

# The Kenyan Constitutional Reform Process: A Case Study on the work of FIDA Kenya in Securing Women's Rights

Grace Maingi

## Introduction

Constitutional reform processes are always highly political, and driven by multiple interests. Despite contemporary debates on the gaps between constitutional positions on women's access to rights and the day-to-day experiences of women in contexts of poverty and patriarchal norms, there is broad consensus that constitution-building offers an invaluable opportunity to translate ideals of gender equity and equality into law. This article tracks the process through which FIDA Kenya, the Federation of Women Lawyers in Kenya, worked (with allies) during 2010 to demand that the Kenyan constitutional reform process recognized the importance of women's rights to equality at the highest level of legal authority. The case study is organized into chronologically-based categories of work based on the different phases of the reform process. It suggests that making the demand for women's rights within high-level processes of legal reform entails a huge range of tasks and skills, which include experience in legal analysis and the drafting of law, media strategy, political networking, community education, and intensive planning in often unpredictable situations. While none of this would surprise legal activists, and organizations already committed to securing women's rights within the law, the level and demands of the work suggest that we cannot ignore the need to continue to document the nature of women's right work in the legal terrain. Without such documentation, the intricacy and sophistication of the work, as well as the lessons we learn from undertaking it, may well become obscured. It is relatively simple to acknowledge that an organization such as FIDA Kenya was one of many who played a key role in Kenya's constitutional reform process of 2010; it is more difficult to remember the details of that role and the layers of the work involved because as time passes these become regulated to the archival files within NGOs and the memories

of the individuals primarily involved. This case study aims to describe some of the details of FIDA Kenya's engagement with the constitutional reform both as a contribution to legal feminist history with the continent, and as a way of honouring a year of difficult and exciting work within FIDA Kenya.

## Background

Kenya has had a very interesting constitutional history. Kenya's independence talks were carried out in constitutional conferences held at Lancaster House, London and Nairobi in 1963. It was at these talks that the Independence Constitution was prepared. In May of the same year elections were held on the principle of one person one vote in leading to victory for the Kenya African National Union (KANU). Internal self-government was attained on 1 June and full independence on 12 December, 1963. In 1964 Kenya did away with the Queen as the Head of State by becoming a republic with an Executive President. Mzee Jomo Kenyatta who had been the Prime Minister became the first President of Kenya. The opposition Kenya African Democratic Union (KADU) merged with KANU, thus making Kenya a *de facto* one party state.<sup>1</sup>

The 1963 Constitution of Kenya has been amended several times since independence. The most far-reaching amendments are those which dismantled the multiparty democracy and ushered in a one party state and later the reversal of that system and the reintroduction of a multiparty political system in the 1990s. Constitutional rule in Kenya has been rocked over the decades since independence by several unexplained assassinations of prominent political figures. These include those of Pio Gama Pinto, Tom J. Mboya, Josiah Mwangi (JM) Kariuki, and Robert Ouko. These assassinations had serious repercussions on the Kenyan body politic.<sup>2</sup>

In 1966, the first Vice President of Kenya Jaramogi Oginga Odinga resigned from the ruling party and government to form the Kenya Peoples' Union (KPU). He was joined by other prominent politicians who were dissatisfied with the way the country was moving politically. These included Bildad Kaggia and Achieng Oneko. Three years later in 1969 KPU was banned, thereby confirming the one-party status of the country. In August, 1978 the first president of Kenya Mzee Jomo Kenyatta died and was succeeded by Daniel Arap Moi.<sup>3</sup>

The period immediately following the death of the founding President was characterised by continued economic progress. Kenya was widely regarded as a good example of an African country that appeared to be truly on course

to becoming a newly industrialised country. Economic growth consistently stayed above the 7% gross domestic product.<sup>4</sup>

In 1982 two events of constitutional importance for Kenya took place. First, there was an attempt to remove the government from power by unconstitutional means – i.e. by use of military force by some sections of the Kenyan army and Airforce. This was unsuccessful. Secondly, Kenya which had only been a *de facto* one party state was officially declared a *de jure* one party state. This was done through the adoption of Section 2A of the Constitution by Parliament, followed by protracted struggles by Kenyans demanding for the resumption of multiparty activity in the country. These struggles took various forms including seminars, workshops and at times demonstrations which were sometimes crushed with excessive force by the members of the police force. The most prominent of the demonstrations were those referred to as the “*Saba Saba*” uprisings of 1990.<sup>5</sup>

