminists have fought for equal access in health for women, radical feminists have agreed that health services must empower women.

(e) *Socialist Feminism*

This category of feminists seemingly combines all theories of feminism and call for the overhaul of the structures that perpetuate

⁷ Supra, note 2 at p. 75

⁸ Supra, note 3 at p.18

⁹ Supra, note 2 at p.77

women's oppression. They single out capitalism and patriarchy which they perceive of as separate entities which when they intersect result in the oppression of women. This includes control of women's reproduction and production. Socialist feminists groups focused upon uniting with other oppressed groups in fighting all forms of oppression rather than organizing or struggling separately to advance the interests of women.¹⁰

3. Gender/Women's Rights

3.1. *Human Rights*

Legal rights comprise a cluster of claims, powers and immunities.¹¹ The fact that a person has a right imposes a duty on another to refrain from interfering with that right. It also entails duties on the state, for instance, to ensure the enjoyment of those rights by its citizenry. Human rights are guaranteed as basic for all members of the human race. They include equality of all before the law and equal protection of the law, protection from discrimination on grounds of sex, ethnic origin, tribe, religion among others and protection from torture, cruel, inhuman or degrading treatment, right to own property and freedom of conscience, expression, movement, religion, assembly and association. Human rights and fundamental freedoms are the birthright of all human beings, their protection and promotion is the first responsibility of all governments.

The Universal Declaration of Human Rights is the basic international statement of the inalienable and inviolable rights of all members of the human family. It is intended to serve as "the common standard of achievement for all people and all nations" in the effort to secure universal and effective recognition and observance of the rights and freedoms it lists.

Basic international law instruments explicitly provide that the rights provided for in them are to be enjoyed by all human beings. The Charter of the United Nations in this preamble states.

"We the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... have agreed..."

The Universal Declaration of Human Rights of 1948 states succinctly that "Everyone is entitled to all the Rights and Freedoms set forth in this declaration without discrimination of any, such as race, colour, sex, language, religion, political or the opinion, national or social origins, property, birth or other status." (Article 2). Though this declaration was not intended at inception to impose legal obligations on parties, a party adhering to the Charter would be expected to ascribe to its provisions. This would then call for domestication of the provisions of the Charter.

From these two landmark instruments have sprung similar promulgations at international, regional and national levels. At the international level, the international Covenant on Economic, Social and Cultural Rights (ICESCR) provides for equal enjoyment of all economic, social and cultural rights (Article 3) which include the right to work (Article 6); the right to "just and favorable conditions of work" (Article 7); the right to social security, including social insurance (Article 9); the right of mothers to special protection "during a reasonable period before and after childbirth" (Article 10 (2)); the right to education (Article 13); the right to take part in cultural life (Article 15) among others.

In similar vein, the International Covenant on Civil and Political Rights (ICCPR) provides for the "equal rights of men and women to the enjoyment of all civil and political rights ..." (Article 3). These rights include freedom from "cruel, inhuman or degrading treatment or

¹⁰ *ibid* at p. 18

¹¹ Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Essays*, (Cook, ed., 1922).

punishment” (Article 7); freedom from arbitrary arrest or detention” (Article 9); freedom from “unlawful interference with ... privacy, family, home or correspondence” (Article 17); the right to “take part in the conduct of public affairs, directly or through freely chosen representatives” (Article 26 (a)); the right to “have access on general terms of equality, to public service” among others.

At the regional level we have, for instance, the African Chapter on Human and People’s Rights which articulates a number of basic rights and fundamental freedoms and makes them applicable to African states. At Article 18(3) it provides that “The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions”.

At national levels, many states have entrenched bills of civil and human rights in their constitutions, enabling their citizens to attack laws and decrees which, although lawfully passed, offend civil and political rights which have been declared so fundamental as to require them to be guaranteed forever. Moreover, private entities may be prevented from engaging in discriminatory aspects in respect of access of housing, services or jobs by domestic human rights legislation.

3.2. *Women’s Rights*

The campaign for *women rights as human rights* emerged in the 1960s when women realized that their needs were not adequately catered for in the general human rights and that their rights were often violated hence, the need for women to have their rights. Indeed, the idea of *women’s right/human rights of women* has developed as it has become increasingly clear that the enjoyment of human rights purportedly guaranteed for all has not been equal for men and women.

The immediate question that arises is: What rights are peculiarly germane to women as a category, which needs to be recognized outside the purview of general human rights? Broadly they include political rights, rights to economic independence and equality, access to education, the right to control their sexual and reproductive lives, rights to children and property both within marriage and upon divorce, and the right to safety in the workplace, at home and in public places. To that extent, women’s rights address the concerns that Liberal, Marxist and Radical feminists raised and use law to realize their imperatives.

Women’s human rights have been the concern of the United Nations since inception and in 1946, the UN established the Commission on the Status of Women. The UN General Assembly and other UN specialized agencies have adopted a number of conventions that address the rights of women. These include:

1. *The Convention on the Political Rights of Women* adopted in 1952 which aims at ensuring the equality of men and women in their participation in public life. State parties undertake to grant women full political rights such as the right to vote and the right to be eligible for election to all publicly elected bodies, to hold public office and to exercise all public functions on equal terms with men, without discrimination.
2. *The Convention on the Nationality of Married Women* adopted in 1957 whose purpose is to ensure the right of everyone to a nationality as recognized in the Universal Declaration of Human Rights. It acknowledges that laws that impose on women the nationality of their husbands affect this right. It provides explicitly that women and men have equal rights to acquire, change or retain their nationality.
3. *The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* adopted in 1962

whose purpose is to ensure, by national legislation, equal rights for both spouses in connection with marriage. Marriages should be entered into with the free and full consent of the spouse which is to be expressed to the responsible authorities. A minimum age for marriage is to be established and all marriages are to be registered.

4. *The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*¹², adopted in 1979 and which is the most exhaustive international legal instrument on the rights of women. It provides at Article 3 that

“States parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”.

It contains explicit provisions on the rights of women in the areas of political and public life (Article 7), government representation (Article 8), nationality (Article 9), education (Article 10), health (Article 12), employment (Article 11), economic and social benefits (Article 13), marriage and family (Article 14). It also targets culture and tradition as influential forces in shaping gender roles and family relations.

The Convention in Article 1 defines discrimination as: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social cultural, civic or any other field.

Article 5 places a duty on states parties to take appropriate measures:

- (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles of men and women;
- (b) to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and developments of their children, it being understood that the interest of the children is the primordial consideration in all cases”.

Article II seeks to eliminate discrimination in the area of employment. Each state party is enjoined to accord women,

- The same employment opportunities, including the application of the same criteria for selection in matters of employment;
- The right to equal remuneration, including benefits;
- To equal treatment in respect of work of equal value;
- To protection of health and safety in working conditions including the safeguarding of the function of reproduction;
- Protection from dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- Introduction of maternity leave with pay or with comparative social benefits without loss of former employment, seniority or social allowances; and
- Provision of the necessary supporting services to enable parents to combine family obligations with work responsibilities.

Article 12 demands in the field of health

¹² This is the most comprehensive treaty on rights of women.

- Equality of men and women in accessing health care services including
- Those related to family planning;
- Ensure that women get appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13 deals with elimination of discrimination in the area of economic and social life and in particular seeks to guarantee the same rights to family benefits, bank loans, mortgage and other forms of financial credit". Article 14 seeks to bring the rural women within the purview of the Convention to ensure their participation and benefits from rural development, health care, social security, training and education, economic opportunities, credit and loans, marketing facilities, housing, sanitation, electricity, water supply, transport and communication".

Article 15 commits states parties to

- Accord to women equality with the men before the law...
- A legal capacity identical to that of men and the same opportunities to exercise that capacity ... to include contracts and to administer property and ... in all stages of procedure in courts and tribunals".
- Accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16 enjoins parties to "take appropriate measure to eliminate discrimination against women in all matters relating to marriage and family relations" and in particular to ensure

- The same right to enter into marriage;
- The same right to freely choose a spouse and enter into a marriage only with their free and full consent;
- The same rights and responsibilities during marriage and its dissolution;

- The same rights and responsibilities as parents, irrespective of their marital status in matters relating to their children;
- The same rights to decide freely and responsibility on the number and spacing of children and to have access to the information, education and means to enable them to exercise these rights; and
- The rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for valuable considerations.

UN Specialized agencies such as the International Labour Organization and the United Nations Educational, Scientific and Cultural Organization have instruments on women's rights in the areas of employment and education respectively. 13

4. Equality and Equity

The provisions on women's rights are predicated on the notions of equality and equity between women and men. Equality between women and men relates to the dignity and worth of men and women, equality in their rights, opportunities to participate in political, economic, social and cultural development and benefit from the results.¹⁴ Equity on the other hand relates to fairness in the treatment of men and women. It adverts to the possibility of inequality between men and women which necessitates the application of differential treatment (DT) to get rid of inequality.¹⁵

13 See, e.g., ILO Convention No. 41 concerning Employment of Women during the Night (revised 1934); ILO Convention No. 89 concerning Night Work of Women Employed in Industry (revised 1948); ILO Convention No 103 concerning Maternity Protection (revised 1952); ILO Convention No. 45 concerning Employment of Women on Underground Work in Mines of all Kinds (revised 1935); ILO Convention No. 100 concerning Equal Remuneration for Men and Women for Work of Equal Value (1953); ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation (1960).

14 Joy Asiema, 2000.

15

4.1. Equality

It is recognized that gender inequality exists. There are some realms where women are underrepresented or totally absent. The question then is: Do women and men have equal rights and opportunities to participate in that realm? If yes, what are the hindrances to the participation for women? This question is one of equity. This raises the issues of formal and substantive equality.

a) Formal Equality

Most theories of justice pursue the achievement of some form of equality as their ultimate goal. However, equality is an elusive concept since different versions of equality yield extremely different substantive outcomes. In industrial countries, the emphasis has historically been on “formal equality” where it is posited that all subjects of the law should be treated in a similar fashion. Rules are usually deemed to be just if they apply to all without discrimination.

At both the individual and international level, formal equality seeks to give every member of the community equal opportunities. Internationally, this conception is, for instance, translated into the notion that states have the right to take any amount of shared common resources on a first-come, first-served basis.¹⁶ This allows states having the most advanced technological capacity to appropriate *de facto* a disproportionate share of the resources while less technologically advanced states benefit less despite the status of such resources as *res communis*. In the context of the revision of the Paris Convention for the Protection of Industrial Property, developing countries have argued that the idea of equality of treatment in the application of patent rules contained in the

¹⁶ See, e.g., Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 Geo. L.J. 675 (1993).

national treatment clause could only be justified among parties economically and technically equal.¹⁷

At the individual level, it is also likely that inequalities attributable to economic entitlements, historical factors and social relations can impact on the access of certain members of the society to guaranteed rights. This is the case with respect to gender relations where interactions between men and women are socially constructed into power relations. This raises the need for substantive equality.

b) Substantive Equality

The provision of moral equality as an ultimate policy goal may, under favorable conditions, produce an optimal aggregate outcome, such as a high rate of economic growth, but does not take into account the welfare of disadvantaged individuals.¹⁸ Accordingly, even if national laws adopt a system built on the rule of law, in which women and men are treated equally, and where all have a chance to enjoy the rights provided for, the least favored will continue to be relatively disadvantaged.¹⁹ More generally, equality of rights or opportunities will not necessarily bring about equality of outcomes, especially in a world characterized by disparities in resources and opportunities.²⁰

Legal systems are premised on the need to bring stability, coherence and foresee ability to human relations. One of the instruments used to regulate social conduct in large groups is the enactment of rules and standards. As noted by Hart, “the law must predominantly (...) refer to *classes of person*, and to *classes of acts, things, and circumstances*.”²¹ It does not however

¹⁷ See, Michael Blakeney, *Legal Aspects Of The Transfer Of Technology To Developing Countries* (1989).

¹⁸ See, e.g., Eduardo Galeano, “Guerre aux!”, 509 *Monde Diplomatique* 6 (1996).

¹⁹ *Contra* Jeffrey Sach, *A New Blueprint: Beyond Bretton Woods*, *The Economist*, 1 Oct. 1994, at 31.

²⁰ See, e.g., Oscar Schachter, *Sharing The World's Resources* (1977).

²¹ H.L.A. Hart, *The Concept Of Law* 124 (2nd ed. 1994).

follow there from that all rules should apply uniformly to all individuals. Different factors militate against a strict reliance on the principle of fixed rules applying uniformly to all.

Firstly, the changing nature of society and human needs calls for progressive change in the legal system. There is thus a conflict between the desire for certainty in legal results and the desire for modification and improvement.²² The fulfillment of unmet basic needs may for instance, push people to seek changes in the existing legal order.²³ This has been the guiding philosophy behind the quest for women's rights.

Secondly, the application of a general rule to a particular case may often necessitate the consideration of special factors and the balancing of the various interests at stake. There is thus a border area where enforcement agencies need to supplement gaps in existing rules.²⁴ There have been arguments that gender neutral law does not, for instance, result in fairness to both gender and that *de jure* equality may result in *de facto* discrimination.

Thirdly, the fact that rules emanate from competent organs and have been taken in regular forms does not guarantee that the rule is equitable. Even though law is usually based on the premises of a coincidence with justice, this is not necessarily realized in practice.²⁵

The search for an alternative basis to the principle of fixed rules leads to the old principle that like cases be treated alike and that

dissimilarly situated people be treated dissimilarly.²⁶ In Aristotle's own words.

"If they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints-when either equals have and are awarded unequal shares, or unequals equal shares. Further, this is plain from the fact that awards should be 'according to merit'; for all men agree that what is just in distribution, must be according to merit in some sense."²⁷

While stressing the importance of foreseeability, this principle of distributive justice implies that relevant dissimilarities between subjects of the law warrant special attention or special treatment.²⁸

Asserting that like cases must be treated alike still begs the question as to which differences should be taken into account, since individuals in a given society will often have several common and several distinct characteristics. It is therefore important to determine whether height, gender, age, wealth or income constitute relevant factors.

Thus, while discrimination in the treatment of individuals is banned in most countries, it is not uncommon for tax systems to tax more heavily people in higher income brackets.²⁹ This constitutes an acknowledgment that a strict reliance on formal equality may yield results which may not be "just" if the existence of inequalities in society is not taken into account.³⁰ In other words, the fulfillment of

²² See, e.g., Neil Snyder, "Natural Law and Equity:", in *Equity In The World's Legal Systems* p.34 (Ralph A. Newman ed., 1973).

²³ See, e.g., Thomas M. Franck, *Fairness In International Law And Institutions* (1995) at 7, noting that the different expectations of people may cause a tension between the search for change (for instance, meeting basic needs) and the search for stability in the legal order.

²⁴ Hart, *supra* note 21.

²⁵ Rene-Jean Dupuy, *La Communauté Internationale Entre Le Mythe Et L'histoire* (1986)

²⁶ See, e.g., Hart, *supra* note 21.

²⁷ Aristotle, *The Nicomachean Ethics* (trans. David Ross, revised by J.L. Ackrill & J.O. Urmson, 1991)

²⁸ Cf. Principle 10 of the Declaration on the Progressive Development of Principles of Public International Law relating to a New international Economic Order, *In International Law Association, Report Of The Sixty Second Conference* 2 (1987).

²⁹ See, E.G., *Tax Progressivity And Income Inequality* (Joel Slemrod ed., 1994).

³⁰ *Contra* Michael Akehurst, "Equity and General Principles of Law", *25 Int'l & Comp. L.Q.* 801 (1976) stating that it is more important to have certain rules than just rules.

formal equality may not bring about substantive equality. The realization of substantive equality requires that existing inequalities, such as inequalities in opportunities, wealth or natural endowments be acknowledged. Further, discrepancies that cannot be traced to individuals' choices should be taken into account and may constitute grounds for redistributive claims.³¹ This is true both in the case of a country lacking primary natural resources and in the case of an individual born disadvantaged or without wealth.

The limits of the traditional notion of equity in law call for new approaches to the realization of substantive equality. *Differential treatment* (DT) constitutes one of the ways in which the principles of distributive justice can be implemented to foster the realization of substantive equality between men and women. Article 4 of CEDAW gives a basis for DT. It decrees that adoption by states parties of

“Temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; These measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved”.³²

c) *Aims of Differential Treatment*

1. In international law political independence and legal equality do not suffice to explain the realities of the different members of the international community. “DT” seeks to adapt the legal system to social and economic realities and is not akin to charity.

³¹ On the contrary, as acknowledged by Eric Rakowski, *Equal Justice* (1991), differences resulting from voluntary wagers cannot serve a basis for redistributive claims.

³² This lays a firm legal basis for affirmative action.

Its eventual aim is the empowerment of weaker actors.³³

1. While differential treatment is doubtlessly aimed at identifying groups of actors who tend to fare less than others under existing systems, it does not seek to ignore the importance of aggregate measures of welfare. It recognized the need to both allocate sufficient minimum amounts to all and to guarantee sustainability in the long term. Thus, it is necessary to consider both aggregate fairness, which seeks to ensure overall of the necessary resources and disaggregate fairness, which seeks to allocate existing resources in such a way that individuals, or state, which need them most, do get a share.³⁴ It has indeed been submitted that the maximization of the welfare of a given individual will often be achieved more surely if the welfare of the group is taken care of at the same time.³⁵
2. Given that the standard rule of law applies to all subjects without distinction, differential treatment is in essence about creating distinctions to achieve a goal which formal equality can in many cases not reach. From the starting point of a “universal” rule, differential treatment thus calls for positive discrimination in favor of a given class or classes of subjects.
4. Positive discrimination does not usually seek to bring about the complete elimination

³³ Salman Khurshid, “Justice and the New International Economic Order”, *In Legal Aspects Of The New International Economic Order* 108 (Kamal Hossain ed., 1980) notes that reverse discrimination is not based on charity.

³⁴ On the link between aggregate and disaggregate fairness, *see, e.g.*, Franck, *supra* note 23 at 30 distinguishing between aggregate fairness (at the community level) and disaggregate fairness that is fair to each person.

³⁵ *See, e.g.*, Mohammed Bedjaoui, “Pour un nouveau droit social international”, *39 YB. Ass’n Attenders & Alumni* 17 (1969).

of inequality but to make sure that inequalities are only the result of individual differences, uncomplicated and unburdened by historical handicaps.

THE SOCIO-CULTURAL ASPECTS OF THE GENDER QUESTION

Prof. Jacqueline Adhiambo-Oduol

1. A Conceptual Overview Of Gender

The concept of gender refers to the economic, political and cultural attributes and opportunities associated with being male and female. Consequently, gender is not a characteristic of a person - something that women have while men remain men - as some people tend to think (Melhuus, 1988). On the contrary, this concept is a product of socialisation processes that ensure in many societies, that men and women differ not only in the activities they undertake but also in levels of access and control of resources. They also differ in their level of participation in decision-making. The conceptual distinction between sex and gender as developed by Oakley (1972) is now often used as an important analytical tool to draw insights on the distinction between these terms. According to this distinction, sex is a biological criterion while the gender identity of men and women is socially, historically, and culturally determined.

In most societies, women tend to have less access than men to resources, opportunities and decision-making. For instance, by 1999, only 11% of countries had achieved gender equality in enrolments (UNIFEM 2000: 10). With reference to women's share of seats in parliament, only eight countries had achieved a level of 30 % or more globally. In the Kenyan context, women " are considered disadvantaged compared to their male counterparts in virtually every sphere of life (Kenya Human Development Report, 1999: 2). Discrimination on the basis of gender leads to social exclusion,

¹ The implication here is that biological and certain physical conditions as exemplified by certain physical conditions such as chromosomes, external and internal genitalia, hormonal states and secondary sex characteristics, lead to the determination of male and female sex.

and is a major factor in accounts of why certain members of society end up in poverty traps.

As an example, in cases where inheritance rules largely favour men, women's access to productive resources is constrained. Similarly, in contexts where marriage rules are heavily weighted in favour of men, women's economic and public spaces become severely restricted, making it difficult for them to pursue interests in these domains, even when they have the talent to do so. World Bank (2001:118) points out that in countries such as Botswana, Lesotho, Namibia and Swaziland, " married women, according to both customary and common law, are under the permanent guardianship of their husband and have no independent right to manage property (except under prenuptial contract)." Gender inequality can also manifest itself due to societal preference for the male child.

Demographic records from North Africa, parts of India and China show that male preference results in increasing cases of mortality and natality inequality. In most of the Asian subcontinent, female mortality rates are very significantly higher than what could be expected to be the norm, given the mortality patterns of men (in the respective age groups). This type of gender inequality is not necessarily due to what has come to be known as female infanticide. The evidence seems to point to the neglect of health, nutrition and other interests of women that influence their survival leading to the following statistics: the number of females per 100 males in the total population of Egypt and Iran is 97, in Bangladesh and Turkey it is 95, while in China it is 94.

These figures say something about the nature of inequality since it has been observed that given similar health care and nutrition, women tend

typically to have lower age-specific mortality rates than men. As a matter of fact, even female foetuses tend to have a lower probability of miscarriage than male foetuses.

Inequalities are impediments to the ability of women to develop and exercise their full capabilities, for their own benefit and that of society as a whole. Kenya stands to gain from a more equitable distribution of opportunities and resources between men and women. In this connection, there is evidence to show that certain yields in agriculture could be improved by as much as 22% simply by giving women farmers the same education and inputs as men. (Ibid. 19).

The origins of the gender question can thus be said to lie partly in development theory. Available literature indicates that the issues concerning women and their part in the development process have been on the rise over the years. Besides this increase, the ways of addressing them have tended to vary as the understanding of women's position in development of gender roles has grown. In this connection, it is significant that although both the UN charter in 1945 and the UN Declaration of Human Rights in 1948 recognised the principle of the equality² of men and women, most development planners did not fully address women's concerns in the development process. For this reason, development planners worked on the assumption that what would benefit men would trickle down to benefit women (Boserup, 1970, Rogers, 1980, Mazza, 1987).

² The concept of gender equality is now taken to mean "equal enjoyment by men and women of socially valued goods, opportunities, resources and rewards. Gender equality does not mean that men and women become the same, but that their opportunities and life chances should be equal. Because of current disparities, equal treatment of women and men is insufficient as a strategy for gender equality (since) where there are disparities, equal treatment in the context of inequalities can mean the perpetuation of disparities". (OECD 1998: 13).

Beginning 1949 and into the 1960s, women's issues in development were subsumed under the question of human rights. These issues were reflected in the following instruments relating specifically to the status of women:

- Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others (1949)
- Equal Remuneration for Men and Women Workers for Work of Equal Value (1951)
- Convention on the Political Rights of Women (1952)
- Convention on the Nationality of Married Women (1957)
- Declaration on the Elimination of Discrimination against Women (1967)

Subsequently in the 1970s, women's key position in the development process achieved due recognition in relation to population and food issues. This explains the 1972 decision to declare 1975 The International Women's Year. The next ten years marked what came to be known as the UN Decade for Women. The concerns to be addressed during this decade were equality³, development⁴ and peace⁵ as well as the issues of health, education and employment. These issues are adequately

³ "Equality is both a goal and a means whereby individuals are accorded equal treatment under the law and equal opportunities to enjoy their rights and to develop their potential talents and skills so that they can participate in national political, economic, social and cultural development, both as beneficiaries and as active agents. For women in particular, equality means the realization of rights that have been denied as a result of cultural, institutional, behavioural and attitudinal discrimination" (FLS paragraph 11).

⁴ "Development means total development, including development in the political, economic, social, cultural and other dimensions of human life as well as the development of the economic and other material resources and the physical, moral, intellectual cultural growth of human beings". (FSL paragraph 12).

⁵ "Peace includes not only the absence of war, violence and hostilities at the national and international levels but also the enjoyment of economic and social justice, equality and the entire range of human rights and fundamental freedoms within society". (FLS paragraph 13).

covered in the Nairobi Forward Looking Strategies (FLS) that recognised the role women could play in the development process. The strategies were a follow-up to the principal concerns of UN Decade for Women. Their objective was to specify the constraints faced by women and to propose relevant strategies for overcoming them. This was to be followed by specific recommendations to be submitted to governments and other bodies such as NGOs for actions aimed at creating equality opportunities at all levels.

In the 1980s and 1990s, there was a growing trend towards treating women as agents and as beneficiaries in all sectors and at all levels of the development process. This transformation was due to greater understanding of gender roles. It contributed to the coining of new terminology to show the linkage between gender concerns and development. One such term is Gender and Development (GAD).

In essence, a gender and development approach focuses on the differential impact development has on men and women. Unlike the earlier approach of Women and Development (WID), GAD deals with the concerns of both women and men as a basis for addressing the nature and extent of gender based disparities. In addition, it recognises the important role women play in production. This can be traced to one of the most important influences in its evolution namely Boserup (1970) who advanced the following thesis:

1. Although in all societies there exists division of labour between women and men, this division varies between groups and social classes in each country;
2. Economic changes affect/impact differently on women and men;
3. The Third World women are key contributors to the economic development of their countries and therefore their contributions cannot be ignored.

Clearly, the concept of gender is now firmly established as a broad societal issue that women and men must address as partners through mainstreaming⁶. Two principal aspects stand out in a mainstreaming strategy. One is the integration of gender equality concerns into the analyses and formulations of all policies, programmes and projects. The next is the concern for initiatives that can enable women as well as men to formulate and express their views and participate in decision-making in all development issues.

It needs to be emphasised that a major consideration in the interpretations given to the conceptual meaning of gender is the awareness that gender definitions- namely definitions that show what it means to be male or female on the basis of socially constructed roles are cultural creations acquired through a process of socialization. Child rearing practices, language, proverbs, belief and value systems, religion and unchallenged day to day patterns of life cause most individuals in a culture to embody assigned gender characteristics that are then passed on to new members. Gender refers to what it means to be a "man" or a "woman" in a particular society as apart from the biological sex distinctions into male and female which is not culture specific. This manifestation of gender varies from culture to culture and changes over time. Moreover, because it is a social construct, gender not only varies from one culture to another, but also varies within cultures over time; culture after all is not static but evolves.

This is why there are many faces to gender inequality (Amarta Sen) and why there is so much controversy about its meaning, its manifestation and how it should be addressed.

⁶ The 1995 Beijing PfA treats mainstreaming as the key strategy in support of gender equality. Thus, governments “and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes so that, before decisions are taken, an analysis is made of the effects on women and men respectively”. (Para.202).

"Given the many faces of gender inequality, much depends, on which face we look at (because) gender inequality has many distinct and dissimilar faces"⁷.

Since perceptions of gender roles are culturally defined, gender inequality between women and men is not the same in all cultures. From a socio-cultural perspective we must always remember that gender inequality is not a homogenous phenomenon but is manifested through disparate and sometimes inter-linked ways.

The variations mean that there is no one-all purpose remedy that can be brought to bear on all cases of gender inequality. The situation is made even more complex by the fact that different forms of gender inequality may also impose limitations on the lives of men and boys, in addition to those of women and girls. Additionally, the same country or society may move from one type of inequality to another over time due to cultural and value system changes. It is also significant that gender inequalities present a very big challenge because of the way that different kinds of inequality frequently feed and nourish one another. For example gender inequality in education leads to inequality in access to decision making positions and to low levels of economic empowerment; inequality in decision making leads to inequality in access to information and technology, ownership of property and to low levels of legal literacy; inequality in property ownership leads to inequality in poverty levels.

⁷ They include (a) mortality inequality-high rates for women, (b) natality inequality-preference for boys over girls (c) basic facility inequality-even where demographic characteristics do not show much anti-female bias (d) special opportunity inequality – tendency to keep women out of male areas (e) professional inequality-women face greater handicap than men in employment promotion in work etc (f) ownership inequality and (g) household inequality-family arrangements in terms of sharing the burden of housework, childcare and decision-making (ibid).

Consequently, addressing gender inequalities is not the same as tampering with the traditions and culture of any given society. Rather it is an approach to ensure that the gender differences created by culture do not construct unequal relationships where one category uses power over the other, and where culture socializes people into those differences thereby maintaining the unequal relationship. Addressing gender inequalities particularly in the context of the socio-cultural issues of the gender question in the constitution review process means ensuring that those carrying one label (in this case man) do not have more rights than those carrying the other label (in this case woman) as this would translate into the denial of justice. It means looking beyond the predicament of women and examining the problems created for men as well by the asymmetrical treatment of women. (Amarta Sen).

The conclusion to be drawn from the nature of the relationship between gender and development concerns is the proposition that development theory had a role to play in the evolution of the concept of gender. It is also the case that from a historical perspective, feminism through the feminist movement contributed greatly to the evolution of the concept. At a national level in Kenya, the concept of gender has evolved from the pre-colonial era, through colonialism and attendant religious dimensions to independent Kenya. Key landmarks in our national track include the traditional African contexts as manifested by the country's rich cultural diversity, the impact of religion on gender, the evolution of women's welfare organisations and frameworks (particularly Maendeleo Ya Wanawake MYWO) and the impact of international conventions and instruments.

As we shall see later in the discussion it is the interplay between the different stages of the gender question evolution (nationally and internationally) and the cultural and religious

paradigms of interpretation that require close scrutiny and analysis.

2. Feminism

As a universal concept, feminism is a broad social movement intended to address the thesis that society has not always been fair to women. Feminism is thus naming universal social injustice to women and the measures introduced to work for women's liberation. As a broad social movement, feminism allows for different points of view under the umbrella of working for women's rights and against female oppression. These different points of view offer alternative paradigms (frameworks) for interpreting why women are not treated fairly (are denied justice) by society and seek to identify how (in what ways) women are oppressed so as to establish how to redress the situation.

This unfairness is not a recent phenomenon. Wollstonecraft (1792) cites the example of Reverend James Fordyce who in his *Sermons to Young Women* (1766), warned the young women in England, to whom his sermons were addressed not to follow "those masculine women that would plead for your sharing any part of their province with us." In this case, the province of men included not only "war," but also "commerce, politics, exercises of strength and dexterity, abstract philosophy and all the sciences."

In 1870, Queen Victoria wrote to Sir Theodore Martin complaining about this mad, wicked folly of Women's rights. The formidable empress certainly did not herself need any protection that the acknowledgment of women's rights might call for." (Amarta Sen)⁸

⁸ Amarta Sen is the Master of Trinity College Cambridge. He has worked and written extensively on the subject of gender since the 70's. One relevant article which is a must read in gender is "The Many Faces of Gender Inequality".

In her "after word to Maids and Mistresses", Jean Howard not only points to early modern women's gender consciousness as the basis for alliances and activism; she also rightly remarks on the contributors' "hard-headed" refusal to ignore factors that separate women and cause them to work against each other. Thus Kathleen Brown's essay discusses the complex role of gossip in an eighteenth-century plantation household that was at once a "mosaic of different interests" and a porous community that allowed the participation of enslaved women and white domestics in the affairs of the dominant white family (p. 88). Laura Gowing's study, *Domestic Dangers*, also emphasizes friction as well as collective bonding. In the court cases she studies, women were the ones who maintained the patriarchal gender order, who regularly defamed other women, and who often, following their husbands' affairs, united with their husbands against the women with whom their husbands had slept.

Gowing is interested less in the prescriptive literature about women-what gender was supposed to mean-than in what gender difference actually did mean to early modern people. Her central premise is that codes of morality were radically different for early modern women and men:

"Women's sexual culpability was not just greater than, but incomparable with, men's.... There was no way of calling a man a whore, or condemning his sexual promiscuity; nor of calling a woman a cuckold, or calling her to account for her spouse's misconduct" (pp. 4, 63).

Women's honour was invariably defined in terms of sexual modesty and restraint; indeed, the mere fact of testifying in court, even if only as a witness, could compromise a woman's reputation for chastity. Men's reputations, in contrast, were compromised by accusations of violence or extreme cruelty. Thus gender relationships were not analogous to class

relationships. Women in families did not stand in relation to men as similar but inferior human beings, as subject did to ruler, servant to master, or child to parent. On the contrary, women and men defined themselves as both physically and morally different."⁹

Such clear-cut beliefs about the provinces of men and women are now rather rare, but the presence of extensive gender asymmetry can be seen in many areas of our lives. And it is these patterns of relationships between women and men that underpin the concepts of gender and feminisms. Gender is a relational concept that denotes the manner in which women and men are differentiated and ordered in a given socio-cultural context. Sex then, is distinguished from gender by what one is born as, that is female or male and therefore, it is a biological concept. Culturally determined patterns of behaviour such as rights, duties, obligations and status assigned to women and men in society (gender roles) are varied even within the same society. When one studies the way women and men are differentiated in a socio-cultural context, the focus is on gender relations. When the focus is directed to changing the negative condition of women in society the body of knowledge is known as feminist studies. This is why feminism is considered a political movement, because it aims to transform gender relations, which are oppressive to women.¹⁰

We have divided our world into male and female and proceed to tell people what they can and cannot do depending on what sex they happen to be born in. The male centrally feature a hierarchy of control. For the female, subordination is institutionalised.¹¹

Theories have been developed by feminist thinkers to explain the custom of the feminist

movement and the concepts of gender globally. The history of the women movement, especially in the United States is often described as two "waves". The "second wave" describes the developments from approximately 1960 to the present; the "first wave" refers to the period from the Seneca Falls Convention in 1848 to passage of the Nineteenth Amendment granting women the right to vote in 1920. It is sometimes assumed that the first wave consisted solely of the suffrage movement. In fact however, feminists have inherited a rich history of struggles-intellectual, legal, and political-during which women have repeatedly emphasized, in addition to political rights.

The second wave of the feminist movement emerged in the 1960's as the result of a number of pressures for change. Women were living longer and had greater control and reproduction, and more women, whether married or single, were working for wages outside the home. Many younger women-like their foremothers in the 19th century became involved in the struggle for racial and economic justice. Many of these movements set off to protest women's mistreatment and subordination.¹² At least three identifiable groups committed to changing the statistics of women formed the second wave during its early years: liberal, Marxist, and radical feminists.¹³

The seeds of the 19th Century "women movement" in the US are said to have been planted at the 1840 Anti-slavery convention in London, during which Lucietia Matt and Elizabeth Cady Stanton were deprived of delegate status and consigned to the balcony leading them to launch a women's rights campaign when they returned home.¹⁴

⁹ Source: *Gender Place and Culture – A Journal of Feminist Geography*, June 2001, Vol. 8 issue 2, P. 205.

¹⁰ "Feminists Theories and Study of Gender Issues".

¹¹ Mary Becker, Cynthia Grand and Morrison Torrey: *Feminist Jurisprudence – cases and materials* (1993, West Publishing Co.) P.p. 70-71.

¹² *ibid*

¹³ *Supra*, note 2 at P. 72.

¹⁴ Becker, Grant and Morrison, "The historical background of Feminist Legal Theory" in *Feminist Jurisprudence* (West Publishing Co. U.S.A, 1994) Pp. 1-6

Many of the leaders of the women's movement like Mott, Stanton, and the Grimke sisters gained their initial political experience, which offered them a clear ideological framework for the principle of equal rights for all persons and then for social change. Many of these women were among the first generation of educated women in the US and found a sense of purpose in abolitionism in a society where forms of movement for political and economic activity were closed to women. They quickly learned that in order to further the anti-slavery cause, they must press for their own rights as well given that women were prohibited by custom from speaking in public in mixed assemblies of men and women. Abolitionism also gave these early feminist's male allies in men like Fredrick Douglas, Henry Blackwell (husband to Lucy Stone), and William Lloyd Garrison.

The Seneca Falls Declaration of settlements and resolutions was presented in July 19 and 20, 1848 at the first women's rights convention in the US held at Seneca Falls, New York. At this convention, which was modeled on the declaration of independence, Elizabeth Cady Stanton argued strongly for the inclusion of a resolution concerning the women's right to vote. This was the only resolution that did not pass unanimously and was carried only by a small margin. Ironically, suffrage would almost become the exclusive goal of the one branch of the women's movement in the late 19th and early 20th century in the US.

The Seneca Falls declaration is the central document of this first period of action by American women, when their efforts were concentrated primary on reforms at the state level in order to improve the legal status of women. The declaration contains not only an attack on various discrimination statutes but also a statement of fundamental feminine principles. It attacks the supremacy of man as responsible for the unequal allocation of power in the state and the church as well as the

different moral codes applied to men and women in society.

A summary of the Declaration of Sentiments is that all men and women are created equal and are endowed by their creator with certain inalienable rights among which are life, liberty, and the pursuit for happiness. When long-standing cases of abuse reduce this under absolute despotism it is the duty of those governed to throw off such government, and to provide new grounds for their prime security. The patience of the women under the US government in place, made it necessary to call upon them to demand an equal standing to which they are entitled.

In effect what comes through here is an established custom (of mankind), repeated injuries and denial of rights towards women which in some cases reflect the establishment of an absolute tyranny by man over woman. The following examples were cited:

- He has never permitted her to exercise her inalienable right to the elective franchise;
- He has compelled her to submit to laws, in the formation of which she had no voice;
- He has withheld from her rights which are given to the most ignorant and degraded men-both natives and foreigners;
- Having deprived her of this first right of a citizen - the elective franchise, thereby having her without representation in the halls of registration, he has oppressed her on all sides;
- He has made her marriage in the eye of the law, civilly dead;
- He has taken from her all rights to property, even to the wages she earns;
- He has made her, morally, an irresponsible being as she can commit many crimes with

impunity, provided they are done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master-the law giving him power to deprive her of her liberty, and to administer catchments. He has framed the laws of divorce as to what shall be the proper causes and in case of separation, to who and when the guardianship of the children shall be given, regardless of the happiness of the woman - the law, in all cases, going upon a false supposition of the supremacy of man, and putting all power into his hands.

- After depriving her of all rights as a married woman, if single and the owner of property, he has taxed her to support a government, which recognizes her only when her property can be made profitable to it.
- He has monopolized nearly all the profitable employment and from those she is permitted to access, she receives but a scanty remuneration. He has closed, against her, all the avenues to wealth and reserved distinctions, which he considers most honorable to himself. As a teacher of theology, medicine, to law, she's not known.
- He has denied her the facilities for obtaining a thorough education, all colleges being closed against her.
- He allows her in church, as well as the state, but a position, claiming apostle although for her exclusion from the ministry, and, with some exceptions, from any public participation in the affairs of the church.
- He has created a false public sentiment by giving to the world a different code of morals for men and women, through which moral delinquencies that exclude women

from society, are not only tolerated, but also deemed of esteem with man.

- He has usurped the prerogative of Jehovah himself claiming it as his right to assign for her a sphere of action, when that belongs to her conscience and to her God.
- He has endeavored, in every way that he could, to destroy her confidence in her own power to hasten her self-respect, and to make her willing to lead the life of a dependant and an object

Thus, the declaration resolved that because woman is interested in the creation with the same capabilities, and the same consciousness of responsibility for their exercise, it is demonstrably her right and duty, equally with man, to promote every righteous cause by every righteous means. This is especially in regard to the great subjects of morals and religion. It is right to participate with her brother in teaching them, both in private and in public through writing and speech and any other proper instrument growing out of the divinely implanted principles of human nature. Any custom or authority adverse to this, whether modern weaved in the heavy sanction of tradition is to be regarded as war with mankind.

As Lucretia Mott stated in the local session of the Seneca falls declaration, the speedy success of the feminist in their case depends upon the zealous and uniting efforts of both women and men, for the overthrow of the monopoly of the pulpit, and for the securing to women an equal participation with men in the various trades, professions and commerce.¹⁵

The women's movement has since continued to grow in the States for a number of reasons key among which include the following;

¹⁵ ibid at P.6.

- Women responded to the call to stand up for their rights as a result of their experience of prejudice and discrimination and they moved in large numbers into wage work and higher education.
- Women flocked into anti-war, civil rights and students' movements regardless of their encounter with negative sex attitudes of liberal and radical men in the movements.
- There was a general climate of critical thinking (review and analysis) applied to the subject of feminism in the west.

Feminism grew through a process where the frustrations women faced combined with the enlightenment of women and promoted the growth of the women's movement. Women questioned sexism in policies and practices that discriminated on the basis of sex. Pertinent examples include less pay for equal work and limitations to professional education and advancement. Subsequently, towards the end of the eighteenth century, most western governments had started responding to the issue of gender inequality by allowing women to have quality services. This marked the beginning of the gender equality debate and process in the West.¹⁶ It is clear from this analysis that feminist scholars have been using gender as an analytical variable.

2.1 *The Many Faces of Feminism*

Against this background, the aims of feminism thus include examining the reasons behind the unfairness women face in society from different angles that have given rise to different interpretations of feminism. Thus, feminism as a movement has many different faces and is not a unitary entity. As we shall see in the brief review below, these different points of view of feminism - liberal, socialist (Marxist), radical, psycho-analytic, and black as well as African-present variations with regard to specific issues

in women's experience in society that each perspective chooses to bring into sharp focus. The brands of feminism indicate the different attitudes and meaning that those subscribing to them have used in attempting to explain the complex reality of women and men's lives. Put another way, we need to think of feminism (naming the social injustice to women) as the territory and the different brands of feminism as different maps that we can use to understand, perceive and interpret this territory that is the injustice. A map is not the territory; it is an explanation of certain aspects of the territory.¹⁷

The accuracy of the map is extremely important, because as we all know, if we have the wrong map we will not be able to get to our destination, which is not to say that the territory does not exist. This is exactly what the various points of view of feminism presented below are - alternative directions and pointers to how we can get to areas in our cultural and social lives where we accept, reinforce and in some cases, even celebrate practices and behaviour that is oppressive to women. It is important that in our discussion of the socio-cultural aspects of the gender question in the constitution review process, we go beyond the different brands of feminism into the actual territory of our value and belief systems and how this affects women.

(a) *Socialist / Marxist Feminists*

Socialist or Marxist feminists hold the view that the inter-linked oppressive forces of gender, class and race constitute one giant element that places women in subordinate positions spurred on by the factors of male dominance and economic inequality. In this perception of oppression, all women are regarded as being oppressed not only because of their gender, but also for some women,

¹⁷ Covey (1985) explains this very well in his book *The Seven Habits of Highly Effective People* when he says that as clearly and objectively as we think we see things, we begin to see that others see them differently from their own apparently equally clear and objective point of view.

¹⁶ Supra, note 28 at P. 8 Para 2.

because of their race, ethnicity, class, age and level of ability. At a theoretical level men who suffer due to these factors find themselves by virtue of their disadvantaged positions, in the same bracket as women; consequently, women can decide to join with them or to organize separately to fight oppression.¹⁸

In contrast to liberal feminists, they locate the source of women's oppression in the structure of capitalism and therefore regard major structural changes as necessary. Liberal/Marxist feminists stress the needs, interests and rights of groups more than those of the individual. Socialist feminist groups thus focus upon uniting with other oppressed groups in fighting all forms of oppression, rather than organizing or struggling separately to advance the interests of women.¹⁹

Marxist feminists are represented by a wide variety of scholars who have attempted to apply dialectical materialism in analysing sources of gender oppression. They locate women's oppression in social class, race and ethnicity. Marxist feminists consider capitalism, imperialism and sexualism as inseparable. In their view, the liberation of women is thus linked to the liberation of all oppressive social class relations. Traditional Marxist feminists, especially those who have been using Engel's theory of the "Origin of the Family", locate women's oppression in their inability to participate in the public sphere. It is assumed from this that the liberation of women from the domestic sphere to the public sphere will contribute to their liberation.²⁰

The concept of mode of reproduction is proposed as antithesis for the more familiar concept of mode of production. This approach links the economy to production and the sexual

system to reproduction. The result is that the ambiguity of either concept is reduced.

The formation of gender identify is an example of production in the gender system. Not all multi-variation of social reproduction can be attributed to the gender system. A gender system is the domain of social life.²¹

The Marxist feminist position in the reproduction/ production debate can be summarized in two viewpoints. The first views women as a reserve labour force for capitalism. Women's labour generally covers wages and provides extra surplus to the capitalism employer. Women also serve the interests of capitalism through the management of family consumptions. The second viewpoint focuses on the relationship between housework and reproduction of labour. Debates on women and housework have revolved round whether or not housework is productive labour. Housework is not perceived as work by a male dominated society because no wage is paid for it.

Educational researchers also use the mode of production/reproduction approach. The reproduction approach considers the school as a photocopying machine. Schooling in a capitalist society is considered as reinforcing social inequities and solidifying social class structure.²²

Feminists within the southern African context have taken advantage of what Marxist tradition offers through dialectical materialism, and gained from the radical feminist theories, which

¹⁸ This is a key-differentiating factor as it illustrates the point that there is nothing wrong in feminists having to join other social movements working for justice irrespective of their sex.

¹⁹ *ibid* at P. 18.

²⁰ *Supra*, note 2 at P. 83.

²¹ *ibid* at P. 84.

²² See Longwe (1997) article "Education for Women's Empowerment-Or Schooling for Women's Subordination", She challenges the common and somewhat unexamined belief that increased schooling for women will automatically bring about women's empowerment. Taking issue with the assumption that it is lack of schooling which has been holding women back, she indicates that schools can provide only schooling for self-reliance, and for the reproduction of patriarchy (and not) education for women's empowerment. P. 9.

consider gender as a source of power independent of class. They are now attempting to provide an analysis, which seeks to empower women through transforming oppressive gender relations.²³

(b) *Radical Feminists*

By way of comparison, radical feminists believe that women's oppression is caused by patriarchy. This in essence refers to the social, political and economic system that grants male power over women as reflected in the existence of all male military, industrial, religious, and political rules in virtually all states of the world. Under patriarchal systems, male rulers control society and use women for their reproductive ability. Radical feminists also contend that individual men use the social unit of the family to exert power over women and children.²⁴ Thus, the way forward from their point of view is to separate themselves and their interests from the interests of men. This has given rise to efforts aimed at creating women-only organizations, institutions and businesses in some parts of the world.

The radical feminists together with the socialist feminists, with their background in the Left and Civil rights movements, began what has become the pre-eminent feminist method; consciousness raising. This technique had originally been used to organize the poor by themselves in order to help them understand the systematic social concerns of their oppression and the need to organize for political solutions.

²³ Supra, note 2 at P. 86.

²⁴ In a patriarchal society, women's limited access to resources is based on established discriminatory practices (often sanctioned by law), which ensure male privilege. In Southern Africa this male privilege includes the control and ownership of land, and the control of family income. Women themselves are also 'owned' by men who buy them for a bride price, and may 'own' several wives. Male wealth is based on exploitation of female labor, and individual male wealth may be increased by acquisition of additional wives. (Longwe: 1997 P.3.

American women in the movement, dissatisfied by the domination of men began to use this same technique themselves, and it spread to all forms of feminism in the early years of the second wave.²⁵

Radical feminists identify men as the oppressors and do not consider social discrimination as affecting women and men in similar ways. Like socialist feminists, they see a need for major structural changes in society. They are however not particularly interested in working for incremental change within the system. Instead, radical feminists demanded radical transformation of the oppressive gender relations. Their strategy is to dissipate power in easy but small victories.

Radical feminism emerged as a result of a breakaway of Marxist feminists who were frustrated by their inability to apply social class in the analysis of gender oppression. They located women's oppression in the social institution of gender. This is why they launched a whole scale onslaught against male dominated society which in their view gave men power and enabled them (the men) to use this power to oppress the women which it renders powerless. Radical feminism puts sexuality, reproduction and patriarchy at the centre of the political arena and is focused on changing women's political consciousness. It challenges the conventional assumptions with regard to the place of women in society. In America for example, radical feminists often staged public protests such as picketing the 1968 Miss America contest and Sit-ins at the offices of the Ladies Home Journal and Newsweek to protest "the ways in which the media's depiction of women perpetuated old stereotypes at the expense of new realities"²⁶

Unlike liberal feminists, radical feminists stress that women and men have conflicting interests. This is why radical feminists believe that "for women to take control of their lives, they must

²⁵ Supra, note 3 at P. 18.

²⁶ Supra, note 2 at P. 75.

separate themselves and their interests from the influence of men... questioning the values developed under patriarchy, they have created the idea of women focusing on their own experiences and setting their own values-woman centeredness."²⁷ They tend to favour separatism and emphasize the need to develop a women's culture, rather than building coalitions with men as liberal women to some extent do. Radical feminism thus came to mean feminists who are "women identified" and who analyse oppression primarily in terms of sex, another concept of gender.²⁸

The four main domains of social life that have been used to differentiate between economic systems and gender systems are gender, production, reproduction and patriarchy. Gender systems involve both the relations of reproduction in the biological sense as well as those other dimensions of reproduction such as labour, employment and technology.

Patriarchy as concept was introduced to distinguish the forces maintaining gender oppression and discrimination from other social forces, such as capitalism socialism. In this connection the concept observes varied manifestations of male power over women. Patriarchy therefore, is the social political, political and economic system of male power over women. In a patriarchal system male rulers control the society and use women and benefit from women's productive capacity. Men treat women as inferior and gain at their expense.²⁹

From a radical feminist point of view, male supremacy rather than patriarchy is therefore

the most appropriate term of describing social systems where there is rigid gender division of roles and labour. Whereas liberal feminists fight for equal education opportunities, radical feminists challenge both the quality and the quantity of education being offered to women. Radical feminists in Africa have been demanding a system of education that is empowering. Studies carried out in Botswana and in Tanzania have demonstrated how educational stereotyping is contributing to the marginalisation of women. Thus while demanding for equal opportunities, radical feminists have further called for changes in the curriculum.³⁰

Radical feminists have also challenged men's control and monopoly over the production and use of knowledge. Gender biases are perpetrated because of the male dominance in media such as radio, TV and newspapers, school curriculum etc. Whereas liberal feminists have been fighting for equal access in health for women, radical feminists have agreed that health services must empower women.³¹

(c) *Liberal Feminism*

A third category of feminism, liberal feminism, advocates for individual equal rights for women by working from the standpoint of existing social systems. This approach targets the achievement of equal rights laws in the areas of politics, employment and education. Unlike the other kinds of feminism which aim to "overturn the present system in one form or another, liberal feminists want to work within the system, to reform it through equal rights laws, especially in the areas like politics, employment and education. They want to end discrimination and build positive role models for women and girls." Liberal feminists believe

²⁷ This includes seeing the positive sides of previously undervalued feminine qualities.

²⁸ *Supra*, note 3 at P. 18.

²⁹ It is however important to note that not all forms of gender-stratified systems are based on patriarchy. In many countries in Africa such as Malawi, the power of the male is founded on their collective adult maleness as depicted by men's houses, warfare and initiation ceremonies. These communities are highly oppressive to women but they are not patriarchal.

³⁰ *Supra*, note 2 at P. 77

³¹ Although many radical feminists were lesbians, within radical feminism, however lesbian feminism became an identifiable intellectual approach as well as political strategy.

that prejudice is the sole reason for women's discrimination (read denial of rights) and think it is more prudent to end this discrimination within existing systems without making major structural changes. Thus, proponents of this brand of feminism do not set out to overturn the status quo. Instead, they see change in gender relations as coming through a gradual process in which the government has a significant role to play and try to influence the government in this direction.

(d) *Psychoanalytic Feminists*

Another category of feminists- namely the psychoanalytic feminists- use Freud's idea of the unconscious to understand and challenge women's oppression.³² The unconscious is that part of the mind to which we have no access as is the case for instance in dreams. Psychoanalytic Feminists believe that the conceptual parameter of the unconscious can help us explain how power relations between men and women are formed, how they are internalised and how they can be changed. From this perspective, patriarchy exists not only in society but also within our very selves since our identity is a product of not only of what we are conscious of, but the unconscious as well. This is why for this brand of feminism the process of changing discriminatory gender relations and practices must also take the unconscious into account.

(e) *Black Feminists*

The last category of feminists consists of Black feminists. The focus of black feminists is that ideas on the manner of female oppression in society must come out of women's real life experiences in their society. Black feminists therefore argue that Black women must define and articulate their own views and identity instead of leaving this exercise to white women

and Black men. At the core of these ideas is the belief that racism and class must be regarded as relevant issues for feminism and that in certain contexts, such as Britain for instance, Black women's lives are best understood by considering the role of British imperialism. This role led to the colonisation of countries and to the unjust treatment of people. The defining feature of Black feminism is thus its focus on issues that move feminism beyond a purely Euro centric perspective and that incorporate the concerns of women from the developing world. The stand taken by black feminists has put them in a difficult position of having to criticize both white feminists and Black men.

2.2 *Feminists Frameworks and the Gender Question*

The schematic division of feminism is underpinned by a central concern namely, the proposition that society has tended to treat women unfairly. There is ample evidence from historical records to put this proposition into perspective. As an example, 19th century Britain denied women many basic rights. Married women could not get a divorce from their husbands, no matter what their husbands had done to them. Worse still, even if a man left his wife, existing structures did not allow her to get custody of the children. Additionally, she could not own property.

"In Patriarchal societies, domestic violence is seen as a natural way of disciplining women. In a number of traditional African societies, beating one's wife is considered acceptable and even normal. Men beat their wives in order to maintain discipline in the home. A Kenyan study demonstrates that despite current socio-cultural changes, wife battering is still a widespread cultural practice and is not confined to rural areas. Men even stated that were they not to beat their wives, it would be seen as a lack of trust and love! This complete distortion of reality powerfully illustrates how such

³² Psychoanalytic feminists however reject Freud's view of 'penis envy', which claims that women supposedly feel lacking because of their biology (Magezis J: 1996 p.15).

cultural beliefs can lead people to believe that women provoke, tolerate and even appreciate a certain amount of violence from their husbands."³³

This is because cultural and social pressure is one of the reasons why victims remain silent in the face of gross violation of their rights.

At a theoretical level, all variants of feminism tend to share three main assumptions: the first assumption views the social construction of gender as a tool that oppresses women more than men; the second assumption rests on the contention that patriarchy (which is the male domination of social institutions) plays a dominant role in shaping the social construction of gender; finally is the view that women's experiential knowledge is crucial to a future that will be free of gender based inequalities. In their attack of gender stereotypes, feminists have used these shared assumptions.

Although foremothers like Mary Wollstonecraft (1759-1797) are often claimed as feminist, the term feminism began to be used only in the 1890s. In the twentieth century, Virginia Woolf (1882-1941) and Simone de Beauvoir (1908-1986) anticipated feminist attacks on women's oppression. It is also noteworthy that the student and civil rights movements of the 1960s influenced feminism by contributing to the language and topics of current feminist theory. As an identifiable area of the social sciences, feminist theory dates from the 1970s with the publication of Millet (1970).

As a theory, feminism is intensely interdisciplinary and cuts across subjects such as history, philosophy, sociology and anthropology among others. Additionally, certain themes constitute the defining features

of the theory. These include reproduction, representation and the sexual division of labour. In recent years, feminist theory has incorporated new concepts such as sexism and essentialism to address absences in existing knowledge as well as the social discriminations that these concepts convey.

Since feminism developed at a time when the participation of women in the workforce was rising fast but while discrimination persisted, critics first focused on the sexism of language and of cultural and economic institutions. Although intellectual ideas rarely present themselves in neat chronological order, the 1970s tackled the causes of women's oppression (capitalism/masculinity) describing society as a structure of oppressors (male) and oppressed (female).

2.3. *Feminism in Africa*

A major debate continues to rage over the relevance or indeed appropriacy of feminist discourse in the African Context. Male and female scholars alike have questioned the existence of valid feminist approaches that are grounded in the African reality and are informed by the African woman's experience. This school of thought while acknowledging the need to examine the way women and men relate in society, and to address any cases of social injustice revealed, feel that a systematic African perspective of feminism and gender has not evolved.³⁴ A feminist philosophy scholar Helen Oduk of Kenyatta University argues that

“although the living conditions of most African women leaves very little room and time for activities in self-reflection and the generation of knowledge, they need to determine what specific issues in their

³³ *Violence Against Women in Urban Areas: An analysis of the problem from a Gender Perspective*. Urban Management Program (UMP) Working Paper Series 17 P.14.

³⁴ Proceedings of *The Great Gender Debate* – a professional debate on gender equality and the advancement of women launched in 1999 and held quarterly at the United States International University Nairobi.

relations to focus on and to bring into sharp focus”.

Oduk proposes that this search for an African perspective should adopt a multi-disciplinary approach, one that recognizes the added value from disciplines such as sociology, philosophy, history, literature, linguistics, anthropology and religion.

The need is to ensure that feminist discourse and the women's movement (at least in the context of addressing national issues such as constitution making) is informed by information and explanations about female and male relations in the continent to achieve a holistic and credible picture of Africa's complex reality. African women need to re-define and re-discover themselves as their sisters in other lands have done. They need to tell their story and explain how they see male and female relations from their cultural and religious world-views. It is important for African women to examine the situation and state what the facts are and what African women and men do. Additionally, it is important to show why this pattern of relationship exists and how it is sustained. Given the concern of feminism to work for women's rights and against female oppression, in doing this, African women should go beyond this level of gathering and stating facts and combine the separate aspects of life to establish a connection between one fact and another and between the facts and real life.

This is because feminism as a tool for naming and addressing the social injustice experienced by women must fit the African reality. African women and men committed to justice must therefore think about what fits and what does not fit their reality from an array of available brands of feminism. They must not be afraid to alter the interpretations or indeed to build new frameworks if what is available does not fit their experience.

