

Constitutionalizing Traveling Feminisms in Kenya

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This Article uses selected provisions of the Constitution of Kenya 2010 to argue that although elaborate legal and institutional frameworks for promoting women's empowerment have been adopted in Kenya's legal framework, implementation of these provisions remains a challenge. *Why is the law in the books so different from the law in action?* This is the question this Article seeks to address. By mapping out how feminist ideas travel through collective action, colonial encounters, local, regional and world conferences, legislation, and other means, the Article demonstrates that the reason why implementation remains a challenge is that these ideas are often in tension with the local contexts. The Article examines challenges and opportunities presented in the Kenyan Constitution and uses specific examples to map out recurring tensions between "traditionalist" and "modernist" claims as well as between "international" and "local" perspectives. The Article is divided into two main parts. The first part tells the story of how the women's movement in Kenya has interacted with transnational feminist movements. I argue that although transnational women's movements have often involved the participation of women from all over the world, nevertheless the legal instruments attempt to mediate diverse ideas, and as a result, the negotiated idea is often in tension with the local context. The Article recognizes that both translocal and transnational feminist projects have been based on different ideological perspectives whose diversity is attributable to the fact that international and domestic legal scholarship is expressive of diversity of thought. Having recognized the diverse nature of feminist ideas, I argue that the "international" doctrine(s) embodied in international treaties and conventions have often captured conflicting philosophical standpoints which are also in tension with translocal feminisms as well the sociopolitical context. The second part describes how the Constitution of Kenya 2010 attempts to accommodate translocal and transnational feminist ideas. The Article concludes with some reflections on the impact of the constitutionalization of traveling feminisms in Kenya.

† The author wishes to thank Professors Janet Halley, Duncan Kennedy, Patricia Kameri Mbote, and Wanjiku Kabira whose mentorship and supervision over the years have contributed greatly to my thinking about women, feminism, and law in general. Thanks also to Boru Gollo, Garvin Rodgers, Muna Abdullahi, Clare Soit, and Jenniffer Githu for research assistance. Thanks also to the Cornell International Law Journal Symposium on Transnational Legal Feminisms for challenging me to think deeply about women in the legal and democratic process.

Introduction	138
I. Encounters Between Translocal Feminist Movements in Kenya and Transnational Feminist Movements Through Time (the 1990s to 2018)	144
A. The Genesis of the Women’s Movement in Kenya (Before 1920)	145
B. When the British Encountered the Africans (1920-1963)	146
C. Sowing the Seeds of an International Kenyan Women’s Movement (1963-1975)	148
D. From Nairobi to Mexico to Copenhagen to Banjul and Back Again (1975-1985)	149
E. The Transnational Struggle for Multiparty Democracy (1985-1995)	152
F. The Consolidation of <i>Transnational</i> Feminist Ideas (1995-2005)	153
G. The Struggle to Constitutionalize and Legislate Transnational Feminisms (2004-2010)	156
H. Women’s Gains in the Constitution (2010-2018)	158
II. The Successes and Challenges of Transnational Feminist Movements in the Kenyan Constitution	159
A. Women’s Rights in the Legal System	159
1. <i>Tradition v. Modernity</i>	162
2. <i>Local v. International</i>	163
B. Women’s Political Representation in Decision Making ..	165
1. <i>Individual Rights v. Community Rights</i>	167
Concluding Reflections	168

Introduction

*Like people and schools of criticism, ideas and theories travel—from person to person, from situation to situation, from one period to another. Cultural and intellectual life are usually nourished and often sustained by the circulation of ideas, and whether it takes the form of acknowledged or unconscious influence, creative borrowing, or wholesale appropriation, the movement of ideas and theories from one place to another is both a fact of life and a usually enabling condition of intellectual activity. Having said that, however, one should go on to specify the kinds of movement that are possible, in order to ask whether by virtue of having moved from one place and time to another an idea or a theory gains or losses in strength, and whether the theory in one historical period and national culture becomes altogether different from one period or situation.*¹

Edward Said

This statement, written by Edward Said in 1983, captures succinctly the state of transnational feminisms today. Indeed, at an international level, feminist ideas and theories have traveled from Mexico in 1975,² to

1. Edward Said, *Traveling Theory*, RARITAN: A Q. REV., Winter 1982, at 41, 41.

2. First International Women’s Year, first global United Nations’ Women’s Conference held in Mexico City and the beginning of the UN Decade for Women. The UN

Copenhagen in 1980,³ to Nairobi in 1985,⁴ and to Beijing in 1995.⁵ At a regional level, feminist schools of thought have traveled to Nouakchott in 1977,⁶ to Lusaka in 1979,⁷ to Lagos in 1980,⁸ to Arusha in 1984,⁹ to Abuja in 1989,¹⁰ and back again to Arusha in 1990,¹¹ and to Dakar¹² and Kampala¹³ in 1993 and 1992 respectively.¹⁴ Traveling feminist ideas is

women's conference in Mexico City drafted two major documents: the Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace and the World Plan of Action for the Implementation of the Objectives of the International Women's Year. World Conference of the International Women's Year, *Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace*, U.N. Doc. E/CONF.66/34 (July 2, 1975); G.A. Res. 3520 (XXX) (Dec. 15, 1975). See also *Gender Equality*, UNITED NATIONS, <http://www.un.org/en/sections/issues-depth/women/> [<https://perma.cc/GD4H-DXSD>] (last visited Mar. 3, 2019). During this period, traveling feminisms focused on three main ideas: Equality, Development, and Peace. See PROMISES & REALITIES: TAKING STOCK OF THE 3RD UN INTERNATIONAL WOMEN'S CONFERENCE 7 (Sarah J. Ruto, et al. eds., 2009).

3. The UN World Summit for Social Development was held in Copenhagen, Denmark in March 1995. See *World Summit for Social Development 1995*, UNITED NATIONS, <https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995.html> [<https://perma.cc/WQS2-93Z2>] (last visited Mar. 3, 2019). During this summit, new ideas traveled. At this point, education, health, and employment were included in the gender, peace, and development agenda of the first conference. See PROMISES & REALITIES, *supra* note 2, at 8.

4. The 3rd World Women's Conference was held in Nairobi in 1985. This conference made visible the plight of the African women and women from the global south. See World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace, *Nairobi Forward-looking Strategies. Introduction*, U.N. Doc. A/CONF.116/28 (July 26, 1985).

5. The Fourth World Conference was held in Beijing, and it resulted in the Beijing Declaration and Platform for Action, on September 15th, 1995. See Fourth World Conference on Women, *Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20, at 4 (Oct. 17, 1995). During this conference, one of the major outcomes was the use of gender mainstreaming as a strategic choice for ensuring gender quality and women's empowerment at local, regional, and international levels. See PROMISES & REALITIES, *supra* note 2.

6. The First Regional Conference for Integration of Women in Development held in Nouakchott in 1977. Commission on the Status of Women, *Preparations for the Fourth World Conference on Women: Action for Equality, Development, and Peace*, ¶ 6, U.N. Doc. E/CN.6/1995/5/Add.2 (Dec. 29, 1994).

7. The Second Regional Conference for the Integration of women in Development held in Lusaka in 1979. *Id.*

8. The Lagos Plan of Action and Final Act of Lagos concluded in Nigeria in 1980. *Id.* ¶ 8.

9. The Third Regional Conference on Women was held in Arusha in 1984. *Id.* ¶ 6.

10. The Fourth Regional Conference on Women held in Abuja in 1989. *Id.* ¶ 8.

11. The Arusha Declaration of 1990. *Id.* ¶ 53.

12. The Dakar Declaration on Population, Family and Sustainable development of 1992. *Id.* ¶ 8.

13. The Kampala Action Plan on Women and Peace, 1993. *Id.*

14. U.N. Under-Secretary-General, The Fifth African Regional Conference on Women, 1 (Dec. 1, 1994); UN Women, Beijing Declaration and Platform for Action: Beijing + 5 Political Declaration and Outcome, 199 (June 5-9, 2000), <https://www.icsspe.org/system/files/Beijing%20Declaration%20and%20Platform%20for%20Action.pdf> [<https://perma.cc/4H9H-NLQY>]; Regional Preparatory Meeting for the 10-year Review of Implementation of the Beijing Platform for Action 14-15 December 2014, *Report of the Economic and Social Council*, 2, U.N. Doc. ECE/AC.28/2004/3/Add.1 (Jan. 13, 2005).

also true in the local contexts as schools of thought travel back and forth from woman to woman, from group to group, and from organization to organization.¹⁵

As a result of these transnational feminist movements, elaborate institutional and legislative frameworks have been negotiated and adopted at international, regional, and local levels.¹⁶ Four World Conferences later, we have numerous pieces of legislation and treaties on gender and equality on several thematic areas ranging from women's human rights,¹⁷ human rights,¹⁸ slavery and slavery-like practices,¹⁹ torture,²⁰ ill-treatment and disappearance,²¹ rights of the child,²² freedom of association,²³ employ-

15. See LILLIAN ADAWO ET AL., HISTORY OF FEMINISM IN KENYA 5 (Oct. 2011); Preston O. Chitere, *The Women's Self-Help Movement in Kenya: A Historical Perspective, 1940-1980*, 17 TRANSAFRICAN J. HIST. 50, 50-68.

16. See NYOKABI KAMAU, WOMEN AND POLITICAL LEADERSHIP IN KENYA: TEN CASE STUDIES, 17 (2010).

17. See, e.g., UN Convention on the Political Rights of Women, Mar. 31, 1953, 193 U.N.T.S. 135; Convention on the Nationality of Married Women, Feb. 20, 1957, 309 U.N.T.S. 65; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; G.A. Res. A/54/4, Optional Protocol to the Convention on the Elimination of Discrimination against Women (Dec. 10, 1999); World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace, *Nairobi Forward Looking Strategies*, U.N. Doc. A/CONF.116/28/Rev. (July 26, 1985); G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993); International Conference on Population and Development, Cairo, 5-13 September 1994, *Programme of Action*, at 3; Fourth World Conference on Women, *Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action*, ¶¶ 3-7, U.N. Doc. A/CONF.177/20 (September 15, 1995); G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Nov. 15, 2000); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, at 1 (Nov. 15, 2000); S.C. Res. 1325 (2000); S.C. Res. 1820 (2008); Rome Statute of the International Criminal Court, art. 7(g), U.N. Doc. A/CONF.183/9 (July 17, 1998).

18. G.A. Res. 2200A (XXI), at 1-2, 6, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); G.A. Res. No. 14668, at 3, International Covenant on Civil and Political Rights (Dec. 19, 1966); G.A. Res. 2200A (XXI), Optional Protocol to the International Covenant on Civil and Political Rights (Dec. 16, 1966); G.A. Res. 44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Dec. 15, 1989); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (June 25, 1993); *Millennium Development Goals (MDGs)*, OSAA, <http://www.un.org/en/africa/osaa/peace/mdgs.shtml> [<https://perma.cc/C9PL-7QMJ>] (last visited Mar. 8, 2019).

19. G.A. Res. 317 (IV), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Dec. 2, 1949).

20. G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at 1-5 (Dec. 10, 1984).

21. *Id.* at 1-5.

22. G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989); International Labour Organization, Worst Forms of Child Labour Convention (June 17, 1999); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, May 25, 2000, 2173 U.N.T.S. 222; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227.

ment and forced labor,²⁴ education,²⁵ war crimes and crimes against humanity,²⁶ genocide and terrorism,²⁷ disability,²⁸ corruption, and organized crime.²⁹ Several polices have also emerged as a result of the international women's movement.³⁰

Similarly, as a result of the emergence of strong regional networks and groups, several regional instruments and treaties have been adopted to support the quest for gender equality on the continent.³¹ Several policies have

23. International Labour Organization, Freedom of Association and Protection of the Right to Organize Convention, No. 87 (1948); International Labour Organization, Right to Organize and Collective Bargaining Convention, No. 98 (1949).

24. International Labour Office, Equal Remuneration Convention, No. 100 (1951); International Labour Organization, Abolition of Forced Labour Convention, No. 105 (1957); International Labour Organization, Discrimination (Employment and Occupation) Convention, No. 111 (1958); International Labour Organization, Employment Policy Convention, No. 122 (1964); International Labour Organization, Occupational Safety and Health Convention, No. 155 (1981); G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Dec. 18, 1990); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Guide on Ratification*, at 17, 26 (Apr. 2009).

