ISSN 0302-9298

Contemporary SOCIAL SCIENCES

Founder
S. S. Shashi

Editor
Dharam Vir

Volume 21, Number 2 (April), 2012

Research Foundation International, New Delhi
(Autonomous, Regd. Recognized Charitable Organization of
Social Scientists, Authors, Journalists & Social Activists)

Contemporary Social Sciences

Founder

Padma Shri S. S. Shashi

Editor

Dharam Vir

Volume 21, Number 2 (April), 2012

RESEARCH FOUNDATION INTERNATIONAL (INDIA)

(An Autonomous, Registered (1972), Recognized Charitable Organization
of Social Scientists, Authors, Journalists and Social Activists)

Editorial Board

ISSN 0302-9298

Contents

1

Kenya's March toward Equality for Women

Dianne Post*

Kenya passed a new Constitution in August 2010. After much work by the women's community, the provisions in the Constitution bring Kenya closer to international compliance on human rights for women, but serious problems remain. Kenya violated the Constitution almost immediately by appointing six men of seven appointees to the new Supreme Court. Under the Constitution, it was required to appoint at least one-third women. The Federation of Women Lawyers (FIDA) filed a lawsuit, but the decision was a great disappointment. Structural problems in the laws mean that Kenya does not meet international standards for human rights for women. Some training has been done but stereotypical reactions still prevent women from achieving justice and their full human rights.

[Keywords : Kenya, Human Rights, Women's Rights, Quotas, Sexual Assault, Constitution, Abortion, Reproductive Health, Positive Action, Equality, CEDAW, Domestic Violence, Child Abuse, Sexual Abuse, Protection Order]

1. Introduction

Kenya passed a new Constitution in August 2010. After much work by the women's community, the provisions in the Constitution bring Kenya closer to international compliance on human rights for women, but serious problems remain. Kenya violated the Constitution almost immediately by appointing six men of seven appointees to the new Supreme Court. Under the Constitution, it was required to appoint at least one-third women. The Federation of Women Lawyers (FIDA) filed a lawsuit, but the decision was a great disappointment.

Structural problems in the laws mean that Kenya does not meet international standards for human rights for women. Some training has been

* An International Human Rights Attorney from the U. S. A.

done but stereotypical reactions still prevent women from achieving justice and their full human rights.

2. What The New Constitution Provides

In August 2010, Kenya passed a new Constitution. Women's groups and feminist attorneys lobbied long and hard to include provisions that would ensure equality for women. They succeeded in some areas and failed in others.

They succeeded in enshrining a Bill of Rights that mandates equality before the law and in marriage :

20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

21. (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

27. (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 fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

45. (1) 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.

(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

(4) Parliament shall enact legislation that recognizes—

(*a*) marriages concluded under any tradition, or system of religious, personal or family law; and

(*b*) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.

In another important success, the women's groups obtained gender parity measures in the Constitution.

81. The electoral system shall comply with the following principles—

(*a*) freedom of citizens to exercise their political rights under Article 38;

(*b*) not more than two-thirds of the members of elective public bodies shall be of the same gender;

91. (1) Every political party shall—

(*a*) have a national character as prescribed by an Act of Parliament;

(*b*) have a democratically elected governing body;

(*c*) promote and uphold national unity;

(*d*) abide by the democratic principles of good governance, promote and practice democracy through regular, fair free elections within the party;

(*e*) respect the right of all persons to participate in the political process, including minorities and marginalized groups;

(*f*) respect and promote human rights and fundamental freedoms, and gender equality and equity;

(*g*) promote the objects and principles of this Constitution and the rule of law; and

(*h*) subscribe to and observe the code of conduct for political parties.

(2) A political party shall not—

(*a*) be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis;

(*b*) engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person;

97. (1) The National Assembly consists of—

(*a*) two hundred and ninety members**,** each elected by the registered voters of single member constituencies;

(*b*) forty-seven women**,** each elected by the registered voters of the counties, each county constituting a single member constituency;

(*c*) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

(*d*) the Speaker, who is an *ex officio* member.

(2) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (*a*).

98. (1) The Senate consists of—

(*a*) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;

(*b*) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause in accordance with Article 90;

(*c*) two members, being one man and one woman, representing the youth;

(*d*) two members, being one man and one woman, representing persons with disabilities; and

(*e*) the Speaker, who shall be an *ex officio* member**.**

(2) The members referred to in clause (1) (*c*) and (*d*) shall be elected in accordance with Article 90.

(3) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (*a*).

100. Parliament shall enact legislation to promote the representation in Parliament of—

(*a*) women;

(*b*) persons with disabilities;

(*c*) youth;

(*d*) ethnic and other minorities; and

(*e*) marginalized communities.

