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LAW AND THE STATUS OF WOMEN IN KENYA:
The Example of Laikipia District*

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LAW AND THE STATUS OF WOMEN IN KENYA:
The Example of Laikipia District

By
Kivutha Kibwana

Abstract

This paper explores the question: how does law affect women's participation in development in Kenya generally and Laikipia District in particular within the framework of economic, social, cultural and related factors. Thus it seeks to determine the nature, extent and impact of gender discrimination against women from a legal stand-point. Through field data obtained in Laikipia, three types of legal constraints - constraints emanating from legal sanction, ineffectual law and legal lacunae which undermine women's participation in development are identified. Finally, a reform agenda is proposed.

In the paper, an attempt is made to examine the legal problems encountered by:

- : women en masse
- : upper and middle class women
- : peasant and working class women (working women) due to
 - a) general exploitation of working class people in a capitalist system
 - b) exploitation and discrimination by upper and middle class men and women
 - c) Exploitation and discrimination by oppressed and exploited spouse or "boy-friend" and his relatives.

It is concluded, inter alia, that because women in both rural and urban settings hardly have land rights, credit, employment or business opportunities, their independent contribution to free enterprise development is significantly curtailed. Further women's participation in development would be enhanced if there was a guarantee of personal access to the fruits of their labour. By distancing women from the means of production and the products of their labour, society pays by having a lower level of development than would otherwise occur.

2/1/83

'The only law which women know here is the law of their husbands'

Ruth Koske
Community Division Assistant
Belgut, Kenya

'Women have always occupied a central role in African economies being the main agricultural producers and suppliers of welfare services at the household and community levels. The woman's position in traditional society was clearly defined and largely determined her rightful social status. However, colonial subjugation and its attendant Victorian attitudes towards women both as workers and as partners in life eroded women's economic and social status. Kenya has been working toward the restoration of women to their active role, not only in the development of the economy but also in the ownership and control of wealth arising from economic production. Women's quality of life, as measured by such indicators as education, urbanisation, employment and incomes, has improved considerably since independence...

Women had well defined leadership roles in traditional society and participated actively in the struggle for independence. However, due to their disadvantaged position in the education system and as a result of unfavourable social attitudes, women have been slow to rise to prominent leadership positions in modern Kenya. However, in both the public service and the Private sector, a growing number of women are assuming managerial and supervisory positions in all sectors of the economy. Politically, women have the vote and exercise a considerable impact on political trends. Women's Groups participatory initiatives have contributed tremendously to economic and social progress'.

Republic of Kenya,
Development Plan 1989 - 1993,
Nairobi, Government Printer at 27-28.

PART I

INTRODUCTION

1.0 Scope of Study

This paper explores the question: how does law affect women's participation in development in Kenya generally and Laikipia District in particular within the framework of economic, social, cultural and related factors. Thus we seek to determine the nature, extent and impact of gender discrimination against women from a legal stand-point. Through field data obtained in Laikipia, three types of legal constraints - constraints emanating from legal sanction, ineffectual law and legal lacunae which undermine women's participation in development are identified. Finally, a reform agenda is Proposed.

1.1 Justification of the Study

Preoccupation with women's issues by researchers, policy makers and implementators in Kenya can be justified - if justification is necessary - on several grounds.

First ... a society loses development opportunities by ignoring women's vital role in society ... although women constitute half or more of national populations Second ... even if women's self-improvement did not lead to quantifiable increases in productivity, discrimination against women is intolerable, as it violates the fundamental rights and freedoms of peoples... Third ... gender issues (are) important to development of research because women's self images affect their own development. (Achola Pala Okeyo 1989: 3-5).

Clearly then, since women constitute the majority population the country deprives itself of a large proportion of human resources if women are routinely ignored, misutilized - in a word peripheralized. In both Eastern and Western Europe, attempts have been made to reintegrate previously subjugated segments of the population including women into the development process. Similarly in Third World countries, recognition and empowerment of such populations has recently begun to be seen as a critical measure in dynamizing existing economic and social structures. For if world history hitherto constituted an attempt by ruling groups to continually exclude significant portions of the population from the development and human arenas, it appears present and future history is/will be about incrementally reintegrating such disadvantaged groups into the economy and generally humanity.

Women's actual contribution to economic production is believed to surpass men's. If that be so, common sense demands such production role should be acknowledged and men must participate equally in both production and consumption. Furthermore, women are largely responsible for the central role of initial socialization of the population. Thus, their treatment by men, political authority and society must be consistent with the above crucial role so that women are given added incentive and support for improving their socialization role. Crucially, rehabilitation of women's condition will dramatically reduce disadvantage and marginalization in society since women constitute a significant proportion of the disadvantaged. Moreover, lessons learned in the study of gender induced disadvantage will, it seems to us, apply mutatis mutandi to an examination of other disadvantaged populations.

Since present legal norms in many communities and countries - including Kenya - were developed within patriarchy, it becomes worthwhile to study how such laws relate to gender discrimination against women. Further in societies such as Kenya's, which are still emerging from the traditional form,

the "invisibilization" and potential of women in the development process deserve special study so that we can determine if modernization can be a viable catalyst in reversing women's discrimination.

As will be clear presently, Laikipia district represents a microcosm of Kenyan society because of the diversity present within it. A study of women and the law in Laikipia is therefore likely to highlight legal problems faced by the Kenyan woman in general.

Laikipia District: Pertinent Background Information¹

The district faces unique ecological constraints which cause untold hardship for women. Extensive aridity and semi-aridity imperil agricultural and livestock production and other economic activities. As a result the working women here have to exert themselves over and above their counterparts from the country's agriculturally favourable areas in order to secure subsistence and family survival. In the drier sections of Mukogodo and Rumuruti, annual rainfall amounts to only 400 mm. Water resources which could facilitate cheap water projects are lacking. Consequently, water development has lagged behind. Women spend considerable time in ensuring provision of domestic water² - indeed one of the most persistent problems articulated by our respondents was acute water shortage.³

1. The information in this section is extracted from: Republic of Kenya, LAIKIPIA: District Development Plan 1989 - 1993, Ministry of Planning and National Development, Nairobi, Government Printer, 1989.

2. Some of our respondents spent 7 hours a day fetching water every two days.

3. The quality of the water is, on the whole, very poor. On several occasions, we drew water from a river used by animals and for bathing and washing clothes. To my knowledge, none of the researchers drank the water.

Due to existence of few forests, wood fuel and charcoal are scarce. Livestock products are thus widely used as a source of energy. Shortage of fuel resources, just like water shortage, also overburdens women because traditionally, they are expected to mobilize both.

Parts of Laikipia have a pastoral economy in which women provide labour within the contexts of unadulterated patriarchy, polygamy and a perennially enfeebled economy. Where the economy is poor, women experience the brunt of such state.

Ranching activity has existed since the colonial era. Women have provided cheap labour in the ranches, often their labour attracting less remuneration than men's. With the africanization of some of the ranches, widespread migration into the district has occurred. Some of the migrants are single women who participate in acquisition of land and independent economic activities often as heads of their households.

Laikipia represents one of the few districts in Kenya where the male population outstrips the female population. In 1979 there were 69,548 males to 64,978 females; a sex ratio of 1:0.93. Men tend to precede their spouses into the district in order to start homes. The Samburu and Turkana herdsmen usually migrate without their families. The military stations in Nanyuki are basically staffed by men.

Landlessness is rife in the district. From an estimated population of 242,260 in 1989, 35,000 people were landless. Women tend to predominate in this category, particularly where, as is the case here, customary law vests land interests in men. Not all private land has been subdivided, hence untitled parcels exist. In such a scenario, proprietary security for women is more hazardous than where titled land exists. On the whole, very small holdings exist which make viable agricultural activity difficult. Like elsewhere in the country, actual agricultural activity is carried out by women.

Small scale farming is predictably an important agricultural and economic activity. To raise agricultural productivity, planners and agriculturalists - particularly extension officers - have to consciously target women.

Also the informal sector serves as an important contributor to economic activity. One problem facing this sector especially among women groups is lack of marketing channels. Also loan applicants are few due primarily to lack of appropriate collateral. This applies more to women than men.

Many women's groups exist and operate within the district. Between 1983 and 1987, 150 groups were registered. Financial assistance seems to be dwindling as the number of groups increases.

Few health institutions and facilities exist. These are 16 dispensaries, 2 sub-health centres, 5 health centres and 1 hospital. Certainly, reproductive health and family planning for women cannot be catered for optimally under such conditions. Children's health is also adversely affected by lack of adequate medical facilities. Women are ordinarily responsible for family health. Therefore they are more acutely affected by problems in the health delivery system than men.

Educational opportunities are as yet extremely limited especially in Mukogodo. There exists a dearth of academic institutions. Women's enrolment is markedly inferior to men's. Adult literacy programmes are rudimentary. As a result, widespread illiteracy embraces the district, this being more pronounced among women. For example, a perennial problem afflicting women leadership is illiteracy. Some parents are still opposed to school education of girls because such parents prefer traditional education for the daughters aimed at preparing them for early marriage.

Finally, in Laikipia, cultural diversity, as well as social and economic differentiation are extreme. Not only is the gap between rich and poor extremely wide, but also culturally diverse groups exist. The pastoral communities still pursue their traditional African culture, whereas most of the migrant communities have, to a large extent, embraced English type "modern" culture.

