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# GENDER EQUALITY AND WOMEN'S SOLIDARITY ACROSS RELIGIOUS, ETHNIC, AND CLASS DIFFERENCES IN THE KENYAN CONSTITUTIONAL REVIEW PROCESS

ATHENA D. MUTUA\*

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\* Athena D. Mutua is an associate professor at the State University of New York, University at Buffalo Law School. I would like to thank and acknowledge Jane Kiragu, Koki Muli, and Jacinta Muteshi, women who represented three of the four organizations that formed the core coalition in the campaign for Safeguarding the Gains of Women in the Draft Constitution. They welcomed me as well as my participation in the campaign and taught me a great deal in the process. Also, much thanks to Willy Mutunga for suggesting that I get involved in women's advocacy in Kenya and for guiding me along the way. I would also like to thank the following people for reading various drafts of this paper and providing invaluable insights: Rebecca French, Isabel Marcus, Martha McCluskey, Makau Mutua and Adrien Wing. And a special thanks to Jim Gardner and Henry "Hank" Richardson for their advice and direction.

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## INTRODUCTION

This article examines the struggle of women in the Kenyan Constitutional Review process<sup>1</sup> to gain new legal authority for gender equality and women's empowerment.<sup>2</sup> It focuses on the 2002 Draft of a new Kenyan Constitution,<sup>3</sup> as well as the Draft's relationship to the current Kenyan Constitution and later constitutional proposals. The constitutional review process is part of a larger movement to democratize the Kenyan post-colonial state, a movement in which women have struggled to find a voice.<sup>4</sup> Although Kenyan women, like women elsewhere, constitute at least half of the Kenyan population,<sup>5</sup> they have faced difficulties acting in solidarity across their differences, and the democracy movement threatens to leave women behind in a legal and social web of beliefs and practices that limit their human potential and abandons them to a subordinated status.

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1. The 1997 Constitution of Kenya Review Act formally instituted the constitutional review process. Constitution of Kenya Review Act, (2001) Cap. 3A.

2. Athena D. Mutua, *The Constitutional Review Process: A Gender Audit of "Bomas," in STEP-BY-STEP BACKWARDS OR FORWARDS? THE REVISED 2003 FIDA KENYA ANNUAL REPORT 31*, 33 (Fed. Women Lawyers Kenya (FIDA) 2003) [hereinafter FIDA 2003].

3. Constitution of Kenya Review Commission (CKRC), *Draft: The Constitution of the Republic of Kenya, 2002*, DAILY NATION, Oct. 2, 2002 [hereinafter *Draft*].

4. See *infra* Part I.C; see also Maria Nzomo, *Kenya: The Women's Movement and Democratic Change*, in THE AFRICAN STATE AT A CRITICAL JUNCTURE: BETWEEN DISINTEGRATION AND RECONFIGURATION 167 (Leonardo A. Villalon & Phillip A. Huxtable eds. 1998) [hereinafter Nzomo, *Women's Movement*] (discussing the various efforts of women during the period of activism for multipartyism in the early 1990s).

5. For texts discussing the size and status of women in countries across the globe, see generally UNITED NATIONS DEV. PROGRAMME, UNDP HUMAN DEVELOPMENT REPORT 1995: GENDER AND HUMAN DEVELOPMENT, available at <http://hdr.undp.org/reports/global/1995/en/>; Nilüfer Çagatay, *Engendering Macroeconomics and Macroeconomic Policies* 3-6 (United Nations Development Programme (UNDP), Working Paper No. 6, 1998); Nilüfer Çagatay, *Gender and Poverty* 2 (UNDP, Working Paper No. 5, 1998) at <http://www.undp.org/poverty/publications>.

Women constitute more than half of Kenya's population. Nzomo, *Women's Movement*, *supra* note 4, at 171; Kenya — *Run, Lornah, Run: Facts and Stats*, PBS Frontline/World, available at <http://www.pbs.org/frontlineworld/stories/kenya/facts.html>. Women in Kenya also represent a majority of rural "producers" or "agriculturalists." Maria Nzomo, *The Impact of the Women's Decade on Policies, Programs and Empowerment of Women in Kenya*, ISSUE: A JOURNAL OF OPINION 9, 16 (1989) [hereinafter Nzomo, *Impact*].

In 2002, the “Kenyan people undertook two historic and nationally significant” events.<sup>6</sup> The first was the election to unseat the ruling party that had governed the country since Independence.<sup>7</sup> The second was the constitutional review process through which Kenyans sought to create a new constitution for Kenya.<sup>8</sup> Kenyans were successful in the first endeavor in that they elected a new party and president into government in December 2002.<sup>9</sup> The second undertaking proved to be more difficult. In October 2002, the Constitution of Kenya Review Commission released a draft of a new Kenyan constitution (the Draft).<sup>10</sup> The Kenyan National Constitution Conference (NCC) agreed on a final version of a draft constitution on March 15, 2004 (the Zero Draft).<sup>11</sup> The government subsequently revised this draft (the Waco draft),<sup>12</sup> and it was defeated in a countrywide referendum in November 2005.<sup>13</sup> This defeat is largely attributed to the conflicts about the issues of executive power and devolution.<sup>14</sup> Nevertheless, the constitutional process continues with most of the basic

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6. Athena D. Mutua, *Foreword, Eyes on the Prize: The Quest for a Human Rights State in Kenya*, in MAKAU MUTUA & WILLY MUTUNGA, *EYES ON THE PRIZE* 2, 7 (Athena D. Mutua ed., 2003) [hereinafter A. Mutua, *Foreword*] (discussing the role of the Kenya Human Rights Commission in the election and release of the Draft Constitution in 2002).

7. Makau Mutua, *Taming Leviathan: The Quest for Constitutional Reform in Kenya* 53-54 (Aug. 1, 2006) (unpublished manuscript, on file with author) [hereinafter Makau Mutua, *Taming Leviathan*]; see also Michael Dynes, *Moi Car Pelted at Power Handover*, *TIMES (LONDON)*, Dec. 31, 2002, at 18.

8. *Kenya: CKRC: The Storm Ahead*, *THE EAST AFRICAN*, Sept. 23, 2002 (discussing the release of the Draft).

9. *A New Beginning in Kenya*, *N.Y. TIMES*, Dec. 31, 2002, at 18.

10. *Draft*, *supra* note 3.

11. CONSTITUTION OF KENYA REVIEW COMMISSION, NATIONAL CONSTITUTIONAL CONFERENCE, *THE DRAFT CONSTITUTION OF KENYA 2004* [hereinafter *ZERO DRAFT*].

12. KENYA GAZETTE SUPPLEMENT NO. 63, *PROPOSED NEW CONSTITUTION OF KENYA*, Aug. 22, 2005 [hereinafter *WACO DRAFT*] (drafted and published by Attorney General Amos Waco pursuant to Section 27 of the Constitution of Kenya Review Act).

13. *Kenya's Draft Constitution Rejected: Electoral Commission*, *XINHUA NEWS AGENCY*, Nov. 22, 2005.

14. Gus Selassie, *D-Day as Kenyans Decide on Divisive Constitution*, *WORLD MARKETS ANALYSIS*, Nov. 21, 2005 (discussing on the day of the referendum primarily the issue of executive power and the ethnic issues involved); see also Njoroge Kinuthia, *Kenyans Reject Proposed Constitution*, *THE NATION*, Nov. 22, 2005; Okiya Omtatah, *Only Structures Will Transcend the Tribe*, *THE NATION*, Nov. 25, 2005 (describing the ethnic tensions that underlie the referendum vote).

However, some speculate that the prospect of women's equality, particularly around land issues, was used as a tactic to persuade male Kenyan citizens to vote “no” in the referendum. Bo Goransson, *When Will Women Push Own Agenda?*, *THE NATION*, Mar. 29, 2006 (noting:

Though the democratic space is gradually widening, women are still politically marginalised.

In some constituencies, they were only one third of the registered voters in the referendum. Reportedly, fear that women would want to inherit land was one reason that many men voted No to the proposed new constitution.)

framework for a new constitution established and with Kenyan women's opportunity to achieve new legal authority geared toward empowering them hanging in the balance.<sup>15</sup>

After the election but before the National Constitution Conference (NCC) began, a group of women activists representing four Kenyan civil society organizations formed a coalition and established the national campaign for "Safeguarding the Gains of Women in the Draft Constitution."<sup>16</sup> The goal of the campaign was to engage in efforts to maintain, enshrine, and strengthen language and mechanisms in the final constitution that would advance women's empowerment and promote women's equality.<sup>17</sup> The campaign embraced the ideal of gender equality as the basis for pushing for women's empowerment in the context of Kenyan society.<sup>18</sup> Specifically they promoted three principles: social justice, gender mainstreaming, and gender equality.<sup>19</sup> They also relied on their commitment to the solidarity of women across diversities.<sup>20</sup> The campaign drew many of these ideas from Kenyan women's past activism and the international women's rights movement.<sup>21</sup> The coalition was one of the first groups to review and

15. Muriithi Muriuki, *Constitution Review Work Resumes Tomorrow*, THE NATION, Mar. 16, 2006; see also Nyabonyi Kazungu, *New Team on Review is Best, Asserts Ndingi*, THE NATION, Mar. 13, 2006 (discussing the team selected by Kibaki to advise him on the future of Constitutional reform).

16. See *infra* Part III (discussing the campaign); see also Jacinta K. Muteshi, *Women Organizing: Engendering and Constituting the Kenyan State*, in HUMAN RIGHTS IN EAST AFRICA: EMERGENT THEMES, CHALLENGES AND TENSIONS (Makau Mutua ed., forthcoming 2006) (discussing the campaign); Athena D. Mutua, *The Constitutional Review Process: A Gender Audit of "Bomas,"* in FIDA 2003, *supra* note 2, at 33-35 (discussing the campaign of which FIDA was a part).

17. FIDA KENYA, INSTITUTE FOR EDUCATION IN DEMOCRACY (IED), KENYA HUMAN RIGHTS COMMISSION (KHRC) & LEAGUE OF KENYA WOMEN VOTERS, SAFEGUARDING WOMEN'S GAINS UNDER THE DRAFT CONSTITUTION: TRAINING MANUAL 1-2 (2002) [hereinafter TRAINING MANUAL] (justifying the campaign and stating that the campaign goals are "[t]o safeguard and strengthen the gains for women contemplated in the Draft Constitution").

18. *Id.* at 76. For a discussion of gender equality in women's rights, see *infra* Part I.A.2. For a discussion on women's rights internationally, see generally Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379 (1999); Hilary Charlesworth, *The Mid-Life Crisis of the Universal Declaration on Human Rights*, 55 WASH. & LEE L. REV. 781 (1998) [hereinafter Charlesworth, *Crisis*]; Hilary Charlesworth, *What are "Women's International Human Rights?"*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 58 (Rebecca J. Cook ed., 1994); Rebecca J. Cook, *Introduction to HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 3 (Rebecca J. Cook ed., 1994); Arvonne Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUM. RTS. Q. 853 (1999).

19. TRAINING MANUAL, *supra* note 17, at 76.

20. See *infra* Part IV.

21. Cf. TRAINING MANUAL, *supra* note 17, at 42-59 (discussing the equality of Kenyan men and women against the backdrop of "the regional and international treat[ies], conventions, and forums to which Kenya is a member").

publish its positions and suggestions to the Draft Constitution after the election.<sup>22</sup> The early release of the coalition's ideas and positions had significant political impact.<sup>23</sup>

The Draft Constitution in many respects embraced the ideal of gender equality and sought to empower women, particularly in the political structures it envisioned.<sup>24</sup> The campaign found, however, that in advocating both to safeguard and to strengthen these provisions, its efforts, like women's empowerment efforts since the advent of the fight for multipartyism,<sup>25</sup> were not only constrained by the patriarchal nature of the society that occasioned their limited access to resources and participation<sup>26</sup> but also by four tensions endemic to the Kenyan state. These tensions, among others, manifest in many postcolonial African countries,<sup>27</sup> include: the issue of ethnic conflict and competition; the incomplete project of modernization; the desire by many

22. The coalition published its recommendations in the Training Manual in March 2003. The coalition publicized these materials among delegates and Parliamentarians in their training sessions in March and April of 2003. The National Constitutional Conference began in late April 2003, at which time the coalition again made these materials available.

23. For example, the campaign's early support for the Kadhi's Courts appeared to set the pace and context of discussions about the courts during the National Constitutional Conference. It also may have helped to minimize the impact of lobbying efforts by The Church of Kenya, which stood strongly opposed to the Kadhi's Courts. See FIDA 2003, *supra* note 2, at 39; see also *infra* Part IV.

24. See TRAINING MANUAL, *supra* note 17, at 14-15.

25. Prior to 1992 Kenya was a one-party state. See A. Mutua, *Foreword*, *supra* note 6, at 7. Protests called for a multiparty state, and this movement was termed the struggle for "multipartyism." *Id.* These struggles kicked off the democracy movement in Kenya. *Id.*

26. M.L. Udvardy, *Theorizing Past and Present Women's Organizations in Kenya*, 26 WORLD DEV. 1749, 1759 (1998).

27. Most studies of the postcolonial state question whether these are true states given the fact that they were largely meant to be extractive of resources and thus the market that developed was not geared toward benefitting the peoples within them. These postcolonial states combined many sub-nationalities that had to compete for meager resources. The justifications used to support these states also involved critiques of these people's social arrangements, which the population generally resented. See, e.g., THE AFRICAN STATE AT A CRITICAL JUNCTURE: BETWEEN DISINTEGRATION AND RECONFIGURATION (Leonardo A. Villalon & Phillip A. Huxtable eds., 1998); Makau Mutua, *Taming Leviathan*, *supra* note 7, at 26-34; Abdullahi Ahmed An-Na'im, *Introduction: Expanding Legal Protection of Human Rights in African Contexts*, in HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 1, 11-16 (Abdullahi Ahmed An-Na'im ed., 2003) [hereinafter An-Na'im, *Expanding Legal Protection*] (quoting Robert H. Jackson & Carl G. Rosberg, *Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis*, 24 J. MOD. AFR. STUD. 1 (1986), and focusing on a number of these issues); L. Amede Obiora, *New Skin, Old Wine: (En)Gaging Nationalism, Traditionalism, and Gender Relations*, 28 IND. L. REV. 575, 580-85 (1995); see also INSTITUTE FOR EDUCATION IN DEMOCRACY (IED), CATHOLIC JUSTICE AND PEACE COMMISSION & NATIONAL COUNCIL OF CHURCHES OF KENYA, REPORT ON THE 1997 GENERAL ELECTIONS IN KENYA 30-31 (1998) (discussing "lessons learnt" and obstacles in the 1997 election including a culture of authoritarianism, ethnic conflict, limits of multipartyism and poverty). See generally COLLAPSED STATES (I. William Zartman ed., 1995).

to preserve traditional beliefs and practices; and, since Independence, the increase in state repression.<sup>28</sup> To accomplish their goals, women had to negotiate these tensions because they engender conflicts among women generally,<sup>29</sup> but specifically because in the constitutional review process they shaped conflicts among women on three significant constitutional issues.<sup>30</sup>

Ethnic conflict and competition over resources reflect the construction of the postcolonial Kenyan state through the colonial exercise of forcibly aggregating over forty independent and quasi-independent nations into one state.<sup>31</sup> This exercise rendered Kenya a pluralist state, which was also religiously and racially plural, among other things.<sup>32</sup> This plurality, in interesting respects, is embraced in both the current and draft constitutions and poses additional obstacles to women's empowerment.<sup>33</sup> On the issue of ethnic tension, competition has been fueled by the colonial pursuit and the postcolonial state's embrace of a divide-and-rule policy among these various nations to facilitate state control over the country.<sup>34</sup> The primary purpose for this control was to extract Kenya's resources, first for the colonial power, and then for the benefit of a small Kenyan elite class.<sup>35</sup>

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28. See generally An-Na'im, *Expanding Legal Protection*, *supra* note 27.

29. See Wilhelmina Oduol & Wanjiku Mukabi Kabira, *The Mother of Warriors and Her Daughters: The Women's Movement in Kenya*, in *GLOBAL FEMINISMS SINCE 1945*, 101, 103-04 (Bonnie G. Smith ed., 2000) (noting the diversity of Kenyan women and the difficulty of pursuing common issues in the context of determining whether a women's movement exists in Kenya); see also TRAINING MANUAL, *supra* note 17, at 40-41.

30. See *infra* notes 61-70 and accompanying text.

31. Makau Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 347, 365-67 (noting that many pre-colonial African cultures were self-governing, homogeneous, single language communities that shared a common culture and traditions; and suggesting that their homogeneity contributed to their cohesion. He refers to them as "nations" even though they were not "states in the modern or European sense") [hereinafter Mutua, *Banjul*].

32. For example, Kenya is religiously diverse, hosting multiple African religions, Christianity, and a sizable Islamic community, especially after the British secured control over the coast of Kenya, which is largely Muslim. See generally Ahmed Issack Hassan, *The Kadhi's Courts — Setting the Records Straight*, KATIBA NEWS (Nairobi, Kenya), Jan. 2003, at <http://www.kenyaconstitution.org/docs/07d047.htm>.

33. For a specific example of how religious and racial plurality posed difficulties for women's rights advocates during the constitutional review process, see Part IV, *infra*, discussing the controversies surrounding Kadhi's courts in Kenya.

34. See Mutua, *Banjul*, *supra* note 31, at 366 (noting the divide-and-conquer practices of colonialists and using the Belgian activity in Rwanda as an example); see also IED, *supra* note 27, at 30 (discussing authoritarian rule and divide-and-rule politics).

35. Leonardo A. Villalon, *The African State at the End of the Twentieth Century: Parameters of the Critical Juncture*, in *THE AFRICAN STATE AT A CRITICAL JUNCTURE: BETWEEN DISINTEGRATION AND RECONFIGURATION* 3, 10 (Leonardo A. Villalon & Phillip A. Huxtable eds., 1998) (citing Crawford Young and noting that colonialism's enduring legacy to the postcolonial state was a "form of control centered on a concern with extraction of resources and the domination of society"); see also Julius E. Nyang'oro &

This ethnic competition raises particular challenges for women's empowerment. Because women are embedded in the cultural communities into which they are born and these communities shape their thinking and behavior, they are often loyal to the ethnic, cultural, and religious community networks in which they form some of their closest bonds.<sup>36</sup> To the extent that these communities are suspicious of the state and of people from other communities, so too are the women of these communities.<sup>37</sup> Thus Kenyan women are divided by ethnicity as well as by the social cleavages of race, religion, class, sexuality and region.<sup>38</sup> These divisions often preclude women from speaking with the united voice necessary to push change on a reluctant power structure.<sup>39</sup>

Second, the process of colonial resource extraction also began the process of integrating the Kenyan economy into the larger world economy and into a modern world, a process skewed and defined largely by the interests of the Christian West.<sup>40</sup> This modernization was incomplete, however, distorting but nonetheless leaving intact various aspects of the many Kenyan communities' pre-colonial social and economic arrangements.<sup>41</sup> Many of these social and economic

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Timothy M. Shaw, *The African State in the Global Economic Context*, in *THE AFRICAN STATE AT A CRITICAL JUNCTURE: BETWEEN DISINTEGRATION AND RECONFIGURATION* 27 (Leonardo A. Villalon & Phillip A. Huxtable eds., 1998) (noting that the relationship between the African state and the metropole continues unabated as evidenced by trade patterns).

36. Florence Butegwa, *Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community-level Action*, in *CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA* 108, 109 (Abdullahi A. An-Na'im ed., 2002) (explaining that women are "cultural and religious beings").

37. *Id.*

38. *Id.* at 109-10; see also TRAINING MANUAL, *supra* note 17, at 40; Martin Chanock, *Human Rights and Cultural Branding: Who Speaks and How*, in *CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA* 41, 41-45 (Abdullahi A. An-Na'im ed., 2002).

39. *Cf.* TRAINING MANUAL, *supra* note 17, at 40-41.

40. The focus here is the expansion of the market economy, as the argument will make clear in reference to April Gordon's analysis of the Otieno case. See April Gordon, *Gender, Ethnicity, and Class in Kenya: "Burying Otieno" Revisited*, 20 *SIGNS* 883 (1995). However, modernization itself was economically problematic in the colonial context because its purpose was to extract resources from the country. Additionally, the Kenyan people associated modernization with the West, presenting a problematic ideological component. See, e.g., Obiora, *supra* note 27, at 586. Obiora states that modernization, as seen from the newly independent postcolonial state, suggested the savagery of indigenous relations as distinguished from "all good things which western civilization [had] produced in the two millennia of its history." *Id.* (quoting HERBERT J. SPIRO, *POLITICS OF AFRICA: PROSPECTS SOUTH OF THE SAHARA* 6 (1963)). She elaborates that although modernization was "at times responsive to objective conditions, modernization remains obliged to an imperialistic logic and ratifies a civilizing agenda that is squarely situated on appalling racist stereotypes." *Id.*

41. The codification of customary law can be seen as a distortion of these arrangements. See *id.* at 587-89 (explaining the codification process of customary law as fraught



arrangements include practices and ideologies that disadvantage women.<sup>42</sup> Although some see these arrangements as being largely patrilineal, colonial distortions rendered them more patriarchal in nature, leaving women more vulnerable to exploitation, exclusion, and further subordination.<sup>43</sup> This patriarchal turn may have bolstered ideologies that supported limiting women's roles and opportunities in these communities, but the economic stagnation and decline over the last several years have further complicated this situation.<sup>44</sup> Economic opportunities available in the emerging paid formal sector of the modernizing market are few and subject to intense competition as well as to the influence of ideological preferences for enhancing men's opportunities.<sup>45</sup> Although women challenge the patriarchal nature of the society, including community practices that limit their human potential, these efforts exist in tension with the reality that the majority of Kenyan women are rural poor women who may actually have greater access to resources and protection within these community arrangements than they do in this emerging modern society.<sup>46</sup>

Third, many Kenyan communities want to preserve their various and distinct cultural and religious heritages and practices.<sup>47</sup> Furthermore, the push for modernization and the past colonial and post-colonial policies of ethnic manipulation, which both implicitly and explicitly critiqued a range of traditional practices and arrangements, have created resentments among the communities, which see this as an attack on their traditions.<sup>48</sup> Some of these traditions and

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with problems); *see also infra* Parts I.A and I.B.

42. Patricia Kameri-Mbote, *Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process*, Paper presented at the Constitution of Kenya Review Commission Seminar on the Gender Question (Dec. 6, 2001), available at <http://www.kenyaconstitution.org/docs/09cd003.htm>.

43. Udvardy, *supra* note 26, at 1759.

44. *See generally* Gordon, *supra* note 40, at 902-03 (discussing the Otieno case and suggesting that many women did not support Mrs. Otieno because their livelihoods are connected to their ethnic and cultural communities).

45. *Id.*

46. *Id.* at 884.

47. *See infra* Part V (describing this sentiment and the way in which both the Zero and Waco drafts capture it in their articles on culture).

48. *See* Butegwa, *supra* note 36, at 109 (noting that if the government grants rights to women in line with secular or other theories, the affected groups might see it as an "act targeting not just women but the entire religion or culture"); Obiora, *supra* note 27, at 578; *see also* Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483 (2002) (exploring the way that later nationalists, including women in colonial and minority communities, came to see women as the embodiment of culture and employing a private/public framework to preserve their cultures through requiring the retention of women in traditional arrangements). Coomaraswamy argues that this framework resulted in part from imperialists targeting certain cultural practices that harmed women, such as female genital circumcision, but doing so from a racist perspective that engendered resentments).

practices not only disadvantage women but also embody a belief in gender hierarchy that justifies women's secondary and subordinated status.<sup>49</sup> Thus the preservation of these traditions is in tension with the women's gender equality and empowerment agenda, yet women who come from these communities are also wedded to various aspects of their cultural traditions through which they have been socialized.<sup>50</sup> Women advocates thus have to mediate these tensions in a way that is beneficial to women.<sup>51</sup>

Fourth, the elite class, acting through the postcolonial state both despite the promise of Independence, became increasingly repressive through both legal and extralegal means.<sup>52</sup> These mechanisms included concentrating and personalizing state power in the hands of a powerful executive by amending and changing the constitution, rendering continuing authoritarian rule legal.<sup>53</sup> In addition, to maintain itself in power the state used extralegal means such as perpetuating violence against individuals and entire communities,<sup>54</sup> as well as through outright corruption and theft of the country's resources.<sup>55</sup> These practices contributed in part to the stagnation and decline of the Kenyan economy and to increased public dissension, to which the state responded with greater repression.<sup>56</sup> For women, this trend

49. See generally Celestine Nyamu, *Gender, Culture, Development and Human Rights*, 41 HARV. INT'L L. J. 408 (2000) [hereinafter Nyamu, *Gender*] (describing the gender bias in landholding as embodying gender hierarchy but advocating for understanding these cultures as dynamic and acknowledging representations about culture as being subject to interrogation).

50. See, e.g., Coomaraswamy, *supra* note 48, at 484.

51. See *infra* Parts IV-V (discussing the campaign's efforts to promote gender equality while also protecting different cultures' ways of life).

52. Nzomo, *Women's Movement*, *supra* note 4, at 168-69; see also REPORT OF THE TASK FORCE ON THE ESTABLISHMENT OF A TRUTH, JUSTICE AND RECONCILIATION COMMISSION, at 9-12 (2003) [hereinafter TRUTH AND JUSTICE COMMISSION REPORT]. The Truth and Justice Commission Report briefly describes the measures and events that led to heightened repression in Post-Independence Kenya and lists six categories of state crimes that constitute the possible terms of reference for the Truth, Justice and Reconciliation Commission. *Id.* at 19-23. These categories are: (1) political assassinations and killings; (2) massacres and possible genocides; (3) political violence and killings of democracy advocates; (4) torture, detention exile disappearance, rape and prosecution of opponents; (5) politically instigated ethnic clashes; and (6) violations of economic, social and cultural rights. *Id.*

53. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 26-34.

54. See TRUTH AND JUSTICE COMMISSION REPORT, *supra* note 52, at 21-22 (discussing massacres in the North Eastern Province of Kenya where ethnic Somalis live, "politically instigated" clashes particularly in the Rift Valley and Coast Provinces, and political violence against democracy advocates).

55. *Id.* at 22-23 (noting the connections between human rights violations that involve bodily harm and economic crimes of corruption such as "forcible eviction of lawful owners" to steal their land and "looting of the public purse," resulting in "collapsed infrastructure and economic decomposition").

56. *Id.* at 23.

created additional problems for their solidarity in that the state used the same tools of manipulation that it had used to control the various other groups in Kenya to control and manipulate Kenya's women's groups. The state did so by insisting that women focus on welfare issues, by repressing women's dissent, and by co-opting women's organizations.<sup>57</sup>

The democracy movement, of which advocacy for multipartyism and constitutional reform are parts, was meant to alter this state of affairs and succeeded in some respects.<sup>58</sup> It sought to change and reorganize the relationship between the governors and the governed by, in part, facilitating open competition among multiple parties for the elections of governors, decentralizing government authority, and guaranteeing the protection of individuals' human rights.<sup>59</sup> Whether the democracy movement was initially meant to change the subordinated status of women is unclear, but women had to fight to make their voices heard in an environment in which the social tensions discussed, among others, made it difficult for them to do so in a unified way.<sup>60</sup> Furthermore, where women failed to articulate a position, women's conditions were not always considered.<sup>61</sup>

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57. *Id.* Scholars are increasingly recognizing the connection between government corruption and lack of development or degenerating economies. See generally UNDP, CORRUPTION AND GOOD GOVERNANCE 35-50 (1997), available at [http://www.undp.org/overnance/docs/AC\\_Pub\\_corruption-goodgov.pdf](http://www.undp.org/overnance/docs/AC_Pub_corruption-goodgov.pdf); INTERNATIONAL MONETARY FUND, GOVERNANCE, CORRUPTION, & ECONOMIC PERFORMANCE (George T. Abed & Sanjeev Gupta eds., 2002), available at <http://www.imf.org/external/pubs/nft/2002/govern/index.htm>.

58. One of the first successes of this movement was the repeal of Section 2A of the Constitution which made Kenya a one-party state. Thereafter Kenya became a multi-party state. See generally WILLY MUTUNGA, CONSTITUTION-MAKING FROM THE MIDDLE: CIVIL SOCIETY AND TRANSITION POLITICS IN KENYA, 1992-1997 (1999) [hereinafter MUTUNGA, CONSTITUTION-MAKING]; Willy Mutunga, *Building Popular Democracy in Africa: Lessons from Kenya*, in LAW AND THE STRUGGLE FOR DEMOCRACY IN EAST AFRICA 199 (Joseph Oloka-Onyango, Kivutha Kibwana & Chris Maina Peter eds., 1996) [hereinafter Mutunga, *Building*] (discussing the movement towards a multiparty Kenya).

59. See, e.g., Kivuthu Kibwana, *One Year after Multi-party Elections: Whither Patriotism, Democracy and Kenya*, in IN SEARCH OF FREEDOM AND PROSPERITY: CONSTITUTIONAL REFORM IN EAST AFRICA 311 (Kivutha Kibwana, Chris Mania Peter & Joseph Oloka-Onyango eds., 1996) (defining democracy, evaluating Kenyan democracy and focusing on such concerns as the limits of multipartyism in light of a reluctant Kenyan regime, ethnic clashes, a federal system, and torture; and evidencing a concern for democratic participation, human rights, and limitations on governmental power); see also Kivutha Kibwana, *The People and the Constitution: Kenya's Experience*, in IN SEARCH OF FREEDOM AND PROSPERITY: CONSTITUTIONAL REFORM IN EAST AFRICA 340 (Kivutha Kibwana, Chris Mania Peter & Joseph Oloka-Onyango eds., 1996) (advocating for constitutional reform, including equitable sharing of resources, devolution of power, and individual rights).

60. See Nzomo, *Women's Movement*, *supra* note 4, at 171 (noting that "the Kenyan state [had] largely pursued patronizing policies toward women and women's associations, encouraging them to function as easy targets for manipulation and exploitation while attempting to ensure that they pose a minimal threat to the political status quo").

61. Even when women did articulate positions, society did not always accept them.

Consequently these tensions played a large role in the constitutional review process, particularly in the campaign's advocacy. The gender equality ideal that the campaign promoted, understood as the social equality between women and men, provided little assistance in charting a way for women to overcome their internal divisions informed by these tensions. As such, it failed to stifle conflicts among women and specifically failed to stifle three conflicts that women had over important constitutional issues. Furthermore, the concept of gender equality itself generated controversy among some women's groups.<sup>62</sup> Finally, the campaign's commitment to solidarity proved to be only the first step necessary to mediating these conflicts.

These constitutional conflicts involved first a clash between Muslim and non-Muslim women over whether to support the retention of Kadhi's courts in the constitution.<sup>63</sup> Kadhi's courts are courts long established in Kenya for the adjudication of personal law issues for those who profess belief in Islam.<sup>64</sup> The Draft Constitution provided for Kadhi's courts by limiting the principle of equality,<sup>65</sup> bringing women activists supporting equality into conflict with Muslim women supporting the retention of Kadhi's courts.<sup>66</sup> Second, women were divided along ethnic lines over the question of decentralizing executive power and devolution.<sup>67</sup> These issues proved detrimental to the constitutional process as a whole and implicated political struggles for greater ethnic representation in government as well as the equitable allocation of resources among groups, thus pitting women from

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For example, at a point of increased advocacy for a new constitution, a woman legislator's motion requiring that women constitute one-third of the Parliamentary seats was soundly rejected. See *infra* Part I.C.

62. See *infra* Part I.A.2.; see also Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW]; Douglass Cassel & Jill Guzman, *The Law and Reality of Discrimination Against Women*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 287, 295-98 (Kelly D. Askin & Dorean Koenig eds., 1999) (discussing the implications of Muslim countries' reservation to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which rejected the application of equality to gender relations).

63. See *infra* Part IV; see also Athena D. Mutua, *Kadhi's Courts, Women's Rights and Equality*, in TRAINING MANUAL, *supra* note 17, at 53-57.

64. Hassan, *supra* note 33.

65. Draft, *supra* note 3, Arts. 199-202.

66. Muslims have consistently criticized the equality doctrine; for example, Muslim countries have made reservations to CEDAW that consistently indicate their refusal to apply equality provisions to gender relations in Muslim countries. See Cassel & Guzman, *supra* note 62, at 295-98; see also *infra* Part IV.

67. See ANNE MURAGU NYABERA, INSTITUTIONAL GAINS, PRIVATE LOSSES: THE 1998 FIDA(K) ANNUAL REPORT ON THE LEGAL STATUS OF KENYAN WOMEN 28-33 (1998) [hereinafter FIDA 1998].

various ethnic groups against each other.<sup>68</sup> Third, some women questioned whether elite urban women could represent the interests of the majority of Kenyan women who are rural and poor.<sup>69</sup> This issue concerned the provisions in the Draft Constitution that called for women to occupy one-third of all elected and appointed positions, positions that arguably would be filled mostly by urban elite women.<sup>70</sup>

The campaign's experiences with these conflicts and tensions suggest several insights for pursuing women's equality and empowerment in view of women's diversity. The Kenyan experience demonstrates the critical importance of having a women's movement that is committed over time to developing, articulating, and acting on behalf of women's interests in all their diversities, as well as mediating the social tensions that produce, inform, and shape these diversities. Furthermore, it demonstrates the importance of developing a commitment to solidarity that includes respectfully listening to and valuing different women's voices and a willingness to craft creative compromises that reflect these differing groups of women's views. The idea of solidarity is based upon broad notions of gender equality that include equality among women and not simply social equality between women and men. As such, this broader notion of gender equality, despite its controversial nature, views all women as having a voice in policy formation and takes their differences and various views into account.

In addition, the Kenyan experience shows that the ideal of gender equality gains its power from attention to the substantive issues and needs of women rather than from a formal, universalized, and absolutist principle.<sup>71</sup> In this sense, equality as a strong normative value must be understood as a flexible and complex idea. Moreover, the ideals of gender equality and women's solidarity benefit from including an affirmative focus on equitable distribution of resources and on giving women across communities access to decision-making structures that influence the distribution of material resources that challenge existing power relations. This attention and activity evidence a commitment to women across their differences. Ultimately, any measure of success depends on developing mechanisms within a movement that can hold women in positions of power accountable

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68. *Infra* Part V. See generally Makau Mutua, Taming Leviathan, *supra* note 7; INSTITUTE FOR EDUCATION IN DEMOCRACY (IED), ENHANCING THE ELECTORAL PROCESS IN KENYA: A REPORT ON THE TRANSITION GENERAL ELECTIONS 2002, at 68 (Oketch Owiti ed., 2003).

69. See *infra* Part VI; see also FIDA 1998, *supra* note 67, at 28-33.

70. ZERO DRAFT, *supra* note 11.

71. See *infra* Part IV.

for ensuring that the needs and interests of women across ethnic, religious, and class backgrounds are met. These insights were crucial to the qualified success that Kenyan women have thus far had in the constitutional review process.

This article consists of seven parts meant to accomplish four goals: to provide background and context for the campaign for Safeguarding the Gains of Women in the Draft Constitution; to examine the nature of the campaign and its goals for the constitution; to explore the conflicts among women about the constitution that the campaign encountered; and to assess the campaign's efforts. The first part contains background information, the foundation and context upon which the campaign's advocacy was built. Specifically it provides a detailed overview of the status of women in Kenya, their socio-economic conditions, their position under the current constitution, and a summary of the Kenyan women's movement, including its relationship to both the global women's movement and the movement for constitutional reform.

Parts II and III examine the Draft Constitution and the campaign's efforts to improve it from the perspective of women's empowerment. Specifically, Part II briefly describes the status of the Draft Constitution and then analyzes it from the perspective of women's rights and the gender equality ideal. Part III examines the campaign's origins and development and details its conceptual framework.

Parts IV through VI explore the conflicts among women that the campaign encountered. Part IV analyzes the conflict over the Kadhi's courts. Part V explores the issue of women's cultural and ethnic identity in the context of the struggle over decentralizing executive authority and devolution. Part VI interrogates the urban/rural divide issue as it relates to concerns about representation in light of similar claims made by women about men. Part VII assesses the successes and failures of the campaign in the context of the latest proposals for a new Kenyan constitution and in constructively engaging the diversity of women.

## I. STATUS OF WOMEN IN KENYA

*By just about any measure, women in Kenya are worse off than men. Their average earnings are less than half those of men. Only 29 percent of those engaged in formal wage employment are women, leaving most to work in the informal sector with no social security and little income. The numbers of women in formal employment are decreasing . . .*

*Women constitute over 80 percent of the agricultural labor force, often working on an unpaid basis, and 64 percent of subsistence farmers are women . . . . Women [nonetheless] provide approximately 60 percent of farm-derived income . . . . Women's land ownership is minuscule despite their enormous contribution to agricultural production . . . [they] account for only 5 percent of registered landholders nationally . . . . Girls receive less education than boys at every level, and women's literacy rate (76 percent) is lower than men's (89 percent). Violence against women is commonplace: 60 percent of married women reported in a 2002 study that they are victims of domestic abuse. In another study published in 2002, 83 percent of women reported physical abuse in childhood and nearly 61 percent reported physical abuse as adults.*

-Human Rights Watch 2005<sup>72</sup>

Women occupy a subordinated status in Kenya.<sup>73</sup> This status is the result of the political, economic, social, and cultural development of the country.<sup>74</sup> Their subordination arises and is maintained by a matrix of historically developed beliefs and practices that various communities hold dear. These beliefs and practices however are based on rationales embedded in economic and social arrangements that have changed, been distorted, or destroyed.<sup>75</sup> Women's limited ownership of land and property exemplifies these conditions,<sup>76</sup> as well as

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72. HUMAN RIGHTS WATCH, *DOUBLE STANDARDS: WOMEN'S PROPERTY RIGHTS VIOLATIONS IN KENYA* 9 (2003) [hereinafter *DOUBLE STANDARDS*].

73. *Id.* at 6 (citing the Task force for the Review of Laws Relating to Women, which noted that gender relations treat male dominance as legitimate and creates a social-power hierarchy that reduces women to powerlessness, economic marginalization and social vulnerability).

74. *Id.*

75. Kameri-Mbote, *supra* note 42 (noting that "women-unfriendly customary law has gradually developed as African societies have undergone change[,] most of which can be seen as arising from colonization and privatisation [sic]"); see also African Legal Aid (AFLA), *Male Primogeniture Unconstitutional: A Legal Victory for African Women in South Africa!*, AFLA Q., July-Sept. 2003, at 30 (discussing the South African case in which the Constitutional court found male primogeniture unconstitutional and suggested that the conditions that justified the practice no longer exist).

76. See generally Butegwa, *supra* note 36, at 108 (describing the various rules that are relevant to land ownership including marriage, inheritance, and cultural preferences for males in land ownership and the changing dynamics).

the interplay of interlocking rules and structures that result in a separate, mostly private regime regulating women's lives.<sup>77</sup>

The current Kenyan constitution in many ways legitimates the second-class status of women.<sup>78</sup> It does so through its embrace of legal pluralism that embodies both customary and religious laws.<sup>79</sup> This framework, although necessary in many ways to accommodate the pluralist nature of Kenyan society, stifles efforts to ameliorate women's oppression because it supports the matrix of social arrangements currently in place.<sup>80</sup> For example, although the current constitution prohibits discrimination based upon sex,<sup>81</sup> the anti-discrimination provision does not apply to matters involving adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law.<sup>82</sup> Thus the anti-discrimination principle does not apply

77. Udvardy, *supra* note 26, at 1749, 1751, 1756 (analyzing women's organizations in Kenya and citing literature to suggest that colonialism imposed a European moral order embodying the public/private distinction onto the "extant gender relations in Africa").

78. Kameri-Mbote, *supra* note 42; BADO MAPAMBANO — KENYAN WOMEN DEMAND THEIR RIGHTS: THE 1997 FIDA(K) ANNUAL REPORT ON THE LEGAL STATUS OF KENYAN WOMEN 5 (1997) [hereinafter FIDA 1997] (noting that as "the current Kenyan Constitution discriminates against women, the issue of the marginalization of women from the constitutional debate was a key component of the 1997 Kenyan women's rights agenda").

79. Kameri-Mbote, *supra* note 42 (discussing the ineffectiveness of gender neutral laws where the laws meet "gender specific reality" and the problems presented by legal pluralism).

80. *Id.*

81. The constitution originally did not prohibit discrimination based upon sex but was amended in 1997 to include sex as a prohibited basis of discrimination. CONSTITUTION Art. 70 (2000) (Kenya), available at <http://www.lawafrica.com/constitution/index.asp>.

82. *Id.* at Art. 82 (1997) (Kenya).

(1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision:

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with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or (d) whereby persons of a description mentioned in subsection (3) may be subjected to a disability or



to the very situations and systems that govern the places where women live their lives.

