



UNIVERSITY OF NAIROBI

**Fallacies of Equality and  
Inequality:  
Multiple Exclusions in Law and Legal  
Discourses**

**Inaugural Lecture**

By

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## Profile

Born on 19<sup>th</sup> March, 1964, Annie Patricia G. Kameri-Mbote had her early education at Mũgoiri Primary School in Mũrang'a County and St. Michael's Girls' Primary School in Kirinyaga County and later proceeded to Loreto High School, Limuru in Kiambu County for her Ordinary and Advanced level studies which she completed in 1982. In 1984, she embarked on her law studies at the then Faculty of Law, University of Nairobi which she completed in 1987 and obtained a Bachelor's Degree in Law (LL.B), Second Class (Upper Division) Honours.

She then proceeded to the University of Warwick in the United Kingdom where she obtained her Masters' Degree in Law (I.L.M) in Law in Development in 1989. She was admitted to the Roll of Advocates in December 1989 having successfully completed her course at the Kenya School of Law in 1988 and obtaining a Postgraduate Diploma in Law.

She was appointed lecturer in January, 1990, and taught until January, 1994 when she proceeded to the University of Zimbabwe on study leave to undertake training in gender and the law leading to a Postgraduate Diploma in Women's Law which she was awarded in 1995. She then proceeded to Stanford Law School at Stanford University to undertake doctoral research on a Fulbright junior staff development scholarship. She obtained a Master's Degree in Juridical Sciences (JSM) in 1996 and a Doctoral Degree in Juridical Sciences (JSD) in 1999 from Stanford University focusing on environmental law and property rights.

Kameri-Mbote's areas of specialisation include environmental law, property law and gender and the law. By the time she proceeded to pursue her doctorate in 1995, she had already published and co-published articles and book chapters and edited and co-edited books. She continued to publish during her years as a doctoral student and by the time she obtained her JSD (1999), she had written articles in leading journals. She has continued to be a prolific writer to date. Her contributions have appeared in journals such as: *Ocean Development & International Law*, *Georgetown International Environmental Law Review*, *Review of European Community & International Environmental Law*, *Colorado Journal of International Environmental Law & Policy*, *International Affairs*; *Journal of Environmental Law*; *Romanian Journal of Political Science*; *VRÜ-Verfassung und Recht in Übersee*; *University of Nairobi Law Journal*; *The ICFAI Journal of Intellectual Property Rights*; *East African Law Journal*; *East African Law Review*; *Law Society Digest*; *Development*; *Law, Environment and Development Journal*; *Annals of Arid Zones*; *East African Journal of Peace & Human Rights*; *Forum for Development Studies*; *Feminist Africa*; *Sustainable Development Law & Policy*; and *Waseda Proceedings of Comparative Law*.

Her full-length work, *Property Rights and Biodiversity Management in Kenya* was published in 2002. She has co-authored and co-edited many other works such as: *Coming to Life: Biotechnology in African Economic Recovery* (1994); *Women Inheritance Laws & Practices* (1996); *Public Involvement in Environmental Decision-making in Asia and East Africa: Law and Practice* (2003); *Land Use for Sustainable Development* (2007); *Globalisation and Environmental Challenges: Reconceptualizing Security in the 21<sup>st</sup> Century* (2007); *Environmental Governance in Kenya: Implementing the Framework Law* (2008); *Facing Global Environmental Change: Environmental, Human, Energy, Food, Health and Water Security Concept* (2009); *Promises and Realities: Taking Stock of the 3<sup>rd</sup> UN International*



*Women's Conference* (2009); and *Coping with Global Environmental Change, Disasters and Security – Threats, Challenges, Vulnerabilities and Risks* (2010).

Kameri-Mbote is an Advocate of the High Court of Kenya and was conferred the rank of Senior Counsel in 2012. She is the current Dean of the School of Law, University of Nairobi and served as the Chair of the Department of Private Law at the School from 2002 to 2008. She was a member of the Committee of Eminent Persons appointed by His Excellency the President of Kenya in February 2006 to advise the government on the way forward for the stalled constitution review process and also served as a Policy scholar at the Woodrow Wilson International Center for Scholars. She also serves on various boards such as: the Global Council of the Water and Sanitation Program (WSP); the International Development Law Organization (IDLO); the Water Services Regulatory Board (WASREB); Lewa Wildlife Conservancy; Advocates Coalition for Development and Environment (ACODE-Uganda); and the Kenya Land Conservation Trust. She is the Chair of the Advisory Board of Strathmore Law School (Strathmore University, Nairobi) whose preparation, planning, initiation and launch she executed between 2009 and March 2012. She has served on the following boards: the Kenya Copyright Board; the Pell Centre for International Relations, Salve Regina University, Rhode Island; the Arts & Humanities Research Board (AHRB) Research Centre for Law, Gender & Sexuality, University of Kent; and the Seeds and Plant Varieties Tribunal.

Kameri-Mbote is a member of the Kenya National Academy of Sciences; the International Commission on Environmental Law (ICEL); and the UNEP Expert Group on Environment & Security. She also serves on the editorial boards of the following journals: *Journal of Law, Environment and Development* (LEAD); the *Global Environmental Politics* (GEP); *Journal of Human Rights and the Environment*; and the *East African Journal of Peace and Human Rights*. She has also taught international environmental law at the University of Kansas; Trade, Environment and Law at the University of Stellenbosch, Cape Town, South Africa; and teaches Women, Access to Resources and the Law at the University of Zimbabwe. She serves as an external examiner to the Faculties of Law at the following Universities: London; Makerere; Witwatersrand; Dar es Salaam; Australian National University and Westminster.

Kameri-Mbote has also been the recipient of various awards. She received the Distinguished Visiting Research Scientist award from the Japanese Society for the Promotion of Science in 2010; Fulbright Scholarship for doctoral study (1995-1999); Stanford Institute of International Studies, O'Be Schultz Research Grants (1997); Study Fellowship from the Norwegian Agency for International Development (1994-1995); and the Overseas Development Authority Shared Scholarship (ODASSS) (1988-1989). She has also received research grants from different organizations including: German Technical Cooperation (GIZ); Ford Foundation; Research Council of Norway; Norwegian Agency for International Development (NORAD); International Development Research Centre; Open Society for Eastern Africa (OSIEA); and the Rockefeller Foundation.

Kameri-Mbote is married to John Mbote and they are blessed with two children – Ian Kamau and Chloe Elaine Wairimu.



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Who and where would I be if it had not been for the saving grace of Christ crucified? My life and intellectual journey to date has been one of faith, self-discovery and assurance of God's care, guidance and protection. I have learnt that nothing is too great or too small to commit to God in prayer.

This inaugural lecture is the culmination of a long journey, walked with the support of many people to whom I owe immense gratitude. First, I would like to acknowledge and thank my spouse, John Mbote Kamau, for being my friend, letting me be and supporting me unambiguously and unequivocally in the 27 years of our relationship. As I have often remarked, being Annie Patricia Gathirũ Kameri Mbote's husband could never have been for a faint-hearted man. I am also grateful to my children Ian Kamau and Chloe Wairimũ, bringing up who has not only given me great joy but enabled me to truly appreciate the ambivalences in the concepts and content of equality and non-discrimination where age and gender are concerned.

Enormous gratitude goes to my parents, Helen Njeri and Venanzio Kameri, for modeling the two thirds gender rule by bringing me up as a strong woman within a family of 3 girls among 6 boys, all having equal voice and treated equally. You taught me in a very real way that equality and non-discrimination was not about numbers or gender but the abilities and industry of the person. Thank you for allowing me to ask you hard questions about life and shepherding me in my restlessness and headstrong insistence on charting my own path of life on unbeaten terrains. Special thanks also go to my siblings for putting up with my elbowing for space and shielding me from multiple exclusions.

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My students over the years have inspired me greatly, through them I found my passion for teaching, coaching, mentoring and sharing ideas. Thank you for allowing me to influence your lives and giving me a purpose to live for. Professor Migai Akech; Justice Professor Joel Ngugi; Professor Sylvia Kang'ara; Prof. Paul Musili Wambua, Prof. Moni Wckesa, Dr. Collins Odote; Dr. Robert Kibugi; Dr. Sarah Kinyanjui; Dr. Luis Franceschi; Maurice Odhiambo Makoloo; Mugambi Kiai; Anthony Munene; Dr. Elizabeth Gachenga; Anne Kotonya; Nkatha Kabira; Mahat Somane; Albert Simiyu; Ruth Aura; Peter Kwenjera; Lillian Cherotich; Fidelis Wangata; Nancy Baraza; Godber Tumushabe; Onesmus Kipchumba Murkomen; Elvin Nyukuri; David Wafula; Wilson Kamande; Hellen Hilda Onyango among many others – I have learnt a lot from you as my students, friends and colleagues and you have made my journey fulfilling and worth the while.

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Center for Scholars for providing the space for exploration of new ideas; Professor Charles Okidi of the University of Nairobi for spurring me along the academic path; Professor Philippe Cullet of the School of Oriental and African Studies, University College London, thank you for unapologetically holding me accountable as an academic by demanding publication off-prints annually and ensuring that the intellectual candle of our dream as students at Stanford Law School – the International Environmental Law Research Centre – continues to shine brightly illuminating the paths of all including those in the global south. Professor Makumi Mvagiru, thank you for imbuing a sense of diplomacy in my handling of conflicts and reminding me that peer reviewed articles do not include newspaper pieces. I also acknowledge the role of Dr. Joyce Wigwe in my life, for caring, unreservedly sharing and continuing to hold me answerable in my roles as a believing woman, wife, mother and professional.

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Special thanks go to Honourable Justice Professor Jackton Boma Ojwang, for setting a standard for me to aspire to when he delivered his inaugural lecture *Laying a Basis for Rights: Towards A Jurisprudence of Development* in 1992. He modelled the life of a true law academic for me and his constant reminders that my academic journey was incomplete until I delivered this inaugural lecture have kept me on track. In a very real sense, in giving this lecture, I stand on the shoulders of a giant! He may not recall that in 2003 when he transitioned from the academy to the bench, he bequeathed to me a Sheaffer pen that he had owned and used for many years. I was then a Senior Lecturer but that act was profoundly impactful – it signified for me the passing of the baton of scholarship and I realized immediately that completing the journey was no longer a matter of my choice. That pen continues to inspire me in the darkest moments of my life journey.

I have been blessed with many great friends – my late sister Jean Marie Wanjiru Kameri; Dr. Wambui Kiai; Njeri Karuru; Njeri Muhoro; Justice Jamila Mohammed; Christine Agimba; Dr. Nightingale Rukuba-Ngaiza; Prof. Idah Sithole Niang; Catherine Kariuki; Agnes Mukoma; Rosemary Okello-Orlale; Susan Murunga; Nyawira Gitau; Naomi Gitau; Margaret Muigai and the Kabii girls to name a few. Thank you all for caring and always being there for me.

Finally, I would like to acknowledge those that have been my ideas' bouncing boards over the years as I conceptualized and shaped my many thoughts, experiences and reflections into a coherent schematic. Thank you Honourable Justice Professor Jackton Boma Ojwang; Professor Makumi Mvagiru; Professor Wanjiku Kabira; Professor Migai Akech; Professor Philippe Cullet, Nkatha Kabira and Dr. Robert Kibugi for your generosity, sharing and brutal honesty that helped me tame the scope of this lecture. The responsibility for any errors of judgment and the views expressed however rests entirely on me.





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## Dedication

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In memory of my paternal grandmother,  
the indomitable and indefatigable

Teresia Njeri daughter of Kameri,

Wife of Gakahũ, also known as 'Warĩro'

who despite her petite stature and soft spoken nature

surmounted many gender exclusions and

wrested the reins of patriarchy to head the large  
polygamous Gakahũ family

You modelled for me the lesson that to debunk

the fallacies of equality does not depend as much

on might or brute force as on subtle, seemingly miniscule  
but powerful actions taken every hour and every day.



## I. Introduction

Equality – the assertion that human beings are equal and have equal rights – is a core tenet in rights' discourses. Equality is pegged on rights or entitlements that all human beings and sovereign states have. Legal rights comprise a cluster of claims, powers and immunities.<sup>1</sup> The fact that a person has a right imposes a duty on another to refrain from interfering with that right. It also entails duties on the state for instance to ensure the enjoyment of those rights by its citizenry. This brings in the issue of justice – in a society of equal states/ persons, what are the guiding or regulatory principles to ensure fairness for all?

Yet questions abound as this core tenet is applied in law. When law is nuanced by the reality within which it operates, equality raises more questions than answers. For instance, are all sovereign states equal? Are men and women equal? Are poor men and rich men equal? Are there instances where the equality praxis favours certain groups of states, men or women? Are environmental rights for environmental resources or for those who use them? Are community land rights equal to private land rights? In my sojourn in the legal academy, I have encountered many paradoxes of equality. In both public and private law spheres, subjects of rights have to explore outside the purview of the grant and normative content of rights to ensure that they realize the promise of rights. In this paper, I discuss some of these paradoxes drawing from the areas of gender equality; international environmental law and property rights. These paradoxes are exacerbated by the processes through which legal knowledge and information about equality, rights and subjects is produced, legitimated and disseminated. I problematize the fallacies of normative equality provided for in law in the absence of mechanisms to ensure that equality is in fact realized by and between different subjects of law. I also discuss the role of agency in couching discourses on equality and the possibility of marginalization of some subjects of law as the knowledge and information about them is excluded in narratives availed through publication channels that have no space for those narratives.

This illuminates the discussion on multiple exclusions of subjects of law both in the quest for equality at different levels and in available narratives of experiences with the equality standard.

Drahos and Braithwaite argue that access to information is fundamental to the exercise of human rights and that allowing capture of knowledge and information by a privileged few is akin to feudalism where feudal lords enclosed land to the exclusion of others.<sup>2</sup> Though their argument relates to the use of intellectual property rights such as patents to lock up vital educational, software, genetic and other information,<sup>3</sup> the result is the same where vital information about equality struggles of groups of people and norms such as 'community' is absent in internationally available legal publications. Both create a global knowledge order dominated by multinational elite.<sup>4</sup> For the subjects of law who are not able to vindicate their rights at the local and national levels, the dominant narratives on equality result in their further marginalization in the framing of rights as their experiences remain outside of this mainstream thought conveyance.

