

Kenya’s Regime Change and Constitutional Review Process: Prospects for Women’s Solidarity Across Religious Difference and Increased Political Participation

1. Athena D. Mutua, “Forward: Eyes on the Prize - The Quest for a Human rights State in Kenya,” in KHRC, Eyes on the Prize (2003)..... p. 2

2. “Brief Evaluation of the First Sitting of the National Constitutional Conference, Kenya.” (excerpted from the Independent Report on the Campaign for “Safeguarding the gains for women in the Draft Constitution,” observer, Athena D. Mutua)..... p. 21

3. Excerpts from Safeguarding Women’s Gains Under the Draft Constitution: Training Manual (2003) (written and produced by FIDA, I.E.D., KHRC, The League of Kenya Women Voters)..... p. 32
 - a. Examples, proposed alternative language: Articles, 14, 31, 35, 199, 95, and 107.

 - b. Short essay: “Notes on Kadhi Courts Women’s Rights and Equality.”

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Foreword - EYES ON THE PRIZE: The Quest for a Human Rights State in Kenya

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The following pages chronicle the efforts of one civil society organization, the Kenyan Human Rights Commission, to help usher in a democratic human rights state in Kenya. These efforts are documented here primarily through press statements the Kenyan Human Rights Commission (KHRC) issued over an eight-month period. They demonstrate the KHRC's commitment to both the ideas and structures necessary to ensuring an accountable and transparent democratic government in Kenya wedded to human rights. The KHRC activities occurred during the extraordinary period in which the Kenyan people undertook two historic and nationally significant endeavors.

The first endeavor involved the exceptionally successful and peaceful election in December 2002. This election removed from power Daniel arap Moi, who had been the president of Kenya for the preceding 24 years and his party the Kenya African National Union (KANU), the ruling party since Independence (1963). This regime, largely dictatorial, was widely believed to be thoroughly corrupt, having orchestrated innumerable human rights abuses, mercilessly looted the public purse and misruled the country for decades. Its legacy had led Kenyans to vote overwhelmingly for a myriad of opposition parties in the 1992 and 1997 elections, to no avail, had resulted in an economy with a negative growth rate, and had earned Kenya the title of the sixth most corrupt nation in the world. In its stead, Kenyans placed their hopes in and elected the united opposition party, known as National Rainbow Coalition (NARC). This party was a super coalition of many of the opposition parties that had come into existence in the early 1990's as a result of calls for multipartism and in rejection of the one-party state. In addition, the party encompassed members from a variety of Kenya's 42 ethnic groups, unifying and potentially softening the ethnic and regional divisions that have historically plagued Kenyan politics.

The second endeavor Kenyans undertook involved the review and vetting of a new Constitution. In September 2002, after ten years of activism calling for a new constitutional dispensation and the establishment of a Constitutional Review Commission in 1998, Kenyans received a new Draft Constitution. Largely a progressive document, many Kenyans had hoped that the Draft Constitution would be enacted before the general elections of 2002. This would have eliminated the electoral advantage that they believed the then current Constitution provided for KANU, the ruling party. This was not to be. The Draft Constitution, by law, first had to be improved and approved by a national constitutional conference and then adopted by parliament. All parliament members, however, were to participate in the national constitutional conference as part of the 629 national delegates. They thereby constituted a full one-third of conference participants. Moi scuttled this processes by dissolving parliament on November 28, 2002, the day after the conference was to begin, making this group ineligible to participate in the conference.

The conference was eventually canceled but rescheduled by the new NARC government for April 2003, only months after their electoral victory.

The KHRC played a sometimes hidden but nevertheless, pivotal role in the events leading up to and after the elections. Once NARC was in power, it added its voice to those insisting that the NARC government honor its pledges to give Kenyans a new constitution. In addition, the KHRC outlined an agenda for the newly elected NARC government that provided a guide for monitoring its progress toward a democratic state committed to justice, fairness and human rights for all. Further, the KHRC was instrumental in laying the philosophical and institutional foundation for the Ministry of Justice and Constitutional Affairs, a newly created executive ministry under the NARC administration to oversee the legal and judicial sector. Moreover, the KHRC launched, pursued and crafted the public debate on a truth, justice and reconciliation commission for Kenya and began to lay and formulate the institutional framework for such a commission. Therefore, it was unsurprising when in April 2003, the chair of KHRC, Professor Makau Mutua, was appointed to head a ministerial task force charged to investigate the need for and design a truth, justice, an reconciliation commission for the country.

The papers and press statements that follow were the primary instruments through which the KHRC launched its ideas and made these contributions. Often intense lobbying by KHRC officials and staff followed the release of these documents. Other times, not. The statements, simultaneously, however, subjected KHRC to intense scrutiny and criticism. The most consistent charge was that KHRC had become a partisan organization, or worst, after the election, that the KHRC was the puppet and executioner of NARC, the controlling political party. Taking stands are not without cost. These charges forced KHRC to constantly review and reassess its efforts. These reassessments can also be seen through the statements. In the end, whether the positions and institutions for which KHRC advocated will help bear the fruit of democracy and human rights for Kenyans, as KHRC hoped, is yet unknown. You will have to be the judge. What is clear, though, is that the statements at the time of their release seemed to have had the desired effect.

**KHRC Statement of Endorsement:
WHY AND HOW TO BRING ABOUT REGIME CHANGE IN KENYA**

On October 2, 2002, as the Kenyan election campaign swung into gear and in the immediate aftermath of the release of the Draft Constitution, the KHRC in a philosophically consistent but unprecedented step issued a groundbreaking statement endorsing a political party for election. They endorsed the election of the opposition party called National Alliance Party of Kenya (NAK) and its presidential candidate Mwai Kibaki. The press statement, the first of the documents included in this collection, articulates the reasons the KHRC believed it imperative for the other opposition parties to

unite behind the NAK ticket and for the Kenyan people to consider electing this party and its representatives to government power.

Among the reasons the KHRC suggested for its selection and endorsement of NAK was KANU's utter failure to develop the country and its creation of a culture of corruption. Regarding NAK, the KHRC was impressed with its success in uniting several other smaller parties under its banner, the talent and expertise its membership included and the integrity and commitment to change of its flag bearer, Mwai Kibaki. The statement challenged Kenyans to look closely at the exceedingly popular Rainbow Coalition and its members, a faction of the KANU party dissatisfied with Moi's choice of successor, Uhuru Kenyatta. The KHRC argued that none of the members of the Rainbow coalition, except one, Raila Odinga, had ever been committed to changing and reforming the country. Therefore, they concluded that these, if elected, would simply represent a KANU victory, and as such, should be dismissed unless they, along with Odinga, decamped from KANU and joined NAK. Ultimately, KHRC explained, Kenyans wanted a unified opposition that could defeat, what the KHRC called, the Moi-KANU regime.

The statement was a monument to clarity in a time of political uncertainty and prophetic in its calls for unity in both form and substance. The statement proved prophetic in part because KHRC obviously had its hand on the pulse of Kenyans. They indeed wanted a united opposition and they rewarded the unified party of NARC, the coalition of NAK and the Rainbow Coalition, which transformed itself into the political party, the Liberal Democratic Party (LDP), with a landslide electoral victory. The other reason it proved so prophetic was because the statement itself may have been pivotal in influencing the course of events. Although one can never be absolutely sure of this, the evidence suggests that this indeed was the case.

Although the media only belatedly and briefly covered the statement, it was read. The statement was hand delivered to the politicians it named as well as to civil society and other organizations. Other known electoral candidates heard about the statement, came to the KHRC offices, picked up a copy of the statement, advocated that it be more widely published, ran with it, disseminated it and based their political decisions about which party to join on it. Others, who disagreed with its initial analysis, were heard to complain of being "intellectually bullied," but eventually came to similar conclusions. From still others, there was silence, but an eagerness to speak with the KHRC leadership, on the one hand, or disgruntled and steely silence toward KHRC officials, on the other. The press release was the clearest and most comprehensive statement made on the way forward and in the end, though the constitution was not adopted as the KHRC hoped, nor the coalition as broad as the KHRC advocated, the way things happened in terms of the formation and election of a broad united opposition, reflected what the statement said.

The KHRC, at the same time, learned an important lesson about the media through this exercise. It was simply this: If you have a message you want heard, you cannot necessarily depend on the media to get it out to the public. You must rely on your own networks, the more expansive the better. Further, if you have the money - consider buying space! This lesson guided its later efforts and the later press statements included

in this collection were published in the newspapers as paid advertisements. But in the final analysis, the fact that the endorsement statement was not published may have allowed politicians to make the kind of decisions that might have been much more difficult to make under the glare of media light and pressure. It may be that the statement was more powerful as a hidden coalescing force, among others.

Nevertheless, two questions remain. The first one is, was Kibaki the right choice, or were there other leaders who might have more effectively headed the coalition once it came together and eventually the state? Second, while this statement and others by the KHRC identified some of the coalition members as “reformers” and others as “conservatives”- the “spiritual children of KANU,” were Kibaki and many of the NARC members committed to reforming the state into the democratic human rights state that KHRC envisioned and later articulated, or were they simply committed to removing the Moi-KANU regime and replacing the head of state?

So, What Really is Non-Partisanship?

Publicly endorsing a candidate and a party for the elections had its costs. With the issuance of the statement, KHRC immediately faced criticism. The charge was that it, a human rights nongovernmental organization and member of civil society – was partisan! In the context of Kenyan politics, to be partisan remains unacceptable in the civil society realm, and was thought to threaten the creditability and effectiveness of KHRC as well as other civil society organizations! Surprisingly the charge came not from KANU or other opposing political parties but rather from civil society organizations themselves, western foundations, and other donor agencies.

Dr. Willy Mutunga, the executive director of the KHRC during this time, anticipated such criticism given the history of Kenyan politics. Therefore he had dusted off and updated a paper he had been writing on the issue of non-partisanship as developed by the KHRC over the years. His paper is the next article in this collection of essays. It explores the contours of the KHRC’s commitment to the principle of non-partisanship in light of their perceived violation of that aspect of the principle - not expressing a political preference- that often signals a commitment to non-partisanship practice. In other words, the paper challenges the perceptions of partisanship that the endorsement of NAK provoked

In the paper, Dr. Mutunga never concretely defines the concept of non-partisanship. Rather, he contextualizes the issue within the Kenyan political and cultural arena, and insists that conceptualizing a principle is a necessary first step to any real interrogation of it. Further, he argues, conceptualization is imperative in this case for judging whether an organization, such as the KHRC is, in particular, non-partisan. Dr. Mutunga also makes clear, late in the paper that the KHRC is a human rights organization, and that human rights are inherently political, as is their promotion. The KHRC thus has a political agenda. However, this political agenda - that of promoting

human rights does not render the KHRC a partisan organization. Rather, the commitment to hold any and all governments accountable to democratic and human rights principles seems to be, in fact, an essential ingredient of the non-partisanship concept as practiced by KHRC. Further, Dr. Mutunga suggests that the aspect of the nonpartisan idea of refusing to express a preference for a particular political party or system, a practice he refers to as the “no-comment orthodoxy,” is simply a way to signal nonpartisan practice. Whether it is an accurate signal of that practice requires investigation into the organizations’ philosophy, mandate and activities as well as the context in which it operates.

Dr. Mutunga begins his analysis by pointing out that there exists extensive links in Kenya between civil society and political actors, parties and the political arena. He thereby suggests that there is a fine line between civil society activity and partisan politics particularly with regard to issues of national interest. He does so by providing examples of the many times during activism for constitutional reform and democracy, that civil society agents were called upon to act as impartial arbiters of initiatives and conflicts among various stakeholders. He implies that although these agents were accused of partisanship, they were solicited primarily because they were viewed as non-partisan - in the sense that they had no interests in positions of leadership, nor often membership, in the political parties or institutions resulting from these efforts. Further, they were seen as having no preference between competing factions. He also provides examples of politicians serving on the boards of civil society organizations and directors of civil society entities serving in government. While these arrangements too have been seen as inappropriate, Dr. Mutunga sees little problem in either of these arrangements except for the danger of a civil society organization subjecting its operation and mandate to that of the political agent and/or becoming a wing, department or “appendage” of the political agent. In these cases the goals of the political party, which are partisan, are and become the goals of the civil society organization which ceases to have an independent mandate to work independently or to freely engage a variety of state, civil society and political actors. This is where he draws that fine line. Although civil society activity is political, it should not be primarily at the behest of a political party; and he declares that the KHRC will never be a mere appendage of some political party.

Dr. Mutunga then turns to the history of the non-partisan idea as developed by Amnesty International (AI). He explains that AI developed the nonpartisan idea in the context of its mandate to free and publicize the plight of political prisoners in countries other than its home, Britain. In order for AI to have access to the countries where these prisoners resided it had to convince their governments that it had no interests in participating in the internal political affairs, competitions, or systems of the country. Thus the concept of nonpartisan developed - coupled with its attendant rule of not commenting on the political affairs of these foreign countries. Nevertheless, Dr. Mutunga points out that AI itself ran into problems when it acted in complete fidelity to this principle and it refused to comment on the internationally recognized evil of the apartheid regime. More importantly, however, Dr. Mutunga suggests that applying the nonpartisan principle in the same way that AI does is inappropriate for organizations, like the KHRC, that are based and operating in their country of origin and on behalf of all the

people of their country. Dr. Mutunga therefore suggests that there is a significant distinction between civil society organizations that work within their own countries on behalf of their fellow people and external organizations, the goals of which are to benefit populations of a foreign country.

Dr. Mutunga then answers the question that he only implicitly asks: Can a home-based civil society organization, particularly a human rights organization, ever remain silent and nonpartisan in the way that AI practices it, in the context of a country ruled by a dictatorial government that oppresses and abuses the rights of its people? His answer: NO. A home-based civil society organization like the KHRC cannot be nonpartisan in the face of systemic governmental abuse of its fellow citizens in the way practiced by AI. However, it can be nonpartisan in their commitment to hold all governments within its country accountable to the same principles of human rights. This practice of nonpartisanship, according to Dr. Mutunga, is more important than a symbol of non-expression that may or may not signal nonpartisan practice. At the same time, however, Dr Mutunga argues that the moment of the KHRC's endorsement of a political party was a significant moment in Kenya's history. And while the KHRC's commitment to the non-partisanship principle at its base is to hold all governments accountable to human rights, he suggests that the KHRC does not expect to have to express a political preference in the future. He does not rule out the option though, rather, he suggests that the KHRC will be judicious in its decisions around such issues and expressions.

