WOMEN GAINS
in the Proposed Constitution of Kenya
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Executive Summary

As Kenya gears up for a referendum on the 2010 proposed constitution, GEM and AWC collaboratively compiled this document to give Kenyan women an opportunity to understand the issues that directly affect them in the proposed constitution. This document aims at making the contents of the draft accessible to as many women as possible by simplifying the language and explaining the implications of the provision that directly address gender equality. Overall, the audit reveals that by far this is a better document in terms of women rights than the current constitution. The gains made include:

1. All forms of discrimination including violence against women are explicitly prohibited;
2. Under the proposed constitution, women can own and inherit land. Matrimonial property is protected during and after termination of marriage;
3. Customary law that is inconsistent with the constitution is void thus personal law which is discriminatory to women if in contradiction with the constitution is invalid;
4. Equality in Marriage;
5. Women’s representation is guaranteed;
6. Women are recognized citizens and will be able to bestow citizenship to their foreign spouses or children born outside the country;
7. Equal parental responsibility of the mother and father to provide for the child;
8. Increased numbers of women in all decision making organs including the devolved government;
9. Elimination of discrimination in laws, customs and practices related to land and property in land and;
10. Any government or decision making organ that does not comply with constitution is unlawful and unconstitutional.

We have further provided a chapter by chapter analysis of the provision of the proposed constitution and we hope this document will help the women of Kenya and other Kenyans committed to social justice in making the right decision during the upcoming referendum.
Chapters and Articles Specific to Women/Gender Issues

This is an audit of chapters and clauses that are specific to women rights. The evaluation is based on recognized international women human rights standards as articulated in the United Nation Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), Beijing Platform for Action (1995) and African Protocol on Human and Peoples rights on the rights of Women (Maputo protocol).

Preamble

The preamble of the draft recognizes key principles of gender equity including social justice, parity and fair representation. This critical in advancing of women rights and gender equity.

RECOGNIZING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.
CHAPTER ONE: The People’s Sovereignty and Supremacy of The Constitution

The proposed constitution will regard as void or invalid customary or religious laws that are in contradiction with the provisions of the constitution. This is important to women because the current Constitution has legitimized subordination of women as it embraces legal pluralism which embodies customary and religious laws that are discriminatory to women. The proposed draft constitution seeks to reverse the current in the following article:

Article 2
(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency and any of the omission in contravention of this Constitution is invalid.

In the past, women rights advocate have struggled with domestication of progressive treaties or convention that the Kenya government has ratified. On this issue the proposed draft states that:

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.

Over the years, Women in Kenya have decried their minimal representation in public office. Attempts to put in place affirmative action measure in regard to women representation have been futile, a mere lip service. The proposed constitution gives women power to challenge as unconstitutional any government that does not comply to the required number of women in the governing organs of the state in the following article:

Article 3
(2) Any attempt to establish a government otherwise that in compliance with this constitution is unlawful

Women can challenge the legality of any government body that does not observe the one-third representation of women.

CHAPTER TWO: The National Values, Principles and Goals

The proposed constitution recognizes equity and non- discrimination as part of the value systems and principles of social justice in our society. This will go along way in accelerating gender justice for women as stated in the following article:
Women Gains in The Proposed Constitution of Kenya

Article 10
(2) The national values and principles of governance include—
   (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
   (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
   (c) good governance, integrity, transparency and accountability; and
   (d) sustainable development.

CHAPTER THREE:
Citizenship

Citizenship has been a contentious issue for Kenyan WOMEN. The current constitution treats Kenyan women as second class citizens because it only provides for MEN to pass on citizenship to their foreign wives and children but not the Kenyan WOMEN. However, this is going to change in the proposed constitution as stated in the following article:

Article 14
(1) A person is a citizen by birth if on the day of the person’s birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.

Article 15
(1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.

CHAPTER FOUR:
The Bill of Rights

The world over, the Bill of Rights section of the constitution is fundamental in the sense that this section outlines fundamental entitlement for all citizens in line with the 1948 Universal Declaration of Human Rights. In the proposed constitution, women of Kenya stand to benefit immensely from the following provisions in the Bill of Rights:

Article 21
(3) All state organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth,
members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

Every year hundreds of women die as a result of complications of pregnancy. The draft constitution seeks to address this by allowing termination of pregnancy if the life of the mother is in danger and inherently gives the woman a choice as stated in the following article:

**Article 26**

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

Discrimination on the basis of sex is explicitly prohibited. Sexism is oppressive to women and contributes hugely to women subordination in Kenya today.

**Article 27**

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

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

Women representation is guaranteed in the proposed constitution as stated in:

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

Violence against Women (VAW) is explicitly prohibited in the proposed constitution. This is a huge gain for women and girls given the high prevalent rates of VAW in Kenya. The following articles attest to this:

**Article 29**

Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) subjected to any form of violence from either public or private sources;
(d) subjected to torture in any manner, whether physical or psychological;
(e) subjected to corporal punishment; or
(f) treated or punished in a cruel, inhuman or degrading manner.

The proposed constitution gives women the rights to acquire and own property. This is fundamental given the high rates of women disinherition and its consequences. This is stated in the following article:

**Article 40**

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
   (a) of any description; and
   (b) in any part of Kenya.

