



**JOINT SUBMISSION OF SHADOW REPORT TO THE HUMAN RIGHTS COMMITTEE ON
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

Kenya 105th Session 9 – 27 July 2012

**Federation of Women Lawyers Kenya (FIDA Kenya)
The Global Initiative for Economic, Social and Cultural Rights**

Names of Organisations Consulted

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2. The CRADLE
3. Gender and Media (GEM)
4. United Disabled Persons of Kenya (UDPK)

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Abbreviations and Acronyms

ECOSOC: United Nations Economic and Social Council

FIDA K: Federation of Women Lawyers Kenya

GVRC: Gender Violence Recovery Center

ICCPR: International Covenant on Civil and Political Rights

IDP: Internally Displaced Person

KHRC: Kenya Human Rights Commission

KNCHR: Kenya National Commission on Human Rights

MDG: Millennium Development Goals

NALEAP: National Legal Aid and Awareness Program (NALEAP)

NGO: Non-Governmental Organization

PEV: Post-Election Violence

SOA: Sexual Offences Act

TJRC: Truth, Justice and Reconciliation Commission

PROFILES OF SUBMITTING ORGANIZATIONS

I. THE FEDERATION OF WOMEN LAWYERS – KENYA (FIDA KENYA)

The Federation of Women Lawyers Kenya (FIDA Kenya) is a non-profit, nonpartisan membership organization, its membership comprising women lawyers and women law student. FIDA Kenya is committed to the creation of a society that is free from all forms of discrimination against women by reason of their gender or sex. Established in 1985, FIDA Kenya works towards increasing access to justice and also seeing to the improvement of a sound policy, legislative and practice framework for the social protection and advancement of the rights of women.

A core programme of the organization is to monitor progress made by the state in domestication and implementation of various international human rights instruments that Kenya is party to. Over the years FIDA Kenya has carved itself a niche as a defender of women's rights at the international, national and local level through provision of legal aid services and also through lobbying and advocating for policy and legislation that speaks to the increased enjoyment of women's rights. FIDA achieves this through several programmatic interventions and also through activities in concert with several like minded partners for purposes of sharing and learning of best practice.

FIDA Kenya has a long-term working relationship with Parliament and the Judiciary all in a quest to contribute to the promotion and enjoyment of women's rights. FIDA Kenya is represented in key and strategic committees of government and contributes to transformative change for indigent woman at national level. FIDA Kenya enjoys special consultative status with the United Nations Economic and Social Council (ECOSOC) and observer status before the African Commission on Human and People's Rights. FIDA Kenya works within these spaces to bring pressure to bear with respect to Kenya's obligations under international and regional human rights instruments.

Further information about FIDA Kenya can be accessed at <http://www.fidakenya.org>

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II. THE GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Global Initiative for Economic, Social and Cultural Rights ('Global Initiative') is a 501(c)(3) non-profit, non-governmental organization that was registered in the United States in 2011. Its mission is to implement a concrete strategy for economic, social and cultural (ESC) rights advocacy, aimed at improving the lives of the world's poor. We reach this goal by building strategic alliances with influential actors within and beyond the human rights movement, including the development sector and the environmental movement; entrenching ESC rights in law and practice through standard-setting and strategic litigation; and developing practical methods and tools for realizing ESC rights, making them available to policy makers at national and local levels.

The Global Initiative has a special interest in advancing women's land and property rights. The realization of women's ESC rights can itself be transformative, not only in ensuring that women's immediate material needs are met, but also in fundamentally reshaping unequal power relationships. Indeed, we know that certain rights are especially transformative from the standpoint of women's empowerment, including equal rights over housing, land and property. For women, advancement on these critical issues is more than about poverty alleviation, it is about uplifting women's status in a fundamental way, and ending women's subjugation on the basis of gender.

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EXECUTIVE SUMMARY

The promulgation of the Constitution of the Republic of Kenya on August 27, 2010 is viewed as a new beginning for the people of Kenya. The Constitution is key to driving fundamental reform and also, Kenya's transition towards enhanced democracy and respect for the rule of law. By virtue of the provisions of Article 2, the supremacy of the Constitution is underscored. Kenya is signatory to several human rights instruments that provide a guarantee to protection of the rights of women and also gender justice. Among these is the International Covenant on Civil and Political Rights. Article 2(5) and 2(6) of the Constitution of Kenya does away with the system of dualism. Accordingly, the general rules of international law and any treaty or convention ratified by Kenya shall form part of the law of Kenya. Principles of international treaties can therefore be applied by courts, tribunals and administrative authorities, or by any other competent authority provided for by the legal system of the State. Implementation of rights and freedoms is a fundamental duty of the State and of every State organ under Article 21(1). Additionally, Article 21(4) of the Constitution requires the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.