1 Hohfeld, W., (1922) *Fundamental Legal Conceptions as Applied in Judicial reasoning and other Essays*, (Cook, ed.)

2 Drahos, P. and John Braithwaite, (2002) *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan,

3 *Ibid.*

4 *Ibid.*



These issues have concerned me as I have observed and participated in the process of birthing a new Constitution in Kenya. The transition from the old to the new and the hopes and aspirations of Kenyans from all walks of life in the new order has prodded me to critically analyse the notion of equality. The Constitution of Kenya 2010 unequivocally and unambiguously provides for equality of subjects of law in the following terms: 'Every person is equal before the law and has the right to equal protection and equal benefit of the law'.<sup>5</sup> It goes on to elaborate that 'equality includes the full and equal enjoyment of all rights and fundamental freedoms'<sup>6</sup> and that 'women and men have the right to equal treatment'<sup>7</sup> and opportunities 'in political, economic, cultural and social spheres'<sup>8</sup>. This call to equality is further buttressed by the exhortation of the state<sup>9</sup> and other persons<sup>10</sup> not to directly or indirectly discriminate against any person on any ground. The listing of objectionable grounds on which discrimination may not be based is wide and includes: 'race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.'<sup>11</sup> It also provides that to give full effect to the realization of the rights guaranteed, legislative and other measures such as affirmative action programmes and policies 'designed to redress any disadvantage suffered by individuals or groups because of past discrimination' shall be undertaken by the State.<sup>12</sup> Further that 'not more than two-thirds of the members of elective or appointive bodies shall be of the same gender'.<sup>13</sup>

This is a robust exposition of the right to equality and non-discrimination by any standard. The question is whether what it promises will be realized by all subjects of law in Kenya. My research in the areas of international environmental law<sup>14</sup> and gender and my engagement in legal education circles nationally and internationally have sharpened my awareness of the different variables that stand in the way of the realization of the equality and non-discrimination principles for states and individuals. It is from this paradigmatic stance that I have observed the application of the Constitutional provisions highlighted above. Having celebrated the repeal of Kenya's older Constitution that legitimated discrimination in the areas of adoption, marriage, divorce, burial, devolution of property on death and personal law<sup>15</sup>, I expected that the new constitutional dispensation would make the quest for equality and non-discrimination on the grounds of sex easier. However, in the short period that the Constitution has been in operation, the fallacies of the constitutionally entrenched principle of gender equality have become apparent in the areas of political representation and appointments to offices. There is a tension between equality and non-discrimination and inequality and discrimination on the one hand and inclusion and exclusion on the other.

5 Article 27 (1).

6 Article 27 (2).

7 Article 27 (3).

8 *Ibid.*

9 Article 27 (4)

10 Article 27 (5)

11 Article 27 (4)

12 Article 27 (6)

13 Article 27 (8)

14 Kameri-Mbote, P., (2009) "Law, Gender and Environmental Resources: Women's Access to Environmental Justice", in Jonas Ebbesson & Phoebe Okowa eds., *Environmental Law And Justice in Context*, Cambridge University Press, Cambridge pp. 390-407

15 Section 82(4) of the repealed Constitution



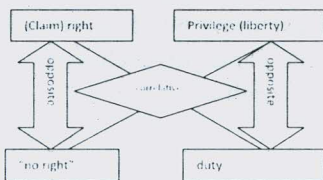
A chiasmus is discernible in the practical application of equality and non-discrimination which results in discrimination and inequality. This is also the case where inclusion results in exclusion and vice versa.

This paper is divided into five parts. Part I is the introduction. Part II comprises the conceptualization of the principles of equality and non-discrimination and related concepts. Part III discusses the theory of intersectionality and relates it to the multiple exclusions that stand in the way of differently placed subjects of law seeking to vindicate their rights. Part IV lays out some fallacies of equality in the realms of gender, international, environment and property law. It also addresses hegemonic knowledge production, legitimation and dissemination processes and forums that relegate the struggles and voices for equality and against discrimination of some subjects of law to the periphery. Part V proposes ways of countering the fallacies going forward.

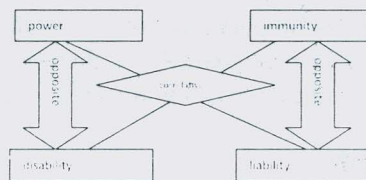
## II. Laying the Basis: Fundamental Concepts

### A. Rights

The term right is so often used that we assume that it has an uncontested definition. The lack of precision in the import has concerned natural law and positivist jurists for years. For instance, John Locke in 'Two Treatises of Civil Government' makes a case for the limitation of governmental authority by individual rights that morality requires all human beings to grant all others.<sup>16</sup> Following from this assertion, American constitution architects opined that certain rights are fundamental and are guaranteed to every individual.<sup>17</sup> Hohfeld, in clarifying the apparent ambiguities in the term 'right', distinguished eight concepts as the lowest common denominators of the law – basic conceptions in legal analysis.



- Right is the jural correlative of duty
- Privilege is the correlative of no right
- Right is the opposite of no right
- Privilege is the opposite of duty



- Power is the jural correlative of liability
- Immunity is the correlative of disability
- Power is the opposite of disability
- Immunity is the opposite of liability

Source: Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Essays*, (New Haven, Yale University Press., 1919)

The term 'right' is often used in both broad/generic and narrow senses, encapsulating four terminologies namely: claims/rights; privileges/liberties; powers and immunities.<sup>18</sup> The existence of a claim/right connotes a duty on the part of another to fulfil that right. In

16 Locke, J. (1993) "Two Treatises of Civil Government" in Smith, P. ed., *The Nature and Process of Law: An Introduction to Legal Philosophy* Oxford University Press, New York.

17 Corwin, E.S., (1965), *The "Higher Law" Background of American Constitutional Law* Ithaca, N.Y: Cornell University Press.

18 Smith, P. ed., (1993) *The Nature and Process of Law: An Introduction to Legal Philosophy* Oxford University Press, New York.



similar vein, if you have a liberty or a privilege, there is no right against you; if you have a legal power, someone else is liable; and if you are immune to some law, it is disabled against you. In a nutshell to have a right is to be entitled to something for some reason. Law, as legitimate authority, gives force to rights and even though natural law theorists perceive rights to be God-given and more basic than human law or government, in the discussions on rights today, rights derive force from law. This is a particularly pertinent point in this lecture because when we discuss the concepts of equality of rights and the related principle of non-discrimination, our focus is the Constitution, statutory law, international law, religious and customary law. This plurality of laws makes the concept of rights and hence equality and non-discrimination complex and at times ambiguous especially in the encounter between formal, written law and informal, unwritten law; between customary law and religious law; and between the Constitution and people's lived realities where there are no neat boundaries between statute, custom, religion and other norms generated and enforced within different loci where subjects of law operate such as families and clans.<sup>19</sup>

Lawrence Becker, writing on individual rights asserts that rights are 'more than... norms, or expectations, or standards of conduct'.<sup>20</sup> They define what is owed to right holders by right respecters and are enforceable – a right holder can take justifiable steps to extract the right if it is not fulfilled.<sup>21</sup> It is therefore imperative that rights are specific on *who* has the right, *what* – the content of the right and the appropriate kind of enforcement and the redress available to the right holder in the event of violation of their rights.<sup>22</sup> These characteristics of rights are important in the discussion on the right to equality and non-discrimination. They also delineate parameters of inclusion and exclusion. Indeed, it is in the discussions on the experiences of different subjects of law with these rights that one observes fallacies or flaws that vitiate the basic argument that for instance, men and women are equal. This in turn leads to inclusion of some and exclusion of others. To further exacerbate the situation of legal subjects, there is no guarantee that one falls in a single exclusion band. As we will see below, subjects of law frequently find themselves in multiple bands of exclusion. To further develop our argument, we now turn to the issue of human rights.

## B. Human Rights

### 1. Normative Renditions

Human rights are guaranteed as basic for all members of the human race. They include equality of all before the law and equal protection of the law, protection from discrimination on grounds of sex, ethnic origin, tribe, religion among others and protection from torture, cruel, inhuman or degrading treatment, right to own property and freedom of conscience, expression, movement, religion, assembly and association. Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of all governments. The Universal Declaration of Human Rights<sup>23</sup> is the basic International statement of the inalienable and inviolable rights of all members

19 Falk Moore, S., (2000) *Law as Process: An Anthropological Approach* LIT Verlag Münster.

20 Becker, L., (1993) "Individual Rights", in Smith, P. ed., *The Nature and Process of Law: An Introduction to Legal Philosophy* Oxford University Press, New York. P. 57

21 *Ibid.*

22 *Ibid.*

23 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> [accessed 17 November 2012]



of the human family. It is intended to serve as the “common standard of achievement for all people and all nations”,<sup>24</sup> in the effort to secure universal and effective recognition and observance of the rights and freedoms it lists. The covenants relating to human rights have provisions barring all forms of discrimination in the exercise of the human rights.

Basic international law instruments explicitly provide that the rights provided for in them are to be enjoyed by all human beings. The Charter of the United Nations in its Preamble states.

We the peoples of the United Nations determined ...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small... have agreed...”

The Universal Declaration of Human Rights of 1948 states succinctly that “Everyone is entitled to all the Rights and Freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origins, property, birth or other status” (Article 2). From these two landmark instruments have sprung similar promulgations at international, regional and national levels. At the international level, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for equal enjoyment of all economic, social and cultural rights (Article 3) which include the right to work (Article 6); the right to “just and favourable conditions of work” (Article 7); the right to social security, including social insurance (Article 9); the right of mothers to special protection “during a reasonable period before and after childbirth” (Article 10(2)); the right to education (Article 13); the right to take part in cultural life (Article 15) among others.

In similar vein, the International Covenant on Civil and Political Rights (ICCPR) provides for the “equal rights of men and women to the enjoyment of all civil and political rights...” (Article 3). These rights include freedom from “cruel, inhuman or degrading treatment or punishment” (Article 7); freedom from arbitrary arrest or detention” (Article 9); freedom from “unlawful interference with ... privacy, family, home or correspondence” (Article 17); the right to “take part in the conduct of public affairs, directly or through freely chosen representatives” (Article 26 (a)); the right to “have access on general terms of equality, to public service” among others.

At the regional level we have, for instance, the African Charter on Human and People’s Rights<sup>25</sup>, which articulates a number of basic rights and fundamental freedoms and makes them applicable in African states. At Article 18(3) it provides that “[T]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”. The principles of non-discrimination against women and children have been further amplified in the Optional Protocol to the African Charter on Human and People Rights on the Rights of Women in Africa<sup>26</sup> and African Charter on the Rights and Welfare of the Child.<sup>27</sup>

24 *Ibid.* Preamble.

25 OAU DOC.CAB/LEG/67/3 REV.5 (1981), entry into force 12 October 1986 (with the 26th instrument of ratification.)

26 *See* African Union Protocol to the African Charter on Human And People Rights on The Rights of Women in Africa, adopted by the Conference of Heads of State and Government on 11 July 2003 in Maputo Mozambique and came into force in November 2005. It is a Protocol to the African Charter on Human and Peoples Rights, OAU DOC.CAB/LEG/67/3 REV.5 (1981), entry into force 12 October 1986 (with the 26th instrument of ratification.)

27 OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.



At national levels, many states have entrenched bills of civil and human rights in their constitutions, enabling their subjects to attack laws and decrees which, although lawfully passed, offend civil and political rights which have been declared so fundamental as to require them to be guaranteed forever. Moreover, private entities may be prevented from engaging in discriminatory acts in respect of access to housing, services or jobs by domestic human rights legislation. Kenya's 2010 Constitution includes an elaborate bill of rights detailing human rights and fundamental freedom.<sup>28</sup> This is stated to be an integral part of Kenya's democratic state and "... the framework for social, economic and cultural policies"<sup>29</sup> whose purpose is to 'preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.'<sup>30</sup> Interestingly, the Constitution adopts a natural law approach to these rights by stating that 'the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State'<sup>31</sup>. The provision on the right to equality and freedom from discrimination outlined above is in this part of the Constitution.

## 2. Critique of Rights

Despite the exegesis on human rights above, there are many biting critiques. Baxi<sup>32</sup> for instance, distinguishing between modern and contemporary notions of human rights, argues that the former has historically been used to produce 'justified' forms of human suffering in designating the subject of rights. This in his view explains the exclusion of slaves, colonized peoples, indigenous populations, women, children, poor and marginalized people from the definition of 'human' at specific historical junctures. This resonates with Marxist critiques of natural rights as tools of capitalism.<sup>33</sup> The hierarchies and asymmetries<sup>34</sup> observable in human rights law affect the principles of equality and non-discrimination discussed below.

Indeed, despite the assertion in international and national laws that all men are born equal, inequalities inevitably creep into human beings' lives to nuance this assertion. There are contradictions, disputations, rivalries and instabilities in the casting of rights and these are influenced by power relations.<sup>35</sup> Jeremy Bentham's *Anarchical Fallacies* for instance, comprise a scathing attack on the content of Article 1 of the 1789 French Declaration restated in the 1791 Declaration to the effect that "Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good." He states:

All men are born free? All men remain free? No, not a single man: not a single man that ever was, or is, or will be. All men, on the contrary, are born in subjection, and the most absolute subjection--the subjection of a helpless child to the parents on whom he depends every moment for his existence. ... All men born free? Absurd and miserable nonsense! ... All men are born equal in rights. The rights of the heir of the most indigent family equal to the rights of the heir of the most wealthy? ... All men (i.e. all human creatures of both sexes) remain equal in rights. ... The apprentice, then, is equal

28 Chapter 4

29 Article 19 (1)

30 Article 19 (2)

31 Article 19 (3) (a)

32 Baxi, U., (2006), *Future of Human Rights*, Oxford University Press, Oxford p. 45

33 Marx, K., (1926), "On the Jewish Question", in *Selected Essays by Karl Marx*, H.J. Stenning trans., Leonard Parsons, London and New York.