After the failed military coup of 1982 the ruling regime embarked on a process of purging elements in the military, government and academia viewed as being dissidents intent on undermining the government. Detention without trial and crackdown of ‘revolutionary movements’ and the free media became commonplace. For all intents and purposes, Kenya was a one party dictatorship between 1982 and 1991. The next phase of reforms, which took place over the period 1989 and 1992, was triggered by the fall of the former Soviet Union and subsequently the Berlin wall, events that marked the collapse of global communism and the genesis of a wind of change in favour of Western style democracy and the end of the cold war.<sup>6</sup>

As all this was going on, pressure for economic reforms fronted by the two Bretton Woods institutions namely, the International Monetary Fund (IMF) and the World Bank was intensifying. Governments in the developing world urged to adopt structural adjustment programmes (SAPS) in order to become eligible for loans from the IMF and the World Bank. SAPS required imposition of user charges for public services, including essential ones such as health and education, many of which were previously provided free by governments. The result was reduced access to these services by the majority poor citizens majority of whom are women. Levels of poverty and deaths from preventable diseases escalated to unprecedented proportions.<sup>7</sup>

The authoritarian nature of the government of Kenya resulted in a state of affairs where appointments to public office were based on loyalty to the President and the ruling party rather than experience and capacity of the

holders of those offices. The result was poor economic management and intermittent breaking of relations with the country's major bilateral donors. Levels of corruption escalated at the same rate at which the standards of living of citizens plummeted. Budgetary indiscipline, compounded into a crippling domestic debt problem. The government's operations and maintenance budget dropped from 46% in 1980 to 25% in 1996 even with increasing donor assistance.<sup>8</sup> A year later in 1991 Section 2A was repealed and political pluralism was allowed once again in Kenya.

The long awaited constitutional review process came in 1997 when the Constitution of Kenya Review Commission Act was passed to provide a framework for constitutional change. Following extensive negotiations between the government and civil society, changes were effected in that law through the Constitution of Kenya Review Commission (Amendment) Act, 1998. The new changes managed to incorporate a people driven constitution-making process the insistence by those in government and the ruling party that it is only parliament that could review the constitution stalled the process again. It is at this point that the Ufungamano Initiative; a citizen's lobby group on constitutional change led by the religious sector came into life. The mandate of this group was to facilitate the making of a constitution for Kenyans by themselves. Following the intervention by Prof. Yash Pal Ghai, the Chairman of the Constitutional Review Commission, the two initiatives – i.e. the parliamentary group and the Ufungamano group, merged to form one Commission.<sup>9</sup>

The Constitution of Kenya Review Commission (CKRC) was formed through the enactment of the Constitution of Kenya Review Commission (Amendment) Act of 2001, however after consultation that lasted less than a year the march towards a new constitution was stopped when Parliament was dissolved in October 2002 to prepare for the general elections at the end of that year.

The CKRC continued with its original work of collecting views from Kenyans after the National Alliance Rainbow Coalition (NARC) won the December 2002 general elections. The outcome of that process was a Draft Constitution (Ghai Draft) which was presented to and adopted by a National Constitutional Conference, of which FIDA Kenya participated in, as the Bomas Draft. This draft was however contested and after the Bomas process collapsed, the Attorney General prepared the Proposed New Constitution of Kenya (2005) or the so called Wako Draft that was subjected to a referendum on the 21<sup>st</sup> of November 2005 and was rejected.

The rejection of the Proposed Constitution in 2005 engendered a tense political environment that contributed to the disputed Presidential elections of 2007 and the resultant post election crisis. The crisis was resolved through the National Accord and Reconciliation Agreement mediated by the African union appointed Panel of Eminent Persons led by H.E. Kofi Anan, the former UN Secretary General. The Agreement was underpinned by the National Accord and Reconciliation Act (2008) (NARA). NARA established the coalition government, a framework and institutions to initiate a constitutional review process that would lead to a new constitution for Kenya. Notable among the key concerns was the Agenda Four of the National Accord that called for the resolution of long standing constitutional, legal and institutional reforms, including the passage of a new Constitution.

