

Women's participation and influence in post-conflict reform: The case of Kenya

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April 2022



Women, Peace and Security: Breaking down silos

Abstract

This paper examines how women influenced constitutional reform and land reform processes in Kenya; how they were supported in this by international actors; and the extent to which these reforms resulted in stronger gender equality frameworks and outcomes. The paper finds that Kenyan women's long history of mobilisation resulted in strong women's movements with significant capacity and a clear agenda, which were well placed to take advantage of openings that emerged following political violence and advance gender equality goals within reform processes. While international support for women's mobilisation played an important role in enabling women to influence these reform processes, particularly in the case of constitutional reform, this support could have been more politically aware and strategic.

The paper finds that formal rights established by constitutional reform and land reform have had limited impact on outcomes for women and that long-term international support is required for women's continued action to demand and monitor implementation of these new frameworks. It concludes that the WPS agenda has potential to

provide a framework for ongoing strategic and interconnected support by international actors to strengthen Kenyan women's rights across political and economic arenas, including through implementation of the new constitution and land laws. mobilised extensively during peace negotiations to ensure that the agreement included gender language and addressed women's concern.



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How to cite: Castillejo, C. (2022) Women's participation and influence in post-conflict reform: The case of Kenya. ODI Country study. London: ODI (<https://odi.org/en/about/our-work/the-women-peace-and-security-agenda-breaking-down-silos/>)

Disclaimer: the content of this publication has been produced to provide early ideas and analysis on a given theme. It has been peer reviewed and edited.

Acknowledgements

The author would like to thank peer reviewer Pilar Domingo for her valuable comments and feedback. I would also like to recognise the support of Maegan Rodricks in the publication process, Deborah Eade for copyediting and Elaine Antwi for managing the project.

The paper was generously funded by the Conflict, Stability and Security Fund through the Foreign Commonwealth and Development Office. The views and findings presented here are the author's and do not represent the view of the Conflict, Stability and Security Fund.

About this publication

This publication was produced as part of a study on **Women's influence and leadership: Integrating Women, Peace and Security into wider peacebuilding engagement**, which was undertaken by ODI. The research team included Clare Castillejo, Pilar Domingo, Alina Rocha-Menocal and Theo Tindall. The study examined how to integrate Women, Peace and Security (WPS) work more strategically with wider peacebuilding and conflict-related interventions to enhance women's influence and leadership across different peacebuilding processes. It developed analysis regarding how women seek to influence a range of change and reform processes related to peacebuilding that are often overlooked in the WPS agenda; how the nature of these processes and the actors involved in them hinder or enable women's access and influence; and how international actors can best support women's access and influence within these processes.

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Acronyms

AU	African Union
CSO	civil-society organisation
EU	European Union
FIDA	Federation of Women Lawyers
IDEA	Institute for Democracy and Electoral Assistance
NGO	non-governmental organisation
NLC	National Land Commission
KNAP	Kenya's first National Action Plan
KNAU	Kenya National African Union
KWCG	Kenya Women's Consultative Group
WLR	Women's Land Rights
WPS	Women, Peace and Security

1 Introduction

In Kenya, widespread post-election violence in 2008 and the resulting peacebuilding process led to a significant renegotiation of the political settlement, with the development of a new constitution, extensive legal reform, and new political space for previously marginalised groups. Kenyan women mobilised in unprecedented ways to influence these change processes and promote women's rights within them. This case study examines two central elements of post-conflict reform in Kenya – constitutional reform and land reform. It examines how women mobilised around and influenced both of these reform processes and the extent to which these reforms resulted in stronger gender equality frameworks and outcomes.

2 Background

Kenya's political order from independence in 1963 until the 1990s was characterised by predation, exclusion and corruption, highly centralised power, and the repression of political and social opposition. Pressure for reform ultimately resulted in a transition from single- to multi-party rule in 1992. Following transition, the country experienced growing political instability and electoral violence driven by a number of factors, including a political system that enabled electoral winners to monopolise the benefits of state power; the instrumentalisation of ethnic and regional rivalries by political elites; and a range of underlying grievances regarding regional inequalities, land inequalities and social exclusion. This increasing instability and violence led to growing demands for reform of the political and social order, as well as some ineffective efforts to undertake such reform.

It was in this context that a disputed presidential election in 2007 triggered a wave of violence in which more than 1,000 people died and over 350,000 were displaced.¹ Violence was largely targeted along ethnic lines, which are the basis for political affiliation in Kenya. Political leaders mobilised their own ethnic communities to attack those of opponents, while the Kenyan police responded with brutal force and exacerbated the situation. Sexual and gender-based violence was widely reported.²

International mediation led to the establishment of the Kenya National Dialogue under the auspices of Kofi Annan and the African Union (AU) Panel of Eminent African Personalities. The aim of this dialogue was to end the violence and address the underlying causes that fuelled it.³ The negotiations resulted in a power-sharing agreement between the two parties; peace agreements to address the structural causes of the conflict; and the establishment of commissions to implement and monitor these agreements. Most notably, under a new constitutional reform commission, a new, highly progressive, constitution was developed and approved in a referendum in 2010.

¹ The incumbent President Mwai Kibaki was declared as having won the election, despite evidence of widespread electoral fraud, angering supporters of opposition leader Raila Odinga, who viewed the election as having been stolen.

² See Kenya National Commission on Human Rights, 2008.

³ The Dialogue process had four agendas: stopping the violence; addressing the humanitarian and internal displaced persons' crisis; settling the political crisis; and addressing long-term problems and grievances.