232. (1) The values and principles of public service include—

(*a*) high standards of professional ethics;

(*b*) efficient, effective and economic use of resources;

(*c*) responsive, prompt, effective, impartial and equitable provision of services;

(*d*) involvement of the people in the process of policy making;

(*e*) accountability for administrative acts;

(*f*) transparency and provision to the public of timely, accurate

(*g*) subject to paragraphs (*h*) and (*i*), fair competition and merit as the basis of appointments and promotions;

(*h*) representation of Kenya's diverse communities; and

(*i*) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

260. In this Constitution, unless the context requires otherwise—

"adult" means an individual who has attained the age of eighteen

"affirmative action" includes any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom;

Kenya took another step forward in September 2011 when it passed a law against Female Genital Mutilation (FGM). Kenya is the most recent African country to ban female genital mutilation, with the passing of a law making it illegal to practice or procure it or take somebody abroad for cutting. The law even prohibits derogatory remarks about women who have not undergone FGM. Offenders may be jailed or fined or both.

While great steps forward, the Constitution does not enshrine women's fundamental rights as recognized by international law. This was aptly illustrated by the decision of the high court regarding the appointment of six of seven male supreme court justices. (*Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR) In addition to the Federation of Women Lawyers, other plaintiffs were Centre for Rights Education and Awareness, League of Kenya Women Voters, Women in Law and Development, Caucus for Women Leadership, Coalition on Violence against Women. Other interested parties and amicus curiae on behalf of the women were Kenya Women Political Alliance, National Council of Women of Kenya, International Centre for Policy and Conflict, Kenyans for Peace, Truth and Justice, Kituo Cha Sheria, Association of Media women of Kenya, Tax Watch Forum and Commission on the Implementation of the Constitution.

On the question of jurisdiction, the court ruled for the women that they had jurisdiction to review the issue because it was not a question of the competence of the judges but whether the procedure followed the constitution. On the larger question of whether the constitution means what it says, the court said no it didn't. The statement about equality of women was only aspiration not mandatory, and it was up to the legislature to determine exactly how that was to be done. They claimed that the language only permitted affirmative steps but did not require it and further, they could not see the harm to women anyhow.

It is indeed a very disappointing decision. They treated the constitution like a regular contract, which it is not. They ignored the plain meaning of the words since the Constitution does not permit positive steps, it requires it. As judicial interpretation, they breached their duty and shifted the responsibility onto the legislative body some time in the future.

They even put into question the reservation of seats for women and disadvantaged communities by claiming it could violate voting rights. The court kept repeating that they had to be shown "genuine need" for taking positive actions. The failure to understand the impact of long standing discrimination makes clear their own gender bias as if women in the country, constituting 50% of all people, and the country in general had no genuine need for equality of women or that women weren't disadvantaged in the past. The underlying misogyny is clear in the so-called apology at the end of the decision. First, they wrote as if the case were about a few individual women not getting a job, which is insulting and patronizing. Secondly, they commented that the women should keep the "feminine" missiles on the launch pads making clear the obscenity of the decision.

3. What Does International Law Require For Women's Rights?

International best practices and norms are constructed from conventions and treaties, United Nations (UN) committee decisions, court decisions and guidelines/best practices pronouncements. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the major norm on women's rights, and correspondingly the Children's Rights Convention (CRC) represents the baseline for children. The Statute of Rome establishing the International Criminal Court (ICC) has good language defining sexual violence and the Convention against Torture and other Inhuman and Degrading Punishments is being used to create jurisprudence against sexual violence.

3·1 Domestic Violence

Several international cases have established "best practice" relating to sexual and gender based violence. At the Inter-American Court of Human Rights (Report No. 54/01, Case 12.051, *Maria Da Penha Maia Fernandes v. Brazi*l, April 16, 2001), the court established certain principles that have since become best practice: The police must use due diligence in investigating and the

prosecutor in prosecuting sexual and gender based violence cases; a state must have a separate law making domestic violence criminal, a state must have a protection order scheme to assist victims, and the state must train law enforcement, prosecutors and judges.

In another case at the Inter-American Court of Human Rights, (*Gonzales et al v. Mexico* (Cotton Field), Preliminary Objection, Merits, Reparations and Costs judgment of November 16, 2009), the court ruled that the state had failed to investigate, had discriminated against women, had given impunity to the perpetrators, and violated due diligence. The court made clear that violence against women is discrimination. The State was ordered to investigate, train all law enforcement, put up a web page of the missing women and take other measures.

In a case against the United States, the Inter-American Commission on Human Rights *Lenahan (Gonzales) et al. v. United States*, Report No. 80/11, July 21, 2011 the Commission held that Lenahan, a victim of domestic violence along with her three daughters, had obtained a restraining order against her ex-husband. The police refused to enforce it and her ex-husband was subsequently shot by the police and all three girls were found dead in his truck. The police then refused to do an adequate investigation. These failures to protect by the police constituted a form of discrimination in violation of the American Declaration, since they took place in a context where there has been a historical problem with the enforcement of protection orders; a problem that has disproportionately affected women since they constitute the majority of the restraining order holders.