Parliament enacted the Constitution of Kenya (Amendment) Act, 2008 and the Constitution of Kenya Review Act, 2008 to serve as the legal framework for achieving a new constitution.<sup>10</sup> The Constitution of Kenya Review Act, 2008 provided for the following:

1. The establishment or recognition of four organs to be involved in facilitating the review process and drafting the new constitution.
2. The procedure and the modalities of the work of these organs especially as regards the achievement of consensus on the so called contentious issues.
3. The provision for the holding of a referendum in which all eligible voters will decide on the new constitution.

The four organs established or recognized by Parliament to help achieve a new constitution were-

- The Committee of Experts
- The National Assembly
- The Parliamentary Select Committee
- The Referendum - People of Kenya

These organs were established and expected to operate independently and not accept instructions from any person. The Committee of Experts and the other organs were required by the law to take into account the following as guidelines in their work.

- (a) ensure that the national interest prevails over regional or sectoral interests;

- (b) be accountable to the people of Kenya;
- (c) ensure that the review process accommodated the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;
- (d) ensure that the review process–
  - (i) provided the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution;
  - (ii) was guided by the principle of stewardship and responsible management;
  - (iii) was conducted in an open manner; and
  - (iv) was guided by respect for the principles of human rights, equality, affirmative action, gender equity, and democracy;
- (e) Ensured that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

## **The Committee of Experts**

The Committee of Experts was the main technical organ in the process. It comprised nine experts who were nominated by the National Assembly and appointed by the President as per the requirement of the Act. In nominating persons for appointment as members of the Committee of Experts, the nominating bodies (the National Assembly and the Panel of African Union Eminent Persons) were required by law to have regard to the experience and academic qualifications of the applicants, the principle of gender equality and Kenya's national character and diversity.

Six of the members of the Committee were Kenyans and three members were non-Kenyans. The Committee of Experts was required by law to–

- (a) identify the issues already agreed upon in the existing draft constitutions;
- (b) identify the issues which were contentious or not agreed upon in the existing draft constitutions;
- (c) solicit and receive from the public written memorandum and presentations on the contentious issues;
- (d) undertake thematic consultations with caucuses, interest groups and other experts;
- (e) carry out such studies, researches and evaluations concerning the

- Constitution and other constitutions and constitutional systems;
- (f) articulate the respective merits and demerits of proposed options for resolving the contentious issues;
  - (g) make recommendations to the Parliamentary Select Committee on the resolution of the contentious issues in a manner that will be for the greater good of the people of Kenya;
  - (h) prepare a harmonized draft Constitution for presentation to the National Assembly;
  - (i) facilitate civic education in order to stimulate public discussion and awareness of constitutional issues;
  - (j) liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution.

The Committee of Experts prepared its report and the harmonized draft Constitution and published the draft Constitution for a period of thirty days; and after that ensured that the report and the draft Constitution were made available to the public. After receiving the views of Kenyans the Committee of Experts reviewed the draft Constitution and incorporated the views of the public and then presented the draft Constitution and the report to the Parliamentary Select Committee for deliberation and consensus building on the contentious issues. In debating the contentious issues the Parliamentary Select Committee was required to take into account the recommendations of the Committee of Experts.

FIDA Kenya was able to participate in the various public forums held by the COE and specifically presented a memorandum to the COE on the women's agenda for the Constitutional review process. The memorandum and presentations at the public forums borrowed heavily from the past work FIDA Kenya had undertaken at Bomas, the draft constitution prepared by FIDA Kenya, IED, the League of Kenya Women Voters and the Kenya Human Rights Commission.

During this period, FIDA Kenya was also able to undertake civic education on the harmonized draft constitution in thirty three constituencies countrywide. This initiative was geared towards drawing public attention to the process and content of the Harmonized draft. Various challenges were faced during this civic education process which included fear and suspicion of the Constitution due to the post election violence, poor distribution of the harmonized draft constitution, the illiteracy still prevalent within Kenya's

poorest communities, and popular ideas rooted within Kenya about the legitimacy of women as full citizens when it came to questions of inheriting property and reproductive control.