The International Covenant on Civil and Political Rights is currently the most substantially domesticated human rights instrument under Kenyan law. The State's third periodic report was in the first instance, submitted before the promulgation of the Constitution of Kenya, 2010. We note that the enactment of the Constitution in itself speaks to various issues that will be taken up in connection with the consideration of the third periodic report of Kenya. Cognizance is paid to the great strides in incorporating the provisions of the International Covenant on Civil and Political Rights into the Constitution of Kenya, (2010), legislation and also incorporating the same into administrative, policy and other measures.

This report nonetheless also highlights several areas that we note, impede to effective realization of these rights and on the status of the rights of women and girls in Kenya. While objectively recognizing positive steps that have been undertaken, the report provides insight into matters of concern and also provides workable recommendations towards achieving this end.

INTRODUCTION

The promulgation of the Constitution of Kenya, 2010 provides several gains for the situation of women in Kenya. The inclusion of a comprehensive Bill of Rights is seen as a laying a sound foundation for protection of women through, among others, the following provisions;

Article 27(3) which provides for equal treatment and opportunities in political, economic, cultural and social spheres without discrimination;

Article 43(1) which guarantees the right to health including reproductive health;

Article 45(3) which provides for equal rights between men and women at the time of marriage, during marriage and on its dissolution;

Other progressive provisions within the Constitution include;

Article 53(1) which provides for shared parental responsibility regardless of marital status;

Article 60 (1) (f) on the elimination of gender discrimination in relation to land and property;

Article 68 (c) (iii) which offers protection of matrimonial property with a special interest on the matrimonial home during and upon the termination of marriage

Article 91(f) that guarantees gender equality in political parties;

Article 232(1)(i) that calls for adequate and equal opportunities for appointment, training and advancement at all levels of the public service under Article 232 (1)(i).

Despite these gains, we are conscious that the role of Kenyan women in the society has been underplayed and full enjoyment of their rights compromised.

It is against this backdrop that this alternative report is submitted to the Human Rights Committee following the Kenyan Government's Third Periodic Report under the International Covenant on Civil and Political Rights. The report provides a detailed analysis on the current status of women in Kenya with specific reference to civil and political rights. The report tracks progress that has been made towards realization of various rights but also serves to flesh out matters of concern that if left unchecked, may serve to hinder effective realization of rights. It is these matters of concern that we highlight in a bid for the same to be considered by the Committee in prescribing recommendations on steps to be taken by the State party.

ARTICLE 2(NON-DISCRIMINATION)

Every State party to the International Covenant on Civil and Political Rights undertakes to respect and ensures that all individuals within its territory are free from discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. A State party must therefore take the necessary steps in accordance with its constitutional processes, and with the provisions of the Covenant, to adopt such laws and measures as may be necessary to give effect to the rights recognized by the Covenant. The Government of Kenya must keep to its international obligations which include but are not limited to publish and widely disseminate the concluding observations to for instance all relevant Ministries, the National Assembly and the Judiciary so as to ensure their full implementation and to be circulated for the attention of the non-governmental organisations operating in Kenya.

Article 27(1) of the Constitution of Kenya provides for equality and freedom from discrimination where every person is equal before the law, has the right to equal protection of the law and equal benefit of the law. Article 27 (3) provides that men and women have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres regardless of race, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. If properly implemented, the Constitution of Kenya will lay the foundation for a democratic and open society in which every person is equally protected by the law.

In order to curb discrimination, equal opportunities must be presented to both men and women. The State reported that the Equal Opportunities Bill 2007 was drafted and published. The Bill aimed at promoting equal opportunities for all persons by prohibiting discrimination and providing remedies for victims of discrimination. The State also reported that the 10th Parliament of Kenya established a Parliamentary Select Committee on Equal Opportunities. The Committee was mandated to monitor and promote measures designed to enhance equality and improvement in the quality of life and status of all Kenyans. The State has to curb discrimination, especially as relates to Kenyan women in the employment. (Article 26 of the Covenant)

Laws relating to property rights have historically been discriminatory to women. In the case *Echaria v. Echaria*¹, a wife is bringing to Court an issue concerning the joint ownership of their shared property. The judge of the Superior Court had considered the women's domestic work and decided to equally divide the property between the spouses. This remarkable judgment was however reversed by the Court of Appeal which declared that the Superior Court erred in considering the wife's non-monetary contribution and in granting her half of the property.