While the peace process resulted in wide-ranging reform of the state and of state–society relations, its politics in Kenya is still marred by political violence and impunity. It is alleged that during the 2017 election police and pro-government militia were responsible for more than 100 deaths of opposition supporters as well as numerous rapes, while the authorities consistently failed, and still fail, to ensure accountability for such abuses (Human Rights Watch, 2019). Moreover, Kenya’s security landscape remains complex, with challenges including intercommunal and pastoral violence; political violence associated with elections, ethnicity, devolution and decentralisation; a rise in violent extremism; and resource-based tensions. All of these are exacerbated by high levels of social marginalisation, poverty and inequality, as well as wider instability in the region.

3 Gender equality activism in Kenya

The last 30 years have seen a rapid growth in women's activism in Kenya and there is a strong and diverse network of national and subnational women's organisations working across a range of issues. These organisations have been highly effective at advancing a shared agenda to influence change processes in the country, although, as Domingo et al. (2016) point out, they involve women from widely different backgrounds and should not be viewed as a homogenous force. It was this women's movement that provided the basis for women to successfully engage with and influence the peace process and the various change processes that developed from it.

Until the 1990s there were relatively few women's organisations in Kenya, and those that did exist were largely co-opted by the ruling party Kenya Africa National Union (KANU). The arrival of political pluralism in 1992 provided space for women to mobilise in new ways, operating independently of the ruling party and making more directly political demands. Recognising the importance of influencing the democratisation process from a gender equality perspective, in 1992 The National Council of Women of Kenya and FEMNET organised a National Women's Convention that brought together more than 2,000 women from across the country to establish a 'Women's Agenda for a Democratic Kenya'. This agenda shaped the future direction and priorities of Kenya's women's movement for the following decade (Tripp et al., 2014).

By 2007 Kenyan women's civil society was comparatively strong, and was well placed to engage with the peacebuilding process from a gender perspective. Many women activists had been involved in peace-related work in Kenya and the wider region, had received international support and capacity building, and were aware of the Women Peace and Security (WPS) agenda. As key actors within some of Kenya's leading civil society organisations (CSOs), women played an important role in the wider civil society response to the violence. Women activists also founded a separate entity called the Kenya Women's Consultative Group (KWCG), which acted as a channel for the wider women's movement to engage with the peace process. At the national level women mobilised and collaborated effectively in order to influence the National Dialogue and Reconciliation Process, including through the development of a joint Women's Memorandum to the Panel, which situated a range of

gender equality demands within the 1325 framework (Tripp et al., 2014). At the local level, women's organisations and individual women activists undertook community-level reconciliation. For instance, Rural Women Peace Link, a local non-government organisation (NGO) based in Rift Valley, initiated community dialogues for reconciliation during the height of the post-election violence (Preston McGhie and Wamai, 2011).

As well as lobbying the peace process from outside, Kenyan women also influenced it from within. Both of the negotiating parties had a woman as one of their four main negotiators. While these female negotiators sought to advance gender equality concerns, their main focus was negotiating on behalf of their party, which 'created tension between these female negotiators and women's leaders in civil society who felt they should have also represented – and ideally prioritised – women's issues in the process' (Preston McGhie and Wamai, 2011). As the only woman on the AU panel of three eminent persons that led mediation, Graça Machel played a particularly central role in bringing gender issues to the table, using her extensive experience on women's rights and her seniority to advance women's concerns within the process. Recognising that women's groups were experiencing the same polarisation as the wider country, Machel 'helped women's groups negotiate their differences and come up with one joint memorandum to be submitted to the AU panel, and most of its provisions found their way into the agreement' (UN Women, 2015).

Several commissions were established as part of the peace agreements.⁴ These commissions included different social and political constituencies and mixed gender and geographic representation. In some cases, civil society demands for gender balance in the commissions were incorporated in the commissions' founding charters, guaranteeing women's representation. These commissions were an important mechanism for women to influence the change processes that emerged from the peace process.

The Inclusive Peace and Transition Initiative (2016) identifies some of the key factors that contributed to women's effective participation and influence in the Kenyan peace process. These include the existence of strong women's organisations that were already well connected with each other; effective coalition building, particularly through the establishment of the KWCG; the development of a joint memorandum; successful advocacy strategies including the use of UNSCR 1325 as a framework for demands; and lobbying of international actors. The supportive approach of the mediation team and pressure from international actors to include gender issues also played a positive role.

⁴ Prominent among these were the Constitutional Reform Commission; Independent Review Commission; Truth, Justice and Reconciliation Commission; Land Commission; Electoral Reform Commission; and National Integration and Cohesion Commission.

Since the 2008 peace process and 2010 constitutional reform there have been some further successes in terms of women's mobilisation and rights. The 2011 Elections Act⁵ and 2011 Political Parties act⁶ laid the ground for women's greater involvement in political life. In 2012 women's groups established the National Women's Charter, which set a common agenda for the 2013 elections. In the 2017 election 29% more women ran for office than in the previous election, leading to the largest number of women ever seated at all levels of the Kenyan government (NDI and FIDA, 2018). However, there is some evidence that the Kenyan women's movement has lost momentum following the peace and constitution processes, with some of its best leaders moving into government and the private sector, donor funding being redirected towards government, and some divisions appearing within the movement (Tripp et al., 2014).