And finally, although Dr. Mutunga references organizations, such as media in other countries, that express partisan views but are still considered nonpartisan in that they are viewed as "objective," the value of this idea for other civil society organizations in Kenya should be highlighted. For instance, trade unions in other countries, while considered nongovernmental and non or not for profit organizations, and therefore a part of civil society, are often quite partisan. Given that their mandates are more consistent with and better facilitated by the philosophies and objectives of specific political parties, they tend to support and advocate for these parties' control in government. However, in Kenya, civil society organizations, despite their individual mandates, seem to have been more influenced by the nonpartisan practices of the human rights movement and religious organizations (perhaps because many of the active civil society organizations are relatively young). This is so despite the fact that their individual goals might be better accomplished under one type of political party, one that they perhaps should support as opposed to another.

The accusations of partisanship against the KHRC would not go away during this period. However, they did change form. Having always had an antagonistic relationship with the KANU government, the KHRC had to begin to find its way between the extremes of conflict and collaboration once a new political environment became possible with NARC's election. From the KHRC's perspective, its own independence was never in doubt, but even it recognized that it had to consciously manage a new balance between collaboration and critique vis-a- vis the government. This balancing act, nevertheless, would open the KHRC up to new accusations of partisanship. This time it would be

accused of being the executioner of NARC, a mere appendage to the NARC political machine.

The Agenda for President Kibaki and the NARC government.

On January 8, 2003, a week or so after the NARC electoral victory, the KHRC issued a press statement setting out its agenda for President Kibaki and the NARC government. While many statements and editorials had been issued through the press charting a way forward for the NARC government, the KHRC's statement was different in both tone and scope. Others had listed areas of concern on which the new government should focus, including fighting corruption; resuming the constitutional process; rebuilding the infrastructure, namely, roads; addressing teachers' pay and education; and reorganizing the health sector. The KHRC statement in contrast, while touching on many of these issues and others, expounded a broad philosophical vision for Kenya as a "progressive modern state." This modern state required that government be guided by democracy, "the highest standards of ethics, the rule of law, an uncompromising quest for justice, equity and respect for human rights," and create "a fair and just economy." It painted a picture of the state under the Moi-KANU regime as being one of the most undemocratic, corrupt and incompetent in the world, and the country as devastated, dilapidated and underdeveloped. The state needed to be "reoriented" and a "new national identity" created.

While the statement begins by calling on the government to immediately revamp the educational system in its entirety and cease perpetuating an array of human rights abuses, the subsequent three sections focus on the culture of corruption in Kenya and elaborate on the KHRC's vision for the country through recommendations on constitutional review, wealth declaration, and a possible truth commission. The statement recommends that the constitutional review process, which had been aborted by Moi, be resumed immediately noting that NARC was elected in part because they promised a new constitution and that a new national identity "devoid of the corrupted soul cultivated under KANU could not be created without it. "Ending corruption," the KHRC argues, "must begin at the top" and so it calls on Kibaki and all government official to declare their wealth, assets and liabilities, with job loss as the immediate consequence of fraudulent and untruthful declarations; something Kibaki had promised during the campaign. And finally, the KHRC suggests that a truth commission, a subject on which the KHRC leadership had harped since October, is needed to confront the past of gross human rights abuses and extensive economic crimes, to deliver justice and to reconcile the nation unto itself and others.

The statement then makes a number of recommendations dealing with specific issues. These include demands that the government recognize freedom fighters, particularly the Mau Mau, as heroes responsible for Kenyans independence, and rectify the intentional and vast abuse, neglect and underdevelopment of the northeast region and its people. In between the statement calls on the government to be gender sensitive and inclusive, recommending that it keep its promises of appointing one-third of government

positions to women, that it adopt affirmative action measures to ensure girls and women's participation in all sectors of the society and that it establish an office for the first lady. The KHRC also notes that, "leadership cannot be demanded but should be sought with humility and an awareness that government leaders are public servants."

And last, the statement turns to Kenya's place in the international arena, focusing on globalization, terrorism and foreign affairs. Here the KHRC recommends that the new government design a coherent foreign policy that is informed by "the challenges of globalization, the asymmetry in the North-South relationships, the power disequilibria in international and multilateral institutions and the growing influence of non-state actors in international affairs. The statement argues among other things, that the point of privatization, aid, trade and the like, is the welfare of the people; in other words, it should be people-centered with people as the focus of economic development. Regarding terror, the statement notes that Kenyans have been the collateral damage and sacrificial lambs in a contest between the Muslim nations and the West, a contest in which they are not central players. The KHRC suggests that frank and public discussions should be held examining the reasons why Kenya has been the site of three separate attacks in this contest and that these discussions should inform foreign policy decisions.

The statement was warmly received judging by the calls of congratulations that the KHRC staff entertained. In addition several officials in the NARC government were heard to comment that they used the statement as a checklist for noting those issues on which they had made progress and those on which they needed additional work. However, two specific but unrelated responses were significant. The first was the public rebuke the KHRC received by commissioners of the Constitutional Review Commission of Kenya. The second event was that the Minister of Justice and Constitutional Affairs invited the KHRC to participate in a brainstorming workshop on organizing his newly established ministry.

In two lines of the agenda statement, the KHRC had recommended that since a draft constitution had been produced by the 27-membered Constitutional Review Commission of Kenya (CKRC), that it be disbanded and replaced with a team of six or seven experts who would "refine" it for consideration by the National Constitutional Conference. Several leading commissioners of the CKRC roundly and publicly condemned the suggestion, arguing that they continued to work on the draft and to document the host of recommendations they had received since the draft's publication in October. They also condemned the KHRC, accusing the leadership of seeking to secure for themselves the positions on the expert team they suggested should refine the draft. The CKRC commissioners further argued, revealing their long-standing disagreements with the chair of the commission, Professor Yash Pal Ghai, that Professor Ghai and the KHRC leadership, among others, were involved in a secret shadow group discussing the draft Constitution, the goal of which was to take over the functions of the CKRC. Dubbed the "Palacina group" the commissioners produced copies of transcripts of Palacina group discussions in which it was developing strategies for having its views incorporated into the Constitution during the conference.

A huge public debate ensued carried out through the media. However, while the Palacina group did not respond, the wider public took up the debate. They accused the commissioners themselves of seeking to have their huge and exorbitant salaries continued during a time when there was nothing for them to do. Further the public seemed to view the commissioners with suspicion, suggesting that many were KANU appointees who had been charged and in fact acted to forestall and scuttle the entire review process, a process Kenyans had desperately wanted.

The KHRC leadership however was not silent. The debate pulled them into the limelight and they were on radio, TV, and in the print media echoing the public sentiment and arguing that the CKRC had done its job and could therefore be disbanded. Further, regarding their involvement with the Palacina group, they refused to apologize, arguing that it was the duty of all Kenyans to analyze the draft constitution, suggest ways to strengthen it and prepare for the constitutional conference. They suggested that many such groups, organizations and others were in fact doing this and that the draft belonged to all Kenyans and not to the CKRC. The CKRC had no right, they insisted, to attempt to forbid Kenyans from discussing the draft in any manner they saw fit. Professor Ghai for his part noted that he attended many such meetings and group sessions and attended as many meetings as possible to which he was invited. Further, he explained that other commissioners had also been invited to participate in the Palacina group, among others and had chosen not to attend.

The Minister of Justice and Constitutional Affairs ended the debate by temporarily suspending salaries for the commission since their mandate had ended on January 3. However, once parliament reconvened and reconstituted the Parliamentary Select Committee on Constitutional Review (PSC), the committee charged with overseeing the constitutional review process, the PSC extended the CKRC's mandate leaving it in tact. As for the Palacina Group, its efforts died and no additional meetings were held. Although the Institute of Economic Affairs (IEA), which had sponsored the group, was in transition regarding its leadership and complained of lack of money to continue the enterprise, it is believed that the negative publicity persuaded the organizers to discontinue the discussions. To date, it appears that only one endeavor grew out of the Palacina constitutional efforts. This was the gender discussion. The KHRC members and affiliated persons involved in reviewing the draft from a gender perspective took some of the ideas first formulated in the context of Palacina to the Federation of Women Lawyers (FIDA) organization. FIDA is a civil society organization committed to women's rights and had been heavily involved in the constitutional review process. With FIDA as the lead organization, a collaboration between four organizations was formed including FIDA, the KHRC, the Institute for Education and Democracy (IED) and the League of Kenya Women Voters (The League). Together they initiated the campaign for "Safeguarding the gains for women in the Draft Constitution.

Three public phenomena seen in the CKRC debate would reassert themselves time again throughout this period. One was the general feeling by the public that government and public officials, in a host of capacities, often pursued their own interests,

particularly financial interests, at the expense of the public. This distrust and suspicion manifested and proved itself a valid concern when one of the first orders of business for members of parliament (MPs) was to increase their own remuneration. Whether this action was correct and necessary or not, there was a public outcry that given Kenya's economic woes, it was inappropriate for MPs to give themselves raises and a feeling that the MPs were conducting business as usual, the historical business of fleecing the public for personal gain. This same sentiment reared its head again when one of the first actions undertaken by the delegates to the constitutional conference, many of whom were ordinary Kenyans, was to demand that their sitting allowances be increased.

The second phenomenon was the accusation and/or fight over what was perceived as lucrative or well-paying positions, mostly government positions. This sentiment seemed understandable in a state where the economy was in collapse and where one of the only ways to make a living was in occupying a government job. However, the craving for governmental or quasi-governmental positions together with the tendency of both affluent and ordinary people alike to wrench personal financial gain from every possible opportunity, appeared to be a symptom of the much deeper problem of corruption, created and now embedded in the culture. The third reoccurring phenomenon was the public suspicion that conspiracies to take over government functions were afoot. Palacina was one among many groups and actions interpreted as a conspiracy to inappropriately takeover or stall some activity that Kenyans wanted accomplished.

The media focus on the CKRC debate helped to propel the KHRC into the thick of political thought and activity. In other words, it raised the KHRC's public profile on these political issues, some of which were distinctly partisan. The KHRC used these opportunities to not only discuss its debate with the CKRC but to discuss more broadly the content of its statement and to advocate for a number of its positions including the need for a truth, justice and reconciliation commission. In addition during this time in January and February of 2003, the KHRC added its voice to calls for the chief justice of the high court, Justice Bernard Chunga, to step down and resign his position. The KHRC, among others, explained what was widely known, that the judiciary was hopelessly corrupt and had no independence, having adhered to the whims of former President Moi (and Kenyatta and the British before him). Chunga headed this corrupt institution and was seen to play a crucial role in its continuing demise. After a huge public outcry, Chunga resigned.

The Chunga affair raises a number of questions. First, how should government deal with, and civil society react to, public officials who have tenure of office but have lost public support and are believed to be corrupt? Second how should these same entities deal with officials who are implicated in serious acts of corruption or abuse but whose crimes have not yet been legally adjudicated or proven? One hopes such people will voluntarily resign, but if they do not, should they be forced out of office or denied appointments? The KHRC argued that people implicated in serious crimes in credible political processes certainly should be denied political appointments. In addition, they apparently continued to believe that those in office and implicated in serious crimes should be shamed, and forced out of office. However, in the case of the judiciary, KHRC

reviewed its activity, as is evident in later statement included here, and while not ruling out civil society's obligation to call for certain judge's resignations, concluded that a formalized process by government was necessary to review judges and clean up the judiciary. But its elevated public voice in unison with others cemented Justice Chunga's fate.

The KHRC's heightened public political profile complimented its long-standing reputation as the leading human rights organization in Kenya, a reputation built on the in-depth, painstaking work of a dedicated staff and board of directors. Celebrating its 10-year anniversary in June 2002, the KHRC was originally established and registered in Washington DC in 1992 because human rights organizations were suppressed in Kenya at that time. Once established it assembled a talented staff and board of directors and developed an integrated approach to human rights encompassing and emphasizing the indivisibility of human rights and therefore focusing on both economic, social and cultural rights as well as political and civil rights. Its mission: "to promote, protect and enhance the enjoyment of human rights for all Kenyans; its vision: "to root human rights into communities." Consequently, in addition to using the 'violations' method through which it monitors, documents and publicizes human rights abuses via a network of monitors throughout the country, the KHRC has a community based approach which provides institutional support to community grown human rights organizations and both channels information to and learns from communities through its three primary programs. These programs are: the Monitoring & Research Program, the Advocacy Program and the Human Rights Education and Outreach Program.

While researching and publicizing human rights abuses often place KHRC in the public eye, the advocacy program is the KHRC's "public engagement voice." Under it a number of campaigns exists which examine and engage the conduct of not only government, but also a number of institutions, such as the police, prisons, multinational and local companies. For example, "in early 2002 the KHRC launched a campaign to compel the cut flower industry in Kenya to improve its records of respect[ing] and promot[ing] workers rights." Further, the media covered the recent success the KHRC had in inducing Del Monte, the pineapple multinational company, to provide water to the surrounding area in which the families of workers live.

Thus the KHRC's reputation in the country is both broad and deep and its activities have meant that it has always been in the thick of political activity, continuously commenting on and actively participating in public political discussions. However, having expressed a political preference and pushed a very vocal and broad based agenda in the context of a new government, KHRC's public profile was amplified and this higher profile provided it an opportunity to participate in political activity in new ways.

Human Rights in Vision 2007: A Practical Roadmap for the Ministry of Justice and Constitutional Affairs.

The other significant response generated by the agenda statement and the ensuing related activity, was an invitation to the KHRC from the Minister of Justice and Constitutional Affairs to participate in his workshop on the construction and organization of the newly established ministry. The KHRC was one of five civil society organizations invited to attend the workshop, which took place at the Mount Kenya Safari Club on the weekend of March 13-15, 2003. Arguably, the KHRC might have been invited to the workshop in the absence of the statement, as Hon. Kiraitu Murungi, the Minister, was a founding member of the KHRC. Further, the Minister had been a student of Willy Mutunga, the executive director, and had attended Harvard Law School for his LLM degree during the time when the chair, Makau Mutua had headed the Human Rights Program there. Thus, all knew each other and had been friends. Further, some of the staff at the KHRC had been closely involved in the election process and the party process of NAK. However, both the KHRC statements had displayed creative and deliberative thought and a willingness by the KHRC to take the time to put its ideas down on paper. This seemed important to the Minister as he invited them to the workshop but he also, the week before it began, contacted and requested that the KHRC officials to draft a blueprint for the ministry.

