



ANALYSIS ABOUT
LEGISLATIVE, JUDICIAL
SYSTEM AND THE
INSTRUMENTS FOR THE
DEFENSE OF WOMEN'S
HUMAN RIGHTS IN
KENYA

KENYA GROUP



Analysis about Legislative, Judicial System and the Instruments for the Defense of
Women's Human Rights in Kenya

TITLE: Analysis about Legislative, Judicial System and the Instruments for the Defense of Women's Human Rights in Kenya

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Introduction

Gender¹ is defined socially; it is the societal meaning assigned to male and female. Gender is the division of people into two categories, men and women. It is used to describe those characteristics of women and men, which are socially constructed. Therefore Gender Relations refers to a complex system of personal and complex relationships of domination and power through which women and men are socially created and maintained through which they gain access to power and material resources or are allocated status within society.²

The Rule of Law is an aspect of the [British Constitution](#) that has been emphasised by A. V. Dicey and has been adopted by various jurisdictions worldwide. It has three basic tenets as follows;-

- a. The rights of individuals are determined by legal rules and not the arbitrary behaviour of authorities.
- b. There can be no punishment unless a court decides there has been a breach of law.
- c. Everyone, regardless of your position in society, is subject to the law.

There are factors that influence gender relations: There are multiple categorizations of influencing factors and approaches for their analysis. This Guide proposes the following: legal-political, socio - economic, socio - cultural and religious, environmental, technological, language and training factors. None of these are neutral factors but affect gender relations. Some are in favour of greater gender equity, while others promote resistance to change.

Legal-political factors relate to the State influence, its policies and laws. Gender relations are governed by various mechanisms including laws on individuals and family, property rights, right to vote, legal provisions on human rights abuses, gender-based violence, birth control

¹ The generally accepted definition of Gender is that it is the state of being male or female

² (IFAD 2004, page 4)

etc. We can take the example of Kenya where we compare the previous and the new Constitution as follows;

- The previous constitution did not provide for women and girls to own property through inheritance but in the new constitution³ there is elimination of gender discrimination in law, customs and practices related to land and property in land.

Article 27 (3)

specifically provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

Empowerment and Leadership in Development Projects

Public policies, including budgetary policies, structural adjustment policies or sectoral policies (health, education, labour, etc.), have had gender differentiated impact. Gender analysis has generally shown the negative impact of structural adjustment policies and cutbacks in social services (health, schools, day-care centers, soup kitchens) on women. The decline in social expenditure transforms collective responsibilities (principle of social justice) into individual responsibilities, and affects specifically women, as they are responsible for delivering health, education, care and food to all members of the household. The degree of autonomy and women's status in society can be largely determined. The **legal aspects** of these in Kenya are as follows;-

- In the previous constitution there was no provision for women representation in parliament but the new constitution provides that not more than two-thirds of the members of the elective or appointive bodies shall be of the same gender.⁴
- In the new constitution the State has a greater investment in socio-economic infrastructure and this provides a significant support to women's empowerment.⁵

³ The Constitution of Kenya 2010

⁴ Article 27 (8)

⁵ Article 43

Political and Civil Rights: These determine women's capacity to vote and their possibility to stand for election, to participate in political life, in political parties, in public spaces, in social organizations, etc. Civil rights also include the right to enter and exit, reside and move freely within the country, to take up residence, to acquire and transmit nationality, to obtain a passport without her spouse's permission, etc. We can also use the example of Kenya as a case study to compare the provisions in the new and the previous constitution as follows:

- In terms of citizenship the previous constitution treated women as second class citizens and unlike the men, did not allow for women to pass on citizenship rights to their children and foreign wives and no rights to dual citizenship, but the new constitution provides for women to pass rights of citizenship to their children and also have dual citizenship.⁶
- The Constitution is also complemented by the Political Parties Act, 2011 which was enacted by the Kenyan Parliament in 2011 for the purpose of regulating political parties in terms of registration, funding, resolution of disputes among party members etc, stipulates that every political party shall promote gender equality and equality, human rights and fundamental freedoms⁷. The second schedule of the Elections Act, 2011 (Code of Conduct) also promotes gender equality in the electoral process. Previously Kenya did not have an Act to regulate political parties making it hard for women to register in political parties and effectively participate in electoral processes.

Labour rights: the right to work determines women's possibility to access all forms of work, to earn equal pay, to enjoy non-discriminatory working conditions, to take maternity leaves, etc. Maternity leave was not expressly provided for under our laws until the year 2007 when the Employment Act⁸ was amended to provide for paid up three months maternity leave for

⁶ Chapter 3

⁷ First Schedule of the Political Parties Act, 2011, titled Code of Conduct for Political Parties

⁸ Act No. 11 of 2007, Laws of Kenya

women and two weeks paternity leave for men. This was done through the effort of some non-governmental organizations such as FIDA Kenya who lobbied a few members of parliament to allow the said amendment to be effected.⁹

Economic rights: women's access to credit, land ownership, asset ownership, inheritance, and business ownership is often limited due to certain public and private regulations. Their capacity to contract, purchase, sell, rent, transfer, access the market, etc. may also be curtailed by legal, social and cultural (written or customary) rules even though the Law of Contract Act in Kenya defines a Contract as an agreement that is binding between two legal persons or entities.

Family law includes rules and practices governing relations between family members and women's status in the social and family spheres. The following aspects should be given due consideration as potential determinants:

- The matrimonial property regime (acquisition of property, division of property in cases of divorce or separation, community of property, dowry, pre-nuptial agreements and matters of inheritance).
- The rules on marriage, with a focus on women's freedom (consent, capacity to Appeal in case of forced marriage, marital rape, minimum age, etc.)
- The equality of the spouses before the law, or the privileged position of the Husband, endowing him the right to make important decisions concerning the family such as registration of matrimonial property, where the family will stay or where the children will learn, family planning amongst other issues.
- The regulation of alimony.

⁹ Section 29 of the Employment Act.