Many women face serious obstacles in claiming their property rights either because they are unaware of their rights or they are unable to lay claim to this right. To mitigate this, the National Land Policy was adopted in 2009. The policy provides a systematic framework for the management and administration of land and its resources in Kenya. The policy, among other things, provides for the: recognition of marginalized groups, informal settlements and small communities, the harmonization of land laws to ensure better and more effective land administration; the repossession of public land that had hitherto been allocated to private individuals and the development of a land use master plan to guide the optimal utilization of land resources. The Land Act, 2012, the Land Registration Act 2012, and the National Land Commission Act 2012 were recently enacted. The legislation on land revises, consolidates, and rationalizes existing land laws to provide sustainable administration and management of land based resources. These three Acts of Parliament affirm that entire legislation on land as based on Article 68, and other provisions of Chapter Five of the Constitution, give effect to the letter and spirit of the Constitution about realising land reform. The National Land Commission is the central organ in the implementation of the Chapter Five of the Constitution and generally land reforms in the country. These new Acts if properly implemented will ensure the respect of women's rights in land ownership. The State must therefore ensure that registries, Courts, and all other government offices dealing with land issues do not discriminate against women. (Articles 3 and 26 of the Covenant)

In its third Periodic Report, the State committed itself to the provision of equal justice for all by embarking on substantial and outreaching reforms. These reforms were

¹ Civil Appeal No.75 of 2001

aimed at establishing legal and institutional mechanisms that enhance access to justice to the poor, marginalized and vulnerable. Some of the reforms highlighted included the setting up of the National Legal Aid and Awareness Program (NALEAP) launched in 2008 with six pilot projects created. However, questions have been raised over the effectiveness of the programme in offering legal aid to Kenyans in need, and especially women who are unable to afford legal services. Article 48 of the Constitution states that the State shall ensure equal access to justice for all persons, and FIDA Kenya recommends that the State commits itself to ensuring the programme is fully operational to increase women's access to justice.

As part of the process aimed at implementing the new Constitution, judicial reforms have since been initiated. In terms of oversight, the role of Judicial Service Commission (JSC) has been strengthened a great deal and its composition widened to include members of the public and legal fraternity. As provided for in the Constitution, one of its functions is to appoint, receive cases against, investigate and remove from office or otherwise discipline registrars, magistrates, judicial officers and staff in accordance with an Act of parliament. In the case of judges, the JSC can only petition the President to remove from office a judge accused of misconduct or incompetence.

The government has enacted the Judicial Services Act which provides for the recruitment, discipline and removal of judges and the Vetting of Judges and Magistrates Act which provides for the vetting of all the Judges and Magistrates who were in office by 27th August 2010 by the Vetting of Judges and Magistrates Board, to determine their suitability and competence to remain in office under the new Constitution. The exercise seeks to make a significant difference to the judicial reform process, and build public confidence in the judiciary following criticisms for its failure to uphold the rule of law. The vetting process has so far seen the removal of some of the senior Court of Appeal judges for various reasons ranging from lack of independence, incompetence, accepting gifts from litigants, lack of professionalism and supporting authoritarianism².

² Daily Nation "Shock as Top Judges Sacked from Bench" Thursday April 26, 2012.

Correcting gender and minority imbalances within the judiciary is also critical for reform successes. The gender parity notable in the judiciary is demonstrated by a report by the Judicial Service Commission and DPM Compliment Statistical Unit as at 2009 as below;

Judicial Service Establishment in Kenya by Grade and Sex³

Rank	Female	Male	Total	(%) Female
Chief Justice	0	1	1	0
Court of Appeal Judges	0	9	9	0
High Court Judges	14	48	62	22.5
Chief Magistrates	5	8	13	38.5
Senior Principle Magistrates	5	13	18	27.8
Principal Magistrates	12	22	34	35.3
Senior Resident Magistrates	38	62	100	38.0
Resident Magistrates	30	44	74	40.5

In this regard, the number of women within the judicial system has been increased significantly since last year. For instance 13 out of the 28 High Court Judges are women and this number is expected to increase once more judges are appointed to the Court. The Supreme Court has 7 judges, 2 of whom are women including the suspended Deputy Chief Justice⁴. Increasing access to justice especially for the poor and for those in remote parts of Kenya is also crucial as the custodian.

Article 27 (8) embodies the two-thirds gender principle which provides that not more than two thirds of the members of elective and appointive bodies shall be of the same gender. Judiciary has perpetuated gender imbalance in key positions and this cannot be allowed to continue in the new constitutional dispensation. This unfortunately results in a violation of the principle. For instance, this provision was not applied during the appointment of Judges to the Supreme Court of Kenya. The

³ Judicial Service Commission and DPM Compliment Stastical Unit, 2009.