Even more difficult challenges for FIDA Kenya arose however once the Parliamentary Select Committee, which was responsible for tabling the report and draft Constitution received from the Committee of Experts before the National Assembly, began its work. Analysis of the PSC draft revealed to us that a lot of gains made in the Harmonized Draft Constitution prepared by the COE were taken away in the PSC Draft. In summary, these can be named as:

- Significant losses for the protection of the rights of children, women, people with disabilities, and minority groups, among others.
- The PSC Draft represented a significant setback in the government's commitment to protecting and fulfilling economic and social rights, specifically the rights to social security, health, education, housing, food and water.
- The PSC Draft undermined transparency and civil society participation by removing key language protecting the right to information and freedom of association.
- The PSC Draft eliminated language outlining the activities which the government must take to meet its human rights obligations.
- The PSC Draft eliminated the Constitutional Court and its accompanying powers.

It is important to this case study to spell out the specific way in which the PSC Draft represented significant losses for ensuring that women's rights were upheld in the Kenyan constitution.

### *Eliminating Equal Rights around Marriage*

The PSC Draft eliminated the COE Draft language affirming that "Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage, and at the dissolution of the marriage." This affirmative declaration of equal rights was replaced by language that "Parliament shall enact legislation that recognizes the rights of parties to a marriage at the time of marriage, during the marriage, and at the dissolution of the marriage." The word "equal" was markedly absent in the PSC Draft.



### *Threats to Women's Reproductive Health*

The PSC Draft added language stating that “The life of a person starts at conception” and that “Abortion is not permitted unless the in the opinion of a registered medical practitioner, the life of the mother is in danger.” The PSC Draft also removed language affirming the right to reproductive health care.

### *Eliminating Language Affirming Shared Parental Responsibility for the Care of Children*

The PSC Draft removed language stating that “A child’s mother and father, whether married to each other or not, have an equal responsibility to protect and provide for the child.”

In doing so, the PSC Draft left in place a legal regime where mothers are generally held solely responsible for providing for children born outside of marriage.

In the PSC Draft, children were now subsumed within the category of vulnerable groups. The PSC Draft removed the section in the COE Draft (Section 41) which specifically outlined the rights of children, including among others:

- the equality of children regardless of whether they are born within or outside of marriage,
- (as mentioned above) the right to care from both parents regardless of their marital status
- the right to “free and compulsory basic education,”
- the right to “adequate nutrition, shelter, basic health care services and social services,”
- the right “not to be subjected to violence or to be treated or punished in a cruel, inhuman or degrading manner in schools and other institutions responsible for the care of children,”
- the right to “be detained for only the shortest appropriate period” and to “be kept separate from adults in custody.”

In the PSC Draft, persons with disabilities were now subsumed within the category of vulnerable groups. The PSC Draft removed the section in the COE Draft (Section 43) which specifically outlined the rights of persons living with disabilities, including among others:

- the right to “have access to education and to institutions and facilities for persons with disabilities that are as integrated into society as a whole as is compatible with the interests of those persons,”

- the right to have reasonable access to all places accessible to the public, to public transport and to information and communications;
- the right to “use of sign language, Braille and other appropriate means of communication,” and
- “equal rights to inherit, access, and manage property.”

The PSC Draft also represented significant losses for ensuring that the rights of ethnic and religious minorities and marginalized groups were upheld in the constitution.

### *Eliminating the Articulation of Multiple Rights for Minority and Marginalized Groups*

In the PSC Draft, minority and marginalized groups were now subsumed within the category of vulnerable groups. The PSC Draft removed the section in the COE Draft (Section 44) which specifically outlined measures the government should take to ensure that minority and marginalized groups can, among other things:

- “are accorded special opportunities in the educational and economic fields,”
- “are accorded special opportunities for access to gainful employment,” and
- “are assisted to have reasonable access to water, health services and transport infrastructure.”