The interesting thing is that this is what the African women have done. Contrary to popular opinion that they have borrowed wholesale from the west in the area of feminism, there is evidence that the gender question has evolved through a process of using gender as an analytical framework in the African experience. The women's movement in Kenya is a good indicator of this process of evolution. Here, one can discern the struggle, tension and progress experienced by African women in pre-colonial times, through colonialism to independence.

As already discussed, feminism is a broad based movement aimed at transforming gender relations in order to liberate women from oppressive set ups.

From a national perspective we can trace feminist ideologies from the organized participation at the 1st World Conference on women in Mexico in 1975. The momentum picked up with the build up to the 2nd World Conference on women held in Copenhagen in 1980 and reached widespread national recognition in 1985 when the 3rd World Conference was held in Nairobi Kenya. The period between 1985 and the 1995 4th World Conference on women popularly known as the Beijing Conference, marks a rich source of information for the women's movement in Kenya. It was during this period that many women began to stretch the boundaries of their welfare women's associations (popularly known as merry go-rounds) into organized units working towards specific objectives. Although most of them had a strong welfare orientation (e.g. MYWO) a number began to interrogate the unchallenged value and belief systems that reinforced the subordination of women in society. Pertinent examples here include the Association of African Women for Research and Development (AAWORD), the National Council of Women in Kenya (NCWK), the Forum for African Women Educationalists (FAWE), the international Federation of Women Lawyers (FIDA-Kenya), the Kenya League of Women Voters (KLWV).

The period also saw the birth of a multidisciplinary analysis of feminist issues through literature (including oral) linguistics, history, sociology and women in development.³⁵ The period after 1995 is undoubtedly the most vibrant in this regard. (See the Spirit of Womanhood...)

This is why it has been argued that feminism has had its roots in the African region. Women's oppression has been located in the traditional African society, in the colonial system, in the neo-colonial nature of the African state, and in the patriarchal ideologies of the post colonial African states. In the African continent, women have always been aware of the prevailing oppressive gender relations and have throughout history challenged these conditions in a variety of ways. It is therefore a misconception to view feminism as a western ideology which reflects western culture simply because developed feminist theories (like other theories) have been influenced by external pressure resulting from colonialism and imperialism.³⁶

Women's liberation, which is a state of freedom or liberation that women enter within the context of a conscious-organizing to free women from traditional and oppressive attitudes and roles, is a necessary situation. This is because, historically, women have been overburdened with unrecognised work³⁷ and

³⁵ An interesting combination of stories of women's experience is captured in 'My Secret Lives' edited by Akinyi Nzoiki and Wanjiku Kabira. We also have a collection of stories by the Kenya Oral Literature Association targeting women's experiences as well as analysis of traditional stories, proverbs and sayings from a gender perspective. This historical profiles of women's leadership in traditional Kenyan communities are also significant.

³⁶ *ibid* at P. 72.

³⁷ In his article 'The Many Faces of Gender Inequality' Amarta Sen has this to say "In the 1970s, when I first started working on gender inequality, I remember being struck by the fact that the Handbook of Human Nutrition Requirements of the World Health Organization, in presenting "calorie requirements" for different

have been marginalized from active participation in the public arena. An African girl-child in the traditional African society was considered a lesser child who was not exposed to formal education but was instead socialized to undertake domestic chores. And this explains how gender equality and gender equity are products of a relevant call for women's liberation.³⁸

Women rights are gender rights, which in turn support and are an important and integral part of human rights. A human right is an entitlement, which every human being has simply because of the fact that he or she is a human being. The Bill of rights, which contains the fundamental rights and freedoms of an individual in Kenya, is in chapter V of our Kenyan constitution. Section 82 (3) provides that no person shall be discriminated against on the grounds of sex.

Since feminism as a movement seeks to end inequalities between the male and the female sex, as defined by specific societies, we agree with Mitchell (1987) that feminism's history corresponds with the history of the concept of equality. This then justifies feminism's applicability in Africa to ensure that men and women enjoy the inalienable rights that they are entitled to on an equal basis. Furthermore, law should protect everybody's rights since it emanates from the spirit of the people.³⁹

African intellectuals have stressed that when African leaders mobilized their societies to fight against colonization the main purpose was not to change administrative hands, it was not first to substitute white people, the expatriates with black people. African male leaders like Nyerere, Nkrumah and Kaunda stressed that what they wanted was a new society, a society

categories of people, chose to classify household work as "sedentary activity", requiring very little deployment of energy. I was able to determine precisely how this remarkable bit of information had been collected.

³⁸ *Supra*, note 1 P. 3 – 7.

³⁹ C. Smair (1989) *Feminism and The Power Of Law* P. 139.

where people would be respected and not exploited. Like radical feminists, they wanted to change the basic recipe of the pie, not just take the pie away from white people.⁴⁰

In Southern Africa, a critique of the modernization paradigm in the 1970s pointed to the fact that modernization, and indeed the welfare approaches to women's issue, increased the marginalisation and impoverishment of women. The proposal to integrate women in development strategies was provided within the liberal framework. In the 1970s the emphasis shifted from welfare to equity. Within the equity approach, women were supposed to be considered as active participants in the development process and had to be granted equal opportunities through integrating them in the development process.⁴¹

The feminist movement has thus had some impact on development strategies and in advancing women's positions in the society. Although most national governments have pursued policies which have controlled the politicization of women⁴² (consider MYWO in Kenya) women have continued to organize, advocate and lobby policy makers for appropriate changes.

Unfortunately this gallant struggle has encountered resistance at every level, including the systematic use of well-known strategies for gender dominance.⁴³ This typical attitude of men to feminism and therefore to women's rights has often been described in feminist writings. French (1986) writes about what she sees as a rather universal attitude of men that women are not equal to men and that they (women) are not yet ready for top government

posts. In Kenya, the popular saying that women are their worst enemies best captures this. French in her voluminous book "Beyond Power" captures this when she makes the following observation: "although feminists do indeed want women to become part of the structural participation in public institutions; although men want women to access decision making posts, and to have a voice in how society is managed, they do not want women to assimilate society as it presently exists, but to change it".⁴⁴

3. The Significance of the Gender Question in Kenya

What is a gender question a question of? What is an inequality question a question of? In her article, 'Difference and Dominance' Catherine A. McKinnon states that these two questions, which underlie the application of the equality principle to issues of gender, are seldom raised explicitly. She argues that this speaks of the way gender has structured thought and perception, and that mainstream legal and moral theory give the same answer to both questions. This is that they are questions of sameness and difference. The mainstream doctrine of the law of sex discrimination that results is, in her view, largely responsible for the fact that sex equality law has been utterly ineffective at getting women what they need, although they are socially prevented from having these on the basis of a chance condition of birth that proceeds to deprive their lives of reasonable physical security, self expression, individualization, minimal respect and dignity.⁴⁵

According to the approach to sex equality that has dominated politics, law, and social perception, equality is equivalence, not a distinction, and sex is a distinction. The legal

40 Birgit Brocke-Utne: *Women and Third World Countries-What Do We Have In Common?* (19?) P.497.

41 Supra, note 2 at P. 86

42 ibid.

43 These methods that tend to occur mostly in the context of women's participation in leadership and decision-making are: making invisible, making ridiculous, burdening with guilt and shame, double punishment and withholding information.

44 French, Marilyn (1986) *Beyond Power: On Women, Men, and Morals* (London-Abacus)

45 See article by Catharine A. Mackinnon: "Difference and Dominance": cited in *Feminist Jurisprudence-Taking Women Seriously* at P. 71.

mandate of equal treatment - which is both a system norm and a specific legal doctrine becomes a matter of treating likes alike and unlike; and the sexes are defined as such before their mutual unlikeness. Put another way, gender is socially constructed as difference epistemologically; sex dissemination law binds gender equality by difference through doctrine. A built-in tension exists between the concept of equality and the concept of sex, which presupposes differences. Sex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why women have such a difficult time getting it.

3.1 The Gender Question In Historical Perspective⁴⁶

Ancient history reveals many important facts related to the position of women at home and in society. Evidence shows that society tended to follow either matrilineal or patrilineal systems. In matrilineal societies, the mother was the head of the family and the children were linked in descent to the women who had given birth to them. Such kinds of societies were not very common. In fact, in Africa, most communities were, and still are patrilineal.

Property and inheritance destroyed the foundation of the matriarchal and matrilineal system and led to the division of society into social classes. The idea of private property especially in land characterized the patrilineal system, which identified children according to the father and ensured that they earned his name and inherit his property. This system produced systematic gender inequalities. In most societies, property was the male person's domain and the female person's world is the labourer working on the land to improve it and hence get subsistence for her family.⁴⁷

Patriarchy characterizes, almost all of the modern societies in the world. It is a belief that condones male supremacy and dominance over women. In many African communities, the power of the males is founded on their collective adult maleness as depicted by men's houses, warfare and initiation ceremonies. This is the case in Malawi as an example. These communities are highly oppressive to women but they are not patriarchal. Similarly in matrilineal societies, women do not necessarily have sufficient social authority.⁴⁸

Patriarchy is universal and it takes different forms according to historical and cultural circumstances. Overtime, women learnt to oppose their subordination to men giving rise to the formation of the women's movement. The concept of gender was introduced in the women's movement to ensure women are not left subordinate and powerlessness, and locked up by social, cultural, political and historical constraints. This concept is succeeding in integrating both men and women in the quest for gender equality.

(a) Western Societies and the Gender Question

Gender inequalities exist universally. This tallies with the fact that women's rights and gender rights form an integral part of human rights, which are of universal .The experience of women in the west, is diverse but commonly reflect a subordinate status relative to men. The earlier attempts to question the discrimination and injustice against women originated in the west mainly Britain, France and the USA. Feminists, who isolated structural sex discrimination against women, blamed social institutions and social attitudes for women's low or oppressed status in society. Western feminists particularly from U.S.A questioned their government's imitation of women's voting rights and equal participation in the political processes such as vying for parliamentary seats, as well as restriction of women's access to

⁴⁶ Supra, note 1 P. 2.

⁴⁷ CLARION, "The Gender Question in Historical perspective", In *Constitutional Debate No. 11, An Introduction To Gender, Law and Society*, (Claripress Limited, Nairobi, 2001) Pp. 7 – 11.

⁴⁸ Supra, note 2 at P. 76 Para 2.

education, employment, health and other social services. For example, in America the women's movement won the right for women to vote, 55 years after that right had been constitutionally extended to black men.⁴⁹

(b) *The Gender Question In Pre-Colonial Kenya*⁵⁰

In pre-colonial Kenya and other traditional African societies, the exploitation of women covered the whole social, economic, political and sexual realm of women's lives. Typically, Kenyan traditional societies are patriarchal thus maintaining a culture that is prejudicial towards women. It was acceptable for women to be oppressed and subjugated by men. Women could neither inherit nor own property. A woman was a property owned by male members of the family and in a community like the Luo, she could be inherited after her husband's death. She had no right to decision-making or the right to choose her marriage partner. There was unequal distribution of property and power between women and men. These societies were characterized by gross discrimination and violation of the rights of the female gender.⁵¹

(c) *The Gender Question during the Colonial Period*

Colonial rule was carried out through male hierarchies. At the time the British were colonizing Kenya towards the end of the 19th century, the feminist movement was already at an advanced stage in Britain. This means that the colonizers were perhaps conscious of the

biases inherent in the patriarchal system. However, only some mild steps were taken to liberate women from the yoke of this social and cultural oppression. For example, the colonial government encouraged the 'natives' to send their female children to formal schools. This did not augur well with parents who tended to value only boys' education. Even then, only those parents converted into Christianity appreciated the importance of formal education. If girls got an opportunity to join formal schools they were usually taught welfare or domestic oriented subjects such as home science, tailoring and cookery. Such education failed to empower women as equal subjects to men in the public and development arena. In addition, the policies and practices introduced by the colonial governments served to discriminate against women further. These practices included the introduction of cash crops, the wage economy and the land tenure system.

However, some practices curtailing women's personal and social development were vigorously fought during the colonial times. These include female genital mutilation, early marriages, polygamy, the killing of witches and slavery. Some 'converted' Christian Kenyans joined the colonial administration in addressing these cases of gender-based injustice. Such efforts saw a gradual transformation of the women's status in the Kenyan society. The Kenyan feminist movement that haltingly began during the colonial period provided an important entry point that was continued even after independence, and led to the growth of the current vibrant mode.

(d) *The Gender Question In Contemporary Kenya (1963 to the present)*

The contemporary period has witnessed significant changes in gender relations in the Kenyan society.⁵² First, a notable change that characterized this period is that of the shifting views on women and development in Kenya

⁴⁹ Supra, note at 28.

⁵⁰ *ibid.*

⁵¹ This is a commonly held view propelled mainly by people from outside the Luo culture. While it reflects prevailing practice, personal communication with opinion leaders indicate that it is a corrupt form of the traditional position. In its original form a widow had the right to choose from among her in-laws who could inherit her. She also had the power to terminate the relationship by simply placing his meagre belongings outside her hut.

⁵² Supra, note 28.

and the world at large. It became fashionable to seek to integrate women in development processes within a framework that saw societies in the south gradually modernizing along lines similar to those of the industrialized north. The Women In Development (WID) approach was adopted in 1970 with the aim of improving women's access to technology, credit and extension services and thereby positively influencing the development process. The approach was focused on strategies of integrating women in the development process rather than on addressing the relationship between the male and female gender in relation to the development process.

Secondly, social and economic factors such as education influenced accessibility into the economic and political system of the country. At the grassroots level, women groups initiated in the early 1960's have continued to grow in the independence era. Women have utilized the women groups to collectively cope with their problems and to increase their ability to seize opportunities for social and economic change. The fact that women could afford to organize themselves at such basic levels was a major form of contribution towards the goals of the global feminist movements.⁵³

Thirdly, today there are many women-led organizations whose agenda is to address inequalities existing in Kenya's social, economic and political fabric. These include the International Federation of Women Lawyers in Kenya (FIDA - K), the Coalition on Violence Against Women (COVAW), the Kenya Women Finance Trust (KWFT), the Association of African Women for Research and Development (AAWORD), the Kenya Women Political Caucus (KWPC).

⁵³ It however felt that most of these organizations lacked political organization and mobilization techniques. It was not until 1997 when Kenyan women successfully organized collective action with deliberate political focus for structural societal changes in gender relations through the Kenya Women's Political Caucus.

Fourthly, the government has also played a role in addressing gender imbalances. The government has applied affirmative action to correct the gender gap through campaigns and programmes for promoting the girl-child enrolment in education. It has also encouraged expectant schoolgirls to resume school after delivery, and lowered admission points for girls in public universities. The women's bureau establishment in 1976 in the ministry of culture and social services has however not achieved what was anticipated in emancipating women. Despite the gains made by the Bureau, its programs have continued to reinforce traditional stereotypes of the reproductive role of women without coming out sharply to address women's subordination as encapsulated in the whole cultural mesh.

Fifthly, the minimum Inter Party Parliamentary Group (IPPG) constitutional reforms of 1977, outlawed discrimination on the basis of sex. Even though gender based discrimination on the basis of adoption, marriage, divorce, rural and inheritance still remains intact through the application of discriminatory customary laws, the onset of the constitutional reform process was a milestone in the quest for gender equality in Kenya.

In the international realm, world conferences on women have created an ongoing structure within and around which women activists from different parts of the globe can gather, organize, share information, make alliances and embark upon long term collaborations.

In 1975 women's world conference was held in Mexico. The Convention On the Elimination of all forms of Discrimination Against Women (CEDAW) was ratified in 1979. The following year, 1980, marked the Copenhagen Conference, after which were the 1985 Nairobi Conference and the 1995 Beijing Conference.

In conclusion, the growth of modern feminism corresponds both to notions of equality and the idea that equality of opportunity can be

achieved through law in the form of legal rights. Early feminists like Caroline Norton, Barbara Leigh, Smith Bodichon, Francis Power Cobble, and Anna Martin who campaigned at different times in the areas of child custody, matrimonial property, divorce, domestic violence, and maternity benefits, all drew upon the basic idea that women's vulnerability in marriage was the consequence of unequal legal rights which gave husbands undue power. They all in different ways agreed that the existing law denied women citizenship of a democratic order. Feminist discourse constructed women as citizens, as persons worthy of sharing the privileges of newly emergent democratic order of the 19th century. It was part of the feminist strategy to celebrate the work that women did in the family, to draw attention to the responsibilities they had in the private sphere, in fact to argue that domestic work constituted responsible and necessary activity.⁵⁴

(e) *The Current Position of the Gender Question*

Gender is now a high visibility concern in development circles as it is viewed as a critical factor in efforts aimed at achieving all primary development objectives that include poverty reduction and alleviation. It is not for nothing therefore that it is now widely accepted that "development if not engendered is endangered." (UNDP-*Global Human Development Report*, 1995)

Several initiatives have been taken by the Government of Kenya to improve the status of women in the county. This has resulted in significant gains in areas concerning women's rights, education and health. The government has also made it possible, through specific machineries such as the Women's Bureau to deal with women's specific issues. Although it has been faced with problems since its establishment, the Bureau has been able to provide gender training at the district level to stakeholder groups made up of departmental

heads, NGO representatives, church leaders and women leaders. The government has also taken the additional measure of establishing Units of Gender Issues (UGIs) or strengthening such units where they already exist in key sectors that include health, agriculture, environment, education, planning and the Office of the President.

Significantly, the GoK has also undertaken policy commitments on the question of the position of women in the country. The National Assembly adopted the motion on the Beijing Platform for Action on November, 1996. In April 1999, Parliament passed a historic motion for the creation of a Gender Equality Commission. If established and made functional, this Commission will be able to guard women's rights and be responsible for the systematic mainstreaming of gender issues in the country. At present, it is noteworthy that composition of Commissioners in the constitution review process reflects a gender concern pegged to affirmative action as a means for addressing inequality in representation.

At a non-governmental perspective, an increasingly vibrant women's movement has continued to negotiate space for women's voice on matters of national interest and to enhance the institutional gender mainstreaming capacity of government ministries, the Police and other institutions. This is inferable from the work of the following organizations: the International Federation of Women Lawyers (FIDA), the Kenya Medical Women's Association (KMWA), the Kenya Business and Professional Women's Club (KBPWC), the League of Kenya Women Voters (LKWV) and the Collaborative Centre for Gender and Development (CCGD); other major organizations include the Coalition on Violence Against Women (COVAW), the National Commission on the Status of Women (NCSW) and Forum for Kenya Women Educationists (FAWE).

⁵⁴ Supra, note 25 at P. 140

3.2 *The Concept of Gender and Women's Rights*

Article 1 of the 1948 Universal Declaration of Human Rights states that:

" All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

One can conclude that this Article takes into account the interests of all people from a gender perspective following the drafting of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The adoption of these Covenants in 1976 did elevate the prohibition of discrimination to be an important human rights principle at a generic level. However, they were not gender sensitive in relation to the issue of women's rights. This is the inferable conclusion after a perusal of Article 1 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women to which Kenya is a signatory. It states:

"For the purposes of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

The CEDAW Article deals with discrimination in the public and private spheres, and suggests that a woman can face discrimination not only because of her sex, race and religion, but also because she is married and likely to bear children. In addition, she can be a victim of

discrimination because she belongs to a community in which by tradition, men who determine that she belongs to the domestic domain govern her.

Greater understanding of gender as a concept has been instrumental in fine-tuning human rights to make them women sensitive and results oriented. This is typified in Article 2 of CEDAW, which reads:

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

a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

c) To establish legal protection of the rights of women on an equal basis with men and to ensure, through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination;

d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

e) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and

practices which constitute discrimination against women;

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

This Article has the potential of providing appropriate responses to grounds of discrimination against women that encompass the following areas: sex, pregnancy and child bearing, motherhood, marital status, family status, household and family duties, societal, religious and family norms.

4. Mainstreaming Gender in the Constitutional Review Process and Constitutional Design

4.1 Context and Rationale

Despite the persistent popular notions to the contrary, gender equality does not mean that women and men should become the same, but only that their opportunities and chances in life should be equal. Moreover it is not a requirement that all cultures adopt just one way or mechanism of arriving at gender equality. What is critical is that everyone (female and male, young and old, traditionalist or modern and of diverse religious persuasion) examines what their culture has taught them to think, feel and believe about gender relationship and how they make sense of what happens to women and men in their culture. The significance of the socio-cultural dimension of the gender question in constitution making lies in the fact that while culture is extremely important because it provides us with structure and a sense of identity, " we are independent thinking individuals with the ability to analyze and modify our behaviour so that we can adapt to intercultural encounters (and to downright oppression and injustice that is directed to someone on account of their being female or male by culture).

The supremacy of the constitution as a basic set of agreed-upon rules which will govern relationships within Kenya as a nation requires that it spells out rights and obligations agreed upon by all Kenyans for the common good of all. These foundational rules and building blocks, while respectful of cultural diversity, must indicate what interests the members of the various cultures have in common as Kenyans, and how these interests will be defined, managed and protected for their mutual benefit.

Commonly cited reasons for reviewing the constitution in Kenya include the following:

- To heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights;
- To lay a foundation for a democratic society in which government is based on the will of the people and every citizen is equally protected by the law;
- To improve the quality of life for all the citizens and free the potential for each person;
- To build a united Kenya

Over the last two years, when the matter of reviewing the Kenya constitution has taken centre in national discourse, there has been a consensus that democratic values, social justice and fundamental human rights are critical to the constitution. Thus, the constitution as the supreme law of the land should define a road map clearly indicating parameters within which are human dignity, justice, rights and freedom of all women and men, young and old, those with disability and other minority or special interest groups. It should be a basis for guaranteeing every Kenyan protection and security from any injustice or discrimination—deliberate or accidental, subtle or blatant, direct or indirect.

It is important to note from the discussion of gender as a concept and the elaboration of how it has evolved both within the country, at the sub-regional and regional level and internationally that the gender question is about democratic values, social justice and fundamental human rights. This is because it is about protecting the rights of Kenyan women and girls (with all the geographical, religious, age, cultural and other variations) in the same way as the rights of Kenyan men.

We need to recognize that the different social (cultural) groups in Kenya will interpret gender (the social meaning attached to being male or female by society) through a two-stage sequence. Firstly, through the process of recognition and identification via similar physical mechanisms, namely "sensory organs such as the eyes, ears and the nose which permit them to register what they see through the nervous system to the brain" (Ibid: 80). Secondly, at the level of interpretation of that which has been identified - the female and male - through a process that is influenced by one's culture including beliefs, values, customs, and religion. While the first stage of perception is similar for all groups, the second is varied according to the value system that is used to evaluate what being female means in that particular social group (i.e. to be a woman) and what being male means (i.e. to be a man). As an example, in some cultural groups in the country being female means that you can get to thatch the roof (e.g. Meru) while in others (e.g. the Luo) it means that you cannot. In some cultural groups being male gives you an automatic right over and responsibility for your child (e.g. Luhya), while in others it is being female that gives you this right and responsibility (e.g. Kikuyu).

An important point to note is that in almost all of these cultures the masculine gender characteristics are more highly valued than feminine values, and that being a 'woman' almost invariably limits the female's visibility, empowerment and participation in all spheres

of life. On the other hand, being a 'man' is a male privilege that guarantees one a sort of birth right for visibility, empowerment and participation. This is what is translated as the unequal (asymmetrical) treatment of gender issues where a sense of grievance is felt by women that 'maleness' and male needs are mostly met at the expense of 'femaleness' and female needs.

Unfortunately, the complex nature of gender equality and equity issues and the manner in which they nourish and feed one another does not make arriving at a common appreciation of the gender dynamics easy.⁵⁵ The basic functions of culture, its dynamic and symbolic character as well as the inter-linkages between the different manifestations of gender inequalities in the diverse social groups represented in Kenya only aggravate the situation. It makes achieving one of the indicators a good constitution, through a process of evolution characterised by negotiation and compromise, extremely elusive.

Even when Kenyans from the diverse cultural and ethnic diversity in the country acknowledge that gender imbalance is a development problem and call for gender equality and equity as fundamental rights, which are important for attaining social justice, they rarely agree on how the imbalance should be addressed. The dilemma and confusion emerging from this situation has been captured as the "distinction between the conservative and radical definitions of the term" gender.

"When the conservatives talk of equity, it is because the word equality sticks in their throats. They have accepted the unequal position of women (hence the existing gender imbalance) and are trying to achieve a more 'just' or 'equitable' position for women within the existing patriarchal society... For the radicals, this 'just' or

⁵⁵ Ensuring equal access by both men and women to resources.

equitable' position for women within the existing patriarchal society is insufficient and falls short of their ideals. They are not seeking equality for women within the present social (read cultural) system. They are interested in structural transformation towards a more just society, run according to feminist principles that recognise women's right to social justice at an equal level with men. Because gender equality within a patriarchal society is undesirable and perhaps incomprehensive, they use the term 'gender equity' to denote their ambition for a new form of gender justice within an egalitarian society for the future"(Ibid)

This is the point from which the gender question becomes significant in the constitution and the constitution review process, particularly from a socio-cultural perspective. We can get ideas about how to address the socio-cultural dimension of the constitution review process by asking and thinking about specific questions, which will stimulate our minds to think about how to ensure equal rights for all persons in our multicultural context. What kind or level of tolerance for gender imbalance should the constitution of Kenya allow because the diversity reflected in the cultural and religious practices of the people of Kenya? How can the constitution set out principles rules and structures of governance for the nation that respect, provide for and protect women and men from discriminatory cultural and religious practices?

It is true that it is in the context of the socio-cultural aspects of the gender question that the reality of the diversity of the cultures within Kenyan becomes most glaring. Yet, it is also true that it is this context of diversity that must be the basis of arriving at a common collective goal that can unite all Kenyans via the constitution. It is important that all peoples coexist in spite of the differing social-cultural values linked through the constitution which will link them to each other by a collective

bond of respecting the rights and responsibilities of all Kenyans, men and women alike. The constitution needs to provide standards by which all Kenyans can judge the fairness of its institutions and rules towards everybody, women as well as men.

Culture and religion between them provide complex and intricate dimensions of differences in perceptions of gender imbalance on the basis of values, beliefs, traditions, mores and customs associated with women. These have to be addressed and managed through negotiation and compromise in the interest of collective national goals and over-all values in order to realize a state of constitutionalism and a good constitution.

4.2 Mainstreaming Gender in the Constitution and the Constitution Review Process

Gender mainstreaming is a state of the art term used to define an approach to institutionalizing women's affairs and gender issues. It entails putting women's concerns and gender issues into the centre of decision-making, so that before decisions are taken, an analysis is made of the effects on women and men respectively.⁵⁶ Gender mainstreaming thus involves engaging women, their experiences and perspectives in the main arena of decision-making. In the context of the constitution and the constitution making process, it is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of the review policies and programs.

With regard to the content of the constitution, it means ensuring that gender equality pervades all interventions, research, policy development and legislation. Given prevailing gender disparities and socio-cultural value and belief systems, the constitution should create space within which women develop and exercise their full capabilities for their own benefit and of the

⁵⁶ Beijing Platform for Action paragraph.

society as a whole. It should create conditions whereby women can meet their material needs, have access to means of production, and participate in decision making at all levels.

Mainstreaming gender in the constitution and the constitution review process should therefore be guided by the following key considerations:

- The awareness of a wrong against women through constitutional claw-back clauses, which give with one hand and take back with the other. These are especially important with regard to three specific issues: (a) customary/religious laws and their conflict with statutory law, (b) inadequacy of existing legal regimes governing women's socio-economic rights and (c) a wide range of divergence between de jure laws and actual practice.⁵⁷
- The development of a sense of collective action by women to overcome inequality through mobilization and organization. Through a strong voice of women gender imbalances created by the constitution and women's issues of national concern that the constitution should address should be identified and changes in institutional practices and social relations through which gender disparities are currently reinforced and sustained projected.
- The development of an alternative vision for the future where all Kenyans are considered equal and truly protected at a national level irrespective of their gender.

Specific strategies for achieving this goal include:

- Ensuring that the preamble includes women's concerns and issues and defines gender equality as a specific objective;

- Mainstreaming gender into civil laws;
- Eliminating claw-back clauses that exist in the legal framework of the constitution;
- Developing consensus over the legal rights of women through a process of negotiation and compromise - this should be clearly covered under the declaration of rights in the constitution;
- Spelling out affirmative action as a strategy in implementation given the present level of performance in effective implementation of even the most gender sensitive constitutional and other legal provisions;
- Ensuring the declaration of rights is gender sensitive with regard to the protection of civil and political rights in order to accord women protection from some women-specific ways in which these are violated (e.g. freedom of movement by dangers of sexual assault and in marriage, freedom from torture, inhuman and degrading treatment and freedom of assembly and association);
- Ensuring that constitution facilitates the domestication of international laws by eliminating claw-back clauses which limit the application of fundamental rights and freedoms of all individuals-male and female;
- Providing more functional mechanisms for enforcing rights and obtaining remedies for offences, especially the gender related ones;
- Outlawing gender discrimination in a systematic and holistic manner that is not negated in the areas of family law, marriage, divorce, inheritance and customary law.

In effect, mainstreaming gender in the constitution and the constitution review process means paying attention to the women's

⁵⁷ *Gender and Law: Eastern Africa Speaks*- a World Bank Publication of a sub-regional conference of gender law held in Addis Ababa, October, 1997.

minimum requirements or standards that have been captured in several women's meetings on the subject of constitutional making which are summarised below:

- Clearly stated equality between women and men;
- Promulgation of laws which protect the rights of women and ensure that all past injustices against women are eliminated;
- Guaranteeing of access to all resources including property and land;
- Abolition of cultural and religious practices which directly or indirectly discriminate against women;
- Protection of women against all forms of violence;
- Proportional representation of women in all institutions of governance;
- Guaranteeing education and training for the girl child and women;
- Measures to protect women's health, reproductive and sexual rights especially in the light of the HIV AIDS pandemic which has been declared a national disaster;
- Automatic incorporation into domestic law of all International conventions signed and ratified for the promotion of human and women's rights;
- Establishment of practical implementation mechanisms and affirmative action programs to ensure the desired goal of achieving true equality between women and men.⁵⁸

⁵⁸ *Women's Rights in the Zimbabwe Constitution*- prepared by Paul Mutangudura for the Association of Women's Club, 2001 P.6

5. Conclusion

The area of gender and culture has been identified as a critical area of concern in the constitutional review process, especially given the urgent need to reconcile cultural and religious interference with women's rights in law or in practice. The issue of claw-back clauses, which inhibit the achievement of women's rights in most African countries mainly, revolves around issues of culture and religion.

In Kenya the law is still blind or silent on socially sanctioned matters of personal interest such as wife beating, marital rape and other cases of sexual and domestic violence. A Kenyan woman married to a non- Kenyan citizen has no right to bestow citizenship to her children or her foreign husband while Kenyan men have both rights by birth. The constitution of Sudan only treats issues relating to women in Article (15) The Family and Women only. Even then, it only talks about married women and is silent on issues relating to all other categories of women (widowed, women with disability). The constitution further stipulates that Islamic law shall apply to Sudanese people in total disregard of the needs of non-Muslims.⁵⁹

Although the constitution of Uganda provides for all human rights equally between women and men, and is considered truly gender sensitive by many standards, it has not managed to escape from the clutches of patriarchy. The Ugandan constitution upholds affirmative action in favour of women and girls in the critical areas of concern such as education and leadership and decision-making.⁶⁰ In practice, however, patriarchal

⁵⁹ Okumu Mary – “African Women’s Experience With International, Regional and National Instruments that Support Women’s Role in Peace Building”- Paper presented at the Seminar on Mainstreaming Gender in IGAD Peace and Conflict Resolution Mechanisms, October 15-16th held in Khartoum Sudan. P. 2.

⁶⁰ Kenya participated at the Dakar (1994) FWCW in Beijing (1995) meetings where twelve critical areas were

attitudes and practices continue to prevail and to constrain women from fully benefiting from the good constitutional provisions. It is reported that men have beaten their wives for a variety of reasons (including holding a different political point of view and exercising their democratic rights by voting for the candidates of their choice) with impunity. It is clear that such men operate from the vantage point of tradition and custom that designate a man as having control or power over the woman.

From these, and other examples, we can see that in most African countries men enforce the law through either religious or cultural provisions in their dealings with women. In fact, in a number of these cases, governments refer women's legal complaints and disputes to customary or religious law. The threat posed to women's rights by this state of affairs is evident from the fact that it is men who preside over customary and religious courts such as Sharia courts. The testimonies given by women at the emerging structure of The Court of Women' show that women's victimization tend to arise from the society's interpretation and construction of 'woman' as less than or secondary to the man.

Thus it can be seen that both culture and religion, which remain a male strong hold in many African countries, have been used as a tool for social control over women. Traditional myths and proverbs reinforce women's subordinate position and in a number of cases trivialize women's social standing.⁶¹ It is for this reason that women's rights must be

identified as a basis for immediate action (hence platform for action) by all stakeholders under the leadership of the government. Affirmative action was identified as an indispensable strategy for gender mainstreaming at both meetings as well as the Beijing + 5 follow up meetings in Dakar (1999) and New York (2000).

⁶¹ The female in African society (woman) is captured through some very negative traditional belief systems such as "naturally cunning, wicked, sexually immoral, sinful, untrustworthy and unintelligent". As an example see *The Source of All Evil* by Mineke Schniper.

enshrined in the national constitution, as all Kenyans, in pursuit of providing for women's human rights will respect a constitutional framework. Given the prevailing attitudes, beliefs and value systems about women, it is clear that if the constitution does not make provision for the enforcement of common law, then the women who find themselves imprisoned by cultural and religious laws will have no recourse to justice.

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CHRISTIAN FEMINISM

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1. Christian Feminism

I will reflect on the following issues; (a) the Christian understanding of Gender (b) the Role of Religion in Gender Relations (c) Obstacles in the Christian Tradition that militate against women's rights and finally, (d) incorporating Beneficial Christian Practices on Gender in the constitution.

The paper will begin by defining Christian Feminism. In its most fundamental meaning is a conviction and a movement opposed to discrimination on the basis of gender. Feminism opposes ideologies, beliefs, attitudes or behaviour which establish or reinforce discrimination. Francine Cardman defines feminism as-

"a movement that seeks to realize the equality of women and men in all areas of life, so that our relationships, both personal and societal are characterized by the freedom and mutuality which can only occur between equals. [Feminism and Faith, *LCWR Newsletter vol. VII.No. 2, 1980:1*].

Feminism also recognizes that sexism [male-centredness patterns, behaviors, systems and structures which reflect and reinforce the unequal status of women and men) is probably the primary expression of the systems of oppression and domination, which control the world.

Maria Riley states that all the "isms" like sexism, racism, classism, militarism, neo-colonialism, and imperialism are rooted in "the same system which requires that one person or group be subordinated to another". [*Women: Carriers of A New Vision, Centre of Concern 1984:3*].

Feminism is a call to authentic Christian living and is pro-human. It holds that all people-women and men are human persons who are called by the creator to develop to full personhood. Feminism believes that human talents and rights or imperfections are not divided along sex lines. [A. Nasimiyu, "*Feminism and African Theology*" 1988].

Mercy Amba Oduyoye defines feminism as:

"part of the whole movement geared to liberating human community from entrenched attitudes and structures that cannot operate unless dichotomies and hierarchies are maintained".

Thus feminism focuses on the wholeness of the human community in which the female-humanity and the male-humanity shape a balanced community within which each and every person experiences a fullness of becoming or being. It calls for the inclusion of women into the community of interpretation and definition. It calls for the women's experience to become an integral part of the definition of being human. hearing and knowing.

Feminism is vigorously committed to criticizing all institutions which exploit women, stereotype them, deny them rights to actualize their potential and keep them in inferior positions. Feminism stands for openness, creativity and more dynamic human relations, which enable her story and his story to form human story. Linda Genness stresses that feminism is a prerequisite of the struggle of any society to liberation, democracy and social progress. [*Feminism and Socialism. 1977:28*].

A Christian feminist is a person - a woman or a man who is fully committed to the goals of feminism and "recognizes the need for radical changes in attitudes and structures" if the goals

of partnership, mutuality and equality are to be realized [Maria Riley, 1984:3-4]. Jesus Christ was a model feminist.

There are three categories of Christian feminists. First of all there are the post-Christian feminists who see the bible as promoting an oppressive patriarchal structure and reject it as not authoritative. Some reject the whole Judeo-Christian tradition as hopelessly male-centred for example, Mary Daly.

The second category of Christian feminists are the conformists who find no oppressive sexism in the Bible. They accept the hierarchical model and the traditional argument for its support. They see the woman's place in God's created order as that of submission and dependence in family, society and the Church. This category fears the collapse of the hierarchical framework into a form of female subordinationism.

The third category of the Christian feminists is that of reformists. They strive to overcome the patriarchal chauvinism in the Bible and Christian history. They see human liberation as the central Biblical message.

Some of the feminist exegetics are attempting to bring to light the positive role of women in the biblical sources, while others are struggling with 'unusable' male bias in the scripture and are searching for 'unusable' hermeneutic of liberation in the prophetic tradition. Within this category there is a group of those who call for a feminist 'hermeneutic of suspicion' which acknowledges that the Bible was written, translated, interpreted and canonized by males. The women have to do theology and exegetical reconstruction in order to recapture their place in Christian history.

These categories show that there are different understandings and expressions of feminism depending on which category a person is and also the economic, social, political and cultural background which influences ones perception of the reality.

In summary feminism seeks that women's experience as women enter equally and mutually into the human endeavour, both in the Church and in the world. [Maria Riley 1984:4]. Women's absence at the centres of powers and decision-making means that human family sees with one eye, hears with one ear, walks on one leg and works with one hand. By limiting the chance of women to participate in the shaping of the Church and the world, human potential to address the enormous problems which face humanity today is also limited.

2. The Christian Understanding of Gender and The Role of Religion in Gender Relations.

In Genesis 1:26 there is a clear distinction between the creation of other beings and that of humanity. Humanity is created as a result of a particular deliberate decision on the part of God — the Creator. What is even very unique is that human beings are created "in the image and likeness of God" both female and male. Thus the distinction between male and female is at the foundation, intrinsic in the idea of humanity. Mary Evans has stressed this idea by emphasizing that the creation of humanity as male and female is an integral part of God's decision to make humanity. [*Women in the Bible* 1983:12]. This clearly shows that the idea of humanity has its full meaning in women and man and not in man alone. In addition, human personality has to be expressed in either female or male form. In this creation narrative, sexual distinction is quite clear. There is no indication of subordination of one sex to the other. Humanity is created both male and female and entrusted with the stewardship over the rest of created beings.

Human beings [men and women] are not only creatures but conscious creatures and in consciousness of their creature-hood they mirror in the same fashion that supreme consciousness with whom God can dialogue. Although this has been the traditional view of the Church, some Church fathers did develop different theories.

For example Thomas Aquinas whose theological influence in the Catholic Church still lingers on does not mention the male/female relation in any of his nine theological discourses which deal with the divine image.

The Bible was written in a patriarchal culture and as such some of the Biblical texts portray women as inferior and as individuals in subjugation to men. For example Exodus 20 - the Ten Commandments are addressed to men and women are pieces of property along with oxen and asses. John 8:1-11 adultery is seen only as unfaithfulness by a woman not by a man, and for it she is condemned to death. Jesus Christ challenged this Jewish law and gave a new law that both men and women were called to faithfulness. The Bible and every theological formulation no matter how primitive or sophisticated must be seen ultimately against the culture which produced it. In the New Testament Jesus broke the male-dominated attitudes of his day and reached out to women. The Christian story in four Gospels asserts that a group of women were the first people to receive the news of the Easter announcement of the Resurrection. Women seem to have been the financial supporters of the apostolic band and were primary leaders in Paul's embryonic Church.

Despite these exceptions, however, the patriarchal definitions of women and men are predominant throughout the pages of our sacred story from Genesis to Revelation.

It is in Paul's writings that we see most clearly the struggle between accepting the attitudes of a male dominated society and being faithful to his Lord who accepted all persons and treated them with equal seriousness. In I Cor. 11:7-9; 14:34 Eph. 5:23 Paul affirms the subordination of women to men but he also speaks of mutual submission between husband and wife (Eph. 5:21-33). Above all, in Gal. 3:28 Paul loudly and clearly proclaims;

"there is no difference between Jew and Gentile, between slaves and free, between men and women; you are all one in union with Christ Jesus".

The liberative message is present in the scriptures which affirms the equality of all the Children of God.

Unfortunately the texts which reveal paternalistic ideals and inferior status of women have been used in arguments in support for the status quo. In quoting the scriptures the Church Fathers selected texts which bespoke their views on women's subordination. The Church Fathers focused on verses that provided rationale for restricting women and which served to give support, re-enforce and justify traditional cultural attitudes towards women. Women were almost viewed only in their sexual roles as the relievers of male's lust and as bearers of men's children. This mentality and attitude towards women overshadowed and alienated women both in Church and society.

Jesus Christ came to restore human relationship to God, to each other and to creation. The culture of sin has continued to play a strong influence on even the greatest of the Church Fathers. The Church Fathers portray male humanity as primary instance and female humanity as something secondary, if not derivative. This bring us into a society where male gender is placed at the centre and in which female gender exists for men" support. The primary role of women is procreation and household management.

For centuries male scholars have gone to the scriptures and selected those texts that support their male-dominated societies views on women. In human creation Genesis 2 masculinity begot femininity. The male gives first initiation then the work of procreation is assigned to women. The church fathers selected and canonized scripture and this lead to textual and historical marginalization of women. Therefore women are questioning the patriotic

interpretation which does not allow women in leadership roles beyond the household management.

When this form of Christianity was brought to Africa the African woman lost the power she had in religious sphere. Traditionally, African women were religious leaders e.g. prophetesses, mediums, seers, diviners, medicine person and priests. As religious leaders they were respected and treated in the same way they treated the male religious leaders.

Christianity has failed to reflect Jesus Christ's restoration Gospel message. It has alienated and marginalized African women and all women in the Church. There is no wonder that Africa is leading in emerging church movements which are seeking wholeness, healing and recognition of women's leadership.

3. Obstacles in the Christian Tradition that militate against women's Rights

1. In the first place, at the community level sexism as an ecclesial and social sin is embodied in structural and institutionalized injustice. Secondly at individual level sexism as personal sin means the conscious cooperation in structural sin. Sexism is one of the main obstacles in the Christian Tradition that militates against women's human rights. It is a structural embodiment of human power and oppression- It maintains the religious - spiritual power of men over women. It encompasses the dehumanizing trends, injustices, discriminations, violence and oppression perpetuated by ecclesial and societal patriarchal structures and institutions.

Sexism as ecclesial - social structural entity provokes a symbolic and theological system that legitimizes the patriarchalization of the Church and the marginalization of women. Scripture, theology and church law justify the institutional oppression and marginalization of women as a theologically

given, a historical common sense and as beneficial to women.

Sexism as a theological system promotes "false consciousness" which is internalized in socialization and education. This "false consciousness" permits those in power to perpetuate sexism and the oppressed people are compelled to accept their oppression and to internalize the values of the oppressors.

2. Secondly, the church's patriarchal anthropology which advocates submissiveness is an obstacle. It is easy to see the human face of patriarchy in oppression and exploitation that women are subjected to in many areas of life in social, economic and spiritual spheres by developing myths that disguises patriarchy. For example by treating motherhood as sacred. But if this is so why are mothers treated with scorn and are oppressed? Why are unwed mothers discriminated against? It seems that the protection of man is required to sanctify the reproductive ability of women. A social ecclesial community that operates on the basis of patriarchy cannot be called a just society. Power rests with the powerful and patriarchy is powerful.

Women have to become aware of the images and symbols they have inherited from childhood which are controlled by patriarchy. For example, "Girls are weak. Boys are strong.". "Girls are silly. Boys are sensible" and so it goes on. Patriarchy like consumerism is targeted at women and is perpetuated mainly by women. Children are taught at home, in our schools through community activities that male is superior and right. These images are internalized from childhood in both men and women. A grown woman believes that she is weak and silly and projects to all the women folk and will not support a woman who diverges from these norms and principles, in the same way a grown man believes that he is strong and sensible. The low esteem of a woman

becomes a source through which she is exploited. This low image that most women have of themselves makes them accept and tolerate exploitation. For example violence against women, especially physical violence has come into the open due to rising level of consciousness created by women's groups.

The main line Churches accept patriarchy as their model and patriarchal images as their symbols, thus their visions will have little credibility in the process of building a just and equal society.

3. African culture as interpreted today prevents women from playing leadership roles in Church and society. African culture has undergone metamorphosis. It has been influenced by Western culture. In African history one hears of powerful women like Wangu wa Makere or Ma Kitilili but their importance is played down in the same manner in which women in the Bible are played down. Some cultural practices which are dehumanizing and dangerous to women's health have continued to be practised. For example, the female circumcision and the widow inheritance and opportunities given to girl child. Cultural practices that violent the human rights of women should be outlawed and condemned. The form of Christianity that came to Africa - Kenya included, did not critically evaluate the African culture in order to highlight and reject the oppressive elements and embody the liberative, life giving elements that were present within the culture.
4. The Church's androcentric approach to human rights contributes to the violation of the human rights of women. The dignity which the church gives to women is not equal to the dignity it gives to men. [*Catholic voices on Beijing: A call for Social Justice for Women* CFFC.: 2000:21]. When the church addresses women's rights it is often done out of paternalistic concern to protect women's roles as mothers and

wives rather than to promote equality, mutuality and partnership.

4. Christian Practices on Gender for Incorporation in the Constitution: -

1. The believe that men and women are made in the likeness and image of God. Therefore both men and women should be given equal status in all spheres of life.
2. The acknowledgement of women as moral agents who have to be listened to and their insights to be incorporated in the human research for national and global justice.
3. Commission on gender equality to be enshrined in the Kenyan constitution. This will provide for engendering of all human life from the family to kindergarten, to primary schools, high schools and all social, political, cultural and religious spheres of life.
4. The inclusion of the Christian feminists critical social analysis which is enriching social justice analysis in constructing social, economic and political policies. The insights gained through women's social analysis should be taken into greater account This necessitates inclusion of suitably representative and diverse women in all levels of policy and decision-making in the society.
5. Taking the diversity of men's and women's experiences into consideration by allowing and respecting the individuals to follow their conscience.
6. Treating the non-human creation with respect by recognising the intrinsic value both in the human and in the non-human world. Promote human care for the earth with humility and appreciation of the people's dependence upon the non-human world.

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ISLAM AND WOMEN'S RIGHTS

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1. Introduction

The argument in this presentation is not based on what Moslems practice today, but is directed towards the teaching of Islam (both from the Quran and tradition of Prophet Muhammad (P.B.U.H). This is so because religion throughout history has been subjected to abuse and misinterpretation; thus it has become a weapon of suppression and oppression leading to untold suffering and violation of human rights. I believe this approach will help us get a clear picture on how Islam and Muslims understand the concept of gender: the roles of religion in gender relation; the obstacles in the Muslims tradition that militate against women's rights (if any). The understanding of this shall be the basis of my recommendations of what is ideal to be incorporated in a constitution with regard to the question of gender in Islam.

2. Definition of Key Concepts

Let me start of by defining some of the key concepts that I feel are paramount to the discussion and advancements of my argument-

2.1. Gender

There is need to get and understand the difference between sex and Gender. Sex refers to the biological differences between a boy and a girl or between a man and a woman. Whereas on the other hand, Gender refers to the characteristics of men and women that are socially or culturally determined as opposed to those that are natural or biologically determined.

2.2. Gender Equality

This refers to the concept that all human beings are free to develop their personal abilities and make choices without the limitations set by strict gender roles; that the different behaviour aspirations and needs of women and men are considered valued and favoured equally. Gender equality therefore pre-supposes the absence of barriers to economic, political and social participation on ground of sex, society and upbringing of individuals. However, the gender equality has been often understood equality in terms of numbers something that obscures the sense of gender equity.

2.3. Gender Equity

Gender equity refers to the fairness of treatment by gender, which may be equal treatment or treatment which is different but which is considered equivalent in terms of rights, benefits, obligations and opportunities. For purposes of clarity, ladies and gentlemen let me also mention some key terms in relation to the question of gender equity; namely gender awareness, gender sensitivity and gender responsiveness. Gender awareness refers to the capacity to acknowledge that differences between men and women exist, while Gender sensitivity means the ability to analyse the causes of the differences; and gender responsiveness on the other hand refers to the much more grounded capacity to put mechanisms in place to address gender differences for purposes of achieving social justice.

2.4. Gender Relations

This refers to the relationship and unequal power distribution between women and

men, which characterize any specific gender system.

3. Muslim Understanding Of Gender

Gender is a well-developed theme in Islam that began right from the creation of humankind. To understand the Muslim understanding of gender we need to focus on the status of women in Islam. In the Quran, Allah says,

“Mankind fear your Guardian Lord who created you from a single person, created his mate of like nature and from them both scattered countless men and women”- Quran (4:11).

“It is He who created you from a single person, and made his mate of like nature, in order that, he might dwell with her”- Quran. (7:189).

“O mankind! We created you from a single (pair) of male and female, and made you into nations and tribes, that you may know each other (not that despise each other”- Quran (49:11).

“and Allah has made for you mates (and companions) of your own nature...” - Quran (16:13)

These and other related verses from the Quran reveal that Allah, during the creation of humankind created man and woman from the same soul, made them equal entities to form equal couples that complement each other. I am probably yet to discover any verse in the Quran that highlights man as a supreme human being in comparison with a woman. But at least according to what I know from the Quran, Islam overtly declares and recognises a woman as a fully-fledged human entity in proportion with a man. Unfortunately, however, Islam in practice is a victim to influence of certain ideologies that are rooted in a particular society.

The opponents of Islam especially those who choose to violate the women's rights

base their argument on the prophet's tradition when he said;

"Women are lacking in religion and reason"

This Hadith has been quite often misinterpreted for selfish ends. When the prophet was asked to explain this, he said, "is not the women's testimony half that of men?" The attendants answered; "Yes. This is due to her lack of reason." Then he added, when a woman is in her monthly period, doesn't she stop praying? Those present replied, "Yes. This is due to her lack of religion." We need to pause and ask ourselves, under what context did the prophet say this? Whereas Islam accords an equal status to both men and women, Islam still recognises the biological and physiological differences between the two sexes.

Islam is aware of the emotional and physiological state of a woman. You will agree with me that, much as we are striving to achieve gender equality, it is important to note that Islam does not accept the concept that gender is just an issue of upbringing or culture or traditions, for there are inherent differences in males and females. Therefore, the prophet's teachings were not meant to make a woman inferior to man, he simply appreciated a woman as a different sex from the man.

It is not, ladies and gentlemen, only in the idea of creation that Allah granted equality to men and women but they were equally assigned the same spiritual roles and responsibilities. God says:

“And whatever wrong any human being commits rests upon himself alone; and no bearer of burdens shall be made to bear another's burden...”

“For, He who has made you inherit the earth, and has raised some of you by degrees above others, so that He might try you by means of what he bestowed upon you” - Quran(6:164-165).

For Muslim men and women for believing men and women, for devoted men and women, for true men and women, for men and women who are patient and constant, for men and women who give in charity, for men and women who fast, for men and women who guard their chastity, and for men and women who engage much in Allah prize for them has Allah prepared forgiveness and great reward - Quran (33:35).

The Quran further states;

“Whoever works righteousness, man or woman, and has Faith and Verity, to him will give new life, and life that is good and pure and we will bestow on such their reward according to the best of their actions”- Quran (16:97)

The above verses reveal that both women and men have the same obligations to Islamic principles and practices and God will reward them not by their gender but by their deeds. Unfortunately, quite often men have taken the responsibility of punishing the women for their (women) failure to stick to the Islamic principles and practices. The Quran does not authorize men to be the enforcers and guardians of the Islamic law. Consequently, humans cannot be judged according to their own deeds unless they have the freedom of choice to do so. The woman has the responsibility to make the right choices as it is in the case of men. If any chooses wrongly he or she is solely culpable.

The understanding of spiritual equality, responsibility and accountability for both men and women in Islam is not restricted to spiritual and religious issues but it is a basis for equality in other aspects of life. This brings me to my next point of discussion, which is the role of religion in gender relations.

4. The Role Of Religion (Islam) In Gender Relations

Allow me ladies and gentlemen, to address this point by looking at gender equality and equity in relation to education, work, inheritance, marriage and code of dressing. This will understand the obstacles in the Moslem traditions that militate against women's rights and also form a basis of my recommendation.

4.1 Islam and Education

There is perhaps no religion, culture or society that promotes women rights to education like Islam does. At the beginning of Islam, no where is it mentioned that women were restricted or prohibited to seek and impart knowledge and education. Prophet Muhammad (P.B.U.H) says that.

"Seeking knowledge is incumbent upon Muslim men and women"

The Quran further reveals that; it is important for both man and woman to seek knowledge and education. It says

"Those truly fear Allah among his servants, who have knowledge"- Quran (35:28).

This and many other teachings elevate Islam as a religion that gives the woman all the rights to acquire knowledge without any restrictions. To prove this further, history has it that there were many women scholars who had very significant roles and responsibilities in the Islamic world. Aisha, the wife of the prophet was a well learned and famous scholar to the extent that her intelligence and outstanding memory made her be considered as one of the most reliable source of Hadith. Quite often, the prophet during his time sent many of his followers including both men and women to Aisha for teaching and guidance. Another Muslim woman scholar worth mentioning is Nafisa. Nafisa did not teach only ordinary people but great scholars like Imam Shafi-ai who learnt a lot from her.

Further in his other tradition, the prophet says that;

"He who brings up three daughters and educates them well, his reward is paradise"

His followers asked him; supposing one had only two daughters? The prophet answered;

"Yes even if it was only one daughter, paradise will be in yours."

What has been said confirm the content of the following verse;

"O ye who believe let not some men among you laugh at others, it may be that the latter are better than the former; nor let some women laugh at others, it may be that the latter are better than the former"- Quran (49:11).

I know at this moment you are wondering, why women in Afghanistan were restricted from receiving education to the extent that women who were discovered running schools were put in prison, beaten and many killed. It could be that the Talibans have cultural beliefs that they want to jealously protect, but do it under the guise of Islam. However, as discussed above, Islam gives the same rights to both men and women and does not accept traditions that are not based on the teachings of the Quran and the tradition of Prophet Muhammad.

4.2 Islam and Freedom of Association

Women have a substantial freedom of association. If some women were great teachers and narrators, who taught both men and women, transacted successful businesses with men, participated in armed forces with men, then there is no doubt that Islam allows free interaction of women and men. However, it should be clearly understood that Islam does not encourage women to interact with men in places of worship for a particular reason. Prophet Muhammad (P.B.U.H) says that

"The best men's queue is the first one and the worst is the last one. The best woman's queue is the last one and the worst woman's queue is the first one"

That, and other traditions of the prophet, which restrict women from leading men in prayer, do not indicate a woman's inferiority in spiritual matters, but as a measure to avoid temptation as on the part of who may be diverted from concentration on prayer and focus on the woman's physical attraction.

On other spiritual activities, Islam allows women to freely participate. Aisha, the wife of Muhammad is reported to have been an Imam (spiritual leader) for other women in prayer, participated fully in wars and is reported to have commanded a battle known in Islamic history as the battle of camels. Such examples clearly show us that the Prophet never restricted women to merely take care of children, cooking food or waiting for their husbands to return home, but encouraged anyone regardless of sex to work and fight for Islam. However, much as Islam gives a woman freedom of movement and association, likewise it qualifies it with a condition that when women leave their homes on a long journey they must be in company of a male relative. This can be looked at as an indirect way of confining a woman in the house; this is so because the condition presupposes that every woman has male relatives.

4.3 Islam and Work

Islam equally gives a woman the right to work and be paid for her work. But she should put on decent attire and conduct herself in a way that is not likely to seduce men. During the prophet's time, some women worked in market places, a place that was open to both women and men. Hadija, the prophet's wife was a prominent businesswoman who employed and supervised all her employees, including the prophet himself. Regarding the right to work, the Quran states:

“And in no wise covet those things in which Allah hath bestowed His gifts more freely on some of you than on others: to men is allotted what they earn and to women what they earn: but ask Allah of his bounty. For Allah hath full knowledge of all things”- Quran 4:32.

As seen above, in the early Islamic history women participated fully in the economic, political and social spheres of their society. However, in practice, these rights have been deliberately or otherwise violated propelling the position of Muslim women to a drastic change for the worst; probably since the death of prophet Mohammed (P.B.U.H)

It is clear that what some radical Muslim countries or Muslims do with respect to women's rights to work, to get education, to interact freely (if not in prayers) is unfounded and anti-Islam. It is therefore my contention that such acts of violating women's rights are anti-Islam and should be subjected to condemnation.

4.4 Islam and Inheritance

Seen from one point of view, ladies and gentlemen, it is difficult to believe that Islam goes ahead to grant equal rights to women and men in inheritance. I remember one time someone shouted and shut me up when I mentioned that Islam treats women and men equally and perhaps treats women better in matters regarding inheritance. In the Quran, God says;

“From what is left by parents and relatives, there is a share for men and share for women whether the property is small or big, a determinate share”- Quran (4:7) .

