

## EXECUTIVE SUMMARY



*Staking our Claim* is FIDA Kenya's 2002 annual report on the legal status of Kenyan women. Through a gender lens, the report presents an overview of Kenya's policy and legal landscape in the past five years. This report is targeted at policy and lawmakers who, by virtue of their position, can make the kind of transformations advocated for in this report. For the first time since the launch of the FIDA Kenya annual reports, FIDA Kenya members have written the various chapters in *Staking our Claim*.

This report documents the space that has been carved out for advancing women's rights in the past five years. As a result of the contribution of many women's organisations and the vibrant growth of civil society, the 2002 report is a testimony to the fact that things are indeed changing. Attitudes that were shaped over centuries of time are now being questioned. The nature of our deliberations with the various stakeholders has also been transformed: we are now debating not whether there is need to reform the legal and policy terrain for women, but how and when these reforms should take place. *Staking our Claim* is indeed a manifestation of how women's voices have become louder at the decision making table.

The past five years have seen an intensification of the struggle for meaningful participation and involvement by women in the government machinery. In 2002, FIDA Kenya can now authoritatively and refreshingly state that progress has been made towards recognition of women as partners in the development process. That various arms of government, such as the Judiciary, Legislature and the Executive appreciate the added value of 'expert' opinion from FIDA Kenya is telling of the ground gained by Kenyan women. In the past five years, FIDA Kenya has been engaged in formal discourse with various government bodies on key subjects of concern. For instance, FIDA Kenya was extensively consulted before the establishment of the Family Court. In addition, FIDA Kenya's expertise was called upon during deliberations on the proposed domestic violence legislation. During the period under review, FIDA Kenya was also able to evaluate the government's implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In this regard, we are glad to report that the government submitted the third and fourth report to the CEDAW Committee in a timely manner.

*Staking our Claim* traces the patterns of societal and systemic change regarding women's rights. While applauding the women-friendly legal reforms that have already taken place, there is concern that pending draft Bills could be mere public relations exercises at the expense of women's activism and Kenya's public resources. This report presents the next government with a checklist for action. Furthermore, Kenyan women's stake in the new constitutional order has been clearly articulated in the Chapter titled 'Two Steps Forward, One Step Back'.

In addition, the 2002 report amply demonstrates that the arena of women's human rights is not only the preserve of women lawyers. Over the past two years, FIDA Kenya has provided community-based monitors with skills to monitor and document violations of women's human rights within the diverse communities in Nyanza, Western and Nairobi provinces. Their findings are presented in this report.

*Staking Our Claim* also demonstrates the impact that the HIV/AIDS has had on women, who remain victims of a legal and policy framework that fails to respond to the realities of the pandemic. While commending the government's efforts to formulate a draft law on HIV/AIDS, FIDA Kenya highlights the need to mainstream gender concerns into the proposed legislation.

Finally, over the past five years, FIDA Kenya's most renowned and public function has been offering legal assistance to poor women in both the Nairobi and Kisumu legal clinics. An extensive report detailing FIDA Kenya's experiences with Public Interest Litigation will soon be released. Just by sheer numbers, FIDA Kenya's clients have demonstrated the great need for legal aid services in Kenya. The following table illustrates the number of women who have sought assistance from FIDA Kenya during the period January 1999 to October 2002:

Year	No. of Clients attending Nairobi Clinic	No. of Clients attending Kisumu Clinic	Total
1999	4795	2224	7019
2000	5295	3258	8853
2001	5845	2609	8454
2002	4499	1452	5951
<b>Total</b>			<b>30277</b>

A legal and policy framework that recognises the centrality of women's rights in development is the pillar upon which Kenyan women shall fully realise and enjoy their potential. *Staking Our Claim* is both a historical document and forward-looking Plan Of Action.

Jane Kiragu  
Executive Director

## 1. MOVING FROM THE OLD TO THE NEW: NOVEL STRATEGIES IN CLAIMING POLITICAL AND LEGAL SPACE

By Anthony Mugo

### WOMEN DEMAND THEIR FAIR PORTION OF THE CAKE



The period 1997 to 2002 saw numerous and far reaching changes on the political, social and legal fronts. Politically, the country witnessed the consolidation of multi-party democracy in Parliament, with the House becoming more assertive and increasingly independent. At the social level, citizens generally became more aware of their rights as evidenced by the types of demands that they made of their leaders. Evidently however, there was continued need for civic education to make citizens even more aware of their rights and obligations. A key obstacle to this process was the fact that avenues for delivering civic awareness through the use of public media remained largely restricted as the Government maintained a tight grip on the sole state controlled broadcasting establishment—the Kenya Broadcasting Corporation. To a significant extent though, the private sector provided added channels for information dissemination as privately owned radio stations, which predominantly broadcast on the FM band, proliferated. Some privately owned television stations also went on air, radically changing the media landscape of the previous five years.

And despite the Constitutional amendments of 1997 during which the Public Order Act<sup>1</sup> was amended to remove the clause requiring that licenses be obtained to convene public rallies, the police continued to crack down on civic education rallies with impunity. Still there was marked improvement even in this respect during the period under review.

Changes in other areas were not all positive. The state of the nation, particularly the national economy declined to un-precedented levels with the economy in 2001 recording negative growth for the first time since independence. This meant that the standard of life among Kenyans declined to levels that under different circumstances or country could well have led to a national revolution. In Kenya however, hopes were kept high by promises and expectations of imminent change. Hope that the political and governance setups would change in the short term helped the situation by raising optimism for better things to come.

For women, the five years between 1997 and 2002 passed with mixed success. With only two years having passed since the holding of the 4<sup>th</sup> UN Conference on Women in Beijing, China in 1995, Kenyan women had looked up to more inclusive political and governance dispensations. After all, the Conference resolutions captured in the Beijing Platform for Action (PFA) were quite explicit and represented a global consensus in terms of strategies for ensuring women's full participation the process of social and economic development.

Signs that this was indeed the case abounded. In 1996, Parliament adopted a Motion on the Beijing Platform for Action (PFA)<sup>2</sup>. In this Motion, which was moved by Hon. Charity Ngilu, the Government Committed itself to among other things, translate, interpret, simplify, clarify and disseminate the resolutions of the Platform for Action (PFA); convene seminars, workshops and other forums in all sub-locations to explain the PFA and; allocate adequate budgetary provisions for the enhancement of the welfare of women, implement and continuously monitor and assess the PFA. This was the first time in Kenya for a woman MP to move a women-friendly Motion. Women therefore had cause to remain optimistic that the system was indeed beginning to become responsive to their needs. The euphoria created by the passage of that Motion was however short-lived. The Government did not create the necessary mechanisms for its implementation. Women were quick to realize how quickly private members Motions could be shelved to gather dust since the Government did not generally feel obligated to implement them.

The mover of the Motion, Hon. Charity Ngilu, however remained relentless in her struggle. The same year, she became the first woman to declare that she would run for the presidency in the general election of December that year. She went ahead to run and to become fourth overall in a field of two women and seven men. She is currently one of the five opposition front-runners in a coalition of opposition parties going by the name of National Rainbow Coalition (NARC).

The watershed event for women's full drive to demand political participation came in 1997. In that year, Hon. Phoebe Asiyo unsuccessfully tabled a private members Motion seeking to legislate Affirmative Action in Kenya's political arena. The Motion contained, among other proposals, a requirement that all registered political parties nominate at least one-third women candidates. The defeat of the Asiyo Motion of 1997 served as a wake up call for women. They realized that the success of their cause depended on their acting jointly rather than in isolation. After quick consultations, the Kenya Women's Political Caucus (KWPC) was inaugurated in the precincts of Parliament; a symbolic move given that the mission of the KWPC was to increase women's representation in political offices.

*Underpinning women's demands was the concept of inclusiveness in governance and the constitutional review process*

The rise of the KWPC marked the strongest manifestation that women were determined more than ever to consolidate their struggle for political participation as a joint force. Its first joint initiative was in August 1997 when the KWPC presented women's demands for inclusion in the constitutional review process in the form of "The Women's Reforms Initiative – A Document of the Kenya Women's Political Caucus". The Reforms Initiative was made public during the National Convention Assembly (NCA) held in August 1997 under the auspices of the National Convention Executive Council (NCEC)<sup>3</sup>.

Underpinning women's demands was the concept of inclusiveness in governance and the constitutional review process. Women demanded not only that their issues be brought to the forefront of the reform agenda but also that women actors were visible and effective. The key reform demands by

women were: an inclusive constitutional reform process; repeal of sexist sections of the Constitution and; incorporation of international human rights instruments pertaining to women's human rights in the constitution and other laws.

Between August and October 1997, there were rapid shifts in the manner of approach to the process. Some members of the NCEC, which was facilitating initial constitutional review discussions, broke ranks and joined a quickly constituted entity known as Inter-Parties Parliamentary Group (IPPG). The IPPG was made up of only members of Parliament and was mandated to make minimum constitutional amendments to bring about a level playing field ahead of the general elections of December 1997. For women, the fact that the constitutional reform process was now controlled solely by members of Parliament meant that they could not influence it as desired, given their under-representation in Parliament.

Women however, faced a looming threat to their unity from within their ranks. The unity of purpose demonstrated by the formation of the KWPC was quickly viewed with a lot of suspicion, particularly by conservative forces that traditionally regard any show of unity by significant political constituencies as threats to the *status quo*. Less than one year after its formation, divisive forces emerged within the Caucus and it was inevitably split into two in 1999.

The splitting of the KWPC was closely linked to the division of the NCEC-led process of Constitutional reform. Events were triggered by the decision by Parliament to appoint a Select Committee to review the *Constitution of Kenya Review Act of 1997*. The Select Committee was formed in December 1999. The decision to constitute the Select Committee was made despite the existence of another legislation known as the *Constitutional Review Commission (Amendment) Act 1998*. The latter Act had emerged out of consultations which went on at Bomas of Kenya and Safari Park Hotel between May and October 1998. The Bomas of Kenya and Safari Park processes were widely inclusive bringing together members of Parliament, civil society, religious groups and the NCEC.

The appointment of the Parliamentary Committee caused a major split which threatened to halt the Constitutional Review Process. The idea of leaving the Constitution making process solely to Parliament was considered unacceptable by those behind the Ufungamano Process. The fact that only two women were appointed to the Parliamentary Select Committee, which had a membership of 27, was considered unacceptable in view of the need for substantive representation of women in the process of constitutional review. As it happened, one of them, Charity Kaluki Ngilu declined to take up her seat. The decision by the second woman, Hon. Phoebe Asiyo, to take up her seat resulted in calls for her resignation from the KWPC due to the inevitable conflict of interest. Hon. Asiyo refused to tender her resignation, further increasing acrimony within the KWPC, which among other factors led to the formation of a splinter group.

Out of the split emerged a group that retained the name of the Kenya Women's Political Caucus and one that was christened, the Women's Political Alliance – Kenya (WPA-K). Women who aligned themselves with the WPA-K, tended to be aggressive activists whose demands were characterised by calls for not only increased representation of women in political decision making but also more inclusive processes for realising those aspirations.

The creation of the Parliamentary Select Committee resulted in two parallel constitutional review processes, one controlled by the Parliamentary Committee on Constitutional Review and the other one fronted by the Ufungamano Committee. The latter group was referred to as such after it settled for Ufungamano House as the standing venue for its meetings. Ufungamano House is owned an umbrella body of churches, the National Council of Churches of Kenya (NCCK).

The main issue raised by religious, professional organizations and civil society groups was the lack of representation of wide ranging interests in the review process should the Parliamentary Select Committee become the sole route towards constitutional reform. The Ufungamano Process was, on account of the wide-ranging interests it represented, viewed as being more 'people driven' and was hence more popular among the citizenry.

In May 2000 and five months after the appointment of the Parliamentary Select Committee, the Attorney General published the *Constitution of Kenya Review (Amendment) Bill, 2000*. The Bill proposed the setting up of a constitutional review Commission made up of 15 Commissioners, among them at least three women. The Bill was met with widespread opposition. Members of the Ufungamano Initiative questioned the motive behind the Bill given its similarity with the *Constitution of Kenya (Amendment) Act 1998*.

Women and civil society organizations put their collective weight behind the religious community leading to the creation of a parallel constitutional process known as the Ufungamano Initiative. The group proceeded to create its own commission with the aim of developing a parallel constitution.

It took the patience, negotiation skills of a number of individuals as well as pressure from Kenyans to have the two parallel review processes merge and therefore to kick-start the review process once more. The merger resulted from a spirited process of negotiation spearheaded by the Chairman of the Parliamentary Select Committee, Professor Yash Pal Ghai<sup>4</sup>. President Daniel Arap Moi had appointed Professor Ghai in late 2000. He however declined to take his oath of office until the merger of the two processes was realised. The merger was took place in March 2001.

On March 22, 2001, the Attorney General published two bills namely, *The Constitution of Kenya (Amendment) Bill 2001* and the *Constitution of Kenya Review (Amendment) Bill 2001*. The *Constitution of Kenya Review (Amendment) Bill 2001* became law on May 24, 2001 following assent by the President. The 27-member Constitution of Kenya Review Commission was

subsequently constituted and started work on June 15, 2001 when the Ufungamano group's commissioners were sworn in. For women, this marked a major breakthrough because seven out of the 27 commissioners were women. These were Kavetsa Adagala, Abida Ali-Aroni, Phoebe Asiyo, Nancy Baraza, Dr. Wanjiku Kabira, Salome Muigai and Alice Yano.

#### FROM SENSITISATION TO PARTNERSHIPS- THE WOMEN'S STRUGGLE ENTERS A NEW PHASE

Over the five years under review, shifts did not only occur in terms the profile of the players in the women's movement but also in terms of strategies used. Over the late 1980s and mid-1990s, feminist activists began by making strong forceful statements regarding recognition of women's rights to equality before the law. Their demands called for changes in laws and policies to ensure recognition of women's rights as human rights. In essence, the earlier feminist activism in Kenya functioned very effectively as an awareness-raising phase of the women's empowerment process.

Women's lobbying and advocacy strategies have evolved over the period under review from more confrontational approaches to the present ones characterised by collaboration and building of partnerships.

These contrasts can be illustrated by looking at two legislative initiatives fronted by women to address discrimination, one having taken place in the 1990s and the other in 2001.

As cited earlier, in April 1997, a private members' Motion was moved by the then MP for Karachuonyo, Hon. Phoebe Asiyo seeking legislation of Affirmative Action in the assigning of Parliamentary seats to women. The Motion essentially sought to have one-third of Parliamentary seats reserved for women; the introduction of an amendment to the Constitution of Kenya to provide two Parliamentary constituencies exclusively for women in each province and; the introduction of public funding for political parties requiring that the level of such funding be pegged to the percentage of women candidates put forward by each party.

In preparation for the debate on the Motion, women's organisations, which included FIDA Kenya, developed fact sheets containing information on the need for Affirmative Action. These were then distributed to all members of Parliament. Women MPs also lobbied male MPs in their individual capacities in order to secure their support for the Motion. Despite these initiatives, the Motion was defeated with male MPs questioning why women were in a hurry to go to Parliament. Although the fact that the Motion was debated by a different Parliament is an important factor in contributing to its failure, the mode of engagement of MPs then was also a factor. Notably, there were no formalized mechanisms for educating MPs about the issue of lack of adequate representation for women in decision-making. The time available to lobby members of Parliament was also too short.

*It took the patience, negotiation skills of a number of individuals as well as pressure from Kenyans to have the two parallel review processes merge and therefore to kick-start the review process once more*

*The example of the Family Protection (Domestic Violence) Bill as well as the Equality Bill now pending in Parliament would serve to illustrate the way women's activism has evolved by way of strategy. It has moved from confrontation to collaboration*

The example of the Family Protection (Domestic Violence) Bill as well as the Equality Bill now pending in Parliament would serve to illustrate the way women's activism has evolved by way of strategy. It has moved from confrontation to collaboration through sensitisation, information sharing and education of key agencies concerned with formulation of laws and policies particularly legislators.

The Domestic Violence (Family Protection) Bill emanates from the Task Force to Review Laws Relating to Women, which was established in 1993. Among the recommendations of the Task Forces was the development of legislation to address domestic violence and its associated negative effects on the family unit, particularly women and children. The Equality Bill, whose genesis is similar, seeks to outlaw discrimination faced by various marginalised groups, in particular, women, children, pastoralists, members of religious minorities and the disabled. To this end, the Bill prohibits discrimination on the grounds of sex, race, disability, gender, pregnancy, marital status, ethnic or social origin, colour, social status, age and religion among others<sup>5</sup>.

The process of drafting the Domestic Violence (Family Protection) and the Equality Bills involved the Government from the start. Drafting of the Bills took place in February 2000 and involved the Attorney General and FIDA Kenya. Both bills are now pending in Parliament with the Domestic Violence (Family Protection) Bill having passed its second reading.

The main difference in the strategies used to push for the legislation of laws five years ago and today has been the involvement, sensitization and partnership building with the key actors, particularly Parliament and the Attorney General's office well before the bills are published. Prior to the tabling of the two Bills for example, FIDA Kenya sought official authority to work closely with the relevant Parliamentary Committee on law reform namely the Parliamentary Committee on Administration of Justice and Legal Affairs. Upon receiving the necessary authorization, FIDA Kenya sought to get better acquainted with individual members through consultative forums outside Parliament. These forums served to further sensitise MPs to better understand the reasons for the legislation being sought and to disabuse them of any inaccurate notions and myths. As a result, Parliament as a whole has become more receptive to formulating women friendly laws as exemplified by the passage of the *Children Act* in 2002.

The eighth Parliament was evidently much more progressive in terms of recognition of women's marginalisation than any other previous Parliament. For the first time, Parliamentary Committees were operationalised to the extent that private citizens could make input to pending bills before their final debate and subsequent enactment. One of the factors that contributed to this state of affairs is the fact that despite their well-documented flaws, the 1997 general elections created a true opposition in Parliament. Very few defections were witnessed between 1997 and 2001. The other important factor is that members in the eighth Parliament, particularly in the opposition ranks, were generally younger and more educated-attributes which appear to be essential in combating long held cultural and traditional attitudes among a substantial number of men.