Kenyan women used the WPS agenda to make demands in relation to the peace process and has more recently become a framework that brings together the state, civil society, security actors, and donors to address a range of gendered security issues. WPS was embedded within policy through Kenya's first National Action Plan (KNAP) (2016–2018), which was developed with a medium level of civil society involvement⁷. Its second NAP (2020–2024) adopts a 'whole-of-government' approach, but was developed with low levels of civil society involvement.⁸ The current NAP takes a wide-ranging approach to the WPS agenda, including a focus on climate change; violent extremism; gender-based violence; forced migration and human trafficking; and humanitarian disasters.

⁵ This provided for proportional representation (PR) through the use of mixed-member party lists. The PR system is used in conjunction with the plurality system with respect to the women nominated to the National Assembly and Senate.

⁶ Under this act parties must have a gender balance in their governing structures and a third of their funds must go towards promoting female candidates. There has been weak enforcement of this regulation.

⁷ According to the London School of Economics (LSE) and University of Sydney database on National Action Plans [LSE - WPS National Action Plans \(wpsnaps.org\)](https://wpsnaps.org).

⁸ Ibid.

4 Constitutional Reform

4.1 Nature of Kenya's constitution reform process and its implications for women's rights

The process of constitutional reform in Kenya was a stop–start journey over almost two decades⁹ in which progress frequently stalled and was then resumed, until a new constitution was finally adopted in 2010. Pressure for constitutional reform was fuelled by growing political conflict, violence, and unresolved elite competition. Tripp et al. (2014) describe how 'The process of constitution-making in Kenya was unusually acrimonious and contested', with power-holders strongly resisting demands for reform from opposition forces and civil society. Despite this resistance, progressive forces were ultimately able to exert significant influence over the reform process and develop a new constitution that includes 'a progressive Bill of Rights, including for women and other disadvantaged groups, the decentralisation of political power from the executive and a fundamentally restructured framework of checks and balances and accountability and oversight mechanisms to limit the exercise of power and advance the realisation of rights' (Domingo et al., 2016).

The 2010 constitution has vastly strengthened women's formal rights. It underlines freedom from discrimination and the principle of equality, recognising the right of 'women and men to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres' (Constitution of Kenya, 2010). It also specifies that laws stemming from it supersede any customary or other laws; and establishes human rights as the core values against which state action is to be measured. Critically, constitutional reform has created the opportunity for further legal change to advance women's rights, by establishing an architecture mandated to oversee implementation and to align Kenyan laws with new constitutional norms and principles. Since its promulgation, feminist activists and lawyers have been using the constitution as basis for lobbying and litigation to advance women's rights.

The constitution has conferred new rights for women in areas that have long been a focus of Kenyan women's activism, but where they had previously faced implacable resistance. Kenyan women had been campaigning for affirmative action since 1992 without success,

⁹ The 1997 Constitution of Kenya Review Act and 2001 establishment of the Constitution of Kenya Review Commission created frameworks for reform. Following this there were a number of different drafts (CKRC Draft 2002, Bomas Draft 2004, Wako Draft 2005, Harmonised Draft 2009) before the final Constitution was adopted in 2010. The Wako draft was rejected in a referendum in 2005.

but constitutional reform provided an opening to advance this agenda, resulting in commitments in the new constitution that no more than two-thirds of members of elective or appointed bodies may be of the same gender. This has led to more women in decision-making positions at every level, although in practice women still face a range of structural and normative barriers to participation in decision-making roles. Likewise, Kenyan women had long been excluded from land and property ownership, a situation the 2010 Constitution addressed by recognising equal rights of women and men to inherit land; committing to the elimination of gender discrimination in law, customs, and practices related to land and property; and upholding equal rights to matrimonial property. However, in practice it remains extremely difficult for women to realise these new rights to land ownership, as discussed below. Women activists also campaigned strongly for the inclusion of reproductive rights in the constitution, in the face of significant resistance. As a result of this campaigning the constitution recognises women's right to reproductive health care and permits abortion in some limited circumstances.¹⁰

It is important to understand Kenyan women's successful engagement with constitutional reform as part of their engagement with a broader and longer process of iterative political change, in which progressive forces, including women's movements, made claims, faced resistance or subversion, achieved some legislative and policy gains, and regrouped to adopt new approaches or to address new issues. Domingo et al. (2016) describe this as a process of change and counter-change, with women's movements reacting creatively and strategically to shifting political opportunities. The engagement of women's movements in this decades-long process of political change meant they were well placed to mobilise effectively to influence constitutional reform. In light of this, the 2010 Constitution should be understood both as an outcome of longer-term processes of mobilisation and as a basis for further contestation and change.

4.2 How Kenyan women influenced constitutional reform

The huge political upheavals caused by the 2008 election violence created an unprecedented opportunity for Kenyan women to advance key gender equality agendas. The violence created immense internal and external pressures to renegotiate the political settlement and take forward the stalled constitutional reform process, which became a central commitment of the peace agreement. The 2008 violence also left the political elite in disarray, providing an opening for women

¹⁰ Abortion is permitted when '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' Art. 26 (4), Constitution of Kenya.

to gain entry to political processes. As Tripp (2014) describes, 'women's rights activists also took advantage of the failure of political leadership during the political upheaval to insert themselves into the process [and] assert leadership in the overall process as well as regarding women's rights'. According to UN Women (2017) this experience is common in post-conflict contexts where post-conflict transitions create 'political openings' for women to make far-reaching demands for gender equality as part of constitutional reform.