The Commission established that the State did not duly investigate the complaints presented by Jessica Lenahan before the death of her daughters. The State also failed to investigate the circumstances of their deaths once their bodies were found. Consequently, the law enforcement officers in charge of implementing the law have not been held accountable for failing to comply with their responsibilities. The Commission ordered the United States to conduct a serious, impartial and exhaustive investigation into systemic failures that took place related to the enforcement of Jessica Lenahan's protection order, to reinforce through legislative measures the mandatory character of the protection orders and other precautionary measures to protect women from imminent acts of violence, and to create effective implementation mechanisms, among others.

At the European Court of Human Rights, in *Bevacqua and S. v. Bulgaria*, (Application No. 71127/01, June 12, 2008), the husband was violent and the wife left with the child to get a divorce. The court still had not issued interim orders for custody after eight months, the violence continued, and the child was snatched back and forth between the parties. The court ruled that domestic violence is not a private matter but must be dealt with by criminal prosecution. The court must rule quickly on interim custody orders for best interest of the child.

In *Opuz v.Turkey*, (Application No. 33402/02, June 9, 2009), the husband was extremely violent and threatening and blamed the mother-in-law for the breakup of the marriage. The wife made several police reports but police only interviewed the accused, released him and never filed charges. When he was released, he would threaten her again, and she would withdraw the reports. Two weeks after one interview, he killed her mother and stabbed the wife seven times.

The court ruled that the state failed in due diligence to investigate and protect, they did not pursue criminal charges as they are obligated to even if the victim says not to. Rather, they must look at the seriousness of the actions and threats. The court made it clear that domestic violence is not a private or family matter but that vulnerable individuals are entitled to state protection from private actors. Failure to protect is a violation of equal protection for women and is discrimination.

3·2 Child Abuse

The European Court of Human Rights has ruled on several cases impacting both children and women in sexual and gender-based violence. In two cases (*Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73- 75, ECHR 2001-V; and *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002), the court ruled that since the state knew of the serious sexual and physical abuse of the children by their parents, and failed to take action thus leaving the children to suffer for years, the state had violated the children's rights under several provisions of the ECHR and had to pay compensation.

3·3 Sexual Abuse

In *M.C. v. Bulgaria*, (European Court of Human Rights, Application No. 39272/98, December 4, 2003), a girl of fourteen was raped and sexually abused by two adult men. The investigation by the police concluded there was no

proof that she was compelled, i.e. it was "date rape" and she consented. The court said that consent cannot be inferred from lack of resistance, that violence and physical resistance are not ingredients of rape, and that special attention must be paid to the fact that the victim was only fourteen.

International jurisprudence through the ad hoc tribunals has moved to recognize rape and other sexual offenses toward women for what they are—crimes. The East Timor Regulations promulgated by the United Nations Transitional Administration list sexual offenses as a serious crime (1.3(e)). As crimes against humanity, it includes rape, sexual slavery, enforced prostitution, and other forms of sexual violence of comparable style (5.l(g)). Torture is defined as the infliction of severe pain or suffering either physical or mental in custody or under the control of the abuser (5.2(d)). (Regulation No. 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses.)

In 1998, the Rwanda Tribunal defined rape as a form of genocide (Prosecutor v. Jean Paul Akayesu, (1996) ICTR-96-4-T, (Rwanda)), and the Yugoslavia Tribunal defined rape as a form of torture in Celebici (Prosecutor v. Zejnil Delalic, et al., (1998) IT-96-21-T, (Yugo.)) and Furundzija (Prosecutor v. Anto Furundzija, (1998) IT-95-17/1-T, (Yugo)). The statutes of both tribunals list rape among the crimes against humanity and through the jurisprudence of both, rape and other forms of sexual and gender-based violence have been recognized as genocide, torture, and other inhumane acts.

In another ICTY case, *Prosecutor v. Dragoljub Kunarac*, et al. (2001)IT-96-23/1-T (Yugo.) women were locked in an apartment with no access to the outside world. The men had knives, rifles and pistols. The women had to obey every command, including cleaning up after their tormenters and serving them food and drink. They were stripped and ordered to dance, and, ultimately, they were sold. The tribunal found that such acts, "no doubt constituting serious violations of common Section 3, (Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135) entail criminal responsibility under customary international law." (*Prosecutor v. Dragoljub*, supra at para. 408) The tribunal went further than the tribunal in *Furundzija* and discussed the issue of factors other than coercion or force or threat of force that would render sex non-consensual or non-voluntary on the part of the victim. The court found that the basic underlying legal principle was that sexual penetration is rape if it is not truly

voluntary or consensual on the part of the victim, which goes beyond only looking at force but also looking at sexual autonomy. Sexual autonomy is violated whenever the person has not freely agreed to it or is otherwise not a voluntary participant. (id at para 456)

The ICTY also concluded that the definition of rape meant more than just body parts but must include intimidation, degradation, humiliation, discrimination, punishment, control, or destruction of a person. Rape plainly constitutes torture. (Aydin v. Turkey (No. 50), 1996-VII Eur. Ct. H.R. 75 (1997); Mejia v. Peru, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser.L../V/II.91, doc. 7 at 182-188 (1996))

The absence of consent or voluntary participation was also discussed in Dragoljub. (Prosecutor v. Dragoljub, supra at para. 440) Looking at the circumstances that define the vulnerability or deception of the victim, the court concluded that the common denominator was (para 452) that the behaviors of the perpetrator have an effect such that the victim's will was overcome or that her ability to freely refuse sexual acts was temporarily or more permanently negated. The tribunal found that alleged consent is not a defense under the Rules of Procedure. (para 464) No one can consent to be a victim of crime. The focus must remain on the criminal act not on the behavior of the victim.