## BROADENING THE STAKEHOLDER BASE

### THE MEDIA

The five years between 1997 and 2002 saw the strengthening of partnerships between women's organisations and the media. In 1999, the Nation Newspapers inaugurated a section dedicated to stories on violence against women. The widely publicised death of Betty Kavata on Christmas day in 1998 as a result of injuries inflicted by her policeman husband directed national consciousness to increasing incidences of violence against women. The annual 16 Days of Activism Against Gender Violence celebrated between November and December continued to receive increased attention by the media. In March 1999, *The Daily Nation* dedicated an entire section of the newspaper to Violence Against Women. The second biggest daily newspaper, *The East African Standard*, featured and continued to feature in depth analyses of issues affecting women ranging from violence to political participation.

From 2000, the Nation Media Group started producing a special full size magazine to mark the International Women's Day. The coordinator of this project and the magazine's editor, Ms. Lucy Oriang' noted in the editorial of the inaugural issue:

*"If the media helped push the agenda to a happy conclusion, it is only because of an ever-growing realisation that women do make news not as passive objects, not in stereotypical roles that have served to reinforce traditional beliefs of a woman's place in society but because it is clear to us (Nation Media Group) that anyone who seeks to address less than half of the population only has failed in the art of communication right from the start"*<sup>6</sup>.

Regarding progress so far made by the women's movement in pushing the women's agenda, Ms. Oriang in the 2001 issue of the special women's day supplement commented:

*"If there is one thing that Kenyan women can take pride in, it is their growing capacity to engage in public debates. Whereas it can hardly be described as a bed of roses, given the setbacks grounded in resistance based on cultural notions of gender roles, women can rightfully be said to have come into their own as a political force to reckon with. They are knocking on doors, demanding answers and getting the nod in a large part. Kenya's society may still be traditional in many ways, but girls and women are pushing back the boundaries that have defined their lives through the centuries"*<sup>7</sup>.

### THE GOVERNMENT

The first official attempt by the Government of Kenya to mainstream gender was the establishment in 1975 of the Women's Bureau as a Division of the Social Services Department of the then Ministry of Culture and Social Services. The Bureau was established with the mandate to formulate policy, monitor, collect data, liaise with NGOs, advice and provide support on gender mainstreaming within the Government<sup>8</sup>.

By giving the monumental task of incorporating gender into government policy to a mere department within a ministry, experience has shown that this was essentially a half measure. To date, the Bureau's fiscal and human resources remain grossly inadequate. As a result, disaggregated data on the status of women is hard to come by. The support that the Bureau is supposed to provide to NGOs has not been forthcoming. Instead, certain specialised women's NGOs such as FIDA Kenya and the Collaborative Centre for Gender and Development (CCGD) have from time to time been called upon to provide technical support to the Bureau by way of assisting in drafting progress reports to international women's rights commissions such as the UN Commission on CEDAW. The CCGD has supported the Bureau in spearheading the Government's initiatives to mainstream gender through adequate resource provisions in the national budget.

The fact that the official Government office dealing with women's issues remains a mere division of the Office of the Vice President, Ministry of Home Affairs Heritage and Sports is an enduring indication that the Government of Kenya has not accorded the requisite seriousness to women's empowerment.

*The fact that the official Government office dealing with women's issues remains a mere division of the Office of the Vice President, Ministry of Home Affairs Heritage and Sports is an enduring indication that the Government of Kenya has not accorded the requisite seriousness to women's empowerment*

Following the 1997 general elections, women's hopes that this state of affairs was changing were raised when a Ministry of Women's Affairs was created in January 1998. However, those hopes were quickly dashed when a male minister, Maalim Mohammed, was appointed to head the newly created ministry. Women viewed this as a demonstration of the notion that women's capacity for leadership was wanting, despite glaring evidence to the contrary. The Ministry was subsequently dissolved hardly two months after its establishment. An assistant minister in the defunct ministry, Hon. Marere wa Mwachai, was subsequently deployed to the Ministry of Home Affairs in the same capacity where she remains to date. Kenyan women saw this as yet another attempt by the Government to make a token gesture to women while remaining largely un-committed to truly addressing women's issues by facilitating the formulation of effective policies under the leadership of qualified women.

Unfortunately, the tendency to allocate women to the culture ministry appears not to be the preserve of the government. In April 1998 when the Democratic Party of Kenya named its shadow cabinet, it appointed Hon. Martha Karua, as Shadow Minister of Culture and Social Services instead of Shadow Attorney General as widely expected on account of her long service to the party as Secretary for Legal Affairs. Hon. Karua declined to take up the appointment citing this as an example of glaring discrimination<sup>9</sup>.

#### WORK WITH THE POLICE

The process of mainstreaming gender in law enforcement, which started in 1994, was particularly illustrative of what is achievable through building of partnerships. Having started through sensitisation and raising of awareness among police officers and recruits in 1994, this initiative saw not only the Department of Police but also Prisons and other disciplined forces open up and become more receptive to concepts of human rights.

The entry by FIDA Kenya started in the form of a poster campaign aimed at informing women about the need to take steps to seek justice in relation to domestic violence. The main message on the poster *Vita Nyumbani ni Hatia*<sup>10</sup> was put on a metal poster and displayed at police station receptions throughout the country. Many of the posters are still in place, seven years later. Engagement with the police evolved to the current level where gender based violence and women's human rights generally will soon be incorporated into formal police training. By the end of 2002, it is intended that a training curriculum will be formally launched and the process of incorporation in police training set in motion.

#### LIST OF WOMEN MPS IN THE EIGHTH PARLIAMENT

Martha Karua (DP Gichugu)  
Beth Mugo (SDP, Dagoretti)  
Charity Ngilu (SDP, Kitui Central)  
Tabitha Seii (DP, Nominated)  
Mariam Matano (NDP, Nominated)  
Marere wa Mwachai (KANU, Msambweni)  
Grace Mwewa (KANU, nominated)  
Zipporah Kitony (KANU, nominated)

#### ORGANISATIONAL MEMBERSHIP TO THE WOMEN'S POLITICAL ALLIANCE-KENYA (WPA-K)

Federation of Women Lawyers – Kenya (FIDA Kenya)  
The League of Kenya Women Voters (LKWV)  
Federation of Women Groups  
Friends of Esther and Deborah Trust (FREDA Trust)  
Ahantu for Development  
Muslim Sisters' Network  
Kangemi Women's Empowerment Centre (KWEC)  
Collaborative Centre for Gender and Development (The Centre)  
National Council of Women of Kenya (NCWK)  
Council for Economic Development of Women of Africa (CEEWA)  
AMKA Space for Creativity  
Kenya Oral Literature Association (KOLA)  
Kenya Professional Businesswomen Club (KPBWC)  
Country Micro Enterprise Women Association in Kenya (CMEWAK)  
Women's Association in Rural Development (WARD)  
Women in Law and Development in Africa (WILDAF)

#### MEMBERS OF THE CONSTITUTION OF KENYA REVIEW COMMISSION (CKRC)

Prof. Yash Pal Ghai	Member and Chairperson
Ms. Kavetsa Adagala	Member
Mrs. Phoebe M. Asiyu	Member
Pastor Zablon F. Ayonga	Member
Mr. Ahmed I. Hassan	Member
Mr. John Mutakha Kangu	Member
Bishop Bernard N. Kariuki	Member
Mr. Gitthu Muigai	Member

*The entry by FIDA Kenya started in the form of a poster campaign aimed at informing women about the need to take steps to seek justice in relation to domestic violence. The main message on the poster Vita Nyumbani ni Hatia was put on a metal poster and displayed at police station receptions throughout the country. Many of the posters are still in place, seven years later*

Prof. H.W.O. Okoth-Ogendo	Member
Mr. Domiziano M. Ratanya	Member
Prof. Ahmed I. Salim	Member
Dr. Mohammed Swazuri	Member
Mr. Keriako Tobiko	Member
Mr. Paul Wambua	Member
Mrs. Alice Yano	Member
The Attorney General	Ex-Officio Member
Mr. Arthur Owiro	Ex-Officio Member and Secretary (Resigned)
	replaced by Patrick L. O. Lumumba
Dr. Oki Ooko Ombaka	Member and Vice-Chairperson (Deceased)
	replaced by Dr. Adronico O. Adede
Mrs. Abida Ali-Aroni	Member and Second Vice-Chairperson
Dr. Charles M. Bagwasi	Member
Ms. Nancy Baraza	Member
Mr. Isaac Lenaola	Member
Dr. Wanjiku Kabira	Member
Mr. Ibrahim Lethome	Member
Ms. Salome Muigai	Member
Mr. Abubakar Zein Abubakar	Member
Mr. Riunga L. Rajji	Member
Dr. Mosonik arap Korir	Member
Dr. Abdurizak K. Nunow	Member

## (Footnotes)

- <sup>1</sup> *The Public Order Act Cap 56* was amended to the effect that individuals or groups intending to hold public meetings only need to notify the local police.
- <sup>2</sup> Atsango Chesoni, *Second Class Citizenship: The 1996 FIDA (K) Annual Report on the Legal Status of Kenyan Women*, FIDA Kenya, p. 17.
- <sup>3</sup> Atsango Chesoni, *Bado Mapambano: Kenyan Women Demand Their Rights, the 1997 FIDA (K) Annual Report on the Legal Status of Kenyan Women*, FIDA Kenya, p. 22-30.
- <sup>4</sup> For a detailed chronology of the process of negotiating a merger between the Ufungamano and Parliamentary Committee processes, see *Beyond The Door: The Challenges Ahead, The FIDA (K) Annual Report 2001*, FIDA Kenya.
- <sup>5</sup> Anne Nyabera et al. *Setting the Pace: The 1999/2000 FIDA (K) Annual Report on the Legal Status of Kenyan Women*, FIDA Kenya.
- <sup>6</sup> *Reaching In, Reaching Out*, a special publication of *The Nation Media Group* in commemoration of International Women's Day, March 8, 2000.
- <sup>7</sup> 'One Small Step for Women: A Giant Step for Mankind', a special publication of *The Nation Media Group* in commemoration of International Women's Day, March 8, 2002.
- <sup>8</sup> FIDA Kenya, Report of the Stakeholders' Workshop to Review Progress for Women in the Millennium held on November 15-16, 2000.
- <sup>9</sup> *The Daily Nation*, June 5, 1998.
- <sup>10</sup> Kiswahili for 'Fighting at Home is a Crime'.

## 2. TWO STEPS FORWARD, ONE STEP BACK: WOMEN AND CONSTITUTIONAL REFORM 1997 – 2002

By Atsango Chesoni



The constitution of a nation is a contract between its citizens that stipulates the values and principles by which they wish to live while instituting the organs through which they will be governed. It is the supreme law of the land. In 1962 when Kenya's current constitution was finally agreed and negotiated at Lancaster House in England, only one African woman, Priscilla Abwao, attended and she was not allowed to participate in the talks or present her memorandum<sup>1</sup>. It is therefore not surprising that the current Constitution of the Republic of Kenya discriminates against women and provides only limited protection from discrimination on the basis of sex. Women's very citizenship as decreed under sections 90 and 91 of the Constitution is of a subsidiary nature in that they cannot bequeath citizenship on their husbands or children. This forces women into a situation of forfeiting their citizenship upon marriage to a non-Kenyan. For women resident in the country, it is impossible to acquire identification documents without the permission and/or authority of their father or husband. Furthermore section 82 (4)(b) allows for discrimination in matters of personal law, marriage and devolution of property, the areas in which women's rights are most violated. Section 82 (4)(c) permits discrimination in matters of personal law that is justified on the basis of custom, culture or religion.

The period of 1997 to 2002 has been one in which Kenyans have made significant strides towards their dream of achieving a new constitutional order. Unlike the case of the 1962 Lancaster House Constitutional Conferences, this time round women have demanded and secured several places at the negotiating table. They have been active in pressing for constitutional reform as they have a major stake in the overhaul of the existing Constitution. This chapter will examine the promise of the Draft Bill of the Constitution of Kenya Review Commission and the emerging challenges to women's constitutional equality.

### THE PROMISE OF THE DRAFT BILL OF THE CONSTITUTION OF KENYA REVIEW COMMISSION

The Draft Bill of the Constitution of Kenya Review Commission holds much promise for women. The Bill has addressed many of the concerns of Kenyan women regarding constitutional equality through woman-specific provisions, and mainstreaming gender, while directly addressing barriers to a culture of constitutionalism that has affected all seeking to rely on the Constitution to enforce their rights. Due to the provisions of section 84(6) of the current Constitution, citizens cannot directly invoke the provisions of the existent Bill

*Until the year 2000, no Chief Justice had ever promulgated the rules required to invoke the Bill of Rights under section 84(6). In contrast, Article 73(3) of the Draft Constitution requires the Chief Justice to promulgate rules providing for the implementation of the Bill of Rights therein, within a year of the Draft Constitution coming into force*

of Rights without the permission of the Chief Justice. Until the year 2000, no Chief Justice had ever promulgated the rules required to invoke the Bill of Rights under section 84(6). In contrast, Article 73(3) of the Draft Constitution requires the Chief Justice to promulgate rules providing for the implementation of the Bill of Rights therein, within a year of the Draft Constitution coming into force. This is just one example of a non-gender specific provision that will enable all Kenyans, women, children and men, to realise the dream of a truly egalitarian, liberatory, and equitable culture of constitutionalism.

#### **WOMAN FRIENDLY PROVISIONS IN THE CONSTITUTION OF KENYA REVIEW COMMISSION BILL**

The major gains for women contained within the Draft Constitution have occurred in respect of the following areas:

##### **USE OF GENDER NEUTRAL LANGUAGE**

The Draft Constitution is written in gender-neutral language, enabling women to fully benefit from several provisions that they could not under the current constitution such as those pertaining to citizenship. The inclusive nature of the language also creates ownership and inhibits discrimination that could arise out of a narrow interpretation of sexist language.

##### **PARTICIPATION OF WOMEN IN THE SOCIO-ECONOMIC LIFE OF THE REPUBLIC**

In Article 14(11) the Draft Constitution places on the State an obligation to ensure the full participation of women, people with disabilities and other marginalised communities in the political, social and economic life of the country.

##### **AFFIRMATIVE ACTION MEASURES FOR WOMEN**

In Article 14(12) the Draft Constitution provides for Affirmative Action for women in respect of elective and appointive bodies requiring that a third of the membership of all such bodies shall be women. In doing so the Draft Constitution recognises the implications of women's historical marginalisation and makes some provision for mechanisms to address the impact of this legacy and ensure the full participation of all citizens.

##### **CITIZENSHIP**

Chapter 4 of the Draft Constitution addresses the issue of citizenship. It grants equal citizenship rights to both women and men. The Draft Constitution provides for citizenship in three circumstances: by birth, registration and naturalisation (Article 18). Both women and men can bequeath citizenship on their spouses and children and both have equal rights to identification documents and passports. Chapter 4 also makes provision for citizens who had lost their citizenship rights through previous discriminatory legislation, to

re-acquire them. Thus Kenyan women who had renounced their citizenship upon marriage to a non-citizen can now acquire it. Furthermore there is provision for dual citizenship. The Draft Constitution entrenches citizenship by birth as an inalienable right.

##### **THE BILL OF RIGHTS**

Chapter 5 contains the Draft Constitution's Bill of Rights, which is extremely broad. The Bill of Rights recognises and prohibits discrimination on the basis of sex. It prohibits cultural practises that discriminate against and undermine the dignity of women. Article 35 recognises women as a historically marginalised group and provides for their protection and right to equality.

##### **RIGHT TO REPRESENTATION**

Article 76 provides that elections shall provide for the representation of women, people with disabilities and minorities, while Chapter 7 provides for a bi-cameral legislature with an Upper Chamber of Parliament (National Council) half of whom will be women.

##### **LIMITED PROVISION FOR PROMOTION OF GENDER EQUALITY**

Article 288 (3)(a)(ii) provides for the Commission on Human Rights and Administrative Justice (CHRAJ) to inter alia promote gender equality and equity.

##### **IMPORTANT NON-GENDER SPECIFIC PROVISIONS**

The Draft Constitution also contains several non-gender specific provisions the implementation of which will promote the advancement of women and create a conducive environment for the evolution of an equitable culture of constitutionalism. The Draft Constitution for instance recognises and provides for the right to legal aid. Given that poverty is a barrier to the realisation of ones rights, providing that 'no fee may be charged' for commencing proceedings under the Bill of Rights, ensures that all citizens will be able to enjoy their constitutional rights, not just the wealthy. The Draft Constitution also recognises that many people suffer a number of forms of oppression simultaneously, for example a woman with disabilities could experience both sexism and discrimination against people with disability- this phenomenon is referred to as intersectionality. The very recognition and prohibition of discrimination against people with disabilities is new, as the current constitution does not recognise this area of human rights violations.

Some of the general provisions contained in the Draft Constitution that are important towards the realisation of women's human rights are delineated below.

*The Draft Constitution also recognises that many people suffer a number of forms of oppression simultaneously, for example a woman with disabilities could experience both sexism and discrimination against people with disability- this phenomenon is referred to as intersectionality*

### PROMOTION OF CIVIL SOCIETY'S ROLE IN GOVERNANCE

Given the absence of women in mainstream governance institutions, civil society has proven a critical vehicle through which women can articulate themselves. The Draft Constitution provides in several instances for the recognition and promotion of civil society's role in governance. Article 14(9) provides that the Republic shall promote the role of civil society in governance. The Bill of Rights goes further to place on the State an obligation to promote civil society's role in decision-making and management of public affairs. Furthermore in Article 30(6)(c) there is a requirement that the State facilitate civil society's role in submitting alternative reports as part of fulfilling international obligations.

### DUTIES OF A CITIZEN

Article 15 defines the duties of a citizen. This is a new provision. Article 15(1)(d) includes amongst the duties of a citizen the responsibility to:

Engage in work, including homemaking, for the support and welfare of themselves and their families, for the common good and to contribute to national development.

In acknowledging homemaking as a contribution to national development, the Draft Constitution goes a long way towards affirming the primary economic contribution of the majority of Kenyan women. Further, by recognising homemaking as a citizen's duty, men are facilitated in playing their role in this respect. Since the repeal of the Affiliation Act, men had not been responsible for children born outside of wedlock until the recent enactment of the Children Act, 2001. This was a source of destitution for many children and placed an unfair responsibility on women for the upbringing of children.

### COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

Article 29(6) provides that the State shall 'fulfil all its international obligations in respect of human rights.' Kenya is party to and has ratified several international human rights instruments the implementation of which would greatly advance the status of women. These include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Beijing Platform for Action. Article 29(6) would therefore ensure that the Government delivers on its promises to the citizenry.