Professor Mutua and Dr. Mutunga drafted the paper entitled “Human Rights in Vision 2007: A Practical Roadmap for the Ministry of Justice and Constitutional Affairs”(Roadmap), the next selection in this collection of papers. The paper puts forward a philosophical foundation for the ministry and makes specific recommendations as to institutions that should be included as part of it. In its introduction, echoing the title of this collection, “Eyes on the Prize: Laying a Foundation for a Human Rights state for Kenya,” the Roadmap emphasizes that human rights is the key to the development of a modern state and sees the Ministry of Justice and Constitutional Affairs as being the most important state organ in the effort to ensure these rights and render Kenya a true democracy. Philosophically, the paper stresses two important points that are consistent with themes suggested in earlier statements. First, it emphasizes that all human rights are important and indivisible, political and civil rights and economic, social and cultural rights. Second, and related to this, it insists that the Ministry work toward a social democracy in Kenya moving away “from free market fundamentalism” and toward the “implementation of economic, social, and cultural rights.” It notes, in the last section of the paper, that human rights are implicated in the state’s relationship with the World Bank, IMF, WTO, and implies that human rights are often subjugated to the dictates of these organizations free market policies. But from the KHRC’s perspective, a social democracy resulting from the implementation of economic rights, etc., is crucial to developing democracy in Kenya, and ultimately, the purpose of democracy, together with development, is the overall well being of ‘real, living and breathing people.’”

In terms of its recommendations, the paper advocates for a legal aid scheme for the poor, a comprehensive review of all Kenyan laws including the constitution, and a framework for reviewing, domesticating, and reporting on the international law obligations undertaken by Kenya. Institutionally, it calls for the establishment of a Justice College to provide continuing legal training to judges and magistrates, among

others and to publish a monthly law review chronicling various legal issues and developments. It also recommends that an office for state-civil society relations be established to develop working relations between these two sectors of society. Further the paper seeks to define the relationship between the ministry and the judiciary, security, the Electoral Commission of Kenya and other ministries. Specifically, regarding the judiciary, although the paper suggests that the ministry has a role in the infrastructure and capacity building of the court system, it recommends that the Judicial Service Commission be empowered and strengthened in order to do the necessary work of cleaning the judiciary of corruption. Here the paper stresses the need for the judiciary to become and then remain independent.

The paper does not define the relationship between the Ministry of Constitutional Affairs and the Human Rights Commission that is proposed in the Draft Constitution. However, many expect that the Human Rights Commission, an independent organ of the state, which, unlike the ministry, is not subject to the executive, will be the leading governmental institution in the country for the protection of human rights contrary to the ideas suggested in the paper.

While the paper was a success at the workshop and formed part of the overall strategic plan and organization developed for the Ministry, there were other conversations, presumably in the evenings, among the participants during the weekend and later publicized, that set off conspiracy alarms. The media speculated and word went around that there existed a Mount Kenya Mafia whose goals were to control the government and act as a shadow authority. The stories supposedly reflected conversations in which participants at the workshop discussed the need to review the list of delegates slated to participate in the constitutional review conference. Many of the delegates were felt to be “KANU hacks” and therefore threatening to the review process. Other conversations touched on the draft constitution itself. The public seemed to view the discussants as powerful ministers and/or officials who could make real their ideas and who potentially had the ear of the President. Many of these ministers were from the Mount Kenya region. Therefore, the joke became that those people who could see Mt Kenya from their homes, particularly people from the ethnic groups in that region of the country, were part of the Mt Kenya Mafia. These people included among them President Mwai Kibaki.

The theory of the Mount Kenya Mafia gained more credibility when the Minister of Justice and Constitutional Affairs, Kiraitu Murungi, the convener of the workshop, confessed to supporting the election of Paul Muite, an MP, for chair of the Parliamentary Select Committee against the Minister Raila Odinga, who had formerly been the chair. This was scandalous, as Raila Odinga and Murungi were both party members of NARC, and Odinga had been seen as instrumental in bringing about the coalition forming NARC, Mr. Muite, though known as a committed reformer, came from a smaller party and had only belatedly supported NARC. These groupings and speculations had ominous ethnic undertones as Muite and Murungi came from the Mount Kenya region, although from different but related ethnic groups, whereas Odinga, whose father had spent most of his life in opposition to the government of Jomo Kenyatta and Moi, hailed from the west.

Jomo Kenyatta, the first president of Kenya shares ethnicity with Paul Muite. The idea of a Mt. Kenya Mafia and perhaps the practice of it would plague later constitutional efforts.

Keynote Address: Why Kenya Needs a Truth Commission

The speculations about the Mt. Kenya Mafia had little effect or impact on the KHRC, as its leadership was neither implicated in the suspect conversations nor from the Mt. Kenya region (although the concern about the delegates list, an issue raised in those conversations became a KHRC concern and are found in later KHRC statements). However, rumblings about the KHRC's relationship with the government began to circulate among civil society organizations. The launch of the public debate on a truth commission heightened this dissatisfaction.

The paper for the Ministry of Justice had discussed the need for a truth, justice and reconciliation commission, as had many of the oral and written statements by KHRC officials. In the paper, however, the KHRC had offered to assist the Ministry in considering the commission idea by drafting a law to establish one or organizing workshops to discuss the purposes and need for such a commission. The Ministry took them up on the suggestion and on March 28, 2003, only weeks after the workshop, the KHRC hosted a one-day conference to launch a public debate about a truth commission in Kenya, a conference at which the Minister for Justice made the opening remarks. The debate launch was held at the Norfolk Hotel in Nairobi and Professor Makau Mutua gave the keynote address. That address is the next essay in this collection.

The address on the truth commission basically explains what a truth commission is. It discusses the truth commission as an internationally accepted instrument generally used in transition periods when a state is trying to move from a period of gross human rights violations and economic crimes to a state that aspires, espouses and attempts to practice ideals of democracy and human rights protection. It also discusses the objectives, functions, and structures of truth commissions. It then turns to the Kenyan case arguing that not only is a truth commission needed but also a truth, justice, and reconciliation commission is needed in Kenya. Taking off from the adage that those who do not learn from history are bound to repeat it, the essay chronicles many of the human rights abuses perpetuated in Kenya and suggests that these cannot be simply forgiven. Rather, it reasons, that before forgiveness is contemplated the facts must be made known, the truth told and justice done. Then the foundation will be laid for forgiveness and reconciliation.

The debate launch was a huge success. The conference boasted of the participation of a number of well-know advocates for justice and a varied group of attendees representing a cross section of the Kenyan society. Professor Mutua's speech was widely acclaimed and he was both quoted and interviewed rather extensively in the media. Thus it was unsurprising when in April 2003, Professor Mutua was named chair of the task force to design a truth commission for Kenya, if the task force in fact found that one was necessary. The public launch of the task force took place on May 11, in the midst of the constitutional conference. Nevertheless, while the one-day debate on the

truth commission bode well for the KHRC's efforts to see justice done in Kenya, it also brought harsh criticisms and protests by other civil society organizations that claimed that the KHRC had become NARC's puppet and executioner.

Approximately a week after the public debate on the truth commission, the Center for Governance and Democracy (CGD) convened a meeting including the Kenya Human Rights Network to discuss how and whether civil society should engage the NARC government. Here the KHRC's activities, particularly those such as the debate on the truth commission, an event involving the government, were widely criticized. Several organizations felt that the fundamental role of civil society was to be a watchdog of the government and that KHRC's activities suggested that they had abandoned this function. The KHRC had become a collaborator of the government, a partisan appendage carrying out the goals and work of NARC. Still others believed that civil society should collaborate with the NARC government.

The KHRC officials defended their actions by characterizing its activities as within the boundaries of collaboration and critique appropriate for a human rights organization and more importantly, that its actions were facilitating the development of the kind of human rights state for which they all had long fought. They argued that times had changed and therefore civil society organizations also needed to change their relationship with the government from one of antagonism to one of constructive and critical engagement in addition to maintaining its role as watchdog. The KHRC suggested that its role included all three functions, holding the government accountable to human rights norms, critiquing and exposing government where it fell short, and engaging and encouraging it to be responsive to democratic, human rights and justice concerns.

Nevertheless, the question lingers, specifically with regard to a possible truth commission and in light of the fact that the KHRC chair has been appointed to chair the task force on such a commission, whether KHRC in these functions is acting as an executioner for the NARC government. In other words, might the truth commission be a vehicle for the KHRC or some other person or organization to do the dirty work of cleaning out corrupt officials both within and outside of NARC? On the other hand, it is widely agreed that the culture of impunity needs to be confronted and abated and justice done. If this is true, who then, other than agents of civil society and religious leaders are in a position to conduct such a commission with the necessary legitimacy? And in any event, can an effective truth commission be established in the current political environment, given the fact that both its legitimation and creation would be a political process?

The First 100 Days: a Report Card on President Kibaki and NARC

The charges of partisanship were fresh in the minds of KHRC officials as they set out to write their evaluation of the first 100 days of the Kibaki and NARC administration. At the same time, KHRC officials wanted to continue to encourage and push the government toward reform. Their report card therefore sets out to provide a balanced account, complimenting the government on its successes and critiquing it for its failures.

Entitled “The First 100 Days: a Report Card on President Kibaki and NARC,” the evaluation was released as a press statement on April 9, 2003, and is the last essay in this collection of papers.

The report begins by noting that NARC is “neither a revolutionary movement nor an inherently reformist political force,” but rather a “coalition of reformers and hardcore conservatives.” However for NARC to act as a “midwife of democracy” the reformers need to prevail and institute a break with the past. Ultimately the evaluation found that while the “government has embarked on some reforms and set a hopeful mood in the country” it had also “failed to boldly capitalize on the generous public mood to fundamentally recreate the state, root out corruption, and provide transitional justice.

The report card first comments on the office of the president noting that while the first wave of Kibaki appointments had been plausible, the second set was disappointing in that it “recycled KANU stalwarts” or rewarded “loyal cronies.” Further, although it commends the President’s management style of delegating authority, it recommends that he be more visible and engage the country in a vision of reform. In evaluating NARC, the statement notes that the party was an alliance of diverse political parties; it then encourages the coalition to work toward coalescing into a strong party, avoiding the squabbles for high-level positions and the acrimony that pervaded its ranks upon the assumption of power. To do otherwise, counsels the statement, would result in the party squandering this transition opportunity.

The report then turns to the constitution, the government’s relationship with civil society and its fight against corruption. On the constitution, the KHRC reiterates its belief that the CKRC should be streamlined and adds that the delegates’ list needs to be reviewed. Further, it signals its support for retention of the Kadhis courts in the constitution and for women’s rights, both controversial constitutional issues. In addition it warns against self-seekers and power mongers attempting to paralyze the conference and finally, comments, that the constitution should be a people-driven process. It therefore recommends that the Review Act be amended to allow the people to ratify the constitution through a national referendum instead of ratification by Parliament. Regarding civil society it again admonishes the government to establish good working relationships with civil society and complements those ministries that have done so. However, the report card indicates that in the fight against corruption, the government has “made the correct statements” about the fight but “very little appears to have been accomplished.”

And finally, the evaluation reiterates points made in earlier press statements and papers regarding the need and progress made on a truth commission and reform of the legal and judicial sectors. However, as the truth commission will deal with post-colonial Kenya, the statement encourages the government to support the African Union’s Group of Eminent Persons on Reparations for Slavery, Colonialism, and Neo-colonialism, a group that would deal with the crimes the British committed during the colonial period. In addition, on the judiciary, the KHRC changes the position it advocated in the Roadmap piece recommending that a strengthened Judiciary Service Commission meant to deal

with judicial corruption be chaired by someone other than the Chief Justice. The statement then turns to evaluating individual ministries, noting first that they are all in “great need of a statement of strategic purpose, direction and priorities. The KHRC concludes by predicting that the next six months will be crucial for the administration if it is to “grow wealth, reduce poverty, restore the human rights of Kenyans, and make impunity a phenomenon of the past.

As in the past, the KHRC statement was read and well received. It, momentarily, together with the CGD meeting, helped to quiet the criticisms of nonpartisanship. Further, government officials seemed to have found it a helpful assessment. However, although the statement discussed and reflected the general disappointment with Kibaki’s second wave of appointments and reproved the in-fighting and political jockeying within NARC for political positions, even the KHRC seemed to have failed to recognize the magnitude of the opportunities missed in these actions. These only became clear during the first two weeks of the National Constitutional Conference during which the delegates broke down into regional and largely ethnic cauc using that obscured significant reform and ideological differences, placing supposed reformers and conservatives on the same side based on ethnicity.

Ethnicity has always played a significant role in Kenyan society, in part because 42 different ethnic groups were grouped in one nation designed and administered for the benefit of Britain. But more importantly, these differences have played a sometimes troublesome role in Kenya largely because not only the British but both Kenyatta and Moi manipulated and played the various groups against one another as a means of maintaining power - divide and rule. Consequently ethnic differences often play a role both in politics and in social interactions and relations among individual Kenyans.

The coalition and triumph of NARC had signaled a chance to overcome the negative influence of these differences and, as the report card stated, represented “an incipient renewal of Kenya’s national unity and the project of Kenyan-ness.” But the government’s first wave of appointments had failed to adhere to a memorandum of understanding between NARC’s two predominant coalition partners, NAK and LDP, which called for the equal appointment of members to ministries from both parties. The LDP members complained that they had not received the number of seats in the cabinet contemplated by the memorandum. However, their complaints were initially ignored in the euphoria of NARC’s victory. The memorandum also presumably outlined new positions that were to be created under the new constitution and their designated occupants. One such position was that of prime minister, to be occupied by Raila Odinga.

The LDP, the party presumably slighted in cabinet appointments, is led by Raila Odinga, the undisputed leader of the Luo, the second largest ethnic group in Kenya originating in the western part of the country. The beneficiaries' of cabinet level and many other government positions were seen to be from the Mt. Kenya region, which includes the Kikuyu, the largest ethnic group. This group occupies the Mount Kenya and the Rift Valley regions and is the group from which Kenyatta and Kibaki both come. However, although Mt. Kenya is home to Kikuyus, Mt Kenya from which Kibaki comes

voted overwhelmingly for NARC. The Rift Valley, which has a sizable Kikuyu population, primarily voted for KANU in the election.

Although the complaints by the LDP about the memorandum of understanding and the ministerial positions they believed should have accrued to them were initially ignored, the second wave of appointments caused people from a variety of groups to increasingly criticize the direction of the government and complain that the “friends” of Kibaki were rewarded with “plum” positions without regard to merit. Further they took more notice of the LDP complaints. *{Even so, many people appeared to excuse President Kibaki, the person, for these missteps primarily because of his illness, rumored to have been a stroke suffered after his election and which resulted from a life-threatening car accident in which he was involved weeks before the election. Those surrounding him, however, were not excused and –not included n final}* these tensions began to play themselves out in earnest once the constitutional conference was about to begin and the issue of the prime minister, as contemplated in the draft constitution, surfaced sharply. Ultimately the prime minister position is about power arrangements as between an executive president, the vice president and the prime minister, succession politics and ethnic interests in both.