34 Gear, A., (2012), 'Human Rights, property and the search for 'worlds other'', *Journal of Human Rights and the Environment* Vol. 3, No. 2 pp173-195

35 *ibid.* p. 173



in rights to his master; ...So again as between wife and husband. The madman has as good a right to confine anybody else, as anybody else has to confine him.<sup>36</sup>

These statements underscore the tensions inherent in the equality principle. Similar sentiments have been expressed by Ngaire with regard to gender. She opines that the person with the greatest rights in law does not really exist characterizing that person as follows:

the abstract individual of law is not a prototypical person... he is an idea of humanity... He has the social and physical characteristics and the moral qualities considered ideal by those who find themselves reflected in this image. The 'ideal type' of legal person... possesses at least three essential qualities which match those of the socially powerful. One pertains to sex, a second to class, a third to gender. The legal model of the person... is a man, not a woman... a successful middle-class man, not a working-class male... a middle-class who demonstrates ... a form of 'emphasized' middle-class masculinity... and he evinces the style of masculinity of the middle classes.<sup>37</sup>

From Bentham's and Ngaire's statements above, it is clear that beneath the veneer of equality, are factors that mediate the realization of the standard. Consequently, attainment of equality for all human beings requires more than normative legal provisions in bills of rights and international instruments. While these are important for stating the standard, they are incapable of delivering equality by themselves. Besides, feminist<sup>38</sup> and ecocentrist<sup>39</sup> critiques of law have flouted the couching of legal provisions that suit specific subjects and exclude others hence resulting in inequality. The claim to property for instance illustrates how human rights are at once inclusory (owner) and exclusory (non-owner) and open to conflicting interpretations that can emancipate and oppress at the same time.<sup>40</sup> We now proceed to look at the principles of equality and non-discrimination.

### C. Equality

Equality relates to the dignity and worth of men and women, equality in their rights, opportunities to participate in political, economic, social and cultural development and benefit from the results. Westen asserts that statements of equality entail statements of rights.<sup>41</sup> Equity on the other hand relates to fairness in the treatment of different subjects of law. It adverts to the possibility of inequality, which necessitates the application of differential treatment (D1) to get rid of inequality.

Law can be used to reinforce or give permanence to certain social injustices leading to the marginalization of certain groups of people. In the realm of women's rights for instance, legal rules may give rise to or emphasize inequality. Bartlett and Kennedy aptly point out that

36 Bentham, J., "Anarchical Fallacies; Being an Examination of the Declarations of Rights Issued during the French Revolution", in *The Works of Jeremy Bentham* published under the superintendence of his Executor, John Browning, vol. two, New York: Russell & Russell, Inc., 1962, [originally published in 1843], 498-499.

37 Ngaire, N., 'The Man of Law', in *Law and the Sexes: Explorations in Feminist Jurisprudence*, Sydney; London: Allen & Unwin (1990) pp100-123 at 100

38 Smart, C., (1989), *Feminism and the Power of Law*, Routledge, London.

39 Merchant, C., (1990) "Ecofeminism and Feminist Theory", in I. Diamond & G. F. Orenstein, *Reweaving the World: The Emergence of Ecofeminism*, Sierra Club Books, San Francisco p. 100.

40 Grear, *supra* note 34 at p. 177.

41 Westen P., 'The Empty Idea of Equality', *Harvard Law Review* Vol. 95 No. 3 1982 p. 542. Cf. Bedau, H. A., "Anarchical Fallacies": Bentham's Attack on Human Rights, *Human Rights Quarterly*, Volume 22, Number 1, February 2000 p. 261



law has both helped to implement and constrained feminist agendas through the equality principle and mechanisms for pursuing legal change on the one hand and strengthened gender hierarchies through such doctrines as precedent on the other hand.<sup>42</sup> Legal systems can also become obstacles when change is required in legal rules, procedures and institutions to remove the inequality by the oppressed. This necessitates an inquiry into what injustices are intertwined within the legal systems and the extent of their operation. One often finds that the *de jure* position, which may provide for neutrality cannot be achieved in practice due to the numerous existing obstacles, which make the law powerless.

In discussions on equality, the pendulum shifts from utilitarianism<sup>43</sup> and intuitionism<sup>44</sup>. Justice, a virtue which predisposes one to give every person their due whether in private contracts, social life or in the political sphere is informed by the latter principle. It proceeds from the premise that the liberties/freedoms of all persons in a just society are well settled.<sup>45</sup> Justice as fairness according to Rawls has two stages like other contract views namely, the Original Position (OP) or status quo insuring equality and fairness with the debate centred on whether this will achieve justice; and the Principles, the issue here being whether people in the OP really would choose these principles.<sup>46</sup> The principles are: the Equality Principle- entitling each person to an equal right to the most extensive basic set of liberties compatible with a similar set for others and the Difference Principle – requiring that social and economic inequalities are arranged to the benefit of the least advantaged and attach to positions and offices open to all.<sup>47</sup>

Equality is the main goal in the pursuit for justice. Formal equality gives all individuals the same choices and therefore allows them to maximize their well being.<sup>48</sup> However, equality premised on equal treatment is difficult to achieve. *De jure* equality can lead to *de facto* discrimination where the consequences of the law are not anticipated. For instance the legal mandate of equal treatment is interpreted as the treatment of likes in a similar manner and unlikes in unlike manner. In the realm of gender such a distinction fails to take into account the distinctions that are the result of social constructions rather than difference as such.<sup>49</sup> In such cases, the application of laws without discrimination may in essence result in discrimination.

- 42 Bartlett, K. T. & R. Kennedy (eds.) (1991) *Feminist Legal Theory: Readings in Law and Gender*, Westview Press, Boulder, Colorado p. 2
- 43 Defined in the Oxford English Dictionary to mean that actions are right if they are useful or for the benefit of a majority; or that the greatest happiness of the greatest number should be the guiding principle of conduct.
- 44 Defined in the Oxford English Dictionary to mean belief that primary truths and principles of ethics and metaphysics are known directly immediate apprehension in the mind without reasoning. Cf. understanding of intuitionism as a doctrine of an irreducible family of first principles which have to be weighed against one another and a determination of the one that is most just determined in Rawls J., *A Theory of Justice* (1971) Belknap Press of Harvard University Press, Cambridge Massachusetts p. 34
- 45 *Ibid.* Rawls at p. 4.
- 46 *Ibid.* at p. 118.
- 47 *Ibid.* at p. 150.
- 48 Becker M., et. al, eds., (1994) *Feminist Jurisprudence: Taking Women Seriously, Cases and Materials*, American Casebook Series, West Publishing Co. St. Paul, Minnesota, pp. 68-81
- 49 MacKinnon C. A., (1987), *Feminism Unmodified: Discourses on Life and Law* Harvard University Press, Cambridge Massachusetts at p. 32.



## D. Discrimination

Discrimination means 'making distinction' but has increasingly been used to mean 'non-permitted distinction'. Non-distinction/non-discrimination is imperative for the equality principle and facilitates equal protection of the law and of human rights. Understanding the meaning of the term 'discrimination' is important for our discussion of the fallacies of equality and we find the definitions in the 1965 International Convention on Elimination of All Forms of Racial Discrimination (ICERD) and the 1979 CEDAW instructive. ICERD defines discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect to nullify or to impair the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>50</sup> CEDAW defines discrimination as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.<sup>51</sup>

Discrimination has two elements namely, its basis and the manner of execution. Both Conventions provide the bases of the non-permitted distinction.<sup>52</sup> It is clear that not all distinctions are forbidden and indeed the cardinal rule of equality is that all persons should be treated equally save when there are reasons for treating them differently. This latter proposition lends credence to the difference principle. Discrimination may be direct when different groups are treated in a different manner or indirect when a law appearing to have general application to all has different impacts on different groups.<sup>53</sup> Gender neutral law is a good example here. Confronted with laws that patently treat women and men the same using 'he' to mean men and women, one needs to understand not only the intention and rationale behind the law but also the consequences of law on individuals.<sup>54</sup> Such gender neutrality does not guarantee the realization of equal rights and privileges. In Tove Stang Dahl's words

As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender-neutral legal machinery ... meets the gender-specific reality...<sup>55</sup>

It is for this reason that both the equality and the difference principles find their pride of place in modern Constitutions. The challenge however, is to establish the Original Position in a context where different kinds of inequalities mesh without entrenching

50 *International Convention on the Elimination of All Forms [of] Racial Discrimination*, 24 September 2009, CERD/C/GC/32, available at: <http://www.unhcr.org/refworld/docid/4adc30382.html> [accessed 17 November 2012]

51 UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.unhcr.org/refworld/docid/3ae6b3970.html> [accessed 17 November 2012]

52 Deskoka, R., (1983), "The Right of Non-Discrimination and Affirmative Action", *Iustinianus Primus Law Review* Vol 1:1 p. 1

53 *Ibid.*

54 Kameri-Mbote, P., (2003). 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', in *University of Nairobi Law Journal*

55 Dahl, T. S., (1987), *Women's Law: An Introduction to Feminist Jurisprudence*, Norwegian University Press, Oslo p. 40.



differences and introducing new inequalities. The Kenyan Constitution seeks to deal with a number of differences that result in inequalities such as age (young and old); disability; and gender.<sup>56</sup> The cover all phraseology used in Article 56 on minorities and marginalized groups is an elaborate enunciation of the difference principle. The State is mandated to put in place affirmative action programmes to ensure that these groups participate and are represented in governance and other spheres of life<sup>57</sup>; have special opportunities in educational and economic fields<sup>58</sup>; have special opportunities for access to employment<sup>59</sup>; develop their cultural values, languages and practices<sup>60</sup>; and have reasonable access to water, health services and infrastructure<sup>61</sup>. Legislation is the logical point for elaboration of the components of marginalization and minority status. The fact that some regions, communities and individuals consider themselves minor and marginal makes the drawing up of a list of minority and marginalized communities an arduous task. This has to be considered within the context of historical perceptions of privileged and under-privileged regions, communities and individuals which is not supported by rigorous analysis. The difference principle interventions may in the circumstances result in inequality unless benchmarks are established and achievements tracked to ensure that once the marginal or minor state is addressed, intervening measures are stopped before the perceived mainstream and majority become marginalized and minority.

The measures in the difference principle would be imbuing equity or substantive equality by addressing the shortcomings of formal equality. While the quest for substantive equality will lead to some form of discrimination or differential treatment, it is justifiable as a means of leveling the playing field, given that equal rights will not deal with past injustices occasioned by formal equality that does not take into account historical and structural distinctions. The United Nations' Convention on the Elimination of All Forms of Discrimination Against Women, proposes differential treatment for women under Article 4 which decrees that adoption, by states parties of

temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Indeed even if national laws provide for equal treatment of all, those who are marginalized will continue to be relatively disadvantaged on account of historical impediments if 'equals have and are awarded unequal shares, or unequals equal shares'<sup>62</sup>. The compensatory mechanisms however must not be open ended and for all time. They need to be temporary with the expectation that they will be stopped when equality is attained.

56 See Part 3 of the Bill of Rights and Article 52 in particular to the effect that 'This Part elaborates certain rights to ensure greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons'.

57 Article 56 (a)

58 Article 56 (b)

59 Article 56 (c)

60 Article 56 (d)

61 Article 56 (e)

62 Aristotle, (1991) *The Nicomachean Ethics* (trans. David Ross, revised by J.L Ackrill & J.O. Urmson).



### III. Intersectionality and Multiple Exclusions

#### A. What is intersectionality/Multiple Exclusions?

The term intersectionality was popularized by Kimberle Crenshaw<sup>63</sup>, writing about the absence of the experiences of African American and women of colour in discourses on violence against women. Intersectionality calls for wholeness in looking at subjects of law that are marginalized in more ways than one.<sup>64</sup> Crenshaw argues that focusing on the most privileged group members marginalizes the 'multiply burdened'.<sup>65</sup> While critiques of the theory point to its limited application to race and feminism<sup>66</sup>, there is broad consensus that any one identity can encapsulate many intersections.<sup>67</sup> Indeed this phenomenon has been observed in other contexts. For instance, in dealing with marginalized communities, the concern with the community body politic masks the experiences of members of the community such as youth and women who are marginalized within the community. In a study on the experiences of women in forest dwelling and pastoralist communities in east Africa, we found that the quest for community recognition by the nation state takes precedence over all other identities within the community.<sup>68</sup> The identities of the internally marginalized groups are hence multiply excluded from mainstream community and national equality and non-discrimination discourses. The identity of the violators of the equality and non-discrimination tenets are also not clear cut raising the need to ensure that activities of all groups are captured while keeping the bigger picture in full view.<sup>69</sup>

Furthermore narratives of marginalization or discrimination against poor and less developed countries, women and other marginalized groups in a country, have tended to focus on men, rich countries and powerful elites as the villains without addressing the role of middle income economies, women and those marginally above the excluded in the broader picture of exclusions. This ignores the reality, namely that segments of the society at the intersections may either move permanently or intermittently from the excluded to the marginally included making the capture of the experiences of this segment difficult.<sup>70</sup> While those who move permanently in the excluded or included category may provide a semblance of stability, those who move intermittently introduce an element of fluidity that makes the study of the states or individuals at the intersection complicated.<sup>71</sup> This is why some scholars have raised the intra-categorical complexity of intersectionality to demonstrate the inadequacy of categorizing marginalized subjects raising the potential for categories to be exclusionary

63 Crenshaw, K., (1991) 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', *Stanford Law Review*, Vol. 43, No. 6, pp. 1241-1299

64 Nash, J. C., (2008), "Rethinking Intersectionality", 89 *Feminist Review* at p. 3

65 Crenshaw K., (1989), "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics", University of Chicago Legal Forum at p. 139.

