



International Environmental  
Law Research Centre

# Law and the Status of Women in Kenya

published in:

Janet Kabeberi-Macharia ed.,  
*Women, Laws, Customs and Practices in East Africa - Laying the Foundation*  
(Nairobi: Women & Law in East Africa, 1995), p. 80.

Vicky W. Mucai-Kattambo  
Janet Kabeberi-Macharia  
Patricia Kameri-Mbote

*This paper can be downloaded in PDF format from IELRC's website at*  
<http://www.ielrc.org/content/a9501.pdf>

## Table of Content

---

<b>I. Introduction</b>	<b>1</b>
<b>II. Civil and Political Rights</b>	<b>1</b>
<b>III. Enjoyment of Fundamental Rights and Freedoms</b>	<b>1</b>
<b>IV. Laws on Citizenship</b>	<b>3</b>
<b>V. Women and the Political Process</b>	<b>3</b>
<b>VI. Civil Law</b>	<b>4</b>
Legal Capacity	4
Rights Relating to Marriage	5
Rights of Inheritance	8
Women and Criminal Law	10
<b>VII. Nutrition, Health Care and Family Planning</b>	<b>11</b>
Right to Food and Nutrition	11
Health Care	11
Access to Contraceptive and Family Planning Information and Services	12
Voluntary Sterilization (Tubal Ligation)	12
Pregnancy Termination or Abortion	12
Acquired Immune Deficiency Syndrome (AIDS)	13
<b>VIII. Education</b>	<b>13</b>
<b>IX. Employment</b>	<b>14</b>
<b>X. Conclusion</b>	<b>15</b>

## **I. Introduction**

Kenya has a geographical area of 583,000 square kms. and is bordered by Somalia to the north east, Indian Ocean to the east, Ethiopia to the north, Uganda to the west and Tanzania to the South. Currently, the population is estimated at 23 million, the last census having been held in 1989.

Kenya gained Independence in 1963 from the British Colonial Government. Politically the country is divided into 188 parliamentary constituencies, which are represented in parliamentary duly elected members. As of December 1991, Kenya adopted the multiparty system, which has seen emergence of a number of parties each with a different agenda. Each party has indicated, interest in involving women in their policies or considering women's issues.

Women constitute over 50% of Kenya's population, but the majority of them are among the illiterate and poor in the country. A number are still affected by customary laws and practices which have for so long perpetuated their oppression. In this chapter, we look at the legal status of women in Kenya.

## **II. Civil and Political Rights**

(p. 81) Enjoyment of both civil and political rights is crucial to the enjoyment of gender equality in any society. In this section, we look at enjoyment of fundamental rights and freedoms, citizenship, laws and participation of women in the political process.

## **III. Enjoyment of Fundamental Rights and Freedoms**

The Constitution of Kenya provides the fundamental rights and freedoms of the individual, under Chapter Five. These rights and freedoms which are accorded to both men and women, include:

- (i) Protection of right to life.
- (ii) Protection of right to personal liberty.
- (iii) Protection from slavery and forced labour.
- (iv) Protection from inhuman treatment.
- (v) Protection from deprivation of property.
- (vi) Protection against arbitrary search or entry.
- (vii) Provisions to secure protection of law.
- (viii) Protection of freedom of conscience.
- (ix) Protection of freedom of expression.
- (x) Protection of freedom of assembly and association.
- (xi) Protection of freedom of movement.
- (xii) Protection from discrimination on grounds of race, etc.

The enjoyment of the above freedoms is guaranteed to every person in Kenya irrespective of race, tribe, place, of origin, (p. 82) residence or other local connection, political opinions, colour, creed, or sex, (section 70), though enjoyment of some of these rights and freedoms are subject "to respect for the rights and freedom of others and for the public interest".

Despite the above guarantee, one finds that Section 82 of the constitution, which is concerned with discrimination, affects women more than men. Section 82 (1) provides that no law shall make provision that is discriminatory “either of 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 the function of a public office or public authority”(82)(2). Discrimination of purposes of Section 82(3) means giving preferential treatment to different persons on the basis of race, tribe, place of origin or residence, or other local connection, political opinion, colour or creed. One’s gender as a basis for discrimination is not provided for.

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 affect women. Coupled with section 82(3) which omits “sex” as a basis of discrimination, one finds that women’s enjoyment of the fundamental freedoms guaranteed by the constitution is severely restricted. The omission of “sex” has generated arguments for and against the omission. Kibwana points out that,

*“Significantly, the constitution does not ban discrimination based on grounds of sex, Given that in section 70 “sex” is included as one of the categories which must not be used to disenable a citizen from enjoyment of human rights, it becomes clear that constitutional language deliberately excluded “sex” as a category for purposes of barring discrimination. The oft-advanced argument that sex discrimination was thought to be so objectionable that it was so assumed without explicit constitutional provision is a weak argument... Existing constitutional silence on (p. 83) whether sex discrimination is not allowed ensure that where such discrimination occurs there is no clear-cut existing operative law which can be relied on to challenge the discrimination”.*<sup>1</sup>