PART II

GENDER DISCRIMINATION, LAW AND DEVELOPMENT: THEORETICAL ISSUES⁴.

2.1 Gender Discrimination Defined

Tove Stang Dahl defines sex discrimination thus:

Discrimination means differential treatment. Sex discrimination means differential treatment because of sex, for example rules and actions that treat men and women differently on the basis of their sex. Rules and actions that treat women and men differently on other ground are not, ab initio, sex discrimination since the intention has not been to treat them differently on the basis of sex. But such rules and actions can in fact have sex discrimination as a consequence. (Tove Stand Dahl, 1987:37).

Gender discrimination thus amounts to advantage - economic, political, social, cultural and psychological - accruing to the male on account of their control of natural and human resources, the production, distribution, exchange and consumption processes. (Maria Nzomo, 1987:111 at 114-116). The justification for engaging in sex discriminatory practices is however, articulated within the cultural realm, the argument being men are natural and historical leaders whom therefore society expects to assume dominant role in societal organization. Often, male superiority is also

4. For a discussion of theoretical issues of women and the law in Africa, see Janet W. Kababeri, 1989.

justified as a function of biology. ently then, gender discrimination flows from patriarchal and economic hegemony over the female species - of whatever class - based on a web of half-truths and lies.⁵

Although gender discrimination and all discrimination for that matter - is by and large negative, there does exist positive discrimination of two types, that is "negative positive discrimination" which accrues to A, directly or indirectly, due to the effect of negative discrimination against B. Writes Tove Stang Dahl 'It will always be the case that negative discrimination against one sex, directly or indirectly, means positive discrimination for the other and vice-versa'. (Tove Stang Dahl 1987:39). Secondly, there exists positive discrimination intended to consciously correct existing negative discrimination. For example, provision of job quotas to women who had previously been subjected to employment discrimination constitutes positive discrimination.

2.2 Who is Discriminated Against?

The majority of studies, especially by Western feminist writers, tend to treat women as a homogeneous entity. It is true all women - whatever their social and class position - are discriminated against by men within the same class or men above their classes. However, upper and middle class women are not discriminated against by men in the same manner, extent and ways as working women are. In identifying problems encountered by women due to gender discrimination, it then becomes imperative to distinguish

- : problems encountered by women en masse
- : problems encountered by upper and middle class women
- : problems encountered by peasant and working class women (working women).

5. For a comprehensive discussion of patriarchy and gender discrimination see generally Maria Mies, 1986.

Blurring of the above categories can lead to mis-identification of the problems flowing from gender discrimination. The scientific content of our enquiry, as a consequence, is then seriously undermined. This is more so in a developing country, where upper and middle class women form a small minority of the female population and therefore a study of gender discrimination has necessarily to concentrate on working women⁶.

We are obviously not arguing that the problems of upper and middle class women are inconsequential. No. In the women's rights movement, gender discrimination against such relatively advantaged women must also be identified and actively mobilized against. Crucially however, gender discrimination against working women must be consciously identified and remedied. Needless to say, problems common to all women must similarly be addressed.

One of the reasons we have isolated the working woman for special scrutiny is that hers is multiple exploitation and discrimination. She is exploited within the framework of the capitalist system in general, just as her male counterpart is. She is also exploited and discriminated against by upper and middle class men and women. Also she is exploited and discriminated against by her oppressed and exploited spouse or 'boy friend' and his male relative.

In our view, any analysis of gender discrimination especially in the African context must be sensitive to the above multi-layered reality if it is to avoid being simplistic, apologia or a smokescreen for promoting upper and middle class women's partisan struggles for "women's liberation".

6. Indeed for Laikipia district the majority of the women population are working women.

2.3 Causes of Gender Discrimination

Gender discrimination has diverse causes. It may be officially sanctioned, consciously or unconsciously engendered in societal organizational structure especially within patriarchy, outlawed but alive in societal practices, sanctioned by legal lacunae or lack of awareness of measures designed to eradicate it and so on. Moreover, sections of the populace e.g. extremely disadvantaged and culturally oppressed and subordinated women may be conditioned not to identify discrimination and therefore to them discriminatory practices are in the short run acceptable. Even where the subjects of gender discrimination recognise its ills, they may choose docility in preference to enjoyment of the meagre benefits of the present gender biased system.

Friedrich Engels posits that gender discrimination is rooted in the genesis and development of private property especially with the advent of class, slave owner society. Such Engelian thesis runs thus: under primitive communalism, women's position in the household and society was dominant, but women did not exploit such superiority. The dominancy arose from the fact that the women played a greater role than the man in the reproduction of the human species and production of social life being in charge of housekeeping as she was. Engels comments:

Communitistic housekeeping, however, means the supremacy of women in the house, just as the exclusive recognition of the female parent, owing to the impossibility of recognizing the male parent with certainty, means that the women - the mothers - are held in high respect. One of the most absurd notions taken over from 18th century enlightenment is that in the beginning of society woman was the slave of man. Among all savages and all barbarians of the lower middle stages, and to a certain extent of the upper stage also, the position of women is not only free, but honourable (Friedrich Engels: 1972 ed: 113).

Engels argues that as society emerged from primitive communalism and man - who owned and controlled the tools of production outside the household - multiplied and privatized property, (Id. 118) a reversal of gender roles began to occur. Write Engels:

Thus on the one hand, in proportion as wealth increased, it made the man's position in the family more important than the woman's, and th on the other hand created an impulse to exploit this strengthened position in order to overthrow, in favour of his children, the traditional order of inheritance. This, however, was impossible so long as descent was reckoned according to mother right. Mother right therefore, had to be overthrown. .. (Id. 199).

'The overthrow of mother right was the world historical defeat of the female sex. The man took command in the home also; the woman was degraded and reduced to servitude; she became the slave of his lust and a mere instrument for the production of children.' (Id. 120-121).

Engels proceeds to show that in order to defeat mother right (that is, recognition of descent only through the mother's side and recognition, for purposes of inheritance, of only the female line due to the fact of group marriage) it was mandatory for the already propertied man to introduce monogamy of the women (Id. 100). Engels writes:

Monogamy arose from the concentration of considerable wealth in the hands of a single individual a man - and from the need to bequeath this wealth to children of that man and of no other. For this purpose, the monogamy of the woman was required, not that of the man, so this monogamy of the woman did not in any way interfere with open or concealed polygamy on the part of the man, (Id. 138).

To summarize, Engels demonstrates that man's capture of private property, particularly within a patriarchal and class set up, ensured his dominancy over woman. Indeed

progressively, the woman became man's slave and a producer of his children and labour. Because house work was no longer treated as socially necessary labour, it was not recognized as such and the woman was catapulted into an inferior position with the accompanying degradation.

Most feminist writers today agree with Engels, at least his broad outlines, that the economic marginalization of women through history - their distancing from control and ownership of the means of production - is, in large measure responsible for their present subordinate position.

Although generally adopting the Marxist framework, Claude Meillasoux thinks that women's subordination is traceable to a factor other than the genesis and control of private property by males. He states

(Historical materialism is also valid for 'primitive' society and ... the production of material life conditions the general process of social, political and intellectual life' ...

still and this is important in contrast to capitalism, power in this mode of production (pre-class mode of production) rests on control over the means of human reproduction - subsistence goods and wives - and not over the means of material production. (1981:49) (emphasis in the original).

He adds (and we quote in extenso)

Women's subordination makes them susceptible to two different kinds of exploitation - the exploitation of their labour, in that they lose their claim to their own products; which is handed over to their husbands who take control of it or pass it on to the elder, and is never returned to them in its entirety; and the exploitation of her reproductive capacities, mostly since filiation (that is rights over the progeny) is always established through men ... (1981:77).

Marx is therefore right to believe that women probably constituted the first exploited class. All the same, it is still necessary to distinguish different categories of women in terms of the functions they fulfil according to age by which they are not in the same relations of exploitation and subordination. The advent of 'private property' certainly brings significant changes in the position of women, as Engels discerned, but we have seen that the causes for their submission are more intimate and have more distant origins (1981:78).

Although Meillassoux's work is incisive and an important contribution to the gender discrimination debate, it has been criticised. Sharon B. Stichter and Jane L. Parpart write:

Meillassoux seemed to be arguing that in all human societies subsequent to hunting bands and gynolocalities (excepting, in the future, advanced communism), men had of necessity controlled reproduction, and hence controlled women. Edholm, Harris and Young responded that even if some kind of social control over reproduction were a necessary feature of all societies, such control need not necessarily be by men, nor need it be inimical to the interests of women. Furthermore, control over reproduction was only part of the problem of controlling allocation to the labour force. Finally, the question of who controlled women's important work as material producers had been neglected. Reproduction had become an overloaded concept; to make it the all-inclusive explanation for men's control over women was unconvincing. (1988:6).

It seems to me Engel's work could be read to include Meillassoux's point on the centrality of the issue of control over reproduction by men. Due to emergence of private property, men found it necessary to control women's reproduction for purposes of expanding labour power at their disposal as well as securing heirs of undisputed paternity. During the above process, women became subordinated. If the thesis of men's control of reproduction per se is over-emphasised, we run the risk of viewing women as the weaker

sex who had to be protected by men during the course of which subordination resulted. Such formulation would expose us to the charge of paternalism.