66 Nash, J. C., *supra* note 64 ; Chang R.S. & Culp J. M., "After Intersectionality", *University of Missouri-Kansas City Law Review* Vol. 71 at p. 485

67 Nash, J. C., *supra* note 64 at p. 5

68 Research on *Access to Land and Land based Resources for women in forest dwelling and pastoralist communities in Kenya, Uganda and Tanzania* funded by the International Development Research Centre (IDRC) and carried out under the aegis of the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi. It covered the Ogiek and Maasai in Kenya; the Hadza'be and Maasai in Tanzania and the Batwa and Karimojong in Uganda. [Research reports on file with the author]

69 Walby S., Jo Armstrong and Sofia Strid , *Intersectionality: Multiple Inequalities in Social Theory*, originally published online 10 January 2012, <http://soc.sagepub.com/content/46/2/224>

70 *Ibid.*

71 McCall, L., (2005), "The Complexity of Intersectionality", *Signs* Vol. 30, No. 3 p. 1771



themselves.<sup>72</sup> For instance, class, which is critical in the structuring of inequalities,<sup>73</sup> is not recognized as a justiciable inequality in both the United States and the European Union. The latter has six grounds for legal action on illegal discrimination: gender, ethnicity, disability, age, religion/belief and sexual orientation.<sup>74</sup> These grounds intersect with each other to create for some subjects what is referred to as a 'matrix of domination'<sup>75</sup> which may be more overwhelming for some subjects than for others on account of agency and capacity to negotiate and move between different intersections as the situation demands.

## B. Intersectionality and Multiple Exclusions in Kenya's Constitution

From the discussion above, one might ask whether some inequalities have been privileged while others are overlooked. Intersectionality theory reminds us that privileging the treatment of some inequalities such as regional balance ignores the fact that inequalities are often mutually constitutive and could result in greater marginalization for others by 'reproducing power mechanisms ... and failing to address the creation of categories that are at the root cause of inequalities'<sup>76</sup>

Kenya's Constitution captures the collective Kenyan spirit for making the constitution in the Preamble. It recognizes the aspirations of all Kenyans for a government based on the essential values which include human rights, equality and freedom. Article 27 (6) of the Constitution lists grounds for legal action on illegal discrimination namely: race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The Court has had occasion to consider the issue of discrimination on the basis of gender in appointments to the Supreme Court.<sup>77</sup> Adverting to the issue of multiple exclusions (gender and regional in this case) and the possibility of privileging some inequalities over others, the judges observed as follows:

One may ask why should a lady Judge from Central, Western, Nyanza and Rift Valley Provinces get an edge over a male Judge from the upper Eastern or Northern Kenya who may actually have faced tougher and more difficult conditions in terms of economic, social, political and environmental struggle. It is also clear and we have taken judicial notice that young girls from Turkana, Pokot, Masai, Boran, Kuria and Northern Kenya and the whole of Coast Province suffer hardships that make them disadvantaged. If the point is to help the disadvantaged it should be based on something more than a female gender and unless one carries out an affirmative action from the grass root it would be difficult for the deserving persons to benefit from any kind of affirmative action. If the formula and criteria is not set properly, affirmative action would benefit an already advantaged lot.<sup>78</sup>

72 *Ibid.*

73 Hills J. et al. (2010), *An Anatomy of Economic Inequality in the UK: Report of the National Equality Panel*. London: Government Equalities Office. Accessed at <http://www.equalities.gov.uk/pdf/NEP%20Report%20bookmarkedfinal.pdf>

74 The EU Treaty of Amsterdam in 1997 and its Council Directives 2000/43/EC, 2000/78/EC, 2004/113/EC

75 Collins P. H., (2000), *Black Feminist Thought* Routledge New York

76 Ferree M. M., (2009), 'Inequality, Intersectionality and the Politics of Discourse: Framing Feminist Alliances', in Lombardo E. et al, eds., *The Discursive Politics of Gender Equality; Stretching, Bending and Policy Making* London Routledge p. 86

77 Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR, High Court of Kenya at Nairobi Petition Number 102 of 2011

78 *Ibid.* at, p. 30



The issue of hierarchy of equality has also been discussed within the European Union context with some arguing that gender has been privileged<sup>79</sup> and others arguing that the inclusion of gender among six other inequalities amounts to a downgrading of gender.<sup>80</sup> The reality however is that gender inequality has not been cascaded to all other inequalities through the often used mechanisms of gender mainstreaming, affirmative action and availing equal opportunities in the European Union which has had longer experience in this regard.<sup>81</sup> Indeed even in the European Union, there is uneven development in different inequalities because of the absence of mainstreaming in religion, belief, sexual orientation, race, disability and age. Inequalities such as gender which have been in the policies for long have broader strategies that do not easily take on board the other inequalities.<sup>82</sup> The result is that as the framework of equality develops and broadens, a 'configuration of more and less privileged inequalities'<sup>83</sup> emerges. This is likely to be the case in Kenya as the quote above seems to suggest. Regional balance may emerge as a defining principle with traditionally recognized inequalities such as gender taking a back seat. In the Research on *Access to Land and Land based Resources for women in forest dwelling and pastoralist communities in Kenya, Uganda and Tanzania* funded by the International Development Research Centre (IDRC) and carried out under the aegis of the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi cited above, the issues of internal exclusion have been noted alongside a strong narrative of external/national exclusion of the community as a whole. The benefits for the entire community in gaining recognition are considered more important than the rights of women and youth within the nationally excluded community. The latter are subjugated to the former and may be forgotten altogether when the fight for national inclusion is won by the community.<sup>84</sup> Indeed, as in the EU, the development of the equality institutional framework in Kenya is likely to generate perceptions of injustice and thus create tensions between people in different inequality categories. Intersecting inequalities rather than placing them side by side would provide a more robust framework for addressing them.<sup>85</sup>

### C. Utilitarianism or Intuitionism?

Why do we abhor inequalities? Is it because equality is right and should be the guiding principle of conduct as useful or for the benefit of most of us and results in the greatest happiness of the greatest number and is in the best interest of the majority of us? Is it because we know that it is the right thing to do and we believe in it as a primary truth and principle of ethics which we do not need to give reasons for? The discussion on utilitarianism and intuitionism goes to the core of the fallacy of equality and probably explains the hierarchies in the treatment of inequalities by the courts and in policy. Both assume that there are some underlying core agreements on for instance, the best interest for all and universally held fundamental truths. The Hohfeldian exposition on fundamental legal

79 Bell M., (2002), *Anti Discrimination Law and the European Union*, OUP

80 Lombardo E. & Verloo Mieke, (2009), Institutionalizing Intersectionality in the European Union? *International Feminist Journal of Politics* p. 478.

81 FIDA Case, *supra* note 77.

82 Lombardo E. & Verloo Mieke *supra* note 80 at p. 481.

83 *Ibid.*

84 Kameri-Mbote P., and Jacinta Onyango Oduor, (2007), 'Following God's Constitution: The Gender Dimension in the Ogiek Claim to Mau Forest Complex', in Anne Hellum et. al, *Paths are Made by Walking: Human Rights Interfacing Gendered Realities and Plural Legalities*, Weaver Press, pp. 164-201

85 Lombardo E. & Verloo Mieke *supra* note 80 at p. 481.



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85 Lombardo E. & Verloo Mieke *supra* note 80 at p. 481.



conceptions lends some credence to utilitarianism in the framing of jural correlatives and opposites, the interaction of which and tempered by the equality and difference principles propounded by Rawls, brings about a semblance of balance in society.

For intuition, Fletcher puts out the argument that equality under law is grounded in a 'holistic view of human dignity' applying to every person on account of their being a person and independent of particular criteria or purposes.<sup>86</sup> This would also find support in Aristotle's proposition that things that are alike should be treated alike and things that are unlike should be treated unlike to the extent that they are unlike.<sup>87</sup> Drawing on both the individualist and collectivist claim to equality, Fletcher traces the basis to a creator who made all men equal.<sup>88</sup> He distinguishes between the grounding for equality under law predicated on the desire to avoid disenchantment and the dictum of the rule of law ideal for just ordering of societies, guaranteeing social rights and government accountability, seeking just outcomes that are right, fair, appropriate, deserved and protection from arbitrariness. He argues however that there is a distinctive theological foundation for commitment to equality which alone explains the admission of previously excluded groups such as slaves into the ambit of equal rights with their former owners.<sup>89</sup> In Fletcher's argument, we also find explanations for utilitarianism in the United States Constitution of 1787 and Bill of Rights in 1791 where class distinctions are rejected on the one hand but hierarchies on the bases of gender and slavery are retained on the other hand.<sup>90</sup> Relying on the creation of Adam, he argues that we are descendants of a single being made in the image of God.<sup>91</sup> That holistic approach of humanity as the image of God does not have room for tolerating outright discrimination for the sake of state interests however compelling as courts sometimes do.<sup>92</sup> Indeed in doing so, courts affirm a differentiation based on privilege and disadvantage.<sup>93</sup>

Once we accept equality and non-discrimination as important principles, drawing from the analysis above, we need to identify good bases for excluding some people. This is especially critical if we accept that 'all men are born equal'. In Fletcher's words, 'when the state tolerates ingrained social attitudes that violate the principle of human equality, it permits the evil to escape unchallenged.'<sup>94</sup> Yet this seems to be the norm rather than the exception.

In the next section I problematize the concept of equality using legal subjects (states in international law; gender; and land tenure regimes) on the one hand and the agency of producing, legitimating and disseminating legal knowledge and information about equality, rights and subjects on the other.

86 Fletcher G. P., (1999), 'In God's Image: The Religious Imperative of Equality under Law', *Columbia Law Review* Vol. 99 p. 1608

87 Aristotle, (1991), *The Nicomachean Ethics* (trans. David Ross, revised by J.L Ackrill & J.O. Urmson).

88 Fletcher *supra* note 86. Cf. Westen P., (1982) The Empty Idea of Equality, 95 *Harvard Law Review* p. 537.

89 Fletcher *supra* note 86.

90 *Ibid.*

91 *Ibid.* at p. 1619. This he says is the same idea propounded by Immanuel Kant in secular terms – 'the humanity in each of us is of infinite value, and ...we must respect the humanity of others as we respect the humanity in ourselves'. See Immanuel Kant, *Foundations of the Metaphysics of Morals*, (Robert P. Wolff ed., Lewis W. Beck trans., Bobbs-Merrill Co. 1969 (1785)

92 Fletcher *supra* note 86 at p. 1619.

93 The categories he gives to illustrate privilege and disadvantage are: white and black; men and women; citizens and aliens; legitimate and illegitimate children; heterosexuals and homosexuals; aristocrats and commoners in Britain and Brahmin and untouchables in India. He explains the basis of the privilege or superiority as cultural or religious and find reflection in law because of wide support from the society.

94 Fletcher *supra* note 86 at p. 1629.



## IV. The Fallacies of Equality

However one conceptualizes equality and the related principle of non-discrimination, there are inherent incongruences that vitiate its articulation with reference to specific situations and legal subjects. For instance, when a statement is made that all sovereign states are equal or that all human beings are equal (and should therefore be treated alike), there is an assumption that all are starting from the same space and with equal natural endowments such that any differences arise more from capacity of the legal subjects than from inherent inequalities. This proposition as well as that of an original position insuring equality and fairness does not obtain for states and individuals. No categories of like legal persons exist and this affects the principle of like treatment.<sup>95</sup>

Moreover, according to Westen, rights of race and sex which are included in many equality clauses can be stated as independent rights without reference to equality or likeness.<sup>96</sup> To discount race or sex in determining how people fare for purposes of equality and likeness however, is to leave out critical identifiers that are sometimes relevant in determining how such people should be treated.<sup>97</sup> Indeed the argument against affirmative action for women in elective and appointive positions in Kenya has been predicated on equality of treatment and neglected the differences that warrant different treatment.

### A. Subjects of Law

#### 1. States in International Law

All sovereign states are equal according to Article 2.1 of the UN Charter.<sup>98</sup> This means those old and new states; rich and poor states; powerful and marginal states are equal and entitled to the same treatment. But are they, in reality? Endowments and historical circumstances nuance this platitude and it may ring hollow when one looks at the actual situation on the ground and the relationships between states. Indeed as Cullet argues, legal equality translated into rules which apply to all states equally is fictional.<sup>99</sup> For instance, many African states were founded on the basis of inequality with their former colonising states negating the sovereign equality principle. It would be fallacious to say that Britain and Kenya are equal because of the historical circumstances surrounding their relationship. Again new emergent states such as South Sudan, though well endowed with resources, join the community of states when some structures, rules and relations have been shaped and concretized. They need to catch up with those that have been there longer with explicit and implicit tensions between them and older states especially the one from which they seceded.

This has necessitated the working of rules to enable differently placed but equal states to relate cooperatively rather than through confrontation.<sup>100</sup> This is the case particularly in the realm of international environmental law. This body of law has developed in an *ad hoc*

95 Westen, *supra* note 88 at p. 537.

96 *Ibid.* at p. 565

97 *Ibid.* at p. 566

98 One of the consequences is that States are juridically equal. See, e.g., G.A. Res. 2625 (XXV), *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations*, 24 Oct. 1970, reprinted in 9 ILM 1292 (1970).

99 Cullet, P., (1998) *Differential Treatment in International Environmental Law: A New Framework for the Realisation of Sustainable Development*, (Ann Arbor, MI: UMI Dissertation Services).