25. Convention against Discrimination in Education, Dec. 14, 1960, 429 U.S. 93; World Conference on Education for All, UNESCO, *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs* (1990).

26. G.A. Res. 2391(XXIII), Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Nov. 26, 1968).

27. *Id.* at 1-2; G.A. Res. No. 1021, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948); Rome Statute of the International Criminal Court, art. 5-6, U.N. Doc. A/CONF.183/9 (July 17, 1998); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 32-33, Aug. 12, 1949, 75 U.N.T.S. 75; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 51, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4, June 8, 1977, 1125 U.N.T.S. 609.

28. G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, 2 (Jan. 24, 2007).

29. G.A. Res. 58/4, United Nations Convention Against Corruption (Oct. 31, 2003); G.A. Res. 55/25, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000); G.A. Res. 55/255 (May 31, 2001).

30. UNICEF, *Working for an Equal Future: UNICEF Policy on Gender Equality and the Empowerment of Girls and Women* (May 2010); Commonwealth Secretariat, *Gender Equality Policy* (2012).

31. African (Banjul) Charter on Human and People's Rights, June 27, 1981, at 2, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; African Charter on the Rights and Welfare of the Child, July 11, 1990, at 8, O.A.U. Doc. CAB/LEG/24.9/49 (1990); Fifth African Regional Conference on Women (1994) preparatory to the fourth World Conference on Women (1995), *African Platform for Action*, 7-9, U.N. Doc. E/ECA/ACW/RC.V/CM/3 (Jan. 20, 1995); African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999); Org. of African Unity [OAU], *Constitutive Act of the African Union*, art. 3, 4, (2000); Org. of African Unity [OAU], *Abuja Declaration on HIV and AIDS, Tuberculosis and Other Related Infectious Diseases*, 7, U.N. Doc. OAU/SPS/ABUJA/3 (Apr. 24-27, 2001); African Union Convention on the Prevention and Combating of Corruption, at 3, July 11, 2003; Org. of African Unity [OAU], *Solemn Declaration on Gender Equality in Africa* (2004); Org. of African Unity [OAU], *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, June 10, 1998; Inter-

also emerged as a result of these efforts.³²

In recent years, one significant development in the transnational feminist movement is the constitutionalization of feminist ideas as well as the establishment of numerous pieces of legislation in order to domesticate the outcomes of various international, regional, and national conversations within the global women's movement. In the Kenyan context, for instance, the 2010 Constitution represents major gains towards the realization of gender equality and delivers on many areas that have been at the heart of the women's movement in Kenya as well as the transnational feminist movement.³³ The Constitution goes far beyond what existed in the old constitution by embodying concerns such as socioeconomic, political, and cultural rights, as well as civil liberties such as equality of opportunity in education, employment, and political spheres.³⁴

Governmental Authority on Development Gender Policy and Strategy (2004); IGAD Regional Strategy, IGAD, <https://igad.int/about-us/strategy> [<https://perma.cc/4DDC-2JZA>] (last visited Apr. 6, 2019); African Union Commission, *The Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2007-2010*, O.A.U. Doc. Sp/MINCAMH/5(1); Media Statements, African Union Summit on Maternal, Infant and Child Health and Development, Kampala, Uganda (July 19-27, 2010), https://www.who.int/pmnch/media/events/2010/20100719_27_jap_at_AU/en/index2.html [<https://perma.cc/N9M9-3EQG>]; African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, July 11, 2003, O.A.U. Doc. CAB/LEG/66.6.

32. African Union, *African Union Gender Policy* (2009); East African Community, *EAC Strategic Plan for Gender, Youth, Children, Persons with Disability, Social Protection and Community Development (2012-2016)* (Mar. 2012); East African Community, *EAC Social Development Policy Framework* (2013) (Oct. 2012).

33. CONSTITUTION art. 59 (2010) (Kenya).

34. The enactment of the Constitution of Kenya 2010 also demanded that the Kenyan Parliament review numerous pieces of legislation. As a result, several pieces of legislation were enacted in order to respond to the demand for inclusion of gender equality and women's rights provisions. These laws include: Asian Widows' and Orphans' Pensions Act (2012) Cap. 193; The Breast Milk Substitutes (Regulation and Control), No. 34 (2012), KENYA GAZETTE SUPPLEMENT No. 153; Basic Education, No. 14 (2013); Children Act (2017), No. 8 (2001); The Elections Act (2012), No. 24 (2011); Employment Act (2012) Cap. 226; HIV and AIDS Prevention and Control Act (2012), No. 14 (2006); Judicial Service Act (2012), No. 1 (2011); Kenya National Commission on Human Rights Act (2012), No. 14 (2011); Land Act (2012), No. 6 (2012); Legal Aid Act (2016), No. 6 (2016), The Land Registration Act (2012), No. 3 (2012), Law of Succession Act (2017) Cap. 160; Legitimacy Act (2012) Cap. 145; Marriage Act (2017), No. 4 (2014); The Matrimonial Property Act, No. 49 (2013) KENYA GAZETTE SUPPLEMENT No. 183; National Gender and Equality Commission, No. 15 (2011), Prohibition of Female Genital Mutilation Act (2012), No. 32 (2011); The Protection Against Domestic Violence Act, No. 2 (2015) KENYA GAZETTE SUPPLEMENT No. 60; Sexual Offences Act (2014), No. 3 (2006); and The Public Finance Management (National Government Affirmative Action Fund), Regulation 3 (2016). Several policies have been also been adopted various ministerial policies and instruments that capture gender equality and women's empowerment provisions. See, e.g., Department of Children's Services Ministry of Gender, Children and Social Development, *A Technical Assessment of the Legal Provisions and Practices of Guardianship, Foster Care and Adoption of Children in Kenya* (Nov. 2008); REPUBLIC OF KENYA, KENYA VISION 2030 (2007); Ministry of Gender, Children and Social Development, *Training Manual on Gender Mainstreaming* (June 2008); REPUBLIC OF KENYA, MINISTRY OF GENDER, SPORTS, CULTURE AND SOCIAL SERVICES, PLAN OF ACTION (2008-2012) TO IMPLEMENT THE NATIONAL POLICY ON GENDER AND DEVELOPMENT (2008); REPUBLIC OF KENYA MINISTRY OF HOME AFFAIRS, HERITAGE AND SPORTS, KENYA NATIONAL YOUTH POLICY

The Constitution also domesticates many of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), The African Charter on Human and People’s Rights (“ACHPR”), and The Protocol to the African Charter on Human Rights of Women in Africa–Maputo Protocol.³⁵ Furthermore, it provides that Kenyan law consists of the “general rules of international law” as well as any treaty or convention ratified by the Kenyan Government.³⁶ Although institutional frameworks for gender mainstreaming and promoting women’s empowerment have been adopted in Kenya’s legal framework, implementation of these provisions remains a challenge. Why is the “*law in the books*” so different from the “*law in action*?” This is the question this Article seeks to address.

In order to respond to this pertinent question, it is important for us to recognize that feminist projects³⁷ at the international and local levels of the women’s movements have been based on different perspectives. The multiplicity is due to the fact that global feminist legal scholarship is representative of diversity of thought.³⁸ These include liberalism,³⁹ socialism and Marxism,⁴⁰ American critical legal studies,⁴¹ critical race theory,⁴² African

(2002); REPUBLIC OF KENYA, MDGS STATUS REPORT FOR KENYA (2005); REPUBLIC OF KENYA OFFICE OF THE PRESIDENT: DIRECTORATE OF PERSONNEL MANAGEMENT, PUBLIC SECTOR WORK-PLACE POLICY ON HIV AND AIDS (2005).

35. CONSTITUTION art. 21(3) & 27(3), (4), (8) (2010) (Kenya).

36. *Id.* art. 2(5).

37. By project, I mean a “continuous, goal-oriented practical activity based on an analysis of some kind . . . but the goals and the analysis are not necessarily internally coherent or consistent over time.” DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 6 (1997).

38. Feminist legal scholars have described “feminisms” in different ways. In her book *FEMINIST POLITICS AND HUMAN NATURE*, Alison Jaggar describes four major versions of feminist thought—liberal, Marxist, radical, and socialist—and provides an account of each one’s prescriptions for political change. ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983). Sandra Harding has suggested a tripartite categorization of feminist theories: empiricism, standpoint theories, and post-modernism. SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 24–29 (1986). Carol Smart describes four types of feminisms: “feminist empiricism,” “standpoint feminism,” and “postmodern feminism.” CAROL SMART, *LAW, CRIME, AND SEXUALITY: ESSAYS IN FEMINISM* 1–11 (1995). For a discussion on African feminism, see Aili Mari Tripp, *African Feminism: A New Wave of Activism*, Paper Presented at the Annual Meeting of the American Political Science Association, Philadelphia Marriott Hotel, Philadelphia (Aug. 28–31, 2003).

39. See generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, 19–73 (David M. Trubek, ed. 2006). See also, Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 *J. L. & SOC* 351 (2002). The idea that social order should be based on the subjective consent of individuals is the most fundamental claim of the liberal tradition. For a discussion on liberal feminism, see JAGGAR, *supra* note 38, at 35. See also *Locke’s Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Jan. 11, 2016), <https://plato.stanford.edu/entries/locke-political/> [<https://perma.cc/VM3J-Y73R>].

40. Marxist feminism was born out of the Marxist movements of the 1970s and early 1980s. See, e.g., Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism*, in *THE SECOND WAVE: A READER IN FEMINIST THEORY* 97 (Linda Nicholson ed., 1997); Catharine A. Mackinnon, *Feminism, Marxism, Method, and State: An Agenda for Theory*, 7 *SIGNS: J. WOMEN IN CULTURE & SOC’Y* 515, 516 (1982). See generally MICHÈLE BARRETT, *WOMEN’S OPPRESSION TODAY: PROBLEMS IN MARXIST AND FEMINIST ANALYSIS* (1980).

studies,⁴³ poststructuralism,⁴⁴ and postmodernism.⁴⁵ It is therefore not surprising that feminists working on transnational agendas have often been divided over political issues.⁴⁶

Against this backdrop, what happens when women from all over the world meet to chart the way forward on significant issues? Which ideas travel? How do they travel? Which ones dominate? According to Edward Said, ideas travel in four stages:⁴⁷

First, there is a point of origin, or what seems like one, a set of initial circumstances in which the idea came to birth or entered discourse. Second, there is a distance transversed, a passage through the pressure of various contexts as the idea moves from an earlier point to another time and place where it will come into a new prominence. Third, there is a set of conditions—call them conditions of acceptance or, as an inevitable part of acceptance, resistances—which then confronts the transplanted theory or idea, making possible its introduction or toleration, however alien it might appear to be. Fourth, the now full (or partly) accommodated (or incorporated) idea is to some extent transformed by its new uses, its new position in a new time and place.⁴⁸

The section that follows uses the example of the Kenyan women's movement to demonstrate how feminist ideas have traveled through the four stages, transnationalized, encountered local contexts, and found their way into the Kenyan Constitution.

I. Encounters Between Translocal Feminist Movements in Kenya and Transnational Feminist Movements Through Time (the 1990s to 2018)

In recent years, the women's movement has become a force to reckon with.⁴⁹ It has evolved from its focus on individuals to communities, to

41. See generally the work of Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

42. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (1989).

43. See, e.g., Gwendolyn Mikell, *African Feminism: Toward a New Politics of Representation*, 21 FEMINIST STUD. 405 (1995).

44. See, e.g., CAROL SMART, FEMINISM AND THE POWER OF LAW 8 (1989).

45. See PATTI LATHER, GETTING SMART: FEMINIST RESEARCH AND PEDAGOGY WITH/IN THE POSTMODERN IX-X (1991).

46. Diverse feminist thought is a reflection of divergent socio-political and economic realities amongst women. See, e.g., AMRITA BASU, WOMEN'S MOVEMENTS IN THE GLOBAL ERA: THE POWER OF LOCAL FEMINISMS 2, 12, 25, 28 (2010).