In most patriarchal states, there is a fear that illegalization of sex discrimination may lead to countless court suits by women. This fear has therefore meant that women who are most likely to be affected by such provisions, are denied constitutional protection from sex based discrimination. “

Another argument for the omission is given by the so called liberal school of thought which claims that provision of sex as a basis for discrimination, was not necessary since both men and women have the same rights and privileges, and thus ought to be treated equally. Therefore there is no need for such provision of “sex” as a ground for discrimination and exclusion of sex as ground for discrimination does not necessarily legitimise sex discrimination.<sup>2</sup>

The so-called conservative school has a different argument. This school “engages ill a strict interpretation of the law and argues that by failing to refer to sex, the necessary implication is that affording different treatment or grounds of sex, is not considered discrimination at law”.<sup>3</sup> Whatever the argument, women are the majority of victims of sex based discrimination, by virtue of being women.

Section 82(3) denies them protection outside their homes (e.g. in work place) whilst section 82(4) (6) further denies them protection in their homes. The effect is that at no time are women guaranteed protection from sex-based discrimination.

Section 82(4) (b) legitimises 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.

But this bill has failed to pass through Parliament for reasons including objections to interference with a man’s right to chastise (p. 84) his wife,<sup>4</sup> 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, for its success, it is, imperative that the constitution be amended to repeal the provision of Section 82 which advocates for sex based discrimination in matters of personal law, marriage, divorce and succession.

#### **IV. Laws on 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 if he abandoned her? 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 require their father's citizenship. Section 89, however, provides, that:

*“Every person born in Kenya after 11<sup>th</sup> 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 to 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.

A Kenyan woman married to a foreigner does not pass on her citizenship to her husband though this applies if a Kenyan man married 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 (p. 85) in Kenya, and may 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 a citizenship in the prescribed manner, which includes complying with the provisions of the constitution.

The passing of one's domicile to 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 a 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. Recently, a case from Botswana *Unity DOW vs. AG* shows that this provision is discriminatory and also contravenes the Convention on the Elimination of Discrimination Against Women (C.E.D.A.W.) of which Kenya is a signatory. If Kenya is to live up to its obligation under the convention, then it should repeal such provisions which promote discrimination against women.

#### **V. Women and the Political Process**

It is clear that women are the majority of the voter population though eventually they turn out to be under-represented. Women have often been socialized into believing that the political arena is for men only.<sup>5</sup> Thus their participation in the political and elective office is at a low level. Although some women have attempted to enter

the political field, the number of women members of parliament are still very few. Other than this, there has been no significant appointments of women into top level ministerial posts (p. 86) in the Government and in parastatals. Currently, there are only two women elected members of parliament, one of whom is an Assistant Minister. The highest ministerial post a woman has ever had in Kenya is that of an Assistant Minister. It is therefore important that:

*“Participation of women in political and public decision making is viewed critical to the actualization of sex equality because women must command real political power if their concern are to be prioritized meaningfully included in the national agenda”.*<sup>6</sup>

Representation of women should also be effective at the district and locational levels, as well as in the country, town and municipal councils. In the “Blue Book” on district focus on rural development (1987), full participation of the local community in planning and implementation of development activities is emphasized. This means that both women and men should participate in the development of their communities. Unfortunately, participation of women is low and ineffective both at the local and national levels. For example Women’s participation in the local councils is very low as shown by Table 1 here below: (p.87)

The poor representation and local councils may have changed since 1985 but not significantly. This is, however, reflective of the position women hold in the total political field.

Deliberate moves can be undertaken to ensure that women are well represented in the government by appointing women to top leadership posts. Registration may facilitate this by deliberately reserving a certain number of seats in parliament or in the party for women. The same can similarly be provided for in the local councils.

Women being the majority of the voters can, if properly mobilized, vote in candidates who are sensitised to their needs. However, studies have shown that even though women are aware of such candidates, they are either manipulated by other candidates or by their husbands giving them no free choice in the voting. In the forthcoming general elections it will be useful to observe the extent to which each political party is willing to put women’s issues on the agenda. This will depend on the constitutions of the parties and how these have provided for the participation of women.

(p. 88) In conclusion, the constitutional legitimation of sex discrimination has far reaching consequences for women in Kenya. This has meant that in the area where women are most affected the constitution offers them no protection. In the political process where women are significantly’ ignored in politics, policymaking and implementation, no policies adopted to improve their lot will not be easily prioritised.<sup>7</sup>

## **VI. Civil Law**

### **Legal Capacity**

According to the Age of Majority Act (Chapter 33 Laws of Kenya) 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. 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.

The “agency of necessity” principle entitles a married woman to pledge her husband’s credit for necessities of life commensurate with 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 to desperate situations.

Thus, where a woman has adequate means of maintenance she cannot pledge her husband's credit (*Biberfeld vs Berens* (1952) *Aller* 237). 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 necessaries claimed.