100 *Ibid.*



manner and in response to environmental problems that nation states have encountered.<sup>101</sup> Climate change, biological diversity and species' loss among others have brought states together in search for cooperative solutions. For instance, while the Convention on Biological Diversity<sup>102</sup> recognises the sovereignty of states to the biodiversity found within their territories, it also notes that biological diversity is an issue of common concern.<sup>103</sup> The notion of common concern adverts to the reality that environmental concerns are global and countries which host biodiversity, are held as trustees of that diversity for the good of all humanity.<sup>104</sup> Common concern here implies recognition of the global importance of biodiversity but does not detract from the principle of permanent sovereignty over natural resources.<sup>105</sup> It seeks to facilitate and promote global co-operation for the conservation of biodiversity without forcing any given state to participate in this process. It is in this vein that financial mechanisms for the conservation of biodiversity have been put in place to assist developing countries.<sup>106</sup> Assistance to developing countries to comply with their international environmental obligations is also a feature in the climate change arena.<sup>107</sup> In this latter regime the equity principle of common but differentiated responsibility is the basis of different treatment accorded to developing countries which took differentiated responsibilities for climate change and respective capabilities of states into account in assigning the role to protect the climate system for the benefit of present and future generations of humankind.<sup>108</sup> Developed country Parties who bore more responsibility for emissions than their developing country counterparts took the lead in combating climate change and the adverse effects thereof. It is important to note that climate change, like other environmental problems started as a development issue pitting developed countries against developing ones. The treatment of the two sets of countries as unlike, with the former having obligations to reduce greenhouse gases while the latter provided opportunities for

- 101 Birnie P., et al, (2009), *International Law and the Environment*, Third Edition, Oxford University Press, Oxford.
- 102 United Nations Conference on Environment and Development: Convention on Biological Diversity- Done at Rio de Janeiro, June 5, 1992, *reprinted in* 31 I.L.M. 818 (1992) at Articles 1 and 15
- 103 The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biodiversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.
- 104 Bragdon, S., (1992), 'National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity?', 33 *Harvard International Law Journal* p. 381.
- 105 *See e.g.*, Principle 2(b) of the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (*Report of the United Nations Conference on Environment and Development*, United Nations, Rio de Janeiro, 13 Jun. 1992, *reprinted in* 31 I.L.M. 881 (1992).
- 106 The realisation that developing countries have competing basic and developmental needs that may make them ignore or neglect environmental concerns has led to the development in international environmental law of differential treatment of countries in so far as obligations are concerned. In these agreements, developed countries have been required to assist developing ones to meet their obligations through technology transfer or funds. *See* Daniel B. Magraw, (1990) 'Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms, 1 *Colorado Journal International Environmental Law & Policy* p. 69 whose discussion of differential, contextual and absolute norms as used in international environmental law captures very well the evolution towards concessions for developing countries in certain conventions and the basis for this development. *See also* the Montreal Protocol on Substances that Deplete the Ozone Layer, United Nations: Protocol on Substances that Deplete the Ozone Layer- Done at Montreal, September 16, 1987, *reprinted in* 26 I.L.M. 1541 (1987).
- 107 United Nations Framework Convention on Climate Change, New York, 9 May 1992, *reprinted in* 31 ILM 849 (1992) and Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 Dec. 1997, Decision 1/CP.3/Annex, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Third Session*, Kyoto, 1-11 Dec. 1997, UN Doc. FCCC/CP/1997/7/Add.1 [preliminary version *reprinted in* 37 ILM 22 (1998)].
- 108 Article 3 United Nations Framework Convention on Climate Change, New York, 9 May 1992, *reprinted in* 31 ILM 849 (1992).



emission reductions through activities implemented jointly with the developed countries. Some developing countries that are now on a high emission trajectory could lose the advantage of differential treatment when a new climate change regime that takes emissions as the determinant in assigning responsibilities comes into effect. This regime is proposed for 2015.<sup>109</sup>

The equality of states is therefore nuanced by pragmatic considerations that necessitate different treatment for equally sovereign but differently endowed states. Another example is the River Nile which is one of the world's greatest rivers, flowing for 6825 kilometres through much of North-Eastern Africa and draining approximately 2.9 million square kilometres of territory or roughly one tenth of the African continent,<sup>110</sup> the main river flowing through Uganda, Ethiopia, Sudan and Egypt. The Nile basin covers eleven states, namely: Kenya, Uganda, Tanzania, Rwanda, Burundi, the Democratic Republic of Congo (DRC), Ethiopia, Eritrea, South Sudan, Sudan and Egypt. Two riparian countries, Sudan and Egypt, benefit most from the waters of the Nile. This is because of agreements entered into during the colonial era<sup>111</sup> which protect Egypt's use of the water from the river Nile. It has even been asserted that "Egypt is the Nile and Nile is Egypt."<sup>112</sup> Egypt's favoured position draws from both the historical legal instruments and its relative economic, political, and military strength compared to other co-riparians.<sup>113</sup>

The independence of the states in the basin gave rise to the legal question of whether or not the treaty commitments made by the predecessor states are binding on post-colonial states.<sup>114</sup> The lack of agreement on this question is responsible for the divergent positions adopted by Egypt and the other states in the basin. While the latter contest the validity of the agreements, the reality is that the use of Nile waters by upper riparian states is limited and Egypt continues to have pre-eminence in the control of the Nile and unimpeded use of the Nile for national development. The Nile Basin Cooperative Framework Agreement concluded under the Nile Basin Initiative in 2010 seeking to iron out the differences between the basin states has not yet come to force because of the contending claims of the lower riparian countries.

The question to ask is whether the upper riparian countries that were under colonial rule when the agreement was entered into have the same rights as Egypt. Despite the fact that all the states are sovereign states, there are factors that affect their enjoyment of equal rights to the Nile waters such as age (some only became independent in the last two decades);

109 COP 17 of the United Nations Framework Convention on Climate Change, 28 November to 9 December 2011 Durban, South Africa

110 Okidi, C.O., (1994) "History of the Nile and Lake Victoria Basins Through the Treaties" in P. P. Howell & J.A Allan, eds *The Nile: Sharing a Scarce Resource* Cambridge University Press, Cambridge, and Brunnee, J and Toope, S *The Changing Nile Basin Regime: Does Law Matter?* 43 *Harvard International Law Journal* 105.

111 There are numerous treaties of this nature, some captioned as "Exchange of Notes". While these agreements are listed (and some reproduced) online at [www.internationalwaterlaw.org/africa/html](http://www.internationalwaterlaw.org/africa/html), it should be noted that they do not appear in regular treaty publications such as UNTS or the LNTS. The agreements most relevant in this discussion are: the 1929 Agreement between the UN and Egypt Relating to the Use of the Nile Waters for Irrigation Purposes; the 1953 Agreement between UK and Egypt regarding the Construction of Owen Falls in Uganda; and the 1959 Agreement between Egypt and Sudan for the Utilization of the Nile Waters.

112 Marcus A.D., (1997), 'Water Fight', *Wall Street Journal*, at 1.

113 Kameri-Mbote, P. & Kithure Kindiki, (2008) 'Water and food security in the River Nile Basin: The perspectives of governments and NGOs of upstream countries', in Hans Günter Brauch et al., eds., *Facing Global Environmental Change: Environmental, Human, Energy, Food, Health and Water Security Concept*, Berlin – Heidelberg – New York – Hong Kong – London – Milan – Paris – Tokyo: Springer-Verlag, Autumn pp. 651-659

114 *Ibid.*



resources at their disposal and capacity to vindicate their claims. Egypt's claim to the Nile waters is predicated on the theory of absolute territorial integrity where a lower riparian state has the right to the full and uninterrupted flow of water of natural quality. The upper riparian may not interfere with the natural flow without the consent of downstream states. This principle is the basis of the 1929 and 1959 Nile treaties.<sup>115</sup> This theory favours downstream states against upstream states.

The 1997 UN Convention, however seeks to balance the rights and duties for both upstream and downstream states. The claim of downstream states is based on their prior appropriation rights or 'natural and historic rights' to internationally shared rivers. This principle allows any riparian that puts the water of an internationally shared river to use first to establish prior and incontestable rights over the particular use. Upstream states rely on the principle of equitable utilization, already followed in treaty and customary international law. It is the most widely endorsed theory that treats international watercourses as shared resources subject to equitable utilization by all riparian states.<sup>116</sup> It rests on the foundation of equality of rights and relative sovereignty but should not be confused with equal division. It calls for accommodation of the interests of all riparian states. It has found support from case law, state practice, treaties and other codifications. In the *River Oder Case*<sup>117</sup> the Permanent International Court of Justice (PCIJ), which is the progenitor of the ICJ invoked the exigencies of justice and considerations of utility, favouring "a community of interest" in the utilization of an internationally shared river by all riparians based on equality of rights on the whole of the navigable part of the River Oder. Although this case involved navigation, the same principle is applicable to the consumptive, non-navigational uses of international watercourses.

## 2. Gender

Gender refers to more than *physical differences* between male and female and encompasses *social constructions of maleness and femaleness* which often translate into *power relations* between men and women. Culturally determined patterns of behaviour (gender roles) determine the rights, duties, obligations and status assigned to women and men in society.<sup>118</sup> The situation is made more complex in former African colonies by the existence of a plurality of norms where the official legal system provides an operating environment for different legal orders. For example, Kenya's Constitution provides for the operation of different laws as long as they conform to the Constitutional provisions.<sup>119</sup> Religious and customary laws and international law form part of the law of Kenya. Women find themselves situated in the intersection between different systems of laws and a plethora of normative orders that influence the choices that they can make and the decisions that are reached about their lives by others. Thus legal pluralism takes on a new meaning, recognising that there are regulatory and normative systems other than formal law that affect and control people's lives. In most cases, there seems to be a conspiracy to deny women full enjoyment of their rights even when these are guaranteed in law.

115 *Ibid.*

116 Birnie, P., *supra* note 101.

117 Series A No 23-Series C No 17-11, Judgment of September 10<sup>th</sup>, 1929.

118 Kameri-Mbote P., (2003) *supra* note 54.

119 Article 2



For instance, normative equality for men and women in most spheres of life has been part of Kenya's legal and policy terrain for a long time. However, according to a 2009 survey by the Ministry of Gender, Kenyan women comprise only 30.9 per cent of the public service workforce with 72 per cent of these engaged in lower service cadres. The situation is replicated in the judiciary which is currently working on redressing the gender imbalance in ongoing recruitment processes. Perhaps the worst arena is political representation – in the current Parliament only 10 per cent of the seats are held by women. This brings out the fallacy of equality in gender neutral laws which operate in a gendered reality that is skewed against women. In a recent study on women in politics, cultural barriers and political structures and institutions were cited as some of the hindrances to women's advancement.<sup>120</sup>

A number of examples will suffice to illustrate this point below:

### (a) Elective and Appointive Positions

The quest for equality in the sphere of politics has been long and winding. Hon. Phoebe Asiyo tabled a motion for affirmative action to increase women's participation in parliament and local authorities to at least one third (33.3%) in 1997 which was soundly defeated. Hon. Beth Mugo tabled a similar motion in 2000 which was referred to the Constitution Review Commission of Kenya (CKRC).<sup>121</sup> One would therefore have expected that with the promulgation of the Constitution in 2010 which included a robust equality and non-discrimination provision in Article 27, these issues would be addressed once and for all. The provision for 'not more than two thirds of any gender' in appointive and elective decision-making positions and the call for measures of affirmative action to deal with past discrimination were aimed at precisely the kind of situation that Hon. Asiyo and Hon. Mugo had sought addressed earlier without success. The absence of implementing mechanisms has however made the realization of the intention to increase women in elective positions very contracted. The refusal by Members of Parliament, mainly men, to change the political party and elections rules has brought home the reality that the requirement on "not more than two thirds" will not be satisfied through the ballot box owing to unfavourable rules, past injustices, cultural and structural constraints. The Attorney General moved to the Supreme Court to seek an advisory opinion on this point praying that the Court determines how to address the matter owing to the ambiguity.<sup>122</sup> The majority opinion in this reference determined that the two thirds rule was intended to be progressively realized. In his dissenting opinion however, the Honourable Chief Justice, Dr. Willy Mutunga noted that taking the history of Kenya into account and the constitutional provisions on non-discrimination and national values, political and civil rights demanded immediate realization.

In the FIDA Case on gender considerations in appointments to the Supreme Court cited above, the court relied on a number of decided cases from Kenya and other jurisdictions

120 Kamau, N., (2010), *Women and Political Leadership in Kenya: Ten Case Studies*, Heinrich Boll Stiftung, East and Horn of Africa, Nairobi.

121 Kabira, W. M., (2012), *Time for Harvest: Women and Constitution Making in Kenya*, University of Nairobi Press, Nairobi.

122 Republic of Kenya, In the Supreme Court of Kenya, (2012), *In the Matter of an Application for Advisory Opinion under Article 163 (6) of the Constitution and In the Matter of Article 8, Article 27(4), Article 27(8), Article 96, Article 98, Article 177 (1) (b), Article 116 and Article 125. Article 89 (2), Article 89 (4), and the Consequential Provisions in the Sixth Schedule Section 27 (3) of the Constitution of the Republic of Kenya and In the Matter of the Principle of Gender Representation in the National Assembly and in Senate.*



especially India and USA to hold that “a mere production of inequality is not enough to hold that equal protection has been denied.”<sup>123</sup> According to the court, it was necessary to establish lack of equal protection in order to prove the exercise of an invidious discrimination. Through those cases, the court was emphatic that the “law of equality permits many practical inequalities” and “the inequality produced in order to encounter the challenge of the Constitution must not be actually and palpably unreasonable and arbitrary.” The court summed the issue of unequal protection of the law in the following words: “In other words a classification having some reasonable basis does not offend merely because it is not made with mathematical niceties or because in practice it results in some inequalities.”<sup>124</sup> The judges advised the Petitioners and their supporters to

Keep your feminine missiles to their launch pads *until the State acts on policies and programmes as are envisaged in Article 27(6) and (8) and the Legislature has legislated accordingly to set the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution within the time frame set by the Constitution or in default of their complying within that time frame.*<sup>125</sup> (Emphasis mine)

The questions one asks in light of this decision are: *firstly*, why bother to have equality and non-discrimination clauses in a constitution when, in the judges’ view, they are designed to not offend merely because in practice they result in inequalities. *Secondly*, must we wait for policies and laws to be passed to benefit from the equality and non-discrimination principle? What happens as is the case currently in Kenya, if those supposed to pass the laws on equal opportunities resist them or fail to pass them expeditiously? Do the rights lie in limbo at the pleasure of legislators and state functionaries? *Thirdly*, given the experience with the enactment of laws on elections and political parties and the failure to institutionalize gender representation provisions, is there any hope that Parliament would come up with favourable laws where equal opportunities are concerned? Further, what can we expect from a predominantly male parliament where members have assumed the role of guardians of the bastions of patriarchy and the allied citadels of male political privilege?<sup>126</sup> Law makers are likely to be the gate-keepers defending their spheres of influence threatened by a perceived incoming deluge of females wanting to take what they assume to be men’s entitlement. *Fourthly*, how do we ensure that new claimants for rights are accepted by those already enjoying the rights who are likely to erect insurmountable obstacles in the way of those seeking to share their privileges?