Kenyan women were highly effective in mobilising to influence both the process and content of constitutional reform. Lobbying by women activists helped ensure that the process was sufficiently participatory, influenced the composition of the constitutional reform structures, and ensured a strong women's presence in all the major committees. Women also played a role in maintaining the momentum of the reform process. Tripp et al. (2014) describe how 'in 1998, 2000 and after the election violence in 2008 – the Kenya Women's Political Caucus took the initiative to break the stalemate in the constitution-making process'. In terms of content, women successfully lobbied for the inclusion of progressive normative commitments and robust oversight mechanisms, as well as specific content on women's rights.

A key factor that shaped women activists' success was the broad and inclusive nature of their mobilisation, bringing together a wide range of women around a common agenda despite rural–urban, ethnic and religious divisions. As Kabira and Kimani (2012) describe, within the Kenyan women's movement 'structures have been inclusive, horizontal, and dependant on collective and individual commitment... [they] are multi-ethnic, are across political parties and respect different expertise'. According to Waylen (2014), such a broad mobilisation and presence is critical, as women are better placed to take advantage of opportunities offered by constitutional reform when they are present at multiple levels and in a range of roles.

The flexible approach adopted by women's movements was central to their effectiveness. As Domingo et al. (2016) describe, 'a key feature of the success of Kenyan women's movements was their responsive and adaptive approach to navigating the constitutional review process', with different constellations of women activists forming alliances to work on specific issues and challenges as these emerged. Strong coordination among women from different organisations and spheres, and at multiple levels, was also key. This included coordination between women in elected office and civil society, which has been identified as a critical factor in shaping women's influence in a number of constitutional processes (Tamaru and O' Reilly, 2018). Women activists also engaged effectively with allies outside the women's movement, such as MPs, the media, and wider civil society. According to UN Women (2017), building such strategic alliances is critical in order to influence constitutional design from different locations.

Women adopted a range of effective strategies to influence constitutional reform. These included engaging with political parties and parliament, the national gender machinery and other state institutions. Women's organisations also undertook social mobilisation at multiple levels and developed communication and media strategies to gain wider support for their goals. Women activists also used the international normative framework to develop and advance a Kenyan agenda of gender equality.

Kenyan women activists had strong experience, capacity and skills built up over decades of mobilisation, which they used to influence constitutional reform. As Domingo et al. (2016) describe, the history of working together and engaging in contestation, negotiation, dialogue, and networking had provided a political apprenticeship for Kenyan women activists. By the time of the 2007 violence and following reform processes, Kenya had skilled feminist politicians, lawyers and civil society leaders, as well strong as feminist scholarship (Nzomo, 2013). Moreover, as Preston McGhie and Njoki Wamai (2011) point out, links developed through this history of shared mobilisation connected women within and outside formal peace and constitutional processes, allowing a wide range of women's concerns to be fed into formal deliberations.

4.3 Challenges to women's influence within constitutional reform

Kenyan women seeking to influence constitutional reform faced a variety of challenges including structural constraints, barriers to access, and multiple forms of resistance and backlash. Moreover, following the adoption of the new constitution, women have faced significant obstacles and resistance in advancing implementation.

Kenyan women face a range of normative and structural constraints to exercising political voice at all levels, which inevitably constrained their ability to influence negotiations on constitutional reform. These constraints include patriarchal norms that exclude women from decision-making, inequality in education and experience, and limited economic autonomy, which is crucial for political influence in Kenya.

Once the constitution was drafted, women activists faced challenges in mobilising women across the country to vote for it. As Maingi (2011) describes, Kenyan women generally had a low awareness of gender inequalities and limited knowledge of gender provisions in the constitution. There was also low voter registration among women, and some husbands obstructing their wives from registering to vote. Women's organisations worked alongside the Independent Electoral Commission to inform women about the constitution and encourage them to register to vote.

Women activists faced sustained resistance, which came from multiple sites and took multiple forms, and they were forced to expend significant political energies addressing this. Such resistance is unsurprising given that many of the women's demands ran against prevalent socially conservative norms. One manifestation of resistance was the spread of distortions and misinformation about women's agenda for constitutional reform. According to Maingi (2011) such distortions mainly centred on the controversial topics of land, abortion, Kadhi Courts¹¹ and same-sex marriage. Women's groups responded with media and communications strategies to counter misrepresentations.

While women were relatively successful at overcoming resistance within the constitutional reform process, an even bigger challenge has been resistance to implementation of the constitutional provisions that advance women's rights. As Tripp describes 'Women also came out of the [constitution making] process with a strong awareness of how much resistance there was to their demands and that it would be an uphill battle to see that the provisions would actually be implemented'. Indeed, elite resistance to the new 'rules of the game' expressed in the constitution can be seen in the 2012 Supreme Court ruling that the two-thirds affirmative-action principle was to be implemented progressively in the National Assembly and Senate. As Tripp et al. (2014) argue 'While the constitution provided a clear framework, cultural and legal interpretations undermined its authority'. Women's organisations are challenging the state's failure to implement the constitution. For example, in 2011, women's organisations went to court to challenge the appointment of judges to the Supreme Court, on the basis of the the failure to comply with the constitutional principle that no more than two thirds should be of one gender (Nzomo, 2013).

4.4 International support for women's engagement with constitutional reform

In recent years international agencies have increasingly recognised that constitutions with strong gender equality provisions can 'provide gender equality advocates with powerful tools to challenge the historical and continuing experiences of inequality that women experience in the courts, workplaces, homes and in all aspects of their lives' (UNDP, 2016). International actors engaged in Kenya therefore largely recognised the opportunity that the re-invigorated constitutional reform process provided to advance gender equality goals. International agencies provided significant support for women's engagement, as part of wider international support for Kenyan civil society to participate in the constitutional reform process.