Given the socio-economic subordination of women, the fact that women have exercised little political power is unsurprising. Since Independence, women's elected representation at the national level has never risen above five percent, while their representation at the local level only rose above three percent after 1992.<sup>83</sup> Women's political efforts have been further hampered by a postcolonial state that sharpened and enhanced the oppressive apparatuses of the colonial state.<sup>84</sup> From Independence in 1963 until the elections in 2002, this state has been controlled by one party, the Kenya African National Union party (KANU), first under the leadership of Kenyatta, the first president of Kenya, and then under Daniel Arap Moi, who was president for twenty-four years.<sup>85</sup> These regimes increasingly became authoritarian and anti-democratic, brokering little public dissent including dissent voiced by women about the subordination of Kenyan women.<sup>86</sup> Additionally these regimes hindered economic development through corruption and intermittent cooperation with a skewed international economic order.<sup>87</sup>

Nonetheless, Kenyan women have organized themselves into women's groups to combat the disadvantages supported by this framework.<sup>88</sup> Recently they have begun to challenge women's absence in the political and legal structures that influence the organization of power as well as the social and economic distribution of resources.<sup>89</sup>

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restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

*Id.*

83. Cf. Nzomo, *Women's Movement*, *supra* note 4, at 173, 180-81.

84. Makau Mutua, *Taming Leviathan*, *supra* note 7 (discussing the postcolonial state and the constitutional efforts to reform it); *see also* Nzomo, *Women's Movement*, *supra* note 4, at 168-76.

85. Nzomo, *Women's Movement*, *supra* note 4, at 168-69.

86. *Id.* at 168-71.

87. *See* TRUTH AND JUSTICE COMMISSION REPORT, *supra* note 52, at 22-23 (linking economic stagnation in part to corruption); UNDP, *supra* note 57, at 35-50 (same). The order is skewed in that Westerners initially built the country upon extractive principles, and the country continues to exist in uneven economic relations of dependency today. Nyang'oro & Shaw, *supra* note 35, at 32-33 (discussing the "classic [economic] dependency syndrome" of the past and arguing that the neo-liberal consensus of open markets and withdrawing state control will likely not benefit African countries in the future).

88. Maria Nzomo, *The Status of Women's Human Rights in Kenya and Strategies to Overcome Inequalities*, ISSUE: A JOURNAL OF OPINION, Summer 1994, at 17, 20 n.4 [hereinafter Nzomo, *Status*] (noting that women's organizations "mushroomed" in the post-1992 election period).

89. Nzomo, *Women's Movement*, *supra* note 4, at 177-80 (discussing the shift from

The Women's Political Caucus,<sup>90</sup> and later the campaign for Safeguarding the Gains of Women in the Draft Constitution,<sup>91</sup> is part of this tradition.

#### A. Land Ownership: Exemplifying the Status of Women

The ownership of land, one of the most important resources to Kenyans,<sup>92</sup> is a good example of the matrix of conditions, beliefs, practices, and legal complications that constrain women's empowerment.<sup>93</sup> The current lack of women's land ownership and the ideology that fuels it originated in pre-colonial Kenyan social arrangements. Colonial rule and the post-colonial state later distorted these arrangements however, worsening their impact on women.<sup>94</sup>

In most of the pre-colonial Kenyan communities, as in much of sub-Saharan Africa, individuals did not own land outright.<sup>95</sup> Rather, the family-clan controlled the land, with elders, predominately men, controlling the access to land for use by individual homesteads.<sup>96</sup> Men, viewed as perpetuators of the family lineage,<sup>97</sup> were conceptualized as inheriting the right to control and allocate land for maintenance of their individual homesteads, with women as the primary cultivators of crops for family consumption.<sup>98</sup> Women were thus an integral part of the land tenure system,<sup>99</sup> and these communities often

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welfare focus to strategies of empowerment and noting that "the hope that if enough women attained key political decision making capacities, they would be able to repeal the laws that discriminate against women at the social and economic level, and they could design alternate development policies to mainstream, rather than marginalize, women's issues").

90. See Kenya Women's Political Caucus, <http://www.kwpc caucus.com>; FIDA 1998, *supra* note 67, at 29-31.

91. See TRAINING MANUAL, *supra* note 17.

92. See DOUBLE STANDARDS, *supra* note 72, at 7; see also Akinyi Nzioki, *The Effects of Land Tenure on Women's Access and Control of Land in Kenya*, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 218 (Abdullahi A. An-Na'im ed., 2002).

93. DOUBLE STANDARDS, *supra* note 72, at 2.

94. *Id.* at 7-8; see also Butegwa, *supra* note 36, at 110; Celestine Nyamu-Musembi, *Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights*, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 126 (Abdullahi An-Na'im ed., 2002) [hereinafter Nyamu, *Local Norms*]; Nyamu, *Gender*, *supra* note 50, at 408.

95. DOUBLE STANDARDS, *supra* note 72, at 7.

96. *Id.*

97. Butegwa, *supra* note 36, at 111.

98. DOUBLE STANDARDS, *supra* note 72, at 7.

99. See Butegwa, *supra* note 36, at 112 (citing Miki Rwebangira and E. Mnemeey, *The Legal Status of Woman in Tanzania*, in WOMEN, LAWS, CUSTOMS, AND PRACTICES IN EAST AFRICA 50 (J. Kabebere-Macharia ed., 1995)) (suggesting that "so long as women's work was absolutely central in the production and reproductive system, and land had not yet become a commodity, women were relatively indispensable and their security in land rights unlikely to be threatened").

associated women's fertility with the fertility of land, representing maternal power.<sup>100</sup> Consequently, women's access to land and other resources was granted and protected.<sup>101</sup> However, this access was protected through women's relationships to men, generally to their husbands and their husbands' families.<sup>102</sup> Women generally did not inherit land from either their natal family (because their communities viewed them as leaving these families upon marriage and becoming part of their husband's clan) or as heirs to their husbands' clan land, preserved through the lineage system.<sup>103</sup> Rather, their husbands' family provided them access to and use of the land.<sup>104</sup>

As such, marriage was expected, often arranged by families, perceived as a union between families, and occurred in some communities as early as puberty.<sup>105</sup> Other practices and rituals, such as bride price or other exchanges of gifts that the man's family provided to the woman's family, accompanied marriage.<sup>106</sup> Where a husband died before his wife, the wife maintained her access to her husband's clan land through the inheritance of such land by her adult sons.<sup>107</sup> In the absence of adult sons, some communities practiced wife inheritance whereby another male relative of the husband inherited the

100. Udvardy, *supra* note 26, at 1753-56. Udvardy discusses the women's organizations in three East Africa groups, two in Kenya, where the female gender was associated and attributed with maintaining the "fertility of both human beings and the land." *Id.* at 1755. He suggests that the social structures of these groups respected and understood women as being responsible for the land, a role that was not viewed as subordinate but as an integral part of the social system.

101. Butegwa, *supra* note 36, at 108; *see also* Gordon, *supra* note 40, at 903-04 (noting that usufruct rights are acquired through husband's lineage).

102. DOUBLE STANDARDS, *supra* note 72, at 7-10; *see also* Gordon, *supra* note 40, at 903-04. *But see* Udvardy, *supra* note 26, at 1756-58 (arguing that women's groups also provided a source of power and protection for women's traditional roles as established by the community).

103. DOUBLE STANDARDS, *supra* note 72, at 7; *see also* Kameri-Mbote, *supra* note 42 (noting that "[t]he reason behind males [sic] inheritance was the notion that they remained within the families while the daughters got married and left").

104. DOUBLE STANDARDS, *supra* note 72, at 7.

105. *Id.*; *see also* Kameri-Mbote, *supra* note 42 (noting that customary law linked marriage to circumcision and to puberty, which occurs in some children as young as nine and eleven, and that child marriages have been the subject of much controversy because statutory law does not regulate the capacity to contract a marriage under customary law); FIDA 1997, *supra* note 78, 37-40 (discussing early marriage and noting that the practice exists among many Kenyan communities but suggesting that it is a well-known practice among the Maasai and the Somali people of Kenya). *But see* STAKING OUR CLAIM: THE 2002 FIDA KENYA ANNUAL REPORT ON THE LEGAL STATUS OF WOMEN 24-26 (2002) [hereinafter FIDA 2002] (noting that the Children Act of 2001 is intended to offer children protection from "female circumcision, early marriage, or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life . . .").

106. Kameri-Mbote, *supra* note 42 (noting that most marriage systems in Kenya require the payment of dowry).

107. DOUBLE STANDARDS, *supra* note 72, at 7.

wife, and thus legitimized her continuing claim to clan land use.<sup>108</sup> In these cases, the commonly practiced custom of polygamy, which involved a man marrying two or more wives, may have aided in maintaining women's access to land because they could be "inherited" by a male relative who was already married.<sup>109</sup> Burial of clan members on the land was and is perceived to solidify the family's claim to the land.<sup>110</sup>

Divorce, on the other hand, often required the return of bride price provided to the woman's family upon her marriage.<sup>111</sup> This arrangement left little room for concepts of separating or accounting for any property accumulated throughout the marriage.<sup>112</sup> Upon divorce, therefore, women often returned to their natal families with little more than that with which they entered the marriage and would be provided access to small plots of land by their parents.<sup>113</sup> However, the majority of natal property would be reserved for use and inheritance by their brothers who carried on the family lineage and were expected to provide land use and property for their wives' and families' maintenance.<sup>114</sup>

British colonialism disrupted this social system, leaving some aspects of it intact while distorting and destroying others.<sup>115</sup> Examples of four colonial policies demonstrate the effect of this disruption on land allocation as a resource for women. First, the British usurped land for ownership and development by whites and the colonial state, displacing entire communities in the process.<sup>116</sup> Second, they instituted a system of private property in which clan land was for legal purposes divided into individual lots and registered to an individual, usually the male/husband, as owner.<sup>117</sup> Third, they instituted a poll tax, which forced mostly African males to work for whites and/or the colonial state.<sup>118</sup> This practice allowed Africans to access cash with

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108. *Id.* at 12 (discussing inheritance and ritual cleansing and noting in footnote 44 that these practices are "notorious among the Luo and Luhya ethnic groups"); see also Kameri-Mbote, *supra* note 42 (discussing levirate unions as a form of wife inheritance).

109. For example, the Qur'an permits a Muslim man to marry up to four wives if he does so in the context of providing for orphans when a father dies and where the man is capable of dealing justly and equitably with all of his wives. HOLY QUR'AN, S. IV:3. See also Alamin Mazrui, *The Equality Bill 2000; an Alternative Islamic Perspective*, in HUMAN RIGHTS AS POLITICS 310, 314-15 (Kenya Human Rights Commission 2003).

110. Gordon, *supra* note 40, at 896.

111. DOUBLE STANDARDS, *supra* note 72, at 7.

112. *Id.*

113. *Id.*

114. *Id.*

115. Nyamu, *Gender*, *supra* note 50, at 408 (discussing an "ethic of care" that allowed for the provision of natal land for unmarried or divorced daughters).

116. DOUBLE STANDARDS, *supra* note 72, at 7.

117. *Id.*; see also Nyamu, *Gender*, *supra* note 50, at 407-08.

118. Oduol & Kabira, *supra* note 29, at 106-07.

which to pay the poll tax, thereby beginning the process of integrating them into the cash and market economy.<sup>119</sup> Fourth, the British governed through a policy of indirect rule which often strengthened the hand of a single man, a chief, to direct activities of communities, often leaving community customs in place.<sup>120</sup>

As a result, men, who were required to work outside of their farms and homes, increasingly left almost all subsistence farming to their wives and children.<sup>121</sup> Working outside of their homes undermined and loosened clan control over these men, as their livelihood no longer rested solely with the community.<sup>122</sup> Moreover, with titles to the land vested in these individual men, men increasingly gained power to sell the land without clan permission, without any control capable of being exercised by their wives, and sometimes without their wife's knowledge.<sup>123</sup> At the same time, the law largely extinguished land use rights that women had held historically, which meant that while they might be practiced in some communities they were not necessarily legally enforceable against husbands with sole title.<sup>124</sup>

Colonialism thus shifted women's dependence on family/clan relationships to dependence on a single man, usually her husband.<sup>125</sup> It did so without providing women any countervailing rights to land as a resource except through appeal to husbands or to a weakened clan.<sup>126</sup> These clans increasingly exercised little control over men but were left primarily with control over women, on the basis of traditions that protected but also disadvantaged women.<sup>127</sup> In addition, women, often already seen as the source of community life, also came to represent the embodiment of the clan's and community's culture, and the community's control over women often represented their efforts to maintain their culture in the face of a changing social environment.<sup>128</sup> Thus, while the pre-colonial social structure could be characterized

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119. *Id.*

120. Gordon, *supra* note 40, at 888.

121. Kameri-Mbote, *supra* note 42 (noting that the concern for women under customary law has been dropped in the modern era but that the removal of protection "has not been accompanied with fewer roles for women within the community"); Udvady, *supra* note 26, at 1751 (noting that "the imposition of a Western public/private conceptual distinction . . . result[ed] both in a muting of women's participation in the public, political activities, and to increasingly heavy workloads for women in the private, domestic sphere").

122. See Oduol & Kabira, *supra* note 29, at 106-07; see also Gordon, *supra* note 40, at 888.

123. DOUBLE STANDARDS, *supra* note 72; Butegwa, *supra* note 36, at 110.

124. Kameri-Mbote, *supra* note 42; Gordon, *supra* note 40, at 906.

125. Gordon, *supra* note 40, at 906 (citing INGRID PALMER, GENDER AND POPULATION IN THE ADJUSTMENT OF AFRICAN ECONOMIES: PLANNING FOR CHANGE 140 (1991)).

126. *Id.*

127. *Id.*

128. Oduol & Kabira, *supra* note 29, at 107.

as a patrilineal system, this structure has increasingly become a patriarchal one.<sup>129</sup>

Women therefore enter the post-independence period primarily engaged in subsistence farming on land that they do not own and have no chance of owning due to a system of beliefs developed historically but maintained presently. Absence of land ownership limits their ability to access credit or to access other resources in the modern era. Furthermore, women's landlessness is accomplished and accompanied by a complex of practices and ideas concerning marriage, burial, and women's competencies that represent the remaining aspects of their communities' cultures, which these communities struggle to protect. Practices such as polygamy, bride price, early marriage, forced marriage, and female genital circumcision remain as evidence of their cultural identity and in some cases a way for women to access resources,<sup>130</sup> even as they have "hampered women's advancement."<sup>131</sup>

In addition, women's vulnerabilities have increased in Kenya by the general worsening of economic conditions over the last two decades in which the country has seen an insignificant or negative growth rate.<sup>132</sup> Women are more likely to be adversely affected by these conditions "given their multiple roles as . . . mothers, wives, food providers, care providers, heads of households and workers."<sup>133</sup> These vulnerabilities have also been increased by the activities of an emerging African political elite that has continued to usurp additional land under a cycle of government corruption,<sup>134</sup> in a society where

129. See Udvardy, *supra* note 26, at 1759 (suggesting that pre-colonial Kenya represented a patrilineal society that increasingly became patriarchal under colonialism); see also Felix K. Ekechi, *Women and the Democratization Process in Africa*, in *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA* 203, 205-207 (John Mukum Mbaku & Julius Omozuanvbo Ihonvbere eds., 2003) (discussing the debate about gender parity in precolonial Africa); Gordon, *supra* note 40, at 903 (citing Patricia Stamp, *Burying Otieno: The Politics of Gender and Ethnicity in Kenya*, 16 *SIGNS* 808, 813 (1991)).

130. See, e.g., *DOUBLE STANDARDS*, *supra* note 72, at 7; FIDA 1997, *supra* note 78, at 37-40; Erin Han, *Legal and Non-Legal Responses to Concerns for Women's Rights in Countries Practicing Female Circumcision*, 22 *B.C. THIRD WORLD L.J.* 201, 208-10 (2002); Kameri-Mbote, *supra* note 42.

131. Committee on the Elimination of Discrimination Against Women, *Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: third and fourth periodic reports of States parties: Kenya*, at 11, U.N. Doc. CEDAW/C/KEN/1-2 (2000) at <http://www.un.org/womenwatch/daw/cedaw/28sess.htm> [hereinafter *Kenya Report to CEDAW*].

132. *DOUBLE STANDARDS*, *supra* note 72, at 14; see also UNDP, *Kenya: Macro Economic Evolution since Independence* (2002), available at <http://www.ke.undp.org/Corporate%20Publications.htm>; REPUBLIC OF KENYA, *KENYA REVIEW AND APPRAISAL: FINAL REPORT ON THE IMPLEMENTATION OF BEIJING PLATFORM FOR ACTION 1* (2004), available at [http://www.cities-localgovernments.org/uclg/upload/docs/KENYA\\_English.pdf](http://www.cities-localgovernments.org/uclg/upload/docs/KENYA_English.pdf) [hereinafter *FINAL REPORT ON THE IMPLEMENTATION OF BEIJING PLATFORM*].

133. *FINAL REPORT ON THE IMPLEMENTATION OF BEIJING PLATFORM*, *supra* note 132, at 1.

134. HUMAN RIGHTS WATCH, *KENYA'S UNFINISHED DEMOCRACY: A HUMAN RIGHTS*

most people engage in agricultural work,<sup>135</sup> and by a society where men's "success" is preferred.<sup>136</sup> Thus, women and their claims to land are increasingly seen as competition.<sup>137</sup> Although the circumstances of the majority of men have also deteriorated, men have stronger ideological claims to land and the few opportunities the social structure now provides, a situation that increases their hostility to women's claims to resources.<sup>138</sup> Under these conditions, many women, as cultural beings, may support retention of their economic and social arrangements and retention of older cultural practices that bind them to their clans and ethnic communities. They also may encounter less hostility and have greater access to resources within these cultural arrangements than they do in the small, discriminatory, private sector.<sup>139</sup> This socio-economic reality may further bind Kenyan women to these communities and practices.

The received religions, Christianity and Islam, complicate this picture, as they can embody rules and belief systems that also subordinate women to men under ideologies that characterize the genders as complementary. Even where they seek to protect some measure of women's economic independence, as for example with Islam which provides for some form of women's inheritance, women may still be unable to access land and other resources. This inability is due to the patriarchal interpretation of their religions, pre-existing inheritance practices in the community,<sup>140</sup> or the economic realities.

As such, it is unsurprising that women, as a vulnerable group in Kenya, only own five percent of the land, have higher rates of malnutrition, suffer from inadequate health care, are increasingly vulnerable to HIV, have less education and fewer jobs generally, with limited access to paid jobs in the formal sector, are consequently disproportionately poor and are largely absent in the decision-making apparatuses in the country.<sup>141</sup> It is also unsurprising that some

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AGENDA FOR THE NEW GOVERNMENT 7 (2002).

135. Nzioki, *supra* note 92, at 220 (stating that "the livelihood of over 80 per cent of the Kenyan population is directly dependent on agriculture").

136. *Cf.* DOUBLE STANDARDS, *supra* note 72, at 33-34 (discussing bias against women's property rights in Kenya).

137. DOUBLE STANDARDS, *supra* note 72, at 41-42.

138. *Id.*

139. *See* Gordon, *supra* note 40, at 898. Gordon argues that the division among women evidenced around the famous Otieno case represented a clash between the family/clan mode of production and the emerging capitalist society. She suggests that the majority of Kenyan women have more access to resources in the former rather than the latter, albeit limited access.

140. DOUBLE STANDARDS, *supra* note 72, at 8.

141. *Id.* at 9-10. *See generally* FINAL REPORT ON THE IMPLEMENTATION OF BEIJING PLATFORM, *supra* note 132.

portion of these women nonetheless feel bound to traditions that do not seem to be beneficial in the long run.<sup>142</sup>

### *B. Kenyan Women and the Current Constitution of Kenya*

The current Kenyan constitution in many ways legitimates the second-class status of women embedded in Kenya's socio-economic realities by explicitly disadvantaging women in certain circumstances, such as in matters of citizenship<sup>143</sup> and by embracing a pluralist system that embodies both customary and religious laws to which the constitutional anti-discrimination provisions do not apply.<sup>144</sup> A network of other laws in many respects discriminates against and disadvantages women, including a system of multiple marriage laws.<sup>145</sup> Even where advocates have attempted to cure the disadvantages embodied in these laws, the patriarchal nature and socio-economic structure of the society subvert the goals of these laws.<sup>146</sup> The Law of Succession Act is one such law.<sup>147</sup> Other laws that disadvantage women include penal laws addressing the definition and administration of sexual offenses, the absence of separate domestic violence legislation, and certain laws in the employment area.<sup>148</sup>

The current constitution explicitly discriminates against women with respect to citizenship. Whereas a Kenyan man automatically bequeaths citizenship to his children born outside the country with a foreign wife and also to his foreign wife, Kenyan women do not automatically bequeath citizenship to a foreign husband or to children born to them.<sup>149</sup> Furthermore, other laws consistent with the underlying philosophy guiding citizenship require single women to obtain consent from their fathers to obtain a passport, require married women to obtain consent from their husbands, and require mothers

142. Gordon, *supra* note 40, at 908.

143. CONSTITUTION, Arts. 87-98 (1997) (Kenya).

144. Nzomo, *Women's Movement*, *supra* note 4, at 18.

145. See Kameri-Mbote, *supra* note 42.

146. *Id.*

147. Law of Succession Act, (1981) Cap. 160 (Kenya).

148. See FIDA 1998, *supra* note 67, at 8-14 (discussing laws concerning domestic violence and sexual violence); Kameri-Mbote, *supra* note 42 (discussing employment laws). See generally Penal Law, (2003) Cap. 63 §§ 139-57 (Kenya) (addressing various sexual offenses, including rape, attempted rape, abduction, statutory rape, forced prostitution, etc.); Laws of Kenya, Cap. 226, 229, 231-237 (addressing employment issues).

149. Compare CONSTITUTION, Art. 90 (2004) (Kenya) (stating that "[a] person born outside Kenya after 11th December, 1963 shall become a citizen of Kenya at the date of his birth if at that date his father is a citizen of Kenya") with *id.* Art. 91 (stating that "[a] woman who has been married to a citizen of Kenya shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya"). See also FIDA 1997, *supra* note 78, at 22-24; *Kenya Report to CEDAW*, *supra* note 131, at 22-23 (making similar points).



with children under the age of seven to obtain the children's father's consent for the children to travel on their mother's passport.<sup>150</sup>

The Constitution does not explicitly provide for equality and equal protection of the laws. Rather, it provides that ". . . every person in Kenya is entitled to the fundamental rights and freedoms of the individual," including the right to "life, liberty, security of the person and the protection of the law."<sup>151</sup> This provision is complemented by Article 82, which prohibits discrimination on the basis of "race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex . . ." <sup>152</sup> However, the anti-discrimination principle does not apply to matters involving "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law,"<sup>153</sup> or "in the case of members of a particular race or tribe of customary law."<sup>154</sup>

These exceptions mean that women are subject to potentially discriminatory laws in the majority of legal cases in which they are involved. For example, marriage-related claims, including claims involving maintenance, custody, divorce, and succession, constituted over sixty-seven percent of the cases handled by the Nairobi office of the Federation of Women Lawyers' legal aid clinic.<sup>155</sup> These types of cases represented over fifty-two percent of the cases in their Kisumu office.<sup>156</sup> Cases involving land claims constituted another eleven percent of the cases in both offices, with cases involving claims of violence constituting seventeen percent in Nairobi and twenty-three percent in Kisumu.<sup>157</sup> Further, because the overwhelming majority of women work in the informal sector and live within the contexts of their cultural/ethnic communities,<sup>158</sup> many will be subject to potentially discriminatory customary laws and practices.<sup>159</sup>

Marriage, divorce, and other personal law claims are governed by various sources of Kenyan law including customary and religious

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150. See FIDA 1997, *supra* note 78, at 22 (noting that a person needs a passport or a national identity card to get a voter registration card and that to obtain either, the Registrar of Persons office requires a woman to be accompanied by her husband, a rule that the government justifies by reference to Article 91 of the Constitution); see also FIDA 2002, *supra* note 105, at 14-15.

151. CONSTITUTION, Art. 70 (2004) (Kenya).

152. *Id.* Art. 82.

153. *Id.* Art. 82(4)(b).

154. *Id.* Art. 82(4)(c).

155. FIDA 2002, *supra* note 105, at 32.

156. *Id.*

157. *Id.*

158. See generally Gordon, *supra* note 40.

159. Kameri-Mbote, *supra* note 42 (noting that because customary law is unwritten, various formulations of it often reflect the articulators' biases); accord Nyamu, *Gender*, *supra* note 50, at 404-06.

laws in a complex system of multiple marriage laws. The current constitution, the supreme law of the land,<sup>160</sup> does not explicitly provide the sources of Kenyan law but references several such sources including customary<sup>161</sup> and Islamic law.<sup>162</sup> The sources of Kenyan law are specifically set out in the Judicature Act<sup>163</sup> and include: the constitution; the National Assembly's legislative acts; specific Acts of the British Parliament before the establishment of the Republic of Kenya; English common law and doctrines of equity in force at the beginning of colonial law; African customary law as a guide in civil matters; and Islamic law in some matters of personal law affecting Muslims.<sup>164</sup> Furthermore, the government applies Hindu Law on questions of marriage and divorce under the Hindu Marriage and Divorce Act.<sup>165</sup> Kenyan court decisions also operate as a source of law.<sup>166</sup>

Kenya has at least four different systems of marriage.<sup>167</sup> These different marriage systems represent and seek to recognize the country's different cultural and religious heritages. They potentially provide a system of choice under which couples choose to subject themselves to the marriage regime they prefer.<sup>168</sup> This conceptualization is hindered by three significant realities. One is that many women may not even know that they can choose among marriage systems.<sup>169</sup> Second, even if they possess such knowledge, women living and working in rural communities may face tremendous pressure to marry

160. CONSTITUTION, Art. 3 (2004) (Kenya) (stating that it is the supreme law and its positions are to prevail where there are conflicts of laws); *see also* CHARLES MWALIMU, *THE KENYAN LEGAL SYSTEM* 23 (1988); Kameri-Mbote, *supra* note 42 (citing the Judicature Act, (1998) Cap. 8 (Kenya)).

161. *See* CONSTITUTION, Art. 82(4) (2004) (Kenya) (rendering the anti-discrimination principle inapplicable "in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons").

162. *Id.* Art. 66 (authorizing the establishment of Kadhi's courts and providing that the jurisdiction of a Kadhi's court extends to the "determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion").

163. The Judicature Act (1998) Cap. 8 § 3 (Kenya).

164. MWALIMU, *supra* note 160, at 22; *see also* The Judicature Act (1998) Cap. 8 (Kenya).

165. MWALIMU, *supra* note 160, at 26; *see also* The Hindu Marriage and Divorce Act (1948) Cap. 11 (Kenya).

166. MWALIMU, *supra* note 160, at 25.

167. DOUBLE STANDARDS, *supra* note 72, at 8-9 (noting five different systems); FIDA 2002, *supra* note 105, at 26-27 (noting five different recognized forms of marriage in Kenya); Kameri-Mbote, *supra* note 42 (noting four different systems); *see also* Catherine A. Hardee, Note, *Balancing Acts: The Rights of Women and Cultural Minorities in Kenyan Marital Law*, 79 N.Y.U. L. REV. 712 (2004) (discussing marriage laws under the Hindu Marriage and Divorce Act; the Mohammedan Marriage, Divorce, and Succession Act; the African Christian Marriage and Divorce Act; and customary laws).

168. *See* Hardee, *supra* note 167, at 715.

169. *Id.* at 732.

under traditional rules.<sup>170</sup> Third, although all marriage regimes, except customary law, require registration, each registration regime is separate.<sup>171</sup> Thus, even women who choose a monogamous form of marriage may not be aware of marriages formerly or subsequently contracted under other systems or under customary laws.<sup>172</sup>

This complex of laws also complicates issues of succession. For example, in the famous case of *S.M. Otieno*,<sup>173</sup> although it was argued that the Otienos married under English common law (arguably akin to a civil law marriage), the Court ruled that customary law applied to *S.M. Otieno's* burial.<sup>174</sup> It thereby granted Otieno's brother decision-making power over his burial instead of his wife, a decision that implicated issues of access to property.<sup>175</sup>

Dissolution of marriage under most of these systems is complicated by the lack of a developed legal or ideological framework that contemplates marital property and the idea that women, whether through labor or financial contribution, contribute to marital property. This situation is further complicated by the fact that men may have multiple wives under different marital systems. Thus, securing maintenance (alimony) may be difficult if not impossible. Although some have interpreted Islam as requiring maintenance for wives in cases of divorce,<sup>176</sup> it is not clear that Muslim women find it any easier

170. *Id.* at 733-34.

171. *Id.* at 736.

172. See FIDA, *BEYOND THE DOOR: THE CHALLENGES AHEAD: FIDA ANNUAL REPORT 2001*, at 16-19 (2002) (discussing some of the problems with the multiple marriage system); Hardee, *supra* note 167, at 736; see also *DOUBLE STANDARDS*, *supra* note 72, at 8.

173. *Otieno v. Ougo*, January 5, 1987, slip opinion of Mr. Justice J.F. Shields (C.A.) (Kenya). The Court of Appeals ordered a new trial. Mr. Justice S.E.O. Bosire of the High Court of Kenya ruled in favor of the defendant on February 13, 1987. The Court of Appeals affirmed Mr. Justice Bosire's ruling on May 15, 1987. See also John W. Van Doren, *Death African Style: The Case of S.M. Otieno*, 36 *AM. J. COMP. L.* 329 (1998).

174. Evans Monari, *Burial Law — Reflections on the S.M. Otieno Case*, 31 *HOW. L.J.* 667, 669-770 (1988).

175. Gordon, *supra* note 40, at 884 (noting that Wambui Otieno, the wife, argued that the issue was a smokescreen for the Luos to access the deceased Otieno's assets for claimed burial expenses).

176. The provision of maintenance is often based on Surā II, verses 240-41, which require men to provide for their wives and to provide for them when they die or leave their wives. HOLY QUR'AN S. II:240-41. This view gains overall support from the verses regarding inheritance. HOLY QUR'AN S. IV:11-12, 34 (providing that "men are the protectors and maintainers of women, because Allah has given the one more strength than the other, and because they support them from their means"). See Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 61 *ALB. L. REV.* 511, 541 (1997); ALAMIN MAZRUI, *THE EQUALITY BILL 2000: AN ALTERNATIVE ISLAMIC PERSPECTIVE IN HUMAN RIGHTS AS POLITICS* 316-17 (2003).

Egypt, in its reservation to CEDAW Article 16, expressed the interrelationship of these ideas. It stated:

Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the

to secure maintenance given the economic realities in Kenya and the overall patriarchal nature of the society.<sup>177</sup>

Furthermore, both customary and Islamic marriage norms that permit parents to arrange marriages for children without their consent and without minimum age requirements have proven problematic in the context of forced and/or early marriages.<sup>178</sup> Until recently, a young girl who refused to be married and those acting on her behalf had no legal basis to reject the marriage.<sup>179</sup> The consequences of these practices are many. Forced and/or early marriages, where a young girl is often married to an older man, usually disrupt a girl's education, subject her to the health risks associated with early motherhood, and can increase her chances of contracting HIV if the husband is older and has had other partners.<sup>180</sup> Furthermore, economic stress may encourage the early marriage of young girls as families look to receive dowry payments for survival.<sup>181</sup> Historically, efforts to combat forced and/or early marriage, as well as a host of other traditional practices such as female circumcision, had little legal basis because they were permitted under customary or religious laws.<sup>182</sup> The enactment of laws such as the Children Act 2001 is slowly rectifying this state of affairs, at least at the level of law.<sup>183</sup>

Even where laws have been changed in an attempt to cure the disadvantages women face under customary or other marriage laws, these reforms have fallen short of their goals because of omissions in

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marriage and upon its dissolution, without prejudice to the Islamic *Sharia's* provisions . . . one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.

U.N. Dep't Econ. & Soc. Affairs: Division for the Advancement of Women, *Declarations, Reservations and Objections to CEDAW*, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited Sept. 21, 2006).

177. MAZRUI, *supra* note 176, at 317.

178. Kameri-Mbote, *supra* note 42 (discussing capacity to marry under customary law); *see also* FIDA 1997, *supra* note 78, at 37-40 (discussing issue of early marriage).

179. FIDA 1997, *supra* note 78, at 37-40; Kameri-Mbote, *supra* note 42.

180. FIDA 2002, *supra* note 105, at 50-55; *see also* FIDA 1997, *supra* note 78, at 37-40 (discussing a specific case of forced early marriage and a number of the systems and support for girls trying to escape early marriage); *HIV/Aids: Things We Should Know*, [http://www.southafrica.info/public\\_services/citizens/health/aids-findings-101205.htm](http://www.southafrica.info/public_services/citizens/health/aids-findings-101205.htm).

181. FIDA 1997, *supra* note 78, at 37-40.

182. *Id.*; Biketi Kikechi, *Moi Bans FGM, Affirms Stand over Women*, EAST AFRICAN STANDARD, Dec. 13, 2001.

183. Children Act (2001) Cap. 586 (Kenya); *see also* FIDA 2002, *supra* note 105, at 24-26.

the law, biases in administration, or the law's ill fit with traditional attitudes and practices.<sup>184</sup> The Law of Succession Act is one example.<sup>185</sup> The law's purpose was to provide "a uniform code as far as the devolution of property on death . . . and [to give] both men and women equal rights to inherit, own and dispose of property."<sup>186</sup> It covers both testate and intestate succession and was meant to apply in all cases.<sup>187</sup> However, the Act itself exempted certain land from its coverage, effectively making the Act inapplicable to pastoral women's claims specifically for livestock and land.<sup>188</sup> These claims remain subject to customary law.<sup>189</sup> Furthermore, Muslims protested the Act arguing that it was incompatible with Islamic laws of inheritance and the Act was made inapplicable to them in 1991.<sup>190</sup> And finally, the surviving spouse, under the Act, only receives a life interest in the property, which means that she cannot transfer or sell the property, and a woman's interest terminates if she remarries.<sup>191</sup> Except for the provision exempting Muslims, these other provisions are obvious drawbacks of the law itself.

Other drawbacks occur as a result of various social practices. For example, the Act's provisions on testate succession specifically provide for women to own and inherit property.<sup>192</sup> However, the reach of the Act is constrained by the fact that the majority of wills are made by men who leave their property to male heirs.<sup>193</sup> Furthermore, women can make a will with "respect to property she owns [only]."<sup>194</sup> As marital property is often registered in the sole name of the husband, women find they own little in their own names.<sup>195</sup> Thus, further laws need to be enacted to ensure that marital property is considered the property of both spouses if women are to access and devise property accumulated in a marriage.<sup>196</sup> Otherwise, individual

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184. Kameri-Mbote, *supra* note 42.

185. The Law of Succession Act, (1981) Cap. 160 (Kenya).

186. *Kenya Report to CEDAW*, *supra* note 131, at 6; *see also* The Law of Succession Act, (1981) Cap. 160 (Kenya).

187. *See* Kameri-Mbote, *supra* note 42.

188. The Law of Succession Act, (1981) Cap. 160 § 32 (Kenya) (listing regions of the country exempt from application of the Acts provision); *see also* Kameri-Mbote, *supra* note 42.

189. Kameri-Mbote, *supra* note 42.

190. DOUBLE STANDARDS, *supra* note 72, at 32.

191. Kameri-Mbote, *supra* note 42.

192. *See* The Law of Succession Act, (1981) Cap. 160 (Kenya); Kameri-Mbote, *supra* note 42.

193. Kameri-Mbote, *supra* note 42.

194. *Id.*

195. *Id.*

196. *Id.*

women are left to press the point with their spouses, a currently unpopular position.<sup>197</sup> Furthermore, the intestate provisions create a number of problems as they attempt to deal with succession issues in both monogamous and polygamous marriages.<sup>198</sup> Finally, women have been disadvantaged in the administration and interpretation of the Act.<sup>199</sup> For example, courts have consistently held that married daughters are ineligible to inherit their father's property, even though these decisions directly contradict the clear language of the Act.<sup>200</sup>

Nevertheless, the Law of Succession Act has been heralded as improving the lives of women.<sup>201</sup> In allowing women to inherit property, the Act shifts the focus from the traditional African inheritance schemes in which property is held for the benefit of an expansive and extended family by men to the Western model where family property is held for the exclusive use of or at the discretion of a narrower nuclear family.<sup>202</sup> Kameri-Mbote comments that, insofar as wives' and daughters' rights are concerned, this shift is a radical one for which much of the society is unprepared.<sup>203</sup> Whether alternatives to such a shift exist is unclear because few customary practices have been explored with the goal of understanding them as providing women the independent economic means to develop adequately and to protect themselves given their dependent status and increasing vulnerability.<sup>204</sup>

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197. *Id.* (commenting that Kenyan society is "unprepared for the revolutionary aspects of the Law of Succession Act in so far as wives' and daughters' rights are concerned").

198. *See, e.g.*, The Law of Succession Act, (1981) Cap. 160 §§ 36, 40 (Kenya). For example, the Act creates problems for women who have married under monogamous systems and thus believe their marital property is protected in that where their husbands have entered into previous or subsequent marriages under systems that allow polygamy, these wives and their children are also entitled to inherit under the Act. *See* The Law of Succession Act, (1981) Cap. 160 § 3(5) (Kenya). Thus the marital property, upon the death of the husband, must be shared, undermining perhaps the concept of monogamous marriages and certainly a supposed benefit of it. Kameri-Mbote, *supra* note 42. Some have suggested that an Affiliation Act might be a way to meet the needs of these women and children. *Id.*

199. Kameri-Mbote, *supra* note 42.

200. *Id.*

201. ANNE MURAGU NYABERA, ALIYA MAWANI, & WANJA NGARI, SETTING THE PACE: THE 1999/2000 FIDA (K) ANNUAL REPORT ON THE LEGAL STATUS OF WOMEN 33 (2000) [hereinafter FIDA 1999].

202. Kameri-Mbote, *supra* note 42.

203. *Id.*

204. Nyamu, *Gender*, *supra* note 50, at 413. Nyamu urges that customary practices be explored to see where they might in fact support women's access to property among other resources instead of assuming that customary rules always burden women. She further argues that this exploration should replace acceptance of what simply may be dominant expressions of a customary practice meant to protect the interests of dominant groups. *Id.* at 406-09, 413-16.

### C. Kenya Women's Movement

Women in Kenya have historically organized themselves into women's groups to provide mutual support.<sup>205</sup> These groups have occasionally mobilized around national political issues such as the war of Independence,<sup>206</sup> or issues seen to protect women's lives and lifestyles.<sup>207</sup> Nonetheless, scholars generally have characterized these bodies as self-help and welfare groups that previously have been largely apolitical,<sup>208</sup> both by design and by fiat in the context of authoritarian and undemocratic regimes.<sup>209</sup> To the extent that the state directly addressed women's issues, it did so in terms of their contributions to the household and social welfare, and later in terms of the discourse of development.<sup>210</sup>

However, since the fifties these largely grassroots groups have progressively organized under national umbrella organizations such as Maendeleo ya Wanawake (Maendeleo), the oldest and largest of such organizations,<sup>211</sup> and the National Council of Women of Kenya (NCWK),<sup>212</sup> of which the Nobel prize winner and founder of the Green-belt tree planting movement, Wangari Maathai, was once a leader.<sup>213</sup>

205. See generally Rhoda Malemba Lewa, *Women's Groups and the Law in Kenya, in LAW AND THE QUEST FOR GENDER EQUALITY IN KENYA* 74 (Kivutha Kibwana & Lawrence Mute eds., 2000); Oduol & Kabira, *supra* note 29; Udvardy *supra* note 26; Audrey Wiper, *Equal Rights for Women in Kenya*, 9 J. MOD. AFR. STUD. 429 (1971).

206. Oduol & Kabira, *supra* note 29, at 106-09.

207. *Id.* at 106-11 (discussing the grassroots women's groups), 112-14 (discussing women NGOs); Lewa, *supra* note 205, at 74-77. See generally Udvardy *supra* note 26 (discussing pre-colonial women's groups as being focused on maintaining gender roles that provided a basis of power for women; in this sense they were not simply welfare organizations but groups with specific goals related to women's gendered power and empowerment); Nzomo, *Status*, *supra* note 88, at 19-20 (discussing rare unity among women during the 1992 elections).

208. Some of the Kenyan scholars who argue and characterize these groups as apolitical include: Kivutha Kibwana, *Women Politics and Gender Politicking: Question from Kenya, CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES* 194 (Onyango-Oloka et al. eds., 2001); Nzomo, *Impact*, *supra* note 5, at 15-16.

209. Nzomo, *Women's Movement*, *supra* note 4, at 170-73.

210. *Id.* at 177 (noting that these organizations moved from simply promoting welfare to promoting women's empowerment).

211. Wiper, *supra* note 205, at 432. Maendeleo ya Wanawake was the first and largest organization, the goal of which was to organize and mobilize the grassroots organizations. Wiper describes Maendeleo as "a self help organisation concerned with change at the most fundamental level, the home. It aims to improve domestic standards by educating women in home making, child care, nutrition, and hygiene." *Id.*; see also Nzomo, *Impact*, *supra* note 5, at 15 (on MYWO); Nzomo, *Women's Movement*, *supra* note 4, at 174-76; Oduol & Kabira, *supra* note 29, at 112-13 (on NCWK).