In Aydin v. Turkey, the female detainee complained of rape and argued that it constituted torture. She had been stripped, put into a car tire and spun around, beaten, sprayed with cold water from a high-pressure hose, blindfolded, and raped. Medical evidence showed bruising and a torn hymen. The Court reiterated that there could be no derogation from the prohibition on torture. The Court found that rape is an especially grave and abhorrent act that leaves deep psychological scars that do not respond to healing as quickly as other types of injuries. Therefore, rape can be defined as torture rather than just inhuman and degrading treatment.

In the International Criminal Tribunal for Rwanda, Case No. ICTR-95-1B-T, *Prosecutor v. Mikaeli Muhimana*, Judgment of April 28, 2005, the court held that rape is a crime against humanity. It is more than just an enumeration of body parts and objects, it is more than non-consensual sexual intercourse, it is a degradation of the person and force is not an element of rape.

In the Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-T, Judgment of March 2, 2009, the court found that rape is a crime against humanity under customary

international law. If a person is incapable of consenting e.g. in time of war, threat, age or when the male is exercising so-called "ownership" over the woman, lack of consent is found. The goal of rape is the humiliation, degradation and violation of the dignity of a person and those are the elements of rape, not body part, objects, use of force, or proof of resistance.

A court decision in Zambia in 2008 was one of the first to grant a student compensation for rape by a teacher and resulted in the case being referred for criminal charges. In Yemen in 2008, a 14-year-old sued to prevent forcible marriage to a much older man and won. Kenya must increase its prosecutions of rape cases and must change its law to define marital rape as a crime.

4. CEDAW Rulings

International courts are not the only place where international standards are set. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) has become widely known as the international bill of rights for women. It has an enforcement committee that can review cases from countries that have signed the optional protocol.

In an important early case, (Communication No.: 2/2003, *Ms. A. T. v. Hungary* (Views adopted on 26 January 2005, thirty-second session)) the woman had tried every remedy she knew. She had gone to the police, gone to the court, filed for divorce, changed the locks on the apartment door, and tried to go to a shelter but they refused her because of a disabled child. The husband went to court, and she was found to be violating his rights by locking him out of the apartment.

The committee found against the state for lack of due diligence in investigation and failure to protect. They were ordered to create a law against domestic violence, to create a protection order scheme, to train officers and prosecutors, and take many other steps to protect all citizens.

In two subsequent cases, (*The Vienna (Austria) Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir (descendants of the deceased), Fatma Yildirim (deceased*), Communication No. 6/2005, CEDAW/C/39/D/6/2005, 1 October 2007, *The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased), S¸ahide Goekce (deceased*), 07-49543

(E) Case no 5/2005, 6 August 2007) an organization brought complaints on behalf of deceased women.

In the first case, in spite of numerous threats and incidents of domestic violence reported to the police by the woman, the prosecutor refused to charge the perpetrator. The perpetrator's residence permit depended on his wife and when she said she wanted a divorce, he was threatened with potential deportation. He killed her, was convicted and was sentenced to life imprisonment.

The state denied compensation for the minor child because they said the actions of the prosecutor were justified. They also assured the Committee of all the changes they were making and things they were doing regarding gender based violence. They claimed that the perpetrator was innocent until proven guilty so there was nothing they could do since he had no criminal record or convictions of previous violence toward the wife.

The committee ruled that the state failed in due diligence. They should have paid attention to her complaints, they should have arrested him, and most importantly, they ruled that the perpetrators rights to due process do not supersede a woman's right to life and integrity.

In the second case, her husband choked and strangled her. She did not press charges, but she got a protection order. A year later, he flattened her face to the floor and threatened to kill her. She got another order. His own brother went to the police and said that the abuser had a gun and was dangerous. The brother was ignored. The husband eventually shot and killed her. The state blamed her saying she should have done something else (though they did not specify what) to stop the violence. The committee found that the State failed in due diligence and showed lack of seriousness to the issue.

In another case, (Communication No. 18/20081, *Karen Tayag Vertido v. The Philippines*, 16 July 2010) the Committee faced sexual violence squarely. Vertido was raped by the former president of the City Chamber of Commerce and Industry where she was at that time the Executive Director. She was forced to quit her job and had to move to another city to avoid harassment. The man hired to replace her was paid twice her salary.

The police refused to arrest the wealthy, well-known accused man for eighty days. The trial went on for more than eight years. He claimed consent and was acquitted as the judge used the rape myth that rape is easy to charge

and hard to disprove. She was also blamed by the judge because she didn't act as he thought she should have.