¹¹ Courts that deal with family and inheritance rights for Muslims.

USAID and UN Women played a lead role in supporting women's participation in constitutional reform, with a wider set of development partners engaging through the Gender Sector Coordination Group, and a multi-donor pooled fund channelled through UN Women.¹² Domingo et al. (2016) describe how, while this support for women's engagement with the constitutional process at national and subnational level was very valuable, it could have benefited from being more agile. They argue that USAID support was particularly valued because it was flexible and adaptive.

International democracy organisations, including Netherlands Institute for Multiparty Democracy, the National Democratic Institute and International IDEA, provided support and capacity-building efforts to Kenyan women politicians engaged in constitutional reform. Among the types of support provided, Domingo et al. (2016) identify as particularly useful peer learning from women's engagement in other constitutional reform processes, as well as training opportunities that female candidates and parliamentarians used to increase their legitimacy and lobby others.

Despite the undoubted value of the international support, there are several ways in which it could have been more effective. Critically, this support could have taken a more political approach to women's engagement in constitutional reform, as well as a better account of how opportunities for and obstacles to women's influence related to wider power dynamics and bargaining over the political settlement. As Waylen (2014) describes, there is a 'need to open up the "black box" of the processes of negotiation and settlement surrounding institutional creation and design. This will allow us to understand not just the formal, but also the informal dimensions that have an impact on participants' strategies and tactics and on outcomes'. In addition, a more political approach would have helped international actors to appreciate the fact that apparently very technical constitutional and legal change is highly politically fraught.

Tripp (2014) reports that international partners viewed support for Kenyan women's participation in constitutional reform as less politically strategic than other types of support to the reform process. It would have been useful for international actors to understand women's participation as contributing to wider peacebuilding, inclusion and democracy goals rather than just as a means to advance gender equality agendas. Such a focus could have prompted greater connection between the wider support international agencies provided for participatory and inclusive constitutional reform and the ways in which they supported women's participation. Part of this weakness may have been due to organisational and funding silos within international partner organisations, which limit the possibility of such an interconnected approach.

¹² This pooled fund included contributions from Canada, Denmark, Finland, the Netherlands, Norway, Spain, Sweden and the UK.

There could also have been more emphasis placed on supporting documentation of women's engagement with the constitutional reform process, in order to develop evidence, reflect on lessons and inform future action. As Maingi (2011) argues, 'We cannot ignore the need to continue to document the nature of women's right work in the legal terrain. Without such documentation, the intricacy and sophistication of the work, as well as the lessons we learn from undertaking it, may well become obscured'.

Critically, while significant international support was provided for women's organisations to engage with the constitutional reform process, this declined after the constitution had been adopted. This reflects a common approach among international donors and other organisations, which sees promulgation of a constitution as the final goal, and fails to recognise that constitutional provisions are put into practice through long-term and contested processes of technical implementation, constitutional interpretation and cultural change (Dziedzic, 2016). Indeed, as International IDEA argues 'any assumption that a referendum followed by the enactment of a constitution marks a conclusive transformation of conflict into a political contest within rules misunderstands the nature and difficulties of transitions' (International IDEA, 2011).

Implementation of constitutional provisions on gender equality has been challenging. Those provisions with the greatest transformational potential (e.g. on women's land rights, or affirmative action) have faced some of the greatest resistance. Tripp (2014), for instance, describes how reduced funding for Kenyan women's organisations has made it difficult for them to campaign for implementation of key commitments, such as affirmative action, in the national legislature.¹³ There is a need for ongoing support for women's organisations to advance implementation of constitutional provisions through working with key accountability institutions, strategic litigation strategies, and undertaking social mobilisation and campaigning.

Support for implementation of the gender equality commitments in the Kenyan constitution therefore requires international partners to invest in women's movements at multiple levels – beyond the achievement of formal constitutional reform and over the longer term – in ways that are flexible and can respond to unfolding challenges and opportunities for advancing constitutional implementation. It also requires them to foster their engagement with the state structures responsible for implementing the constitution. For example, by supporting the development of justice, oversight and accountability institutions that have the capacity and will to honour gender equality elements of the constitution; supporting the presence of skilled

¹³ According to the Inter Parliamentary Union, 21.43% of Kenyan MPs today are women, despite a constitutional commitment that more than two-thirds of the members of elective or appointive bodies shall be of the same gender. [Data on women in national parliament | Parline: the IPU's Open Data Platform](#)

women within these such institutions; and supporting women's organisations' access to and engagement with them.

5 Land Reform

5.1 Nature of land reform and implications for women's rights

Land-related inequalities and exclusion – including dispossession and expropriation – have been a source of grievance and conflict throughout Kenya's colonial and post-colonial history. Political actors have consistently used these grievances to mobilise their ethnic base. As Akech (2020) argues, 'For those without access to political power, politically driven exclusions from owning land has bred deep resentment, especially where [those] who control access to land are perceived to favour members of their own ethnic communities'.

Kenyan women face particularly profound inequalities with regard to land inheritance and land rights. According to Kenya Land Alliance 2014 (in ActionAid Kenya, GROOTS Kenya and LANDac, 2018) women provide 89% of labour in subsistence farming, 70% of cash-crop labour, and are 32% of all household heads. Yet most women do not own land and their access to land is mediated through their relationship to male family members. Of registered private land only 1% of land titles are in women's names, while 5–6% is held in joint names.