The principle of "presumed agency" does not depend on separation of spouses and a woman is entitled to bind her husband to a contract for necessaries of life.

(p. 89) There are few reported cases (see *Nanyuki General Stores vs Peterson* is EACA 28) on the application of these principles which implies that there are few controversies on the matter. Alternatively, women may be ignorant of them or they are constrained from involving them due to a variety of reasons including threats by husbands.

## **Rights Relating to 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.

A monogamous marriage may be contracted under Marriage Act (Chapter 150 Laws of Kenya); the Hindu Marriage and Divorce Act (Chapter 157 Laws of Kenya) and the African Christian Marriage and Divorce Act. (Chapter 151 Laws of Kenya) 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 (Chapter 63 Laws of Kenya).

Customary law allows a man to marry as many wives as he wishes, while Islamic law allow as many as four wives at any given time. The offence of bigamy does not apply to polygamous men under these two systems.

The rights and duties of spouses are dependent on the system of marriage applicable to the marriage.

### ***Capacity to Marry***

Capacity to contract a monogamous marriage is set out in statutory law. Under the Marriage Acts, 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 (p. 90) 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 (Chapter 152 Laws of Kenya).

Capacity to contract marriage under Customary law and Islamic 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 of marriage. Under Islamic law, a contract of marriage may be concluded by a guardian on behalf of a child who is below the age of puberty.

Child marriages have been the subject of much controversy in recent times 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.

The commissioners considered the marriage wrong in principle and contrary to the best interests of Kenya (See para 63 of marriage Report). They recommended minimum ages for marriage to apply to all communities – 18 years for males and 6 years for females. This recommendation found its way into a marriage bill which has yet to become law.

Thus, the vulnerability of female children in communities which practice these marriages is real and has nega-

tive implications for the general status of the Kenyan women. Not only do these marriages undermine the education 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 younger age groups, and exposure to sexually transmitted diseases as husbands of the children are usually older people who may have had several sexual partners.<sup>8</sup>

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 (p. 91) country which are notorious for child marriages have highlighted the role of Chiefs and other administrators in curbing the practice by involving the Chief Authority Act (Chapter 128 Laws of Kenya).

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, interventions under this Act lack adequate legal basis and therefore concrete solutions must come from an ongoing review of child law under the auspices of the Kenya Law Reform Commission.<sup>9</sup>

### *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 v I* (1971, EA 278) in which the court applied the English Married Women Property Act 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 (*feme sole*). Subsection 2 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 feme 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 v I* were not subject to customary law, the Married Woman's Property Act has been extended to parties married under customary law, for example *Karanja v. Karanja* (1975 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 (p. 92) 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. For example, questions have arisen regarding the position of an unemployed woman vis-à-vis her husband on the question of property especially when it is registered in the husband's name. Questions also arise where spouses acquire property through joint efforts and then it is registered in the name of one of the spouses.

In the absence of local legislation, Kenyan courts have yet again to resort to English law. The Judicature Act (Chapter 8 Laws of Kenya states that English rules of equity 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" Section 3 (1 )(C)). Under rules of equality, 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 a 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. Where a woman contributes to the purchase of the matrimonial home, spouses are entitled to it in equal shares irrespective of whether the contributions of the wife were smaller than those of the husband and vice versa.

The practical application of these principles 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 the reach of a majority of Kenyan women implying that special legal aid arrangements are necessary to enable them to 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. There are divergent practices on the position of the woman as regards her property rights on dissolution of marriage.<sup>10</sup>

Although this situation is changing through liberal judicial intervention and increasing advocacy on women's rights, specific (p. 93) policy interventions and legislative measures are necessary to ensure that women are empowered to have access to Matrimonial property. More training and employment opportunities are some examples of the necessary interventions. Moreover, legislation is necessary to address rights of women involved in situations of cohabitation for a considerable number of years without going through a ceremony of marriage, under any Law.

### *Parental Rights and Duties*

The principal legislation regarding maintenance and custody of children is embodied in the Guardianship of Infants Act, (Chapter 144 Laws of Kenya) the Children and Young Persons Act, (Chapter 141 laws of Kenya) The Matrimonial Causes Act, (Chapter 152 laws of Kenya) and the Subordinate Courts (Separation and Maintenance) Act (Chapter 153 Laws of Kenya). Parental rights and with regard to children born within wedlock arise from this legislation, which also provides a child with necessities of life.<sup>11</sup> In all matters pertaining to the rights and duties of children born within wedlock, courts treat men and women equally. Courts must, however, have the welfare of the infant as the first paramount consideration. In the absence of exceptional circumstances courts confer rights of custody of young children in the mother (See *Githunguri vs Githuguri* KLR 9).

The responsibility to care for the child born out of wedlock is placed squarely on the mother who has to provide for its education and other necessities of life. This state of affairs arose out of the repeal of the Affiliation Act in 1969. The Act had been enacted by the colonial government to ensure that putative fathers cared for their children. The Act enabled the mother of an out of wedlock child to apply for a court order against the expenses incurred in respect of the birth of the child, its education so long as the child was under 16 years old and its death.