### *Eliminating a Minority Rights Commissioner*

The PSC Draft replaced the Human Rights and Gender Commission contained in the COE Draft with an Equality Commission. In doing so the specific designation of a “Minority Rights Commissioner, who shall have special responsibility for the rights of ethnic and religious minorities and marginalized communities” was eliminated.

### *Eliminating Language to prohibit compelling a person to indicate race or ethnicity*

Under the Equality and Freedom from discrimination provision, the PSC draft removed language stating that “A person may not be compelled to indicate or define that person’s ethnicity or race.”

In summary, then, the PSC Draft seriously weakened constitutional protections for economic and social rights. The PSC Draft consolidated

into one article the freestanding rights to social security, health, education, housing, food, and water as they were elaborated in the COE draft. It then framed these rights solely in the context of progressive realization, stating that the “State shall take legislative, policy and other measures, including the setting of standards to achieve the progressive realization of the rights of every person to” these rights. In doing so, as discussed below, it weakened the contents of these rights significantly. In addition, the PSC Draft removed the provisions which would allow oversight and accountability for ensuring whether the government was meeting its progressive realization obligations, including removing a freestanding right to information and removing the clauses which would guide accountability body in determining whether the government was complying with its obligations.

### **Fida Kenya’s initiatives after the PSC Draft**

Following the presentation of the PSC Draft FIDA Kenya undertook various initiatives to counter the negative effect of the PSC draft on both specific and general issues and both on its own and as part of various networks. FIDA Kenya specifically focused on issues around the bill of rights, specifically gender related provisions and the Judiciary.

During this period FIDA Kenya in conjunction with the Reproductive Health Rights Alliance (RHRA) worked towards highlighting the negative effects of the clause on right to life. This was done at two levels that is activities geared towards policy makers, that is the Committee of Experts and Parliamentarians and on the second level activities geared towards changing public perceptions on reproductive health rights and abortion in general.

In order to successfully mount this campaign to have the language in the PSC draft amended to ensure that the right to life clause was left to read as per the Harmonized draft, FIDA Kenya and the RHRA were able to establish a rapid response unit to counter negative messaging.

Due to the high level of negative portrayal of reproductive health rights and the clause on abortion, it was essential to ensure that any misleading information on abortion and reproductive health rights developed by the anti choice movement was countered with researched and factual information. This led to the development of clear messaging on the effects of article 25(4) of the PSC draft which in simple terms meant that women would only be able to procure an abortion if their life was in danger and that this could only be determined by a doctor. This bore several challenges that include

that in Kenya there are under one hundred registered gynecologists working in public health facilities countrywide therefore limiting women's ability to receive effective care.

Simple messaging was used to shift public opinion and perception and this included using medical practitioners and women leaders to speak out together with the same message. This also included use of media to propagate the messaging through the use of vernacular radio, use of both print and electronic media with widespread coverage and other information education and communication tools such as pamphlets and fliers.

The Judiciary is the custodian of the Constitution. It is mandated to ensure that the protection of the rights provided in the Constitution and polices the boundaries between the powers of the various state organs. In order to fulfill its inherent constitutional mandate, the Judiciary must enjoy independence from other branches/organs of government. Consequently, independence of the Judiciary is a crucial means to an end. The independence and accountability of the Judiciary is key to the realization of the rule of law, social, political and economic stability of any nation.

FIDA Kenya in conjunction with the Kenyan Section of the International Commission of Jurists (ICJ Kenya and the Kenya National Commission on Human Rights (KNCHR) reacted to the decision of the Parliamentary Select Committee regarding transitional clauses on the Judiciary in the Harmonized Draft Constitution through various methods including issuing press statements on the same. The PSC draft proposed to maintain the Judiciary unaltered, even as the country sought reforms in its institutions as part of the constitutional reform process.

This position was a departure from the initial proposal in the Harmonized Draft Constitution which had taken into account the general consensus on judicial reforms and had gained popular public support. The transitional clauses in the COE draft proposed the reform of the country's judicial system, and provided that upon the enactment of the new Constitution, the President and the Prime Minister would be required to establish an Interim Judicial Service Commission to serve for a year.

The Commission would be mandated to reform the Judiciary by subjecting all judges and judicial officers to a conduct review. Whilst the review was being conducted, all judges and other judicial officers - including current head of judiciary - would continue to serve but under an acting capacity.