- For instance the previous Kenyan constitution did recognize customary marriages as long as they are not repugnant to justice and morality¹⁰ but there was no equality. This also showed itself in the way that there was no equal parental responsibility in that a woman was in certain circumstances left with the sole responsibility of taking care of the children single handedly.¹¹ But the new constitution provides for equality in marriages especially customary ones and also advocates for equal parental responsibility.¹² Men are also held accountable in taking care of their children. The Constitution specifically provides that *“Every child has the right to parental care and protection which includes equal responsibility of the mother and father to provide for the child , whether they are married to each other or not...”*¹³

– The acquisition or loss of nationality in case of marriage or its dissolution.¹⁴

Scope:

The judicial-political factors relates to the state influence, its policies and laws. Gender relations are governed by various mechanisms including laws on the individuals and family, property rights, rights to vote, legal provisions on human rights abuses, gender-based violence, birth control. The Legislature (Parliament) is vested with the authority to make laws and in Kenya the Constitution is the supreme law of the land. Anything that contradicts it is invalid.¹⁵

¹⁰ Section 3(2) of the Judicature Act, Chapter 8, Laws of Kenya

¹¹ Section 24 of the Children Act 2010

¹² Article 45 (3)

¹³ Article 53 (e)

¹⁴ Previous legislations provided that the father's nationality determines the spouses and the children but this situation was revised by Article 13 (3) which provides that *“Citizenship is not lost through marriage or the dissolution of marriage.”*

¹⁵ Article 2(4)



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Analysis of the existing legislation in Kenya in terms of Women's Rights and the adherence to International Instruments:

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

The protocol was adopted by the African Union on 11th July 2003 at its second summit in Maputo, Mozambique on 25th November 2005, having been ratified by the required 15 member nations of the African Union, the protocol entered into force. Kenya is one of the countries that signed the protocol in 2005. However just like other countries it has taken time to ratify due to the clause on abortion.

Once ratified the protocol will complement the Kenyan Constitution especially Article 2, on Elimination of Discrimination of Women which among other things states that all State Parties that have ratified the Protocol shall include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application.

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

CEDAW was adopted in 1979 by the UN General Assembly; the Convention has 30 articles. It defines what constitutes discrimination and sets up an agenda for national action to end such discrimination. Kenya is one of the countries that has domesticated and ratified the Convention and has even submitted periodic reports on progress it has made to eliminate discrimination to the CEDAW Committee.

As indicated in the table below the Kenya Constitution complements CEDAW; Chapter four of the Kenyan Constitution for example stipulates the Bill of Rights, Article 27 of the Constitution (Equality and freedom from Discrimination) sub article 3 states that women and men and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

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

International Convention on Economic and Social and Cultural Rights (ICESCR)

Kenya ratified this Convention on January 3, 1976. Under **Article 2(5) and (6)** of the Constitution, the general rules of international law and any treaty or convention ratified by Kenya forms part of the Kenyan law. The Constitution entrenches both civil and political rights and also social and economic rights and makes both justiciable. "Under **Article 43**, persons are entitled to the fundamental rights to accessible and adequate housing, and reasonable standards of sanitation, health care, clean and safe water and education," the judge said. Under **Article 47** the evictees are entitled to be given written reasons regarding the evictions, meaning they are to be consulted prior to the action which was not the case.

Despite the provisions under the Constitution, the country has witnessed forceful evictions and demolitions of property worth millions in the recent past. It is worth noting that in these, women and children are the most vulnerable. The **UN Human Rights Committee**, which monitors compliance with ICESCR, has defined forced eviction as "the permanent or temporary removal against the will of the individuals, families and/or communities from their home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."

"For the evictions to be justified under ICESCR, they must be carried out in the most exceptional circumstances after all feasible alternatives to eviction are explored and after due process protections are afforded to the individual, group or community," The ICESCR had imposed obligation that there should be no form of discrimination in evictions and no eviction should render persons homeless or vulnerable to other human rights violations.

Article 8 of the **Universal Declaration of Human Rights** provides that a proper remedy for forced eviction is to return the victims as close as possible to the original situation before the violation occurred. This has not been done.



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The Charter of Feminist Principles For African Feminists

This Charter was adopted during the African Feminist Forum which took from 15th to 19th November 2006 in Accra, Ghana. It brought together over 100 feminists from Africa and the Diaspora including Kenya. The Charter was unanimously adopted as a catalyst for strengthening and building the feminist movement in Africa as well as an accountability and peer review tool.

Beijing Declaration

Beijing Declaration and Platform for Action was adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing on 15 September 1995. The Beijing Declaration acknowledges that women's rights are human rights and is determined to among other things ensure the full enjoyment by women and the girl child of all human rights and fundamental freedoms and take effective action against violations of these rights and freedoms; take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women. Kenya is a signatory of the Beijing Declaration and has made steps to ensure that the rights of women are upheld.

Kenyan Policies that complement the Beijing declaration include the Constitution, the Kenya Land Policy, Education Policy, gender policy which all uphold the right of women to inherit and own land, to access education etc.

The Convention on the Rights of the Child

The United Nations General Assembly adopted the Convention on the Rights of the Child in November, 1989. The Conventions spells out rights that all children world over are entitled to. Kenya has adopted this through the Children Act 2010 which upholds the fundamental principle that all matters with regard to children must be held in the "Best Interest of the child".

1948 Universal Declaration of Human Rights

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The Constitution of Kenya 2010 at chapter four sets out the Bill of rights which outlines fundamental entitlements for all citizens in line with the Declaration at Article 21.

Below is a comparison of the previous and new constitution of Kenya showing how both either favored or discriminated against the rights of women and also the relevant ongoing policies, initiatives and programs towards the advancement of women’s rights.¹⁶

TOPICS	PREVIOUS LEGISLATION ADVERSE TO THE RIGHTS OF WOMEN <i><u>Discrimination against women</u></i>	EXISTING LEGISLATION <i><u>Discrimination against women</u></i>	RELEVANT POLICIES/INITIATIVES/PROGRAMS
1. Definition	<p>Section 89 and 90 of the Constitution of Kenya.</p> <p>Penal code Section 250 to 253 (only defines assault, no specific provision on domestic violence)</p>	<ul style="list-style-type: none"> ○ Section 2, 5 of the Equal Opportunities bill defines discrimination ○ Part II (section 9 – 21) Equal Opportunities Bill prohibits discrimination ○ Section 11 (g) and (h) on maternity leave ○ Chapter IV –The Bill of Rights. Article 27 The Constitution of Kenya 	

¹⁶ All references to the Constitution under the column ‘Existing Legislation’ refers to the Constitution of Kenya 2010 while all references to the Constitution under the column ‘Previous Legislation’ refers to the previous Constitution.