After scrutinizing relevant literature by naturalists, liberal and leftist feminists (Marxist and radical) (see also Susan Moller Okin, 1989:170-186; Diana K. Coole 1988 esp ch.10; David L. Kirp et al 1986:46-66) we conclude wide agreement therefore exists that ultimately economic emancipation of the female population is a basis and necessary condition for realization of gender equality.

To the extent that women incrementally access and control means of production, their labour and the fruits of such labour and production, gender discrimination against them is also incrementally reduced and the movement towards equality put on a sure and concrete footing.

Patriarchy - within which men own the means of production and property in general - provides a fitting framework for gender discrimination. 'Patriarchy' literally means 'the rule of fathers'. But today's male dominance goes beyond 'the rule of fathers', it includes the rule of husbands, of male bosses, of ruling men in most societal institutions, in politics and economics, in short, what has been called 'the man's league or more 'men's house'. (Marie Nies 1986:87).

Although sexist ideology does not and cannot cause gender discrimination, it is however, relied on significantly to justify such discrimination. Notions of the woman's subordinate position in society being associated with her biological and physical inferiority are frequently peddled even by some writers (David Kirp et al 1986:47). Moreover, some religions and religious texts have also justified gender discrimination. (Osita C. Eze 1984:141).

2

The relationship between culture and tradition on the one hand and gender discrimination on the other is a complex one. Some writers believe that 'the real basis of the inequality of sexes in Africa should be traced essentially to the traditional division of labour'. (ID.142). The argument has it that within the cultural traditions of African societies, women were assigned those roles which made them inferior to the men in so far as the roles were the "soft" ones. Whereas it is true that in African societies, where slavery and nascent feudalism - or societies developing towards such modes - existed, the status of women was subordinated to that of men. However, it has to be conceded that in pre-class pre-colonial societies, the woman's role was acknowledged and treated with dignity; many such societies were matrilineal or had a patrilineal structure moderated by elements of matriarchy. To the extent that private property and patriarchy were not dominant, mother right tended to preserve respect for women. However, the introduction and penetration of capitalism in Africa upon colonialism accelerated the subjugation of women. For example, land ownership was officially recognized among male household heads thereby reducing women land rights to merely use or access rights. Once the woman's marginalization and inferiorization reached its zenith under capitalism, some writers on gender discrimination resorted to culture to explain that women subordination in African societies had cultural roots. Missionaries also buttressed such position. In time too, a large proportion of African men came to believe that within their culture and traditions, justification for their domination over women existed. Predictably the entire fabric of present societies is so structured that it ensures gender inequality in favour of men; both consciously and unconsciously men and women ordinarily behave and live in ways which perpetuate gender inequality. It is no wonder that radical feminism has the following agenda for inducing gender equality. Writes Diana K. Coole:

Unlike the Marxist approach, it (radical feminism) has not struggled to incorporate women into a pre-existing political framework, but instead attempts to shift our whole perception of society, to restructure it in terms a radically new set of woman - centred meanings. Its

aim has been to recast personal identities; to reclaim language and culture from their masculine forms; to relocate significant political power; to reassess human nature and to challenge traditional values ... (1988:2-35).

Diana G. Cole summarizes the radical feminist approach when she writes:

radical feminism ... fostered the claim that the personal is political ... (at 235).

claims that the personal is political thus shift traditional notions of politics in fundamental ways. First, they locate the family and the sexual identities constituted there, rather than the state, as the primary site of power relations. They mean that politics is about personal life not simply about electoral battles and ambitious individuals; that the way we live in our private lives is as much the stuff of politics as parliamentary debates of theories of state. Who raises the children and does the housework becomes a political issue. Second, they isolate men, rather than economic classes of self-interested individuals, as the prime power seekers. Third, they find that power is exercised through a whole range of channels but tend to focus on psycho-cultural ones, since consciousness-raising is needed before victims recognize the full scope of their oppression. Fourth, then the scope of politics is considerably broadened; it no longer makes sense to locate a circumscribed political arena and juxtapose it to an a political private realm. As women's experience testifies, there is no escape from power relations in the world as we know it. (at 257).

Undeniably emphasizing the personal realm where consciousness raising and other battles for equality must occur is critical. However, de-emphasizing the primary role of class and state in creating and maintaining gender inequality can easily result in a mis-identification of the causes of gender discrimination. Indeed what the radical feminists have to say turns out to be that radical after all.

2.4 Effects of Gender Discrimination

Recent preoccupation with the role of women in development by international institutions and governments has arisen principally due to a realization that it does not make economic sense not to consciously target and mobilize over half the population in society. In pursuit of holistic development, it has been realized, the female component of the population must be recognized and addressed not merely as an appendage of the male economy but in its own right. Hence, one of the deleterious effects of gender discrimination against women is that society is rendered poorer by ignoring, de-emphasizing and marginalizing over half of its population. A caution is necessary at this stage. Even when women are being "ignored", they still represent the backbone of the economies in Africa - particularly rural working women. Most of rural production is accomplished by such women with or without male management input and other effort. Many feminist scholars have decried the phenomenon of the "invisible male" within the rural economy. Gender discrimination against women then is relative in the sense that:

- i) due to it men do not necessarily input into production as much as they could and should.
- ii) women's production is not as high as it should be since it is not adequately supported by men's productive activity.
- iii) policy makers and implementators continue to plan for and address men and thereby do not also sufficiently target women who are responsible for the bulk of the production.
- iv) to the extent that domestic work by women is not legally recognised, a significant proportion of women's labour is appropriated by the men without compensation and other recognition. Such productive activity is further not reflected in national economic figures, thereby legitimizing this species of male exploitation.

- v) since women particularly in the rural economy, undertake the bulk of agricultural work such is also converted into domestic work consequent upon which its recognition disappears. Work which if undertaken by men would have been recognized and compensated for is not "domesticated" and virtually rendered for free.
- vi) Women are not allowed by the existing exchange and consumption relations to appropriate to themselves an equitable amount of their labour's product.
- vii) women's self-esteem due to the above consequences is perpetually low and the consequent loss to society occasioned by non-existence of confident population, etc.

Clearly, the gender discrimination which in the first place is meant to advantage men, ends up undermining the total development which society en masse is capable of and could achieve.

Gender discrimination against women is part and parcel of other differentiation rife in class society. Such differentiation is on class, racial and other minority dimensions. Such overall negative differentiation prevents society from exploiting its maximum potential. For example, within capitalism, the working man is exploited and oppressed by the owning class(es). In turn the working man exploits his wife, sisters, etc. who are also exploited within the broader system. Because the working man is not simply a victim but also an oppressor, his own anger against the broader system stands minimized.

2.5 Government Policy and Gender Discrimination

As one of the introductory quotations suggests, the Government is cognizant of the possible ill effects of gender discrimination against women. Policy documents - particularly recent national plans - emphatically articulate the position.

'women are an important element in the development process and should be integrated in that policy' (Maria Nzomo, 1982:9). After analyzing the development of WID policy since 1978, however, Maria Nzomo concludes that 'what we have so far are sweeping, vaguely worded statements of government commitment and intentions on WID, such as those found in national plans and party manifestos'. (Id.).

So far the government is yet to reduce its policy on gender discrimination and the role of women in development into the one comprehensive and authoritative document, for example, a Sessional Paper devoted wholly to such issue. Moreover, the existing elements of policy enunciation on women normally affirm that women are not discriminated against and therefore do not mirror the reality on the ground. The policy statements too do not go further to suggest the actual measures that must be pursued to correct gender discrimination against women.

The keen analyst is left with a lingering feeling that government policy articulation at this stage is uncommitted and largely ineffectual; indeed lack of policy clarity contributes to and supports adverse gender discrimination measures and practices.

Most importantly, the gains achieved by women due to government policy commitment towards them as enunciated in national plans and other policy sources, are seriously punctured - or even negated - by the constitutional position, which favours discrimination against women. Section 62 of the Constitution bars discrimination on all grounds except sex! What this means is that women in Kenya may not successfully use the Constitution to challenge laws, policies and practices which discriminate against them on grounds of sex.⁷

⁷ For a fuller discussion of this point see Kivutha Kibwana, 1989. See also Wilfred W. Nderitu, 1988, esp. at 1-14.

From the above, it should be clear that present government policy on the role of women in society is yet to be articulated in clear cut and firm manner. Moreover, the manner in which such policy should be actualized is not stated as an amplification of the policy. Critically, whatever policy on the role of women is to be found in ordinary policy documents, is perhaps fatally contradicted by the Constitution which does not outlaw sex discrimination.

2.5 Law and Gender Discrimination

Often the law contributes to promoting gender discrimination although ideally law should do the reverse. Addressing such reality Margaret Schuler writes:

"The problem of the inferior legal status of women centers around three key issues:

- the laws themselves are often unjust or discriminatory, limiting the rights of women;
- the application of the law - even when adequate - is often arbitrary or prejudicial towards women; and
- women tend to be unaware of their own legal status, of the effect laws have on them, or even that they are the objects of injustice" (Margaret Schuler 1988:4).