The repeal introduced a major discriminatory element in the responsibilities of biological parents to care for their children. An unwed mother has no remedy save for pregnancy compensation which is recoverable by parents under customary law. An action may be brought under the Magistrates' Courts Act (Chapter 10 Laws of Kenya). The compensation of KShs. 1000/= currently (p. 94) sanctioned by the law, is contemptuous to say the least and would not even go halfway to defray medical expenses related to the child's birth. In any case, it is recoverable by parents for the lost honour of their daughter and not necessarily for the maintenance of the child.

The problem of illegitimacy is of topical interest and has formed an important aspect of the on going review on child law, under the auspices of the Kenya Law Reform Commission. Legislative efforts to grapple with the problem since the repeal of the Affiliation Act have yielded an interesting innovation embodied in the law of succession. The Law of Succession Act (Chapter 160 laws of Kenya) (section 3(2)) confers a right of inheritance to a child born out of wedlock if evidence can be adduced to show that the putative father (deceased) recognized the child or assumed permanent responsibility over him/her.

Whereas this provision rightly responds to the material needs of an illegitimate child, it may be the source of distress to an unsuspecting widow who is suddenly confronted with the reality of her late husband's infidelity. Why not hold the man responsible while he is still alive? It is expected that the child review exercise aforesaid will deal with this problem.

## *Separation and Divorce*

The law on separation and divorce provides differential treatment for men and women. Women who are married under a monogamous system of marriage, have the exclusive right to seek separation and maintenance in speedy and inexpensive proceedings in magistrates courts under the Subordinate Courts (separation and maintenance) Act. A woman may also petition for judicial separation and maintenance under the Maintenance Causes Act.

Under the Subordinate Courts (separation and maintenance) Act, a woman may seek separation on the grounds that the husband is a habitual drunkard; drug taker; is infected with a venereal disease; he has subjected her to prostitution; has been convicted of a crime under the penal code for having caused her actual bodily harm by causing her to take noxious substances, by unlawfully wounding her, or by assisting her or if he has failed to (p. 95) provide the necessities of life to her and the children. (See section 3).

The Matrimonial Causes Act also entitles a wife to petition for judicial separation where a husband who has been found guilty of rape, sodomy, or bestiality. These grounds may also form the basis for divorce. In addition to granting a divorce, courts are empowered to order the husband to pay alimony to the wife, the court is also empowered to exercise discretion with due regard to the wife's fortune, if any, the ability of the husband, and the conduct of the parties.

The above grounds are not available to men and in this sense the law has leaned heavily towards the protection of women. It should be noted, however, that the wide protection provided in the above legislation is limited to monogamous unions. The position of the woman is insecure under both Islamic and customary law.

A Muslim husband is empowered to unilaterally terminate marriage by pronouncing three *talaks* which mean (I divorce thee, I divorce thee, I divorce thee). The wife lacks the power to divorce her husband. In this way and once divorced, a woman loses her right of maintenance on expiry of three months.

Divorce under customary law involves clan elders and families of the spouses since marriage is basically a union between clans. A divorced or separated wife is not entitled to maintenance.

## **Rights of Inheritance**

The key legislation in this area is the Law of Succession, Act (Chapter 160 Laws of Kenya) passed in 1972, with the main objective of unifying the law of succession under the different personal laws. Thus, (except in the case of Muslims recently exempted from the Act)(See L.N. 21. of 1990) male and female children enjoy equal rights' of inheritance. Widows and widowers are also entitled to equal rights with the exception that a widow's right to her deceased's husband's immovable property is terminated by her subsequent marriage (See section 35).

Section 5(2) confers a right to a female person, whether married or unmarried, to make a will in the same way that a male person can. The act provides extensive measures to ensure rights (p. 96) of widows and children in monogamous as well as polygamous situations. Widows without children have also been provided for.

The Act was the result of deliberations of a presidential commission appointed in March 1967 to recommend a new comprehensive and uniform code on succession to apply to all persons. It has been hailed as an achievement towards ensuring equality between sexes. Indeed the Report on the Law of succession of 1968, of the commissioners underlined the observed underprivileged position of wives and daughters, (para 54) and, therefore, a deliberate attempt was made to create rights that would remove existing injustices. However, a number of provisions of the Act leave doubt on its effectiveness in curbing persistent discriminatory practices.

For example, Section 32 states that the provisions of the Act on intestacy shall not apply to:

- (a) agricultural land and crops thereon; or
- (b) livestock, situated in such areas as the Attorney General may by notice in the gazette specify.

Further it is stated in Section 33 that the property afore said shall be governed by the "law or sworn applicable

to the deceased's community, tribe, religion or sect as the case may be". These states that property set out in section 32 aforesaid continue to be regulated by the various laws of succession which govern the four systems of family law.

This has far reaching consequences for women particularly those governed by customary law and communities where land and livestock are the most important forms of property. Under customary law, some communities granted wives and daughters the right of maintenance only. This limited interest was, however, terminated on return of a widow to her family or on her marriage. The exception in Section 32 has, therefore, the effect of perpetuating the discriminatory traditional practices.