212. Nzomo, *Impact*, *supra* note 5, at 11; Oduol & Kabira, *supra* note 29, at 112.

213. See Udvardy, *supra* note 26, at 1757.

The establishment of women-focused professional non-governmental groups (NGOs) has increasingly complemented these grassroots organizations and umbrella groups. These NGOs include the Federation of Women Lawyers of Kenya (FIDA) and the League of Kenya Women Voters (The League), which draw upon the discourse of women's human rights in their articulation of women's issues.<sup>214</sup> The political efforts of individual women have also complemented grassroots groups and women's NGOs, together forming the essential elements in a vibrant women's movement in Kenya.<sup>215</sup>

With the advent of "multipartyism" in Kenya in the early 1990s and the global women's movement's success in articulating and promoting the ideal of gender equality and women's human rights, the Kenyan women's movement has increasingly and politically challenged the laws, policies and practices that support women's subordination in Kenya,<sup>216</sup> as evidenced by the efforts of the Women's Political Caucus.<sup>217</sup> Specifically, multipartyism and the global women's movement became major elements in the changing focus of the Kenyan women's movement. Multipartyism provided the political space for Kenyan women to challenge their subordination more directly.<sup>218</sup> The ideals of gender equality and women's human rights increasingly provided an ideological framework for Kenyan women's activism,<sup>219</sup>

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214. Oduol & Kabira, *supra* note 29, at 112-13. See generally FIDA 2003, *supra* note 2.

215. Oduol & Kabira, *supra* note 29, at 102 (discussing whether a women's movement in Kenya exists). Oduol & Kabira argue that Kenyan women's groups are numerous and vibrant and note that these organizations constitute the "source of the most radical consciousness to be found in the countryside providing women with a basis for resistance to exploitation." *Id.* (quoting Patricia Stamp, *Kikuyu Women's Self-Help Groups: Towards an Understanding of the Relation Between Sex-Gender System and Mode of Production in Africa*, in *WOMEN AND CLASS IN AFRICA* 27 (C. Robertson & I. Berger eds., 1986)). Because these groups "are often uncoordinated and fragmented," people tend not to think of these groups as constituting a women's movement that emphasizes a common objective, continuity, unity and coordination. *Id.* These groups do occasionally demonstrate coordination and cohesion, as they have existed since pre-colonial Kenya and have often stood together against cultural and patriarchal dominance. *Id.* at 103. Oduol and Kabira argue that Kenya's women's movement consists of three elements: grassroots rural groups; officially registered, largely urban-based women's non-governmental organizations; and the efforts of individual women. *Id.*

216. Lewa, *supra* note 205, at 74.

217. See FIDA 1998, *supra* note 67, at 29-31.

218. Nzomo, *Women's Movement*, *supra* note 4, at 177-81.

219. In this vein, they have supported efforts to mainstream women in economic development programs, supported legislation for affirmative action of women and equality, as well as been involved in efforts to change the marriage laws, fight domestic violence, oppose early marriage, fight for equal citizenship rights, legalize and ensure inheritance rules for women and girls. Furthermore, they have insisted that the Kenyan government adopt and implement both CEDAW in its entirety and the Beijing Platform. See, e.g., Nzomo, *Impact*, *supra* note 5, at 11-13.



and the calls for constitutional review provided a concrete issue and target for their efforts.<sup>220</sup>

### 1. *Multipartyism: Space*<sup>221</sup>

Women's issues prior to the early nineties had been discussed in the context of development. Development was a primary concern for many of the developing countries after independence. This concern was also captured in the nascent global women's movement.<sup>222</sup> The vibrancy of the hundreds of small women's groups throughout Kenya made them important to development projects and the dissemination of development information, with a number of larger women's NGOs being organized around these efforts.<sup>223</sup> Although these programs provided some social benefits to women, they failed to provide any change in the overall economic conditions of women as a group and failed to act as empowering agents.<sup>224</sup>

Three factors contributed to this failure. First, due to the socio-economic and historical development of the country, women lacked influence or control over vital economic resources and technologies, development plans and policies, or the "fruits of their production."<sup>225</sup> Thus, even where women's groups were involved in income-generating projects, these projects rested on a weak economic base.<sup>226</sup> Second, women's groups lacked cohesion.<sup>227</sup> The nature of the small women's groups meant that they primarily sought to address the local and immediate needs of their members.<sup>228</sup> Even though many of these groups

220. See TRAINING MANUAL, *supra* note 17, at 1-3.

221. See Nzomo, *Women's Movement*, *supra* note 4, at 176 (noting that multipartyism provided space for the women's movement to become a force in shaping democratic change in Kenya).

222. See *generally Promoting Women in Development*, in WOMEN GO GLOBAL, (United Nations, Division for the Advancement of Women CD-ROM, July 2002). This interactive multimedia CD-ROM, published by the U.N. Division for the Advancement of Women, chronicles many of these efforts, beginning in 1945 up to the year 2000. It notes that several months after the New Mexico conferences, the U.N. declared the years 1976-1985 the Decade for Women. *Id.* The international activities during this time coincided with the second wave of feminism in the West and the liberation of large numbers of women from developing countries eager to assist in the decolonization and development of processes in their countries. *Id.*

223. Nzomo, *Impact*, *supra* note 5, at 11-12; Udvardy, *supra* note 26, at 1749-51, 1757-58.

224. Nzomo, *Women's Movement*, *supra* note 4, at 170-75 (discussing the colonial state's interest in larger NGOs as a mechanism to assert control over women and grassroots groups); Nzomo, *Impact*, *supra* note 5, at 12-13.

225. Nzomo, *Impact*, *supra* note 5, at 12.

226. *Id.*

227. *Id.* at 13.

228. *Id.*; see also Oduol & Kabira, *supra* note 29, at 110.

had been organized under the large umbrella groups, these umbrella groups, like other women's NGOs, often split within themselves over leadership issues and goals.<sup>229</sup> Third, the Kenyan state was authoritarian, and although it conceded that women had a role in development, it denied the fact that women faced any discrimination.<sup>230</sup> Efforts by women to articulate their specific problems or to challenge unfair practices and laws therefore often faced rebukes and minimalization.<sup>231</sup> The state further sought to co-opt women's organizations to ensure that the primary goals of the one-party state remained minimally contested, including its views that women were not subordinated and that at best women's efforts should focus on non-political welfare issues.<sup>232</sup> For example, Maendeleo, with its emphasis on women as "homemakers," at one point officially merged with the state party, KANU.<sup>233</sup> At the same time, NCWK, which during that time had been one of the only NGOs to "take a position on national issues" and to make demands for legislative changes in favor of women's rights, suffered declining membership and a diminishing role.<sup>234</sup>

Kenya, however, was not immune to the wave of democratization that swept Africa and many parts of the world after the collapse of the Soviet Union in 1989 and the international calls for good governance that followed.<sup>235</sup> In the 1990s, pro-democracy elements in Kenyan society began advocating for multipartyism. Specifically, civil society began advocating for repeal of section 2A of the constitution, the provision that had made Kenya a *de jure* one-party state.<sup>236</sup> The people further called for the registration of additional

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229. Nzomo, *Impact*, *supra* note 5, at 12-13.

230. *Id.* at 15; *see also* Makau Mutua, *Taming Leviathan*, *supra* note 7, at 24-31 (describing the emergence constitutionally of the authoritarian state upon the framework of the colonial state in post-Independence Kenya).

231. Nzomo, *Impact*, *supra* note 5, at 15; Oduol & Kabira *supra* note 29, at 113 (noting that the government censored the NCWK, while under the leadership of Wangari Maathai, for challenging government policies).

232. Nzomo, *Impact*, *supra* note 5, at 15; Nzomo, *Women's Movement*, *supra* note 4, at 170-71; Oduol & Kabira, *supra* note 29, at 111.

233. Nzomo, *Impact*, *supra* note 5, at 15.

234. *Id.*

235. *See generally* George T. Abed & Sanjeev Gupta, *The Economics of Corruption: An Overview*, in GOVERNANCE, CORRUPTION, & ECONOMIC PERFORMANCE 1 (George T. Abed & Sanjeev Gupta eds., 2002), available at <http://www.imf.org/external/pubs/nft/2002/govern/index.htm> (making the link between the end of the Cold War and the rise in international concern in issues of state accountability or good governance). For a critique of the good governance framework and ideology, see James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, in 1998-1999 THIRD WORLD LEGAL STUD. 65; Nyang'oro & Shaw, *supra* note 35.

236. Mutunga, *Building*, *supra* note 58, at 214-23.

political parties.<sup>237</sup> These calls and protests resulted in the repeal of the constitutional ban on political parties and the first multiparty elections in Kenya in 1992.<sup>238</sup>

Since the 1990s, this activism also created the space for women groups to engage in concerted political activities and for the women's movement to expand. For example, women's organizations such as NCKW, the League of Kenya Women Voters, and the Association of African women for Research and Development (AAWORD),<sup>239</sup> actively participated in galvanizing women and the country for the first multiparty elections, finding a rare but intermittent unity of purpose.<sup>240</sup> In fact, NCKW "launched the National Committee on the Status of Women (NCSW) to educate women on democracy and their political rights as Kenyan citizens."<sup>241</sup> Furthermore, it played an important role by organizing the First and Second National Women's Conventions in 1992 and 1993 and "brought women together to strategize and demonstrate their solidarity in the struggle against gender-based oppression."<sup>242</sup> The NCSW was built on a strategy of "Unity in Diversity" and turned their attention toward political empowerment with the hope of securing thirty to thirty-five percent of all parliamentary and civic seats.<sup>243</sup>

In addition, many women's organizations were established during this time.<sup>244</sup> For example, the League of Kenya Women Voters,<sup>245</sup>

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237. *Id.* at 215-17. See generally MUTUNGA, CONSTITUTION-MAKING, *supra* note 58.

238. The Kenya Constitution did not make Kenya a *de jure* one-party state until 1982 when it was amended by adding Section 2A. Makau Mutua, however, argues that Kenya had been a *de facto* one-party state since 1969. Makau Mutua, Taming Leviathan, *supra* note 7, at 28-35.

239. Oduol & Kabira, *supra* note 29, at 112-13. FIDA was established after the 1985 United Nations Third World Conference on Women, which was held in Nairobi. FIDA Kenya, *Rules for Application for Membership to FIDA Kenya* (2003), at [http://www.fidakenya.org/ab\\_aboutus.htm](http://www.fidakenya.org/ab_aboutus.htm); see also *infra* Part III.

240. Nzomo, *Status*, *supra* note 88, at 19-20 (commenting on women's rare unity around the 1992 multiparty elections). The League of Kenya Women Voters, for example, organized a voter education program during this time. Oduol & Kabira, *supra* note 29, at 113.

241. Oduol & Kabira, *supra* note 29, at 112.

242. *Id.*

243. Nzomo, *Women's Movement*, *supra* note 4 at 177.

244. Nzomo notes that women's organizations mushroomed after the 1992 election. Nzomo, *Status*, *supra* note 88, at 20 n.4.

245. The League of Kenya Women Voters was established in 1992 following the repeal of section 2A. Colleen Harrington, *Intern Experiences and Reports: Kenya League of Women Voters, Nairobi Kenya*, available at [http://www.claihr.org/claihr\\_new/n\\_intern\\_harrington.html](http://www.claihr.org/claihr_new/n_intern_harrington.html).

The Education Centre for Women in Democracy,<sup>246</sup> ABANTU,<sup>247</sup> and Women in Law and Development in Africa (WiLDAF),<sup>248</sup> were all established during the space created by the pro-democracy movement. These groups would join approximately fifty other women's groups to become the Women's Political Caucus, the alliance that fought to ensure that women would be included in the constitutional review process.<sup>249</sup> Kenyan women thus began to challenge their status and to act on the growing realization that even economic empowerment would require that women be in positions to influence policies, practices, and laws that hindered their development.<sup>250</sup>

This shift in women's advocacy from a focus on women's issues almost solely within the realm of home and/or development to a focus that included activism around women's rights was also occurring at the international level.<sup>251</sup> Because many of the Kenyan NGOs established during this period were initially affiliated with larger regional and international organizations,<sup>252</sup> it is unsurprising that these developments influenced the NGOs' efforts.

246. The Education Centre for Women in Democracy was founded in 1993. Education Centre for Women in Democracy, <http://www.ecwd.org/> (follow "About ECWD" hyperlink).

247. ABANTU for Development, an NGO that believes "that the continuous gender disparity is a violation of human rights and entrenches poverty especially among women and is a major hindrance to accelerated development," established in 1990. ABANTU for Development, <http://www.h-net.org/~harrison/ABANTU/aboutrowa.html>.

248. Women in Law and Development in Africa (WiLDAF) was founded in 1990. WiLDAF, <http://www.wildaf.org.zw/>.

249. See FIDA 1998, *supra* note 67, at 29-31.

250. Nzomo, *Impact supra* note 5, at 15-16. In her 1989 article, Nzomo urges the women's movement to become political, noting that "it is mainly through political struggle that power to control and influence social change in any society is attainable." She further urges women to increase their participation in trade unions to "fight for their rights as workers" and also to "seek greater and more effective representation in high level decision-making positions in the political system. *Id.* at 16; see also IMPACT, *The Unfinished Women's Agenda*, KAMPALA, Dec. 31, 2001, at 20 (quoting Phoebe Asiyo's article "Words No longer Enough":

There is growing recognition that economic and political participation of women can not be separated. In fact, women's economic independence is critical for their exercise of influence on decisions and laws that affect their lives and families as well as their country. There are strong linkages between leadership and governance on one hand, and the processes that lead to poverty and gender disparities on the other.)

See also Nzomo, *Women's Movement, supra* note 4 at 177-81 (discussing the shift "from welfare to empowerment" and explaining that it was women's "hope that if enough women attained key political decisionmaking capacities, they would be able to repeal the laws that discriminate against women at the social and economic levels, and they could design alternate development policies to mainstream, rather than marginalize, women's issues").

251. Oduol & Kabiri, *supra* note 29, at 200.

252. *Id.* (noting that many of the formalized women's organizations were affiliated with international women's organizations).

## 2. *The Ideal of Gender Equality and Women's Human Rights*

The Kenyan women's movement has informed and been informed by the global women's movement for women's human rights.<sup>253</sup> Women at the global level have increasingly fought for and, to a lesser degree, secured the articulation and understanding of women's rights as human rights,<sup>254</sup> encouraged the addition of new rights from the perspectives of women's bodies and lives,<sup>255</sup> and pushed for an understanding of human rights as indivisible, interrelated and interdependent.<sup>256</sup> Several world conferences, some women-centered and some non-women centered, have captured these ideals.<sup>257</sup> At the center of

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253. Kenyan women's efforts have informed the global women's rights movement. For instance, international literature on women's rights has highlighted Wangari Maathai's environmental efforts in the green-belt movement. *See, e.g., Introduction to United Nations Decade for Women: Nairobi Conference Adopts Forward Looking Strategies*, in *WOMEN GO GLOBAL*, *supra* note 222. At the same time Kenyan women have advocated for the integration of CEDAW, in its entirety, into Kenyan law and have fought for the implementation of the Beijing Platform. *See* FIDA 1997, *supra* note 78, at 64.

Furthermore, the gender equality ideal embodies standards upon which most governments have agreed. *See, e.g., CEDAW*, *supra* note 62. It thus serves as a benchmark against which women may evaluate their efforts. The grounding of the gender equality ideal in the international human rights regime has been crucial to Kenyan women's advocacy for women's rights because it situates and legitimizes their efforts. International acceptance of women's rights legitimizes the gender equality ideal in the eyes of the government, with Kenyan women constantly reminding the government that it has signed many human rights conventions. *TRAINING MANUAL*, *supra* note 17, at 42-50. It also legitimizes women's efforts in the eyes of the Kenyan people, who have often articulated their struggle for better government in terms of human rights. A. Mutua, *Foreword*, *supra* note 6, at 7.

254. Hilary Charlesworth, *Introduction to 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* xix (Kelly D. Askin & Dorean M. Koenig eds., 1999) (stating that "the preference for the term 'women's international human rights' . . . suggests a bold claim to inclusion in the mainstream rather than specialized side waters" of human rights in the 1990s and arguing that women and women's activism moved to the front and center of the human rights movement when women began to engage the human rights regime directly). *See generally* Berta Hernández-Truyol, *Human Rights through a Gendered Lens: Emergence, Evolution, Revolution*, in *1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 3 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

255. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at 217, U.N. GAOR, 48th Sess, Supp. No. 49, U.N. Doc. A/48/49 (Dec. 20, 1993) [hereinafter *DEVAW*]; *see also* Sherrie L. Russel-Brown, *Rape as an Act of Genocide*, 21 *BERKELEY J. INT'L L.* 350, at 357, 373 (2003) (discussing the classification of rape as a crime against humanity).

256. World Conference on Human Rights in Vienna (1993), <http://www.unhchr.ch/html/menu5/wchr.htm>; *see also* Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 *AM. J. INT'L L.* 152 (1994) (discussing the Vienna Conference).

257. Hernández-Truyol, *supra* note 254, at 31-33. Hernández-Truyol notes that during the 1990s the U.N. hosted six "gender-marginalization-shattering" conferences that dealt with issues related to women's rights. Women were a central force in many of these conferences. The result of this engagement was a shift in focus to view women's rights as human rights.

the women's human rights concept is the ideal of gender equality.<sup>258</sup> This ideal is grounded in the language of the Universal Declaration and other human rights instruments, which, in addition to language recognizing "the inherent dignity and . . . the equal and inalienable rights of all members of the human family," also reaffirms "fundamental human rights . . . the dignity and worth of the human person and . . . the *equal rights of men and women* . . ." <sup>259</sup> The understanding of gender equality as simply requiring the social equality between women and men is grounded in this ideal.

Women have traditionally been absent from official efforts promoting human rights, leaving a one-sided perspective in human rights discourse.<sup>260</sup> For example, although Eleanor Roosevelt chaired the committee charged with drafting the Universal Declaration of Human Rights (UDHR) in the 1940s, she was the only woman on the committee.<sup>261</sup> Furthermore, only four women were among the one hundred sixty signatories of the U.N. charter.<sup>262</sup> Women's increasing

258. *Id.* at 29-30.

259. Universal Declaration of Human Rights (UDHR), G.A. Res. 217A(III), at 71, U.N. Doc A/810 (Dec. 10, 1948). Similar language is also found in the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A(XXI), at 50, art. 3, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); and the International Covenant on Civil and Political Rights, G.A. Res. 2200B(XXI), at 53, art. 3, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

260. Charlesworth, *Crisis*, *supra* note 18, at 786 (noting that women were absent in the "processes of defining and implementing human rights standards").

261. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (discussing Roosevelt's role as chair of the UDHR drafting commission).

262. *UN Charter Calls for Equality: Four Women Sign UN Charter*, in *WOMEN GO GLOBAL*, *supra* note 222. Much of the "conceptual work for the Charter's language on women's rights grew" out of women's action in the 1920s and 1930s, particularly as advanced by the Pan American Union's Inter-American Commission of Women and the League of Nations. *Id.* Even though few women participated in the formulation of the initial human rights regime, the U.N. Charter elaborated on equality or promoted an additional equality right for women, declaring the "equal rights of men and women." U.N. Charter pmbl. Furthermore, the UDHR and the Political and Economic Covenants declare and/or require state parties to undertake to ensure the "equal rights of men and women" while prohibiting discrimination based on sex. See *supra* note 259.

The U.N. also established the Commission on the Status of Women ("CSW") in 1946. *Commission on the Status of Women Established*, in *WOMEN GO GLOBAL*, *supra* note 222. It monitored and contributed to U.N. activities in early years. *Id.* The CSW initially focused on the issues related to the status of women including the political rights of women, equal pay, women and education, marriage rights, customs and traditions harmful to women, trafficking, and prostitution. *CSW Focuses on Women's Rights*, in *WOMEN GO GLOBAL*, *supra* note 222. In the early 1960s, with the entry of developing countries into the U.N. and their concerns about development, the CSW began to focus more on promoting women in socio-economic development. *Promoting Women in Development*, in *WOMEN GO GLOBAL*, *supra* note 222. Twenty-one developing countries and Poland prompted the U.N. to draft the Convention on the Elimination of Discrimination Against Women, on the theory that discrimination against women impeded development. Fraser,

involvement in developing the gender equality vision within the human rights movement therefore has been essential.<sup>263</sup> This vision seeks to re-articulate the human rights regime and its fundamental principle of equality to account for and respond to women's biology as part of human embodiment and diversity and to eliminate systems of disadvantage that limit women's human potential.<sup>264</sup> The gender equality ideal understands human rights as an international set of standards to which the world's nations agree to meet.<sup>265</sup> Furthermore, it takes seriously the idea that women's rights are human rights.<sup>266</sup>

Although the idea of gender equality is grounded in international human rights, the ideal has been developed in part to overcome some of the problems that limited the initial human rights regime's applicability to women's lives.<sup>267</sup> Women have observed that the regime's limitations arise in part from three sources. The first limiting source is that men were the primary creators of the human rights regime, and the regime therefore reflects men's historical control over most social institutions and male perspectives, including their bodies, lives, and experiences.<sup>268</sup> Second, the regime is limited by social systems

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*supra* note 18, at 889-94 (noting that this call for a declaration came in 1963 during deliberation on human rights questions in ECOSOC).

263. Hernández-Truyol, *supra* note 254, at 32 (noting that the women's human rights revolution was "started by women for women with the goal of inclusion and representation in the global sphere").

264. *Id.* at 34-39.

265. Abdullahi Ahmed An-Na'im, *Introduction to HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 1* (Abdullahi Ahmed An-Na'im ed., 2003) (noting that international human rights provide an independent standard to which the community of nations must meet); see also R. Christopher Preston & Ronald Z. Ahrens, *United Nations Convention Documents in Light of Feminist Theory*, 8 MICH. J. GENDER & L. 1, 2 (2001) (noting that feminists have used the international human rights regime because they see it as a forum for advancing women's rights).

266. It also represented an effort to recapture and to approach women's economic development from a different perspective, a human rights perspective. Diane Otto, *A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 115, 123 (Kelly D. Askin & Dorean M. Koenig eds., 1999) (citing Jane Connors, *NGOs and the Human Rights of Women at the United Nations*, in "THE CONSCIENCE OF THE WORLD": THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE UN SYSTEM 147, 158-60 (Peter Willetts ed., 1996)) (explaining that the "strategy aimed at achieving the recognition of women's 'human rights,' rather than 'needs,' was launched . . . [to] provide a new focus for the floundering women-in-development agenda").

267. Charlesworth, *Crisis*, *supra* note 18, at 786.

268. The invisibility of women and any perspective they might bring to the human rights regime was accomplished in two primary ways. First, men predominantly controlled and led the states themselves. This control resulted from the socio-historical development of most states, which embodied social structures and cultural, political, and religious laws, norms, and practices of the communities they represented. These norms, practices, and structures saw and enforced men as the "natural" governors of family, social, and institutional life and thus the public actors, spokesmen, and decision makers in all social institutions. As such women were largely absent as state leaders. Second,

that historically have separately regulated women's lives as part of the private sphere and thus outside of the vision and purview of state action.<sup>269</sup> Relatedly, the third source that limits the applicability of human rights to women's lives is the regime's orientation itself. This orientation primarily focuses on the state and regulates state action vis-à-vis the individual, largely regulating public activity while ostensibly preserving private activity to the individual. To the extent that women's concerns were seen as relating to issues regulated in the private sphere, their issues warranted little attention from the international regime.<sup>270</sup> The human rights regime further manifests a hierarchy of rights, privileging political and civil rights over economic, social, and cultural rights,<sup>271</sup> and also over collective rights, focusing

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the human rights regime focused on legitimate state action, which was conceptualized as relying on the consent of the governed (at one point mostly men) and regulating the public sphere of action between individuals. Report of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, ¶ 4.24, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) (noting that "[m]en play a key role in bringing about gender equality since, in most societies, men exercise preponderant power in nearly every sphere of life, ranging from personal decisions . . . to the policy and programme decisions taken at all levels of Government").

Women, however, were already contesting the exclusivity of men's rights to govern all forms of social life and as the only public actors required to consent (vote) to governance when states were constructing the human right regime. Nonetheless, women were largely viewed as attendant to, dependent upon, and governed by their fathers and husbands. Women's duties were primarily to these men and children within the context of the family unit. The family unit was perceived as part of the private sphere inappropriate for state action. Furthermore, it was idealized and viewed as unproblematic for the individuals within it. See Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to Int'l Law*, 85 AM. J. INT'L L. 613, 621 (1991); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 895 (1989); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

269. Many feminists discuss the impact of the public/private distinction in law. See, e.g., Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda G. Dallmeyer ed., 1993); Susan Millns, *Women's Rights After the Human Rights Act 1998*, in WOMEN MAKING CONSTITUTIONS: NEW POLITICS AND COMPARATIVE PERSPECTIVES 142, 146 (Alexandra Dobrowolsky & Vivien Hart eds., 2003) (discussing cases in which the European Court of Human Rights has held that "states may be under positive obligations to prevent harm caused by private persons"); Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 126 (Julie Peters & Andrea Wolper eds., 1995). Although women certainly constituted individuals covered by human rights law, their activities were regulated and largely restricted to this private sphere by the political, legal, economic, cultural, and other social relations where their access to education, economic means, decision-making, etc., was often limited. Hilary Charlesworth, *Human Rights as Men's Rights*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 103, 103-05 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter Charlesworth, *Men's Rights*].

270. See *supra* note 268.

271. This hierarchy privileges civil and political rights as the first generation of rights, commensurate with the power of the West, over economic, social, and cultural rights, the second generation of rights. See Hurst Hannum, *Contemporary Developments in the*



on the individual rather than groups or communities.<sup>272</sup> Finally, the regime understands equality as requiring the state to provide the same treatment to individuals while presuming the overall fairness and neutrality of current social orderings.<sup>273</sup> These factors tend to reinforce the first two limitations, already inherent in the structure of the regime, rendering its orientation both masculinist and status quo oriented, with limited applicability to women's bodies, lives, and social subordination.<sup>274</sup>

The gender equality ideal confronts these issues within the human rights regime by analyzing human rights from the perspective of women, women's biology, and women's lives. This perspective seeks to alter the human rights regime in five significant ways. First it seeks to reformulate understandings about specific human rights through re-envisioning them from a woman's perspective, a process that often has entailed revealing the hidden male viewpoint in these rights as well as unpacking the public aspects of seemingly private regulation.<sup>275</sup> Thus, this process, for example, has led to violence against women being understood as a violation of human rights<sup>276</sup> and rape as a crime against humanity where used as a systematic tool of war.<sup>277</sup> In the process more people have come to believe that human rights, in certain regards, also apply to private actors,<sup>278</sup> as opposed to being solely the obligations of states.

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*International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431, 1432-36 (1991) (analyzing the debate in both the League of Nations and the United Nations between advocates of civil and political rights and advocates of economic, social, and cultural rights). In human rights equality jurisprudence, this hierarchy requires the state to provide equal treatment under the law in the realm of political and civil rights while presumably providing "equal opportunity" to access any other rights. *Id.* at 1434-35.

272. Developing countries joining the United Nations challenged the human rights regime's focus on individual rights and were particularly concerned about the right to development as a collective right and superior to individual claims to property. This concern resulted in an effort to formulate a third generation of collective rights. Karel Vasak, *Pour une Troisième Génération des Droits de l'Homme*, in *ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET* 837 (Christophe Swinarski ed., 1984). For further discussion of the subordination of collective rights, see generally REBECCA J. COOK, *WOMEN'S HEALTH AND HUMAN RIGHTS: THE PROMOTION AND PROTECTION OF WOMEN'S HEALTH THROUGH INTERNATIONAL HUMAN RIGHTS LAW* 16, 23-36 (1994); Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3 (1988); Charlesworth, *Men's Rights*, *supra* note 269; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985).

273. Otto, *supra* note 266, at 115-17, 126-31.

274. *Id.*

275. See Charlesworth, *Men's Rights*, *supra* note 269.

276. DEVAW, *supra* note 255, at art. 5(g).

277. Russel-Brown, *supra* note 255.

278. Rebecca J. Cook, *State Responsibility for Violations of Women's Rights*, 7 HARV. HUM. RTS. J. 125, 137-38 (1994).

Second, the gender equality ideal has advanced a subtle but significant shift in human rights equality analysis from one that presumes the fairness of current social orders and defines equality as providing the same, nondiscriminatory treatment to each individual, to an analysis that promotes equality by recognizing that inequality and disadvantage are inherent within social orders.<sup>279</sup> This shift first appeared in the Convention on the Elimination of Discrimination Against Women (CEDAW). Later human rights and state understandings further articulated this shift.

CEDAW obligated states to take action to eliminate discrimination against women.<sup>280</sup> It defines discrimination as:

... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>281</sup>

CEDAW then proceeds to obligate states to adopt appropriate legislation and other measures; to prohibit discrimination against women by any person, organization, or enterprise; and to modify or abolish existing laws, regulations, customs, and practices that constitute discrimination against women.<sup>282</sup> It specifically requires states to modify the social and cultural patterns of conduct of men and women, including stereotypes,<sup>283</sup> and to eliminate customary and other practices based on the idea of inferiority or superiority of either of the sexes.<sup>284</sup>

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279. This shift is also apparent in Canadian jurisprudence. Although Canada recognizes that equality as requiring the same treatment of different individuals, Canadian courts have also recognized “that every difference in treatment between individuals under the law will not necessarily result in inequality and . . . identical treatment may frequently produce serious inequality.” Colleen Sheppard, *Equality Rights and Institutional Change: Insights from Canada and the United States*, 15 ARIZ. J. INT’L & COMP. L. 143, 156 (quoting *Andrews v. Law Soc’y of B.C.*, [1989] S.C.R. 143, 164). Canadian courts further acknowledge that “the accommodation of differences . . . is the essence of true equality . . .” *Id.* (quoting *Andrews*, [1989] S.C.R. at 169). Canadian jurisprudence has also revealed “a willingness to accept a more substantive and less formalistic approach to equality and an explicit rejection of the similarly situated test.” *Id.*

280. *See* CEDAW, *supra* note 62.

281. *Id.* art. 1.

282. *Id.* art. 2.

283. *Id.* art. 10 (c).

284. *Id.* art. 5. CEDAW further requires states to “ensure the full development and advancement of women.” *Id.* art. 3. It also allows states to establish affirmative action programs or “temporary special measures aimed at accelerating de facto equality between men and women . . .” *Id.* art. 4. Additionally, CEDAW obliges states to take

An important feature of CEDAW is that it recognizes that equality did not exist between women and men.<sup>285</sup> In doing so, it looked behind the formal legal declarations of equal and fair treatment of people to the actual conditions of women's lives; that is, it looked to the substance of women's lives as compared to men in determining whether equality existed and found it did not.<sup>286</sup> As such CEDAW forced states to acknowledge women's inequality and then to correct it or to justify or deny that women's secondary status existed.

The promotion of gender equality also marked a shift, perhaps unrecognized at the time, in equality jurisprudence more generally. The fact that CEDAW sought to promote equality and increased awareness that equality did not already exist made promoting gender equality in society, at the level of principle, explicit. Gender equality became a value and a condition to which countries were not just to aspire but also to work toward. This idea of promoting equality is captured in the U.N. Human Rights Committee's adoption of General Comment No. 28, which, although seeming to reiterate an already known position, actually takes this position explicitly for the first time. In it, the Committee notes:

The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials in human rights, and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant. The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.<sup>287</sup>

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measures to eliminate discrimination against women in remarriage and to ensure equality of women and men in freely choosing a partner, to enter marriage based on consent, and to freely decide the number and spacing of children. *Id.* art. 16. Moreover, CEDAW requires states to provide equal rights to women in acquiring nationality and to ensure equal access to education, *id.* art. 10, employment, *id.* art. 11, and health care, *id.* art. 12, as well as equal opportunities for women to represent their governments and formulate government policy. *Id.* arts. 7-8. The convention also pays particular attention to the issue of trafficking against women, *id.* art. 6, and to "the particular problems faced by rural women." *Id.* art. 14.

285. *Id.* pmb1.

286. *Id.*

287. Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women (Article 3)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 179 (May 12, 2003).

This language builds on a shift perhaps started with CEDAW but emphasized and further explained in later women's conferences, including the World Conference to Renew and Appraise the Achievements of the United Nations Decade for Women (Nairobi Conference),<sup>288</sup> the United Nations International Conference on Population and Development (ICPD),<sup>289</sup> and the Fourth World Conference on Women (Beijing Conference).<sup>290</sup> A more general shift in philosophy regarding the promotion of equality also began to emerge in some U.N. member countries.<sup>291</sup> Additionally, this shift within the gender equality ideal

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288. For example, the Nairobi conference noted that equality meant not only legal equality and "the elimination of de jure discrimination, but also equality of rights, responsibilities and opportunities for the participation of women in development, both as beneficiaries and as active agents." Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, World Conference, July 15-26, 1985, Nairobi, *Nairobi Forward-Looking Strategies for the Advancement of Women*, ¶ 10, U.N. Doc. A/CONF.116/28/Rev.1 (1986), available at <http://www.un.org/womenwatch/confer/nfls/Nairobi1985report.txt> [hereinafter *Nairobi Forward-Looking Strategies*]. The Nairobi Conference report also explained that:

Equality is both a goal and a means whereby individuals are accorded equal treatment under the law and equal opportunities to enjoy their rights and to develop their potential talents and skills so that they can participate in and can benefit from its results. For women in particular, equality means the realization of rights that have been denied as a result of cultural, institutional, behavioural and attitudinal discrimination. Equality is important for development and peace because national and global inequities perpetuate themselves and increase tensions of all types.

*Id.* at ¶ 11.

289. The International Conference on Population and Development notes that "men play a key role in bringing about gender equality since in most societies men exercise preponderant power in nearly every sphere of life." International Conference on Population and Development, Sept. 5-13, 1994, Cairo, *Programme of Action of the International Conference on Population and Development*, ¶ 4.24, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994).

290. The Beijing Platform explains that "[e]quality between women and men is a matter of human rights and a condition for social justice and is also a necessary and fundamental prerequisite for equality, development and peace." Fourth Conference on Women, Sept. 4-15, 1992, *Beijing Declaration and Platform for Action*, ¶ 1, U.N. Doc. A/CONF.177/20, Annex II (Oct. 17, 1995). The Beijing Declaration gives substance to the idea of promoting equality by requiring governments to ensure "equal access to and equal treatment of women and men in education," by recognizing the need to increase women's access to health care, and by promoting women's economic rights and independence, including actions to provide access to employment and control over resources. Fourth Conference on Women, Sept. 4-15, 1992, *Beijing Declaration and Platform for Action*, ¶¶ 15, 17, 30, U.N. Doc. A/CONF.177/20, Annex I (Oct. 17, 1995).

291. For example, Canadian jurisprudence interpreting the Canadian Charter of Rights and Freedoms understands the Charter as promoting equality. *See, e.g., Andrews v. Law Soc'y. of B.C.*, [1989] S.C.R. 143, 171. Although Canadian women have fought for this interpretation, the idea of promoting equality was not limited to promoting equality between women and men but to promoting equality throughout all Canadian society. *Id.* In South Africa, the constitution seeks to "promote the achievement of equality," committing itself to, among other things, both a non-racist and non-sexist society. S. AFR. CONST. 1996, art. 9. Other newly enacted constitutions throughout Africa contain language that encompass this shift. *See, e.g., UGANDA CONST.* (1995).

is important because, in recognizing the disadvantages embedded in current social orderings,<sup>292</sup> the ideal justifies a focus on the results of specific decisions, policies, and programs.<sup>293</sup> It thus concerns itself to some degree with outcomes.<sup>294</sup>

Third, women's global activism around the gender equality ideal has begun to promote an understanding of affirmative action as a necessary and complementary measure geared toward promoting equality, as opposed to a deviation from equality.<sup>295</sup> CEDAW approved the use of affirmative action measures to "accelerate" equality, which "actions are not considered discrimination,"<sup>296</sup> adding steam to this notion. One can also view affirmative action policies as a key measure in attempts to effectuate economic, social, and cultural rights by bringing more women to the decision-making table and by applying these policies to certain non-state actors.<sup>297</sup> Later international conferences also advanced this matrix of ideas.<sup>298</sup> Regarding the participation of women in international bodies, the Nairobi conference report specifically refers to the phrase "affirmative action."<sup>299</sup> The Beijing Platform,

292. Interpreting the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979).

293. See Cook, *supra* note 278, at 137.

294. *Id.*

295. Women's global activism as manifest in the Nairobi and Beijing conferences advanced the idea that affirmative actions measures should be used, at a minimum, to correct societal imbalances in the status of women. See *infra* note 298.

296. CEDAW, *supra* note 62, at art. 4.

297. See, e.g., Title VII of The Civil Rights Act of 1964, 42 U.S.C.S. § 2000e.

298. The Copenhagen, Nairobi, and Beijing conferences all reiterate that affirmative actions measures should be used, at a minimum, to correct societal imbalances in the status of women. The Copenhagen conference states, for instance, in paragraph 50:

Governments should, where appropriate, design certain special transitional strategies and establish compensatory mechanisms aimed at achieving equality of opportunity in education, employment and health as a means of overcoming existing inequalities in national administration, the educational system, employment, health services and the like, it being clearly understood that the special strategies are designed to correct imbalances and discrimination and will be phased out when such imbalances and discrimination no longer exist.

World Conference of the United Nations Decade for Women: Equality, Development and Peace, Copenhagen, July 14-30, 1980, ¶ 50, U.N. Doc. A/CONF.94/35 (1980).

299. The Nairobi Conference report notes:

All bodies and organizations of the United Nations system should therefore take all possible measures to achieve the participation of women on equal terms with men at all levels by the year 2000. To achieve this goal, the secretariats of the United Nations and all the organizations and bodies within the system should take special measures, such as the preparation of a comprehensive affirmative action plan including provisions for setting intermediate targets and for establishing and supporting special mechanisms . . .

*Nairobi Forward-Looking Strategies*, *supra* note 288, at ¶ 358.

on the other hand, uses a variation of the European term “positive action” for affirmative action programs.<sup>300</sup>

Fourth, in the development of the gender equality ideal, the concept of gender mainstreaming also emerged, a process that has both institutional and policy implications. Gender mainstreaming primarily requires that all programs and policies be evaluated for their impact on women and men as gendered individuals,<sup>301</sup> but it has also encouraged the creation of new institutional frameworks to ensure gender analyses and parity between women and men.<sup>302</sup> The precursors to the idea of gender mainstreaming appear as early as the Nairobi conference,<sup>303</sup> but the notion did not specifically emerge

300. References to positive action are in the sections on education. *Beijing Declaration and Platform for Action*, Annex II, *supra* note 290, at ¶ 80(c). In regard to political participation, the Beijing Platform provides that governments should:

Commit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary, including, *inter alia*, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions . . .

*Id.* at ¶ 190(a).

With regard to women and the economy, the Beijing Platform asserts that affirmative action is to be a mechanism for women to access social and economic resources. For instance, actions to be taken by government employers and others include “[i]mplement[ing] and monitor[ing] positive public- and private-sector employment, equity and positive action programmes to address systemic discrimination against women in the labour force . . .” *Id.* at 178(f). The Beijing Platform further provides that governments should: “[d]evise mechanisms and take positive action to enable women to gain access to full and equal participation in the formulation of policies and definition of structures through such bodies as ministries of finance and trade . . .” *Id.* at ¶ 165(d). These ideas reinforce the gender equality ideal’s commitment and focus on effectuating equality in society and on results as the measure of women’s advancement.

301. Gender mainstreaming is

[t]he process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.

U.N. Econ. & Soc. Council [ECOSOC], *Report of the Economic and Social Council for 1997*, at 27, U.N. Doc. A/52/3 (Sept. 18, 1997) [hereinafter *1997 ECOSOC Report*].

302. See *Beijing Declaration and Platform for Action*, *supra* note 290, at ¶¶ 1-5.

303. See *Nairobi Forward-Looking Strategies*, *supra* note 288, at ¶ 16. These precursors include three aspects that would later develop into gender mainstreaming: 1) including women’s perspectives on issues and policies; 2) using gender analyses as a mechanism for taking into account concerns of both women and men but also assessing the differential impact of policies on men and women; and 3) developing institutions to monitor and ensure gender analysis at all levels of government and policy making. The Nairobi conference report alludes to these ideas, noting:

until the World Conference on Human Rights in Vienna in 1993.<sup>304</sup> The Beijing Platform further solidified the concept of gender mainstreaming, noting that member nations have made "important progress in achieving equality between women and men" and that some governments "have established national machineries to ensure the mainstreaming of gender perspectives in all spheres of society."<sup>305</sup> In 1997, the U.N. Economic and Social Council developed policies to create an "active and visible" commitment to gender mainstreaming throughout U.N. bodies as a part of implementing the Beijing Platform for Action.<sup>306</sup>

Fifth, armed with the mechanisms of gender mainstreaming and affirmative action within the gender equality ideal, women have attempted to harness social and economic resources for the advancement of women. They have fought to acquire these resources by crafting arguments that rely on notions of gender equality and the indivisibility of all human rights to justify directing resources to women and placing them in decision-making positions, albeit with minimum success. The Beijing Platform specifically advocated increasing women's participation in the political arena.<sup>307</sup> Gender equality thus potentially

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The need for women's perspective on human development is critical since it is in the interest of human enrichment and progress to introduce and weave into the social fabric women's concept of equality, their choices between alternative development strategies and their approach to peace, in accordance with their aspirations, interests and talents.