The self-organization of the constitutional conference delegates along ethnic and regional lines certainly signaled a historical way of conducting business in Kenya. But it also signaled NARC's failure to capitalize on its initial unity, to build consensus along party and across ethnic lines and to appoint people in a way that reflected both merit and regional and ethnic balance. This failure was made more obvious when accusations surfaced that the Mount Kenya Mafia and others from the Mount Kenya and Rift Valley regions wanted and were attempting to sabotage and scuttle the constitutional conference and process. Presumably the leaders from this area opposed the establishment of the prime minister's position and opposed Raila Odinga's occupation of it. However, this effort was widely and loudly condemned, as was ethnic caucusing (although one wonders how community based activism would be accomplished).

Although the efforts to sabotage the constitutional process appear momentarily defeated, a coalescence of multiple forces interested in delaying the process for different reasons have apparently succeeded in unnecessarily dragging out the process and making it that much more expensive. Nevertheless, there are now signs that some form of consensus is building around a number of controversial issues including the issue of the prime minister, though one is not yet formalized.

Today is May 15, 2003 and Kenyans are in the middle of the constitutional conference. Whether the conference ultimately will build consensus on a host of controversial issues including the proposed devolution scheme, retention of the Kadhis courts, adoption of mixed member proportional representation, establishment of a second chamber, and women's rights, remains to be seen. There are, however, hopeful signs. Further, given the loose organization of the conference, its makeup and the varied interests at play, whether Kenyans obtain a good constitution that will stand the test of time, only time will tell.

As for the KHRC, its leadership and staff find itself in the middle of the constitutional process trying to broker agreements and foster consensus. Whether they will be successful, again, time will tell. Further, whether their efforts chronicled through these essays will, in any small way, contribute to Kenya's becoming a human rights state committed to democracy -- you will have to be the judge.

Athena D. Mutua
May 15, 2003

Brief Evaluation of the First Sitting of the National Constitution Conference, Kenya

(Excerpted from the Independent Report on the Campaign for “safeguarding the gains for women in the Draft Constitution” and its efforts during the First Sitting of the National Constitutional Conference, Kenya)

**Observer
Athena D. Mutua
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June 8, 2003**

Abbreviated Recommendations On the process and organization of the NCC, Kenya

1. Schedule the conference for six weeks to eight weeks, no more.
2. Establish a rule establishing a set payment to be made to delegates, two-thirds to be paid weekly, and the last third to be paid upon timely completion of the constitution. If the constitution is incomplete at time of closure, delegates forfeit the last one-third payment and should be sent home in shame having failed the nation.
3. After opening day, delegates proceed immediately to committees.
4. Through Rule 45(10) submitted and signed by delegates of the steering committee, conveners of the committees and others, consider requesting delegates to work with revised draft of the draft Constitution or to review the original and revised drafts side-by-side as revised draft is better written.
5. Committee stage should last no more than three to four weeks.
6. Each committee should have a projector and screen to facilitate discussion of articles.
7. Discussion should be limited to a series of paragraphs/articles on screen. (Special sessions should be developed for the section on devolution to include presentation of a couple of different devolution models consistent with country-wide and delegate's views expressed in debate stage. Using the district level as foundational, the committee might consider having district officials – a man and woman from each-comprise, among a certain number of parliamentarians and ministers, the advisory second chamber that meets twice a year).
8. Conveners should be empowered to temporarily suspend participation of unruly or uncooperative delegates for a session or day.
9. Experts should be assigned to each committee and Conveners should be empowered to bring in other experts on particularly difficult topics. Presentations of experts should be no more than two hours.
10. Conveners should order and review the day's goals and agenda complete with appropriate consideration of written and oral statements on relevant articles and issues.
11. Consensus should be the primary modus operandi of committee work. However the alternative mechanism below should be employed for contested issues
 - a. Contested issues should be discussed for only such time, as the conversation requires without numerous repetitions on the same point.

b. Conveners may and should recommend that parties to a contested issue select two representatives from each side to serve on an ad hoc committee to negotiate a compromise position while the technical committee continues without them to consider the remaining articles.

c. The ad hoc committees that negotiate positions should be given no more than 48 hours. The agreement of the parties should be accepted by technical committee and negotiated language substituted.

d. If the ad hoc committee fails to agree on a compromise provision of an article or issue, the provision must be left as is and submitted for reconsideration and decision by an independent experts group selected by the Chair of the conference, Professor Ghai. If these experts decide more than 25% of the constitutional articles, the constitution as a whole must be subject to a countrywide referendum.

e. Conveners should be empowered to appropriately cut off debate.

f. Voting should not be used during committee stage to decide issues but rather only to move the discussion forward.

12. Convener should be empowered to extend review time to allow for evening or weekend sessions to ensure work can be completed.

13. There should be a presumption during the final consideration stage where the entire conference considers technical committee recommendations, that the recommendations of the committee are sound. The report and consideration of a committee report on average should run no more than half a day.

Introduction

Below is a very critical but brief assessment of the first sitting of Kenya's National Constitutional Conference held on April 28- June 6, 2003. The assessment is followed by recommendations that I believe may aid in improving the organization and processes of the second sitting of the Conference.

General Assessment of the Conference's organization and accomplishments.

A. The Conference - A Marginal Success

The people-driven process of collecting views of Kenyans for the draft constitution was a huge success, forming the basis for a very good, progressive and modern document; and it resulted in a good, albeit not perfect, draft constitution for consideration, improvement and adoption by the National Constitutional Conference. The conference, however, in my estimation, was only marginally successful. The conference delegates managed to have a healthy, albeit repetitive, debate on most of the chapters of the draft constitution. This debate roughly confirmed the views collected from Kenyans throughout the country and outlined a tentative, though potentially elusive, consensus on a number of divisive issues. Further, although the conference was to complete its task and render Kenyans a constitution by June 6, perhaps an unrealistic goal, the conference did create the momentum necessary to bring about the completion of a solid constitution. This can be done in a reasonable amount of time and expense if some of the problems discussed below are addressed and target dates, goals, and processes are adopted to build on this momentum and facilitate sound analyses and improvement of the Draft. .

Given the only marginal success of the conference, there is some debate as to whether a constitution constructed in this conference phase of the process will result in the positive modern constitution expected, reflecting both the best of the Kenyan peoples and their highest aspirations, as well as stand the test of time. Many think, as do some in this coalition, that Wanjiku have served their very necessary and important role in this process and that the balance of the work on the constitution should be turned over to experts to construct the legal document, that which a constitution is meant to be, subject to a country-wide referendum. While this is a plausible plan and one that might be embraced, I believe the effect of failing to continue the conference process will have serious negative impacts on the process of democratization in Kenya and undermine the people's burgeoning confidence in self-governance in the face of historical and new attempts of authoritarian rule. As such, this evaluation and its recommendations proceed as if the conference will be reconvened and move into the committee stage of the process as is currently planned.

The conference made progress on a potential constitution despite being hampered by a number of problems, the solutions to which are crucial if the conference is to proceed in an orderly and efficient manner rendering Kenyans a solid constitution that is both just and fair. In short, the first sitting of the conference suffered primarily from weak and ineffectual leadership and the lack of a workable vision about how the

conference should proceed. This lack of leadership was inspired in part and compounded by the initial stroking by parliamentarians and the adoption by delegates of ethnic, regional, and rural/provincial verses urban divisions and orientations over narrow political agendas that led to tension and suspicion between and among them. Consequently, an environment of civil dialogue, trust, and commitment to consensus building, so essential to constitutional making processes was lacking. These problems were cemented by a misplaced monetary incentive in the payment of commissioners and delegates. The fact that delegates as well as the CKRC commissioners could make more money by having the conference sit longer potentially provided an incentive for inefficiency and delay leading to lassie faire attitudes and actions by both groups meant to prolong the conference and accumulate additional personal pay at tax-payer expense.

1. Lack of leadership and vision on organization

Although several prominent leaders, including President Kibaki spoke passionately during the opening session of the conference about the solemn importance of creating a new national constitution and the necessity of dialogue, hard work and commitment to consensus building in the process, leadership at the constitutional conference was nevertheless sorely lacking. Neither the chair of the conference nor the CKRC or PSC, initially established the rules, decorum, or requirements for participation in the conference worthy of a process organized on behalf of 30 million Kenyans to formulate the foundational legal document of the country. Nor did they enforce a consistent regiment for orderly dialogue, engaged listening, the appreciation of others points of view and the written and engaged work necessary for meaningful deliberation on the draft document. This situation was made worst by the decision to have rotating chairs with different styles and levels of ability to lead a focused discussion. In addition there was no oral mechanism for recognizing the growing consensus on particular issues and thereby cementing them, ending debates and moving the conversation on the draft forward.

Part of the problem was the commission lacked a workable vision of how the conference should proceed. The debate stage of the conference was initially organized to provide an opportunity for every delegate to speak for ten minutes on issues of concern to him or her. This format would have facilitated a more focused discussion on the ten or eleven predictable issues that ended up occupying most of the conference time between April 28 and June 6 anyway. These issues included the one-third principle and affirmative action, the mixed member proportional representation scheme, the second chamber, devolution, the kadhis courts, the prime minister position, age limits for offices, and land. However, it is not clear that this initial plan made sense in terms of encouraging meaningful debate and consensus building. And yet it is clear that this scheme would have been totally unworkable in the absence of enforcing basic rules including the rules that would have required delegates to submit written motions on the issues on which they felt passionately. Submission of these motions in turn would have allowed the CKRC or the steering committee to order them in a reasonable fashion geared toward facilitating deliberative debate.

In this regard the chapter-by-chapter approach eventually adopted by the conference provided a superior way to proceed with discussions on the draft constitution and allowed a few additional insights and issues to surface. Nevertheless, no one exerted the needed leadership to insist on processes requiring respectful speech, listening or appreciation of the points of others. Further, nothing was to done to require that delegates refrain from extensive and rampant repetitive comments, spurious, argumentative and time consuming points of order or reckless and disrespectful activity. Here in the absence of leadership and the mechanisms to hold delegates accountable, insisting that they act responsibly in relation to their duty on behalf of a nation, the high honor bestowed on delegates gave way to, with the instigations perpetuated by parliamentarians, ignoble self promotion and aggrandizement by some delegates, and eventually led to a false sense of power by them.

2. Negative Parliamentary Activity

The lack of effective leadership by those responsible for organizing, guiding and steering the conference to a successful conclusion was in part intentional, inspired and compounded by extensive initial negative parliamentary activity. Some of this activity was in fact intended to slow down the constitutional process. This activity encouraged ethnic and regional tension among delegates, stroked divisions between urban and rural/provincial-based delegate constituencies and inspired suspicion of the very civil society forces and individuals who had worked so hard with other Kenyans for over a decade to bring about constitutional reform. This activity was carried on by both NARC and KANU politicians often through the lobbying of delegates at their hotels in the evenings during the first weeks of the conference.

In the context of NARC, this activity reflected the narrow political agenda of various NARC politicians in conflict over the establishment of a prime minister's position in the constitution. Instead of the consideration of a long-term workable governmental arrangement through which executive authority might be de-concentrated and in which a prime minister position might play a role, this conflict in NARC was primarily concerned with succession politics and the internal organization of the governing party, both with ominous ethnic undertones. In terms of succession politics a prime minister position potentially places the occupant of such a seat in a good position vis a vis the succession game. In terms of NARC's internal party organization the issue reflected dissatisfaction with the governing party's allocation of what are considered plum governmental positions to its various coalition members pursuant to party - not national, memoranda of understandings. Those dissatisfied with the allocation of government seats as well as the individual presumably slated to sit in a potential prime ministers' position belong to the second largest ethnic group, and delegates from this group were presumably encouraged to support the position. Those believed to be in control of government and benefiting from its largess are ethnic groups from the Mount Kenya region who were presumably urged to oppose such a position. Whether or not this group shared the government's point of view, they became the subject of wider ethnic suspicion.

Further, the possibility of a new constitution in the immediate future appeared to threaten NARC's governing light's increasing desire to consolidate their and NARC's authority under the broad and sweeping powers enjoyed by KANU and Moi and inherited by them when the draft constitution failed to be approved before the election. Although it was probably a good outcome that the draft constitution was not rushed and ratified before the elections, given that it could be improved, the result is that NARC has come to enjoy the broad, over-reaching, and unaccountable powers that the old constitution provides. Thus, politicians skeptical of the prime minister position and concerned about any transitional mechanisms that might result in the constitution's immediate implementation, including some of those on the PSC sought to slow the process down and therefore encouraged the lack of instruction, leadership and establishment of rules to guide the process. This intensified the leadership lacuna experienced in the conference during the first two weeks. "Let the delegates do what they want," was their clarion cry and with this they fostered the initial disorganization and disrespect for any ordered process, goals or targets meant to ensure systematic and deliberative consideration of the draft. These efforts together with the multitude of suspicions aroused among delegates caused immediate ruckus in the conference proceedings. These suspicions were further inflamed by motions interpreted as measures to scuttle the process led by those believed to be operating on behalf of NARC factions.

KANU's activities, on the other hand, did not appear to take positions with regard to particular constitutional issues. Rather, consistent with past KANU practices, their activities were meant to discredit certain people, particularly civil society and others progressive political actors, "the urban elites," who were seen as responsible for contributing to KANU's electoral defeat. Theirs were a politics of revenge. And they appeared quite successful. For example, many of the leading lights of civil society, such as Mutava Musemi and Kivuthu Kbwana were booed and heckled during the very first week of the conference, long before their views on various constitutional provisions were known. As a result, many civil society actors, the very people who led with other Kenyans the fight for constitutional reform, were locked out of effective participation in the conference, never quite recovering and leaving provincial delegates in the lead.