47. EDWARD W. SAID, THE WORLD, THE TEXT, AND THE CRITIC 226-27 (1983).

48. *Id.*

49. See Mary Wambui Kanyi, *Kenya Women's Journey in Their Quest for Affirmative Action*, in THE WALLS WE CAN'T SEE: PUBLIC POLICY LETHARGY ON WOMEN'S POLITICAL PARTICIPATION IN KENYA 2 (2016); Chitere, *supra* note 15, at 50-68. See also PILAR DOMINGO ET AL., WOMEN AND POWER: SHAPING THE DEVELOPMENT OF KENYA'S 2010 CONSTITUTION, 8 (2016).

groups, to a national movement, to a regional movement, and to an international movement.⁵⁰ At a local level, women have organized themselves in the form of groups, community-based organizations, self-help groups, and nongovernmental organizations, among others.⁵¹ In order to understand the women's movement in Kenya, its historical roots must be discussed. The following section traces how feminist ideas in Kenya have behaved in their encounter with traveling feminist ideas through the pre-colonial, colonial, post-colonial, and contemporary historical epochs. It demonstrates how these movements have shaped the status of women in Kenya today.

A. The Genesis of the Women's Movement in Kenya (Before 1920)

The rise of the women's movement in Kenya parallels the emergence of women's self-help groups.⁵² Prior to the establishment of colonial rule in Kenya, women were actively organizing themselves for collective action in order to overcome the economic and political challenges they faced as farmers, wives, mothers, and daughters.⁵³ In Kenya, as is the case with many African countries, during the pre-independence period, many women's groups continued to emerge as a direct result of the political and economic struggles that they were facing in the country.⁵⁴ Women farmers who sought to empower themselves and their households formed self-help groups⁵⁵ in order to assist each other through labor-saving activities⁵⁶ or other forms of mutual assistance such as child caring, amongst others.⁵⁷ During this period, the basic unit for socioeconomic and political organization was the family, and women from various ethnic groups organized themselves at a family level in order to form these groups.⁵⁸ The Kikuyu women, for instance, formed *ngwatio*, a system characterized by mutually beneficial work between women to cultivate each other's farms on a rotational basis.⁵⁹ Among the Gusii community, the system was known as *risaga* while the Luo's women's system of organization was known as *saga*.⁶⁰ The Kamba, on the other hand, had a system known to them as

50. See Maria Nzomo, *Women in Political Leadership in Kenya: Access, Agenda Setting & Accountability*, 1, 3, 6, https://ke.boell.org/sites/default/files/uploads/2014/01/women_in_political_leadership_in_kenya_access_influence.pdf [https://perma.cc/B6UG-8KRD].

51. Isaboke Peter Kennedy Nyataya, *Women Self Help Groups Enhancing Women's Development Processes in Kenya*, 2 INT'L J. OF RES. SOC. & ANTHROPOLOGY 18, 19-20 (2016).

52. Regina G. Mwatha, *The Women's Movement in Kenya*, in WOMEN'S ACTIVISM IN AFRICA 184 (Balghis Badri & Aili Mari Tripp eds., 2017).

53. Fredoline Anunobi, *Women and Development in Africa: From Marginalization to Gender Inequality*, AFR. SOC. SCI. REV., Fall 2002, at 41, 55.

54. See NZOMO, *supra* note 50, at 2.

55. KABIRA WANJIKU, TIME FOR HARVEST: WOMEN AND CONSTITUTION MAKING IN KENYA 13 (2012). See Mwatha, *supra* note 52, at 184.

56. Mwatha, *supra* note 52, at 186.

57. Anunobi, *supra* note 53, at 55.

58. Nyataya, *supra* note 51, at 19.

59. JUDITH KEGAN GARDINER, PROVOKING AGENTS: GENDER AND AGENCY IN THEORY AND PRACTICE 73-75 (1995).

60. Mwatha, *supra* note 52, at 186.

vuli.⁶¹ Each of these systems of organization within these ethnic groups formed the basis for collective, political, economic, and social strategies by women to cope with the daily challenges they faced as women, as mothers, and as wives in their respective communities.⁶² This period was largely characterized by family-based, ethnic-based systems of organization by women in Kenya.⁶³ Women's collective actions became an important strategy in the fight against poverty.⁶⁴

B. When the British Encountered the Africans (1920–1963)

Upon the introduction of colonial rule in Kenya, radical changes in economic, political, and social systems of thought and organization resulted in the metamorphosis of the form and purpose of women's groups.⁶⁵ Along with the introduction of a formalized legal system, a formal economy, formal education systems, formal religion, and formal political institutions of law and governance, the women's groups began to morph into formalized systems whose agenda slowly shifted from a family-ethnic based system of organization to national systems of organization.⁶⁶ During this critical formative phase in the women's movement in Kenya, the groups became more formalized and with a wider membership.⁶⁷ As a result of the dual mandate and the division of the colonies into two worlds, namely, the "formal system" governed by British law and the "informal system" governed by African legal systems of thought.⁶⁸ The early Kenya women's movement was also bifurcated and characterized by this duality. On the one hand, many women's groups inspired by the traditional models of *ngwatio* and *risaga* were formed during the colonial period and particularly during the state of emergency.⁶⁹ These groups were mostly formed by women who hoped to assist each other in farming activities, taking care of children and grandchildren as the men had gone off to war or to work on European farms in the white highlands.⁷⁰ On the other hand, other women's groups ascribed to the British model and were modeled around a classical British "ladies associations" model characterized by various social welfare activities such as literacy campaigns or holding classes on household activities such as cooking and sewing for women.⁷¹

61. *Id.*

62. *See id.* at 185-86.

63. *See generally* Rosemary Wanjiku Mbugua, *Women's Organisations and Collective Action in Kenya: Opportunities and Challenges—The Case of the Maendeleo ya Wanawake Organization*, PATHWAYS TO AFR. FEMINISM & DEV., May 2017.

64. WANJIKU, *supra* note 55, at 14.

65. *See* Peter Wanyande, *Civil Society and Transition Politics in Kenya: Historical and Contemporary Perspectives*, in DISCOURSES ON CIVIL SOCIETY IN KENYA 8 (P. Wanyande & M.A Okebe eds., 2009).

66. *See* Nyataya, *supra* note 51, at 19-20.

67. *See generally id.*

68. *See generally* Sinmi Akin-Aina, *Beyond an Epistemology of Bread, Butter, Culture and Power: Mapping the African Feminist Movement*, NOKOKO, Fall 2011, at 65.

69. WANJIKU, *supra* note 55, at 13.

70. *See id.*

71. *See* Anunobi, *supra* note 53, at 55-56.

The coexistence of these two types of women's groups during the colonial period would ultimately find a home in the *Maendeleo Ya Wanawake Organization* (MYWO)⁷² which was founded in 1952 by the Colonial Government's Department of Community Development and Rehabilitation.⁷³ The organization formalized traditional informal women's groups in Kenya.⁷⁴ From its inception, this organization was viewed by many as a tool for barring women from joining the *Mau Mau* freedom movement for independence.⁷⁵ However, the organization became a force to be reckoned with when it was taken over by African women from grassroots organizations of rural women throughout the country.⁷⁶ The organization's sole focus was strengthening women's participation in rural community projects.⁷⁷ The idea of women's participation in organizations to further develop women's groups has been an ever-increasing phenomenon in Kenya since the birth of MYWO.⁷⁸

During this period, women also mobilized each other to rebel against colonial policies that disrupted their traditional systems of socioeconomic and political organization.⁷⁹ For instance, in 1922, the Native Authority Ordinance legalized forced labor on European farms with minimal pay and the Swynerton Plan of 1955, another colonial agricultural policy, encouraged production of cash crops for export, predominantly done by men, and marginalized the labor of women in food production.⁸⁰ The women fought against these laws in order to emancipate themselves and their families from the shackles of patriarchal colonial rule.⁸¹

At an international level, in 1947, the Commission on the Status of Women ("CSW") first met at Lake Success in New York soon after the founding of the United Nations in 1945.⁸² The seeds of a transnational

72. This roughly translates from Kiswahili to English as "The Development (or Progress) of Women."

73. See Audrey Wipper, *The Maendeleo Ya Wanawake Organization: The Co-Optation of Leadership*, *AFR. STUD. REV.*, Dec. 1975, at 99-120; Mildred A.J. Ndeda, *Women's Organizing for Self-Improvement in Colonial and Post Colonial Kenya: A Historical Analysis* (2011), <https://awsc.uonbi.ac.ke/sites/default/files/chss/arts/awsc/Women%e2%80%99s%20Organising%20for%20Self%20Improvement%20in%20Colonial%20and%20Post%20Colonial%20Kenya%20A%20Historical%20Analysis%20by%20Mildred%20Ndeda.pdf> [<https://perma.cc/QB5Y-N73C>]; *History*, MAENDELEO YA WANAWAKE (2011), <http://www.mywokenya.org/index.php/about-us/history> [<https://perma.cc/NBM9-HS8E>].

74. Wanjiku Mukabi Kabira & Elishiba Njambi Kimani, *The Historical Journey of Women's Leadership in Kenya*, 3 *J. EMERGING TRENDS EDUC. RES. & POL'Y STUD.* 842 (2012).

75. Mwatha, *supra* note 52, at 184-85.

76. See NZOMO, *supra* note 50, at 4-5.

77. See generally Mwatha, *supra* note 52, at 185.

78. See Nyataya, *supra* note 51, at 20.

79. See generally Chitere, *supra* note 15, at 50-68; CHRISTINA HOFF SOMMERS, *FREEDOM FEMINISM: ITS SURPRISING HISTORY AND WHY IT MATTERS TODAY* (2013).

80. Mwatha, *supra* note 52, at 186-87.

81. *Id.* at 186.

82. See *A Brief History of the Commission on the Status of Women*, UN WOMEN <http://www.unwomen.org/en/csw/brief-history> [<https://perma.cc/P6QG-2JBD>] (last visited Mar. 3, 2019).

feminist movement began to be sown when the CSW was formed to focus “on setting standards and formulating international conventions to change discriminatory legislation and foster global awareness of women’s issues.”⁸³

This period also marked the beginning of the enactment of international human rights conventions with the adoption of the Universal Declaration of Human Rights (“UDHR”), in 1948, after the Second World War.⁸⁴ UDHR proclaimed the equal entitlements of women and men to the rights contained therein, “without distinction of any kind, such as . . . sex”⁸⁵ This signaled the beginning of the inclusion of gender equality provisions in international laws.

Meanwhile, in response to injustices meted to them by the colonial government, women in Kenya continued to organize themselves to protest against these injustices.⁸⁶ Through song and dance, they led demonstrations and demanded to be heard.⁸⁷

C. Sowing the Seeds of an International Kenyan Women’s Movement (1963-1975)

After six decades of colonial rule, Kenya finally achieved independence from the British in 1963 and adopted its first Independence Constitution.⁸⁸ At this time, ideas such as “affirmative action,” “gender mainstreaming,” “women’s political participation,” etc., had not yet broken ground.⁸⁹ Indeed, the Independence Constitution had no mention of women.⁹⁰ In fact, this first constitution defined and prohibited discrimination but allowed it in the case of customary law and Muslim personal laws, thereby leaving women’s lives in the hands of African tradition, religion, and culture.⁹¹

An idea that traveled during this period as a result of the international feminist movement was the importance of organizing women in national

83. *See id.*

84. *See Universal Declaration of Human Rights: an Introduction*, UNITED FOR HUMAN RIGHTS, <https://www.humanrights.com/what-are-human-rights/universal-declaration-of-human-rights/> [https://perma.cc/D8FD-R2YA] (last visited Mar. 3, 2019).

85. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2, U.N. Doc. A/810, at 71 (Dec. 10, 1948).

86. *See* Fatuma B. Guyo, *Colonial and post-colonial changes and impact on pastoral women’s roles and status*, PASTORALISM, RES., POL’Y, & PRAC., June 2017, at 1, 11.

87. *See id.*

88. *See* H. W. O. Okoth-Ogendo, *The Politics of Constitutional Change in Kenya since Independence, 1963-69*, 71 AFR. AFF. 9, 13-14 (1972).

89. *See* Patricia Kameri-Mbote, *The Quest for Equal gender representation in Kenya’s Parliament: Past and Present Challenges*, in GENDER EQUALITY AND POLITICAL PROCESSES IN KENYA: CHALLENGES AND PROSPECTS 39, 46, 89 (Japhet Biegon ed., 2016).

90. *See* Effie Owuor, *Women and political inclusion in Kenya: A historical overview, 1963 - 2016*, in GENDER EQUALITY, *supra* note 89. *See generally* Jill Cottrell & Yash Ghai, *Constitution Making and Democratization in Kenya (2000-2005)*, 14 DEMOCRATISATION 1 (2007).