*Id.*, at ¶ 16. The report further explains that it "is desirable that governmental departments establish a special office in each of them, headed preferably by a woman, to monitor periodically and accelerate the process of equitable representation of women." *Id.* at ¶ 88.

304. The Vienna Declaration and Programme of Action noted the need to "mainstream" women's human rights into the U.N. human rights body of work. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 37, U.N. Doc. A/CONF.157/23 (July 12, 1993). The integration of women's human rights requires a "revision of existing methodologies for monitoring and reporting and . . . reexamination of the legal framework to be applied." Sullivan, *supra* note 256, at 163.

305. *Beijing Declaration and Platform for Action*, Annex II, *supra* note 290, at ¶ 25. The Beijing Platform also provides three strategic objectives for achieving the further implementation of gender mainstreaming. Strategic Objective H.1 calls for governments to "[c]reate or strengthen national machineries and other governmental bodies" for the advancement of women who have "the ability and competence to influence policy and formulate and review legislation." *Id.* at Strategic Objective H.1. Strategic Objective H.2 is the integration of "gender perspectives in legislation, public policies, programmes and projects." *Id.* at Strategic Objective H.2. Strategic Objective H.3 calls for governments to "[g]enerate and disseminate gender-disaggregated data and information for planning and evaluation." *Id.* at Strategic Objective H.3.

306. *1997 ECOSOC Report*, *supra* note 301, at 28. The 1997 report also required all U.N. entities to "institutionalize mainstreaming of gender perspectives at all levels." *Id.* at 30. The U.N. Council noted that gender mainstreaming was to be applied everywhere, and in particular, in policy analysis and development, research, technical assistance, servicing intergovernmental bodies, and data collection, analysis, and dissemination. *See id.* at 30-35.

307. *Beijing Declaration and Platform for Action*, Annex II, *supra* note 290, at ¶ 1.

embodies a vision of substantive equality concerned with justice and with the “absence of major disparities in people’s resources, political and social power, well-being and [an absence] of exploitation and oppression.”<sup>308</sup> Ultimately gender equality is a principle of political justification that guides and directs the allocation of resources in favor of women in light of their social inequality.<sup>309</sup>

The gender equality ideal, however, has some drawbacks. First it focuses attention solely on gender relations and therefore on women’s equality with men, resulting in several consequences. The ideal makes men’s lives and experiences the standard against which society measures equality.<sup>310</sup> In this way it ignores the breadth and depth of women’s subordination as defined by their own biology, lives, and experiences.<sup>311</sup> It also reenforces the male biases already inherent in many social institutions,<sup>312</sup> while simultaneously obscuring the fact that because men are divided by race, class, and so on, some men also experience oppression.<sup>313</sup> This drawback raises the question of which group of men’s lives and experiences define social equality.<sup>314</sup> The ideal similarly fails to recognize that women, like men, are subject to social cleavages of ethnicity, race, class, nationality, and other characteristics. It thus precludes the possibility that one class or race of women perhaps should be equal to another class or race of women, limiting the many axes and social boundaries that the goal of promoting the equal worth of every individual implies.<sup>315</sup> In other

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308. Donna Greschner, *Does Law Advance the Cause of Equality?* 27 *QUEENS L.J.* 299, 303 (2001) (quoting J. BAKAN, *JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS* 46-47 (1997)).

309. See, e.g., Jeremy Waldon, *Jurisprudence and Political Theory: The Substance of Equality*, 89 *MICH. L. REV.* 1350, 1358 (1991).

310. Catherine A MacKinnon, *On Difference and Dominance*, in *FEMINISM UNMODIFIED* 34 (1987) (suggesting that sex equality discourse contains a hidden male norm).

311. Otto, *supra* note 266, at 118-19; see also MacKinnon, *supra* note 310, at 36 n.18 and accompanying text (critiquing sex equality analysis in the U.S. and noting that, in reference to the case of *General Electric v. Gilbert*, 429 U.S. 125 (1976) (now statutorily superseded), women have been denied pregnancy benefits because women’s equality is understood to mean sameness with men, who do not need pregnancy benefits).

312. Charlesworth, *Men’s Rights*, *supra* note 269, at 104-06 (noting that the gender equality ideal limits women to a world already created socially and institutionally by men, thereby constraining and in some ways eliminating women’s ability to change and transform institutions, practices, and norms that men have already created).

313. BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 18 (1984).

314. From an analytical perspective, the difficulties in forming comparative gender groups simply may mean that certain women are only equal to similarly situated men, even if these similarly situated men are poor and oppressed themselves. See Otto, *supra* note 266, at 115-19, 133; see also HOOKS, *supra* note 313, at 18.

315. The idea of equality and nondiscrimination informs the idea of equal worth. The UDHR recognizes and “reaffirm[s] their faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women . . . .” UDHR *supra* note 259, at 72.



words, the ideal does not recognize that some of the same social systems that result in women's diversity also result in the myriad of different ways in which society subordinates women. Second, the gender equality ideal provides no roadmap as to how women should overcome the divisions created by this diversity. Finally, the ideal of gender equality remains contested in several social quarters.<sup>316</sup> Nonetheless, these ideas increasingly influence Kenyan women's activism, and Kenyan women's efforts in pursuing women's solidarity across their diversity calls for a broader understanding not only of gender equality but also of equality among and between different women.

### *3. The Women's Political Caucus: Bringing Women's Voices into the Advocacy for Constitutional Reform*

The influence of the global women's movement on Kenyan women's activism became clear during advocacy for a new Kenyan constitution. This advocacy became another moment of focus and unity in the women's movement, although brief, in the form of the Women's Political Caucus. In particular the Women's Political Caucus advocated for the inclusion of women in the constitutional reform process on the basis of the gender equality ideal, including its focus on affirmative action and gender mainstreaming.

Multipartyism in the 1992 Kenyan elections failed to remove from power Daniel Arap Moi, the president, and the Kenya African National Union party (the Moi-KANU regime).<sup>317</sup> Many of the civil society actors involved in the push for multipartyism had predicted such an outcome.<sup>318</sup> Before the elections some of these actors had argued for the complete overhaul of the state, including its constitution, to create an appropriate political system capable of allowing Kenyans to attain their goals of social, economic, and cultural empowerment.<sup>319</sup> These groups would later focus squarely upon the current constitution, which the British had created with minimal input by Kenyans

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316. Cassel & Guzman, *supra* note 62, at 290, 293.

317. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 60.

318. MUTUNGA, *CONSTITUTION-MAKING*, *supra* note 58, at 37 (discussing how the Coalition for a National Convention (CNC) tried to encourage the opposition parties to boycott the elections and were not surprised when they lost). Mutunga also notes that Maria Nzomo and Jayne Michuki drafted the gender provision in the preamble of the Proposal for a Model Constitution, an effort that the Kenyan Human Rights Commission initially led. *Id.* at 55, 68 n.16.

319. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 58-59 (describing the goals of civil social society actors after the legalization of multi-partyism and quoting Odindo Opiate, *Of Phrase-Mongering and the Political Debate*, NAIROBI L. MONTHLY, Sept. 1991, at 4).

and that had generated little allegiance from either ordinary Kenyans or the elites who inherited it. Consequently, governing elites had easily amended the constitution, transforming it into a document that both centralized and personalized state power in the office of the president.<sup>320</sup> Furthermore, the state, perfecting the tools of repression and economic extraction available to it under the current constitution, had become increasingly repressive in the years preceding multipartyism.<sup>321</sup> Civil society actors had sought to change this oppression, calling for a national convention for constitutional change and later drafting a model Kenyan constitution.<sup>322</sup>

The opposition parties within the civil society movement, however, had insisted on "minimum legal and constitutional reforms to level the playing field" with the hope that they would then be able to "capture . . . state power."<sup>323</sup> The Moi-KANU regime had refused to make the kinds of changes that would enable democratic elections, and this maintenance of the status quo, coupled with the fact that the opposition parties were split into largely ethnic blocks fielding their own candidates, doomed the hopes of regime change.<sup>324</sup> The fervor and political activity for a new constitution thereafter increased, initially led almost completely by civil society advocates.<sup>325</sup>

Women, both in groups and as individuals, were part and parcel of this increasingly vocal civil society movement.<sup>326</sup> Their efforts

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320. *Id.* at 27-31 (discussing the amendments in the constitution that led to the centralization and personalization of state power). The first amendment declared Kenya a republic with the president as head of state and commander-in-chief, changing the Kenyan state from a quasi-federal system with a weak national prime minister answerable to and headed by a governor-general who reported to the British monarch. *Id.* at 27-28. Later amendments made it easier to "amend the constitution; declare a state of emergency; abolish the right of appeal to the Privy council, the last court of appeal for current and former British colonies; . . . grant the President power to detain individuals without judicial review; [and] abolish the bicameral parliament." *Id.* at 29. These amendments also provided that a presidential candidate be elected by a party, which, given KANU's status as the only effective party, gave KANU a preserve on the presidency. *Id.* When Moi became president in 1981, he further amended the constitution in several ways, one of which was pushing through the enactment of the Section 2A amendment that outlawed all political opposition and rendered Kenya a *de jure* one-party state. *Id.* at 33.

321. *Id.* at 58-63.

322. *Id.*; see also MUTUNGA, CONSTITUTION-MAKING, *supra* note 58, at 55, 68 n.16. Mutunga notes that the Kenya Human Rights Commission's support of gender provisions in the proposal for a model constitution blossomed into the establishment of the group called the Citizens Coalition for Constitutional Change or the 4Cs. *Id.* at 46-64.

323. Makau Mutua, Taming Leviathan, *supra* note 7, at 58.

324. *Id.* at 59-60.

325. See generally MUTUNGA, CONSTITUTION-MAKING, *supra* note 58.

326. For instance, the Kenya anti-rape organization and Wangari Maathai were a force behind part of the Middle Ground Group who joined those supporting a national convention as proposed by the Coalition for National Convention (CNC). *Id.* at 29, 43 n.20.

however were largely fragmented until April 23, 1997,<sup>327</sup> when Phoebe Asiyo, a woman and member of Parliament, put forward a motion in Parliament calling for affirmative action for women in representation.<sup>328</sup> The motion proposed that the government introduce legislation requiring that at least one-third of political parties' candidates for local and national office be women (a percentage discussed at the international level, including in the Beijing Platform) and that funding go to this affirmative action policy.<sup>329</sup> The motion further required the government to introduce a constitutional amendment establishing two Parliamentary constituents per province exclusively for women candidates.<sup>330</sup> Many women's groups had rallied behind the motion,<sup>331</sup> but the overwhelmingly male Parliament unceremoniously and crudely rejected it.<sup>332</sup>

The motion's defeat marked the birth of the Women's Political Caucus, an alliance that unified many of the women's organizations and became the political force that carried women's concerns into the forums advocating for a new constitution.<sup>333</sup> Asiyo's motion came after a declaration by civil society organizations, including the opposition parties, that they would not participate in the 1997 elections unless "faciliatory' constitutional and legal reforms were implemented."<sup>334</sup> The declaration arose out of the National Convention Assembly (convened by the National Convention Executive Council (NCEC)), an organization that included members who represented various stakeholders, including "opposition party parliamentarians, heads of religious institutions, representatives of trade unions, the youth, various civil society organs and women."<sup>335</sup> NCEC thereafter planned and implemented a number of mass rallies to make the point.<sup>336</sup>

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327. FIDA 1997, *supra* note 78, at 22. Women had not "collectively articulate[d] a position on the constitutional reform process" prior to April, 1997. *Id.* However, given the later events of that year, "1997 mark[ed] a watershed year in respect of pressing for woman-friendly law reform in Kenya. 1997 [sic] is the year in which Kenyan women finally collectively articulated their demands for inclusion in the constitutional reform process." *Id.*

328. *Id.* at 52.

329. *Id.*

330. *Id.*

331. *Id.* at 58.

332. *Id.* at 52.

333. FIDA 1997, *supra* note 78, at 57-58 (interview with Dr. Wanjiku Kabira, convener of the WPC, describing the motion brought by Asiyo and birth of the WPC from its ashes).

334. *Id.* at 21.

335. *Id.*

336. These rallies took place between May and October, 1997. *Id.* at 27-28.

In August 1997 in the NCEC's Second National Convention, the Women's Political Caucus (WPC) presented a document entitled *The Women's Reforms Initiative — A Document of the Kenya Women's Political Caucus*, in which they made their demands for the inclusion of women in the advocacy of constitutional reform and any process established to accomplish this purpose.<sup>337</sup> Significantly, the WPC's demands included: that women make up half of any body charged with constitutional reform; that under a new constitution, thirty percent of the seats in Parliament be reserved for women; that the government enact legislation to implement the Beijing Platform and ratify Article 13 of the *Women's Convention*, providing Kenyan women equal access to socio-economic benefits; and that the constitution establish a gender equality commission.<sup>338</sup> All of the WPC's demands echoed themes made throughout Kenyan women's past advocacy and the global women's activism around women's human rights and gender equality.

By September, however, Moi, hoping to thwart the progress of the NCEC in its demands for comprehensive constitutional and political reform, reached out to the opposition political parties.<sup>339</sup> He then established a Parliament-based process for constitutional reform over which the government had control.<sup>340</sup> Called the Inter Parties Parliamentary Group (IPPG),<sup>341</sup> this effort shifted the constitutional debate from civil society to Parliament.<sup>342</sup> This shift disadvantaged women and women's groups because very few women held seats in Parliament.<sup>343</sup> Nonetheless, the WPC, as well as FIDA, submitted materials to this government-based process to ensure women's inclusion in constitutional reform.<sup>344</sup> The IPPG, which later passed the Constitution of Kenya (Amendment) Act of 1997, accepted some of the WPC's proposed constitutional reforms.<sup>345</sup> Notably, the IPPG amended section 82(3) of the constitution to include sex as a prohibited basis of discrimination.<sup>346</sup> Nevertheless, Moi again won the elections in December of 1997.<sup>347</sup>

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337. *Id.* at 22.

338. *Id.* at 64.

339. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 66.

340. *Id.* at 66; FIDA 1997, *supra* note 78, at 29.

341. FIDA 1997, *supra* note 78, at 29.

342. *Id.*

343. *Id.*; *see also* FIDA 1998, *supra* note 67, at 28.

344. FIDA 1997, *supra* note 78, at 29.

345. *Id.* at 29-30.

346. *Id.* at 30; *see also* Constitution of Kenya Review Act, (2001) Cap. 3A.

347. *Moi Wins Disputed Kenyan Election*, CNN, Jan. 3, 1998, <http://www.cnn.com/WORLD/9801/03/kenya.wrap/>.

The WPC continued to advocate for women's equal participation in the constitutional review process<sup>348</sup> and became a significant player in the process<sup>349</sup> when the IPPG enacted and then amended the Constitution of Kenya Review Act in late 1998, under heavy pressure.<sup>350</sup> The Act established the constitutional review process and provided that the review would be conducted through three organs: a commission, district forums, and the national forum.<sup>351</sup> The commission was to be the primary organizing organ responsible for conducting and facilitating civic education, collecting and collating the views of the Kenyan people, and conducting studies and research on constitutionalism,<sup>352</sup> for the purposes of preparing a draft bill to alter the current Constitution (which would eventually become the Draft Constitution).<sup>353</sup> The Commission initially was to consist of twenty-five official commissioners (later changed to twenty-seven),<sup>354</sup> thirteen commissioners selected from political parties, and twelve from civil society including religious organizations.<sup>355</sup> Of the civil society

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348. FIDA 1997, *supra* note 78, at 32 (noting that FIDA and the WPC submitted memoranda suggesting that "[g]ender equality should be one of the inviolable principles guiding the constitutional review process and the new *Constitution*;" that half the Commissioners should be women; that the chair and vice chair should be of different sexes; and that civic education should be undertaken before the Commission collects public views). Regarding gender equality the WPC suggested the Act be amended to read:

There is hereby established a Commission to be known as the Constitution of Kenya Review Commission to facilitate the review of the *Constitution* by the people of Kenya and eventual alteration of the *Constitution* . . . to the intent that the *Constitution* shall stand the test of time and — . . . exalt and enshrine good governance under the rule of law, the values of human rights, democracy and gender equality . . .

*Id.* at 32 (omissions in original).

349. *Id.* at 29.

350. Constitution of Kenya Review Act, (2001) Cap. 3A; FIDA 1998, *supra* note 67, at 29.

351. Constitution of Kenya Review Act, (2001) Cap. 3A § 2B.

352. *Id.* at § 10 (a-c).

353. *Id.* at § 26(7) (calling for the Commission to compile a report on its recommendations and to draft a bill to alter the Constitution). This draft bill was interpreted to be a draft of a new Constitution. This interpretation was subject to some debate and a number of legal challenges. *See id.* at § 27.

354. *Id.* at § 7.

355. *Id.* at § 3. It reads:

(1) There is established a Commission to be known as the Constitution of Kenya Review Commission.

(2) The commission shall, subject to subsection (3), consist of —

(a) the chairperson appointed in accordance with section 5;

(b) thirteen persons nominated by the political parties represented in the Inter-Parties Parliamentary Committee of whom at least two shall be women;

(c) one person nominated by the Muslim Consultative Council and the Supreme Council of Kenya Muslims;

(d) one person nominated by the Kenya Episcopal Conference;

(e) one person nominated by the protestant churches in Kenya as represented by —

positions, women would occupy eight seats: five seats nominated from women's organizations, two seats from political parties, and one seat from other civil society organizations.<sup>356</sup> The legislation specifically authorized the WPC to nominate the five commissioners from women's organizations.<sup>357</sup>

The WPC's success in ensuring that women would be included in constitutional reform would also contribute to its downfall. As a nominating body for the review commission, the WPC proposed and nominated five women to become commissioners.<sup>358</sup> Their nominations set off a storm of dissent, led in part by the government and in particular by Moi and his followers, who claimed in part that "rural women who comprise the majority of Kenyan women would be without a voice in the Commission because all the nominated [women] Commissioners were urban and elite women."<sup>359</sup> Some women also dissented, particularly a number of members of Maendeleo ya Wanawake, who argued that the WPC's designation as the nominating body for women's organizations was inappropriate because the WPC was not even a registered women's group.<sup>360</sup> In addition, they complained that the WPC had not included a person from the Rift Valley Province, the largest province in Kenya.<sup>361</sup> These women filed an application for judicial review challenging the WPC's status as the nominating body for women and its selected nominees, an application that the court later dismissed.<sup>362</sup>

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- (i) the National Council of Churches of Kenya;
  - (ii) the Seventh Day Adventist Church;
  - (iii) the Church of God;
  - (iv) the Kenya Indigenous Christian Churches;
  - (v) the Evangelical Fellowship of Kenya;
  - (f) five persons nominated by women's organisations through the Kenya Women's Political Caucus of whom at least one shall be a woman with a disability;
  - (g) four persons nominated by the civil society through the National Council of Non-Governmental Organisations, particular regard being had to the youth, the disabled, professional associations and the pastoralists in Kenya, of whom at least one shall be a person with a disability and one a woman;
  - (h) The Attorney General or his representative who shall be an *ex-officio* commissioner.

356. *Id.*; FIDA 1998, *supra* note 67, at 29. The WPC negotiated for these positions. NGOs, political parties, and religious organizations initially dominated women's seats. The WPC suggested that a significant number of positions go to groups representing women *qua* women as opposed to other issues. FIDA 1998, *supra* note 67, at 29-30.

357. Constitution of Kenya Review Act, (2001) Cap. 3A § 3(2)(f).

358. FIDA 1998, *supra* note 67, at 30.

359. *Id.* at 31.

360. *Id.*

361. *Id.* at 30.

362. *Id.* at 31-33.

Women were not the only group bickering over the nominations to the review commission. Political parties were also fighting over how many nominations each party possessed.<sup>363</sup> This political bickering stalled the process for almost a year.<sup>364</sup> In late 1999, two parallel efforts were launched to salvage and jumpstart the review process, one by Parliament and the other by civil society.<sup>365</sup> Although the WPC survived the nomination process, it would not survive the bifurcation of the constitutional review process.

Parliament again amended the Constitution of Kenya Review Act (the Review Act), this time establishing the Parliamentary Select Committee to oversee the constitutional process and the review commission.<sup>366</sup> It created a slightly different review commission consisting of fifteen commissioners, of which only three would be women, a decrease from one-third to one-fifth.<sup>367</sup> Opposition leader Raila Odinga, a long-time politician from the second largest ethnic group in Kenya and head of the National Development Party (NDP), headed the Parliamentary Select Committee.<sup>368</sup> The NDP had entered into a marriage of convenience with the Moi-KANU regime, in many ways further splitting the opposition parties.<sup>369</sup> Civil society, for its part, established a parallel constitutional review process under the stewardship of the religious communities, called the Ufungamano Initiative.<sup>370</sup> This initiative, decrying the government process as “anti-people,” structured its process and selected its commissioners on the basis of the meetings that had informed the 1998 amendments to the Review Act.<sup>371</sup> The WPC came out in support of a “people-driven” constitutional process and in opposition to what many saw as Moi’s plan to control the process through Parliament.<sup>372</sup> This support was not unanimous, however, and the WPC leadership thereafter also split over which constitutional review process to support.<sup>373</sup>

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363. *Id.* at 35.

364. FIDA 1998, *supra* note 67, at 36.

365. *Id.*

366. ANNE MURAGU NYABERA ET AL., *SETTING THE PACE: THE 1999/2000 FIDA ANNUAL REPORT ON THE LEGAL STATUS OF KENYAN WOMEN 12 (FIDA 2000)* [hereinafter FIDA 2000].

367. *Id.*

368. International Press Institute, *2000 World Press Freedom Review*, [http://www.freemedia.at/cms/ipi/freedom\\_detail.html?country=/KW0001/KW0006/KW0160/&year=2000](http://www.freemedia.at/cms/ipi/freedom_detail.html?country=/KW0001/KW0006/KW0160/&year=2000) (last visited Sept. 21, 2006); Raila Odinga: Official Website, <http://www.raila2007.com> (last visited Sept. 21, 2006).

369. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 70.

370. FIDA 2000, *supra* note 366, at 12-13.

371. *Id.* at 13.

372. *Id.* at 14; Judith Achieng, *Rights — Kenya: Women’s Political Caucus Calls for People-Driven Constitution*, GLOBAL INFORMATION NETWORK, Nov. 15, 1999.

373. Tervil Okoko, *Kenya’s Women Major Political Lobby Group Cracks Ranks*, PAN-AFRICAN NEWS AGENCY, July 7, 2000, <http://www.hartford-hwp.com/archives/36/202.html>.

Although many factors contributed to the split in the WPC,<sup>374</sup> a catalyzing movement occurred when Asiyo, the chair of the Caucus, refused to take up her nominated seat on the Ufungamano-led constitutional review commission.<sup>375</sup> Asiyo planned to run on the NDP ticket in the future, a party that had been a major supporter of efforts on gender matters.<sup>376</sup> Asiyo explained her reluctance to take the nomination by stating “there was need for the two reform initiatives to work together.”<sup>377</sup> In response, several members of the WPC’s Credentials and Management Committee called for Asiyo’s resignation.<sup>378</sup> These members included Dr. Wanjiku Kabira, the initial convener of the Caucus; Martha Koome, the FIDA chairperson; Abida Alia of the Association of Muslim Sisters in Kenya; and Gichugu Member of Parliament Martha Karua.<sup>379</sup> They argued that “the fundamental issue bringing together the [WPC] members was ensuring the women’s agenda in a *people-driven* Constitutional review process.”<sup>380</sup> The divide had ethnic undertones as Asiyo and Raila Odinga belonged to the second largest ethnic group in Kenya, the Luos,<sup>381</sup> whereas Kabira came from the largest ethnic group in Kenya, the Kikuyu (as did former president Kenyatta).<sup>382</sup> When Asiyo refused to resign, the Kabira group split from the WPC to form the Women’s Political Alliance.<sup>383</sup>

The split came during a year of potentially landmark gains for women on the legislative front, including legislative movement on affirmative action and equality.<sup>384</sup> The latter initiative unfortunately

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374. *Id.* (stating that “the core of the bitter row is that the caucus has been operating on the basis of [a] ladies’ agreement, with no definite terms;” that the WPC suffered “a despicable lack of communication among the leaders and the member NGOs;” that the WPC lacked “operational structures and transparency;” and that the alliances on any side of the split were forged among regional clusters that “smacked of ethnic chauvinism”); see also FIDA 2000, *supra* note 366, at 14 (noting that “lack of formal institutional structures,” among other factors, contributed to the split); FIDA 2002, *supra* note 105, at 5 (noting that the split came from within the Caucus but that its initial unity was viewed with suspicion by conservative forces).

375. FIDA 2000, *supra* note 366, at 14.

376. Okoko, *supra* note 373 (commenting that “[t]his means she must go the Odinga way” and making the connection that Odinga and Asiyo share the same ethnic affiliation).

377. FIDA 2000, *supra* note 366, at 14 (citing THE DAILY NATION, July 17, 2000).

378. *Id.*

379. *Id.*

380. *Id.* (quoting THE DAILY NATION, July 17, 2000) (emphasis added).

381. A. Mutua, *Foreword*, *supra* note 6, at 22.

382. *Id.*; see also Okoko, *supra* note 373 (describing their groups’ ethnic affiliations and noting that “in Kenyan politics ethnicity is a great factor”).

383. FIDA joined the Women’s Political Alliance, as did The League of Kenya Women Voters. FIDA 2002, *supra* note 105, at 11.

384. See Jacinta Sekoh-Ochieng, *Year of Landmark Gains for Women*, THE NATION, Dec. 28, 2000, at 28, available at <http://www.hartford-hwp.com/archives/36/201.html>



also faced the protests of Muslim women.<sup>385</sup> Although the WPC ceased to be the powerful and unified force it had been, its work laid the public and intellectual groundwork that informed what would later become the campaign for “Safeguarding the Gains of Women” and its principles of social justice, gender equality and gender mainstreaming.<sup>386</sup> Nevertheless, its internal conflicts would continue to haunt these efforts.

## II. THE DRAFT CONSTITUTION

In September of 2002, the Constitution of Kenya Review Commission (CKRC) released its Draft Constitution.<sup>387</sup> The constitutional review process had gotten underway in part due to the efforts of Professor Yash Pal Ghai,<sup>388</sup> whom Moi appointed as chair in late 2000.<sup>389</sup> The commission’s work was a boon for the inclusion of a number of women’s concerns, largely because of the efforts undertaken by women through the WPC and other women’s groups.<sup>390</sup> At the same time, the release of the Draft was accompanied by a dramatic election campaign, the stunning results of which contained the seeds of dissension that would hamper the consideration and adoption of the Draft Constitution.

### A. Constitutional Review Underway

Professor Yash Pal Ghai, as chair of the Constitution of Kenya Review Commission (CKRC), spearheaded negotiations that resulted in the merger of the parallel constitutional review processes,<sup>391</sup> which

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(stating that Parliament passed an affirmative action motion spearheaded by the WPC and permitted introduction of an Equality Bill for consideration, which FIDA helped to formulate). The Attorney General published both the Criminal Law Amendment Bill, 2000, which if enacted would “be a boon for girls and women seeking redress for sexual violence,” and the Domestic Violence Bill. *Id.* The Family Court was finally launched to handle cases “related to custody of children, divorce, separation, burial disputes and legitimacy,” as well as matters of guardianship, probate, alimony and the Married Women’s Property Act. *Id.* Finally, the President appointed a commission to review Kenya’s land law system. *Id.*

385. *Id.*

386. See Athena D. Mutua, *The Constitutional Review Process: A Gender Audit of “Bomas,”* in FIDA 2003, *supra* note 2, at 33 (noting that four Civil Society Organisations worked together to initiate the campaign).

387. *Draft, supra* note 3.

388. See Makau Mutua, *Taming Leviathan, supra* note 7, at 78 (stating that Yash Pal Ghai was a constitutional law expert and human rights scholar who previously consulted in the writing of other countries’ basic laws).

389. FIDA 2002, *supra* note 105, at 6.

390. *Id.* at 13-18.

391. *Id.* at 6; see also Makau Mutua, *Taming Leviathan, supra* note 7, at 78-83.

was codified in the again amended Constitution of Kenya Review Act in 2001.<sup>392</sup> The CKRC, with the Parliamentary Select Committee providing oversight as liaison between the CKRC and Parliament, began its work after the negotiated Ufungamano members of the CKRC were sworn in.<sup>393</sup> Owing to Kenyan women's past advocacy, women ultimately comprised seven of the twenty-seven CKRC commissioners, one delegate from every district, and twenty or so delegates drawn women's organizations and other civil society organizations, for a total of approximately one hundred of the 629 delegates slated to attend the National Constitutional Conference.<sup>394</sup>

Part of the work of the Commission was to collect views from ordinary Kenyans about a new constitution.<sup>395</sup> The views collected from Kenyans registered general support for women's rights.<sup>396</sup> Many women's groups also submitted reports to the Commission for consideration as part of this collection process. In addition, the Commission, in its capacity of conducting studies and researching issues, included a review of gender concerns in their review of constitutionalism.<sup>397</sup> The Draft Constitution, issued in September of 2002, reflected this support for women's rights and drew upon Kenyan women's past advocacy, insights, and international norms,<sup>398</sup> among other things, in structuring provisions that sought both to empower and protect women's participation in the Kenyan polity. As a result the Draft itself was a watershed document for the potential realization of new legal authority for women's rights and the ideal of gender equality in Kenya.

### *B. The 2002 Elections*

The release of the Draft Constitution accompanied a dramatic election campaign season that saw a number of the most credible opposition parties and their leadership unite under the National Alliance Party of Kenya (NAK).<sup>399</sup> NAK was the first opposition party since 1992 that had a credible opportunity to oust KANU.<sup>400</sup> KANU

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392. Constitution of Kenya Review Act, (2001) Cap. 3A; FIDA 2002, *supra* note 105, at 6 (noting that the bill became law on May 24, 2001).

393. FIDA 2002, *supra* note 105, at 6-7.

394. *Id.*

395. Constitution of Kenya Review Act, (2001) Cap. 3A § 17(b).

396. CONSTITUTION OF KENYA REVIEW COMMISSION, REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION 56 (2002) [HEREINAFTER CKRC REPORT] (summarizing "[t]hirteen main points from the people" and including "equal rights and gender equity" in the list).

397. *Id.* at 50-53.

398. *Id.* at 99, 131, 139-40.

399. Makau Mutua, Taming Leviathan, *supra* note 7, at 102-03.

400. *Id.* at 103.

needed to choose a successor for Moi to run in the 2002 Presidential election since the constitution barred Moi from seeking another term.<sup>401</sup> Moi snubbed several senior KANU officials when he anointed Uhuru Kenyatta, the son of late president Kenyatta, as his heir apparent and ensured that Kenyatta became the KANU presidential candidate.<sup>402</sup> Attempting to force Moi to alter his selection of Kenyatta as KANU's presidential candidate, several of these senior officials, led by Raila Odinga of the NDP party, formed the Rainbow Alliance.<sup>403</sup>

Although the Alliance failed to sway Moi's decision, its open and bold defiance of the Moi-KANU regime captivated the nation.<sup>404</sup> In an effort to capitalize on the public support of the LDP and to unify Kenya's electorate, NAK and the LDP signed a memorandum of understanding in October 2002 to form the National Rainbow Coalition (NARC), a coalition party.<sup>405</sup> Inspired by the executive arrangements contained in the Draft Constitution, NARC agreed that if it won the elections, elected officials would divide cabinet posts equally between the two parties and appoint Odinga to a newly created prime minister position.<sup>406</sup> Although NARC triumphed in the December 2002 elections, ending the almost forty-year rule and monopolization of state power by KANU, its origins would negatively impact the process for constitutional review.<sup>407</sup>

The election of Mwai Kibaki as president of Kenya and NARC's majority sweep into Parliament rendered the Kenyan population jubilant.<sup>408</sup> President Kibaki failed however to fulfill the promise of power-sharing with the LDP faction of NARC and placed mostly NAK Parliamentarians and other old Kibaki stalwarts into the cabinet and other high-ranking government positions.<sup>409</sup> These political

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401. *Id.*

402. *Id.* at 104-05.

403. *Id.* The Alliance later formed the Liberal Democratic Party (LDP). *Id.*

404. *Id.* at 103-04.

405. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 105.

406. *Id.* at 105.

407. *Id.* at 138-39, 155, 160 (discussing the election of NARC, the constitutional battles between its warring factions, and the referendum defeat in November 2005). The author argues that the conflicts around governing and the constitution were actually conflicts within a corrupt political class that used state power for its own aggrandizement and continuously fought about the rotation of positions as a means to continue to use the state for similar purposes. *Id.*

408. *Carnival Mood After NARC Boss Takes Over*, THE NATION, Dec. 31, 2002, available at <http://www.nationaudio.com/News/DailyNation/31122002/News/News3112200214.html>; Odhiambo Orlale, *NARC Crowds Cheer as GSU Officers Leave Moi Residence*, THE NATION, Dec. 31, 2002, available at <http://www.nationaudio.com/News/DailyNation/31122002/News/News311220024.html>.

409. Makau Mutua & Willy Mutunga, *The First Hundred Days: A Report Card on President Kibaki and NARC*, in MAKAU MUTUA & WILLY MUTUNGA, *EYES ON THE PRIZE* 68, 69 (Athena D. Mutua ed., 2003) [hereinafter *EYES ON THE PRIZE*] (describing the first

appointments infuriated the LDP members who claimed a breach of the memorandum of understanding.<sup>410</sup> This political infighting had ethnic overtones as the different coalition partners had formerly represented largely ethnic-based parties.<sup>411</sup> The majority of Kibaki's appointments were from his own ethnic group or from closely related or affiliated groups, adding to the dissatisfaction.<sup>412</sup> This infighting carried over into the constitutional review process.<sup>413</sup>

In late April 2003, the Kibaki government reluctantly convened the much-awaited National Constitution Conference.<sup>414</sup> The new government, and particularly the executive branch, had entered office under the old but current Constitution and appeared to have grown comfortable with the extensive powers it provided.<sup>415</sup> Nonetheless, consistent with their campaign promises, NARC convened the National Constitution Conference (NCC) to review the Draft Constitution pursuant to the Review Act.<sup>416</sup> The NCC consisted of 629 delegates gathered from around the country, including all members of Parliament, representatives from a host of civil society organizations, and elected delegates from each of the districts in Kenya.<sup>417</sup>

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wave of President Kibaki's appointments as plausibly legitimate but describing his second wave of appointments as consisting of "KANU stalwarts" and "loyal cronies").

410. A. Mutua, *Foreword*, *supra* note 6, at 23.

411. *Id.* (noting that the Luo were loyal to Odinga and the LDP, whereas many of the cabinet positions following the 2002 elections went to individuals from the Mt. Kenya region, home to the Kikuyu. The Mt. Kenya region voted overwhelmingly for NARC).

412. *Id.*

413. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 112; *see also* A. Mutua, *Foreword*, *supra* note 6, at 22.

414. FIDA 2003, *supra* note 2, at 44 (noting that the Kibaki government, which had become comfortable with the broad executive powers provided under the current constitution, seemed threatened by the idea of constitutional reform, an anxiety that manifested itself as a hesitancy to convene the NCC).

415. *Id.*

416. Constitution of Kenya Review Act, (2001) Cap. 3A §§ 4, 27, 28.

417. *Id.* at § 27(2), providing The National Constitutional Conference shall consist of:

(a) the commissioners who shall be *ex-officio* members without the right to vote;

(b) all members of the National Assembly;

(c) three representatives of each district, at least one of whom shall be a woman, and only one of whom may be a councillor elected by the respective county council in accordance with such rules as may be prescribed by the Commission;

(d) one representative from each political party registered at the commencement of this Act, not being a member of Parliament or a councillor;

(e) such number of representatives of religious organisations, professional bodies, women's organisations, trade unions and non-governmental organisations registered at the commencement of this Act and of such other interest groups as the Commission may determine:

Provided that —

(i) the members under paragraph (e) shall not exceed twenty-five per cent

The NCC met over the course of a year in three sets of four to six week periods. Referred to as Bomas I, II, and III, the initial sitting of the NCC was chaotic.<sup>418</sup> Many factors caused this chaos, but one involved the initial indecision about the format to use for debating the Draft.<sup>419</sup> The conference settled on a chapter-by-chapter review of the Draft.<sup>420</sup> The second reason for some of the chaos was the infighting in NARC that carried over into the conference.<sup>421</sup> Bomas I quickly became organized around ethnic groupings, owing in part to the manipulation of delegates by the factious Parliamentarians, who consisted of a full third of the conference.<sup>422</sup> One of the central goals for LDP politicians was to ensure that a new constitution enshrined the powerful prime minister position that the Draft envisioned, a position Raila Odinga hoped to eventually occupy.<sup>423</sup> The NAK governing faction vehemently opposed this position and eventually walked out of the NCC.<sup>424</sup> By this time two other controversial issues had emerged involving the devolution of government power and the retention of the Kadhi's courts.<sup>425</sup> These issues, together with the issue of the prime minister's position, eventually stalled the entire process.<sup>426</sup>

Thirteen technical committees, organized by Draft chapter, began reviewing their assigned chapters in Bomas II after completing the debating phase in Bomas I.<sup>427</sup> In Bomas III, the committees completed their chapter reviews of the Draft and adopted suggested revisions.<sup>428</sup> The conference as a whole then voted on the committee's recommendations.<sup>429</sup> It accepted the NCC's revised draft constitution, popularly

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of the membership of the National Constitutional Conference under paragraphs (a), (b), (c) and (d); and

(ii) the Commission shall consult with and make regulations governing the distribution of representation among, the various categories of representatives set out in paragraph (e).

(3) The chairperson of the Commission shall be the chairperson of the National Constitutional Conference.

(4) The quorum of the National Conference shall be one half of the members.

For a critique of the NCC delegation, see Makau Mutua, *Taming Leviathan*, *supra* note 7, at 111-13.

418. FIDA 2003, *supra* note 2, at 42.

419. *Id.* at 42-43.

420. *Id.* at 35.

421. *Id.* at 43.

422. *Id.* at 43-44; *see also* Makau Mutua, *Taming Leviathan*, *supra* note 7, at 111; A. Mutua, *Foreword*, *supra* note 6, at 22-24.

423. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 116.

424. *Id.*

425. *Id.* at 142-44.

426. *Id.* at 142.

427. *Id.* at 116; *see also* FIDA 2003, *supra* note 2, at 35.

428. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 116; *see also* FIDA 2003, *supra* note 2, at 35.

429. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 116.

known as the “Zero Draft,” in March 2004 and forwarded it to Parliament.<sup>430</sup> The Zero Draft retained the initial Draft’s very powerful prime minister position, with the balance of executive power going to the appointed prime minister as opposed to the elected president.<sup>431</sup> LDP had triumphed. This issue, along with devolution and the retention of Kadhi’s courts, remained divisive within the NARC government and throughout its review of the Zero Draft.

The fractious government spent over a year trying to re-negotiate and review the Zero Draft.<sup>432</sup> Having modified the Zero Draft, particularly the chapters regarding the executive branch and devolution, among others, the government released a new draft (the Waco draft) in August 2005.<sup>433</sup> This draft was defeated in a countrywide referendum, with the NAK government faction publicly supporting adoption of the Waco draft as the new constitution for the country and the LDP faction publicly advocating against it.<sup>434</sup> President Kibaki is currently in the process of convening a committee of experts to advise the government on what steps it should take regarding constitutional review. The gains that women made as embodied in the various draft constitutions hangs in the balance.

### *C. The Draft: Equality?*

The Draft Constitution produced by the CKRC was massive, containing some twenty chapters and almost three hundred provisions.<sup>435</sup> It significantly reorganized and altered the balance of state power by devolving power to multiple and increasingly local levels,<sup>436</sup> decentralizing executive (presidential) power through the addition of a powerful prime minister as the head of the cabinet,<sup>437</sup> strengthening

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430. ZERO DRAFT, *supra* note 11.

431. Compare *id.* Art. 152 (“Authority of President”) with *id.* Art. 172 (defining authority of Prime Minister).

432. Makau Mutua, Taming Leviathan, *supra* note 7, at 161-63, 168-75.

433. WACO DRAFT, *supra* note 12.

434. Jillo Kadida & David Mugonyi, *Orange victory vow*, DAILY NATION, Nov. 23, 2005 (discussing the proposals by the Orange No-Vote, consisting of the LDP, to enter into talks with the Banana Yes-Vote, consisting of the NAK faction of NARC, on the future of the constitutional process).

435. *Draft*, *supra* note 3.

436. *Id.* Art. 215 (devolving power to four local levels: villages, locations, districts, and provinces).