### RECOGNITION OF INTERSECTIONALITY

As stated previously, the Draft Constitution provides protection for women who suffer multiple forms of discrimination simultaneously (intersectionality). Article 39 acknowledges and prohibits discrimination against people with disabilities. Article 39(3) provides that wherever appropriate, legislation and policy measures provided for in this clause shall 'make special provision for

women with disabilities.' This means that women with disabilities will be able to sue if for instance, toilet facilities in a public institution are provided for women, but are not wheelchair accessible.

### STATE OBLIGATION TO ADDRESS VIOLENCE BY PRIVATE AND PUBLIC ACTORS

Article 41 guarantees the right to security and extends this right to include protection from violence both in public and private. This is a boon for those who have campaigned against domestic violence and rape. Women are predominantly victims of violence perpetrated by private actors and the fact that domestic violence takes place in the home has often been used as a justification by law enforcement acts when they do not intervene.

### POWER TO SUE AS A CLASS

Finally Article 73, provides that in seeking enforcement of the Bill of Rights, the categories of persons who may complain to the Commission on Human Rights and Administrative Justice or the Court includes inter alia:

- (b) a person acting on behalf of another person who cannot act in their own name
- (c) a person acting as a member of, or in the interest of, a group or class of persons;
- (d) a person acting in the public interest; and
- (e) an association acting in the interest of members.

The power to act in the public interest or in the interest of a group or class is important for women, because as a marginalised group, they sometimes suffer violations that affect them by virtue of belonging to that group.

### WHAT FOR WOMEN IS MISSING IN THE DRAFT CONSTITUTION?

Whilst the Draft Constitution has gone a long way in addressing women's concerns, there are several areas in which it could be strengthened. There are also provisions that women sought that are critical to the advancement of women's human rights that were not incorporated into the draft.

### AN EXPRESS RIGHT TO AFFIRMATIVE ACTION

The Draft Constitution does not expressly provide for the right to Affirmative Action for all historically marginalised groups. Thus there is an absence of recognition that where an individual, community, and/or class have rights that have historically been systematically violated they are entitled to redress and compensation. Affirmative Action is one of the means through which redress and/or compensation can be accomplished. The lack of uniformity in

*The Draft Constitution does not expressly provide for the right to Affirmative Action for all historically marginalised groups*

*In acknowledging homemaking as a contribution to national development, the Draft Constitution goes a long way towards affirming the primary economic contribution of the majority of Kenyan women*

provisions for Affirmative Action further weakens the provisions for Affirmative Action. For example, while section 28(1) provides for the Citizenship Registration Board, there is no provision for at least a third of its membership to be women. Women have been categorical in asserting the fact that they are over a half of the population, the provision of a third is actually a minimum. Women are therefore demanding that the Draft Constitution should consistently provide for a 'minimum of one third' of all positions where it is being applied.

#### A GENDER EQUALITY COMMISSION

While Article 288 has provided for the CHRAJ to promote gender equality and equity, it still does not measure to what women have pushed for. Women have consistently demanded a Gender Equality Commission, since the current state machinery for the advancement of women is weak. The only state machinery available to cater for women's concerns is the Women's Bureau, which is a desk within a Ministry. It lacks the necessary authority to enforce measures at the inter-ministerial level. Furthermore, Kenya lacks a National Gender Policy. There is therefore need for an institutional mechanism that will ensure the implementation of state policy at all levels. Such a body would need to have sufficient authority to influence policy making at the ministerial and judicial levels.

#### EMERGING CHALLENGES TO KENYAN WOMEN'S CONSTITUTIONAL EQUALITY

Even as the Draft Constitution has opened a window of possibility for Kenyan women, new challenges to their constitutional equality are emerging.

#### OPPOSITION TO THE CONSTITUTIONAL REVIEW PROCESS

The constitutional review process itself is in jeopardy. On Friday 25<sup>th</sup> October 2002, the Head of State, dissolved Parliament, effectively bringing to a halt the constitutional review process.<sup>2</sup> The National Constitutional Conference (NCC) was due to begin on 28<sup>th</sup> October 2002. Section 27(2)(a) of the *Constitution of Kenya Review Commission Act Revised Edition 2001 (2000)*, provides that a third of the delegates of the NCC will be members of the National Assembly. On 27<sup>th</sup> October 2002, the CKRC postponed the NCC *sin die* pursuant to the dissolution of Parliament. On 28<sup>th</sup> October 2002, the President claimed that the CKRC had been dissolved as a consequence of the dissolution of Parliament<sup>3</sup> – however the Attorney General subsequently announced that the CKRC still has legal mandate.<sup>4</sup>

Prior to the dissolution of Parliament, the review process was under threat also through two suits, which had been filed by the judiciary, seeking to prevent further debate and discussion of the provisions of the Draft Constitution pertaining to the Judiciary.<sup>5</sup> None of these suits has been decided. Section 17(a (i)) of the *Constitution of Kenya Review Commission Act Revised Edition 2001 (2000)*, lists amongst the functions of the Commission the responsibility to:

Examine and recommend the composition, functions of the organs of state including the executive, the legislature and the judiciary and their operations aiming to maximise their mutual checks and balances and secure their independence;

These actions against the CKRC while not gender specific have grave ramifications for women's human rights. As stated earlier, women have a major stake in the continuation of the constitutional review process.

#### THE RENEWED ASSAULT ON AFFIRMATIVE ACTION

*'In putting forth our specific requests, we trust that the delegates will note that we are not asking for a special position for ourselves. We are asking that we, the African women, be treated as equal partners in the new society, which we are creating, as well as the endeavours to create that society.'*

Priscilla Abwao, *Memorandum on Behalf of the African Women to the Kenya Constitutional Conference in London*, February 1962.

The words of Priscilla Abwao in the African Women's Memorandum to the 1962 Constitutional Conference ring true today. Ironically, Kenya's women are once again confronted with the same arguments as they were in 1962. In a renewed assault on Affirmative Action, critics of the Draft Constitution are charging that it lays the groundwork for a 'culture of entitlement and victimhood' by granting socio-economic rights and affirmative measures to women. They further argue that the Draft Constitution would be too expensive to implement, and that it places the cost burden on male, Christian taxpayers; the insinuation being that women and other marginalised groups do not pay taxes and ergo do not contribute to the economy.<sup>6</sup>

This argument contains several fallacies: that Affirmative Action is a permanent measure; and that Kenya's economic wealth is generated by tax payers, a class to which women and other marginalised communities purportedly do not belong, and finally that women's continued exclusion does not cost the economy. In addition, implicit in this position is the notion that those who have suffered some violation of their rights are not entitled to legal redress- which is essentially what Affirmative Action provides.

What this renewed assault on Affirmative Action has confirmed is the need for women's human rights advocates to continue to provide accurate information on Affirmative Action. Kenya is a State Party to CEDAW. Under Article 5 of CEDAW, Kenya has committed to undertake temporary measures- these include Affirmative Action- to ensure that women attain equal status and access to resources with men. There is also a need to re-examine the clauses of the Draft Constitution pertaining to Affirmative Action to ensure:

*This argument contains several fallacies: that Affirmative Action is a permanent measure; and that Kenya's economic wealth is generated by tax payers, a class to which women and other marginalised communities purportedly do not belong, and finally that women's continued exclusion does not cost the economy*

On 28<sup>th</sup> October 2002, the President claimed that the CKRC had been dissolved as a consequence of the dissolution of Parliament – however the Attorney General subsequently announced that the CKRC still has legal mandate

- Recognition of the right to Affirmative Action as a means of redress for all marginalised groups.
- That these clauses provide for Affirmative Action as a temporary measure.

Finally, it is important to observe that all Kenyan African males who have held political office are beneficiaries of Affirmative Action. In 1944 Eliud Mathu became the first African member of the Legislative Council (Legco) through nomination, not election. In the 1950s pressure mounted to increase African representation to a total of sixty five by the time of the promulgation of the First Lancaster House Conference of 1960, which adopted the Macleod Constitution. It is these sixty five African Legco members who represented Kenya in the Second Lancaster House Conference of February to April 1962. Both Priscilla Abwao and President Daniel arap Moi were there in these capacities<sup>1</sup>.

#### ASSAULT ON EQUAL CITIZENSHIP RIGHTS

A few individuals have argued against the proposed equal citizenship rights contained in the Draft Constitution. Their position is that in granting women equal citizenship rights, there is a danger that a non-Kenyan may ascend to the presidency. Underlying this argument is the notion that only a man can become President. This concern is actually addressed in Article 156 (1) (a) which provides that 'a person shall be qualified for nomination as a presidential candidate if the person is a citizen of Kenya by birth'.

#### GENDER BIASED EXEMPTIONS TO THE BILL OF RIGHTS

Article 31(4) of the Draft Constitution reads:

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

*Secondly, if the Bill of Rights allows derogation in respect of one faith, does this not set a dangerous precedent: who is to stop proponents of customary law from arguing that in pursuit of their practises, they too should be exempted from the Bill of Rights?*

There is therefore still a category of women (Muslim women) who will not be able to benefit from the proposed equality provisions of the Draft Constitution. Muslim women have argued that this exemption exists at their request. This provision raises two concerns- firstly, given that the implications of the Constitution are long term, is it wise to legislate a permanent inequality for any category of citizens? Secondly, if the Bill of Rights allows derogation in respect of one faith, does this not set a dangerous precedent: who is to stop proponents of customary law from arguing that in pursuit of their practises, they too should be exempted from the Bill of Rights? These are the challenges facing Kenyan women in their continued struggle for constitutional equality. There is therefore need to explore the possibilities of entrenching equality rights.

#### (Footnotes)

<sup>1</sup> There were three Lancaster House Constitutional Conferences, the final one which was held in October 1963 to settle outstanding issues before Kenya became independent. Priscilla Abwao was a delegate to the Second Lancaster House Conferences. See Kihoro Wanyiri, ed. *A Vision of The Future From the Past*. Abantu for Development, 2002.

<sup>2</sup> See Rugene Njeri. 'Countdown Begins' in: *The Daily Nation*, 26<sup>th</sup> October 2002.

<sup>3</sup> See Kago Tony and Muriuki Muriithi. 'Moi Moves To Disband Ghai's Reforms Team', in: *The Daily Nation*, 28<sup>th</sup> October, 2002, which read:

The Ghai Commission, which has been writing Kenya's new Constitution has been dissolved, President Moi said yesterday. The announcement came as the commission officially dissolved the National Constitutional Conference – a gathering of all MPs and special interest groups called to scrutinise the draft Constitution.

<sup>4</sup> See Muriuki Muriithi. 'Ghai Team Protected By The Law', in: *The Daily Nation*, 30<sup>th</sup> October, 2002 in which the Attorney General is reported to have said that :

The Ghai Commission, could only be disbanded when a new Constitution is enacted. His statement lays to rest doubts over the fate of the Constitution Review Commission of Kenya headed by Prof Yash Pal Ghai.

<sup>5</sup> See, Kago Tony, Judges Want Ghai Team Thrown Out' in: *The Daily Nation*, 25 October 2002 which reads:

The two judges who have been trying to block judicial reforms proposed in the new constitution now want the entire Ghai review declared unconstitutional. Judges Moijo ole Keiwa and Vitalis Juma were yesterday allowed to challenge the legality of the Act establishing the Constitution Review Commission of Kenya.

<sup>6</sup> One of these critics, Sam Mwale, wrote:

The patriarchy is probably also to blame for economic inequality and because it is the main tax paying constituency, it will fund the state's additional commitments under the draft constitution that include support to the elderly, support to persons with disability... By so strongly emphasising Affirmative Action, the draft constitution may create something worse than anticipated, a culture of victimhood and a permanent underclass that is forever seeking redress and entitlement that is due it from the Government.

<sup>7</sup> Kihoro.

### 3. LEGISLATIVE REFORM FOR WOMEN: THE MILESTONES, AND A CHECK-LIST FOR THE NEXT GOVERNMENT

By Mariba Koome



#### INTRODUCTION

Ten years later after the first multi-party elections, we are gearing ourselves to the third general elections. The question arises, what have we achieved, and what are the gains we have made in advancing the rights of women?

FIDA Kenya was founded principally to address the gaps in the law, procedures and practices, coupled with the negative attitudes that have compounded and institutionalised discrimination against women.

Law and order is the basic cornerstone of any democratic and sovereign state and maintenance of law and order is the Government's cardinal responsibility. A legislative framework that ensures speedy and affordable access to justice, guarantees equality, and protects and promotes the rights of its citizens, is a litmus test for any democratic form of Government.

FIDA Kenya has in her previous annual reports emphasised the need for constant, consistent, and coherent revision and reform of laws to respond to the needs and aspirations of Kenyans especially women and children.

At independence in 1963, Kenya inherited a legal system that was imported and modeled on the British Common Law. However this system provided limited structures to support the limited level of development at the time. The laws were designed to strike a delicate balance between re-assuring the white minority and foreign investors on one hand, and assuaging the hunger for opportunities among the indigenous black majority, who had previously been constrained by colonial laws, on the other hand. However, since independence, Kenya has experienced rapid population growth, the shift to the money economy, and a myriad of other social, cultural, and political developments. Nevertheless, these changes have not been matched by continuous review and reform of the laws to give effect to and support a responsive legal system.

This chapter will chronicle the key efforts that have made by the Government to respond to the issues of discrimination against women. It will largely focus on the 1992-2002 period- the era of political pluralism in Kenya.

#### THE 1993 TASK FORCE ON LAWS RELATING TO WOMEN

The Task Force on Laws Relating to Women was appointed by the Attorney General of the Republic of Kenya in October 1993 and its mandate was to carry out the following:

- Review current laws, regulations, practices, customs and policies that impose constraints on equal enjoyment of rights by women in civil, political, social, cultural or related matters;
- To propose approaches to reform, and the removal of the sources of inequality referred to above;
- To prepare a scheme of legislation designed to remove and limit the inequalities referred to above;
- To propose any other appropriate reforms such as those of a policy and administrative kind, aimed at the removal and limitation of the inequalities referred to above.<sup>1</sup>

The Task Force traversed the whole country and collected and collated views from both men and women. Despite the fact that the Task Force took an inordinately long five-year period to complete its task, it nevertheless compiled and released a highly lauded report that highlighted the economic, social, and political constraints that impede on and compromise the status and rights of women.

The Task Force report was finalised in 1998 and presented to the Attorney General in 1999. It is our recommendation that the findings of the report should be implemented through multi-disciplinary and multi-sectoral approaches. Moreover, the report proposes time lines within which certain laws should be enacted. If enacted, the new draft constitution will provide a good framework for immediate implementation.

#### THE ESTABLISHMENT OF THE FAMILY COURT DIVISION

The Chief Justice launched the Family Court Division in December 2000 after a persuasive lobbying and advocacy campaign by FIDA Kenya and other women's rights organisations. Furthermore, the report of the 1993 Task Force on Laws Relating to Women had recommended the establishment of such a court. The Family Court is located in the Nairobi High Court and is currently headed by Honourable Justice Joyce Aluoch and served by two other Judges. There is a court registry and two Deputy Registrars. The cases that are handled by the Family Court Division are mainly succession and inheritance; divorce; separation; custody; maintenance; division of matrimonial properties, and adoption matters.

*FIDA Kenya has in her previous annual reports emphasised the need for constant, consistent, and coherent revision and reform of laws to respond to the needs and aspirations of Kenyans especially women and children.*

### HAS THE ESTABLISHMENT OF THE FAMILY COURT DIVISION FACILITATED ACCESS TO JUSTICE FOR WOMEN?

While the establishment of the Family Court Division is a commendable step and was hailed by some as a judicial milestone<sup>2</sup> towards facilitating access to justice for women and children, the court is only located in Nairobi, whereas families are found in every corner of the country. In addition, laws relating to the family have not been reviewed and revised to outlaw discrimination, and harmonise the rights of women within marriage and in succession. Moreover, the court procedures remain very complex and cumbersome and there is still tremendous delay between the time of filing and completion of matters.

*Judges who are handling Family Court matters require continuous gender sensitisation training. In fact, a proven gender sensitivity track record should be a pre-requisite to being posted to this division of the High Court*

FIDA Kenya has also noted that some judges still exhibit low morale, a negative attitude, and lack of sensitivity to the plight of women. Judges who are handling Family Court matters require continuous gender sensitisation training. In fact, a proven gender sensitivity track record should be a pre-requisite to being posted to this division of the High Court.

The high costs related to filing fees and the hiring of legal representation constitutes the biggest obstacle facing litigants today. Many Kenyan women cannot afford to pursue the protection of their legal rights. Alternative Dispute Resolution (ADR) mechanisms, and an informal justice system that is dispensed by traditional community leaders have not been developed as viable and gender-sensitive alternatives to the formal legal framework. The Family Court division should also allow the involvement of the Kadhis Court in order to develop Islamic jurisprudence.

In addition to simplified rules of procedure and practice, there should be more specialised case management training for the registry staff. The other key concern is the lack of professional counseling services within the Family Court structure. Disputes involving families require a certain degree of sensitivity, and the support services of trained counselors are necessary to facilitate not only alternative dispute resolution, and to provide trauma counseling, but also to provide independent reports on the welfare of children involved in disputes.

### THE ENACTMENT OF THE CHILDREN ACT, 2001

Before the enactment of the *Children Act, 2001* Kenya's legislation on children was scattered in several statutes. *The Children Act, 2001* which came into operation in March 2002, saw the establishment of the Children's Court and the re-deployment of about 60 magistrates all over the country. The principal object of the Act is to safeguard the rights and welfare of the child. The Act contains what can be considered as the bill of rights for the promotion and protection of the rights of the child.

The rights incorporated in the *Children Act 2001* include:

- The right to life and survival and development of the child
- The right to non-discrimination on the basis of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic, or other status, race, disability, tribe, residence or local connection
- The right to parental care
- The right to education
- The right to religious education (subject to appropriate parental guidance)
- The right to health and medical care
- The right to a name and nationality
- Right to leisure, play, and recreation
- Right to privacy, subject to parental guidance

The *Children Act, 2001* also offers children protection from:

- Physical and psychological abuse, neglect and any form of exploitation, including prostitution
- Female circumcision, early marriage, or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development
- Sexual exploitation, use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials
- The use of hallucinogens, narcotics, alcohol, tobacco products or psychotropic drugs and any other drugs that may be declared harmful by the Minister responsible for health
- Economic exploitation and any work that is harmful to their health, physical, mental, moral or social development, or which could interfere with their education
- Torture and deprivation of liberty.