91. *See* CONSTITUTION art. 82(4) (2010) (Kenya). Numerous authors have written about this as it marked a hallmark in gender jurisprudence in Kenya. *See generally* Owuor, *supra* note 90.

councils.⁹² As a result of this, in 1964, National Council for Women in Kenya (“NCWK”) was founded as an “umbrella organization” to coordinate the activities of Kenyan women including MYWO, and it was formed as the Kenyan Chapter of the International Council of Women.⁹³ NCWK was also meant “to strengthen and unite women’s organizations at the local[,] national[,] and international levels.”⁹⁴ This period was pivotal in the emergence of international human rights treaties and instruments. In 1966, two other human rights significant treaties were adopted, The International Covenant on Civil and Political Rights (“ICCPR”) and International Covenant on Economic and Cultural Rights (“ICESCR”).⁹⁵ Together with the UDHR, these treaties make up the International Bill of Human Rights.⁹⁶ The ICCPR and ICESCR provide what the state parties to the Covenants must undertake “to ensure the equal right of men and women to the enjoyment of all [civil, political,] economic, social and cultural rights set forth in the . . . Covenant” respectively.⁹⁷ During this period, as with many other parts of the world, international human rights consciousness influenced the women’s movement in Kenya, as women began to demand inclusion in leadership in institutions of governance such as the Legislature but the African governments did not oblige.⁹⁸

D. From Nairobi to Mexico to Copenhagen to Banjul and Back Again (1975-1985)

During this period, three significant international conferences and four regional conferences occurred. The international concern for women in development was clearly spelled out during the first World Conference

92. Wanjiku Mukabi Kabira & Patricia Kameri-Mbote, *Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise*, in *BALANCING THE SCALES OF ELECTORAL JUSTICE—RESOLVING DISPUTES FROM THE 2013 ELECTIONS IN KENYA AND THE EMERGING JURISPRUDENCE* 182-83 (Collins Odote & Linda Musumba eds., 2016); Gretchen Bauer, *Fifty/Fifty by 2020*, 10 *INT’L FEMINIST J. POL.* 348-68 (2008); *Chapter 9: African Women’s movements and the World*, in *AFRICAN WOMEN’S MOVEMENTS CHANGING POLITICAL LANDSCAPES* 217 (Aili Mari Tripp et al., eds. 2009).

93. Owuor, *supra* note 90, at 19.

94. NYOKABI KAMAU, *WOMEN AND POLITICAL LEADERSHIP IN KENYA: TEN CASE STUDIES* 17 (2010).

95. See generally Compass, Summary of ICCPR and ICESCR, http://www.eycb.coe.int/compass/en/pdf/6_4.pdf [<https://perma.cc/5QAR-DKA5>] (last visited Mar. 6, 2019).

96. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *WOMEN’S RIGHTS ARE HUMAN RIGHTS* at 4, HR/PUB/14/2, U.N. Sales No. E. 14.XIV.5 (2014).

97. G.A. Res. 2200A (XXI), *The International Covenant on Civil and Political Rights*, art. 3 (Dec. 16, 1966); G.A. Res. 2200A (XXI), *International Covenant on Economic Social and Cultural Rights*, art. 3 (Dec. 16, 1966).

98. See KARUTI KANYINGA, *KENYA: DEMOCRACY AND POLITICAL PARTICIPATION: A REVIEW BY AFRI-MAP, OPEN SOCIETY INITIATIVE FOR EASTERN AFRICA AND THE INSTITUTE FOR DEVELOPMENT STUDIES (IDS), UNIVERSITY OF NAIROBI* 83-84 (2014), <https://www.opensocietyfoundations.org/sites/default/files/kenya-democracy-political-participation-20140514.pdf> [<https://perma.cc/7NDS-VTYT>]. See generally CARL G. ROSBERG, JR. & JOHN NOTTINGHAM, *THE MYTH OF “MAU MAU”: NATIONALISM IN KENYA* (2006).

for Women that took place in Mexico City in 1975⁹⁹ and it reiterated the Guiding Principles of “Equality, Development, and Peace.”¹⁰⁰ The Meeting recommended to the General Assembly the idea of launching the “United Nations Women’s Decade: 1975-1985.”¹⁰¹ The Mexico City Conference, which coincided with the 1975 International Women’s Year, was important because the idea that equality, development, and peace were significant in the world gained potency and resulted in decade-long increased research and intellectual activity on issues related to women’s empowerment in the world.¹⁰²

For instance, in 1977, in Kenya, The Green Belt Movement (“GBM”) was established by Professor Wangari Maathai¹⁰³ under the auspices of the NCWK.¹⁰⁴ The organization brought together women from the rural areas to plant trees and generate income from their work.¹⁰⁵ Shortly after its formation, GBM put the government in check by demanding “greater democratic space and more accountability from national leaders.” For instance, GBM, through its leader Professor Maathai, protested against the building of a tower block in Uhuru Park in Nairobi and also called “for the release of political prisoners.”¹⁰⁶

Soon thereafter, women from Kenya joined other women from all over the world, as the Second World Conference of the United Nations Women’s Decade was held in Copenhagen, Denmark in 1980; there, they assessed the successes and challenges of the first half of the women’s decade. In light of the results of the review, the General Assembly adopted three new sub-themes: “education, health, and employment,” to expand the development goals of the decade.¹⁰⁷ The most significant event to come out of the conference was that the formal signing of the CEDAW, which took place during the opening ceremony of the conference.¹⁰⁸

Meanwhile, at the regional level, in June 1981, following a conference that included the participation of leaders from all over Africa, The African Charter on Human and Peoples Rights (the “Banjul Charter”) was adopted by the eighteenth Assembly Heads of State in Government, in Nairobi.¹⁰⁹ The Banjul Charter is intended to promote and protect human rights and

99. World Conference of the International Women’s Year, *Report*, U.N. Doc. E/Conf.66/34 (June 19-July 2, 1975).

100. Jacinta Muteshi-Strachan, *Conceptualizing the Nairobi Forward-Looking Strategies: Continuing Relevance for African Women*, in PROMISES & REALITIES, *supra* note 2, at 7-8.

101. *Id.*

102. See World Conference of the International Women’s Year, *supra* note 99.

103. NAMULUNDAH FLORENCE, WANGARI MAATHAI: VISIONARY, ENVIRONMENTAL LEADER, POLITICAL ACTIVIST xv (2014).

104. *Our History*, GREEN BELT MOVEMENT, <http://www.greenbeltmovement.org/who-we-are/our-history> [https://perma.cc/H9YK-AKPJ] (last visited Mar. 7, 2019).

105. *Id.*

106. *Id.*

107. World Conference of the United Nations Decade for Women: Equality, Development and Peace, *Report*, 4, U.N. Doc. A/CONF.94/35 (July 14-30, 1980) (emphasis added).

108. *Id.* at 89.

109. Organization of African Unity (O.A.U.), *African Charter on Human and Peoples’ Rights (“Banjul Charter”)*, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982).

basic freedoms in the African Continent. Article 18(3) of the Charter provides that “The State shall ensure elimination of every discrimination against women”¹¹⁰

Furthermore, during this same time period, the Women’s Bureau, whose mandate was to register and coordinate the activities of all women’s groups in Kenya, was formed.¹¹¹ While the Women’s Bureau was registering the groups, *Maendeleo ya Wanawake* was gathering together all these women’s groups.¹¹²

By the time the UN International Women’s Conference was held in Nairobi in 1985, 300,000 women in Kenya had joined MYWO and 8,000 groups had registered under the Women’s Bureau, a government department in the Ministry of Culture and Social Affairs.¹¹³ Furthermore, women all over Africa had met in four regional conferences in Nouakchott in 1977,¹¹⁴ to Lusaka in 1979,¹¹⁵ to Lagos in 1980,¹¹⁶ to Arusha in 1984.¹¹⁷ During these conferences, conversations surrounding the plight of women in Africa and the uniqueness of their plight had begun to take shape.¹¹⁸ The Nairobi Women’s Conference expanded the framework for the analysis of women’s issues from gender, peace, and development by incorporating a further level of discursive analysis with regard to the North-South power inequalities in the transnational feminist movement.¹¹⁹ The Nairobi Conference resulted in the first world consensus on a Plan for Action known as the Forward-Looking Strategies for the Advancement of Women (“NFLS”).¹²⁰ This World Conference was held in Nairobi at a time when, to a large extent, the national laws in Kenya were still subject to the Constitutional provisions which de facto sanctioned customary practices.¹²¹

In 1985, as a direct result of the conversations during the Third UN Conference on Women held in Nairobi, The Federation of Women Lawyers (“FIDA Kenya”) was founded with the purpose of promoting and advocat-

110. *Id.* art. 18(1).

111. *Happy Women’s Day*, KENYA NATIONAL BUREAU OF STATISTICS (KNBS) (Mar. 8, 2018), <https://www.knbs.or.ke/happy-womens-day/> [<https://perma.cc/9Q6A-LDHX>].

112. See generally *History*, MAENDELEO YA WANAWAKE, <http://mywokenya.org/index.php/about-us/history> [<https://perma.cc/SCX8-4KML>] (last visited Mar. 6, 2019).

113. WANJIKU, *supra* note 55, at 15.

114. The First Regional Conference for Integration of Women in Development was held in Nouakchott in 1977. Fifth Regional Conference on Women, *African Platform for Action*, U.N. Doc. E/CN.6/1995/5/Add.2, at 4, (Dec. 29, 1994).

115. The Second Regional Conference for the Integration of women in Development was held in Lusaka in 1979. *Id.*

116. The Lagos Plan of Action and Final Act of Lagos concluded in Nigeria in 1980. *Id.*

117. The Third Regional Conference on Women was held in Arusha in 1984. *Id.*

118. See generally *id.*

119. Muteshi-Strachan, *supra* note 100, at 8.

120. *World Conference to Review and Appraise the Achievements of the UN Decade for Women, Nairobi 1985: Nairobi Forward-Looking Strategies for the Advancement of Women*, WOMEN WATCH, <http://www.un.org/womenwatch/confer/nfls/> (last visited Mar. 6, 2019).

121. WANJIKU, *supra* note 55, at 15.

ing for legal rights of women and challenging discrimination and legal bias against women.¹²²

The ideas that were born out of the Nairobi conference resulted in the development of the Forward-Looking Strategies for the Advancement of Women (“NFLS”), from 1986 to 2000.¹²³ These ideas were expected to provide practical guidance for global action to promote greater equality and opportunity for women’s empowerment in all spheres of life.¹²⁴

E. The Transnational Struggle for Multiparty Democracy (1985–1995)

Following the Nairobi Women’s Conference, many women’s organizations were formed in Kenya. These included Federation of Kenya Women Lawyers (“FIDA”), Association of African Women Research and Development (“AAWORD”), Women and Law in East Africa, the Coalition on Violence Against Women (“COVAW”),¹²⁵ and women in the media, among others.¹²⁶ During this period, women’s movements strongly advocated for gender equality, women’s empowerment through legislative and institutional review, and women’s participation in planning processes—ideas which were at the forefront of the conversation that took place during the Nairobi Women’s conference.¹²⁷

Additionally, the struggle for women’s rights coincided with the national quest for constitutional reform in the country.¹²⁸ In December 1991, Section 2A of the Constitution was repealed which returned the

122. *Background History*, FEDERATION OF WOMEN LAWYERS (Mar. 21, 2017), <https://www.fidakenya.org/background-history/> [https://perma.cc/GY5E-DAN7].

123. *World Conference to Review and Appraise the Achievements of the UN Decade for Women, Nairobi 1985*, *supra* note 120. See also *World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Report*, U.N. Doc. A/CONF/.116/28/Rev.1, at 1 (July 15–26, 1985) [hereinafter, “UN Decade for Women Report”].

124. UN Decade for Women Report, *supra* note 123, ¶ 15. NFLS consistently provided in each area of specific actions with respect to:

- Enhancing women’s participation in planning, implementation, and administration of critical areas of concerns;
- The creation of opportunities and encouragement for women’s education and training to strengthen women’s capacity to participate in all spheres of life;
- Putting in place necessary measures that prioritize the development of infrastructures to deliver necessary services;
- Recognizing women’s key contributions in every sphere of life; and
- Improving the status of women legislation and reform institutions.

For more information on NFLS, see PROMISES & REALITIES, *supra* note 2, at 10–11.