Women's exclusion from land rights is due to multiple factors. Colonial practices of land titling granted land to men as the assumed head of the family, leaving women excluded from formal land ownership. Moreover, the patrilineal system means that land is shared among sons, excluding daughters. Harrington and Chopra (2010) describe how families frequently use both the customary and formal justice systems to expropriate land from widows and daughters, even if they have been left land in a will. In addition to these challenges, Kimeu and Maneno (2017) document how Kenyan women's exclusion from land ownership results in exclusion from credit, as land titles are a common collateral for loans.

The 1990s and early 2000s saw growing demands from civil society to address land-related exclusion. While a series of inquiries during this period identified deep flaws in Kenya's centralised, corrupt and inefficient system of land administration,¹⁴ it was the 2007 violence that finally provided impulse to advance land reforms. The Kenya National Dialogue and Reconciliation's *Statement of Principles on*

¹⁴ These include the 2002 Report of the Commission of Inquiry into the Land Law Systems of Kenya ('Njonjo Commission Report') and the 2004 Report of the Commission of Inquiry into Illegal/ Irregular Allocation of Land 2004 ('Ndung'u Commission Report').

Long-term Issues and Solutions stated that 'Land reform is a fundamental need in Kenya and that the issue must be addressed comprehensively and with the seriousness that it deserves'. As part of the change processes established in response to the violence, a series of policy and legal processes were undertaken to address land-related grievances.

In 2009 the National Land Policy was developed, following lengthy consultation. This policy aimed to guide the country towards 'efficient, sustainable and equitable use of land' and offered a potentially transformative vision for land management. Among other progressive elements, the policy identified women's land rights as requiring special intervention and attention, particularly with regard to discriminatory customary practices in inheritance; marital property and land ownership; women's inadequate representation in land institutions and communal ownership schemes; and the paucity of women with formally registered land.

The 2010 Constitution reflected key components of the 2009 National Land Policy and directly addressed grievances over land and established mechanisms to address historical land injustices. Article 40 established the principles governing land policy, which include equitable access; security of land rights; sustainable and productive management of land resources; transparent and cost-effective administration; and the elimination of gender discrimination in law, customs, and practice related to land and property. Article 67 established a National Land Commission (NLC) to investigate 'historical land injustices' and recommend appropriate redress, while Article 68 required parliament to enact a law to 'enable the review of all grants or dispositions of public land to establish their propriety or legality'. Furthermore, the 2010 Constitution provided for strengthened justice for women in relation to land, including by formally recognising 'traditional dispute resolution mechanisms', provided these do not violate the constitution, and prohibiting gender-based discrimination in all matters, including land-related issues. The 2010 Constitution also provides protections against harmful and discriminatory social and cultural practices and guarantees the equal protection of property rights for women and men in marriage.

In the following years, various new laws were passed with the aim of enacting constitutional commitments related to land. These include the 2012 Land Act, which provided the overarching legal framework for land governance, including the definition of public, private, and community land; the 2012 National Land Commission Act that established the NLC; and the 2012 Land Registration Act, which provides that a spouse may acquire an interest in their spouse's land if they contribute by labour or other means to this land. In 2016 the Community Land Act set a new framework for customary land-holdings, enabling a community to secure a single collective title over its lands and govern this property according to standardised rules, including membership and decision-making power for women and

men. Kenya is one of the few African countries to have a comprehensive national Land Policy whose key principles are anchored in the constitution, or a Community Land Act to guide the management of community land rights. However, Manji (2015) argues that these laws do not adequately enact the progressive land and environment chapter of the constitution and that there was inadequate consultation on them. She states that ‘the process of translating these [constitutional] principles into law was widely seen as an opportunity to redress Kenya’s grossly skewed structure of land management and end predatory land practices by the state’, but that this opportunity was missed.

In addition to these land-focused reforms, in response to women’s campaigning there have been other reforms that specifically address women’s access to land and property. In particular, the 2013 Matrimonial Property Act recognises spouses as equal property owners, provides a clear definition of matrimonial property and ownership in polygamous marriages, recognises contributions made by both spouses to matrimonial property and assets, and protects women’s rights to land ownership during marriage, divorce and separation.

5.2 How women have mobilised for land rights

The new legal framework provided by the 2010 Constitution and various land laws has been the result of sustained campaigning by civil society and particularly women’s rights activists. Manji (2015) documents how the Kenya Land Alliance, Kenya Human Rights Commission and others have made concerted efforts to introduce ideas of justice into discussions about the politics of land and the direction of land law reform, and to situate gender issues within this.

Kenyan women continue to mobilise on multiple levels to campaign to advance their land rights. For example, in 2021 FIDA Kenya, supported by Oxfam International and the European Union (EU), developed a National Shadow Report on Women Land Rights (WLR) (FIDA, 2021). This report identifies a number of obstacles that prevent women from realising their land rights, including ‘patriarchy, the inferior status granted to women, information and knowledge gaps, a scarcity of resources to advance the discourse around WLRs, limited access to justice, gaps in the documentation and reporting of information, and systematic challenges around processes as pertains to WLRs’. It calls for a more concerted effort to achieve this goal of ensuring equality and inclusion for Kenyan women in the area of land rights. A particular challenge is that data on gender and land in Kenya is very weak, making it difficult to measure and demand accountability for progress on land rights. Those advocating for WLRs have recognised this and pushing for strengthened data.