Any person who infringes on any of the rights of a child shall be liable to a term of imprisonment not exceeding twelve months or to a fine not exceeding 50,000/- or to both imprisonment and fine.

Whereas the *Children Act, 2001* has been lauded as a landmark framework for the protection of the rights of the child, one of its most glaring inadequacies which was pointed out even before the legislation was passed by parliament is the provision regarding parental responsibility. This provision limits the rights of an un-married woman to file a case for child support in the case of a child born out wedlock. Women activists interpret this provision as one that takes away the gains found in the previous law. In the previous legislation,

*Whereas the Children Act, 2001 has been lauded as a landmark framework for the protection of the rights of the child, one of its most glaring inadequacies which was pointed out even before the legislation was passed by parliament is the provision regarding parental responsibility*

an un-married woman could file a case for child support under the repealed *Guardianship of Infants Act* in relation to children born out of wedlock. However, it remains to be seen whether this provision in the *Children Act, 2001* will be in conformity with Section 37(4) of the Draft Constitution which provides that 'a child's mother and father, whether married to each other or not, have an equal duty to protect and provide for the child'.

In addition, under the Act the government is charged with the responsibility of providing legal aid to every child who comes into conflict with the law. However, apart from the limited legal aid being provided by some NGOs the government has not offered legal representation to needy children as required by the law.

*The immediate actions that should be undertaken to remedy some of the current problems in the Children's Department include recruiting additional staff and increasing budgetary allocations for the effective implementation of the Children Act, 2001*

The Children's Department has been short of staff needed to enable it follow up on all deserving cases of children in need of state care. The numbers of children in the streets and without parental care has multiplied to the point of outstripping the Department's capacity for attention and policy-making. Furthermore, the Department's capacity to enforce the law relating to children, and of court orders is weakened by general lack of support from the security arms of government. Moreover, unlike Labour Officers, Children's Officers are not designated as public prosecutors to deal with parents who are negligent.

The immediate actions that should be undertaken to remedy some of the current problems in the Children's Department include recruiting additional staff and increasing budgetary allocations for the effective implementation of the *Children Act, 2001*.

## PENDING DEMANDS: A CHECKLIST FOR THE NEXT GOVERNMENT!

### HARMONISATION OF MARRIAGE AND DIVORCE LAWS

One of the most urgent legal concerns for women is the need to harmonise the existing laws relating to marriage and divorce. The first major attempt to address the problems associated with the phenomenon of multiple jurisdictions in matrimonial causes in the post- independence era was made by the Commission on the Law of Marriage and Divorce appointed by the late President Jomo Kenyatta in 1967. The Commission was mandated 'to consider the existing laws relating to marriage, divorce and matters relating thereto, and to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform law of marriage and divorce applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, Islamic law, Hindu law and the relevant Acts of Parliament and to prepare a draft of the new laws'.

The Commission appreciated the difficult problems presented by the five recognized forms of marriage in Kenya. These forms of marriage are encapsulated in:

- *Marriage Act Cap 150 Laus of Kenya*
- *The African Christian and Divorce Act*
- *The Hindu marriage and Divorce Act*
- *The Mohamedan Marriage, Divorce and Succession Act Cap 157 Laus of Kenya*
- African customary marriages

The legal consequences of these marriages, especially the rights and obligations of the parties to the marriage depend generally on the form of marriage.

The laws relating to divorce, separation, nullity, and other matrimonial relief arising out of a monogamous marriage are governed by the *Matrimonial Causes Act*. Both the High Court and the Magistrates Courts have concurrent jurisdiction. Matrimonial causes arising out of Mohamedan marriages are governed by Islamic law under the *Mohamedan Marriage, Divorce and Succession Act*. The Kadhis Court and the High Court have concurrent jurisdiction.

There is no written law regarding matrimonial causes arising out of marriages contracted under the customary law. These marriages are governed by customary practices. The failure to register customary marriages is an impediment to ascertaining the existence of a customary marriage. This is in light of the rising number of couples living together as married but who have not undergone all the customary marriage rites.

The diversity of marriage laws creates a number of practical legal problems. These include different procedures; the complexity in addressing inter-ethnic, inter-racial, and inter-religious marriages; and also in ascertaining the existence of marriage due to the diversity of marriage registers. The diverse types of marriages also confer different rights and obligations. For instance depending on the type of custom in customary law marriages, a wife cannot be granted custody of children or maintenance of self.

Moreover, the current legal procedures do not provide for a one-stop shop where litigants can bring out all their complaints in one case for the diverse issues of maintenance, custody, ownership of property, divorce, and separation to be decided at once. The procedures for filing different applications and suits are complex, expensive, time consuming and confusing to litigants. The procedures do not also provide for a prioritisation of the legal issues at hand, so that in most cases divorce orders are first granted and parties are then advised by the Court to pursue maintenance and issues of custody of children afterwards.

Taking this into consideration, there is great need to harmonise and streamline the diverse marriage laws.

*The diversity of marriage laws creates a number of practical legal problems. These include different procedures; the complexity in addressing inter-ethnic, inter-racial, and inter-religious marriages; and also in ascertaining the existence of marriage due to the diversity of marriage registers*

### URGENT NEED FOR LEGISLATION ON DOMESTIC VIOLENCE

Women's human rights organisations have advanced the case for domestic violence legislation in Kenya for over a decade. The *Domestic Violence (Family Protection) Bill 2002* was at its final committee stages before the dissolution of the Eighth Parliament in October 2002.

The *Domestic Violence (Family Protection) Bill 2002* offers a wide definition of domestic violence, to include psychological and other forms of violence that have not been captured under the current legal framework. It aims to reduce and prevent violence in domestic relationships by recognising that domestic violence in all its forms is unacceptable behaviour, and ensuring that where domestic violence occurs, there is effective legal protection for its victims by:

- Empowering courts to make orders protecting victims of domestic violence
- Ensuring that access to courts is simple, quick and inexpensive
- Providing appropriate programmes for victims of domestic violence, such as counseling
- Requiring respondents to attend programmes with a primary objective of stopping or preventing domestic violence
- Providing for sanctions and enforcement in the event that a Protection Order is breached.

The *Domestic Violence (Family Protection Bill) 2002* proceeds from the premise that domestic violence does not only affect women but the entire family. The Bill also gives a broader definition of family to cover uncles, aunts, uncles-in-law, aunt-in-law, nephew, nieces and cousins. It departs from the conventional way of looking at perpetrators of violence or crimes as only deserving custodial sentences. It proposes a rehabilitative kind of approach where the perpetrators are expected to enroll in a program that will help them address their violent character. Essentially, the proposed Bill does not just seek to protect the victim of domestic violence; it also reaches out to the respondent requiring him/her to undergo counseling and rehabilitation. Though the proposed law is not penal in nature (an obvious shortcoming), it does set up fines of up to 100,000 Kenya shillings plus a jail sentence of a minimum of one year for a respondent who violates a Protection Order in respect of a victim of domestic violence.

Under our current legal framework, victims of violence are not even compensated for the medical expenses incurred for treatment of injuries suffered as a result of the violence. There is however hope in the proposed *Domestic Violence (Family Protection) Bill 2002* since there are provisions for compensation for the women victims of violence through the proposed Domestic Violence (Family Protection) Fund.

### OTHER LEGISLATION ON THE PARLIAMENTARY WAIT-LIST

Several pieces of draft legislation were pending before the dissolution of the Eighth Parliament. They include:

- The Equality Bill, 2002
- The National Commission on Gender and Development Bill, 2002
- The Criminal Law Amendment Bill, 2002

The above draft legislation has been thoroughly examined in previous FIDA Kenya annual reports on the legal status of Kenyan women. We call upon the new government to urgently pass this pending legislation!

#### (Footnotes)

<sup>1</sup> Task Force for the Review of Laws Relating to Women

<sup>2</sup> The Daily Nation, May 9, 2001.

## 4. THE LAST FIVE YEARS: EXPERIENCES IN COURT

By Judy Thongori



### INTRODUCTION

The current Constitution provides for equal protection for all under the law. Everyone is entitled to equal treatment without personal favour or prejudice. This provision makes certain assumptions including:

- That every Kenyan is aware of their rights
- That every Kenyan person can afford to pay for legal advice
- That the laws can be easily understood and that they offer adequate protection
- That women encounter the same problems in accessing justice as men.
- That the courts are impartial and disputes and complaints can be solved expeditiously.

The reality is that due to the deepening poverty levels in Kenya; only about 30% of Kenyans are able to access justice through the formal system. Poor Kenyans, particularly women are the most vulnerable to all forms of crime and civil disputes, and in numerous instances, the formal justice mechanisms fail to protect them.<sup>1</sup> Despite the guarantee to equal protection under the law, the government has no legal aid provisions in place except in the very limited provision provided in murder cases. Undeniably, access to justice for women in Kenya is very limited.

In pursuit of FIDA Kenya's vision to help create a just society that is free of discrimination against women, the organisation established the legal aid programme with the specific goal of providing legal aid services to women who are marginalised and denied the full enjoyment of their rights.

The legal aid services provided by FIDA Kenya have proved to be a special avenue for enhancing access to justice for Kenyan women. The services have been offered in an environment that is inimical to the special needs of women and where women are largely treated as second-class citizens.

The environment in which the organisation operates has shaped the demand for legal aid services at FIDA Kenya in the past five years. During that period, the country witnessed increased levels of violence against women and other types of women's rights violations. Consequently, a large proportion of FIDA Kenya's clientele has sought justice principally in relation to violence related matters. That clientele has also sought refuge and seen FIDA as a safe house in which to shelter from such violations.

The economic environment deteriorated over the same period, with poor governance exacerbating the situation. The retrenchment of workers in the private and public sectors exacted a heavy toll on the social life of the country. Due to the lack of social support systems, the poor became poorer while the erstwhile middle class sunk lower into poverty. In many instances, husbands mortgaged or sold off family property resulting in the destitution of a large number of families. Many women sought FIDA Kenya's assistance in recovering their family property.

At the same time, the HIV/AIDS pandemic continued to have diverse ramifications on the lives of Kenyans. For instance, women lost partners to the debilitating disease. Accessing the deceased person's property proved to be a difficult task, as the current succession laws are not sensitive to the reality of HIV/AIDS. Indeed, a number of FIDA Kenya's clients died while the succession disputes were still pending.

### ASSISTING WOMEN: FIDA KENYA'S CORE BUSINESS

Through its two legal aid clinics based in Nairobi and Kisumu, FIDA Kenya has assisted a large number of women in the last few years. The range of services provided to FIDA Kenya clients include legal advice, representation, counselling, and training in self-representation and referral, including referral to shelters and safe houses.

The FIDA Kenya Legal Aid Clinics assist women with the following types of cases:

- Family matters including divorce, separation, maintenance and custody of children, division of matrimonial property, succession and inheritance matters.
- Land disputes based on sex discrimination.
- Employment matters only where there is evidence of discrimination on the basis of sex.
- Criminal matters by making interventions on behalf of clients and training clients on self-representation.

The following table illustrates the large number of clients that have been assisted in the Nairobi and Kisumu Legal Aid Clinics from 1999 to October 2002:

Year	No. of Clients attending Nairobi Clinic	No. of Clients attending Kisumu Clinic	Total
1999	4795	2224	7019
2000	5295	3258	8853
2001	5845	2609	8454
2002	4499	1452	5951
<b>Total</b>			<b>30277</b>

*The environment in which the organisation operates has shaped the demand for legal aid services at FIDA Kenya in the past five years*

The following is a summary of the types of cases currently being handled at the Kisumu and Nairobi Legal Aid Clinics:

Type of case	Kisumu	%	Nairobi	%
Maintenance	180	27	1831	41
Violence	126	19	529	12
Custody	33	5	60	1.3
Divorce	22	3	171	4
Succession	118	17	953	21
Defilement	44	6	14	0.3
Assault	20	3	112	3
Rape	8	1.1	80	1.8
Incest	1	0.1	6	0.1
Sexual Harassment	3	0.4	6	0.1
Death Threats	2	0.2	3	0
Bigamy	2	0.2	1	0
Separation	1	0.1	0	0
Property	10	1.4	0	0
Abduction	2	0.2	1	0
Malicious damage	1	0.1	0	0
Defamation	0	0	0	0
Trespass	1	0.1	0	0
Contempt of court	0	0	0	0
Confiscation of documents	0	0	0	0
Child neglect	1	0.1	0	0
Child stealing	1	0.1	0	0
Sodomy	1	0.1	0	0
Land	73	11	477	11
Wrongful dismissal	5	0.7	0	0
Wife inheritance	1	0.1	0	0
Retirement benefits	1	0.1	0	0
Burial Dispute	0	0	0	0
Division of property	0	0	165	4
Theft charge	0	0	9	0.2
Police Brutality	0	0	2	0
FGM	0	0	1	0
Forced marriage	0	0	2	0
Abuse by parents	0	0	2	0
Murder	0	0	2	0
Dismissal due to pregnancy	0	0	10	0.2
Charge with malicious damage	0	0	5	0.1
Medical malpractice	0	0	1	0
Accident claim	10	1.4	2	0
Money claim	0	0	1	0
Dismissal due to HIV	0	0	1	0
Dismissal due to illness	0	0	1	0
Debts	12	1.7	0	0
<b>Totals</b>	<b>679</b>		<b>4,448</b>	

The above numbers demonstrate the immense need for legal aid services for women in Kenya. Notably, the bulk of the cases handled by the Kisumu and Nairobi Legal Aid Clinics are maintenance cases- a reflection of the need for precise and harmonised laws relating to marriage.

#### HIGHLIGHTS OF KEY CASES

Some key cases have illustrated the challenges that FIDA Kenya faces in litigating on behalf of Kenyan women. The following is a brief synopsis of these cases:

##### UNDETERRED MAN REPEATS ASSAULT AND BECOMES BENEFICIARY OF A PRESIDENTIAL PARDON! - *Republic v Dan Wamamba Criminal Case No. 16419/97 (Makadara)*

Dan Ndenda Wamamba tortured his wife, Wilmina Ochieng, by lacerating her private parts and inserting the broken pieces of a stool inside her vagina. He was punishing her for coming home late and for failing to account for her whereabouts between 1.00 pm and 8.00 pm on December 6, 1997. Wamamba was subsequently arraigned in court for the offence. He admitted to having committed the offence but remained un-repentant, claiming that his action was consistent with his Luhya community's way of dealing with such behaviour. He was fined 10,000 Kenya shillings<sup>2</sup>, which he promptly paid, and went home to beat up his barely recovered wife again. He was then re-arrested, charged with the offence of assault, and eventually jailed for six months.

In our opinion, Wamamba had inflicted grievous bodily harm on his wife. A charge of grievous bodily harm attracts a maximum sentence of life imprisonment with or without corporal punishment. However, the defendant was charged with causing actual bodily harm, an offence whose maximum sentence is only five years imprisonment. This is due to the fact that the doctor who examined the complainant negligently failed to document the full extent of the injuries.

As if to add insult to injury, Wamamba was released through a presidential pardon during a national day in 1999. This case demonstrates the need to reassess the type of prisoners who deserve to benefit from such blanket pardons.

In this case, the criminal justice system was seen for what it is: totally unsupportive of victims of domestic violence.

##### *Republic v Hussein Abdi SRM Criminal Case No. 162 of 2000 (Wajir)*

*Republic v Hussein Abdi* was one of the notable cases that FIDA Kenya dealt with during the period under review. The case involved a minor who was allegedly defiled by her Deputy Headmaster in Wajir. The Medical Officer of Health (MOH) at Wajir District Hospital confirmed in his report that she was actually below 14 years at the time of defilement. However and in the course of hearing the case, the same doctor wrote a letter to Court withdrawing his

*As if to add insult to injury, Wamamba was released through a presidential pardon during a national day in 1999*

earlier report. The girl's father then sought FIDA Kenya's assistance in having the Police Surgeon in Nairobi involved in the case. Despite the fact that the Police Surgeon gave evidence to the Court supporting the earlier report that the girl was indeed under 14 years of age, the Court nevertheless acquitted the respondent. This case yet again demonstrated the lack of seriousness on the part of the judicial system in prosecuting gender violence cases. Why didn't the Court query the withdrawal of the MOH's medical report?

**Republic v Wafula Ochoya Criminal Case No. 4728/98 (Kibera)**

Edward Wafula Ochoya was charged with defilement of a girl under the age of 14 years contrary to Section 145(1) of the *Penal Code*. The 11-year complainant was infected with HIV AIDS as a result of the defilement. Ochoya received the maximum sentence for the crime-14 years. However, in her judgment, Principal Magistrate Ondieki stated that in her view the maximum sentence as provided in the law was insufficient, considering the circumstances of the case.

This case gave a strong justification for the on-going campaign by FIDA Kenya and other women's right's organisations to have stiffer sentencing of sexual offenders. The proposed *Criminal Law Amendment Bill, 2002* proposes that the maximum penalty for defilement be raised from 14 years to life imprisonment.

**Florence Nangini & 2 others v Hon. Julius Sunkuli Criminal Case No. 1293/2000 Private Prosecution (Nairobi)**

Following the failure of the Police Commissioner and the Attorney General to prosecute a Minister for an alleged defilement, FIDA Kenya on the instructions of the complainant instituted a Private Prosecution in the Chief Magistrates Court at Nairobi. The allegations were that the Minister had defiled a minor contrary to Section 145 of the *Penal Code*. Two other respondents, the Chief of Kilgoris and the Divisional Criminal Investigation Officer Kilimani were charged with compounding a felony.