437. *Id.* at Arts. 151(2)(a)(1), 170 (stating that the prime minister, in addition to being the political party leader, is the leader of the Cabinet and presides over its meetings). Under the current constitution, the president is the head of government. CONSTITUTION, Art. 17 (1992) (Kenya) (making no mention of a separate Prime Minister position). Also, under the Draft Constitution, the President can only dismiss the Prime Minister on a vote of “no confidence” by Parliament, as opposed to the President’s current powers, under which the vice president and most other ministers serve at the pleasure of the president. Compare *Draft*, *supra* note 3, Art. 174, with CONSTITUTION, Art. 16 (1992) (Kenya).

the legislative branch,<sup>438</sup> and creating a second legislative branch, the National Council, in addition to the National Assembly, Parliament.<sup>439</sup> Furthermore, the Draft Constitution included “a comprehensive bill of rights,”<sup>440</sup> including the socio-economic rights of social security, health, education, housing, food, water, and sanitation.<sup>441</sup> The Draft also proposed norms, institutions, and structures that would “democratize the [Kenyan] state.”<sup>442</sup>

The Draft Constitution addressed many of the issues for which the Kenyan women’s movement had advocated. For instance, it obligated the state to “ensure the fullest participation of women, the disabled, and the marginalised communities . . . in the political, social and economic life of the country.”<sup>443</sup> It ensured the personal security of everyone “from all forms of violence from either public or private sources.”<sup>444</sup> Although the Draft Constitution only required the state to achieve “the progressive realisation” of its provisions for socio-economic rights,<sup>445</sup> many Kenyans saw these rights as crucial for women because they are often “the providers of food, water, and health care for their families.”<sup>446</sup> In addition, the Draft provided that women would represent one-third of elected and appointed government positions<sup>447</sup> and established a special constitutional Commission on Human Rights and Administrative Justice that included a gender department, albeit not an independent gender institution.<sup>448</sup> Unfortunately, although the Draft sought to implement the ideal of gender equality,<sup>449</sup> contained a provision providing for the equal protection and benefit of the law,<sup>450</sup> and was undoubtedly informed by equality precepts, it lacked an explicit commitment to equality as a value. Specifically, equality was not a primary or basic tenet of the 2002 Draft, unlike two more recent constitutions enacted in Uganda

438. *Compare Draft, supra* note 3, Arts. 171(3), 175(1) (stating that Parliament must approve appointment of Cabinet ministers), *with* CONSTITUTION, Arts. 16-17 (1992) (Kenya) (making no mention of requiring Parliament’s approval in granting the president authority to make appointments).

439. *Draft, supra* note 3, Art. 105.

440. Makau Mutua, *Taming Leviathan, supra* note 7, at 94; *see also* FIDA 2002, *supra* note 105, at 15 (commenting that the bill of rights is “extremely broad”).

441. *Draft, supra* note 3, Arts. 56-62.

442. Makau Mutua, *Taming Leviathan, supra* note 7, at 94; *see also Draft, supra* note 3, Arts. 75, 279 (guiding courts on how to interpret the Bill of Rights and defining the objectives of constitutional commissions).

443. *Draft, supra* note 3, Art. 14(11).

444. *Id.* Art. 41.

445. *Id.* Art. 30(3).

446. FIDA 2003, *supra* note 2, at 38.

447. *Draft, supra* note 3, Art. 14(12).

448. *Id.* Art. 288.

449. *Id.* Art. 288(3)(c)(I) (instructing Gender Commissioner to “promote gender equality and equity”).

450. *Id.* Art. 33.

and South Africa, both created in the last decade.<sup>451</sup> For both countries, equality forms an intricate part of the intrinsic and explicit values of their constitutions and their visions for society.

For example, the Preamble to South Africa's Constitution states: "We . . . adopt this constitution . . . to . . . [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law."<sup>452</sup> Chapter 1 of the South African Constitution, the Founding provision, further declares that "The Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms."<sup>453</sup> Similarly the Preamble in the Ugandan Constitution states that the country is "[c]ommitted to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress . . ."<sup>454</sup> The Kenyan Draft Constitution in contrast makes no mention of equality in the preamble.<sup>455</sup> Furthermore, in the article listing the founding values of the Republic, equality is noticeably absent.<sup>456</sup> It states:

The Republic of Kenya is founded on republican principles of good governance through multiparty democracy, participatory governance, transparency and accountability, separation of powers, respect for human rights[,] fundamental freedoms, and the rule of law.<sup>457</sup>

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451. See S. AFR. CONST. 1996; UGANDA CONST. (1995).

452. S. AFR. CONST. 1996, pmbl.

453. *Id.* Art. 1.

454. UGANDA CONST., pmbl. (1995).

455. See *Draft, supra* note 3, pmbl., which states as follows:

We, the people of Kenya —

AWARE of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation;

COMMITTED to nurturing and protecting the well-being of the individual, the family and the community within our nation;

RECOGNISING the aspirations of our women and men for a government based on the essential values of freedom, democracy, social justice and the rule of law;

EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having fully participated in the constitution making process;

Do adopt, enact and give to ourselves and to our future generations this Constitution.

GOD BLESS KENYA.

456. *Id.* Art. 6(2).

457. *Id.*



In fact, equality barely makes an appearance in Chapter Two. It is only mentioned in relation to the idea of a state religion, declaring that “[s]tate and religion shall be separate. There shall be no state religion. The state shall treat all religions equally.”<sup>458</sup> The notion of equality makes its first significant appearance in Chapter Four, on citizenship, in which all citizens of Kenya are “equally entitled to the rights, privileges and benefits of citizenship,” as well as its “duties and responsibilities.”<sup>459</sup>

Equality is most noticeably absent among the principles, goals, and values of the nation as articulated in Chapter Three, Article 14.<sup>460</sup> This chapter describes the Republic’s responsibility for promoting such principles and goals as national unity, recognizing diversity of its people, promoting principles of democracy, eradicating corruption, ensuring access to justice, promoting human rights and fundamental freedoms, and ensuring the fullest participation of women, disabled and marginalized communities, among others.<sup>461</sup> As such, equality is not an independent value in the Draft.<sup>462</sup>

Unsurprisingly, the Bill of Rights of the 2002 Draft contains the principle of equality in the list of fundamental rights and freedoms. In this respect it is similar to both the Ugandan and South African Constitutions. The initial mention of the equality principle in this chapter is unfortunately in Article 34(2) on the *limitation* of rights:

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.<sup>463</sup>

Thus the first rule articulated in the Bill of Rights regarding equality as a principle is in fact a limitation on that principle.<sup>464</sup> The actual equality provision appears two articles later, providing that:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms.<sup>465</sup>

458. *Id.* Art. 10.

459. *Id.* Art. 16 (a), (b).

460. *Id.* Art. 14.

461. *Draft, supra* note 3, Art. 14.

462. Although arguably equality is included in the commitment to human rights and fundamental freedoms. *Id.* Art. 14(17).

463. *Id.* Art. 31(4).

464. Given Muslim women’s protests against the Equality Bill, Sekoh-Ochieng, *supra* note 384, the drafter perhaps sought to embody the value of equality in various provisions without explicitly calling attention to the notion. Regardless of their motivations, they failed when they limited equality before ever defining it.

465. *Draft, supra* note 3, Art. 33.

This language is typical of equal protection language.<sup>466</sup> But unlike the South African Constitution, the Draft contains no language indicating a commitment to promoting equality.<sup>467</sup> Furthermore little in the Draft indicates a substantive notion of equality or equal protection. In the absence of an act to clarify its meaning, one could interpret the Kenyan equality provision as referring simply to mere formal equality. The anti-discrimination provision in the Kenyan 2002 Draft Constitution follows the equality provision in Article 34.<sup>468</sup>

The Kenyan women's movement promoted many notions of equality, and the 2002 Draft nevertheless reflects several of the interests articulated by this movement. For example, the Draft captures the idea of equal citizenship,<sup>469</sup> a concept expressed in women's literature as well as in literature discussing constitutionalism and women.<sup>470</sup> The Draft also contains an article specifically establishing that women should have the same rights as men and provides for what one could characterize as affirmative action measures to bring about equality, authorizing "reasonable facilities and opportunities to enhance the welfare of women."<sup>471</sup> The article also specifically provides for the equal right to inheritance and control over property and specifically prohibits any law, culture, custom, or tradition that undermines

466. Cf. UGANDA CONST., art. 21 (1995), which states in part:

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

467. The Draft's language is almost exactly the same as the language in South Africa's constitution regarding equality. S. AFR. CONST. 1996, Art. 9. However, the South African equality provision adds that "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." *Id.* The South African equality provision then combines, in three additional sections, the principles of non-discrimination. *Id.* Although some have suggested that this language does not explicitly call for substantive equality, read together with the Equality Act enacted pursuant to the South African Constitution, substantive equality is the goal. SHADRACK B.O. GUTTO, EQUALITY AND NON-DISCRIMINATION IN SOUTH AFRICA 126 (Brenda Barron ed., 2001).

468. *Draft, supra* note 3, Art. 34 reads:

The state shall not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, sex, pregnancy, marital status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, language or birth.

Article 34 later allows the state to take "measures designed to benefit individual or groups who are disadvantaged." *Id.*

469. *Id.* Art. 16.

470. *See supra* notes 149-50 and accompanying text.

471. *Draft, supra* note 3, Art. 35.

women's interest or status.<sup>472</sup> These provisions go to the heart of many of the issues that undergird women's inequality and with which the campaign for Safeguarding the Gains of Women in the Draft Constitution was concerned. Thus the Draft signaled potentially new legal authority for women's rights and empowerment.

### III. THE CAMPAIGN

#### A. *The Birth of the Coalition*

In the heat of the fall 2002 election campaign, Betty Maina of the Institute of Economic Affairs quietly convened and hosted a group of scholars, NGOs, religious leaders, and others to study the Draft Constitution.<sup>473</sup> Among this group were Yash Pal Ghai, the chairman of the Constitutional Review Commission, and Willie Mutunga, executive director of the largest human rights organization in East Africa, the Kenya Human Rights Commission (KHRC),<sup>474</sup> and the force behind the meeting.<sup>475</sup> Called "the Friends of the National Constitutional Conference," the public nicknamed it the Palacina Group because its members met at the Palacina Hotel in Nairobi.<sup>476</sup> The group had some twenty members who divided themselves into teams to study various sections of the Draft including the structure of government, land and environment, the leadership code, religion, and women/gender issues, among others.<sup>477</sup>

A subcommittee of the group charged with reviewing the Draft through the lens of gender produced a report, which, among other things,<sup>478</sup> outlined a plan of action to ensure that NCC delegates

472. *Id.*

473. A. Mutua, *Foreword*, *supra* note 6, at 14-15.

474. See EYES ON THE PRIZE, *supra* note 409, at 2.

475. A. Mutua, *Foreword*, *supra* note 6, at 14-15.

476. Ken Opala & Macharia Gaitho, *Why the Law Review Team Rose against Its Chairman*, THE SUNDAY NATION, Jan. 19, 2003, available at <http://nationaudio.com/News/DailyNation/19012003/Comment/19012003324456.html>.

477. The groups were Representation, Land and Environment, Structure of Government, Peace & National Security, Women/Gender, Religion, Strategy, Public Finance, and Leadership Code.

478. The Gender Report to Palacina noted two issues regarding language on gender. The first question was whether the draft constitution should use the word *gender* and, if so, whether it should appear consistently throughout the document in addition to the word *sex* to refer to biological sex. FRIENDS OF THE NATIONAL CONSTITUTIONAL CONFERENCE, GENDER REPORT TO PALACINA 1 (2002) (on file with author) [hereinafter PALACINA GENDER REPORT]. It suggested that the phrase *men and women* replace generic terms such as *people* to emphasize that the constitution applied to both genders. *Id.* Second, the report questioned whether the notion of substantive equality should somehow be introduced into the Draft. *Id.* The Report further identified three significant concepts to maintain and strengthen in the Draft: affirmative action, gender mainstreaming, and

would consider and retain gender provisions in the final constitution.<sup>479</sup> These strategies included soliciting leadership from one of Kenya's women's groups to lead an organized and concerted effort in support of women's rights.<sup>480</sup> This subcommittee's work would be one of the only endeavors that mushroomed into a full-fledged constitutional campaign in the form of "Safeguarding the Gains of Women in the Draft Constitution." In January, critics of Yash Pal Ghai's leadership in the Constitutional Review Commission accused the Palacina group of trying to take over the functions of the CKRC.<sup>481</sup> Although some CKRC and Palacina members engaged in heated exchanges in the press, the Palacina group quietly died.<sup>482</sup>

Women involved in Palacina later identified the Federation of Women Lawyers of Kenya (FIDA) as the organization that might best advance a program for advocating women's rights in the constitution at the NCC. FIDA, a civil society membership organization consisting primarily of women lawyers and law students,<sup>483</sup> was started in 1985 after the Third U.N. Conference for Women.<sup>484</sup> Its purpose is to "increase access to justice for women in Kenya" and to "improve the legal status of women in Kenya."<sup>485</sup> FIDA provides legal

an independent gender commission. *Id.* at 1-2. The Report also proposed several amendments to the 2002 Draft covering chapters one through nine. *Id.* at 3-5.

479. Lynn Waneke was initially to head the group charged to review the 2002 Draft through the lens of gender but was unable to attend many of the meetings. In late November, Willy Mutunga approached the author to work on the gender section of the group. He later also recruited Jacinta Muteshi, a consultant on gender issues who also served on the board of the KHRC. Muteshi and the author combed the first half of the 2002 Draft and drafted proposals to improve it on gender issues, proposals that would be the first and final report to Palacina. *See id.*

480. *Id.* at 2-3. The Report outlined the following steps:

1. Soliciting Leadership— letters to leading women organizations informing them on what we have done, seeking advice on proposals and soliciting leadership
2. Building and strengthening Coalitions with Muslim women and other women groups
3. Building and strengthening Coalitions with Ufungamano and other organizations
4. Preparing papers, fact-sheets, and information on gender issues
5. Hosting meetings, workshops, [and] educational fora for Parliamentary and conference members, and parallel workshops/conferences before and during Constitutional Conference.

481. A. Mutua, *Foreword*, *supra* note 6, at 14-15; Opala & Gaitho, *supra* note 476.

482. A. Mutua, *Foreword*, *supra* note 6, at 15.

483. FIDA Kenya, *Rules for Application for Membership to FIDA Kenya*, [http://www.fidakenya.org/opp\\_membership.htm](http://www.fidakenya.org/opp_membership.htm) (last visited Sept. 21, 2006) (noting that there are four categories of membership including student members, practicing women lawyers, and honorary and affiliate members who become so through recommendation by the governing body of FIDA).

484. FIDA Kenya, *About Us*, [http://www.fidakenya.org/ab\\_aboutus.htm](http://www.fidakenya.org/ab_aboutus.htm) (last visited Sept. 21, 2006) (describing the organization and its objectives).

485. FIDA Kenya, *Our Objectives*, [http://www.fidakenya.org/ab\\_objectives.htm](http://www.fidakenya.org/ab_objectives.htm) (last visited Sept. 21, 2006).

services to women through its legal aid program.<sup>486</sup> It is also committed to raising awareness about women's issues through its programs on women's rights monitoring and advocacy, gender and legal rights awareness, and public relations and fundraising.<sup>487</sup> Like many organizations, FIDA has conducted civic awareness programs to prepare the citizenry for the CKRC's process of collecting views from Kenyans on the constitution.<sup>488</sup> They have also been leading participants in several legislative efforts on behalf of women.<sup>489</sup> These efforts included drafting and promoting bills on equality and domestic violence.<sup>490</sup>

Members of the Palacina Gender Group met with the executive director of FIDA, Jane Kiragu.<sup>491</sup> Cecilia Kimemia, executive director of the League of Kenya Women Voters (the League), was also present at the meeting. Kiragu and Kimemia both saw the potential program of educating NCC delegates on women's rights as a continuation of their organizations' efforts on constitutional reform.<sup>492</sup> Both FIDA and the League agreed to take on the project, which Jane Kiragu dubbed "Safeguarding the Women's Gains Under the Draft Constitution."<sup>493</sup> FIDA and The League immediately arranged for a consultative meeting of various human rights and women-focused organizations on February 7, 2003.<sup>494</sup> Leaders of the project decided that FIDA, the League, the Institute for Education in Democracy (IED), and KHRC would collaboratively form the core group of the coalition, with FIDA as the head administrative organization.<sup>495</sup> As primary leader of the campaign, FIDA would supply the administrative support for the coalition's work, including spearheading fundraising, providing office space, personnel, and materials.<sup>496</sup> In return each organization would

486. FIDA Kenya, *Mission*, [http://www.fidakenya.org/ab\\_mission.htm](http://www.fidakenya.org/ab_mission.htm) (last visited Sept. 21, 2006).

487. *Id.*

488. A. Mutua, *Foreword*, *supra* note 6, at 15.

489. *See* FIDA 2002, *supra* note 105, at 7-8, 22-29 (discussing legislative efforts in which FIDA was involved, including legislation for the Equality Bill and the Domestic Violence (Family Protection) Bill).

490. *Id.* at 28-29.

491. Koki Muli, Jacinta Muteshi, and the author, all of whom were members of the Palacina Gender Group, attended the FIDA meeting.

492. These reform efforts were in part captured in the document entitled *Women's Agenda for the Republic of Kenya*, compiled by FIDA Kenya for the Women's Political Alliance on September 9, 2002 and released at the same time as the Draft Constitution. FIDA, *WOMEN'S AGENDA FOR THE REPUBLIC OF KENYA* (2002).

493. *See generally* TRAINING MANUAL, *supra* note 17. The campaign was originally known as the "Campaign for Safeguarding the Gains of Women in the Draft Constitution." *Id.* at ii. Noel Media, who printed the manual, changed the name during the editing process.

494. *Id.* at 1.

495. *Id.*; A. Mutua, *Foreword*, *supra* note 6, at 15.

496. Meeting with FIDA, the League, IED, & KHRC, in Ufungamano House, Nairobi,

coordinate any independent fundraising targeted for the constitutional process with the coalition.<sup>497</sup>

The consultative meeting held at Ufungamano House provided a big psychological boost for the campaign but foreshadowed future competition among women's groups. As it turned out, another women's group had scheduled a similar meeting and several of the participants at Ufungamano House speculated that they had done so upon learning about "FIDA's meeting." Nonetheless, thirty women attended the consultative meeting from approximately twelve different organizations.<sup>498</sup> The attendees were extremely excited about the project and divided themselves into working committees to focus on the five areas of work that the workshop identified as needed. These committees focused on conference procedures, lobbying and advocacy, media, training, and technical aspects of the provisions in the Draft Constitution.<sup>499</sup> Only the technical and training committees ever became fully functional,<sup>500</sup> but the coalition left the meeting with a strong mandate to pursue the project. Thus the Campaign for Safeguarding the Gains of Women in the Draft Constitution was born.

### *B. The Campaign's Training Manual: Social Justice, Gender Mainstreaming, and Gender Equality*

The training manual for "Safeguarding Women's Gains Under the Draft Constitution" became the most comprehensive and significant statement of the campaign's message. It defined the campaign's principles, stated and explained the campaign's positions on controversial issues, provided proposed changes to the Draft Constitution, and provided the campaign's training exercises.<sup>501</sup> The campaign's newspaper *Yawezezana*, the only onsite newspaper that covered the NCC, later supplemented the manual.<sup>502</sup>

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Kenya (Feb. 7, 2003); see also TRAINING MANUAL, *supra* note 17, at 1 (noting that FIDA was the lead organization for the campaign).

497. *Id.*

498. The organizations represented were ABANTU, CRADLE, FEMNET, FIDA, Hienrich Boll Foundation (HBF), IED, KWEC, KHRC, KUPPET, NARC (the governing political party), The League, UON, and WRAP. FIDA, Report on A Consultative Workshop on "Safeguarding the Gains of Women in the Draft Constitution" (2003) (on file with author).

499. TRAINING MANUAL, *supra* note 17, at 1.

500. Minutes of Meeting on the Development of Training Materials for the Constitutional Conference, in FIDA Kenya Offices, Nairobi, Kenya (Feb. 26-27, 2003) (on file with author); Minutes of the Training Committee Meeting, in League of Kenya Women Voters Boardroom, Nairobi, Kenya (Feb. 10, 2003) (on file with author).

501. See generally TRAINING MANUAL, *supra* note 17.

502. Several of the early editions of *Yawezezana* are available at [http://www.fidakenya.org/bomas\\_agender.htm](http://www.fidakenya.org/bomas_agender.htm) (last visited Sept. 21, 2006).

The coalition decided early that it would make arrangements to train the provincial delegates to the NCC.<sup>503</sup> Training the delegates would provide the campaign members an opportunity to get to know some of the delegates, particularly some of the women delegates. This training would also expose a range of delegates to campaign issues.<sup>504</sup> Consequently, it became evident that the coalition required materials on which to train these delegates; the group settled on a training manual.

Meeting in late February, the core group of the coalition met as part of the technical committee to draft the training manual.<sup>505</sup> The coalition decided that the manual would consist of three parts: training exercises; a section on background information, which would include the principles, positions, and essays that explained and supported the positions recommended; and the suggested alternative language to the Draft.<sup>506</sup> The coalition also agreed that the primary objective of the manual was to provide delegates with the tools to participate effectively in the conference and to familiarize them with the campaigns goals, objective, positions, and ideas.<sup>507</sup>

To prepare delegates to engage in the conference effectively, the coalition began four significant training efforts. The first effort was to simplify the conference procedures.<sup>508</sup> Believing that parliamentary procedures could pose substantial obstacles to delegates' participation, the coalition simplified these procedures and developed a set of exercises that would provide delegates practice in using them.<sup>509</sup> Second, the coalition included in the manual exercises meant to explain the purpose of constitutions in structuring governance and the governments' relationship to its citizenry.<sup>510</sup> It also provided a historical

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503. *Id.* at 1.

504. *Id.* at 1-2.

505. The core group at this point and until part II of the NCC consisted of Jane Kiragu, executive director of FIDA; Edla Muga, a staff attorney with the League (who singlehandedly simplified the conference procedure); Koki Muli, executive director of IED; Jacinta Muteshi, board member of KHRC; Enid Muthoni, a staff attorney with FIDA; the author, a consultant to the campaign and to the KHRC; Immaculate Muringo Njenge, a staff attorney at FIDA and assistant to the campaign; and Wairimu Mungai, volunteer and secretary for the campaign. Winnie Guchu, then a consultant to FIDA, led the manual-drafting workshop. Joyce Majiwa, chair of FIDA from 2003 to 2004, contributed the essays on equality as part of her role on the technical committee, as did Jane Kamangu of CRADLE.

506. See generally TRAINING MANUAL, *supra* note 17.

507. *Id.* at 1 (explaining in a section entitled "Campaign Justification" that delegates to the NCC needed to understand the content of the Draft, language in the Draft, and conference procedure to participate effectively).

508. *Id.* at 1, 4-10.

509. *Id.* at 4-11, 61-74.

510. *Id.* at 11-16.

overview of constitution-making efforts in Kenya.<sup>511</sup> Third, the manual included a set of exercises to draw the delegate's attention to the language in the Draft Constitution, language that, if implemented, would stipulate the basic rules and arrangements for governance. This section particularly focused on language about gender and gender relations as a way of introducing the campaign's goals, positions, and ideas.<sup>512</sup> Finally, the manual included exercises to teach and test lobbying skills, skills the campaign believed would be of crucial importance to delegates who would have to persuade and lobby others to their point of view during the conference.<sup>513</sup>

Writing the section of the manual on "Background Information" helped to crystallize the coalition's specific ideas and positions.<sup>514</sup> The first idea to emerge was the concept of the three key principles of social justice, gender equality, and gender mainstreaming, principles that would guide the coalition's efforts.<sup>515</sup> Almost all of the coalition's proposed improvements to the Draft advanced one of these three principles.<sup>516</sup> Each of these principles represented a distinct element

511. *Id.*

512. TRAINING MANUAL, *supra* note 17, at 16-29.

513. *Id.* at 29-32.

514. *Id.* at 33-74.

515. *Id.* at 76. These principles represented a refinement of the ideas developed in the Palacina Gender Report. There the ideas were gender mainstreaming and affirmative action. PALACINA GENDER REPORT, *supra* note 478, at 1-2. Here the concern for the Gender Commission fell under the gender mainstreaming principle, equality was set out as a separate principle, and affirmative action fell under the idea of social justice. TRAINING MANUAL, *supra* note 17, at 76.

516. The manual includes twenty-nine proposed changes to the language of the 2002 Draft Constitution. See TRAINING MANUAL, *supra* note 17, at 77-94. One can group these changes as follows:

*Equality and Anti-discrimination Articles*

Chapter Three: National Goals, Values and Principles

1. 14(10) — advances equality by including it among fundamental principles;

2. 14(11) — advances anti-discrimination by explicitly authorizing the social justice measure of affirmative action;

Chapter Four: Citizenship, Article 19(1)

3. 19 — supports equal citizenship for women and men and for their children;

Chapter Five: Bill of Rights

4. 31 — advances equality by eliminating limitations on equal rights; specifically, by requiring Islamic courts to adhere to the equality principle;

5. 34 — advances anti-discrimination by explicitly authorizing the social justice measure of affirmative action;

6. 35 — advances equality by removing discriminatory stereotype from the Draft's language and by authorizing affirmative action;

Chapter Nine: Judicial & Legal System

7. 199 & 200 — requires applications of Shari'a law to be consistent with social justice and equality in fact;

8. 200 — advances equality by suggesting a right of appeal to non-Muslim courts where the Kadhis court did not adhere to "the ends of social justice and equality;"



**Chapter 11: Land & Property**

9. 232 — advances gender equity by prohibiting “gender discriminatory laws, regulations, customs, [and] practices related to land;”

**Chapter 14: Public Service**

10. 265 — requires police to “avoid bias or discrimination with regard to . . . women, marginalized and vulnerable groups or other sections of society;

*Social Justice***Chapter Three: National Goals, Values, and Principles**

11. 14(12) — emphasizes that goal of one-third principle is gender parity;

**Chapter Five: Bill of Rights**

12. 30 — establishes procedure by which government must prove that it does not have the resources to implement a particular right and emphasizes gender equity;

13. 39 — requires the State to provide representation to “disabled persons in decision-making at all levels;”

14. 55 — gives pregnant women the right to reasonable working conditions and to special protections against harmful work;

15. 76 — extends right of fair representation in elections to “other marginalized communities;”

**Chapter Six: Representation of the People**

16. 77 — requires that eighty percent of a political party’s “candidates for proportional representation at public elections” be women;

17. 95 — strengthens funding for political parties with promotion of women candidates

**Chapter Seven: The Legislature**

18. 107 — proposing that the first eighty percent of Mixed Member Proportional System nominees be women, representing all districts and including “persons with disabilities, or who are youth and minorities;”

19. 109 — emphasizes that goal of one-third principle is gender parity;

**Chapter Nine: Judicial & Legal System**

20. 184 — ensures that justice be accessible to all men and women;

**Chapter 10: Devolution**

21. 226 — ensures that revenue distribution “include budgets that target women and other marginalised communities;”

**Chapter 13: Public Finance**

22. 243 — requires allocation of resources “to enhance women’s equality and equity and develop mechanisms for compiling gender-disaggregated statistics;”

*Gender Mainstreaming: Articles***Chapter Nine: Judicial & Legal System**

23. 147 — empowers Parliamentary Service Commission to “identify and formulate gender equality guidelines for all parliamentary bodies and other offices on which gender balance and fair representation must be realised;”

24. 194 — requires a gender-balanced bench;

**Chapter Seven: The Legislature, Articles**

25. 205 — empowers Judicial Service Commission to ensure gender mainstreaming;

**Chapter 10: Devolution**

26. 213 — states that one of the purposes of devolution is to protect and promote interests of women;

27. 230 — applies one-third principle to local governments;

**Chapter 14: Public Service**

28. 265 — requires police departments to develop policies to combat domestic violence and child abuse;

of the gender equality ideal for which Kenyan women had historically fought and was grounded in the rhetoric and strategies of global activism for women's human rights.

### 1. *Social Justice*

The coalition defined *social justice* as a

commitment to policies, principles, structures, activities and measures that bring about just and fair social arrangements. These measures and arrangements enable all people and communities to live up to their full human potential and to actively *participate in and benefit* from the social, economic, cultural and political life of the country. Affirmative Action is a temporary form of a social justice measure meant to remedy past and present discrimination, promote equality, eliminate the effects of barriers to opportunity, and create mechanism[s] to bring about equality, equity, parity and justice.<sup>517</sup>

One of the primary goals of the social justice concept was to articulate and justify the necessity of affirmative action in promoting women's equality in Kenya. In particular it was to justify the one-third principle, instituting women's representation as contained in the Draft.<sup>518</sup> The social justice commitment also embraced the campaign's support of the Mixed Member Proportional representation system (MMP) also employed in the Draft Constitution.<sup>519</sup> Perhaps more importantly, the social justice principle was a means to reach out to other groups that might have seen the constitutional effort as an opportunity to reorder the power relations among various ethnic groups.<sup>520</sup>

#### *a. Rearticulating Affirmative Action*

The campaign sought to re-articulate the issue of affirmative action as a social justice issue by incorporating affirmative action within the broader framework of social justice and justifying it as a measure aiding in the creation of just and fair social arrangements.<sup>521</sup>

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Chapter 17: Constitutional Commissions and Constitutional Offices, Articles 29, 287 & 288 — establishes separate Gender Commission;

517. *Id.* at 76.

518. *Id.* at 34-35.

519. *Id.* at 57-59.

520. *Id.* at 34 (defining *social justice* as "giving a chance to marginalised and disadvantaged groups to be visible in leadership in parliament, local authorities and other structures of government").

521. TRAINING MANUAL, *supra* note 17, at 76.

Opposition to the one-third principle, voiced by several organizations and individuals after the Draft was released in September, partly motivated the move to recast, situate, and explain the concept of affirmative action as a social justice measure.<sup>522</sup> One example of this opposition was found in a pamphlet entitled *A Gathering Storm* published by an association of Christian churches called the Kenya Church.<sup>523</sup> The pamphlet critiqued the “overemphasis on Affirmative Action,” arguing that this “overemphasis” could “easily affect the need for hard work and merit.”<sup>524</sup> Furthermore, in apparent reference to women seeking positions of leadership and representation, it noted: “There are dangers in the proposed reversal of the God given structure of the family, and specifically of the leadership role and position of the man.”<sup>525</sup> The pamphlet reserved its harshest critique for the Kadhi’s courts, which this federation wanted eliminated from the Draft Constitution.<sup>526</sup>

Other examples of opposition to the one-third principle were found in newspaper coverage of the issue. For example, a newspaper editorial by a young man railed against the one-third policy as an unfair and undemocratic policy, arguing that “gender activism promotes bias against men.”<sup>527</sup> He suggested that the youth should stand against affirmative action because they would be the ones primarily hurt by it; that his future job should not be given to “an unqualified woman;” and that women, like men, should have to run for elective office on the same footing.<sup>528</sup> The manual includes a response to the young man entitled *Case Study on Social Justice*, which likens his response to a young white South African woman who, when seeking admissions to a foreign educational institution, became enraged that affirmative action plans favoring black South Africans might be in place at the institution.<sup>529</sup> The article notes:

[This young woman] seemed oblivious to the fact that the entire social, cultural and political system in South Africa had been geared toward ensuring the success of white students like herself . . . [Y]et she seemed decidedly undisturbed by this fact or that the vast majority of the most beneficial educational spots, jobs, and previously occupied political positions had gone to whites,

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522. See, e.g., *id.* at 37-39 (discussing one such article).

523. KENYA CHURCH, *A GATHERING STORM? CRITICAL CONCERNS ON THE DRAFT CONSTITUTION* (2003).

524. *Id.*

525. *Id.*

526. *Id.*

527. Athena D. Mutua, *Case Study on Social Justice*, in *TRAINING MANUAL*, *supra* note 17, at 37.

528. *Id.*

529. *Id.*

even as she was profoundly disconcerted by affirmative action programmes designed to bring and ensure a fraction of those benefits to qualified but disadvantaged blacks.

The young man in the article demonstrates the same blind spot. He is unbothered by men occupying an overwhelming majority of the governing, business and private positions in this society. Yet he is incensed by proposed constitutional provisions seeking to ensure that people, representing more than half the population, earn at least 1/3 of the government positions.<sup>530</sup>

The essay further chastises the gentleman for assuming that only men constitute the youth and that women were presumptively unqualified for any particular position.<sup>531</sup> It also notes that the young man has increased potential access to political office, as compared to a potentially more qualified woman, as the result of the unearned and unfair privileges of being born male in Kenya.<sup>532</sup>

The primary essay on social justice in the manual was originally an essay by Technical Committee member Jane Kamangu justifying and explaining the campaign's support of affirmative action. Kiragu later edited and recast the essay as a social justice piece during the course of writing the manual.<sup>533</sup> The revised essay gave examples of other social justice measures (including Africanisation measures) that the Kenyan government had previously implemented to remind the public that many different groups had been beneficiaries of affirmative action.<sup>534</sup> These affirmative action plans operated in a variety of sectors comprising the educational,<sup>535</sup> economic,<sup>536</sup> and political realms.<sup>537</sup> Jane Kiragu commented while editing the essay that the public might finally understand women's rights advocates' support of affirmative action based on this recasting of the debate.

530. *Id.* at 38.

531. *Id.* at 39.

532. *Id.* at 37.

533. Jane Kamangu, *Social Justice and the Constitutional Review*, in TRAINING MANUAL, *supra* note 17, at 34.

534. *Id.* at 34-35.

535. *Id.* (listing as examples the "quota system in the education system regarding admission to national and secondary schools, tertiary institutions and others where, through affirmative action, students have been admitted from marginal areas of Kenya into national secondary schools with less points than those from high potential areas," and the "[d]ecision by joint Admission Board in 1997 to lower admission points for girls to public universities by 1 mark").

536. *Id.* at 35 (noting the "Africanisation of the economy in 1965 during which Kenyan Government adopted a deliberate policy to increase opportunities for Africans").

537. *Id.* at 35 (noting that in the political sector the following affirmative action policies had been implemented: "[t]he 1998 Constitution of Kenya Amendment Bill regarding nomination of commissioners," and "[t]he IPPG brokerage prior to the 1997 General Elections that required 50 percent nomination of women MPs, leading to the nomination of 5 women MPs in the current parliament").

Although many Kenyans and NCC delegates firmly identified the one-third idea as an affirmative action tool, the campaign saw the one-third idea as a principle, a matter of equality and social justice.<sup>538</sup> Both were right: the one-third principle was a social justice measure, but one meant to move the country toward equality.<sup>539</sup> Through the course of the campaign, however, the coalition found itself trying to distinguish between the *mechanisms* (temporary affirmative action measures that would result in women constituting at least one-third of all elective and appointed offices) from the one-third provision as a permanent social justice *principle*.<sup>540</sup> As such they sought to cast the one-third idea as a social justice provision to be permanently enshrined and maintained in the constitution as a constitutional *principle* applicable to both women and men.<sup>541</sup> The campaign viewed any immediate mechanisms used to implement the one-third principle as potentially temporary affirmative action policies that the State could only eliminate after “parity had been reached.”<sup>542</sup> The campaign pushed this distinction with some measure of success. The Zero Draft enshrined the one-third provision as a permanent principle,<sup>543</sup> although many NCC delegates appeared not to make the distinction in discussions.

*b. The Mixed Member Proportional Representation System: Implementing the One-Third Principle*

The campaign began to conceptualize many of the other structural constitutional arrangements it supported as social justice measures, including the Mixed Member Proportional Representation

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538. See Press Release, FIDA, *Safeguarding the Gains for Kenyans in the Draft Constitution*, THE SUNDAY NATION, May 11, 2003, at 30-31, available at [http://www.fidakenya.org/news/news\\_090603\\_01.htm](http://www.fidakenya.org/news/news_090603_01.htm) (identifying the one-third principle as an equality issue).

539. *Id.* (discussing one-third principle as a provision of equality and emphasizing that “[t]he one-third principle is a principle!”).

540. The Draft identified the one-third principle as a *principle*. For instance, Article 14(12) on the national goals, values, and principles states “[t]he State shall implement the principle that one-third of the members of all elective and appointive bodies shall be women.” *Draft*, *supra* note 3, Art. 14(12).

541. See Press Release, FIDA, *supra* note 538.

542. In the manual, the coalition proposed the following alternative language for Draft Article 14(12): “The state shall implement the principle that *at least* one-third of the members of all elective and appointive bodies shall be women, *with the eventual goal of gender parity and balance*.” TRAINING MANUAL, *supra* note 17, at 79 (emphasized words represent the suggested alterations). Although the state could eliminate these measures after reaching parity, it presumably also would have to reinstate these measures if necessary to maintain a balance between male and female representatives.

543. ZERO DRAFT, *supra* note 11, Art. 12(2)(j) (stating that the State shall “implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”).

system (MMP).<sup>544</sup> The MMP system, proposed by the Draft Constitution and supported by the campaign, combined the two most common electoral systems: the majoritarian system (or the first-past-the-post system) and the proportional representation system.<sup>545</sup> Under this system Kenyans would continue to elect 210 constituency representatives to Parliament but would also elect an additional ninety parliamentarians selected through party lists pursuant to rules for proportional representation.<sup>546</sup>

Although the campaign supported the institutionalization of the MMP system,<sup>547</sup> it went farther, proposing a radical use of the proportional representation seats: that women occupy all ninety seats!<sup>548</sup> The Draft went some distance in institutionalizing the one-third principle by requiring that women occupy half of the new ninety

544. TRAINING MANUAL, *supra* note 17, at 79.

545. *Id.* at 57-59. Under the majoritarian system, the candidate who wins the highest number of votes in a constituency wins the election, regardless of whether that candidate won a majority of the votes. *Id.* at 57. Under the PR system, an election ballot contains only party lists, with voters voting for a party. *Id.* at 58. The parliamentary seats are distributed to the parties in proportion to the number of votes cast for each of the parties. *Id.*

Kenyan elections currently operate under the majoritarian system with 210 constituencies. *Id.* at 57. In addition to the 210 constituency seats, the Kenyan system also provides for twelve "nominated" parliamentary seats that are distributed to the parties in proportion to the number of constituency seats won by party members. CONSTITUTION, Art. 33 (1998). The parties then nominate individuals of their choice to occupy the number of seats they have captured. *Id.*

546. TRAINING MANUAL, *supra* note 17, at 59. This system would allow Kenyan voters to vote for an individual to represent their constituency (as part of the 210 members) and vote for the party that they thought would best lead the nation (through party list). *Id.* In this dual system, a voter might select a constituency representative from one party but cast a proportional representation vote for another party. MMP provided a system unlike the "nominated" parliamentarian system, in which a constituency vote automatically counted as a vote for the party in which the constituency representative belonged. *Id.* at 59. The "nominated seats" feature of the Kenyan system made discussions about MMP very difficult because many of the delegates saw the proportional representation elections as simply an explosive expansion of the twelve nominated seats from twelve to ninety seats. *Id.* As such these delegates believed the proportional representation feature simply constituted additional seats into which the party bosses could place their friends. *Id.*

547. The campaign members, like the drafters of the 2002 Draft Constitution, saw MMP as combining the best features of both systems. *Id.* at 33. The majoritarian system better promoted geographical and group representation and allowed for the assessment of individual candidates, thereby promoting accountability. Press Release, FIDA, *supra* note 538. The proportional representation feature, on the other hand, better reflected the idea of "one-person, one-vote," promoted the building of political parties, discouraged gerrymandering, and encouraged voting across ethnic lines. TRAINING MANUAL, *supra* note 17, at 59. Proportional representation also tends to result in a greater number of women being elected. *Id.* at 37.

548. TRAINING MANUAL, *supra* note 17, at 33 (recommending that delegates "[s]upport women occupying all new 90 additional seats in National Assembly"); *see also id.* at 84-85 (suggesting that eighty percent of the proportional presentation list be women).

proportional representation seats.<sup>549</sup> It did so by requiring the party list to alternate between women and men,<sup>550</sup> an arrangement referred to as the zebra.<sup>551</sup> The Draft also required that thirty of the hundred seats in a newly created second chamber consist of women.<sup>552</sup>

Under the zebra method women would constitute at most a mere fifty-five seats out of a three-hundred-person Parliament.<sup>553</sup> Although fifty-five is considerably more than the number of women who have ever served in Parliament,<sup>554</sup> this result did not meet the one-third principle. Implementing the one-third principle would entail women occupying one hundred of the three hundred parliamentary seats, a critical mass more likely to reshape the orientation of Parliament.<sup>555</sup> Thus the coalition recommended that women constitute the first eighty percent of all PR party lists, that these women represent a different district until all districts were represented, and that the lists include persons with disabilities, youths, and minorities.<sup>556</sup> The purpose of requiring each district to have a woman representative was to ensure geographical and ethnic diversity of the women MPs and to guard against the predominance of urban women.<sup>557</sup> Further the idea that the lists include women with disabilities, young women, and minority women was a means to ensure that the overall goals of the proposed proportional representation system in Kenya were met.<sup>558</sup>

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549. *Draft*, *supra* note 3, Art. 107 (5)(b).