### (b) Employment

Another area where the fallacy of equality is manifest on gender considerations is employment. If men and women are equal and entitled to the same opportunities for employment, why are some professions the preserve of men such as the military? In a study on the working conditions of married female academic staff at the University of Nairobi in 1994, I found that there was inequality between male and female academic staff members.<sup>127</sup>

123 FIDA Case, *supra* note 73.

124 *Ibid.*

125 *Ibid.*

126 Kameri-Mbote P. & Dr. Celestine Nyamu Musembi, (2011) ‘Assaulting the Citadel of Male Political Privilege: Political Party Lists as the Site of Contest for Gender Balanced Representation’, August 27.

127 Kameri-Mbote P., (1995), *Protection of the employed women’s rights in Kenya: A Case-study of the female academic staff members at the University of Nairobi*, Project paper submitted in partial fulfillment of the requirements for the award of the Diploma in Women’s law (Dip.WL), Faculty of Law, University of Zimbabwe.



That was before the 2010 Constitution. I had predicated my arguments on the then absence of housing and house allowance for married female academic staff members; the limitation of medical benefits to the female staff member and her children excluding the spouse; and the denial of annual leave to a female academic staff member in any year that they took maternity leave.<sup>128</sup> This has since changed but the question I still ask is: are female and male academic staff members equal and do they have the same opportunity, space and facility to go up the academic ladder? On the face of it yes but when I look again I see the latent inequalities inherent in the intersections between the private/ reproductive and the public / productive domains for female academic staff members.

On average a female staff member joins the ranks of the academy in the twenties and thirties which is when she is getting married and having children. Thanks to the women's movement in Kenya, women can now take maternity leave for three months in addition to annual leave entitlement for the year in which she takes maternity leave<sup>129</sup> and fathers are entitled to two weeks<sup>130</sup> paternity leave. When female staff members get married, there are real implications for their agency and availability to engage in public/productive work and private/reproductive work. When they take maternity leave for three months (which they could choose to combine with their annual leave to give them more time with the baby), they are totally removed from the public/productive work in the academy and could miss out on vital steps required to move up the academic ladder. There are tough choices to be made: to delay having children or to have them? To go abroad for further studies or to stay, have and raise children? What is the rational choice? Whatever choice one makes, there are implications. These choices are more personal to female than to male academic staff members. While equality is the norm, inequalities also creep into the decisions on whether to hire or not to hire women in a particular age range when it is expected that they will need to take time off to have and raise babies. After the child bearing years, depending on whether the woman survived in the academy, she becomes androgynous and her gender does not matter yet the years when gender roles influenced her choices are so critical for her progression up the academic ladder and it may be already too late.

### (c) Ownership and Inheritance of Land

Ownership which constitutes the overall right to land is a factor of social relations in any community even though theoretically it is vested in the entire community. While the perception is that the entire community owns the land, it is clear that the entity that has control can exercise rights akin to ownership to the detriment of other members of the community. The rights of access may be limited by the person that has control over the land. In this way, ownership and control of land constitutes essential validation of social, economic and political autonomy for individuals as well as communities. Access to property in many societies is predicated on three things: membership to a given society, functions relating to the property and the performance of reciprocal obligations owed to others in the society. The socially constructed roles of men and women are integral to the delineation of ownership and access rights. Control for its part entails the power to distribute and redistribute access rights to members of the society. This power is determined by the power relations between members of the community. In patriarchal settings, the role is vested in

128 *Ibid.*

129 Section 29 (1) and (7) of the Employment Act, 2007

130 Section 29 (8) of Employment Act, 2007



the older male members of a community. Women's access to land is principally through vicarious ownership by men as husbands, fathers, uncles, brothers and sometimes sons.<sup>131</sup>

Access to, control over and ownership of land is influenced by diverse factors which include gender, age and marital status. Land is mainly controlled by male household heads on the assumption that the rights are held in trust for all in the household. To that extent, women's autonomy in the social, political and economic realms is circumscribed by their lack of control over land. This is significant taking into account that land represents the vehicle through which women can move from the reproductive (private and non-work) realm to the productive (public and work) realm.

Flowing from the principle of equality, women should be able to own land equally with men but land is so colonized by patriarchal norms as is discernible from the above rendition. The predominance of patriarchy in law, policy and practice ensures that the land has its owners and these are not women. Even where law guarantees women's equal rights to property with men as is the case with the Law of Succession Act 1981, the realization of the right is contested as is evident from the many cases brought by sons, brothers, nephews and uncles fighting women's succession rights. It is also notable that women's rights to land were among the nine most contentious issues in the Proposed Constitution of Kenya that was rejected in a national referendum in 2005.<sup>132</sup>

### 3. Property

The private property rights institution has been presented as a panacea for the tragedy of the commons around the world.<sup>133</sup> It is with this understanding that the private or individual tenure system was superimposed on pre-existing notions of ownership in Kenya. The traditional communal nature of land holding in Kenya was perceived by colonial agronomists as a structural handicap to the generation of economic gains for the settlers and the colony.<sup>134</sup> The solution was conceived in terms of privatisation of land rights. However, the appropriation by settlers (facilitated by the colonial authorities) and the post-independence state of rights in land amounted to the expropriation of the native communities' rights to the land.<sup>135</sup> These introduced conceptions of property rights assumed equality of actors in the negotiation of entitlements. This clearly was not the case with the colonisers and the Africans and the state and its subjects.

While the colonial state concentrated on entrenching and protecting the private rights of settlers, it neglected the rights of the natives which were communal in nature. This perpetuated a dual system of property rights<sup>136</sup> and led to the natives' clamouring for land

131 UNHCS (1999) Women's rights to land, housing & property in post conflict situations & during reconstruction: A global overview. Land Management Series no.9.

132 Republic of Kenya, (2006), *Final Report of the Committee of Eminent Persons*, Government Printer.

133 This theory postulates that when property rights are not assigned in situations of open access, there is an incentive to over-exploit renewable resources. See Hardin, G., (1968) 'The Tragedy of the Commons', *Science*, Vol. 162.

134 Okoth Ogendo, H. W. O., (1991) *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, ACTS Press, Nairobi.

135 Kameri-Mbote, P., (2002) *Property Rights and Biodiversity Management in Kenya: The case of Land Tenure & Wildlife*, ACTS Press, Nairobi.

136 See Republic of Kenya, (2002), The Commission of inquiry into existing land law and tenure systems (Njonjo Commission), Government Printer describing economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasantry. The duality was manifest in systems of land tenure based, on principles of English property law versus a largely



rights and demanding that the colonial state restore the lands stolen from them. This in turn awakened the colonial administration to the need for tenure reform.<sup>137</sup> The colonial agronomic experts viewed the solution to the African land problem as related to the structure of access to and use of land in areas occupied by the natives. They specifically identified two issues as inimical to proper land use and agricultural development - the fragmentation of land as reducing returns from labour and time expended on the land and incessant disputes.<sup>138</sup>

The solution to the problem in their view was to individualise title to land and intensify agriculture in African areas through technological improvements. It was hoped that this would increase production and divert the attention of the Africans from the settler occupied areas.<sup>139</sup> The assumption here was that individual proprietorship would generate entrepreneurship irrespective of the injustices occasioned by expropriation of African rights to land by the settlers.<sup>140</sup> A Commission was set up to investigate African tenure systems and make recommendations on ways of improving them and making them contribute to the economic development of the colony.<sup>141</sup> It recommended the consolidation of land holdings of families into one, followed by the adjudication of property rights in that land and the registration of individuals as absolute owners of land adjudicated as theirs. It also recommended the registration of groups of pastoralists as owners of large blocks of land with fixed boundaries<sup>142</sup>, upon realising that the individualised tenure system proposed would not work in areas where nomadic pastoralism was practiced.<sup>143</sup> These processes ended the perceived uncertainty of customary tenure already considerably modified by years of European contact.

The assumption was that traditional tenure schemes would completely fall into desuetude and be systematically replaced by the individualised tenure system that was introduced by the colonial authorities and inherited by the independence governments.<sup>144</sup> Such accounts have over time been negated by the reality on the ground where despite the institutionalisation through law of an individualised tenure system, customary notions of communality still abound.<sup>145</sup> Before the promulgation of the Constitution of Kenya 2010, land in Kenya was classified as individual/private, government and group or community (trustland and group ranches) and governed under different laws.

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neglected regime of customary property law; a structure of land distribution characterised by large holdings of high potential land, versus highly degraded and fragmented small holdings; an autonomous and producer controlled legal and administrative structure for the management of the European sector versus a coercive control structure for the African areas; and a policy environment designed to facilitate the development of the European sector of the economy by under-developing its African counterpart.

137 Okoth Ogendo, H. W. O., *supra* note 134.

138 Swynnerton, R. J. M., (1954) *A Plan to intensify the development of African agriculture in Kenya*.

139 *Ibid.*

140 Kameri-Mbote, P., (2002), *supra* note 135.

141 Swynnerton, R. J. M., *supra* note 138.

142 This was done through the Land (Group Representatives) Act of 1968.

143 *See Report of the Mission on Land Consolidation and Registration in Kenya 1965-1966*(1965) which was instituted to look at the status of registration in the country and make recommendation on the general direction that it should take.

144 Shipton, P., (1988) "The Kenyan Land Tenure Reform: Misunderstandings in the Public Creation of Private Property", in *Land and Society in Contemporary Africa* p. 91 discussing the overlap in traditional and introduced tenure systems among the Luo of Kenya.

145 Okoth Ogendo, H. W. O., *supra* note 134.



Customary land rights had been largely neglected in Kenyan law.<sup>146</sup> The absence of clear and secure property rights for communities has been an impediment to full enjoyment of the incidents of property holding, productive use of land and national development. This also became a perverse incentive for communities to move away from community rights leading to defensive titling of land within the trustlands and the group ranches into individual holdings to protect their rights from encroachment by the government or other entities.

It is within this context that both the Constitution of Kenya 2010 and the first ever land policy in Kenya – Sessional Paper No. 3 of 2009 – provided for the recognition of community rights to land. They sought to right the wrongs in the neglect of community tenure. The provision for community tenure alongside public and private tenure<sup>147</sup> is a good starting point for treating the three tenure categories equally. The Constitution vests community land in communities identified on the basis of ethnicity, culture or similar community of interest.<sup>148</sup> The definition of ‘community’ in the glossary of terms included in the National Land Policy is also instructive namely,

Community refers to a clearly defined group of users of land, which may, but need not be, a clan or ethnic community. These groups of users hold a set of clearly defined rights and obligations over land and land-based resources.

Despite the constitutional recognition of community rights and its elaboration in the National Land Policy, there is as yet no legal framework on community rights. Private and public land tenure under the Constitution has already been elaborated under the Land Act<sup>149</sup> and the Land Registration Act.<sup>150</sup> The separation of community land legislation from public and private land legislation in Constitutional implementation is a departure from the National Land Policy’s proposal for a single Land Act and Land Registration Act. While both the Land Act and Land Registration Act make references to community land, the fact that there is no Community Land Act yet creates an implicit hierarchy in tenure regimes. This perpetuates the perception that community land tenure is less important and therefore a less secure form of tenure relative to public and private land tenure.<sup>151</sup> Equality of tenure regimes under these circumstances is more of a platitude than a reality. The western notion of a dominant property holder – an individual or corporate entity – has struggled to accommodate other property holders that do not fit in the defined categories. This is the problem for communities who are not perceived as quintessential loci for grant of rights.

It follows of essence that if the tenure types are not equal, the holders of rights under those different tenure types cannot be equal or enjoy the same quantum of rights under the Constitutional protection of the right to property.<sup>152</sup> Community land under Article 63 of the Constitution includes group ranches; land lawfully transferred to a specific community by any process of law; land declared to be community land by an Act of Parliament; and land

146 Akech, J. M., (2001). *Rescuing Indigenous Tenure from the Ghetto of Neglect: Inalienability and Protection of Customary Land Rights in Kenya*, ACTS Press, Nairobi

147 Article 61 (2)

148 Article 63 (1)

149 Kenya Gazette Supplement No. 36 (Acts No. 6) 2012.

150 Kenya Gazette Supplement No. 36 (Acts No. 3) 2012.

151 Kameri-Mbote, P., (2009), “The Land Question in Kenya: Legal and Ethical Dimensions”, in *Governance: Institutions and the Human Condition*, Strathmore University and Law Africa pp. 219-246

152 Article 40.



lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments.<sup>153</sup> The groups that fall in these categories are also in the marginalized and minority communities bringing in the issue of intersectional/multiple exclusions.

## B. Knowledge Hegemonies: Control of Knowledge and Information Generation and Dissemination

Knowledge is a powerful way of highlighting the plight of holders of rights and the realization of the ideal of equality. Information about the marginalization of subjects of law will only be available if there is research about those subjects and if such information is channeled through accessible media. For academics, the media includes journals (print and electronic); books and the platforms availed through the internet. There are also other processes of validation of academic work such as peer review. Currently, research from Africa and work by African scholars is not widely available in the mainstream publication networks. The knowledge produced by African scholars on the African continent is also not available in knowledge and information platforms available globally. The inaccessibility of the information does not only affect the global audience but also most scholars within the continent and in the country where it is generated. Katebire<sup>154</sup> laments the poor visibility of Africa scholarship and notes that scholarly publishing in Africa is below par.<sup>155</sup>

We noted above that the equality of states is fallacious because the economic, military, endowment, historical relations and 'age' advantage some states over others. This colours the availability and accessibility of knowledge and information about African states. African universities have additionally had to contend with reduced availability of funds for research as states have invested less in higher education and in some cases required universities to generate income.<sup>156</sup> The problem is exacerbated in the case of legal scholarship because legal education leans heavily on imparting effective legal practice skills and not legal research.<sup>157</sup>

Investment in income generation by universities also takes scholars away from research as their time is diverted to either more teaching and larger classes or to consultancy work. Another factor that militates against the generation of knowledge by African scholars is the need to supplement their income. Remuneration for academic staff in Kenya was very low until the late 1990s. While the situation has somewhat improved, a lot more still needs to be done. In the legal academy for instance, most teachers are qualified and licensed to practice law and run vibrant legal practice firms alongside their teaching engagements leaving little room for research and publication. It is perhaps the greatest indictment of the Kenyan legal academics in Kenya and the Diaspora that we use British and American texts as our core instructional materials over forty years since the first law school was established despite the developments in Kenyan law.