Many believe that KANU's success resulted from the fact that many of the delegates, particularly from the provinces, which also reflect more ethnic-type groupings, were "KANU delegates," having been selected some two years ago when KANU was still in power. These delegates, it is argued, are "KANU hacks" who never fought for constitutional reform and therefore do not care or understand the need for and importance of securing a new constitution. This view is supported by the fact that although the conference roughly reflected the views collected by Kenyans from across the country, conference delegate's views appeared slightly more conservative than those collected country-wide, particularly regarding minority rights and protection of the disadvantaged. This notion has raised the concern as to whether this body can yield the kind of enlightened and modern constitution – not to mention, well-written document - that the collection of Kenyan views signaled in terms of protecting the dignity of all people and establishing the kinds of institutions that will bring about fair and just social arrangements in the face of vast inequalities. This concern has fueled proposals that

advocate for turning the balance of the process over to experts to finalize the written document consistent with the collected views of Kenyans. S

However, this view does not take into account the fact that some delegates, such as those from central province, were actually selected from opposition strongholds during the time KANU governed. Further, it obscures the fact that all of the delegates are indeed Kenyans presumably committed to the overall welfare of the country; an insight demonstrated by the delegates actually settling down into serious consideration and discussion of most of the chapters of the draft constitution; no small feat and despite the initial unruliness. And finally, although the delegates did appear to buy into the suspicion, ethnicizing and shenanigans promoted by various MPs, they displayed a surprising amount of independence and thoughtfulness regarding issues around which their constituencies were committed. For example, many delegates, particularly provincial delegates were committed to the idea of a recall provision for MPs much to the chagrin of many parliamentarians who oppose such a provision.

Shortly after the discussion on the recall provisions, and with the position of the MPs on this issue clearly in the minority, the presence of parliamentarians significantly declined. Having cultivated much dissension and distrust, polarized a host of positions instead of having built consensus, stirred the ethnic pot, slowed the process down with the help of weak CKRC leadership, and succeeded in marginalizing much of civil society, many MPs ran away leaving a chaotic situation that they could not control.

Their absence in some ways further contributed to the participating delegates' false sense of power that they alone, unaccountable to no one and on their own terms, could bring the constitutional process to closure without the participation, expertise, and legitimacy of civil society or parliamentarians, who together make up more than a third of the conference. This attitude dissipated, though not completely, as the conference process wore on but not in time to alter the snail's pace at which the conference proceeded and certainly not in time to render Kenyans a constitution by June 6. The slight change came about in part because of some of the negative press coverage the deliberations received, the fact that suggestions continued to surface to amend the Constitutional Review Act in one way or another or replace the delegate process with experts, and because delegates recognized that Parliament in fact could amend the Review Act or limit the conference's budget after June 6 when Parliament was scheduled to debate the national budget. In the end, nonetheless, the conference managed to review most of the draft Constitution's chapters.

3. Misplaced Monetary Incentive

The payment structure for the CKRC commissioners and the delegates may have provided an additional incentive for both the commissioners and the delegates, particularly the provincial delegates, to slow down the conference process. Although the conference was scheduled to end on June 6, it became widely believed that delegates and commissioners would continue to be paid for as long as the as the conference met. Delegates, in addition to having full room, board and transportation cost provided, were

entitled to a daily sitting fee, collected every week. By the end of the first week they were advocating for higher sitting fees. It was whispered that when significant higher fees were not forthcoming, a longer conference, with mounting and additional payments earned might make up for this. Though this is a cynical view and may not accurately account for monies lost during the time delegates participated in the conference, the idea that some delegates saw the conference as a moneymaking exercise without regard to the national welfare was widely circulated. Further, some commissioners were heard in the last week or so of the conference advocating for delegates to lobby Parliament for a budget that would cover the conference until such time as they completed their work. They did not however attempt to set reasonable goals, targets or deadlines. In this sense, a payment structure that rewards diligence and efficiency, instead of delay, may contribute to a more orderly and productive second sitting of the conference, and more properly place money incentives.

B. Recommendations on the process and organization of the Constitutional Conference

It is naive to assume that strong procedures and processes can overcome the very significant differences on issues that arose during the conference debate or that process can, by itself, overcome the suspicions and mistrust created among delegates. However, strong procedures may be able to structure and contain some of the difficulties that surfaced during the debate.

In particular, the procedures should avoid creating the opportunity for delegates to rehash in general form the debates already discussed. Rather the conference should proceed directly into committees where they review paragraph by paragraph the chapters to which they are assigned. Generally, discussions should be limited to the paragraphs/articles before the groups and individual comments should be geared to improving, adding or eliminating specific language in the text. Where there are no suggested changes the articles should be approved without discussion. Given that the debate stage of the conference only highlighted a limited number of contested issues and given that the very largest chapters in the draft constitution contain only approximately 45 articles, if the committees at an extremely slow pace approve only three articles a day, all chapters could be concluded with recommendations within 15 working days – three weeks. Allowing another two to three weeks for consideration of committee recommendations by the entire conference suggests that the conference can be concluded relatively comfortably in six to eight weeks. As the conference can be concluded within this time span, the goal should be that it be done within this timeframe – six to eight weeks.

Further, the CKRC should consider using article 45(10) of the regulations on committee work to suggest that delegates use the revised draft as the basis for their work or to consider the structure or language changes in the revised draft side-by-side of their consideration of the published draft constitution articles. Article 45(10) allows any delegate to make a statement to any committee. A recommendation such as this could be

made and signed by delegates of the steering committee, committee chairs and others who may agree that the revised draft is a better-written document. Substantive changes in the revised draft constitution however should be reviewed carefully. The government and various political parties should also consider using this avenue of delegate statements and others like it to submit their positions and political compromises considered at the committee stage.

Below are my recommendations.

1. Schedule the conference for six weeks to eight weeks, no more.
2. Establish a rule establishing a set payment to be made to delegates, two-thirds to be paid weekly, and the last third to be paid upon timely completion of the constitution. If the constitution is incomplete at time of closure, delegates forfeit the last one-third payment and should be sent home in shame having failed the nation.
3. After opening day, delegates proceed immediately to committees.
4. Through Rule 45(10) submitted and signed by delegates of the steering committee, conveners of the committees and others, consider requesting delegates to work with revised draft of the draft Constitution or to review the original and revised drafts side-by-side.
5. Committee stage should last no more than three to four weeks.
6. Each committee should have a projector and screen to facilitate discussion of articles.
7. Discussion should be limited to a series of paragraphs/articles on screen. (Special sessions should be developed for the section on devolution to include presentation of a couple of different devolution models consistent with country-wide and delegate's views expressed in debate stage. Using the district level as foundational, the committee might consider having district officials – a man and woman from each-
comprise, among a certain number of parliamentarians and ministers, the advisory second chamber that meets twice a year).
8. Conveners should be empowered to temporarily suspend participation of unruly or uncooperative delegates for a session or day.
9. Experts should be assigned to each committee and Conveners should be empowered to bring in other experts on particularly difficult topics. Presentations of experts should be no more than two hours.
10. Conveners should order and review the day's goals and agenda complete with appropriate consideration of written and oral statements on relevant articles and issues.

11. Consensus should be the primary modus operandi of committee work. However the alternative mechanism below should be employed for contested issues

- a. Contested issues should be discussed for only such time, as the conversation requires without numerous repetitions on the same point.
- b. Conveners may and should recommend that parties to a contested issue select two representatives from each side to serve on an ad hoc committee to negotiate a compromise position while the technical committee continues without them to consider the remaining articles.
- c. The ad hoc committees that negotiate positions should be given no more than 48 hours. The agreement of the parties should be accepted by technical committee and negotiated language substituted.
- d. If the ad hoc committee fails to agree on a compromise provision of an article or issue, the provision must be left as is and submitted for reconsideration and decision by an independent experts group selected by the Chair of the conference, Professor Ghai. If these experts decide more than 25% of the constitutional articles, the constitution as a whole must be subject to a countrywide referendum.
- e. Conveners should be empowered to appropriately cut off debate.
- f. Voting should not be used during committee stage to decide issues but rather only to move the discussion forward.

12. Convener should be empowered to extend review time to allow for evening or weekend sessions to ensure work can be completed.

13. There should be a presumption during the final consideration stage where the entire conference considers technical committee recommendations, that the recommendations of the committee are sound. The report and consideration of a committee report on average should run no more than half a day.

(Draft copy)

GENDER ISSUES AND THE DRAFT CONSTITUTIONAL REVIEW PROCESS:

SUGGESTED ALTERNATIVE LANGUAGE ON GENDER

Sponsored by the Federation of Women
Lawyers, Institute for Education in Democracy,
Kenya Human Rights Commission, League of
Kenya Women Voters

Draft

SUGGESTED ALTERNATIVE LANGUAGE ON GENDER

Principles that Inform a Gender Perspective & Inform Commitments to Provisions in the Draft Constitution as well as Suggestions for Alternative Language

Social Justice – commitment to policies, principles, structures, activities and measures that bring about just and fair social arrangements that enable all the diverse people and communities to live up to their full human potential and to actively *participate in and benefit* from the social, economic, cultural and political life of the country. Affirmative Action is a temporary social justice measure meant to remedy past and present discrimination, promote equality, eliminate the effects of barriers to opportunity, and create mechanisms to bring about equality, equity, parity and justice

Gender equality, equity, parity and fair representation

- ◆ Equity- Women are often disadvantaged therefore being fair to women means compensating first for women's disadvantages. Equity will then lead to equality.
- ◆ Equality- The equal valuing by society of women and men. To ensure equality entails the removal of discriminatory barriers. To move towards equality between women and men it is essential that a whole range of resources are made accessible to both women and men: in terms of respect, participation in all aspects of life, access to institutional power, wealth, control over one's life, security etc so that women and men realize their full potential.. Gender equality refers to:
 - Equality under law
 - Equality of opportunities (rewards, access to resources that enable opportunities, etc.
 - Equality of outcome (recognizing the differences in needs, interests and requirements of women and men so as to ensure equity)
- ◆ Parity- Recognition of full equality and balance between women and men in all areas of life: national political, economic, social development
- ◆ Fair representation- Representation is a central principle of democracy. Fair representation is about ensuring that women, who make up half the Kenyan population, have an equal voice in determining the way their society is governed. This requires that women in large numbers must be present and participating at all levels and centers of power in their society.

Gender mainstreaming - a strategy for making women and men's concerns an important consideration in designing and implementing policies and programs in political, economic and social spheres so that women and men share equally and inequality is not perpetuated. The most important requirement is an enabling environment where there is political will, resources, administrative frameworks, processes, women in decision-making positions and the support and involvement of civil society to promote gender parity, equity and equality

Suggested Alternative Language – 29 Proposals

Chapter Three

Article 14

Chapter Four :Citizenship

Article 19(1)

Chapter Five: Bill of Rights

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31(4)

34(3);

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39(2)(g)

55(2)(b)

Chapter Six: Representation of the People

76(5)

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95(3)

Chapter Seven: The Legislature

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Chapter Nine: Judicial & Legal System

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Chapter 10: Devolution

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226(3)

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Chapter 11: Land & Property

232

Chapter 13: Public Finance

243(e)

Chapter 14: Public Service

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Chapter 17: Constitutional Commissions

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Fifth Schedule: Leadership and Integrity Code

ARTICLE 14

(Chapter Three: National Goals, Values and Principles)

Article 14 National Goals, Values, and Principles

Article 14 (10) Currently Reads

The Republic is fully committed to respect, protect, and promote human rights and fundamental freedoms and enhance the dignity of individuals and communities.

(10) Proposal

The Republic shall respect, protect, promote and ensure human rights, fundamental freedoms and the equal protection and benefit of law for men and women and enhance the dignity of individuals and communities.

Explanation: "**shall**" – simply makes more precise the idea of “fully committed to.” It also more strongly suggests an undertaking, an obligation. Query whether a stronger word such as “must” be used.

“ensure” – creates an obligation on the government to make certain and guarantee an environment where the human rights and fundamental freedoms of people flourish. It implies that the government must undertake mechanisms and create structures that result in an environment where human rights are valued and held in esteem. To respect human rights is to defer to or hold the rights in esteem but does not necessarily imply that the government must create an environment that results in the respect for human rights. To protect human rights is to defend them against loss and to promote is to encourage human rights and fundamental freedoms. One can respect, promote and protect human rights and fundamental freedoms without having the obligation to make certain the result of these things. The word “ensure” adds this obligation.

NOTE – SOUTH AFRICA CONSTITUTION ALSO HIGHLIGHTS EQUALITY. IT TALKS ABOUT HUMAN RIGHTS, EQUALITY AND FREEDOM. IN COMMITMENTS.

Explanation: ***the equal protection and benefit of law for men and women***- this language does a number of things. The phrase “equal protection of law” or “equal protection before the law” generally means that the law is to be applied equally to all people without regard to their economic, social, political or other statuses. That is, the law should not be prejudice against an individual simply because of who he or she is. This phrase is usually interpreted to require that people be treated “the same” under the law. The language, “benefit of the law” on the other hand, focuses on outcomes. It seeks to recognize that while the law

should not be prejudice because of a person's statuses, people are different and these differences should be taken into account to ensure that all people can access what the law offers; that they benefit from the law in the same way that someone differently situated benefits. The goal then is not just formal equality before the law but equality in fact, ideas that together advances the ends of social justice. Finally, the right of equal protection is a fundamental freedom and its inclusion here emphasizes and places the equality principle on the same plane with the notions of human rights and fundamental freedoms possibly making it as important, of primary concern

The phrase "men and women" is added because the term equal protection of the law has historically been interpreted to protect primarily men with women's protection interpreted as limited through a host of traditional and other practices. This language ensures that both men and women will have equal protection and benefit of the law. The Ugandan Constitution repeatedly uses the phrase "men and women" throughout the document to emphasize that both men and women are protected by the constitution and its various provisions. Ugandan women fought for this language. This language also complements the provisions concern for both the "individual and the community."

Article 14 (11) Currently Reads

The Republic shall ensure the fullest participation of women, the disabled, and the marginalized communities and sectors of society in the political, social and economic life of the country.

(11) Proposal

The Republic shall ensure the fullest participation of women, the disabled, and the marginalized communities and sectors of society in the political, social and economic life of the country, ***employing among other things, affirmative action policies and programs to ensure this participation.***

Explanation: "***employing among other things, affirmative action policies and programs to ensure this participation***" - The added language simply authorizes the state to use affirmative action policies and programs to make certain that these groups can participate in the life of the country. Query, whether some sort of deadline or indication that affirmative action programs are temporary measure should be included in this provision. For instance, in the section on Women in the Bill of Rights, a section has been added which indicates that affirmative action programs should be used "until such time as parity is reached." Such language could be included here. On the other hand, if such indications of temporariness are consistently included in other sections where

affirmative action is mentioned, inclusion here may be unnecessary. It may also be clumsy here.

Article 14 (12) Currently Reads

The State shall implement the principle that one-third of the members of all elective and appointive bodies shall be women.

(12) Proposal

The State shall implement the principle that ***at least*** one-third of the members of all elective and appointive bodies shall be women, ***with the eventual goal of gender parity and balance.***

Explanation ***at least*** – the omission of this language was probably a mistake as the “at least” language is found in articles 109 relating to women in Parliament; 214(e) on the principles of devolved government; 230(i) on legislative provisions for devolution; etc.