This verse establishes a woman and man's right to inherit. If a woman can inherit property she can possess that property and manage it as she pleases. Allah goes on to say:

"You have half of what your wives leave behind (after their death) if they have no child, if they have a child, your share is one fourth of what they leave behind. And they (women) has half of what you leave behind (after your death) if you have no child, if you have a child, your share is one eighth of what you leave behind.”- Quran (4:12).

The above verse teaches us that, in the event of death, a woman is entitled to inherit some of the property left by her husband. The percentages and conditions are clearly stipulated in the Quran in a way that does affect the woman in any way. In Sura 4 verse 11 the Quran gives us a verse that has been a source of controversy. It reads;

"Allah directs you as regards your children's (inheritance) to the male, a portion equal to that of two females..." - Quran (4:11).

Many think that this disfavour a woman economically. To understand this, we need to understand first what Islam says about marriage (I will say something about it later). However let us note the following;

1. In Islam whereas a man is supposed to take care of his wife and children, it is not mandatory for a woman to take care of the husband and the children economically. I do not mind what we practise in real life, but as I told you, my task today is to make ourselves aware of what Islam says about women's rights.
2. During marriage women always ask for dowry (Mahar) from men who are willing to take them as wives. The dowry (Mahar) is meant to empower the women so that they have a source of income. In some rich Islamic states the Mahar is so high that you can hardly find a man with two or more wives.
3. If a man dies, all his children and wives are entitled to the same property, whereas if a woman dies it is only her

biological children and husband who are entitled.

4. Again a man is legally obligated to keep the relatives-say parents who might be in need of assistance whereas a woman is excused from these obligations.
5. Another principle is that the husband is the manager of his property so is a wife; Both are responsible for the management of their property. So there is nothing like joint ownership, which normally ends up in favour of men in marriage. Personally, I find this fair and convincing. If I compare it with what happens in some cultures, where a woman is completely denied of any property in the event of death of her parents or husband.

4.5 Islam and Marriage

Islam distributes all the rights equally between men and women. A woman has a right to choose a partner and has the right to either marry or stay single so is the man. One of the pillars of marriage in Islam is the consent of a female partner. A woman in Islam is not supposed to be forced to marry out of her wish. During Prophet Mohamed's days some women did not marry; (a case of his wife's sister Imara who never married is proof enough, that women may or may not marry) The prophet advises believers in some of his traditions;

He says;

"You the youth, marry if you can, if you can't you fast"

We need to understand that first and foremost women as well as men have the choice to marry. However even after marriage, co-operation, care, responsibility of the wife should not be taken for granted. A woman has to be consulted on major and minor issues. Prophet Muhammad (P.B.U.H) used to consult them, even on the issues of getting another wife. Muhammad at one time had to consult Sauda, one of his wives, to choose between divorce or allowing her husband to allocate her days to

Aisha, since she could no longer fulfill her sex obligation.

Therefore Mohammed's relationship with his wives epitomises the true marriage that is in harmony with the teaching of Islam. He is a husband that never believed in loading all domestic chores on the shoulders of his wives. He used to do most of the work, for example he used to milk his goats and repair his shoes. What he did follows the Islamic principle that;

"The owner of something is most suitable person to carry it".

Islam gives a right to women to bear children in accordance with their wishes. Nowhere, as far as I know in Islam, I stand to be corrected on this, does Islam condemn barren women or those who have chosen not to have children. However the prophet teaches that, marry fertile women and the beautiful so that you have no excuse when it comes to loving them or treating them well.

Women share responsibility with men as far as custody and care of children is concerned. In case of divorce, the mother takes care of all her children below the age of seven with financial support from the father. After seven years, the children are consulted on which of the two parents she/he would like to stay with and their decision should be respected. This is not meant to burden the mother, but Islam, as I said earlier, puts into consideration the physiological and biological nature of both sexes in distributing responsibilities. Women have the nature of mother not by culture, tradition, up-bring or society but inherently, they are better in taking care of the offspring, a bond that Islam recognises.

As men, women are free to divorce at anytime they feel like; nowhere does Islam force a woman to stay in misery under the guise of marriage. However, if a woman decides to divorce, she is obliged to pay back the dowry before the divorce proposal is finally honoured. Other procedures are also taken. For instance, after divorce both

the wife and the husband have to wait for the period of three months. This is meant to establish whether the woman is pregnant or not. And if she is found to be pregnant the man is responsible for the maintenance until the child is born. Furthermore, if a woman is divorced with a baby, Islam gives her the right to stay around and breastfeed her baby up to two years. During this time, the man is expected to take care of both the woman and the baby. The period of three months also acts as a reconciliation period, whereby the relatives and friends can come in to try to settle the differences.

Let me briefly say something about polygamy in Islam. In Uganda, this topic sells like a hot cake and has become an issue to debate. Let us see what Islam says about this; Islam per se allows men to marry more than one wife and the legislation of polygamy is there in Islam. Prophet Muhammad (P.B.U.H) himself married at least more than one wife. However, much as Islam grants the freedom to choose to marry one or more wives, it also puts up some conditions of which all Moslem believers are expected to fulfill. The Quran says;

“If ye fear that ye shall not be able to deal justly with orphans, marry women of your choice, two, three or four. But ye fear that ye shall not be able to deal justly with them, then only one”- Quran (4:3).

The above verse teaches that, orphans should be treated well and men are free to marry more than one woman if they are certain of treating them justly. The Quran further states that;

“You are never able to be fair and just as between women, even if it is your ardent desire; but turn not away altogether, so as to leave her hanging. If ye come to a friendly understanding, a practice of self-restraint, Allah is of forgiving, most merciful”- Quran (4:129).

With those two verses it is clear that a man has a right to marry up to four wives.

However he is obligated to treat them justly. The question of whether this is possible in practice or not is up to the individual man to decide to venture accordingly. You may be interested to know my stand on this. I surely don't find it a problem. Islam gives a choice to marry and to divorce. If my husband gets another wife I have the choice to stay married or to divorce.

4.6 Islam and the Code of Dressing

No subject in the recent past has received more attention than that of women's dressing code. The recent report on women's health rights in Afghanistan reveals grave abuse of their health rights by being forced to put on a thick burqa covering their entire body, which has caused them to suffer from eye problems, heart disease etc.

What does Islam say about the code of dressing in Islam? Let me cite the different verses that address this issue;

"O prophet! Tell your wives and daughters and the believing women that they should draw over themselves their hijab when in public; this will be more conducive to their being recognised as decent women and not harassed. But God is indeed of forgiving and most merciful"- Quran (33:59).

In another verse, the Quran says;

"And know that women advanced in years, who no longer feel any sexual desire incur no sin if they discard their hijab, provided they do not aim at a showy-display of their *zeenah*. But it is better for them to abstain; and God is all-hearing, all knowing" - Quran (24:60).

Closely related to the above, in another verse, God says;

"Say to the believing men that they should lower their gaze and guard their modesty: that will make for greater purity for them: and God is well acquainted with all that they do. And say

to the believing women that they should lower their gaze and guard their modesty; that they should draw their veils over their bosoms and not display their *zeenah* except to their husbands, their father and that they should not strike feet so as to draw attention to their hidden *zeenah*" - Quran (24:31-31).

These verses point at among other things, the following:

1. A Muslim woman should not display her beauty and adornment (*zeenah*) expect for "that which must ordinarily appear of it, i.e. the face and the palms"
2. The head-covers should be drawn over the neck slits. This means that the head-cover should be drawn so as to cover not only the hair but should be drawn to cover the neck and bosom.
3. The dress should be loose enough so as not to show the shape of a woman's body.
4. The dress should be thick enough so as not to show the colour of the skin it covers or the shape of the body, which it is meant to cover.
5. The dress should not be such that it attracts men's attention to the woman's beauty. Islam does not only restrict women in the mode of dressing but also sets conditions and requirements of men.

Men should dress decently and avoid clothes of fame pride and vanity. They should not put on ornaments or clothes similar to those of female. Equally see-through clothes and stylish clothes that seduce the opposite sex are discouraged.

The question of Muslim women and Moslem men dress conduct is not a choice but a requirement for all Muslim women believers. For Allah says,

"It is not befitting for a believer, man or woman when Allah and His apostle have

decided a matter, to have any option about their decision. If any one disobeys Allah and his Apostle, he is indeed on a clearly wrong path" - Quran 33:36.

One thing that should be clear as per those verses, Islam requires a woman and a man to dress modestly especially in public places. I look at modesty as a way that is respectful and decent. Many Muslim women that cover their hair, and dress modestly are often recognised as decent Moslem women; therefore veiling and dressing modestly is not a violation of the women's rights. And those who feel that Moslem women who keep their veils on need to be liberated suffer from ignorance about the Islamic law.

The exact length and thickness of the hijab should be based on what the Quran says and the traditions of the prophet. The idea of women wearing a hijab that threatens their lives, I strongly believe is anti-Islam and should be condemned.

5. Moslem Practices That Militate Against Women's Rights

The discussion above gives us a clear picture of the Islamic stand on gender equality, equity and on the whole the gender relations. However some Moslem communities bank on some of the teachings of the Quran to implement certain practices that directly impinge on women's rights. This creates the impression to non- Moslems that Islam as a religion traditionally subjects women to deprivation of even the basic human rights. The idea that women are supposed to be submissive does not add up to the assumption that they should be condemned to slavery under the hands of human beings that are fighting for personal satisfaction and aggrandizement. Some of those practices include:

5.1. *Restriction of women to move alone in public places without the company of a male relative.*

This is true to the teaching of Islam and imitates what was practiced during the times

of the Prophet. The motive behind this was to keep the woman in line with fulfilling her obligation of staying custodians of purity and to live by that, and it was also meant to protect them from immoral acts like rape, adultery etc. However, this whole idea is short on the fact that it is tantamount to punishing women for not following God's commandments. But who did God give the mandate to punish women on his behalf and who did God assign the responsibility to supervise women on his behalf? Why can't women be left to be accountable for their deeds before their God? If people were given the authority to judge spiritual cases on God's behalf, are women also allowed judging and punishing men if they fall culprit? Women should be given the opportunity to do certain things; if they culminate into sin they will be held accountable. Eve gives a living example to all of us. She was given the freedom; she chose wrong and it was indeed God but not Adam that punished her. The obvious repercussion of this is the denial of women of things that are of great importance to survival in our days, like education, health care, work and leadership which keeps Moslem women in ignorance and backwardness.

5.2 *Men's dominance over women*

In another teaching of the Quran God says:

“Women shall have rights similar to the rights against them, according to what is equitable but men have a degree over them” - Quran (2:228)

Muslim opportunists have interpreted the word degree as supremacy and authorisation of dominance. They base on this verse to justify the violence they inflict on women especially in marriage. Islam requires that husbands treat their wives with respect and prohibits any form of physical or emotional abuse. It requires that spouses treat each other with love and mercy (Quran 30: 21). Moreover, the Quran constantly warns husbands not to use injurious statements against their wives (Quran 58: 2-4).

5.3. *The right to marry as many as four wives*

Many Moslem women are vulnerable to being co-wives. This is a result of the teaching of the Quran that men are free to marry as many as four women so long as men can love those women justly. But men are human beings and are prone to having human weaknesses. It is common sense that conjugal love can hardly be shared by more than two people. In His creation God created Adam and Eve as his wife. We should not think that God had just run short of raw materials to create Adam a second or more wives. God is omnipotent, as believers know. When Moslem women are married in polygamous marriages, their husbands are only trying to prove what is, in human nature, impossible. It looks like they are marrying not to bestow just love that the Prophet recommends but to subject women to misery. Men are quenching their sexual desires at the expense of denying women love.

5.4. *Women not to raise their voices in public*

In the Quran and teachings of the Prophet, women are advised not to raise their voices in public as men might be seduced by the sweetness of their voices. And in another tradition, the Prophet says. "Nothing I have left is as tempting as a woman." Some Moslems manipulate this to not only look at a woman as a devil and therefore source of temptation but have also denied her the freedom of expression, which the Quran clearly gives her - Quran 58:1-4 and 60:10-12. The Prophet allowed women to freely express their opinions, argued and participated with him and he gave them audience.

5.5. *Marrying off the Moslem girl child at a young age*

In the history of Islam it is well known that the Prophet married Aisha at the age of nine. Some individuals who are material opportunists have used this as an excuse to

sell off their daughters at an early age, denying them the opportunity to have an education and have a choice of making a decision on who they love to have as their future husband.

However, it should be noted that what the prophet did would be healthy and acceptable because it did not involve having carnal knowledge of Aisha till when she had reached the right age. The wholesale imitation of this practice does not put into consideration whether the man will be patient enough to waiting for the girl to become an adult.

5.6. *The denial of women to have the right to own property*

In the Quran and the tradition of Prophet Mohammed, as earlier discussed, men have more financial obligation than women do. Basing on this, some men have decided to deny women the right to own property. This is against the teachings of Islam.

A lot more can be cited as examples of the violation of women's rights but mentioning those ones above does not mean that they are the only cases of women rights abuse. And their order of presentation is arbitrary. Let me take this opportunity to suggest a few things from the Moslem practices that can be of some importance to the review of the Kenyan Constitution.

6. Freedom with regard to Belief, Worship and Conscience.

Individuals should be given the freedom to worship in any religious faith of their choice and no man or woman should be responsible to punish him or her basing on any violation of religious principles.

Individual men who declare themselves as Moslem should be allowed to marry more than one wife on condition that they seek consent from their first wife, have enough resources to take care of extra people, that is the new wives, their children and

dependants, and they show reasonable proof that they shall love them justly.

- Islamic marriage should be legalised on condition that whatever happens to this marriage should be settled under the Islamic law. For instance, procedures before, during and after marriage including child care after divorce
- The age of consent and the freedom to choose should be considered in order to shield the Moslem girl-child from falling prey to hands of some individuals.
- Moslem women should be given the right to own property, as per the teaching of the Quran regardless of their financial obligations to the family.
- Women should be allowed to exercise their freedom of expression, association, freedom to choose what they consider modesty but in doing all this they should bear in mind the teaching of the Quran.

Finally, I say the divisions and intolerance expressed regarding Islam and women's rights remains a curse to the development of our nations. For Islam sets out clear principles and guidelines that can help us break out of backwardness without transgressing the boundaries of social morality, without betraying the national/Islamic culture within which the modern ideologies were shaped. We can surely be modern and remain modest and authentic believers.

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GENDER IN THE AFRICAN TRADITIONAL CONTEXT

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1. Abstract

This paper sets out to argue that the family is the foundation of every society. In this regard everything should be done to save the Kenyan family. Family is one of the oldest and most common human institutions. Since prehistoric times, the family has been an important organization in society. Most people grow up as a family, and as adults establish a family of their own. Some traditional African societies had an Equalitarian System which gave women and men equal power in the family. Researchers have not found a truly Matriarchal System in which the mother headed the family and had the most power in society. But in most African cultures the mother was essentially honored. People regulated themselves by elaborating rules governing sexual pairing. These rules were, and remain extremely diverse, although prohibitions against incest - sexual relations between close family members - have been virtually universal. The incest taboo requires individuals to find and marry mates from outside their own family group: There are two general sources of complexity in family structure. The first originates in taking more than one spouse. Some African cultures practiced polyandry, the system by which one woman takes more than one husband. The other is Polygyny or Polygamy where one husband marries more than one wife.

It further argues that feminism has some strengths and weaknesses as far as the African family is concerned. Only the strong points of feminism should be upheld. The negative ones should be discarded.

It also argues that there are a number of strengths of the traditional African family, which should be incorporated in the Kenya

constitution. Again the negative ones should be one away with. It centres on the African Womanism as a movement which encourages the African Women and Men to evaluate the state of the family now and decide: "Whither way forward for the African family: Womanist or Radical feminism?" It concludes by stating that let the good values from both feminism and womanism be carried forward and let the negative ones be discarded.

The purpose of this paper is to present on the question of Gender in the African tradition. The issue to be covered by the presentation will include among others: The African understanding of gender, the role of culture in gender relations, obstacles in the African traditions that militate against women's rights, and incorporating beneficial African traditional practices on gender in the constitution.

2. Definitions

To begin with, the paper will grapple with the definition of the word "gender". What is gender? Consider your answers to that question now and again at the end of this presentation. To answer the question requires thinking about what it means to individuals to be *men* and to be *women* and how these meanings affect the ways we interact with each other, the kinds of relationships we form, and our positions in our communities. It also entails thinking about the institutions that distribute power resources and status among various groups of women and men.

What does it mean to be a woman? Thinking about women's experiences is a complicated task because women have as many differences from each other as

commonalities. On the one hand, women everywhere experience certain obstacles because they are living in patriarchal societies. Yet gender is not the sole influence on any woman's life.

Differences of race, ethnicity, class, age, nation, region and religion shape women's experiences. Moreover, these differences intersect with each other.

The experience of being a woman may be quite different from distinct groups of women. For a white upper-class heterosexual American woman for example, femininity might entail being economically dependent on her husband, perfecting a delicate and refined physical appearance and achieving social influence through child-raising and volunteer work. Womanhood for a middle-class African-American woman might mean providing financial support for her children, holding influential and respected positions within her church and community, yet being stereotyped by the dominant white culture as sexually promiscuous or unintelligent. The experiences of men are similarly varied. Although men benefit from power and privilege here and there, some groups of men also exercise power over other men while other men are excluded from economic or political influence. To understand the position of a particular man, we must consider his gender, race, class, age, and so forth- in order to understand the particular advantages and disadvantages he faces.

In short, gender is defined in various ways for different groups. Gender definitions bring with them a distinct set of restrictions and advantages for members in each group, as well as privileges and sources of power or resistance.¹

Next let us say something about Gender, culture and socialization.

Everyone is born into a culture – a set of shared ideas about the nature of reality, standards of right and wrong, and concept for making sense of social interactions. These ideas are put in practice and in behaviours and material objects. As totally dependent infants, we are socialized – taught the rules, roles and relationships of the social world we live in. In the process of growing up, we learn to think, act and feel as we are “supposed to”. As adults, we are embedded in our cultures' assumptions and images of gender.

What then is the meaning of *Feminism*? According to the Webster's seventh New collegiate Dictionary, feminism is “The theory of the political, economic and social equality of the sexes or organized activity on behalf of women rights and interests” (p. 307).

Feminism is the belief that women should have economic, political, and social equality with men. The term feminism also refers to a political movement that works to gain such equality. This movement is sometimes called the women's liberation movement or women's rights movement.

Feminist beliefs have existed throughout history, but feminism did not become widespread in Europe and the United States until the mid-1800's. At that time, many people regarded women as inferior and less important than men. Such people believed a woman's proper place was in the home. They reflected this opinion. For example, women were barred by law from voting in elections or serving on juries. Most institutions of higher education and most professional careers were also closed to women. Despite strong opposition, feminism grew in power during the 1800's and 1900's and won a number of new rights for women. Many people regard the feminist movement- and the resulting changes in the status of women – as a turning point in the history of society.

One of the first feminist books was *A Vindication of the Rights of Woman* (1792)

¹ R. Laurel Richardson, Verta Taylor and Nancy Whittle. *Feminist Frontiers*, Fifth edition (Boston: Mchrawltill 2001) p. 1

by the British writer Mary Wollstonecraft. In this book, Wollstonecraft described the state of ignorance in which society kept women. She also pleaded for better educational opportunities. Another early feminist writer was the American antislavery leader Sarah M. Grimke. She wrote a pamphlet called *Letters on the Equality of the Sexes and the Condition of Women* (1838). Grimke presented a powerful argument against religious leaders who claimed to find support in the Bible for the inferior position of women.

3. The Women's Movement

Throughout the 19th and early 20th centuries the women's movement primarily reflected white middle-class values and never satisfactorily answered the ex-slave Sojourner Truth's challenge: "Ain't I woman?" The goals of black and working-class women remain inseparable from their racial and class oppression. The goals of middle-class women centered on obtaining the opportunities available to the men of their own class, such as education or reforming society as a whole. Thus some women sought to improve the position of women through temperance, social reform, and protective legislation for working women. After women won the vote, the women's movement waned, and the first Equal Rights Amendment (ERA), introduced by Alice Paul in 1923, failed to pass.

The women's movement did not reemerge until the 1960s when the example of the civil rights movement and the dissatisfactions of college-education women converged. Betty Friedan's *The Feminist Mystique* (1963) called national attention to women's plight. The founding in 1965 of the National Organization Of Women provided a focus for the struggle for women's rights. In 1973 the ERA was reintroduced. Since the passage of the Civil Rights Act of 1964, women have won the right to abortion and some guarantees for equal opportunity and pay in employment.

During the early 1980s, however, the ERA was defeated, the right to abortion came under attack, and a growing number of women were finding the ad hoc employment measures inadequate to guarantee equality. The decline in alimony and child support, combined with the rising divorce rate, made women's rights to economic equality pressing. As Friedan's *The Second Stage* (1981) suggested, many feminists were also interested in building a new kind of family life.

Despite differences, most feminists seek equal economic rights, support reproductive rights, including the right to abortion; criticize traditional definitions of gender roles and favour raising children of both genders for similar public achievement and domestic responsibilities. Many wish to reform language so that it does not equate *man* with *humanity*. Many also campaign vigorously against violence against women (wife battering, rape) and against the denigration of women in the media.

Radical school of feminism sees the women as oppressed and it defines the oppression of women as a fundamental political oppression, wherein women are categorized as an inferior class based upon their biological/sex differences. The radical feminists claim that oppression of women is manifested in particular institutions, constituted and maintained to keep women in their place. They champion relationships such as those of Lesbianism, which means female homosexual. In this regard two women can marry each other and live as husband and wife. They support the idea of lesbianism being surrogate mothers. They also support the male gay and the male homosexuals as well as sex change. When I was at the University of Iowa in 1996-97, I witnessed an experience about sex change. There was a University Professor of Economics married with three children. I shall refer to that Professor as Professor X. During one semester, Professor X went to Europe and had sex change from a man to a woman. In the next semester, Professor X was no longer a man but a woman! 'She'

was no longer a married man but a single lady putting on high heeled shoes, earrings, lipstick, cutex, a dress and neatly combed hair of a lady. The University's news editor interviewed Professor X who had also changed from a man's name to a woman's name. The Editor asked "him" thus – 'What do your children call you now that you have sex change?' 'She' answered: What matters is my own happiness not somebody else's happiness. In this regard one can see an element of individualism which seems to pre-occupy the feminists as well. This is opposed to the African philosophy of life based on communalism to togetherness.

In the book *The African Child* by Camara Laye, the writer tells us about communalism in the African community and how it brought about harmony. There's harmony at home, harmony in the village and harmony everywhere. The people's gestures are always in harmony. There's unity in everything. Unity of purpose. The world described by Camara Laye is the world of peace and tranquility. The community seems to spend its time in festivals. Everybody participates and as people work, they sing to the rhythm of the drum and praise singers entertaining them. The community has plenty of food and work for them is a pleasure not a duty. The people themselves are not in a hurry. They stop by each others' houses to greet one another and say a few words.² My question with regard to sex and individualism is: How would you feel as parents when your daughter comes home with a lady and introduces that lady as her 'husband'? How will you feel as parents when your son comes home one day with a man and introduces to you as his 'wife'?

Another short-coming of feminism is that it raises a lot of emphasis on divorce which causes a lot of psychological problems for children. As the saying goes, "when bulls fight, it is the grass which suffers".

As the 18th and 19th century American feminists drew on the theories of the bourgeois theoreticians such as John Adams, John Stuart Mill, so their sisters in present-day Kenya draw on the same bourgeois foundations and functions within the framework of bourgeois society. As commissioner Kavetsa Adagala has rightly put it in her book entitled *Wanja of Petals of Blood: The Women Question and Imperialism in Kenya* published by Derika Associates in 1985: "In the 60's, 70's and 80's, feminists in Kenya struggled to join the bourgeois class and have finally succeeded in integrating themselves into the ruling class under the guise of representing the women of Kenya and working for the interests of Kenyan women", (pg 8). Feminists also assert that women constitute a social class, which is oppressed by men. This is equivalent to saying that there are no economic class distinctions among women.

The movement for the liberation of the masses of women draws its theory from and is based on the scientific analysis of the development of society from earliest times to the present presented in a book entitled; *The Origin of the Family, Private Property and the State* by Frederick Engels. The thesis presented in this work clearly and scientifically demonstrates that the exploitation and oppression of women is a class question based on ownership of private property. Historically, it means that the oppression of women first began with the beginning of class society and had the same origin as the first division of society into classes and the first class oppression, namely, the establishment of the system of the private ownership of the means of social production (pg 23).

4. The African Traditional Understanding of Gender

What are the feelings about Western feminism of some Africans? Ama Ata Aidoo, one of today's internationally acclaimed African novelists and critic has this to say.

² Camara Laye, *The Africa Child* (London: Collins Fontana p. 26 – 30)

“Feminism. You know how we feel about that embarrassing Western philosophy? The destroyer of homes imported mainly from America to ruin nice African women”

This is what Samuel Chiraisi said about feminism in the *‘Daily Nation’*, Tuesday, March 20, 2001.

“Western Feminists Keep Off

The cult of feminism has just ended its pilgrimage in several cities around the World, confusing our women and smart girls. The feminists have succeeded in convincing the whole world that women have been profoundly broken by history, and that the women should, therefore, be treated as eternal cripples”.

Instead of teaching our children the core values of society, these women masquerading as men have continued to teach our girls that the relationship between man and woman is, inevitably, adversarial.

They have sacrificed the core foundation of our society, the family, on their altar of feminist god, unisexuality.

Most of them are practicing a doctrine of the barren women, telling our girls that irresponsible sexual behaviour is normal and if they get pregnant, they just abort. They have abandoned their families, while others did not even start one because they are too busy holding seminars around the world to educate women on their rights.

If they cannot raise a family, what can they teach the mother of my children? They are only interested in power for themselves and not for future generations, otherwise they would not support abortion.

Most of these cults originate from the West where the values of society have been dumped. Our well-meaning African women should prove that they are not “little minds” by setting agendas which reflect African values in international forums. They should

stop running from city to city collecting cultural garbage as if we have no culture of our own.

The Westerners came to “Christianise and civilise” us, savages. They indoctrinated us to dump our indigenous names. They have now come back to liberate our so-called enslaved African women. They will soon come again to liberate the African heterosexual man by urging him to take up homosexuality because it is accepted in the West.

They are the same people who said Africans are nothing but overgrown babies. They are the same ones who force our Government to lay off workers and sell all our property at throwaway prices to foreign companies.

African women should strive for the ultimate emancipation of African people regardless of gender. They should strive for intellectual emancipation and stop using separatism as a coping strategy.

Our women should teach the virtues of liberty and equal opportunities for all. Africans have a history which shows that man and woman had different, but complementary roles in society. Man and woman are equal in the eyes of God.

Ben Ojuang Udo in the *‘Daily Nation’* further noted:

“I am writing in support of Samuel K. Chiraisi’s timely warning of Western feminists to keep off Kenyan women – *D/Nation* of March 20, 2001. I have been concerned by the number of Western feminists operating in the rural areas under some NGO’s whose objectives are quite vague. The leaders of the NGO’s all of whom are from the west, seem to be more keen in getting information and teaching the women how to stand up against the men. Some of them delve into cultural practices and advise the women to reject the African cultural practices and adopt the Western culture

I have just finished reading a book entitled *The Gender Agenda* by Dale O'Lear. The book, which is a must for all women in position of influence, is based on the discussions of the UN women conferences in Cairo and Beijing. After reading the book, I didn't know whether to laugh or cry. Laugh because some of the suggested actions to be taken are ridiculous and absurd. It is even hard to imagine how spokesmen for women and mothers can advocate such policies. "The Gender Agenda" is hidden that even those who are vocal in it's support have no idea what the West has in mind. The West has been very busy 'mainstreaming the gender perspective' and the rest of the world knows very little what it entails. Countries are being pushed to implement what was agreed without the public being enlightened on what it is all about. How can a country for instance, agree to pay prostitutes retirement benefits like other working women? This is what is included in the Beijing Platform '97 (95). It would seem that the West want to restructure the entire world's society through legislation and the UN is using radical feminists to push the ideology.

I don't know which government in the world countries can approve of weird ideas like homosexuals being allowed to bring up children born of surrogate mothers and lesbians being allowed to have children through artificial insemination. It is even suggested that women should liberate themselves from vocations of wives and mothers, from the traditional concepts of marriage and family. To the radical feminists, the 'right to choose' extend to other areas of sexual liberty, such as prostitution, and incest should be acceptable unless it involves the use of power by adult over child! The radical feminist even blame religion for suppressing woman! Where is the educated woman going or is he so frustrated for being left in the shelf that she engages in such absurd pursuits? It is incredible that whilst the radical

feminist don't want to conceive and deliver children they are keen to adopt other women's children!

I do hope and pray that there are still level-headed women in our society who will see through the West's machinations to destabilise the set of families in the third world. Theirs, I am afraid, is there by name only. If the West women who care for humanity can decry the impending dangers, the African women need to move more cautiously".

In a book entitled: *African Women Liberation: A Man's Perspective* by Rev. Fr. Dr. P. N. wa Chege – the author says that traditionally or with regards to traditional realms, it should dawn on women that they are not inferior. It is only that they are traditionally socialized to inferiority complex.

Jomo Kenyatta said about women that "Women are essentially the homemakers and without them there is not a home". (*Facing Mt. Kenya*). That is why if one visits an African home and the woman is not there, even the husband will be quick to tell you that people are not there but this does not mean that women should be overworked'. A woman is worth her integrity and dignity – 1 Corimthians 7:14 confirms that a relationship between a husband and wife should be mutual: " wife is not the master of her body, but her husband is, in the same way, a husband is not the master of his body but his wife is". The woman was so strong in the Old Testament that she managed to convince man to eat the forbidden fruit. Thus with her authority and power, she made the weak man full with her and in the New Testament it is the woman – namely Mary who bore the redeemer and saviour of all mankind- thus restoring proper relationship with God for both women and men.

Granted, the prioritizing of female empowerment and gender issues may be justifiable -those African women who do

adopt it do so because of feminism's theoretical and methodological legitimacy in the academics and their desire to be a legitimate part of the academic community. While some have accepted it, more and more African women today in the academy and in the community are re-assessing the historical realities and the agenda for the modern feminist movement. These women are concluding that feminist terminology does not accurately reflect their reality.

Regardless of one's position, the implications of the feminist movement for the black woman are complex. Several factors set the black woman apart as having a different order of priorities. She is oppressed not simply because of her sex but ostensibly because of her race and for the majority, essentially because of their class. Women belong to different social-economic groups and do not represent a universal category. Because the majority of black women are poor, there is likely to be some alienation from the middle-class aspect of the women's movement which perceives feminism as an attack on men rather than as a system which thrives on inequality.

In the traditional African culture, the African woman did not see the man as her primary enemy as does white/western feminist, who is carrying out an age-old battle with her white male counterpart for subjugating her as his properly. Joyce Ladner, a sociologist, succinctly articulates the dynamics of the relationship between African men and women and does not view the former as an enemy of the latter in a book entitled *'Tomorrow's Tomorrow'*:

“Black women do not perceive their enemy to be black men, but rather the enemy is considered to be oppressive forces in the larger society which subjugate black men, women and children” (p 277-78)

It appears that many African women who become feminists base their decisions upon either naivete about the history and

ramifications of feminism or on negative experiences with African men. For example, because there are some African women who pride themselves on being economically independent – which was the way of life for African women long before the advent of feminism – and because one of the chief tenets of feminism in the larger society is that a woman is economically independent – many African women respond positively to the notion of being a feminist. To be sure, African women have always been independent and responsible co-workers and decision-makers in a traditional set up.

According to the feminists: “it is no longer either necessary or possible for women to devote the greater part of their lives to child rearing”. Some women take this statement a step further and wish to be liberated not only from their families but from their obligation to men in particular. This sentiment may appeal more to radical lesbian feminists or radical feminists separatists. Many white feminists deny traditional familyhood as an integral of their personal and professional lives.

While the white man may very well be the enemy of the white woman in her struggle, the Kenyan man does not necessarily hold that position against the Kenyan woman. The African womanist movement, then, could possibly close the gender gap and heal the wounds of both genders so that they could more collectively work toward ameliorating the life-threatening social ills for Kenyan people in particular and people in general in our world today. Considering the worsening collective plight of Black people, they cannot afford to have their attention deflected and focus on gender-based animosities. Remember, unity is strength. This is not to say that there is no room for discussion of issues relating to interactions between Kenyan (African) men and Kenya (African) women.

As a black woman, I view my role from a black perspective – the role of black women

is to continue the struggle in concert with black men for the liberation and determination of blacks.

The Kenyan woman should reclaim her characteristics from her traditional society as follows – That she is a :

1. *Self-Namer*

In African cosmology, naming is very important. “It is through the correct naming of a thing that it comes into existence”. Then the Kenyan woman must properly name herself and her movement that is as African Womanist movement and African Womanism. Always a self namer, she is her own person, operating according to the forces in her life, and thus, her name must reflect the authenticity of her activity, not that of another culture. An example in this regard is that of the Black American woman who always, is a self-namer. Even during American slavery when the white slave owners of the black slave woman labelled her a breeder for American society, the black woman insisted on identifying herself as a mother of her children and as a companion of her male counterpart.

2. *Self – Definer*

Black women/Kenyan women should attempt to define and express themselves in totality rather than being defined by others or by other cultures.

3. *Family-Centred*

In the traditional African Community, the woman was family-centred, as she was more concerned with her entire family rather than with just herself. According to the critic Sofala:

“The world’s view of the African is rooted in the philosophy of holistic harmony and communilism rather than in the individualistic isolation of

Europe. The principle of relatedness is the *sine qua non* of African social reality”³

While the concern for the survival of her family, both personal and collective, are of utmost importance to the traditional African/Kenyan woman, the mainstream feminist is self-centred or female-centred, interested in self realization and personal gratification. On this same note, one critic, Alcholonu contends that:

“Feminism in this regard subscribes to exclusive individualism, which is a Philosophy of life alien to African and therefore quite antithetica to our communal way of life”⁴.

Despite many obstacles, the greatest concern of the African woman has always been her family. Therefore, unlike the feminist who discourages emphasis on the family “if it becomes an instrument of oppression and denial of individual rights”. The African woman is less inclined to focus primarily on herself and her career at the expense of the family and its needs. Granted, she is concerned with her career, as it is the very means by which she can contribute to the support of the family. The notion of self as a primary issue and family as a lesser priority is unfounded and unworkable in the reality of the traditional African woman and her individual perspective. The movement of the African Womanist today, is from the workplace to the homeplace, at least spiritually if not physically, in the sense of where her heart and spirit rest

³ This quote comes formZulu Sofala in her paper entitled “Feminism and thee Psyche of African Womanhood” which was delivered at the International Conference on Women of Africa and the African Diaspora, July 1992

⁴ Rose Acholonu at the 1992 Conference on Women of Africa and the African Diaspora made this statement in his paper entitled “ Love and the Feminist Utopia”

regarding the importance of her family and home.

In 1960 the Japanese author, Fr Daisaku Ikeda prophesied that the twenty-first century would be the century of Africa. The Black American author, W.E.B. Dubois in *The Souls of Black Folk* said that the major contributions of African people and people of the African descent to the entire world is their humanizing mission. If we take to the African roots and be family centered and not egocentric, the world will gain so much by emulating us.

4. *In Concert With Males In Struggle*

The African womanist is also in concert with males in the broader struggle for humanity and the liberation of all Africana people. Unlike the mainstream feminist whose struggle is characteristically independent of and often times adverse to male participation, the African Womanist invites her male counterpart into her struggle for liberation and parity in society as this struggle has been traditionally the glue that has held them together and enabled them to survive all odds.

A close look at the consideration of the dynamics of feminism clearly reveal some rather shocking, disconcerting and even threatening consequences if left unaddressed, particularly in regard to the African woman. The solution, as perceived by the feminist, to the long-existing and neglected threat to the freedom and dignity of the woman does not come without sacrifices to her community. For example, the numerous appendages to the term feminist, such as radical feminist, separatist, cultural feminist, post-structural feminist, and lesbian suggest a quasi – exclusive membership, one that often exudes an intolerance of men in general.

According to Nicholus Davidson in *The Failure Feminism*:

“The feminist perspective imposed a one-dimensional interpretation on all aspects of human life, namely, that evils of the world can all be traced to men oppressing women. It generates chauvinism and sex-hate mongering. (p.296)

For the white feminist, separation from the male sector, and/or physically, as a survival strategy is essential in order for her to become whole. This is not the case for the Africana Womanist. The African Womanist believes that instead of addressing conflicts between African men and women by excluding the men, that they resolve such conflicts by working together - both men and women with mutual respect.

5. *Flexible Roles*

The Africana Womanist accepts the traditional roles, some of which are valid and appropriate. This is because there is obviously some distinctions between the sexes, such as the biological differences between men and women. Women cannot share their biological roles as childbearer and men are still considered the protectors in most circles, and are expected to uphold the family and defend - physically if need be, both their women and children.

6. *Genuine In Sisterhood*

There has always been bonding among African Women which can not be broken. This is genuine sisterhood. This is a value that was carried on from the traditional African society to the present. When I was growing up, I remember seeing women in my village work together in groups to support one another. In this community of women, all reach out in support of each other by looking out for one another. They are joined emotionally as they embody

emphatic understanding of each others shared experiences. Everything is given out of love, criticism included and at the end the sharing fo the common and individual experiences and ideas yields rewards.

There is no substitute for sisterhood, and while the traditional family is of key importance to the African Womanist, she recognizes her need for this genuine connection between women, one that supports her in her search for solace in her time of need, and offers insight in her time of confusion. While there have been attempts to define all types of female relationship, this kind is not lesbianism it refers to an a sexual relationship between women who confide in each other and willingly share their true feelings, their fears, their hopes, and their dreams. Enjoying, understanding and supporting each other, women friends of this sort are invaluable to each other. With such love, trust and security as that found in genuine sisterhood. In Kenya currently, this is evidenced in the existence of what we call "Women groups" both at the grassroot and in urban centres. Thus, the constitution should have room for support of women groups.

7. *Strength*

Generally speaking, the African Woman comes from a long tradition of psychological as well as physical strength. Witnessing and understanding her male counterpart's powerlessness at times, she has continued to demonstrate her strength and steadfastness in protecting the vulnerabilities of her family. She embraces with open and true love for her family. Thus, the African Woman lives on.

8. *Male Compatible*

The African Womanist desires positive male companionship, a relationship in which each individual is mutually

supportive and important part of an African family. According to the African writer Elechi Amadi, "Men and Women need each other emotionally and of course, for survival". (*Ethics in Nigeria Culture p. 71*). In the traditional African community, neither women nor men have allowed any concern with the other gender to force them to conclude that the other gender was irredeemable and, therefore, undesirable. Such a stance of totally disregarding or dismissing the other gender would have resorted to suicide for the African people. Note that in the midst of the experiences of strong African Women being abandoned by men, there are millions of African Women with entirely different experiences, those who praise their hard-working husbands and fathers who got recognition. These stories or cases have somehow been overlooked in the historical perspective. Be that as it may, positive male companionship is of great interest to the African Womanist in general, for she realizes that male and female relationships are not only comforting but the key to perpetuating the human race. Without each other, the human race becomes extinct.

The African Womanist also realizes that, while she loves and respects herself and is, in general, at peace with herself, she ultimately desires a special somebody to fill a void in her life - one who makes her complete. Novelist Terry McMillian considers many African Women's desire for male companionship and comments on the void in their lives:

"We don't have a husband or a steady man in our lives, though most of us would like toWe spend too many precious hours on the phone, over dinner - everywhere - discussing the problems and perils of wanting, loving and needing black men". (McMillan, "Hers").

The African Womanist is in search of a positive male / female relationship experience. However, merely settling for companionship for the sake of having a man is the farthest thing from the best case scenario of the true African Womanist. The true African Womanist settles for a serious marriage in most cases.

9. *Respected And Recognized*

The African Womanist above all, demands respect for and recognition of herself in order to acquire true self esteem and self-worth, which in turn enables her, among other things, to have complete and positive relationships with all people. According to Crooks and Baur in *Our Sexuality*, "when people feel secure in their own worth and identity, they are able to establish intimacy with others" (p. 238). If the African Woman lacks self-love, she will inevitably exude a negative sense of herself, thereby assuming This negative self-image could possibly result in her allowing herself be disrespected, abused and trampled on by her male counterpart. Unquestionably, the salient phenomenon that plagues the African community is poverty, and out of this poverty comes crime and death. Be that as it may, whether it is a problem of race, class or sex, the African Woman must insist upon both respect of her person and recognition of her humanness so that she may more effectively fulfill her role as a positive and responsible co partner in the overall Africa struggle.

10. *Whole And Authentic*

The true African Womanist seeks both wholeness and authenticity in her life. Understanding by now she wants it all, or at least as much as she can assist in achieving in life. That means, she wants her home, her family and her career, neglecting no one of these for the others. Granted, the family does come first in priority for the African Woman, but the

other things are very much needed and extremely important, as they come together to ensure harmony and security in the home.

In acquiring wholeness the African Womanist demonstrates her desire for a positive male companionship, for without her male companionship, her life is not complete in a real sense. She needs male companionship and likewise, he needs female companionship. Both are essential to the survival of the human race. This sense of wholeness is necessarily compatible with her cultural consciousness and authentic existence. As an authentic being, her standards, her acts, and her ideals directly reflect those dictated by her own culture. Hence, her true essence compliments her culture. Her heritage also strongly stresses the importance of an entire family unit.

11. *Spirituality*

The African Womanist demonstrates a definite sense of spirituality, a belief in a higher power which transcends rational ideals, which is an ever-present part of African culture. From this point of reference, she acknowledges the existence of spiritual reality, which brings into account the power of comprehension, healing and the unknown. A natural phenomenon, spirituality can not be omitted from the character of African Women, "whose spirituality" according to Alice Walker, "was intense, so deep, so unconscious, that they were themselves unaware of the richness they held". In almost every aspect of the African Womanist's life she bears out and bears witness to, either consciously or subconsciously, this aspect of African cosmology. When one looks at her in making everyday decisions, one sense her reliance upon the inner spirit or mind. In the area of health care, she frequently goes back to folk medicine (*Song of Lawino*, pp 147 - 167) and spiritual healing, such as the laying on of hands, which entails her

placing her hands on another while praying for his or her healing. Moreover, she is connected to the spiritual world and with **undaunted** faith, she is often spiritually guided by those of that world. In African cosmology, the physical and spiritual world co-exist and hence, **both realities** compliment each other in working for the good of all in the universe. In *Song of Lawino*, Lawino takes time to describe the validity of traditional medicines because the western point of view as stated by Ocol is negative about them. Ocol condemns all traditional medicines. But Lawino insists that both the Acholi and Western medicines can not defeat the most serious calamities such as death : (*Song of Lawino* pp. 147- 167).

12. **Respectful Of Elders**

The true African **Womanist** respects and appreciates elders, insisting that her young do likewise, for African elders have served as role models and have paved the way for future generations. This respect and appreciation for elders is another continuum of African Culture, which African women still demonstrate and insist upon in their everyday lives. They protect their elders and seek their advice, as the wisdom of elders is indisputable. Elders, in general, have been an integral part of African familyhood and have themselves continued to strengthen the family by physical and / or spiritual participatory activities. As a spiritual and / or religious people, African Women have been taught to practice the greatest regard for elders, for they are the mothers and the fathers of our community. If one cannot respect the parents, one cannot be expected to respect anyone - self included. Thus African Women out of both habit and consciousness have a tremendous reverence and a genuine love and compassion for their elders.

13. **Adaptable**

The true African **Womanist** demands no separate space for nourishing her individual needs and goal, while in the twentieth century cum twenty-first century, there is the white feminist's insistence upon personal space. One of the leading mainstream feminists, Virginia Wolf, insists that women must have their separate space preferably a place away from home in order for them to be truly creative⁶. A woman must have, she feels, a room of her own, a place to escape to, for success and creativity. This could allow the intellectual freedom that depends upon material things, which comments upon the necessity of economic freedom. A separate space for most African women, as well as for lower- working - class women in general, is not only impossible but inconceivable. These women in general often have limited funds. Taking those funds to defray expenses for a separate space, which necessarily means renting a place and hiring a sitter for the children in most cases, would in effect mean taking the necessities from the family. Needless to say, this is not the common reality of the African woman. However, the absence of a separate space does not render her noncreative, neither does it render her unsuccessful.

14. **Ambitious**

Ambition and responsibility are highly important in the life of the African **Womanist**, for her family too depends on these qualities in her. From early on, the African Woman is taught the importance of self-reliance and resourcefulness and hence, she makes a way out of no way, creating ways to realize her goals and objectives in life. The sense of responsibility she has for her family is paramount and so she creates a private space for herself in the midst of chaos, confusion, and congestion, even while

⁶ For further discussion on Virginia Woolf's theory of "Separate Space" see her book entitled: "A Room Of One's Own"

washing dishes, feeding the baby, or cooking dinner. It may be bedtime for her family, but not a totally separate space away from her family. Whatever the case, the Africana woman, with ingenuity, provides herself with whatever is necessary for her creative energies to soar. Thus, within the walls of some African homes lurk many perceptive and creative African Women writers, for example, workers, without rooms of their own, who explore their myriad experiences in attempts to create some artistic semblance of their realities, perspectives, and possibilities regarding the status of the African community - its women, its men, and its children. In the final analysis, the African Womanist is her own person, fully equipped with her own problems, her own successes, and her own priorities.

15. *Mothering And Nurturing*

Finally, the African Womanist is committed to the art of mothering and nurturing, her own children in particular, and humankind in general. This collective role is supreme in African culture, for the African woman comes from a legacy of fulfilling the role of Supreme Mother, nature nurturer, provider and protector. As Achebe puts it:

“Can you tell me, Okonkwo, why it is that one of the commonest names we give our children is Nneka, or ‘mother. is supreme?’ A child belongs to his father and his family and not to its mother and her family. A man belongs to his fatherland and not his motherland. And yet we say Nneka - ‘Mother Is Supreme’ . Why is that? why is it that when a woman dies she is taken home to be buried with her own kinsmen? She is not buried with her husband’s kinsmen, why is it that your mother was brought home to me and buried with my people. Why was that?”

It is true that a child belongs to its father. But when a father beats his child, it seeks sympathy in its mother’s hut. A man belongs to his fatherland when things are good and life is sweet. But when there is sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect. And that is why we say that Mother is supreme”, p. 944 of *Things Fall Apart* by Chinua Achebe.

There is a historical emphasis on the importance of motherhood of Africa, since the structure of the family in many countries was polygamous. Historically, the role of mother was more important than the role of wife, for example. The African Woman operates from within these constructs. Unlike many white feminists quoted in Davidson’s *The Failure of Feminism* such as Kate Millet (who calls for the abolition of the traditional role of the mother) Germaine Greer (who expounds upon the crucial plight of mothers) Betty Rollin (who contends that Motherhood is none other than a concept adopted from society by women) and Betty Friedan (who pleads the case of pathology in children of careless, overprotective mothers, the African Woman comes from a legacy of dedicated wives and mothers. And thus, according to Angela Harris:

“Black Women have consistently indicated that they value the role of mother and consider it an important aspect of their sex role identity. Indeed there was evidence that Black Women sometimes prioritized the mother role over wife role and worker roles.” (p. 204).

The African Womanist is committed to loving and caring for her own, which extends to the entire African family. Enjoying her role, she both encourages her own and sacrifices herself in executing her duty to humankind. She is consistent in doing what must be done

for the survival of the family, a commitment grounded in and realized through a positive sense of history, familyhood, and security, which true mothering and nurturing provides, and which the true African Womanist embodies. These are the key features of the true African Womanist. They are important in bringing about a holistic existence for herself and her family. The establishment of the concept of African Womanist which simply outlines what has always been a reality for African women, is long overdue. It is a critical concept that could possibly resolve much of the conflict existing between African men, women and children. In addition, if fully realized, it could conceivably short-circuit the growing tension between African men and women. This could hopefully foster a better sense of harmony and unity for the creation of a better world for all, today and in the future.

It is fairly difficult to finalize the dynamics of the true African Woman without giving some attention to her male counterpart, the positive African Man. It seems only plausible and natural that the African man would have characteristics commensurate with those of his counterpart. Thus, in observing positive African men, it becomes clear that positive African men share similar qualities with the African Woman. The following are the 18 identifiable characteristics of the African man to which Kenyan men in general could aspire:

1. self-namer
2. self-definer,
3. family-centred,
4. role model,
5. strong,
6. committed to struggle,
7. whole,
8. authentic,
9. flexible role player,
10. respectful of women,
- II. Protector,
12. moral,
13. female compatible,
14. respectful of elders,
15. supportive,
16. ambitious,
17. fathering, and
18. loving.

If all African men respect the original reality of the equality of both sexes in African cosmology, then they would refuse to continue to allow external forces, such as

non-traditional African religions and alien political family structures wherein female subjugation is inherent, to influence their lives and ways. The end result would be that African people (men and women) the world over - Kenya included - would then collectively struggle toward recovering their natural birthright as determiners of their fate as a liberated people, dedicated to their families and their future generations, Marianna Ma Ba in *So Long A Letter* ably summarises the above through her major character, Ramatoulaye. As Ramatoulaye closes a letter to Aissatou, commenting on her daughter, her daughter's new husband Ibrahim, and future generations, she delivers one of the most powerful and positive commentaries on male/female relationships within the context of human existence and the role of familyhood thus:

"I remain persuaded of the inevitably and necessary complementarity of man and woman. Love, imperfect as it may be in its content and expression, remains the natural link between these two beings. To love one another! If only each partner could move sincerely towards each other if each could only melt into the other! If each would only accept the other's successes and failures! If each would only praise the other's qualities instead of listing his faults! If each could only correct bad habits without harping on about them! If each could penetrate the other's most secret haunts to forestall failure and be a support while tending to the evils that are repressed. The success of the family is born of a couple's harmony, as the harmony of multiple instruments creates a pleasant symphony. The nation is made up of the families - rich and poor, united or separated, aware or unaware. The success of a nation therefore, depends inevitably on the family". (88 - 89).

Ba emphatically stresses the importance of the family rather than that of the individual. The novel demonstrates the need to address the woman's concerns; however, at no point

does it de-emphasize the intertwined nature of the life of the female protagonist and that of other entire family, males included. Ramatoulaye respects the idea of co-partnership between women and men in order to ensure the perpetuation of life. While all is not perfect in the affairs of the characters in *So Long a Letter*, Ba leaves the novel on a positive note, one that calls for the amicable cohabitation of future generations of men and women, which is particularly demonstrated by the protagonist's refusal to give up on the male sector. This is truly a goal of the African Womanist. In the final analysis, notwithstanding all that Ramatoulaye has gone through - female subjugation, rejection, poverty etc, she has not surrendered her ideals concerning family. She optimistically ends her letter to her confidante: "I shall go out in search of it [happiness]. Too bad for me if once again I have to write you so long a letter" (p. 89).

In sum then, one can say that African Womanism values the family, it is interested in saving the African family, it focuses on women and men being compatible, nurturing, spiritual and valuing the family, the feminist movement stresses individualism, it fights for Lesbianism, Homosexuality, sex change - whereby a woman can be operated to become a man and a man can have an operation to become a woman.

The African understanding of gender roles is that men and women played distinct roles which were complimentary. Nowadays women want to play the role of men thereby destroying the role of the man in society. Women and men should see themselves as complimentary to one another but not as competitors. Couples should come together in forums to exchange views in terms of saving the African family. Traditionally, there were four major ways of making a living; through farming (i.e. agriculture); keeping of animals (i.e. nomadic pastoralism); the combination of farming and keeping animals (i.e. agropastoralism) and hunting and gathering. The men and

women had distinctive roles in all the above. Currently, because the role of the woman has changed to double up at the work place - the new laws should protect her from being overworked - the husband should also support the wife to be able to cope with double labour of being a housewife-cum a worker in the job place. Kinship, embodied the African essence of *utu* (humanity) is an essence that provided us with our cultural identity. Women and men should unite to work together to reclaim that "*utu*" which was lost since colonization and change of the economic, social and political system. Because the traditional African society largely operated on "*utu*", the result was that: "We had no prisons, no detention laws, no prostitution, no slums, no street children and the sort of crimes we are now witnessing".

5. Obstacles in the African Traditions that Militate against Women's Rights

1. *Bride-price*

Current society sees bride-price as an out-dated, exploitative custom. Traditionally, bride-price was given as a gift to the parents of the girl for raising her and yet upon marriage she was to leave her parents and join her husband in his community. The reasoning was that she was going to be of benefit to the other community for she would bear them children, who would speak her husband's language and she would be an everlasting benefit to her new found home. Bride-price also made the marriage bond stronger and reduced divorce. If bride price is a gift, then may be it should be both ways - parents of the boy give gifts to those of the girl and vice - versa—but I do not feel that we should do away with bride price.

2. *Custody Of Widows And Children - Inheritance?*

When a man has died and his funeral ceremonies are over, his near relations go to his widow (or widows) and tell her that she cannot live by herself, but may choose from

amongst the dead man's brothers, one who will protect and provide for her the way her husband did. This man is then told by the clan elders that it is his duty to look after the woman, protect her and provide for her, to live with her and to eat her food and drink the beer prepared by her, to manage the property she has been left with but not to use it for his own ends. The widow is told that she must not annoy her husband or cause trouble with his own wives. Normally, the two will have intercourse together. However, if the woman has already had many children, she can refuse saying that she no longer needs a man. Children born after the death of her husband, although her "new husband" is the father, the children according to society are treated as being the children of the dead man and bear his name. No man normally becomes responsible for more than one widow. What the constitution should cater for is property rights of widows. The modern society does not treat the widow as the traditional society did. All the close relatives of the man want after he dies is to greedily amass his wealth. They do not care about the welfare of the widow.

In this time of HIV-AIDS, the widow should be protected under the law-if she wants to re-marry finer. If not, the state should have laws protecting her, her children and her property. Traditionally, ownership of land was composed of two bundles of rights: (a) a use right bundle and (b) a disposal right bundle. Where use rights were concerned, it was recognized that different people had different lawful rights to the same piece of land or animal. Thus while one would have an exclusive use rights of farming a plot or land, others would have other use rights such as of passage, or the right to collect firewood, get water, *mboga* (vegetables) or even medicinal herbs in someones *shamba* (land) without being accused of trespassing. Since times have changed and communal use of property is no more, the constitution should lay laws which are very sensitive to safeguarding properties for widows and their children.

Among the Akamba custody of children was as follows: The children or the widow and any that may be born to her subsequently, are likewise looked after by the "musina", He assumes the responsibilities of the dead man, even a fully grown son, who has perhaps married but is still living in his father's homestead, will accept the "musina" in his father's place and will no more be in control there than when his father was alive. His uncle who normally will act in his dead brother's place in all matters concerning bride price for his nephews and nieces, will be their protector and arrange their affairs, until the young men leave the "musyi" to set up one of their own - just as they would have done had no death occurred — and the young women go off in marriage. The uncle acts, therefore, as her father when a young niece marries, taking part in the ceremonies previously described.

The bride price is paid over to him, but he only formally receives it - it is not his property (*contra Lindblom*, p. 85). it is placed in the cattle boma of the widow (that is, of the dead man) and will be used for buying wives for her sons, or any other similar necessary purpose. The "musina" may not use any of the dead man's property, or any paid over in bride price, for himself or his own sons. Should he do so, he would at once be accused before the Native Tribunal by the other clan elders. It would, however, be justified and in order if he exchanged some of the stock for others for good reason, e.g., if he took goats from the bride price paid for one of the daughters and exchanged it for a heifer, ready to pay for a wife for one of the sons. This is the sort of trusteeship of the dead man's property which he is expected to carry out. It would be in order, too, to take the widow's heifer in exchange for his own goats, if he needed the heifer to buy a wife for his own son (i.e. to exchange the widow's stock with his own), provided that the widow agreed and the clan elders knew and approved and the exchange was a fair one - the agreement of the widow is essential; he cannot exchange stock against her wishes. If there is not enough stock to buy a wife for one of the

dead man's sons, the "musina" may make up the tally from his own stock, but there is no obligation upon him to do this and it is purely a loan - a recoverable debt. The "musina", therefore, in return for his guardianship, receives the services of the woman who grows food and prepares it for him, brews beer for him, has intercourse with him, and whose homestead he treats as his own; but he may not take or use the dead man's property for his own benefit and the children he fathers are not his.

3. *Obstacles In The African Traditional Marriage*

Cruelties and exploitation of in-laws to the wife e.g. after the husband is dead. They move in to grab the deceased person's properties and leave the children with nothing. The constitution should provide for wife protection in such a case. Husbands should protect their wives from in-law cruelty.

The man should either be a transparent monogamous man or polygamous man. The issue of being 'monogamous' and yet have many "ndogo ndogos" on the side creates many problems when the husband dies. In traditional African societies, polygamy was transparent. The man treated all children equally. More power was given to the senior 1st wife. Respect was given to the first wife.