125. WANJIKU, *supra* note 55, at 16. In 1995, The Coalition on Violence Against Women (“COVAW”) was formed. The coalition was a response to the silence of the Kenyan society in addressing violence against women. COVAW works to advance women’s rights by working towards a society free from violence against women. The organization was formed in a workshop that recognized that no organization was working to eradicate violence against women at the time. As Wanjiku notes, there existed “a critical mass, gender solidarity, and the building of strategic alliances” amongst women’s movements to foster women’s agenda.

126. *Id.*

127. *Id.* at 16–19.

128. Mwatha, *supra* note 52, at 184.

Multi-party democracy.¹²⁹ This opened up the political space for women's political participation and activism and created an opportunity for reviving the women's movement in Kenya. Women expressed their desire and determination to fully participate in the process and insisted on their issues being mainstreamed in the new democratic agenda.¹³⁰

Furthermore, in 1992, women from all over the country gathered at a National Women's Convention that brought together over 2,000 Kenyan Women Representatives from both the grassroots and the national level.¹³¹ The objective of the meeting was to chart out "*Women's Agenda for a democratic Kenya.*"¹³² As a result of this meeting, women demanded the engendering of the democratization process and the elimination of all forms of discrimination against women in decision-making processes.¹³³

As part of the clamor for constitutional reform and democratic change in Kenya and following the energy that emanated from the sense of women's solidarity at the Nairobi Conference, Mothers of Political Prisoners was born in 1992.¹³⁴ This group consisted of elderly mothers, who unconventionally stripped naked in public as a strategy of public protest against the Kenyan government.¹³⁵ These mothers mobilized support and seized the political space for activism created by the return of Multi-party democracy. As a result of this bold move by the mothers of political prisoner's movement, four prisoners were released in June 1992, and four more in January 1993.¹³⁶ These mothers raised national consciousness and began to set the pace for women's empowerment in the quest for democracy and legal process in Kenya.¹³⁷

Indeed, in 1992 the League of Kenyan Women Voters was formed with the aim of promoting participation of women in leadership and decision making.¹³⁸ Furthermore, in 1993, a task force, led by Justice Effie Owuor, was set up in Kenya to review the laws in Kenya relating to women and to make recommendations of new laws that would ensure women enjoy equal rights as men.¹³⁹

F. The Consolidation of *Transnational* Feminist Ideas (1995-2005)

To reiterate the need for gender equality and equity, the fourth Inter-

129. Nyataya, *supra* note 51, at 20.

130. *Id.*

131. DOMINGO ET. AL, *supra* note 49, at 17.

132. See Maria Nzomo, *Women's Agenda For a Democratic Kenya: Political Participation*, paper Presented at the National Women's Convention, KICC (Feb, 22, 1992); Kivutha Kibwana, *Women and the Constitution in Kenya*, 25 L. & POL. AFR., ASIA & LATIN AM. 6 (1992).

133. Nzomo, *supra* note 50.

134. See Nzomo, *supra* note 50, at 8. See also *Women in Kenya: Repression and Resistance*.

135. Nzomo, *supra* note 50.

136. See NZOMO, *supra* note 50, at 8.

137. *Id.*

138. *Id.* at 5.

139. Effie Owuor, Keynote Address at the Regional Conference on the Legal Status of Refugee and Internally Displaced Women in Africa (August 1, 1995).

national Women's Conference was held in Beijing, China, in 1995.¹⁴⁰ By the time the Conference was held, several regional conferences had also been held in Arusha, Abuja, and Lagos, among others.¹⁴¹ The translocal, transregional, and transnational women's movements had begun to consolidate their ideas to challenge the status quo based on their specific contextual thoughts of the time. The conference in Beijing resulted in the Beijing Platforms for Action,¹⁴² a document which twenty years later still forms the basis of most conversation on gender equality at global levels.¹⁴³ Indeed, "gender mainstreaming" was an idea that has continued to travel all over the world as a result of the conversations that took place in Beijing.¹⁴⁴

Furthermore, in 1996, "the Collaborative Centre for Gender and Development (CCGD) was established . . . by a small group of academics, researchers and development experts to build capacity in gender responsive planning, advocacy, and programming."¹⁴⁵ CCGD works through a multisector approach with partnerships "between international, regional, and national government agencies as well as civil society and [the] private sector . . ."¹⁴⁶ Soon thereafter, what is now called the Caucus for Women Leadership ("CWL") was founded to work towards increasing the representation of women at all levels of leadership and governance.¹⁴⁷ The Caucus was born to respond to the fact that the very first affirmative action motion tabled in Parliament by Hon. Phoebe Asiyo had been defeated in Parliament.¹⁴⁸ The motion never became law but instead brought forth a phenomenon that would forever transform the struggle for women's political liberation in Kenya—the Kenya Women's Political Caucus ("KWPC").¹⁴⁹ KWPC strengthened the women's movement by creating mechanisms to

140. Owuor, *supra* note 90, at 26.

141. Fifth Regional Conference on Women, *African Platform for Action*, U.N. Doc. E/CN.6/1995/5/Add.2, at 5, (Dec. 29, 1994).

142. Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20, at 4 (Oct. 17, 1995).

143. UNIT FOR THE PROMOTION OF THE STATUS OF WOMEN AND GENDER EQUALITY, GENDER EQUALITY AND EQUITY: A SUMMARY REVIEW OF UNESCO'S ACCOMPLISHMENTS SINCE THE FOURTH WORLD CONFERENCE ON WOMEN (BEIJING 1995), 5-12 (2000).

144. *Id.* at 5.

145. THE CENTRE, COLLABORATIVE CENTRE FOR GENDER & DEVELOPMENT, <http://ccgdcentre.org/about-us> last visited Mar. 6, 2019).

146. *Id.*

147. U.S. AID, WOMEN'S LEADERSHIP AS A ROUTE TO GREATER EMPOWERMENT: KENYA CASE STUDY 7-8 (September 29, 2014), <https://www.usaid.gov/sites/default/files/documents/1866/WiP%20-%20Kenya%20Case%20Study%20Report.pdf> [<https://perma.cc/8LEF-2AWH>].

148. *Id.* at 7-8. See Kanyi, *supra* note 49, at 6. See also Judith Achieng, *RIGHTS-KENYA: Women's Caucus Calls For People-Driven Constitution*, INTER PRESS SERVICE NEWS AGENCY (Nov. 15, 1999), <http://www.ipsnews.net/1999/11/rights-kenya-womens-caucus-calls-for-people-driven-constitution/> [<https://perma.cc/5YJD-W248>].

149. U.S. AID, *supra* note 147, at 7-8. See Kanyi, *supra* note 49, at 6. Dennis Onyango, *Pioneer of 'Maendeleo ya Wanawake' who broke the glass ceiling*, STANDARD DIGITAL (Feb. 5, 2014), <https://www.standardmedia.co.ke/article/2000103995/pioneer-ofmaendeleo-ya-wanawake-who-broke-the-glass-ceiling%20on%2030%20October%202016> [<https://perma.cc/N86D-8BE5>].

ensure “[c]ollaboration, mobilization . . . and [c]ollective [a]ction among [w]omen’s [o]rganizations.”¹⁵⁰

During this period, women’s representation in Parliament rose to eight out of a possible 220 and the Kenya Women Parliamentary Association (“KEWOPA”) was established in 2001 in order to lobby for women-centered policies and laws.¹⁵¹ The primary objective of the association was to lobby for women-centered policies and laws.¹⁵² The KEWOPA successfully lobbied for the establishment of the Parliamentary Committee on Equal Opportunity and also influenced the passing of crucial legislation such as the Sexual Offences Act (2006), the Anti-FGM Act (2009), and the formation of the implementing board, amongst others.¹⁵³

In keeping with the spirit of the conversations in Nairobi and in Beijing and all the prior consolidation of efforts by the women’s movement, in 1998, the Constitutional Review of Kenya Act 1998 was enacted and it kicked off the review process of the constitution and inclusion of women into decision making.¹⁵⁴ In the same year, several organizations were formed in order to push for the women’s agenda as encapsulated in the Women’s Agenda for Democracy. These organizations included African Women’s Development and Communication Network (“FEMNET”),¹⁵⁵ Women in Law and Development in Africa-Kenya (“WILDAF-KENYA”),¹⁵⁶ and the National Commission on Gender and Development (“NCGD”).¹⁵⁷

150. NZOMO, *supra* note 50, at 6.

151. KENYA WOMEN PARLIAMENTARY ASSOCIATION, <http://www.kewopa.org/> [<https://perma.cc/Q2J6-TPSZ>] (last visited Mar. 7, 2019). See also CPA SECRETARIAT, WOMEN’S ORGANISATIONS WORLDWIDE (PARLIAMENTARY/NON-PARLIAMENTARY) 7; AFRICAN WOMEN’S DEVELOPMENT AND COMMUNICATION NETWORK (FEMNET), BEIJING +15 HOW FAR HAVE WE COME, HOW FAR TO GO?: ASSESSING THE IMPLEMENTATION OF THE BEIJING PLATFORM FOR ACTION IN KENYA (Nov. 2009). See generally Mwatha, *supra* note 52, at 190; NZOMO, *supra* note 50.

152. See NZOMO, *supra* note 50, at 6.

153. See NZOMO, *supra* note 50, at 12.

154. Patricia Kameri-Mbote & Nkatha Kabira, *Separating the Baby from the Bath Water: Women’s Rights and Politics of Constitution-Making in Kenya*, 14 *EAST AFR. J. HUM. RTS.* 1, 6, 8 (2008).

155. FEMNET was founded to help NGO’s share information and approaches to women’s development, equality, and other human rights. *About FEMNET*, FEMNET, <https://femnet.org/about-us/> [<https://perma.cc/LYJ8-5TVD>] (last visited Mar. 7, 2019).

156. It was registered as a “Pan-African, Nonpartisan, [and] Non-Governmental Organization that works to promote and strengthen strategies which link law and development to promote a culture for the exercise of and respect for women’s human rights in Africa . . . WILDAF works to promote women’s human and legal rights and the active participation of women in development at all levels. [Its] ideas and vision for existence are anchored on the values of gender equity and equality, social justice and fair representation.” *Women in Law and Development in Africa (WILDAF) Kenya*, TAKINGIT-GLOBAL, <https://orgs.tigweb.org/women-in-law-and-development-in-africa-wildaf-kenya> [<https://perma.cc/3MW7-MP44>] (last visited Mar. 7, 2019).

157. The NCGD was founded to coordinate and facilitate gender mainstreaming in national development through advice to the government and stakeholders, participation in policy formulation, advocacy, research, education, investigation of gender-based violations, the establishment of partnerships, monitoring, and evaluation, in order to achieve gender equity and equality. *Mandate and Function of NCGD*, NCGD, <https://www.ngeckeny.org/about/15/mandate> (last visited Mar. 7, 2019).

Together, all these organizations lobbied government actors to mainstream gender in all sociopolitical and economic spheres of law and governance.¹⁵⁸

As Celestine notes in her piece, “*Pulling Apart*,” postcolonial constitutions in many parts of Africa included clauses in their laws that on the one hand banned discriminatory practices while on the other hand allowed for the application of customary law practices and, in so doing, sanctioned “negative discrimination.”¹⁵⁹

During this period, women ensured that they were at the negotiating table during the constitution-making conversations so as to make certain that these practices would be eliminated and that gender equality provisions would be mainstreamed into legislation and policy.¹⁶⁰

G. The Struggle to Constitutionalize and Legislate Transnational Feminisms (2004–2010)

From 2004 to 2010, women created spaces to have their voices heard and were instrumental in the struggle for constitution-making.¹⁶¹ The struggle for inclusion in constitution-making processes had culminated in the inclusion of a clause that required one-third of women’s participation in all constitution-making organs.¹⁶² Women were present as commissioners in the review process, as legislators, as delegates at the constitutional conference, as presenters at the local constituent assemblies, and as contributors to scholarly debate and critique of the Kenyan legal system.¹⁶³ This culminated in several constitutional drafts, all of which represented major gains for transnational feminisms. These documents constitutionalized and legislated the ideas embodied in several international, regional, and local documents.¹⁶⁴ For instance, in 2006, The Sexual Offences Act was enacted.¹⁶⁵ This Act provided for sexual offenses, their definition, the prevention and the protection of all persons from harm from unlawful sexual acts, and provided for the minimum sentence for offenses—a development that had hitherto been absent in the domestic criminal law

158. See, e.g., Seung Yeon Cho et al., *Preventing Post-Election Violence Based on the Kenyan Experience*, STAN. L. SCH.: L. & POL’Y LAB, Annex 2, at 1–8 (Mar. 13, 2015), <https://www-cdn.law.stanford.edu/wp-content/uploads/2016/07/Cho-Connors-Fatima-Yalim-Preventing-Post-Election-Violence-Based-on-the-Kenyan-Experience.pdf> [https://perma.cc/H3JY-MDGZ].