Explanation: "***with the eventual goal of gender parity and balance*** – this language is meant to convey and emphasize the idea that the one-third provision is a floor and that the eventual goal of this provision is to ensure gender parity at all levels of the government in the future. Terms other than “gender parity and balance” could be used here. Suggestions include “gender equity and equality, gender equality, gender balance, etc. This additional language is particularly important in this chapter as this chapter spells out the nation’s goals and values. Also this reading is consistent with paragraph 217 on Location Government which states that the “Location Council consists of two representatives, one of whom shall be a woman, elected from each Village Council;” and Article 219 on Provincial government. In these provisions women’s representation is 50%. This is higher than the one-third floor and could be seen as the goal of all of the provisions. It’s important to note that some have looked at paragraph 217 and suggested that their be three representatives from each Village to ensure that women represent no more than one-third in the Location Council.

Article 31

(Chapter Five: The Bill of Rights)

Article 31 Limitation on Rights

Article 31 (4) Currently Reads

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

(4) Proposal

ELIMINATE (4) (The provisions of this chapter on equality are qualified to the extent strictly necessary for the application of Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance) (a narrower exemption placed in section on Kadhis courts).

Explanation Consistent with the amendment of article 14(10) where the profile of the equality principle was raised, the elimination of the limitation on the equality principle here does the same thing, it strengthens the equality principle and subjects all interpretations to it.

Further although the limitation was placed here for the sole propose of allowing the application of Islamic law to those who profess faith in it, as a practical matter it may have the effect of denying equality primarily to Muslim women. This is felt to be inappropriate and dangerous in a constitution made to last for the ages. However, it is thought that Muslim women requested this limitation. A compromise has been proposed which would authorize the application of Islamic law in the section where the constitution establishes the Kadhis courts. This could then be interpreted as understanding Islamic law as providing for equality in substance (or at least equity), if not in the form as understood by most proponents of the equality principle. See proposed amendments and explanations to Articles 199 and 200. In this sense equality is not just seen as an end in itself but as a means to social justice.

ARTICLE 35

(Chapter Five: The Bill of Rights)

Article 35	Women
Article 35	(5) <u>Currently Reads</u>
<p>(1) Women have the right to equal treatment with men, including the right to equal opportunities in political, economic and social activities.</p> <p>(2) Women are entitled to be accorded the same dignity of the person as men.</p> <p>(3) Women and men have an equal right to inherit, have access to and control property.</p> <p>(4) Any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women is prohibited</p> <p>(5) The State shall –</p> <p style="padding-left: 40px;">(a) protect women and their rights, taking into account their unique status and natural maternal role in society; and</p> <p style="padding-left: 80px;">(b) provide reasonable facilities and opportunities to enhance the welfare of women to enable them to realize their full potential and advancement.</p>	

(5) Proposal

The State shall-

(a) protect women and their rights, taking into account ***the variety and extensive roles of women in society including*** their unique status and ***(eliminate “natural”)*** maternal role ***(eliminate “in society”)***; and

(b) provide reasonable facilities and opportunities to enhance the welfare of women to enable them to realize their full potential and advancement, ***including,***

(i) affirmative action and policies until such time as parity is reached and to be reviewed periodically; and

(ii) mechanisms, processes, and structures for gender mainstreaming, among other policies and measures.

Explanation: ***the variety and extensive roles of women in society including*** their unique status and ***(eliminate “natural”)*** maternal role ***(eliminate “in society”)*** – this language is meant to acknowledge the variety of roles that women play in society not just their roles as mothers. To suggest that women

are only or primarily mothers is stereotypical. At the same time it is important to acknowledge the unique status of women as potentially mothers and their maternal roles.

Sections (i) and (ii) –simply, explicitly, would authorize the state to use affirmative action and policies as a mechanism for enabling women to realize their full potential.

The language also authorizes the state to develop processes for mainstreaming gender analyses and policies, among other measures.

ARTICLE 95

(Chapter Six: Representation of the People, Part III Political Parties)

Article 95 Purposes of Fund

Article 95 (3) Currently Reads

Fifty per cent of the moneys allocated by Parliament shall be distributed equally among political parties each of which obtained not less than five per cent of the total votes cast at the previous parliamentary elections, and the remaining fifty per cent shall be paid proportionately by reference to the number of votes secured by each of the political parties and the number of women candidates elected in each party.

(3) Proposal

Fifty per cent of the moneys allocated by Parliament shall be distributed equally among political parties each of which obtained not less than five per cent of the total votes cast at the previous parliamentary elections **and which ensured that at least one third of its candidates for direct election were women while fifty (80%?) per cent of its candidates for proportional representation were women**; and the remaining fifty per cent shall be paid proportionately by reference to the number of votes secured by each of the political parties and the number of women candidates **directly elected by constituencies if a minimum of two women were so elected.**

Explanation: the new language tracks language in Article 77 which requires political parties to ensure that the candidates they sponsor consist of one-third women for direct elections and that fifty per cent of the candidates listed for proportional representation also be women. The addition here simple ties funding for political parties to this requirement. Parties who fail to meet these criteria will be ineligible for public funding.

The second clause provides additional funding for those parties that successfully secure the direct election of women if they have been successful in electing at least two women directly in constituency elections.

These kinds of provisions encourage political parties to identify, cultivate, nominate and seriously support women for political office in the same way that men are cultivated.

Article 107

Article 107 Members of the National Assembly

Article 107 (1) and (5) Currently Reads

(1) Elections to the National Assembly shall be based on the Mixed Member Proportional System in which two hundred and ten members shall be elected on the basis of single member constituencies and ninety members shall be elected on the basis of list of candidates submitted by political parties contesting the elections.

(5) Each list shall –

(a) rank the nominees in order of priority of nomination;

(b) alternate between women and men in the priority of the nominees;

(c) take into account the need for representation of the disabled, youth and minorities; and

(d) reflect the national character.

Proposal

(5) (b)

[eliminate -) alternate between women and men in the priority of the nominees] and replace with –

(b) provide that the first 80 per cent of nominees be women, each representing a different district until all districts represented, and some of whom are persons with disabilities, youth , an minorities;

Explanation: New language is similar to the changes proposed for Article 77 and the explanation is the same. Given Kenyans past voting patterns and the

substantial cultural, political, social and economic barriers women face in securing political office, this provision provides the country the real chance of meeting the constitutional principle that at least one-third of all elective offices be held by women. It does so by requiring that party list consist primarily of women, that these women together come from and represent all the districts in the country and that they also be diverse including women who are disabled, youth, ethnic minorities and other interested groups. In proving that the listed women be diverse, the provision also ensures that rural as well as urban women are represented and it maintains and facilitates the goal of the MMP system, which is proportional representation.

ARTICLE 199 & 200

(Chapter Nine: Judicial and Legal System)

Article 199 The Kadhis courts

Article 199 (1) Currently Reads

There are established Kadhis Courts, the office of Chief Kadhi, office of Senior Kadhis and the office of Kadhis.

(1) Proposal

There are established Kadhis Courts, the office of Chief Kadhi, office of Senior Kadhi and the office of Kadhi ***to apply Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and Inheritance, consistent with the ends of social justice and equality in fact (of outcomes)***

Explanation ***to apply Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance*** – its proposed that this language be removed as a limitation on the equality principle, but that Muslim women wanted to have Islamic law authorized in these areas. The compromise was to authorize the application of Islamic law in this section that establishes Kadhis courts. This compromise, it is hoped, will maintain the solidarity between Muslim and non-Muslim women. However, there are two complications here; one legal, the other political. The legal matter involves the equality principle to which all personal law, including Shari ‘a law in this instance, is presumably now subject, given the elimination of the limitation on equality that is herein proposed. *The question is, does the equality provision nullify Shari ‘a law, for instance, in regard to inheritance and require a fifty-fifty split Or might these types of provisions of Shari ‘a law be interpreted as complying with the equality provision in substance, albeit not in form? Will women advocate*

for such an interpretation and can it succeed? This kind of interpretation would be true to the spirit if the compromise with Muslim women.

The second problem is political and involves various religious groups calling for the elimination of the Kadhis courts. Will the lead women's groups take a position on this? If not, the above amendments could be submitted on the condition that the Kadhis courts survive in the constitution. The same is true even if they take a position against the courts. If they decide to take a position in favor of the courts, such a position can be justified on at least three grounds. One, the courts have a long history in Kenya during which time they have worked well and Muslim and non-Muslim groups have lived together peacefully within this arrangement. In a world where Christian and Muslim countries seem to be in tension, Kenya becomes a good model. Second, the courts can be justified under a theory of minority rights, and third under principles of real, substantive notions of freedom of religion and equality in fact (in outcomes) – the same sort of outcome oriented justice that women seek.

consistent with the ends of social justice and equality in fact (of outcomes)- this language is being suggested that decisions must be fair, (particularly since they may not conform to notions of equality in form.

Notes on the Kadhi Courts, Women's Rights and Equality

What are Kadhi Courts?

Kadhi Courts are courts authorized under Kenyan law to apply Islamic law to those who profess a belief in Islam in relation to personal status, marriage, divorce and inheritance.

Like the Christian West, which developed practices of constitutionalism, its own understandings and practices of law (including the separation of church and state), and the application of law to cases in courts, the Islamic East developed a sophisticated legal system, complete with laws and practices including a judicial system of which Kadhi courts are a part. These courts apply the Islamic personal law.

Living according to Islamic law is considered an important part of practicing the Islamic faith and being a Muslim. In this sense, having access to courts that can knowledgeably apply Islamic personal law can be considered religiously required.

These courts have long been integrated into the Kenyan legal system, in recognition and accommodation of Kenya's Islamic population, providing this population with the legal means to practice their faith. It also exemplifies the peaceful and co-existent relationships in Kenyan between Muslim and non-Muslim communities.

Kadhi courts existed long before and during colonization, are authorized presently under the current Constitution and are entrenched in the new draft Constitution. As such the Muslim right to access Kadhi courts have long-since crystallized. This means that eliminating Muslim access to these courts is to extinguish a right they already have and may create the kind of resentment in which Islamic fundamentalism may thrive.

Should women support the maintenance of Kadhi courts in Kenya?

There are some good reasons to support Kadhi courts.

1. ***Support of the Kadhi courts would place non-Muslim women in solidarity with Muslim women***, many of who want the Kadhi court in place and believe they have more protection and rights under Islamic law. Solidarity across religious difference is but one challenge to women's solidarity generally and to women's commitment to respect all women's and people's voices and experiences. Support of the Kadhi courts is one way to strengthen that solidarity and commitment between Christian and Muslim women or rather, non-Muslim and Muslim women.

2. ***Support of Kadhi courts is consistent with women's concern for real justice. Like women want real equality, equity, and fair representation, Muslims want the real freedom to enjoy their religion.***

Women's concerns require more than mere platitudes or declarations against discrimination or for equality, given the vast gender inequalities in place. Because these disadvantages permeate every sector of society and are embedded in the cultural, traditional, customary, and religious practices and ideologies of the society, many women seek to put in place institutions, policies and mechanisms that will eradicate barriers to the development to their full human potential and to create an environment that enables and ensures that women can participate in the political, social and cultural life of the country equally with men. They want *real* equality, equity and gender parity.

In the same way, Muslims require more than mere platitudes about freedom of religion in order to practice their religion in a country where the majority of people are Christians and many of the legal institutions are derived from the cultural and religious understandings of the Christian West. These understandings and institutions see religion as something very distinct from the state and its instruments of justice. This is in contrast to the way many Muslims in Kenya understand and practice law and religion. Nevertheless while accepting the nation's distinctions, Muslim's seek the institutions, policies and mechanism that will allow them the *real* freedom to enjoy their different religion; a religion that requires they live by Islamic personal law and have their cases adjudicated in line with this religiously inspired law.

3. Support of Kadhi courts is consistent with women's concern for social justice for everyone, including other marginalized and/or vulnerable groups, including religious minorities.

Women seek just and fair social arrangements for everybody and all groups, including religious minorities. This concern arises in part because they are generally concerned with establishing a just society, but it also arises from the recognition that women form part of all groups in society, including minority groups. In other words, they recognize that the group called Muslims include women and that some women are Muslims.

Protecting minority rights and the practice of real religious freedom are related, however, in this instance, much as they have been when Christians have been minorities in Islamic countries. When this has been the case, ***Christians have recognized the basic idea that a simplistic understanding of religious freedom, a neutral law or decision, does not attend to values and practices formed in one cultural/religious context when living in another.***

An example: When the government of Albania, an Islamic country decided, with good intentions, to provide and compel free public education for all children, Christians realized very quickly that their children would be exposed to an education that flowed from and imbibed Islamic religious and cultural traditions. Though perhaps not religious education per se, the effect, they believed, would be an Islamic education. Christians were provoked by this and went to court. Under principles of minority rights and rights of parents to educate their children in their own religion, they fought to secure the right of real religious freedom. They suggested by default that neither the neutral law applied the

same to everyone, nor, the “secular” education provided by the Islamic State was enough to guarantee them the real freedom to practice their religion.

If we provide for Kadhi courts in the Constitution, are we not enshrining inequality in the Constitution for Muslim women and jeopardizing non-Muslim women’s right and desire for equality?

Not necessarily. This is the answer to both questions, although the way the draft Constitution is currently organized makes these issues more problematic.

Currently the draft Constitution qualifies (limits) equality in order to allow and authorize the application of Islamic personal law for those who profess a belief in Islam. Leaving aside arguments that the provision assumes that Islamic law authorizes inequality, is unchanging in its human interpretation, or whether equality is important in the Islamic worldview, this provision gives credence to the concern that it enshrines inequality for Muslims.

This, however, can be partially remedied by placing the authorization for the application of Sharia law by the Kadhi courts in the section establishing the Kadhi courts.

1. Answering the second part of the question first, moving this part of the provision has the effect of subjecting all customary and personal law to the equality principle, as was done in South Africa. This together with Article 35 on women, which also requires equal treatment of men and women and makes illegal traditional practices that discriminate against them, militates against interpretations that jeopardize non-Muslim’s rights to equality. In other words, the interpretation that because Islamic personal law is preserved, then all aspects of personal law systems that disadvantage women, remain in place, has less creditability when the Constitution is read as a whole.

2. Moving this section, also, however subjects the application of Islamic personal law by the Kadhi courts to equality, a result seemingly in contrast to what some Muslim women want. Arguably however, the interpretation of what equality means in the context of Islamic law is left to the Kadhi courts, in the first instance, and these courts also are left to figure out how to accommodate the various interpretations of Islamic personal law - manifested differently the world over - to the equality requirement.