6. *The Role Of Culture In Gender Relations*

Culture plays a very big role in gender relations. One of the earliest and most deeply seated ideas to which we are socialized is that of gender identify : the idea that "I am a boy" or "I am a girl". Because the culture promotes strong ideas about what boys and girls are like, we learn to think of ourselves as in terms of our gender identity (our "boyness" or "girlness"). Parents are strong socializing influences, they provide the first and most deeply experienced socialization. In the African Traditional society, women and men were each socialized to do roles which complimented

one another. The roles did not compete one another.

7. *Conclusion*

Let the women and men of Kenya not sacrifice their family, their community nor their character because of emulating individualistic ideals. Let them borrow the positive values from the traditional society to be self-designers and self-namers of their destiny; let them be family centred like our great grandparents used to be, let them be genuine in sisterhood and brotherhood, let the women be in concert with male struggle and vice-versa, let them be respectful of elders.

Let them be spiritual, nurturing, mothering, fathering etc. Let their daily efforts demonstrate a collective struggle with men, women and children in combating today's societal perils so that our world may survive the unfortunate threat of doom and destruction.

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ENGENDERING THE KENYAN CONSTITUTION: POLITICAL AND ECONOMIC ASPECTS.

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1. Introduction

“Women will have to wait at least 450 years before they are represented in equal numbers with men in the higher echelons of power. At the current rate of progress, they will reach equality with men in decision-making positions only around the year 2465 (possibly) further away - around the year 2490. Should women wait that long to achieve equality in economic decision-making? No. They cannot and probably will not. Women’s meaningful participation in strategic decision-making, it is increasingly recognized, is not just good for women but good for organisations, business and society (United Nations: 2000)”

While women everywhere are increasingly mobilizing and actively participating in groups, organizations, etc., when it comes to top leadership and high level decision-making positions in most public institutions, women are a distinct minority in almost all countries of the world. This is despite the fact that, most national constitutions, have affirmed women’s right to vote, to be eligible for election and appointment to public office, as well as to exercise public functions on equal terms with men at local, national and international levels. The typical scenario therefore is that the higher one goes in either political party or any state hierarchy, the fewer women there are, and when women are found in policy making and administrative positions, they typically hold “soft” positions.”

Women constitute about half of the world’s population. They constitute the majority of voters in electoral processes. They do 55 percent of the world’s work - this is without even considering unpaid and unrecognized

domestic services in households, in agriculture and food processing and other goods production - but remain marginal in key decision-making. ILO, notes three reasons why it is important for women to play an equal role in decision-making. Firstly, it is a question of human rights. Women constitute more than half the world’s population but only one third of the statistically recognized workforce. They have therefore a right to demand equality of opportunity and treatment in employment. Secondly, it is a matter of social justice. Discrimination against women is at its harshest when it comes to formal employment. Thirdly, it is an essential requirement for the acceleration and effectiveness of development, as women are able to contribute and to utilize their abilities and creativity to the maximum. They can also ensure a better balance in the allocation of resources and distribution of the benefits of progress.

The World Survey on the Role of Women in Development identifies three factors leading to women’s poor representation at the economic decision-making level, especially in the private sector - a predominantly male culture of management, the continuing current effects of past discrimination, and the lack of recognition of women’s actual and potential contribution to economic decision making and management. Usually, if women gain access to waged employment, they tend to remain in the lower ranks and to be concentrated in women-dominated bureaucracies and management organisations. Women’s choices tend also to be determined by gender-ascribed roles that limit their access to powerful and strategic career posts.

Women's professional advancement is also hampered by the "glass ceiling", - the invisible but impassable barrier, formed out of biased work conditions and the male corporate culture. For example, employment rules, regulations and performance evaluation systems tend to be gender-biased. "Since conditions of work are largely constructed around the interests of men as employees and employers, they are often unsympathetic towards and **unsupportive** of the behaviour, roles and outlook of women. Biased attitudes are also embedded in the corporate culture, that takes forms such as sexual harassment, the exclusion of women from developmental opportunities, the exclusion of women from formal and informal networks and the downgrading of women's skills".

Other obstacles are more structural and include low levels of literacy and lack of opportunities for training. For women in most third world countries, labour is their single most important resource; yet they often do not have the necessary skills to raise their productivity in both household and market-based production. Their access to productive resources such as capital, technology and land is limited. Though women's right of access to own land is recognized in many developing countries, their actual control of land is rare. Similarly, customary laws governing inheritance, ownership and control of property tend to work against women. Strong negative views about women's ability to assume leadership positions add further barriers.

2. Why Engender the Kenyan Constitution?

The Constitution is a covenant or social contract entered by people living in one society, in order to set out the basic principles on how they wish to govern themselves. The basic tenets of the current constitutional reform debate are that the original Constitution was drafted outside of Kenya by a minority of **Kenyans** and that the people of Kenya were not en masse involved in the writing of the

Constitution. Secondly, during the last 38 years many undemocratic amendments have been made to the independence constitution without consulting the citizens. In seeking to engender the current constitution making process and design, in Kenya, therefore, the point being made is that the current constitution, like the rest of the society is **engendered** as are the institutions and the structures of governance and social structures derived from them. Women have been excluded from the process of making the old constitution but must now participate in this current constitutional making process to ensure that the new one is gender responsive in all its aspects and that it reflects the true aspirations of all **Kenyans** both women, men, the disabled, the poor, the youth and different ethnic and racial communities.

3. Participation of Women in Decision Making Positions

The problem with Kenya today is not lack of women active participation but rather the manner and impact of that participation. As majority of voters in the **national** elections, routinely vote in male legislators who do not advance their gender concerns. It is significant in this regard that whereas women participated actively in the struggle for political liberation from colonial rule, they have been conspicuously marginal or absent in the emerging governance structures and practices following independence. Indeed, women were hardly represented at the crucial Lancaster Constitutional negotiations talks that laid the framework on how the post-independence Kenya would be governed. The token woman - **Priscilla Abwao**- who accompanied the male leaders to Lancaster, was an afterthought and could hardly be expected to effectively represent women's gender concerns at that historical moment. Similarly, whereas women are rhetorically praised as being "the backbone of the economy" they are conspicuously absent at strategic decision making tables where national economic policies are charted and

allocation of budgets made. The result is that women literally end up as “the backbone of the economy”, carrying the heavy burden of poverty, resulting from inappropriate economic and social policies, designed primarily by male policy makers.

Women have been under-represented in all elective and administrative structures of the State with no woman MP between 1963 - 1969. From 1969, women have never formed more

than 3% of elected Members of Parliament, Since 1963, the numbers of elected and nominated women MPs has been as follows: 1963, there was none. In 1969, there was 1 elected woman MP; 5 were elected in 1974; 3 in 1979; 1 in 1983; 2 in 1988 and 6, the largest number ever in 1992 and 4 in 1997. The same pattern is clear even in the Local Authorities where women Councillors averaged 2.1% in 1986 and 2.7% in 1992 of all elected Councillors.

Table 1: Number of Members of National Assembly by Gender and Year of Election

Year of Election	Elected Members				Nominated Members			
	Male		Female		Male		Female	
	No.	%	No.	%	No.	%	No.	%
1969	154	99.4	1	0.7	11	91.7	1	8.3
1974	152	96.8	5	3.2	10	83.3	2	16.7
1979	155	98.1	3	1.9	11	91.7	1	8.2
1983	157	99.4	1	0.6	9	81.8	2	18.2
1988	186	98.9	2	1.1	11	100.0	1	0.0
1992	182	96.8	6	3.2	10	100.0	2	0.0
1997	206	89.1	4	1.9	8	66.7	4	33.3
1998	206	89.1	4	1.9	7	58.3	5	41.7

Table 2: Local Authorities Membership by Sex

Authorities	1988			1992			1998		
	Total	Women	% Women	Total	Women	% Women	Total	Women	% Women
County	631	13	2.1	1,029	24	2.3	2,455	201	8.2
Municipal	215	7	3.3	354	15	4.2	596	52	8.7
City Council	-	-	-	55	4	7.3	69	7	10.1
Town	125	3	2.4	398	7	1.8	572	40	7

Council									
Total	971	23	2.4	1,836	50	2.7	3,692	300	8.1

Women's participation in politics has continued to be very low. In 1994, the President appointed the first woman Cabinet Minister. Although Hon. Nyiva Mwendwa was relegated to the Ministry of Culture and Social Services, her appointment was seen by gender activists as a positive step in the right direction.

In the Civil Service, women are concentrated in job groups A-G where they have consistently averaged over 22% of all persons employed in those cadres. In the top echelon of the Civil Service, job group P and above, their number average about 4.5% of all personnel in positions, as illustrated by the gender ranking of women in the Judiciary, Diplomatic service and some selected Government Ministries.

Table 3: Judicial Service Establishment-October 1998

Rank	Women	Men	Total	%of Women
Chief Justice	-	1	1	-
Judges of Appeal	1	9	10	10
High Court Judges	5	24	29	17.2
Comm. of Assize	4	6	10	40
Chief Magistrates	4	6	10	40
Sr. Principal Magistrates	3	7	10	30
Sr. Resident Magistrates	14	25	39	35.9
Magistrates	28	58	86	32.6
District Magistrates	40	72	112	35.7
Chief Kadhis	-	17	17	-
Total	99	225	324	30.6

Table 4: Proportion of Women in Diplomatic/Administrative Services - October 1998

Rank	Total	Women	% women
PS	30	4	13.3
Ambassadors	33	2	6.1
D/Secretary	82	13	15.8
U/Secretary	197	30	15.2
S,A/Secretary	155	42	27.1
Ass. Secretary I	85	28	32.9
Secretary II	88	32	36.9
Secretary III	98	38	38.8
Total	768	189	24.6

The following data illustrates gender distribution management and administrative positions in six government Ministries: Agriculture, Public Works and Housing, Industrial Development, Health and Education as at June 1998. Note that the Ministry of

Industrial Development, formally Ministry of Commerce and Industry, is charged with the key responsibility in government of implementing Kenya's stated objective of attaining NIC status by the year 2020.

Table 5: Ministry of Agriculture, Livestock Development and Marketing

	Men	Percentage	Women	Percentage
Management	66	77.6%	19	22.4%
Administrative	251	67.7%	120	32.3%
Total	317	72.7%	139	27.3%

Table 6: Ministry of Industrial Development

	Men	Percentage	Women	Percentage
Management and Administrative	367	85%	65	15%

Table 7: Ministry of Education

	Men	Percentage	Women	Percentage
Management	36	92%	3	8%
Administrative	744	84%	140	16%

Source: Gituto & Kabira

4. Status of Women in Politics and Public Decision-making

The magnitude of gender disparities in the Civil Service is also reflected in Teacher employment at all levels of the education system. Of the 190,304 Primary School Teachers as of January 1998, only 40% were female. Out of these, women represented only 27% of the top rank graduates and 33% of the SI's. In Secondary Schools, women comprised only 34% of the 41,865 Teachers in government employment, and only 18% of the top grade of Senior Head Teachers. In

Technical Education, including Institutes of Technology, Technical Training Institutes and the Kenya Technical Teachers College, women comprised 27% of the 2,890 Teachers in employment. There were 3 women Directors of Training Institutes compared to 7 men. This situation gets worse in special Institutions which includes all schools for the handicapped, the Kenya Institute of Special Education, Primary Teacher Training Colleges, Teachers Advisory Centres, the Kenya Institute of Education and others defined under department 41 of the Teachers Service Commission.

Women comprised a mere 24% of the 5,825 Teachers in this sector as at January 1998. There were 2 male for every 1 woman senior Head Teachers - 10 out of 11 Deputy Principals in TTC's were men. At the University and National Polytechnic levels women comprise 27% of the teaching staff.

Women form more than 50% of Kenya's population. Women are responsible for 80% of Kenya's agricultural production, although according to the government of Kenya they are only 25.1% of Kenya's workforce. Considering that agriculture is the primary source of livelihood for 80% of Kenya's people, one must question why Kenya's women are classified as only 25.1% of the workforce. The

figure of 25.15 illustrates the invisibility of women's work. It is derived from figures of people in paid and formal employment. This does not reflect the beneficial impact of the informal and agricultural sectors where most of Kenya's women and men earn their living. Policy does not take into account the needs of the majority of the women on whose work they depend and consequently, resources allocated are not commensurate with the work they do. Not only is women's work not recognized, they also do not benefit from it. Women own less than 1% of the land. Inequality manifests itself early in the lives of Kenyan women. 16.5% of boys as compared to 27.1% of girls have not received formal education.

Table 8: Social, Economic and Status by Gender

Indicators	Female (%)	Male (%)
Primary School Enrolment	50	50
Primary School Completion rate	34	70
Public Universities enrolment	30	70
Enrolment in Technical Training Institutes	34.1	65.9
Primary School Teachers	42.1	57.9
Secondary School Teachers	36.6	63.4
Enrolment in Adult Education	73.9	26.1
Share of workload in Agriculture	75	25
Land Ownership	4	96
Ownership of Housing in Urban Areas	20	80
No. of District Education Officers	2*	82*

* Actual number not percentage

5. Women in the Electoral Process

Legally, Kenya has an electoral system based on universal suffrage whereby, both men and women have the legal capacity to vote so long as they fulfill the minimum requirement as to age and citizenship. This can be interpreted to mean that they have equal chance of attaining

political office or determining who gets elected to political office. In practice, this is not the case. Studies conducted on factors impinging on women's participation in elective politics show that there are formidable factors that can make the success of women in politics an uphill battle.

In particular, women candidates as they attempt to participate in politics, face many man-made barriers that have been erected by society to bar women from politics. Because of the cultural norms that society has internalized to the effect that women can not make good leaders, a woman's political campaign is invariably more difficult than a man's as she has to prove that she is a better candidate than the male one and that there is an important and special contribution she can make if elected into political office. Thus, while occasionally voters may wonder if a male candidate is tough enough to hold office, women office seekers are always expected to prove their competence, strength and experience. They have to walk a fine line between reassuring the voters about their toughness and at the same time not appearing to be too aggressive. Women are also judged more harshly than men for showing emotion in public. Factors such as personal appearance tend to colour voters' perceptions about female candidates far more than male candidates. Hairstyles, height, weight, dress and general grooming of the female candidate provide fodder for the news media. Women also experience more acutely than men an assault on their personal integrity. Furthermore, unlike political men, women politicians' marital and moral status is often made a big campaign issue. If a woman candidate is married, she is likely to be accused of being an irresponsible wife and mother who is sacrificing her family life for politics. If she is divorced, then she is likely to be accused of being an immoral unstable women who could not even keep her husband and who is hence not fit for leadership. If she is a widow, she is likely to be accused of having contributed to her husband's death and hence better off in prison than political leadership. If she is single, the chances are that she is going to be viewed as an irresponsible person, of doubtful morals and hence cannot possibly qualify for political leadership. A woman candidate must be confident enough to withstand the mudslinging that accompanies an election campaign and she must learn not to respond emotionally to

personal attacks because emotional responses are likely to be used against her, as excellent proof of the woman's inability for leadership. A woman candidate's avoidance of confrontation if she can succeed, then that is already a big plus for her in the process of winning.

Women candidates are often treated by some male politicians as intruders in a "men only" club and hence are likely to be deprived of critical political information which men share among themselves in bars and clubs. Being dubbed "immoral" or frowned upon and given a "what is a good woman like you doing in a place like this?" If she goes to the same places men politicians go at night soliciting for votes. This situation has been confirmed many times by most of our brave women politicians. For example, Hon. Charity Kaluki Ngilu, MP for Kitui Central and Presidential Aspirant in 1997 recalls the biggest challenges she faced as a woman presidential candidate. She cites the following

- organized violence both physical and psychological
- vote buying capitalizing on mass poverty and low civic awareness especially women who are the majority of the voters.
- Government propaganda effected through it's well established administrative and information networks countrywide.

In December 2001, Hon. Martha Karua the MP for Gichugu summarized the situation well when she was interviewed in regard to KANUs failure to meet the set quota of women for East Africa Assembly. Ms. Martha Karua, noted that cultural expectations, reinforced by men's attitudes have made it hard for women to compete. Women are not expected to ask for leadership. When a woman stands up on issues, she suddenly becomes "that noisy woman" while a man who does so becomes "that tough guy". Bad-mouthing and gender based insults are deliberate attempts by men to derail the women. I have learnt to live like a person in a war zone, expecting to be shelled any time.

Almost every woman who sticks out her neck has to go through that.

Similarly, **Beth Mugo** MP for **Dagoretti**, confirmed that women can not compete fairly with men because “more women than men are hurt in violence and the violence is almost always instigated by men”. Even the violence is driven by anti-women feelings the society harbours, according to Mrs Mugo. “People see women as weaker and easier to attack”. “During campaigns, I need extra protection and any woman who cannot afford that cannot dream of going into politics.” The MP recalls that violence was meted out on her on a number of occasions during her 1997 campaigns. She had to contend with abuse and derogatory language, “things my male opponents did not

have to face.”

The contention therefore that women are the majority of voters and, therefore, can elect their own is not realistic in the Kenyan context. Though a numerical majority as voters, women still remain a power minority, **disempowered** by patriarchal **socio-cultural** attitudes and values, illiteracy, poverty and limited access to relevant information.

Despite women’s major participation as votes, their numbers in Parliament has continued to remain much less than that of men. In 1997, women accounted for 5.7% of the total candidature. This reflects a significant increase from 0.6% in 1969. (see table below)

Table 9: Number of Candidate by Sex 1969 – 1997

Year of Election	Number of Candidates			% Women
	Women	Men	Total	
1969	4	602	606	0.66
1974	11	728	739	1.49
1979	10	734	744	1.39
1983	7	720	727	0.96
1988	12	840	852	1.41
1992	19	835	854	2.23
1997	50	832	882	5.7

Source: Electoral Commission, January 1998

If equality of rights and justice is to be achieved in elective politics, we cannot afford to rely on the existing legal guarantees of that equality. Other new laws and implementation mechanisms must therefore, be injected into our laws to level the playing ground and to directly increase the proportion of women in decision-making.

6. Women Participation in Kenyan Political Parties

CEDAW requires political parties to ‘intensify their efforts to stimulate and ensure equality of participation by women in all national bodies and achieve equity in appointment, election and promotion of women to high posts. In particular, political parties are urged to make ‘a deliberate effort to increase women’s participation within their ranks’ and to give equal access to the political machinery of the

organisation, resources and tools for developing skills in the art and tactics of practical politics, as well as effective leadership capabilities.

The prevailing situation in Kenya, does not yet conform to CEDAW requirements, despite the 1997 Amendment of section 33 of the constitution of Kenya, that required, in subsection (3) that: “The persons to be appointed to fill the twelve (12) nominated MPs position shall be nominated by parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality”. This is so

because after the 1997 elections, five (5) and not six (6) women were nominated. Where a party had only one chance, it nominated a man except in the belated case of SAFINA. Out of the six opportunities, KANU only nominated two women. Eventually therefore, the final tally of the nominated women MPs did not meet the anticipated gender equity criteria.

Current data available is thin on gender distribution of key decision making positions in mainstream political parties. However, the information available suggests that women’s numbers are increasing but not yet enough to make a significance difference.

Table 10: Selected Political Parties: Women in Key Decision-Making Positions – December 2001

Political Party	Position
Democratic Party of Kenya (DP)	1. National Secretary General 2. Deputy Secretary General 3. Secretary General - Women’s Congress
Social Democratic Party (SDP)	Vice Chair
National Democratic Party (NDP)*	
Forum for the Restoration of Democracy - (FORD) Kenya	1. National Organising Secretary 2. National Secretary for Gender
National Party of Kenya (NPK)	1. National Treasurer 2. National Secretary General 3. Deputy Secretary General 4. Branch Co-ordinator

* Information unavailable

A study conducted in 1996, using five of Kenya’s leading political parties, revealed a marked similarity in their ideological kinship. (Mbugua and Maina: 1996) In terms of political power, all of them professed a belief in liberal values such as rule of law, freedom of expression, property rights and constitutionalism. In terms of their vision for deepening the democratic agenda, no major philosophical differences were observed. In

regard to their economic vision, all the parties examined were found to be gender blind in connection with the role of women as both producers and consumers. This would indicate that if any of them came to power, they did not intend to plan for women nor address women’s concrete needs that traditional economic theory does not often plan for. But in terms of economic reform, all of them claimed to be in favour of free-market economy and for

privatisation. There are a few innovations and points of differences when one looks a little more closely but the basic ideological orientation was the same.

First, the marginal role of women was not mentioned in the sections on political power and secondly, their role as producers is ignored in the discussion on the economy, including strategies to facilitate the absorption of retrenched women into gainful employment. Such strategies might include business skills, training and credit schemes. Party policies and manifestos ought to reflect an awareness of these needs. A common thread that runs in all party manifestos are promises to review the repressive laws. Apart from vague commitment to remove discriminatory gender practices, the parties' legislative programmes may only serve to aggravate the invisibility of women. The authors conclude that the apparent half-hearted commitment to the gender question in the party manifestos reviewed, would seem to suggest that other than broad theoretical commitment to the rule of law, the parties are also committed to sustaining patriarchy. If this is so, then one can argue that their paper commitment to democracy does not entail democratising power sharing as men and women. Thus, in the context of a new ideology of power, Kenyan political parties need to discuss not just what their parties will do to address the gender question but also how their own structures are formed as a gender hierarchy. In practical terms, parties should have Affirmative Action programmes within their Manifestos. They must demonstrate this commitment by meeting the 30% gender quota, in their appointment of women to decision-making organs of those parties.

Indeed, the 1997 Phoebe Asiyo Motion on Affirmative Action provides a viable guideline as to the kind of measures political parties ought to take if they are serious about gender mainstreaming of their parties. The Asiyo motion required the government to pass legislation requiring all registered political

parties to nominate at least one third of women candidates to participate in the Presidential, National Assembly, and Local Authorities' elections and for the political parties to support an amendment to the Constitution of Kenya to provide two Parliamentary Constituencies exclusively for women candidates in each administrative District or Province of the Republic.

Post independence Kenya has a history of presidential political appointments method of specifically responding to pressure from the social forces demanding the engendering of the democratic project and promotion of women's rights as human rights. But from the vantage point of this analysis, such few and politically calculated appointments amount no more than political tokenism, patronage and expediency. Such steps in themselves may not necessarily amount to Affirmative Action as they may fail to respond to the dynamics of the processes and institutional structures which breed gender based discrimination and differentiation. It should not therefore be assumed that placing women into positions of authority automatically translates into a move towards gender, justice and peace. There has to exist a qualitatively different set of norms to promote gender equality.

7. Systems Of Government That Promote Political Participation By Women

The studies reviewed for this paper indicate that the type of political system that promote women's political participation is one where the principle of power sharing is legislated and practiced. Whether or not the political system is based on a federal or unitary government should not be the primary concern because, in the final analysis the key gender issue is whether the various structures and bodies of the political system become gender responsive and facilitate the attainment of gender equity and justice. In this connection, the most commonly cited political structures that are deemed desire-

able for promoting women's political participation include proportional representation and quota systems at the various electoral and nomination levels of the political processes. Under proportional representation, each voter votes for a party and then seats are allocated according to party lists and the proportion of the vote that party received. Thus, if a party received 30% of the vote, 30% of the representatives elected would be candidates. The Party would have a list of candidates, and those elected would be the ones at the top of that list, for example, the first thirty if the election were for 100 legislators. In this connection, this preference seems to arise out of the conviction that the systems of political selection and the nature of electoral systems themselves may be limiting the election of women to public office. For instance, studies have found that the proportion of women elected to the lower house of the national legislature in 23 industrial democracies at the beginning of the 1980s was much higher in districts with multiple seats, proportional representation, and a party list of candidates, than in single-seat winner-take-all systems.

Among Scandinavian countries for example, women's breakthrough into political institutions has been achieved partly through a quota policy introduced by the political parties. Measures of this kind are not "a paternalistic solution which degrades women, but a solution which indicates the extent of the degree of sincerity in all those very important declarations about equality, and changes in legislation. And in Africa, there is a growing and widespread consensus about the need for inclusivity and power-sharing as a fundamental important characteristic for institutional arrangements in Africa's emerging democracies. It is therefore often argued that the winner-takes-all electoral systems do not suit the specific requirements of Africa's democratic ideals, nor do they respond positively to women's needs.

In South Africa for example, the principal instrument used to improve the representation of women was the implementation of quota systems, to guarantee women's equitable representation and compensate for barriers that prevent women from obtaining seats in the normal manner. Today, 29.6 % of South Africa's MPs are women and the country now ranks in the top ten countries in the world for the women in parliament. Out of the 37 Cabinet Ministers, 7 are women, and hold such portfolios as Minerals and Energy, Public Works, Foreign Affairs and Housing. Also in Uganda, where quota system is operational, one observes a vast difference between her and Kenya in regard to women participation in key decision making. Thus, whereas there is no woman full Cabinet Minister in Kenya, in Uganda, not only is there a woman Vice President, but also three out of the 21 Ministers are female and hold such key portfolios as Energy and Minerals, and Justice and Constitutional Affairs. The Deputy Speaker is a woman, while out of the 44 Deputy Ministers, 12 are women. The Parliament in Tanzania too has adopted a quota system. The members of the National Assembly join the House in the following ways:- Members directly elected from the constituencies are 232. Seats for women are 37, which account for not less than 15 percent of the total members elected on other categories. Consequently, there are 45 women in Tanzania's Parliament. Internationally, Sweden has one of the best records of Affirmative Action.

In the case of affirmative Action in Namibia, local party lists with 12 members, were required to field at least three women candidates. In those Municipalities with only seven seats, each party had to field at least two women candidates. However, the provision did not stipulate the position women should have on the list, and parties were not required to allocate seats in order of appearance on the list. The Local Authorities Act also provided for parties to be broadly defined, allowing women's organizations that do not exclude

male membership to field candidates. Any organized group therefore with support of a minimum of 250 members registered to vote, could field candidates. This broad definition of parties which is the only provision affecting women favourably, was to apply in future local elections. Apart from proportional representation and quota system, women largely desire a structure a completely different style of governance which would entail an overhaul of patriarchal political structures, and styles of governance, and replace it with a political system of power sharing where Affirmative Action is legislated and where there is a clear separation of powers between the Executive, the Legislature and the Judiciary.

8. Do Women make a Difference in Political Life?

By bringing in more women in political and public decision-making positions at both the bureaucratic, local and parliamentary levels, we improve the quality of governance and national policy-making.

Empirical studies of women and men in legislative office suggest that independent of party and ideology, women are more likely to support and work on issues important to women than men. For example, one study of state legislators reports that 76% of liberal women (but only 67% of liberal men) were working on women's rights bills; 58% moderate women (but only 35% of moderate men) were working on such bills; 39% of conservative women (but only 26% of conservative men) were working on such bills. Note that conservative women tend to be more committed to women's issues than moderate men. As Phoebe Asiyo noted, in tabling the Affirmative Action motion in Parliament "... If the women were here and in the government when a decision was made to establish an oil pipeline from Mombasa to Kisumu and Eldoret, they would have simultaneously created a water pipeline alongside the oil pipeline. That

would have saved many lives and a lot of hours that women have to spend looking for dirty water all over this country." Agreeing with Asiyo, Ooko Ombaka noted that: "the fact that women are not represented in this House warps the qualitative analysis that we bring as Members of Parliament in any debate before this House".

9. Women In The Economy

As already noted, not only is women's work undervalued, they remain marginal in the economic sphere as employees, managers and heads of public and private corporations and institutions. Gender blindness by policy-makers in regard to targeting women's economic needs sometimes may arise out of ignorance of the actual as opposed to imagined needs. In this regard, women have two levels of needs that economic planners need to pay attention to. First, there are Practical Gender Needs (PGN). These are the needs women identify within their concrete situations in life. These are responses to immediate necessity and are generally concerned with inadequacies in living conditions such as water provision, healthcare and employment. Here women do not challenge their subordination to men. They do not question the general gender division of labour. Secondly, women also have Strategic Gender Needs (SGN). These are the needs women have and that arise out of their subordination to men. They relate to gender divisions of labour, power, access and control of resources. Policy measures advocating targeting of credit to women, for instance, are an attempt to meet strategic needs. When SGN are met, women achieve greater gender equality.

Targeted credit institutions such as the Kenya Agricultural Finance Corporation (AFC), have not fared too well in targeting credit to women. Most of the loan portfolio of the Corporation goes to large scale farmers, that is those with more than 25 hectares. The AFC has a policy of not lending to farmers with less than two

hectares, precisely where a majority of women and women-headed households lie. Most of the farmers assisted by AFC are, in fact, the very ones who would be able to access credit “from commercial sources”. Clearly, Corporations like AFC serve the country better if their loan portfolio is directed to “small-holder development”. If credit policies are carried out hand in hand with comprehensive agrarian reforms, it is possible to alter patterns of poverty in the rural areas, impact on health and nutrition and act as catalyst to women’s economic empowerment.

To effectively address economic gender inequalities in our society, it is also necessary to come to terms with the fact that there is nothing in the internal logic of a free market system that requires it to right historical injustices or to address the fact that past discrimination may have undermined certain individuals’ ability to access, use and control the resources necessary for their livelihoods. The free market shields itself with the ideology of individual ability, initiative, industry and intelligence to sustain the myth that all who do not succeed in it are somehow to blame. Furthermore, **globalisation** and the expanded role of the free market by shrinking the role of the state also enhancing the essential **powerlessness** of women, already hindered by the weight of historical injustice and **marginalisation**. A free market system cannot be expected to correct or put right such historical injustices and inequalities.

Employment opportunities for women have been limited. Women experience discrimination in education, training, hiring, promotion, and pay. Legal and customary barriers to ownership of land capital and technology, impede women’s economic advancement. Women’s **unremunerated** work in agriculture, food production, and community work is under-valued and under-recorded.

10. Strategies for Women’s Economic Empowerment

Special institutions should be set up to provide credit facilities to poor women and to empower them to enter the market. Lack of access to credit - as well as to other productive assets, particularly land - is often responsible for denial of economic opportunities to women. Women are regarded as **uncreditworthy** with no collateral to offer. Formal credit institutions do not bank on poor women. Normally, less than 10 per cent of bank credit is allocated to women. Some countries are beginning to design innovative credit institutions, on the pattern of the pioneering effort made by the **Grameen** Bank of Bangladesh, to provide credit to poor women for setting up micro-enterprises or other service activities for self-employment.

Among other things; **Governments** should enact laws to give property rights to women. Finance Ministries and Central Banks should encourage organisational as well as structural changes in financial systems, including **reallocation** of government and external funds for women entrepreneurs, and encourage setting up small and micro-enterprise financing. Commercial Banks should recognize the market potential of women in small and micro-enterprise sector and structure their services to reach women entrepreneurs.

Building capacities and commercial links: to become successful entrepreneurs and managers, women need basic cash “ and credit management skills. Enterprise associations, business **NGOs** and national training institutes can provide women with training, advisory and monitoring programmes in these areas. Women also need advice on legal rights related to assets, land tenure and credit access. Women-owned micro-business can create collective ventures and forge links with larger women-owned business organisations. International networks of women’s organisations should also develop monitoring joint ventures, technical

and commercial linkages among women-owned enterprises within regions and globally. Women should take action collectively and individually by using their economic power as workers, consumers, voters, managers, executives and entrepreneurs. They can use their vote to increase the number of women in public life. They can create pressure groups at various levels to influence official decision-making.

Women's managerial and entrepreneurial organisations may also forge alliances to raise women's representation in all economic decision-making forums. Databases should be developed to highlight potential models in all sectors, including business. Institutions at national and international levels should be committed to developing gender-disaggregated data defining the magnitude of women's economic contribution and the gaps between policies and practices.

11. Engendering the Constitution

Given the political, economic, and socio-cultural constraints noted that impede women's equitable participation in private and public life, it is my view that one of the main strategies of moving forward is to sensitize and mainstream gender concerns in the constitutional review process and design.

The question however may be asked: why focus on women's constitutional rights and not men's rights? The simple answer is that whereas the current constitution contains major flaws and shortcomings of a gender neutral nature, its language content not only tends to privilege men, but some of the legal provisions have the effect of discriminating against women. Thus, although the Universal Declaration of Human Rights (UDHR) does not require any rights to be constitutionalised, putting provisions in the constitution gives them the status of supreme law which largely immunises them from ordinary political processes. It is also important that the idea of rights and the principal rights, have

constitutional supremacy and women's rights will not, in fact, be respected and ensured unless they are rendered effectively supreme.

11.1. Deficiencies in the Current Constitution

Although Kenya has ratified several international human rights instruments that affect women's human rights, namely the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Kenya acceded to on 9th March, 1984, the Declaration on the Elimination of Violence Against Women of 1993 (DEVAW) and the Beijing Declaration and Platform for Action of 1995 except for the latter, these conventions have not been incorporated into Kenya's municipal law. Very little has been done to ensure that Kenya's domestic law conforms with international standards in respect of women's human rights.

Many gender discriminatory laws remain in the current constitution that need to be reviewed, repealed and/or amended as necessary. It is important in this regard to note that, despite the 1997 amendment to include sex as basis of discrimination, the existence of Section 82 (4)(b) & (c) reserves the right to discriminate especially in the areas of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. Furthermore, although statutory laws are supposed to be superior to customary law and any law that contradicts the Constitution of Kenya is null and void to the extent of the contradiction, there have been instances where customary law has overridden the written law. For example, the 1987 Wambui Otieno burial case. Second, the jurisdiction which empowers Section 70 to enforce fundamental rights and freedoms also states that the courts are to be guided by the norms of African customary law so far as this is not inconsistent with any written law. As African customary law generally places women in a less favourable position compared to men,

it would appear to conflict with the written law of the constitution.

Further still, on Citizenship, Section 90 and 91 discriminates against women in not giving them a right to bequeath citizenship to their foreign husbands or children born out of those unions. Sections 90 and 91 generate the continuation of sexist immigration policies; registration for national identity cards. The language of the constitution is not gender neutral. The constitution uses “man” to represent both genders. Other areas of constitutional concern for women include: marriage laws, child support and violence against women.

11.2 Gender Commission

In societies where convention is deeply rooted, and various practices, beliefs and circumstances are not in favour of women, it is not enough to have laws that seek to upgrade the status of women. There is often need for a national machinery to oversee the transition from gender inequality to gender equality and to ensure that the trend is not reversed. This machinery will support women’s causes and monitor implementation of policies and recommendations. In South Africa, Parliament passed a legislation to create a National Commission on Gender Equality, which commenced its work in 1997. The task of the Commission is to promote gender equality in society and to ensure that Government and other non-statutory bodies implement their commitment to gender equality. The Commission, consisting of both men and women chosen by Parliament and approved by the President, engages civil society and Government structures in gender issues, monitors the situation and advocates gender equality in a variety of ways.

In Kenya, it is important that this kind of Commission be established. We are at a level in our society’s development when patriarchal attitudes and stereotypes are deeply entrenched

in our social cultural traditions and practices. This raises a genuine fear that any equality measures instituted under a new constitution would find some frustration in implementation. There is therefore a need for the watchdog role that a gender equality Commission could offer. The Commission will also involve civil societies and other actors in formulating a comprehensive national policy on gender issues so that it can buttress the constitutional guarantees and ensure a society where men and women have as equal representation as is possible in all public spheres.

11.3 Proposed Legal Reforms

Legal obstacles to women’s advancement are closely intertwined with the political, economic and social status of women. Indeed, gender discrimination laws that give legitimacy to the existing economic, political and social practices that often discriminate against women, militate against their effective participation in governance. Legal strategies for empowering women must then address issues that cut across all aspects of women’s lives.

While recognizing that changing the laws may not necessarily affect the status of women immediately, legal reforms are needed as a first step to enhancing the progress and development of women in Kenya and in assisting women to contribute legitimately to the economy and gain equal access to social services and control over resources. In this connection, there are a number of laws that need to be scrutinised, revised or added with a view to instituting reform, repeal or amendment to the Kenyan Constitution as follows;

- Preamble- The new Kenyan constitution must have a preamble that expresses the basic national values, philosophy and the vision to which Kenyan people collectively aspire. The preamble should capture the spirit of the entire constitutional framework stating and affirming the basic principles and commitments expounded in the rest of the constitution, including commitment to

gender equality, democratic development and pursuit of social justice. A preamble would therefore, fix the parameters of the meaning of Kenya nationhood and the true meaning of Kenyan citizenship. Good examples in this regard are South African and Ghanaian Constitutions, among others.

- The new constitution should provide for an independent Gender Commission to monitor and review progress in the implementation of gender equity law and policies, and peruse existing national development policies and programs and recommend amendments to make them consistent with a gender sensitive democratic agenda.
- The new constitution should provide for full citizenship rights for women. In this connection, any woman who has reached maturity age (18 years) should not be required to obtain permission from her father or spouse in order, for example, to obtain travel documents or to travel abroad with her children. Furthermore, Kenyan women married to foreigners should be granted the right to pass on their citizenship to their spouses in the same way as Kenyan men pass on their citizenship to their foreign spouses. In other words, the Kenya constitution should once and for all remove the gender double standard that reduces women to second class citizens and privileges Kenyan men's citizen rights over those of Kenyan women.
- Family Law needs thorough review and reform as appropriate, especially to harmonise the co-existing and often contradictory Customary, Christian, Hindu and Islamic Laws. Women have often been victims of manipulation of such laws especially on matters of marriage and divorce, inheritance, as well as ownership of marital property. In regard to marriage law, there is need for its unification and harmonization to ensure that the same rights and duties exist for all individuals in the country and does not contain provisions that discriminate against some women. Maintenance Law should also be reviewed to provide for stiffer penalties for those who default in their maintenance responsibility.
- Law of Succession Act 1981 while in general this law makes provision for both men and women to inherit family property, this law does not protect pastoral women who are still governed by the land groups representatives Act, whereby women cannot inherit family land. The law should be amended to provide that all family land, even when registered in the name of a husband, should be deemed registered in the name of both spouses.
- 1975 Employment Act: This Act is outdated and need thorough reform. As it stands at present, this Act clearly discriminates against women on matters of terms and conditions of employment in the public sector. In this connection, women's employment rights and privileges should not in any way be pegged against their spouses. Women should not be penalized during maternity leave. They should be accorded adequate maternity leave with full employment benefits. Furthermore, the law should provide that, as part of "affirmative action" women employed in the civil service should be given special consideration in the current retrenchment process, taking into account the central role women play in the economy and the fact that the number of women in public employment is very small as it is.
- Given the enormous amounts of work women do that is not recognized as work, a legal provision should be introduced in the Kenyan Constitution to legitimise and give recognition to household work and agricultural work undertaken by women on behalf of their families and society. Such work should constitute equal contribution to

family income, as formal employment, so that in the event of divorce, property acquired during marriage would be divided equally between the spouses. Amendment may be necessary to re-introduce the Independent Candidates Act provision repealed in 1969, to allow candidates to contest political office without being required to be nominated by a political party. The restoration of this Act would create more space for political participation in future Civic and Parliamentary elections. For example, this could assist women who would otherwise wish to vie for political office, but cannot find a suitable political party and may not want to set up a new party.

- There should be a thorough review of all laws relating to all forms of violence against women and girls. Minimum sentence for rape should be set at life sentence with hard labour. All rapists should be medically examined and if found to be AIDs carriers, be charged with murder of their victim(s). The law should also provide for the possibility of rape within marriage.
- The new constitution should completely separate and differentiate the gender rights from those of youth and children, so as to accord full recognition and attention to the needs of each social category.
- Section 84 of the Constitution needs to be reviewed and discriminatory aspects eliminated.
- Kenya should incorporate all the key international instruments concerning women's rights into our Municipal law, including CEDAW, DEVAW and the Beijing Declaration and Platform for Action of 1995 and the 1985 Forward Looking Strategies.
- The language of the new Constitution

should be simplified with a view to demystifying the law and making it more citizen friendly.

- A comprehensive Affirmative Action Law should be put in place and mainstreamed in the entire constitution to ensure the elimination of all areas of discrimination and to facilitate the attainment of equity and justice for all. This requires the establishment of a gender sensitive quota system in all public and private institutions and companies. Affirmative action should be applied in appointment, recruitment, promotion, retention, deployment, training and staff development, in recognition that women are starting from a point of great disadvantage vis-a-vis men, as they struggle to take their rightful place in public life. Political quota system is already working well in such African countries as Tanzania, Algeria and Uganda. If the principle of quota system is adopted in this country, the female percentage should be at least 35% of the total in key decision-making organs of political bodies, bureaucracies and private institutions.

12. Conclusion

The formal constitutional guarantees of women's rights is just the first step towards the attainment of gender equity. It must be followed by a deep transformation in social values and practices. It is for this reason that the civic education programme that is underway during the Constitutional Review Process, should be continued even after the completion of the new Constitution. Such civic education should continue until such a time that the retrogressive socio-cultural attitudes and values that obstruct the attainment of gender equity and social justice are gradually eroded and eventually eradicated. Women and other disadvantaged groups have a special responsibility to sharpen and sustain lobbying and advocacy for entitlement, bearing in mind that rights and powers are not given they are taken.

MODELS OF AFFIRMATIVE ACTION FOR WOMEN

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“It is important to achieve the normalisation of political role of woman, the restoration of her dignity as the mother of the family, the realisation once and for all in an efficient meaningful manner of what every country calls women's rights”.-
Cheikh Anta Diop.

1. Introduction

Affirmative Action (AA) is not a new concept in the history of societal re-distribution and sharing of power. It has worked successfully in many countries around the world. During the colonial period in many Sub-Saharan African Countries (SSA), affirmative action was used to include indigenous communities who had been excluded from political decision - making processes into the political arena. This was achieved by reserving special seats for indigenous people. Examples of successful implementation of affirmative action policies are numerous. Indeed, the success stories of affirmative action implementation encouraged the United Nations Systems to endorse it as a positive instrument for achieving gender equality in societies around the world. This means that Affirmative Action is not an instrument for certain special countries but rather it affects all countries worldwide. While the UN recognised and endorsed affirmative action as an instrument for facilitating the process of gender equality in diverse fields, it did not provide a working definition for the same. As a result, the concept of affirmative action has been misunderstood and misinterpreted leading to confusion and mutual lack of positive support for its proper adoption and implementation.

This paper will provide talking points on the meaning of affirmative action and its history.

2. The Meaning of Affirmative Action

Affirmative Action has been defined as a temporary partial remedy for post and continuing discrimination against historically marginalized and disenfranchised groups in any society. Affirmative action works to provide marginalized groups greater equality of opportunity in diverse contexts marked by substantial inequalities and structural forces that impede a fair assessment of their abilities and capabilities.

From the above definition, affirmative action:

- Is a temporary corrective measure to eliminate discriminatory practices targeting the marginalized groups in a society.
- Works to provide equality of opportunities in social, economic and political realms.
- Enhances confidence in the sanctity of individual rights and liberties.
- Safeguards the interests of marginalized groups and minorities.
- Affirmative Action is a temporary measure or instrument aimed at bringing the under-represented and disadvantaged groups that suffered discrimination and marginalization into a higher degree of welfare, access, participation and control of governance and development.
- Affirmative action is an instrument for promising equality and visibility for the hitherto marginalized and disadvantaged cadres in all sectors of life.

- It is a conscious and deliberate decision to offer a section of the population a privilege on a non-competitive basis.
- Affirmative action is closely related to the concept of gender equality, which is a human rights issue and is critical to the socio-economic and political empowerment of women.

3. A Brief History of Affirmative Action

Affirmative action has its origins in the renowned case of *Brown versus the Education Board of Topeka Kansas* handed down by the supreme court of the United States of America in 1954. Since the birth of the US as a nation, blacks were legally pushed to the margin of society where many were left to dwell in poverty and powerlessness.

In the spring of 1951, the Reverend Oliver Brown's nine-year-old daughter Linda, was in the fourth grade in Monroe School Topeka Kansas. Traveling to Monroe involved an inconvenient bus journey of nearly five miles and a walk through a dangerous area of town. Her parents would have liked her to attend Summer School just four blocks away but Summer School was an all-white school and Linda was black. Since 1867, a Kansas Statute had permitted cities with a population of more than 15,000 to maintain racially separate elementary schools. In 1951, seven Kansas cities, including Topeka, had set up segregated elementary schools. Topeka had four grade schools for black children and 18 for white children.

Brown then sought the aid of the National Association for the Advancement of Coloured People (NAACP) which was already bringing lawsuits against the system of segregated schools in other States. At this point Brown's aim was really to protest against the distance that his child had to travel and not to take the lid off a teething political issue. This case was to challenge segregation as a denial of the equal rights upheld by the United States Constitution. The NAACP, which filed this case on behalf of

Brown, believed that segregation inevitably provided inequalities between whites and blacks in educational facilities and curriculum

On May 17, 1954, Chief Justice Earl Warren read the Supreme Court's decision to a group of reporters. In the 25-minute statement he set out the points at issue:

“Does segregation of children in public schools solely on the basis of race even though the physical facilities and other tangible factors may be equal, deprive the children of the minority group of equal opportunities? We believe it does.... To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone”

Indeed this decision was arrived at after several months of reflection by a number of eminent Judges who had diverse opinions on the matter. This landmark decision brought about a compromise. The judgement required the Federal Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary to admit to public schools on a racially non-discriminatory basis with all deliberate speed to the parties in the cases. This was a very difficult task because it met a lot of resistance from the white population, who did not appreciate the thought of mixed race schools let alone facilities. There were reported cases of violence and many white parents withdrawing their children from schools when the Federal Court complied with the opinion of the Supreme Court.

4. Different Models of Affirmative Action for Women

There are many countries in SSA which have been implementing affirmative action to and the discrimination of women and other marginalized groups. Perhaps, it will be more

enriching if models used in these countries were carefully examined. In this context, one is thinking of accessing models from countries such as Uganda, Zambia, Tanzania, South Africa and Eritrea among others. For purposes of this discussion, there are three proposals:

- Affirmative action worked and shared out on the basis of the population of both women and men in award. This is at the local authority level.
- The understanding here is that democracy cannot be fully realized if more than 50% of a population are excluded from political decision-making processes.
- Quota system where certain seats are reserved for women using a carefully thought out criteria.

5. Advantages of Affirmative Action

Affirmative Action will:

- Recognize and acknowledge the contribution of women in all spheres of life

ranging from social, economic and political realms.

- Lead to gender equality.
- Enhance the democratization process.
- End of discriminatory practices targeting women and minorities.
- Recognize women's right to political representation and participation as part of their human rights.
- Establishment of social justice for all.
- Incorporating Affirmative action for women in the constitution.

Affirmative Action is not about women taking over from men, but is a process of sharing and recognizing the need to make provisions for equality to all citizens of a country.

Such provisions of equality can only be appreciated and implemented if and when it is incorporated in the supreme law of the land.

Therefore, the constitution is the only document which should make provision for affirmative action.

GENDER CONSIDERATIONS IN CONSTITUTION-MAKING: ENGENDERING WOMEN'S RIGHTS IN THE LEGAL PROCESS

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I. Introduction

This part of the paper looks at the role of law in promoting women's rights in Kenya. I look at the legal framework and raise the main legal issues that arise in an analysis of the application of law to women. I problematise the application of plural legal systems to the same person in a situation where it is assumed that there is only one organised and predictable system of law (legal centralism). I then look at different areas of law that need to be addressed in engendering women's rights in the legal process.

2 Women's Rights and the Law in Kenya

Law can be used to reinforce or give permanence to certain social injustices leading to the marginalization of certain groups of people. In the realm of women's rights, legal rules may give rise to or emphasize gender inequality. Legal systems can also become obstacles when change is required in legal rules, procedures and institutions to remove the inequality by the oppressed. This necessitates an inquiry into what injustices are intertwined within the legal systems and the extent of their operation. One often finds that the *de jure* position, which may provide for gender neutrality cannot be achieved in practice due to the numerous existing obstacles, which make the law powerless.

2.1. Women and the Law

Three points to note here:

1. Our statute books contain legal rules and principles which are or can be seen as a legitimization of the subordination of women to men;
2. The structure and administration of laws can occasion the subordination of women to men; and
3. The socio-economic realities in Kenya and many African countries and the patriarchal (the ordering of society under which standards - political, economic, legal, social- are set by, and fixed in the interests of men) ideology pervading society prevent the translation of abstract rights into real substantive rights.

Women have been systematically removed from fully participating in the development process despite their active participation in the production processes alongside men. Even where women's legal rights have been provided for, ignorance of such rights exacerbated by illiteracy ensures that they do not benefit from such provision. The effectiveness of laws in according women equal opportunities with men depends largely on the society's willingness and ability to enforce such laws. It is at this point of enforcement that one gets caught up in the dichotomies and conflicts of statute law, customary law and law in practice (living

law) which many a woman find themselves warped up in.

To understand the role of law in women's lives, one needs to understand not only the intention and rationale behind the law but also the consequences of law on individuals. In Kenya, despite the gender neutrality of our legal provisions, equal rights and privileges cannot be assumed to have been guaranteed and realized. Gender-neutral laws have, in many instances, resulted in de facto discrimination. As Tove Stang Dahl aptly points out.

“As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender-neutral legal machinery ... meets the gender-specific reality...”

The end of the women's decade in 1985 culminated in the World Conference in Nairobi at which the "Nairobi Forward Looking Strategies" were drafted. These provided a framework for the elimination of obstacles to the advancement of women and gender-based discrimination. In the area of law, the ratification and domestication of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) was identified as an important first step to removing obstacles in this area. Revision of laws of countries taking part in the conference was also seen as crucial to the endeavour. Laws have a part to play in the process of eliminating carriers in the way of women's advancement. The test of effectiveness of such laws, however, lies largely in their implementation. It is consequently imperative that implementation mechanisms be engrained into the specific pieces of legislation if they are to benefit Kenyan women.

Another crucial area of concern is awareness by women of their rights. A right whose content is not known by the holder is at best a paper right. Legal awareness should be part of the task of achieving change in the legal status of women. Education of women on the content of their rights and modes of exercising those rights is a must if law reform is to achieve its stated objectives.

2.2 *The Legal Framework*

(a) *Legal Pluralism Versus Legal Centralism*

Studies on gender and legal change in former African colonies have to take into account that the lives of women and men are affected by a plurality of norms. Legal centralism and legal pluralism are analytical frameworks that provide different understandings of the law. While the former denotes a unified system of rules, which are enforced through state machinery, the latter describes a system where the tiered and interactive normative systems operate within a system either within or without the formal state legal system.

Legal centralism starts from the standpoint that states law or state recognized and enforced law is the most important normative order and all other norm creating and enforcing social fields, institutions and mechanisms are illegal, insignificant or irrelevant.²

Legal pluralism may be divided into two: namely, juristic and diffuse. Juristic legal pluralism arises in situations where the official legal system recognizes several other legal orders and sets out to determine which norms of these legal orders will apply. Thus, the official legal system provides an operating environment for the plural legal orders. For example, a constitution may provide for the operation of

² Pursuing Grounded Theory in Law.

certain religious, or customary laws for particular ethnic or religious groups. In juristic legal pluralism, which is common in colonial and post-colonial Africa, state law is the ultimate authority and it dominates other plural legal orders. The Judicature Act (Cap. 8 of the Laws of Kenya), for instance, sets out the sources of Kenyan law and places the Constitution as the supreme law of the land. In the event of conflict of laws, the constitutional position prevails. Diffuse legal pluralism arises where a group has its own rules regulating social behaviour whose operation is neither sanctioned nor emanates from state law.

Different forms of law exist in a situation of legal pluralism:

(i) State Law

These are rules promulgated by the state. Law in this form is a coherent and unified system of rules enforced through the state court machinery, uniform for all persons, exclusive of other law and administered by a single set of institution.

State laws being applied by post-colonial states such as Kenya comprise of imported European substantive and procedural law and customary law as interpreted by the courts. For many women, the fact that they are trapped within the state's interpretation of the construction of families, its assumptions about the status of women in customary law has been a barrier to advancement even when the broader areas of the law have been reformed for the benefit of women.

(ii) Customary Law

Customary law is the law of small scale communities which people living in these communities take for granted as part of their everyday experience but it excludes outsiders who, to get any account of it have

to either be told about it or read about it. Whether read about or narrated, customary law is once removed from the source. Thus the written accounts there are of customary law are not direct accounts of community practice but the work of informants each of whom, in recounting a particular rule brings to bear on the subject his/her preconceptions and biases. It would be easy to understand the ramifications of customary law if it was only one. However, there are as many customary laws as there are tribal communities and despite the general consensus on certain fundamental principles, there are nuances in each that only one well versed with the community's way of life can identify.

The hallmark of African customary law is the dominance of older male members over property and lives of women and their juniors. Allied to this is the centrality of the family as opposed to the individual and the definition of the family in expansive terms to include ascendants and descendants and more than one wife in polygynous unions, an outsider looking at these societies' structures may aver that women have no rights under customary law⁶. It has, however, been contended that women were better off under customary law than they currently are because they were accorded great protection as mothers and assured of a share of and access to resources even where they did not exercise political leadership of the community.⁷ The women-unfriendly customary law has gradually developed as African societies have undergone change most of which can be seen arising from colonisation and privatisation. The battle of the sexes at customary law is in one sense

⁶ At about the end of the nineteenth century when colonialism began, it is recorded that Kenya had as many as 64 tribes. See D. T. Arap Moi, *Kenya African Nationalism* (1986).

⁷ Alice Amstrong, "Customary Law in Southern Africa, what Relevance for Action", *Newsletter* Vol. 7 No. 1

therefore a struggle over scarce resources and power as overlords in the form of colonial powers and states in modern African states have assumed control over all aspects of the lives of Africans, prompting the African males to consolidate the one bastion of their authority, namely customary law. In some cases, notions of customary law such as the concern for women have been dropped making women very vulnerable. The removal of protection has not been accompanied with fewer roles for women within the community. Their roles of reproduction and production have remained intact (rural women in Africa contribute substantially to food production).

(iii) Religious Law

Islamic, Christian, Hindu, African religion etc

(iv) Intersections between different laws and normative orders

Women often find themselves situated in the intersection between different systems of laws and a plethora of normative orders that influence the choices that they can make and the decisions that are reached about their lives by others. Thus legal pluralism takes on a new meaning, recognizing that there are regulatory and normative systems other than formal state law that affect and control people's lives.

(b) *International Law*

In looking at the legal status of women in Kenya, one has to look at both the international and domestic dimensions. Kenya is a signatory to many international legal instruments that have a bearing on the legal status of women. She also has domestic laws touching on this issue. Kenya is a member of the United Nations and would therefore have an international legal obligation to provide for equal rights to men

and women as provided for in the UN Charter and the Universal Declaration of Human Rights. Kenya is also a signatory to the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the Political Rights of Women and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (1979). There is no shortage of obligations in the area of equality of the sexes in international law. That many of these have not found their way into the Kenyan domestic legal regime and remain largely in the realm of the ideal, points to the impotence of international legal obligations. Domestication of such obligations is imperative if they are to be realized. Kenya does not have an automatic domestication clause in respect of ratified international covenants and domestication of the conventions has to be through legislation.

At the 1985 World Conference on Women held in Nairobi, the domestication of CEDAW was singled out as an important step toward implementation of the basic strategies formulated at the conference at the national level. Issues of equality in the areas of political participation, education, employment, civil codes pertaining to family law, ownership of property, availability of credit, health and social security, to name but a few were also identified as crucial intervention points. The 1990 *"Abuja Declaration on Participating Development: The Role of Women in Africa in the 1990's"* amplified the same thematic issues. Subsequent international meeting addressing women's rights have raised the need for domestication. It is interesting to look at the domestic scene to gauge how far if at all these international instruments have influenced law reform in Kenya.

International legal obligations are expressed in general terms. For them to form part of

Municipal Law, there has to be specific legal enactment encompassing the international legal obligations as pointed out above. There exists a well established principle of international law that all states parties must organize and regulate their domestic jurisdictions to abide by international legal obligations. In the *Free Zones of Upper Savoy and District of Gex Case* (1932) PCIJ, Series A/B No. 46) the Permanent Court of International Justice said

"It is certain that France cannot rely on her own legislation to limit the scope of her international obligations" (page 167).

However international law is characterized by weak enforcement machinery and unless a state has the political will and enacts municipal law to fulfil international obligations, its subjects are unlikely to benefit from such international obligations.

(c) *Domestic Law*

(i) Constitutional Provision on Fundamental Civil Rights and Discrimination

On the domestic scene we have a plethora of laws touching on the status of women. The primary legal document in this arena is the Constitution. The Constitution at chapter five provides for the fundamental rights and freedoms of the individual. These rights include the protection of the right to life, protection of the right to personal liberty, protection from slavery and forced labour, protection from inhuman treatment; protection from deprivation of property; protection against arbitrary search or entry; provisions to secure protection of the law; protection of freedom of conscience; protection of freedom of expression; protection of freedom of assembly and association; protection of freedom of movement and protection from discrimination on grounds of race.

Section 82 of the Kenyan constitution deals with the question of discrimination. Section 82 (1) provides that no law shall make provision that is discriminatory "either in itself or in the effects" and neither should a person be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of functions of a public office or public authority" (Section 82 (2)). Under Section 82 (3) discrimination is defined as "affording different treatment to different persons attributable wholly or mainly to their ...race, tribe, place of origin or other local connexion, political opinions, colour, creed or sex ...". (Section 82(3)).