	<p>2010</p> <p>Section 3 Family Protection Bill. Definition of Domestic violence.</p>	
<p>2</p> <p>Elimination of Discrimination Against Women</p> <p>Section 19 of the Marriage Act; allows Marriage of parties less than 18 years.</p> <ul style="list-style-type: none"> ○ Customary law ○ Section 27 Constituency Development Fund (CDF) Act 	<p><u>The Constitution</u></p> <ul style="list-style-type: none"> ○ Chapter IV ○ Article 27; equality and freedom from discrimination. ○ Article 21, 22 and 23; Implementation and enforcement of the Bill of Rights. ○ Article 14 (1); citizenship removes discrimination against the mother ○ Article 59 KNHR and Equality Commission 	<p>Department of Gender and Social Development under the Ministry of Gender, Children and social Development.</p> <p>Vision 2030 campaigns promote the involvement of women in the development of the nation</p>

	<ul style="list-style-type: none"> ○ Article 60(1) (f) against discrimination on acquisition of property. <p><u>Marriage Bill</u></p> <ul style="list-style-type: none"> ○ Section 8 – Age of consent for marriage <p><u>Equal Opportunities Bill</u></p> <ul style="list-style-type: none"> ○ Section 2 ○ Section 5 ○ Section 11 ○ part II section 9 to 21 	
<p>3. Right to Dignity</p>	<ul style="list-style-type: none"> ○ Article 28 of the Constitution of Kenya 2010 ○ Part II of the Equal Opportunities Bill 	
<p>4. The Rights to Life, Integrity and Security of</p> <ul style="list-style-type: none"> ○ No rehabilitation program or policy but it is proposed in the Family Protection Bill Section 51 ○ No specific anti- trafficking 	<ul style="list-style-type: none"> ○ Article 26, 27 and 28 and 29 of the Constitution of Kenya 2010 ○ Part II, IV family protection Bill 	<p>Formation of Sexual Offences Act (SOA) task force (manual)</p> <p>Implementation of</p>

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<p>the Person</p>	<p>law but there is a Bill in parliament</p> <ul style="list-style-type: none"> ○ Offences under Immigration Act are against victims of trafficking instead of perpetrators. 	<ul style="list-style-type: none"> ○ Section 33, 51 Family Protection Bill ○ Part I to V of the Counter Trafficking in Persons Bill 2010. 	<p>training of police, prosecutors and judges of these rights.</p> <p>National Gender Based Violence (GBV) framework that is being implemented by the Government through the National Commission Gender Commission on Gender and Development.</p> <p>Appointment of Gender commission and creation of the Ministry of Gender, Children and social Development</p>
<p>5. Elimination of</p>	<ul style="list-style-type: none"> ○ The Children's Act leaves women over the age of 18 with no legal grounds to 	<ul style="list-style-type: none"> ○ Family protection Bill part II and IV 	<p>It was outlawed in 2001</p>

<p>Harmful Practices</p>	<p>resist FGM.</p>		<p>Anti-Female Genital Mutilation (FGM)</p> <p>Campaigns by Maendeleo Ya Wanawake Organization (MYWO)</p> <p>The passing of the Female Genital Mutilation Bill into an Act of Parliament.</p>
<p>6. Marriage</p>	<ul style="list-style-type: none"> ○ Section 24 (c) of the Children Act read together with Section 25 of the Act. ○ Section 19 of Marriage Act ○ Section 40 of the -Law of Succession Act. Polygamy ○ Section 97 Constitution of Kenya. No dual citizenship ○ Section 4 and 5 of the Marriage Bill. Polygamy. ○ Section 31 (c) of the Hindu 	<ul style="list-style-type: none"> ○ Section 3, 4, 6, 8, 11 and Part IV of the Matrimonial Property Bill 2007 ○ Article 13 (3), 16 of the Constitution on citizenship by marriage and dual citizenship ○ Section 3, 8 10, 11, 47, 51 of the Marriage Bill. ○ Article 45 (2) of the Constitution of Kenya 	<p>There is an existing call by various Women Rights Movements and Civil Society Organization's to pass the three family Bills (Marriage Bill, Family Protection Bill and Matrimonial Property Bill) into law so as to ensure equality</p>

<p>Marriage and Divorce Act.16 years</p> <ul style="list-style-type: none"> ○ Peter Mburu Echaria V Priscilla Njeri Echaria Court of Appeal case. (The Court held that only financial contribution is considered when it comes to division of matrimonial property despite the fact that women largely contribute in non- monetary terms) ○ Section 9 and 11 of the Mohammedan Marriage and Divorce Registration Act. minors 	<p>2010. Consent of marriage parties.</p>	<p>in marriage.</p>
<p>7.Separation, Divorce and Annulment of Marriage</p> <ul style="list-style-type: none"> ○ Echaria case on financial contribution by the wife. ○ Section 82(4) (b) of the current Constitution creates a loophole 	<ul style="list-style-type: none"> ○ Section 13, 14 and part III of the Marriage Bill ○ Section 8 of the Matrimonial Property Bill ○ Article 45(3), 53(1)(e) of the Constitution of Kenya 	

<p>8. Access to Justice and Equal Protection before the Law</p>	<ul style="list-style-type: none"> ○ Section 61 of the Constitution of Kenya- no provision for women appointment in the judiciary 	<ul style="list-style-type: none"> ○ Article 27 (1) of the Constitution (equality) ○ Article 56 of the Constitution. (marginalization) ○ Part II of the Equal Opportunities Bill 	<ul style="list-style-type: none"> ○ National Legal Aid and Awareness Programme (NALEAP) ○ Affirmative Action campaigns ○ Legal Aid Clinics hosted annually by various NGO's
<p>9. Right to Participation in the Political and Decision-Making Process</p>	<ul style="list-style-type: none"> ○ Constitution of Kenya 2010 Article 27(3) and 38. ○ Article 91(1) (f) and (2) a and b. political parties ○ Article 97(1) (b), 98 (1) (b). specific slotted positions for women 	<ul style="list-style-type: none"> ○ Vision 2030 – Women Enterprise Fund ○ URAIA and Vijana Tugutuke 	

- **Section 21 Equal Opportunities Bill**

Media programmes.