There are several reasons why FIDA Kenya was opposed to maintain the

status quo in the Judiciary. First, the procedure by which judicial appointments had been made was opaque and did not lend itself to public confidence. It is not possible to argue that the composition of the current Judiciary has been arrived at on the basis of merit alone. While a number of the serving judges are competent, and enjoy the confidence of colleagues in the legal profession, a large number of others are unfit for the offices that they hold and are of great disservice to the institution and their colleagues.

Secondly, the Kenyan Judiciary has consistently been the subject of criticism and declining public confidence from the political class, media and most importantly, the general public. A number of credible independent assessments of the Judiciary have resulted in findings that there was an urgent need for an overhaul of the Judiciary. The UN Special Rapporteur Professor Philip Alston and the Commission of Inquiry into Post Election Violence (CIPEV) Report made specific recommendations on the need to urgently reform the Judiciary.

Thirdly, the PSC had proposed a strong presidential system “with checks and balances”. One of the checks and balances on a strong presidency is a strong Judiciary. As demonstrated in several situations, including its participation in the hurried swearing-in of President Mwai Kibaki for his controversial second term, which is the acknowledged trigger for the post election violence, the current Judiciary lacked civic courage and had no capacity to withstand extreme political pressure.

FIDA Kenya also participated as an active member of the Katiba Sasa<sup>11</sup> Campaign which was a civil society initiative aimed at ensuring that Kenya got a new constitution. Through the Katiba Sasa! Campaign FIDA Kenya was able to ensure that women’s issues remained key within the constitutional debate. The Katiba Sasa! Campaign maintained regular contact with the public through its regular Sunday press conferences and actively engaged Members of Parliament and the PSC on key fundamental issues. FIDA Kenya’s active involvement in the Campaign as a member of the technical committee ensured that women’s rights matters were mainstreamed.

## National Assembly Debate

When the Revised Harmonized Draft (RHD) was tabled before Parliament there were over one hundred amendments proposed by Members of Parliament to the same. This was not an ideal situation for FIDA Kenya or women in general as we were of the opinion that any tampering with clauses within

the RHD would serve to water down the key principles around human rights and equality. Various strategies were employed to counter the MPs proposed amendments.

FIDA Kenya in conjunction with other civil society groups presented a petition to Parliament to halt any amendments to the RHD. In addition to this FIDA Kenya and other key women rights organizations organized several meetings with female MPs and the then Minister of Gender to garner support for maintaining five key women gains in the constitution. FIDA Kenya was also part of a lobby to push for amendments to the RHD in favour of reproductive health rights through various strategic MPs.

FIDA Kenya also joined other civil society organization to caucusing with Members of Parliament as organized interest groups and to provide technical expertise to MPs. Various media engagements were undertaken in order to shape public opinion and this also included one on one civic education with colleagues, friends and acquaintances.

The debate on the Proposed Constitution was very spirited with the green colour symbolizing support for the proposed constitution and the colour red symbolizing rejection of the proposed constitution. At this point a certain group of civil society organizations saw it unfit to declare support for either side however due to the gains that the proposed constitution had for women FIDA Kenya however came out strongly to show its support for the proposed constitution. As a result of FIDA's work, and the work of other feminist activists, we argued that the proposed constitution – as revised – carried strong gains for women. Some of the gains for women in the PCK included:

- Women would be able to pass on citizenship to their children regardless of whether or not they are married to Kenyans. This is as opposed to the old constitution which only allows women married to Kenyan men to acquire citizenship through marriage. Citizenship is also not lost through marriage or the dissolution of marriage- This is a gain for women as it is not expressly stated in the current Constitution. It is a symbol of protection and safety of women by the state.
- The constitution accords Right to health included the right to reproductive health to women Under Article 43 (1) (a). Article 27 (3) also provides that women and men have equal opportunity without discrimination. Health is a basic need for human existence and survival and as such, it is a right that must be respected, promoted and protected by government and society.