In a strange turn of events, the complainant withdrew instructions from FIDA Kenya before the completion of the case. It was FIDA Kenya's opinion that the complainant was probably compromised and the following letter that FIDA Kenya received from a concerned citizen illustrates the events that may have transpired:

*I seek your indulgence regarding the above referenced matter. I am a FIDA Kenya member, however I will not disclose my identity for security reasons.*

*On 31<sup>st</sup> August 2000, I was aboard a Kenya Airways flight No. KQ603, which departed Mombasa at 9.00 a.m. and arrived in Nairobi at 10.00 a.m. On the same flight, aboard the 1<sup>st</sup> class cabin of the plane was "Baba Dennis" and "Mama Dennis". Upon disembarking the flight, "Baba Dennis" left hurriedly, but "Mama Dennis" accompanied by a young man I believe could be an "aide" of "Baba Dennis" remained behind with the rest of the passengers in the luggage collection room.*

*In a strange turn of events, the complainant withdrew instructions from FIDA Kenya before the completion of the case*

*It was therefore with profound shock when later that evening, watching KTN news, I saw "Mama Dennis", still dressed as she was at the airport, (a maroon and white dress, brown shoes), accompanied by the same "aide" referred to above leaving the Law Courts having withdrawn the rape case against "Baba Dennis".*

*As a lawyer, a FIDA Kenya member, and an advocate of women and children's rights, I was infuriated by the decision to withdraw the case. What is worse is that I believe "Mama Dennis" was coerced or unduly influenced to withdraw the case – otherwise how do you explain her little sojourn in Mombasa with "Baba Dennis", which ultimately resulted in the withdrawal of the case?*

*Sorry for taking your time Madam, but I felt compelled to let FIDA know the circumstances under which the rape case was withdrawn. It is not fair for "Baba Dennis" and "Mama Dennis" to cut a deal, and then use FIDA as a scapegoat!*

*I remain your faithful FIDA member. Thank you for listening.*

NOTE:

*Unless "Baba Dennis" and "Mama Dennis" used fictitious names, you may also confirm their presence on flight KQ603 of 31<sup>st</sup> August 2000 from the passenger list of Kenya Airways.*

It was surprising to FIDA Kenya that the Court allowed the complainant to withdraw from the case, without ascertaining the reasons for the withdrawal. Section 204 of the *Criminal Procedure Code Cap 75* provides as follows:

*'If a complainant, at any time before a final order is passed in a case under this Part, satisfies the Court that there are sufficient grounds for permitting him to withdraw his complaint, the Court may permit him to withdraw it and shall thereupon acquit the accused'.*

**IS THERE JUSTICE FOR WOMEN IN PROPERTY OWNERSHIP?**

**Wanjiru v Kamau (real names withheld as the case is still pending)**

In a case that is on going, a family had lived and worked on their property, which was registered in the husband's name for over thirty years. On the property stood a permanent house and mature tea bushes on which the family depended for their sustenance. However, the husband sold the property without his wife's knowledge, and by the time the wife made the discovery that a sale of the property had taken place, the title deed had already been transferred to the buyers. Despite the institution of suit by FIDA Kenya, the family was still evicted and though the organisation initially managed to have them momentarily re-instated, they were eventually formally evicted and the house and moveable property destroyed. The entire family has now been transformed into beggars on the streets of Nairobi.

*Both cases are still pending in Court. It is FIDA Kenya's opinion that the situation would have been averted if Kenya's legal framework allowed for the presumption of spousal co-ownership of property*

Moreover, the agony of our client has taken a different turn as her son is now being charged with the murder of one of the purchasers of the suit property.

Both cases are still pending in Court. It is FIDA Kenya's opinion that the situation would have been averted if Kenya's legal framework allowed for the presumption of spousal co-ownership of property. If this were the case, men would not be able to sell family property without the prior consent of their wives.

#### ***Republic v Elina Muthoni Ndung'u***

In this highly publicised case, Elina Muthoni Ndung'u was sentenced to eight years in prison for selling a family cow. She had sold the cow to offset a hospital bill for her husband who later went to Court claiming that she had stolen the animal. The District Magistrate's Court in Kigumo in Central Province proceeded to mete out the stiff sentence. Fortunately, an uncle to the jailed woman reported the matter to FIDA Kenya. Through FIDA Kenya's intervention, the High Court ordered the re-trial of the case at the Thika law courts. The case did not however proceed because the client was discharged.

#### **NEGATIVE ATTITUDES TOWARDS WOMEN INFLUENCING COURT DECISIONS**

##### ***Mary Wambui Gichuki v Stanley Mathenge RMCC 634 of 2002***

The popular belief is that access to justice for women is hindered by various factors including lack of legal knowledge, and unavailability of affordable legal advice. Increasingly however it is becoming evident that access to justice for women may be for the most part fettered by the negative attitudes of certain judicial officers against women.

In the recent case of *Mary Wambui Gichuki v Stanley Mathenge RMCC 634 of 2002*, the complainant went to Court seeking damages from the respondent who had promised to marry her, and then reneged on the marriage promise. The Court in Nakuru made the following observations:

'Unfortunately for the present plaintiff, although she had been very generous to the defendant, supplying services for a period of three years, she never became pregnant. Only God knows who was to blame for this situation...I am therefore satisfied that Plaintiff has no reasonable cause of action to claim anything from the defendant. It was upon her to work very hard within the three years she slept with the defendant in the same bed, to become pregnant to enable her father to claim pregnancy compensation. We have not been told of any serious attempts by her to become pregnant'.

#### **A GLIMMER OF HOPE IN THE APPLICATION OF INTERNATIONAL INSTRUMENTS**

Kenya has acceded and ratified many international conventions and agreements, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Beijing Platform for Action (PFA).

FIDA Kenya and other human rights bodies have long advocated for the domestication of conventions and other international agreements that Kenya has ratified. Since this is not yet a reality in Kenya, FIDA Kenya has also been calling for judicial activism in the implementation of the covenants, especially in cases where there are gaps in the statutes. However, there has been reluctance on the part of the Judiciary principally because formal domestication has not yet taken place.

Nevertheless, certain members of the Judiciary have begun a welcome trend of referring to international agreements in their judgements. *Mburu Chubvu v Nungari Muiruri and 2 others HCCA No. 335 of 1999* was a land case in which a man was alleging that his sisters are not entitled to inherit their parents' land. Honourable Justice Waki, in his judgment stated as follows:

'That existing view may well test the conscience of modern day activists who would justifiably plead that the custom is discriminatory to women and contrary to international instruments assented to by this country, prohibiting discrimination on the basis of sex.

I allude to the to the United Nations Convention on the Elimination of All Forms of Discrimination against Women. (CEDAW) which Kenya ratified on 9/3/1984...

Perhaps it is time serious thought was given to implementing Article 5 of CEDAW which again this country has undertaken to do but has taken no step to. Our hopes are that the current Constitutional Review Process...will examine the issue squarely.

For now I can only bemoan the binding precedents of the Court of Appeal of entitlement to land by unmarried women as determined by custom.'

The reference to CEDAW by the Judge was positive as he did so under his own volition. We should also note that the Honourable Judge has been one of those trained on the Jurisprudence of Equality Programme. This is a Programme coordinated by the Kenya Women Judges Association (KWJA) with the purpose of training judicial officers on human rights issues. Hon. Justice Waki is in fact a trainer under this same programme. Quite obviously, training does yield results. FIDA Kenya salutes the Honourable Judge and hopes that he will keep searching for a way to apply the convention.

It is also consoling to know that the Draft Constitution cites international conventions as one of the sources of law in Kenya. Even though the Draft Constitution does not contain an automatic domestication clause, it does provide a framework for beginning to ensure that Kenya is a good citizen of the larger world.

FIDA Kenya's experience in providing legal aid to needy women over the last five years has resulted in lessons that will be invaluable in the establishment of a National Legal Aid Scheme. It can now be hoped that the scheme will draw from these lessons even if it takes the form of the office of the Public Defender proposed by the Draft Constitution.

**(Footnotes)**

<sup>1</sup> *Eliminating World Poverty: A Challenge for the 21<sup>st</sup> Century*.

<sup>2</sup> US\$125 equivalent at current rates.

## 5. AN ANALYSIS OF FIDA KENYA'S MONITORING REPORTS: COMMUNITY LEVEL TRENDS

By Asba Hasbmy, Enid Mutiboni and Alice Macharia

### THE CASE FOR THE MONITORING OF WOMEN'S RIGHTS VIOLATIONS

FIDA Kenya's Women's Rights Monitoring and Advocacy Programme monitors and documents women's rights violations in Kenya. The rationale behind this programme is that all lobbying and advocacy activities need to be supported by credible evidence. Data also provides a benchmark upon which to measure successes and to adequately inform interventions. However, basic statistics on women's rights violations in Kenya are lacking largely due to the fact that the Kenyan police do not maintain gender dis-aggregated data.



Several women's organisations like FIDA Kenya, Women and Law in East Africa (WLEA), and the National Council of Women in Kenya (NCWK), have carried out base-line surveys to collect data on women's rights violations. However, this data is collected for a limited period of time and by researchers who do not have long-term ties with the community.

FIDA Kenya's community monitoring system is conducted by Community Based Monitors, and has been in place since April 2001. It covers Nairobi, Nyanza and Western provinces. The monitoring of violations is source-based, and is conducted at strategic points such as hospitals, police stations, labour offices, institutions of learning, refugee camps, pre-natal and post-natal clinics, and law courts. The monitoring is also issue-based, focusing on certain issues such as domestic and sexual violence which have already been identified as forms of recurrent human rights violations against women.

*The monitoring of violations is source-based, and is conducted at strategic points such as hospitals, police stations, labour offices, institutions of learning, refugee camps, pre-natal and post-natal clinics, and law courts*

### AN ANALYSIS OF THE MONITORS' REPORTS

A total of 206 reports were received from the Community Based Monitors in the year 2002 up to the month of October. In all the cases reported, the survivors were female. The most prevalent violations were physical abuse, intimidation, and verbal abuse, which mostly occurred within the home. Some respondents reported more than one type of violation. Each type of violation was treated as a separate variable. Therefore, the percentages may not add up to 100 per cent.

### THE NATURE AND PREVALENCE OF HUMAN RIGHTS VIOLATIONS REPORTED

Data that was collected by the Community Based Monitors in 2002 confirms that domestic violence is still the most frequent violation against women and has far-reaching effects that undermine the stability of the family unit. The fact that the victims are at risk in their own homes and are vulnerable to abuse from the people that are closest to them emphasises the need for legislation that will protect them from these perpetrators, hence FIDA Kenya's call to the next parliament to urgently enact the *Domestic Violence (Family Protection Bill) 2002*. Furthermore, as a result of training provided to the Community Based Monitors, more data was collected relating to psychological forms of abuse, which the Monitors now recognise as a form of domestic violence.

The data also indicates the need for greater knowledge amongst women of their property rights to prevent them from losing their lawful right to inherit property, matrimonial or otherwise. A significant number of the cases reported involved women who were denied their right to inherit property, especially matrimonial property.

#### TOTAL NUMBER OF VIOLATIONS REPORTED, JANUARY-OCTOBER 2002

Violation	Occurrence	%
Forced wife inheritance	8	1.4
Denial of inheritance of land owned by:		
• Father	10	1.8
• Husband	46	8.5
• Other	6	1.1
Matrimonial desertion	32	5.9
Bigamy	19	3.5
Physical abuse by:		
• Punching, slapping, kicking	106	19.7
• Using objects	37	6.9
• Burning using fuel	3	0.5
• Burning using water	1	0.1
• Burning using other fluids	-	-
Intimidation	92	17.1
Verbal abuse, shouting	125	23.2
Rape	10	1.8
Attempted rape	8	1.4
Defilement	10	1.8
Indecent assault	5	0.9
Incest	2	0.3
Sexual harassment	12	2.2
Denial of sexual rights	1	0.1
Forced early marriage	-	-
Denial of education	3	0.5
Denial to maintenance	1	0.1
Employment discrimination	1	0.1

According to the monitoring reports, verbal abuse and intimidation were the most prevalent forms of abuse, standing at 23.2% and 17.1% respectively. Physical abuse by punching, slapping, and kicking stood at 19.7% while cases of violence using objects stood at 6.9%. The youngest survivor of physical abuse was a 7 year old girl.

In addition, there were a total of 10 rape cases as well as 10 defilement cases. The youngest defilement victim was 4 years old. One of the perpetrators in a defilement case was the father of the survivor. Additionally, there were 2 reported cases of incest. In one case, the perpetrator was a cousin of the survivor. These statistics demonstrate that even minors are at a great risk of suffering violence from the people known to them and especially those that they trust. Since minors are even more vulnerable than adults, this poses great challenges to those seeking solutions to this phenomenon.

#### RELATIONSHIP BETWEEN THE PERPETRATOR AND THE SURVIVOR

In 80.1 % of the instances, the perpetrator of violence was a relative of the survivor. Thus, most of the time, the survivor, were familiar with their violators. Additionally, husbands comprised the highest category of perpetrators of the various forms of violence. In-laws were the next most common perpetrators followed by step-sons, brothers, uncles, cousins, sons, and fathers. Cases involving strangers comprised 15.5% of the total, while 'others' were responsible for 11.2% of the violations. 'Others' includes categories such as teachers and friends. The table below summarises these results:

Perpetrator	Frequency	%
Relative	165	80.1
Other	23	11.2
Stranger	32	15.5
Neighbour	1	0.48

#### MANIFESTATIONS OF THE PHYSICAL ABUSE REPORTED

The physical manifestations of physical abuse are a testimony to the kind of violence meted out to the survivors. However, this is only one way of assessing the degree of damage done. Physical scars do not demonstrate the depth of psychological torture that the survivors of violence often experience. The data below is a summary of the findings for the year 2002:

Consequence	Times Mentioned	%
Breaks and fractures	11	5.4
Deformities	11	5.4
Amputation	11	5.4
Other visible marks	65	31.6
Missing hair, teeth	10	4.9

The most prevalent manifestation of physical abuse reported was the appearance of visible marks. Some 65 survivors (31.6% of women in this sample) reported that they sustained one or more visible scars on their bodies. 5.4% of the survivors suffered either breaks and fractures, deformities, or amputations respectively, while 4.9% had missing hair and teeth as a result of the physical abuse.

#### FREQUENCY OF VIOLATION

In most cases reported (47.6%), violence occurred more than once. Hence, a pattern of violence emerged, demonstrating that violence against women is often a recurrent phenomenon. Some survivors in this category reported violence over a long period of time. 19.4% of the survivors reported that the violation had never happened before, while 18.4% reported that while the violence had never happened before, there had been a threat of it happening. The table below summarises the frequency of violence as reported by the monitors:

Frequency of Violation	Frequency	%
Never happened before	40	19.4
Never happened before, but there has been threat of it happening	38	18.4
First time it happened	14	6.8
Occurred more than once before	98	47.6
Missing data	14	6.8
Total	206	

#### TIME BETWEEN VIOLATION OCCURRENCE AND REPORTING

*This is a significant observation, as late reporting of cases of women's rights violations has a significant negative effect on the probability of a successful prosecution. This particularly applies to cases of sexual violence*

Data collected over the year indicated that most cases were not reported immediately. Only 67 (32.5%) women out of a total of 206 reported the human rights violations immediately. 22 cases (10.6%) were reported within three days and 15 cases were reported between 3 days and a week. A quarter of the cases were reported after a week had already lapsed. This is a significant observation, as late reporting of cases of women's rights violations has a significant negative effect on the probability of a successful prosecution. This particularly applies to cases of sexual violence. Additionally, 21% of the cases had not been reported at all. The lack of reporting of human rights violations is of great concern to FIDA Kenya. Many survivors fear the consequences of reporting, especially if the perpetrator is a family member of close associate. Others have a deep distrust of the administration- police, chiefs - and do not believe that they will receive redress from these channels. Yet another group seek alternative means to resolve what they perceive to be a dispute (as opposed to a crime). Hence they resort to elders or other community members for arbitrations. This means that perpetrators of crimes such as domestic violence or sexual violence may get away with a mere slap of the wrist from the community. The following is a breakdown of the duration of time taken to report cases throughout the year:

Duration of Time Taken to Report Violation	Number	%
Immediate	67	32.5
Within 3 days	22	10.6
Between 3 days and 1 week	15	7.3
After a week	50	24.3
Not yet reported	44	21.4
No response	8	3.9
Total	206	

#### WHERE ARE HUMAN RIGHTS VIOLATIONS REPORTED?

The table below shows that most respondents (48%) reported to the chief or local administration first. Of all the cases reported, only 15.5% were reported to the police. This shows that the general public still does not think of reporting violations to the police, and would rather report to another authority. 14% of the cases were reported to the local community leaders. The cases that were reported to 'other' include those that were reported to the Children's department, an NGO or a local legal aid organization. Some cases were reported to more than one place. The table below gives the break-down of the data received:

*This shows that the general public still does not think of reporting violations to the police, and would rather report to another authority*

Place Reported	Number	%
Not reported	35	16.9
Chief/local administration	99	48.0
Police	32	15.5
Local leaders (church leaders, elders)	29	14.1
Relatives	15	7.3
Other	22	10.7
No response	4	1.94

#### ELECTION MONITORING

Election monitoring is a systematic observation of the electoral process. The importance and relevance of election monitoring cannot be downplayed. Election monitoring encourages electoral participation and safeguards the credibility of the electoral processes. Enhanced domestic monitoring efforts by non-partisan groups contribute to a more genuine election process by encouraging fairer campaign practices, as well as reducing the possibility of fraud and irregularities.

FIDA Kenya has engaged in election monitoring in previous elections. In preparation for this year's election, FIDA Kenya is conducting election monitoring through the Engendering the Political Processes (EPP) Programme. This is a programme that is being jointly implemented by a network of organisations. FIDA Kenya is implementing the election monitoring component in cooperation with the National Council of Women of Kenya (NCWK).

FIDA Kenya has trained a pool of elections monitors mobilised from constituencies where women have indicated an intention of vying for parliamentary seats in the next general election. These constituencies are Migori, Butere, Nyakach, North Mugirango, South Mugirango, West Mugirango, Dagoretti, Kamukunji, Ndia, Kandara and Malindi.

The election monitoring is targeting five stages in the electoral process namely: voter registration, party nominations, campaign rallies, ECK nominations and polling day.

This preliminary report will focus on the campaign period. Although the campaign period had not been officially announced at the time of compiling this report, politicians had nevertheless been carrying out their campaigns in social gatherings and functions. For instance, fundraisings are the most common social gatherings for holding political campaigns.

#### AN ANALYSIS OF ELECTION MONITORS' REPORTS

##### BACKGROUND

The political parties that featured in the monitors' reports are the Social Democratic Party (SDP), Kenya African National Union (KANU) and Ford People. This can be attributed to the fact that the monitoring reports came from constituencies which are traditional strongholds of these parties: Nyakach, West Mugirango South Mugirango, Butere, Nyamira, and Migori. The table below gives a summary of the frequency distribution of the campaign rallies/meetings reported per party:

Party	F REQUENCY DISTRIBUTION	%
SDP	2	30
KANU	3	60
Ford People	1	10
Total	6	100

##### NUMBER OF PEOPLE ATTENDING RALLIES BY GENDER

The monitors were requested to estimate the number of people (according to gender) attending the political rallies based on the following ranges:

- Less than 100
- 100-500
- 1000-5000

Overall, fewer women (40%) attended the rallies than men (60%).