⁴ Daffline Sure, "*Critique of Petition 102 of 2011: FIDA Kenya & 5 Others v AG and JSC*", FIDA KENYA Annual Report 2011

Supreme Court of Kenya was established in 2011 and given exclusive jurisdiction to hear and determine disputes relating to elections to the office of the President. The process of appointing the Supreme Court judges did not adhere to the two thirds gender principle stipulated by Article 27(8) of the Constitution. The Federation of Women Lawyers Kenya and other stakeholders filed a petition (**FIDA Kenya & 5 others v Attorney General & another 102 of 2011 KLR**) challenging the unconstitutional appointment of the five judges. It was the goal of FIDA Kenya, and the other five stakeholders to hold the Cabinet responsible for not adhering to the two thirds principle, and for the judges to be appointed meeting the requirements of article 27 (8) of the Constitution. The Cabinet has recently approved the Constitution (Amendment) Bill, 2011 which formulates definitive mechanisms to ensure that the principle is actualized.

The court overruled FIDA Kenya's petition, and ruled that this principle was "progressive". FIDA Kenya criticizes this judgement. We argue that this principle was intended to take effect immediately, and was not designed to be a progressive principle. FIDA Kenya urges the State to ensure that the principle is adhered to in all public appointments to curb discrimination against women. (Articles 3, 14 and 26 of the covenant).

The Truth, Justice and Reconciliation Commission was established under the Truth, Justice and Reconciliation Act, 2008. The Commission was given the mandate to conduct investigations throughout the country on the cause and effect of historical injustices based on discrimination. It is expected that the findings of the report will encourage mitigation on discrimination. (Articles 3 and 26 of the Covenant).

The 2007-2008 Post Election Violence resulted in massive violations of human rights including the loss of lives, rape, destruction of property and the displacement of people from their homes⁵. Most of the perpetrators of PEV are yet to be held accountable and justice has not been sought for the victims. The Commission of Inquiry into Post Election Violence found that 82% of the victims did not formally report their experiences of sexual violence. The reasons for the lack of reporting ranged from having been attacked by the police (32%), fear of being attacked

⁵ Report of the Commission of Inquiry into post Election Violence (CIPEV) page 270

again (24%), thinking nothing would be done (45%), and not being able to identify the rapist (31%)⁶. To date, five thousand criminal cases were filed but the progress of these cases is unclear. Almost five years later, rape victims who were mostly women and girls have yet to receive justice⁷. The Government has implemented Gender Violence Recovery Centers (GVRCs) into many hospitals, to offer free medical services to victims of sexual violence. The Commission of Inquiry into Post Election Violence recommended, and FIDA Kenya agrees, that citizens should be informed about the GVRCs, and the GVRCs should be established in every hospital with their own staff, facilities, and budget⁸.

Thousands of internally displaced people (IDP) remain in Kenya, and they have been defined as “persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violation of human rights or natural or human-made disaster, and who have not crossed an internationally recognised state border”⁹. Although IDPs was a problem before the elections in 2007, it is estimated that there were 350,000 persons displaced as a result of the PEV in 2007/8¹⁰. FIDA Kenya urges the State to follow through on its commitment to resettle the IDP's as they continue to suffer inexplicable injustices. (Articles 3 and 17 of the covenant)

Successfully returning IDPs is dependent on the “safety of returnees, restitution and return of property to displaced, and the creation of an economic, social and political environment that sustains them”¹¹. FIDA Kenya has been part of a working group convened by the Ministry of Special Programmes and KNCHR that had been looking into matters of IDPs. Discussions have been ongoing since 2008 towards seeing the moving of the legislation for the protection of IDPs in line with various

⁶ *supra* 1 at 249

⁷ Mathews Ndanyi, “5,000 Post Election Violence Cases to be Fast Tracked” The Star, 21 February

⁸ *supra* 1 at 249

⁹ Francis Deng, The Guiding Principles on Internal Displacements; E/CN.4/1998/53/ADD.1, February 11. New York, NY; United Nations, New York, United Nations

¹⁰ *supra* 1 at 274

¹¹ *supra* 1 at 296

regional and international human rights instruments. With contribution from the Working Group - there is now a Bill on Internally Displaced Persons.

Section 162 of the Penal Code which criminalizes homosexuality, is a contradiction article 26 of the covenant which states that all persons are equal before the law and entitled to be treated without discrimination. The State party is encouraged to repeal section 162 of the Penal Code to ensure that the rights of lesbians, gays, bisexuals, transsexuals and intersexuals (LGBTI's) are protected. (Article 14 and 26 of the Covenant)

ARTICLE 3-EQUALITY BETWEEN MEN AND WOMEN

Equality between women and men before the law remains a theoretical ideal in Kenya. This is despite the fact that Kenya is a State party to the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination against Women and the African Charter on Human and Peoples Rights. Actualization of women's rights continues to be hindered by factors such as poverty, low income levels, lack of knowledge on the rights of women and the existence of discriminatory laws.