Further, language has been suggested, with Muslim women’s demands in mind, which would authorize that the application of Islamic personal law be done consistent with “the ends of social justice and equality in fact.” This language would presumably allow for interpretations of equality that result in equal or equitable arrangements in substance (effect) but which might not meet the test of formal equality defined as fifty-fifty. So for example, inheritance arrangements (two-thirds to men, one-third to women) under Islamic law might pass non-Muslim judicial muster under such language, even as it is recognized that Tunisia, for example, has interpreted Islamic inheritance law itself as allowing a fifty –fifty inheritance split for women and men.

Some non-Muslim women believe that even this kind of arrangement compromises the non-negotiable principle of equality too much. Perhaps. At the same time, some Muslim women, in seeking to protect their own interests, have been willing to deny equality protection to those women, women like themselves, who have decided that equality provides the best liberation and protection for them. Ultimately women have to decide as a group and individually: What kind of compromises, if any, can be made in the cause of women's solidarity?

3. *At the same time, Muslim women are also diverse.* Consequently it is suggested that all Muslims be given the right to petition or appeal to non-Kadhi court on issues related to personal law in the same way they can now go to non-Kadhi courts on civil and commercial small claims matters.

Are there other Opposing Arguments?

Yes

1. The Constitution should be a secular document.

Some people argue that the Constitution should be a secular document that simply authorizes religious freedom without mentioning any particular religion. This, they suggests would be similar a US-styled neutral religious provision.

But a Kenyan –styled arrangement which includes the Kadhi Courts may be a superior arrangement in terms of real freedom of religion and social justice, which remains nonetheless secular.

For example, some in the US have argued that many of the so-called neutral provisions in US law have become mere platitudes behind which the majority masks their intentions to thwart real justice and maintain and capitalize on accumulated advantages. In fact, they argue that it is through these platitudes that the real damage is done. Without measures to correct inequities, s/he who has the advantage, will keep the advantage where neutral laws are applied the same way to everyone without accounting for these inequities. And so racial, ethnic, religious and other minorities, though differently situated, continue to be socially penalized under laws that fail to guarantee the benefit of law to everyone.

Further, simply mentioning different religions does not render a Constitution a non-secular document. Rather, what is most important is that the Constitution does not align the State with the practice of a particular religion. The draft Kenya constitution clearly states that it is a secular state and that there is no state religion. (It should be noted however, that the many times Islam is mentioned should be limited.)

In addition, it is important that particular religious doctrines are not enshrined in the Constitution. Islamic law is not a particular religious doctrine per se. Rather, it is a system of laws. However, it is through the application of Islamic personal law that particular Islamic doctrines come into play. To the extent that Muslims can voluntarily submit themselves to these doctrines and these laws do not bind non-Muslims in any way, the application of these doctrines through the application of Islamic law is less problematic. In addition the full range of Islamic law is not authorized, rather, it is to be applied primarily in the area of personal status, marriage, divorce and inheritance.

2. There should be one law for everyone

The idea of one law for one people is a nice slogan, but even in the United States, upon which this argument is supposedly based, there are many opportunities for choosing between laws and there are at least two sets of laws at any given time, federal and state.

Again, what is important is that the Constitution is supreme. Further all of the rights in the Bill of Rights should apply to each person. Many of the suggested changes to the provisions on equality, establishment of the Kadhi courts and their jurisdiction should ensure that the Constitution and the Bill of Rights apply to everyone.

Further, it is important that there is one integrated judiciary for the administration of justice. Although this system might include different courts for different branches of law, e.g. bankruptcy courts, or for different groups, e.g. juvenile courts, all should be overseen and directed through a single system.

3. Taxes should not be paid for Kadhi Courts

And finally, some have argued that all Kenyans should not have to pay **taxes** for these specialized courts, even as taxes are paid for other specialized courts. However, how much tax revenue is lost or spent on Christian holidays as compared to Muslim, Hindu and other religious holidays. Further, are taxes also spent on Christian and Christian oriented schools, Muslim schools, Hindu schools and the like. Are the teachers for these institutions paid for by the general teachers fund supported by everyone's taxes? It should be remembered that Muslims pay taxes too. And in a country where the majority of people are Christians and the country is Christian oriented, many hidden monetary and other supports provide often-unseen benefits and advantages to this religious practice and orientation.

KATIBA – the newsletter for the Constitution of Kenya Review Commission in its January 2003 issue carried articles on the Kadhis Courts. They not only provide good background information on how the Courts were established in Kenya, but also provide a tally of citizen responses to questions about the Courts. The majority of those responses indicate that the Courts should be maintained.

(Essay updated replacing references to Shari'a law with references to Islamic law or Islamic personal law)

Safeguarding the gains for women in the Draft Constitution

Sponsored by the Federation of Women Lawyers, Institute for Education in Democracy, Kenya Human Rights Commission, and The League of Kenya Women Voters

Kenya is currently in the process of creating a new constitution, and its draft form is now under discussion at the National Constitutional Conference. A constitution should reflect the people from which it emanates - who they are, who they want to be and their aspirations. (As a people and a nation). The constitution should establish the framework for fair and stable democratic structures. The hallmark of a good constitution is not simply that it establishes good democratic structures or how it treats the strong and the rich **BUT** how it protects and enables the weak, the poor, the disabled, the disadvantaged minority and the vulnerable to realise their full human potential.

During the constituency, district, provincial and national hearings convened by the Constitution of Kenya Review Commission, Kenyans made clear that they wanted a society in which - women and men, rich and poor, able and disabled, young and old, advantaged and disadvantaged, majority and minority - would be able to develop their full human potential and to contribute to, participate in and benefit from the political, social and economic life of their country. Further, Kenyans now have leadership at the helm that has demonstrated the political will to create political spaces in which the sometimes-suppressed voices of disadvantaged groups including women can begin to express their aspirations and be heard.

It is within this context that four civil society organizations; Kenya Human Rights Commission, Federation of Women Lawyers (Kenya), Institute of Education in Democracy and the League of Kenya Women Voters; spearheaded an initiative to ensure that the gains for women in the draft constitution reflecting the demands of the Kenyan people are safeguarded.

The groups in the campaign “Safeguarding the gains for women in the draft constitution,” spent months analysing the draft constitution, identifying the provisions that safeguarded democracy, transparency, accountability and the people’s participation in government and highlighting principles of social justice, gender equality and gender mainstreaming. This was in recognition that all of these principles required national unity, the appreciation of diversity, and promotion of just and fair social arrangements. We developed three guiding principles for our work and targeted 29 provisions of the Draft Constitution for which we have suggested alternative language that would clarify and strengthen these principles, which reflect the wishes of the Kenyan people.

We have compiled several materials that contain these principles, suggestions and position papers that are published in three handbooks: a training manual, a delegates’ manual that contains a simplified version of the conference rules and procedures and a parliamentary handbook. These materials shall be available to

delegates at the coalitions tent at the Boas of Kenya. We have provided training to provincial delegates and conducted a survey of delegate's views on certain issues. We received a warm reception from provincial delegates, especially on the clarification of gender issues and language and the conference rules and procedures which we had simplified to ease the tabling of motions, conference protocol and the order of business of conference etc.

Following the warm reception by provincial delegates, we were encouraged to share our campaign with their representatives in Parliament. Surprisingly the reception we received from the people's representatives in Parliament was not as warm. We here, unconditionally state and expect that the issues of fairness and justice for all people, - women and men, poor, disabled, youth, the elderly, disadvantaged and minority groups - in light of the historical and continuing inequality in Kenya, be protected in the constitution. We strongly believe that the task the delegate's face at the National Constitutional Conference must be effectively and knowledgeably undertaken, as it is a momentous task with grave implications for social justice and gender fairness.

Taking the campaign to the peoples representatives: The April Conference in Mombasa

Following consultation with Hon. Paul Muite, the chair of the Parliamentary Select Committee and PLO Lumumba, secretary to the Constitution of Kenya Review Committee (CKRC), representatives of the campaign were invited to the Mombasa conference to share our views and findings on the draft constitution. Experts speaking on a variety of issues were well received, but unfortunately our expert speakers on gender were ridiculed and hardly had an opportunity to make their presentation. Undeterred, Martha Koome and Dr Jacinta Muteshi spoke passionately about the role of the constitution in structuring a just and fair society, the continued injustices borne by women in all walks of life and the need for the kind of fair representation incorporated into the one-third principle found in the draft constitution. The situation had disintegrated so much that a few women including Hon. Linah Jebii Kilimo and male members of parliament pleaded with their colleagues to give audience to our experts. In addition, PLO Lumumba spoke eloquently and knowledgeably about gender roles, women's disadvantages in society, and the need for just, fair and corrective policies.

The next day, the Honorable Raila Odinga, also spoke, passionately and knowledgeably about the continuing gross inequities between women and men, the negative perceptions and treatment of women and the need for gender equality, equity, and fairness. In recognizing that women's socialization contributes to their lack of representation in leadership, he suggested that an arrangement similar to that found in Uganda for women's political participation was necessary in Kenya. The Honorable Kivuthu Kibwana, supported these sentiments.

The campaign “Safeguarding the gains for women in the draft constitution” is based on three principles; social justice, gender equality, equity and fair representation and gender mainstreaming.

Principle One: Social Justice.

A commitment to social justice is a commitment to the policies, principles, institutions, structures, activities and measures that bring about just and fair social arrangements. These measures and arrangements enable - women and men, rich and poor, able and disabled, young and old, advantaged and disadvantaged and majority and minority groups - to live up to their full human potential and to actively *participate in and benefit* from the social, economic, cultural and political life of their country. Given past and present discrimination, inequality and inequities, and barriers to opportunities, commitments to policies, measures, and institutions that can bring about social justice are required. For instance, affirmative action is one such *temporary* social justice *measure* meant to remedy past and present discrimination, promote equality, eliminate the effects of barriers to opportunity, and create mechanisms to bring about equality, equity, party and justice. Further, the retention of Kadhis courts in a single integrated judiciary in the constitution, promotes social justice through a commitment to a historic institution that protects a minority’s way of life, appreciates diversity, and allows the real and full enjoyment of human rights.

Insisting on social arrangements that are just and fair is a worthy cause. And yet, because women are half the population, they are part of every group that exists. They are among the young, the old, the rich, the poor, the economically advantaged and the disadvantaged, the disabled, and they are among majority groups and minority groups and all ethnic and racial groups! Justice for all women would mean, justice for all of these groups. Thus, in the campaign to safeguard the gains for women in the draft constitution, the suggestions for alternative language include language to strengthen the protection, empowerment and representation for disabled people, the disadvantaged, children, and minorities, among others. Therefore, we can no longer say that only certain things fall under "women's issues".

SOCIAL JUSTICE AT WORK: Mixed Member Proportional Representation

The Draft Constitution employs the Mixed Member Proportional System (MMP). We believe this system in Kenya represents a permanent social justice measure meant to bring about a more just and fair electoral system that ensures wider representation of the Kenyan people. MMP combines the two dominant electoral systems: the Constituency also known as First Past the Post system (the current

Kenyan electoral system) and the Proportional Representation system. In doing so, it combines the advantages drawn from both systems. These advantages include:

CONSTITUENCY SYSTEM	PROPORTIONAL REPRESENTATION
Promotes geographical representation	Promotes one-person one vote
Reflects representation among groups/regions	Ensures that no vote is lost
Allows assessment of individual candidates promoting accountability by the electorate	Discourages gerrymandering and therefore rigging
Simpler system to administer	Builds institutions in political party form
	Encourages voting across ethnic lines
	Encourages the election of more women

Under MMP proposed in the draft constitution, the National Assembly (Parliament) would consist of 300 members: **210** would be individuals elected from and representing the different constituencies using the constituency system, while **90** would be party representatives elected proportionately by the country's voters based on the Proportional Representation system. The constituency system means that Members of parliament are elected on a constituency basis, where the individual with highest number of votes wins (the current system). The advantages of this system are that it is easy to administer and different regions and groups get represented. However, the disadvantage is that even if the person only wins with 10 or 20 per cent of the total votes cast, they win the election. Secondly the principle of one-person-one-vote is not respected, for example a constituency with 100,000 registered voters and another constituency with 10,000 voters will each send only one representative to Parliament.

Adding the proportional representation system to the constituency system helps to correct these disadvantages, while retaining its strengths. The proportional representation system means that candidates are elected based on political parties' list. In practice, political parties often identify and make public prospective candidates based on special interest groups, for example minorities and persons with disability, who will occupy the proportional seats in Parliament. These candidates then often campaign for their political parties. Voters may vote for a party based on its prospective candidates, party vision, policies, plans, manifestos, and ideas for the country. Each party receives the number of seats in Parliament proportional to the number of the votes it wins. Thus individuals' votes are represented in Parliament as a percentage of votes cast, whether or not they live in a constituency with 100,000 people or 10,000 people. "One

person, one vote” gets respected and no votes get lost! Further proportional representation encourages party formation across ethnic lines and the development of national parties. Because people tend to vote for parties that include members from their group, parties will tend to ensure that more groups are represented among the candidates. Small groups, disabled, minorities, women and other disadvantaged groups are better represented. Combined, Kenyans get the advantages of both systems.

The campaign believes that the mixed proportional representation system promotes fair representation and enhances effective citizen participation.

The next issue is on the Second Principle: Gender equality, equity, parity and fair representation.

Safeguarding the gains for Kenyans in the Draft Constitution – Part 2

Sponsored by the Federation of Women Lawyers, Institute for Education in Democracy, Kenya Human Rights Commission, and The League of Kenya Women Voters

The constitutional process provides us with an opportunity to do things differently with the ultimate aim of safeguarding the dignity, rights and the humanity of Kenyan people. Through the constituency, district and national constitutional hearings, we heard new voices that reflected the need for change. Although Kenya is rich in human and natural resources, the Kenyan state has been marked by corruption, mismanagement, manipulation of ethnic difference, human rights violations, gender inequality, human suffering and poverty.

However, the Kenyan people have argued and agitated for ten years now for a new constitutional dispensation that is committed to revamping the institutions, principles and mechanisms that hindered development. They have demanded that the country employ social arrangements that ensure justice for everyone, preserve the rich and diverse heritage of its various cultures, and unleash the full potential of its people. Kenyan people recognized that to get results different from those in the past, different governing and social structures were needed. Consequently they overwhelmingly elected new leadership and continued their demands for a new constitution.

Nevertheless, actions to scuttle the constitutional review process and deny Kenyans the change for which they have fought so hard continue. Although we have new leaders, this leadership has grown up with the values and political skills learned under a system that facilitated decay. If the review is scuttled, it will mean that Kenyans will labor under the same institutional, legal and philosophical framework of the past that will most likely bear similar results. For Kenyan women, this means continued discrimination and marginalization.

