

# ENFORCEABILITY OF EQUALITY RIGHTS IN KENYA AFTER 2010

DR. PETER ONYANGO O. (PhD)<sup>1</sup>

**Abstract:**

*The enforceability of equality rights in Kenya is a serious and honest attempt from lawyer's perspective to critically discuss the development of human rights law in Kenya and the serious challenges facing the enforceability of those rights under the new constitution of 2010.*

*The article believes in theoretical basis of human rights and how such rights are perceived by citizens and Government in Kenya. Evaluating some of the key achievements and implementation challenges, the discussion looks at positive gains as well as some unforeseen and evident impediments.*

*Lawyer's account of the enforceability of equality rights identifies some of the lacunae in the legal system and makes some academic suggestions in regard.*

*The article is also alive to the law reform process in Kenya and accountability of human rights issues. It avoids extensive analysis of some areas of human rights law especially those ones dealing with civil and political rights such as liberties, freedom, and right to life. Instead it concentrates adversely on the second generation of human rights based on economic, social and cultural rights as experienced in the Kenyan juridical order in attempt to address the basic questions such as what are the equality rights? Are they real rights? Are*

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<sup>1</sup> Lecturer School of Law University of Nairobi.

*they achievable? How are they understood by the people, the judicial and other State authorities in Kenya today?*

**Keyword: Equality, Rights, Law, Enforceability, and Constitution.**

## THEORETICAL FRAMEWORK AND PROMINENT QUESTIONS ON EQUALITY RIGHTS

Social and human rights lawyers *cum* scholars have purportedly confined equality rights within the context of social justice and social welfare rights. However it is practically difficult to speak of equality rights without addressing the meaning of the term “equality” and its contextualization. Human equality and equal rights go along together and are based on the ontology of human life and radical capacity which exists in individual personhood<sup>2</sup> as distinct from another.

Human equality and equality of rights in our modern understanding are derived directly from the historical French Revolution slogan of *égalité* which by extension covers the meaning of liberal egalitarian movements in Europe. The sociological approach to equality rights is what makes it acceptable in the legal sphere under the context of human rights making equality a norm by all standards. There is principle of equal concern and respect which applies to Governments as we shall discuss later.

By definition equality is expressed in equal shares, similar to equitable or equivalent rights but even such etymological descriptions fail to fully persuade dissenting opinions of some human rights lawyers who by principle argue differently.

By and large, human rights understand equality rights from different perspectives expressed to such concepts as “All are born free and with equal dignity and rights” which premises the

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<sup>2</sup> < <https://www.youtube.com/watch?v=NFLDFYyr7tQ>> Dr. John Finnis lecture on “Equality and Issues of Life: A Scorecard”.

Universal Declaration of Human Rights in 1948 and the United Nations Charter of 1945. The United Nations reading of equality rights has meaning only when we refer it to universal natural rights or inherent rights that each person is entitled to in so far as he or she belongs to the family of human beings.

Equality rights are universal, inalienable, indivisible and are birth rights. In this conception they have to be equal, identical and universal in nature according to contentions of legal philosophers especially Immanuel Kant<sup>3</sup> and John Locke<sup>4</sup>. Kant gave value to the ability to reason as a human right, the freedom to think and share<sup>5</sup>. Locke argued that certain rights are self-evidently pertaining to individuals as human beings as they existed also during the state of nature before humankind entered social contract.<sup>6</sup>

French legal sociologists have used equality to refer to social inequalities, social injustice and imbalance in retributive justice based on the experience of the French Revolution. Their contribution looks at equality in terms of sharing of resources equitably and fairly among the citizens, a factor that grossly influenced the minds of French thinkers. According to Jean Jacque Rousseau<sup>7</sup>, human persons have personal individual wills that are allotted to them by Nature. Such individual wills, however, become stronger when they are considered collectively. Individual wills put together become general will which according to him should define social contract or the will of the state as we have it in modern notions of the constitution, the rule of law and human rights. Rousseau also said that *human being is born free but everywhere he is in chains*. This theory sees rights as individualistic, naturally free

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<sup>3</sup> OMONY, JOHN PAUL, *Key Issues in Jurisprudence: An In-Depth Discourse on Jurisprudence Problems*, LawAfrica Publishing, 1<sup>st</sup> Edition, p. 19.

<sup>4</sup> RICHARD N. RWIZA, *Ethics of Human Rights: The African Contribution*, CUEA, Nairobi, 2010, p. 34.

<sup>5</sup> *Op. Cit.*, p. 37.