159. See Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARVARD INT’L L.J. 381, 398, quoted in Celestine Nyamu Musembi, *Pulling Apart? Treatment of Pluralism in CEDAW and Maputo Protocol*, in WOMAN’S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW 212 (Anne Hellum & Henriette S. Aasen eds., 2013).

160. See WANJIKU, *supra* note 55, at 16.

161. See Wanjiku Mukabi Kabira, *Okoth the Dream Keeper: Expanding the Boundaries of Law, Women Constitution Making in Kenya*, Submitted to The School of Law, University of Nairobi (2015).

162. See Kanyi, *supra* note 49.

163. See generally WANJIKU, *supra* note 55.

164. J.B. Ojwang, *Constitution Trends in Africa: The Kenya Case*, 10 TRANSNAT’L L. & CONTEMP. PROBS. 517 (2000).

165. See generally The Sexual Offences Act (2012) Cap. 12 (Kenya).

provisions.¹⁶⁶

Unfortunately for the women of Kenya, the first draft of the Constitution of Kenya was defeated in a protracted Referendum that deeply divided Kenyans.¹⁶⁷ During this period, I wrote a piece with Professor Patricia Mbote reflecting on why Kenyan women had voted against the Constitution despite the fact that the Constitution had elaborate provisions on women's rights and gender equality provisions in general.¹⁶⁸ The struggle for constitution-making and inclusion of women's rights provisions would continue for five more years as a highly political and ethnically divisive process.¹⁶⁹

Meanwhile, in 2008, after the post-election violence, a number of grassroots and community-based organizations mobilized women to help collect information on GBV following the violence as well as to protect each other during this crisis.¹⁷⁰ In fact, the International Commission of Jurists, together with other women's organizations as well as Kenyan civil society organizations, filed a petition in court against state perpetrated gender-based violence of police and military personnel, demanding justice for victims of rape and other forms of sexual violence.¹⁷¹

Furthermore, in 2008, Kenya Vision 2030 was put in place as a long-term policy plan for accelerating the transformation of Kenya into an industrializing middle-income nation by 2030.¹⁷² This vision acknowledges that cases of GBV are increasing and lays out strategies to reduce their occurrence and the vulnerabilities that surround them.¹⁷³

At a local level, FIDA Kenya, as well as other national women's organizations such as the Kenya Women Political Alliance, convened meetings to discuss the implications of voting either "yes" or "no" on the constitutional referendum for women.¹⁷⁴ These organizations successfully urged women to vote for the Constitution.¹⁷⁵ The media also had moved women's issues

166. Kiarie Waweru Kiarie, *The Sexual Offences Act: Omissions and Ambiguities*, KENYA LAW (July 2007), <http://kenyalaw.org/kl/index.php?id=1894> [<https://perma.cc/5ASX-R3J9>].

167. David Fickling, *Kenyans Say No to New Constitution*, GUARDIAN (Nov. 22, 2005), <https://www.theguardian.com/world/2005/nov/22/kenya.davidfickling> [<https://perma.cc/8ZP6-HTGB>].

168. See generally Kameri-Mbote & Kabira, *supra* note 154.

169. Compare with Kiarie, *supra* note 166 and Anthony Kariuki, *Kenya Referendum Date Set*, DAILY NATION (May 14, 2010), <https://www.nation.co.ke/News/Kenya%20referendum%20date%20set/-/1056/918046/-/1gc3eiz/-/index.html> [<https://perma.cc/ERY5-Q7WV>].

170. See, e.g., Cho et al., *supra* note 158, Annex 2, at 1-8; Emma Wakari Kang'ethe, *Gender-Based Violence: Best Practices in Prevention and Rehabilitation of Victims in Nairobi, Kenya* (2010) (unpublished master's thesis, Nairobi University).

171. See Coalition on Violence Against Women and Others v. the Attorney General of Kenya and Others (2016) H.C.K. (Kenya).

172. *Marking 10 Years of Progress*, KENYA VISION 2030, <http://www.vision2030.go.ke/> [<https://perma.cc/97XD-AHTA>] (last visited Mar. 7, 2019).

173. NAT'L GENDER & EQUALITY COMMISSION, KEEPING THE PROMISE END GBV CAMPAIGN: DUTY BEARER'S HANDBOOK, 1, 15 (2015).

174. See Grace Maingi, *The Kenyan Constitutional Process: A Case Study on the work of FIDA Kenya in Securing Women's Rights*, 15 FEMINIST AFR. 63, 79 (2011).

175. See *id.* at 77-78.

to the front page and on the editorial pages to ensure adequate publicity.¹⁷⁶ It is also during this time period that G10 led a one-week sex strike where women withheld sex privileges from male partners for seven days in order to coerce the President and Prime Minister to sign a Performance Contract.¹⁷⁷

To consolidate the efforts of the women's movement during this time period, in 2006:

the National Commission on Gender and Development, in partnership with women's organizations and development partners, led the Nairobi +21 process, a series of events and activities which were designed to offer a critical space for the reflection on the commitments of the Nairobi Forward Looking Strategies (NFLS) and the Beijing Platform for Action (BPFA). This then culminated in the Nairobi Conference held on the 27th of October 2006, which was a commemoration of the Nairobi Forward-Looking Strategy.¹⁷⁸

During this period, women used unconventional ways such as hunger strikes and stripping naked in public as a strategy of public protest against the Kenyan government.¹⁷⁹

H. Women's Gains in the Constitution (2010-2018)

After two decades of struggling for the inclusion of women's rights issues as captured in the various transnational movements, on the 12th of August 2010, the Constitution of Kenya 2010 finally saw the light of day.¹⁸⁰ This Constitution sought to radically transform Kenya's legal system.¹⁸¹

The 12th of August 2010 signaled a new beginning for Kenyans in general, but an even more significant development not only for the translocal feminist movement but also for the transnational feminist movements. This Constitution represented major gains as it encapsulated many of the traveling feminist ideas captured in the preceding sections. Among the central successes of the transformative constitution endorsed by Kenyans and promulgated in August 2010 was the domestication of international law as a source of law thereby making all the transnational treaties on women's rights applicable in Kenya,¹⁸² and having equality for all,¹⁸³ non-

176. See Onsomu Marcellah Eucabeth, *A Comparative Content Analysis of Print Media Coverage of Kenyan Parliamentarians*, 22 (2012) (unpublished master's thesis, Nairobi University).

177. See NZOMO, *supra* note 50, at 9.

178. AFRICAN WOMAN AND CHILD FEATURE SERVICE, *NAIROBI + 21: COMMEMORATING THE THIRD UN WORLD CONFERENCE ON WOMEN*, preface (2007), https://ke.boell.org/sites/default/files/nairobi_21_-_commemorating_the_3rd_un_world_conference_on_women.pdf.

179. See Erdmute Alber, *Women's life worlds 'in-between'*, 15 (Bayreuth Afr. Stud. Working Papers No. 7, 2011); NZOMO, *supra* note 50, at 8; Odhiambo Orlale, *The fall of a giant*, KENYAN WOMAN, Issue No. 22: Oct. 2011, at 1, <http://awcfs.org/kw/wp-content/uploads/2014/05/Kenyan-Woman-022.pdf> [<https://perma.cc/X9FT-W4D4>].

180. See Kariuki, *supra* note 169.

181. See *Kenyans back change to constitution in referendum*, BBC (Aug. 5, 2010), <https://www.bbc.com/news/world-africa-10876635> [<https://perma.cc/VL9K-X38R>].

182. CONSTITUTION art. 2(5) & 2(6) (2010) (Kenya).

discrimination,¹⁸⁴ inclusiveness,¹⁸⁵ gender equity,¹⁸⁶ human rights,¹⁸⁷ rules of law,¹⁸⁸ freedom, democracy,¹⁸⁹ and protection of the marginalized.¹⁹⁰ The hopes and dreams embodied in the Constitution provided potentially powerful tools for addressing governance issues, broadly speaking, and gender issues, more specifically.¹⁹¹ This period was largely characterized by the constitutionalization of transnational feminism and the translation of many feminist ideas into legislation, policies, and institutions in Kenya.¹⁹² The following section analyzes the successes of the transnational feminist movements as embodied in the 2010 constitutional dispensation.

II. The Successes and Challenges of Transnational Feminist Movements in the Kenyan Constitution

As we have begun to glean in the preceding section, traveling feminist ideas have found their way into the Kenyan Constitution. Given the fact that these feminist ideas are the negotiated product of translocal, transregional, and transnational feminisms, these major successes in the movements have also been accompanied by challenges. Indeed, the interaction, distribution, circulation, assimilation, and appropriation of ideas has resulted in the encounter of multiple legal regimes and systems drawn from international and national religion, culture, and tradition. Given the multiplicity of thought embedded in the Constitution, several tensions abound.

This part maps out some successes and challenges of transnational feminist movements in the Kenyan Constitution. It highlights two specific areas, namely: Women's Political Representation and Women in the Legal System. Within these three broad areas, the Article highlights some tensions between "traditional" and "modern" perspectives and "local" and "international" perspectives which are embedded in the Kenyan Constitution and continue to pose implementation challenges. This section homes in on some examples of the tensions emanating from multiple norm-generating sites, from community, national, and international sites.

A. Women's Rights in the Legal System

The Constitution of Kenya 2010 guarantees women's rights to marriage, culture, language, security, housing, education, life, the right to form a family, the right to equality before the law and freedom from discrimina-

183. *Id.* at art. 27(1).

184. *Id.* at art. 27(4).

185. *Id.* at art. 10(1)(b).

186. *Id.*

187. CONSTITUTION pmb., art. 10(1)(b) (2010) (Kenya).

188. *Id.*

189. *Id.*

190. CONSTITUTION art. 56 (2010) (Kenya).

191. Tom Wolf, *Kenya's New Constitution: Triumph in Hand, Testing Times Ahead?*, 3 KAS INT'L REPORTS 52, 54, 59-60 (2011), http://www.kas.de/wf/doc/kas_22143-544-2-30.pdf?110309094707 [<https://perma.cc/K4MU-PKG9>].

192. *Id.* at 58, 60; DOMINGO ET. AL, *supra* note 49, at 3-4.

tion, and freedom of expression, among others.¹⁹³ The Constitution has extensive provisions that speak to women's rights on Affirmative Action,¹⁹⁴ The Bill of rights,¹⁹⁵ The State and the Political System, Devolution,¹⁹⁶

193. CONSTITUTION art. 27, 32, 45-46 (2010) (Kenya).

194. Article 27(3) provides that "Women and men have the right to equal treatment, including [the right to equal] opportunities in political, economic, cultural and social spheres." Article 27 (6) provides, "to give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination." Article 27(8) states that "In addition to 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 are from the same gender." Article 81 further reiterates that the same rule should be applicable in elective public bodies. CONSTITUTION art. 27(3), 27(6), 27(8), 81 (2010) (Kenya). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) has similar provisions to Article 27 on equality between women and men. Article 8 of the Maputo Protocol provides that women and men are equal before the law and shall have right to equal protection and benefit of the law. Article 9 of the Maputo Protocol provides that States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures. African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, July 11, 2003, O.A.U. Doc. CAB/LEG/66.6, art. 8 & 9 [hereinafter Maputo Protocol].

195. The Bill of Rights is protected under the Constitution and International instruments such as Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that form part of Kenyan law pursuant to Articles 2(5) and (6). See generally Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; *Ratification Status for Kenya*, U.N. HUM. RTS., https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN [<https://perma.cc/4BJQ-WRP8>] (last visited Apr. 6, 2019); CONSTITUTION art. 2(5) & 2(6), (2010) (Kenya). Article 19(2) provides that "The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings." CONSTITUTION art. 19(2) (2010) (Kenya). "The rights and fundamental freedoms in the Bill of Rights - a. belong to each individual and are not granted by the State." Pursuant to Article 24, rights "in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors." CONSTITUTION art. 24 (2010) (Kenya). To implement the rights and fundamental freedoms guaranteed under the Constitution, "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." CONSTITUTION art. 21 (2010) (Kenya). The Bill of Rights guarantees women's right to life, equality, and freedom from discrimination, right to dignity, freedom of conscience, religion and belief, family, reproductive health care, parental responsibility, land and property rights, among others. See generally CONSTITUTION (2010) (Kenya).