In the above instances identified by Schuler, sex discrimination can be engendered in the law itself or the law may provide de jure equality and yet de facto discrimination exists. (Tove Stang Dahl, 1987:44-51). Perhaps one can add to the above instances a fourth scenario in which legal lacunae enables existence of gender discrimination. We have, for example seen that Kenya's constitutional structure does not outlaw gender discrimination and thus constitutional silence may be said to sanction discrimination on ground of sex.

Writers on women and the law as a preliminary endeavour always identify the key issues in the debate. (See for example, Margaret Schuler (1986:14 - 15) Unfortunately, such identification focusses on the problems confronting upper and middle class women to the exclusion of the working woman - both rural and urban. Even when issues apply to both the working woman and women from the owning classes, their manifestation can be dissimilar. For example, husbands or male relatives of working women may not have real property for whose ownership and control their wives and sisters and daughters can contend. Also inheritance may not be crucial for such women.

In our view, much of the discussion on women and law in Africa and the Third World is non-focussed to the extent that legal issues identified among upper and middle class women are treated as the global issues of all women. Even supposedly radical feminist scholars succumb to such analytical and perhaps ideological pitfalls even after identifying them initially (Maria Nzomo, 1982; 1987; S.B.C. Gutto 1976 etc.).

2.7 Women, Law and Development: Mobilization for Empowerment

Schuler defines development thus: Development is essentially a process of allocating and utilizing resources for the social and economic benefit of society. Unfortunately, the net result of many development processes in the third World today is the political and economic advancement of certain groups and the marginalization, exclusion, or subordination of others. Women comprise one major social sector systematically excluded from full economic and political participation in the production and benefits of development (Margaret Schuler 1986:1).

Most writers on the role of women in development in the Third World define development in terms of integration of women into the capitalist model. The argument then is women have not been equally exposed to the opportunities available under capitalism as men. To dynamize capitalism and introduce equity in a welfarist sense, women have to be given equal opportunity,

as men to enter the capitalist mode of production as actors and not just as objects. If the above happens, women, the free enterprise system and society will be more the richer. Thus, greater incorporation of women into capitalist production will increase surplus, some of which can be shared out among working people (especially working women) and hence lead to some raising of the general standard of living.

In capturing the above understanding of development and the place of women within it and posing the possibility of a different kind of development, Achola Pala Okeyo writes as follows (and we quote in extenso):

The basic premises of much of the integrationist research (and the United Nations is no exception) was that women were outside the mainstream of development. Unfortunately, the small projects have come and gone with little impact. We must then ask why sex inequality persists and what the other dimensions of gender-based inequality are. The main questions become: into what structures are women being integrated, and what is the pattern of social and economic differentiation within those structures? Do women really need to be integrated into unequal structures or should there be a new society based on gender equity? These questions underlie a critique of the concept of "integrating women in development". "Mainstreaming" of women is not a workable strategy in and of itself. The question must go further: what is the mainstream? Is it good for women? Does it offer equality? Achola Pala Okeyo 1989:5).

From the above passage, Okeyo anticipates two types for development; development in the short term, which consists of "mainstreaming" or integrating women into present capitalist system into either a reformed capitalism, which is to some extent sensitive to the demands of women in their march for equality, or a post-capitalist system in which equality, not only for women vis-a-vis men, but also for all humanity is guaranteed.

For our present purposes, we concentrate on the short term and therefore define development as that process which will incrementally open up the capitalist system equally for all sexes and ensure that exploitation and oppression merely on account of sex is non-existent or substantially reduced. Hence, we are interested in exploring how legal constraints relating to women's status can be removed to ensure that their participation in development, as defined above, can be enhanced. However, together with other authors on the subject, we recognize the fact that overhauling of the present international economic and capitalist-patriarchial systems must prelude the actualization and guaranteeing of genuine equality inter se sexes and among peoples.

Part III

3.0 Law and the Status of Women in Laikipia: Research Findings and Analysis.

3.1 Introduction

Prior to analysis of the legal problems identified in our research, a word about the methodology adopted. Field-work was conducted from January-April 1989 and from November-December 1989. From the data collected, based on a structured questionnaire administered to both women and men (but with a bias on women respondents), 90 cases from Mukogodo, Rumuruti and Ol Ngarua (referred to subsequently as Area A and 16 from Central (Area B) were analysed.⁸ The data was analysed separately vis-a-vis the above two localities because the population in the first three divisions, largely consisted of rural poor working people, while in Central division more "modernity" and slightly higher incomes were noticeable. It was anticipated the above dichotomization would enable us to study women and law in light of economic, social and cultural differentiation.

8. Although we have introduced Area A and Area B abbreviations, sometimes we identify the localities by their appropriate name.

Another important source of data in our study was unstructured interviews further supplemented by keen observation of myriad process and activities within the community.

Earlier, we lamented that analyses in this area do not usually identify the problems encountered by women as a consequence of their gender, class and station in life separately. In this part then, we wish to examine the problems within the framework of:

- problems encountered by women en masse.
- problems encountered by upper and middle class women.
- problems encountered by peasant and working class women (working women) due to
 - a) general exploitation of working class people in a capitalist system
 - b) exploitation and discrimination by upper and middle class men and women.
 - c) exploitation and discrimination by oppressed and exploited spouses or "boy-friend" and his male relatives.

Three caveats however must be immediately entered. Most of the women in the district are working women. Problems of upper and middle class women may not be widely canvassed in this study. Second, many of the problems discussed do not fit in only one of the categories, they traverse more than one of the three broad categories. Third, we do not concentrate on problems encountered by working women by reason of the general exploitation of working class people to the extent that this represents the common exploitation of the sexes.

3.2. PROBLEMS ENCOUNTERED BY WOMEN
EN MASSE.

Cohabitation.

Present Kenya law regarding the rights of women and children (Githu Muigai 1989: 113, 119-121) under a cohabitation arrangement are not clear⁹. Our marriage law does not grant a species of rights to parties who are in a cohabitation relationship; they have to recourse for redress to some other law, e.g. contract law in relation to the sharing of jointly acquired property. A special type of cohabitation is prevalent in Manyuki town. Military preserve in the town is high since several barracks are located here. There are instances of military men who set up houses for women and visit them regularly. Often children are borne out of such unions. After the men's tour of duty, the women (and children) are abandoned.

Possibly some of the above unions can fall under criminal sanction which forbids any party from initiating false marriages¹⁰. Also it can be argued that some of such unions are marriages under customary law, or common law marriages: marriages by habit and repute. Where the above fails, then one is interested to know the rights of the woman and children during the currency of the cohabitation and upon dissolution by one party. Upon abandonment by the men, the female partners should seek judicial remedy particularly for division of any property of the 'union'. It is unfortunate as the law stands, the female partners will not get affiliation support for minority issues of the 'union' (see fn 13). Preferably, the female partner should insist on regular unions. A draw-back to this solution is that most the men are already monogamously married. The result is that such

9. Section 179, Penal Code (Cap. 63).

10. Id section 287.

women and their children are largely unprotected by the law.

3.2.2. Property: Division of Labour and Product.

In Laikipia - as in other parts of the country - property ownership resides in the man even when there exists over-whelming evidence to show that the women are responsible for most of its accumulation. In both agricultural and pastoral communities, traditional division of labour - which itself was lopsided against women - has been further transformed to ensure tasks hitherto performed by men fall to women.

Land, on the whole, belongs to men. So do animals with a possible exception of chicken¹¹. Men can dispose of the animals usually without approval of their wives, although sometimes they inform them about the disposal. The wives are managers or keepers of the animals and are deemed to own the milk¹². But as the milk is part of the food consumed the families, ordinarily the women cannot sell it.

Among the Maasai in Laikipia, women often herd animals especially goats. The men, who in the past undertook the task, are migrating into towns in search of employment.

Among the agricultural communities in Laikipia - as in other parts of Kenya - men seem to participate notably in the initial preparation of land and harvesting; other stages being left to the woman, although the man undertakes a supervisory role. Initial preparation of the field may be achieved through mechanized help paid for from family

11. Women's groups can own and sell goats. However, it appears most of the proceeds are utilized by men and the family as a unit, and not the woman immediate beneficiary of the group.

12. In Kericho, where milk is an important source of income, men own the morning milk, whereas the women own the evening milk. In the morning, cows produce more milk.

savings, from sale of crops or cash raised from man's employment. Often the women are assisted by hired help in performing other jobs in the farming process. We learned that one of the reasons men participate significantly in harvesting is to ensure they are available to receive the proceeds from sale of crops. Clearly men control the family income; it is their duty to distribute such income.

We found that even in the case of women working in paid employment, their salaries are controlled by the men; often such salaries are deposited in the husbands' bank accounts or given to the husband in cash.

Although in Nanyuki town 1/4 of the businesses are registered under women's names and are actually run and managed by women, when the man comes to appraise the business, he usually siphons off the profits. As a consequence, businesses can hardly stabilize.

As we indicated earlier, the condition of women, particularly in Laikipia's arid parts, is worsened by the fact that much time is expended in fetching water and wood. Such chores multiply the already existing tasks that the women must undertake. Central to improving the condition of women in this district will be provision of adequate water for all the families and their animals.

We noticed that some families decide on registration of land in the wife's name in order to have access to more land in a land buying company. Control of such property still vests in the man. He seems to be responsible for taking decisions as regards transfer of such land.