A number of laws are exempted by Section 82 (4) from the provisions against discrimination. These are laws affecting non-Kenyan citizens; laws of adoption, marriage, divorce, burial, devolution of property on death and personal law matters; laws affecting members of a particular tribe or race in matters exclusively concerning them and such an action is seen as justifiable in a democratic society. The laws exempted by Section 82 (4) are in areas that directly affect women.

One therefore finds that women's enjoyment of the fundamental freedoms guaranteed by the Constitution is severely restricted. In most patriarchal states, there is a fear that making sex discrimination illegal may lead to countless court suits by women. (Kibwana: 1990:2-3). This fear has therefore meant that women who are most likely to be affected by such provisions, are denied Constitutional protection from sex discriminatory laws. While Section 82 (3) gives women protection from discrimination on the basis of sex generally Section 82 (4) denies them protection in their communities and homes. The effect is that at no time are women guaranteed protection from sex-based discrimination.

Section 82 (4) legitimizes the traditional position, which accorded women fewer privileges than men, in matters concerning their families, marriage, divorce and succession. This presents problems when we seek to apply statutes such as the Law of Succession Act (Cap. 160) which seeks to give both men and women equal rights in matters of succession. Other than this, the Marriage Bill (1985) gives equal rights to spouses in a marriage in matters concerning custody of children, divorce, or division of matrimonial property. This Bill has failed to pass through parliament for reasons including objections to interference with a man's rights to chastise his wife; objections to adultery being made an actionable civil wrong, independent of divorce proceedings, and objections to a wife having a right to object to her husband marrying a second wife. If the Marriage Bill of 1985 is adopted as an Act of Parliament or other laws passed to ensure equality of the sexes for their success, it is imperative that the Constitution be amended to repeal the provisions of Section 82 which advocates for sex based discrimination in matters of personal law, marriage, divorce and succession (Kabeberi Macharia, Kameri-Mbote and Mucai-Katambo: 1992)

(ii) Laws of Citizenship

Various issues have arisen concerning a woman's right to pass on her citizenship to her children and her husband especially where he is a foreigner. If she loses her Kenyan citizenship upon marriage to a foreigner, what is her status should he abandon her? Does she become a stateless person or can she re-adopt her Kenyan citizenship? One position is that she may retain her Kenyan citizenship. Though she cannot pass it on to her husband or to their children who may acquire their father's citizenship. Section 89 however provides that:

"Every person born in Kenya after 11th December, 1963 shall become a citizen of Kenya, if at the date of his birth one of his parents is a citizen of Kenya" (emphasis added).

Exceptions to this are, if the father is an envoy in Kenya, or the father is a citizen of a country that is at war with Kenya and the birth occurs in a place that is occupied by that country. It is clear from section 89, that a Kenyan woman married to a foreigner who does not fit into the two exceptions, can pass on her Kenyan citizenship to the children of such marriage if they are born in Kenya. The same does not happen if the child is born outside Kenya, since such a child acquires Kenyan citizenship only if the father is a Kenyan citizen. (Section 90).

A Kenyan woman married to a foreigner does not pass on her citizenship to her husband, though this applies if a Kenyan man marries a foreign woman. Section 91 entitles "a woman who has been married to a citizen of Kenya ... to be registered as a citizen of Kenya" upon making an application in the prescribed manner. The effect of this is that her husband remains a second class citizen in Kenya, and may only be granted Kenyan citizenship after application, a process which may take up to seven years.

The Citizenship Act (Cap 70) gives equal rights to both men and women who wish to acquire Kenyan citizenship. However, one has to apply for citizenship in the prescribed manner, which includes complying with the provisions of the Constitution. The passing of citizenship one's child or spouse is governed by the Law of Domicile Act (Cap. 37). The Act primarily concerns itself with the conferring of a domicile status by parents to their children. A child born within wedlock acquires the domicile of its father but if born outside wedlock such child acquires the domicile of its mother.

An abandoned child acquires the domicile of the place where the child was found. According to the Constitution, a child acquires the father's citizenship, but if such child is born outside wedlock, it acquires the mother's domicile (as per law of Domicile Act). This may present problems should the mother marry a man of a different citizenship than that of the father.

The laws barring a woman from passing citizenship to both her husband and children are discriminatory. In *Attorney-General of Botswana vs. Unity Dow* CA No. 4/9 it was held that this provision is discriminatory and contravenes the Convention on the Elimination of Discrimination Against Women. If Kenya is to live up to its obligations under the Convention, then it should remove such provisions as this, which promote discrimination against women.

Certain Rules made under the Immigration Act (Cap. 172) are also indicative of the differential status accorded to men and women. One such rule is that the legal guardian of a child is the father and the mother only becomes such guardian once the father of the child dies. This provision has caused untold suffering to mothers where the mother of the child wants to acquire travel documents for the child and the father of the child is uncooperative. It is interesting to note that a father can get the name of his children included on his passport without the mother's consent while the mother has to get the father's consent. Other rules that require married women to obtain their husband's consent before acquiring passports or travelling out of the country are discriminatory against women and should be abrogated to tally with the legal capacity accorded to women under the law.

(iii) Civil Law

According to the Age of Majority Act "a person is deemed to have full legal capacity on the attainment of eighteen years". Full legal capacity to enter into legal transactions presupposes that the person is of sound mind. The Act does not discriminate between men and women and therefore upon attainment of eighteen years, a woman sheds all legal disabilities and may enter into legal transactions in her own right. This is a shift from the pre-independence society where men were more advantaged than women in contractual matters (Maina, Mucai, Gutto: 1976). However, it is noteworthy that English common law principles of "agency of necessity" and "presumed agency" have been received in Kenya and are applicable to women. These are based on the notion that married women are chattels and have no proprietary capacity (*Best V. Samuel Fox and Co. Ltd.* (1954) 2 All E.R. 394 which regarded the husband as having a proprietary right in his wife).

The "agency of necessity" principle entitles a married woman to pledge her husband's credit for necessities of life commensurate with their normal standard of living. This power may be exercised by a woman during a separation pending a court order for maintenance, its application is reserved for desperate situations.

Thus, where a woman has adequate means of maintenance she cannot pledge her husband's credit. Moreover, the presumption of authority to bind the husband can be rebutted if the husband proves that the wife was well provided for, or that he had warned her against pledging his credit, or that he had warned the supplier against supplying the necessities claimed. The principle of "presumed agency" does not depend on separation of spouse and a woman is entitled to bind her husband to a contract for

necessaries of life. There are few reported cases on the application of these principles which implies that there are few controversies on the matter. Alternatively, women may be ignorant of the right or they are constrained from invoking them due to a variety of reasons including threats by husbands.

2.3. *Rights Relating To Marriage*

(a) Right to retain family name

There is no legal provision in Kenya regulating what name parties should adopt after marriage. The prevalent is for the wife to take on her husband's name retaining her name in brackets if she wishes. Parties to a marriage should have the right to decide which names to keep after marriage and public authorities should desist from insisting that women change their names after marriage.

(b) Other Rights During Marriage

Personal matters pertaining to marriage are governed by different laws, which are recognized by the constitution and accorded equal importance. There are four systems of marriage namely; Customary Law, Moslem Law, Hindu Law and Civil Law which embodies the English philosophy of life and Christian doctrine. Two of the systems (Civil law and Hindu) only recognize monogamous marriage and the other two (customary and Moslem laws) recognize polygamous unions as well. Marriages under marriage Act, the African Christian marriage and Divorce Act the Islamic and Hindu laws are evidenced by registration and issuance of a marriage certificate if they satisfy the requirements of those legislations as to formality and procedure. Customary law marriages are not thus evidenced and couples who are customarily married either marry again under statute or swear affidavits

to the effect that they are married under customary law.

A monogamous marriage may be contracted under the Marriage Act (Cap 150), the Hindu marriage and Divorce Act (Cap 157) and the African Christian Marriage and Divorce Act (Cap. 151). A spouse who contracts another marriage while the first one is still subsisting under any of these acts, commits the offence of bigamy under the Penal Code.

The requirements for a valid marriage at customary law are not uniform for all ethnic communities. They include payment of dowry or bride price and some ceremony signifying the union of the individuals concerned. It is not uncommon for these processes to take a protracted length of time before completion. Dowry for instance may take more than the couples' lifetime to clear and oft times, it is never fully paid. It is consequently difficult to say with certainty whether a person is married or not while the processes are going on. When one of the parties to a customary marriage dies or if the man seeks to throw out the woman, the issue as to whether a customary marriage is in place becomes crucial. The parties here may be at some stage along the route of marriage which under customary law is a process rather than an act. Whether such stage is interpreted as marriage or not depends on the interpreter. It would be desirable to have registration of all customary marriages to avoid the kicking out of women who all along believed themselves to be married and acted as such.

Customary law allows a man to marry as many wives as he wishes. The offence of bigamy does not apply to polygamous unions under this system. This underlines an element of inequality whence a man is deemed capable of looking after many wives while polyandry (a situation where a woman

has more than one husband) is not a practice discernible or even acceptable.

The rights and duties of spouses are by and large dependent on the system of marriage applicable to the system of marriage. In most systems of marriage dowry is payable. This has been viewed as "wife purchase" and augurs badly for equality of the sexes. The idea behind payment of dowry may be good and noble, that is, providing a forum for cordial relations between the families of the persons marrying. This practice has however been abused and does not serve its intended original purpose.

(c) *Capacity to Marry*

Capacity to contract a monogamous marriage is set out in statutory law. Under the Marriage Act, the man and woman must have attained the age of 18 years. Under Hindu law, the bridegroom must have attained the age of 18 years and the bride 16 years. If the bride is between 16 and 18 years, the consent of a guardian or the High Court must be sought. Consent to marriage is an important legal requirement in a monogamous marriage and lack of it nullifies marriage under the Matrimonial Causes Act (Cap 152).

Capacity to contract marriage under customary law is linked to circumcision and puberty and is not subject to statutory regulation. Puberty may be attained as early as 11 or 9 years which in effect means that a child could enter into a contract or marriage. Child marriages have been the subject of much controversy for a long time and a major focus of women's and children's rights advocates. As early as 1967 a Commission on Marriage and Divorce appointed by the President to review family law, and recommend a comprehensive uniform code of marriage and divorce deliberated on this question. (Kabeberi-Macharia, Kameri-Mbote and Mucai-Kattambo: 1992).

The commissioners considered the marriages wrong in principle and contrary to the best interests of Kenya. They recommended minimum ages for marriages to apply to all communities - 18 years for males and 16 years for females. This recommendation found its way into a marriage bill which is yet to become law.

Thus, the vulnerability of female children in communities which practise these marriages is real and has negative implications for the general status of the Kenyan women. Not only do these marriages undermine the educational opportunities of the girls who are forced out of school but also pose threats to their health and that of their offspring.

Advocacy on this matter has linked this problem to child abuse, as many of the minors involved are forced to become adolescent mothers with the accompanying risks of early pregnancy and health risks to the children brought forth. Health personnel have cited increasing incidents of cancer of the cervix among young age groups and exposure to sexually transmitted diseases as husbands of the children are usually older people who may have had several sexual partners.

There are however signs of change and acceptance that child marriages are contrary to the interests of women and must be discouraged at all costs. Recent reported incidents in parts of the country which are notorious for child marriages have highlighted the role of chiefs and other administrators in curbing the practice by invoking the Chiefs Authority Act (Cap 128).

By exercising powers under the Act, chiefs have been able to restore back to school, girls who have been forcefully removed for purposes of marriage. However, intervention under this Act lack adequate legal basis and

therefore concrete solutions are expected from the review, of child law under the auspices of the Kenya Law Reform Commission.

Other customary practices that may engender inequality of the sexes are woman to woman marriages, sororate unions and levirate unions practised among certain ethnic communities' marriages. A widow who has no children or has reached menopause makes dowry payment to the parents of a young woman who comes to her home to bear children sired by a selected male relative of the deceased husband of the widow. The children thus born are regarded as children of the deceased (Otega; 1985).

Sororate unions entail the replacement of a deceased wife by her sister as wife to the widower where the deceased died without issue or without male issue. The underlying consideration here is that dowry has been paid by one family to the other and rather than refund such dowry, the deceased's family provides a wife.

Levirate unions are a form of widow inheritance. When a man dies his wife goes into cohabitation with the brother or a male relative. While such woman remains a wife to the deceased, she has a conjugal relationship with a living person. Widow inheritance, in the strict sense entails the taking over of a widow by a relative of her deceased husband who could be a brother or even a son. The idea behind these practices is to ensure that the widow and her children are looked after within the family of the deceased husband and father. Emphasis here ought to be placed on the assumption of the protective and supportive roles of the deceased rather than on the sexual relationship. A woman should be able to choose who to inherit her or to opt out of such arrangement altogether.

Relationships in all the above marriages and unions have a purpose to serve in certain contexts. However, they are based on the inequality of the sexes. While proscribing them through law may not be the best approach, it is necessary, through education, to seek a gradual mode of discouraging their prevalence. There is evidence that widow inheritance, for instance, is increasingly being challenged in the wake of the HIV/AIDS pandemic.

(d) *Property Rights*

Kenya's legal system has since 1971 established the principle that spouses have equal rights in ownership of property. This principle was enforced in the case of *I vs I* (1971) E.A. 278) in which the court applied the English married property of 1882. The act has since become a statute of general application and has been invoked to deal with matrimonial property disputes. This has contributed to the general advancement of women in relation to ownership of property.

Section 1 (1) of the Act provides that a married woman is capable of acquiring, holding and disposing by will or otherwise of movable or immovable property as her separate property, in the same manner as if she is a single woman (*femme sole*). Sub-section 2 of this section of the Act provides that a married woman may sue or be sued in respect of her separate property either in contract or tort as if she were a *femme sole*. A married woman carrying on business separately from her husband is subject to the law of bankruptcy in respect of her separate property.

Although the parties in *I vs I* were not subject to customary law, the Married Women's Property Act has been extended to parties married under customary law, for example in *Karanja v. Karanja*. (1976) K.L.R. 307). The implication of the decision in *Karanja's* case is that the Act is applicable

to all the systems of marriage recognized under Kenya Law, and has the potential of removing inequalities experienced by women especially within the context of customary law. It should be recognized however that the continued application of the English Act shows that the Kenyan legal system is wanting. It has yet to be decided with certainty whether relevant developments in English law should be applied in Kenya.

Moreover, there are practical problems in the application of the principle of equality of sexes in the matrimonial context. During the dissolution of a marriage, questions arise as to which spouse owns which property where the property is registered in the name of one spouse and the other spouse claims an equitable interest therein or where it is registered in the names of both spouses but the exact amount of contribution of each is not ascertained. The question as to whether a wife can be deemed to have contributed to matrimonial property by looking after children and attending to other domestic chores also arises. This raises the broader question of society's perception of women's work.

With regard to the issue of registration of property in the name of the spouses, it has been established that where such property is registered in the name of the husband, a wife who claims an interest therein must show that she contributed some money towards the purchase of the property. It has also been established that where the spouse holds the title to the matrimonial home, the other spouse may gain an interest in the property by making substantial improvements to such property.

In the absence of local legislation, Kenyan courts have yet again to resort to English law. English rules of equity and common law are applicable in Kenya "so far only as the circumstances of Kenya and its

inhabitants permit and subject to qualifications as those circumstances may render necessary". Under rules of equity, where property is purchased by the husband and is transferred to the wife, there is a rebuttable presumption of a resulting trust in favour of the wife. Where a wife and husband have a joint bank account they are presumed to be entitled to it in equal shares. Where investments are made out of the joint account in the name of the husband, he will be held to be a trustee for his wife, who would be entitled to a half share. This position was succinctly stated in *Karanja v. Karanja* as follows:-

"The fact that property acquired after marriage is put into the name of the husband alone and that the husband has evinced no intention that his wife should share in the property does not necessarily exclude the imputation of a trust nor preclude the wife in appropriate circumstances from obtaining a declaration that the property acquired by virtue of a joint venture is held on trust for them both".

Where the woman is unemployed our law is silent on the value of her non-monetary contribution to the matrimonial kitty. The Tanzania Court of Appeal was seized with the opportunity of determining whether or not the domestic services of a housewife amounted to a "contribution" in acquiring matrimonial assets in the case of *Hawa Mohamed v. Ally Sefu* (Unreported Civil Appeal No. 9 of 1983) and it observed:

"On examination of the Law of Marriage Act 1971, and the law as it existed before its enactments one cannot fail to notice that the mischief which the law ... sought to cure or rectify was what might be described as oppression by reducing the traditional inequality between them and their husbands in so far as their

respective domestic rights and duties are concerned."

This thinking is also to be found in justice Omollo's decision in *MaryAnne Matanu Kivuitu v. Samuel Mutua Kivuitu* (1991) KAR 241 where he was of the view that non-monetary contribution by the housewife in preparing for the family and keeping the family going generally constituted contribution to the acquisition of matrimonial property. There have been more recent cases recognising the wife's contribution to the acquisition of matrimonial property. Such progressive thinking should form the basis of legislation with regard to matrimonial property if the gains made are to be firmly consolidated. The practical application of such principles in favour of women raises questions in view of the fact that resolution of conflicts is largely dependent on legal counsel and access to courts. Legal services are out of reach of a majority of Kenyan women implying that special legal aid arrangements are necessary to enable them challenge discriminatory practices inherent in personal laws. For example under customary law, there is a general principle, that the husband should manage the wife's property except for movables such as personal effects and there are divergent practices on the position of the woman as regards her property rights on dissolution of marriage as noted above.

Although this situation is changing through liberal judicial intervention and increasing advocacy on women's rights, specific policy interventions and legislative measures are necessary to ensure that women are empowered to have access to property. More training and employment opportunities are but examples of the necessary interventions. Legislation is also necessary to address rights of women involved in situations of cohabitation for a considerable number of years without going through a ceremony of marriage. Courts in Kenya have had to

grapple with disputes emanating from associations that do not neatly fit into any of the four systems of marriage. The parties to these relations may be those who are on the road to customary marriages not having completed the process, or persons who come to live together outside a formal marriage. In the event of such cohabitants acquiring property together or bringing their individually owned property to the union questions as to property rights to such are bound to occur in the event of death or the relationship turning sour.

Faced with such disputes, courts seek to determine whether in fact the cohabitation constituted a marriage for purposes of allocating property rights. Proof of existence of marriage always tends to be disadvantageous towards a woman who has to prove her status as wife before the court. In *Mary Njoki v. John Kinyanjui* and others (Unreported Civil Appeal Case No. 71 of 1984) the appellant's claim to the deceased's property was rejected despite her cohabitation with him. The court was of the view that cohabitation and repute alone were not enough to constitute a marriage. It was necessary in the court's view, that such cohabitation be accompanied by an attempt to carry out some ceremony or ritual required for any marriage or by customary law. The determination of what constitutes a qualitative relationship can be pretty harsh on women.

(d) *The Law of Succession Act*

The key legislation in this area is the Law of Succession Act passed with the main objective of unifying the law of succession under different personal laws. It applies to both testate and intestate succession. It does not however apply to Muslims (Act No. 21 of 1990 which came into effect in January 1991).

The Act sought, in addition to unifying the laws, to correct the defects of the previously applicable regimes. The Commission's proposals on testate succession sought to improve the status of women, whether as daughters or widows. They observed that tribal sanctions engrained in rules of succession no longer obtained and stricter controls of administration procedure were needed (Maina: 1992).

(i) Testate Succession

On testate succession, section 5(f) makes detailed provisions relating to capacity to make wills, construction and formalities among others. The sections are gender-neutral using such terms as "every person" or "any person". Capacity of women to make wills has been specifically provided for. The fact that women can now own property seems to be the guiding force behind this provision. Section 5 (2) ordains that "A female person, whether married or unmarried, has the same capacity to make a will as does a male person". Such female person ought to be an adult of sound mind and the will may be written or oral. She can only make a will in respect of property that she owns. While this is a step in the right direction, the tendency of family property to be registered in the husband's name only even where both parties have contributed to its acquisition, leaves many a woman at the mercy of the man upon the dissolution of the marriage.

Safeguards are needed to ensure joint property is considered as the property of both spouses even where evidence of direct financial contribution is lacking (See *Kivuitu v. Kivuitu* (1991) KAR 241). It is perhaps not surprising that more men than women make wills. This may be explained on the basis of the continuum of customary law whereby all property was owned by the man. Also notable is the fact that wills made by men tend to favour male heirs. (See for

instance *Wanjau Wanyoike and four others v. Ernest Wanyoike Njubi and the Public Trustee* (in Cotran; 1987:323). The property dealt with here mostly includes land, houses, cars, and other capital goods. This denies women heirs a share or even access to such property.

While such practices may have a lot to do with attitudes and cultural considerations, it is here contended that under customary law, whoever inherited property was enjoined to access it to other members of the family men and certain categories of women. The reason behind males inheriting was the notion that they remained within the families while the daughters got married and left. Since this is not always the case and even where the daughters get married, they have been known to maintain close ties with their families, attitudes ought to take cognizance of the current trends and allow women to inherit their parents properties.

For any disposition of the deceased's estate under the Act, whether that disposition is effected by will, gift in contemplation of death or by the law relating to intestacy, or by the combination of will, gift and law, if it is deemed unreasonable by the court, such court could order the reasonable provision for any dependant out of the deceased's estate (Section 26). The court in making such reasonable provision is vested with discretion (Section 27) and guidelines for the exercise of that discretion (Section 28) are clearly laid out.

A "dependant" is widely defined to include the wife or wives or former wife or wives and children of the deceased whether or not maintained by him immediately prior to his death; deceased's parents, step-parents, grandparents, grandchildren, step-children whom the deceased has taken into his family as his own, brothers, sisters, half-brothers, half-sisters as were being maintained by the deceased prior to his death (Section 29).

This section takes into account the African concept of the extended family. A husband would be the wife's dependant where he was being maintained by her immediately prior to her death. This is a recognition of the capacity of a woman to hold property independently of her spouse and apply it for her maintenance, her spouse's maintenance and that of her children.

(ii) Intestate Succession

Part V of the Act deals with the rules of intestacy. Section 32 exempts certain gazetted areas from application of these rules in respect of agricultural land and livestock. These areas include Wajir, West Pokot, Turkana, Tana River, Kajiado, Garissa, Marsabit, Isiolo, Mandera and Lamu. If a person dies intestate in any of these areas, customary law applies with regard to agricultural land and livestock. The problem here is that the two categories of property excluded may be the only property owned by a deceased person. This means that women in those areas cannot benefit from or seek protection under the provisions on intestacy which if properly implemented could elevate the status of women in property control and management in Kenya.

The Act at section 35 denominates a surviving spouse in a monogamous union as the most suitable person to take charge of a deceased's property. This is a departure from African customary practice of favouring the eldest male issue. It is however, remarkable that the surviving spouse gets only a life interest in the property and where that is the woman (widow) the interest determines upon her remarriage.

Indeed women's interests in matrimonial property are clearly provided for under the Act. Under Section 29 the wife ranks high among the dependants of the deceased husband while the husband only becomes a

dependant of the wife if he was maintained by her prior to her death, (Section 26)

Section 36 of the Act clarifies the issue on dealing with a surviving spouse who has no children. The spouse here is entitled to the personal and household effects of the deceased absolutely; either the first Kshs. 10,000/- or twenty per cent of the net intestate estate and a life interest in the whole remainder so long as, in the case of a woman, she does not re-marry.

Succession to the property of a polygamous person who died intestate having married under a system of law permitting polygamy is to be effected in terms of houses and is dependent on the number of children in those houses (section 40). Any wife who survives the husband is regarded as an extra unit to the number of children in the household.

The Act talks of "children" without differentiating between male and female children. The spirit behind this provision is to make allowances for all the children, male, female, married, unmarried depending on their means and needs. This is also the case for the grandchildren (see sections 29, 35, 36, 37, 38, 39, 40, 41).

The Law of Succession Act has made big strides in the way of eliminating discrimination of female persons in matters of succession. The practice however still seems tilted against women. In the case of the *Estate of Njeru Kamanga (Deceased)* Succession Case No. 93 of 1991 (Unreported) Maina: 1992 the daughters of the deceased were disinherited by the magistrate who felt that the daughters, being married, had no right to the father's property. This was notwithstanding the clear provisions of Cap 160.

In the Matter of the Estate of Richard Martin Kibisu (Deceased) High Court

Miscellaneous Application No. 272 of 1985 the deceased had made a will providing that his land should not be divided into pieces but that it be cultivated by any of his children able to do so. A daughter of the deceased petitioned the court saying that the will indicated the wish and intention of the deceased that the land should be sub-divided and demarcated equally among all the children of the deceased. The petition was opposed by the sons contending that the provision against subdivision made the will null and void and the deceased should be considered as having died intestate.

This would mean that the estate be divided according to the deceased's customary law in this case Luhyia customary law. Under this law the right of daughters to the estate of their father is to be maintained by the deceased's estate if they were single or without other support. If such law were applied none of the daughters qualified to inherit. It was held that the deceased's intention should be followed as closely as possible and the court favoured a construction avoiding intestacy; that the land was intended to go to all the deceased's children, sons and daughters and that the condition restricting partition, and not the whole will, is void as contrary to the law. Such condition, in the court's view, was made after the gift had vested in all the children and being unenforceable, was void.

The effect of section 35 would seem to be that women married to men who had initially transacted a monogamous marriage and the children of such women could not inherit from or succeed the man. The Act was subsequently amended by Act No. 10 of 1981 and addition of section 3 (5) to the Act, which enables subsequent women (wives and their children) to inherit. It provides that

"Notwithstanding the provisions of any other written law, a woman married under a system of law which permits

polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act".

This provision has been lauded by many as reflecting the reality of Kenyan life where many Africans contract Christian or civil marriages but relapse back to traditional African practices or contract Christian or civil marriages along with the performance of customary marriage rites. In this latter case, it is difficult to categorize the marriage as either Christian or customary (Curia:1978).

On the other hand, it is felt that the amendment denies women security in marriage which they seek by transacting monogamous marriages. They realize later that matrimonial property has to be shared with persons who have disrupted the monogamous marriage or persons not known to the monogamous marriage wife and her children before the husband/father died.

In the Matter of the Estate of Reuben Mutua Probate and Administration Cause No. 843 of 1986 (High Court), the deceased, Mutua, married Teresa in 1961. The marriage was conducted under ACMDA. When Mutua died in 1986, a lady called Josephine claimed to be his wife, allegedly married to him under Kamba customary law in 1980. She also claimed that her three children were Mutua's children and contested his will in this Cause because she and her children had been omitted while they were legally entitled to some part of the estate as dependants. It was held that Mutua lacked the capacity to marry customarily while his marriage with Teresa still subsisted. It was therefore not necessary to prove that a

subsequent marriage was genuinely customarily undergone as "it is not relevant under these circumstances".

Justice Aluoch refused to give a literal interpretation to the subsection which would have favoured Josephine. She said that the provision was intended for women married under customary law who were either neglected or abandoned by their husbands during their lifetime. Regarding the words in the section, "previous or subsequent" she said-

"From my reading of the amendment, I would say that the words used in this amendment are meant to make it comprehensive otherwise the meaning of it which is important is what I have already given it"

In the Matter of the Estate of Duncan Kiiru Karuku (Deceased) Succession Cause No. 74 of 1987 it was held that for purposes of intestate succession, although the first marriage was conducted under statute, the other wives and their children were wives and children of the deceased and were entitled to inherit (reference made to section 29 of Cap 160 and direction given that sections 40-42 of the Act be referred to for guidance on the mode of distribution, this appears to be a literal interpretation of section 3 (5).

Section 3 (5) sanctions adultery and bigamy while undermining the institution of marriage and encouraging the breach of the marriage contract. It also redefines marriage making nonsense of specification of a marriage as a monogamous one. The section also undermines the widow's property rights. In *Karanja v. Karanja* cited above the court recognized the fact that a wife could help her husband acquire property through direct financial contribution. The contribution of a wife as a housekeeper is no less important. Her duties

of taking care of the husband and the children are a significant contribution that should not be overlooked (See also *Kivuitu v. Kivuitu* and *Hawa Mohamed v. Ally Sefu*).

While we appreciate the needs of women and children anticipated at section 3(5), we think that if the practice of contracting customary marriages when a monogamous marriage subsists is to be discouraged, the provision should be abrogated. Other ways of supporting such women and children without disrupting the marriage institution should be sought. An Affiliation Act may be one way of providing this support. Such an Act ought to be well thought out to avoid its being thrown out again as happened to Cap 142 in 1969. To ensure self-censorship on the part of men, adultery should be made both an actionable civil wrong apart from divorce and a crime. There have arisen many disputes over a deceased person's estate owing to this provision (See also *In the Matter of the Estate of John Nyagado Okach (Deceased)* High Court Probate and Administration Cause No. 787 of 1988; *In the Matter of Thoithi Kirogoi (Deceased)* High Court Succession Cause No. 701 of 1984 which deal with administration of estates where the deceased was polygamous and had died intestate).

In certain cases where a woman seeks to bring herself within the protection of section 3 (5) the court considers whether the formalities of marriage have been complied with. The few reported disputes show clearly that the Kenyan society, especially rural communities, are unprepared for the revolutionary aspects of the Law of Succession Act in so far as wives' and daughters' rights are concerned. The judicial approach has tended to lean towards recognition of daughters' and wives' rights but at the same time distinction has been drawn between the rights of unmarried and married daughters. It has been argued and held that married daughters are not entitled

to inherit. It can be argued that the liberal approach of the court is beneficial to only those women who have access to legal counsel and that many may be suffering in silence as relatives deny them a source of livelihood. Indeed, this poses important considerations regarding the statement of the law and its application.

2.4 Women and Criminal Law

Criminal law is basically gender-neutral. Both men and women are subjected to the same protections of the law as accused persons and also to similar penalties for the same offences except in few instances. For example, a pregnant woman cannot be sentenced to death. Some offences such as rape, defilements and indecent assaults, can only be committed by males. Section 19 of the Penal Code (Cap 63) provides a special defence for women in all offences (except treason and murder) where she shows that the criminal act was committed in the presence of her husband and under his coercion. Prostitution, the practice whereby the woman submits herself to sexual intercourse with a man in exchange of money (Otega: 1985) is not defined in the Penal Laws. Prostitution is itself not described as an offence and it is only for living on the earnings of prostitution that one can be indicted under sections 153 and 156 of the Penal Code. The way the offence is couched means that both women and men are indictable for the offence. However, the swoops carried out to flush out prostitutes exclusively nets women as culprits.

2.5 Violence Against Women

Violence here refers to both physical and psychological use of force to brutalize women. It includes domestic violence such as wife battering, marital rape, incest, sexual harassment in and out of the work place,

rape, defilement, indecent assault, female genital mutilation to name a few. A reading of our local press indicates that violence against women is on the rise. Because of the nature of the violations, many cases still go unreported.

Despite the stiff penalties for offences such as rape and defilement, these still abound pointing to the inadequacy of the legal provisions available to deal with the problem. While seeking legal reforms, it is important to conduct public education campaigns to discourage gender based sexual violence. Such campaigns should also seek to redress attitudinal biases and cultural practices that, justify such violence. That the maximum penalty for rape, that is, life imprisonment, has not deterred would be rapists underscores the need of social, alongside legal reforms. This can be achieved through public education.

Women should be educated to understand that being victims of violence is not at all their fault, they should also be encouraged to report incidents of violence instead of guarding such as their own secrets. There is no provision for marital rape in our laws. Looking at the definition of rape however, namely having:

"carnal knowledge of a woman or girl, without her consent or with her consent if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act...."

Rape can occur in the context of marriage. This is in the instances where the woman is forced into having sex with her spouse.

It is also important for law to address cultural practices that perpetrate violence against women such as the chastisement of wives.

2.6. *Employment*

Women are a significantly low percentage of the total number of employed persons in Kenya.

Between the years 1970 and 1983, the number of female employees increased from 14% to 20% of the total number of persons engaged in any form of employment. A number of reasons are given for women's low participation in employment, and these include lack of equal education and skills training with men, cultural attitudes about women working, or family obligations.

Kenya's employment law is provided by the Employment Act (Cap 226) which does not specifically provide for employment as a right. There is an underlying implication that it is however gender neutral. Bearing in mind that the Constitution condones sex discrimination, one can see that the gender neutrality of the employment law may be undermined by such a provision.

Often it is in the workplace that women face discrimination by virtue of their sex even though there is no explicit law allowing for such practices. This often happens when the law is put into practice. In such situations, many employees feel that they do not have any means of legal redress.

The Employment Act does make provision for specific working hours for women, as well as forms of employment that they can undertake. It is argued that these provisions are in line with international Labour Organization conventions on the focus of employment and working conditions of women. The Act provides that no woman or juvenile can be employed in an industrial undertaking between 6.30 p.m. and 6.30 am, unless firstly, where working in unforeseen emergencies which are not of a recurring nature.

Secondly, where the nature of their work involves raw materials which may deteriorate, if not preserved immediately. Thirdly women managers, or medical personnel are exempted from the provisions of this section. Other than prohibiting women from working in mines at all hours and in industrial taking (at certain hours) the Act fails to consider protection of women in other fields of employment. Such protective provisions militate against free choice of career and could shrink employment opportunities for women.

An area that is raising concern is the export processing zones which provide work for women. In these zones women are often preferred due to the nature of work, but studies have shown that they are underpaid and overworked. Also, there are no trade unions permitted in such zones, which makes labour very cheap and working conditions fairly poor. Considering that Kenya is establishing EPZs, it is very important that laws to protect workers from exploitation in these zones are enacted, and conditions for their work place determined, before the zones become fully operational.

Women employees are also guaranteed maternity leave for two months though they are supposed to forfeit their annual leave the year they take up maternity leave. Maternity has often been used as an excuse to deny women appointment to certain posts for the simple reason that it will be uneconomical to employ them. Some employers therefore prefer women who are past child bearing or who do not intend to have children. The appreciation of maternity as a necessary social function would entail a longer period of maternity leave and an atmosphere conducive to such function.

Although Kenya's employment laws are gender neutral, one finds that in practice women have not been effectively catered

for. Deliberate measures are therefore important to ensure that practices which tend to promote sex discrimination are eliminated. The fact that women are mainly engaged in informal employment means that they cannot benefit from National Social Security provisions as can people in formal employment. Ways of bringing women within Social Security Provisions even where they are not in formal employment should be sought given the number of women-headed households. The Pensions Act (Cap 189) contains discriminatory rules on who can be the beneficiary of a pension. A widow, for instance, cannot be the beneficiary of a pension if she does not remain unmarried and of good conduct. Widowers are not affected by this provision (Sections 15 A (b) and 17). Similarly a female child loses her entitlement to benefit from a pension once she gets married.

The Provident Fund Act (Cap 191) at section 16 provides that a married woman is not a qualified contributor to the fund. She can only make such contribution with the Minister's permission. The Income Tax Act (Cap 470) treats working men and women differently by virtue of their marital status. A married woman draws the same relief as a single person whereas a married man draws family relief which is more than the single relief.

3. Conclusion

If women are to fully participate in the economic and overall development of Kenya, it is important that impediments which prevent their realisation of their full potential are eliminated. A number of these arise from societal attitudes on the role and place of women. Others can be found in roles which place barriers to the advancement of women.

This therefore necessitates further research into those constraints and practices, in order

to pinpoint where the problem lies. One such area that cries for research is women and law. A variety of laws have been looked at above and requisite changes recommended therein. Law reform should ensure equal rights for men and women eliminating de jure and de facto discrimination where it exists. The dichotomies that characterize non-effectiveness of legislative changes should also be addressed such as the socio-economic inequalities determining women's knowledge of and access to the law; lack of the ability to exercise full legal rights without fear of recrimination or intimidation from male relatives and spouses and the community in general, and lack of or inadequate dissemination of information on women's rights and the available recourse to justice which hamper the achievement of expected results from such legislative changes.

A thorough understanding of the relationship between existing legal systems is also imperative if law reform is to be fruitful. Many women are still largely affected by customary and religious laws and any law that ignores customary and religious legal tenets will be observed more in breach than in observance.

The challenge for the Constitution Review Commission is to ensure that the potential of the country's women does not remain locked up due to legal constraints. The Constitution, as the supreme law of the land should proscribe discrimination on the basis of sex and provide a framework for remedying past injustices that have affected women's enjoyment of rights provided for in the law. It should provide a context conducive to the passing of laws that seek to afford women equal protection with men such as the Family Protection (Domestic Violence) and the Bill Equality Bill. It should also assure women of recourse to law in situations where sex is used as the basis for unfair treatment of women.

NATIONAL EXPERIENCES AND CHALLENGES ON WOMEN WITH DISABILITIES AND CONSTITUTION MAKING A PAPER PRESENTED

Hon. Josephine Sinyo, M.P.

1. Introduction

It should be made clear that disability is not inability to work or contribute to development. However, for a long time the issue of people with disabilities has been misunderstood and misinterpreted to mean inability. This trend is not only existing at the society and community levels but unfortunately, even in the policy and legal documents of many countries.

Disabled people are human beings with full rights like other citizens. It should be understood that people with disabilities are in fact people with special needs and different abilities.

Problems of persons with disabilities have been considered by the United Nations for many years including its International Year for disabled persons in 1981. Initial attention did not recognize differences between women with disabilities. But women with disabilities have known that many issues affect them differently and that discriminations occur against women and against persons with disabilities. Undoubtedly, women with disabilities suffer double discrimination.

Women with disabilities are faced with a number of challenges ranging from gender discrimination, sexual abuse, family and social isolation, neglect, to economic deprivation. In most instances, these discriminations leave them stigmatized and are hardly eligible for active role in the society unlike their male counterparts.

2. The Constitution and People with Disabilities.

The issue of labelling by society and the language of the constitutions is insensitive to the plight of the disabled women. There is a need for clear stipulation of their needs and rights in the constitution. The challenge is to enact a law that protects disabled women from abuse and discrimination practices.

As it is currently constituted, the Kenyan constitution presents a major bottle neck to the realization of people with disabilities human rights. Whereas the constitution dedicates a full chapter (chapter 5) on the bill of rights contained in or envisaged by the declaration spelling out the protection by law of the fundamental human rights and freedoms for the individuals including people with disabilities, little efforts has been made for especially the people with disabilities, to enjoy the rights contained in this particular section.

It can safely be said that the Kenyan laws are comprehensive on the provisions of the rights and liberties inter alia, the right to life, liberty, security of the persons, protection of the law, freedoms of association, assembly, conscience, protection of the privacy of the home and from deprivation of property without appropriate compensation, the right to personal liberty, the protection from torture or inhuman or degrading treatment and the protection of the freedom of movement. Nevertheless, there lacks a comprehensive enactment body whose principle objectives would be the centralization of the state policy as regards

the people with disabilities and the ultimate enlightenment and enforcement of the legislated human rights.

The law further states and defines the classes of people who should enjoy this right by race, tribe, place of origin and sex but fails to state or recognize the status of people with disabilities.

The task forces and other legislation in Kenya also, to a greater extent, discriminates against people with disabilities. The National Assembly and Presidential Election Act reads in part that "A person shall be qualified to be elected as a member of the National Assembly if, and shall not be qualified unless (c) he is able to speak and, unless incapacitated by blindness or other physical cause to read and speak Swahili and English well enough to take an active part in the proceedings of the National Assembly."

Although the Attorney general sought in as much as possible to shed light on this section, the section should be explicit and very clear in order to avoid any ambiguity.

3. Affirmative Action Strategies for ensuring Equitable access to Parliament for People with Disabilities

One of the great successes of the World Women Conference held in Beijing in 1995 was the way in which disability issues were woven throughout the twelve critical areas of concern and the clear manner in which recommendations were made to Governments and International Community. Among the recommendations that were made was the use of Affirmative Action as a strategy for the enhancement of women in leadership and decision making position. The implementation of Affirmative Action would go alongway to address the gaps and concerns of the disabled women. The enactment of the Constitutional Review

Amendment Act of 1998 in particular, recognized the participation of the disabled people in the review process. The Act provided for the nomination of a disabled woman through the Kenya Women Political caucus as a commissioner. The inclusion of the disabled persons was further included at both the District and the National Forums.

The foregoing illustrates that the participation of participation of people with disabilities in designing and contributing to the development of the society can, to a larger extent, be enhanced by the implementation of Affirmative Action policies at all levels.

In a bid to promote the participation of people with disabilities to positions of leadership and decision making and especially in parliament, the following Affirmative Action measures can be considered:

- The new constitutional order should provide for a social security scheme for the persons with disability, particularly women in terms of basic needs e.g. housing, cloting, health and food. This would ensure tha disabled women possess the necessary requirements for wielding economic power - an important requirement for accessing political power.
- There should be a constitutional provision for the election of disabled persons to Parliament through the quota system. This should entail the provision that at least one (1) MP per Province should be disabled. Half of the total number of disabled people elected through this way should be women with disabilities.
- Affrimitive Action on disabled women should be enforced through political parties during the nomination process and sharing of party office. This will

ensure that people with disabilities are taken on board.

- The constitution should create a Ministry for Gender and Women Affairs with a specific department dealing with disabled women and girls.
- There is need for accurate figures on women with disability as a planning strategy to ensure their welfare is catered for in Parliament and other institutions of governance. Women with disability who aspire to become MPs should not be subjected to a hostile electoral environment. They should be allowed to run as independent candidates representing their special constituencies i.e “women with disabilities”. The constitution should provide for opportunities for suitable employment of the disabled candidates.
- The constitution should provide for integrated systems of special and non-formal education. A library should be established for people with disabilities. MPs who are disabled and are women should be provided with social facilities

while in Parliament and out of Parliament to enable them contribute to parliament debates like their male counterparts.

- The constitution should provide for a barrier-free environment to enable women with disabilities have access to buildings, roads and other social amenities. The constitution should protect the civil rights of disabled women who participate in elections as voters or parliamentary candidates. For instance, disabled women should be entitled at their request, to be assisted by persons of their choice in voting in presidential, parliamentary and civic elections.
- There should be a provision for independent candidates. This would enable people with disabilities to vie for political office without being tied to the requirement of nomination by political parties. Very often political parties will discriminate against the nomination of people with disabilities.

NATIONAL EXPERIENCES ON WOMEN AND CONSTITUTION – MAKING-A PRESENTATION

**Hon. Zipporah J. Kittony, MBS, OGW, MP,
National Chair, Maendeleo Ya Wanawake Organisation**

1. History Of Women’s Movement In Kenya

The concept of women’s liberation as we understand it today came into vogue in the Independence struggle days when women, no longer able to sit back and watch their husbands, sons and brothers being mistreated by the colonial regime, discretely passed on vital intelligence and foodstuffs to the latter. Thereafter, women begun to be increasingly aware of their potential and gradually but steadily begun to venture out of the homestead into hitherto male-only territory.

By the time Kenya attained her independence in 1963, a significant pool of Kenyan women had formed themselves into organized functional pressure groups with the express object of creating awareness and planting gender equality in the national psyche.

2. Milestones & Lessons Learnt From The Women’s Struggle For Equality In Kenya

Considering that virtually all Kenyan communities were fiercely patriarchal in their structure, the thought of incorporating women into decision-making and resource sharing partnerships was met with a great deal of hostility, strong opposition and suspicion. Nevertheless, some remarkable milestones have since been accomplished, the major ones being;

1. Access of the girl child to conventional education
2. Access of women to credit and loan facilities

3. Ownership of property

4. Citizenship

One of the lessons in the women’s struggle for equality in Kenya is that its rationale was distorted—either deliberately or through ignorance to mean that it was no more than a women’s attempt to supplant and dislodge men and that it amounted to a rebellion against societal age-old norms and value systems. Gender equality crusaders were therefore viewed as rebels and renegades who were out to cause disaffection and discontent in the society.

Most such women were treated as social misfits from whom society must insulate itself. Indeed, many a women gender equality crusader most likely have had to be called a divorcee, prostitute, big-headed or frustrated for the mere fact of articulating the gender matters. Quite refreshingly, however, we are beginning to experience the softening of society in matters related to gender equality in particular and the women’s movement in general.

In retrospect, we can acknowledge that we may have been rather inept and naïve in our approach to gender issues; that our mood and language was a little too combative and provocative. Through pain, we now know that in order for us to succeed, we need to be persuasive, to employ negotiating power, tact and dexterity.

Above all, we as women must recognize that for us to push through our agenda, the active support of men must be enlisted. After all, it takes two to tango.

3 Challenges facing Women in Kenya

In my view, the biggest challenge women in Kenya today is psychological. I say this because while we have successfully fought for the scrapping of laws and policies which clearly discriminate against women, we have largely been sluggish and lethargic in taking advantage of new opportunities.

This state of affairs has given our detractors, the ammunition to dismiss us as mere busybodies who forever contend on playing second fiddle and only wait to be provided for by men. This defeatist predisposition emanates from attitudes such as low self-esteem and lack of confidence.

The second challenge centres on our ability to stork the fire of women's liberation through advocacy, lobbying, networking and the implementation of sustainable programmes. We also need to bring on board young career women to give impetus to the women's movement.

Our ability to dismantle socio-cultural and other factors that impede women's full participation in national affairs also constitutes a critical challenge.

4. Strategies for Incorporating Women's Needs in Decision Making Organs.

A great deal of energy, time and resources has been expended in advocacy work on matters of mainstreaming gender in all decision-making organs and fora. Such organs and fora could be in the political, social, economical or environmental spheres.

One can safely assume that majority of Kenyans today appreciate and indeed identify with the realization that no meaningful progress can be achieved unless and until the enormous contributions made

by women is harnessed and duly acknowledged.

The following specific strategies can be adopted:

- Enlisting women's opinions and concern at the grassroots level.
- Revitalization of adult literacy classes.
- Promotion of girl-child education.
- Ease of information on and access to credit.
- Encouraging women to venture into entrepreneurial engagement.
- Focused and sustained education campaigns through mass media and other sources.
- Ensuring adequate and informed women representation in important decision making organs.

5. Constitutional Provisions & Institutions that Promote and Protect Women's Needs

About the most critical function of any constitution lies in its ability to protect and guarantee the rights, privileges and obligations of both private citizens' certain primary or secondary groups in any nation.

The constitution must expressly and categorically provide for women's rights so that the aid rights are free from any ambiguity or vagueness.

Women's rights, which should need constitutional protection, encompass areas such as:

1. Reproductive health

2. Property ownership and right to inherit husbands' estates
3. Sexual abuse and harassment
4. Female genital mutilation
5. Marital issues; divorce, separation, incest, bigamy, wife inheritance

6. Legal representation
7. Citizenship etc.

I wish to conclude by challenging my fellow women to fully take advantage of the constitutional review process to ensure that all their interests, needs and aspirations are factored into the document so as to avoid being shortchanged in future.

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NATIONAL EXPERIENCE ON WOMEN AND CONSTITUTION MAKING

Dr. Julia Ojiambo

National Chairperson The Labour Party of Kenya

1. History Of The Kenya Women's Movement

The history of the Kenya women's movement dates well back to the 1950's. By the early 1960s, Kenyan women were already organized and in active groups such as Maendeleo ya Wanawake and the East Africa Women's League, hosting East African women conferences in Nairobi. These conferences brought together women from Uganda, Tanzania and Kenya, to strategize on the role the women of East African states would play after independence of their states from the colonial governance. Today the Kenyan women's movement is composed of a large variety of people with different backgrounds and political affiliations, including women and men professionals, (lawyers, doctors, journalists, university dons) and women and men from Government departments.

2. Milestones

Kenyan women participated in the country's freedom struggle as fighters and service providers from the 1950's to the early 1960's. The women who were not directly involved in the freedom struggles were busy attending to important issues of food security and security of their homes in the absence of their husbands. Other women who were literate trained in skills that would allow them to participate effectively in the management of the affairs of the state once the war had been won against the colonialists.

Representatives of Kenyan women embarked on nation building and formed themselves into women groups to strengthen their contributions to the nation. Women's self-

help activities have since expanded and become diversified to cover various economic activities ranging from agricultural and livestock concerns, to home improvement activities, such as roofing and purchase of furniture, utensils, handicrafts and micro enterprise activities.

Come the Lancaster Conference on the independence constitution, the women of Kenya were left out of the process! Even though Priscilla Abwao found her way to London, she never was allowed to be part of the process.

The 1970's were the years of the *women's liberation movement and the Mexico Conference*. It was an important lesson following decolonization. Kenyan women learnt important lessons politically, socially and economically and further wanted to consolidate their strengths in order to conquer illiteracy, poverty and diseases. The Kenya Women's Bureau was established in 1976. Kenyan women became aware that their reproductive and productive roles were closely linked to the political, economical, social, cultural, legal, educational and religious conditions that had over the years constrained their advancement. The majority of Kenyan women started to internalize that the factors which exacerbated their economic exploitation, marginalization and oppression had resulted from inequalities, injustices and exploitative conditions at the family, community and national level.

In the 1980's Kenyan women had developed confidence, and as they went to the 1980 Copenhagen World Women conference, they were able to campaign to bring the global women's movement to Kenya-the

1985 World Women's Conference that deliberated and adopted the Nairobi Forward Looking Strategies for the Advancement of Women of the world to the Year 2000 and beyond. In the conference strategy, the importance of women participation in the development process as both experts and beneficiaries was stressed.

The 1990's have been years of decline in women's movement activities, witnessing an all time economic decline. The GDP for Kenya declined from 4.3% to 0.2%, thus adversely interfering with the women's resolve to implement the PFA.

In spite of that about 500 Kenyan women determined to move on, went to Beijing to deliberate on their Platform of Action (PFA). On return they were greeted with a wild accusations that they had gone to support lesbianism. With a lot of difficulty to explain the gains made at the Beijing Conference, Kenya eventually adopted and domesticated the PFA, thus retaining all the recommendations made at the Beijing conference for the total advancement of women the 12 critical areas of: Poverty, Health, Economy, Media, Armed conflict, Violence against Women, Human rights, Education and Training, the Girl Child, the Environment, Power and Decision – making.

The Beijing Women's World Conference held in 1995 gave Kenyan women fresher challenges for their emancipation, as evidenced during 1997 when Charity Ngilu inspired by the determination of Kenyan women to democratize Kenya's political process effectively contested for the Presidency of Kenya.

3. Challenges Facing Women In Kenya

In the independence struggle, Kenya women fought alongside their men not as women but as Kenyans oppressed and colonized.

Together with the men of Kenya, women searched for their national self-determination. It is surprising to note that Kenyan women's participation in their national decision-making machineries is not a right to them. Most Kenyan women who merit to be in places of decision –making have been sidelined while selective tokenism and/or favouritism has been applied to promotion of women to positions of power in Kenya.

Women in Kenya are faced with several challenges. We mention a few:

- Low representation in decision-making foras
 - Parliament
 - Civil service senior positions
 - Local authorities
- Poor economic status as a result of:
 - Feminized poverty (lack of consistency in application of marriage and property inheritance laws deprive women of property and land ownership)
- Unfavourable legislations
 - Property inheritance laws need harmonisation
 - Absence of marriage laws
 - Discriminative migration laws
- Cultural factors
 - Insensitivity to women's rights
 - Strong patriarchal society
- Inadequacy of educational and training for the girl child.
 - High drop out of school rates

- Teenage pregnancies among the girl child
- High school fees rates
- Political parties insensitivity to women's equal representation in elective positions.
 - Need for independent electoral commission.
 - Unfavourable nomination rules
 - Violent elections campaigns.

4. Strategies For Incorporating Women's Needs In Decision Making Organs

- *Legal framework*

Since law has a major role to play in determining the extent to which women can effectively participate in public affairs, issues like:

- Citizenship
- Voting rights
- Rights to access property are very important and need to be addressed.
- *Affirmative Action*

A strategy that would ensure equitable and proportional representation of the voting

population without exclusion of any Kenyans would benefit women.

- *Civic Education*

Awareness of the right to participate is not enough unless it is accompanied by appreciation of the importance of power associated with effective participation.

- *Engendering political parties*

Most male political parties discriminate against women at party nominations.

5. Constitutional Provisions and Institutions that Promote and Protect Women's Needs

- The constitution of Kenya should create an independent Electoral Commission to ensure level playing ground for women at election time.
- The constitution should provide for Affirmative Action to promote equality of participation in national affairs by women, youth, disabled people and minority groups.
- The Constitution of Kenya should provide a provision to protect against exploitation of women by men under the pretext of traditional or cultural practices. The constitution should override culture and tradition where such practices are against the women.

WOMEN AND CONSTITUTION MAKING IN UGANDA

Hon. M. R. K. Matembe
Minister Of State For Ethics And Integrity, Uganda

1. Introduction

Central to the Democratisation process in Uganda was the Constitutional Review Exercise. The 1995 Uganda Constitution was made on the basis of popular participation of the people of Uganda and I have now been requested to share with you the experience of Uganda women in this process.

I am certainly delighted and privileged to be given this rare opportunity at this particular time when my brothers and sisters in Kenya are going through a similar exercise particularly so after the exciting events that took place in Arusha last week signifying our renewed spirit of sisterhood as East African countries.

I am glad to see my sister from South Africa because I remember I had a similar opportunity to share the Uganda women's experience with the women in South Africa at a time when South Africans were making their new Constitution. Since the product of our sharing in South Africa was the good gender-sensitive Constitution, it is my sincere hope that after this sharing, Kenya will likewise come out with a gender-sensitive and gender-responsive National Constitution.

In order to understand the need and the importance of women's participation in the national constitutional review, we need to address ourselves to the following issues:-

- That women are full human beings in their own right and not simply appendages of men.
- That women have potential, wisdom, talents and skills like their counterparts
- That women have a stake in their nations and so have a right to participate in the shaping of their nations; yet
- Many women have been denied the opportunity and their right to fully and effectively participate in public management of their nations by the following factors.
 - Ignorance
 - Legal discrimination and legal inadequacies
 - Negative customary and cultural practices
 - Religious misinterpretation and misapplication
 - Poverty (lack of economic independence).

For women therefore to be able to utilise their full potential, wisdom and talents for their own development and that of their nation they need instruments to cut these chains of bandage off them.

A national Constitution is such an instrument because it will help to deal with the chain of legal discrimination and legal

inadequacies. When Ugandan women realized this fact, they effectively participated in the Constitution making exercise and the result of their participation was a gender-sensitive and responsive National Constitution.

2. The Nature and Extent of Women's Participation

The participation of women in the exercise evolved in four phases. They participated through the Commission's Programme, through membership on the Commission, through the Programme of the Ministry and finally, through women NGO's Programmes. In this paper, I discuss the nature of that participation. According to the Report of the Uganda Constitutional Commission, women participated in all the three stages of the Commission's work effectively and enthusiastically. Indeed, women were the most united group that embraced the exercise with vigour, hope, confidence and trust.

According to Waliggo, women knew what they wanted, and had a unity of purpose, as shown by their proposals¹. Because of their long history of oppression, discrimination and exploitation, women looked at the constitution-making exercise as their 'salvation.' As observed in the report of the Commission.

"Almost all women who participated in the exercise had no doubts in their minds that the new constitution was a powerful weapon in their total emancipation. To the rural women, finally the opportunity had come for all their problems to be solved, so that they can live as full human beings".²

¹ Walliggo; "Did Women Get a Raw Deal" in Arise 1996.

² Uganda Constitutional Commission Report 1992: 148.

Owing to the enthusiastic involvement of women in the Constitutional Commission's work, the Draft Constitution contained comprehensive provisions for the promotion and protection of women's rights.³

2.1. Membership of the Commission

There were two qualified women feminist lawyers on the 21-member Commission.⁴ Although their appointment to the Commission was based on their own merit, it cannot be ruled out that it was intended to cater for gender balance and to ensure that women's concerns received a more sympathetic and sufficient attentions. The gross gender imbalance in the membership of the Commission was a big constraint to women's participation. Numbers aside, most of the male Commissioners were not gender-sensitive. Nevertheless, the calibre of the two women Commissioners helped them to make breakthroughs. Being knowledgeable and committed to the advancement of women in Uganda, they managed to prepare and present position papers on the socio-legal status of women to the Commission. This was used as a strategy to interest and influence their male colleagues on the gender question. Another strategy was to ensure attendance of all sessions by both, or at least one, of the female Commissioners⁶.

The two women Commissioners ensured that the Commission drew its programme in

³ See the Draft Constitution 1992.

⁴ The author had the privilege of being one of the only two women Commissioners. The other was Mrs. Mary Maitum who is a lawyer by training and activist who was at one time a Chairperson of FIDA (U). Currently she is a member of Electoral Commission.

⁵ Section 2 (2) of the Statute 5 of 1968 spells out the qualifications of the persons to be appointed on the Commission.