The committee said the decision was based on gender stereotypes, bad faith and myths. The court is prohibited from using gender stereotypes or set ideas of how women should react in violent situations. Taking eight years to prosecute the case by itself violated her rights and the state was guilty of lack of due diligence even though it was a non-state actor who raped her. The state was ordered to compensate her, change their legislation, stop the undue delays and train police and prosecutors.

5. Use of CEDAW in Kenyan Courts

Kenya not only passed CEDAW but has actively used it in her own courts. In re Wachokire, (August 19, 2002) Chief Magistrate's Court at Thika, Jane Watiri petitioned the court to award her one-half of a parcel of land that belonged to her deceased father on which she lived with her four children. Her brother objected, arguing that he had cultivated a larger portion of the land during his father's lifetime than his sister and therefore was entitled to that larger portion. Under Kikuyu customary law, an unmarried woman like Watiri lacked equal inheritance rights because of the expectation that she would get married.

The court held that this customary provision discriminated against women in violation of Section 82(1) of the Kenyan Constitution, which prohibits discrimination on the basis of sex. It also violated Section 18(3) of the Banjul Charter and Section 15(1)-(3) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that provides for legal equality between men and women. Watiri and her brother were each awarded an equal share of their father's property.

In *Mary Rono v. Jane Rono* (2005) AHLR 207 (KeCA 2005) 81, a case about inheritance under customary law when women were not allowed to inherit, the court applied international treaties including CEDAW, the Bangalore Principles, and the African Charter on Human and People's Rights to find that customary law that disinherits women is discriminatory and cannot stand.

In *Re the Estate of Lerionka Ole Ntutu* (deceased) [2008] eKLR, the daughters petitioned to have an equal share of the estate that under Masai tribal custom was not allowed. The court discussed the evolution of Kenya jurisprudence along with international standards. The court held that to

uphold customary law would be repugnant to justice and morality, as well as violate several international treaties Kenya has signed including CEDAW. Therefore the daughters could inherit.

Given Kenya's adoption of CEDAW jurisprudence in these cases, they should also adopt the rulings in the cases relating to domestic violence and sexual assault. Those following international best practices are :

1. CEDAW and its attached declarations are the women's international bill of rights;
2. Every state should have a protection order scheme in its civil law to protect victims;
3. Every state should have a specific crime of domestic violence including marital rape;
4. Law enforcement systems must be trained on prevention, protection, investigation and prosecution of S and GBV;
5. Free legal aid must be provided to victims;
6. States should organize national plans and multi-sectoral approaches to deal with S and GBV;
7. Domestic Violence is not a private matter but constitutes discrimination;
8. Children must be protected and custody cases ruled on timely;
9. Sexual violence is a crime and a human rights violation;
10. Violence, force and physical resistance is not a necessary element to prove rape;
11. Myths and stereotypes about rape or about women cannot be used in place of facts and reasoning;
12. Rape may be a crime against humanity including genocide or torture;
13. Sexual penetration is rape without the full consent of the parties which means sexual autonomy;
14. Exercising "ownership" of a woman is not consent and constitutes rape;
15. A defendant's right to due process does not supersede a woman's right to life and integrity.

6. Where Does Kenya Fall Short?

6·1 Domestic Violence

While Kenya has no specific domestic violence law, it does have several penal provisions that could be used in domestic violence cases :

- Penal Code 231 Acts intended to cause grievous harm
- Penal Code 234 Grievous harm
- Penal Code 237 Unlawful wounding or poisoning
- Penal Code 250-251 Assault
- Penal Code 220 Attempted Murder
- Penal Code 258-260, Kidnapping,
- Penal Code 261, Unlawful Imprisonment.

However, these provisions are not widely used and such cases are seldom prosecuted. In a study done by FIDA, (Gender Based Violence in Kenya, FIDA), they reported that a government study found that 44 per cent of married, separated or divorced women had been subjected to domestic violence and a private study placed it at 83 per cent.

A 2003 demographic survey found that 49 per cent of women reported that they had experienced violence since they were fifteen, 25 per cent of married, divorced or separated women had experienced violence by their current or most recent husband, 40 per cent had experienced physical violence and 16% sexual violence, often marital rape (10 per cent).

The frequency of violence was high with 22 per cent saying they were abused most of the time, and 29·3 per cent saying it was a regular event. In fact, 78·3 per cent in one study said abuse was frequent or very frequent. Injury or death was the result in 29 per cent of the cases, sexual abuse in 16 per cent, financial problems in 26·3 per cent, emotional depression in 8% and separation or divorce in 21 per cent.

The most frequent response was counseling or reporting (43·9 per cent), perseverance (29·3 per cent), and separating (14·6 per cent). However, most relied on community based organizations (71·7 per cent) not law enforcement and 28 per cent said there were no methods to address the issue. However, taking legal measures is one of the most effective methods (33 per cent) and 45 per cent wanted more access to justice, though 43 per cent said traditional structures particularly elders can be an effective method.