Only unmarried women who own land and other property are able to exploit and enjoy their property, although male relatives often make demands on them. Some senior married

women employees in government, local authorities and private sector have limited autonomy regarding disposal of their salary and earnings.

Even where members of the women's groups derive financial benefits from their activities, such benefits are enjoyed by their families, e.g. money or goods acquired through merry-go-round activities. (Supra fn 11). Men argue that initially they have given the women money for joining the women's groups and so the family deserves the resultant proceeds. Women's group activities, then, are geared towards family subsistence which is also achieved through subsistence agriculture, hawking etc. Such activities are reminiscent of and a development from prior communalist house-keeping.

Finally, under this subheading we consider division of property upon divorce. Present Kenya law does not recognize women's participation in household keeping as a sufficient contribution towards purchase of property to enable the woman to share in it upon divorce. (Githu Muigai, 1989). Such position dooms most rural women. If their role is interpreted (or misinterpreted) as exclusively household keeping, then property acquired through family endeavour is deemed to exclusively belong to men. If on the other hand women's household keeping and agricultural production roles are acknowledged, then whatever property the husband acquired will be deemed to be joint property.

For subdivision of property to occur upon divorce under present law, the wife has to show she contributed directly to wards its purchase. (Id). Women in salaried employment and business may be able to prove this.

Especially among the pastoral communities in Laikipia, many women never think they should get any property subsequent divorce or separation. In Area A 68.8% of our re-

spondents stated husbands keep property upon divorce as opposed to 4.4% of women. 69% of the respondents expect women to keep nothing; 13.3% expect husbands to help women with children; 2.2% expect to be given a piece of land upon divorce, whereas 2.2% expect sharing all the property. In Area A 40% of the respondents expected husband to keep wife's property upon divorce, whereas 35.6% expected wife to keep her own property. In Area B the respondents who answered the question, 63.3% stated husbands keeps property after divorce; 80% affirmed husbands keep even property owned by wife, whereas 20% stated wife's property is shared between both parties.

On the while, respondents though the women can have what the man chooses not to keep. Fortunately under Maasai customary law the man can transfer a wife he has disagreed with to another boma, giving her animals to rear for his male children.

Domestic work should be recognized by the law just as any other kind of work. If such recognition takes place, in case of divorce, the property can be shared because it is understood that the woman contributed directly towards its purchase. The acknowledgment of domestic work is really of crucial importance even at a psychological level as many husbands think their wives must work free for them and believe they are the only ones who actually work. A woman who works outside the home is more self confident (although she is exploited most of the times). A woman who works at home is totally dependent on her husband because she is also convinced that her work is no work. This "invisible" work should therefore be acknowledged as work on its own right.

As the law stands, men can insist that land in the wife's name was so registered in her capacity as a trustee. (d). If a trust relationship is established, then the man can retransfer the property to himself upon or before divorce. The property owning woman has therefore to ensure that registration is under her name in her own right.

3.2.3. Divorce

As indicated earlier, customary law holds sway in most of Laikipia. Our research revealed most women never anticipate leaving their husbands, but think husbands may leave them. It also appeared that there is no divorce as such among Laikipia's pastoral community. Women cannot entirely leave their husbands. As we have already seen if disagreement arises, the husband sets up another "boma" for the woman and her children and in such a role she acts as a custodian of the animals for her male children. Among the pastoral community, we only sampled three women who had left their husbands due to persistent violence. However, in Area A 58.8% of those who responded to the question whether they knew any divorced person answered affirmatively (40 respondents) and 41.2% negatively (28 respondents). By divorce the respondents meant separation as described above. In Area A higher percentages of the respondents (40%) seemed to believe women should keep children upon divorce, whereas 15.6% believed custody should be shared.

More reasons for divorce were offered in Area A than B. In B spousal violence was the main ground for divorce. In A the reasons for divorce ranged from failure to give birth (17.8%), where one spouse does not provide food for the other (13.3%), adultery (8.9%), disagreement (6.7%), marrying more wives than a man can support (6.7%), violence (4.4%) and witchcraft (2.2%).

Another significant factor in divorce is that the respondents believed it should take place extra-judicially. Only 4.4% in Area B felt courts should be involved in divorce proceedings. In Area A the respondents did not know courts do adjudicate in divorce proceedings. The above findings have far reaching implications for the vindication of women's rights upon divorce, as we have seen in the subsection on division of property upon divorce.

3.2.4. Women and Personal Liberty.

Due to patriarchy, women's personal liberty is significantly curtailed by men. In Laikipia, for example, some men forbid women (girls) to go to school, to join women's groups, attend meetings, enrol in adult literacy classes, use family planning services, talk to visitors (e.g. extension officers and researchers). In Area A for example, all the women who used family planning services did so with spousal permission. Women become confined to the home and other production arenas (e.g. their husbands' agricultural land, grazing land and community land where there are wells, rivers, and forests). Greater freedom is necessary for women, particularly in the pastoral set up if they are to enhance enjoyment of their human rights and their developmental role.

3.2.5. Legal Illiteracy and Legal Aid

In Laikipia, women are ignorant of the laws which seek to protect them. For example, most women did not know there exists four regimes of family law. The majority of women have no access to lawyers or legal aid. Some would like to vindicate their rights in court, e.g. upon divorce, but they stated that lawyers' fees were prohibitive. Others, e.g. employees, felt that legal action against employers would lead to victimization.

General illiteracy in Laikipia is quite high, especially among women. For example, in Area A 40% of respondents are illiterate and 4.4% are undergoing adult education, whereas 35.6% had some primary school education. Legal literacy cannot flourish where general illiteracy is rampant.

3.3.0. PROBLEMS ENCOUNTERED BY UPPER AND MIDDLE CLASS WOMEN

3.3.1. Single Parenthood.

Under this subheading, we merely wish to indicate that the incidence of single parenthood in Laikipia is high - especially in Nanyuki. Prostitution contributes to this. About 3/4 of women in towns are not married. Also women have moved from other districts to acquire land in the former ranches. Some of these form another category of single parents. Since the repeal of the affiliation Act¹³ in Kenya, single female parents have been left without appropriate help from their male counterparts for purposes of bringing up offspring.

3.3.2. Law and Women's Groups.

Women's groups, just like informal sector business, face the perennial problem of identifying appropriate business form. Many women's groups are not even registered; members are wary of the perceived government scrutiny attendant registration. Most women's groups are merely registered by the Women's Bureau of the Ministry of Culture and Social Services. Such registration ensures the Ministry keeps track of the groups; it also enables the Ministry to vet the registered groups for financial support or recommendation thereof.

However, the Ministry registration does not confer a business status to the women's groups. Over and above the Ministry registration, the women's groups have to register as partnerships, co-operatives and companies. For purposes of inter alia, licensing and credit acquisition the groups in Laikipia are not registered

13. The Affiliation Ordinance No. 12 of 1959 was repealed by The Affiliation (Repeal) Act No. 11 of 1969. Any affiliation orders which were in force lapsed immediately upon repeal.

as businesses. Without legal personality, the groups find it difficult to operate in the business world, sue when transgressed, etc.

Women's groups tend to be amorphous entities in which the rights and duties of the groups are indeterminate. Members cannot easily enforce their rights against the group and inter se. For example, among most of the groups in Laikipia, hardly any principle and formula regarding profit sharing exists. The majority of the groups engaged in business in Laikipia have not to date shared any profits. Moreover, if a member exits from the group, no clear-cut rules exist relating to refund or non-refund of contributions. If a member leaves the group, but had hitherto contributed money which went into a project, it is not clear how she can realise her portion of the investment and future profit from such investment. Similarly, if a member withdraws from merry-go-round activity after the group has contributed money for her, but before completion of one circle, it is yet not clear what duty, if any, she owes to the group.

Leadership of the groups runs on ad infinitum. Although the relevant Ministry has a regulation seeking leadership turnover every two years, in Laikipia usually only death changes offices.

Meetings and records are irregular. Therefore, it is not easy to detect misappropriation of funds. Most of the treasurers are barely literate. Only the secretaries are literate and young, whereas other officers tend to be older women. Where men are permitted to join women's groups, they are often accused of misappropriation of funds and other sabotage.

Women's groups, as currently conceived and organized, do not contribute significantly to the economic development of rural areas. They constitute socialization points and are desperate attempts by women to mobilize themselves, where the free enterprise system and government have not succeeded. They are primarily an extension of traditional subsistence efforts by women.

3.3.3. Employment

Only a few women are in gainful employment in Laikipia. Government departments, local authorities and the private services sector constitute the major employers of women. A small number of women are employed in the ranches, particularly to herd goats and sheep and undertake milking of animals.

Complaints from women employed in hotels and bars include inadequate pay, lack of housing allowance, overwork, (often they work for 15 hours), unpaid overtime, absence of leave, lack of respect by employers (Often including sexual harassment by employers and customers)¹⁴, perpetual temporary employment status, regular termination in which terminal benefits (end pay, notice pay, leave, overtime) are not paid, denial of maternity leave etc. However, labour officials informed us such complaints are routinely voiced after termination and not during currency of employment, the reason being employment is scarce and precarious and therefore employees choose not to complain in advance for fear of being sacked.

House maids in Nanyuki town complain of long hours inadequate pay and periodic sexual harassment.

Some women are employed in saw milling. They are not allowed to work machines, this being preserve of men. Only those who work machines are entitled to bonus pay and therefore higher pay.