Inequality between men and women is severely rampant in matters of succession and inheritance. This situation is made worse by the existence of legislation that is in itself discriminatory. The State reported that the Kenya Law Reform Commission had embarked on the reform of the Law of Succession to align it with non discriminatory principles specific to women. However, the Act still retains provisions that promote discrimination. For instance, under section 35(1) (b) of the Law of Succession Act, widows and widowers do not have equal rights to property. The Act provides that widows are only entitled to a life interest in their husband's property which is extinguished when they remarry. Widowers on the other hand continue to enjoy rights over their deceased spouse's property whether or not they remarry. FIDA Kenya recommends that the State to take steps to repeal this section of the law and of all other laws that discriminate against women in matters of inheritance and succession. (Article 2 and 26 of the covenant)

There have been widespread reports on the trafficking of Kenyan women to other countries where they suffer gross human rights violations which infringe on their right to have their dignity respected. Reports of women being subjected to forced labor and sexual violation are on the rise. This is despite the fact that Kenya has a Counter-trafficking in person's Act. FIDA Kenya urges the State to take immediate and effective steps to curb this trend.

ARTICLE 6- THE RIGHT TO LIFE

The Committee raised concern on the high maternal mortality rate prevalent in the country due to the high number of unsafe and illegal abortions. Article 26 (4) provides that abortion is not permitted unless in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger or if it is permitted by any other written law.

In Kenya, women's right to life is compromised as they continue to die needlessly from well known and preventable causes of maternal deaths. The rate of maternal mortality in Kenya continues to rise with official statistics showing the same to have increased to 488 deaths per 100,000 live births in 2003, from 414 in 2003¹². According to the same report, unsafe abortions are estimated to cause 35-50% of all maternal deaths in Kenya. This percentage is quite high compared to global rates where only 13% of maternal deaths are attributed to unsafe abortions. Furthermore, the Center for Reproductive Rights-Kenya estimates that complications from unsafe abortion cause the death of 2,600 women annually in Kenya¹³. Every year, approximately 21,000 women are treated in Kenya's public hospital for complications from incomplete or unsafe abortion, a number that could be easily reduced as unsafe abortion is easily preventable. More aggravating is the fact that this number do not represent the adequate figure of women suffering from complications, as it does not encompass women seeking treatment in private clinics and women who cannot or do not seek for treatment¹⁴. This dire state of affairs persists despite the enactment of

¹² Kenya National Commission on Human Rights, *Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality?*, A report of the Public inquiry into Violations of Sexual and Reproductive Health Rights in Kenya, April 2012.

¹³ <http://fidakenya.org/wp-content/uploads/2011/02/InHarmsWay.pdf>

¹⁴ *Ibid.*

New Constitution of Kenya that guarantees: the right to life, health, reproductive health care and permits provision of safe abortion to save life.

In addition, Kenya has committed to numerous international and regional human rights instruments and committed to Millennium Development Goal 5 to reduce the maternal mortality rate. Kenya National Commission on Human Right has corroborated the foregoing. In 2011, pursuant to a complaint received by FIDA Kenya and the Centre for Reproductive Health Rights, KNCHR conducted a public inquiry to investigate violations that women face while seeking reproductive health care. In May 2012, they released the inquiry's report dubbed "Realizing sexual and Reproductive Health rights In Kenya: A myth or a reality?" The finding of the report was that the Government has failed to protect women lives by abdicating its obligation to promote and enhance reproductive health rights in Kenya. You may see the report here: http://www.knchr.org/Portals/0/Reports/Final%20Report_%20Sexual_Reprodutcive_health.pdf

The Committee also raised issue with the high rate of deaths resulting from HIV/AIDS complications and the unequal access to appropriate treatment for those infected with the virus. HIV/AIDS remains of greater concern among women as its prevalence is higher in women than in men. According to the KNCHR report, this is due to the persistence to unequal power relations between men and women, poverty and the inferior status of women which hamper their ability to negotiate safe sexual practices. The HIV/AIDS crisis has introduced the angle of child-headed household of AIDS orphans where girls have disproportionate responsibilities that make them vulnerable to HIV/AIDS and prostitution. The State party reported that the strategy for mainstreaming gender in the National HIV/AIDS Strategic Plan was done and it recognizes the value of reducing the negative social and economic impact of HIV/AIDS on women. Having the strategy implemented might be a good step forward, but the continued lack of protection of land and housing rights of women in the context of HIV/AIDS still greatly affects their health and social means to mitigate the pandemic (Articles 2, 3, 26 of the Covenant).

ARTICLE 7- FREEDOM FROM TORTURE OR CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT.