Advocacy for women's land rights is also happening at local level. For example, GROOTS Kenya's community land watchdog groups use volunteers within the community who are trained as paralegals to map land rights and mediate threats for vulnerable people such as widows and orphans (ActionAid Kenya, GROOTS Kenya and LANDac, 2018). These groups mobilise, sensitise and convince communities, families and local administrators to protect the land rights of widows or orphans on a case-by-case basis. In addition, Kenyan women have joined with other African women to demand greater land rights. Through a Charter of Demands (Women to Kilimanjaro, 2016), Kenyan women's associations and farmers' groups, alongside similar groups from 20 other African countries, demanded equal access to and control over land, increased collection of gender-disaggregated data, and equal decision-making power for women and communities related to land-based investments by the government or private sector.

5.3 Weaknesses in legal framework and its implementation

Despite the relatively progressive new framework provided by the constitution, land policy and land laws, in practice there has been limited progress in advancing Kenyan women's access to land. This is due to weak implementation of the new provisions, a range of barriers that prevent women from asserting their rights, strong resistance by power-holders, and flaws in the framework itself. As a result, within private tenure regimes, Kenyan women still own very little land, either individually or jointly. Hennings (2021) reports that whereas 36.1% of the households are female-headed, women only hold 1% of land titles in addition to 5% jointly hold with their spouse, and that only 2% of title deeds were issued to women between 2013 and 2018. Moreover, in community-tenure regimes, women remain severely underrepresented in governance structures and decisions regarding land access.

There has been a real failure to effectively implement the new legal framework. In particular, while the constitution allows for the use of alternative dispute-resolution mechanisms provided that these are consistent with the constitution and with the principles of justice and morality, in practice customary law applied to land issues at local level is highly discriminatory and not in line with constitutional equality provisions (FIDA, 2021). As an evaluation of USAID programmes on justice in Kenya (Freudenburg and Santos, 2013) concludes, 'Legal rights to land are necessary but not sufficient. There must also be in place institutions at the national and local levels that recognize and enforce those rights'.

Women face a range of structural and cultural barriers in claiming their land rights. As Kimeu and Maneno (2017) point out, many Kenyan women are unaware of their rights under the constitution and

new legal framework and struggle with understanding succession, joint ownership and laws related to women's land inheritance. In cases where women are aware of and want to assert their rights, Harrington and Chopra (2010) found that most women follow a similar path, where they turn first to their family and community to seek justice, and if that fails to the Provincial Administration (chief). Provincial Administrations employ mixed elements of community and formal law, are the focal point for all local disputes, and play a major role in advancing or undermining women's land rights – but frequently violate these rights. Finally, women may approach the formal justice system to claim their rights, although this is rare and involves formidable obstacles related to legal costs, language barriers, the need to travel long distances to get to court, and lengthy delays. Under the Matrimonial Property Act, women may also need to present proof of monetary or non-monetary contributions to their matrimonial property. Women who take their family to formal courts over land disputes often face extreme hostility and violence from family and community.

Harrington and Chopra (2010) detail how formal, informal, and hybrid legal institutions that adjudicate on land in Kenya are all 'underpinned by the same local power dynamics that control and ultimately prevent women from obtaining land, leaving all of these systems inadequate in ensuring women's access to land'. This research documents how community leaders play a key role not only as local power-brokers, decision-makers, and protectors of local practices, but also as gatekeepers to the formal system.¹⁵ These leaders frequently limit women's access to the formal system, thereby denying their land rights in order to uphold 'tradition'. Harrington and Chopra (2010) stress that despite the appearance of being more equitable, in reality, the formal system is subjected to the same structures that underpin community solutions –that is, those with power, money, or education are much more likely to gain from it.

A critical area where implementation of the new framework remains a challenge is in women's inclusion in decisions regarding land. The FIDA National Shadow Report on Women Land Rights (2021) states that 'skewed implementation of the law has denied women effective inclusion in land governance and decision-making processes'. As Musangi (2017) describes, most women are not engaged meaningfully in land-administration institutions. In both elected and appointed land bodies, women are either absent or vastly outnumbered by men, in violation of the constitutional provision that not more than two thirds of the members of elective and appointive bodies should be of the same gender. ActionAid Kenya et al. (2018) elaborate how in community-tenure regimes, women are still underrepresented in land-governance structures and excluded from taking part in decision-making processes, meaning that these do not

¹⁵ For example, as Harrington and Chopra (2010) describe, in formal succession processes, chiefs play a significant role as they enumerate all beneficiaries to a particular piece of land for the court.

reflect their interests. Actors such as FIDA are campaigning for women's greater inclusion in land-administration institutions, and for these bodies to be better trained on women's land rights.

While most analysis focuses on weak implementation of the new legal framework for women's rights, some also question the robustness of this framework itself. Manji (2015) argues that the land law bills did not live up to the transformative ambition of the 2009 Land Policy or 2010 Constitution. She claims that 'the final stages of the reform process can easily be interpreted as a last-ditch attempt by certain parties to stymie it, subvert the intentions of the National Land Policy and renege on the promises of the constitution. The draft land bills were flawed, weak and seemed to be almost entirely disconnected from their guiding documents'. According to Manji (2015), the approach to land reform was overly legalistic and 'technicist', avoiding difficult questions about who controls access to land and how a more just distribution might be achieved. The result is that new laws have not been redistributive or transformative, have not addressed longstanding grievances and injustices, and have not effectively addressed inequalities in land access, including gender inequalities.