We in the campaign for safeguarding the gains for women in the draft constitution:

- CONDEMN, all attempts to derail the constitutional review process.
- DEMAND a constitution that will stand the test of time and is a framework for good governance, democracy, accountability, fairness and justice for all of Kenya's women and men.
- CALL UPON, all Kenyan people of good will to hold accountable those who are entrusted with ensuring the success of the constitutional review process.

In evaluating the quality of the constitutional process, we in the campaign for safeguarding the gains for women in the draft constitution, will ultimately judge its success on the basis of whether the final Constitution embodies the institutions, policies and measures that promote social justice, gender equality, equity, parity and fair representation and gender mainstreaming. The promotion of these principles is about securing a better world for both men and women because gender refers to both women and men.

The campaign for safeguarding the gains for women in the draft constitution is based on three principles:

1. Social justice;
2. Gender equality, equity, parity and fair representation; and
3. Gender mainstreaming.

Principle Two: Gender equality, equity, parity and fair representation

What is Gender? Gender refers to women's and men's roles, responsibilities, expectations and behaviours that are defined socially and culturally by society on the basis of their biological sex as either male or female. The ways in which women and men therefore operate in society is always taught and learnt, because these are things, which are expected of a woman and man by culture. We see this very clearly when we examine the differences in the way girls and boys are raised. For example, in many African cultures the tasks we give girls and boys show gender expectations for the future. Girls, unlike boys, are more likely to be given domestic and household tasks in the home. Boys help less with household tasks because customs do not encourage it or they are encouraged to be involved in activities that are outside the domestic sphere. Gender roles are also subject to change over time; for instance, what it means to be a woman or man can and does change. In Kenya, for example, especially among the poor, it is estimated that women now head one in three households. Also in many Kenyan communities as more men migrate to the towns in search of paid employment, more women, left behind, are now found performing responsibilities such as herding or clearing fields which were traditionally recognised as male activities. Gender roles and responsibilities are therefore influenced by socio-economic, political and cultural contexts and further affected by age, ethnic group, socio-economic class, and race. Importantly, our gender roles will determine whether we will have access to resources, to opportunities and to rights. For example, across many of our African cultures, land is a very valuable resource often controlled by men.

Using a gender perspective therefore helps us understand how women and men's human rights may be adversely affected by how we construct female and male roles in society.

The draft constitution has paid attention to gender issues by taking into account the concerns that universally affect Kenyan men and women. Through the language and words it has selected to use, the draft constitution seeks to achieve just and fair social arrangements for women and men. The language in the draft constitution has therefore been crafted to shape perceptions and consequently is steering gender relations for both State and non-state actors in new ways.

We in the campaign recognise that words and language are socially and culturally

visualise a man when they hear the word 'president'. While general words such as "a

person", "a human being" or "people" suggest inclusion of both women and men. Therefore what a word stands for is important since words are never neutral or

random. In addition, words and language allow us to express our lives and to understand and share our experiences. As language use is often the very basis of the inequity and inequality experienced by women, the campaign seeks to redress this issue by making proposals for alternative language to strengthen the provisions in the draft constitution.

Given the power of words, the debate at the constitutional conference is one in which women and men will be discussing language issues. The focus on language emerges out of our understanding that language is an important tool and resource. The campaign is bringing a focus on gender because 'Gender' is an empowering word and language that enables us to bring together both women and men into the constitutional discussions about equal participation, power and respect for all. At the same time, we also bring specific attention to "women" because women have been more negatively affected by the gender roles and responsibilities that deny them equality and keep us from recognizing the rights of women.

Principle two of the campaign thus focuses much more on gender and gender relations as well as on ideas of equality, equity and fair representation - words and language essential to addressing issues related to gender. These words and language can inform a gender perspective and they also underlie many of the principles the campaign seeks to protect and to advance.

The language of Equality

Equality for all people is a foundational principle of modern democracies coupled with the principle of non-discrimination. When we speak of gender equality we are referring to the equal valuing by society of women and men. However, women and men are not the same, not only biologically but also because of socially constructed differences upheld by our beliefs and perpetuated socially. These result in norms, practices and assumptions made about men and women as to their roles, capacities, needs and interest and these in turn influence our policies and their implementation. Differences between women and men whether biological or socially construed have often resulted in women experiencing disparity and disadvantage. It is not enough, therefore, to only focus on treating women and men the same, we must also ensure that they have the same access and benefit of law. This requires identifying and acknowledging the **different needs** of women and men in our communities.

Consequently we must expand our understanding of equality by utilizing the more broader and deeper substantive model of equality. This model requires that there should be:

"EQUALITY UNDER LAW," the equal valuing of women and men by the Constitution and the laws of Kenya.

“EQUALITY OF OPPORTUNITY” which means that women are equally entitled to the country’s resources; duly secured by the Constitution, laws, policies and institutions. To ensure equality of opportunity, requires us to remove discriminatory barriers. Moving towards equality between women and men means that it is essential to make a whole range of resources equally accessible to both women and men; including resources in terms of, respect, participation in all aspects of life, access to institutional power, wealth, control over one's life, security, etc so that women and men realise their full potential.

“EQUALITY OF RESULTS” also known as equality of impact, this is the real achievement of positive change for women and not just equality that is strongly worded on paper. It is achieved by recognising the differences in needs, interests and requirements of women and men so as to ensure equality. This approach recognizes that in order to distribute benefits equally between women and men, approaches to promoting women’s rights must transform unequal power relations between men and women. For this to happen there must not only be equal opportunity for men and women but there must be equal access to the opportunity. Therefore, the constitution, legislation, policies and programs must aim at creating enabling conditions.

The campaign also recommends other words and language that strengthen our discussion on gender equality. For example: recognising the disadvantages that accrue to women because of their gender, we use the word **equity**. It means fairness and we must compensate for women's disadvantages in order to achieve equality. The language of **parity** on the other hand means that there must be full equality and balance between women and men in all areas of life: national political, economic, and social development. Finally, **fair representation**, which is a central principle of democracy, is about ensuring that women, who make up half the Kenyan population, have an equal voice in determining the way their society is governed. This requires that women in large numbers must be present and participating at all levels and centres of power in their society.

The “At Least One- Third” Principle

The one-third principle is a principle! It is meant to suggest that never again will only men or only women represent the men and women of Kenya! The face of government will reflect the face of Kenya, a Kenya that comprises men and women. The goal of the provision is gender parity. As such, it forbids a time when women shall takeover from men or where men shall dominant women in terms of representation. Further the “at least one-third principle is a basic minimum, consistent with the idea of parity. This means that while neither women nor men may comprise less than a third of all elective and appointive office, the goal is 50 per cent representation of each.

The principle of “at least one-third representation” of each, both women and men is crucial to the idea of fair representation, an essential component of democracy. So too are the ideas, contained in the draft, providing that persons with disability, the youth and other minorities be represented in government. This ensures that the unique perspectives gained by the living conditions of these groups are reflected in decision-making, policies and measures to ensure that all people of differing situations participate in, enjoy and benefit from the economic, cultural and social life of the country. While able-bodied majority men may also be capable of representing these groups, including women, they often lack the will or the knowledge about these groups’ experiences to adequately do so.

For example, although the overwhelming majority of men in Parliament are supposed to represent boys, girls, women and men of their constituencies, girls and women in those constituencies for the most part and in fact all over Kenya continue to suffer higher levels of illiteracy, ill health, AIDS, inadequate and lower levels of nutrition, less education, restricted access to property and overwhelming discrimination and rights violation. Of course these problems are carried over from extreme historical inequalities believed and practiced by both women and men. The effects however, particularly in the modern state and economy means that while women contribute to their homes, families and communities, society as a whole has not recognized this contribution nor benefited fully from their vast talents and work. Hence the urgent need for their potential to be fully enabled, empowered and developed. Unleashing their potential would mean that they would engage in the public and private sector on the same terms as men, substantially adding to society’s health, power and wealth. One of the ways to unleash this power is to bring women to the table of decision-making. The “at least one third principle” seeks to guarantee this.

One of the pillars of democracy is the requirement that people choose their leaders. Often however, in modern electoral systems, people elect those who present themselves to campaign. Often the candidates who do so have the money and social backing to do this. Significant barriers limit the number of women who run for election. These include the socialization of both women and men who do not value women leadership, as well as, the historical barriers to property and to other cultural, social and economic resources.

The one-third principle seeks to balance representation. It suggests that while human attitudes and behavior take a long time to change, changing institutional requirements can facilitate and enable this change. By ensuring that women represent at least a third of the face of government, we change our reality and begin to raise a future generation accustomed to seeing women in leadership. This generation will come to expect and thrive in social and institutional arrangements that are fairer to Kenyans of all walks of life. Whether they are girls or boys, from minority groups or not, with disability or not, young or elderly – they will expect and possess a Kenya with the social arrangements capable of

cultivating their full human potential so they, in turn, can contribute their unique talents to the society.

Making the One-Third Principle Work

While the one-third principle requires that both women and men each comprise at least one-third of the appointive and elective offices, the principle by itself does not create a mechanism to accomplish its goal. Therefore mechanisms in the Constitution should be created. They should be created in the constitution so as to ensure that the principle becomes operational for the very next election. In a short period of time, instead of a hundred or more years, the government of Kenya will begin to represent the face of Kenya.

The organizations in the campaign for Safeguarding the gains of women in the draft constitution, considered many ways of making the one-third principle work, including using models such as those found in Uganda and South Africa. However, many of the ideas required substantial modifications to the draft constitution. We came up with a proposal that will not significantly alter the people's draft constitution but yields the constitutional goal of "at least one third" representation by both women and men. We challenge others to design a better system. If a superior system is proposed we will gladly sign on to one that makes the laudable goals of gender parity, fair representation and the one-third-principle work.

The proposal in short is as follows: The draft constitution contemplates 300 seats in Parliament. In order for women to comprise one-third of these seats they would have to win 100 seats. Given Kenya's past voting patterns, only approximately 20 seats will be won by women under the current system. We propose that only women be allowed to contest for the 90 new seats proposed under the mixed member proportional representation system. These women must include disabled persons, youth, minorities, among others and come from every district.

Third Principle: Gender mainstreaming

What Is Gender mainstreaming: Gender mainstreaming is a strategy for making women and men's concerns an important consideration in designing and implementing policies and programs in all political, economic and social spheres. This is necessary as certain policies may impact differently on men and women because of the different roles and responsibilities they have in any given society. Considering these different roles and expectations in policy making is meant to ensure that inequality is not perpetuated.

For example, while reductions in health care services may affect the health of both men and women, it may have a more severe impact on women because

women's roles in the family often mean they are responsible for providing care for sick children, spouses and the elderly. Therefore, when health services become less available they must spend more time and effort providing for their loved ones who are sick. In another example, certain agricultural policies may affect men and women differently because of where the majority of women and men are differently located and work in the agricultural economy. In addition, in cases where women's economic participation is overlooked, using a gender perspective makes this work visible.

In a properly functioning democracy the diversity among and between women and men must be taken into account. A democracy must put all women and men at the center of policy making; acknowledge and utilize the resources of all women and men; and make gender visible (the multiple, differing and various roles of men and women) at all levels of society. This will enhance the practice of social justice for all.

In order to mainstream gender considerations, a variety of offices or positions must be charged with making sure that gender concerns are available to policy makers. They therefore must have processes to raise gender awareness, collect and analyze sex-disaggregated data, forge links and coordinate activities among the private, civil society and other sectors of society, and develop avenues for getting the information to policy makers. In some of our suggested alternative language we have identified offices and personnel that should be responsible for gender mainstreaming.

GENDER MAINSTREAMING AT WORK: GENDER COMMISSION:

The Draft Constitution currently provides for a Gender Commission within the Human Rights and Administrative Justice Commission. We believe that this body should remain a constitutionally mandated agency but that it must be a separate independent Commission that will act as the lead national agency on gender issues. A gender commission is particularly important for women's participation in the life of the country given the historical and continued inequities that women face. Where efforts to improve women's lives have been successful, a lead governmental agency with the sole mandate of ensuring that gender equity issues are consistently taken into account and which has the authority, stature, funding, personnel and ability to coordinate its efforts with other offices, has been created.

What is A Gender Commission? A Gender Commission is a constitutionally mandated, strong, independent, autonomous institution that is responsive to all in ensuring gender equality and gender responsive governance. The Gender Commission has several responsibilities and duties:

- ◆ It will examine human right complaints that are gender specific and are submitted by women, men and other non-state actors.
- ◆ Appoint special rapporteurs to investigate specific human rights concerns of women and men as gendered persons and to promote action.
- ◆ It makes recommendations to the government on women's rights issues.
- ◆ It reviews, evaluates and recommends measures including priorities to ensure the full integration of women for economic, social, political and cultural development.
- ◆ It will ensure that the gender dimension is taken into account in all relevant state policies and actions at all levels in accordance with the guiding principles, procedures and rules for constitutional commissions and constitutional offices as outlined in chapter 17.
- ◆ It will bring attention and advice to the concerns involved in promoting equality of opportunities between women and men thus contributing to an environment conducive to democratic practice and transformation.
- ◆ It is an advisory body to the government on policies and programs for the advancement of women. Therefore it will conduct policy studies and advocate for the issuance of legislative measures concerning women.
- ◆ In collaboration with ministries and the judiciary it will help the government to be responsive to gender issues and concerns.
- ◆ Ensure that the State lives up to its obligations by promoting the implementation of (CEDAW), a UN convention on the elimination of discrimination against women
- ◆ The actions of the Gender Commission can send out broad social messages that advocate for shifts in existing and specific areas of gender power relations.

A variety of other mechanisms to ensure that women and men have recourse to enforcing their rights and freedoms can and should exist at multiple levels of government concurrent with the "Gender Commission," including for example, a human rights commission, an ombudsperson, family courts, disability boards, constitutional courts to name just a few. However, although they can all provide a variety of needed forums for enforcing rights, for lodging complaints, and for application of remedies for discriminatory treatment, they, nevertheless can be limited in safeguarding the constitutional gains for women if they are non-representative, gender unaware or unresponsive to progressive social change. Thus the need for a constitutionally-mandated Gender Commission to safeguard the important gains for women in the constitution.

The Challenge that we put before our society is to:

- Support the development of skills for women and men to challenge a male-vision- of- the-world and provide an alternative to that world that is a People-Centered-Vision.

- Build strong independent, autonomous organisations to represent the needs and demands of a diversity of women and men to ensure fair and just social arrangements.
- Support the participation in all levels of state organs for all women and men - that is the democratic process.