⁶ In fact one time the male Commissioners smuggled out a provision previously agreed upon when Mary was away and the author had just gone out to answer a telephone call.

such a way as to reach and involve as many women as possible. As a result of the women Commissioners' efforts, the educational programme of the Commission contained the topic "Women and the Constitution," highlighting the role, rights and status of women in nation building.⁷

2.2. The Commission's Educational Programme

Women leaders participated in all the district and sub-county seminars and workshops organised by the Commission. They were also able to organise separate meetings through the Secretary for Women's Affairs and invite Commissioners to educate them on the constitutional issues. The subject "women and the constitution" was always hotly debated and tended to evoke emotional and exciting contributions from the participants. Other subjects covered in these seminars included the following: -

1. What is a constitution and why does Uganda need one?
2. The historical context within which the new constitution was being made.
3. The major constitutional issues Uganda should focus on when making a new constitution.
4. The legal rights of women and other marginalised or disadvantaged groups.⁸

One major weakness of the Commission's Educational Programme was that the numbers of women attending the district and sub-county seminars was small compared to men.⁹ This was due to several factors. Firstly, the district seminars were directed at

people holding leadership positions within the districts. Unfortunately, there are very few women falling under this category.

Secondly, the sub-county seminars were held at venues involving a long distance walk for most residents. Besides poor transport, women's heavy workload prevented them from attending the sub-county seminars in big numbers. After noting the poor attendance of women at the first district seminars, the Commission was persuaded by its women members to extend an open invitation to women irrespective of whether they were leaders or not. In addition, the Commission organised seminars that targeted leading women NGOs/ and a national seminar on the theme "Women and the Constitution."¹⁰

2.3. The Ministry of Gender and Community Development

The Ministry was aware of the fact that due to usual lack of enthusiasm on political matters women might not participate in the Constitutional Reform Process.¹¹ Yet this was a great opportunity for women to influence the process so as to eliminate discrimination against them. Therefore, in collaboration with some of the leading women's non-governmental organizations, such as Action for Development (ACFODE), Uganda Women Lawyers Association (FIDA) and University Women Association (UWA) the Ministry designed and implemented a Constitutional Consultation Project. The Consultation Project, which complemented the Commission's work, conducted its programme through a national workshop, research, staff recruitment and seminars.

⁷ See Guidelines on Constitutional Issues March 1991.

⁸ Guidelines *ibid*.

⁹ The percentage of women attendance at these seminars ranged between 2-10%. Matembe, M. (1990) "Uganda women's participation in the Constitutional Reform Process". In Women, Law and Development in Africa.

¹⁰ See Commission's Report 1992: 223.

¹¹ Tereza Kakooza, "A Report on the Consultation Project 1989-1990", and a Pilot Survey on "Women and the Constitution 1990 by ACFODE.

2.4. Brain-Storming Workshop

Before it embarked on the educational programme, the Ministry organised a national workshop for women on the theme "Women and Constitutional Reform." The objective of the workshop was to enable the Ministry work out an educational programme based on the needs, interests and aspirations of the women of Uganda. Elderly, middle aged and young women activists chosen to represent the whole country attended the workshop. On the basis of the workshop recommendations, the Ministry produced a training manual on women and the new Constitution and worked out an educational programme.

2.5 Research on Women and the Constitution

The Ministry commissioned ACFODE to conduct a pilot survey to obtain baseline data to assist the Ministry to determine the best way of involving women, especially at the village-level, in the constitutional reform process. ACFODE believed that for women to participate effectively in the process, their understanding of their status and the national socio-economic and political affairs must first be determined. Only then would the Ministry design an appropriate educational programme to enable women understand the importance of their participation and its relevance to their equality.

The research was conducted in Mbarara District targeting rural women and in Kampala District, focusing on slum areas, women traders and women professionals.¹² The survey was also used to pre-test the training manual on women and the constitution which had been produced and published by the Ministry.

The Constitutional Commission also used the report of ACFODE's findings in designing its educational programme targeting women.

2.6. Recruitment of Co-ordinator and Trainer

The Ministry recruited a Project Co-ordinator and a Trainer both of whom worked under the Management Committee constituted by the Ministry, ACFODE, FIDA and UWA to implement the project.

2.7. Educational Programme

The project organized joint seminars for women members of Parliament and the Secretaries for Women's Affairs at the district level. Two persons from each district were trained and mandated to organise educational seminars for women in their districts. The project also runs regional seminars for women in each of the five regions of Uganda. The Ministry appointed a gender media contact group, sensitized it, and commissioned it to spread information on the constitutional reform countrywide. Some constitutional committees were formed at different levels in the districts and charged with the responsibility of stimulating debate on constitutional reform and collecting views to be incorporated in the Ministry memorandum. The aim of the Ministry and the organizations involved in all these programmes was to prepare and equip women with the necessary information and skills to be able to give their views on the new constitution.

Despite the tremendous efforts put in by the Ministry, its project also had some shortcomings.¹³ The project lacked sufficient funds to enable it to run smoothly. For instance, the training manual used for educational programmes was in the English

¹² ACFODE Ibid.

¹³ See Tereza Kakooza Ibid.

language and at times proved difficult for most of the women with little education to understand it and later explain it to others in the way which was expected of them. There were no funds to translate it into different local languages of Uganda.

Additionally, the two trainers for each district who were expected to sensitize women on the constitutional reform hardly carried out their assignment due to lack of facilitation. Besides, the training they received was not sufficient to enable them to explain the constitutional issues to their fellow women.

Due to insufficiency of funds, the national trainer was not able to follow up and monitor the trainees.¹⁴ Constitutional Committees were never formed at all levels in every district as was intended by the project.

All these constraints prevented the project from reaching as many women as it had intended to. This notwithstanding, the Memorandum prepared by the Ministry as a result of this project was put to very good use by the Commission as is reflected in the provisions contained in the Draft Constitution.¹⁵ Many times the women commissioners did not hesitate to draw the attention of the Commission to the Ministry's memorandum claiming it to be reflecting the majority view since women in Uganda form slightly more than 50% of the population and the memorandum was representing their voice.¹⁶

2.8. Women's Non-Governmental Organizations (NGOs)

When peace and order returned to most parts of Uganda in 1986, women reactivated their old organizations and many formed new ones. The proximity of Uganda to Kenya, the venue of the international conference to mark the women's decade in 1985, helped Ugandan women to follow the proceedings of the conference. This raised their awareness and interest in gender issues. Many Ugandan women attended the Nairobi Conference and were, for the first time, exposed to the different dimensions of women's emancipation for development as opposed to focusing on women's welfare and social issues which had hitherto dominated the women's movement in Uganda. Some of the NGOs were national, while the majority of them operated locally within their districts and sub-counties, including the community-based women's clubs. Most of them actively participated in the Constitution making process. The leading ones such as ACFODE, FIDA and NAWOU acted as facilitators and conducted seminars and workshops for other women local organizations and clubs.¹⁷

3. Women And The Constituent Assembly

3.1. Establishment of the Constituent Assembly (CA)

It was originally proposed that after the Commission submitted the Draft Constitution to Government, it would be discussed, adopted and promulgated by a Constituent Assembly composed of the members of the National Resistance Council (NRC, the interim Parliament) and the National Resistance Army (NRA, the national army).¹⁸ However, after the people had been educated about the Constitution-

¹⁴ Tereza Kakooza Ibid.

¹⁵ See the Draft Constitution 1992.

¹⁶ This strategy helped Mary and the Author, a lot, to secure the provisions for women's rights in the draft constitution.

¹⁷ Many of the women NGO's memoranda commended the efforts of ACFODE, FIDA and NAWOU for assisting them.

¹⁸ Legal Notice No. 1 of 1986 as amended by Statute No. 1 of 1989.

making exercise, they rejected this position on the ground that if the constitution was to be truly theirs, based on their views, they had to be the ones to decide on who would discuss their draft and promulgate the new constitution. So they recommended the establishment of a Constituent Assembly elected through universal adult suffrage. On the basis of this recommendation, the Constituent Assembly Statute establishing the Constituent Assembly was passed in 1993.¹⁹

Section 4 of the Statute stipulates the categories of people to constitute delegates to the CA as including those representing interest groups such as women, youth, and people with disability, workers and the army; in addition to delegates directly elected from each electoral area. This provision has been a subject of criticisms²⁰ on the grounds that it dilutes democracy by bringing a big number of indirectly elected delegates to the Constituent Assembly (totaling 72 out of 284, about 25% of all delegates). On the other hand, the beneficiaries of the provision appreciated it for enhancing democracy by enabling the marginalised groups of people to participate in the Constitution-making process. In the absence of a provision of this nature, the majority of Ugandans, who are women and the youth would have had no voice in determining how they should be governed. The provision was in furtherance of the commission's observation that Uganda needed a Constitution to which people have sufficient commitment to enable it to control effectively political action, governments and the governed. The participation of all classes of people in the debate, adoption, and promulgation of the Constitution was seen as a way of enhancing this commitment.

3.2. The Nature and Extent of Women's Participation in the Constituent Assembly

At this stage women knew that they faced the task of influencing the Constituent Assembly elections to their advantage. They tried to do so through voter education and by participating in elections.

3.3. Voter/Civic Education

The Ministry of Gender and Community Development designed and conducted voter/civic education specifically directed at women. In addition, some women NGOs such as the Uganda Gender Resource Centre supplemented the civic education programme of the Ministry by conducting voter/civic education in some districts.²¹ The aim of voter education was to explain to the women the importance of participating in the CA elections both as voters and as candidates. The provisions for promotion and protection of women's rights in the Draft Constitution were explained to the women. Appeals were made to women to offer themselves as candidates and also to vote for gender-sensitive men and women to defend those provisions.

3.4. Contesting Elections and Voting

After learning the importance of the election exercise, women participated in the CA elections both as voters and candidates in record numbers.²² These elections registered unprecedented numbers of 26 women competing with men in general elections. Also the number of women contesting on the affirmative action seats increased. Women voters were able to question candidate's stand on the gender issues and to vote for those they felt would represent them adequately. For the first time in the history

¹⁹ Statute No. 6 of 1993.

²⁰ Oloka-Onyango, Ibid.

²¹ The districts of Kabale, Mbarara and Iganga were covered by these NGOs.

²² CA Election Report 1994.

of Uganda, the issues of women equality formed part of the campaign agenda.

As a result of women's efforts in running voter education programmes, the CA elections of 1994 ushered in 51 delegates - nine women through the county constituency elections, thirty-nine district women representatives, one representative of the National Association of Trade Unions (NOTU) and two women nominated by the Uganda President in accordance with the provisions of the electoral law then in force.

3.5. The Work of the CA Women Delegates

The women of Uganda had, through hard work, secured specific provisions for the promotion and protection of their rights, in the Draft Constitution. It was therefore one of the biggest challenges to the CA women delegates to ensure that those provisions and even more, became entrenched in the new Constitution. The Ugandan electorate, the majority of whom are women, had entrusted those delegates with the responsibility to ensure that women's voices were not only heard but were able to influence the new constitution.²³

The women delegates, however, had two limitations. Firstly, many of them were new comers to the political scene and lacked the necessary experience to discharge this enormous task effectively. Secondly, they were few, being 51 out of 284 or 17% of the CA delegates. This meant that if they were to realize their mission of making a gender sensitive constitution, they had to lay proper strategies and be tactful in their work so as to penetrate and influence the heavily male-dominated Assembly without antagonizing the men on whose support they depended.

The first strategy was to make alliances with members of other "interest groups" in the CA namely, the representatives of the youth, people with disabilities, the workers and the representatives of the army. This boosted their numbers from 51 to 72, thus raising their numerical strength to about 25% of the Assembly. The 72 delegates constituted themselves into a caucus known as the "CA Women's Caucus."

The second strategy was to embark on skills-development training. To this end, the Ministry of Gender and Community Development, in conjunction with the Uganda Gender Resource Centre, organised regular workshops and seminars in which the Caucus members were educated on the procedures and rules that governed the CA, negotiation techniques, coalition-buildings, debating skills, utilization of media and the art of lobbying. Through the workshops, women acquainted themselves with salient provisions of the Draft Constitution, their implications and gender relevance in constitution making.

The Ministry established a Committee to monitor the proceedings in CA. In addition, the National Council of Women established a "Gender Information Office" through which the Caucus co-ordinated its activities. The Caucus designed a lobbying device that was called "Gender Dialogue". 'Gender-Dialogue' was a meeting at which the Caucus would invite some delegates, in particular the most eloquent and articulate males, to lobby and interest them in assisting the Caucus to pass the provisions and amendments affecting the interests of the Caucus members. This process made it possible for the caucus to be an effective minority and succeed in shaping the CA agenda. The caucus used every possible tactic that would enable it to win on any provision. For example, it was agreed that if any caucus member differed with other members on a particular provision, that

²³ The enthusiasm with which women participated in the election, campaigning for an electing women delegates demonstrated that trust.

member should keep quiet instead of opposing the provision on the floor, thereby diluting Caucus unity. The specific talents of individual members of the Caucus were invoked when need arose. If an issue was sensitive and needed the articulation of soft-spoken people, the aggressive members of the caucus would refrain from contributing, in case they antagonized their would be allies. Some women delegates used their time for general debate on the Draft Constitution to sensitize the delegates on gender issues.²⁴

Women used every opportunity and negotiation skill available to them to articulate their primary needs. When most of the women delegates made a protest and diplomatic "walk out" from the CA at the very initial stage, they gave a clear warning that they meant business and demanded seriousness. As Waliggo observed,

"Their 'No' was to be taken as 'No', their 'Yes' as 'Yes'. They were not going to tolerate a few men who thought women's issues were issues of fun. That day they gave a clear lesson not only to the CA and the mass media but to the nation as a whole."²⁵

The New Vision Newspaper of 13 July 1997 under the heading "Matembe leads a walk out" reported that all the women CA delegates except five, walked out of the CA in protest against use of derogatory, sexist and offensive language by one of the male delegates. When women protested the use of the language, the Chairman of the Assembly was reluctant to rule the delegate out of order. When he finally yielded to the overwhelming pressure from the women and ruled the delegate out of order, the delegate reluctantly withdrew the offensive words,

²⁴ See the contributions of Hope Mwesigye and Miria R. K. Matembe on General Debate on the Draft Constitution in CA official Proceeding Report.

²⁵ Waliggo Ibid.

but substituted them with more offensive ones. When the women could not take it any more, they diplomatically walked out in protest. Responses from some of the male delegates that made comments on the matter testify to the support women enjoyed in the CA. In the words of Hon. Karuhanga.²⁶

"Mr. Chairman, the issue of sexist language in this hall which tends to demean other members of the other sex should be taken very seriously by the members. When I was elected, I was elected among others by women and my job here is to make sure that their dignity is preserved in this Assembly. Any words which imply their demeanor or continued situation as they are, should be resisted and should be avoided... I really would like to appeal to members in future to use a language that does not offend members of the opposite sex."

Another negotiation skill employed by women delegates was threatening to de-campaign the male delegates in the next general elections if they did not support the provisions on women's rights.

So women did not simply let their voices be heard, they cried out loud for everyone to hear and they refused to be ignored by anyone. It is evident from the contributions to the debate as reported in the CA proceedings (The Hansard) that women contributed intelligibly to every aspect of the new constitution. George Kanyeihamba observes that women played such a vital role in the CA, to the extent that by the end, men were frightened to oppose amendments moved by women.²⁷ While the debate in the

²⁶ Hon. Karuhanga, currently a member of Parliament from Nyabushozi County was a very strong supporter and ally of women in the CA who among other male delegates helped the Caucus members to pass their amendments through.

²⁷ Personal interview with Prof. George Kanyeihamba, a human rights activist, who has held

CA was going on, ACFODE through a programme known as "The Link" kept the public, particularly women alert and abreast of the proceedings. The programme stimulated and sustained public interest in the constitution-making exercise.²⁸ It is, however, not easy to tell its impact on the CA itself.

Thus, the product of the Uganda women's concerted efforts in CA was the gender sensitive national constitution that is also responsive to the interests of the children, the youth, the workers, ethnic and religious minorities.

However, this should not create an impression that all was well in CA. Some issues were resisted while others attracted heated and emotional debate. For example, although the issue of gender neutral language was eventually accepted, it was at the beginning resented as could be noted from the proceedings of the CA. When the current author raised the argument in favour of a gender neutral language she was many times rudely interrupted with points of 'order' and 'information' from the male colleagues while female delegates kept numb except Hon. Rhoda Kalema who unfortunately opposed the argument.²⁹

Another issue that attracted heated debate and was eventually lost was the proposal by Hon. Hope Luberenga, that upon disillusion of marriage, each spouse should have an equitable share in the property jointly acquired during marriage. The majority of male delegates opposed this proposal. Whereas all the proposals on women's rights

were decided upon by consensus, this particular one called for the division in the house and the women lost it. Sadly enough, some female delegates voted against it. This particular incident points to a very important factor in the struggle for realization of women's rights. Whereas men are willing to give abstract rights to women, they do not seem ready to give women concrete rights. This should signal a warning that all may not go well when it comes to enactment of specific laws such as the laws of domestic relations that translate the general principles of the constitution into real rights.

However, one big lesson that can be learnt from the CA exercise is that with proper plans and strategies, a minority in numbers cannot be a hindrance to well and clearly defined goals. Ugandan women demonstrated that gender-sensitive constitutional guarantees are not simply given; they are a product of struggle that must continue since the task ahead appears more challenging.

4. The Legal Consequences of Women's Participation

4.1. Overview

The participatory approach in making a national constitution with the involvement of women is not unique to Uganda. Other African countries that have recently undergone democratisation have used a similar approach.³⁰ The consequences of women's participation in these processes have been the improvement in their legal status as reflected in the respective constitutions.

As already indicated, through the effective participation of women in the constitution-making process, the 1995 Ugandan Constitution guarantees rights of women

several ministerial appointments in Uganda including one of Justice and Attorney-General. He was a member of Parliament 1986-96 and a delegate to the CA and supported women's issues in the Assembly. He is currently a judge of the Supreme Court.

²⁸ The Link Evaluation Programme Report 1995.

²⁹ See C. A. Official Report contents 17 June 1994: 223.

³⁰ South Africa, Eritrea, Ethiopia and Zambia.

through specific provisions. I now wish to make an assessment of the implications of the said provisions on the legal status of women and pose the challenges that women have to face to realize these rights.

4.2. The Provisions Dealing with Women's Rights and their Legal Implications

All the 19 chapters of the 1995 Ugandan Constitution are relevant to women and men, but the provisions under discussion in this paper are the ones specifically for women. These are found in the general section on the National Objectives and Directive Principles of State Policy, Chapter Three on Citizenship, Chapter Four on the protection and promotion of fundamental rights and other human rights and freedoms, Chapter Six on the Legislature, and Chapter Eleven on Local Government.

(a) General (National Objectives and Directive Principles of State Policy)

These are the directive principles that are supposed to guide all state organs in the implementation of the Constitution. In designing its policies and programmes, Government must be guided by these principles. Principle four (4) states;

"The State shall ensure gender balance and fair representation of marginalised groups on all constitutional and other bodies."

The fifteenth (15) principle, states;

"The State shall recognize the significant role that women play in society."

The implication of these provisions read together is that having recognized the significant role played by women in Uganda, the government shall be governed by the principle of gender balance in

appointing people to key positions of decision-making. This will therefore influence decisions, which affect women's lives. Very few women in Uganda have hitherto been appointed to such key positions.

This principle is already being invoked because out of seven members on the Electoral Commission, three are women, and one of them is the Vice-Chairperson. The seven-person Human Rights Commission has three women and its Chairperson is a woman. The Vice-Chairperson to the Judicial Service Commission is also a woman but unfortunately she is the only one. This is not to forget that the Vice President, the Deputy Speaker and the Deputy Chief Justice are women.

The numbers of women are clearly fewer than men, a fact that defeats the principle of gender balance. As indicated earlier, the seven-member Judicial Service Commission has one woman, while Uganda's 66-member cabinet has only 16 women. This cannot pass for the principle of gender balance. Besides, the provision does not guarantee the qualitative nature of the women appointed to these positions. In most cases, governments, the majority of whom are men prefer those "good girls" who would not give the men trouble.

Nevertheless, by virtue of the first directive principle, the President is required, once a year to report to Parliament and the nation on all the steps taken by his/her government to ensure the realization of these state objectives and policies. This provision is very important for women because upon it, they can hold the government accountable for the realization of their rights. If they find the government wanting in following the principles as enshrined, to promote and protect women's rights, they could, through

their powerful weapon of numbers, vote that government out.

(b) *Chapter Three (Citizenship)*

According to Article 10, the following persons shall be citizens of Uganda by birth:

- A. "Every person born in Uganda, one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February, 1926 and set out in the Third Schedule to this Constitution; and
- B. Every person born in or outside Uganda one of whose parents or grandparents was at the time of birth of that person a citizen of Uganda by birth."

The implication of this provision is to enable a Ugandan woman who is married to a non-Uganda to pass her citizenship to him by registration. Previously, this right was enjoyed by men only. Denial of women to pass their citizenship either to their children or their husbands had caused a lot of problems to women and children under the previous law. Some women, after marrying foreigners and having children with them would either divorce or lose their husbands. When they came back to Uganda, their children could not be treated as Ugandans until they became of majority age to get citizenship of choice on application. If such a woman and her husband wanted to live in Uganda permanently they could not be Ugandans. These problems are now solved.

(c) *Chapter Four (Protection and Promotion of Fundamental and other Human Rights and Freedoms)*

Article 21 states:

"(I) all persons are equal before and under the law in all spheres of political,

economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."

These provisions expressly establish the principle of equality between male and female and prohibits any gender-based discrimination in all aspects of life. In this way the Constitution conforms to the requirements of the UN Convention on the elimination of All Forms of Discrimination Against Women (CEDAW) (1979) which requires government, inter-governmental bodies, private institutions and all citizens to take the necessary steps and actions to ensure equality for women.³¹

There are two aspects to equality; notably in terms of majority age and equal opportunities. This provision means that women should be treated as adults. Women in Uganda have been treated as minors incapable of managing their affairs independently, by both law and custom. For instance according to immigration regulations, women needed the consent of their husbands to get a passport or to endorse their children in their passports. They also required their husband's consent to use family planning methods.

The provision also means that women should be given equal opportunities with men in terms of access to economic resources like land and other property, access to employment on the principle of equal pay for equal work and also in terms of political participation. Women of Uganda have hitherto been denied all these opportunities by both law and custom as a result of which, they have been suffering injustice and inequalities.

Article 24, states as follows:

³¹ Uganda Ratified the Convention in 1985.

"No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment."

With the principle of equality between men and women clearly established, this specific article should be able to protect women from domestic violence, which has been endangering their lives in many ways. Parliament can, on the basis of this provision, make laws on violence against women. Currently there are no such laws on our statute books. This opens doors for law enforcement agencies, local councils, police and even courts and the public to treat violence against women as a crime and not a private matter, as has been the case.

Article 32 (1) of the Constitution establishes the principle of affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason and article 32 (2) provides for the establishment of an equal opportunities commission to ensure that the principle of affirmative action is given full effect. For the purposes of emphasis, 33 (5) provides as follows: -

"Without prejudice to article 32 of this Constitution women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom."

What these provisions mean is that not only are women to be given equal treatment as men, but because they have been denied this equality for so long, women are to enjoy affirmative action to hasten the elimination of inequalities. The establishment of affirmative action is extremely important. It will ensure that the principle benefits the most deserving rather than acting as a blanket affirmative action which presumes that women are a homogeneous category.

Article 31 states:

1. Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution”.
2. Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children.
3. Marriage shall be entered into with the free consent of the man and woman intending to marry”.

Article 31 has several implications for women: first, it is aimed at outlawing child marriages that have been negatively affecting many girls in Uganda up to now. Secondly, it outlaws forced marriages to which girls have been and continue to be subjected by their parents in search of bride price! The provision establishes marriage as a partnership in which both parties should have mutual respect for each other as equal partners.

The other implication of this provision is that it outlaws polygamous marriages that have been permitted by the customary marriages Registration Decree (1975). Women would have equal rights in making decision affecting their family, be it over property or children. Hitherto, children have been customarily regarded as belonging to men under patriarchal arrangements. Also upon divorce, the welfare principle in custody cases looks at means of the parents. In most cases men end up with custody of children because they are better off financially. The new constitutional provisions change these arrangements.

For the first time in Uganda, the rights of widows have been constitutionally recognized under this provision. Widows in Uganda have been suffering. Immediately the husband dies the relatives of the

deceased grab the property from the widow leaving her and the orphans impoverished. The Succession Act (Amendment) Decree 1972 that was enacted to streamline the inheritance law in Uganda has in most cases not been useful to widows. For example of the cases handled in KABNETO Legal Aid Clinic under the supervision of Uganda Gender Resource Centre in 1996, 85% were of inheritance and succession.³² Article 33 enlists six fundamental principles for the protection and promotion of women's equality and empowerment.

1. "Women shall be accorded full and equal dignity of the person with men.
2. The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement.
3. The state shall protect women and their rights, taking into account their unique status and natural maternal functions in society.
4. Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
5. Without prejudice to article 32 of this Constitution women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.
6. Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution".

These provisions are clear and self-explanatory. They mean that the reproductive role of women will be valued as a contribution to the development process, which has not been the case before. The state is required to provide women with adequate skills and facilities to enable them play this role more effectively. In many cases women have been penalized for their maternal role. For instance, they have been denied promotions because they are pregnant, or dismissed from jobs because they absent themselves to take care of sick children. Some are denied maternity leave as if it is a crime to be a mother. This provision is meant to eliminate those problems. Things like establishment of training centers, day care centers, and promotion of appropriate technology to ease the women's workload, are all implications of this article.

Customary and cultural practices have been, and continue to be the main offenders of women's rights. They have been responsible for undermining women's status and causing them great harm. For the first time the State has recognized this problem and has declared customs such as bride price, widow inheritance and female circumcision illegal as they devalue women. The State should, through this provision take other appropriate measures to fight these harmful customs.

This progressive Article 33, however, faces many problems of implementation. In view of the poor state of the economy, it will certainly be difficult to facilitate women as required by the provisions of this article. Also customs die hard and it is quite difficult to eliminate customary practices by legislation. It will require intensive education of society coupled with economic empowerment of women. Thus Marsha Freeman (1990) observes:

"Practical application of legal rights is problematic because women must assert themselves in face of traditional male

³² Uganda Gender Resource Centre Report 1997.

attitudes that deny women's full adulthood"³³

(d) *Chapter Six (The Legislature)*

Article 78 (1) on composition of Parliament provides inter-alia as follows:-

"Parliament shall consist of:

- a) Members directly elected to represent constituencies;
- b) One woman representative for every district."

The implications of this provision is to give more opportunity for women to be elected to Parliament. Women can contest elections on the basis of equality with men under (a) and can also contest alone under (b) by way of affirmative action. Because of the cultural bias against women, coupled with low levels of education and lack of economic independence, women in Uganda have not been effectively participating in politics as candidates. But through this affirmative action 50 women were elected to Parliament in 1996 and will hopefully influence the laws to their advantage.

(e) *Chapter Eleven (Local Government)*

Article 180 (b), in the same spirit provides that,

"One third of the membership of each local government council shall be reserved for women."

With decentralization now taking place in Uganda, this provision is very useful, as it will enable women, through the electoral process to enter fora in which decisions affecting their lives are made. It is hoped

that women will be able to influence decisions on matters like budgetary allocations, establishment of health centres, educational institutions and such other important matters of interest and concern to women, policy and planning. The position of Secretary for Women's Affairs on local councils has been too small a voice to achieve much. The voice of 30% women will be louder and more beneficial.

This article too faces a big challenge. In view of low levels of education among women it will be difficult to realize a qualitative 30% of women at higher levels such as district and sub-county councils in some parts of the country.

Lastly, the Constitution adopted a gender-inclusive language. Language plays a big role in the denial of women's rights. The words 'Man' and 'He' are always used to refer to men and women, but in practice they do not. The 1995 Ugandan Constitution has substituted the word "Chairperson" for the traditional word "Chairman" and uses the words "he/she".

One can say that on the whole, the 1995 Constitution marks a watershed as far as legal status of women in Uganda is concerned.

5. Challenges

Now that the Constitution is in place, the challenge to translate the guarantees into women's lives is even greater. Firstly, the Constitution is written in the English language and to that extent is not yet accessible to the majority of Ugandans who do not speak English. Knowledge of the provisions of the Constitution by all Ugandans is important if women's rights are to be recognized and respected.

Secondly, it is clear that many laws on our statute books, plus many customs and traditional practices, are now not in

³³ Marsha Freeman (1990) "Measuring Equality: A Comparative perspective on Women's Legal CA and Constitutional Rights in Berkeley Women's Law Journal 110.

conformity with the Constitution and the laws must be either repealed or amended.

Until this is done, women cannot proceed, on the basis of constitutional provisions alone, to enforce their rights. Furthermore, many of the current administrative structures and policies do not reflect the principle of affirmative action; they are neither responsive to women's interests nor conducive to their participation. There is urgent need for courts and tribunals to translate the current laws in light of the constitutional provisions.

Thirdly, legal reform per se is not enough to change the status of women. Repressive and oppressive customs and traditions are deeply rooted in the minds of Ugandans.

It is sad to note that five years of the implementation of the new Constitution has not yet seen the enactment of the law of domestic relations. Even the new land law failed to cater for the land co-ownership clause. However, these challenges notwithstanding, Uganda women are on the right track and the struggle continues.

I wish my sisters in Kenya, the best as they participate in this Constitutional Review Exercise.

THE EVOLUTION OF A GENDERED PERSPECTIVE IN THE SOUTH AFRICAN LIBERATION STRUGGLE

Hon. Baleka Mbete

Deputy Speaker, The National Assembly, South Africa

1. Introduction

I wish to acknowledge a group of women we hardly ever talk about today. Those who experienced the basest of the character of subjugation by European settlers especially in the Cape Peninsula. It is recorded that between 1652 and 1808 more than 15 000 slave women were imported from East Africa, Madagascar, the Indonesian Archipelago and India. Black women were often sexually exploited in addition to the hard physical labour they endured. They suckled and brought up white children; many were taken to Europe to continue this job. When the slave trade was ended in 1808, they would be impregnated by white slave masters to breed more slaves.

There are stories of women who silently devised ways of surviving for themselves and their children. Some openly defied and even cursed their oppressors. There are stories like that of a woman called Steyntje of the Cape, who persevered through more than 10 years of humiliating court battles till she won her freedom and that of her children.

Sometimes slave men would connive with slave masters and other passing male visitors to sexually exploit the women. We acknowledge their pain, their silent and not so silent battles, whatever survival strategies they devised, we pay tribute to them for their bravery, their love and their dignity.

An understanding of the development of a perspective that factors women's

experiences, their issues, their values and social contribution is important. It is important in terms of the historical record of

who we are and where we have come from. It is also crucial for understanding our society and therefore better enabling ourselves to harness all our human resources as we continue to struggle for a transformed society.

This paper takes a glimpse at the 19th century on the way to the 20th century which became the focus and the stage on which black, but especially African, women proved their potential. The paper looks at the gradual activation and politicisation of women and how that influenced the political scene.

2. Background

The events of the 19th century set the stage for resistance movements in the colonised communities. The abolition of slavery in 1834 traumatised the settler community who were so dependant on slaves. The Great Trek followed in 1838 with the Afrikaner settler community spreading into the land further north of the Cape Peninsula.

The discovery of diamonds in Kimberley and gold in the Witwatersrand in 1867 and 1886 respectively led to an increased need for cheap black labour. It also was the beginning of industrialisation and urbanisation around the sites of these discoveries. But black labour was also

needed on the white farms scattered around today's South Africa. The answer to this was to combine race and sex in a strategy of strict control of movement by blacks. Black men were required to carry passes that enabled them to be employed by the whites. Black women had to remain the backbone of the subsistence economies in the reserves. This ensured that the industrial economy exploited the cheap black labour to the utmost without taking responsibility for black families. The women had to look after the children, the old and the sick in a situation where their land had been steadily shrinking and getting more and more barren. This way the men could always go back to the reserves if they were no longer of use to their employers.

By the end of the 19th century there was political activity in the provinces among the oppressed.

3. The Beginning of the 20th Century

African leaders i.e. traditional chiefs, educated men, religious leaders mooted the formation of the South African Native National Congress (SANNC) after deputations to England had failed to produce results. Although women were active on the ground, among issues they saw as a threat to their families, in both white settler and indigenous cultures - politics was male dominated.

At this time African women had already entered the wage labour terrain and were confronting the authorities within that context in addition to issues like the many passes and permits they were required to carry stand permits, residential passes, visitors' passes, seeking work passes, employment registration certificates, permits to reside on employers' premises, work on own behalf certificates, domestic service books, washer women's permits and

entertainment permits each of these cost money which the women could not afford.

Women attended the inaugural conference of the SANNC. The conference passed a resolution urging the repeal of all laws which compelled African women to carry passes.

This was not out of the benevolence of the male delegates. It was because women's determined and fearless actions in response to the intolerable conditions they faced, had shown that they had to be reckoned with and their issues had to be taken seriously.

The draft constitution tabled to the first conference only made provision for wives of leaders and other distinguished ladies to be auxiliary members with no votes. It did however provide for "exceptional" women and "Men and Women who shall have rendered eminent service to the native races of South Africa". These could pay more for their two votes.

In 1919 the SANNC adopted a constitution which was an improvement on the earlier draft. It still referred to auxiliary members but no longer mentioned "wives of members . . . and other distinguished African ladies". It referred to "women". It also acknowledged women's rights and ability to organise politically. In fact, the SANNC leadership had encouraged the formation of the Bantu Women's League in 1918.

By this time the situation had been worsened by the promulgation of the 1913 Land Act which created the boundaries of the reserves which were squeezed into 13% of the surface of South Africa, life there was more unbearable. This led to more women seeking jobs on white farms and in the towns. This in turn dynamised their understanding of their situation in the context of broader issues of the society. This did not lead to them challenging the superiority of men - both black and white " at all. It led to their

frustration being channelled into constant confrontations with the system.

4. The Contribution Of The Communist Party of South Africa Towards The Evolving Women's Movement

From its beginning the Communist Party of South Africa (CPSA) endorsed the slogan "no discrimination on the grounds of race or sex". Of course, coming from the same society, the everyday men and women relations in the CPSA were the same as in other organisations. Conventional positions on family roles are never easy to shed for both men and women.

In the late 20s women like Ray Alexander and Josie Palmer became prominent in championing a more political role for women activists. By 1931 the CPSA had formed a women's department. It focussed its attention on the plight of the most oppressed black women. Through the 1930's the overriding concern of the CPSA in organising women, whether against passes, rising food costs or discriminatory legislation, was to mobilise them for a common struggle with men against the white supremacist state. The CPSA encouraged women of different coloured groups to work together. "... only by a united front can you get rid of all the exploitation which you suffer under capitalism and where you, as women, are the greatest sufferers".

5. Organisational Challenges

Given the conditions of the early days, when very few black women were educated and had skills, those few who were lucky to be so endowed, had to overstretch themselves for the good of all. Charlotte Maxeke played such a role from as early as 1902. Her leadership of the Bantu Women's League often meant that women did not have to ask male leaders to speak to the

authorities on their behalf. Charlotte had a national reputation and led women's deputations to government Ministers herself. This was inspiring and encouraging to women and - although somewhat of an irritant to the male leadership, helped develop an acceptance and recognition that women (given the opportunity) could be as capable as men. Charlotte's appearances on the platforms of the Industrial and Commercial Workers' Union (ICU) was encouraging to African women workers. Issues of women farm workers' conditions were raised by women.

The ANC went through an organisational bad patch in the 30's. By the end of the decade the debates relating to its reorganisation and strengthening, integrated the debates about revival of the "women's section". Branches of the ANC Women's Section had coexisted in the provinces with the Bantu Women's League in earlier days.

In 1943 the ANC resolved to form the Women's League, but the debate on its relationship to the ANC continued till 1945 when the Executive resolved "that the women of this Congress be allowed to organise autonomous branches wherever they do desire within the ANC". It would seem though that the 40s were not to be the most active for the ANC Women's League in the political terrain. Under the leadership of Mrs Madie-Hall Xuma who was known not be politically motivated, it leaned towards fund raising and catering.

In 1949 Ida Mtwana - a Youth Leaguer and spirited orator activist was elected president of the ANC Women's League. Provincial structures, bringing it closer to the women on the ground, were formed. The ANC Women's League structures were ready to take the new Nationalist Party on in the 50's.

6. The 50s: Nationalist Party Rule

The Nationalist Party policy of apartheid tightened the system of influx control and extended passes to African women. It rigidly segregated the four "races" in terms of residential areas and other areas of life. Above all, it was obsessed with pushing African women back to the reserves and minimising the permanent African community which had developed in the urban areas. The Migrant Labour System was based on the African Women's continued stay in the so-called homelands to maintain and reproduce the cheap labour needed by white South Africa.

The 50's proved very important in the history of the national liberation struggle broadly, but particularly for women and the women's movement in general. The CPSA was banned in 1950. The women of the CPSA pursued their earlier idea of working towards a national women's organisation across colour lines.

A white women's organisation was born protesting against the government's manipulation of the Constitution to remove the few black people of the Cape who had the vote. The Black Sash, established in 1955, grew and played a positive role in helping Black communities from the on.

Whereas previously black women had confined their activities to local situations, a national perspective developed in response to the NP Government. Women's militancy and fearlessness in the face of repression earned them respect and further recognition of the role of women in the broad liberation struggle. The Federation of South African Women was launched in 1954 and led many demonstrations and campaigns throughout the 50's. The most spectacular was the 1956 one to the Union Buildings.

The formation of the FSAW led to an interesting debate in the Congress alliance about the relationship of the women's organisations with the "mother" body. The

Cape Town FSAW leadership were for the idea of individuals joining the federation in order to protect it from collapse if organisations like the ANC and the Leagues were banned. The Transvaal ANC, Women's League and FSAW feared that if individuals joined, this would compete with the Women's League and threaten the ANC's own membership standing and funding. Indeed although the PSAW was not banned, it collapsed when the affiliate organisations were banned in 1960.

7. The Trade Union Movement

It has become widely acknowledged that black women's entry into wage labour and their supreme efforts to improve the quality of their lives and those of their family has characterized the spirit with which they participated in the trade union movement. It was through the involvement of these black women that certain trade unions in the 1930s, 1940s and 1950s came to play a very important role in fostering and directing the course of the women's movement in South Africa. The increasing numbers of women entering the productive workforce and becoming part of organized labour facilitated the contextualisation of women's oppression within the struggle for working class rights. Wage labour also had the effect of raising women's class consciousness. It was not until women entered wage labour that they started to experience directly their class exploitation in addition to their sexual oppression.

The unions embraced large numbers of working-class women who had already been active in grassroots women's and other organizations. The unions provided a new and different forum in which women could reflect more critically upon their experiences as workers within society. For most of the women workers, usually poorly educated and without political rights, the trade unions represented one area where women could

engage with ideas and issues that went beyond their restricted experience within the home or factory.

It was in the trade union movement that many women confronted and challenged for the first time the dominant discourse of supremacy and exclusivity as it relates to race, class and gender. It has been suggested that for black working-class women, the realization that conditions in the home and in their lives must change, flowed more strongly from their political involvement in trade unions and discussions of political power and democracy.

It was therefore the women themselves who forced onto the agenda of trade unions and popular organizations, the need to change patriarchal attitudes, to share the double shift carried by working women and to achieve higher wages and better working conditions for them. Thus, the trade union movement helped to inspire working-class women in different arenas, but ultimately its main contribution was that the unions provided the training ground for women political leaders.

Many women leaders felt and expressed the need to address the oppression of women as part of the struggle for national liberation. It was for this reason that women activists questioned the lack of women in leadership positions in the United Democratic Front (UDF). They questioned ways in which women's issues could be addressed within the UDFs affiliate organisations and consciously raised the special problems faced by women workers in the factory and in their relationships with men. Women in trade unions and community organizations were beginning to address the question of women's oppression as integral to the struggle for national liberation.

They argued vociferously and relentlessly that the degree to which women's demands

were integrated into programmes and accepted by popular democratic organizations struggling for national liberation, and the strength of women's organizations involved in the change process would be critical to the depth and success of the transformation of the South African society.

During the 1930s, women trade unionists were leading the opposition towards growing Afrikaner nationalism and apartheid in the trade unions. Their essential position was that racial divisions should not segregate unions. These women trade unionists sought free compulsory education for all races, an end to job reservations by race, and training for people of all races.

It was during the 1940s that trade unionism spread rapidly among black workers and provided a critical ideological influence on black political thinking. The potential for women to cooperate across colour lines as workers, with a perceived common interest was great in this. Furthermore, there was the prevalent notion of working-class solidarity regardless of race or sex and that women, together with men, had a common struggle to wage against a common exploitation.

However, working conditions for women were reportedly uniformly dismal. At this stage, the clothing industry was characterized by small, cramped workshops, inefficiently run and with a small turnover. These businesses offered little security for their employees, women worked long hours for minimal pay, and there were no maternity benefits for women. In fact, having a baby often meant the loss of a job. These conditions fueled the spread of trade unionist consciousness among women in South Africa and explains the high degree of trade union militancy that many women have shown. Individuals like Ms. Ray Alexander were prompting trade unionists to pay greater attention to women and

campaigned for pregnancy leave and maternity benefits. However, the position of women remained a low priority on trade union agendas.

As the numbers of women in the industry grew, so women became much more prominent. The Guardian newspaper's coverage of Trades and Labour Council annual conferences during the 1940s indicates the number of women working as trade union organizers was steadily increasing. Women like Ms. Ray Alexander, Ms. Bettie du Tuit and the Cornelius sisters were joined by Ms. Hilda Watts, Ms. Pauline Podbrey and Ms. Joey Fourie. These women were particularly active in the garment and food industries, the major growth points of black female employment.

Women workers also dominated in the food canning industry and soon came to play a pre-eminent role in the management of the union. The Food and Canning Workers Union (FCWU) was established by Ray Alexander in 1941 with unqualified support from Bettie du Toit. This union positioned itself as an active, well-supported body, defining the interests of the workers as a priority. Ray Alexander was elected its first general secretary and she focused her boundless energies on fighting for workers' rights and exposed the extremely poor conditions under which they were forced to work.

By 1951, economic opportunities available to women had become more varied. In spite of this, women's reproductive role was still paramount as evidenced by the continuing sex-stereotyping of jobs. Women workers were still directed primarily into those areas of manufacturing that corresponded broadly to traditional female domestic occupations. The clothing and textiles, and to a lesser degree, food industries dominated.

In the Western Cape, the FCWU was an active politicising agent among black women workers and it identified with the tradition of radical, non-racial workers' organizations. This led in 1955 to the establishment of SACTU and under the influence of Ray Alexander, forged close links with women's organizations and other groups within the national liberation movement. Several women in the Cape—Ms. Liz Abrahams, Ms. Elizabeth Mafeking and Ms. Frances Baard gained political prominence through the trade union movement.

As the numbers of women in industry grew, women became more prominent in the trade union movement, at the leadership and the general membership level. As the union demonstrated its willingness to demand improved working conditions, it won strong support from women workers. Thus, the future of trade unionism as a politicizing force among South Africa's growing number of black women workers held infinite promise.

However, in 1953 the loophole through which black women had squeezed into the registered unions was closed by the Native Labour (Settlement of Dispute) Act. This served to redefine the word "employee" to exclude all blacks, male and female. Though the trade union movement was under siege, the advances gained by the unions in developing a broader political consciousness and leadership among black women could not be obliterated nor reversed.

Black working-class women had emerged as a powerful force for change within their communities. Furthermore, as popular resistance intensified during subsequent years, working-class women increasingly formed and participated in the women's organizations that came to play a major role in progressive political thought and activities. Women actively participated in

campaigns against the increase in general sales tax, rent boycotts and the demand that the South African Defence Force troops move out of the townships.

Furthermore, the growth of the trade union movement provided the impetus for increasing the organization of women in previously non-unionised sectors, culminating in the establishment of the South African Domestic Workers Union in 1986. Earlier, in 1985, the launch of the Congress of South African Trade Unions saw women's rights placed firmly on the agenda of the country's major trade union federation.

The continuation of oppressive conditions under which many women lived and worked led to specific demands on management from the shop floor. Simultaneously, women were struggling for representation in leadership positions in the broader trade union movement. Women workers were therefore developing a critical consciousness that identified the link between economic exploitation and gender oppression. They posited that in establishing a commitment to addressing gender inequality in all spheres, then the issue of working-class interests in general and the needs of women workers in particular becomes paramount.

Though women were becoming increasingly visible in resistance groups, they encountered some difficulties entering into the male-dominated hierarchies of the popular organizations. It was found that excluding women from decision-making weakened a number of consumer boycotts that were used as a tactic to enforce political demands. It was deemed very unstrategic not to include women on local boycott committees, as women were the purchasers of consumables. It has been acknowledged that although no boycotts failed, the exclusion of women did not promote democratic grassroots organization.

The exclusion and alienation of women was also said to increase the tendency to use violence in enforcing campaigns. Women activists have pointed to a clear link between women's representation on local boycott committees and a stronger sense of cohesion within the community. Women then were playing a fundamental role in the re-organisation of communities and in the politics of protest. In many respects, local organizations were being influenced by unionized women. These unionized women brought to organizations important political lessons that they had learnt in the union, namely discipline, commitment and perseverance.

8. Gains Made by Women

Unions with large numbers of women faced a set of demands that included correcting the problem of low pay for what was considered "women's work" and unequal pay for the same job, the inclusion of demands for maternity rights and childcare facilities in negotiations, taking up occupational health problems specific to women, and ending sexual harassment. As many black-women workers were the sole breadwinners or supported extended families, they considered the fight against low wages as an important one.

Attempts were made to secure a "living" wage as opposed to a "family" wage - the latter notion based on the idea that women's wages were supplementary to those of the male breadwinner. This did not reflect the reality of many black women workers. An example of success in equalizing wages involved negotiations between the Chemical Workers Industrial Union and the Vulco Latex Rubber company, which resulted in a R30 per week raise for women. Male workers received a R20 per week increase.

The demand for childcare had also started featuring in negotiations. BMW agreed to finance a creche at its factory in Johannesburg, jointly administered by management and the National Automobile and allied Workers Union. Unions were intent on demanding that the private sector and the state provide childcare facilities in the townships, and where convenient, at the place of employment. Many black women workers live far from work, making the issue of childcare a more crucial one.

9. A Natural Progression

Many women were sent into national governance institutions by the trade union movement, bringing with them perspectives and skills that were to profoundly influence the transformation project. The singular commitment of women trade unionists to improve the quality of life for millions of poor, black women was taken to a different level as these trade unionists entered the political arena. These remarkable women are continuing the struggle for the complete emancipation of women from poverty, hardship, violence and exploitation, albeit from a different platform. However, their activism and commitment was largely consolidated within the trade union movement.

Some of these prominent women include: Mrs. Ngwenya-Kompe who became a union member and shop steward of the Metal and Allied workers Union. She later became a branch Secretary of the Transport and General Workers Union.

Mrs, Patricia De Lille was a South African Chemical Worker's Union N.E.C. member and the Vice-President of the National Council of Trade Unions.

Mrs Pregs Govender was a member of the National Women's Congress in COSATU and the National Educational Officer of the

Government and Allied Workers Union which is now called the South African Clothing and Textile Workers' Union.

10. The External Mission

The exposure that the period of 30 years, while the liberation organisations were banned, proved to be both difficult yet beneficial especially to women. Women of the ANC and PAC addressed the UN on August 9 which the international community recognised as the Day of Solidarity with the struggling women of South Africa and Namibia throughout those years. Women developed through having to address the people of the world and other women of the world on the plight of South African women and children. They mobilised - sometimes directly, other times through the women of various countries - governments against apartheid. They mobilised resources for women in the struggle and for the struggle broadly. The Women's Section was in the good books of the ANC 's Treasurer General.

The exposure the women had to ideas and experiences of other countries helped them influence ANC policy development especially in relation to men/women issues in the organisation and in society back home. Women had opportunities to be involved in every sphere of organisational activity. They trained either academically or militarily, whichever they chose. They got deployed and equally exposed to whatever consequences as seen in the arrest and imprisonment of cadres like Thandi Modise. This does not mean everything was always smooth sailing.

The Women's Section had to help the ANC tackle issues like youth pregnancies and the implications of the withdrawal - from either the army or education - of young female cadres while their boyfriends continued. These were difficult policy debates. Debates

on approaches or organisational interventions in cases of physical abuses by partners or sexual abuse. The ANC was forced to come to terms with these real societal problems which, in fact, still plague us today.

11. Negotiations

When negotiations started, the ANC had to still debate a **gendered** approach. There were mental blocks and uphill hurdles towards adopting an approach that it was necessary to involve women in the constitutional talks because of their **unique** experiences and perspective which had to inform the outcome of the talks. After the debates there was agreement on a policy which saw women participating in constitutional talks and contributing to the new South African Constitution,

The involvement of women in institutions of governance, the leadership they give in different aspects of life,, is **testimony** to the new order. Many **hurdles** still have to be overcome. There is still a lot of sexism as is the case with racism. But a beginning has been made and we do not doubt that **we** are on track. Our Constitution requires **75%** for changing Section 1 in which we commit South Africa to building a **NON-SEXIST** society.

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WOMEN AND CONSTITUTION MAKING: SOUTH AFRICAN EXPERIENCES

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“Freedom cannot be achieved unless women have been emancipated from all forms of oppression. All of us must take this on board that the objectives of the Reconstruction and Development Programme (RDP) will not have been realized unless we see, in practical and visible terms, that the condition of the women in our country has been changed for the better and that they have been empowered to intervene in all aspects of life as equals with any other member of society.” **(President Nelson Mandela, 1994)**

1. Introduction

Since 1994, several pieces of legislation, policies and programmes have been introduced in South Africa with the aim of improving the quality of life and status of women. A great deal of improvement has already been achieved. This paper will attempt to provide a brief overview of these achievements by focusing on:

- Constitutional provisions and institutions that promote and protect women’s needs.
- Strategies that have been used to incorporate women’s needs in decision-making organs.

In addition, the paper will highlight some of the many challenges that continue to face the majority of South African women.

2. Promotion And Protection of Women’s Needs in South Africa

2.1 *The Constitution of the Republic of South Africa, Act 108 of 1996*

The Constitution of South Africa (Act 108 of 1996) is the most significant legislation that impacts on women. The Equality Clause of the Constitution in the Bill of Rights guarantees equal treatment for all South Africans. The State may not discriminate unfairly against anyone on the

basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. This ban on all forms of discrimination has meant that legislation, public policies, programmes and projects as well as institutions needed to be transformed to eradicate oppression against women. The Constitution provides that legislation be enacted to promote the attainment of equality as well as to prevent unfair discrimination.

All legislation that is passed must be gender sensitive. This is ensured through the use of appropriate language and guaranteeing that the legislation in no way discriminates against women. However, the problem arises when legislation is in fact gender neutral but had indirect negative effects on women.

The Constitution of South Africa lays the basis of ensuring a non-sexist and non-racist society. Within this country, several additional mechanisms have been put in place to ensure these:

- The establishment of a comprehensive national gender machinery;
- High representation of women in governance structures;

- An accelerated process aimed at the eradication of gender based violence.

2.2. *The Role of Parliament*

Parliament plays an important role in promoting and protecting women's needs through the execution of its legislative and oversight functions. In exercising their vital function of oversight, Parliamentarians must maintain strong links and open channels of communication between organizations in civil society and Parliament. Parliament will be transformed if people in civil society ensure that the women and men who are elected are committed to the fundamental transformation of the institution so that it becomes more gender representative and its culture and policies more women-friendly. Parliament itself must become the prototype of gender best-practice and model for communities and society, the ideals of equity and justice in all human interaction.

Parliament fulfills its oversight role in the following ways:

2.3. *Oversight of the Executive*

This mechanism of tracking implementation of gender treaties, gender sensitive policies and legislation should derive from internal government processes, usually based on constitution provisions, and public and administrative policies of the state. It must be acknowledged that in pursuing gender justice, gender concerns have to be integrated into all aspects of governments and administration. The State should also be obliged to implement equal rights and administrative justice. It thus becomes the role of Parliament to exercise such oversight and face squarely the challenge of building gender considerations into the lawmaking process

2.4. *Oversight by Civil Society*

Civil society has an important role to play in respect of actively interrogating legislation before Parliament in terms of its potential impact on women. Members of Parliament and not only women Members of Parliament have to ensure that the lawmaking process provides the space to invite comments and inputs on legislation from outside Parliament. In South Africa, the Portfolio and Select Committees actively encourage the public to comment and make representations on Bills. Furthermore, the Commission for Gender Equality monitors and engages with all legislation impacting on gender.

2.5. *Oversight by Committees*

It is within Committees that Members of Parliament can exercise the most effective gender oversight. In South Africa, the joint Monitoring Committee on the Improvement Quality of Life and Status of Women interrogates all legislation for gender impact and implications. However, this should not detract from other Committees' responsibility to do similar gender oversight of legislation referred to it.

2.6. *Monitoring Implementation of Legislation*

It is widely acknowledged that monitoring the implementation and outcome of legislation may be as important itself. Legislation that purports to engender equality may turn out to be imperfect or inadequate, either in its application or long-term consequences. It becomes very important therefore to ensure proper statistics, monitoring and review mechanisms that operate to track implementation of policies and legislation. It must be emphasized that such monitoring be done actively and that Parliaments remains vigilant in exercising the right to

amend legislation if it proves to be working against the interest of gender justice.

This should not detract from the right of MPs to introduce Bills on particular issues that will address gender concerns in society. Such monitoring can be done in conjunction with established monitoring commissions like the Commission of Gender Equality as well as other active civic organizations that have tasked themselves with ensuring gender-sensitive legislation.

2.7. *International Agreements*

South Africa has committed itself to the Convention on Elimination of All Forms of Violence Against Women (CEDAW), the Beijing Platform of Action, the Southern African Development Community (SADC) Declaration on Gender and Development and addendum to the SADC Declaration, namely the Prevention and Eradication of Violence Against Women and Children.

The following section pertains to strategies through which women's needs could be incorporated in decision-making organs. Within the South African context, it is very difficult to distinguish between the institutions, provisions and strategies as they are inextricably linked. For example, the different organs of the Gender Machinery (discussed below) is an institutional provision but can also be viewed as strategies through which women's needs and concerns are incorporated in decision-making processes.

3. **Strategies for Incorporating Women's Needs in Decision-making Organs**

3.1. *South Africa's Gender Machinery*

In order to achieve its national and international commitments to gender equality, a National Machinery was

established. These national machinery structures are located in the Executive, Parliament, and in civil society. An independent statutory body, the Commission for Gender Equality has also been established to monitor the progress and achievements towards gender equality. South Africa has one of the most comprehensive national gender machineries in the world and is generally acknowledged to be a model of best practice. The mechanisms and processes in the national machinery set out to:

- Achieve equality for women as active citizens, decision makers and beneficiaries in the political, economic, social and cultural spheres of life and to prioritise the needs of women most in need of social **upliftment**.
- Develop and implement mechanisms through which the country can meet its constitutional and international commitments towards gender equality, human rights and social justice.
- Transform existing institutional values, norms and cultures that hinder gender equality.
- Promote the enactment of laws that take into account the needs and aspirations of women.
- Assist in the development of strategic objectives for implementing such laws and policies.
- Develop effective management information systems to ensure that those who implement policy receive adequate, appropriate and relevant training and development.
- Develop clear performance indicators in line with priority areas to ensure effective monitoring and evaluation progress.
- Allocate resources for the benefit of women in rural and urban areas and ensure that these resources reach them¹.

¹ South Africa National Policy framework for women's Empowerment and Gender Equality.

Several structures and mechanism have been established at various levels of state and civil society with the above aims in mind.

(a) *Executive Level*

- Office on the Status of Women (OSW) - The OSW is located in the Office of the President. It plays a vital role as the principal co-ordinating structure for the national machinery on gender equality. One of the main functions of the OSW is to develop national gender plans and national strategies to implement them.
- Gender Desks or Focal Points - These focal points are based in government departments. The main task is to ensure the effective implementation of the national gender policy at an operational level. Focal points are responsible for the formulation and implementation of effective action plans to promote women's empowerment and gender equality in the work of Government departments.

(b) *Legislature*

- The Women's Parliamentary Caucus This is a multi-party caucus whose functions include creating forums in which women in Parliament can discuss and debate gender issues and provide capacity building initiatives for women in Parliament. It, furthermore, creates an access point for advocacy by civil society and provides a focal point for women Parliamentarians to communicate with women's organisations in civil society.
- Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women and other Parliamentary committees. The functions are related to formulating specific legislation on gender issues and legislation that is gender sensitive and encouraging the public and women in

particular to participate in the law making process.

(c) *Independent Statutory Bodies*

A number of independent statutory bodies have been established that are involved in gender issues. Amongst these are the Commission on Gender Equality, the Human Rights Commission, the Independent Electoral Commission, the Public Protector, the Public Service Commission, the Youth Commission, the Land Commission, and the South African Law Commission. The Commission on Gender Equality (CGE) is geared specifically towards the empowerment of women and gender equality. It forms an integral part of the gender machinery.

(d) *Women's Organisations in Civil Society*

Women's organisations in civil society play an important role, as the national machinery of a country cannot alone make effective contributions and shift public policy agendas for women. The national machinery should thus establish strong and close working relations with organisations in order to bring about change. The national machinery has a responsibility to provide women's organisations with education and training as well as information and resources.