550. *Id.*

551. Elizabeth Powley & Sanam Naraghi Anderlini, *Democracy and Governance, in INT'L ALERT & WOMEN WAGING PEACE, INCLUSIVE SECURITY, SUSTAINABLE PEACE: A TOOLKIT FOR ADVOCACY AND ACTION* (2004), available at [http://www.huntalternatives.org/download/43\\_section4.pdf](http://www.huntalternatives.org/download/43_section4.pdf).

552. *Draft*, *supra* note 3, Art. 106 (1)(b).

553. TRAINING MANUAL, *supra* note 17, at 60 (noting that although the Draft Constitution guaranteed forty-five seats, it was unlikely that fifty-five other women would be elected to result in one-third representation by women).

554. See Nzomo, *Women's Movement*, *supra* note 4, at 177 (reporting that "women constituted only 1 percent of all MPs" in Kenya in 1992); FIDA 2003, *supra* note 2, at 4 (discussing the election as part of its examination of the NARC political Manifesto). The Kenyan people elected eight women to Parliament in 2002: seven from NARC and one from KANU. FIDA 2003, *supra* note 2, at 4. Parliament included eight women in 2002, four in 1997, six in 1992, one in 1988, two in 1983, and no more than four in any previous elections. *Id.*

555. TRAINING MANUAL, *supra* note 17, at 59-60.

556. *Id.* at 83.

557. Press Release, FIDA, *supra* note 538.

558. *Id.* This insight came from IED Executive Director Koki Muli, who was a consultant on using a proportional representation system. The campaign also suggested that the proposed government funding of political parties be tied more closely to the successful recruitment and election of women representatives. TRAINING MANUAL, *supra* note 17, at 84-85. These particular campaign suggestions reinforced the idea that social justice was in part about the issue of representation.

*c. Attempting to Appeal to Others Through the Social Justice Principle*

Although the social justice principle sought to place affirmative action in a broader framework, the principle also served in two ways as a broad appeal to all who were concerned about constructing a just and fair society.<sup>559</sup> First it recognized that these other communities were constituted in part by women.<sup>560</sup> By building solidarity among women and seeking justice for women, the campaign sought justice for all communities.<sup>561</sup> Second, advocacy of the social justice principle provided a framework for embracing the concerns of a wide range of communities on the fairness of current social arrangements. In this sense it sought to appeal to people interested in reordering these arrangements through the constitutional review process from their own community perspectives.<sup>562</sup>

For example, one could characterize the campaign's support for maintaining Kadhi's courts in the Draft Constitution as an attempt to reach out to Muslim women in particular but also as an attempt to reach out to another community through women's concerns. By embracing the needs of this "minority" community, the campaign broadened its reach and demonstrated its concerns for other communities while also deepening and reinforcing the rhetorical association of women, the marginalized, and minority communities. The social justice concept potentially appealed to many of the various peoples and ethnic groups in Kenya.<sup>563</sup> However, because the recasting of affirmative action as social justice was incomplete, even in the minds of the coalition, the affirmative action framework bound and limited a broader conceptualization of the groups that might have understood their concerns in a social justice framework.<sup>564</sup> Affirmative action

559. TRAINING MANUAL, *supra* note 17, at 76 (defining social justice as "measures that bring about just and fair social arrangements . . . [and] enable all people and communities to live up to their full human potential").

560. *Id.* at 40 (explaining that "women are concerned about the disabled, other disadvantaged groups, children, workers and the poor," and others because women constitute half of all these groups worldwide and more than half of these groups in Kenya). The manual also explains the concept of intersectionality and its implications for differently situated women, and it argues that women are concerned about all of the issues in the constitution because women are effected by all the issues contained therein and have their own ideas about these issues. *Id.*

561. *Id.*

562. *Id.* at 40-41.

563. *See, e.g., id.* at 40 (discussing diversity among women and emphasizing the association of women with other disadvantaged groups while noting that women's "identities are defined along political, social, cultural, racial, [and] ethnic . . . lines").

564. The rhetorical association of women's rights with the rights and needs of marginalized communities and people with disabilities predated the campaign. For example,



policies were understood as benefitting those whom society has disadvantaged. Thus to the extent that the affirmative action framework continued to dominate discourse, it reinforced the positive but limited link between women's rights and the rights of marginalized communities and people with disabilities, groups that the existing social structure had obviously disadvantaged.

## 2. Gender Mainstreaming

The campaign's central focus with respect to the principle of gender mainstreaming was to secure an independent gender commission.<sup>565</sup> Although the Draft provided for a gender department within the Human Rights Commission,<sup>566</sup> women's groups' past advocacy had insisted on an independent entity.<sup>567</sup> The campaign also sought to facilitate the operation of the gender commission and ensure that gender issues would feature in all policy discussions by situating the responsibility for gender awareness in several offices throughout government.<sup>568</sup>

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Article 14(11) of the 2002 Draft Constitution states: "The Republic shall ensure the fullest participation of women, the disabled, and the marginalised communities and sectors of society in the political, social and economic life of the country." *Draft, supra* note 3, Art. 14(11). Furthermore, some have described the 2000 Equality Bill, which the Attorney-General's office drafted in conjunction with FIDA and is pending in Parliament, as a measure to "outlaw discrimination faced by various marginalised groups, in particular, women, children, pastoralists, members of religious minorities and the disabled." FIDA 2002, *supra* note 105, at 8.

The campaign also used this language when discussing social justice. For example, Kamangu's essay suggests that social justice means "giving a chance to marginalised and disadvantaged groups to be visible in leadership in parliament, local authorities and other structures of government." TRAINING MANUAL, *supra* note 17, at 34 (emphasis omitted). In addition, the campaign's newspaper at the NCC, *Yawezekana*, often made reference to women and the marginalized. See, e.g., *Yawezekana Reporter, Affirmative Action: Getting the Real Picture*, YAWEZEKANA, Sept. 8-10, 2003, at 2 (discussing the idea that affirmative action is not just for the benefit of women but also for the marginalized and disadvantaged, pastoralists, disabled people, etc.).

565. TRAINING MANUAL, *supra* note 17, at 50-53.

566. *Draft, supra* note 3, Art. 288.

567. FIDA 1997, *supra* note 78, at 64.

568. See, e.g., TRAINING MANUAL, *supra* note 17, at 85-86 (proposing changes to Article 147 of the Draft that would empower Parliamentary Service Commission to "identify and formulate gender equality guidelines for all parliamentary bodies and other offices on which gender balance and fair representation must be realised"); *id.* at 86 (proposing changes to Art. 184 of the Draft that would require the state to "ensure a gender sensitive bench through providing ongoing education for judges on gender issues"); *id.* at 88 (proposing changes to Art. 205 of the Draft that would empower Judicial Service Commission to formulate "guidelines, in consultation with the Gender Commission and other offices, rendering decision-making, court processes, and the judicial culture, gender fair"); *id.* at 90 (proposing changes to Art. 232 of the Draft that would require the state to ensure gender equity in property laws); *id.* at 91 (proposing changes to Art. 265 of the Draft that would require the Kenya Police Service to develop gender-sensitive policies).

The Draft Constitution provided for a Commission on Human Rights and Administrative Justice (CHRAJ) that included a Gender Commissioner and presumably a gender department within the context of the commission.<sup>569</sup> The CHRAJ was to be an independent commission with the mandate to “educate the public on its role, purpose and functions;” to investigate complaints brought by individuals, their families or other interested persons or organizations; and to “conduct investigations, on its own initiative.”<sup>570</sup> Furthermore, like all of the constitutional commissions, it had the power to establish branches at the provincial and local levels.<sup>571</sup>

Although the Human Rights Commission was strong and had the kind of authority to investigate complaints that many women thought important for an independent commission,<sup>572</sup> the Draft did not provide for an independent commission on gender. Women’s groups had historically advocated for an independent “Gender Equality Commission,”<sup>573</sup> and the campaign drew upon their arguments in proposing the same. The campaign argued that Kenya lacked a national policy on gender, that no state machinery existed with authority to enforce measures or influence policies for women’s advancement, and that none of the successful efforts to improve women’s lives had resulted in a statutory institution (such as a government agency) to ensure that the government consistently took equity issues into account.<sup>574</sup>

The campaign’s arguments suggested that an independent institution was necessary to address women’s issues and that subsuming gender issues under the rubric of the Human Rights Commission might marginalize women’s issues.<sup>575</sup> Although the necessity of an

569. *Draft*, *supra* note 3, Art. 288.

570. *Id.* Art. 282.

571. *Id.* Art. 279(3).

572. FIDA 2002, *supra* note 105, at 17 (celebrating Article 73 of the Draft, which provided that persons acting in the Republic’s interest could bring suits to enforce the Bill of Rights); *see also Draft*, *supra* note 3, Art. 73. Article 282 similarly grants the CHRAJ authority to investigate complaints and applies to suits brought to the constitutionally mandated Human Rights Commission established in Article 288. *Id.* Art. 282; *see also TRAINING MANUAL*, *supra* note 17, at 51 (listing duties of the commission to include examining human rights complaints brought by women, men, and other non-state actors, and appointing special reporters “to investigate specific human rights concerns”).

573. FIDA 1997, *supra* at 105, at 64.

574. *TRAINING MANUAL*, *supra* note 17, at 50; *see also FIDA 2002*, *supra* at 105, at 18 (making a similar argument but noting that the executive branch included a Women’s Bureau that considered women’s issues).

575. *Cf. Penelope Andrews, Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307, 330 (1998) (discussing the debate over the South African Commission for Gender Equality and noting that its supporters believed that only an independent commission could “deal comprehensively with women’s issues”).

independent commission is implicit in the campaign's arguments, it never fully addressed the issue of whether women's interests and the interests of the country might better be served by an independent gender commission or by integrating women's concerns into a human rights framework institutionalized in the way the Draft Constitution proposed.<sup>576</sup> In defending the Palacina Group's integrated approach, Yash Pal Ghai suggested (referencing the South African debate) that women's issues might be ghettoized in a separate commission and that, given the hostility to gender equality and the high cost of establishing several different independent commissions, a separate gender commission might be underfunded and thereby marginalized. Further, institutionalizing an integrated approach where gender issues are part of human rights discussions promotes the idea of women's rights as human rights. This approach presumably would help the Human Rights Commission to develop "the means to cope with women's subordination so that the experiences and needs of women can be incorporated into a comprehensive and effective strategy to combat all kinds of discrimination, no matter where they originate."<sup>577</sup>

Nevertheless, the momentum for an independent gender commission had built, bolstered by the NARC government's pledge and initial steps towards establishing an independent gender commission.<sup>578</sup> This momentum made the campaign confident that women could secure an independent gender commission in the constitution, and the campaign members therefore devoted little discussion to whether this was the correct approach. The campaign was aware however that the Commission could be marginalized and thus sought to ensure that other constitutionally mandated mechanisms were in place to facilitate the Commission's functioning and to ensure that all government entities contemplated gender concerns in the design of policies and program. The campaign accomplished this task by proposing that the Judicial and Parliamentary Service Commissions be responsible for facilitating gender issues and concerns.<sup>579</sup>

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576. *See id.*

577. Andrews, *supra* note 575, at 331.

578. *See* FIDA 2003, *supra* note 2, at 29 (noting that the Gender Commission established by the NARC government was not constitutionally mandated and thus could be proscribed).

579. The Draft would empower the Parliamentary Service Commission to "provide such services and facilities as are necessary to ensure the efficient and effective functioning of Parliament," *Draft, supra* note 3, Art. 147(3)(c), and "to undertake, singly or jointly with other relevant authorities and organizations, such programmes as will promote the ideals of parliamentary democracy." *Id.* Art. 147(3)(h). The Judiciary Service Commission is more powerful than the Parliamentary Service Commission in that it recommends judicial appointees to the president; reviews and makes recommendations "on the terms of service of Judges, magistrates and other judicial officers;" investigates complaints against judges;

### 3. Gender Equality

The gender equality principle was different from the other two principles in that it was to strike at the heart of an array of concepts, traditions and practices that promote or result in gender hierarchies in which women's lives are devalued, disadvantaged, limited or otherwise oppressed. The campaign defined gender equality broadly as the "equal valuing by society of women and men" and included ideas of equality under law, equality of opportunities, and equality of outcome.<sup>580</sup> The equality principle required the government to recognize

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and prepares and implements educational and training programs for judges, among other duties. *Id.* Art. 205(1). The Draft also empowers the Judicial Service Commission "to encourage gender equity in the administration of justice." *Id.* Art. 205(1)(g).

580. TRAINING MANUAL, *supra* note 17, at 20-21. The manual first introduces the concept of gender while explaining the concept of gender equality, noting:

Gender refers to the roles and responsibilities that society constructs, assigns and expects of women and men on the basis of their biological and physical characteristics. These expectations inform stereotypes.

Gender roles change over time . . .

Gender roles and responsibilities are to be found in the economic, social and political realms.

Gender is learnt and will vary within a culture and between cultures.

Gender roles are very affected by age, class, ability, ethnicity and race.

The term "gender" allows us to bring both men and women into our constitutional discussions about equal participation, power and respect for all.

The manual continues, explaining that society's construction of gender roles and responsibilities:

Creates unequal power relationships between women and men.

Labels women as inferior, undervalued and vulnerable.

Denies women full participation within society.

Places greater value on men's roles and functions and allow [sic] surplus resources and benefits to be made available to men as a group.

Is a source of pleasure and creativity and other valuable things for both women and men?

*Id.* at 19.

The campaign's definition of gender performs four functions. First it explains that gender refers to those roles that society constructs based on biological characteristics. Society defines gender based on biological sex, and the definition suggests that gender is at least in part a social construction because gender roles change over time and vary within and across cultures. Second, the definition attempts to make clear that the term gender applies to both men and women. Society assigns roles to both men and women based on their biological sex, and the term gender brings both men and women into the constitutional discussion. Third, the definition seeks to promote women's advancement by noting that current social constructions of gender roles create unequal power relationships between women and men, label women as inferior, deny women participation in society, and place greater value on men's roles. The logical conclusion is that society needs to include women, equalize power relations, change or revalue men's and women's roles, and reallocate resources. Fourth, the definition recognizes that both men and women (despite their devaluation and limited access to social goods) still consider their gender roles as a source of pleasure, creativity, and other valuable things. Although one could argue that this insight suggests that women enjoy their victimized positions, it instead explains that they find joy in being women despite being devalued, that they often do not see their roles as being devalued, or that in any case they value at least some of their roles. The statement

and compensate women for their disadvantaged social status through mechanisms such as affirmative action and the creation of other enabling conditions that would result in equality.<sup>581</sup> It also required recognition of the differing needs, interests, and requirements of women and men.<sup>582</sup> The campaign urged a “result-oriented contextual view of equality” that would permit “both facially neutral and [gender] specific laws to be questioned for their impact on individuals or groups of women, [and to] deliver defacto [sic] equality.”<sup>583</sup> The campaign demanded substantive equality in accordance with notions embedded in the gender equality ideal, and the campaign wanted to see results.<sup>584</sup>

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represents the diversity of women’s reactions to their status and roles in society and the contradictions within those views.

The campaign then defines equality and thereby gender equality. It explains equality as:

The equal valuing by society of women and men. To ensure equality entails the removal of discriminatory barriers. To move towards equality between women and men, it is essential that a whole range of resources are made accessible to both women and men in terms of: respect, participation in all aspects of life, access to institutional power, wealth, control over one’s life, security etc. This enables women and men [to] realise their full potential. Gender equality refers to:

Equality under law.

Equality of opportunities (rewards, access to resources that enable opportunities, etc).

Equality of outcome (recognising the *differences in* needs, interests and requirements of women and men so as to ensure equity).

*Id.*

581. *Id.* at 20, 42-44.

582. *Id.* at 42-44.

583. *Id.* at 44 (quoting Kathleen Mahoney, *Theoretical Perspectives on Women’s Human Rights and Strategies for their Implementation*, 21 BROOK. J. INT’L L. 799, 816-17 (1996) (describing the Canadian Charter’s equality provision).

584. The manual also captures the campaign’s promotion of the broad idea of substantive gender equality. Joyce Majiwa, *The Right to Equality and Non-discrimination*, in TRAINING MANUAL, *supra* note 17, at 42. Majiwa, chair of FIDA from 2003-2004, explains the complex notion of equality as embracing both equality of opportunity and equality of results and critiques the notion of equality as simply “sameness.” *Id.* at 42-43. She argues that understanding equality as simply sameness or requiring the same treatment as men results in men and their experiences being used as the standard of evaluation, obscuring the biological difference between women and men and “the ways in which women’s social reality is very different from those of men.” *Id.* at 42. This social reality is one of historically and socially created subordination and disadvantage. *Id.* Thus she suggests that neutral laws that aim at sameness or symmetry where social reality is asymmetrical simply perpetuate women’s inequality. *Id.* Therefore she advocates for the “corrective approach” to equality, which she characterizes as a “result-oriented contextual understanding” that takes women’s particular disadvantages into account, remedies them, and thus focuses on equality of opportunity, access to opportunity, and results. *Id.* at 44. This corrective approach, she concludes, may sometimes mean that remedies will require identical treatment of women to men. *Id.* In other situations, this approach may require a remedy that acknowledges the social, political, and legal realities of women’s lives. *Id.* By using this language Majiwa demonstrates the campaign’s awareness of the Canadian corrective model as an emerging equality paradigm, which promotes *substantive* equality as equality *per se*.

The campaign's objective in adopting the gender equality principle, however, was to ground and support the proposals it had for improving specific provisions in the Draft Constitution. These included proposals to strengthen the value of equality and especially gender equality in the Draft, as well as strengthen the gender dimensions on language related to inheritance, land, marriage, and the right to life.<sup>585</sup> Although Kenyan women's past efforts inspired these proposals, they also drew on ideas found in international law as developed by global women's activism.<sup>586</sup>

### *a. Strengthening Equality*

One of the first suggestions made to strengthen the principle of equality in the Draft was to include gender equality as one of the basic principles within Chapter Three, Article 14, on the nation's goals, principles, and values.<sup>587</sup> Determined not to alter the Draft rights and fundamental freedoms.<sup>588</sup> Article 14(10) of the Draft Constitution stated, "[t]he Republic is fully committed to respect, protect and promote human rights and fundamental freedoms and enhance the dignity of individuals and communities."<sup>589</sup> This provision was interesting because it stated a commitment to human rights and fundamental freedoms as the primary and motivating idea, and it sought to include and potentially imply a balance between the individual and community. The coalition sought to build upon this provision by introducing the idea of equality between men and women as also being a primary and motivating idea.<sup>590</sup> The coalition proposed that the article read as follows: "The Republic *shall* respect, protect, promote and *ensure* human rights, fundamental freedoms, and the equal protection and benefit of law for men and women and enhance the dignity of individuals and communities."<sup>591</sup>

The coalition further believed that it had to rephrase or eliminate the limitation on equality in Article 31 to strengthen the equality principle in the Draft.<sup>592</sup> The limitation was very narrow. It limited

585. TRAINING MANUAL, *supra* note 17, at 77-94 (proposing changes to the Draft Constitution).

586. *See id.* at 45 (discussing equal rights of Kenyan women in the context of international law).

587. *See id.* at 78 (proposing changes to Article 14 of the Draft).

588. TRAINING MANUAL, *supra* note 17, at 78.

589. *Draft*, *supra* note 3, Art. 14 (10).

590. TRAINING MANUAL, *supra* note 17, at 78. The campaign also sought to complement the potential relationship between the individual and community by subtly suggesting that individuals appear to be either female or male and together make up communities. *Id.*

591. *Id.*

592. *Id.* at 80-81.

the principle of equality “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.”<sup>593</sup>

This limitation posed a number of problems. First, given the absence of the equality principle in the opening chapters of the Draft and the limitation on equality even before the appearance of an equality provision, the limitation seemed to devalue equality as a principle or value.<sup>594</sup> Second, although the Draft language seemed to make clear that equality was only limited with respect to Islamic personal law, campaign members believed that courts might interpret the limitation broadly because the Draft listed Hindu, Islamic, and African personal and customary laws as sources of Kenyan law.<sup>595</sup> Stated differently, some believed that the limitation could set a precedent for its application to other personal or customary practices in which people professed a belief.<sup>596</sup> Such an interpretation could lead courts to protect personal and customary laws that provided for practices such as inequitable inheritance policies, women’s inability to own or control land, wife inheritance, etc.<sup>597</sup> Because this limitation provided a contradicting impulse, courts might use it to protect similar practices despite the equality provision and the provision providing specifically for women’s equality in Article 35.<sup>598</sup> Third, the limitation on equality arguably allowed for the permanent unequal treatment of Muslim women by the state.<sup>599</sup>

The concern that Muslim women would not receive the benefit of equality worried core participants in the coalition (all of whom were non-Muslim women), but all seemed to agree that Muslim women were suspicious of attempts to impose foreign values on interpretation of Islamic law.<sup>600</sup> In fact, Muslim women had protested against the 2000 Equality Bill, drafted by the Attorney General’s office and FIDA.<sup>601</sup> As such, tinkering with the limitation on equality posed the problem of potentially dividing women across religious lines.<sup>602</sup> The campaign might have been inclined simply to avoid the entire issue, but their awareness of the looming issue of the Kadhi’s courts forced

593. *Draft*, *supra* note 3, Art. 31(4).

594. TRAINING MANUAL, *supra* note 17, at 81.

595. *Draft*, *supra* note 3, Art. 5(1).

596. FIDA 2002, *supra* at 105, at 20.

597. *See* Kameri-Mbote, *supra* note 42.

598. *Draft*, *supra* note 3, Art. 35 (providing for equal treatment between women and men, women’s right to receive the same dignity as men, and equitable inheritance laws, and prohibiting customs that undermine women’s “dignity, welfare, interest[s] or status”).

599. FIDA 2002, *supra* note 105, at 20.

600. TRAINING MANUAL, *supra* note 17, at 81.

601. Sekoh-Ochieng, *supra* note 384.

602. *See* TRAINING MANUAL, *supra* note 17, at 81.

them to confront the impact of their proposals on women's solidarity across religious diversity.<sup>603</sup>

*b. Inheritance, Land, Marriage, and the Right to Life*

The campaign was concerned about practices such as chastisement of wives by husbands, wife inheritance, child marriages, and female genital circumcision.<sup>604</sup> They were particularly concerned about inheritance practices, other practices that economically disadvantage women in relation to property and land ownership, marital relations, and reproductive autonomy.<sup>605</sup> The Draft captured and reached the heart of these matters in some limited way. For instance, with regard to unequal inheritance arrangements and other customary practices that disadvantaged women, Article 35 specifically provided that "[w]omen and men have an equal right to inherit, have access to and control property" and that "[a]ny law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women is prohibited."<sup>606</sup> On marriage, the Draft provided that "Every person who is at least eighteen years of age . . . has the right to marry, based upon the free consent of the parties; and . . . has the right to found a family."<sup>607</sup> Furthermore, it provided that persons in the marriage are "entitled to equal rights in the marriage, during the marriage, and at the dissolution of their marriage."<sup>608</sup> The Draft did not address women's reproductive autonomy, but the campaign found relief in the right to life provision that simply stated "Everyone has a right to life" and abolished the death penalty.<sup>609</sup>

The campaign believed that the inheritance clause in the section on women was a good beginning in the fight against unequal inheritance practices for most of Kenya's women.<sup>610</sup> They had conceded this ground in regard to Muslim women upon their request, but the campaign believed that customary inheritance rules were a primary

603. *Id.* at 54 (discussing how support of the Kadhi's courts was "one way to strengthen that solidarity and commitment between [non-Muslim] and Muslim women").

604. FIDA had addressed these issues over the years. *See, e.g.*, FIDA 2003, *supra* note 2; FIDA 2002, *supra* note 105; FIDA 2000, *supra* note 366.

605. *See, e.g.*, FIDA, *supra* note 492, at 17 (lobbying for the new Kenyan constitution to guarantee to every person "[e]njoyment of the highest attainable standard of health including reproductive healthcare") (emphasis added); *id.* at 58-64 (describing governmental finance reforms important to women); *id.* at 65-68 (describing eleven reforms regarding women and land rights).

606. *Draft, supra* note 3, Art. 35 (on women).

607. *Id.* Art. 38(3) (on family).

608. *Id.* Art. 38(4).

609. *Id.* Art. 32 (on the right to life).

610. *See, e.g.*, TRAINING MANUAL, *supra* note 17, at 46 (listing Article 35 as a provision that advanced equality).



obstacle to women owning land.<sup>611</sup> Although a constitutional provision might give women a basis for making claims against particular property, the campaign was under few illusions that such a provision alone would alter years of this practice. The campaign therefore proposed an amendment to the chapter on land in the Draft Constitution.<sup>612</sup> They proposed that the state's obligations to define and review a national land policy include a duty to ensure "gender equity and the elimination of gender discriminatory laws, regulations, customs, [and] practices related to land."<sup>613</sup> Furthermore, the campaign later supported a proposal suggesting that marital homes be placed in both spouses' names and that surviving spouses receive a reasonable portion of the late spouse's property whether or not a will existed.<sup>614</sup> The campaign calculated this provision to prevent marriage homes from being sold from underneath women and to protect women from being thrown off property after her spouse dies.

On marriage, the campaign thought the family provision in the Draft was adequate. The family provision had an age requirement and required consent of the parties.<sup>615</sup> These two aspects of the provision seemed to address the problems of early marriage and forced marriage. Although these provisions did nothing to address the underlying causes of both these practices, they could give individual women a leg on which to stand when fighting a forced or under age marriage and provide women's advocates a platform for creating other laws and plans of action to attack these practices. In addition, FIDA discussed fighting for legislation that would standardize marriage laws.<sup>616</sup>

With regard to women's reproductive autonomy, the campaign said little.<sup>617</sup> However, it quietly began working with several women's health organizations that indicated they were prepared to fight against the Christian forces that were insisting that the right to life provision be amended. These religious groups wanted the provision to read "Every person has a right to life from conception to natural death."<sup>618</sup> The campaign decided that to take on this fight publicly might limit the overall effectiveness of the campaign given general

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611. *Id.* at 90; see also Rosemary Okello, *Land Matters for Women*, YAWEZEKANA, May 29, 2003, at 3.

612. *Id.* (proposing alternative language to Article 232(2) on land policy frameworks).

613. *Id.*

614. See FIDA 2003, *supra* note 3, at 40.

615. *Draft*, *supra* note 3, Art. 38.

616. FIDA 2002, *supra* note 105, at 26-27. The family provision (Article 38) produced little reaction among the public except that many religious groups wanted the constitution to confine marriage to the union of a man and a woman, thereby making gay and lesbian marriages illegal. See, e.g., KENYA CHURCH, *supra* note 523.

617. See generally TRAINING MANUAL, *supra* note 17.

618. KENYA CHURCH, *supra* note 523.

anti-abortion sentiment in the country. This sentiment exists despite the fact that approximately one hundred Kenyan women die each day from complications arising from abortions.<sup>619</sup>

The last of the campaign's ten "Tentative Positions to be Recommended to Members" referred to these issues.<sup>620</sup> It recommended that delegates "[s]upport [the] Bill of Rights as currently written with gender fairness inspired proposed changes."<sup>621</sup> This hands-off approach, while perhaps aiding the campaign in its overall struggle, may have undermined its position on these issues because, consistent with positions pushed by Christian forces, both the NCC's draft (the Zero Draft) and the government-altered draft (the Waco Draft) provided that life "begins at conception," with abortion limited to save the life of the mother or pursuant to laws enacted by Parliament.<sup>622</sup> Furthermore, both of these later drafts limited the definition of marriage as being between a man and a woman<sup>623</sup> and replaced the age requirement with the language of "adults."<sup>624</sup>

### *C. Equal Valuing of Women and Men: Neutrality?*

The campaign embraced one of the central features of the gender equality ideal, which defined equality as between women and men.<sup>625</sup> In this sense, as many feminist scholars have pointed out, women's equality is measured against the experiences of men, as defined by men, the favored and more powerful group.<sup>626</sup> Although the development of the gender ideal seems to have moved beyond this comparative notion to address women's concrete lived experiences and the specific types of subordination that women face, gender equality viewed as women's equality with men has two other flaws that became clear in the constitutional process.

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619. *Foetuses Spark Kenya Abortion Row*, BBC NEWS, June 3, 2004, <http://news.bbc.co.uk/1/hi/world/africa/3773913.stm> (noting that abortion is illegal in Kenya and reporting mortality statistics for women who receive illegal abortions).

620. TRAINING MANUAL, *supra* note 17, at 33.

621. *Id.*

622. ZERO DRAFT, *supra* note 11, Art. 34 (allowing for the termination of an unborn child only to save the life of the mother); WACO DRAFT, *supra* note 12, Art. 35 (stating that "[a]bortion is not permitted except as may be provided for by an Act of Parliament"). Both provisions leave open the possibility for a later fight for abortion rights. Whether the Parliament as currently organized would yield a more liberal view regarding abortion is unclear.

623. ZERO DRAFT, *supra* note 11, Art. 41 (3); WACO DRAFT, *supra* note 12, Art. 42 (3).

624. ZERO DRAFT, *supra* note 11, Art. 41 (2); WACO DRAFT, *supra* note 12, Art. 42 (2) (noting that "every adult has the right . . . to marry a person of the opposite sex, based upon the free consent of the parties").

625. TRAINING MANUAL, *supra* note 17, at 20, 42-44.

626. *See, e.g., id.* at 42.

The first flaw was that, in explaining that gender referred to women and men, the idea that the campaign was pursuing gender equality to advance the empowerment of women in a largely patriarchal order was lost. For instance, the provision for women's equality was isolated in a single article to advance the status of women.<sup>627</sup> By the end of the Kenya National Constitution Conference however, the delegates had renamed this article the "Gender" article with minimal substantive changes.<sup>628</sup> These changes potentially transformed the article into a gender neutral article, eviscerating its purpose of advancing women's status and inadvertently reaffirming the status quo. The revised article undermines the former women's provision because laws, cultures, and customs that protect the status of men are often dependent on the subordinated status of women. Stated differently, in a patriarchal society such as Kenya, the status of men is predicated in part on women's subordinate roles and positions in society.<sup>629</sup> To protect this status while supposedly also protecting women's status potentially leaves the status quo untouched. This language could have been unintentional and simply the result of poor drafting, but it demonstrated the ease with which the concept of gender equality could be transformed into a gender-neutral concept.

Second, the gender equality ideal did little to address the diversity of women. The campaign was aware of this problem and published essays in response that explored the diversity of women.<sup>630</sup> Although the campaign was committed to solidarity of women across their diversities,<sup>631</sup> in practice it faced a number of challenges to this solidarity. The following section analyzes one such challenge that went so far as to cause the campaign to question its commitment to the principle of gender equality.

#### IV. ISSUE OF KADHI'S COURTS

In tackling the issue of Kadhi's courts, the coalition's commitment to solidarity and diversity required it to listen respectfully and to value the voices and experiences of the Muslim women whose beliefs were different from their own.<sup>632</sup> Many Muslim women were

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627. *Draft, supra* note 3, Art. 35 ("Women have the right to equal treatment with men . . . (4) Any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women is prohibited.").

628. ZERO DRAFT, *supra* note 11, Art. 37 (entitled *Gender* and stating that "[w]omen and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social activities. . . . Any law, culture, custom or tradition that undermines the dignity, welfare, interests or status of women or men is prohibited").

629. See TRAINING MANUAL, *supra* note 17, at 37-39.

630. See, e.g., *id.* at 40.

631. *Id.* at 54.

632. *Id.* at 40, 53-57.

suspicious of the campaign's views of equality and believed that the preservation of Kadhi's courts was potentially a mechanism for empowering them.<sup>633</sup> The coalition, in contrast, drawing on past Kenyan women's activism, believed ideas of equality were their best route to empowerment.<sup>634</sup> In resolving this conflict, the campaign found that it could use equality, as a strong normative value and understood as a flexible and complex idea, to craft creative compromises that addressed the substantive needs of these different women. In this sense, the ideal of equality gained its power from attention to the substantive issues and needs of women rather than from a formal, universalized, and absolutist principle. From the campaign's perspective, the idea of solidarity itself was based upon a strong normative and substantive value of equality, despite its controversial nature in the context of conversations between Muslim and non-Muslim women.<sup>635</sup> Substantive equality also viewed all women as having a voice in policy formation, taking their differences and various views into account.<sup>636</sup> It also informed a broader view of gender equality.

On the issue of Kadhi's courts, the substantive needs of Muslim women entailed a fight for rights on their own terms without the overriding precepts embedded in a country and legal system that were largely non-Muslim.<sup>637</sup> The coalition had to be willing to craft creative compromises that reflected these differences. A substantive view of equality aided this process, and promoting women's solidarity provided a strong incentive to find a compromise.

Kadhi's courts have a long history in Kenya and under the current constitution.<sup>638</sup> They have long been part of the Kenyan legal system and part of the judiciary.<sup>639</sup> They apply Islamic personal law to those who profess a belief in Islam.<sup>640</sup> The Draft Constitution retains

633. *Id.* at 57.

634. *Id.*

635. TRAINING MANUAL, *supra* note 17, at 57.

636. *Id.*

637. TRAINING MANUAL, *supra* note 17, at 54-55.

638. See Hassan, *supra* note 33 (discussing the history of Kadhi's courts on the coast of Kenya). At Independence, although the British effectively controlled the coastal strip of Kenya, the Sultan of Zanzibar maintained a claim to sovereignty over the Strip. *Id.* "In 1895, the Sultan gave the British power to administer the 10 mile coastal strip subject to their respecting the existing Kadhis Courts among other conditions. The British did so and declared a protectorate over the coast while the rest of Kenya was a colony proper." *Id.* Hassan further explains that in 1961, two years before Independence, the British government and the Sultan revisited the status of the coastal strip. *Id.* They appointed a Commissioner to review the issues who later recommended that the Strip should be a part of Kenya subject to the Kenyan government agreeing to respect the existence of the courts. *Id.* The Kenyan government agreed, and the Sultan relinquished his claim to sovereignty over the Coastal Strip to Kenya. *Id.*

639. *Id.*; see also CONSTITUTION Art. 66 (2000) (Kenya).

640. CONSTITUTION Art. 66 (5) (2000) (Kenya).

these courts as part of the judiciary<sup>641</sup> and authorizes them to apply Islamic personal law in a manner not limited by the Draft's equality provisions.<sup>642</sup> The Draft also expanded the jurisdiction of Kadhi's courts to provide greater access to a growing population, to cover small claims transactions, and to have appellate powers.<sup>643</sup> The Muslim community, including Muslim women, supported the retention and expansion of the Courts in the final constitution.<sup>644</sup> Muslim women also advocated for provisions that would increase the required qualifications necessary for an individual to become a Kadhi, reasoning that better qualified Kadhis rendered better decisions for women.<sup>645</sup>

The campaign knew that the Kenya Church opposed the retention of Kadhi's courts, arguing that Kenya was a secular state and that the constitution should not mention specific religions or religious institutions.<sup>646</sup> It and other groups advocated instead for a freedom of religion provision similar to the First Amendment to the United States Constitution.<sup>647</sup> They also suggested that Kenyans should be subject to the same single law and that non-Muslim Kenyans should not have to pay taxes for a specialized religious court.<sup>648</sup> The issue later proved so explosive that Ufungamano, the organization viewed as largely responsible for giving birth to the final constitutional review process, split over the issue.<sup>649</sup> Ufungamano originally consisted of leaders from the Catholic Church, the Protestant National Council of Churches of Kenya, the Muslim Supreme Council of Kenya, and the Hindu Council of Kenya.<sup>650</sup> Muslims pulled out of the group on April 22, 2003.<sup>651</sup>

641. *Draft*, *supra* note 3, Art. 199.

642. *Id.* Art. 31 (4).

643. *Compare id.* Art. 200 with CONSTITUTION Art. 66 (5) (2000) (Kenya) (providing that jurisdiction of Kadhi's courts extends only to "questions of Muslim law relating to personal status, marriage, divorce or inheritance").

644. FIDA 2003, *supra* note 2, at 39-40.

645. Muslim advocacy groups made comments to this effect in many conversations throughout the NCC.

646. KENYA CHURCH, *supra* note 523. The Kenya Church "is an inter-denominational federation bringing together all major Church denominations and other independent Church groups in Kenya." For more information e-mail [info@kenyachurch.or.ke](mailto:info@kenyachurch.or.ke). Much of this pamphlet addressed the "special protection and privileges" provided for Islam. *Id.*; see also Juliana Omale, *Separating Religion from Practice*, YAWEZEKANA, May 22, 2003, at 1-2; Arthur Okwemba, *Voices of Delegates*, YAWEZEKANA, May 22, 2003, at 2 (discussing the opposition to Kadhi's courts).

647. TRAINING MANUAL, *supra* note 17, at 56.

648. *Id.* at 57.

649. Independent Catholic News, *Kenya: Muslims, Christians Disagree Over Draft Constitution* (2003), <http://www.indcatholicnews.com/kenmusic.html> (last visited Sept. 21, 2006) (explaining the disagreement over Kadhi's courts).

650. See Human Rights Watch, *World Report 2001: Kenya: Human Rights Developments* (2001), at <http://www.hrw.org/wr2k1/africa/kenya.html> (describing the Ufungamano group members and efforts in the constitutional reform process).

651. Independent Catholic News, *supra* note 650.

Because Muslim women wanted to maintain the Kadhi's courts in the NCC's draft constitution, the campaign had to decide whether it would act in solidarity with Muslim women by reaching out to their communities and supporting their demands.<sup>652</sup> This question was made more urgent by the fact that the same Christian opposition that opposed Kadhi's courts also opposed women's empowerment, particularly the affirmative action provisions in the Draft that advanced women's rights to political participation.<sup>653</sup> The campaign expected the opposition to mount a ferocious fight. Women, they thought, needed to be unified around the issue of women's empowerment and women's rights. As such, after lengthy debate the campaign came out in support of Kadhi's courts.<sup>654</sup> Their support rested upon on two primary justifications that seemed to address the substantive needs of Muslim women. The first was the idea that Muslim women perceived Kadhi's courts, particularly on the coast of Kenya, as women's courts protecting women's rights.<sup>655</sup> The second argument was that the campaign should support the protection and rights of a religious minority.<sup>656</sup> In the end the campaign nevertheless had to confront and compromise on the limitation on equality as applied to Kadhi's courts.

#### A. Kadhi's Courts as Women's Courts

Willy Mutunga, who was Executive Director of KHRC at the time of the NCC,<sup>657</sup> was the first person to raise the issue of the Kadhi's courts and women's solidarity with the coalition. He argued that Kenyan Muslims generally perceived the Kadhi's courts as women's courts, particularly on the coast of Kenya where a large portion of the Muslim community lives.<sup>658</sup> He also noted that increasing numbers

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652. TRAINING MANUAL, *supra* note 17, at 53-54.

653. See, e.g., KENYA CHURCH, *supra* note 523; Juliana Omale, *Kadhis' Courts Steal the Thunder from Chapter on Judiciary*, YAWEZEKANA, June 5, 2003, at 11.

654. TRAINING MANUAL, *supra* note 17, at 53-57 (addressing arguments for and against supporting the Kadhi's courts and justifying the campaign's decision to support them).

655. SUSAN F. HIRSCH, PRONOUNCING AND PRESERVING: GENDER AND THE DISCOURSES OF DISPUTING IN AN AFRICAN ISLAMIC COURT 136-37 (1998).

656. TRAINING MANUAL, *supra* note 17, at 54-55 (stating that support of Kadhi's courts "is consistent with women's concern for real justice. Just like women want real equality, equity, and fair representation, Muslims want the real freedom to enjoy their religion").

657. See Kenyan Section of the International Commission of Jurists, *Profile of Dr. Willy Mutunga*, <http://www.icj-kenya.org/default.asp> (last visited Sept. 21, 2006).

658. Susan Hirsch agrees with this position but notes that Muslim men in particular criticize Kadhi's courts as being "women's courts." HIRSCH, *supra* note 656, at 137 (discussing in the chapter entitled "Marital Disputing in Kadhi's Courts" the complex history of the Kenyan Kadhi's courts, in which Muslim men at different times have viewed the Kadhis and these institutions as collaborators of the state). Hirsch also notes that the increasing success women have had in cases before the Kadhi's courts contributes to these views. *Id.*

of Muslim women were bringing cases to Kadhi's courts and winning!<sup>659</sup> As women's courts, so the argument went, this institution provided an opportunity for women to make their voices heard<sup>660</sup> and provided Muslim women an opportunity to enforce favorable Islamic provisions, particularly regarding maintenance.<sup>661</sup>

The notion that Kadhi's courts in Kenya have proven relatively helpful to Muslim women has some support. Since the 1970s, more Muslim women have taken their marital complaints to Kadhi's courts and the majority of women win their cases against their husbands.<sup>662</sup> Susan Hirsch notes that the number of cases filed in Kadhi's courts in Mombasa and Malindi have increased since the 1970s and that "in Malindi, the number of divorces registered for 1985 and 1986 exceeded the number of marriages."<sup>663</sup> Women bring most of these claims.<sup>664</sup> Of the 129 legal claims filed in a twenty-month period in Malindi, women brought 108, while men brought a mere seventeen.<sup>665</sup> Ninety-three of the claims brought by women were for failure of the men to "provide economic support of one kind or another."<sup>666</sup> Women won 42.5% of their cases, settled 39.8%, and lost only 1.9%, with 14.8% unresolved.<sup>667</sup> Men, on the other hand, won 23.5%, settled 35.3%, and lost 29.4% of their cases, with 11.8% unresolved.<sup>668</sup> Furthermore, most of the cases "won by women resulted in awards of maintenance and/or dissolution of marriage."<sup>669</sup>

The CKRC reached a similar conclusion on the value of the Kadhi's courts. After considering the views collected from Kenyans, the Commission noted:

[I]t was clear that for Muslims, [Kadhi's courts] had become a symbol of their Islamic faith and culture but more importantly for the Muslim women, the courts became an important site for

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659. *Id.* at 127.