In the proposed constitution, women have a right to reproductive health care as stated in the following article:

**Article 43**

(1) Every person has the right—
   (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

The proposed constitution recognizes equality in marriage for all parties involved in whatever system of marriage as stated in following article:

**Article 45**

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

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

(4) Parliament shall enact legislation that recognizes—
   (a) marriages concluded under any tradition, or system of religious, personal or family law; and
   (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or system.

Historically women and young girl have had to deal with the burden of child care especially in situation where that child is born outside the institution
of marriage, and the women/teenage girls are left to take care of the child with no participation or contribution from the men involved. The proposed constitution provides for equal responsibility for child care even out of wedlock as states in the following articles:

**Article 53**
(1) Every child has right---
   (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child;

The proposed constitution proposes to establish a vibrant Kenya National Human Rights and Equality Commission. A merge between the current Kenya National Commission on Human rights and the Gender Commission is a welcome move given the challenges of resourcing that have held back the Gender Commission. The following article attests to this:

**Article 56**
(2) he functions of the Commission are—
   (b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;

**CHAPTER FIVE:**

**Land and Environment**

Historically Land has been the centre for controversy in Kenya, especially the issue of women being denied the right to own or inherit land. There are numerous cases where women are disinherited off land and the proposed law seeks to change this as stated in the following articles:

**Article 60**
(i) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—
   (f) elimination of gender discrimination in law, customs and practices related to land and property in land;

**Article 68**
Enact legislation
   (vi) to protect the dependants of deceased persons holding interests in any land; and
CHAPTER SIX: Leadership and Integrity

Women in Kenya have for a long time championed good leadership and meritocracy in the hiring processes. Corruption and violence especially sexual harassment have hampered effective participation of women in public office. The proposed constitution will change this as stated in the following articles:

Article 73
(2) The guiding principles of leadership and integrity include—
   (a) Selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
   (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices;
   (c) Selfless service based solely on the public interest, demonstrated by—
       (i) Honesty in the execution of public duties; and
       (ii) The declaration of any personal interest that may conflict with public duties;
   (d) Accountability to the public for decisions and actions; and
   (e) Discipline and commitment in service to the people.

CHAPTER SEVEN: Representation of The People

Women representation in all decision making organs is a fundamental issue in advancing gender equality. The proposed draft provides a legal frame work for women representation which is not provided in the current constitution. The articles delineate the composition of women representation in political parties, political parties fund and affirmative action. The articles are as follows:

Article 81
The electoral system shall comply with the following principles—
   (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;

Article 90
Allocation of party list seats
(1) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—
(a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;
(b) except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

Article 91
(1) Every political party shall—
(f) respect and promote human rights and fundamental freedoms, and gender equality and equity;
(2) A political party shall not—
(a) be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis;

CHAPTER EIGHT: The Legislature

In recognizing the legislature as a crucial arm of government, the proposed constitution proposes to reverse the current status of low representation of women in the legislature. Specific articles in this regard include:

Article 97
(1) The National Assembly consists of—
(b) forty-seven women each elected by the registered voters of the counties, each county constituting a single member constituency;

Article 98
(1) The Senate consists of—
(b) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90;
(c) two members, being one man and one woman, representing the youth;
(d) two members, being one man and one woman, representing persons with disabilities;

The draft further commits parliament to legislate in the following article:
Article 100
Parliament shall enact legislation to promote the representation in Parliament of—
(a) Women;
(b) Persons with disabilities;
(c) Youth;
(d) Ethnic and other minorities; and
(e) Marginalized communities

In regard to the composition of the Parliamentary Service Commission, the following article is instructive:

Article 127
(2) The Commission consists of—
(c) seven members appointed by Parliament from among its members of whom—
(i) four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women.
(d) one man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.

CHAPTER TEN: Judiciary

The draft seeks to promote women participation in the Judiciary through the following articles:

Article 171
(2) The Commission consists of—
(d) one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates;
(f) two advocates, one a woman and one a man, each of whom has at least fifteen years’ experience, elected by the members of the statutory body responsible for the professional regulation of advocates;
(h) one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.

Article 172
(2) In the performance of its functions, the Commission shall be guided by the following—
(a) competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and
(b) promotion of gender equality.

CHAPTER ELEVEN: Devolved Government

The draft is laudable for providing a framework that will promote women participation in the devolved government. Articles in the devolution chapter that seek to ensure gender parity include:

Article 175
County governments established under this Constitution shall reflect the following principles—
(c) no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

Article 177
(1) A county assembly consists of—
(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;

Article 197
(1) Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender.

CHAPTER THIRTEEN: The Public Service

The value and principles of the public service in the proposed draft are progressive in that they promote gender justice as stated in the following article:

Article 232
(1) The values and principles of public service include—
(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
(i) men and women;
CHAPTER FIFTEEN: Commissions and Independent Offices

This chapter is following in the spirit of gender equity provides for equal representation participation of women and men in commissions, specifically the following Article:

Article 250
(12) The chairperson and vice-chairperson of a commission shall not be of the same gender.

Conclusion

The constitution has made remarkable gains in both the process and the content compared to the current constitution. The proposed constitution will prohibit all forms of discrimination including violence against women and any customary law that perpetuates such acts while guaranteeing women representation. The proposed constitution also gives women the legitimacy as citizens and the ability to pass that citizenship to their foreign spouses or children born outside the country. Additionally, the provision in the proposed constitution compels equal parental responsibility. Lastly and most importantly, the increase in women representation both at the policy and the judicial level as provided by the proposed constitution will ensure that the gains made are followed through and fully implemented.