(e) *Provincial Machinery*

Different structures have been developed to fulfill the varying needs of the provinces. The National Gender Policy Framework however, recommends that the general principles of the national model be followed. This will include the establishment of an Office on the Status of Women (OSW) (in the Premier's Offices), gender units or focal points in all provincial departments, a women's caucus in the provincial legislature

and support for the establishment of civil society structures.

(f) Local Government Machinery

Local government is in the best position to impact directly and positively on women's empowerment and gender equality. The South African Local Government Association (**SALGA**) has advocated for the creation of gender structures, which would guide the work of local government councils.

3.2. Collaborative Initiatives amongst the Gender Machinery

One of the general principles outlined in the national gender policy framework, is the need for the national gender machinery such as the **OSW's**, etc to support and encourage initiatives within civil society aimed at addressing gender equality. To this end, the various institutions comprising the gender machinery, have undertaken various collaborative initiatives. Some events that have taken place during 2001 are:

- National Conference on 'Enhancing the Participation of Women in the Law Making Process' (25 & 26 July 2001) - This conference, jointly hosted by Parliament's Public Participation Unit (**PPU**) and the Joint Committee on the Improvement of Quality of Life and Status of Women focused on issues of women's participation in law making and the implementation of legislation such as the Domestic Violence Act, Maintenance Act, issues of inheritance and succession and the Budget.
- The Joint Committee on the Improvement of Quality of Life and Status of Women also held hearings on the Impact of **HIV** and AIDS on women and children. One of the main aims of the Hearings was to propose solutions in

dealing with the impact of the epidemic on women and children.

- Gender Summit (5th –8th August 2001) - The objective of the Summit was to bring key stakeholders together to assess the progress South Africa has made in promoting and protecting gender equality. Stakeholders included representatives from government, provincial and national legislatures, the donor community, civil society, business, organized labour, religious institutions, regional and international organizations and institutions. This was a collaborative initiative between the **CGE**, the **OSW** and the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women.
- Rural Women's Workshops: A series of workshops were held with rural women to generate an understanding of how they could get involved in legislative processes. The workshops obtained submissions on how women have experienced the implementation of the Domestic Violence Act and assessed women's needs on issues of inheritance and succession. This was initiated as a pilot project with the view to expansion.
- OSW Hearings on the National Gender Policy Framework (July - August 2001). The OSW held hearings nationally to engage Provincial leadership on the policy framework document as well as to give feedback to civil society on the **Beijing+5** Conference. The Hearings gathered information on what the priority areas are for specific provinces on the issue of gender equality.
- Women's Empowerment Unit (17 & 18 August 2001) - This unit arranged a gender conference for legislative institutions. The conference dealt with issues such as gender **mainstreaming**, the

national gender policy framework, institutional transformation and the 'women's budget'.

4. Challenges facing Women in South Africa

South Africa has one of the most progressive constitutions in the world with regard to gender equality. From the number of laws enacted, gender equality is certainly there on paper. However, for the majority of South African women this is not their daily reality. Some issues that need to be addressed are:

- Lack of adequate infrastructure to successfully implement the Maintenance and Domestic Violence Acts - Research conducted by the non-governmental organization. **Masimanyane**, revealed that many women, especially those in rural areas, had no knowledge of the Maintenance Act and had even less access to it. The same research report indicated that many women experienced problems with the implementation of the Domestic Violence Act. They experienced problems with the attitudes of policemen and magistrates and with the lenient sentences handed down to rapists.
- The continuing high rate of violence against women and children - a number of recent reports on rape have indicated the extremely violent nature of the rapes perpetrated against very young children and babies. This has resulted in a huge outcry by South Africans.
 - The need to transform cultural perspectives on violence against women.
 - The effects of poverty on women - Poverty levels differ between men and women. Almost half of all women live below the poverty line, compared to 44% of men. This difference is even larger in rural areas where 63 out of every 100 rural women are poor, compared to 57 out of every 100 rural men. Black, rural women are most affected by poverty and suffer more from poverty than men. Women's bigger share of the poverty burden can be largely explained by the **disadvantaged** position of women in the labour market. There are fewer jobs available for women and they are generally paid less than men. Women's bigger share of the poverty burden is also related to factors such as culture. The unequal position women traditionally hold in relation to men is an example of the cultural contribution to the burden of poverty assumed by women.
- The effects of **HIV** and AIDS on women - For many poor women and men in South Africa, HIV and AIDS has become the predominant health concern. Women, because of their biological make-up, are particularly vulnerable to HIV and AIDS. The highest prevalence is in women in the 20-24 year age group. This has implications for the increase in rate of vertical transmission of HIV to children. The burden on women as **caregivers** also increase as they have to care for those infected and affected by HIV and AIDS. With the rate of women infected increasing, the consequences become even more profound.
- The need for policies and programmes in Government departments - Parliament plays an important role in ensuring that Government departments introduce policies and programmes that will enable the country to meet the obligations of all signed national and international treaties. Departments should be given the financial, material and human resources to do this, in order for women to experience real and concrete change.
- Removal of existing discriminatory laws against women - Parliament has the responsibility to ensure that the Customary Law on Inheritance and Succession is enacted. This legislation

should reflect the needs of rural women. The Sexual Offences Law should be enacted and it should close all the current loopholes through which rapists escape. Lastly, all existing discriminatory legislation still on the statute books should be removed.

- The re-introduction of the gender analysis of the different programmes in the National Budget. A gender analysis was done of different programmes in the 1998-99 National Budget Review. This was viewed as a victory for women. This gender analysis was not done for the National Budgets in the following years. It needs to be reinstated because it is a necessary tool to ensure that the lives of the poorest women in our country are improved.
- The need for strong partnership. Forging strong partnerships between Government and NGOs working towards the achievement of gender equality. Partnerships are important as organs such as Government Departments and the Office for the Status of Women are under-resourced and thus are not

adequately equipped to monitor and measure the impact that important legislation has on women's lives.

5. Conclusion

In South Africa, much has been achieved for women in respect of policies and legislation. There is a Constitution that has entrenched gender equality and has outlawed discrimination against women. There are laws that protect women's rights. However, much still needs to be done by Parliamentarians to ensure that these laws are translated into real change in the lives of many women.

Parliamentarians all over the world should pledge a commitment to gender justice, advocate that gender issues be addressed in all policy agendas and make the call that justice, development, peace and human rights for all be actively pursued and realised in the 21st century.

ISLAMIC EXPERIENCES IN WOMEN AND CONSTITUTION MAKING

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1. Introduction

My response to the issues raised by the organizers of this seminar are shaped by the following factors:

1. The extreme diversity of Islamic experiences, both historically and at the present time. Accordingly, claims of uniformity of views on the rights and state of women in Islamic societies and communities must be resisted. They are hegemonic projects to impose a single understating of Islam on all Muslims. No human authority has a monopoly on what it means to be "Islamic" in any given historical, cultural or contextual context.
2. We are concerned here with the relationship between Shari' a state law and policy, and not Islam as a personal or communal belief system and practice. However, we are also concerned with the role of the state in influencing the role of Islam in social life.
3. Like all human beings and societies, Muslims beliefs or practices are influences by a variety of social, economic, political and cultural factors and processes. Wherever they happen to live, Muslims tend to interact with national constitutional, political, sociological and other features of their context.
4. Muslims also interact with international human rights standards and institutions, and transitional women movements.
5. These interactions are no doubt influences by the Islamic beliefs of these communities, but one should not overstate the "Islamic exceptionalism" of

Muslim, because, in the final analysis, they are all human beings.

2. History of Women's Movements in Islamic Countries

It is not possible to generalize about this history because it is specific to the country, and of parts within it. The history of each movement has been shaped by the levels of economic developments, political stability, social and cultural conditions, which in turn affect the ability of women organizations and groups to organize and advocate for their rights to equality and social justice. In particular, the level of education and economic independence of women have been critical in this. This is clear from contrasting the history of women's movements in countries like Malaysia, Bangladesh and Pakistan, compared to those of Saudi Arabia and the Gulf States; or those of Turkey, Egypt, Tunisia, Senegal and Mali.

The shared concerns of the vast majority of women's movements in Islamic countries include:

- The role of Islam and Shari'a at the cultural, sociological level, especially regarding gender relations with the family and community and socialization of children.
- The relationship between Islam, Shari'a and the State, that is, whether state policies, administration, education and employment opportunities for women are claimed to be guided by Islam Shar'a principles.

- Islamic family law reform, especially where that aspect of Shari'a is enforced by the state.

3. Milestone, Lessons learned

These parallel the political and sociological history of each country. Another relevant factor is the ability of women organizations and groups to organize locally and nationally, and to interact and collaborate with regional and international women's movements. The role of the UN agencies, Northern development organization and non-governmental organizations should also be taken into account.

Mistakes were made in this latter relationship when such organizations and NGOs attempted to impose, sometimes with the best of interests, Western approaches of women rights and development.

The main lesson learned in this regard is the critical importance for deep contextualization and to use multiple approaches to protecting and promoting the rights of women – legal, educational, economic and so forth. The basic question is simply how to empower women to claim and sustain their rights, in their own specific context.

4. Challenges facing Women in Islamic Countries

These are similar to challenges facing women everywhere in such matters as gender relations within the family and community, education and employment. The basic problem in this regard is that constitutional and legal safeguards for equality and non-discrimination against women are usually not observed or enforced in practice.

The main difference, however, is that inequality and discrimination against women

in Islamic countries are usually rationalized as decreed by Shari'a which makes it much harder for women's rights advocates to redress the situation. Even women activists find it difficult to challenge what is presumed to be the divine law of Islam as unconstitutional or in violation of international human rights standards.

This is particularly true regarding Islamic family law matters, on which Sharia is believed to be more specific and categorical than in other fields where the clear departure of state law from Shari'a principles is taken for granted.

In this context, similar to situations where aspects of cultural/customary practices that violate the constitutional and human rights of women, it is critical for strategies of response to be firmly rooted within an internal Islamic frame of reference. In other words, advocates for equality and non discrimination against women must develop an alternative interpretation of Islamic sources in order to achieve their objectives. Otherwise, as is clear from experiences of many countries, like Algeria and Iran, progress will probably be very slow and always subject to reversal for political expediency. To appease Islamic fundamentalists, governments have tended to sacrifice the rights of women in order to remain in power.

5. Strategies for Incorporating Women's Needs in Decision Organs

In view of the challenges noted above, it is critically important for the state to exercise decisive leadership in appointment of women to key decision-making positions, especially in the judiciary, as well as such fields of health, education and social services. In making such appointments, however, state officials must consult with

women organizations to identify the best candidates.

Women organizations and groups must of course push for such appointments through a variety of political and advocacy strategies. They must be able to anticipate and respond to any rationalizations state officials may raise against such appointments. Women in general must enhance these efforts through the deliberate and strategic use of the political power as voters and members of political parties.

Women organizations and groups should also push for the effective implementation of existing constitutional rights and legal safeguards, while calling for more provisions and allocations for appropriate institutional resources in this regard.

6. Constitutional Provisions and Institutions

It must be emphasized here that the objective should not simply be the inclusion of sufficient and categorical provisions in the constitution, but also to provide for effective institutions and process to monitor the practical implementation of these standards.

Both constitutional provisions and implementing institutions must also anticipate and redress likely sources of opposition from within the apparatus of the state as well as in the social and political process of the country in general.

In particular, recalling the difficulties of overcoming so-called Islamic opposition to the rights of women, emphasized earlier, formal action by the state is necessary but not sufficient by itself. Unless deliberate strategies employing an Islamic discourse to change cultural attitudes and gender relations within the family and community are applied, gains made over many decades

can easily be halted or even reversed, as was seen recently in Afghanistan.

Taking into account all these difficulties, at the official as well as general cultural level, constitutional provisions and implementing institutions must be appropriate to the nature and operation of each form of degree of resistance and take a long term view in the multiple strategies it proposed to apply. This is not inconsistent with taking immediate action to remove discrimination against women, but in so doing due consideration should be given to the protracted and deeply entrenched nature of opposition to such measures. As clearly shown by the official efforts to achieve equitable land tenure for women or combat harmful traditional practices like female genital cutting, legalistic approaches are unlikely to work unless accompanied by educational and other supportive strategies to transform attitudes and negative practices at the family and community level.

These strategies of course need a combination of legal norms and institutions, administrative policies and allocation of sufficient resources. None of that is likely to materialize without necessary political will for far reaching social transformation to overcome resistance and sustain achievements, whenever made.

Since these necessary conditions are of course unlikely to exist all at once, as and when needed, one must work with what is available to enhance official and political efforts, while seeking to improve and promote more conducive conditions for the realization of the desired objectives.

7. Conclusions

As already emphasized, advocates for the rights of women to equality and equity should be both realistic and strategic in their thinking and action. They must be able to

set their own priorities and develop political alliances in pursuit of their objectives.

Special regard must also be given to the needs of women for emotional and material support in their struggle to challenge oppressive understandings of their religion and culture. These women need the utmost help and support in reconciling their own demands for individual rights, with their equally important need to maintain the cohesion and integrity of their families and communities.

Finally, I strongly recommend to the Muslims of Kenya to avoid demands for the enforcement of Islamic family law by the state because that will make reform in this field extremely difficult to make in the future. They can and could seek to have their own values reflected in national legislations and administration of justice in these matters, but that should be clearly seen as a part of the civil law of the state, not the

religious law of Islam. I have made an Islamic argument for this position in the first article listed below.

8. References

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ENGENDERING THE KENYA CONSTITUTION :DOMESTICATION OF INTERNATIONAL COMMITMENTS & BUILDING ON EXISTING NATIONAL GAINS

Nyaradzi Gumbonzvanda
UNIFEM-ECHA Director

1. National Commitments

- CEDAW report commitments
- Commitments of Affirmative Action, Gender
- Commission, Equality Bill and Domestic Violence Bill
- Other national reports and national laws

- 220 members of National Assembly (how many *Wakeshos*)
- 210 representatives from districts (how many *Wakeshos*)
- 29 commissioners (how many *Wakeshos*)
- 115 representatives of political parties (how many *Wakeshos*)

2. The Devil is in the Details on Content

- The key focus is on the review of an existing constitutions.
- What exists in constitution which must be retained from the women’s point of view.
- What exists in the constitution, which must be repealed as it is repugnant to promotion of gender equality and promotion, protection or respect of women’s rights e.g. claw back clauses.
- What are the possible interpretations on some of seemingly neutral texts, which requires strengthening or adjusting as it relates to language.
- What are the gaps, which requires a formulation of new text in the constitution?

- What is the minimum constitutional guarantees for *Wanjiku* at the National Referendum?
 - Basis of a “yes” or “no” vote
 - Final Say by the National Assembly
 - How well informed is *Wakesho* on her issues.

4. Final Tips

- Undertake a “gender analysis” of current constitution, clause by clause
- Develop a minimum list of constitutional guarantees on women’s human rights
- Develop a shadow lobby document (constitution)
- Unleash a massive movement of women’s voices re: the constitution
- Lobby for Effective participation of women in the process.

3. The Process is as Important

- Women Representation and effective participation
 - CKRC
 - National Constitutional Assembly

**NATIONAL CONVENTION FOR PEOPLE WITH DISABILITIES IN THE
CONSTITUTIONAL REVIEW PROCESS APRIL 4 – 6 2002 AT KCCT
MBAGATHI, NAIROBI**

LIST OF PRESENTATIONS AND RESOURCE PERSONS

1. Opening Remarks by Prof. Yash Pal Ghai
2. “Human Rights Gender, Children and Disability: An International Perspective” by Hon. J. Sinyo
3. The UN and Persons with Disabilities : United Nations Commitment to Advancement of the Status of Persons with Disabilities.
4. “Education as a Challenge for Persons with Disabilities in the United States within the Context of the Legal Framework” by Prof. Simon I. Guteng
5. “Governance, Constitution-making and Elections vis-à-vis Disability” by Sameul Kabue
6. Constitution and the International Arena
7. “Culture, Religion and Media and its effects on Persons with Disabilities” by Hon. Florence Nayiga Ssekabira
8. “Communication and Media: Disability and the Constitution” by Peter Wango Opany
9. “Poverty Alleviation, Economic Empowerment and Employment Opportunity for the Disabled” by Hon. Martha Karua
10. Memorandum by the United Disabled Persons of Kenya
11. Memorandum by the Kenya Union of the Blind, Machakos Branch

OPENING REMARKS AT THE OF THE NATIONAL CONVENTION FOR PEOPLE WITH DISABILITIES IN THE CONSTITUTIONAL REVIEW PROCESS

Prof. Yash Pal Ghai
Chairman, Constitution of Kenya Review Commission

It is a great pleasure to be here with you today as you begin your important deliberations on constitutional reform. I have had the opportunity to meet several of you on previous occasions when we have discussed the review process, your participation in it and the reforms which are necessary to protect the rights of people with disabilities and enable them to live a life in dignity.

I look forward greatly to the results of your deliberations which you will present to us tomorrow. No one is better able to speak of the hardships and deprivations that people with disability suffer than you. On previous occasions when we have met, I have become aware of the extreme difficulties you and the people you represent here face in your daily life. I have been deeply touched by your narratives, which have also impressed on me your courage and determination to ensure justice for all. Please let us know how the Commission can assist you in your work and how our constitution and laws can be redesigned to remove obstacles that you face constantly.

I am glad to say that the Constitution of Kenya Review Act under which the review process is conducted provides an excellent framework for the process and the values that must be included in the new constitution. The Commission and other organs of review are accountable to the people of Kenya, including of course yourselves. They must ensure that the process accommodates the diversity of the

Kenyan people, including socio-economic status, ethnicity, gender, persons with disabilities and the **disadvantaged**. They must provide the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the constitution. Above all, they must be guided by respect for the universal principles of human rights, gender equity and democracy. The Commission has endeavoured to ensure that the disadvantaged are given special opportunities to engage in the process and to make their views known to the Commission and the public. This convention represents one of these efforts.

On substance, the Review Act requires the Constitution to ensure a free and democratic system of government, the rule of law, human rights and gender equity. It also requires us to ensure the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources. We have all together collectively to examine the socio-cultural obstacles that promote various forms of discrimination and recommend improvements to secure equal rights for all. There is constant emphasis on human rights in the Act the message of which is that all persons must be treated equally without discrimination on the basis of personal characteristics. The situation of persons with disabilities is indeed a human rights matter, as it cuts across a multiplicity of rights which they are unable to enjoy. The

reference to socio-cultural obstacles makes clear that we must move beyond rhetoric and formalism, and ensure effective equality for all. The assurance of effective equality will in many cases require special measures to assist those who have been disadvantaged historically or for other reasons. You must tell us what special measures the constitution should itself contain or recommend for legislation.

The reference to basic needs alerts us to the fact that we have become an unequal society, with huge disparities in wealth and access to the basic necessities of life. Persons with disabilities inevitably in our society find themselves shoved down the pecking order, and are thus the victims of extreme poverty. The Review Act instructs us to ensure that such persons have access to all the amenities of life, including a caring society and the love of the family.

I believe that apart from the specific recommendations that you will make to us and which other groups working for the disabled have already made to us, we should use the process to make Kenyans aware of the scale and depth of disability. I am told

that over 10% of our population suffer from one or another form of disability—most of which also compound other forms of deprivation. There is tremendous prejudice against persons with disability—in which the valuable contributions that they can make to society are completely disregarded, and denied. We must intensify our efforts to remove this prejudice; Kenyans must realize that persons with disability can in fact be extremely able and talented, with great sensitivity and courage. Society is certainly the poorer because we fail to establish conditions in which it is possible to achieve the potential of the disabled. It is important to remove prejudice for another reason—for however favourable the provisions of the constitution or the law for the disabled, there will be reluctance to implement them, for policy makers and administrators will neither have the understanding nor the commitment to make them effective.

I wish you success in your deliberations. I can assure you that the Commission understands your difficulties and is determined to do all that can be done within the confines of a constitution to help remove the difficulties.

HUMAN RIGHTS GENDER, CHILDREN AND DISABILITY AN INTERNATIONAL PERSPECTIVE:

Hon. Josephine Sinyo

1. Introduction

This occasion is a vital step towards the full recognition and realization of the human rights of all persons with disabilities. We know that persons with disabilities frequently live in deplorable conditions, and face physical and social barriers, which prevent their integration and full participation in the community. As a result, millions of adults and children throughout the world are segregated, deprived or virtually all their rights, and sometimes lead wretched and marginalized lives. This is completely unacceptable.

The Universal Declaration of Human Rights refers specifically to the rights of persons with disabilities. Article 1 declares that all human beings are born free and equal in dignity and rights. There is a joint responsibility at the national and international level to ensure these rights are translated into concrete action.

Despite the adoption of the UN General Assembly of the World Programme of Action concerning Disabled People, and the adoption in 1993 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, it is clear that a great deal need to be done. I know that this is the main reason you are meeting this week. I feel it is time to look afresh at this issue and to identify ways of stepping up our joint efforts to secure the full range of human rights for persons with disabilities.

2. Understanding What Amounts to an Infringement of Human Rights

Although the international community has spoken of disability as a human rights issue for at least two-decades, not all persons with disabilities view discrimination and abuse in terms of international human rights instruments. For some people, discrimination and abuse have become normalized everyday occurrences that are part of their lives as persons with disabilities.

It is also important to note, however, that there is a danger in describing every act of differential or unfavorable treatment as an infringement of a human right. Apart from the fact that this is simply inaccurate, it raises the risk that there will be a backlash against supporting efforts to strengthen human rights. Wherever possible, we would suggest, as a guideline, that persons with disabilities only speak of human rights when such rights are contained in an international human rights instrument (for example, the Universal Declaration of Human Rights and the six main UN Human Rights treaties).

Let me add some questions to the agenda:

- How can persons with disabilities themselves speak up for their rights and make human rights a tool in their continuous struggle for dignity, equality and justice?
- How can we ensure that the rights proclaimed in international norms and legislation are translated into real improvements in the lives of persons with disabilities?

GOVERNANCE, CONSTITUTION MAKING AND ELECTIONS VIS-À-VIS DISABILITY

Samuel Kabue

1. Governance

According to the Oxford Advanced Learners Dictionary, the term governance has been described as the activity or manner of governing. Mr. Joel Barkan, former Governance Advisor at the USAID described governance as “nothing more or less than a predictable and legitimate art of relationships between the ruled and the rulers”. Although Mr. Barkan does not elaborate on who the ruled and the rulers are, it is clear that these two categories include all the people within a nation. In this case, people with disabilities are part of the ruled and the rulers though as we know it today, representation in the latter is almost non-existent. However, be that as it may, they are included in the relationships between the ruled and the rulers.

Going back to the general usage of the ruled and the rulers as understood by Mr. Barkan, in order for this relationship to be predictable and legitimate, it will be necessary to put in to place systems to regulate it. The basis of such systems is the law of which the constitution is supreme. The regulatory systems in place in our country today as is the case with other world democracies include the establishment of power centres or instruments of governance through the constitution as seen in the legislature, executive and judiciary. Each of these instruments or arms of the government are vested with certain powers which, when taken away, the predictability and legitimacy of the relationships between the rulers and the ruled is undermined. Where these relationships are unpredictable and marked by capricious exercise of power by

individuals, rulers or by a defense of the law, there cannot be said to be a stable

system of governance. Likewise, where the relationships are predictable but are not regarded as legitimate as may be the case when the constitution is disregarded, those in power will seek to exercise their will on an unwilling population which in its part will seek to resist the rule. The result will be repression rather than good governance. In this situation, the weak that include persons with disabilities, children and women bear the brunt of the consequences of such repression. They are unable to escape the resulting suffering which they are largely not responsible for instigating.

In the recent past, the donors in reference to Kenya have defined good governance in terms of the absence of corruption and effective performance of governmental agencies in their assigned tasks. Closely related to this has been the respect for human rights. In a situation where rampant corruption and disregard for human rights prevail, people with disabilities are not spared. They either become part of the corrupt society in whatever little way they can, or go through extreme suffering as a consequence of rampant corruption when the general infrastructure is destroyed through corrupt deals. It is the people with disabilities who suffer most because of lack of physical access communication and therefore, impeded interactions. Very rarely does the state at its best consider the rights of persons with disabilities. In a situation where the general human rights are largely disregarded those of people with disabilities are never spoken of. Where inefficient delivery of service in assigned tasks prevail,

necessary social services like education, health care and general security of persons with disabilities will be at stake. Reduced resources in these sectors have for instance seen either closures or serious reduction of intake in educational and vocational institutions of persons with disabilities. Thus, governance seen in this perspective of corrupt state of affairs, abuse of human rights and inefficiency in service delivery is very detrimental to the lives of both children and adults with disabilities.

According to yet another school of thought, governance is a process of creating a conducive environment in which all human potential can fully develop in a participatory manner. This is probably the best definition in Kenya today for persons with disabilities. Lack of conducive environment in which people with disabilities can develop their potential has been the greatest enemy. The need for a conducive environment for personal development and opportunity to participate in societal affairs is the most difficult goal to achieve. Provision of such an environment would form the most ideal living conditions for persons with disabilities and it is therefore the goal to aim and fight for in the search for our rights. Persons with disabilities should live for this struggle whether through advocacy, influence or at best through the constitutional review. In general, governance seen in the light of an enabling environment for self fulfillment, one could conclude that good governance entails an exercise in self determination, self discovery, emergence of alternatives and, or room for dissenting views and providing for consensus building in matters of public interest.

As can be observed from the foregoing, the essential elements of good governance and hence a stable national life include: ethical principles, truth, love, justice, selflessness,

observance of human rights, security for all, respect and recognition of the contribution of all in the society. These are ideals which we, disabled or non-disabled should live for. Absence of these would result in economic, social and political regression. This regression may in turn take two forms. First, the country gets torn by rampant corruption as seen on our roads with the traffic police, public offices, grabbing of public and sometimes private property as reported in our media from day to day as well as corrupt deals in high levels as seen in the regular reports of Auditor and Controller General.

Secondly, there results decline of ethical standards contrary to all world known religions with the consequent disregard not only of human rights but also human life. This manifest itself in brutality in exercise of power, insecurity on the part of all including law enforcement agents society fragmentation” and hence pursuit for group rights - group self-protection with the emergent ethnicity and sectionalism. The end result of all these is chaos. Whereas everybody in this circumstance is affected, the vulnerability of people with disabilities women and children is increased as they are at the mercy of providence in such absence of order.

Going back to Mr. Joel Barkan’s contention that governance is “nothing more or less than a predictable and legitimate art of relationships between the ruled and the rulers”, we saw that to help in the predictability and legitimizing of this relations, calls for putting into place systems to do. This is largely achievable through law of which the constitution is supreme. Its review or amendment is rare and far part. To live at a time when there is an opportunity to have it reviewed by the nation is a privilege that we should enjoy for a better today and tomorrow. This is why it is absolutely necessary for people with disabilities to

Participate in the current constitutional review for self and posterity.

2. Constitution Making

The constitution of a country is the supreme law. It provides the general guidelines under which all other laws are to be based. Any law that is inconsistent with the constitution is null and void. Whereas other laws can and are usually promulgated in Parliament through the representatives of the people, the constitution under which these laws are based should ideally emanate from the people themselves. The term 'constitution' comes from the verb 'constitute' which means to form or to organize. Thus when a group or a society brings individuals together for a common purpose, they constitute themselves and therefore they need a constitution to govern them. Such a constitution regulates their relationships and ensures that they are both predictable and legitimate. A group, a society or even a people constitute themselves when they identify who they are, their reasons for getting together and how they need to regulate their relationships.

The country gets a constitution through; one, a revolution either through war with another country or by war against colonial or other forces. United States of America and many of the countries of Africa have come up with a constitution from this sort of background. The idea has been to agree on how they will live with each other.

Secondly, a country can get a constitution through evolution. Britain is an example of this. It has no single constitution and it has ruled through various documents like the Magna Carta of the 13th Century and other documents that have emerged from time to time as a result of need. The Magna Carta stated that people have to be consulted if their money was to be used on war. In 1628

they came up with a petition of rights. In 1689 they came up with the bill of rights and in 1700, they came up with another document on the supremacy of parliament. All those practices have been establishing milestones in their governance system thus, Britain has been establishing a constitution for the last 900 years.

In modern constitution making, there are three basic stages. The first step is for the people who are formulating the constitution to identify themselves as to who they are. This assumes that there is need for this group of people to have reasons to see themselves as they do. In other words, they may be people within a certain interest, they may be people within a certain border, they may be people who have a common heritage and so they can identify themselves as 'we the people'. This means that there must be a firm foundation why these people have come together and have bound themselves to each other. One major principle for instance in the American Constitution was a belief that is imbedded in their constitution. According to this belief which is commonly called the declaration of independence, 'all men are created equal and are endowed with inalienable right to life, liberty and pursuit for happiness'.

This understanding has to be protected in all possible ways including sharing of power. The spirit of the declaration is that if any government is to interfere with these inalienable rights, it should be challenged and if necessary abolished. Following the above arguments, the first business of a constitution is to tell us who the makers of a constitution are, thus answering the question "who". The identity of people is very important to point out because this is what makes them different from others who are not part of that agreement.

The second step is to identify the reasons why this people are making a constitution -

what background have they gone through, what are the reasons that make them feel that they would be better bound together, what are their common experiences that make it necessary to constitute themselves, and what do they intend to achieve by constituting themselves. The third consideration and stage is the answer to the question how these people who have formed the constitution will want to relate to one another. How do they want to be governed? This aspect sets out the mechanism of how to behave to each other and how to react to different situations both internal and external to the people and especially to those situations that affect their territory, environment and individual and group rights. It governs the equalization and protecting role of each of the people that have constituted themselves. In general, a good constitution has to deal with the distribution of power as a resource and this is done through this third aspect or section of the constitution. It is the enforceable section that provides that all weak and strong are protected by the systems that are put in place.

The political foundation of a constitution is that it should belong to its owners and that there are reasons for it as an agreement. Constitution making is a process of people negotiating the basis on which they should live together. It is therefore absolutely necessary that the process be as inclusive and participatory as possible. This is not the process that our current constitution went through. Instead, a number of people traveled to Britain in the eve of independence, prepared a document at Lancaster House with the help of the former colonizers - and with a number of amendments since then - this is the so called "our constitution". The question that we need to ask ourselves today is what part we want to play - in ensuring that the Kenyan Constitution is an agreement between the

people of Kenya which is different from the Lancaster House document.

The current constitutional review process should be to all Kenyans, a means of getting together to set rules to regulate our harmonious existence, protection for each other, predictability and legitimization of our relationships and to ensure that there is recourse to justice if the relationships are not working as they should.

It is necessary to understand that when a nation constitutes itself into a single unit through the constitution, each individual brings his ability and power together and they, together, hold the power. This is why when we go to elections and we elect a representative, we are surrendering our power to that person to go and represent us in parliament where we all cannot go. We still can take our power in a re-ratification process through another election if the representatives are not playing their role as we would like. If the constitution is the supreme law of the land, it must be decided by those who have the power - and that is all the people of the land together. Thus, it has to be decided through a process of consultation and presentation of views. It has to be fully participatory and where this is not possible, delegates and not representatives have to be used to bring the views of the people. The distinction between delegates and representatives is that delegates are bound to consult with those who have delegated to them while representatives as exemplified by our members of parliament, give their own views. We want to use delegates so that we can be sure that they will bring our views and not their own understanding of our needs. However at best, we should all make our personal presentation to be sure that our needs are addressed.

3. Elections

Elections are the means through which all democracies world over use to re-ratify, re-engage or remove leaders who have not been able to deliver in accordance to the expectations of the people. Through elections, new leaders are put into place and are watched during the periods in between elections to see if they deserve re-election. Use of elections in this manner presupposes that the power belongs to the people and for this matter, to the electorate. Those who are elected to offices hold power in trust and it can be taken away from them if they do not use it as they should. It is during the elections that people take away and exercise their power through the ballot. It has to be borne in mind, that this is the ideal situation but as we know it in Kenya, we have through the tim, experienced people who have come to power because they have either bought their way in or have rigged themselves in. In a country where going to parliament is dependent on how much you can bribe your way in, it is not always the case that those who get into position of authority through “elections” are the right representatives of the people.

Taking the low economic levels of the majority of people with disabilities in this country, it may not matter how knowledgeable they are but they will never see the doors to Parliament. Constitution review has to address these concerns in our young democracy to ensure that everybody irrespective of their economic status has an opportunity to participate. It is our responsibility as citizens of this country to re-claim our power to vote and to be voted in and this can only be done through the constitution making process. The constitution must provide for ideal environment for people with disabilities to exercise their democratic right through the ballot. The entire voting process has to be made accessible in terms of both social and

physical environment. People should not be refused registration on the basis of lack of thumbs or any other shortcoming seen in terms of their disabilities. Instead, they should be facilitated to exercise their voting rights through all possible means. Blind people should be accompanied and helped to mark the ballot by a person of their choice. Ballot boxes have to be placed in an accessible environment. In this case, it will not only be the right but also the duty of every citizen irrespective of their disability to participate in elections.

Our participation in the constitutional review process has to be based on the premise that we as people with disabilities will make contributions that are general to the Kenya population and specific to people with disabilities. These submissions should find their way into the constitution to make a difference in the lives of the people in general and people with disabilities in particular. Some of such recommendations include:

1. Fair representation of persons with disabilities and other marginalized groups in all constitutional and other governing or relationship regulating organs at both regional, national and local levels. This will ensure that their viewpoint is considered in all matters of governance be they economic, social or political.
2. Out-law discrimination on the basis of disability and recognize the dignity of persons with disabilities. In this, it will help to ensure that in all clauses that make reference to grounds on which people should not be discriminated, disability be out-rightly mentioned.
3. The constitution should recognize that persons with disabilities are a category whose needs, aspirations and limitations call for their uplifting in terms of

rehabilitation education, employment and social life. Owing to their present marginalisation, the possibility of affirmative action should be considered until this uplifting is achieved.

4. The constitution should recognize the sign language for the deaf and provide for its promotion.
5. The constitution should provide for parliament to enact relevant laws to persons with disabilities. An example of this is the long waited “disability Bill”. Such laws should be aimed at the protection of persons with disabilities from the excesses and marginalisation tendencies of the society. The provision of an equal opportunity commission to ensure implementation of the constitutional provisions and other subsequent laws is highly recommended.
6. The constitution should provide for parliament to enact laws to provide for the facilitation of citizens with disabilities to register and vote. This is absolutely necessary because persons who do not have hands have in the past been denied registration because they cannot thumbprint on the registration papers. Equally, people with disabilities who aspire for elective positions should be assisted with the necessary logistics.
7. The constitution should provide for Parliamentary and local authority representatives of persons with disabilities who should be elected by persons with disabilities themselves.
8. There are other provisions based on the UN Standard rules on equalization of opportunities in the attached appendix that should be considered for inclusion in the constitution to ensure equal rights for people with disabilities.

APPENDIX

THE INTERNATIONAL ARENA

As we focus on participation in the constitutional review, it is necessary to observe what has been happening at the international level in the last three or so decades and see the relationship with our situation in Kenya. Today the world can, in general, boast of three decades, which have been characterized by a dream of full participation and equal opportunities for persons with disabilities. It all began with the 1971 declaration of the rights of the mentally handicapped and the 1975 declaration of the rights of persons with disabilities. These two United Nations instruments centered on provision of care, service and integration of persons with disabilities.

They are the first instruments that allude to the considerations of the rights approach to disability concerns. Subsequent United Nations initiatives have included the declaration of the international year for persons with disabilities, 1983 to 1992.

These efforts have resulted in such important UN documents like the World Programme of Action, The 1983 ILO convention on Rehabilitation and Employment for persons with disabilities and the NOT standards rules on equalization of opportunities for persons with disabilities. At the close of the twentieth century, the concept of Universal Design for a world free of all barriers was born. The essence of this dream which has led to all these developments has been to create a society where persons with disabilities are able to live an independent life, enjoy all the rights and freedom to which other human beings are entitled and participate fully in the activities of their society. Although this

dream is still real today in the new millennium, it is far from being achieved.

At the international level, there has been encouraging progress as seen in different individual countries through:

1. Revision and changes in Constitutions, equal opportunity laws and anti-discrimination legislation.
2. Growth and recognition of the disability movement at national and international levels. Through this movement, councils and other forms of lobby and advocacy departments have developed.
3. The situation of women with disabilities has called for more attention and they have developed a stronger position in the organizations of disabled persons than ever before.
4. In the recent years, some of the major international financial institutions and development agencies including the World Bank have shown greater interest in including a disability component in their general activities.

The most promising development in the recent years concerns human rights and disabled people. Through a number of resolutions passed by the UN Commission on human rights, disability has been recognized as a human rights concern for the United Nations. Discussions for an international convention on persons with disability as development from the World Programme of Action and the UN Standards Rules on Equalization of Opportunities is at

a very advanced stage. One could even say that all the doors of the UN human rights monitoring bodies have been opened and that the UN is now waiting for the response of the disability organizations.

May I say, that this international scenario has had very little bearing on us here in Kenya as a result of which, many opportunities can be said to have been lost. As we stand here today, there has not been a single legislation on disability throughout the thirty plus years of major world human rights bench marks for persons with disabilities. Although the Attorney General Hon. Amos Wako in what we people with disabilities considered the first most important initiative, put together a team of both people with disabilities and specialists into a Task Force to review laws relating to the disabled and to come up with a disability Bill, not much has been achieved in regard. It is nine years now since that Task Force began working and nearly six years since it presented its report but the Bill is as yet to be presented to Parliament. The question to us has been as to whether Mr. Wako is receiving support on this front and if so, why has this initiative stalled? Who is responsible and what can be done? Thus, in the realm of review and changes in disability laws and enactment of anti-discrimination legislation, we have not made any achievement in Kenya. This is unlike the situation in many other countries of the world where work in this respect was started much later and very good results. Uganda, our neighbour, is a case in point. Other countries with anti-discrimination laws include South Africa, Zimbabwe, Nigeria, Malawi and Zambia to mention but only a few in Africa.

Here at home, the Constitution review process is now with us. It is time to take the opportunity to make our input into the process. If we don't, it will be ourselves to blame. The Commission's work is to collect

and collate views. Such views must be given to them by all stakeholders ensuring proper representation of the general concerns of the country and specific concerns of a particular stakeholder. The disability movement is a stakeholder and their views will not be presented by anybody else. If they don't do it this will be another lost opportunity.

What is our key concern? Whereas there are some very specific concern for persons with disabilities in Kenya, a lot of work has been carried out on disability rights internationally and have identified many common areas of concern for people with disabilities the world over. It is therefore necessary to reflect on some of the resultant documents as we prepare our Kenya specific concerns. We will find that in many cases, what is needed is to adopt these recommendations to our situation. First, there are the provisions of the United Nations Standard Rules on Equalization of Opportunities; this is the most comprehensive disability rights document as at now. We should be able to borrow from its provisions.

These documents provide twenty-two rules, which when followed, rights of persons with disabilities will be observed and their requirements met. The rules are divided into four sections. The first set of these provides for a conducive environment in which equalization of opportunities for persons with disabilities can be achieved. These include:

1. Awareness raising (to also concern) on the plight, needs, aspirations and limitations resulting from the effects of disabilities.
2. Medical care (by all concerned) to assist people with disability cope with their health challenges.

3. Rehabilitation of all people with disabilities to help them adjust to their environment to prepare them for the world of various engagements.
4. Support services (to be provided) to enable persons with disabilities function in a competitive world. The second set of rules are referred to in the document as the target areas of equal participation. They include:
5. Accessibility (to physical and social environment, information, services etc)
6. Education (at all possible levels irrespective of ability to pay for it).
7. Employment (in accordance to one's training, ability and needs). Provisions of suitable accommodation for the successful functioning in employment is necessary.

Where employers are reluctant to hire people with disabilities, provision to enhance this and to help them pay for generation of employment elsewhere will need to be put in place.

8. Income maintenance and social security. This rule is based on the premise that even with the best environment and opportunities, there will be situations where some either because of their disabilities and general unemployment situation, will not be able to take up gainful employment. These need to be helped to live life in full like anybody else.
9. Family life and personal integrity. Nobody should stand on the way of

another on account of disability in regard to family life and personal integrity.

10. Culture: People with disabilities should be facilitated to participate and partake in normally acceptable cultural activities in their society. They should not be excluded on the basis of their disabilities.
11. Recreation and sports: These are desirable leisure activities in which people with disabilities should be facilitated to undertake. The rule provides that necessary appropriate facilities for these be provide, as is the case with the rest of the community in which people with disabilities live.
12. Religion: The rule here provides that people are not excluded from religious practice of their choice on account of disabilities.

Rules 13 to 22 have to do with implementation measures and mechanisms for the monitoring of the implementation of these rules. These may therefore not be very important at this time but if these provisions can find their way into our statutes including the supreme law of the land in preparation, a national mechanism for implementation and monitoring should be provided. This could be in form of a disability Commission or an equal opportunity Commission. Rules 5 to 12 above outlined from the basis of the actual provision of disability rights.

Their achievement would mean to people with disabilities:

- (a) A change in their physical environment in terms of entry into buildings, using transport and moving about in their homes and communities easily.

(b) A change in their educational and professional environment and hence, self-fulfillment and self-esteem.

(c) A change in their social environment and hence total integration in terms of community and family affairs.

EDUCATION AS A CHALLENGE OF PERSONS WITH DISABILITIES IN THE UNITED STATES WITHIN THE CONTEXT OF THE LEGAL FRAMEWORK

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1. Discussion Questions

1. What were the challenges of the United States in educating children with disabilities prior to the enactment of All Handicapped Children Act of 1975 (PL 94-142), now called Individuals with Disabilities Education Act Of 1997 (IDEA)?
2. What were the successes of the United States in educating children with disabilities after the enactment of PL-142? What challenges led to the amendement of the Law in 1997?
3. What were the achievements of the United States in educating children with disabilities after the amendement of IDEA 1997?
4. What remain as apparent challenges facing the United States in educating children with disabilities?
5. Recommendations for providing effective special education to children with disabilities.
6. What were the challenges of the United States in educating children with disabilities prior to the enactment of Education for All Handicapped Children Act of 1975 (PL94-142), now called Individuals with Disabilities Education Act of 1997?

2. From 1950 - 1972

Deaf Children continued to receive education in segregated settings and children with other disabilities (e.g., mental retardation, multiple disabilities, and emotional disorders) were excluded from public education or placed in segregated settings.

Segregation of students did not only happen along disability line, but also along racial lines.

2.1 Resulting Court Cases

(a) *Brown v. Board of Education of Topeka, Kansas, 1954:*

The Supreme court of Topeka Kansas ruled that segregation of students along racial line creates inequality in students' moral and educational development.

"it generates feelings of inferiority...this sense of inferiority affects the motivation of a child to learn...and has a tendency to retard educational and moral development".

(b) *Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania (1972).*

13 Students with mental retardation were excluded from public education.

Reason: They were considered untrainable and uneducatable.

PARC challenged this claims, requiring proofs.

The state of Pennsylvania (the school system) failed to prove it.

The supreme court ruled in favour of the students requiring Pennsylvania School systems to provide public education to the students.

The school system was also required to provide due process, prior notice, and evaluation to students with disabilities.

(c) *Mill v Board of Education of Washington, DC (1972).*

7 Children were excluded from public education due to behaviour problems and reason that there was not enough money to educate them.

Court ruling: Children must not be excluded from public education because of lack of money.

(d) *Hobson v. Hansen (1967).*

District of Columbia school system tracked students into regular or special education classes on the basis of their IQs. The court considered the IQ tests used as culturally biased and Court Ruling: The District of Columbia school system must not track students into regular or special education classes on the basis of their IQs. The IQ tests used were biased and failed to consider cultural and environmental factors.

(e) *Diana v State Board of Education (1970).*

California placed Hispanic students in special classes for students with mental retardations on the basis of IQ tests administered in English.

2.2 **Resulting Action:**

(a) *Enactment of the Rehabilitation Act of 1973 with Section 504:*

- A person is handicapped/disabled under Section 504 if s/he:
 - Has a physical or mental impairment which substantially limits one or more major life activities (e.g., learning, walking, talking);
 - Has a record of such impairment; or
 - Is regarded as having such an impairment.

(b) *Anti-discrimination clause of Section 504 of the American Rehabilitation Act of 1973:*

'No otherwise qualified individual with a disability shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'

More than half of the students with disabilities in the United States were not receiving appropriate educational services, and one million of them were excluded entirely from the United States public school system.

2.3 **Action Taken:**

The Congress of the United States considered education of children with disabilities as a national interest, and the Federal Government decided to assist State and local efforts to provide programs to meet the educational needs of children with disabilities.

The United States' Congress enacted Education of All Handicapped Children Act of 1975, now called Individual with Disabilities Education Act of 1997.

What were the successes of the United States in educating children with disabilities after the enactment of PL 94-142? What challenges led to the amendment of the law in 1997

3. Successes

1. Specific (13) categories of disabilities
2. Least restrictive environment clause
3. Free appropriate public education
4. Use of multiple assessments for assessing students
5. Students were assessed in their primary languages.
6. Federal funding for special education
7. Procedural safeguards for children with disabilities and their parents.
8. Due process

4. Challenges

- A. Inclusion of students with disabilities in regular classrooms
- B. Defining 'least restrictive environment clause' of the Law (PL 94-142)
- C. IEP Accountability
- D. Procedural compliance.
- E. Discipline and suspension of students with disabilities

4.1 Resulting Court Cases

(a) *School District of Rochester, New Hampshire v. Timothy (1988):*

No student is too disabled to be included in regular curriculum. Zero reject.

(b) *New York Association of Retarded Children v. Carey (1979)*

Students with mental retardation, who contracted Hepatitis B should not be excluded from participation in regular curricula activities. Exclusion was violation of FAPE.

(c) *Roncker v. Walter (1983)*

Portable services need to be delivered to students with severe disabilities included in regular classroom.

(d) *Oberti et al v. Board of Education of the Borough of Clementon School District:*

The School district must prove with documentation that it has made reasonable effort to accommodate children with disabilities in the regular classroom, prior to considering separate placement.

(c) *Sacramento City Unified School District Board of Education v. Rachel Holland et al (1994)*

Regular education classroom was the appropriate placement for Rachel.

(d) *Poolaw v. Bishop, 1994*

A deaf child's continuous failure in a mainstream program is sufficient ground for placing the child in a deaf school.

(e) *Doe et al. v. Withers, (1993).*

A school or school district is liable if a student fails a test because his/her teacher fails to provide required accommodations.

(f) *Jackson v. Franklin County School Board, 1986:*

Failure to meet PL 94-142 procedural requirements are adequate grounds by themselves to find that a school failed to provide free appropriate public education.

(g) *Goss v. Lopez, 1975*

(h) *Stuart v. Nappi, 1978*

(i) *Sherry v. New York State Education, 1979*

- (j) *Keeling v. Grubbs, 1982*
- (k) *Doe v. Koger, 1983*
- (l) *S-1 v. Turlington, 1981*
- (m) *Honig v. Doe, 1988*

Decisions in the various court cases and the American People's desire to amend the law led to the amendment of the law in 1997. The law is now called Individuals with Disabilities Education Act of 1997.

What are the achievements of the United States in educating children with disabilities after the amendments of IDEA 1997?

5. Post IDEA 1997 Achievements

1. Increased parents' participation in the education of their children.
2. A better definition of what constitutes 'related services'.
3. Better procedures for meeting the needs of children with disabilities in private schools
4. Clear placement considerations for deaf and hard hearing children.
5. Better procedures for managing and supporting students with disruptive behaviours.
6. Mediation process strongly recommended for resolving disputes.
7. Incentives to states that provide special education services to children with disabilities ages 0-3
8. Refined procedural safeguards
9. Regular assessment of all students with disabilities
10. Increased emphasis on transitional services for students with disabilities.

What remains as apparent challenges facing the United States in educating children with disabilities?

1. Assessment of students with disabilities
 2. Discipline and suspension of students with disabilities
 3. Inclusion of children with disabilities in general education programs
 4. Shortage of special education teachers
 5. Low expectations for students with disabilities.
 6. Collaboration between programs for preparing special education teachers and public schools serving children with disabilities.
- ### 6. Recommendations for Providing Effective Special Education to Children with Disabilities.
1. Funding for educational programs for students with disabilities.
 2. Substantial training stipends for teacher and related service candidates.
 3. On-going professional development for personnel working with children with disabilities.
 4. Proper identification, evaluation and placement of students with disabilities.
 5. Functional procedural safeguards and due process procedures
 6. Increase accountability in the teaching profession

7. Substantive collaboration between teacher preparation programs and public schools serving children with disabilities.
8. Non-discriminatory evaluation of students with disabilities.
9. A recognition of the life and economic importance of education

CULTURE, RELIGION AND MEDIA AND ITS EFFECTS ON PERSONS WITH DISABILITIES

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1. Preamble

Universally, the wind of **Democratisation** is sweeping across as an inevitable phenomenon. This has been warranted by the realization that the cherished development with the accompanying improved standards of living can only prevail in an environment where all individuals and groups in society are represented in the decision making process of their leadership through the circumscribed (demarcated) structures that are or ought to be institutionalised. Because this process is a matter of right, it then has to be documented in the supreme legislation of the land, which is the Constitution.

However, because needs and value vary with space and time, it then becomes imperative that periodically, the leadership must get back to the people to seek their opinion on what they feel should be guaranteed in the National Legislation. This process is what we technically call the Constitutional Review process, which I am delighted to see taking place in Kenya as indeed in Uganda as we speak now.

1.1 Abstract

This paper endeavours to discuss how culture, religion and media affect the persons with disabilities. It is the considered opinion of the presenter that religion is an artefact, therefore a part of culture. Thus, in the mainstream of the presentation, religion shall be fused in culture and discussed therein.

Both the negative and positive effects of culture and media, substantiated with relevant examples shall form the main focus of the presentation.

The paper is premised on the philosophy that in light of the East African Community spirit, as indeed **globalisation**, it is imperative that all the East African states recognize persons with disabilities as key stakeholders and bring them on board.

2. Definitions

2.1 Culture

Refers to the customs, arts and social institutions etc of a particular group or nation. Culture is dynamic; it changes constantly, depending on the strength of influence. Much of Africa's cultural tradition is good, essential and sacred. Examples of our good cultural values include African art, both visual and performing arts, crafts, languages, food traditional medicine, games, sports as well as respect for the elderly¹.

2.2 Religion

Religion is a complex of man's inter-relations with the supernatural².

¹ Government of Uganda (G.O.U.) (1999, pg. 25): *A prosperous people, Harmonious Nationa, Beautiful Country*;

² Seligman R.E. & Johnson (1942. p. 229): *Encyclopaedia of the Social Sciences* Vol. 13, New York.

2.3. *Media*

Media, is a plural for word medium, and is derived from the Latin word *medium* which denotes the means by which a message is communicated ³.

2.4. *Disability*

The term "Disability" summarizes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical condition or mental illness. Such impairments, conditions or ailments may be permanent or transitory in nature.⁴

And they affect the individuals functioning in routine (daily) activities, This is the medical view or model; the social model looks at the social and economic barriers which stop people with Disabilities from participating fully in society ⁵.

A person with disability can therefore be defined as an individual with defect(s) on his body that affect his performance of routine duties; which could not have been the case in absence of such defect.

3.0 **Persons With Disability and Constitutionalism: A Case of Uganda**

Cognizant of the fact that this Convention is being held in the framework of attaining representation of **Persons With Disability (PWDs)** in the constitutional process, it has been considered imperative that reference be

made to my country -Uganda as already there is significant **mainstreaming** of disability issues. It is hoped that the shared experience will provide the impetus and motivation as well as a reference to our PWDs colleagues in Kenya.

The two fundamental factors that have propelled PWDs in Uganda are the goodwill of the Government, and the resilience and cohesion of our Disability Movement.

The disabled persons in Uganda are united under their National Umbrella called the **National Union of Disabled Persons of Uganda (NUDIPU)** whose mission is to advocate for the equalization of opportunities of PWDs with other citizens of Uganda.

It endeavours to improve on their quality of life in the fields of health; education and socio-economic welfare by ensuring that services developed or to be developed are relevant to their needs⁶.

So flamboyant is the NUDIPU that the Government uses its structures, which are spread down to the grassroots, in the election of representatives for PWDs at the higher levels including Parliament. Through the Movement Government has made its support to **PWDs** so certain and this is sustained by the several legislations that cater for PWDs e.g.

- Article 32(1) of the Constitution, provides for Affirmative Action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom.

In light of this, the government has put in place a department headed by a Minister of State in charge of Disability and Elderly Affairs.

³ Dudley F. A. & Rice J. G. (1968, p. 111): *The Humanities*, Tokyo.

⁴ UN Standard Rules on the Equalisation of Opportunities for persons with Disabilities 20th December 1993. pg. 9.

⁵ Ndeezi A (1999) pg. 7: "The Disability Movement in Uganda"

⁶ Ndeezi Alex (1999) pg. 17: Ibid.

- Universal primary Education (PE) policy of Government where all children are entitled to free primary Education-initially targeted, children with disabilities.
 - The Local Government Act provides for representation of PWDs at all levels by at least two persons.
 - The Land Act of 1998 (Section 28) provides for the rights of women, children and PWDs in regard to customary land.
 - Students with disabilities who complete Advanced Level Education get extra or bonus marks to join Makerere University etc.
- The above achievements could not be registered if we as persons with disabilities were not fully involved in Constitutional Review Process, Parliament, and Government.

4. PWDs Vis-a-Vis Culture

As hinted at earlier on in the definitions, our culture or African traditions have inherent values which, when operationalised can yield a lot of positive returns for the disability movement. In the same way, the negative attitudes within our culture are detrimental to the well being of PWDs. It is gratifying to note that inherent within African tradition is a wealth of such social values as love, modesty, hard work, unity etc. In the African homestead for instance, everybody including a stranger was treated with dignity and honour. Work was divided according to age, sex and ability. The PWDs were assigned roles that were consistent with their situation and were as such very productive. This value should be institutionalised in our systems to mitigate the shameful levels of unemployment amongst PWDs as such are very productive.

On the other hand, traditions in Africa have by and large, been accused of marginalizing PWDs in our society. It is sad that there are

many societies that still perceive PWDs very negatively. For instance, it is said that among the Lou, children with disabilities would be killed. In other societies, they are still looked at as a bad omen. Quite often, we hear of disabled children being tethered like goats in the backyard in homes far from where they can be seen. Many times, they are overprotected which leads to depending syndrome, lack of self-esteem and self-confidence.

There is social discrimination of PWDs manifest in Inheritance Rights where children with disabilities are denied a right to property. Many women with disabilities are single mothers because people feel it is a stigma to be associated with them.

The way forward here is to demystify societal attitudes and myths about disability. In this way, the self-esteem of PWDs will be enhanced, thus transforming them into a vibrant resource for development.

Religion and its effect on development ought not to be a subject of so much debate. This is because fundamentally all religions are about goodwill, love, tolerance; forgiveness etc which once practiced can post no unmistakable results for the well-being of PWDs. However the approach by the religious circles has to move from relief to developmental approach. In Uganda, the beggars go out every Friday to benefit from the kind Moslems handouts. This is not developmental.

5. The Media and PWDs

That the media is a big force for social transformation needs no further debate. In as much as it can propel society to progress, it can as well be retrogressive.

Therefore, the media is a consummate ally of the PWDS movement. This is because it has the means to affect or change attitudes in

a short time through what it publicizes. Negative connotations about PWDs such as referring to them, as the *helpless disabled* instead of PWDs should stop.

Parents in Uganda are proud to bring out their children because they see and hear in media of MPs or a Minister with a disability as positive role models of PWDs-so a future and hope for their children should be promoted. Positive language should be promoted. This requires the media personnel to interact with the PWDs have seminars and have a harmonized position. Abuse of PWDs should be brought out to the public to know, as well as their achievements.

6. Conclusion

Considering that the factors which have led to *marginalisation* of PWDs for so long are diverse, it is important therefore, that no

effort should be spared by all stakeholders including the PWDs, state, society, media and individuals.

The fight for emancipation of PWDs is a patriotic fight, let everybody including you and me make it our personal fight and crusade.

The UN- Standard Rules on the equalization of opportunities for persons with disabilities through participation and full involvement should be utilised as framework when discussing disability issues.

I look forward to a better Supreme Law for our neighbours-thus, Kenya shall provide for PWDs. We all have a potential to get disability at anytime in life some time due to sickness, accidents, old age etc, in spite of immunisation, and other good health services. Thus, disability comes any time.

COMMUNICATION & MEDIA

Peter Wango Opany Kenya National Association of the Deaf

1. Introduction

We are all aware that the UN standard rules on the equalization of opportunities for persons with disabilities touches much on this topic which we hope the constitution of Kenya Review will accept in the new constitution.

This paper examines the types and forms of communication and media in the global and country context. It goes further to explore the same subject in the context of persons with disabilities (PWDs) and the deaf.

Finally, the paper examines the role of communication and media in the context of a new Constitution and “Is access to information a human right? The paper concludes with a set of recommendations on the way forward.

2. Forms & Types

Communication is the exchange of information using various forms - audio, visual and gestural. Humans, animals, birds and reptiles all have unique communication patterns. Communication is continuous from cradle to grave. Even a baby’s first cry at the maternity ward is a form of communication.