A few reported disputes show clearly that the Kenya society, especially rural communities, are unprepared for the revolutionary aspects of the Law of Succession Act in so far as wives and daughters' and wives' rights but at the same time distinction has been drawn between the rights of married and those of unmarried (p.97) daughters.<sup>12</sup> It has been argued and held that married daughters are not entitled to inherit. It can be argued and held that married daughters are not entitled to inherit. It can be argued that the liberal approach of the courts is beneficial to only those who have access to legal counsel and that many may be suffering in silence as relatives deny them a source of livelihood. Indeed, this possibility is implied in rural urban migration patterns. This poses important considerations regarding the statement of law and its application.

A recent situation analysis on women and children conducted by the Government of Kenya in collaboration with UNICEF (Draft Report, May 1992) has linked the disadvantaged position of women and children in urban centres to possibilities of implication of Law of Succession Act especially in rural areas. The analysis records the increasing number of women headed households in urban centres who are exposed to extreme poverty, crime, overcrowding, unemployment, and health hazards. It notes that the most significant feature of the woman is that they migrate to towns and cities with their families.

The situation has prompted the conclusion that the law of Succession Act has not necessarily changed the position of women; 'In practice' states the report, "women have rarely inherited land and other property in their rural homes. This is the reason why more female household heads move to the urban areas in search of employment as they lack other means of production and survival".<sup>13</sup>

The same report refers to a study done on street children in Kenya<sup>14</sup> which showed that 31 % of the children interviewed lived with a single parent. This led to the conclusion that a substantial number of street children can be associated with single parenthood.

The same study revealed that 34% of the women never got married, 18% were separated, 16% divorced and 19% widowed. These women had been involved in illegal economic activities which had resulted in them being jailed at one time or another. This is illustrative of the ripples of inequalities on succession and their negative consequences to the society at large.

The exemption of Muslims from the provisions of the Act is a potential source of controversy on the extent to which gender equality can be achieved through its provisions. Although marriage (p.98) under Islamic law creates mutual rights of inheritance, there is evidence of differential treatment between male and female heirs. Each heir takes a fixed share laid down in the Quran. Widows are treated differently depending on whether one has children or not.

One of the fundamental defects in Islamic law identified by the commission on the Law of succession was its application without regard to reforms introduced in several Islamic countries such as North Africa, Middle East and Asia (See Commission Report: para 50). It can be argued that the said exemption is a major drawback in efforts to achieve uniformity in personal law and consequently to alleviate technicalities that do not justify the law. It begs further consideration not only because it reinforces and endorses differential treatment of males and females, but also because it endorses and justifies stagnation of principles that may have been modified elsewhere to reflect modern thinking and practices.

The above scenario indicates that problems affecting women are interwoven and often, property ownership is a very important underlying factor. There is a need to discover linkages between these problems and other problems of disadvantaged groups and to thereafter, devise integrated approaches to tackle all the dimensions

of the problems.

It is significant and noteworthy that female household heads are considered to be within a category of women regarded as being in difficult circumstances who appear more vulnerable than others.<sup>15</sup> The number of “women in difficult circumstances” is said to be increasing. Apart from the household heads other “women in difficult circumstances” include the disabled, adolescent mothers, women living in abject poverty, pastoralists and nomads, refugees, victims of abuse and prisoners.

The creation of the term “women in difficult circumstances” underscores the need for special focus and indeed thorough investigation to see how law can respond to the needs of these women.

### **Women and Criminal Law**

(p. 99) Criminal law is basically gender neutral. Both men and women are subject to the same projections of the law as accused persons and also to similar penalties for the same offences except in a few instances. For example, a pregnant woman cannot be sentenced to death. Some offences such as rape, defilement, and indecent assaults, can only be committed by males.

Female criminality is considered to be relatively minimal as compared to male criminality. This is illustrated by the comparative table below covering a period of sixteen years, where the number of female convicts has fluctuated between 11,000 and 13,000. A significant increase was, however, recorded in 1989 when a total of 16,043 women were convicted. (p. 100)

A striking conclusion drawn from crime statistics has been that increase in female criminality “is due more to the socio economic vulnerability of women than to anything else”.<sup>16</sup> It has been argued that crime statistics for the period 1975 to 1985 demonstrated that 75% of all women admitted to prison had been engaged in marginal economic activities involving hawking, sale of African liquor, and offences under the Chiefs Authority Act.

A further scrutiny of the same statistics also showed that 75% of all the women admitted to prison were between the ages of 18-40 years, which are the most productive years of a woman’s life. Other revelations were that most of the women (76%) were mothers, and were unemployed or self employed before (p. 101) convictions. There was, therefore, a strong implication that the Kenyan woman prisoner is basically young, has little or average education, is a rural urban migrant and is likely to be a single parent.