#### ESTIMATED AGES OF THE AUDIENCE

The majority of the people attending political meetings (80%) were youths within the age bracket of 18 to 45 years.

Age brackets	Frequency Distribution	%
18-35	1	20
36-45	3	60
45 and above	1	20
TOTAL	5	100

#### HOW RALLY INFORMATION WAS DISSEMINATED

The data collected indicates that word of mouth, and posters are the most popular mode of communicating information about political rallies. On the question of how the monitors received information about the campaign rallies, the following was their response:

Method used	Frequency Distribution	%
Posters	2	40
Word of mouth	3	60
Radio	0	0
Newspaper	0	0
Loudspeakers	0	0
Total	5	100

#### CAMPAIGN MATERIALS USED AT THE MEETING

The campaign materials disseminated at the meetings varied from posters, t-shirts, kangas, stickers, etc. Only 20% of the individuals present at the campaign rallies received the campaign materials. Some of the campaign materials used dirty and insulting language. This has been demonstrated to have a negative effect on the attendance of women at political rallies.

Campaign Materials	Frequency Distribution	%
Posters	2	40
T-Shirts/caps	1	20
Kangas	0	0
Stickers	1	20
Leaflets	1	20
Total	5	100

#### MEDIA COVERAGE OF THE MEETINGS

The media covered 40% of the meetings attended by the monitors. Kenya Times, and the Kenya Broadcasting Corporation (KBC), recorded the highest

*Some of the campaign materials used dirty and insulting language. This has been demonstrated to have a negative effect on the attendance of women at political rallies*

percentage of media coverage. Given that KANU organised the highest number of rallies, we inferred that KANU was using KBC, a public broadcasting body to cover its political rallies. All the monitors reported that the media was not prohibited or intimidated from freely reporting the rallies. The table below demonstrates the distribution of media houses present at the campaign rallies:

Media Houses	Frequency Distribution	Percentage
Nation	1	20
Standard	0	0
Kenya Times	2	40
The people	0	0
KBC	2	40
KTN	0	0
Total	5	100

#### CORRUPT PRACTICES

The monitors reported that none of the women aspirants were seen to be dishing out money. However, 80% of the male political aspirants were seen dishing out money to the electorate. In addition, 20% of the monitors' reports indicated that the electorate was approaching the candidates for bribes. The tendency to ask for bribes was higher among men than women.

#### ROLE OF PROVINCIAL ADMINISTRATION/SECURITY PERSONNEL

The provincial administration was present in 80% of the rallies. The principal role of the provincial administration was to provide security as shown in the table below. In 20% of the cases, the provincial administration played an intimidating role at the meetings.

Role of Provincial Administration	Frequency Distribution	%
Provide Security	4	80
Disrupt/interrupt meeting	0	0
Intimidate the people attending the meeting	1	20
Total	5	100

#### INCIDENCES OF POLITICAL VIOLENCE

Political violence is a feature of Kenya's political landscape. In the course of their monitoring activities, monitors were asked to pay particular attention to violence targeted at women candidates. Verbal abuse (72.7%) was the predominant form of violence perpetrated against women candidates. Women candidates suffered diverse forms of violence, including physical attacks (27.3%) and sexual harassment/rape (9.1%). The table below shows the different forms of violence suffered by women candidates:

Form of violence	Frequency Distribution	%
Verbal attack	8	72.7
Physical attack	3	27.3
Sexual harassment/rape	1	9.1
Hijacking/abduction	1	9.1
Attempted assassination	0	0.0
Looting	0	0.0
Destruction of property	1	9.1
Arson	1	9.1
Eviction	1	9.1
Others	1	9.1

#### PERPETRATORS OF POLITICAL VIOLENCE

The key perpetrators of political violence were youths in organised or hired groups. Political party supporters comprised another principal category of perpetrators of violence. There were no reported cases of women candidates acting as perpetrators of violence. This underlines the masculine character of the violence in Kenya's political sphere. A variety of weapons were used during the violence. These included sharp objects such as knives, broken bottles, pangas<sup>1</sup> as well as blunt objects such as *rungus*<sup>2</sup> and *jembe*<sup>3</sup> handles.

*The key perpetrators of political violence were youths in organised or hired groups*

#### (Footnotes)

<sup>1</sup> Kiswahili for machete.

<sup>2</sup> Kiswahili for club.

<sup>3</sup> Kiswahili for hoe.

## 5. THE HIV/AIDS PANDEMIC: THE LEGAL CHALLENGES AND THEIR IMPACT ON THE HUMAN RIGHTS OF WOMEN

By Betty A. Muenesi



*"It is as if we are beginning a new life. Our past is so sad. We are not understood by society we are not protected against anything. Widows are without families, without houses, without money. We aggravate people with our problems. We are the living dead."<sup>1</sup>*

### INTRODUCTION

Of all the pandemics known to mankind, HIV and AIDS currently poses the greatest challenge to the very survival of the human race. The pandemic knows no boundaries. Kenya is no exception, with statistics showing that up to 2.2 million people are infected by the virus while 1.5 million are estimated to have already died from AIDS.

The Human Immune Virus (HIV) is a retrovirus that attacks the immune system, which helps defend the body against infection. Over a period of time the virus overwhelms the immune system causing the body to be unable to defend itself from infections. The virus eventually leads to a disease/condition termed the Acquired Immune Deficiency Syndrome (AIDS) which is a life threatening, and characterised by the destruction of cells, leading to opportunistic infections which are severe and ultimately fatal.

Historically, it was not until the late 1970's that doctors began to recognize a new pattern of illness, which in 1981 was described as AIDS, a syndrome (a group of symptoms emerging from a common cause) of illnesses. The first case of HIV infection in Kenya was identified in the early 1980's. At the time hardly anyone would have thought that this was the beginning of a public health catastrophe, in fact a pandemic. Ultimately, in November 1999 HIV and AIDS was declared a national disaster when President Daniel Arap Moi said of the disease:

*"HIV/AIDS is an enemy of the nation, which all sectors must fight against together with our allies, friends and development partners. But there are also individual responsibilities in this war many of which will require Kenyans to change their customs and behaviors to contain the risk we all face."<sup>2</sup>*

The National AIDS Control Council (NACC) was set up to mobilize and coordinate all sectors in the fight against the HIV and AIDS pandemic.

The quest to fight HIV and AIDS poses complex legal, ethical, and human rights issues which need to be addressed. The present article seeks to highlight these challenges and the effects that the pandemic has had on the human rights of women.

*The quest to fight HIV and AIDS poses complex legal, ethical, and human rights issues which need to be addressed*

### POLICY, LEGISLATION AND HUMAN RIGHTS INSTRUMENTS

Since the first diagnosis of HIV/AIDS in Kenya in 1984, HIV/AIDS was dealt with within the Ministry of Health from a medical perspective. Between 1987 and 1991, the first five year Medium Term Plan (MTP) was launched with the help of the World Health Organisation. This saw the establishment of an AIDS Programme Secretariat (APS) to control the spread of HIV and AIDS.

The National Committee charged with overseeing HIV and AIDS programmes evolved from the National AIDS Control Programme in 1987 to become the National AIDS and STD Control Programme (NASCOP), which is still housed by the Ministry of Health.

From 1984 to 1987, HIV/AIDS was not regarded as a pandemic but as a highly sensationalised and stigmatizing epidemic. Between 1988 and 1991 the Kenyan government acknowledged that HIV/AIDS was a key health problem although there still existed widespread public ignorance in the area of HIV/AIDS transmission and prevention.

The first surveillance data on HIV/AIDS was released in 1992 requiring significant changes in Kenya's HIV and AIDS policy. A socio-economic impact assessment was commissioned by the government and a further five year plan-1992 to 1996 - was envisaged to focus on strengthening inter-sectoral responses to HIV/AIDS as this stage it was realised that HIV/AIDS was not merely a health issue.

In 1997 parliament adopted sessional paper No.4 articulating government policy on HIV/AIDS in Kenya but as earlier stated it was not until HIV/AIDS was declared a national disaster on November 25, 1999 by the President of Kenya that the full resources of the State were marshaled to combat the disease. The National AIDS Control Council (NACC) was put in place and a Task Force on Legal issues relating to HIV and AIDS was set up in June 2001.

A National HIV/AIDS Strategic Plan was developed for the years 2000 – 2005. In the process of formulation of the National HIV/AIDS Strategic Plan, the gender dynamics of the epidemic were recognized necessitating the establishment of a Gender and HIV/AIDS Task Force which was charged with the task of engendering the National HIV/AIDS Strategic Plan by addressing the gender dynamics of HIV/AIDS.

A technical Sub-Committee on Gender and HIV/AIDS was formed by NACC in April 2001. The Sub-Committee was charged with the responsibility of identifying critical gender and HIV/AIDS issues in order to identify strengths and possible gaps in the National HIV/AIDS Strategic Plan and to develop a strategy document to mainstream gender in the National HIV/AIDS Strategic Plan.

The Sub-Committee comprises thirty-six organisations, of which FIDA Kenya is a member. Support for and participation in the Committee has been widespread and from a broad section of organizations. These have ranged from the Government of Kenya, multi-lateral organisations, NGOs, People Living with HIV and AIDS (PLWHA) groups, faith-based organizations, policy groups and donor groups.

The Committee in which the author has actively participated has developed a draft document entitled 'Mainstreaming Gender Into The Kenya National HIV/AIDS Strategic Plan 2000 – 2005' which will be presented to the stakeholders for review and discussion in November 2002.

A human rights focus key to the success of any strategy to combat HIV/AIDS. The focus assumes an even greater significance in an era when in the world's poorest nations spending on health and education is minuscule. Sorrowfully, Kenya falls in the category of nations where debt repayment is so consuming that health, education, and women's rights issues fail to get adequate recognition in the national agenda.

#### WOMEN AND HIV/AIDS

Gender inequality is a key variable in explaining the phenomenon of HIV/AIDS. As gender disparities increase, the pandemic is affecting more and more women who bear the negative consequence of gender imbalances. To women, HIV/AIDS is a serious and emotive issue. Women are far more vulnerable to the HIV infection due to biological, economic and socio-cultural factors.

##### THE BIOLOGICAL FACTORS

Women have a large mucous surface, which is exposed during sexual intercourse. Semen has a far higher concentration of virus than vaginal fluid. Often during intercourse more so coerced intercourse, micro lesions occur creating entry points for the virus. Epidemiologically, women are more vulnerable than men.

##### THE ECONOMIC FACTORS

Rarely do women control household finances, hence the large dependence on men for financial and material support. This means that women cannot control when and with whom to have sex. Many women have to exchange sex for material favours for daily survival. There is the formal sex work but there is also an exchange for sex in many poor settings, which is many women's way of providing for themselves and their children.

In situations of conflict, internal displacement and war makes refugee and migrant women more vulnerable to infection than local populations because poverty, powerlessness and precarious family situations also accompany their circumstances.

#### THE SOCIO-CULTURAL FACTORS

Socio-cultural gender dimensions further increase the vulnerability of women to HIV/AIDS. For instance, women are not expected to discuss, let alone make any decisions about sexuality. They cannot request or insist on the use of condoms or any form of protection.

Violence against girls and women is a particularly insidious aspect of the HIV/AIDS pandemic that is only now starting to get the national recognition it deserves. Domestic violence, rape and other forms of sexual abuse are gross violations of human rights, which contribute directly and indirectly to the spread of HIV. Most countries have failed to deal with this and still consider gender-based violence to be a taboo subject or private matter, which should not be the subject of public concern.

In some parts of Africa, young girls are regularly forced into early marriages with older men who are more likely to be HIV positive. Cultural practices such as female genital mutilation, wife inheritance, polygamy and lack of sensitivity by men to the plight of women in polygamous marriages propagate the spread of HIV/AIDS.

Other dynamics which also impact on the vulnerability of women to HIV/AIDS include women's general low levels of literacy and the lack of access to information. Increased domestic responsibilities placed on the girl child are also leading to a large number of school dropouts from school.

#### EMERGING LEGAL CHALLENGES AND THEIR IMPACT ON WOMEN'S HUMAN RIGHTS

Respect and concern for the law, ethics and human rights at all levels should be the core of collective responsibility in response to the pandemic. Yet it is clear that HIV and AIDS is a relatively new phenomenon, unknown to law. Hence, there is a vacuum in law as well as an absence of any clear legal and ethical rules governing HIV and AIDS.

Governments need to develop gender-sensitive, multi-sectoral programmes and strategies to empower women and girls and to enable men to assume their responsibilities to prevent HIV and AIDS. The need for AIDS prevention programmes to protect human rights and human dignity cannot be overemphasized. Discrimination against, and stigmatization of HIV infected people; and people with AIDS must be curbed.

The following key areas are of paramount concern in addressing the impact of HIV and AIDS on women's human rights.

- Public Health Concerns such as Testing for HIV, Partner Notification and the Legal Rights to Privacy and Confidentiality
- Discrimination and Stigmatization
- Reproductive Health Rights and Matrimonial Obligations
- Access to Health
- Access to Employment

#### CONFIDENTIALITY, TESTING AND PARTNER NOTIFICATION

In light of the fact that women are usually infected by their only partner/husband the issues of confidentiality, testing, and partner notification present complex socio-legal problems.

The concept of confidentiality dates back to the age old Hippocratic oath formulated by the father of medical science more than 2370 years ago. The oath requires the medical practitioner to maintain silence about information acquired in his/her professional capacity relating to a patient. The question arises however, whether health care providers should be allowed to disclose the HIV status of their patients to persons considered to be at risk of infection. Under the current draft legislation on HIV and AIDS, the *HIV and AIDS Prevention and Control Bill, 2002*, confidentiality should be maintained at all costs, thus leaving the decision on disclosure of status entirely upon the patient and/or the personal representative of the patients' estate in the event of death. Under the draft legislation, the physician's duty to respect the confidentiality of his patient would therefore become not only an ethical obligation, but also a legal duty recognised in law.

Testing for HIV and confidentiality are virtually inseparable issues in so far as the right to maintain privacy is concerned. Testing for HIV should only be conducted with specific prior and informed consent of the person tested. Testing should also always be accompanied by appropriate pre-testing and post-testing counseling provisions. Involuntary testing is trespass on the body and a violation of one's human rights.

Questions have arisen relating to whether testing ought to be a pre-condition to marriage. Some religious institutions insist on the presentation of an HIV negative certificate as a pre-requisite to marriage. In a supreme court of India case, it was held that marriage for people living with HIV and AIDS was a suspended right and provided there is full disclosure and informed consent such individuals can marry. Although this may be opposed in some jurisdictions, this judgment is in conformity with the current draft legislation on HIV and AIDS.

*In light of the fact that women are usually infected by their only partner/husband the issues of confidentiality, testing, and partner notification present complex socio-legal problems*

#### DISCRIMINATION AND STIGMATISATION

Discrimination is both a cause and a consequence of the pandemic. Section 82 of the Kenya's current constitution outlaws discrimination on a variety of grounds. However, the constitution does not specifically address the issue of discrimination on the basis of HIV and AIDS. Most notably, the current draft constitution is also silent in regards to discrimination on the basis of health status.

People living with HIV and AIDS are some of the most vulnerable groups in today's society, and discrimination against them is an assault on their dignity. For instance, women are often blamed for spreading the virus, and suffer discrimination when their status becomes known. In the *High Court Divorce Cause NO.8 OF 2000 John M. Midwa v Olivia A. Midwa*<sup>3</sup> a husband petitioned for divorce on the grounds of cruelty; the particulars being that his wife had tested HIV positive and was endangering his life. The Court of first instance ordered the wife to move out of their matrimonial home, into the servants' quarters. She then applied for stay of execution in the Court of Appeal where a three judge bench held that despite the fact that she was diagnosed HIV positive five years earlier, she was still strong and healthy and furthermore, it would be morally wrong for her husband to desert her. It was ordered that she be reinstated in the matrimonial home.

Serious issues in the above case were not delved into, such as whether the husband knew his HIV status, and whether or not he was in danger of being infected by mere co-existence with the wife. This being one of the few reported cases where the HIV and AIDS status of a woman has been highlighted, it further emphasises the negative and discriminatory manner in which people living with HIV and AIDS are treated.

Discrimination against people living with HIV and AIDS also occurs in many other diverse instances relating to reproductive health rights, matrimonial obligations, employment and the right to work, access to health and insurance services, criminal justice, and negligence.

#### REPRODUCTIVE HEALTH RIGHTS AND MATRIMONIAL OBLIGATIONS

*"Women's rights to safe sexuality and autonomy in all decisions relating to sexuality is respected nowhere".<sup>4</sup>*

Women lack control over their own sexuality. By and large most men however poor, can choose when, with whom, and with what protection if any to have sex. The basic premise therefore is that unless and until the scope of human rights fully extends to economic security, women's right to safe sexuality will not be achieved. Poor reproductive and sexual health in women leads to serious morbidity and mortality with the rates of infection in young women being higher than in young men. Although it is a woman's right to protect herself from HIV or other sexually transmitted infections, in many societies women are unable to exercise their sexual rights. Economic factors, social expectations, cultural taboos and religious values all operate in such a way as to increase the barriers to women's sexual autonomy.

Even where women can exercise economic autonomy, social and cultural factors make it very difficult for them to set the terms governing their sexual relationships. For instance, while women are expected to be faithful to one partner, multiple sexual relations are acceptable and are sometimes the norm for men.

Unlike men, women are not free to negotiate the use of contraceptives methods without fear of negative consequences. Submissiveness is part of women's socialisation, while society regards women as procreators. Discussing, making decisions, and enjoying sex are regarded as signs of immorality.

The question of abortion as a reproductive rights concern also raises serious legal, ethical, and religious issues. While abortion is criminalised in Kenya and in many other jurisdictions, the author argues that abortion laws should be reviewed or made less restrictive especially in the wake of the HIV/AIDS pandemic.

#### ACCESS TO HEALTH

The right to life is the most basic human right without which other rights cannot exist. It follows therefore that the right to health is closely linked to this right because an attack on health threatens the right to life.

The reality is that women's access to health care and support is much delayed and when help comes it is limited, as family resources are nearly always devoted to the caring of men even when women themselves are infected with AIDS.

Access to anti-retroviral drugs is still a dream for many women due to their poor economic status, as well as the discrimination and stigmatization faced when their HIV status is known.

The right to health should be based on the premise that every person has a right to the highest attainable standard of physical and mental health achievable and not merely the absence of diseases.