- **Affirmative action**

- **Kenya Women Parliamentary Association (KEWOPA)**

Association (KEWOPA)

- **Presidential decree 2006 of 30% women appointment to public positions**

10. Right

- **Truth Justice and**

<p>to Peace</p>		<p>Reconciliation Commission (TJRC) (looking into the Post Election Violence 2007). 5 women were nominated as commissioners</p> <ul style="list-style-type: none"> ○ United Nations High Commissioner for Refugees (UNHCR) policy on protection of refugees
<p>11. Protection</p>		<ul style="list-style-type: none"> • Recommendations by

<p>of Women in Armed Conflicts</p>		<p>the TJRC once they compile their final report.</p>
<p>12. Right to Education and Training</p>	<ul style="list-style-type: none"> ○ Section 12 Equal Opportunities Bill ○ Article 43, 53(1) (b) of the Constitution 	<ul style="list-style-type: none"> ○ Free primary education. Reference to Sessional Paper No. 1 of 2005 on police framework for education, training and research ○ Kenya Education Sector Support Programme 2005 – 2010 developed by the

		<p>Ministry of Education</p> <ul style="list-style-type: none"> ○ Gender Based Violence on Recovery Centre at Kenyatta National Hospital. Limited in its reach ○ Gender and education policy. Re-enrollment of girls.
<p>13. Economic and Social Welfare Rights</p> <ul style="list-style-type: none"> ○ Section 24 (c) of the Children's Act. Parental responsibility. ○ Pornography still rampant in cyber-cafes yet it's illegal. No regulation for this. 	<ul style="list-style-type: none"> ○ Section 2, 5, 11 and Part II of the Equal Opportunities Bill ○ Article 43 of the Constitution 	<ul style="list-style-type: none"> ○ National Social Security Fund (NSSF) and National Health Insurance Fund

- **Echaria v Echaria. COA decision** Did not recognize the value of work of women at home
- **(NHIF) for informal Sectors**
- **President Kibaki executive Decree in October 2006 that 30 % of all appointments to public positions would comprise of women.**
- **Business district information centres by the Ministry of Trade**
- **Kenya Vision 2030**

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<p>and Reproductive Rights</p>	<p>Poisons Rules</p>	<p>Rights Bill- safeguard the reproductive health of women and girls in Kenya</p> <ul style="list-style-type: none"> ○ Section 13 Equal opportunities Bill ○ Article 43 of the Constitution 	<p>Mother To Child Transmission (PMTCT) guidelines, Anti Retro Viral (ARV) therapy</p> <p>guidelines and clinical manual for ARV providers</p> <ul style="list-style-type: none"> ○ Government birth Control programs ○ Millennium Development Goals
<p>15. Right to Food Security</p>		<ul style="list-style-type: none"> ○ Article 43 of the Constitution 	<ul style="list-style-type: none"> ○ Water sector reforms programme ○ Rural Communiti

		<p>es and Poverty</p> <p>Eradication and Food Security Initiative</p> <ul style="list-style-type: none"> o Kenya Vision 2030
<p>16. Right to Adequate Housing</p>	<ul style="list-style-type: none"> o Article 43 of the Constitution 	<ul style="list-style-type: none"> o Kenya Vision 2030 o Slum upgrading program in Kibera
<p>17. Right to Positive Cultural Context</p>	<ul style="list-style-type: none"> o Article 44 of the Constitution 	<ul style="list-style-type: none"> o Ministry Of State For National Heritage and Culture
<p>18. Right to a Healthy and Sustainable Environment</p>	<ul style="list-style-type: none"> o Chapter VI part 2 and of the Constitution. 	<ul style="list-style-type: none"> o Rehabilitation and restoration of Nairobi River Basin Programme

<p>nt</p>		<ul style="list-style-type: none"> ○ National Environmental Management Authority
<p>19. Right to Sustainable Development</p>	<ul style="list-style-type: none"> ○ Chapter V, part 1 specifically section 60 (1) (f) of the Draft constitution. ○ National Management Authority Act 	<ul style="list-style-type: none"> ○ Kenya Vision 2030(women enterprise fund) ○ National Environmental Management Authority ○ Youth Enterprise fund.
<p>20. Widows' Rights</p>	<ul style="list-style-type: none"> ○ Customary law and practice is against. E.g. the practice of wife inheritance is still rampant in Kenya in some ○ Section 52 Marriage Bill(2007) ○ Section 40 of the Law of Succession Act 	<ul style="list-style-type: none"> ○ Public Interest Litigation

		<p>tribes.</p> <ul style="list-style-type: none"> ○ Section 82(4) (b) of the previous Constitution created a loophole 	<p>against</p> <p>Widow Evictions being undertaken by FIDA Kenya, Kisumu office.</p>
<p>21. Right to Inheritance</p>	<ul style="list-style-type: none"> ○ Section 35(1) and 36(1) Law of Succession ○ Section 82(4) (b) of the current Constitution creates a loophole ○ Customary practices are a hindrance. 	<ul style="list-style-type: none"> ○ Section 8, 11(2) Matrimonial Property¹⁷ Bill(2007) ○ Upheld by the Kenyan Courts. 	
<p>22. Special Protection of Elderly Women</p>	<ul style="list-style-type: none"> ○ Article 57, of the Constitution 		
<p>23. Special Protection of Women with</p>	<ul style="list-style-type: none"> ○ Article 54, of the constitution 	<ul style="list-style-type: none"> • Kenya Re Insurance Company “Niko Fiti 	

¹⁷ This is property acquired during the subsistence of a marriage

<p>Disabilities</p>		<p>Campaign” which aims to raise funds for people with disabilities, women included to assist them in buying equipments such as wheel chairs and visual aids.</p>
<p>24. Special Protection of Women in Distress</p>	<ul style="list-style-type: none"> ○ Article 56 of the Constitution 	<ul style="list-style-type: none"> ○ Shelter Houses for women who are being abused. ○ Rescue Centres for girls who are likely to be forced to go through

			FGM
25.			
Remedies		<ul style="list-style-type: none"> ○ Chapter IV part 1 specifically Article 22 and 23 of the Constitution 	
26.	N/A		
Implementation and Monitoring		<ul style="list-style-type: none"> ● Fifth Schedule (Article 261(1) of the Constitution of Kenya 2010 on legislations to be enacted by parliament including the time frames. 	
27.	N/A		
Interpretation		<ul style="list-style-type: none"> ● Statute of General Application and Interpretation ● Article 260 of the Constitution of Kenya 2010 	
28.	N/A		
Signature, Ratification and Accession		<ul style="list-style-type: none"> ● Article 2(6) of the Constitution of Kenya 2010 	N/A

An analysis of the existing gap between the judicial and legislative advancements and the daily life of women, making the distinction, if possible, between the urban and rural world.