660. *Id.* at 137, 139-93.

661. *Id.* at 126 (explaining that more than seventy percent of the cases brought by women in the Malindi Kadhi Court concerned maintenance). Hirsch explains that women tend to bring strong cases by collecting evidence of strife over time and of having taken their problems to other disputing contexts such as family, local elders, and spiritual healers, all of which evidences their having persevered. *Id.* at 129. Some Muslim women at the NCC argued that the Qur'an, presumably with regard to maintenance, gave them more rights than equality rights would provide.

662. *Id.* at 125, 127.

663. *Id.* at 125.

664. HIRSCH, *supra* note 656, at 125.

665. *Id.* at 126.

666. *Id.*

667. *Id.* at 127.

668. *Id.*

669. *Id.*

resisting the oppression experienced in marriage and in their domestic circumstances in a traditionally patriarchal and male dominated society. Through these courts, Muslim women have succeeded in fighting for the protection and enforcement of their rights as guaranteed under Islamic law and to challenge negative cultural practices and customs of Muslim communities that tend to undermine these rights.<sup>670</sup>

This description of the Kadhi's courts interestingly suggests that the courts are sites of women's resistance to patriarchal conditions, locating these conditions instead in "negative cultural practices and customs," and presuming that Islamic law provides a remedy for them. Whether many of these patriarchal conditions rest only in pre-existing cultural practices and not in mainstream interpretations of Islam is debatable.

Unlike the CKRC, Hirsch cautions against reading Muslim women's increasingly successful use of the Kadhi's courts as entailing resistance to male domination.<sup>671</sup> She argues rather that women engage in acts of faith by petitioning Kadhi's courts.<sup>672</sup> They are demonstrating their faithfulness to their religion while perhaps trying to change their circumstances with regard to individual men.<sup>673</sup> She demonstrates that women in making their claims constitute themselves as gendered subjects through the narratives that they tell in court.<sup>674</sup> These narratives are gendered because mostly women engage in this linguistic form.<sup>675</sup> Women often reference themselves in these narratives as having complied with Islamic law through having "persevered."<sup>676</sup> The idea suggests that whereas men are to maintain women and exercise control over them, the women, who are being maintained, are to "persevere."<sup>677</sup> Hirsch nonetheless concedes that the accumulation of successfully pursued cases by women may in the long term have some transformative effects.<sup>678</sup>

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670. CKRC REPORT, *supra* note 396, at 163; *see also* Walter Owuor, *Judiciary and the Kadhi's Courts*, KATIBA NEWS, Jan. 2003, at 8-9 (discussing and analyzing the seventeen questions regarding the judiciary that the CKRC proposed to Kenyans). Owuor notes that of the 17,010 responses received by the CKRC, half came from the Coastal and North Eastern Provinces, both of which have large Muslim populations. *Id.*

671. HIRSCH, *supra* note 656, at 136-37.

672. *Id.* at 137.

673. *Id.* ("Turning to Kadhi's Court affirms her connection to Islam, even as it calls her piety into question and, simultaneously, constitutes her as a supplicant to the state.")

674. *Id.* at 139.

675. *Id.* at 91-92.

676. *Id.*

677. HIRSCH, *supra* note 656, at 91-92.

678. *Id.* at 129.



### B. 'Real' Religious Freedom for Minorities

The second argument on which the campaign based its support for retaining Kadhi's courts was that retention of the courts furthered religious freedom and protected a minority religious group. The campaign argued that support of Kadhi's courts was consistent with women's concern for real, substantive justice.<sup>679</sup> Just as women wanted real equality and advocated for new mechanisms to implement that equality, the campaign argued that Muslims wanted real freedom of religion.<sup>680</sup> In an overwhelmingly Christian country whose cultural and religious understandings derived from the Christian West, establishing true freedom of religion for Muslims required mechanisms such as Kadhi's courts.<sup>681</sup> The campaign argued that these policies and institutions would result in substantive equality and/or religious freedom and not simply freedom of religion and equality on paper.

The campaign reminded Christians that they had sought similar policies and mechanisms in Islamic countries where Christians were minorities.<sup>682</sup> One specific example given by the campaign was the situation in Albania when the government decided to compel free public education for all children in 1934.<sup>683</sup> Although the proposed education system was not religious education per se, Albanian Christians saw this compulsion as resulting in an Islamic-oriented education for their children and abridging their freedom of religion.<sup>684</sup> They fought for an exemption to this law and the right to educate their children in their own schools.<sup>685</sup> In doing so, they implied that application of a neutral law in the context of an Islamic, although secular, state did not guarantee substantive freedom of religion.<sup>686</sup> Similarly, the campaign was committed to building and maintaining the social justice institutions that would enable and guarantee real substantive freedom for religious minorities, be they Christian or Muslim, in Kenya or abroad.

Finally, the campaign attacked the idea that Kenya should adopt a neutral freedom of religion provision like the First Amendment in the United States Constitution.<sup>687</sup> They implied that the absence of

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679. TRAINING MANUAL, *supra* note 17, at 53-54.

680. *Id.* at 54.

681. *Id.*

682. See Omale, *supra* note 647, at 2.

683. *Id.* at 54-55; see also HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 96-97 (2d ed. 2000) (discussing the Albanian education case).

684. TRAINING MANUAL, *supra* note 17, at 54-55.

685. *Id.*

686. *Id.* at 55.

687. *Id.* at 56.

Kadhi's courts in an overwhelmingly Christian state would operate to disadvantage Muslims and their practices despite being a facially neutral treatment of religion.<sup>688</sup> The campaign argued that "a Kenyan-styled arrangement, which includes the Kadhis courts may be a superior arrangement in terms of real freedom of religion and social justice."<sup>689</sup> The campaign also used this argument to challenge Christian opposition to women's rights, which these groups attacked as a foreign idea to Kenya.<sup>690</sup> The campaign suggested that these Christian groups were the ones promoting foreign ideas while women strove to protect indigenous institutions that had worked to foster peace between the two religious communities.<sup>691</sup>

In the final analysis the campaign refined and rephrased this argument by replacing its emphasis on freedom of religion with emphasis on the notion of "protect[ing] a minority's way of life."<sup>692</sup> One can understand this move as a signal of appreciation for the different cultural practices of Kenya's more than forty various ethnic groups, including pastoralists.<sup>693</sup> From this perspective, society views Muslims as a unified people instead of a group with differing religious beliefs, and it draws upon understandings of the Muslim community as an ethnicized cultural community complete with its own cultural and social arrangements.<sup>694</sup> Additionally, the idea of protecting the way of life of an ethnic group that is culturally or religiously distinct may have resonated with similar claims made by many Kenyan ethnic groups to maintain their distinct cultural heritages and traditions. The campaign shared this sentiment, recognizing women's diversity. Specifically, the campaign acknowledged the reality that women are

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688. *Id.*

689. *Id.*

690. *See, e.g.,* KENYA CHURCH, *supra* note 523.

691. *See* TRAINING MANUAL, *supra* note 17, at 53 (noting that the Kadhi's courts "exemplif[y] the peaceful and co-existent relationships in [Kenya] between Muslim and non-Muslim communities").

692. Press Release, FIDA, *Safeguarding the Gains for Kenyans in the Draft Constitution*, THE SUNDAY NATION, May 4, 2003 (on file with author); *see also* TRAINING MANUAL, *supra* note 17, at 54.

693. MSN Encarta, Kenya, [http://encarta.msn.com/encyclopedia\\_761564507\\_3/Kenya.html](http://encarta.msn.com/encyclopedia_761564507_3/Kenya.html) (last visited Sept. 21, 2006).

694. Note that many scholars distinguish between cultural and religious beliefs. *See, e.g., supra* note 671 and accompanying text (discussing the CKRC's description of the Kadhi's courts and distinguishing between practices that Islam requires and the different cultural practices found in some Muslim communities); Azizah Y. Al-Hibri, *Is Western Patriarchal Feminism Good for Third World/ Minority Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 41, 45 (Joshua Cohen *et al.* eds., 1999) (noting that as a Muslim woman she "believes that many oppressive practices attributed to Islam are either cultural ones or ones that resulted from a patriarchal interpretation of religious texts"). Al-Hibri criticizes the conflation of distinct systems, arguing that some cultures/religions support change and others reject it. *Id.* at 44-45. Islam, she argues, supports change of cultural practices. *Id.*

not simply gendered individuals but also inhabit identities that are ethnicized, raced, religious, or otherwise constructed by factors that represent social cleavages.<sup>695</sup>

### *C. Recasting the Limitation on Equality for Kadhi's Courts*

Support of Kadhi's courts may have placed Muslim and non-Muslim women in solidarity and demonstrated women's commitment to respect all women's voices and experiences, but it did not reconcile the fact that the Draft specifically limited the principle of equality in authorizing application of Islamic personal law by Kadhi's courts.<sup>696</sup> Whereas Muslim women had determined that support of Kadhi's courts was in their best interests, non-Muslim women had agreed that equality provided one of the best avenues for their own liberation and advancement.<sup>697</sup> The question remained how to reconcile the two views in the context of the Constitution.

The coalition first considered simply eliminating the limitation on equality, arguing that all personal and customary practices should be subject to equality. Removing this limitation would also remove any ambiguity regarding the reach of personal and customary laws, as they would apply only to the extent that they met the equality requirements of the Constitution. From this perspective, the Muslim community would simply have to figure out ways to apply their laws in a manner consistent with equality. After all, the primary practices that would be affected were the inheritance laws that provided roughly two-thirds inheritance for sons and one-third inheritance for daughters, the permitted practice of polygamy, and the practice of unilateral divorce.<sup>698</sup> Several "liberal" Islamic countries had found these practices inconsistent with Islam.<sup>699</sup> This push from the equality principle arguably would have encouraged the Muslim community in Kenya to consult the laws of these other Muslim countries and rethink these practices.

The campaign decided that this tactic would probably alienate Muslim women and rupture the solidarity sought across religious lines through the campaign's support of Kadhi's courts.<sup>700</sup> Further,

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695. TRAINING MANUAL, *supra* note 17, at 40.

696. Draft, *supra* note 3, Art. 31(4).

697. TRAINING MANUAL, *supra* note 17, at 54-56.

698. See Mazrui, *supra* note 109, at 310-18 (considering practices such as polygamy and divorce in countries such as Pakistan and Malaysia and making a similar suggestion); see also Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1977 (1995) (discussing the practices in many Islamic countries as related to their reservations to CEDAW).

699. Mazrui, *supra* note 109, at 310.

700. TRAINING MANUAL, *supra* note 17, at 53-56.

they reasoned that the inheritance rules arguably sought to provide an equitable division of property because Islamic law requires men to maintain the family and allows women to keep all of their resources for themselves, resulting presumably in equality in fact if not in formal equality. This argument was extremely problematic, but it provided a possible solution to the problem of equality as limited in the Draft.<sup>701</sup> The campaign's idea was to split the difference: eliminate the limitation on equality, place authorization for application of Islamic personal law in the judicial section establishing Kadhi's courts, and subject application of Islamic law to an idea of equality in fact.

The coalition thus suggested removing the limitation from the Bill of Rights and placing the authorization for the application of Islamic personal law in the judiciary section. The campaign proposed changes to Article 199(1) that added language of social justice and "equality in fact."<sup>702</sup> This addition was to signal that the concept of equality as applied in the context of Islamic law was somewhat different than the stated application of equality found in the Bill of Rights. The proposed provision provided:

There are established Kadhis Courts, the office of Chief Kadhi, office of Senior Kadhi and the office of Kadhi *to apply Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance, consistent with the ends of social justice and equality in fact.*<sup>703</sup>

The proposed new language introduced a more complex concept of equality, one that was inspired by the notion of gender equality but broader in scope in that it encompassed notions of substantive equality. Islamic personal law now appeared to be subject to the equality provision of the Bill of Rights, a condition to which many Muslims objected.<sup>704</sup> The campaign hoped that this language would signal different considerations for understanding equality as applied to Islamic

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701. The idea was problematic in at least three ways. First, it basically left Muslim women dependent on men, albeit male family members. See Mazrui, *supra* note 109, at 317. As such it did little to aid in any efforts to further Muslim women's economic independence. Second, it presumed that men spent a substantial amount, or at least one third of their inherited resources, in maintaining the family. Third, it ignored the fact that the economy within which Kenyan Muslims lived most likely required that most of a family's resources, both men and women's, were necessary to support their families. *Id.* The argument obscured the fact that some men might not in fact support their families while women might not be able to enforce such provisions. It further ignored the issues of polygamy and allowed unilateral divorce as permitted by Islam, practices which could not be so easily accommodated to the requirements of equality. *Id.* at 310. Nevertheless, the argument began to open the door to a resolution of the issue. See *generally id.*

702. TRAINING MANUAL, *supra* note 17, at 87.

703. *Id.* (emphasis added to indicate proposed additions).

704. Mazrui, *supra* note 109, at 310-11.

personal law and provide the room for adherence to Islamic personal law principles. One could interpret the provision as providing the room to understand Islamic personal law as effectively resulting in equality, even if some laws did not meet the standard of formal equality understood as "same treatment."<sup>705</sup> This type of language could also encourage Kadhis to interpret Islamic personal law with social justice and equality in mind.<sup>706</sup>

Finally the campaign hoped that Muslim women could employ this language as an explicit alternative discourse in their battles to make their voices heard. In other words, one could view this arrangement as providing freedom of choice within a group that receives protection as a minority. It thus strikes a balance between encouraging *external protections*, which help a minority group "reduce its vulnerability to the economic or political power of the larger society," and limiting *internal restrictions*, which "restrict individual choice in the name of cultural 'tradition.'"<sup>707</sup> As such one can view the proposed language as seeking to support institutions and practices that facilitate women's equal choices in an atmosphere of more "traditional" worldviews. Muslim women did not have to employ this language in their battles; rather they now had a choice to use it.<sup>708</sup> The campaign was unsure whether the language would have any of these effects but presumed that, in any event, Kadhis would have the first opportunity to interpret the Islamic rules under the new legal order requiring equality in fact. To the extent that the Kenyan Muslims argued that

705. TRAINING MANUAL, *supra* note 17, at 55, 87.

706. *Id.* at 55.

707. Will Kymlicka, *Liberal Complacencies, in IS MULTICULTURALISM BAD FOR WOMEN?* 31 (Joshua Cohen *et al.* eds., 1999). Providing and facilitating choice becomes a way of magnifying women's positions and concerns within those traditions and potentially encouraging internal dialogue. *Id.* at 31-32. Catherine Hardee employs Kymlicka's distinction between internal restrictions and external protections in the context of Kenyan marital law, which allows people to marry under a variety of marriage regimes ("one for each of the major religions and a civil statute"), some of which are viewed as embodying gender hierarchy and disadvantage. Hardee, *supra* note 167, at 718-21. She supports this arrangement because it allows women to choose the marriage regime rules to which they would be subject and to which they therefore consent. *Id.* Women's choices as to which regime they consent become a way of voicing their concern, rejecting those regimes that they believe hurt women, and agreeing to those they find most advantageous. *Id.* at 729-32. Hardee does argue, however, that these choices are often meaningless because the processes and systems to make the choices real or to enforce and register those choices are absent. *Id.* at 732-39. Thus the market systems and processes needed to facilitate these choices should be buttressed. *Id.* at 739-49.

708. Catherine MacKinnon asks what limitation, if any, should be placed on the principle of equality. MacKinnon, *supra* note 310, at 32. One answer could be that individual choice may limit equality in some ways. Muslim women therefore should be allowed to choose to be treated according to their religious faith over a principle of gender equality between them and Muslim men, but these choices must be real and within the purview of the vulnerable group.

Islamic practices were fair and did not result in inequalities between women and men, this legal provision would encourage them to craft arguments that reflected this understanding.<sup>709</sup>

The language of “equality in fact” further complicated the equality concept, introducing an entirely new facet of equality into the text. If one read the Draft as a whole, this language had the potential of turning the equal protection clause into a more substantive notion. In this sense the recasting of the limitation on equality was similar to the idea of affirmative action. Affirmative action permitted policies and measures that would advance the interests of women and other disadvantaged groups and thereby treated them “differently” to bring about equality. “Equality in fact” permitted Islamic rulings that applied only to Muslims and thus treated them differently, as long as the end result approximated equality and was consistent with the notion of social justice. This limitation on equality differed from the original limitation, which simply exempted Islamic personal law from equality notions and implied that equality had no place in Islamic personal law, contrary to what some Muslims suggested.

In the end, the Muslim community did not endorse the alternative language. They nevertheless welcomed the support of women’s advocacy around the Kadhi’s courts issue and seemed to support the campaign’s other initiatives for women’s rights.<sup>710</sup> The solidarity among women thus held for the moment.

#### V. PROTECTING A WAY OF LIFE: ETHNICITY, RESOURCES, DECENTRALIZATION, AND DEVOLUTION

Wangari Maathai, an internationally known Kenyan environmentalist and Nobel Peace Prize winner,<sup>711</sup> argued that Kenya was not made up of one people but of several peoples.<sup>712</sup> “I am a Kikuyu,” she exclaimed as she went on to explain that being Kenyan did not

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709. Several Muslim women argued that Islamic practices were fair and equitable to some extent and provided greater rights and freedom for women than many of the cultural practices of various Kenyan communities. For example, while Islamic personal law provided some inheritance rights for women, some African cultures completely prohibited women from inheriting property. See *supra* text accompanying notes 92-104.

710. Chege Maina, *Kadhis Court Issue Resolved Amicably*, YAWEZEKANA Sept. 25-Nov. 16, 2003, at 3; Marceline Nyambala, *Kadhis Courts: Women’s Affordable Means to Justice*, YAWEZEKANA, Jan. 23-30, 2004, at 3.

711. For more information on Wangari Maathai and the Green Belt Movement she founded, see The Green Belt Movement, <http://www.greenbeltmovement.org/> (last visited Sept. 21, 2006).

712. See Juliana Omale, *Women Take Time Off to Heal*, YAWEZKANA, June 5, 2003, at 12, available at <http://www.fidakenya.org/reports/Bumper.pdf>.

negate the fact that she was Kikuyu in some fundamental way.<sup>713</sup> She further challenged whether the Draft Constitution was an authentic reflection of Kenya's various peoples' lives.<sup>714</sup> The question of whether the Draft reflected Kenya's various cultures invoked two potential conflicts that the campaign faced. The first conflict specifically concerned the campaign's focus and involved the tension inherent in a constitutional framework that sought to protect and enhance women's rights while also preserving cultural/religious community practices that all too often embraced gender hierarchies that subordinated women to men. The second conflict posed a serious challenge to the constitutional process as a whole and involved ethnicity and ethnic politics in Kenya as a pluralist society. Specifically the campaign had to address the tension inherent in viewing the constitutional reform process as an ethnic versus a national project.

The campaign signaled its support for the preservation of Kenya's various cultural heritages through its language about "protect[ing] a people's way of life," which first surfaced in the arguments about retaining Kadhi's courts in the constitution.<sup>715</sup> Rhetorically, the campaign signaled its respect for preserving people's different ways of life<sup>716</sup> by emphasizing its commitment to solidarity of women across diversity.<sup>717</sup> Concretely, it created a scheme in its alternative language proposals whereby women in every district would be represented in Parliament through the one-third principle.<sup>718</sup> Ethnicity nevertheless divided women and did so in struggles over both material and representative resources during the preparation for the National Constitutional Conference, specifically as related to the decentralization of executive power and devolution. When faced with these and other actual ethnicized conflicts over resources, the campaign's reactions were both problematic and late. Further, whereas a strong normative value of equality may have aided in the resolution of these conflicts, a narrow view of gender equality added little.

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713. The author first heard Maathai make these arguments during the campaign's training session in Central Province, the region in which many Kikuyu live.

714. See Omale, *supra* note 713, at 12 (quoting Maathai as saying "[w]e need to cultivate a super-nation of diversity and to recognise English and Kiswahili as our official languages and the remaining 42 as national languages"). She later assisted the subcommittee to study culture and the ways in which it could better be reflected in the Constitution during the NCC. See Janeloise Wambui, *Could Culture Be the Missing Link in Our Development?*, YAWZEKANA, Feb. 24-Mar. 1, 2004, at 2.

715. Press Release, FIDA, *supra* note 693.

716. *Id.*

717. TRAINING MANUAL, *supra* note 17, at 40.

718. *Id.* at 83.

### A. Preserving a People's Way of Life: Women and Culture

The notion of preserving a people's way of life provided three important insights into the campaign's view of community and women's rights. First, it registered recognition of the fact that women have multiple identities, including cultural identities, and that their lives are embedded in and shaped by the cultural communities to which they often have allegiance. It recognizes that women's lives, like that of Wangari Maathai's life, are embedded in the various ethnic cultures and traditions within which they live. The campaign had clearly stated this position in discussing the diversity of women and the intersections of gender with ethnicity, race, age, and ability, among others.<sup>719</sup>

Second, it signaled recognition of ethno-cultural communities' claims for recognition, authentic representation, and self-preservation in opposition to imperialism and ethnicized central authority. These claims are important because they reflect sentiments that value traditional ways of being, specifically an interest in preserving and passing on to future generations certain values and patterns of living and resentment of ideologies and ways of being that threaten these ways of living. These sentiments include resistance to colonial and post-colonial practices and ideologies that have eroded and undermined distinct social arrangements and practices indigenous to the over forty ethnic communities in Kenya.<sup>720</sup> Colonial and post-colonial acts and ideologies have altered or distorted many ethno-cultural practices, but each community retains many of its own customs, social relations, and arrangements, including distinct languages and separate though overlapping territorial origins and claims.<sup>721</sup> Ethno-cultural communities' claims entail demands to live in culturally specific ways under traditional or culturally ordered social arrangements and to engage in specific cultural practices within the pluralist society.<sup>722</sup>

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719. See TRAINING MANUAL, *supra* note 17, at 40. Cultural practices in communities shape, define, and reaffirm individuals' identities. Women are part of these communities and the cultural ways of living and defining a person are constitutive of their lives and identities. As such, these women, like all women and men, are culturally defined people as well as an ethnically defined people and often find their cultural identities reaffirming and a source of value. The lineage-based organization of the communities and their ethnic homogeneity often means that this organic group is far more cohesive than groupings and organizations of women across ethnic and community lines. See Butegwa, *supra* note 36, at 109. See generally Coomaraswamy, *supra* note 48. Thus, these women may have strong allegiance to their communities and wish to see their communities preserved and empowered.

720. See Mutua, *Banjul*, *supra* note 31, at 346-52.

721. *Id.*

722. Many of these cultures were self-governing, homogeneous, single-language communities that shared a common culture and traditions in pre-colonial Africa. *Id.* at 347, 365-67 (describing African pre-colonial societies and suggesting that homogeneity contributed to their cohesion and referring to them as *nations* even though they were not "states in the modern or European sense"). Their governing structures and social arrangements,



Third, this notion may recognized the political context in which many Kenyans saw the constitution as an opportunity to redraw and re-frame power relations among Kenya's various ethno-cultural groups, a point addressed in more detail below.<sup>723</sup>

Women's rights activists seemed to support the preservation of various communities' ways of life, including women and men's rights to engage in cultural life.<sup>724</sup> These activists also seemed to support the empowerment of the various Kenyan communities but recognized that ethno-cultural empowerment could be in tension with ideas of gender equality because many of these communities embrace a gender hierarchy that subordinates women to men and rely upon these unequal gender relations to transmit and ensure the survival of the communities.<sup>725</sup> The campaign nonetheless arduously fought for enhancing the status of Kenyan women through the constitutional process and responded to these concerns in two ways. First, regarding concerns about cultural rights, the campaign promoted the retention of "positive" cultural practices.<sup>726</sup> This support mediated the potential tension between the campaign's support for cultural preservation and women's rights and was a widely repeated retort.

Second, the coalition intended its suggestions and activities to enhance women's ability to both interpret and shape their own cultural contexts. Thus, by insisting that certain percentages of both national and devolved government consist of women, the campaign promoted placing what could be considered as "community women" in positions of power.<sup>727</sup> In doing so the campaign sought to provide women not only with representational status but also with opportunities through

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like many sub-Saharan African communities, were organized through lineage-based cultures that operated on corporate patterns of family groups and clans. See Mutua, *Banjul*, *supra* note 31, at 347-49, 361 (discussing Akan of west Africa and the Kikuyu and Akamba of Kenya as lineage-based societies). The worldview of these communities placed the individual within the groups, and the status of these group-centered individuals reflected the individual's place within the group as well as gender and often age. *Id.* at 361. Many of Kenya's ethno-cultural groups found common cause and resisted both the material and ideological conditions of colonialism in the war of Independence. *Id.* at 366 (discussing the divide-and-conquer strategies of colonial powers but noting that colonialism created a sense of unity among various African communities because they saw themselves as "victims of an alien, racist, and oppressive structure").

723. See *infra* Part V.C; see also Mary Kiio, *Staying Focused on the Process*, YAWZEKANA, Jan. 19-22, 2004, at 8.

724. Virginia Wangari & Frida Were, *Delegates Salute Women's Gains*, YAWZEKANA, Sept. 25-Nov. 16, 2003, at 1.

725. See Omale, *supra* note 647, at 1-2.

726. Janeloise Wambui, *Culture Committee to Discard Retrogressive Practices*, YAWZEKANA, Jan. 19-22, 2004, at 2 ("[A]lthough culture preservation is important, 'we can only revive what is positive.'").

727. TRAINING MANUAL, *supra* note 17, at 83 (proposing alternative language for the article on elections that would ensure that female candidates for office represent all districts, as well as "persons with disabilities, the youth, ethnic minorities and other interested groups").

these positions to interpret their own respective cultural practices, interpretations that might differ from dominant interpretations.<sup>728</sup> One can further characterize the campaign's efforts as enhancing women's power to alter these practices within cultures that are dynamic and capable of surviving change.<sup>729</sup> In other words, the campaign's efforts valued and potentially enhanced women's potential views about their own cultures.<sup>730</sup>

The campaign was not the only group that referred to a people's way of life. The NCC also embraced Maathai's challenge about culture preservation and established a committee of delegates to analyze cultural rights.<sup>731</sup> This committee proposed an additional chapter on culture that defined culture as "the dynamic sum total of the spiritual, emotional, intellectual, material features and aspects of a people's way of life developed in and through their environment, science, technology, language, communication, arts, and value systems."<sup>732</sup> Thus, the provision sought to respect and preserve the diverse languages, customs, traditions, and religions of the various cultures both in their expressive and material forms. The provision also sought to require the government to educate Kenyans about the differing cultural traditions<sup>733</sup> and to preserve and protect the scientific, technological, and intellectual traditions and inventions of these indigenous cultures.<sup>734</sup> Finally, it sought to establish a national commission on culture<sup>735</sup> and

728. See generally Nyamu, *Gender*, *supra* note 50, at 404-06 (noting that society should analyze practices to see if they simply represent dominant perspectives). Nyamu advocates for what she calls a critical pragmatic approach that "enables proponents of gender equality to evaluate each of the overlapping plural normative orders in terms of its specific consequences for gender hierarchy." *Id.* at 410. She also encourages women and others to question norms. *Id.*

729. See generally *id.*; Wambui, *supra* note 727, at 2 (using similar language); *Culture Shock: Delegates Grapple with Emotion and Intolerance*, YAWEZEKANA, Sept. 8-10, 2003, at 6 ("Culture is highly dynamic.").

730. Nyamu, *Gender*, *supra* note 50, at 404.

731. Alice N. Wafula, *Technical Committee on Culture Formed*, YAWEZEKANA, Sept. 22-24, 2003, at 4.

732. The Constitution of Kenya Review Commission, National Constitutional Conference, *The Draft Constitution of Kenya 2004* Art. 15A (Feb. 14, 2003) (unpublished working draft of the Constitution, on file with author). The Culture chapter survived in an altered format in the Zero Draft and without defining culture. See ZERO DRAFT, *supra* note 11, Art. 25-27.

733. ZERO DRAFT, *supra* note 11, Art. 25(c).

734. *Id.* Art. 25(d)-(g). For example, Article 25(d) requires the state to "support, promote and protect scientific and intellectual research, innovation and application." *Id.* Art. 25(d). Article 25(e) provides similar support for medical knowledge and technology. *Id.* at 25(e). Article 25(f) protects indigenous scientific knowledge and technology, whereas Article 25(g) provides similar support for "indigenous knowledge, literature, art, oral traditions, performing arts and other cultural heritage and the intellectual property rights of the people of Kenya." *Id.* Art. 25(f)-(g).

735. *Id.* Art. 26.

an African Traditional Court system.<sup>736</sup> The culture provision in the Bill of Rights permitted the enjoyment of an individual's rights in concert with others to enjoy his or her culture but also forbade the compulsion of any individual to undergo or perform any cultural practice or rite.<sup>737</sup> Even though the coalition had signaled its support for preserving Kenya's various cultural heritages and had committed itself to solidarity among women, their reactions were problematic when they actually had to face the diversity of women in the context of demands for resources based on ethnicity.

### *B. Donor Money and Training*

On the day the campaign began sending out its eight teams to train delegates in the provinces, one of its largest supporters, a United Nations donor agency, called the campaign leadership to its office to discuss problems with fund disbursement.<sup>738</sup> At that point the donor agency's program on gender was one of the primary sponsors of the campaign, as well as a sponsor of many of the individual women's organizations that comprised the campaign,<sup>739</sup> but the program officer with whom FIDA had worked while structuring the funding was leaving her position and being replaced by another woman.

Upon arrival at the donor's office, the coalition was greeted with members of the Women's Political Caucus (WPC). Since the split in the WPC, the group consisted primarily of women from the same ethnic group as the woman who was now heading the donor agency's gender project. Although the woman elected as president of FIDA during the campaign was also from this particular ethnic group, most of the women actively involved in the campaign and seated around the table at the meeting were from differing groups.

The officer informed the campaign that the money they had allocated for constitutional reform was to be shared among the different women's groups, meaning that the campaign would have to share the

736. *Id.* Arts. 183, 184.

737. *Id.* Art. 68. Article 68, entitled "Language and Culture," provides:

(1) Every person has the right to use the language, and to participate in the cultural life, of that person's choice. (2) A person belonging to a cultural or linguistic community shall not be denied the right, with other members of that community — (a) to enjoy that person's culture and use that person's language; or (b) to form, join and maintain cultural and linguistic associations and other organs of civil society. (3) A person shall not compel another to perform, observe or undergo any cultural practice or rite.

*Id.* The Waco draft shortened this chapter significantly, establishing only a commission on culture. WACO DRAFT, *supra* note 12, Arts. 26, 27. Although individual rights may be insufficient to protect individuals from group power, these sections at least provide individual women a leg on which to stand in conflicts with their own communities.

738. See TRAINING MANUAL, *supra* note 17, at ii (listing sponsors).

739. *Id.*

funds allocated to it with the WPC, which claimed that they also intended to train delegates. The officer insisted that because the groups were fighting for the same issues and because the campaign had already prepared extensive training materials, the WPC should use the campaign's training materials. She justified this position by noting that the agency had sponsored the compilation of some of the campaign materials.

The campaign reacted badly, with ideas of solidarity going out the window. They complained that if they shared the money they would not have adequate funds for the training sessions currently underway and for other campaign activities. They further argued that three of their teams had already left for the provinces.<sup>740</sup> Finally, the campaign explicitly refused to share their campaign materials, on which, they argued, none of the WPC members had been trained. WPC members for their part argued that they had developed some of their own materials that they would use for training but that they needed funds.

Ultimately the funds were divided between the groups.<sup>741</sup> Furthermore, the campaign's training sessions went well except in the one province where the predominant ethnicity was the same as that of many of the WPC members. Delegates in this province refused to attend the sessions and were believed to later have been trained by WPC. The campaign and the WPC would not work together until late in the National Constitution Conference process, when indeed they found themselves supporting the same issues, issues for which the Kenyan women's movement had been fighting for a decade.

### *C. Decentralizing Power: The Prime Minister's Position and Devolution*

The campaign repeatedly emphasized its understanding of women's diversity, its commitment to solidarity across this diversity, and its support for preserving people's ways of life. Nevertheless, its efforts concerning matters related to ethnicity and ethnic competition over resources were problematic on the one hand and often late on the other. Furthermore, a commitment to gender equality, which focused only on equality between the genders, added little to the resolution on these issues when they arose in constitutional discussions of decentralizing executive authority and decentralizing central government through devolution.

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740. The officer retorted that she had flagged a possible issue with the funds a week earlier and the campaign therefore should have cancelled or delayed its training sessions.

741. The funding lost due to this partial withdrawal was replaced by monies provided by the Swedish International Development Agency (SIDA). *See, e.g.*, YAWEZEKANA, Sept. 22-24, 2003, at 8 ("With Financial support from the Swedish International Development Agency (SIDA)").

One of the main goals of the constitution was to decentralize executive and government power.<sup>742</sup> The goal of decentralizing executive power was manifest in the Draft Constitution through mechanisms to enhance legislative power and increase the independence of the judiciary,<sup>743</sup> as well as in adding the position of prime minister to the executive branch.<sup>744</sup> Civil society had long advocated for a prime minister position as a way of decentralizing the seemingly intractable and expansive executive authority.<sup>745</sup> Kenyans expected this development, but once the new Kibaki government found itself in power after defeating Moi, this fight became ethnicized among the political class, with both decentralization of executive power and devolution being interpreted as providing the resources of additional political positions and seats to accommodate greater ethnic representation and diversity.

Despite ethnic competition in Kenya (created in part by past governing policies and the ethnic politics of the emerging party system), the election of NARC, a multiethnic party in which the top leadership was ethnically diverse, embodied a positive accommodation of diverse ethnic individuals in the executive branch. It also highlighted however the dark side of this mechanism in that it reinforced the idea that ethnic communities could only access power through representation by "one of their own."<sup>746</sup> The concrete realities of this competition meant that political actors, including the campaign, had to demonstrate this commitment to diverse ethnic representation. Furthermore, the sentiment behind devolution and the reduction of executive power was not unlike the one that propelled women's efforts. The argument was not that people from specific ethnic groups could not represent all the ethnic groups or that men could not possibly represent women,

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742. See *Draft*, *supra* note 3, Art. 213(g).

743. See *infra* Part VII (discussing proposed arrangements for Parliament and devolution in both the Zero and Waco drafts).

744. The Draft Constitution established a prime minister as the leader of the Cabinet, with both the prime minister and members of Cabinet exercising executive authority within the Republic by implementing national budgets and policy, preparing and initiating government legislation for the Parliament, implementing and administering Acts of Parliament, coordinating functions of ministries and departments, and other duties. *Draft*, *supra* note 3, Art. 170. The president's duties would include addressing Parliament, appointing the Prime Minister and all other ministers, judicial officers, and other public officers (with limited dismissal powers), appointing commissions of inquiry with the consent of the Cabinet, declaring states of emergency and war after consultation with the Cabinet and the National Defense Council, appointing diplomats and receiving foreign diplomats, seeking advisory opinions from the supreme court, pardoning or reprieving offenders, and ensuring the independence of courts and commissions, among legislative and other duties. *Draft*, *supra* note 3, Arts. 151-52.

745. See Makau Mutua, *Taming Leviathan*, *supra* note 7, at 151-56 (discussing the struggles in the NCC over whether to create a Kenyan prime minister position).

746. IED, *supra* note 68, at 68.

but rather that given their various conditions and their histories, these groups had failed to represent outside groups or women in the past and little in their present arrangements suggested that they would adequately represent them in the near future.

The Draft Constitution included a prime minister's position, which radically shifted the balance of power from an elected president to an appointed prime minister.<sup>747</sup> The Draft also restricted whom the president could appoint to the position<sup>748</sup> and forbade the president from dismissing the prime minister without a no-confidence vote by the Parliament.<sup>749</sup> The majority in the ruling party vehemently opposed this arrangement,<sup>750</sup> but given their failure to honor the memorandum of understanding that created the NARC coalition and would have demonstrated their commitment to wider ethnic representation required by the concrete political context,<sup>751</sup> the majority's opposition to the prime minister position reinforced the need felt by various groups for constitutional arrangements that ensured ethnic representation and empowerment.

In the context of the NCC, issues of devolution worsened this conflict, which further stimulated ethnic suspicions.<sup>752</sup> The goal to decentralize central government is manifest in the chapter on devolution of power, which envisioned creating governmental structures at more local levels to decide and implement localized policies.<sup>753</sup> Article 213(g) states that one of the principles and objects of devolution is to "facilitate the decentralisation of central government powers and the location of central government institutions and departments away from the capital territory to ensure equitable distribution of resources in all the provinces."<sup>754</sup>

747. *Draft*, *supra* note 3, Art. 170.

748. *Id.* Art. 171.

749. *Id.* Art. 174.

750. See Makau Mutua, *Taming Leviathan*, *supra* note 7, at 154-55 ("[T]he NAK side . . . saw the office as a direct threat to the Kibaki presidency"); see also *Kiraitu Now Rules Out Executive PM*, THE SUNDAY NATION, Sept. 14, 2003, available at <http://www.nationaudio.com/News/DailyNation/14092003/News/News1409200324.html> (quoting Justice and Constitutional Affairs Minister Kiraitu Murungi, who described advocacy for a prime minister position as a "political impossibility and a big joke").

751. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 105; see also David Mugonyi & Benard Namunane, *Opposition Leaders Sign Unity Accord*, DAILY NATION, Feb. 13, 2002, available at <http://www.nationaudio.com/News/DailyNation/13022002/News/News25.html>.

752. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 144-56 (describing devolution as a hotly contested issue and explaining why Kenya is a good candidate for devolved government but noting the many pitfalls including the possible creation of ethnic enclaves).

753. See *Draft*, *supra* note 3, Art. 213-31.

754. *Id.* Art. 213(g). Draft Article 213 also states that the principles and objectives of devolution are to:

(a) give powers of self-governance to the people at all levels . . . ;

The conflict revolved around whether to devolve power to one or to several levels of local government in addition to the central government.<sup>755</sup> These local administrative units however were prone to characterization as an opportunity for ethnic groups to empower themselves and for leaders to create governmental units that reinforced ethnic communities as power bases on the one hand and as a way to access resources (through the instruments of state power) on the other.<sup>756</sup> In other words, many saw constitutional review as a way to access control over resources for the benefit of their own groups and perhaps to preserve ethno-cultural traditions.<sup>757</sup> Consequently, at several points during the national conference, conversations about devolution became discussions about which group would be in control in a certain area and whether the controlling group would allow people of a different ethnicity access to jobs and other resources within the area.<sup>758</sup>

The campaign favored the idea of equitable sharing of both representational and material resources among the groups and regions, as well as local community control, language found in the Draft Constitution.<sup>759</sup> These issues however were only superficially viewed as issues of equality.<sup>760</sup> Had the campaign as well as the various ethnic

(b) strengthen national unity by recognising diversity in ways that promote the sense among all citizens that they belong to Kenya and share in its government;

(c) ensure democratic and accountable exercise of power;

(d) increase checks and balances and the separation of powers;

(e) promote social and economic development throughout Kenya;

(f) ensure equitable sharing of national and local resources throughout Kenya . . . ;

. . . .

(i) [and to] protect and promote the interests and rights of minorities and disadvantaged groups . . . .

*Id.* Art. 213.

755. Specifically, the Draft Constitution required that power be devolved to four levels in addition to the central government: village governments, locational governments, district governments, and provincial governments. *Id.* Arts. 215-19. The Zero Draft had government power devolved to three levels on the basis of regions, districts, and locations, in addition to the central government. ZERO DRAFT, *supra* note 11, Arts. 211, 217, 223. The government's draft accomplished devolution through only one level, the districts, in addition to the central government. WACO DRAFT, *supra* note 12, Arts. 199-201.

756. Makau Mutua, *Taming Leviathan*, *supra* note 7, at 149-50. They were prone to being seen as ethnic issues given the pre-existing notion of *majimboism*, a concept of federalism based on ethnic lines that informed the Independence constitution. *See also* Arthur Okwemba, *Getting to the Centre of Power*, YAWEZEKANA, May 19, 2003, at 1.

757. James Oranga, *Administrative Units Created along Ethnic Lines*, YAWEZEKANA, Mar. 2-8, 2004, at 3.

758. *Id.*

759. *Draft*, *supra* note 3, Art. 213(f).