196. Devolution is no exception to the provisions on gender equality. Article 10 of the constitution outlines the national values and principles of governance that binds all State organs and all persons. CONSTITUTION art. 10 (2010) (Kenya). These national values and principles include sharing and devolution of power and the participation of the people. The principle of public participation, particularly women, is also encouraged in section 87 of the County Governments Act, 2012. County Governments Act No. 17 (2012) KENYA GAZETTE SUPPLEMENT No. 82 § 87(d) (Kenya). Devolution has brought with it the election of forty-seven women from each county into the National Assembly. At the county level, Article 197(1) provides that "Not more than two-thirds of the mem-

Land and Property Rights,¹⁹⁷ Environment and Natural Resources,¹⁹⁸ and Participatory Governance,¹⁹⁹ among others.²⁰⁰ Some of the provisions are specific to women while others apply to all Kenyans but represent a major milestone for Kenyan women.

In keeping with the views of Kenyan women on what they wanted in the new constitutional dispensation, the CKRC and the processes thereafter adopted a position that sought to mediate between the various sociopolitical realities within the Kenyan context. On the one hand was the need to respect the local specificities and on the other hand was the need to take on a more global perspective.²⁰¹ As a result, the constitution incorporates individual rights as well as community rights, provisions aimed at respecting ethnic diversity while at the same time promoting national unity, international law on the one hand and African customary law on the other, and traditional systems of law and government on the one hand and more “modern” systems of law and government.²⁰² The Constitution, therefore, opted to recognize both traditional legal systems, international legal systems, and those inherited during the colonial period from the British.²⁰³

bers of any county assembly or county executive committee shall be of the same gender.” CONSTITUTION art. 197(1) (2010) (Kenya).

197. Article 40(1) provides, “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.” It notes that Parliament is prohibited from enacting a law that permits the state or any person to arbitrarily deprive a person of any property or in any way restrict the enjoyment of property rights on the grounds such as sex. CONSTITUTION art. 40(1) (2010) (Kenya). Pursuant to this, the Parliament enacted Matrimonial Property Act, 2013 to provide for the rights and responsibilities of spouses in relation to matrimonial property. The Law of Succession Act provides for the mechanism by which property devolves from its deceased owner the people he/she left behind and it gives to both men and women equal rights in matters of succession although it has been argued that it contains several discriminatory provisions. See Ruth Aura Odhiambo & Maurice Oduor, *Gender Equality, in THE CONSTITUTION OF KENYA: CONTEMPORARY READINGS* 143, 149-50 (M. K. Mbondenyei et al. eds, 2010); Maria Goretti Nyariki, *Critique of the Constitutionality of the Law of Succession Act and Inheritance Rights of Women in Kenya*, 44 (November, 2014) (unpublished LL.M thesis, University of Nairobi) (on file with author).

198. CONSTITUTION art. 69 (2010) (Kenya).

199. The demand for people-centered, people-driven, participatory processes were at the core of the demand for constitutional change and as a result the Constitution of Kenya 2010 provides at Article 56(a) that “The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups- a. participate and are represented in governance and other spheres of life[.].” CONSTITUTION art. 56(a) (2010) (Kenya). Article 118(1) provides that the “Parliament shall - a. conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and b. it shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees.” CONSTITUTION art. 118(1) (2010) (Kenya). Article 196(1) of the Constitution requires the same of the county assembly. CONSTITUTION art. 196(1) (2010) (Kenya).

200. See generally CONSTITUTION (2010) (Kenya).

201. See Odhiambo & Oduor, *supra* note 197 at 146.

202. See *id.* at 146, 148-51.

203. See *id.* at 148-51.

1. Tradition v. Modernity

As a result, several of the provisions in the Constitution are potentially in tension. The Constitution of Kenya 2010 recognizes traditional and modern as well as local and international systems of law and government.²⁰⁴ As per the Constitution, the sources of law include the Constitution, the substance of the English common law,²⁰⁵ statutes of general application and doctrines of equity, legislation (both delegated and principal), African customary law (including Islamic Law),²⁰⁶ as well as regional and international law.²⁰⁷

Furthermore, the Constitution provides that “5. The general rules of international law shall form part of the law of Kenya[,]” and “6. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.²⁰⁸ Kenya has ratified several treaties that speak to women’s rights including the CEDAW, the Maputo Protocol, and the African Charter on Human and Peoples’ Rights.²⁰⁹ This essentially means that

204. See *id.* at 146.

205. Section 3(1) of the Judicature Act that “The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—

- a) the Constitution;
- b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
- c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, and the procedure and practice observed in courts of justice in England at that date.”

Judicature Act (2012) Cap. 8 § 3(1) (Kenya).

206. Furthermore, the Constitution provides for the application of Islamic Law in cases where parties profess the Muslim religion. This provision thereby recognizes Islamic Law as a source of Kenya law in cases concerning marriage, divorce, and inheritance. See CONSTITUTION art. 170(5) (2010) (Kenya). It provides that a Kadhi’s Court shall have and exercise jurisdiction in matters involving the determination “of Muslim Law relating to personal status, marriage, divorce, or inheritance in proceedings in which all the parties profess the Muslim religion” The same is provided in Section 5 of the Kadhi’s Courts Act. *Id.*

207. Section 3(2) of the Judicature Act provides that “The High Court, the Court of Appeal, and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.” Judicature Act (2012) Cap. 8 § 3(2) (Kenya).

208. See CONSTITUTION art. 2(5) & 2(6) (2010) (Kenya).

209. Kenya ratified the Maputo Protocol on 10/06/2010, CEDAW on 03/09/1984, and African Charter on Human and Peoples’ Rights on 01/23/1992. See generally Maputo Protocol, *supra* note 195; Ratification table: Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, <http://www.achpr.org/instruments/women-protocol/ratification/> (last visited Mar. 8, 2019). See generally Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Ratification Status for Kenya, *supra* note 195. Organization of African Unity (O.A.U.), African Charter on Human and Peoples’ Rights (“Banjul Charter”), June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

these international treaties—the product of traveling transnational feminist ideas—become law in Kenya.

Throughout the constitution-making process, Kenyans were vocal about the need for their culture to be documented, respected, celebrated, and prioritized.²¹⁰ They cited culture as providing for international instruments and argued for their right to practice their cultures and to speak their languages.²¹¹ As a result of this, the final constitutional document states that everyone has a right to culture,²¹² a right to speak their language,²¹³ a right to use traditional dispute resolution mechanisms,²¹⁴ a right to hold land based on tradition and cultural practices,²¹⁵ and a right to marry and form families based on customary law.²¹⁶ In response to what Kenyans wanted to be enshrined in the constitutional dispensation, the Constitution also upholds customary law as a source of law²¹⁷ but incorporates the exclusion cause embodied in the Maputo Protocol and the Kenyan Judicature Act.²¹⁸ This, therefore, means that although customary law is recognized as law in Kenya and the foundation of the nation,²¹⁹ women are not expected to be subjected to customs and traditions that contradict their constitutional rights.²²⁰ Customary laws are only applicable if they are “not repugnant to justice and morality or inconsistent with any [other] written law.”²²¹ This provision mirrors the provision in CEDAW in that it captures the need to eliminate negative culture but also captures the spirit of the Maputo Protocol in that it expresses the need to respect, acknowledge, and celebrate culture (positive culture) but at the same time recognizes the need to eliminate “negative culture.”²²²

2. *Local v. International*

One of the glaring tensions embedded in Kenya’s constitutional dispensation is the tension between the law as envisaged in international treaties and conventions and the law as envisaged in local laws, tradition, and culture.

210. CKRC, FINAL REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION (APPROVED FOR ISSUE AT 95TH PLENARY MEETING OF THE CONSTITUTION OF KENYA REVIEW COMMISSION HELD ON 10TH FEBRUARY 2005) 394 (2005).

211. *Id.*

212. CONSTITUTION art. 44(1) (2010) (Kenya).

213. *Id.*

214. CONSTITUTION art. 159(2)(c) (2010) (Kenya).

215. CONSTITUTION art. 63(1) (2010) (Kenya).

216. CONSTITUTION art. 45(1) & 45(4)(a) (2010) (Kenya); The Marriage Act, No. 4 (2014) KENYA GAZETTE SUPPLEMENT No. 62 § 43(1).

217. Judicature Act (2012) Cap. 8 § 3(2) (Kenya); CONSTITUTION art. 2(4) (2010) (Kenya).

218. *See* Judicature Act (2012) Cap. 8 § 3(2) (Kenya).

219. CONSTITUTION art. 11 (2010) (Kenya).

220. Judicature Act (2012) Cap. 8 § 3(2) (Kenya).

221. *Id.*

222. Celestine Nyamu Musembi, *Pulling Apart? Treatment of Pluralism in CEDAW and Maputo Protocol*, in *WOMAN’S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW* 196 (Anne Hellum & Henriette S. Aasen eds., 2013).

While CEDAW mandates state parties to eliminate discriminatory customary practices, the Maputo Protocol strikes a balance between legitimizing customary law and protecting the rights of women.²²³ As Celestine Musembi argues, although Article 5 of the Maputo Protocol calls on states to prohibit harmful cultural practices, Article 17 of the Maputo Protocol also provides for women's right to live in a positive cultural context.²²⁴

Kenya's Constitution does not take the "elimination" approach espoused in CEDAW.²²⁵ The provisions mirror those in the Maputo Protocol, namely the recognition of the right to culture subject to the repugnancy doctrine.²²⁶ This position is however further complicated by the fact that international law is a source of law in Kenya.²²⁷

Furthermore, despite the fact that elaborate provisions on women's rights are in the document, including one of the most expansive Bill of Rights in the world, tradition, culture, and religious attitudes continue to dominate local thinking about the place of women in society.²²⁸ Kenya continues to be deeply embedded in culture, tradition, and history despite attempts to overhaul the law in the books.²²⁹ This might explain why despite the fact that the Kenyan Parliament has enacted a law outlawing FGM, in accordance with Maputo Protocol; the practice continues to date.²³⁰ To "preserve" the culture, a medical doctor has filed a case in court seeking to have the FGM legalized.²³¹ The doctor argues that the outlawing of female circumcision is against the culture of many African communities and should be reviewed.²³² This court case demonstrates that although the law attempts to cope with the evolving society, many communities cling to their culture and eschew "modernization."

Another example is in the case of abortion where the Maputo Protocol provides that the State shall ensure that the right to health of women, including sexual and reproductive health, is respected and promoted.²³³ It

223. *Id.*

224. *Id.*

225. *Id.*

226. See CONSTITUTION art. 2(4) & 159(3)(b) (2010) (Kenya); Judicature Act (2012) Cap. 8 § 3(2) (Kenya).

227. CONSTITUTION art. 2(5) (2010) (Kenya).

228. *Women's Power Through the Constitution: Our Constitution, Our Life!*, AFRICAN WOMAN & CHILD FEATURE SERVICE, i, iii, <https://www.awcfs.org/index.php/content-development/features/reproductive-health/item/1666-women-s-power-through-the-constitution> [<https://perma.cc/EZ89-MNZG>] (last visited Apr. 6, 2013); Elishiba N. Kimani & Lucy W. Maina, *Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy, and Disenfranchisement*, 19 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK, 256, 258 (2010). See Kimani Njogu & Elizabeth Orchardson-Mazrui, *Gender Inequality and Women's Rights in the Great Lakes: Can Culture Contribute to Women's Empowerment?* 1, 2 (Jan. 2009) (unpublished manuscript).

229. U.N. Human Rights Committee, General Comment No. 28, The equality of rights between men and women, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), ¶ 5 (Mar. 29, 2000).

230. Maputo Protocol, *supra* note 194, art. 5(b).

231. Stephen Muthini, *Legalize Female Mutilation, Says Doctor in Court*, DAILY NATION (Jan. 18, 2018), <https://www.nation.co.ke/news/Legalise-female-circumcision-says-doctor-in-court/1056-4267584-11ajval/index.html> [<https://perma.cc/BZD2-HX6X>].