<sup>6</sup> IDEM.

<sup>7</sup> RICHARD N. RWIZA, *Op. Cit.*, p. 36.

but infringed by State.<sup>8</sup> In the accounts of Emile Durkheim equal rights are achievable in a system of rules that he referred to as social control system or a system of rules. It is through regulations and legal system that equality rights can be realised in a given organised society.

German sociologists anchored their interpretation of equality rights on sociological methods that are evident in various given contexts. Max Weber illustrated his ideal type of society in terms of bureaucracy which to him was the ideal society. In his explanation of ideal types he mentioned, the division of labour, a hierarchy of authority, a system of rules that all must comply to, impersonality of labour and meritocracy in allocating public roles to citizens. By division of labour, Weber conceptualised a situation in which some individuals do more jobs and others are jobless. He interpreted the reality in the industrializing European society in which the division of labour would mean better output and equitable sharing of the fruits of labour. There must be a hierarchy of authority, that is, a ladder in authority of the state or chain of command. Some individuals must be in leading positions and others must be in other level of positions for the bureaucracy in the ideal type society to work properly. He included the role of regulations and a system of rules without which the society shall not work well. It is the same as the rule of law and constitutionalism. Then he realised that some people get jobs that they are not qualified for. Nepotism was rampant and in this case the bureaucracy can only work in a situation where every person will get a job and position he or she is qualified for. He condemned nepotism by adding impersonality, one should deliver work despite his or her relationship with the master and without his or her character or mood. Separating the personality of a person from the work. Karl Marx in his account interpreted all his theory in terms of materialism based on the means of production or socio-economic rights. He came up with class differences, that is, “the masters and the labourers” that

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<sup>8</sup> IDEM.

characterised Western capitalism ideology against social communism which inspired human rights theories.

St. Thomas Aquinas claimed that all human beings are equal in their nature<sup>9</sup>. Equality discourse – basic issues about human equality, reality, concern and respect, equality as entitlement, how does its application threaten the society. Human equality as a fact is formed in Christian traditions *in nature man and man are equal*, this was closer to Roman Jurists informed also by the Greek philosophy of Aristotle and Plato.

In the 19<sup>th</sup> Century John Rawls speaks of equality in the principles of justice. Rawls – the basis of equality of human beings and the basis on which they should be treated as equals. Good sins in tandem with natural rights- moral personality of person equates him to being entitled to justice. Man is capable of having a sense of justice through his power of reason and will. Moral capacity refers to having it not necessarily the ability to apply it<sup>10</sup>.

The understanding of equality rights in the era of United Nations, that is, after 1945, classifies it to the Second Generational theory of human rights as has been attributed to a French Professor Karel Vasak who terms them as “credit” against the State<sup>11</sup>. It is identified in the United Nations Convention of Economic, Social and Cultural Rights, adopted in 1966. It gained the support of socialist states against capitalist states that were reluctant about it<sup>12</sup>.

Equality rights is the most debated part of human rights today due to its vitality and effectiveness in development theories. Promotion and protection of human rights is essential for the survival and progressive of humanity and therefore, the concept of human rights has been with us for centuries and its formalisation into a distinct branch of law forms the basis of public international law.

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<sup>9</sup> Natural law theory of St. Thomas Aquinas in *Summa Theologiae*.

<sup>10</sup> <<https://www.youtube.com/watch?v=NFLDFYyr7tQ>>

<sup>11</sup> RICHARD N. RWIZA, *Ethics of Human Rights: The African Contribution*, CUEA, Nairobi, 2010, p. 174.

<sup>12</sup> <<https://www.youtube.com/watch?v=NFLDFYyr7tQ>>

Equality of rights forms the basis of human rights discourse and litigations. It is also the corner stone for egalitarian thinking which holds that all human beings have equal worth and importance. However, egalitarianism sometimes defend inequality theories holding that some persons deserve more protection than others. For instance, the Head of State has more personal security and privileges given to him by the State than any other citizen. Another example, some laws guarantee pregnant women more protection than un-pregnant women and this is a typical example of accepted inequalities within social rights and legal rights.

Liberal egalitarianism however believes in minimum standards principle for instance, prohibition against inhuman and degrading treatment of a person, protection against blatant violence against a person. The position of liberal egalitarian thinkers is that there will always be major inequalities between people in their status, resources, work and power. The idea of inequality is that the State is to provide a fair basis for managing these inequalities by strengthening the minimum to which everyone is entitled to.