- Article 60 (1) (f) provides for the elimination of gender discrimination in law, customs and practices related to land and property in land. This is a great gain for women as it seeks to rectify historical injustices that have continually faced the women of Kenya. The law as it is has promoted discrimination of women in land and property rights by allowing for the application of customary laws which are discriminative in Nature. The customs and practices of many Kenyan communities promote discrimination of women in several areas, including land and property rights. This will benefit not only the women but Kenyan citizens generally.
- Article 68(1) states that “parliament shall enact legislation which shall regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage” This is recognition of the injustices women have historically faced in relation of matrimonial property. Women’s rights to matrimonial property have been largely compromised due to the patriarchal order of society that views men as the sole owners of matrimonial property.
- Gender equality has been maintained even in political parties with the constitution providing for it as a basic requirement for political parties as amongst others respect and promotion of gender equality. The old Constitution supports customary laws that discriminate against women in the areas of gender-based violence, leadership, early marriage, child labour, divorce, property rights, girl child illiteracy, and other matters while The Proposed Constitution recognises women’s rights above discriminatory customary laws.

There were a number of challenges faced during the pre referendum period and these included low female voter registration and poor understanding of women of their gains within the PCK. The Interim Independent Electoral Commission attempted to encourage an increase in female voter registration ahead of the referendum however this was hampered by patriarchal practices by husbands who kept the national identification cards of their wives and refused to release them to their wives whom they did not want to be in urban areas such as Nairobi during the referendum day due to the fears associated with voting and the post election violence. FIDA Kenya went ahead to mark the 3<sup>rd</sup> of May 2010 as Female Voter Registration Day and held press

conferences calling on women to come out and register to vote.

There was a distinct lack of genuine voter civic education as most of the campaigns began well in advance of the stipulated campaign period and fed into the period set aside for civic education. There was intense campaigning however even now a large percentage of the population did not benefit from quality civic education.

During the pre referendum period there were also numerous distortions made within popular and media debate. These mainly centred on the controversial topics of land, abortion, Kadhi Courts and same sex marriages. A separate study of these discourses would be very interested; some of the misinformation circulation included the idea that mortuary attendants will be able to provide abortions to women; that women would be able to have abortions anytime and anywhere and performed by any person working in a hospital even if they are not a health provider; that sharia law would be introduced in Kenya; that same sex marriages will be allowed in Kenya; and others. In order to counter the distortions FIDA Kenya participated in various radio and TV talk shows in order to address the key distortions affecting women's rights and developed a simple flier which outlined key gains for women in the PCK.

During the debate around the PCK and abortion the clergy and anti choice movement came out very strongly to oppose the PCK and resorted to applying extreme pressure to policy makers to amend the PCK. There were various calls to the President to amend the PCK and at one point there was proposed a meeting between the executive arm of government and religious leaders to broker a deal due to the sharp divide. FIDA Kenya at this juncture presented a letter to both the President and the Prime Minister on the issue. FIDA Kenya is the leading women rights organization in Kenya and was able to liaise with its international partners such as the Centre for Reproductive Rights (CRR) to quickly analyse the various drafts. FIDA Kenya was able, both on its own as part of various networks and initiatives submit memoranda to the Committee of Experts on the gains that women wanted to see in the new Constitution.

In addition to this FIDA Kenya was able to run a civic education programme that utilized community personnel in thirty three constituencies out of two hindered and ten on both the Harmonized Draft and the Proposed Constitution. FIDA Kenya also took part in ad hoc civic education forums organized by its partners through utilizing its membership. FIDA Kenya members were able to provide civic education to the National Nurses



Association of Kenya, the Reproductive Health Rights Alliance, Daughters of Mumbi, Waremba Ni Yes and other groups.

FIDA Kenya held five National Women Strategy Meetings ahead of the referendum to enable women from both the yes and no campaign sides an open space to discuss holding a peaceful referendum and thereafter the Strategy meetings were centred around developing an action plan for women around the implementation of the new Constitution. The work was intensive and demanding; however, we believe that it had powerful effects on public discourses hostile to women's equality.