#### EMPLOYMENT

Discrimination on the basis of HIV and AIDS denies individuals the right to earn a living. The right to earn a living entails the right to access employment without discrimination. On the issues of employment and the right to work, the Chairman of the Legal Task Force on HIV and AIDS, A.D.O. Rachier has stated that:

*'Legitimate commercial requirements are of course an important consideration in determining whether to employ an individual. However we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination*

*of all forms of discrimination. Our constitution protects the weak, the marginalised, the socially outcast and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected'*<sup>5</sup>

Employment discrimination against people living with HIV and AIDS is not limited to women, and applies across the board. Discrimination at work ranges from pre-employment testing and post-employment testing especially for insurance purposes. The right to privacy is a constitutional right, which ought to be protected by prohibiting HIV testing without consent at the work place.

#### CONCLUSION – WHICH WAY FORWARD?

The notion of the law as an instrument for change has been the subject of many a jurisprudential debate. Examples can be found of how the law is ineffective in changing social behavior, this is often due to the fact that it is selectively enforced or ignored altogether. Nevertheless the creative use of law is effective in bringing about positive social change. Law can play a significant role in changing values and patterns of social interaction that create vulnerability to the HIV virus.

The enactment of laws which require a minimum level of participation and representation of vulnerable or socially disadvantaged groups such as women and people living with HIV and AIDS in policy making processes would begin to redress some of the existing injustices.

In addition, the abolition of laws that uphold certain customs or behavior that increase the risk of HIV infection such as harmful cultural practices should be expedited. *The Children Act, 2001* outlaws some of these practices in relation to children. However most of the practices are so embedded in cultural norms that implementation remains a problem.

It is widely hoped that the envisaged legislation on HIV and AIDS will address the current shortcomings in national legislation and overcome the persisting legal challenges.

#### (Footnotes)

<sup>1</sup> UNIFEM. *The Voices of Women Living with HIV/AIDS*.

<sup>2</sup> Kenya National HIV/AIDS Strategic Plan 2000 – 2005.

<sup>3</sup> Unreported High Court Divorce Cause No. 8 of 2000.

<sup>4</sup> UNIFEM.

<sup>5</sup> See A.D.O. Rachier in: *The Lawyer*, November 2001.

Access to anti-retroviral drugs is still a dream for many women due to their poor economic status, as well as the discrimination and stigmatization faced when their HIV status is known

## 6. GENDER AND REGIONAL INTEGRATION: THE AFRICAN UNION, EAST AFRICAN COMMUNITY, AND WOMEN'S RIGHTS

By Njoki S. Ndung'u



### BACKGROUND

Human rights are indivisible, and civil and political rights hold equal value to social, economic, and cultural rights. Respect for human rights, and the implementation of democracy and the rule of law are inter-linked. Therefore abuse of human rights is commonly reflected in disorder, insecurity, conflict, and continuing discrimination of marginalised and vulnerable groups, particularly women, children and the elderly.

On the African continent, the situation of human rights particularly in regards to the promotion and protection of women's human rights has continued to deteriorate due to lack of implementation and enforcement of international and regional human rights instruments.

In 1963, African leaders of newly independent African states signed the Charter of the Organization of African Unity (OAU Charter). The OAU was transformed into the African Union in 2002, through the Constitutive Act of the African Union (AU).

Under this regional system, various initiatives have been launched in an attempt to implement existing legal instruments of the OAU/AU with regard to human rights issues. Examples of these are the Grand Bay (Mauritius) Declaration and Plan of Action 1999 and the Abuja Declaration on HIV/AIDS,<sup>1</sup> which have not as yet been constructively implemented. Both declarations make reference to the need to implement the basic human rights outlined *inter-alia* in the African Charter on Human and Peoples Rights 1981.

In the context of the OAU/AU, the following instruments impact on women and their rights:

- The Constitutive Act of the African Union
- African Charter on Human and Peoples Rights 1981
- African Charter on the Rights and Welfare of the Child
- The Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa

The Constitutive Act is very progressive regarding governance. It pledges respect for human rights and makes a firm commitment to the principle of gender equality.

The African Charter on the Rights and Welfare of the Child came into force in 1999, making the OAU the first regional organization to adopt a binding regional instrument dealing with all aspects of children's rights. The Charter on the Rights and Welfare of the Child recognises the need to eradicate sexual exploitation, trafficking and abduction, and traditional harmful practices. Positive steps have been taken towards the implementation of this Charter, with the establishment of the pre-requisite Committee, which will oversee its implementation. However, the same cannot be said about progress towards the adoption of a draft additional protocol on the rights of women in Africa.

### THE DRAFT PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA: LETHARGY OR APATHY?

In 1981, the African Charter on Human and Peoples Rights was hailed not only as the first African regional initiative on human rights, but also as a precursor to democratic development which would impact on the African continent within the next decade. It was also heralded as a document that reflected the African context of human rights, centered on family and 'people' values, as opposed to the Western Judeo-Christian approach centered on individual human rights. However, the 1995 International Conference on Women in Beijing introduced a different angle that recognized that the family centered cultural approach did not actually accord women the promotion and protection of rights. For instance, although the African Charter had a general anti-discrimination clause, it had failed to prevent the continued abuse of rights of women with regard to cultural practices.

As a post-Beijing initiative, women activists in OAU/AU member states started a lobbying campaign particularly directed at the African Commission on Human and Peoples Rights. Under Article 66 of the African Charter, special protocols or agreements may supplement the African Charter particularly to remedy contemporary issues not previously addressed. It is under this Article that the Commission made a series of recommendations in relation to the rights of women in Africa.

This was followed by a recommendation adopted by the 31st Ordinary Session of the Assembly of Heads of State and Government of the OAU held in 1995. Resolution AHG/Res.240 (XXXI) and subsequently decision AHG/Dec.126 (XXXIV) of the 34th Ordinary Session of the Assembly of the Heads of State and Government held in June 1996 requested the Commission to prepare a draft additional protocol on the rights of women in Africa.

The Meeting of Government Experts in Addis Ababa finally adopted the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa in November 2001. However, further discussions on the Draft Protocol have been stalled since its adoption in late 2001. This is an extremely poor reflection of African governments' commitment to ameliorating the status of women and girls. In a July 2002 Press Statement, Human Rights

*In 1981, the African Charter on Human and Peoples Rights was hailed not only as the first African regional initiative on human rights, but also as a precursor to democratic development which would impact on the African continent within the next decade*

Watch, a leading international human rights NGO urged the African Union to 'urgently finalize a strong protocol on women's rights'<sup>2</sup>.

Unfortunately, this apathy is reflected in many commitments undertaken by the OAU/AU in recent years. Some of these commitments include:

- The ratification and implementation of all major international human rights instruments;
- Full cooperation with international human rights mechanisms;
- Incorporation of international human rights norms into national constitutions and legislation of member states;
- The promotion and protection of the rights of women as enshrined particularly in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Inertia of this kind can be generally based on two premises: lack of resources, in terms of implementation, or lack of political will. It has often been stated that while the OAU/AU may lack resources to send a peacekeeping team to the Democratic Republic of Congo (DRC), the same cannot be said for the adoption of a legal document by member states. The conclusion that can then be made is that the delay that has dogged the adoption of the Draft Protocol on Women can only be attributed to the lack of institutional support and political will.

While it is clear that the AU has recently exhibited renewed vigor, by for example launching new initiatives such as the recent New Partnership for Africa's Development (NEPAD)<sup>3</sup>, it is also very apparent that the institutions of the AU are in urgent need of an overhaul. Although a Women and Development Division was established in recent years, the OAU/AU has neither adopted nor reflected an operational gender policy to date. There has been little attempt to institutionalise equal rights in the working environment, and in terms of representation in senior management, the presence of women is negligible. Maternity benefits remain at the basic bare minimum standard reflected in most African civil services and married women employees are still denied some benefits because of their marital status. Furthermore, the lack of a sexual harassment policy has created opportunities for mischief in terms of abuse of office.

A gender sensitive policy audit of the institutions of the OAU/AU would yield a result of poverty. Gender concerns must be mainstreamed into the structures of the AU before we can hope for the effective adoption and implementation of the Draft Protocol on the Rights of Women in Africa.

While the Draft Protocol still contains some flaws that require further revision, it is nevertheless incorporates far-reaching provisions for the protection of the rights of women and girls. In certain key aspects, it goes far beyond the provisions found in the municipal laws of the various African countries.

## THE EAST AFRICAN COMMUNITY

The three East African Heads of States signed the Treaty for the Establishment of the East African Community on 30<sup>th</sup> November 1999. The Treaty came into force in July 2000. The Treaty aims at developing policies and programmes geared towards integration in the political, economic, social, and cultural fields, research and technology, defence, security, and legal and judicial affairs. To achieve its stated objectives, cooperation will focus on:

- Trade Liberalisation and Development
- Investment and Industrial Development
- Monetary and Financial Affairs
- Development of Regional Infrastructure and Services
- Development of Human Resources, Science and Technology
- Facilitation of Free Movement of Persons, Labour, Services, Rights of Establishment and Residence
- Development of Agriculture and Provision of Food Security
- Environment and Natural Resources Management
- Development of Tourism and Wildlife Management
- Development of Health, Social Services and Cultural Activities
- Enhancing the Role of Women in Socio-Economic Development
- Political, Legal and Judicial Affairs
- Development of the Private Sector and Promotion of Civil Society.

The Treaty further establishes seven basic organs which will facilitate its effective implementation, with the ultimate objective of creating a Political Federation. These include: the Summit of Heads of State; the Council of Ministers; the East African Court of Justice; the East African Legislative Assembly; the Coordination Committee; Sectoral Committees; and a Secretariat.

While an extensive gender critique of the East African Community Treaty has not yet been undertaken, initial observations point to the fact that overall, the Treaty is silent on gender issues and concerns.<sup>4</sup>

## KENYAN WOMEN'S EXPERIENCE IN THE FORMATION THE EAST AFRICAN LEGISLATIVE ASSEMBLY- A PRECURSOR OF THINGS TO COME?

While efforts towards regional integration should be commended, Kenyan women faced an initial humiliating experience during the nomination of representatives to the East African Legislative Assembly (EALA), which took place in November 2001.

*A gender sensitive policy audit of the institutions of the OAU/AU would yield a result of poverty. Gender concerns must be mainstreamed into the structures of the AU before we can hope for the effective adoption and implementation of the Draft Protocol on the Rights of Women in Africa*

The Treaty provides in Article 48 that there shall be 27 elected members and 5 ex-officio members in the Assembly. The selection of the members of the EALA is left to the respective national parliaments. The Treaty further states that each of the three States shall select nine members of the assembly, 'who shall represent as much as it is feasible, the various political parties represented in the national assembly, shades of opinion, gender, and other special interest groups in that partner state, in accordance with such procedure as the national assembly of each partner state may determine'. An obvious flaw of the treaty is that it does not have an outright provision for Affirmative Action on the basis of gender in the selection of EALA representatives.

Nevertheless, a motion was tabled in the Kenyan parliament to provide for Affirmative Action in the selection of representatives to the EALA. This motion was however defeated. As a result, only two Kenyan women, Professor Margaret Kamar, and Rose Waruhiu were selected as members of the EALA. The Kenya African National Union (KANU) selected Professor Kamar, while the Democratic Party (DP) selected Rose Waruhiu.

Infuriated by what they perceived to be an obvious snub by the government, Kenyan women activists took to the streets to protest the nominations to the EALA. In response to the clamor for Affirmative Action in the selection process, President Daniel arap Moi responded "I have tried to assist women, but they are not interested. They are busy politicking about gender, when there is neither discrimination nor bias against them".<sup>2</sup>

As things turned out, despite Kenya's intransigence on the matter, the EALA nevertheless has one third representation of women, due to the fact that Uganda, a country that has embraced the principle of Affirmative Action, nominated four instead of the minimum three women representatives.

## MEMBERS OF THE EAST AFRICAN LEGISLATIVE ASSEMBLY (EALA)

### KENYA

1. Hon. Lt. Gen. Abdullahi Aden	Member
2. Hon. Haji Abdulrahmin Haithar	Member
3. Hon. Prof. Margaret Kamar	Member
4. Hon. Jared Benson Kangwana	Member
5. Hon. Ochieng Gilbert Mbeo	Member
6. Hon. Calista Mwatela	Member
7. Hon. Rose Wairimu Waruhiu	Member
8. Hon. Mohamed Zubedi	Member
9. Hon. Maxwell Shamalla	Member

### TANZANIA

1. Hon. Abdulrahman O. Kinana	Member and Speaker
2. Hon. Dr. Harrison Mwakyembe	Member
3. Hon. George Francis Nangale	Member
4. Hon. Isaac Abaraham Sepetu	Member
5. Hon. Saidi Bakari Jecha	Member
6. Hon. Mabere Nyauchio Marando	Member
7. Hon. Kate Sylvia Magdalen Kamba	Member
8. Hon. Beatrice Matumbo Shelukindo	Member
9. Hon. Mahfoudha Alley Hamid	Member

### UGANDA

1. Hon. Sarah Nanziri Bagalaaliwo	Member
2. Hon. Richard Baker Ddudu	Member
3. Hon. Sozi Kiwanuka Medi Kagwa	Member
4. Hon. Yonasani Bankobeza Kanyomozi	Member
5. Hon. Mishambi Sheila Kawamara	Member
6. Hon. Irene Ovonji Odida	Member
7. Hon. Daniel Wandera Ogalo	Member
8. Hon. Lydia Wanyoto Mutende	Member
9. Hon. Maj. Gen. Muntu G. Mugisha	Member

### EX-OFFICIO MEMBERS

1. Hon. Jakaya Mrisho Kikwete
2. Hon. James Wapakhabulo
3. Hon. Nicholas Kipyator Biwott
4. Hon. Nuwe Amana Mushega
5. Hon. Wilbert T.K. Kaahwa

## RECOMMENDATIONS ON MAINSTREAMING GENDER IN THE EAST AFRICAN COMMUNITY

*Courtesy of the EAC Secretariat*

The members of the East African Legislative Assembly (EALA) having concluded a workshop in Nairobi, Kenya on the 19<sup>th</sup> June 2002, do make the following recommendations for the way forward in relation to activities for the EALA which will support gender mainstreaming of our work:

1. Contribute to the development and adoption of a gender policy in the EAC.
2. Capacity building for all male and female legislators of the EALA.
3. Assessment of gender mainstreaming in the EALA Committees, Rules and Regulations, and working environment and facilities.
4. Harmonization and strengthening working relationships with the Summit, Council of Ministers, Co-ordination Committee, Secretariat, East African Court, and Sectoral Committees on gender mainstreaming in EAC.
5. Establish a network Forum for women members of the EALA and women MP's of National Parliaments in Uganda, Tanzania and Kenya.
6. Organize advocacy activities and cross-border strategies for supporting Affirmative Action in the East African Legislative Assembly, Secretariat, and National Parliaments. Political Parties, systems, movements.
7. Support self-development and skills building of women members of EALA.
8. Establish channels with and acquaint with women in other regional groupings such as SADC, IGAD, OAU, ECOWAS etc.
9. Provide, through the Secretariat, facilities for women members of the EALA.
10. Commission studies on gender-related legislation, laws and policies at the national, regional, and international levels and establish a database for the same.
11. Strengthen the gender component at the Library and Resource Centre at the EAC.

### (Footnotes)

<sup>1</sup> Dealing with the rights of people living with HIV/AIDS.

<sup>2</sup> Human Rights Watch. 'African Union Should Spotlight Human Rights.' Human Rights Watch Press Release, 2002.

<sup>3</sup> NEPAD has also been criticised for being a gender-blind initiative.

<sup>4</sup> See Friedrich Ebert Stiftung and The East African Law Society.

<sup>5</sup> Institutional Framework for an East African Federation.

<sup>6</sup> See Biketi Kikechi. 'Moi Bans FGM, Affirms Stand on Women' in: *The East African Standard*. December 13, 2001.

## 7. ENDING IMPUNITY FOR GENDER CRIMES - REGIONAL TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT

*By Betty Murungi*



"At this juncture I would like to pay tribute to the women of the Women's Caucus for Gender Justice who have taken the experiences of women in war, identified strategies for dealing with violations and, overcoming intense opposition from many representatives at the International Criminal Court negotiations, managed to ensure that rape, sexual slavery, forced pregnancy and other forms of gender-based and sexual violence are included in the statute of the ICC."

Mary Robinson, UN High Commissioner for Human Rights on the occasion of International Women's Day, 8 March 2000.

The genocide that took place in Rwanda in 1994 brought into sharp focus the enormity of crimes that had been committed against women, particularly the women of the group targeted for genocide. The horrendous acts of sexual violence were documented and widely publicised.<sup>1</sup> Following on the heels of the conflict in the former Yugoslavia, where similar violations had been committed against women on a widespread and systematic scale, sufficient attention had been drawn to the egregiousness of rape as a crime against humanity and of its use as a weapon of war and a method of 'ethnic cleansing and genocide'. Numerous studies conducted by *inter-alia* women rights activists, feminist scholars, human rights activists and the United Nations detailed this previously unspoken and ignored crime.<sup>2</sup> By the time the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was drafted, it was a foregone conclusion that rape would be one of the crimes that would be prosecuted at the *Ad Hoc* tribunal. Similarly when the International Criminal Tribunal for Rwanda (ICTR) statute was drafted, it included rape as one of the enumerated crimes against humanity. This development was an advance in international law, given that rape had previously been considered merely as a crime against honour and classified under the category of 'humiliating and degrading treatment' or as an 'outrage against personal dignity'.<sup>3</sup> It is against this background that this Chapter looks at the International Criminal Court and the effort to end impunity for crimes against humanity and particularly crimes against women and FIDA Kenya's participation in this effort as part of the Women's Caucus for Gender Justice.

An examination of this subject requires a critical examination of the history of prosecuting gender crimes at the international level. This Chapter examines the genesis of the law and practice of prosecuting gender crimes at the regional and international level with specific examples of the International Criminal Tribunal for Rwanda (ICTR) and the new International Criminal Court (ICC).

*The genocide that took place in Rwanda in 1994 brought into sharp focus the enormity of crimes that had been committed against women, particularly the women of the group targeted for genocide*

## HISTORY

The 1945 Statutes of the Nuremberg and Far East Tribunals failed to include rape as a war crime. The London Charter creating the International Military Tribunal for Nuremberg makes no mention of rape. Control Council Law No.10 (the basis for prosecution of lower-level Nazis) listed rape as a Crime Against Humanity but no one was prosecuted for this crime. Subsequently the Tokyo War Crimes Tribunal charged rape as an offense and relied on Hague Convention provisions which classified rape as an offense relating to 'family honour'. Several high-ranking Japanese military officials were convicted of crimes of command responsibility for violations of the laws or customs of war, which included widespread rapes and sexual assaults during the rape of Nanking<sup>1</sup>.