Concern regarding women prisoners has been gaining momentum and was brought to the forefront by child rights activists. Indeed, critical issues of female criminality have been raised mainly at workshops organized on child rights issues.<sup>17</sup> The sharp interest by child rights advocates was provoked by the fact that many women prisoners are also mothers.

Children, especially those of single parents have been known to undergo untold suffering as they accompany the mothers throughout the harsh and indifferent criminal justice process. The process which takes them through police cells and eventually prison, exposes children to many forms of abuse including stress and diseases.<sup>18</sup> Those who are left behind are often forced to tend for themselves in streets, market places, private homes and other places where they provide cheap labour and are often abused.

So far, suggestions to deal with the plight of women offenders have leaned heavily towards more use of non-custodial sentences in the interest of the welfare of children and of society in general. Extramural penal employment, conditional discharge, and probation have found favour with most activists.

Sentiments regarding more humane treatment of offenders have found their way in the current Development Plan which reflects progressive thinking on the treatment of offenders. There is emphasis on rehabilitation of offenders within the community which is a more realistic measure in coping with criminality in general.

However, in so far as women offenders are concerned, and as pointed out by Dr. Muli Musiime: (1989)

*“ The most lasting measures will lie in recognizing the status of women in a changing socio-economic and political situation, the equitable distribution of resources, and planning for the woman in the nation’s development strategies. Social programs aimed at eradicating or minimizing the factors that lead to women’s criminality need to be created. This implies providing support systems for those categories of women (p. 102) considered most vulnerable, such as the single mothers and the unemployed”.*

The subject of women in the criminal justice is a research priority of the International Federation of Women Lawyers (Kenya Chapter) (FIDA). The findings of an ongoing study will hopefully further enhance advocacy on the plight of women offenders.

## **VII. Nutrition, Health Care and Family Planning**

### **Right to Food and Nutrition**

Women as a group are at a greater risk of nutritional deficiencies than men due to their reproductive role. It is, therefore, necessary to facilitate their access to food. Kenya’s laws provide no right to food and nutrition.

If society is to continue to reproduce itself such a right needs to be provided for in our laws. Food is a basic necessity for sustenance of human life and access to it should be facilitated through national legislation.

### **Health Care**

Health care is very important to women and access to it ought to be made a matter of right. The greatest effort that the government has made to facilitate the acquisition of health care by the populace is through the National Hospital Insurance Fund (NHIF) established by the National Hospital Insurance Act (Cap- 255 of the Laws of Kenya.)

This piece of legislation is in our view, discriminatory as it is restricted to salaried persons and hence its benefits are realized only by a minority rather than the entire populace. Women form the bulk of the unemployed majority and, therefore, suffer from exclusion from the benefits of the fund.

The Act also makes possible other inequities as beneficiaries are in-patients not out-patients (see 6 of Cap.255). The extent of the benefit also depends on the hospital you attend, a fact determined by how well endowed you are financially. Contributions to the fund are pegged to one’s basic salary: the (p. 103) higher you earn, the greater your contribution. Married women are exempted from contributing if their husbands have named them as beneficiaries under the scheme. A member under the scheme is allowed to name only one wife or husband as his or her children as beneficiaries. In polygamous unions, additional wives can only be covered as single if the husband contributes separately for them.

The latter arrangement is referred to as special contribution and it is open to contributors who wish to name beneficiaries from among those who do not qualify for the compulsory contribution. This arrangement also covers persons whose salaries are less than the stipulated monthly amount, namely Kshs. 1,000/=. Not many people are aware of the special contribution option and, therefore, few exercise it.

Considering the above information, it is clear that fewer women than men qualify for membership and the bulk

of them are excluded from the fund's benefits. That the extent of the benefit depends on the hospital you attend means that the higher paid are able to go to better hospitals. Many men would be better paid than women if we take account of the number of employed women in senior positions.

It is also instructive to note that the fund only covers part of the bill and limits the period of cover to one hundred and eighty days. A member may also not claim benefit from the fund if he or she is entitled to compensation for hospitalisation and illness from another source (section 36) such as the Workmen's Compensation Act (Chapter 236 of the Laws of Kenya.)

Women who are treated for ante-natal and post-natal maladies that do not require hospitalisation are left out of the Fund's benefits even if they are contributors. Added to this factor is the fact that members must attend specially declared hospitals to qualify for subsidy under NHIF.

### **Access to Contraceptive and Family Planning Information and Services**

The rate of population growth in Kenya was until recently among the highest in the world. Despite some decline in fertility now, there is still need for sustained promotion of family planning services. Women have a right to contraceptive (p. 104) information and services if they are to be able to determine the number of children they would like to have.

Certain laws restrict women in their exercise of these rights. No specific law governs family planning and the dissemination of information relating thereto. This is surprising given the clarity of government policy documents on matters pertaining to the issue.

While not prohibiting the use of family planning methods, the requirement for prescription in the case of pills and intra-uterine devices (vide the provision of rule 6 of Pharmacy and Prisons Rules (Chapter 244 Laws of Kenya), is restrictive because doctors are few in Kenya and this hampers distribution of these contraceptives. The law should be amended to allow paramedical staff, nurses, clinical officers and field staff to dispense the contraceptive as is currently the practice.