It is worth noting that despite the various advancements made by the Constitution of Kenya 2010, Kenya is still largely a patriarchal society and the status of women is relatively low with gender inequality/inequity prevailing in many aspects of the Kenya society. Yet they remain marginalized and discriminated upon, a situation that is reinforced by existing laws and policies as well as prevailing social-cultural factors.

It is also a fact that many women in the rural world are not aware of their rights under the law or under any of the International instruments ratified by Kenya basing on the glaring levels of illiteracy and poverty.

Law of Succession

- The law of Succession Chapter 160 Laws of Kenya provides that a widow has the first priority to inherit her deceased's husband's assets but only to hold it in trust for her children. The moment she remarries, she is not entitled to anything. The question then is, isn't this just a mischief in the law to prevent women from remarrying? What of very young widow's? Should they not be allowed to remarry? There has been a great call to amend this law because of the very many ways that it is discriminatory to women.
- Note that when a woman dies, the husband is entitled to all her assets and nothing happens should he remarry. There is actually no provision for situations where the husband dies apart from the fact that he is entitled to the ladies estate if he can prove that she was maintaining him while she was alive.
- Cases of widow evictions are still rampant in Kenya and Succession cases are some of the hotly contested in Kenya especially in the Nyanza region.
- Women in the rural world are most affected especially because most of them are unaware of their rights. In most cases, their deceased husbands are the sole bread-winners hence leaving them destitute.
- There are calls to amend sections of this Act that are not favourable to women.

Children Act of 2001

- There have been calls for Amendment of section 24 of the Children Act which defines children born to single mothers as illegitimate and parental responsibility cannot be forced on the father.
- The said Act also provides that a man can only be considered to have acquired parental responsibility if;-
 - a) He accepts paternity of the child
 - b) or if after the child is born he resides with the child for a total period of 12 months
 - c) or if he has maintained the child
- The above situations no longer exist because the Constitution is the supreme law and therefore overrides the mentioned provisions of the Children Act of 2001. **Article 53(1)(e)** provides that every child has the right to parental care and protection which includes the equal responsibility of the mother and father to provide for the child whether they are married to each other or not.
- The New Civil Procedure rules provide that pleadings must be detailed and cases must also be classified such as 'Small Claims', 'Fast Track' and 'Multi Track'¹⁸. A list of documents and witness statements must also be attached to the pleadings. Through an intervention by several CSO's, these technical procedures have been lifted in custody and maintenance cases for clients who are representing themselves in court.
- Again the women in the rural areas are the ones who are most adversely affected because most of them are not aware of their rights under the law and are also not economically empowered.

¹⁸ Order 3 Rule 2 of the Civil Procedure Rules 2010. Order 3(2) (a) "small claim" refers to a simple claim, involving not more than two parties and whose monetary value does not exceed Kshs. 49,999/-; (b) "Fast track" refers to a case with undisputed facts and legal issues; relatively few parties; and would likely be concluded within one hundred and eighty days after the pre-trial directions under Order 11. (c) "Multi-track" refers to a case with complex facts and legal issues; or several parties and which would likely be concluded within two hundred and forty days from the date of the pre-trial directions under Order 11.

Female Genital Mutilation (FGM) Bill

- The passing of this Bill into an Act was one of the major achievements for women in Kenya this is because, even though the Children Act outlaws harmful cultural practices such as FGM,¹⁹ the said Act only applies to children and defines a child as a person under the age of eighteen years. This left women unprotected but with the passing of the Bill into an Act, the courts can now punish the perpetrators of this crime using the various provisions.
- It is worth noting that even with the passing of this legislation; cases of FGM are still rampant in some areas. Again the most affected women and girls are those in the rural areas such as Kuria West and East and Kisii districts in Kenya amongst other areas.

Sexual Offences Act No. 3 of 2006

- Under this Act, it is unlawful to force a person into any form of sexual activity because of any cultural or religious belief.²⁰
- This Act also makes it a crime for a person to deliberately transmit the AIDS virus.²¹
- Besides these two advancements, the Act presents a setback under **Section 38** which provides that **"...any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that of the offence complained."** This is a major setback in that it has instilled fear in victims or witnesses in that they fear reporting sexual offences. There are calls to amend this section.

Laws relating to Matrimonial Property

¹⁹ Section 14 of the Children Act of 2001 Laws of Kenya

²⁰ Section 29

²¹ Section 26

- There has been a great debate over matrimonial property in Kenya. Kenyan courts are still using the Married Women Property Act of 1882 to decide cases of matrimonial property which is defined as property acquired during the subsistence of a marriage.
- This Act only recognizes direct financial contribution²² and this has been upheld by the courts in the famous case of Peter Mburu Echaria v Priscilla Njeri Echaria²³ in which the Court of Appeal held that the status of marriage does not in itself entitle a spouse to a beneficial interest in property, neither does the performance of a domestic duty. There needs to be greater recognition of women's non-monetary contributions to the acquisition of wealth during the subsistence of the marriage.
- There is hence a need for legislation requiring joint registration of the matrimonial home so that the interest of both husband and wife are protected in the event of dissolution of the marriage.
- There is an existing Matrimonial Property Bill, Family Protection Bill, Equal Opportunities Bill, Marriage Bill and if and when parliament passes these into law, the status quo is bound to change in that spouses will have equal rights to matrimonial property during marriage and at divorce. These Bills address the need to protect the family as a unit of the society in line with **Article 45 (1)**²⁴ of the Constitution of Kenya 2010.
- Pre-nuptial Agreements are still illegal in Kenya but with the passage of the mentioned Bills to law, they will be allowed.
- Under this, the most adversely affected women are those in the rural areas who are still not aware of their rights in a marital union. Some have gone to the extent of taking

²² Direct contribution includes money, shares while indirect contribution includes love and affection, household chores for example cooking, washing clothes, cleaning the house, supervising the house help/workers on the family farm, taking children to school, expenses etc.