In a review of Kenyan appeals cases, the only case found to mention domestic violence was a manslaughter case under 205 of the Penal Code. In 2002, a man admittedly beat his wife with a stick until the neighbor intervened to stop him. In the hospital she died from a pulmonary oedema due to

pneumonia linked to the injuries. The defendant said he was sorry, he had no past record, the four children were at his parents, and he had been in remand for three years. With no analysis or explanation, the court ordered eighteen more months. (Republic v. Mudala Okuku Odindo [2005] eKLR)

Given the frequent occurrence of all types of domestic violence, and the lack of cases in the justice system regarding such violence, it is clear that the available legal measures are not being taken to protect women from violence or to ensure justice after they have been subjected to it.

6·2 Protection Order Scheme

Kenya does not have a proper protection order scheme, but it has forms of procedures that could be used for protection orders. Under The Subordinate Courts (Separation and Maintenance Act) Chapter 153, Section 3-8, the victim can obtain protection but only if the abuser has been convicted, has shown habitual cruelty to her or the children or habit has been established.

Kenya has another form of protection order in The Children's Act, 114(c) in that any person who is doing violence to children can be removed from the home and told not to come into certain spaces.

Kenya has a third form of protection order in the Criminal Procedure Code Section 46. If a magistrate is informed on oath that a person is dangerous or habitually commits breach of the peace, they can require the person to show cause why they should not put up a bond for three years, OR be taken to the district where his home is and restricted there three years OR in some other district.

While all three of these provisions offer some protection, all are limited. In the Subordinate Courts Act, the victim can obtain protection only after conviction or habit has been shown, which is rare. In the Children's Act, the protection only applies to the children and not the adult victim. In the Criminal Procedure Code, the victim has to show danger or habit i.e. only after repeated attacks will she be able to be protected. None of these provisions are widely used.

6·3 Sexual Assault

In 2006, Kenya passed the Sexual Offenses Act to incorporate all sexually related crimes into one law. Unfortunately, the implementation of the law has been less than rigorous. An analysis of Kenyan appeals related to sexual and gender based violence decided after the passage of the Sexual Offenses Act in

2006 showed that the vast majority (37 of 46, 80 per cent) of the cases concerned defilement (rape of children) and only five cases concerned adult rape.

From these numbers alone, it is immediately obvious that though sexual and gender based violence is widespread throughout Kenya, the justice system is only concentrating on one area—defilement of children by non-family members. Either the other cases are not being reported or if reported, not being prosecuted. To meet international standards, prosecution of other sexual and gender based crimes will need to increase.

Rape is broadly defined and has been found to be a crime against humanity and a violation of the prohibition against torture. Further, since Kenya has domesticated the ICC by Chapter 16 Laws of 2008, the definitions and decisions related to the ICC can be used in Kenya directly. Therefore sexual assault and rape cannot be ignored or minimized, put off as custom or a family or private matter. To do so subjects Kenya to negative findings in international law.

The Sexual Offences Act (SOA) is an act of Parliament that makes provisions about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes. One of the objectives of the SOA is to provide for all sexual offences in one act. In this regard, sexual offences that were in the Penal Code have found their way into the SOA by being repealed from the Penal Code. In this regard too, the SOA has given these offences expanded definitions and stricter sentences.

However, in the Sexual Offenses Act, section 43 (5) prohibits prosecution for marital rape no matter what level of violence or coercion is used against the victim.

SOA 43.

(1) An act is intentional and unlawful if it is committed—

(a) in any coercive circumstance;

(b) under false pretenses or by fraudulent means; or

(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

(3) False pretenses or fraudulent means, referred to in subsection (1)(b), include circumstances where a person -

(a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;

(b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or

(c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmissible disease.

(4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act—

(a) asleep;

(b) unconscious;

(c) in an altered state of consciousness;

(d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;

(e) mentally impaired; or

(f) a child.

(5) This section shall not apply in respect of persons who are lawfully married to each other.

This prohibition clearly violates the equality provisions of the Constitution and international law. Women and men are not equal under the

law or in marriage when the woman has no sexual autonomy or control of her own body in sexual matters. Kenyan women's groups tried to have this provision eradicated and the discussions clearly indicated that the men in Parliament considered sexual access to the woman a right of the man upon marriage. This negates any sexual autonomy or true consent by the woman since the man is operating under a theory of 'ownership' of her body.

Acceptance of rape myths and stereotyping of women is evident in Evidence Act 163 :

163. (1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him–

(a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;

(d) when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.

(2) A person who, called as a witness pursuant to sub-section (1) (a), declares another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Not only does this section prejudge women as being liars in court, but it violates equality of the law as it suggests that if a person is "immoral", they are not entitled to the full protection of the law. It is no stretch to guess that persons found "immoral" will be the women, especially one engaging in prostitution, rather than the man making a choice to spend his money on purchasing a woman's body for sex and thus engaging in even more odious behavior.

Interestingly, a woman can be exonerated from criminal responsibility if she can prove that she did the act under coercion of her husband.

Penal Code 19. A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband; but, on a charge against a wife for any offence other than treason or murder, it shall be a good defense to prove that the offence was committed in the presence of, and under the coercion of, the husband.