3.3.4. Women and Business.

As stated earlier, about 1/4 of businesses in Nanyuki

14. Respondents who work in bars stated that men believe all women who work in bars are prostitutes.

are registered in women's names. The majority of those who physically run all the businesses are women. Most of these are family businesses run by women whose husbands are employed elsewhere. Respondents stated that men tend to sabotage development of such businesses by misapplying earned profits. Secondly, women are not given priority in relation to business loans. Lenders prefer giving credit to men. Moreover, most women cannot mobilize title for security, they have to rely on husband's or relatives' security. Since such borrowed security can always be withdrawn, the business venture rests on shaky ground. Thirdly, single women engaged in business are considered dishonest by the community. Consequently, community support is not always forthcoming. Besides, married women engaged in business cannot often take snap business decisions, since usually they have to consult their husbands first. Irreparable damage to the business may ensue when decisions are delayed.

Among the major businesses owned by women in Laikipia are a bakery, a saw mill, bicycle repair shop and a matatu.

Women hawkers exist, especially in towns. A few women have been prosecuted for conducting business without appropriate licensing.

Women's groups are also actors in business. Currently they seem to specialize in identical businesses. These are house-improvement raising money for each other, provision of water tanks, honey gathering, clothes manufacture, posho mills, shops, hotels and rental houses. Some of the problems afflicting the business prospects of such groups are lack of market for products, lack of diversity of economic activity, poor managerial skills, lack of credit facilities, low capital investment, illiteracy of membership and occasional political and administrative interference as contrasted with positive assistance. As of now, the role of the women's groups in Kenya may have been over-emphasized because our research so far indicated hardly any profits accrue from such ventures which percolate to members. So far only non-business oriented women's groups have scored visible successes. Many problems confronting these groups in the business arena are similar to those afflicting the informal sector

as a whole (Kivutha Kibwana, 1988). Solution of such informal sector problems will also assist in resolving the business problems of the women groups.

3.3.5 Credit.

We indicated businesswomen lack credit mainly because they have no security. Borrowed security by women is not as favoured by loan giving institutions as own security. Even where women possess titles and can access loans, they view loans with apprehension. Perhaps even when women have titles, they feel insecure in their ownership and prefer not to jeopardize it at all. They may also not have identified investment opportunities for which to seek loans. Most women seem to use their land as security on behalf of spouses or male relatives.

Through the women's groups, women can be interested in investment opportunities. Loan giving institutions may wish to extend loans to registered groups, since the risk is spread among a larger number of clients.

Perhaps, apart from establishing institutions which only give credit to women, new criteria for giving loans to certain disadvantage groups should be developed which de-emphasize security. (Id).

3.3.6. Succession

In theory, Kenya's succession law¹⁵ does not discriminate on gender lines. A testator/testatrix can will his/her property to any and all children and relatives regardless of sex. The rules regarding intestate succession also ensure property devolves to all dependants irrespective of sex. Indeed, if a parent writes a will

15. Cap 160.

which, for example discriminate a dependant on account of sex, the law can reverse such anomaly.

However, in most instances, property - especially land - is inherited by males in accordance with customary law. In Area B 71.4% of respondents stated only sons should inherit property, as compared to 14.3% who thought all children should inherit. In Area A the figures were 54.3% and 37.1%; 2.9% of the respondents preferred inheritance of property by their grandchildren. To the extent that particularly rural women do not know the law, the above succession preferences work against women's interests. In Laikipia, especially among the pastoral community, the Law of Succession Act does not apply in cases of intestacy and thus customary law, which favours men, is the operative law. This is by virtue of section 32 of the law of succession Act which disappplies the law on int-stacy in respect to agricultural land crops and livestock thereon in certain gazetted areas. Most of Laikipia district is within the gazetted areas for purposes of intestate succession.

Interestingly, we discovered that where women have titled land, they prefer to leave it to their sons. The mothers expect their daughters will be married in a home where they will have use rights to land.

3.4.0. PROBLEMS ENCOUNTERED BY WORKING WOMEN.

3.4.1. Multiplicity of Marriage Laws

Four systems of marriage laws exist in Kenya, that is Christian/Statutory, Hindu, Islamic and African customary law.

Elsewhere we have observed:

Such legal diversity may be an answer to cultural diversity. However, difficulties with legal plurality in family laws arise when the different systems give unequal rights to spouses in the same country.
(Kivutha Kibwana 1988:6)

The overwhelming majority of marriages in the district are conducted and the corresponding rights and duties determined by customary law. This is more prevalent among the pastoral Maasai, Turkana and Samburu peoples as opposed to Kikuyu settlers and urban populations. Thus, in Area A 73.3% of the respondents were married under customary law, as compared to 17.8% under Christian system. Generally, women enjoy less rights and are exposed to more duties under the present customary law system than those married under Christian/Statutory and even Islamic law.¹⁶

Most of the female interviewees were oblivious of the existence of a multiplicity of marriage laws. However, the women respondents preferred they had the right to choose their spouses and marriage system. In Area A, marriage system was chosen by male spouses (47.1%), parents of spouses (11.8%) and female spouses (11.8%). In Area B the figures were 42.2%; 24.5% and 17.8% respectively. When briefly informed about existence of systems other than customary, the female respondents preferred to be married under the Christian system, while only 4% in A did so. The high preference for customary law by men in Central division was predicated on the premise that men exercise more spousal authority and other rights in such marriages.

Women married under customary law did not expect much from their husbands by way of companionship and discussion. Possessiveness to them was not important. They argued that it was advantageous to be in a polygamous family because co-wives provided company. This sentiment however can be viewed to represent criticism regarding the perpetual absence of men from the matrimonial home. Some respondents married under customary law said they preferred a Christian marriage because of absence of adultery within such institution. Other reasons given for this preference were the Christian marriage provided more freedom for women and it was proper to get married in accordance with one's religious beliefs.

16. In Area B, 5.9% were married under Islamic Law.

Due to prevalence of customary marriage in the district, particularly in Area A, short run resistance to a uniform marriage law would be widespread. Even if passage of such law occurred, marriage would most probably continue to be regulated under customary law. A uniform marriage law for the country, if promulgated soon, should thus include transitional provisions preserving some elements of customary marriage such as polygamy while simultaneously attempting to accelerate, incrementally, spousal equality of rights.

3.4.2. Polygamy.

An incidence of customary family law is polygamy. The other system which allows limited polygamy is Islamic law.

Polygamy is widely practised in Laikipia particularly among the Maasai community. In Area A 22.2% of the married respondents are polygamous and 53.3% non-polygamous, whereas in Area B the figures are 17.7% and 41.2% respectively. The institution of polygamy seems to serve economic ends. Each wife and her children are "given" or entrusted with livestock to raise. Ultimately such livestock belongs to the man, especially among the Maasai. Polygamy is also used for birth-control purposes because a man is not supposed to sexually engage a wife who has delivered until the child is approximately 3 years old. Elderly respondents explained that within Maasai culture it was necessary not to have many infant children because, in the event of war, easy mobility was mandatory. Polygamy also helped secure alternative motherhood if one of the wives died, leaving behind off-spring.

Evidently, through polygamy, the man is able to mobilise cheap reliable labour, since he does not personally invest much in the upkeep of the women. The women also reproduce other labour. Polygamy reinforces the authority of patriarchy because women enjoy inferior status under it and the superiority of man - as the person who conceivably can bring as many wives as he wishes under his roof - is dramatically shown.

3.4.3. Minors and the Law

Marriage of minors is not permitted by the law. However, both customary and statutory law define minority and majority differently. Under customary law one attains majority after an event e.g. initiation, whereas under statutory law, the age of majority is 18 years. Therefore, under customary law extremely young girls can be married consequent upon initiation. Recently government administration in Kenya has been mobilizing against marriage of female 'minor' who may or may not have undergone initiation rites under customary law. Laikipia district represents one of the areas where extremely young girls are married off by their parents under customary law.

The administration uses the provisions of Marriage Act and the Penal Code to prevent, whenever it can, isolated cases of marriages of young girls. Under the Marriage Act, the age of consent for marriage is 21 years. However, marriages of 16-21 year olds can take place with consent of parents, or person having lawful custody of a young person. Section 35(2) of Marriage Act forbids marriage of persons under 16 years old. Section 45 of the Penal Code prohibits sexual intercourse with girls under 14 years.

Among the pastoral community in Laikipia, girls tend to drop out of school at primary 6 level for initiation and, subsequently marriage. Statutorily such girls are minors. Due to prevalence of early marriages for girls, parents desist from introducing them to formal education. Traditional education is considered as most suitable for preparing the girls for subservience, marriage and subsequent duties. Assisting their mothers at home is preferred than sending them to school. On the whole, under-age girls' consent to marriage is not sought; their parents and relatives arrange such marriages.

As implied above, another area where the minor suffers disadvantage in Laikipia particularly in the arid parts is lack of educational facilities. Generally, facilities for education are lacking. Where the population is sparse and mobile, the government has not felt motivated to expand educational facilities. Moreover, existing school space is often underutilized. However, parents are not yet adequately encouraged and motivated to send their children to school. As a result, enrolment of children particularly girls is low. Children and parents are discouraged from seeking formal education, where the children have to walk long distances to get to school. Few boarding facilities, especially at primary level education, exist.