²³ Nairobi Civil Appeal No.75 OF 2001

²⁴ The family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the state.

loans through their women groups commonly known as ‘Chamas’ in Kenya and giving the same to their husbands in the pretext of them developing say their matrimonial homes and the husbands have ended up misusing the said funds. Should there be separation in the union; the women are left paying huge loans which they did not benefit from. Another instance is where the spouses develop the home using the funds, say by land but they end up registering the said parcels in their sole names. Again should there be separation; the women are left destitute as land laws in Kenya uphold the doctrine of Absolute Proprietorship.²⁵

A mapping of organizations that work for the promotion and defense of women's rights indicating the areas of work, as well as their contact information (address, email, telephone number, contact person and her or his title.

Organization	Contact Person	Title	Email and website	Address
Federation on Women Lawyers (FIDA-K)	Grace	Executive	info@fidakenya.org / gkimani@fidakenya.org	Amboseli Road, Off Gitanga Road
	Maingi	Director	www.fidakenya.org	P.O. Box 46324 – 00100 Nairobi Tel: 254-020-3870444/3873511/3876991 Fax: 254-020-3876372

²⁵ Under this doctrine, the person in whose names a particular land title is registered is vested with the freedom of using the said property however he or she wishes and that authority cannot be challenged.



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The Caucus for Women's Leadership	Deborah Okumu	Executive Director	dokumu@kwpc caucus.org	Caucus for Women's Leadership P.O Box 55721-00200 Tel: 2737663/ 0727
Maendeleo ya wanawake	Agnes Masika	Executive Director	mywo@mywokenya.org	4th Floor, Monrovia Street P.O. Box 44412 - 00100 Nairobi, G.P.O Tel: 020 - 2252210, 2222095 Fax: 020 - 2249399 Cell: 0721 829937
African Women Child Feature Services	Rosemary Okello	Executive Director	rookello@awcfs.org	Unit 1, Nairobi Baptist Church Flats, Green Lane, Off Ngong Road P.O. Box 48197 - 00100 NAIROBI. +254 20 2720554 / 2724756 +254 20 2718469 +254 722 209510 +254 734 916148
Centre for Rights	Wangechi	Executive Director	wangechi@creaw.org	Content Drive, Lavington, Off Isaac



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Education and Awareness for Women-Kenya			info@creaw.org	Gathanju Road P.O. Box 11964 – 00100 G.P.O. NAIROBI. Tel: +254-20-3860640 Fax: 3861016/237871 Cell: +254720357664 info@creawkenya.org
Women in Law and Development-Kenya	Tabitha Njoroge	Executive Director	tabbynjoroge@gmail.com www.wildafkenya.org	Women in Law and Development in Africa (K) P.O. Box 57539 - 00200; Nairobi. Kenya Tel: +254 20 2729877/8 Mobile: +254 727 942054
Equality Now	Faiza Mohamed	Executive Director	equalitynownairobi@equalitynow.org	Equality Now P O Box 2018 – 00202 NAIROBI, Kenya Tel: 254 – 20 – 2719832 / 2719913 Fax: 254 – 20 – 2719868



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African Women's Development and Communication Network (FEMNET)	Naisola Likimani	Advocacy Officer	advocacy@femnet.or.ke www.femnet.or.ke	African Women's Development and Communication Network (FEMNET) P.O. Box 54562, 00200, Nairobi, Kenya Tel: + (254) 20.2712971/2 Fax: + (254) 20.2712974
The Coalition on violence Against Women-Kenya	Saida Ali	Executive Director	Saida.ali@covaw.or.ke	The Coalition on Violence Against Women-Kenya Haven Court, Block B, Apartment 7 Waiyaki Way (Opp Lyons Place) P.O.Box 10658-00100 Nairobi, Kenya Tel:+254 20 804 0000/1 Mob: +254 722 594 794/ +254 733 594 794



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Institutions that promote the defense of women's rights in Kenya at different levels;-

- **Regional Institutions**

- 1. SOAWR-Solidarity for African Women's Rights**

- Secretariat is in Kenya – 'Equality Now' office.
- The campaign effort is characterised by strategies aimed at ensuring speedy ratification, domestication and implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (referred to as the Protocol). The campaign aims at getting commitment from member states to take firm actions to ratify the Protocol and initiate steps for its domestication and implementation through concrete policy, legislative and budgetary actions at national and sub-national levels.

- 2. East African Declaration on Gender Equality (EADGE) Protocol working group whose secretariat is in Uganda.**

- Appreciating the EADGE protocol as a unique instrument as a basis for all legal policies for gender mainstreaming in the states because it sets the precedent in creating a comprehensive platform to campaign for women rights.

- 3. The African Union**

- It can be described as an event of great magnitude in the institutional evolution of the continent. The A.U was established as a declaration by the Heads of State and government of the organization of African Unity. Its main objective is to achieve greater unity and solidarity between the African countries and the people of Africa.

- 4. GBV Prevention Network**

- The GBV Prevention Network is an affiliation of activists and practitioners committed to preventing gender based violence in the Horn, East &



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Southern Africa. Membership is composed of more than 130 organizations and individuals from more than 18 countries who identify with, see value in, and actively contribute to helping the Network reach our objectives.