Between 1946 and 1948 widespread sexual violence in Europe and the Japanese military's use of the practice of sexual slavery euphemistically referred to as 'the Comfort Women System' was not addressed by the International Military Tribunals. Rape was not included as a crime against humanity.

## THE GENEVA CONVENTIONS

In 1949, The Geneva Conventions (respecting customs of war) were adopted with references to sexual violence in terms of honour and dignity. However, rape was not listed among 'grave breaches'. Article 3 common to the four Geneva Conventions applies to non-international armed conflict and prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment against protected persons'. Women are specifically protected as civilians by Article 27 of the fourth Geneva Convention: 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any other form of indecent assault'. This characterisation of rape is extremely problematic as it equates rape with honour (although this time the honour is that of the woman *not* the family). Article 75 Additional Protocol 1, similarly offers protection to women in cases of international armed conflicts and prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault'. Article 76 offers special protections for women in armed conflict. Article 4 of Additional Protocol 11 relating to internal armed conflict, prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.

## RECENT DEVELOPMENTS

In 1990 former 'Comfort Women'<sup>2</sup> broke their silence of 50 years about their sexual enslavement by the Japanese Military in World War II sparking an international movement seeking reparations, accountability and apology. Following closely thereafter the 1993 Vienna World Conference on Human Rights recognized the need to address grave violations of Women's Human Rights as part of the United Nations agenda.

The 1995 Fourth World Conference on Women in Beijing adopted a Platform For Action that confirmed rape as a war crime.

In September 1998 the International Criminal Tribunal for Rwanda (ICTR) issued the *Akayesu*<sup>3</sup> Judgment. In this judgment, rape was defined for the first time under international law. The Chamber found that rape was a form of genocide as well as torture and could amount to enslavement. The International Criminal Tribunal for Yugoslavia (ICTY) followed with the *Celebici*<sup>4</sup> and *Furundzija*<sup>5</sup> judgments which affirmed *Akayesu* and found rape to be a form of torture. FIDA Kenya participated as one of the organisations<sup>6</sup> that signed on and presented an *amicus curiae* brief during the course of the *Akayesu* trial seeking an amendment to the indictment to include charges of rape and other sexual violence. The indictment was eventually amended to include the charges of rape of which the defendant was acquitted. The Trial Chamber acknowledged the interest of the women's groups.

## THE AD HOC TRIBUNALS

The ICTY and ICTR Statutes list rape as a Crime Against Humanity<sup>10</sup> along with torture murder, extermination, enslavement, imprisonment, deportation and persecution on political racial and religious grounds and also as a serious violation of Common article 3 of the Geneva Conventions. Article 4(e) of the ICTR statute lists 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'. The statutes therefore allow the prosecution of rape in a wide array of ways. The ICTR subsequently cites rape as a genocidal act and as torture in the *Musema*<sup>11</sup> and *Semanza*<sup>12</sup> cases respectively.

## THE JURISPRUDENCE OF THE AD-HOC TRIBUNALS

The rape of women in the wars in the former Yugoslavia captured the world's attention in a manner that had not previously been done, perhaps because the rapes were being committed by white men against white women in Europe.<sup>13</sup> In fact the massive rapes in the territory of the former Yugoslavia became a significant factor in the demand for a war crimes tribunal. Rape had finally made it to the international arena and was now acknowledged as a war crime along side other crimes that were traditionally perceived as more serious. Women had been raped routinely and on a massive scale in civil wars spanning the globe, from Liberia, Burundi, Peru, Ecuador, Pakistan and Rwanda. The world totally ignored the plight of these women. The first reports in the world media of the rapes of Rwandan women during the 1994 genocide happened in the middle of 1995<sup>14</sup>.

Through the jurisprudence of both *ad-boc* tribunals, rape and other forms of gender violence have been recognised as among the most serious crimes under their jurisdiction and have been prosecuted as such. In the most significant decision to date by an international court, the ICTR recognised that rape can constitute genocide and torture. In the *Tadic*<sup>15</sup> case at the ICTY, acts of sexual

mutilation were charged as willful killing and torture (the mutilation was of a male victim of sexual violence). However, the Trial Chamber found that the causal relationship between the sexual violence and the victim's death were not adequately established. These tribunals have been extremely important in surfacing crimes of gender violence and advancing the jurisprudence with respect to rape and sexual violence under international law.<sup>16</sup> The jurisprudence emanating from these Tribunals has had notable influence internationally in informing the question of gender crimes and their prosecution.

#### REGIONAL MECHANISMS

##### The European and Inter-American Courts of Human Rights

The European and Inter-American Courts of Human Rights has been another arena where crimes committed against women have been considered by regional institutions. They have found separately that rape amounts to torture. In

*Aydin v. Turkey*, the European Court of Human Rights found that;

"Rape of a detainee by an official of the State must be considered to be especially grave and abhorrent form of ill treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim, which does not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally"<sup>17</sup>[...] and;

"Against this background the court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention. Indeed the court would have reached this conclusion on either of these grounds taken separately."<sup>18</sup>

In a case before the Inter American Commission on Human Rights, *Fernando and Raquel Mejia v. Peru*<sup>19</sup> the court stated;

"Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt, or in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results in, on the one hand, from having been humiliated and victimised ,and on the other, from suffering the condemnation of the members of their community if they report what has been done to them".

##### The Proposed Africa Court of Justice

The new African Union proposes to establish an African Court of Justice to look at questions of violations of civil, political and human rights of citizens of its member states.<sup>20</sup> It might prove to be Africa's answer to the many problems that impunity breeds in regard to serious crimes of an international nature. Its creation is eagerly awaited. However African States should indicate seriousness in ending impunity for crimes against humanity by ratifying the protocol to the African Charter that creates an African Court of Human Rights<sup>21</sup>. There also exists the newly created East African Court of Justice. It is not clear what the jurisdiction of this court will be. It also provides another ground for continuing the fight against impunity.

##### THE INTERNATIONAL CRIMINAL COURT (ICC)

The International Criminal Court (ICC) is the world's first permanent international tribunal that will try individuals for serious crimes of an international nature. Sixty ratifications were required to bring the Rome Statute, the treaty creating the court, into force. On April 11 2002, the sixtieth instrument of ratification was deposited and the Rome Statute entered into force on July 1<sup>st</sup> 2002. The ICC has jurisdiction over cases of genocide, war crimes, crimes against humanity and aggression<sup>22</sup>. This permanent International Criminal Court is not designed to supplant national courts but to act as a court of last resort when national systems are unable or unwilling to prosecute. Cases can be referred to the ICC by State Parties or the Security Council of the United Nations. In addition, ICC prosecutor will have *proprio mutui*<sup>23</sup> powers to initiate investigations and prosecutions based on information received from any source, including victims or non-governmental organisations. This enables the prosecutor to initiate investigations based on information received from NGOs, making it possible for women's rights organisations to provide information which might otherwise not be forth-coming due the social stigma that attaches to crimes of a sexual nature. Kenya is among states that have signed the Rome Statute; sadly it remains the only East African Country not to have ratified the Treaty.<sup>24</sup>

##### GENDER CRIMES UNDER ICC JURISDICTION

The most detailed codification of rape, sexual violence and other serious violations of International Humanitarian Law as War Crimes and Crimes against Humanity are to be found in the statute of the International Criminal Court (ICC). It specifically prohibits 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms sexual violence'. These crimes are listed in the following articles in the ICC statute; Article 7(1)(g)- Crimes Against Humanity; Article 8(2)(b)(xxii)- War crimes in an international armed conflict; Article 8(2)(e)(vi)-War crimes in non international armed conflict. The ICC provides the best framework for prosecuting gender-based crimes under international law.

*The ICC statute specifically states that the application and interpretation of the law must be without adverse distinction on the basis of enumerated grounds including gender*

Further and for the first time under international law, gender based persecution is included as a crime against humanity. Article 7(1)(h) prohibits: 'persecution against identifiable groups or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3<sup>25</sup>, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any other crime within the jurisdiction of the Court'. The ICC statute also recognises trafficking<sup>26</sup> as a Crime Against Humanity. This is a particularly 'gendered' crime and its inclusion is considered extremely important.

The ICC statute specifically states that the application and interpretation of the law must be without adverse distinction on the basis of enumerated grounds including gender.<sup>27</sup> This principle of non-discrimination has to rank as one of the most far-reaching gender provisions of the Statute. Universal Jurisdiction embraces this principle.

#### OTHER IMPORTANT GENDER PROVISIONS IN THE ROME STATUTE

The Statute provides for the creation of a Victim and Witness Unit inside the Registry to provide protective measures, legal advice and assistance to victims and witnesses, some of whom may be victims. There are provisions that require the court to take appropriate measures including the use of in-camera hearings and hearings by electronic means to protect the safety and dignity of witnesses. The court would be required to take into account such factors as age, gender, nature of the crime, particularly where the crime involves sexual or gender violence<sup>28</sup>.

Another far reaching provision in the Rome Statute is the provision that there be 'fair representation of female and male judges', as well as in the selection of staff to the registry and office of the prosecutor and in all organs of the court. There is also a requirement that in hiring of staff, legal expertise on women and children must be taken into account.

#### UNIVERSAL JURISDICTION FOR GENDER CRIMES

Universal Jurisdiction refers to the ability by States and judicial officers to prosecute or investigate persons for crimes of an international nature regardless of a territorial or national nexus<sup>29</sup>. These crimes include war crimes, crimes against humanity (murder, rape, trafficking, disappearances, genocide torture, and extra judicial killings)<sup>30</sup>. Traditional crimes under Universal Jurisdiction, which are of international concern included crimes such as piracy, hijacking aircrafts, and hostage taking.

However most states, Kenya included, lack domestic legislation that would enable them to bring such suspects to justice<sup>31</sup> and others are reluctant to invoke Universal Jurisdiction and have often harboured within their boundaries perpetrators of these most egregious crimes. Examples of instances where

states have invoked Universal Jurisdiction include the Augusto Pinochet Case<sup>32</sup>; Hissene Habre<sup>33</sup>; (Ex-Chadian dictator indicted on torture charges by a Senegalese Court); Ricardo Miguel Cavallo (Argentinean torturer arrested in Mexico on charges of kidnapping, disappearances and torture);<sup>34</sup> and the case of the Rwandan nuns on charges of genocide and crimes against humanity in Brussels.

The marginalisation of crimes against women in the exercise of Universal Jurisdiction has been starkly evident. Whilst it is important to acknowledge that States have woken to their responsibility and are exercising jurisdiction over the most serious crimes known to international law, we must at the same time point out this discrepancy and insist that crimes such as rape and sexual violence that are distinguished by their 'gendered' nature should also form the subject matter of the indictments that are now being handed out to the worst violators of human rights.

The jurisprudence of the *ad hoc* tribunal has established these crimes as torture, form of genocide, grave breaches, Crimes against Humanity, and also as War Crimes and they should be prosecuted as such universally. The proposed ICC offers great hope for ending impunity for the most egregious crimes known to humankind. However, the ICC will only be as effective and efficient as the State Parties intend it to be. States will have to put in place implementing legislation that will allow them to honour their obligations under the treaty. Most will have to bring their own national laws in line with the Statute. This presents an excellent opportunity for reforming current national laws that are discriminatory to women or that do not encompass all the crimes of sexual nature that are now recognized under the ICC statute. The ICC does not intend to supplant national courts, but to supplement where these courts are unwilling or unable to prosecute. Hopefully the existence of the ICC may encourage states to more seriously and vigorously pursue national prosecutions, including rape and sexual abuse<sup>35</sup>. It may also encourage states that chose to exercise their responsibility of prosecuting violators of international law.

#### FIDA KENYA'S INVOLVEMENT IN THE NEGOTIATIONS OF THE ROME STATUTE (1997-2002)

The negotiations that led to the eventual adoption of the statute for the International Criminal Court (the Rome Statute) presented women rights activists and scholars with an excellent opportunity to address some of the failures of earlier tribunals to properly investigate and prosecute wartime violence against women<sup>36</sup>. FIDA Kenya became a member of the NGO Coalition for an International Criminal Court (CICC) a coalition of over 800 civil society organizations that campaigned tirelessly for the creation of an independent and effective Criminal Court right through 10 preparatory Committee Meetings and the Rome Diplomatic Conference that adopted the statute creating the court.<sup>37</sup> FIDA Kenya joined the Coalition in early 1997 and became a member of the Women's Caucus for Gender Justice at the ICC<sup>38</sup>. Currently, a FIDA Kenya member chairs the Executive Committee of the Women's Caucus for

Gender Justice. The achievements of the Women's Caucus at the ICC negotiations has been widely documented<sup>20</sup>. At this time, the Women's Caucus is engaged in the Nominations Campaign, which aims at ensuring that women judges are nominated and elected to the court.

FIDA Kenya is committed to ending impunity for crimes that are committed against women in times of peace as well as during conflicts and will continue its engagement in regional and international processes committed to the same goal.

#### (Footnotes)

- <sup>1</sup> See Human Rights Watch, Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath, 1996; Catherine A. Mackinnon, 'Rape, Genocide, and Women's Human Rights', *Harvard Women's Law Journal*, Africa Rights, Death, Despair, and Defiance, 1994; Avega Agozo. '...Etude sur le violence faite aux femmes', 1999.
- <sup>2</sup> See Shattered lives, *supra* note 1, Report by the UN Special Representative for Rwanda, Rene Degui Segui, submitted to the Commission on Human Rights, *UN Doc/E/CN.4/1996/68*.
- <sup>3</sup> The Hague Convention respecting the laws and Customs of War of 1907 provides article in 46 that 'family honour and rights, individual lives and private property, as well as religious convictions and liberty, must be respected'. The Nuremberg Charter omitted all mention of sexual crimes. Control Council Law no 10 on the Punishment of Persons Guilty of War Crimes and Crimes Against Peace and Humanity for Germany, Dec 1945, included rape as a crime against humanity but not as a war crime. The references to sexual violence in the Fourth Geneva Convention and Protocol Additional to the Geneva Conventions of 12<sup>th</sup> August 1949, and relating to the Protection of Victims of International Armed Conflicts, (1978) is also inadequate and connects sexual violence to the honour and dignity of women.
- <sup>4</sup> See Iris Chang, The Rape of Nanking, Penguin, 1998.
- <sup>5</sup> See, Ustina Dolgopoul and Snehal Paranjape, 'Comfort Women: An Unfinished Ordeal', (Report of a mission, International Commission of Jurists).
- <sup>6</sup> *Prosecutor v. Jean Paul Akayesu*, 2<sup>nd</sup> September 1998, Case No ICTR -96-4-T.
- <sup>7</sup> *Prosecutor v. Delalic et al.* 16<sup>th</sup> November 1998, Case No IT -96-21T.
- <sup>8</sup> *Prosecutor v. Anto Furundzija*, 10<sup>th</sup> Dec 1998, Case No IT-95-17/1.
- <sup>9</sup> FIDA Kenya participates as a member of the Coalition for Women in Conflict Situations, in making legal interventions at the Ad Hoc Tribunals.
- <sup>10</sup> Article 3, ICTR Statute.
- <sup>11</sup> *Prosecutor v. Alfred Musema* ICTR No 96-13-T.
- <sup>12</sup> *Prosecutor v. J. Semanza* ICTR No 97-20-I.
- <sup>13</sup> See Rhonda Copelon, *supra* note 1.
- <sup>14</sup> See Rhonda Copelon *supra* note 1.
- <sup>15</sup> *Prosecutor v. Dusko Tadic*, *supra*.
- <sup>16</sup> See generally Avril Mc Donald, 'Prosecuting IHL Violations Against Women' (un-published) and 'Sex Crimes at the Ad Hoc Tribunals' (un-published).
- <sup>17</sup> Paragraph 83 of the decision.
- <sup>18</sup> Paragraph 86 of the decision.
- <sup>19</sup> See, Annual Report of the Inter American Commission on Human Rights, Report No. 5/96, case No 10,970, P 186.

- <sup>20</sup> Thabo Mbeki, President of the Republic of South Africa in interview, *Africa Journal*, 13<sup>th</sup> July 2001.
- <sup>21</sup> 15 ratifications are required and only five have ratified. Kenya is not one of the ratifying states.
- <sup>22</sup> Aggression will come under the ICC's jurisdiction when a definition is agreed upon at the first review conference of state parties, seven years after the Court enters into force.
- <sup>23</sup> On hers or his own motion.
- <sup>24</sup> See Betty K Murungi, 'A Case for Universal Jurisdiction' in: *Transparency International Report*, September 2002 for status of ratification in Africa.
- <sup>25</sup> Article 7(3): 'For the purposes of this statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above'.
- <sup>26</sup> Article 7(1)(h), 7(1)(c) and 7(2)(c).
- <sup>27</sup> Article 21(3): 'the application of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic, or social origin, wealth, birth or other status'.
- <sup>28</sup> For details refer to the Rome Statute.
- <sup>29</sup> See generally Amnesty International, *Universal Jurisdiction*, AI Index :10r 53/002/2001, September 2001.
- <sup>30</sup> See generally Amnesty International, *Universal Jurisdiction*, AI Index :10r 53/002/2001, September 2001.
- <sup>31</sup> Botswana courts cannot try offences that took place outside Botswana unless authorised by legislation.
- <sup>32</sup> Indictment issued by a Spanish Judge based on complaints by Chilean Nationals.
- <sup>33</sup> The Dakar Court eventually dismissed the charges.
- <sup>34</sup> See Human Rights Watch, World Report 2001.
- <sup>35</sup> See Avril Mc Donald *supra* note 1.
- <sup>36</sup> See Barbara Bedont and Katherine Hall-Martinez, Ending Impunity for Gender Crimes under the International Criminal Court.
- <sup>37</sup> FIDA Kenya representatives at the Rome Conference were Betty Kaari Murungi and Jayne Michuki.
- <sup>38</sup> Women's Caucus for Gender Justice materials can be downloaded on [www.iccwomen.org](http://www.iccwomen.org)
- <sup>39</sup> See Barbara Bedont, *supra* and [www.iccwomen.org](http://www.iccwomen.org) (Women's Caucus for Gender Justice, web page).