153 Article 63 (2)

154 Katebire, A.K., (2008), 'Promoting Visibility of African Scholarship through Access to Appropriate Technology', Paper presented at a Conference on Electronic Publishing and Dissemination, 6-7 October, Dakar, Senegal at p. 3.

155 *Ibid.*

156 Mamdani, M., (2007), *Scholars in the Market Place: The Dilemmas of Neo-Liberal Reform at Makerere University, 1989-2005*, Fountain Publishers, Kampala.

157 Lawal, V., (2007), 'Legal research and Legal Education in Africa: The Challenge for Information Literacy', *Starr Workshop Papers*, Paper 5 at [http://scholarship.law.cornell.edu/sws\\_papers/5](http://scholarship.law.cornell.edu/sws_papers/5)



Where legal researchers in Kenyan law schools are involved in research, it is usually conducted outside the University context with non-governmental organizations or other networks. It has for example been contended that Kenyan legal and other academics in Universities did not participate in the Constitution Review process.<sup>158</sup> This is despite that fact that many commissioners, officers and researchers in the Constitution of Kenya Review Commission were drawn from active and retired academics and students from the Universities.<sup>159</sup>

The absence of platforms in universities where academics can collectively contribute to national processes and where universities show case the research and publication of their faculty makes it difficult to link particular scholars with universities and facilitates the 'ownership' of such scholars' contributions by other actors. The universities may however, not be entirely to blame for this situation. The repression and silencing of academics critical of the government in the early 1980s changed the way researchers worked significantly. As the Honourable Chief Justice Willy Mutunga remarked, "I suspect that the universities in Kenya and the intellectuals in them never quite recovered from the traumatic crackdown on dissent in the 1980s and 1990s"<sup>160</sup> The Moi government indirectly dictated what academics could read, research, teach and publish. Though the situation has radically changed, the implications of this dark period on the generation, availability and dissemination of knowledge and information generated by Kenyan scholars are still evident. More specifically, information on rights and equality fell in the banned category and could be construed as calculated to cause citizenry disaffection with the rulers.

With regard to publications, it is important to contextualize the absence of endogenous Kenyan legal texts. Production of books is expensive both in terms of time and financial resources. Without support from their institutions, individual scholars are unlikely to produce books. Law Schools are very aware of the dearth of local law resources and have sought to remedy the situation by publishing Law Journals<sup>161</sup> edited by students and peer reviewed journals by academic staff. These journals are however only produced intermittently and because they are only available in print form, they are not accessible to a large audience.

The scarcity of forums for publishing legal research in Kenya dictates that the process of generation, legitimization, production and dissemination of legal scholarly work by Kenyan legal researchers is left to international journals. Such journals have their established readership which is not necessarily interested in reading about experiences with rights and equality by Kenyans, marginalized Kenyan communities such as the Ogiek, Sengwer or Endorois or marginalized individuals such as women and children in these communities.

158 Mutunga, W. M., (2012) *Kenya's Constitutional Transition: The Challenge of University, State, Society Relations*. a Public Lecture delivered by the Honorable, The Chief Justice of the Republic of Kenya at Taifa Hall, University of Nairobi, on August 21, 2012, as part of the Judicial Marches Week.

159 Those drawn from the legal academy included the late Prof. H. W. O. O. Okoth-Ogendo; the late Andronico Adede; Attorney General Prof. Githu Muigai; the late Arthur Okoth Owiro; Prof. P.L.O Lumumba; Lady Justice Pauline Nyamweya. Other academics from Kenyan Universities included Prof. Wanjiku Kabira. There were also other academics who contributed to the framing of issues through presentations and also in reviewing the documents, such as Prof. J.B. Ojwang; Prof. Charles Okidi; Prof. Jacqueline Oduol; Prof. Maria Nzomo; Prof. Monica Mweseli; myself and countless others.

160 Mutunga, *supra* note 158 at p. 11

161 The University of Dar es Salaam publishes the East Africa Law Review; Makerere University Human Rights and Peace Centre (HURIPEC) at the Faculty of Law publishes the *East African Journal of Peace & Human Rights*; the University of Nairobi intermittently publishes the University of Nairobi Law Journal which is run by law students and the East Africa Law Journal which is peer reviewed and managed by academic staff. Moi University and Mt. Kenya University also publish law journals.



Submitted manuscripts dealing with such issues may consequently be rejected, not because they are not rigorous scholarship but because they deal with subject matter that is considered too local and therefore not suited to the journal. In other instances, the publication of accepted manuscripts may be delayed as the journal editors look for like articles to publish in a 'special' issue making the research results dated. Locating Kenyan legal information and knowledge within the global system pits it against dominant forces responding to market economics.<sup>162</sup> Indeed global publishing and visibility of scholarship is highly skewed in favour of established actors.<sup>163</sup>

Writing generally on research publication in Africa, Gray points out that African knowledge and scholarship is marginalized within the global publication system.<sup>164</sup> This is because on the one hand, if it is published through that system, it is not available in Africa and on the other hand if it is published in African journals, it is viewed as lower in rank compared to the former.<sup>165</sup> Information communication technologies have been proposed as a way to improve the visibility and accessibility of African scholars' knowledge and scholarship.<sup>166</sup> This calls for investment in both technology hardware and software. It is noteworthy that internet access has improved on the continent but a lot still needs to be done in Universities and to widely avail products of legal research through this medium. For instance, Kenya has a highly rated National Council for Law Reporting that has made laws, case law and other legal materials widely accessible locally and globally. This can be used as a platform for availing legal research by Kenyan academics.

## V. Way Forward: Countering the Fallacies

This paper has argued that normative equality is unlikely to yield equality of outcomes for different subjects of law especially where there are overlaying, intersecting and multiple inequalities. As Aristotle points out, 'if they are not equal, they will not have what is equal'.<sup>167</sup> Indeed giving unequals equal shares introduces inequality.<sup>168</sup> A marginalized individual in a marginalized community living in a marginalized region in a developing/marginalized country, information about who is not available locally, nationally or globally is unlikely to enjoy the right to equality fully. The situation is however not intractable. The malleable nature of human rights makes them a double edged sword. The fact that human rights are not settled and there are always new claimants for rights being admitted provides the necessary space for countering the fallacies of equality and inequality. Indeed this provides the space for bringing the 'others' from the excluded space to the included space. This can be done using different interventions and strategies.

162 Katebire, *supra* note 154 at p. 6

163 *Ibid.*

164 Gray, E., (2006), 'Bridging the North-South Divide in Scholarly Communication: Threats and Opportunities in the Digital Era', Paper presented at the CODESRIA-ASC Conference Series.

165 *Ibid.*

166 Katebire, *supra* note 154.

167 Aristotle, *supra* note 87.

168 *Ibid.*



## 1. Locating and Understanding Legal Subjects

While it is important to study legal subjects that suffer inequality and discrimination, there is need to go beyond those falling squarely within specific inequality boxes and to focus on the particularities of groups at the inequality intersection.<sup>169</sup> This will help in addressing the causes, manifestations and consequences of exclusion. It will also facilitate the unmasking of the complexities of lived realities within such groups.<sup>170</sup> This approach engages subjects and maps relationships of inequality among social groups and shifting manifestations of inequality. It also requires the engagement of other structures that generate inequalities.<sup>171</sup> Such structures include culture and religion. The fact that customary law - whose hallmark is the dominance of male members - is recognized as law in Kenya points to a contestation in the way of meaningful realization of constitutional rights by women. The mere proscription in the Constitution of customary laws and practices that are based on the superiority or inferiority of one gender will not eliminate these laws and practices which are within the very fabric of society.

## 2. Dealing with Gate Keepers

The resistance by those already enjoying the rights is a major barrier to the realization of rights to equality and non-discrimination and needs to be tackled. This is illustrated in the case of women's participation in the male dominated political arena in Kenya. Christopher Stone, in his article written in 1970 titled *Should Trees Have Standing*<sup>172</sup> explains the resistance that quests for admission into the rights' enjoying categories elicit from the entities that already have the rights and have the power to bestow rights. He opines that 'until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of us'. It is hard to see it and value it for itself until we can bring ourselves to give it rights.<sup>173</sup> This has been the experience of slaves, racial minorities and women. Moreover, the grant of rights does not assure instant enjoyment of equality by new entrants with already established subjects of law as the example of states and the principle of sovereign equality and the Nile River Basin discussed above illustrates. This calls for measures beyond law to challenge, engage and disarm gate keepers.

## 3. Beyond Formal Equality

Formal equality alone is inadequate to deal with entrenched social, economic and cultural handicaps. While the Kenyan constitution provides for formal equality between men and women for instance, the realization of gender equality calls for the dismantling of structural barriers to women's enjoyment of their rights. This applies to other subjects of law who suffer systemic intersectional inequality. To address this issue calls for substantive equality

169 Crenshaw 1991, *supra* note 63.

170 McCall *supra* note 71

171 *Ibid.*

172 45 *South California Law Review* (1972) p. 450

173 *Ibid.*



anchored in law. Affirmative action or differential treatment gives effect to substantive equality. For affirmative action to achieve its desired objective however, it must be preceded by a process of unpacking inequalities, ranking and intersecting them rather than placing them side by side. This will facilitate the framing of effective intervention strategies where affirmative action alone is not sufficient. It will also provide benchmarks that the proposed measures are expected to achieve and track them over time to ensure that they do not stay in force for longer than is necessary. We must however accept that differences exist between different subjects of law which mediate their enjoyment of rights and these should not be used to justify denying any subject of their rights.

#### 4. Judiciaries as Vanguard of Equality and Non-Discrimination

While Constitutions can provide robust expositions of rights, this is not enough. Enforcement of rights to equality and non-discrimination is very important if the provisions of law are to have any effect for subjects. It is imperative that the progressive provisions of our Constitution are implemented to benefit right holders. This brings to the fore, the role of the judiciary as the guardian of Constitutional norms and as the institution charged to breathe life into its provisions through interpretation. Considering that the new legal dispensation is a radical departure from the old order, there are many challenges in the way of implementing these provisions. The resistance by those currently enjoying rights to admission of new entrants can relegate rights to equality and non-discrimination to a mirage or eternal fallacy. The judiciary must be the bridge between the old and the new and boldly perform its role by demanding fidelity to the Constitution by the executive, the legislature and the public.

It is encouraging to note the changes going on in the judiciary in recognition of the fact that new wine requires new wine skins. This has given hope to Kenyans and should facilitate access to justice for 'Wanjiku' and those at the intersections of marginalization/exclusion. We can learn a lot from South Africa where law was the basis for the transformation of an oppressive exclusionary apartheid system to a democratic and inclusive one. The judiciary in that country has played an admirable role of mediating between the old and the new and ensuring in the process, that the old order does not come back through the back door. Our judiciary must play a similar role and where the legislature for instance, refuses to pass laws to give life to the provisions of equality and non-discrimination, the judiciary should ensure that this does not lead to loss of entitlements in the Constitution for subjects.

#### 5. Countering Knowledge Hegemonies

Other interventions for countering fallacies of equality include *firstly*, investment in research on marginalized states and groups and allowing them to tell their stories and narrate their experiences so that they inform the framing of appropriate responses. This is also useful in framing legal responses to situations of inequality. In the Constitution review process, allowing the people to name their problems where they were, in the language they chose and using spaces they felt comfortable in has been hailed as the reason we have an inclusive Constitution.<sup>174</sup> The use of the term 'Wanjiku' as the representative of the common and

174 See e.g. Kabira, *supra* note 121.



previously excluded Kenyan in that process kept it focused on the goal of inclusion. It has continued to inspire the implementation of the Constitution.

*Secondly*, there should be exchange of ideas between subjects of law suffering inequality to facilitate the identification of the potential for intersectional inequalities. This will also enable different groups to understand inequalities of others that they do not face and contribute to building cohesive communities empathetic of the plight of others who are excluded. This is critical if we are going to go beyond the privileging of some inequalities over others and deal with all multiply excluded subjects of law.

*Thirdly*, with regard to knowledge generation, production, legitimation and dissemination, it is critical for stories of intersectionally marginalized subjects of law generated through the research and law reform initiatives above are availed and made accessible locally, nationally and globally. This demands the establishment of a culture of rigorous research in Universities and publication of the findings of research using different media. It also brings to the fore the role of University presses and information communication technology departments in communicating scholarship through publications<sup>175</sup> and the need for strategic policy actions for appropriate ICT choices and capacities. This should be undergirded by research support for academics to enable them generate material to be communicated.

*Fourthly*, Universities can consider the adoption of open systems that thrive on shared standards, collaborative development and common use<sup>176</sup> to give scholars' work virtual visibility without stripping them of rights to the work.<sup>177</sup> While the investment in information communication technology may appear daunting, the pay offs justify the investment. The ranking of scholars and universities worldwide is usually predicated on the number of citations of scholars' work. If the work remains only on bookshelves and in computers of the scholars, the perception is that African, nay Kenyan scholars are not generating any information. This perpetuates the marginalization of scholars and scholarship in the Kenyan academy.