The law by itself places women in a subordinate category in violation of the Constitution and is ironic since while she is legally protected if she commits a crime coerced by him, when he commits a crime against her, she has no remedy; therefore "wives" are in a subordinate category to all other person who are protected from crime.

6·4 Women's Reproductive Health Care is Illegal

The Center for Reproductive Rights released a comprehensive review of the impact of Kenya's prohibition of abortion. (In Harm's Way: The Impact of Kenya's Restrictive Abortion Law, Center for Reproductive Rights, 2010)

Every year, at least 2,600 women die from unsafe abortion in Kenya; 21,000 more women are hospitalized annually with complications from incomplete and unsafe abortion, whether spontaneous or induced. As grim as these numbers are, they do not capture the number of women killed or disabled by unsafe abortions who never visit a health facility or whose cause of death is not recorded.

Even these numbers are unacceptably high, both in absolute terms and comparatively. Unsafe abortion is responsible for 30-40 per cent of maternal deaths in Kenya, far more than the worldwide average of 13 per cent.

Patients arrive in the hospitals daily, the health care system is ill-equipped to deal with the problem and puts strain on all sectors and women and girls are denied their fundamental right to health care that could save their lives.

Unsafe abortion is a major public health crisis in Kenya, accounting for 35% of Kenya's maternal deaths.

Women fear to seek post-abortion care for fear of prosecution and thus suffer more and needlessly. They also had to pay bribes for care or providers threatened to report them.

Approximately 21,000 women are admitted each year to Kenya's public hospitals for treatment of complications from incomplete and unsafe abortion,

spontaneous or induced. More than 40 per cent of those women "fall into the categories of probable or likely induced abortion." One study conducted in two informal settlements in Nairobi found that more than 50 per cent of abortion fatality cases "do not seek care even in the event of a complication after the abortion." However, these statistics are likely underestimates: the World Health Organization notes that "[more than any other aspect of sexual and reproductive ill-health, abortion suffers from gross under- reporting."

In addition, the cost of unsafe abortion to Kenya's healthcare system is substantial. Kenyan gynecologist J.K.G. Mati has suggested that "a very conservative estimate of the annual cost to Kenya [of the management of botched abortion] is of the order of 250–300 million shillings [$3.3–4 million approximately]." Treating complications from unsafe abortion significantly strains the already limited funds, staff, and medical supplies available to Kenya's public health system, diverting scarce resources to an easily preventable public health problem. Gynecology wards and maternal health-related services experience this financial impact most acutely. A report by International Planned Parenthood Federation, for example, concluded that "[t]he impact [of unsafe abortion] on the resources of Kenya's healthcare system is enormous, with as much as 60 per cent of the resources of Kenyatta National Hospital's maternity ward taken up by victims of unsafe abortions."

Both the Constitution and the Penal Code make abortion illegal.

Constitution Article 26:

(1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) 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 permitted by any other written law.

Penal Code 158. Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years.

Penal Code 228. Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of

such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable to imprisonment for life.

Due to the inordinate influence of the Catholic Church and other fundamentalist sects, women's health care needs are still widely denied and their rights violated in many countries. However, it is clear from the findings of the study by Reproductive Rights that women are dying and their health is being seriously compromised by their inability to obtain health care—a basic and fundamental right. Discrimination in violation of the Constitution is clear as women alone bear the burdens.

The European Court of Human Rights has ruled on the denial of women's reproductive health needs. In *Case of A, B and C v. Ireland* (Application no. 25579/05, 16 December 2010) three women brought suit under Article 3, 8, 13 and 14. The court denied jurisdiction under 3 and declined to rule separately on 13 and 14.

Abortion is prohibited under the criminal law by section 58 of the Offences Against the Person Act of 1861. An abortion is available in Ireland if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, including a risk of self-harm, which can only be avoided by a termination of the pregnancy. Only after recent litigation was the Constitution amended to allow women to leave the country to obtain an abortion elsewhere and to obtain information about abortion. In the above case, all of the complainants traveled to England to obtain their abortions. Such travel was physically and psychologically difficult as well as burdensome for one applicant who did not have the monies and another who had cancer.

The court held that existing procedures do not provide adequate criteria for doctors to determine what is acceptable under the law nor does a legal framework exist that would allow for adjudication of differences in opinion. This is a failure of the positive obligation of the state to secure respect for private life under article 8 and has a chilling effect on the medical establishment. The state was ordered to pay the women compensation.

In the European Court of Human Rights case *R.R. v. Poland*, (Application no. 27617/04, 26 May 2011), the mother had an ultrasound scan and found out early in the pregnancy that the fetus suffered from severe genetic abnormalities. She already had two children and said she wanted an abortion if

the findings were verified. The state then failed to follow through on the testing.

She complained under Article 3 of the Convention regarding inhuman or degrading treatment and Article 8 regarding right to respect for private life. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health from the office of the UN High Commissioner for Human Rights intervened on the side of the complainant.

The Court found that the applicant was in great vulnerability. She was distressed and needed information and options in a timely manner. The failure of the government to provide either caused her to endure weeks of painful uncertainty and anguish as time passed for some options. The shabby treatment rose to the level of humiliation to be actionable under Article 3 and a breach was found.