Such amendment would also allow for the broadening of personnel who can prescribe the pills. That most pharmacies are situated in large urban centres makes contraceptives requiring prescription unavailable to the bulk of women situated in rural areas.

### **Voluntary Sterilization (Tubal Ligation)**

This is treated as surgery in the Penal Code (Cap.631) and it is an offence if it endangers the life and health of the client. The operation is carried out only on women who are over 35 years and it takes place in health institutions. A married woman is expected to show her spouse's consent before she can have the operation. This requirement is constraining in that a woman who has made an independent and informed choice, for it based on full information and want of pressure may be prevented from exercising her right by the spouse, if he wants more children.

### **Pregnancy Termination or Abortion**

The use of abortion is not a new phenomenon in Kenya. The available abortions data on is obtained mainly from hospital studies where victims of induced abortion usually end up. The Penal Code (Cap.63) makes it an offence for any person other than the woman (p. 105) herself to administer poison or noxious matter or to use any other means or physical force on a woman with the intention of causing her to miscarry.

It is immaterial whether or not the woman is pregnant as long as the intention is proved to exist. A woman on

her part is guilty of an attempt to procure her own abortion when she administers or allows someone to administer to her poison or drugs, to perform operation or to use force to detail above. Liability in the case of a woman is dependent on the fact of her being pregnant.

Under the Kenyan law, abortion is only allowed where the operation is performed to save the physical or mental health of a pregnant woman. In this instance, at least two (2) medical opinions have to confirm the necessity of the operation for the reasons stated above. The woman's consent and that of her spouse (if she is married) are a prerequisite to such an operation.

Needless to say, this law is restrictive and interferes with a woman's right in so far as making a decision as to how to regulate her fertility is concerned. By making abortion illegal, the law makes this service unavailable to women who might find themselves unable to cope with the child they are expecting. Consequently, the law imposes compulsory motherhood on expectant women with all its attendant consequences. It also creates a disparity regarding access to (abortion) service by different socio-economic groups of women. Women who are materially well off can evade the prohibitive laws by acquiring the medical opinions to support their desire for an abortion while the poor and disadvantaged women remain bound by the legal restrictions.

### **Acquired Immune Deficiency Syndrome (AIDS)**

One cannot address the issue of health care as it affects women and fail to look at issues related to AIDS. AIDS is an acronym for the Acquired Immune Deficiency Syndrome. Women suffer as AIDS victims, as persons charged with caring for AIDS sufferers either as mothers or spouses.

There is yet no known cure for the malady and persons afflicted can only control the situation by taking various medications to prevent the disease from reaching an advanced stage. (p. 106) This is expensive and puts further strain on already over-stretched household budget. Since control of the disease underlines in most cases the difference between life and death, household food and other basic needs are likely to be overlooked in favour of medication to contain AIDS.

Laws should address the issue of AIDS with a view to exhaustively dealing with issues relating thereto and protecting rights of persons affected.

## **VIII. Education**

Education is treated as a basic need by the Government, and as such the Government is committed to the position of equal educational opportunities for all persons in Kenya. Since independence, the primary school enrolment has increased from 892,000 to 5.5 million in 1990; 30,000 to 614,161 in secondary schools and 517 to 40,000 in universities in 1990. With the increase in educational opportunities for all, women's education has significantly improved and as of 1991, the enrolment of girls in primary schools was almost 49% of the total enrolment rate giving a near gender parity.

Despite these figures there are regional and district imbalances especially in areas where girls are married at an early age. Unfortunately, about 60% of these girls enrolled in primary schools are unable to complete their primary education which means that they may eventually slip back to illiteracy.

In the secondary schools, due to high wastage rates of girls in primary schools, most girls are enrolled in other schools where the drop out rate is very high. A number of reasons are given for the high wastage rates, and these include early marriage, pregnancy, lack of tuition fees or poor facilities.

The Education Act does not make education a right for all Kenyans although current policy makes it compulsory. Women's education is often curtailed by factors such as pregnancies, discrimination and cultural prac-

tices. The practice of expelling pregnant schoolgirls has had far reaching consequences for the education of women.

Whereas we do not condone adolescent pregnancies, these girls should be allowed to resume their studies after giving birth. (p. 107) In this way they acquire some education or skills, which would later help them in maintaining their children. It is discriminatory against women to expel a pregnant schoolgirl and do nothing to the father of her child. Bearing in mind that affiliation laws are non-existent in Kenya, deliberate measures should be undertaken to ensure that adolescent mothers are given the opportunity to further their education.

The education materials used in various institutions have been criticized for failing to depict women as role models. In a 1980 analysis it was found that whereas women accounted for 50% of the population, their representation in the school textbooks was only 17.5%. Thus schoolgirls are deprived of female adult role models with whom they can naturally identify.