Our research also revealed that the incidence of school pregnancies, especially in the urban centres and recently also among the Maasai, is high. School regulations, as they exist, penalise the girl and deny her further education even after delivery whereas the male culprit, if a pupil, continues with his studies.

We also found that, especially in the ranches, child labour was employed particularly in herding. The labour department is aware of such problem. It had tried to educate employers vis-a-vis the problem. Unfortunately, in a district where economic conditions are extremely harsh, parents wish to exploit all avenues of income generation - including their children's labour. Young girls⁹ are involved more in household help than in herding.¹⁷ The labour department indicated it was harder to control such employment since it was not carried out in the public area.

Another area of difficulty in the relationship between law and female minors is that of delivering family planning services. (F. W. Gitau 1989: 31-33). Especially in Nanyuki and other towns, 16-18 years olds seek birth control devices. Health personnel initially tried to give information to such minors and to persuade them to be accompanied by parents during subsequent visits. Such strategy failed to achieve

¹⁷ A school for training house maids exists in Laikipia.

positive response. Even though existing policy disallows provision of family planning devices to minors, the health officials seemed to favour a pragmatic approach of being sensitive to the family planning needs of adolescents. Even where parental consent was unavailable, the officials felt female adolescents capable of pregnancy should be exposed to family planning methods consistent with the health needs of such adolescents.

Finally, social workers indicated that in Nakuru town, instances of child prostitution, as well as adolescent single parenthood, are on the increase.

3.4.4 Women and Land.

In Laikipia one can identify several categories of land as far as women are concerned. These are

- : pastoral land under the Land (Group Representatives) Act¹⁸ and customary law
- : agricultural land under customary law
- : titled land registered in husband's name
- : urban land temporarily allocated to women's groups

and

- : land on which both men and women are squatters.

¹⁸ Cap. 287, Laws of Kenya.

The district has 13 group ranches in which instead of pursuance of individualization of land, in keeping with the land reforms of the late 1950s and early 1960s, the inhabitants' pastoral way of life was respected and hence group registration favoured. Under such residual systems, only adult males were initially registered on a family basis. Women's rights under customary law were not registered. Moreover, women's use rights under a pastoral economy were less than use rights of women under an agriculturally based economy under customary law.

Since women did not/do not, on the whole, own animals, they did not/do not have significant use rights on their (pastoral) land. Therefore, in the pastoral communities, women are considerably distanced from land as a natural resource and means of production. Women seem to have use rights regarding the animals and therefore limited use rights on the family and communal land for purposes of actualizing their use rights vis-a-vis the animals. Also the land on which the homestead is built belongs to the men, although each woman's hut could be said to belong to her. In the pastoral area, agriculture has hardly begun. In the few instances where practised, although the land immediately belongs to the head of the household, here the woman who works it could be said to have use rights similar to those possessed by women as regards untitled agricultural land owned by their husbands.

A critical problem which will plague land under this category, is that if and when sub-divisions occurs, registration will invariably be male oriented, since today only men are registered as group owners.¹⁹

In those areas where agricultural land is still unregistered, men are deemed the owners under customary law, whereas women have use rights. One problem noted about registration of such land is that women's use rights are not reflected in the register and thus women have to rely on men's benevolence for continued use of the land.

As implied above, although registration of land vests its absolute proprietorship in the registered owner, in many communities in Kenya, land use has continued as it customary land tenure exists. As a result women continue to exercise their customary use rights although these are not officially recognized and, on the whole, can be easily terminated especially where the man decides to transfer the land.

As of 1989, about 46 ranches in Laikipia had been subdivided. Women ownership of this category of land is high. In Ngerua for example, 45% of those registered are women, both unmarried and married. Women ownership of this land is high because migrant women who had money were able to become members of the land buying companies and thereby own land. In families also, both the man and the woman would register as separate entities so that the family could own two plots, which, ultimately, tend to be controlled by men. In situations of disagreement, however, the Administration has witnessed instances where women successfully assert exclusive ownership of such land. In Area A 66.7% of land is registered in husband's name, 6.7 in wife's and 2.2% jointly (20% did not answer the question or had no registered land or any land at all). In B,

¹⁹. Where a registered man dies, his senior wife can be registered as a trustee for male uninitiated children. An adult male relative of the husband can also act as such trustee.

of those respondents who answered the question, 71.4% of land is registered in husbands name, 14.3% in wife's name and 14.3% in both names.

In Laikipia several women's groups are at the stage where they require land to house projects such as pusho mills, shops, hotels and rental houses. Rarely is such land bought by the group so that the title is in group's name. More often than not, the women's groups seek land from County Council and Municipal Council. Currently the demand for such land by the women outstrips supply by the civic authorities. Moreover, the civic authorities allocate land to the women under Temporary Occupies licence. On such temporary allocations, the women are not officially allowed to build permanent structures. However, the more recent needs of the women, eg. rental houses, require permanent structures. One respondent told us that although the land was allocated on a temporary basis, the Administration had allowed them to build permanent structures.

Squatting exists on some of the private ranches, as well as in the towns, especially in the slum areas of Nanyuki town. Squatting involves a scenario where the squatter has no legal rights to the land under utilization. Such person's existence is thus extremely precarious. Often the squatter relies on good will of Government to ensure continued use of squatted land. The point we want to make here is that, if the man's position in a squatting scenario is precarious, the woman's is even more so. At least the men have attempted to resist eviction, a prospect women may prefer not to duplicate. Most women squat because their own men initiated the survival strategy.

3.4.5 Women and Violence

Physical spousal violence is prevalent in Laikipia. Among the pastoral community, the problem is compounded because the women seem to accept that a husband has a right to beat his wife. Only in two instances did we find divorce occurring due to violence. In Area A, 42.4% of the respondents stated that husbands were entitled to beat wives for failure to perform duties (33.3%), irresponsibility (13.3%), rudness (11.1% and immorality (4.4%). Some men also beat their wives due to influence of

alcohol. In Area B, 17.6% of the respondents stated husbands could beat wives due to any wrongdoing, 11.8% if the husbands so desired, 11.8% felt husbands would anyway beat their wives.

Female circumcision, another form of physical violence is still prevalent in the district. Parents are interested in having their daughters circumcised early to prepare them for marriage. Government administration seemed resigned to the continued existence of this practice. Health personnel do advise on hygienic methods of circumcision so as to limit risks of extensive bleeding and infection.

3.4.6 Women and Crimes

In Nanyuki town, the commonest crimes committed by women are loitering with intent to prostitute contrary to Municipal Council By-Laws and Chief's orders under the Chief Authority Act ²⁰, assaults, being drunk and disorderly, and handling of stolen goods.

Due to the military presence in Nanyuki town, women and young girls are attracted by prostitution, particularly because the economy does not provide many alternative opportunities. Since 1988, only one man has been arrested for loitering with intent to prostitute, he was in the company of a woman identified by police as a suspect prostitute. Although the police mount periodic swoops against female prostitutes, such manoeuvres do not seem to dent the practice of prostitution.

Women in the slums are also used by men for storing, to store stolen goods, hence the prevalence of the offence of handling goods by women.

In the rural areas, brewing of traditional liquor is the most prevalent offence against women. One respondent, who was jailed for such offence, informed us that she considered brewing of traditional liquor as a legitimate economic activity necessary to mobilize school fees for her children.

²⁰Cap. 128 Laws of Kenya.

Our enquiries in the law courts also revealed that some single parents are guilty of both child abuse and negligence. However, although social workers identify such cases, court action does not necessarily proceed. Many grandmothers are saddled with neglected children.

PART 4

4.0 Conclusions and Recommendations

Gender discrimination against women is prevalent in Laikipia district. Such discrimination is more rife among the pastoral community and, generally, in rural areas, as compared to urban areas. Legal regulation contributes to sex discrimination in various ways. In many areas of social and economic endeavour, 'enough law' does not exist to adequately attract discriminatory practices; often law enforcement is weak or deliberately de-emphasized by male officials so that discriminatory practices flourish. Often legal lacunae promotes sex discrimination.

This study clearly reveals that all classes of women are discriminated against on gender lines by men generally and male government officials. Policies, laws and their implementation are usually not gender sensitive. The same applies to corresponding institutional structure. In the rural areas, discrimination against women is particularly extreme perhaps due to cultural factors and less economic opportunities for the community generally and women in particular. As a result, women's rural population is more marginalised than its urban counterpart and hence more peripheralized in the development process. However, rural women contrary to popular myth, do not accept the discrimination and continue to assert themselves; the women's group movement is articulate evidence of such assertion.

Because women in both rural and urban settings hardly have land rights, credit, employment or business opportunities, their independent contribution to free enterprise development is significantly curtailed. Although as is women who work on behalf of their husbands and/or relatives and for their children, they would enhance their participation if there was a

guarantee of personal access to the fruits of their labour. By distancing women from the means of producing and the product of their labour, society pays by having a lower level of development.

Since men over rely on women's contribution in production, they do not themselves input into production as much as they could as a result of which some important development potential and opportunities are missed.

We have stated that we found gender discrimination was more rampant in rural as opposed to urban areas, the forces of modernity are contributing to ensure an enhanced sensitivity regarding discrimination of women. It is likely therefore that more advocacy by rural women to ensure removal of such discrimination will occur. The progressive and historic freeing of all women in Kenya and elsewhere will not merely advantage the women but society as a whole when their energies are released without hindrance in more just and fairer society.