Media is a systematic process of disseminating communication to reach an audience ranging from one person to several millions.

3. Global Context

The world is now in the “Information Age”. This age is even more powerful than the vaunted “Industrial Age” and the “Age of

Capitalism” of the previous centuries. Technology has greatly improved the traditional forms of communication. Today, a Child in Taita Taveta is able to watch the live transmission of a global event such as the World Cup in Korea/Japan at the same time as a child in New York. Technology has transformed the world into a single global village and hence aided the growth of communication, learning and interaction.

Because of the power of instant communication made possible by new forms of media, people are more and better informed on the affairs of the world around them and more likely to take part in the affairs of their country, region and the world.

The days of political dictators are coming to an end, overtaken by the power of communication and media. The owners of media systems (electronic and publishing) are now more powerful than heads of state or the billionaire industrialists.

4. Country Context

Kenya, being a Third World country, only enjoys limited success and benefits accruing from the global shift to the new Information Age. The limitation is both economic and political. Since a country’s political dispensation determines its economic direction (liberalized or command economy), the obstacles placed in our path to the Information ‘superhighway are more political than economic. In Kenya, communication and media is tightly controlled and regulated by a mixture of legal and malicious laws intended to limit access to information by persons living in

rural areas who also form the biggest voting constituency.

The government has been slow or reluctant to liberalize the airwaves to independent broadcasting stations this, to ensure the rural masses do not have access to alternative political and economic views that would help them make informed choices during the elections. Curtailing the free flow of information is a denial of communication, effectively preventing people from utilizing all available forms of communication and enlightenment.

5. Disability Context

Persons with disabilities are disadvantaged in every aspect of political, economic and social life. The negative stereotyping common in the mainstream media does not help them. Thus, we read daily of such offensive terms as cripple, lame, deaf and dumb, blind leading blind, .etc. Knowingly or unknowingly, the mainstream media perpetuates a patronizing and condescending attitude towards the disabled.

The corporate world (big business) has little incentive to pursue socially - responsible policies in favor of the disabled because the whole society looks down on the disabled as unable or helpless. Telephone sets in public phone booths are erected without regard to the physically disabled. Phone buttons and TV remote control devices and the Daily newspapers do not have Braille symbols to assist the blind dial or surf independently.

Of course, the World Wide Web does not have voice cues to enable the blind enjoy full access to the joys and benefits of the information superhighway. Television captioning took root in the 1980s, but has not even reached the Kenyan market. Telephones for the Deaf (teletype or TTY phones) have been in use for about 20 years

now, but have not reached Kenya. The list goes on and on.

6. Deaf Context

The Deaf occupy a particularly precarious position in the world of communication and media. The Deaf occupy the dubious position of third class citizens and the following reasons explain why:

The Deaf are a linguistic minority. They communicate in Sign Language. Since sign language is not a mainstream language, it does not dominate the mainstream media. By default, any method of communication that's aural based is off limits to the Deaf without the aid of visual aids such as captioning or translation.

The Deaf are not well educated because their primary language (Sign Language) is not recognized as a medium of communication and instruction in schools for the Deaf. The introducing of preconceived methods of teaching in such schools has greatly contributed to the low education standard of the Deaf people.

Where the use of Sign Language is sanctioned, an artificial form of language (signed English) is used in the place of the Deaf people's natural language (Sign Language). Educators seem unable to differentiate between English and Sign Language and use both languages interchangeably.

At the end of their primary school, the majority of Deaf students cannot write a complete sentence in English. Is it any wonder that the Deaf cannot read Newspapers beyond the glossy photographs and a few words? What about the fast-paced television captioning (where available)? About the only thing that has brought some measure of independence to Deaf persons is

the use of e-mail and short messaging service (SMS).

7. Access to Information

I am also going to deal with the question of democracy. How does lack of access to information influence the ability to participate in democracy and in turn how does this inability influence democracy?

Is access to information a human right? Well, in our part of the world it is considered as something very fundamental that people should be able to know what is going on in the world. It is such a matter of course that most people do not think about the amount of information that is being made available to them through the mass media every minute a day.

However, it is not a universal human right in the UN universal declaration of human rights from 1948. The famous article 19, which deals with freedom of speech, also mentions the freedom to receive information. This means that we as human beings are free to receive and thus should not be punished for receiving any kind of information regardless of the kind. So we are free to receive information but do not have a right to receive it.

However, if we look at declarations that deal with the rights of various minority groups we have paragraphs about rights within this field. No matter if the Deaf are regarded as linguistic minority groups or a group of disabled persons there are declarations that protect their rights. In both cases the concern is that the state should not mistreat them as citizens.

The declaration on the rights of persons belonging to national or religious or linguistic minorities says:

“Persons belonging to the minorities have the right to participate effectively

in culture, religious, social, economic and public life”.

It is evident that if you are deprived of information you can't participate effectively in the culture, religious, social, economic or public life. However, the paragraph only deals with the rights to participate. It does not call upon the state to take definite measures to make this possible.

But in the Vienna declaration and programme of action of 1993 it does say that:

“Measures to be taken where appropriate should include facilitation of their full participation on all aspects of the political, economical, social, religious and cultural life of society and in the economical progress and development in this country”.

But it is rather vague that measures should be taken only where appropriate. Who should decide where certain measures are appropriate? The disabled group or the government? And will they agree about it? This is open for interpretation in the constitution.

The standard rules on the equalization of opportunities for persons with disabilities it says:

“For persons with disabilities of any kind, states should undertake the measures to provide access to information and communication”.

And the latter states should encourage the media especially television, radio and newspapers to make the service accessible and the standard rules goes quite a bit further within this field and can be used and should be used as a lever to obtain access to information.

If we consider the situation in Kenya however, one may think that the standard

rules have not been of much good in anyway. This situation is quite depressed. Deaf people are still excluded from following most of the programmes that are being broadcast to the Kenyan citizens.

The situation especially is bad when it comes to news programmes. Deaf people in Kenya do not have access to these programmes considering the role the media plays. In the modern society today it is evident that the information gap between the hearing and the deaf is widening. In most other areas the Deaf are coming to equality but when it comes to access to information the situation seems to be the opposite. Deaf people are falling more and more behind.

As said before, I would like to stress that one of the most serious consequences is that lack of information affects our ability to participate in democracy. It is tempting to quote George Orwell here. "We are all equal but some are more equal than others".

In any country in the world – this is considered to be one of the characteristics of democracy – that all vital information is being made available to the citizens giving them an inside view of all major decision making process in society. We are used to thinking in terms of access to information in society as a reflection of its degree of democracy.

8. Recommendations

1. Communication is a Human Right. The stifling of media that relays communication to the masses is illegal.
2. Laws that stifle the freedom of the media should be declared unconstitutional and repealed.
3. Media institutions must be more sensitive to the needs of persons with disabilities especially in their awareness creation to the public and education.
4. Telecommunications companies, public and private, should consult organizations of the disabled when planning and laying out communications infrastructure.
5. Telecommunications companies, public and private, should introduce Teletype phone capabilities in the existing networks in accordance to the needs of Deaf people.
6. Deaf persons should be allowed to import television-captioning and other high tech communication devices duty free.
7. Kenyan Sign Language should be entrenched in the new Constitution as the third official language after Kiswahili and English.
8. All schools for the deaf should use Kenya Sign Language developed locally by the competent Deaf organizations like Kenya National Association of the Deaf and teachers of such schools be trained Sign Language thoroughly.
9. Electronic media institutions, public and private, should employ Sign Language translators and Deaf programme presenters to allow unlimited access to their programming.
- 10 Broadcasting stations should allow at least one programme to air the problems affecting the disabled in society or in schools.
11. The existing traffic laws regarding passengers service vehicles have proved inefficient and must be amended by the constitution to provide accessibility to persons with Disabilities.

12. Roads and pedestrian facilities in Kenyan cities and towns must be reserved for persons with disabilities. The constitution must enact a law that guards all road Acts to avoid further causes of disabilities caused by reckless drivers.

13. Laws guarding the rights of persons with disabilities be enacted in the constitution so that Law enforcement officers must not violate the rights of persons with disabilities in time of disaster by committing acts of rape and assaults to disabled persons.

THE UN AND PERSONS WITH DISABILITIES

UNITED NATIONS COMMITMENT TO ADVANCEMENT OF THE STATUS OF PERSONS WITH DISABILITIES

1. Introduction

More than half a billion persons are disabled as a result of mental physical or sensory impairment and no matter which part of the world they are in their lives are often limited by physical or social barriers. Approximately 80 per cent of the world's disabled population lives in developing countries.

Disabled persons often suffer from discrimination, because of prejudice or ignorance and also, may lack access to essential services.

This is a "silent crisis" which affects not only disabled persons themselves and their families, but also the economic and social development of entire societies where a significant reservoir of human potential often goes untapped. Considering that disabilities are frequently caused by human activities, or simply by lack of care assistance from the entire international community is needed to put this "silent emergency" to an end.

From its early days the United Nations has sought to advance the status of disabled persons and to improve their lives. The concern of the United Nations for the well-being and rights of disabled persons is rooted in its founding principles, which are based on human rights, fundamental freedoms and equality of all human beings. As affirmed by the United Nations Charter, The Universal Declaration of Human Rights International Covenants on Human Rights and related human rights instruments, persons with disabilities are entitled to exercise their civil, political, social and cultural rights on an equal basis with non-disabled persons.

The contribution of United Nations specialized agencies to advance the situation of disabled persons is noteworthy: the United Nations Educational Scientific and Cultural Organization (UNESCO) by providing special education; the World Health Organization (WHO) by providing technical assistance in health and prevention; the United Nations International Children's Fund (UNICEF) by supporting childhood disability programmes and providing technical assistance in collaboration with Rehabilitation International (a non-governmental organization); the International Labour Organization (ILO) by improving access to the labour market and increasing economic integration through international labour standards and technical cooperation activities.

2. First Steps: Evolution of Human Rights of Disabled Persons

In the 1940s and 1950s the United Nations was active in promoting the well-being and rights of persons with physical disabilities through a range of social welfare approaches. The United Nations provided assistance to Governments in disability prevention and the rehabilitation of disabled persons through advisory missions, workshops for the training of technical personnel and the setting up of rehabilitation centres. Seminars and study groups were means of exchanging information and experience among experts in disability. Fellowships and scholarships were awarded for trainers. As a result of initiatives from within the community of disabled persons, the 1960s saw a fundamental re-evaluation

of policy and established the foundation for the full participation by disabled persons in society.

In the 1970s United Nations initiatives embraced the growing international concept of human rights of persons with disabilities and equalization of opportunities for them. In 1971, the General Assembly adopted the "Declaration on the Rights of Mentally Retarded Persons" This Declaration stipulates that mentally retarded persons are accorded the same rights as other human beings as well as specific rights corresponding to their needs in the medical, educational and social fields. Emphasis was put on the need to protect disabled persons from exploitation and provide them with proper legal procedures. In 1975, the General Assembly adopted the "Declaration on the Rights of Disabled Persons" which proclaims the equal civil and political rights of disabled persons. This Declaration sets the standard for equal treatment and access to services which help to develop capabilities of persons with disabilities and accelerate their social integration.

3. The International Year of Disabled Persons

In 1976 the General Assembly proclaimed 1981 as the International Year of Disabled Persons (IYDP) it called for a plan of action at the national, regional and international levels- with an emphasis on equalization of opportunities, rehabilitation and prevention of disabilities

4. World Programme of Action concerning Disabled Persons

A major outcome of the International Year of Disabled Persons was the formulation of the World Programme of Action concerning Disabled Persons, adopted by the General Assembly in December 1982.

5. Women and Disability

Women's needs require special attention. The consequences of disablement are particularly serious for women, because disabled women are discriminated against on double grounds: gender and disability. Therefore, they have less access to essential services such as health care, education and vocational rehabilitation.

Women are also specially affected by disability because they are often entrusted with the responsibility of caring for disabled persons in the community. Furthermore, women are more exposed to the risk of becoming disabled because of neglect and certain forms of abuse and harmful traditional practices directed against them.

The work of the United Nations will increasingly focus on equalization of opportunities for persons with disabilities. One of the most important concerns is inaccessibility of new technologies in particular information and communications technologies, as well as to the physical environment. The notion of mainstreaming will also be given prominence, that is including a disability dimension in policy recommendations covering a wide spectrum of social and economic concerns

6. The Special Rapporteur on Disability

In 1994, Mr. Bengt Lindqvist was designated by the Secretary-General of (the United Nations as Special Rapporteur on Disability of the Commission for Social Development: His duties are to assist in the monitoring of the implementation of the Standard Rules, and in the discharge of his functions, he divides his time between advisory functions and establishing a dialogue with States and local non-governmental organizations to further the implementation of the Standard Rules. The

Special Rapporteur works closely with a panel of experts, composed of representatives of international

organizations of persons with disabilities, and with the United Nations Secretariat.

APPENDIX

STANDARD RULES ON THE EQUALIZATION OF OPPORTUNITIES FOR PERSONS WITH DISABILITIES

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities were Approved by the United Nations General Assembly at its 48th session on 20th December 1993 (Resolution 48/96).

EXECUTIVE SUMMARY

1. INTRODUCTION

Background and current needs
 Previous international action
 Towards standard rules
 Purpose and content of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities
 Fundamental concepts in disability policy

Rule 14. Policy-making and planning
 Rule 15. Legislation
 Rule 16. Economic policies
 Rule 17. Coordination of work
 Rule 18. Organizations of persons with disabilities
 Rule 19. Personnel training
 Rule 20. National monitoring and evaluation of disability programmes in the implementation of the Rules.
 Rule 21. Technical and economic cooperation Rule
 Rule 22. International cooperation

2. PREAMBLE

2.1 PRECONDITIONS FOR EQUAL PARTICIPATION

Rule 1. Awareness-raising
 Rule 2. Medical care
 Rule 3. Rehabilitation
 Rule 4. Support services

2.4. MONITORING MECHANISM

2.2 TARGET AREAS FOR EQUAL PARTICIPATION

Rule 5. Accessibility
 Rule 6. Education
 Rule 7. Employment
 Rule 8. Income maintenance and social security
 Rule 9. Family life and personal integrity
 Rule 10. Culture
 Rule 11. Recreation and sports
 Rule 12. Religion

2.3 IMPLEMENTATION MEASURES

Rule 13. Information and research

1. Introduction

1.1. Background and current needs

1. There are persons with disabilities in all parts of the world and at all levels in every society. The number of persons with disabilities in the world is large and is growing.
2. Both the causes and the consequences of disability vary throughout the world. Those variations are the result of different socio-economic circumstances and of the different provisions that States make for the well-being of their citizens.
3. Present disability policy is the result of developments over the past 200 years. In many ways it reflects the general living conditions and social and economic policies of different times. In the disability field, however, there are also many specific circumstances that have influenced the living conditions of persons with disabilities. Ignorance, neglect, superstition and fear are social factors that throughout the history of disability have isolated persons with disabilities and delayed their development.
4. Over the years disability policy developed from elementary care at institutions, to education for children with disabilities and rehabilitation for persons who became disabled during adult life. Through education and rehabilitation, persons with disabilities became more active and a driving force in the further development of disability policy. Organizations of persons with disabilities, their families and advocates were formed, which advocated better conditions for persons with disabilities. After the Second World War the concepts of integration and normalization were introduced, which

reflected a growing awareness of the capabilities of persons with disabilities.

5. Towards the end of the 1960s, organizations of persons with disabilities in some countries started to formulate a new concept of disability. That new concept indicated the close connection between the limitation experienced by individuals with disabilities, the design and structure of their environments and the attitude of the general population. At the same time, the problems of disability in developing countries were more and more highlighted. In some of those countries the percentage of the population with disabilities was estimated to be very high and, for the most part, persons with disabilities were extremely poor.

1.2. Previous International Action

6. The rights of persons with disabilities have been the subject of much attention in the United Nations and other international organizations over a long period of time. The most important outcome of the International Year of Disabled Persons, 1981, was the World Programme of Action concerning Disabled Persons, adopted by the General Assembly by its resolution 37/52 of 3 December 1982. The Year and the World Programme of Action provided a strong impetus for progress in the field. They both emphasized the right of persons with disabilities to the same opportunities as other citizens and to an equal share in the improvements in living conditions resulting from economic and social development. There also, for the first time, handicap was defined as a function of the relationship between persons with disabilities and their environment.
7. The Global Meeting of Experts to Review the Implementation of the World

Programme of Action concerning Disabled Persons at the Mid-Point of the United Nations Decade of Disabled Persons was held at Stockholm in 1987. It was suggested at the meeting that a guiding philosophy should be developed to indicate the priorities for action in the years ahead. The basis of that philosophy should be the recognition of the rights of persons with disabilities.

8. Consequently, the meeting recommended that the General Assembly convene a special conference to draft an international convention on the elimination of all forms of discrimination against persons with disabilities, to be ratified by States by the end of the Decade.
9. A draft outline of the convention was prepared by Italy and presented to the General Assembly at its forty-second session. Further presentations concerning a draft convention were made by Sweden at the forty-fourth session of the Assembly. However, on both occasions, no consensus could be reached on the suitability of such a convention. In the opinion of many representatives, existing human rights documents seemed to guarantee persons with disabilities the same rights as other persons.

1.3 Towards Standard Rules

10. Guided by the deliberations in the General Assembly, the Economic and Social Council, at its first regular session of 1990, finally agreed to concentrate on the elaboration of an international instrument of a different kind. By its resolution 1990/26 of 24 May 1990, the Council authorized the Commission for Social Development to consider, at its thirty-second session, the establishment of an ad hoc open-ended working group

of government experts, funded by voluntary contributions, to elaborate standard rules on the equalization of opportunities for disabled children, youth and adults, in close collaboration with the specialized agencies, other intergovernmental bodies and non-governmental organizations, especially organizations of disabled persons. The Council also requested the Commission to finalize the text of those rules for consideration in 1993 and for submission to the General Assembly at its forty-eighth session.

11. The subsequent discussions in the Third Committee of the General Assembly at the forty-fifth session showed that there was wide support for the new initiative to elaborate standard rules on the equalization of opportunities for persons with disabilities.
12. At the thirty-second session of the Commission for Social Development, the initiative for standard rules received the support of a large number of representatives and discussions led to the adoption of resolution 32/2 of 20 February 1991, in which the Commission decided to establish an ad hoc open-ended working group in accordance with Economic and Social Council resolution 1990/26.

1.4 Purpose and Content of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities

13. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities have been developed on the basis of the experience gained during the United Nations Decade of Disabled Persons (1983-1992), 2 The International Bill of Human Rights, comprising the Universal Declaration of

Human Rights, 3 the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, 4 the Convention on the Rights of the Child, 5 and the Convention on the Elimination of All Forms of Discrimination against Women, 6 as well as the World Programme of Action concerning Disabled Persons, constitute the political and moral foundation for the Rules.

14. Although the Rules are not compulsory, they can become international customary rules when they are applied by a great number of States with the intention of respecting a rule in international law. They imply a strong moral and political commitment on behalf of States to take action for the equalization of opportunities for persons with disabilities. Important principles for responsibility, action and cooperation are indicated. Areas of decisive importance for the quality of life and for the achievement of full participation and equality are pointed out. The Rules offer an instrument for policy-making and action to persons with disabilities and their organizations. They provide a basis for technical and economic cooperation among States, the United Nations and other international organizations.
15. The purpose of the Rules is to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and obligations as others. In all societies of the world there are still obstacles proclaimed by the General Assembly in its resolution preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of States to take appropriate action to

remove such obstacles. Persons with disabilities and their organizations should play an active role as partners in this process. The equalization of opportunities for persons with disabilities is an essential contribution in the general and worldwide effort to mobilize human resources. Special attention may need to be directed towards groups such as women, children, the elderly, the poor, migrant workers, persons with dual or multiple disabilities, indigenous people and ethnic minorities. In addition, there are a large number of refugees with disabilities who have special needs requiring attention.

1.5 Fundamental Concepts in Disability Policy

16. The concepts set out below appear throughout the Rules. They are essentially built on the concepts in the World Programme of Action concerning Disabled Persons. In some cases they reflect the development that has taken place during the United Nations Decade of Disabled Persons.

1.6 Disability and Handicap

17. The term "disability" summarizes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.
18. The term "handicap" means the loss or limitation of opportunities to take part in the life of the community on an equal level with others. It describes the encounter between the person with a disability and the environment. The

purpose of this term is to emphasize the focus on the shortcomings in the environment and in many organized activities in society, for example, information, communication and education, which prevent persons with disabilities from participating on equal terms.

19. The use of the two terms "disability" and "handicap", as defined in paragraphs 17 and 18 above, should be seen in the light of modern disability history. During the 1970s there was a strong reaction among representatives of organizations of persons with disabilities and professionals in the field of disability against the terminology of the time. The terms "disability" and "handicap" were often used in an unclear and confusing way, which gave poor guidance for policy-making and for political action. The terminology reflected a medical and diagnostic approach, which ignored the imperfections and deficiencies of the surrounding society.

20. In 1980, the World Health Organization adopted an international classification of impairments, disabilities and handicaps, which suggested a more precise and at the same time relativistic approach. The International Classification of Impairments, Disabilities, and Handicaps make a clear distinction between "impairment", "disability" and "handicap". It has been extensively used in areas such as rehabilitation, education, statistics, policy, legislation, demography, sociology, economics and anthropology. Some users have expressed concern that the Classification, in its definition of the term "handicap", may still be considered too medical and too centred on the individual, and may not adequately clarify the interaction between societal conditions or expectations and the

abilities of the individual. Those concerns, and others expressed by users during the 12 years since its publication, will be addressed in forthcoming revisions of the Classification.

21. As a result of experience gained in the implementation of the World Programme of Action and of the general discussion that took place during the United Nations Decade of Disabled Persons, there was a deepening of knowledge and extension of understanding concerning disability issues and the terminology used. Current terminology recognizes the necessity of addressing both the individual needs (such as rehabilitation and technical aids) and the shortcomings of the society (various obstacles for participation).

1.7. World Health Organization, International Classification of Impairments, Disabilities, and Handicaps:

(a) Prevention

22. The term "prevention" means action aimed at preventing the occurrence of physical, intellectual, psychiatric or sensory impairments (primary prevention) or at preventing impairments from causing a permanent functional limitation or disability (secondary prevention). Prevention may include many different types of action, such as primary health care, prenatal and postnatal care, education in nutrition, immunization, campaigns against communicable diseases, measures to control endemic diseases, safety regulations, programmes for the prevention of accidents in different environments, including adaptation of workplaces to prevent occupational disabilities and diseases, and prevention

of disability resulting from pollution of the environment or armed conflict.

education, health, employment and social services.

(b) *Rehabilitation*

23. The term "rehabilitation" refers to a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric and/or social functional levels, thus providing them with the tools to change their lives towards a higher level of independence. Rehabilitation may include measures to provide and/or restore functions, or compensate for the loss or absence of a function or for a functional limitation. The rehabilitation process does not involve initial medical care. It includes a wide range of measures and activities from more basic and general rehabilitation to goal-oriented activities, for instance vocational rehabilitation.

27. As persons with disabilities achieve equal rights, they should also have equal obligations. As those rights are being achieved, societies should raise their expectations of persons with disabilities. As part of the process of equal opportunities, provision should be made to assist persons with disabilities to assume their full responsibility as members of society.

2. Preamble

Mindful of the pledge made, under the Charter of the United Nations, to take joint and separate action in cooperation with the Organization to promote higher standards of living, full employment, and conditions of economic and social progress and development,

(c) *Equalization of opportunities*

24. The term "equalization of opportunities" means the process through which the various systems of society and the environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities.

Reaffirming the commitment to human rights and fundamental freedoms, social justice and the dignity and worth of the human person proclaimed in the Charter,

25. The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis of the planning of societies and that all resources must be employed in such, as to ensure that every individual has equal opportunity for participation.

Recalling in particular the international standards on human rights, which have been laid down in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

26. Persons with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of

Underlining that those instruments proclaim that the rights recognized therein should be ensured equally to all individuals without discrimination.

Recalling the Convention on the Rights of the Child, which prohibits discrimination on the basis of disability and requires special measures to ensure the rights of children with disabilities, and the International

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provides for some protective measures against disability,

Recalling also the provisions in the Convention on the Elimination of All Forms of Discrimination against Women to ensure the rights of girls and women with disabilities

Having regard to the Declaration on the Rights of Disabled Persons, the Declaration on the Rights of Mentally Retarded Persons, the Declaration on Social Progress and Development, the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care and other relevant instruments adopted by the General Assembly,

Also having regard to the relevant conventions and recommendations adopted by the International Labour Organisation, with particular reference to participation in employment without discrimination for persons with disabilities

Mindful of the relevant recommendations and work of the United Nations Educational, Scientific and Cultural Organization, in particular the World Declaration on Education for All, the World Health Organization, the United Nations Children's Fund and other concerned organizations.

Having regard to the commitment made by States concerning the protection of the environment,

Mindful of the devastation caused by armed conflict and deploring the state of scarce resources in the production of weapons,

Recognizing that the World Programme of Action concerning Disabled Persons and the definition therein of equalization of opportunities represent earnest ambitions on

the part of the international community to render those various international instruments and recommendations of practical and core significance,

Acknowledging that the objective of the United Nations Decade of Disabled Persons (1983-1992) to implement the World Programme of Action is still valid and requires urgent and continued action,

Recalling that the World Programme of Action is based on concepts that are equally valid in developing and industrialized countries,

Convinced that intensified efforts are needed to achieve the full and equal enjoyment of human rights and participation in society by persons with disabilities,

Re-emphasizing that persons with disabilities, and their parents, guardians, advocates and organizations, must be active partners with States in the planning and implementation of all measures affecting their civil, political, economic, social and cultural rights,

In pursuance of Economic and Social Council resolution 1990/26, and basing themselves on the specific measures required for the attainment by persons with disabilities of equality with others, enumerated in detail in the World Programme of Action,

Have adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities outlined below, in order:

- (a) To stress that all action in the field of disability presupposes adequate knowledge and experience of the conditions and special needs of persons with disabilities;

- (b) To emphasize that the process through which every aspect of societal organization is made accessible to all is a basic objective of socio-economic development;
- (c) To outline crucial aspects of social policies in the field of disability, including, as appropriate, the active encouragement of technical and economic cooperation;
- (d) To provide models for the political decision-making process required for the attainment of equal opportunities, bearing in mind the widely differing technical and economic levels, the fact that the process must reflect keen understanding of the cultural context within which it takes place and the crucial role of persons with disabilities in it;
- (e) To propose national mechanisms for close collaboration among States, the organs of the United Nations system, other intergovernmental bodies and organizations of persons with disabilities
- (f) To propose an effective machinery for monitoring the process by which States seek to attain the equalization of opportunities for persons with disabilities.
- information on available programmes and services to persons with disabilities, their families, professionals in the field and the general public. Information to persons with disabilities should be presented in accessible form.
2. States should initiate and support information campaigns concerning persons with disabilities and disability policies, conveying the message that persons with disabilities are citizens with the same rights and obligations as others, thus justifying measures to remove all obstacles to full participation.
 3. States should encourage the portrayal of persons with disabilities by the mass media in a positive way; organizations of persons with disabilities should be consulted on this matter.
 4. States should ensure that public education programmes reflect in all the aspects, the principle of full participation and equality.
 5. States should invite persons with disabilities and their families and organizations to participate in public education programmes concerning disability matters.
 6. States should encourage enterprises in the private sector to include disability issues in all aspects of their activity.
 7. States should initiate and promote programmes aimed at raising the level of awareness of persons with disabilities concerning their rights and potential, Increased self-reliance and empowerment will assist persons with disabilities take advantage of the opportunities available to them.
 8. Awareness-raising should be an important part of the education of

2.1 Preconditions for Equal Participation

Rule 1. Awareness-raising

States should take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution.

1. States should ensure that responsible authorities distribute up-to-date

children with disabilities and in rehabilitation programmes. Persons with disabilities could also assist one another in awareness-raising through the activities of their own organizations.

9. Awareness-raising should be part of the education of all children and should be a component of teacher-training courses and training of all professionals.

Rule 2. Medical care

States should ensure the provision of effective medical care to persons with disabilities.

1. States should work towards the provision of programmes run by multidisciplinary teams of professionals for early detection, assessment and treatment of impairment. This could prevent, reduce or eliminate disabling effects. Such programmes should ensure the full participation of persons with disabilities and their families at the individual level, and of organizations of persons with disabilities at the planning and evaluation level.
2. Local community workers should be trained to participate in areas such as early detection of impairments, the provision of primary assistance and referral to appropriate services.
3. States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society.
4. States should ensure that all medical and paramedical personnel are adequately trained and equipped to give medical care to persons with disabilities

and that they have access to relevant treatment methods and technology.

5. States should ensure that medical, paramedical and related personnel are adequately trained so that they do not give inappropriate advice to parents, thus restricting options for their children. This training should be an ongoing process and should be based on the latest information available.
6. States should ensure that persons with disabilities are provided with any regular treatment and medicines they may need to preserve or improve their level of functioning.

Rule 3. Rehabilitation

States should ensure the provision of rehabilitation services to persons with disabilities in order for them to reach and sustain their optimum level of independence and functioning.

1. States should develop national rehabilitation programmes for all groups of persons with disabilities. Such programmes should be based on the actual individual needs of persons with disabilities and on the principles of full participation and equality.
2. Such programmes should include a wide range of activities, such as basic skills training to improve or compensate for an affected function, counseling of persons with disabilities and their families, developing self-reliance, and occasional services such as assessment and guidance.
3. All persons with disabilities, including persons with severe and/or multiple disabilities, who require rehabilitation should have access to it.

4. Persons with disabilities and their families should be able to participate in the design and organization of rehabilitation services concerning themselves.
 5. All rehabilitation services should be available in the local community where the person with disabilities lives. However, in some instances, in order to attain a certain training objective, special time-limited rehabilitation courses may be organized, where appropriate, in residential form.
 6. Persons with disabilities and their families should be encouraged to involve themselves in rehabilitation, for instance as trained teachers, instructor or counselors.
 7. States should draw upon the expertise of organizations of persons with disabilities when formulating or evaluating rehabilitation programmes.
3. To achieve this, generally available technical know-how should be utilized. In States where high-technology industry is available, it should be fully utilized to improve the standard and effectiveness of assertive devices and equipment. It is important to stimulate the development and production of simple and inexpensive devices, using local material and local production facilities when possible. Persons with disabilities themselves could be involved in the production of those devices.
 4. States should recognize that all persons with disabilities who need assertive devices should have access to them as appropriate, including financial accessibility. This may mean that assertive devices and equipment should be provided free of charge or at such a low price that persons with disabilities or their families can afford to buy them.
 5. In rehabilitation programmes for the provision of assertive devices and equipment, States should consider the special requirements of girls and boys with disabilities concerning the design, durability and age-appropriateness of assertive devices and equipment.

Rule 4. Support services

States should ensure the development and supply of support services, including assisting devices for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights.

1. States should ensure the provision of assertive devices and equipment, personal assistance and interpreter services, according to the needs of persons with disabilities, as important measures to achieve the equalization of opportunities.
2. States should support the development, production, distribution and servicing of assertive devices and equipment and the dissemination of knowledge about them.
6. States should support the development and provision of personal assistance programmes and interpretation services, especially for persons with severe and/or multiple disabilities. Such programmes would increase the level of participation of persons with disabilities in everyday life at home, at work, in school and during leisure-time activities.
7. Personal assistance programmes should be designed in such a way that the persons with disabilities using the programmes have a decisive influence on the way in which the programmes are delivered.

2.2 Target Areas for Equal Participation

Rule 5. Accessibility

States should recognize the overall importance of accessibility in the process of the equalization of opportunities in all spheres of society for persons with disabilities of any kind. States should (a) introduce programmes of action to make the physical environment accessible; and (b) undertake measures to provide access to information and communication.

(a) Access to the physical environment

1. States should initiate measures to remove the obstacles to participation in the physical environment. Such measures should be to develop standards and guidelines and to consider enacting legislation to ensure accessibility to various areas in society, such as housing, buildings, public transport services and other means of transportation, streets and other outdoor environments.
2. States should ensure that architects, construction engineers and others who are professionally involved in the design and construction of the physical environment have access to adequate information on disability policy and measures to achieve accessibility.
3. Accessibility requirements should be included in the design and construction of the physical environment from the beginning of the designing process.
4. Organizations of persons with disabilities should be consulted when standards and norms for accessibility are being developed. They should also be involved locally from the initial planning stage when public construction projects

are being designed, thus ensuring maximum accessibility.

(b) Access to information and communication

5. Persons with disabilities-and where appropriate, their families and advocates should have access to full information on diagnosis, rights and available services and programmes, at all stages. Such information should be presented in forms accessible to persons with disabilities.
6. States should develop strategies to make information services and documentation accessible for different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments. Similarly, appropriate technologies should be used to provide access to spoken information for persons with auditory impairments or comprehension difficulties.
7. Consideration should be given to the use of sign language in the education of deaf children, in their families and communities. Sign language interpretation services should also be provided to facilitate the communication between deaf persons and others.
8. Consideration should also be given to the needs of people with other communication disabilities.
9. States should encourage the media, especially television, radio and newspapers, to make their services accessible.
10. States should ensure that new computerized information and service

systems offered to the general public are either made initially accessible or are adapted to be made accessible to persons with disabilities.

11. Organizations of persons with disabilities should be consulted when measures to make information services accessible are being developed.

Rule 6. Education

States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings. They should ensure that the education of persons with disabilities is an integral part of the educational system.

1. General educational authorities are responsible for the education of persons with disabilities in integrated settings. Education for persons with disabilities should form an integral part of national educational planning, curriculum development and school organization.
2. Education in mainstream schools presupposes the provision of interpreter and other appropriate support services. Adequate accessibility and support services, designed to meet the needs of persons with different disabilities, should be provided.
3. Parent groups and organizations of persons with disabilities should be involved in the education process at all levels.
4. In States where education is compulsory it should be provided to girls and boys with all kinds and all levels of disabilities, including the most severe.
5. Special attention should be given in the following areas

- (a) Very young children with disabilities;

- (b) Pre-school children with disabilities;

- (c) Adults with disabilities, particularly women.

6. To accommodate educational provisions for persons with disabilities in the mainstream, States should:

- (a) Have a clearly stated policy, understood and accepted at the school level and by the wider community;

- (b) Allow for curriculum flexibility, addition and adaptation;

- (c) Provide for quality materials, ongoing teacher training and support teachers.

7. Integrated education and community-based programmes should be seen as complementary approaches in providing cost-effective education and training for persons with disabilities. National community-based programmes should encourage communities to use and develop their resources to provide local education to persons with disabilities.

8. In situations where the general school system does not yet adequately meet the needs of all persons with disabilities, special education may be considered. It should be aimed at preparing students for education in the general school system. The quality of such education should reflect the same standards and ambitions as general education and should be closely linked to it. At a minimum, students with disabilities should be afforded the same portion of educational resources as students without disabilities. States should aim for the gradual integration of special

education services into mainstream education. It is acknowledged that in some instances special education may currently be considered to be the most appropriate form of education for some students with disabilities.

9. Owing to the particular communication needs of deaf and deaf/blind persons, their education may be more suitably provided in schools for such persons or special classes and units in mainstream schools. At the initial stage, in particular, special attention needs to be focused on culturally sensitive instruction that will result in effective communication skills and maximum independence for people who are deaf or deaf/blind.

Rule 7. Employment

States should recognize the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. In both rural and urban areas they must have equal opportunities for productive and gainful employment in the labour market.

1. Laws and regulations in the employment field must not discriminate against persons with disabilities and must not raise obstacles to their employment.
2. States should actively support the integration of persons with disabilities into open employment. This active support could occur through a variety of measures, such as vocational training, incentive-oriented quota schemes, reserved or designated employment, loans or grants for small business, exclusive contracts or priority production rights, tax concessions, contract compliance or other technical or financial assistance to enterprises employing workers with disabilities. States should also encourage employers

to make reasonable adjustments to accommodate persons with disabilities.

3. States' action programmes should include:
 - (a) Measures to design and adapt workplaces and work premises in such a way that they become accessible to persons with different disabilities;
 - (b) Support for the use of new technologies and the development and production of assistive devices, tools and equipment and measures to facilitate access to such devices and equipment for persons with disabilities to enable them to gain and maintain employment;
 - (c) Provision of appropriate training and placement and ongoing support such as personal assistance and interpreter services.
4. States should initiate and support public awareness-raising campaigns designed to overcome negative attitudes and prejudices concerning workers with disabilities.
5. In their capacity as employers States should create favourable conditions for the employment of persons with disabilities in the public sector.
6. States, workers' organizations and employers should cooperate to ensure equitable recruitment and promotion policies, employment conditions, rates of pay, measures to improve the work environment in order to prevent injuries and impairments and measures for the rehabilitation of employees who have sustained employment-related injuries.
7. The aim should always be for persons with disabilities to obtain employment in

the open labour market. For persons with disabilities whose needs cannot be met in open employment, small units of sheltered or supported employment may be an alternative. It is important that the quality of such programmes be assessed in terms of their relevance and sufficiency in providing opportunities for persons with disabilities to gain employment in the labour market.

8. Measures should be taken to include persons with disabilities in training and employment programmes in the private and informal sectors.
9. States, workers' organizations and employers should cooperate with organizations of persons with disabilities concerning all measures to create training and employment opportunities, including flexible hours, part-time work, job-sharing, self-employment and attendant care for persons with disabilities.

Rule 8. Income maintenance and social security

States are responsible for the provision of social security and income maintenance for persons with disabilities.

1. States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities. States should ensure that the provision of support takes into account the costs frequently incurred by persons with disabilities and their families as a result of the disability.
2. In countries where social security, social insurance or other social welfare schemes exist or are being developed for

the general population States should ensure that such systems do not exclude or discriminate against persons with disabilities.

3. States should also ensure the provision of income support and social security protection to individuals who undertake the care of a person with a disability.
4. Social security systems should include incentives to restore the income-earning capacity of persons with disabilities. Such systems should provide or contribute to the organization, development and financing of vocational training. They should also assist with placement services.
5. Social security programmes should also provide incentives for persons with disabilities to seek employment in order to establish or re-establish their income-earning capacity.
6. Income support should be maintained as long as the disabling conditions remain in a manner that does not discourage persons with disabilities from seeking employment. It should only be reduced or terminated when persons with disabilities achieve adequate and secure income.
7. States, in countries where social security is to a large extent provided by the private sector, should encourage local communities, welfare organizations and families to develop self-help measures and incentives for employment or employment-related activities for persons with disabilities.

Rule 9. Family life and personal integrity

States should promote the full participation of persons with disabilities in family life. They should promote their right to personal

integrity and ensure that laws do not discriminate against persons with disabilities with respect to sexual relationships, marriage and parenthood.

1. Persons with disabilities should be enabled to live with their families. States should encourage the inclusion in family counseling of appropriate modules regarding disability and its effects on family life. Respite-care and attendant-care services should be made available to families which include a person with disabilities. States should remove all unnecessary obstacles to persons who want to foster or adopt a child or adult with disabilities.
2. Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood. Taking into account that persons with disabilities may experience difficulties in getting married and setting up a family, States should encourage the availability of appropriate counseling. Persons with disabilities must have the same access as others to family planning methods, as well as to information in accessible form on the sexual functioning of their bodies.
3. States should promote measures to change negative attitudes towards marriage, sexuality and parenthood of persons with disabilities, especially of girls and women with disabilities, which still prevail in society. The media should be encouraged to play an important role in removing such negative attitudes.
4. Persons with disabilities and their families need to be fully informed about taking precautions against sexual and other forms of abuse. Persons with disabilities are particularly vulnerable to abuse in the family, community or institutions and need to be educated on

how to avoid the occurrence of abuse, recognize when abuse has occurred and report on such acts.

Rule 10. Culture

States will ensure that persons with disabilities are integrated into and can participate in cultural activities on an equal basis.

1. States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas. Examples of such activities are dance, music, literature, theatre, plastic arts, painting and sculpture. Particularly in developing countries, emphasis should be placed on traditional and contemporary art forms, such as puppetry, recitation and story-telling.
2. States should promote the accessibility to and availability of places for cultural performances and services, such as theatres, museums, cinemas and libraries, to persons with disabilities.
3. States should initiate the development and use of special technical arrangements to make literature, films and theatre accessible to persons with disabilities

Rule 11. Recreation and sports

States will take measures to ensure that persons with disabilities have equal opportunities for recreation and sports.

1. States should initiate measures to make places for recreation and sports, hotels, beaches, sports arenas, gym halls, etc. accessible to persons with disabilities. Such measures should encompass

support staff in recreation and sports programmes, including projects to develop methods of accessibility, and participation, information and training programmes.

2. Tourist authorities, travel agencies, hotels, voluntary organizations and others involved in organizing recreational activities or travel opportunities should offer their services to all, taking into account the special needs of persons with disabilities. Suitable training should be provided to assist that process.
3. Sports organizations should be encouraged to develop opportunities for participation by persons with disabilities in sports activities. In some cases, accessibility measures could be enough to open up opportunities for participation. In other cases, special arrangements or special games would be needed. States should support the participation of persons with disabilities in national and international events.
4. Persons with disabilities participating in sports activities should have access to instruction and training of the same quality as other participants.
5. Organizers of sports and recreation should consult with organizations of persons with disabilities when developing their services for persons with disabilities.

Rule 12. Religion

States will encourage measures for equal participation by persons with disabilities in the religious life of their communities.

1. States should encourage, in consultation with religious authorities, measures to eliminate discrimination and make

religious activities accessible to persons with disabilities.

2. States should encourage the distribution of information on disability matters to religious institutions and organizations. States should also encourage religious authorities to include information on disability policies in the training for religious professions, as well as in religious education programmes.
3. They should also encourage the accessibility of religious literature to persons with sensory impairments.
4. States and/or religious organizations should consult with organizations of persons with disabilities when developing measures for equal participation in religious activities.

2.3. Implementation Measures

Rule 13. Information and research

States assume the ultimate responsibility for the collection and dissemination of information on the living conditions of persons with disabilities and promote comprehensive research on all aspects, including obstacles that affect the lives of persons with disabilities.

1. States should, at regular intervals, collect gender-specific statistics and other information concerning the living conditions of persons with disabilities. Such data collection could be conducted in conjunction with national censuses and household surveys and could be undertaken in close collaboration, inter alia with universities, research institutes and organizations of persons with disabilities. The data collection should include questions on programmes and services and their use.

2. States should consider establishing a data bank on disability, which would include statistics on available services and programmes as well as on the different groups of persons with disabilities. They should bear in mind the need to protect individual privacy and personal integrity.
3. States should initiate and support programmes of research on social, economic and participation issues that affect the lives of persons with disabilities and their families. Such research should include studies on the causes, types and frequencies of disabilities, the availability and efficacy of existing programmes and the need for development and evaluation of services and support measures
4. States should develop and adopt terminology and criteria for the conduct of national surveys, in cooperation with organizations of persons with disabilities.
5. States should facilitate the participation of persons with disabilities in data collection and research. To undertake such research States should particularly encourage the recruitment of qualified persons with disabilities.
6. States should support the exchange of research findings and experiences.
7. States should take measures to disseminate information and knowledge on disability to all political and administration levels within national, regional and local spheres.

Rule 14. Policy-making and planning

States will ensure that disability aspects are included in all relevant policy-making and national planning.

1. States should initiate and plan adequate policies for persons with disabilities at the national level, and stimulate and support action at regional and local levels.
2. States should involve organizations of persons with disabilities in all decision-making relating to plans and programmes concerning persons with disabilities or affecting their economic and social status.
3. The needs and concerns of persons with disabilities should be incorporated into general development plans and not be treated separately.
4. The ultimate responsibility of States for the situation of persons with disabilities does not relieve others of their responsibility. Anyone in charge of services, activities or the provision of information in society should be encouraged to accept responsibility for making such programmes available to persons with disabilities.
5. States should facilitate the development by local communities of programmes and measures for persons with disabilities. One way of doing this could be to develop manuals or check-lists and provide training programmes for local staff.

Rule 15. Legislation

States have a responsibility to create the legal bases for measures to achieve the objectives of full participation and equality for persons with disabilities.

1. National legislation, embodying the rights and obligations of citizens, should include the rights and obligations of persons with disabilities. States are

under an obligation to enable persons with disabilities to exercise their rights, including their human, civil and political rights, on an equal basis with other citizens. States must ensure that organizations of persons with disabilities are involved in the development of national legislation concerning the rights of persons with disabilities, as well as in the ongoing evaluation of that legislation.

2. Legislative action may be needed to remove conditions that may adversely affect the lives of persons with disabilities, including harassment and victimization. Any discriminatory provisions against persons with disabilities must be eliminated. National legislation should provide for appropriate sanctions in case of violations of the principles of non-discrimination.
3. National legislation concerning persons with disabilities may appear in two different forms. The rights and obligations may be incorporated in general legislation or contained in special legislation. Special legislation for persons with disabilities may be established in several ways:
 - (a) By enacting separate legislation, dealing exclusively with disability matters;
 - (b) By including disability matters within legislation on particular topics;
 - (c) By mentioning persons with disabilities specifically in the texts that serve to interpret existing legislation.

A combination of those different approaches might be desirable.

Affirmative action provisions may also be considered.

4. States may consider establishing formal statutory complaints mechanisms in order to protect the interests of persons with disabilities.

Rule 16. Economic policies

States have the financial responsibility for national programmes and measures to create equal opportunities for persons with disabilities.

1. States should include disability matters in the regular budgets of all national, regional and local government bodies.
2. States, non-governmental organizations and other interested bodies should interact to determine the most effective ways of supporting projects and measures relevant to persons with disabilities.
3. States should consider the use of economic measures (loans, tax exemptions, earmarked grants, special funds, and so on) to stimulate and support equal participation by persons with disabilities in society.
4. In many States it may be advisable to establish a disability development fund, which could support various pilot projects and self-help programmes at the grass-roots level.

Rule 17. Coordination of work

States are responsible for the establishment and strengthening of national coordinating committees, or similar bodies, to serve as a national focal point on disability matters.

1. The national coordinating committee or similar bodies should be permanent and

based on legal as well as appropriate administrative regulation.

2. A combination of representatives of private and public organizations is most likely to achieve an inter-sectoral and multidisciplinary composition. Representatives could be drawn from concerned government ministries, organizations of persons with disabilities and non-governmental organizations.
3. Organizations of persons with disabilities should have considerable influence in the national coordinating committee in order to ensure proper feedback of their concerns.
4. The national coordinating committee should be provided with sufficient autonomy and resources to fulfill its responsibilities in relation to its decision-making capacities. It should report to the highest governmental level.

Rule 18. Organizations of persons with disabilities

States should recognize the right of the organizations of persons with disabilities to represent persons with disabilities at national, regional and local levels. States should also recognize the advisory role of organizations of persons with disabilities in decision-making on disability matters.

1. States should encourage and support economically and in other ways the formation and strengthening of organizations of persons with disabilities, family members and/or advocates. States should recognize that those organizations have a role to play in the development of disability policy.
2. States should establish ongoing communication with organizations of persons with disabilities and ensure their

participation in the development of government policies.

3. The role of organizations of persons with disabilities could be to identify needs and priorities, to participate in the planning, implementation and evaluation of services and measures concerning the lives of persons with disabilities, and to contribute to public awareness and to advocate change.
4. As instruments of self-help, organizations of persons with disabilities provide and promote opportunities for the development of skills in various fields, mutual support among members and information sharing.
5. Organizations of persons with disabilities could perform their advisory role in many different ways such as having permanent representation on boards of government-funded agencies, serving on public commissions and providing expert knowledge on different projects.
6. The advisory role of organizations of persons with disabilities should be ongoing in order to develop and deepen the exchange of views and information between the State and the organizations.
7. Organizations should be permanently represented on the national coordinating committee or similar bodies.
8. The role of local organizations of persons with disabilities should be developed and strengthened to ensure that they influence matters at the community level.

Rule 19. Personnel training

States are responsible for ensuring the adequate training of personnel, at all levels,

involved in the planning and provision of programmes and services concerning persons with disabilities.

1. States should ensure that all authorities providing services in the disability field give adequate training to their personnel.
2. In the training of professionals in the disability field, as well as in the provision of information on disability in general training programmes, the principle of full participation and equality should be appropriately reflected.
3. States should develop training programmes in consultation with organizations of persons with disabilities, and persons with disabilities should be involved as teachers, instructors or advisers in staff training programmes.
4. The training of community workers is of great strategic importance, particularly in developing countries. It should involve persons with disabilities and include the development of appropriate values, competence and technologies as well as skills which can be practiced by persons with disabilities, their parents, families and members of the community.

Rule 20. National monitoring and evaluation of disability programmes in the implementation of the Rules

States are responsible for the continuous monitoring and evaluation of the implementation of national programmes and services concerning the equalization of opportunities for persons with disabilities.

1. States should periodically and systematically evaluate national disability programmes and disseminate

both the bases and the results of the evaluations.

2. States should develop and adopt terminology and criteria for the evaluation of disability-related programmes and services.
3. Such criteria and terminology should be developed in close cooperation with organizations of persons with disabilities from the earliest conceptual and planning stages.
4. States should participate in international cooperation in order to develop common standards for national evaluation in the disability field. States should encourage national coordinating committees to participate also.
5. The evaluation of various programmes in the disability field should be built in at the planning stage, so that the overall efficacy in fulfilling their policy objectives can be evaluated.

Rule 21. Technical and economic cooperation

States, both industrialized and developing, have the responsibility to cooperate in and take measures for the improvement of the living conditions of persons with disabilities in developing countries.

1. Measures to achieve the equalization of opportunities of persons with disabilities, including refugees with disabilities, should be integrated into general development programmes.
2. Such measures must be integrated into all forms of technical and economic cooperation, bilateral and multilateral, governmental and non-governmental. States should bring up disability issues

in discussions on such cooperation with their counterparts.

3. When planning and reviewing programmes of technical and economic cooperation, special attention should be given to the effects of such programmes on the situation of persons with disabilities. It is of the utmost importance that persons with disabilities and their organizations are consulted on any development projects designed for persons with disabilities. They should be directly involved in the development, implementation and evaluation of such projects.
4. Priority areas for technical and economic cooperation should include:
 - (a) The development of human resources through the development of skills, abilities and potentials of persons with disabilities and the initiation of employment-generating activities for and of persons with disabilities;
 - (b) The development and dissemination of appropriate disability-related technologies and know-how.
5. States are also encouraged to support the formation and strengthening of organizations of persons with disabilities.
6. States should take measures to improve the knowledge of disability issues - among staff involved at all levels in the administration of technical and economic cooperation programmes.

Rule 22. International cooperation

States will participate actively in international cooperation concerning policies for the equalization of opportunities for persons with disabilities.

1. Within the United Nations, the specialized agencies and other concerned intergovernmental organizations. States should participate in the development of disability policy.
2. Whenever appropriate. States should introduce disability aspects in general negotiations concerning standards, information exchange, development programmes, etc.
3. States should encourage and support the exchange of knowledge and experience among:
 - (a) Non-governmental organizations concerned with disability issues;
 - (b) Research institutions and individual researchers involved in disability issues;
 - (c) Representatives of field programmes and of professional groups in the disability field;
 - (d) Organizations of persons with disabilities;
 - (e) National coordinating committees.
4. States should ensure that the United Nations and the specialized agencies, as well as all intergovernmental and inter-parliamentary bodies, at global and regional levels, include in their work the global and regional organizations of persons with disabilities.

2.4. Monitoring Mechanism

1. The purpose of a monitoring mechanism is to further the effective implementation of the Rules. It will assist each State in assessing its level of implementation of the Rules and in measuring its progress. The monitoring should identify obstacles and suggest suitable measures that would contribute to the successful implementation of the Rules. The monitoring mechanism will recognize

the economic, social and cultural features existing in individual States. An important element should also be the provision of advisory services and the exchange of experience and information between States.

2. The Rules shall be monitored within the framework of the sessions of the Commission for Social Development. A Special Rapporteur with relevant and extensive experience in disability issues and international organizations shall be appointed, if necessary, funded by extra-budgetary resources, for three years to monitor the implementation of the Rules.
3. International organizations of persons with disabilities having consultative status with the Economic and Social Council and organizations representing persons with disabilities who have not yet formed their own organizations should be invited to create among themselves a panel of experts, on which organizations of persons with disabilities shall have a majority, taking into account the different kinds of disabilities and necessary equitable geographical distribution, to be consulted by the Special Rapporteur and, when appropriate, by the Secretariat.
4. The panel of experts will be encouraged by the Special Rapporteur to review, advise and provide feedback and suggestions on the promotion, implementation and monitoring of the Rules.
5. The Special Rapporteur shall send a set of questions to States, entities within the United Nations system, and intergovernmental and non-governmental organizations, including organizations of persons with disabilities. The set of questions should address implementation plans for the Rules in States. The questions should be selective in nature and cover a number of specific rules for in-depth evaluation. In preparing the questions the Special Rapporteur should consult with the panel of experts and the Secretariat.
6. The Special Rapporteur shall seek to establish a direct dialogue not only with States but also with local non-governmental organizations, seeking their views and comments on any information intended to be included in the reports. The Special Rapporteur shall provide advisory services on the implementation and monitoring of the Rules and assistance in the preparation of replies to the sets of questions.
7. The Department for Policy Coordination and Sustainable Development of the Secretariat, as the United Nations focal point on disability issues, the United Nations Development Programme and other entities and mechanisms within the United Nations system, such as the regional commissions and specialized agencies and inter-agency meetings, shall cooperate with the Special Rapporteur in the implementation and monitoring of the Rules at the national level.
8. The Special Rapporteur, assisted by the Secretariat, shall prepare reports for submission to the Commission for Social Development at its thirty-fourth and thirty-fifth sessions. In preparing such reports, the Rapporteur should consult with the panel of experts.
9. States should encourage national coordinating committees or similar bodies to participate in implementation and monitoring. As the focal points on disability matters at the national level, they should be encouraged to establish procedures to coordinate the monitoring

of the Rules. Organizations of persons with disabilities should be encouraged to be actively involved in the monitoring of the process at all levels.

10. Should extra-budgetary resources be identified, one or more positions of interregional adviser on the Rules should be created to provide direct services to States, including:
 - (a) The organization of national and regional training seminars on the content of the Rules;
 - (b) The development of guidelines to assist in strategies for implementation of the Rules;
 - (c) Dissemination of information about best practices concerning implementation of the Rules.

11. At its thirty-fourth session, the Commission for Social Development should establish an open-ended working group to examine the Special Rapporteur's report and make recommendations on how to improve the application of the Rules. In examining the Special Rapporteur's report, the Commission, through its open-ended working group, shall consult international organizations of persons

with disabilities and specialized agencies, in accordance with rules 71 and 76 of the rules of procedure of the functional commissions of the Economic and Social Council.

12. At its session following the end of the Special Rapporteur's mandate, the Commission should examine the possibility of either renewing that mandate, appointing a new Special Rapporteur or considering another monitoring mechanism, and should make appropriate recommendations to the Economic and Social Council.
13. States should be encouraged to contribute to the United Nations Voluntary Fund on Disability in order to further the implementation of the Rules.

For further substantive information please contact:

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POVERTY ALLEVIATION ECONOMIC EMPOWERMENT AND EMPLOYMENT OPPORTUNITY FOR THE DISABLED

Hon. Martha Karua

1. Historical Background

History of discrimination in some of our cultures. Lack of appreciation of different qualities and abilities of persons, leading to discrimination of the differently abled. Same attitude has led to and entrenched discrimination not just of those physically or mentally challenged of other marginalized groups most notably women. Need to appreciate all human beings and treat each with dignity irrespective of their circumstances, abilities or any other conditions.

Our supreme law i.e. the Constitution does not explicitly prohibit discrimination on basis of differences in ability. This in my view constitutes acquiescence to such discrimination. Result is discrimination in all areas, education, health, employment etc. In education a policy of separation exists with schools for the disabled like Thika School for the Blind etc. coupled with lack of facilities to accommodate the disabled in our learning institutions, health institutions, work place and indeed all public places.

Lack of access to basic facilities especially education leads to lack of economic empowerment. Creating awareness given to others that may lead the differently abled to self-sustainability and also to self-empowerment and open doors to exploit one's full potential. Until recently, indeed Hon. Josephine Sinyo's entrance to Parliament it was widely believed that being literate meant to be able to read and write in a manner understood by most i.e. most of us did not see braille as a form of writing satisfying that criteria or reading braille as

satisfying criteria for literacy. Our social attitudes towards the differently able have been and are still wanting we cannot empower this category of our citizens if they remain excluded by practice and the laws from the mainstream of public services and opportunities.

2. Way Forward.

2.1 Legal framework

- Safeguard the rights of the different abled and securing freedom from discrimination.
- Obligate a state to provide different facilities where necessary in order to guarantee equal access to opportunity and services,
- Recognize affirmative action as an avenue to redress current imbalances in such areas as education, employment, credit, training etc.

2.2 Policy Framework

Policy framework to support the legal framework including awareness on need to

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