Thus, as the books progress, one finds continuous use of masculine words, illustrations and content; women, where portrayed in schoolbooks, are often known as mothers, cooks; nurses or teachers. Most books fail to show them in technical positions, which would mean associating them with the physical sciences.

In adult literacy programs, one finds that women are often a majority of the “students” even though illiteracy amongst women remains very high. Currently 55% of women in Kenya are literate in comparison with 37% of men.<sup>19</sup> Increased participation of women in adult literacy programs should be encouraged.

## **IX. 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.<sup>20</sup> A number of reasons are given for women’s low participation in employment, and these include lack of equal education and skills training compared 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 (p. 108) central. 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 the work place that women face discrimination by virtue of their sex, even though there is no explicit law allowing for such practices often when the law is put into practice. In such situations, many employees feel that they do not have any means of legal access.

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 ILO convention on the focus of employment and working conditions of women. Section 7 provides that no woman or juvenile can be employed in an industrial undertaking between 6:30 p.m. and 6:30 a.m., unless firstly, where working in unforeseen emergencies which are not of 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 provisions of this section. Other than prohibiting women from working in mines at all hours and in industrial under-taking (at certain hours) Section 7 fails to consider protection of women in other fields of employment.

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 over-worked. Also, there are no trade unions permitted in such zones, which make labour very cheap and working conditions fairly poor. Considering that Kenya is establishing EPZs, it is important that laws to protect workers

from exploitation in these zones are enacted, and conditions of their work place determined, before the zones become fully operational.

One area that continues to generate a lot of bitterness amongst women employees and the Government and public sectors is the issue of house allowance. Government civil service regulations (L31) exclude married women from earning house allowance unless they can show they are sole supporters of the household.

Women employees are also guaranteed maternity leave for 2 months though they are supposed to forfeit their annual leave the year they take up maternity leave. Maternity has often been used as (p. 109) 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.

Although Kenya's employment laws are gender neutral, one finds that in practice women have not been sufficiently catered for. Deliberate measures are, therefore, important to ensure that practices which tend to promote sex discrimination are eliminated.

## **X. Conclusion**

If women are to fully participate in policy making and implementation it is important that impediments which prevent their participation 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. Moreover, there is need to continue conducting research on women and law in order to expose the constraints and practices that obviate women's empowerment and advancement.

## Endnotes

- <sup>1</sup> Kivutha Kibwana, *Women and Constitution in Kenya* (1991, mimeo) at 2-3.
- <sup>2</sup> *Ibid.*
- <sup>3</sup> W.N. Ndiritu, *Inequality Between Sexes: To What Extent is the Statutory Corpus to Blame* (University of Nairobi LL.B. Dissertation, 1988) at 3.
- <sup>4</sup> P. Asiyo, 'Legislative Process and Gender Issues in Kenya', in Ombaka Mbeo eds, *Women and Law in Kenya* (PLI, 1989) at 41.
- <sup>5</sup> *Ibid.*
- <sup>6</sup> J. Kabebere-Macharia & Kivutha Kibwana, *A Study of the Implementation of the UN Convention on the Elimination of all Forms of Discrimination against Women in Kenya* (1992) at 22.
- <sup>7</sup> Kivutha Kibwana & P.G. Kameri-Mbote, *Women and Law in the Democratization Process* (mimeo, 1992) at 27.
- <sup>8</sup> ANPPCAN - African Network for Protection and Prevention of Child Abuse and Neglect Newsletter, 1988.
- <sup>9</sup> Some non-governmental organizations such as the Child Welfare Society have taken a keen interest in this matter and have spearheaded a study on the female child which is addressing the issue of child marriages.
- <sup>10</sup> Eugene Cotran, *Casebook on Kenya Customary Law* (Nairobi University Press, 1987), at 97.
- <sup>11</sup> Omissions to do any act which is one's duty to perform are offences under the Penal Code punishable by imprisonment for six months.
- <sup>12</sup> For example in the matter of the Estate of Stephen Mbuthi (Deceased) Civil Case No. 1289 of 1974 and Josephine Wanjiru and others v. Gichu Watene Civil appeal No. 22 of 1980.
- <sup>13</sup> GOK/UNICEF, *Situation Analysis on Women and Children in Kenya* (May 1992, unpublished), at 33.
- <sup>14</sup> ANPPCAN - African Network for Protection and Prevention of Child Abuse and Neglect Newsletter, 1991.
- <sup>15</sup> Kabebere-Macharia & Kibwana, *supra* note 6 at 28.
- <sup>16</sup> R.N. Mutua, *Penal Institutions and Children*, Paper presented at a workshop on Criminal Justice and Children (Nairobi: Kenya Institute of Administration, 1986).
- <sup>17</sup> *Ibid.*
- <sup>18</sup> Muli Musiime & Dorothy Kilonzo, Paper presented in a workshop on Children in Especially Difficult Circumstances (Nairobi, 1985).
- <sup>19</sup> GOK/UNICEF, *supra* note 13.
- <sup>20</sup> *Ibid.*