5. International Conference on the Great Lakes Region

The different regional organizations and Government representatives in the coalition demand for the Heads of State of the International Conference of the Great Lakes Region to be at the frontline of the fight against SGBV and:

- Declare **Zero Tolerance Now** on SGBV crimes and impunity;
- Allocate specific and adequate **funding for SGBV prevention programmes** within a Gender Responsive Budgeting Framework;
- Institutionalize **community policing** in the prevention, early warning and response to SGBV, in collaboration with the security service sector;
- Establish an independent **Regional Impunity Monitoring Unit** by the next Summit of the Heads of State, to thereafter report on progress annually to the International Conference on the Great Lakes Region (ICGLR) Ordinary Summit of Heads of State;
- Establish national **Reparation Funds** for survivors of SGBV by the next ICGLR Ordinary Summit of Heads of State;
- Adopt a **comprehensive SGBV performance framework** (in the form of an Index or Barometer) with clear standards and targets, with opportunity for civil society to present shadow or parallel reports;

6. Coalition On Housing Rights and Eviction coalition (COHRE)

The Centre on Housing Rights and Evictions (COHRE) is an independent, non-governmental, not-for-profit human rights organization established in 1994 in the Netherlands and now based in Geneva, Switzerland. It is one of the principal agencies focusing on the human right to housing and on forced evictions at the international level. It works closely with an extensive network of partner organizations and community activists around the world including Kenya.



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COHRE works at all levels – from grassroots assistance to communities fighting forced eviction or slum conditions, to standard-setting at international institutions such as the United Nations – to resist and prevent forced evictions, strengthen the protection and promotion of housing rights and increase awareness of these fundamental rights. Regional programmes currently exist in Africa, the Americas and the Asia-Pacific region. Thematic programmes focus on women and housing rights, housing and property restitution, housing rights litigation, the right to water and monitoring and preventing forced evictions. It regularly undertakes fact-finding missions to investigate and seek remedies for housing rights violations around the world and provide legal advice and advocacy in a range of forums for organizations and communities fighting for their right to adequate housing.²⁶

National Level (The Government)

1. The Gender Commission

The National Commission on Gender and Development's vision is to be the leading national institution central to the realization of gender equality and equity in all aspects of development for a fair and just society. Their main mission is to coordinate, implement and facilitate gender mainstreaming in national development through advice to the government and stakeholders, participation in policy formulation, advocacy, research, education, investigation of gender based violence, establishment of partnerships, monitoring and evaluation in order to achieve gender equity and equality.

2. The Ministry of Gender, Children and Social services

This department was established in December 2006 following the merger between the departments of Gender and Social Services. The overall mandate of the Department of Gender and Social development is to promote Gender equality and women empowerment through gender mainstreaming in the development process, capacity building, social protection, community participation and public-private partnership.

²⁶ www.wiserearth.org/.../view/e7408b74704972055e7eea74e9303a14

3. Truth Justice and Reconciliation Commission

The Truth, Justice and Reconciliation Commission (TJRC) was established by an Act of Parliament ([Truth Justice and Reconciliation Commission Act no. 6 of 2008](#)) to investigate the gross human rights violations and other historical injustices in Kenya between 12 December 1963 and 28 February 2008. The TJRC is part of the accountability component of [Agenda Four \(4\) of the National Accord](#) signed in 2008. By addressing the cause and effects of historical injustices and gross violations of human rights the TJRC will contribute towards national unity, reconciliation, and healing. One of the objectives of TJRC is Restoration of the human dignity of victims and perpetrators. To achieve of this, it has been carrying out hearings nation-wide for victims and in the end will write a report to be presented to parliament for action.

4. National Legal Aid Awareness Programme

The National Legal Aid (and Awareness) Pilot Programme (NALEAP) was launched on 18th September 2008. NALEAP's broad objective is to improve access to justice in Kenya, especially among the poor, the marginalized and the vulnerable in society. It is no longer a pilot programme and has several branches countrywide.

5. The Kenya National Commission On Human Rights

The Kenya National Commission on Human Rights (the Commission) is an autonomous National Human Rights Institution established by an Act of Parliament in 2002. Its core mandate is to act as a watchdog over the Government in order to further the protection and promotion of human rights in Kenya. Many countries have similar bodies. The United Nations encourages Governments to create National Human Rights Institutions as a strategy towards better protection and promotion of human rights.



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Non Governmental Organizations

The organizations in the women's movement that directly deal with the advancement of women's rights in Kenya are as follows:

- The Coalition On Violence Against Women-Kenya (COVAW-K)
- Federation of women Lawyers-Kenya (FIDA-K)
- The Caucus of women's leadership
- Young Women's Leadership Institute (YWLI)
- Centre for Rights Education and Awareness of Women (CREAW)
- Economic Centre for Women in Development (ECWD)
- Western Education Advocacy and Empowerment Programme (WEAEP)
- GROOTS Kenya
- Maendeleo Ya Wanamwake (MYWO)
- Girl Child Network (GCN)
- African Women Child Feature Services (AWCFS)
- The Kenya Human Rights Commission

Foreign funding agencies that work for the promotion and defense of women's rights, indicating their area of work and an assessment of their intervention in the country are namely:

1. UN Women

- Through the Finish Embassy funds for the implementation on United Nations Security Council Resolution 1325 on Women, Peace and Security.
- UNSCR 1325 promotes women's rights in protecting women in terms of systems and structures in place pre and post conflict, participate in the decision making bodies to deal with conflict or to mitigate against conflict and gender parity in missions and office in regard to peace and security.
- They are currently funding for the development of the Kenya National Action plan on UNSCR 1325 which seems to be effective in terms of



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mitigating against violence ahead of the 2012 presidential election in Kenya.

2. The Open Society Initiative of East Africa (OSIEA)

- They support and promote public participation in democratic governance, the rule of law, the respect for human rights by awarding grants, developing programs and bringing together diverse civil society leaders and groups. They are based in Nairobi and with offices in Uganda; the initiative supports work in Kenya, Uganda, Tanzania and Sudan as well as regional organizations whose mandate encompasses Eastern Africa.

3. Wellsprings

- Wellspring Advisors are a private, philanthropic advisory firm. They are neither a donor nor a foundation. Wellspring works with philanthropists who are their clients in researching and identifying charitable organizations that match their clients' philanthropic goals.
- One of their interest areas is in primary prevention of intimate partner violence
- Piloting an IPV programme in Kenya. It's still in its preliminary stages therefore the assessment of their intervention is null and void.