Kenyan women continue to suffer discriminatory and harmful practices under the cloak of culture. This is in contravention of Article 44(3) of the Constitution which provides that no person shall compel another person to perform, observe or undergo any cultural practice or rite. Harmful cultural practices that discriminate against women such as female genital mutilation, widow cleansing, early marriages and widow eviction continue to violate women's rights. Article 28 of the Constitution provides that every person has an inherent dignity and the right to have that dignity respected and protected. We commend the State for its role in the enactment of the Prohibition of Female Genital Mutilation Act, 2011 which seeks to protect women and girls from the practice by criminalizing the act and punishing all associated practices. The Act complements section 14 of the Children's Act 2001, which forbids the carrying out of female genital mutilation on children. However, no law has been formulated to criminalize "widow eviction" and "widow cleansing". FIDA Kenya urges the State to formulate laws and policies that seek to eradicate these harmful and discriminatory practices. (Article 2, 3, and 26 of the Covenant)

As much as we applaud the adoption of the Sexual Offences Act, 2006, which creates new sexual offences and better punishing measures, the later failed to create an offence of marital rape. This deliberate gap in Kenya's Criminal Law has not yet been rectified. It is recommended that Parliament amend the Sexual Offences Act, 2006 by repealing section 43(5) to allow for the prosecution of rape between married couples. It is also recommended that section 38 of the Sexual Offences Act, which currently criminalizes the making of false allegations of rape be repealed. This section contains a highly punitive sentence of up to life imprisonment for those who falsely accuse another of a sexual offence. The Penal Code already criminalizes false accusations and imposes less severe penalties.

FIDA applauds the Statute Law (Miscellaneous Amendments) Bill, 2012 which incorporates the proposal of repealing section 38 of the SOA for the reasons stated above¹⁵. However, despite this initiative to reform the SOA, we are apprehensive that the move to repeal may be defeated. The Parliamentary Hansard reveals that in

¹⁵ The Statute Law (Miscellaneous Amendments) Bill, 2012

discussions on May 29th 2012 one legislator , Dr. Khalwale opposed to this repeal. Dr. Khalwale states that the importance of keeping section 38 is because “whoever steps forward to make ... (a) complaint, should have a case”¹⁶. Given this situation of controversy concerning the Bill, FIDA-Kenya is hoping that the government will make sufficient efforts in ensuring that the repeal takes place and, by the same fact, bring positive impacts to the judicial system. Finally, FIDA Kenya argues that this section may discourage victims from filing complaints for fear that they will be charged in the event of an acquittal.

The State reported under paragraph 132 that Kenya had passed laws to address gender based violence. The State also reported that there had been steps taken to ensure that a Domestic Violence (Family Protection) Bill, 2007 was enacted into law. The Bill was never passed. The Bill sought to make provisions for the protection and relief of victims of domestic violence. The Bill was revised and renamed as the Protection Against Domestic Violence Bill 2012 and has still not been passed into laws. FIDA-Kenya urges the State to pass this in conformity to article 2, 3, and 26 of the Covenant.

ARTICLE 23- THE RIGHTS OF THE FAMILY

In its third periodic report, the State reported that key legislative developments in ensuring that women’s rights are respected and promoted had been achieved through the tabling of the Marriage Bill, 2007 and the Matrimonial Property Bill, 2007 before Parliament. Parliament did not pass these Bills. The Constitution of Kenya 2010 provides in Article 45(1) that the “family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.” The Constitution also provides for equality of rights at the time of marriage, during the marriage and at the dissolution of the marriage. Article 45(4) mandates Parliament to enact legislation providing for the protection of the family unit. Currently, matters relating to marriage continue to be governed by different laws which are based on the existing systems of marriage.

¹⁶ Parliamentary Hansard on the 2nd Reading of The Statute Law (Miscellaneous Amendments) Bill, 2012, 2nd May 2012.

The Bills were revised and are currently titled Marriage Bill 2012, Matrimonial Property Bill 2012 and the Protection Against Domestic Violence Bill 2012. The Marriage Bill 2012 aimed at amending and consolidating the various laws relating to marriage and divorce; Matrimonial Property Bill 2012 aimed at making provisions for the rights of spouses in relation to matrimonial property and the Protection Against Domestic Violence Bill 2012 aimed at making provision for the protection and relief of victims of domestic violence. Failure to have these key laws enacted is in direct conflict with Article 45(3) of the Constitution which provides that parties will be entitled to equal rights at the time of marriage, during marriage and at its dissolution. FIDA Kenya recommends that the State shows its commitment to respecting and promoting women's rights by enacting these crucial Bills into law.

The Kenyan Marriage Bill, 2012 has been designed to harmonize Kenya's marriage and family laws. Currently there is stakeholder consultation led by the Commission for the Implementation of the Constitution. The Marriage Bill, 2012 is a key legislative development. The purpose of the Bill is to ensure that partners have equal rights during and after a Marriage. This Bill outlaws forced marriages and wife inheritance and recognizes both monogamous and polygamous marriages. The Bill also provides for a consolidation of all current marriage Acts in Kenya. The issue of matrimonial property has been a continuous threat to the institution of marriage in Kenya. The Matrimonial Property Bill, 2012 seeks to provide the foundation for equality of married women and men in dealing with property in terms of right to ownership, access, control and disposition of matrimonial property.