760. The idea seemed to be that women supported devolution and their main concern was trying to ensure women were adequately represented in these structures. *See Mary*

groups viewed empowerment through the lens of equality in addition to devolution or framed devolution more broadly as a matter of equality, these debates may have been more constructive. In addition they may have collaterally provided additional support for gender equality. In any case, the ideal of gender equality as between women and men again proved too narrow conceptually to advance a vision that would mediate or add to the resolution of these issues of which women were clearly a part.

Ultimately, however, the campaign only took a formal position on both of these issues in January 2004 through their model constitution,<sup>761</sup> despite earlier requests. On the prime minister position, the campaign embraced a prime ministership as part of the executive branch of government on the theory that given past ethnic conflict, showings of good faith had to be made, and on the theory that the Kenyan people expected it.<sup>762</sup> The balance of power in the coalition's construction of the prime ministership, however, remained more fully in favor of the president, with the prime minister executing administrative functions but whose duties, appointment, and dismissal were subject to constitutional and legislative authority instead of presidential authority.<sup>763</sup> On the issue of devolution, the campaign endorsed three levels of devolved government similar to that adopted eventually by the Zero Draft.<sup>764</sup> Given the lateness of the campaign's efforts, however, these suggestions were seen as simply supporting a government that had reneged on its promises of ethnic diversity in representation and seemed opposed to the constitutional process fought by civil society for over a decade. Had the coalition taken this position earlier, a position that again sought to promote solidarity and to strike compromises, it might have tipped the balance toward a compromise on this issue.

Although the campaign had professed that all constitutional issues affected women, and thus women were concerned with all of the constitutional issues,<sup>765</sup> its failure to address a central issue of constitutional reform in a timely manner minimized the effect of their suggested compromises. The campaign also learned the hard way that solidarity of women across diversity, particularly in the

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Kiio, *Women Urged to Monitor Devolution Talks*, YAWZEKANA, Mar. 2-8, 2004, at 6; James Oranga, *Devolution to Benefit Women*, YAWZEKANA, Jan. 19-22, 2004, at 1.

761. *Safeguarding Gains for Women in the Draft Constitution: Model Proposals*, YAWZEKANA (SPECIAL ISSUE), Jan. 28, 2004 [hereinafter *Model Proposals*].

762. Caleb Atemi & Rosemary Okello, *Taming the Devolution "Beast,"* YAWZEKANA, May 26, 2003, at 1.

763. *Model Proposals*, *supra* note 762, at 8-9.

764. See ZERO DRAFT, *supra* note 11, Art. 211, 217, 223; Kiio, *supra* note 761, at 6.

765. TRAINING MANUAL, *supra* note 17, at 40.



context of past ethnic competition, meant that they had to be attentive to the allocation of resources, that they had to demonstrate this commitment to the equitable sharing of resources in their suggested arrangements, and that they had to be willing to suggest creative compromises around these issues — all in a timely fashion.

## VI. RURAL/URBAN DIVIDE

The charge that elite urban women were incapable of representing rural women was a charge that preceded the constitutional review process and one that was historically and cynically employed by the Moi-KANU regime.<sup>766</sup> The tension inspired by this charge reemerged at the beginning of the National Constitutional Conference.<sup>767</sup> The effect of this renewed tension was to further poison an already challenging environment in which NGOs and other members of civil society, including the campaign, initially had minimal and limited access to the conference and to delegates.<sup>768</sup> It thus made it initially difficult for the campaign to seek to influence the delegates, particularly women delegates, or to try to hold them accountable for women's demands.

The campaign's response demonstrates the need for independent activist women's movements that can structure forums and build mechanisms to allow diverse women to voice their opinions, educate themselves, develop consensus on a set of issues, and later to provide a united front on issues where the group has reached a consensus.<sup>769</sup> It also may allow them to hold one another accountable for these issues, including women in decision-making positions or other positions of power.

766. FIDA 1998, *supra* note 67, at 29-33.

767. FIDA 2003, *supra* note 2, at 45; Isaiah Kipyegon & Susan Mwangi, *It's Thumbs-up and Thumbs-down from Kenyans*, YAWZEKANA, June 5, 2003, at 1 (mentioning the "war between the urban elite and the rural folks" at the NCC).

768. FIDA 2003, *supra* note 2, at 45 (discussing the way in which the in-fighting among the two NARC factions and the hostility with which the CKRC viewed civil society, together with the tensions between the urban and rural delegates, impeded the campaign's efforts to work with women delegates).

769. In some ways these meetings served as consciousness-raising meetings allowing women to share and fight out their conflicts while potentially building a consensus on issues that allowed the women delegates to represent women's "group perspective," however partial. See S. Laurel Weldon, *Beyond Bodies: Institutional Sources of Representation for Women in Democratic policy Making*, 64 J. POL. 1153, 1156-58, 1160-61 (2002) (explaining that "[a]utonomous women's organizing improves women's ability to articulate their perspective" and suggesting that women's movements and organizations can hold government bureaucrats accountable by providing places where women can develop their "group perspective" through conversations about women's issues).

Specifically, the campaign's response to the hostile environment, created in part by the debate over the urban/rural divide, was to hold two important meetings.<sup>770</sup> This response in some ways became a mode of operation for the campaign, which sponsored several other gatherings later.<sup>771</sup> These two meetings facilitated women delegates in discussing and exploring their differing views, experiences, and perspectives as part of a process of forging and producing consensus on particular issues. Furthermore, the campaign sought to remind these delegates of the role the women's movement had played in their presence at the conference. It also sought to remind the delegates of the movement's goals with the intent to hold them accountable to those goals. These meetings then facilitated the campaign's entry and participation in the forums established for women delegates and to institutionalize this form of participatory dialogue and action, providing them a greater voice in the delegates' deliberations.<sup>772</sup>

These participatory forums were also consistent with the campaign's response to the question of whether urban women can represent rural women. This response, as manifest in the campaign's proposed scheme of representation,<sup>773</sup> suggests some skepticism about the ability of elite urban women to represent poor rural women and thus invites rural women to participate in selecting "one of their own" to represent their interests in government. At the same time, the campaign sought to create institutional structures that would bring rural, urban, and other women together to direct their mutually defined goals.

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770. For a reference to these two meetings, see FIDA 2003, *supra* note 2, at 45 (noting that the coalition "managed to secure an agenda item during the women's caucus lunch . . . geared toward trying to heal the urban/rural . . . difference that divided women"). The 2003 report further notes that the campaign organized a meeting after Bomas I with delegates who represented women's organizations. *Id.*; see also Martin Adhola, Susan Mwangi & Betty Oyugi, *Then and Now: Great Expectations*, YAWZEKANA, Aug. 18, 2003, at 7 (discussing training session); Omale, *supra* note 713, at 12 (on healing meeting).

771. Other meetings included several dinner sessions and a training session on MMP. See Otumo Ongalo & Mary Kii, *Women Delegates Forge Unity in Diversity*, YAWZEKANA, Sept. 8-10, 2003, at 3 (discussing a campaign-sponsored dinner); Otuma Ongalo, *MMPR or District Constituencies?*, YAWZEKANA, Mar. 2-8, 2004, at 1 (noting that the campaign hosted a retreat for delegates to discuss MMPR. One of the concerns about the two systems was that one might favor urban women.) Consultative meetings may well have been a typical tool employed by women's organizations such as FIDA.

772. Ongalo & Kii, *supra* note 772, at 3; Ongalo, *supra* note 772, at 1.

773. See TRAINING MANUAL, *supra* note 17, at 84-85 (proposing that election to National Assembly be based on the Mixed Member Proportional Representation system and requiring that the first eighty percent of the nominees be women representing every district); see also *id.* at 59-60 (exploring the implications of the MMPR proposal under the one-third principle).

### A. Providing Forums for "Healing" and Accountability during the NCC

During the NCC, the CKRC arranged for women delegates to meet biweekly for lunch, ostensibly to discuss the Draft Constitution.<sup>774</sup> Instead, at many of the initial luncheons, CKRC commissioners gave lectures on the Draft.<sup>775</sup> Although these lectures were extremely helpful to the delegates, the commissioners had a particular position. They were advocating for the Draft provisions as drafted. Initially, neither the CKRC nor the delegates would grant women observers from the campaign an opportunity to address the luncheon.<sup>776</sup> The CKRC stated that women's group observers could attend the luncheon but could not participate.<sup>777</sup> Delegates made clear that they were working to create a constitution for all Kenyans and not just women.<sup>778</sup>

The campaign had a rocky relationship with the CKRC. Although the campaign had worked with the CKRC on the conference procedures<sup>779</sup> and secured a time to address Parliament during CKRC training on the Draft,<sup>780</sup> the CKRC remained distant from coalition members.<sup>781</sup> This distance seemed to increase with the opening of the NCC.<sup>782</sup> The campaign had to struggle to get tent accommodations at the site where the NCC was held. It also struggled with the CKRC to get enough observer status passes for its observer delegation to attend the NCC meetings. Despite the lip service that the CKRC gave to the idea of facilitating discussion among all NCC participants, the campaign soon realized that the CKRC viewed its primary obligations as being to the delegates and perceived the observers as interfering.

Women delegates were also distant in the first few weeks of the NCC even though many of the campaign's observers knew groups of women from the provincial trainings. Ethnic tensions contributed partially to this distance. Delegates also soon began to see themselves as *meshimwa* (honorable), distancing themselves above observers and

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774. Frida Were, *Nyama Choma Ranch: Women's Strategy Ground*, YAWEZEKANA, Sept. 25-Nov. 16, 2003, at 10-11 (discussing the luncheons as a strategy ground, which it increasingly became).

775. *Id.*; see also FIDA 2003, *supra* note 2, at 45.

776. FIDA 2003, *supra* note 2, at 45.

777. *Id.*

778. *Id.*

779. *Id.* at 34.

780. *Id.* at 33-34.

781. *Id.* at 45; Otuma Ongalo, Editorial, *Moment for Sober Decisions as D-time Dawns*, YAWEZEKANA, Mar. 2-8, 2004, at 8 (capturing this distance in suggesting that delegates did not want to listen to anything that came outside of the forum, even at this late date in the process).

782. FIDA 2003, *supra* note 2, at 45.

others.<sup>783</sup> Furthermore, the delegates were operating under much speculation that the government might try to “scuttle” the conference and perhaps bring in experts to review the Draft, a position delegates found particularly offensive.<sup>784</sup> In this context the charge that urban elite women inappropriately were seeking to represent poor rural women was explosive and seemed to give the delegates pause, especially district delegates.<sup>785</sup> Although these district delegates appeared unlikely to classify themselves as poor rural women, their suspicion among the delegates, the of elite urban women, among other things, caused significant tensions campaign, and other women’s groups observing the process.

In the midst of these tensions, Jane Kiragu of the campaign came up with idea of having a meeting of “healing” among the women.<sup>786</sup> She approached one of the women’s group delegates who had emerged as an organizing leader of the delegates to request such a meeting during the women’s luncheon. After much negotiation, the delegates scheduled the meeting for the last week of May, 2003.

During the meeting a diversity of women spoke about the urban/rural divide as well as other issues and sources of division among women.<sup>787</sup> For example, several Muslim women spoke about the Kadhi’s courts. Although the participants made no *decisions*, the meeting lowered the temperature and distance among the delegates and between delegates and observers, and they agreed to continue talking about the issues.<sup>788</sup> Although women’s groups observing the conference did not receive immediate invitations to address the delegates at the luncheon, campaign observers found the delegates more interested in the materials they were providing and more committed to pushing particular campaign agenda items.<sup>789</sup>

Given the success of the meeting, the campaign decided to host a workshop on August 21, 2003.<sup>790</sup> The campaign invited a range of women delegates but particularly those delegates who represented

783. *Id.*

784. *Id.*; see also Juliana Omale, *Spotlight on Role of Experts*, YAWZEKANA, May 29, 2003, at 1 (noting some concern over “experts”).

785. FIDA 2003, *supra* note 2, at 45; Kipyegon & Mwangi, *supra* note 768.

786. FIDA 2003, *supra* note 2, at 45; Omale, *supra* note 713.

787. Omale, *supra* note 713. See generally Weldon, *supra* note 770, at 1156-58 (noting that part of what women’s groups do is to discuss and seek to resolve their divisions, particularly those arising because of their diversity).

788. Omale, *supra* note 713.

789. *Id.* (citing Ida Odinga who said that the meeting should have been held at the beginning of the NCC).

790. Meeting with Campaign to Safeguard Gains for Women in the Draft and NCC Delegates, in Silver Springs Hotel, Nairobi, Kenya (Aug. 21, 2003); see also Ongalo & Kiio, *supra* note 772, at 3.

women's groups. The campaign's intent was threefold. First the meeting was to remind women delegates that the women's movement and women's groups were largely responsible for their participation in the NCC. Second, the idea was to remind delegates from women's organizations in particular that women's groups had sent them to the NCC to advance women's interests, to "act for" women, not simply to "stand for" women in terms of descriptive representation or because they were simply to mirror women's existence in the general population.<sup>791</sup> Third, the idea was to review the campaign's alternative constitutional language and suggestions.

The workshop took place after the conclusion of Bomas I and before the beginning of Bomas II.<sup>792</sup> Over twenty women delegates participated. The campaign accomplished its goals of reminding the delegates of their specific obligations to promote women's gendered interests, despite their diversity.<sup>793</sup> The highlight of the meeting was the discussion of the particular issues the campaign's materials raised. For example, the meeting participants had a lively debate over whether proportional representation and its mechanisms for women's inclusion was the appropriate electoral institution for Kenya. Many women had knowledge of and seemed to prefer the Ugandan system of separate electoral districts or forums for women.<sup>794</sup> Another lively debate was over whether the campaign's hands-off approach to the abortion issue was correct. Many of the delegates wanted to directly advocate for "safe motherhood"<sup>795</sup> and the right to choose.

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791. Pitkin first articulated this formulation of the issue as between "acting for" and "standing for." HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* 144, 232 (1967); see also SYLVIA TAMALE, *WHEN HENS BEGIN TO CROW: GENDER AND PARLIAMENTARY POLITICS IN UGANDA* 68-90 (1999) (applying this analysis in her study of the Ugandan experience with the affirmative action parliamentary system for women).

792. Ongalo & Kiio, *supra* note 772, at 3; see also Martin Adhola, *The Battle for Words Begins*, YAWZEKANA, Aug. 18, 2003, at 1 (discussing the focus on language and words of the meeting in preparation for Bomas II).

793. Ongalo & Kiio, *supra* note 772, at 3; cf. Sylvia Tamale, *Towards Legitimate Governance in Africa: The Case of Affirmative Action and Parliamentary Politics in Uganda*, in *LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES* 235, 249 (Edward Kofi Quashigah & Obiora Chinedu Okafor ed., 1999) (noting that "the variety of women's interests does not refute the claim that interests are gendered") (citing A. PHILLIPS, *ENGENDERING DEMOCRACY* (1991)).

794. For more information on the Ugandan Electoral Process, see Republic of Uganda, The Electoral Commission, <http://www.ec.or.ug/> (last visited Sept. 21, 2006).

795. For more information on safe motherhood programs, see generally ANNE TINKER & MARJORIE A. KOBLINSKY, *MAKING MOTHERHOOD SAFE* (1993) and Republic of Kenya Ministry of Health, Division of Reproductive Health, Safe Motherhood, <http://www.drh.go.ke/html/motherhood.asp> (last visited Sept. 21, 2006). The World Health Organization (WHO), the United Nations Fund for Population Activities (UNFPA), and the World Bank founded a Safe Motherhood Initiative in Nairobi, Kenya at the Safe Motherhood Conference, Feb. 10-13, 1987. Susan A. Cohen, *Special Report: The Safe Motherhood Conference*, 13 INT'L FAM. PLAN. PERSP. 68 (1987).

The meeting facilitated the development of some common goals and strategies that the delegates decided to pursue.<sup>796</sup> The meeting also helped to establish greater communication between the campaign and this group of delegates. Through them the campaign gained greater access to women delegates more generally. In particular they gained greater access to the luncheon forum. In this sense the campaign, as part of a larger movement for women's rights, helped to provide the fora and opportunity for women to build a consensus on controversial issues and to work on and across their differences.

### *B. A Question of Representation*

The specific question of whether urban elite women, who stood to gain the most from increased representational status in government, could or would represent the interests of poor rural women goes to the heart of questions about democratic representation.<sup>797</sup> It particularly addresses these concerns in contexts of group conflict or a history of subordination and oppression. One could characterize the campaign's push to have more women in positions of representation as raising a similar question about democratic representation. The question raised by both situations is whether one group (such as men or urban elite women) can adequately represent another group (such as women or poor rural women).

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796. Ongalo & Kiio, *supra* note 772, at 3.

797. Jane Mansbridge has argued that in contexts of distrust and in contexts where interests have not yet crystallized, both present situations in which constitutional designers and individual voters may want to institute policies of descriptive representation. Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628 (1999). Mansbridge defines *descriptive representation* as consisting of representatives who "are in their own persons and lives in some sense typical of the larger class of persons whom they represent. Black legislators represent Black constituents, women legislators represent women constituents, and so on." *Id.* at 629. She notes that this descriptiveness includes not only visible characteristics but also shared experiences. *Id.* Mansbridge argues that representative democracies have two primary functions, one deliberative and the other aggregative. *Id.* at 634. Descriptive representation aids primarily in the deliberative function. *Id.* It aids in the mutual communication between representative and constituent (vertical communication) in contexts of group distrust and subordinate groupings. *Id.* at 641-43. It also aids in bringing new and different perspectives to the table among deliberators (horizontal communication) where these perspectives and interests have yet to crystallize (where parties or groups have not yet formed positions around an issue because it is just emerging). *Id.* at 643-48. She notes regarding the latter situation that rules such as requiring representatives to be long-time residents of a region or nations' requirements that the president be born in the nation may capture this form of descriptive representation. *Id.* at 629. Regarding novel legislative issues that require introspective representation, constituencies often see politicians from the same region or sharing similar experiences as the best representatives for the region's constituents. *Id.* at 643-48.

Although the theories of democratic representation are beyond the scope of this article, the initial campaign members might have responded to this question in a variety of ways to justify their push for more female legislators. One response is that it is doubtful that men can represent the lives, experiences, and interests of women absent women's equal and valued participation.<sup>798</sup> A second response is that men could represent women and their interests if they had sufficient interest, concern, education, commitment, and means to understand women's lives and interests. Most electoral systems are based on theories that assume that those who choose lawmaking as their vocation have the commitment, education, concern, and interest in representing their constituencies and that elections provide those constituencies the opportunity to choose among individuals who are so committed.

A third response might have been that men may choose not to represent women's interests even if they could do so, given the fact that many of men's societal advantages depend on women's subordination. As one example, male legislators might not heed women's demands for more female legislators or descriptive representation because it might cost them their jobs. Disincentives may also arise from socialized perspectives about proper social arrangements, perspectives that require mothers to stay at home for example. Stated in the alternative, the question is whether men *will* represent women's interests without significant pressure to do so. A fourth response may have been that the question of whether men can represent women is irrelevant; rather the questions are whether men have represented women's interests in the past and are they likely to do so in the future, given the current arrangements and structures in place.

In the context of the rural versus urban divide, Kenyan women have had three specific responses to these questions. First they exposed the cynicism of those who raised the question by pointing out that most of the men in government, and in Parliament in particular, were also middle class men from urban areas, yet they assumed that they were better able to represent both rural men and women, poor and rich alike.<sup>799</sup> Second, some elite urban women were once poor

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798. The presumption here is that women and men have different interests. One should query whether they do in fact have different interests across the range of issues. Vega and Firestone, in looking at the effects of gender on congressional behavior in the United States from 1981 through 1992 and focusing on the introduction of bills and cohesive voting, found that female members of Congress were increasingly representing women's issues, but in terms of voting behaviors, female members of Congress as a group were not significantly different from their male counterparts. Arturo Vega & Juanita M. Firestone, *The Effect of Gender on Congressional Behavior and the Substantive Representation of Women*, 20 LEGIS. STUD. Q. 213 (1995). This study may suggest that men and women may not have significantly different interests across a range of issues.

799. FIDA 1998, *supra* note 67, at 34-35.

rural women or came from poor rural families, and the divide was therefore artificial to some degree.<sup>800</sup> Third, the campaign had minimally responded to this charge initially by creating a scheme in which rural women, or at least district women, could represent themselves. In the campaign's representational campaign scheme, women would be represented in Parliament from every district in the country, a system that would limit the seats urban women from Nairobi could occupy.<sup>801</sup> The campaign had also promoted Article 106 of the Draft Constitution, which established a second legislative chamber consisting of one hundred seats, thirty of which were reserved for women representing the provinces and Nairobi.<sup>802</sup> Furthermore, they supported provisions about devolved government in which women would occupy half the seats at the locational and provincial levels, which would require additional local women to be in government.<sup>803</sup>

Two theories support the campaign's efforts and its other representational suggestions: a justice theory and a difference/exclusion theory.<sup>804</sup> Justice arguments suggest that because women are half the population and because talent is not limited to one gender, women should be in elective office to roughly the same extent as men absent discrimination.<sup>805</sup> Difference arguments suggest for example that having women in office, especially where there is a critical mass, will bring different or enriching perspectives that will aid decision making and may transform the way business is conducted.<sup>806</sup> The campaign's difference/exclusion arguments suggested that women's voices represented the concrete, material, and expressive social experiences of difference and subordination and that these experiences informed perspectives that had been excluded from decision-making processes.<sup>807</sup>

800. *Id.* at 34.

801. TRAINING MANUAL, *supra* note 17, at 83-84 (suggesting alternative language and proposing that election to National Assembly follow a Mixed Member Proportional Representation system requiring that the first eighty percent of the nominees be women representing every district); *see also id.* at 59-60 (explaining this proposal as crucial to realizing the one-third principle).

802. *Draft*, *supra* note 3, Art. 106.

803. *Id.*, Art. 217, 219; TRAINING MANUAL, *supra* note 17, at 33 (recommending that delegates support the current devolution requirement of fifty percent election of women).

804. *Cf.* Marian Sawyer, *Parliamentary Representation of Women: From Discourses of Justice to Strategies of Accountability*, 21 INT'L POL. SCI. REV. 361, 362-66 (2000) (noting two types of arguments often employed by women's groups to justify increased descriptive representation).

805. *See* TRAINING MANUAL, *supra* note 17, at 76; *see also* Sawyer, *supra* note 805, at 362. Sawyer further argues that opening offices to women may double the pool of talent from which legislators are recruited. *Id.*

806. Sawyer, *supra* note 805, at 365-66.

807. *See* TRAINING MANUAL, *supra* note 17, at 34 ("Greater participation of women in political leadership would bring new perspectives and priorities in politics . . . add value to debates and deliberations and enlarge the democratic spaces.").



Furthermore, the campaign's actions evidenced a belief that having a critical mass of women in government would allow these perspectives to emerge. Finally, the campaign believed that the emergence of these perspectives would render beneficial changes for women generally, would improve the country as a whole, and possibly transform current governmental processes from its traditionally patriarchal workings.<sup>808</sup> The campaign thus made no difference between improving the welfare of women and improving the welfare of the country but rather suggested that improving the situation of women would improve the overall state of the country, an argument that had been made in the development context in particular.<sup>809</sup> In this sense, they refuted the idea that writing a constitution to advance the status of women was inconsistent with writing a constitution to advance the country; the former served the latter.

On the particular question of representation of rural women, the campaign hedged, inspired in part by the approach taken by the Draft Constitution, which sought to ensure the representation of a broad range of people including specifically marginalized groups, people with disabilities, the young, and the elderly.<sup>810</sup> On the one hand, the campaign sought to include rural women's actual representation of themselves by electing "one of their own" local people through the district scheme.<sup>811</sup> On the other hand, their activities evidenced a commitment to creating forums in which women in their "heterogeneity" could explore their different perspectives and to reach policies or strategies informed by those perspectives.<sup>812</sup> This commitment to considering all points of view would also encourage individual women representatives

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808. Cf. Sawyer, *supra* note 805, at 365 (discussing critical mass).

809. Cf. Statement from Kernal Dervis, Adm'r, United Nations Dev. Programme, to UNDP/UNFPA Executive Board (Sept. 6, 2005), <http://content.undp.org/go/newsroom/september-2005/board-undp-unfpa-20050906> (last visited Sept. 21, 2006) ("Strong evidence from around the world confirms that gender equality accelerates overall economic growth, strengthens democratic governance and reduces poverty and insecurity. As we move forward with the implementation of the MDGs, it is important that we are fully committed to investing in policies and programmes that empower women and promote gender equality.").

810. See, e.g., *Draft, supra* note 3, Art. 14(11).

811. Note that local women and poor rural women are not synonymous terms. In all likelihood, local women will be local elite rural women. Cf. TAMALE, *supra* note 792, at 75 (noting that the profiles of professional women in Uganda differ from the typical profile of more than ninety percent of Ugandan women, who are "illiterate or semiliterate rural peasants engaged in subsistence farming").

812. This commitment was particularly evident in the campaign's ideas for the Gender Commission. For example, campaign members discussed having the commission's local offices both to identify the needs of local women through different kinds of forums and to identify and train local women that emerged as possible leaders to run for elections. See Betty Oyugi, *It[s] Time We Had a Gender Commission*, YAWEZEKANA, Aug. 18, 2003, at 2.

to represent their group or gendered interests. In this sense they expected women not simply to *stand for women* but to *act on behalf of them*, on platforms formed through consensus-building and informed by their diversity.

## VII. ASSESSING AND STRATEGIZING

The experiences of Kenyan women over the past decade provide a potential road map about how to articulate and safeguard human rights in constitutional and legislative reform movements. The Kenyan people seek to overcome countless obstacles in their struggle to effect governmental change. Colonization, exploitation, political corruption, and ethnic and class division are obstacles in themselves, and they have led to an extremely pluralistic state consisting of many competing interests. Women in particular have faced decades of oppression and subordination without having sufficient political rights to plead for change.

Kenyan women have mobilized to protect their human rights, as evidenced in the constitutional review process. Here, at least in these first rounds of negotiations, women were able to safeguard their rights through open debate, consideration of all views, and compromising in the interest of women's solidarity. By analyzing their successes and their missteps, other women's movements can find guidance in advocating for women's interests.

Reviewing the NCC's Zero Draft and the government's Waco draft reveals that Kenyan women's efforts and particularly the efforts of the campaign for Safeguarding the Gains of Women in the Draft Constitution were a qualified success. Women's advocacy of the gender equality ideal led to its partial embodiment in the initial Draft. Nevertheless, women were only successful in enshrining into later constitutional drafts those issues on which they could agree and pursue as a group across their diversity, and nothing more. In addition, women were successful on those issues supported by a long history of activism, giving them the time to publicly develop, discuss, debate, and cultivate positions in women-centered forums and efforts. Furthermore, women were successful where their positions were closely aligned with the status quo or met the overall expectations of society. In each of these situations, women were able to frame, shape, or sustain the debate in ways that were beneficial to them. Conversely, novel provisions or arrangements that the campaign proposed were almost always rejected, even where they might have deepened or expanded the goals of a broader gender equality ideal. These results point to the necessity of an independent women's movement with organizations and opportunities for women to consult one

another across their diversities and that are capable of articulating and fighting for women's gendered interests.

As stated above, women had their greatest successes on those issues supported by both current advocacy and a history of activism. For example, the Gender Commission, the one-third provision, and affirmative action measures generally were all areas that had received substantial activism in Kenya throughout the previous ten years. Both later drafts largely embraced these ideals. Kenyan women were successful in securing a constitutionally mandated independent gender commission,<sup>813</sup> although the later drafts did not adopt the novel idea of providing greater institutional support for gender parity through the judiciary and parliamentary service commissions in the Waco Draft. The campaign was also successful in enshrining a principle for the elimination of gender discriminatory laws, regulations, customs, and practices in relation to land,<sup>814</sup> although the Waco Draft dropped the provision securing a spouse's access to marital property.<sup>815</sup>

Unfortunately, because determining the specific language used to capture these ideas in a constitution was a recent issue itself, women achieved less consensus about how to word provisions embracing these ideas. The campaign's efforts went far in providing suggestions about how best to capture these ideas. In addition, the campaign's suggested language, stated positions, and explanations provided the campaign and women greater credibility and perhaps confidence in the NCC process.<sup>816</sup>

813. See ZERO DRAFT, *supra* note 11, Art. 297(b); WACO DRAFT, *supra* note 12, Art. 76.

814. ZERO DRAFT, *supra* note 11, Art. 77(2)(f); WACO DRAFT, *supra* note 12, Art. 78(2)(f); see also TRAINING MANUAL, *supra* note 17, at 90 (making this suggestion).

815. See ZERO DRAFT, *supra* note 11, Art. 82.

816. The author bases this statement on anecdotal evidence from the conference. Observers often commented that women were one of the most active groups in the NCC, largely due to the campaign efforts. See Makau Mutua, *Taming Leviathan*, *supra* note 7, at 128-30. Although women delegates were initially distant from the campaign, they nevertheless used its materials and came to rely on them in their deliberations. Furthermore, many considered *Yawezekana*, the only newspaper provided on site at the conference, to be a women's paper, which provided a degree of legitimacy to women delegates' efforts. Several delegates also requested that the campaign develop materials on devolution and create some suggestions for a special district plan based on the Ugandan model.

Furthermore, many Parliamentarians commented on the usefulness of the manual. During one Parliament-organized session the week before the NCC in Mombassa, several Parliamentarians insisted that the attendees review and discuss the campaign's Training Manual, particularly the suggested language section. Similarly, Parliamentarians favorably commented on the campaign's goal at the CKRC constitutional training session for Parliamentarians.

Finally, several of the core campaign participants were asked to continue their work on the constitutional review process. Jacinta Muteshi became an expert consultant to the NCC. She was later named chair in the government-established gender commission. Koki Muli was also later involved in the negotiation efforts centered around the government's process to modify the Zero Draft.

Nevertheless, the manner in which the various drafts enshrined these issues conveys the power structure's resistance to women's empowerment and the necessity of a women's movement. For example, although both drafts generally adopted the one-third principle in the provision on national values, principles, and goals, the language changed over the drafts. It now provides: "The state shall . . . implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."<sup>817</sup> The rewritten text is more abstract, and the delegates presumably sought to make the principle more universal and less time-bound. They apparently anticipated a time when women might constitute the majority of governing bodies and sought to preclude this. The effect of the language is to obscure the current political context in which men overwhelmingly populate governing bodies. It also obscures the provision's initial goal, which was the empowerment of women within this context. This change may have arisen out of the campaign's efforts to explain the ways in which the term *gender* applies to both women and men. Furthermore, given the current context, the change likely provided some comfort to men, who were assured in the near future of retaining a majority of seats.

Although this change seems harmless, one cannot say the same about the provision on women. Again, this provision was meant to empower women. To the extent that certain men have unearned privilege and status, the gender equality ideal seeks to undermine this status in fact. The NCC renamed the provision on women to "Gender," and it now provides in part that "[a]ny law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women or men is prohibited."<sup>818</sup> One could thus characterize this provision as protecting men's unearned privilege and prohibiting any actions that would undermine that status. This language is perhaps simply the result of sloppy drafting and the pressures of the particular political moment, but it is consistent with a particular limiting tone taken by the later drafts in adopting the demands regarding gender equality and women's human rights for which women have fought over a decade.

Issues of women's representation and the one-third principle also met with opposition. Women's groups intended to apply the one-third idea throughout devolved government, thus embracing the interests of a diversity of women. In this regard the campaign fought for

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817. ZERO DRAFT, *supra* note 11, Art. 12(2)(j). The Waco Draft also adopted this provision. WACO DRAFT, *supra* note 12, Art. 13.

818. See ZERO DRAFT, *supra* note 11, Art. 37(3); WACO DRAFT, *supra* note 12, Art. 38(3).

a mixed member proportional representation scheme that sought to mainstream women through political parties throughout the system and to place community or district women throughout devolved government. Unfortunately women did not have the time to agree on an appropriate system, and the approach the campaign suggested was novel. Although delegates discussed the campaign's plan, they ultimately rejected it. The campaign further failed to structure an alternative scheme upon which women may have agreed. Women delegates thus muddled through these sections of the constitution, forced to tinker with the system initially contemplated by the Draft Constitution, which was based on the scheme adopted in Uganda. Here however, the Zero Draft and the Waco Draft took slightly different approaches given the controversies around devolution. Whether either draft contemplates the same level of women's representation that the campaign's scheme promoted is unclear.<sup>819</sup>

The Zero Draft fully rejected the mixed member proportional representation scheme and instead adopted a second chamber and a four-tier government system with a central authority and three levels of devolved government.<sup>820</sup> The first chamber, the National Assembly, would consist of between two hundred eighty and three hundred members, two hundred ten representing each constituency, as is currently the case, and a woman from each of approximately seventy districts.<sup>821</sup> The second chamber, the Senate, would consist of a senator from each district and two women from the eight or so regions plus additional women from marginalized groups.<sup>822</sup> Although women senators are to be one-third of the total senate body, whether this formula will meet the one-third target is unclear.<sup>823</sup> Finally, women are to constitute one-third of the district counsel seats, a body that acts as the Electoral College for the Senate seats and regional seats,<sup>824</sup> but the Zero Draft contains no clear requirements that women be represented at the locational or regional levels of devolved government.<sup>825</sup>

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819. The campaign proposed that Parliament seats be reserved for women from each of the seventy districts. See TRAINING MANUAL, *supra* note 17, at 84-85. The campaign then recommended the devolved government system proposed by the Draft Constitution. *Draft*, *supra* note 3, Art. 106. The Draft also proposed a second chamber of one hundred members, thirty seats of which were to be women. *Id.* It then proposed that women represent fifty percent of the representatives at the locational and provincial levels. *Id.*, Art. 217(1), 219(2).

820. ZERO DRAFT, *supra* note 11, Art. 120.

821. *Id.* at 123(1).

822. *Id.* Art. 122(1).

823. See *id.* Art. 102(4) (stating the one-third principle).

824. *Id.* Art. 219(1)(b).

825. See *id.* Art. 212, 224.

The Waco Draft adopts a single legislative body, Parliament, with additional seats for women from “special constituencies” prescribed by law.<sup>826</sup> Nothing in the Waco Draft makes clear whether these seats represent district-like constituencies or how many seats there will be. The Waco Draft also devolves government to only one level, the district.<sup>827</sup> Although women are to make up one-third of the district assemblies,<sup>828</sup> the draft does not make clear whether they must be represented in the district councils, which form the executive authority for the districts.<sup>829</sup> Finally, although there is no second chamber of central government, the Waco Draft establishes a National Forum for District Governments, whose “membership and procedure for the conduct of business” are subject to an act of Parliament.<sup>830</sup>

Although women effectively advocated for the one-third principle, the way the Zero and Waco Drafts enshrined it suggests that women likely received less than they bargained for. In retrospect, the campaign should have more thoroughly analyzed the devolution scheme initially in a manner consistent with its philosophy that all of the issues in the constitution affected women.<sup>831</sup> Furthermore, it should have proposed multiple representational arrangements regarding devolution, particularly arrangements built on the strengths of the Uganda scheme, since many Kenyans were familiar with it. In this way, women may have found it easier to agree upon an arrangement and fight as a group for that arrangement, with the details better articulated. Such solidarity may have increased their chances of securing wider and deeper representation through devolved government as provided in the drafts.

Furthermore, as women were subject to the tensions wrought by the urban/rural divide and anticipated some of the ethnic and regional divisions implicated in devolution, including the implicit claims concerning allocation of resources, a more thoroughly developed devolution plan may have forced the campaign to be more attentive initially to these issues. The campaign’s overall philosophy supported the view that resources should be equitably shared, that community integrity and preservation in a pluralist society was important, and that wide representation of the diversity of the society was necessary. A developed devolution scheme may have given the campaign and women delegates a greater ability to push these ideas. In this regard, it is noteworthy that the coalition failed to conceptualize a broad

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826. WACO DRAFT, *supra* note 12, Art. 116.

827. *Id.* Art. 199 (“The district is the unit of devolution.”).

828. *Id.* Art. 209(1)(b).

829. *Id.* Art. 210.

830. *Id.* Art. 206.

831. *See* TRAINING MANUAL, *supra* note 17, at 41.

equality principle as a basis for gender equality and to articulate explicitly a goal of "promoting equality." Although this idea informed the campaign's activities, the campaign failed to articulate this idea, to seek its enshrinement in the Zero Draft, and to frame a number of issues from this perspective. Greater advocacy of this broader equality principle could have helped groups with different interests to understand the connections between their efforts and the women's.

The campaign's success regarding the Kadhi's courts issue supports the argument that women might have had greater success in the area of devolution if they had articulated a better-developed devolution scheme more familiar to the society at large. Women's solidarity and committed support to the Kadhi's courts was probably essential for its success. The early publication of the campaign's positions was an important factor in tilting the debate of the Kadhi's courts and appeared to sway the political parties to unite on this issue. Here the campaign took seriously the divergent views and voices of women and sought to address the concerns they raised. The campaign used its own commitment to equality both to legitimate the varying views and to fashion a compromise. This compromise took note of the argument that women within the Islamic community in Kenya might want access to equality and given a chance might use it, but the coalition overall supported the particular way in which Muslim women believed they might best be empowered: through retention of the Kadhi's courts. Although Muslims ultimately rejected the compromised equality language, both Muslim and non-Muslim women benefitted from their solidarity. Muslim women benefitted from the support of their sisters in their efforts on the Courts and non-Muslim women gained an ally in the Muslim community. In addition, the two groups politically defeated an adversary whose positions would have limited the human rights of both groups. This success is a clear example of how working towards solidarity across competing interests could have benefitted the campaign in its efforts regarding other controversial issues.

This success also supports the argument that had women initially formulated a position on the prime minister position they may have shaped this debate. Early discussions with women delegates to the NCC made clear that most were going to come out in favor of a prime minister position. The campaign's informal questionnaire to delegates during their provincial training confirmed that the delegates and the public supported a prime minister position. Nevertheless, many people in civil society, including the male leadership of the KHRC, saw little need for a prime minister position given the election of NARC. These individuals argued that a strengthened Parliament

provided a sufficient check on presidential power. Influenced by these arguments, the campaign was ready to compromise on a prime minister position with fewer powers. Unfortunately, by the time the coalition announced its position, the issue had become intractable in the NCC, and many observers simply saw women's efforts as supporting the NAK faction of the NARC government.

Where women had advocated for particular issues over many years but the campaign failed to highlight these issues, women were also less successful. For example, although the Draft established age requirements for marriage, as women had demanded for many years, these requirements were challenged and defeated in the Zero and Waco Drafts.<sup>832</sup> Furthermore, where the campaign took a hands-off approach with regard to abortion rights and same-sex marriage, these too suffered challenge and defeat. These outcomes demonstrate the fact that women cannot rest on their laurels but rather must continue to fight and advocate for those rights that affect women's empowerment even though they may believe those rights have already been safeguarded. Where the campaign failed to carry past advocacy forward into the constitutional debate, these issues suffered setbacks. This finding also suggests that had women failed to advocate actively for, for example, the one-third principle, little suggests that the current power structure would have seen fit to provide it.

### CONCLUSION

Women's identities are embedded in and shaped by the society, communities, and cultures of which they are apart. They are a diverse group subject to the division of social cleavages along the lines of ethnicity, race, religion, and region, among others. They therefore live and think differently and have diverse views on a host of issues, making it difficult to agree on strategies to improve their conditions. Furthermore, even if women were unified and could agree on common positions and strategies, they often have only limited access to resources to help them change and improve their condition because women historically have been a subordinated group. Nevertheless, women's movements, which can provide women an opportunity to forge common philosophies, positions, and strategies, are essential to changing this subordinated status. Women's efforts and organization provide opportunities for women to access positions of power and other resources and can be essential to women's efforts to gain greater opportunities in government.

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832. ZERO DRAFT, *supra* note 11, Art. 41 ("Every adult — (a) has the right to marry a person of the opposite sex, based upon the free consent of the parties . . ."); accord WACO DRAFT, *supra* note 12, Art. 42.



The Kenyan experience demonstrates the necessity of women's movements in forging common positions among diverse women. It further demonstrates that a commitment to solidarity informed by women's diverse perspectives and experiences is a fundamental part of being in a position to forge these common ideas. This solidarity is based in part upon ideas of gender equality, not simply between men and women but among women. It not only values women's different perspectives but takes them into account through a willingness to strike creative compromises. These compromises understand gender equality as a flexible and complex idea that must address the substantive needs of women in their diversity. As such it rejects an absolutist, universal notion of equality as merely same treatment and oblivious to outcomes. Furthermore, the notion of gender equality and a commitment to solidarity within women's movements must also be attentive to resources. The allocation and distribution of resources, both material and expressive, are evidence of a commitment to solidarity and further facilitate it, as well as facilitating efforts to forge a common agenda. Where women are not attentive to the allocation of resources, their commitment to the empowerment of all women is open to challenge.

Finally, although the Kenyan experience focuses on legal empowerment and largely representational resources, even as they may implicate material resources, it does not engage the larger problem of women's subordination and limited access to resources in a rapidly globalizing world in which power over both expressive and material resources is increasingly in the hands of private corporate institutional entities as opposed to government. Nevertheless, the tools of an engaged women's movement committed to women's empowerment and solidarity based on a broad understanding of gender equality may well be indispensable to this larger struggle.