

# **GENDER CONSIDERATIONS IN CONSTITUTION-MAKING: ENGENDERING WOMEN'S RIGHTS IN THE LEGAL PROCESS**

**By**

**Dr. Patricia Kameri-Mbote**

**Faculty of Law, University of Nairobi**

Paper presented at the Constitution of Kenya Review Commission Seminar on the Gender Question held on 6-7 December 2001 at Safari Park Hotel, Nairobi

## **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.

## **II. 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.

### **A. 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 barriers 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.

## **B. THE LEGAL FRAMEWORK**

### **1. 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.

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 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:

#### **a) 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 institutions.

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.

#### **b) 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 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 law. 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. 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 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).

### **c) Religious Law**

Islamic, Christian, Hindu, African religion etc

### **d) 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.

### **e) 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.

### **3. Domestic Law**

#### **a) 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, Kamari-Mbote and Mucai-Katambo: 1992)

## **b) 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 a 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 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 one 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.**

## c) Civil Law

### 1. Legal Capacity

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 has 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 necessities 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. 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. (Ibid.).

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, stricto sensu

entails the taking over of a widow by a relative of her deceased husband who could be a brother or even a son (Ibid.). 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).

### **1. TESTATE SUCCESSION**

On testate succession, sections that make 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.

## **2. 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 Luhya 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 Mutual Niota Probate and Administration Cause No. 843 of 1986 (High Court), the deceased, Mutual, married Teresa in 1961. The marriage was conducted under ACMDA. When Mutual died in 1986, a lady called

Josephine claimed to be his wife, allegedly married to him under Mamba customary law in 1980. She also claimed that her three children were Matual'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 Mutual lacked the capacity to marry customarily while his marriage with Teresia 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.

#### **d) 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 woman 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 than men are indictable for the offence. However, the swoops carried out to flush out prostitutes exclusively nets women as culprits.

#### **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 are perpetrate violence against women such as the chastisement of wives.

#### **e) 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.

## V. 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.