The Protection Against Domestic Violence Bill 2012 seeks to make provisions for the protection and relief of victims of domestic violence. Evidence shows that socio-cultural and economic factors together with complex court procedures have prevented many victims of domestic violence from receiving protection under the law. The law is necessary to protect survivors of domestic violence, and ensure speedy, inexpensive and simplified procedures to access justice. The Family Protection Bill requires perpetrators of domestic violence to undergo counseling programmes with the goal of preventing future violence. Enactment of these Bills has not been prioritized by Parliament. The Fifth Schedule of the Constitution requires that

they be enacted within five years of promulgation but it is recommended they be passed within one year, by August 2011.

ARTICLE 25- THE RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS

Historically, women's participation in public life has been slow. This in turn has directly affected the representation of women at the national level. Article 38 of the Constitution guarantees the right to participate in political affairs and is therefore a remedy to this state of affairs. The article provides that every person has the right to free, fair and regular elections based on universal suffrage and the free expression of will.

Article 91(1) provides that every political party must respect and promote gender equity and equality. Article 97 (1) provides that the National Assembly must have 47 women representatives. Article 98 (1) (b) provides that sixteen women must be nominated by political parties according to their proportion of members of Senate. Article 98 (1) (c) and Article 98(1) (d) provide that a woman must represent the youth and persons with disabilities respectively.

Article 81(b) of the Constitution provides that not more than two-thirds of elective public bodies shall be of the same gender. It was foreseen that the implementation of this article would prove challenging in respect to the above states provisions and in ensuring the equal representation of women at the national and county levels during the 2013 general elections. This belief originates from the fact that women will still have to face pre constitution challenges in the up-coming election and nomination stages. Those challenges originate from the traditional gender biased stigmas that promote discrimination against women.

To remedy this, the former Minister for Justice, National Cohesion and Constitutional Affairs Hon. Mutula Kilonzo proposed to amend the Constitution through the Constitution of Kenya (Amendment) Bill, 2011 which aimed at giving full effect to Article 27 (8) and Article 81(b) of the Constitution, providing that no more than two-thirds of member of elective public bodies shall be of the same gender. The Bill therefore seeks to give lasting solutions on issues of gender parity and equity in

elective positions, and more specifically in the National Assembly and the Senate. The Bill was tabled before Parliament and subjected to national review. The President has recently recommended that the Bill be debated in Parliament and passed into law.

The State has also enacted the Political Parties Act, 2011 (which repealed the Political Parties Act 2007) and the Elections Act, 2011. Even though the enactment of these acts was a good step forward for the protection and implementation of the two-thirds principle, there is a need for a workable and definitive mechanism. Such a mechanism would ensure a better actualization of the constitutional principle. FIDA Kenya urges the State to ensure that these Acts and other Acts conform to the two-thirds gender principle.

Questions/Recommendations to the Committee to Consider:

1. **What is the government doing to ensure that the provisions promoting equality including the two-thirds gender principle, representation of the youth, persons with disabilities, minorities and marginalized groups are fully implemented? (Legislative and policy frameworks for the advancement of equality)?**
2. **What other steps has the state taken to eliminate discriminatory practices that impact negatively on women's access to land and property?**
3. **The government should set up a National Legal Aid Scheme or in the alternative financially resource legal aid organisations in Kenya to deliver the services to Kenyans.**
4. **How will the government implement recommendations of the Truth, Justice and Reconciliation Commission?**
5. **How committed is the government in enacting the Gender Bills?**
6. **The government must enact the Family Protection Bill 2012, the Marriage Bill 2012 and the Matrimonial Property Bill 2012 within one year.**
7. **How far has the government gone in amending or repealing laws that are discriminatory to women?**
8. **Without an effective law against domestic violence, how does the government intend to effectively address the issue of domestic violence?**
9. **What measures has the government taken to provide protection and rehabilitation of victims of domestic violence?**
10. **What is the status of the 5,000 criminal cases filed on post election violence?**
11. **To what extent is the government committed to resettling Internally Displaced Persons (IDPs)?**
12. **To what extent is the state committed to ensuring that the Judiciary and the Police reforms incorporate trainings on internal instruments and domestic laws that seek to protect the rights of women?**

Appendix 1: Voting Trends (1963-2007) and Country Comparison Chart on Women Representation

Voting Trends (1963-2007)