Manji (2015) describes how during the development of the land laws, civil society activists failed to challenge this approach, but instead 'were distracted and mollified by the technical obfuscation that tends to be part and parcel of land law reform – and which typically reinforces the status quo'. She details how, as a result, the redistributive potential of the national land policy was not realised. Likewise, how Kenya's new land laws have facilitated the continued practice of appropriating public land for private gain to continue, resulting in communities being routinely deprived of land for schools, clinics and other public facilities, with particular implications for women who are often reliant on these services.

5.4 International support for land reform

International agencies provided support for a progressive approach to issues of equality and land within the land policy and constitution. However, it appears that by focusing on technical aspects of the reform of land law, rather than wider issues of land justice and access, they contributed to the development of legal reform that did not live up to the transformative potential of the constitution and land policy. According to Manji (2015) this is part of a wider pattern in which 'since the 1990s, law reform has been the favoured means of addressing contentious land issues. Bilateral and multilateral donors have promoted the rule of law, administrative justice, formalisation of tenure, promotion of individual title, encouragement of property markets and technical solutions'.

This was the approach taken in Kenya, which resulted in comprehensive reform of land law, but a failure to address the complex politics of land ownership and access. Indeed, Manji (2015:1) argues that the 'disproportionate focus of donors, policymakers and academics on law, the omission of the theme of justice, and an overly-technical approach that ignores political realities are deficiencies in the common "global" approach to land reform glaringly highlighted during the drafting of Kenya's new land laws. Instead of the redistributive, transformative land reform enshrined in the National Land Policy and constitution, Kenyans received incoherent land laws that threaten further to undermine the rule of law and to perpetuate the country's long-running land corruption, conflict, injustices and inequalities'. In terms of gender inequalities, this approach, while providing women with stronger formal rights in relation to land, failed to address the interests and power dynamics that in practice continue to exclude women from land.

There has also been criticism of the approach various development partners in Kenya have taken to formal and customary land laws and the relationship between them. As Harrington and Chopra (2010) describe, among international actors there are two main schools of thought on how to address women's land insecurity – one advocating increased attention to formal law, legal mechanisms and entrenched rights, and the other focused on supporting local systems and community approaches, either despite or within formal law. This research found that such a formal vs informal dichotomy overlooks the reality of Kenyan's women's experience in seeking to claim land rights, in particular that the same local power dynamics underpin, control and ultimately undermine land access for women in both arenas, with both formal and informal justice institutions equally abused by those with power. Hence the strongly legalistic approach adopted in Kenya – passing legislation, mandating formal equality, attempting to make the formal system more accessible, and linking customary and formal institutions in a hybrid system at local level – has not resulted in improved outcomes for women.

This analysis leads to important lessons regarding how international actors can support post-conflict land-reform processes in ways that guarantee women's land rights. First is the need to pay greater attention to the political and economic context and the power dynamics that allow more powerful men to use either customary or formal systems to undermine women's rights to land. Second, as Harrington and Chopra (2010) stress, is the need to understand and address the norms and attitudes that make it acceptable for male relatives to seize land belonging to women. Positive community values and concepts that promote the protection of women should be identified and strengthened to counter the legitimacy of such practices and provide support for women's land rights at the community level.

Analysis by the Kenya Human Rights Commission offers some insights into how international actors can better support women's land rights. This analysis suggests that the civil education on women's land rights that accompanied legal reform was unstructured and uncoordinated and resulted in women's inadequate knowledge of their rights and how to pursue them. Likewise, the Commission (2008) highlights the significant lack of data on women's status on land access, use, control and ownership of land. International actors are well placed to support the gathering of such data and the development of more effective civil education on women's land rights. Likewise, there is a need for well-coordinated multi-stakeholder platforms advancing women's land rights, which international actors could support.

6 Conclusions

An examination of women's engagement with constitutional and land-reform processes in Kenya illustrates the importance of understanding women's engagement with such reforms as part of much longer trajectories of women's involvement in political change processes. Kenyan women had long mobilised around these and other demands, building strong and diverse women's movements with significant capacity and a clear agenda. This allowed them to take advantage of openings and opportunities that emerged following the political violence. Women's movements in Kenya have also shown great flexibility, adapting to respond to new opportunities or to address different forms of resistance.

International support for women's mobilisation played an important role in enabling them to influence these reform processes – particularly in the case of constitutional reform. However, in relation to both constitutional reform and land reform this support could have been more politically aware and strategic. In the case of land reform, it appears that international support did not sufficiently understand or engage with the underlying interests, politics and power dynamics that shape access to land or motivate resistance to women's land rights.

The new formal rights established by constitutional reform and land reform have so far had limited impact on outcomes for women. Implementation has been a major challenge, with women facing strong resistance at multiple levels when seeking to claim their new rights. International support focused strongly on the moment of reform, but there is a need for much longer-term engagement to support women's continued mobilisation and action to demand and monitor implementation of these new frameworks.

The WPS agenda has the potential to provide a framework for ongoing strategic and interconnected support by international actors to strengthen Kenyan women's rights across political and economic arenas, including through implementation of the new constitution and land laws. Such an interconnected approach is particularly important given the strong overlap between actors, interests and sources of resistance in relation to women's political and economic rights. This would depend on a broad interpretation of the WPS agenda that demonstrates its relevance to a wide range of change processes and works in an integrated way across the four WPS pillars.

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