232. *Id.*

233. Maputo Protocol, *supra* note 194, art. 14(2)(c).

also mandates State parties to “protect the reproductive rights of women by [authorizing] medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the [fetus].”²³⁴ There is a specific provision on abortion in CEDAW and Maputo Protocol.²³⁵

Despite the fact that the Kenyan Constitution recognizes the right to reproductive health, it does not specifically provide for the right to abortion.²³⁶ However, the provisions in the Maputo Protocol explicitly authorize medical abortion in cases of sexual assault, rape, and incest.²³⁷ This does not anchor well with the Constitution of Kenya 2010 and in fact, was one of the reasons for the defeat of the 2005 Draft Constitution in a referendum.²³⁸ The 2005 Draft contained a provision that mirrored the Maputo Protocol.²³⁹ The Constitution of Kenya states that “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.”²⁴⁰ Abortion in Kenya does not extend to cases of sexual assault, rape, or incest as it had been stipulated in the Maputo Protocol.²⁴¹ However, in light of the fact that international law is a source of law in Kenya, the question as to whether the international law has been localized through the Constitution remains to be answered.²⁴²

B. Women’s Political Representation in Decision Making

As we saw in the preceding sections, the women’s struggle from Mexico to Nairobi and back again has been instrumental in championing for the inclusion of affirmative action strategies, policies to remedy historical injustices that had left women out of governance processes. The demand for people-centered, people-driven, participatory processes was at the core

234. *Id.*

235. Maputo Protocol, *supra* note 195; Convention on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 35, § 18, U.N. Doc. CEDAW/G/GC/35 (July 26, 2017).

236. The right is recognized under Article 43(1)(a) which provides that “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[.]” CONSTITUTION art. 43(1)(a) (2010) (Kenya).

237. See Maputo Protocol, *supra* note 194, art. 14(2)(c).

238. It was also listed as one of the contentious issues by the Eminent Persons Report on Constitution Review. See REPUBLIC OF KENYA, REPORT OF THE COMMITTEE OF EMINENT PERSONS ON THE CONSTITUTION REVIEW PROCESS 56, ¶ 191 (May 30, 2006); Kathambi Kinoti, *Abortion Rights and Realities in Kenya: The Constitutional Debate*, AWID (Apr. 24, 2010), <https://www.awid.org/news-and-analysis/abortion-rights-and-realities-kenya-constitutional-debate> [<https://perma.cc/TSW6-MBXM>].

239. See Draft of CONSTITUTION, Part II, ¶ 35(3) (2005) (Kenya).

240. CONSTITUTION art. 26(4) (2010) (Kenya).

241. Letter from Evelyne Opondo & Onyema Afulukwe, Regional Director & Senior Legal Advisor, Center for Reproductive Rights, to Committee Members, Committee on Economic, Social and Cultural Rights, at 5-6, https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KEN/INT_CESCR_ICO_KEN_21708_E.pdf [<https://perma.cc/7YSN-5DDW>] (last visited Apr. 6, 2019).

242. See *id.*

of the demand for constitutional change.²⁴³ Similarly, the shared transnational and translocal promises of the Nairobi Forward Looking Strategies, the Beijing Platform for Action, and the Dakar Platform for Action, among others, bore fruit when the Constitution of Kenya finally explicitly provided for the streamlining of affirmative action policies into every area of governance.²⁴⁴ In addition to ensuring that governance processes are open, participatory, and democratic, the constitution requires that gender equality and affirmative action be upheld.²⁴⁵

After several failed attempts to legislate on affirmative action, the Constitution now finally entrenches affirmative action provisions in every organ of governance.²⁴⁶ It provides that “women and men have a right to equal treatment, including opportunities in political, economic, cultural, and social” spheres.²⁴⁷ The Constitution further provides that the State shall legislate in order to give full effect to these provisions and to ensure that all members of all “elective and appointive bodies” shall adhere to the two-thirds gender rule.²⁴⁸

This provision mirrors the equality provisions in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women (Maputo Protocol).²⁴⁹ The Protocol provides that “Women and men are equal before the law and shall have the right to equal protection and benefit of the law.”²⁵⁰ It also provides that “States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures”²⁵¹

243. Kameri-Mbote & Kabira, *supra* note 154, at 7.

244. Article 56(a) says that “The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups - (a) participate and are represented in governance and other spheres of life[.]” CONSTITUTION art. 56(a) (2010) (Kenya).

245. Article 118(1) provides that the “Parliament shall - (a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.” Article 196(1) of the Constitution requires the same of the county assembly. CONSTITUTION art. 118(1) & 196(1) (2010) (Kenya).

246. CONSTITUTION art. 27(6), 55, 56 & 201(3)(h) (2010) (Kenya).

247. CONSTITUTION art. 27(3) (2010) (Kenya).

248. Article 27(6) provides, “to give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.” CONSTITUTION art. 27(6) (2010) (Kenya). Article 27(8) states that “In addition to 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.” CONSTITUTION art. 27(8) (2010) (Kenya). Article 81 further reiterates that the same rule should be applicable in elective public bodies. CONSTITUTION art. 81 (2010) (Kenya).

249. The Maputo Protocol has similar provisions to Article 27 on equality between women and men. Maputo Protocol, *supra* note 194, art. 2, 8, 9, 13.

250. Maputo Protocol, *supra* note 194, art. 8.

251. Maputo Protocol, *supra* note 194, art. 9.

In order to put the government to task and to ensure implementation, the Constitution provides a five-year timeline for the Kenyan Parliament to enact legislation on the two-thirds gender rule.²⁵² Several cases have been brought before the court by women's rights organizations such as FIDA and CREAM, among others, in order to demand that the government respect the Constitution.²⁵³ In a recent case,²⁵⁴ Justice Mativo declared that the Parliament as currently comprised was unconstitutional as it failed to meet the two-thirds gender rule threshold.²⁵⁵ Why is it so difficult to implement these affirmative action provisions in the Constitution? The section that follows discusses some underlying tensions that make implementation of these provisions difficult.

1. *Individual Rights v. Community Rights*

While the Constitution provides for the individual rights of women's political representation, it fails to take into the account the nature of local politics in the Kenyan context. In fact, the 2010 Constitution is largely based on an approach that seeks to balance ethnic diversity and the promotion of a national unity.²⁵⁶ When we talk about democracy in the Kenyan context, it is impossible to think about the individual as removed from the community and the ethnic context within which she belongs. At a formal level, women's rights are guaranteed but at an informal level, women face numerous challenges in order to run for office. One striking example that illustrates the background rules that operate in any given electoral process is the case of negotiated democracy.

In northeastern Kenya, the communities have adopted a form of democracy referred to as a *negotiated democracy*.²⁵⁷ This system is clan-based and requires that a council of elders negotiate for the various availa-

252. See CONSTITUTION 5th Schedule (2010) (Kenya); Centre for Rights Education and Awareness & 2 others v. Speaker the National Assembly & 6 others (2017) K.L.R. 7 (Kenya). This timeline has been the bone of contention in several cases including, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion No. 2 of 2012) K.L.R., at 6 (Kenya); Centre for Rights Education & Awareness (CREAW) v. Attorney General (2015) K.L.R., at 2; and the most recent case on this issue, Centre for Rights Education and Awareness v. Speaker the National Assembly (2016) K.L.R., at 7 (Kenya).

253. See, e.g., Federation of Women Lawyers (Fida-Kenya) v. Attorney General (2016) K.L.R., at 1 (Kenya).

254. Centre for Rights Education and Awareness & 2 others v. Speaker the National Assembly & 6 others (2016) K.L.R., at 16 (Kenya).

255. *Id.*

256. The Constitution of Kenya Review Act (2008) Cap. 9 § 6(a). The fundamental principles of the Constitution are best gleaned from the Preamble and Article 10. The Preamble states the Kenyan people's "pride in our ethnic, cultural and religious diversity" and their determination to "live in peace and unity as one indivisible sovereign nation," the two ideas demand that one must strike a balance between national identity and other personal and communal identities. CONSTITUTION pmbl. & art. 10 (2010) (Kenya). The values set out in the Constitution include national unity, sharing of power, social justice, inclusiveness, equality, human rights, and human dignity, and protection of the marginalized.

257. Mary W. Kanyi & Fatman M. Mohamed, Opinion: Negotiated Democracy in North Eastern Kenya and Women's participation in elective politics (2017) 1.

ble elective positions.²⁵⁸ Ideally, they negotiate and share the available elective positions amongst their preferred individuals from their clan. The selected “candidate is then endorsed by the COE to run for the specific position. This is done in an effort to reduce stiff individual competition and violence that characterize elections in an elective system where the winner takes it all.”²⁵⁹

Although the system has worked to successfully avert inter-clan violence, it “has systematically excluded women in political leadership since they are not” present at the negotiation table of a council of elders, “because no clan wants a woman to represent them.”²⁶⁰ The system not only “locks out any prospective female candidate[s]” but also denies the people the opportunity to democratically elect women leaders who may have better leadership skills and abilities.²⁶¹ “As a result [of this system], women from these communities have only been able to predominantly access . . . the [reserved] affirmative action . . . seats in the County Assembly[, the Senate,] and the National Assembly,” as stated in the Constitution of Kenya 2010.²⁶²

Concluding Reflections

Ideas may travel but what happens when they encounter different socio-cultural contexts? This Article has argued that transnational feminist movements have created opportunities as well as challenges for women worldwide. We have seen that as a result of the emergence of strong feminist transnational and translocal networks, women all over the world have been able to wield power globally in order to influence social and legal transformation. As a result of this, constitutions and various treaties and conventions have been negotiated, ratified, adopted, and in the case of Kenya, domesticated. Traveling feminist ideas have thereby been constitutionalized and as a result, elaborate institutional and legislative frameworks have been enacted by the Kenyan Government. These laws range from marriage laws to domestic violence to FGM and to education laws. The Article has argued further that the constitutionalization of traveling feminisms has created tensions in the Constitution. These tensions mirror ideological tensions within the feminist transnational movements. Why is the law in the books so different from the law in action? This Article has demonstrated that the tensions embedded in the Constitution and the discrepancy between the law in the books and the law in action makes implementation of these provisions very difficult. Indeed, the constitutionalization of traveling feminisms has created tensions that blur the underlying disharmonies between the dreams and actualities in transnational feminist movements. As T. S. Eliot notes, “[b]etween the idea [a]nd the reality . . .

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

[f]alls the shadow.”²⁶³ In other words, western concepts of individualism, freedom of choice, democracy, good governance, etc., when transplanted into the local context face serious implementation challenges. For the most part, mainstream international legal feminisms have traveled, leaving the criticisms of the theory at home. However, the constitutionalization of these traveling theories and the tensions created that present implementation challenges offer an opportunity for feminist scholars to reflect on traveling with the theory *and* the criticism as well. Is it possible that ideas are only able to travel by excluding the various identity lines along which a woman finds herself in?²⁶⁴ Are the Constitutional provisions a shadow of ourselves? Is it the case that the Constitution deals with the shadow and not the reality? These ideas have found their way into the Constitution but not into the people’s culture and into the sociocultural context. Are we living in the shadows of traveling ideas and thoughts where we remain between the reality and the ideas? Could this be what Mariama Ba meant when she said I celebrate every time a woman emerges from the shadows?²⁶⁵ We live in the shadows of the sociocultural context. At the end of the day, these individual rights would be emancipatory for women but these ideas do not find their expression in women’s lives. They have not found their expression in the lives of a majority of the women because the ideas appear to be mere shadows. Is the reason why we continue to remain in a state of having “constitutions without constitutionalism” because these traveling ideas are mere shadows?²⁶⁶ The woman is removed from the sociopolitical reality within which she finds herself in any given moment. These are questions for another day.

263. T.S. ELIOT, *THE HOLLOW MEN*, stanza V (1925).

264. For a discussion on exclusions, see generally Patricia Kameri-Mbote, *Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses*, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTER (2013), <http://www.ielrc.org/content/w1301.pdf> [<https://perma.cc/32CH-N4WV>].

265. MARIAMA BA, *SO LONG A LETTER* 88 (1979).

266. Okoth Ogendo, *Constitutions without constitutionalism: reflections on an African political paradox*, AMERICAN COUNCIL OF LEARNED SOCIETIES (1988).