Parliament	Period	Total No. of Constituencies	No. of Women Elected	Available Slots for Nomination	No. of Women Nominated
1 st parliament	1963-1969	158	0	12	0
2 nd parliament	1969-1974	158	1	12	1
3 rd parliament	1974-1979	158	4	12	2
4 th parliament	1979-1983	158	5	12	1
5 th parliament	1983-1988	158	2	12	1
6 th parliament	1988-1992	188	2	12	0
7 th parliament	1992-1997	188	6	12	1
8 th parliament	1997-2002	210	4	12	5
9 th parliament	2002-2007	210	10	12	8
10 th parliament	2007-2012	210	16	12	6
		1,796	50	120	25

Country Comparison Chart on Women Representation

Country	Population Size	Population Ratio Men Women	Total No. of National Assembly	No. of Women in National Assembly in 2011	Percentage
Canada	34,300,083	0.98 : 1	308	76	24.7%
Australia	22,018,576	1 : 1	150	37	20.6%
Japan	127,368,088	0.94 : 1	480	54	11.25%
Kazakhstan	7,522,010	0.92 : 1	107	19	17.8%

South Africa	48,810,427	0.99 : 1	400	178	44.5%
Rwanda	11,689,696	0.99 : 1	80	45	56.3%
Kenya	41,000,000	1 : 1	222	22	10%

Appendix 2

Cabinet approves two-thirds gender rule

09/06/2012

BY FRANCIS MUREITHI

THE Cabinet yesterday formally dropped the proposal to change the election date from August to December, and subsequently approved a fresh bill that will only deal with ensuring the two-thirds gender requirement for elective positions is realised.

The Cabinet approved the Constitution of Kenya (Amendment) Bill 2012 that will ensure that not more than two-thirds of members are of the same gender.

The bill proposes that both the Senate and the National Assembly have special seats.

“The amendments propose that women will now be nominated from a political party list that will be presented before the elections,” said a statement by the Presidential Press Service.

The Constitution of Kenya (Amendment) Bill 2011, introduced in Parliament by former Justice minister Mutula Kilonzo last year, had tied the gender issue with the election date. The government was seeking to change the election date from August to December.

Once the bill approved yesterday is endorsed by Parliament, Kenyans will vote for their preferred candidate irrespective of the gender.

When elections are completed, a tally will be conducted for both the National Assembly and Senate to establish if the two-thirds gender rule has been met.

If it has not been met, then it will be established how many more women should be nominated either into the Senate or the National Assembly to meet the two-thirds gender rule.

Once the number is established, political parties will be given the slots based on their strength in the Senate and the National Assembly. Once handed its slots, a party will then be required to nominate from a list prepared before the elections.

MEETING | Ministers discussed payments of judicial officers and procedure for swearing in President

Cabinet nod to law on more MPs

Bill to ensure country meets the two-thirds rule on gender

BY BERNARD NAMUNANE
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Members of the next National Assembly could go beyond the constitutionally stated figure of 349 if a Bill approved by Cabinet yesterday is passed by MPs.

The Cabinet, in a bid to resolve the contentious one-third gender requirement, agreed on the proposal to allow political parties to nominate the number of women from lists submitted to the Independent Electoral and Boundaries Commission.

This means the IEBC proposal to designate certain constituencies as gender seats has been thrown out and the Constitution of Kenya Amendment Bill will target to change the fixed number of MPs in the House to comply with the Constitution.

"The Cabinet today (yesterday) discussed and approved

the Constitution Amendment Bill that provides for gender representation in Parliament. The amendments propose that women will now be nominated from a political party list that will be presented before elections," said a dispatch from the Presidential Press Services (PPS) after the Cabinet meeting that was chaired by President Kibaki at State House.

Heated debate

The Constitution provides that no single gender should hold more than two-thirds of elective seats at any level of government — both county and national. The next elections will be held on March 4, 2013 unless the Court of Appeal reverses the High Court's ruling on the polls date.

The requirement triggered heated debate with MPs opposed to a proposal by the

THE PROCESS

Steps it will go through

1 Cabinet approves Constitution Amendment Bill on gender requirement.

2 Bill fine-tuned by the AG, presented to Parliament for debate.

3 MPs required to raise two thirds majority vote to pass it.

4 Bill taken submitted to President to assent it into law.

National Assembly. The proposal was effectively dropped from the Elections Bill, which has since been passed. The Cabinet, subsequently mandated then Justice Minister Mutula Kilonzo to craft the first Bill to amend the Constitution promulgated in August 2010 to fix the problem.

The gender question aside, the Cabinet also approved the Assumption of the Office of the President Bill, which guides how the President-elect will take office and gave the nod for conversion of a Sh1.4 billion loan that was granted to the Horticultural Crops Development Authority (HCDA) by the Japanese Government in 1994 into a grant.

It also left a smile in the face of those who served as members of the Judicial Service between January 1993 and January 2003 by approving their ex-gratia payment based on the terms set by the JSC.

IEBC, which sought to meet the one-third requirement without upsetting the 349-member