*Fifthly*, the academy in a developing country such as Kenya has the role of generating endogenous knowledge about the country and developments therein through vibrant research that is published and disseminated widely. Scholars at Kenyan universities have an opportunity to collectively contribute to the development of new books and articles as the Constitution is implemented. This will only happen if universities provide anchorage for the collective research initiatives and forums for publishing the research. *Sixthly*, Universities can also promote African scholarship in the promotion criteria by giving considerable weight to contributions to African discourses by their scholars and encouraging the use of local texts in curricula.

175 Katebire, *supra* note 154 at p. 6

176 Katebire, *supra* note 154 at p. 13

177 *Ibid.*



## VI. Bibliography

1. Akech, J. M., (2001). *Rescuing Indigenous Tenure from the Ghetto of Neglect: Inalienability and Protection of Customary Land Rights in Kenya*. ACTS Press, Nairobi
2. Akech, M. and Patricia Kameri-Mbote, 'Kenyan Courts and Politics of the Rule of Law in the Post-Authoritarian State', *East African Journal of Peace & Human Rights*, Journal of the Human Rights and Peace Centre (HURIPPEC), Faculty of Law, Makerere University, (Forthcoming, 2012)
3. Aristotle, (1991) *The Nicomachean Ethics* (trans. David Ross, revised by J.L. Ackrill & J.O. Urmson).
4. Bartlett, K. T. & R. Kennedy (eds.) (1991) *Feminist Legal Theory: Readings in Law and Gender*, Westview Press, Boulder, Colorado
5. Baxi, U., (2006), *Future of Human Rights*, Oxford University Press, Oxford p. 45
6. Becker, L., (1993) "Individual Rights", in Smith, P. ed., *The Nature and Process of Law: An Introduction to Legal Philosophy* Oxford University Press, New York. Hohfeld, W., *Fundamental Legal Conceptions as Applied in Judicial Reasoning and other Essays*, (Cook, ed., 1922)
7. Bedau, H. A., (2000), "Anarchical Fallacies": Bentham's Attack on Human Rights, *Human Rights Quarterly*, Volume 22, Number 1, February
8. Bell M., (2002), *Anti Discrimination Law and the European Union*, OUP
9. Bentham, J., "Anarchical Fallacies; Being an Examination of the Declarations of Rights Issued During the French Revolution", in *The Works of Jeremy Bentham* published under the superintendence of his Executor, John Browning, vol. two, New York: Russell & Russell, Inc., 1962, [originally published in 1843]
10. Birnie P., et al, (2009), *International Law and the Environment*, Third Edition, Oxford University Press, Oxford.
11. Bragdon, S., (1992), 'National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity?', 33 *Harvard International Law Journal*.
12. Brunnee, J and Toope, S The Changing Nile Basin Regime: Does Law Matter? 43 *Harvard International Law Journal*.
13. Chang R.S. & Culp J. M., "After Intersectionality", *University of Missouri-Kansas City Law Review* Vol. 71
14. Collins P. H., (2000), *Black Feminist Thought* Routledge New York
15. Convention on Climate Change, *Report of the Conference of the Parties on its Third Session*, Kyoto, 1-11 Dec. 1997, UN Doc. FCCC/CP/1997/7/Add.1 [preliminary version reprinted in 37 *ILM* 22 (1998)].



16. Corwin, E.S., (1965), *The "Higher Law" Background of American Constitutional Law* Ithaca, N.Y: Cornell University Press.
17. Crenshaw K., (1989), "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics", , University of Chicago Legal Forum
18. Crenshaw, K., (1991) 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', *Stanford Law Review*, Vol. 43, No. 6
19. Cullet, P., (1998) *Differential Treatment in International Environmental Law: A New Framework for the Realisation of Sustainable Development*, (Ann Arbor, MI: UMI Dissertation Services.
20. Dahl, T. S., (1987), *Women's Law: An Introduction to Feminist Jurisprudence*, Norwegian University Press, Oslo
21. Deskoka, R., (1983), "The Right of Non-Discrimination and Affirmative Action" , *Iustinianus Primus Law Review* Vol 1
22. Drahos, P. and John Braithwaite, (2002) *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan
23. EU Treaty of Amsterdam in 1997 and its Council Directives 2000/43/EC, 2000/78/EC, 2004/113/EC
24. Falk Moore, S., (2000) *Law as Process: An Anthropological Approach* LIT Verlag Münster.
25. Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR, High Court of Kenya at Nairobi Petition Number 102 of 2011
26. Ferree M. M., (2009), 'Inequality, Intersectionality and the Politics of Discourse: Framing Feminist Alliances', in Lombardo E. et al, eds., *The Discursive Politics of Gender Equality; Stretching, Bending and Policy Making* London Routledge
27. Fletcher G. P., (1999), 'In God's Image: The Religious Imperative of Equality under Law', *Columbia Law Review* Vol. 99
28. Gray, E., (2006), 'Bridging the North-South Divide in Scholarly Communication: Threats and Opportunities in the Digital Era', Paper presented at the CODESRIA-ASC Conference Series.
29. Grear, A., (2012), 'Human Rights, property and the search for 'worlds other'', *Journal of Human Rights and the Environment* Vol. 3, No. 2 pp173-195
30. Hardin, G., (1968) 'The Tragedy of the Commons', *Science*, Vol. 162.
31. Hills J. et al. (2010), *An Anatomy of Economic Inequality in the UK: Report of the National Equality Panel* London: Government Equalities Office. Accessed at



- <http://www.equalities.gov.uk/pdf/NEP%20Report%20bookmarkedfinal.pdf>
32. *International Convention on the Elimination of All Forms of Racial Discrimination*, 24 September 2009, CERD/C/GC/32, available at: <http://www.unhcr.org/refworld/docid/4adc30382.html> [accessed 17 November 2012]
  33. Kabira, W. M., (2012), *Time for Harvest: Women and Constitution Making in Kenya*. University of Nairobi Press, Nairobi.
  34. Kamau, N., (2010), *Women and Political Leadership in Kenya: Ten Case Studies*, Heinrich Boll Stiftung, East and Horn of Africa, Nairobi.
  35. Kameri-Mbote, P., (2009), "The Land Question in Kenya: Legal and Ethical Dimensions", in *Governance: Institutions and the Human Condition*, Strathmore University and Law Africa pp. 219-246
  36. Kameri-Mbote, P., (2003). 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', in *University of Nairobi Law Journal*
  37. Kameri-Mbote, P., (2009) "Law, Gender and Environmental Resources: Women's Access to Environmental Justice", in Jonas Ebbesson & Phoebe Okowa eds., *Environmental Law And Justice in Context*, Cambridge University Press, Cambridge
  38. Kameri-Mbote P., and Jacinta Onyango Oduor, (2007), 'Following God's Constitution: The Gender Dimension in the Ogiek Claim to Mau Forest Complex', in Anne Hellum et. al, *Paths are Made by Walking: Human Rights Interfacing Gendered Realities and Plural Legalities*, Weaver Press
  39. Kameri-Mbote, P. & Kithure Kindiki, (2008) 'Water and food security in the River Nile Basin: The perspectives of governments and NGOs of upstream countries', in Hans Günter Brauch et al., eds., *Facing Global Environmental Change: Environmental, Human, Energy, Food, Health and Water Security Concept*, Berlin – Heidelberg – New York – Hong Kong – London – Milan – Paris – Tokyo: Springer-Verlag, Autumn
  40. Kameri-Mbote, P., (2002) *Property Rights and Biodiversity Management in Kenya: The case of Land Tenure & Wildlife*, ACTS Press, Nairobi.
  41. Kameri-Mbote P. & Dr. Celestine Nyamu Musembi, (2011) 'Assaulting the Citadel of Male Political Privilege: Political Party Lists as the Site of Contest for Gender Balanced Representation', August 27.
  42. Kameri-Mbote P., (1995), *Protection of the employed women's rights in Kenya: A Case-study of the female academic staff members at the University of Nairobi*, Project paper submitted in partial fulfillment of the requirements for the award of the Diploma in Women's law (Dip.WL), Faculty of Law, University of Zimbabwe.
  43. Kant, I. *Foundations of the Metaphysics of Morals*, (Robert P. Wolff ed., Lewis W. Beck trans., Bobbs-Merrill Co. 1969 (1785)



44. Katebire, A.K., (2008), 'Promoting Visibility of African Scholarship through Access to Appropriate Technology', Paper presented at a Conference on Electronic Publishing and Dissemination, 6-7 October, Dakar, Senegal
45. Lawal, V., (2007), 'Legal research and Legal Education in Africa: The Challenge for Information Literacy', *Starr Workshop Papers*, Paper 5 at [http://scholarship.law.cornell.edu/sws\\_papers/5](http://scholarship.law.cornell.edu/sws_papers/5)
46. Locke, J. (1993) "Two Treatises of Civil Government" in Smith, P. ed., *The Nature and Process of Law: An Introduction to Legal Philosophy* Oxford University Press, New York.
47. Lombardo E. & Verloo Mieke, (2009), Institutionalizing Intersectionality in the European Union? *International Feminist Journal of Politics*
48. MacKinnon C. A., (1987), *Feminism Unmodified: Discourses on Life and Law* Harvard University Press, Cambridge Massachusetts
49. Magraw, D. B., (1990) 'Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms, 1 *Colorado Journal International Environmental Law & Policy*
50. Marcus A.D., (1997), 'Water Fight', *Wall Street Journal*
51. Marx, K., (1926), "On the Jewish Question", in *Selected Essays by Karl Marx*, II.J. Stenning trans., Leonard Parsons, London and New York.
52. McCall, L.,(2005) "The Complexity of Intersectionality", *Signs* Vol. 30, No. 3
53. Merchant, C., (1990) "Ecofeminism and Feminist Theory", in I. Diamond & G. F. Orenstein, *Reweaving the World: The Emergence of Ecofeminism*, Sierra Club Books, San Francisco
54. Mamdani, M., (2007), *Scholars in the Market Place: The Dilemmas of Neo-Liberal Reform at Makerere University, 1989-2005*, Fountain Publishers, Kampala.
55. Mutunga, W. M., (2012) *Kenya's Constitutional Transition: The Challenge of University, State, Society Relations*, a Public Lecture delivered by the Honorable, The Chief Justice of the Republic of Kenya at Taifa Hall, University of Nairobi, on August 21, 2012, as part of the Judicial Marches Week.
56. Nash, J. C., (2008), "Rethinking Intersectionality", 89 *Feminist Review*
57. OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.
58. OAU DOC.CAB/LEG/67/3 REV.5 (1981), entry into force 12 October 1986 (with the 26th instrument of ratification.) African Union Protocol to the African Charter on Human And People Rights on The Rights of Women in Africa, adopted by the Conference of Heads of State and Government on 11 July 2003 in Maputo Mozambique and came into force in November 2005. It is a Protocol to the African Charter on Human and Peoples Rights, OAU DOC.



- CAB/LEG/67/3 REV.5 (1981), entry into force 12 October 1986 (with the 26th instrument of ratification.)
59. Okidi, C.O., (1994) "History of the Nile and Lake Victoria Basins through the Treaties" in P. P. Howell & J.A Allan, eds *The Nile: Sharing a Scarce Resource* Cambridge University Press. Cambridge
  60. Okoth Ogendo, H. W. O., (1991) *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*. ACTS Press, Nairobi.
  61. Rawls J., *A Theory of Justice* (1971) Belknap Press of Harvard University Press, Cambridge Massachusetts
  62. *Report of the Mission on Land Consolidation and Registration in Kenya 1965-1966*(1965)
  63. Republic of Kenya, Employment Act, 2007
  64. Republic of Kenya, (2006), *Final Report of the Committee of Eminent Persons*, Government Printer.
  65. Republic of Kenya, (2010), *The Constitution of Kenya*, Government Printer, Nairobi.
  66. Republic of Kenya, In the Supreme Court of Kenya, Reference No ... of 2012, *In the Matter of an Application for Advisory Opinion under Article 163 (6) of the Constitution and In the Matter of Article 8, Article 27(4), Article 27(8), Article 96, Article 98, Article 177 (1) (b), Article 116 and Article 125, Article 89 (2), Article 89 (4), and the Consequential Provisions in the Sixth Schedule Section 27 (3) of the Constitution of the Republic of Kenya and In the Matter of the Principle of Gender Representation in the National Assembly and in Senate*. Smart, C., (1989), *Feminism and the Power of Law*. Routledge, London.
  67. Republic of Kenya, (2002), *The Commission of inquiry into existing land law and tenure systems* (Njonjo Commission), Government Printer
  68. Shipton, P., (1988) "The Kenyan Land Tenure Reform: Misunderstandings in the Public Creation of Private Property", in *Land and Society in Contemporary Africa* v. 91 discussing the overlap in traditional and introduced tenure systems among the Luo of Kenya.
  69. Smith, P. ed., *The Nature and Process of Law: An Introduction to Legal Philosophy* Oxford University Press, New York.
  70. Swynnerton, R. J. M., (1954) *A Plan to intensify the development of African agriculture in Kenya*.
  71. UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.unhcr.org/refworld/docid/3ac6b3970.html> [accessed 17 November 2012]



72. United Nations Conference on Environment and Development: Convention on Biological Diversity - Done at Rio de Janeiro, June 5, 1992, *reprinted in* 31 I.L.M. 818 (1992) at Articles 1 and 15
73. United Nations: Protocol on Substances that Deplete the Ozone Layer - Done at Montreal, September 16, 1987, *reprinted in* 26 I.L.M. 1541 (1987).
74. United Nations Framework Convention on Climate Change, New York, 9 May 1992, *reprinted in* 31 I.L.M. 849 (1992) and Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 Dec. 1997, Decision 1/CP.3/Annex, United Nations Framework
75. United Nations Framework Convention on Climate Change, New York, 9 May 1992, *reprinted in* 31 I.L.M. 849 (1992).
76. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> [accessed 17 November 2012]
77. Walby S., Jo Armstrong and Sofia Strid , *Intersectionality: Multiple Inequalities in Social Theory*. originally published online 10 January 2012, <http://soc.sagepub.com/content/46/2/224>
78. Westen P., 'The Empty Idea of Equality', *Harvard Law Review* Vol. 95 No. 3 1982