4. United Nations Population Fund (UNFPA)

- They work in partnership with governments, other agencies and civil societies to advance their mission of promoting the rights of every woman, men and child to enjoy a life of health and equal opportunities UNFPA supports countries in using population data for policies and programmes to reduce poverty and to ensure that every

pregnancy is wanted, every birth is safe, every young person is free of HIV/AIDs and every girl and woman is treated with dignity and respect.

5. Comic Relief

- This is a major charity based in the United Kingdom which strives to create a just world free from poverty through raising money through two big fundraising campaigns –Red Nose Day and Sports Relief. The money is spent to tackle the root causes of poverty and social injustice.
- Their intervention in Kenya is their collaboration with many NGO'S in Kenya such as Amnesty International - Kenya to fund various programs of great benefit to women.

6. Ford Foundation

- The Ford Foundation is a major source of funding for thousands of Non Governmental Organizations around the world. The Foundations mission statement is to “reduce poverty and injustice, strengthen democratic values, promote international cooperation and advance human achievement.”
 - Their intervention using FIDA Kenya as an example is their funding of the Public Interest Litigation programme. Through this programme, the organization identifies a particular adverse issue affecting women in the community; does extensive research on it, then takes the matter to court as a matter of public interest. Once a ruling on it is made, it sets a precedent for such other issues.
-
- **Organizations that hinder, violate or prevent the exercise of women's rights, with a brief explanation of why.**

1. There are no organizations that hinder the exercise of women's rights as such in Kenya. There is a verbal movement started by men said to be called ***Maendeleo ya Wanaume*** (Swahili for men's advancement). This is because Kenya being like any other African Country, patriarchy is deeply entrenched. Men feel that by doing so, they can justify by saying there are men whose rights are violated by women.
2. The Government in a way hinders the advancement of women's rights indirectly in terms of legal frameworks to mitigate against violation of women's rights. A good example is the ratification of regional and international instruments on advancement of women's rights like The Maputo Protocol which has been ratified but with reservations on ***Article 10 (3)*** which speaks of reducing military expenditure for general development and advancement of women's rights and ***Article 14 (2) (c)*** which speaks on reproductive health rights of women. By so doing the rights enshrined therein cannot be realized. By also not implementing the optional protocols both regional and international and not allocating sufficient or any budgetary allocation the women do not realize their rights.
3. Certain communities also hinder the advancement of women's rights by promoting backward and adverse practices such as female genital mutilation. Just to mention but a few we have the Maasai, Kuria and Kisii communities which are well known to continually practice female genital mutilation despite Kenya passing legislation to prohibit the same.
4. Some indigenous churches and sects also hinder the exercise of women's rights in Kenya. such stretch the definition of submissiveness for a woman and in the process brainwash the women to an extent that they feel totally inferior to their men. Examples of such inferiority complex is exhibited when the churches and sects promote domestic violence, being forced to dress in a certain manner, illiteracy just to mention but a few.
5. Some traditionally set up institutions such as the Council of Elders commonly known as "Wazee wa Mtaa" in the rural areas also hinder the advancement of women's rights. Such institutions are set but to act as ad hoc tribunals and in

most cases when there is a problem they are the first to arbitrate in most instances before the courts. The normal set up of such institutions is that their leaders are mostly men and therefore their decisions tend to favour the men more than the women. The most prevalent issues that they arbitrate upon are such as domestic violence, divorce and separation, payment of dowry, infidelity and polygamy.

6. It is also worth noting that the perpetrators of FGM in Kenya are women and even though there is a law in place that targets their prosecution, the law is only enforceable if they are caught in the act. Most of them have therefore resorted to conducting their activities at night or in secret and then hiding their tools of trade. To that extent, these women and the mothers who take their daughters for the cut greatly hinder the advancements of women's rights in Kenya.

- **Other actors of interest.**

- 1) **Survivors of Violence**

- They undergo self-representation trainings so that they can represent themselves in court because they cannot afford lawyers
- Support groups that enable them to speak out and get legal counsel or psycho-social support.

- 2) **GBV Service Providers**

- **HealthCare Workers** – they are normally the first to receive victims of sexual abuse. Apart from healthcare they also provide the victims with psycho – social support. COVAW²⁷ and Liverpool VCT²⁸ have continuously trained the healthcare workers at the Kenyatta National Hospital Gender Based Recovery Centre.

²⁷ Conducts trainings on the Sexual Offences Act of 2006

²⁸ Conducts trainings on counselling including trauma counselling



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- **Law Enforcement Agents** – these are Police Officers and the Provincial Administration. In majority of the cases they are the first people to who Gender Based Violence Cases are reported to.
- **Community Paralegals** – they are not lawyers but have got some training in the law. They then use this knowledge to sensitize members of the community on their rights. They also report Gender Based Violence cases to the relevant Authorities.
- **Community Activists** – they mobilize members of the community to talk about issues facing the particular community and find solutions to them. Besides that, they also mobilize them to attend rights sensitization and awareness events such as during festivities like Gender Festival and during 16 Days of Activism amongst other such events.
- **Judicial Officers** – these are judges and magistrates. They form the third arm of government (the judiciary). Their work is to implement laws once passed by the legislature (parliament) and in turn set precedents which apply across the board.
- **The Informal Justice System** – these consist of village elders. They are the custodians of culture. Of great importance is to involve them when dealing with adverse issues facing members of the community so as to strike a balance between culture and the law and how to bring the two in a way that does not violate the rights of women.



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CONCLUSION

Although there have been some positive achievements for women in Kenya, there have also been major deterrents and setbacks in the advancement of women. The most obvious deterrent to the advancement of women and their enjoyment of their rights is the lack of legislative and policy framework to accelerate advancement of women; the other is lack of awareness of women's rights by the populace.

The society seems to be ignorant of women's rights and therefore violates them. Additionally, many women are still not aware of their rights and suffer in silence without seeking redress. Hence, much needs to be done, especially by the government, to put in place adequate laws and policies and to create awareness that will change the attitudes of its citizens as far as women and their rights are concerned. Furthermore, the awareness will empower women to stand up for their rights and to make informed choices that will result in leading better lives, free of discrimination.



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www.ngo-monitor.org/..//ford_foundation

www.soros.org/initiatives/osiea The Open Society Initiative for Eastern Africa.

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www.unfpa.org The United Nations Population Funds.

www.unwomen.org UNWOMEN