The court went further to note that the law that punishes a doctor who terminates a pregnancy in violation of the legal conditions is three years imprisonment. This law has a chilling effect on doctor who have to decide whether the legal requirements are met. The court urged the law to be reformulated so to eliminate this chilling effect. Recalling an earlier case, (Tysic v. Poland, no. 5410/03, §§ 116 - 124, ECHR 2007-IV) the court reminded Poland that it cannot structure its legal framework in such a way that it is impossible to obtain. In fact the state is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion. If the law allows for abortion in some cases, there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on lawful abortion is available to pregnant women. Since the State did not provide this, it violated its positive obligations to secure to the applicant effective respect for her private life and thus there has been a breach of Article 8 of the Convention.

The CEDAW Committee has spoken twice in 2011 on the right of women to adequate health care related to pregnancy and abortion. In *Maria de Lourdes da Silva Pimentel, mother of Alyne da Silva Pimentel Teixeira* (deceased) v. Brazil, Communication No. 17/2008, (25 July 2011) an Afro-Brazilian who reported stomach pain and nausea was ignored and sent home. She subsequently died from hemorrhage after the fetus was found to have died in utero at the time she

was seeking help. The committee noted the poor health care especially for vulnerable minorities.

The Committee said the state is responsible even if they contract out medical care, and the lack of appropriate maternal health services in the state party clearly fails to meet the specific, distinctive health needs and interests of women and violates article 12 paragraph 2 of the Convention and is discrimination against women under article 12, paragraph 1 and article 2 of the Convention. The lack of appropriate maternal health services has a differential impact on the right to life of women. The applicant had been discriminated against based on sex, status as a woman of African descent and her socio-economic background. The state was ordered to provide affordable access to adequate care, professional training, effective remedies and training for the justice system as well, ensure that private health care facilities comply with relevant standards, impose sanctions on those who refuse, reduce preventable maternal deaths, and compensate the family.

In a second CEDAW Committee decision, (Communication No. 22/2009, *L. C. v. Peru*, 17 October 2011) a 13-year-old girl had been sexually abused since she was eleven. Fearing she was pregnant and seeking to end the abuse, she attempted suicide by jumping from a building. She injured her back and was permanently disabled. The hospital refused to perform the surgery that might have helped her because she was pregnant. When they did, it was too late.

Abortion is illegal in Peru with some exceptions under article 119 of the Penal Code that do not include rape or sexual abuse. No legal recourse existed to request a legal abortion or to speed the process. No regulations were in existence as the previous law had been repealed, thus officials had total discretion. The complainant cited violation of right to health, a life of dignity and to be free from discrimination in access to care. Potential harm to the fetus was placed above the rights of the 13-year-old girl for possible rehabilitation. Her mental health was completely ignored in the considerations.

The Committee found that owing to her condition as a pregnant woman, L. C. did not have access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required. Those services included both the spinal surgery and the therapeutic abortion. This is even more serious considering that she was a minor and a victim of sexual abuse, as a result of which she attempted suicide.

The suicide attempt is a demonstration of the amount of mental suffering she had experienced.

Thus the Committee ruled that Peru had violated article 12 of the Convention and article 5 because the decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the fetus should prevail over the health of the mother. They also found there was no effective remedy as a violation of article 2(c) and (f). The state was ordered to pay compensation, provide for access to therapeutic abortions to protect women's physical and mental health, provide education and training, and decriminalize abortion when pregnancy results from rape or sexual abuse.

Since Kenya has not ratified the optional protocol to CEDAW, but CEDAW is widely used directly in Kenyan courts, these decisions can be used push for change in Kenya's abortion laws.

7. Conclusion

The Kenyan women have achieved a massive victory in the new Constitution. To enshrine equality and gender parity in the document is a tremendous step forward. But, as with women's right everywhere, they still have a long way to go. The high court decision on the quota provisions shows that even Constitutional protection is not enough. Provisions need to be changed to address domestic violence, marital rape and to provide protection. The issues of abortion loom large and have an extremely negative effect on the health and lives of Kenyan women. As the gender parity laws put more and more women into positions of influence, we watch with hope that the goals of equality and justice will be reached.

Notes and References

1. Authoress Dianne Post is an international human rights attorney from the U.S. who has worked in fourteen different countries on sexual and gender-based violence against women. She worked in Kenya for three months in 2011 with Violet Mavisi, former chief judge of the constitutional court, on a prosecutor training manual for domestic and sexual crimes.
2. Parts of the foregoing article are from that work, parts are from an article previously published on the legalization of prostitution as a violation of international human rights.

★

ISSN 0302-9298 Regd. No. RN 23807172

For enquiry, please contact :
The Managing Editor
CONTEMPORARY SOCIAL SCIENCES
D-59, Shastri Nagar, Meerut—250 004 (India)
<e-mail : managingeditor@jndmeerut.org>
<sanjeevmahajan@jndmeerut.org>