Prior to the referendum a number of cases were filed in a bid to halt the constitutional review process. One such case touched on article 26(4) with regards to the Right to life and abortion. The petitioner requested the court to delete the article from the Proposed Constitution. FIDA Kenya was able to appear before the court as an intervener and contended that the court had no jurisdiction to review content of the PCK as regulation 12 of the IICDRC Rules stipulates that;

"Any person who is aggrieved by a matter relating to the constitutional review process as specified under the Act may petition the court in accordance with these rules."

Regulation 12 clearly dealt with the process of the Constitutional Review and not the content and or the substance of the draft Constitution.

By urging this Honorable court to strike out Article 26 (4) and to insert a new Article 26(4) as contained in the Bomas Draft the petitioner was asking the Court to change the content of the Constitution. FIDA Kenya pointed out that the statutory power of reviewing the Constitution of Kenya lied in the hands of the organs of review, under Section 5 of the Constitution of Kenya Review Act – Act 9 of 2008 which included the Committee of Experts, the Parliamentary Select Committee, and the National Assembly and the Referendum. The power to insert and remove Articles in the draft constitution was alive and in the hands of these organs during the review process. FIDA Kenya pointed out that the National Assembly was the organ that had the opportunity to amend the draft constitution and, although 7 amendments were proposed to Article 26(4) alone, not a single amendment was successfully passed by the elected officials in the National Assembly. All proposed amendments failed. Instead, the draft constitution was approved by the National Assembly in its current form and there this was the draft that must, according to the Constitution of Kenya Review Act, go to the final

review organ, the *referendum*, to be voted on by the people of Kenya.

FIDA Kenya's application was successful and the case was thrown out.

During the referendum itself FIDA Kenya monitored the levels of electoral violence. It was widely celebrated that the referendum process was both well managed by the Interim Independent Electoral Commission (IIEC), the referendum was peaceful and that there was high turnout. A number of initiatives were geared towards spreading the message of peace during the referendum and this became the rallying call of the women's movement.

On the 4<sup>th</sup> of August 2010 the majority of Kenyans voted in the Proposed Constitution of Kenya which was promulgated on the 27<sup>th</sup> of August 2010. The grand promulgation was everything that any Kenyan would hope for save for the presence of President Omar Bashir who has outstanding ICC arrests warrants but whom was invited to the ceremony by the Kenyan Government, this and the fact that no woman spoke throughout the entire promulgation ceremony were stake reminders that the Government viewed everything 'as business as usual'.

## Conclusion

As Kenyans focus on the arduous task of implementing the new Constitution there is a renewed energy amongst all. As FIDA Kenya the key lessons that we learnt during this process include the importance of a co-ordinated response to such mammoth tasks. This includes the need to undertake intense mapping of partners, sharing of responsibilities and synchronized, aggressive fundraising. Another key lesson for FIDA Kenya is the power of networking. Through various interest initiatives and networks FIDA Kenya was able to propagate the message of gender equality and therefore use various strategies open to a wider cross section of civil society. It is hard to deny that continuous engagement and a rapid response unit to issues did not greatly assist the process. The technical assistance from foreign partners also contributed to the successful passing of the Constitution and is a clear case study of how various efforts can contribute to a great change. In the long run, it remains to be seen how the commitments of the new Constitutions can open up new avenues of thought and practice, particularly in the controversial arenas of women's right to terminate pregnancies, to inherit property, and to have access to the same rights as Kenyan men.

## Endnotes

1. Report of a fact-finding mission of Kituo Cha Katiba (East African Centre for Constitutional Development) on the progress of the constitutional review exercise in Kenya
2. Ibid.
3. Ibid.
4. Country reform in Kenya. Case study region 7 – sub Saharan Africa. FIDA Kenya.2002.
5. Report of a fact-finding mission of the Kituo Cha Katiba on the progress of the constitutional review exercise in Kenya
6. Country reform in Kenya. Case study region 7 – sub Saharan Africa. FIDA Kenya. 2002.
7. Ibid.
8. Gatheru, G. and Shaw R. 1998. *Our problems, our solutions: an economic and public policy agenda for Kenya*, Institute of Economic Affairs Nairobi, Kenya.
9. Report of a fact-finding mission of the Kituo Cha Katiba (East African Centre for Constitutional Decevelopment) on the progress of the constitutional review exercise in Kenya.
10. COE.
11. Constitution now in Swahili.