In Part 3, we tried to present the types and nature of women's discrimination from a legal perspective. In so doing, an attempt was made to separately identify problems facing working women and those of middle class and upper class women. On the whole, Laikipia's women are working women. Our enquiry in Part 3 was meant to provide both the analytical and practical basis of unravelling and removing legal impediments which allow existence of gender discrimination against women. Policy makers, policy implementators, donor agencies, women leadership etc should consider inter alia, all the areas discussed in Part 3 for purposes of promoting legal reform and other assistance. Any intervention to be effective must affect the whole community and not merely the women (or women's groups). For example directing family planning services only to women to the exclusion of men does not achieve the desired goal(s). The problem of gender discrimination against women is therefore not merely a women's problem, but a general societal problem. Resolution of the problem requires both men and women be targets of reform initiatives.

4.1 Specific reforms and recommendations include the following:

1. introduction of registration of customary marriages.
2. resumption of marriage law reforms to facilitate passage of a uniform marriage law which gives spouses similar and equal rights within marriage. However, transitional provisions preserving some elements of customary and Islamic Law marriages may supplement the uniform law to ensure undue resistance to the uniform law is avoided.
3. some aspects of customary law which are beneficial to women and which could be strengthened should be identified.
4. to undertake study of customary marriage laws and customary succession laws with a view to exposing problems as a basis of reform.
5. legal rights and duties within marriage must be popularized through appropriate fora to both men and women by government agencies, non-governmental organizations and other interested parties.
6. long term proscription of polygamy. In the meantime its negative aspects should be exposed through public education.
7. reform of cohabitation law to clarify the rights of the parties involved and in particular those of women and children of the unions.
8. judicial intervention so that cohabitation is, unless a contrary intention is proved, treated as marriage by habit and repute.
9. reinstatement of the Affiliation Act so that the putative father supports the mother in maintenance of issue.
10. a uniform law on age of marriage corresponding to present statutory provisions should be passed.
11. female students who give birth should rejoin school after necessary maternity rest.

12. more rigorous control of child labour especially in ranches and the domestic sphere by the labour department is critical.
13. health officials should be sensitive to family planning needs of adolescents capable of pregnancy consistent with the health needs of such adolescents.
14. all adult persons whose families have rights to land under the land (Group Representatives) Act should be registered as having rights to group ranch land.
15. since women's groups are currently embarking on permanent developments on land, temporary allocations of land especially by civic authorities should be de-emphasized in preference to more permanent forms of alienation.
16. rigorous registration of women's groups both under the Women's Bureau and at sub-locational/ward level by government administration should be undertaken.
17. commerce officials should prioritize registration of women's groups as business organizations. However, groups which merely wish to engage in social and cultural activities could be registered as societies. Subsequent change of status should result in change of registration.
18. rights and duties of members of women's groups should be specified within the constitutive documents.
19. profit sharing or distribution formula and procedure within women's groups should be established.
20. periodic change of leadership within women's groups should be encouraged. Moreover, literacy criteria especially for some of the senior officers should be established.
21. sub-locational/ward, locational, constituency, district, provincial and national organization of women's groups should be encouraged.
22. to sensitize women's leadership to gender discrimination issues through seminars etc., so as to dynamize the leadership and ensure it can take concrete steps to raise women's consciousness against gender discrimination.

23. employment, business, loans etc. quotas for women should be explored and implemented.
24. education on women's rights in employment is mandatory. Such education should highlight discriminatory practices which are illegal.
25. more education on the fact that women can own property in their own right is necessary. At all appropriate and unofficial levels, women should be encouraged to own property independently and/or jointly with husbands.
26. criteria and institutions for giving loans without security should be developed. More institutions which give loans only to women are necessary.
27. reform of division of property upon divorce law to ensure women's household work and other family oriented work is recognized as a contribution to accumulation of family property.
28. reform of the law so that divorce can only be granted by courts.
29. rigorous education on succession law to all citizens. The administration should be co-opted to ensure all rights recognized by Kenya's succession law are enforced especially in respect of women dependants.
30. to develop country wide legal aid system with a women's issues sub-department.
31. to emphasize general literacy among women and especially legal literacy and rights awareness.
32. to introduce women and law studies in school curriculum especially in relevant university levels.
33. to formulate a clear-cut policy on women and development preferably in a single document e.g. a sessional paper.
34. reversal of present cultural constraints and patriarchal values which encourage subordination, oppression and exploitation of women through rigorous education especially in schools, through

the mass media and other appropriate fora.

35. section 82 of the Constitution should be ammended to outlaw discrimination based on sex.

Admittedly the above reform agenda is extensive; some of the suggested reforms could even be viewed as revolutionary. To remove many of the legal constraints which prevent women's proper integration and participation in the development process, our country must seriously address the above suggestions. If the above occurs, of course on an incremental basis women's standard of living and role in society will be improved significantly in the short run. As a result, a sound basis for long term solution of the Women's question will have been created. Ultimately, gender discrimination against women will be resolved when there occurs a re-ordering of economic system at the international and domestic levels to ensure greater and eventually equal access by women and all other disadvantaged sections of society to the means of production and products of their labour.

REFERENCES

Articles

- Gutto, S. B. G. (1976) 'The Status of Women in Kenya: A Study of Paternalism, Inequality and Underprivilege' IDS, University of Nairobi Discussion Paper No. 235.
- Kabeberi, Janet W. (1989) 'Women's Law: A Strategy for the African Woman' Paper presented to the YWCA - AAWORD Kenya Regional Conference for Eastern and Southern Africa on "Sustainable Development and Change" held in Nairobi, Kenya 27th November, 1989 - 2 December, 1989.

- Kibwana Kivutha (1989) 'Women and the Constitution in Kenya Id.
_____ (1988) 'Critical Aspects Regarding the Legal Regulation of the Informal Sector' Paper presented at the First International Conference on Urban Growth and Spatial Planning of Nairobi, Kenya December 13-17, 1988.
- Muigai, Githu (1989) 'Women and Property in Kenya' in Mary Adhiambo Mbeo and Oki Ooko Ombaka (eds) Women and Law in Kenya, Nairobi, Public Law Institute at 113.
- Nzomo, Maria (1982) 'The Impact of the Women's Decade on Policies, Programs and Empowerment of Women in Kenya' in Issue A Journal of Opinion Vol, xvii/2 at 5.
- _____ (1987) 'Women, Democracy and Development in Africa' in W. O. Oyugi and A. Gitonga (eds), Democratic Theory and Practice in Africa, Nairobi, Heinemann, Kenya at 113.
- Ukayo, Achola Pala (1989) 'Towards a New Theory and Method in the Study of Women in Africa' in Mary Adhiambo Mbeo and Oki Ooko Ombaka (eds) supra at 3

Books, Government Documents, Theses.

- Corle, Diana H. (1988) 'Women in Political Theory From Ancient Misogyny to Contemporary Feminism. Hertfordshire, Wheatsheaf Books Limited.
- Dahl, Tove Stang (1987) Women's Law: An Introduction to Feminist Jurisprudence (Trans. by Ronald L. Graig Oslo, Norwegian University Press.

- Engels, Friedrich (1972 ed.) The Origin of the Family, Private Property and the State, New York, International Publishers.
- Eze, Osita C. (1984) Human Rights in Africa: Some Selected Problems Lagos, Nigerian Institute of International Affairs and MacMillan Nigeria Publishers.
- Gitau, F. W. (1989) Contraceptives and the Law: Need for a Comprehensive Legislation, unpublished LL.B Dissertation, University of Nairobi.
- Kirp David L et al, 1985 Gender Justice Chicago & London, the University of Chicago Press.
- Mazingira Institute, (1985) A Guide to Women's Organization's and Agencies Serving Women in Kenya, Nairobi, Mazingira Institute.
- Meillassoux, Claude 1981 Maidens, Meals and Money: Capitalism and the Domestic Community Cambridge etc
- Mies, Maria (1986) Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour, London, Zed Books Ltd.
- Nderity, Wilfren N. (1988) Inequality Between the Sexes: To What Extent is the Statutory Corpus to Blame? Unpublished LL.B Dissertation, University of Nairobi.
- Ramazanoglu, Caroline (1989) Feminism and the Contradictions of Oppression, London and New York, Routledge.
- Republic of Kenya, (1989) Development Plan 1989-1993, Nairobi Government Printer.
- Okin, Susan Moller (1989) Justice, Gender and the Family Basic Books Inc.

- Republic of Kenya (1989) Laikipia: District Development Plan 1989 - 1993, Nairobi, Ministry of Planning and National Development. Government Printer.
- Robertson, Claire & Iris Berger, (1986) Women and Class in Africa New York & London, Africana Publishing Company.
- Schuler, Margaret (Ed.) (1986), Empowerment and the Law: Strategies of Third World Women, Washington D.C. OEF International.
- Schuler, Margaret (Ed) 1990 Women, Law and Development in African WLDAF. Origins and Issues Washington D.C. International.
- Stichter, Sharon B & Jane L. Parpart (eds.) (1988) Patriarchy and Class: African Women in the Home and the Work force. Boulder & London, Westview Press.