John Rawls is one of the liberal egalitarian thinkers especially in his focus on economic, social inequalities when he says that such inequality should work for the greatest benefit of the least advantaged members of society<sup>13</sup>. This is the position that originated from socialist European States especially from former Sovietic Union during the compilation of the United Nations Universal Declaration of Human Rights but remained noncommittal to its implementation. Their Western counterparts, UK and USA endorsed the Economic, Social and Cultural Rights with suspicion during the heights of the Cold War.<sup>14</sup> However, all State parties acknowledged that human rights are universal, indivisible and complementary<sup>15</sup>.

## INEQUALITY AND PROMINENT QUESTIONS

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<sup>13</sup> RHONA K.M. SMITH & CHRISTIEN VAN DER ANKER, *The Essentials of Human Rights*, Hodder Arnold, Oxford University Press, USA, 2005, p. 108.

<sup>14</sup> *Op. Cit.*, p. 100.

<sup>15</sup> IDEM.

Inequality is exactly the opposite of equality of rights and its proponents agree to this. It refers to various disproportionality in the distribution of resources among human beings in their social contexts as true in the market economy theory that thrives in the capitalist contexts. Speaking of equal rights in a context of unequal conditions is self-contradictory and perplexing if truly equality means its mathematical equivalence as  $1=1$ . Equality of rights in the human rights context is not that of the mathematical axiom  $1=1$  but insists on minimum standards other than absolute standards of equality which maybe a mere utopian social ideology<sup>16</sup>.

Inequality which moved French sociologists has more to do with equal rights in reference to socio-economic status of individuals who are entitled to natural rights and no subjection to discrimination. In human society there shall be the “haves” and the “have-nots”. The extreme communist assumption of a society of all equals in terms of resources, services and human security has been challenged by the liberal egalitarians that believe in some proportional inequality in society based on the principle of equal concern and respect<sup>17</sup>. It is certain that social classes ranging from the upper class, middle upper class, middle class, lower middle class and the lower class shall always be there even several Centuries after Karl Marx whose idea expressed in the Communist Manifesto criticised socio-economic variation between the producers and the owners of the means of production.

The historic UN Declaration was the epitome of aspirations of many nations that had experienced situations of war, hunger, oppression, discrimination, deprivation, and abuse to human rights and fundamental freedoms. Massive and systematic violations of basic human rights and fundamental freedoms were recorded and this trend continues even in the

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<sup>16</sup> PHILIPS ALSTON AND GERARD QUINN, “The Nature and Scope of States’ Parties Obligations under the International Covenant on Economic, Social and Cultural Rights, in the *Human Rights Quarterly*, 9(1987), 156-229, The John’s Hopkin’s University Press, p. 156.

<sup>17</sup> <https://www.youtube.com/watch?v=NFLDFYyr7tQ>

independent Africa<sup>18</sup> and other parts of the world. The emphasis on discrimination wraps up the idea of equality in the human rights perspective. Promotion and protection of equality rights is premised on the concept of discrimination and not on the assumption that all human beings must be equal. The document that was endorsed by majority of nations was premised on respect for human dignity and the equality of rights, especially listed rights which the global community recognised and unanimously agreed to respect<sup>19</sup>.

Already it is self-explanatory that men are not equal to women; girl child is not equal to boy child at least by physical features and their fundamental roles in society. Homosexuals are not equal to heterosexuals; refugees are not equal to citizens, social upper class members are not equal to social lower class and so on. Social stratification theories present it that we are different in races, beliefs, sex, political opinions, colour of the skin, geographical locations and habits<sup>20</sup>. But what human rights explain is based on the sense of natural allotments or entitlements known as natural rights which cannot be derogated but inbuilt in our dignity. These are the equal rights that States, Governments and individuals are obligated to respect, promote and protect.

The prominent questions are: is the Republic of Kenya recognizing equality rights? Does Kenya honour her obligations in the international law? What are the equality rights? Do they make any sense in a society of unequals? Are they real rights or abstract rights? Are they achievable or they are good in the letter of law only? How do we interpret them? And lastly, are they enforceable in Kenya? Are the world resources at the disposal of all human beings?

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<sup>18</sup> RHONA K.M. SMITH & CHRISTIEN VAN DER ANKER, *The Essentials of Human Rights*, Hodder Arnold, Oxford University Press, USA, 2005, p. 1.

<sup>19</sup> RHONA K.M. SMITH & CHRISTIEN VAN DER ANKER, *The Essentials of Human Rights*, Hodder Arnold, Oxford University Press, USA, 2005, p. 100.

<sup>20</sup> Equal concern and respect meant for all human beings. <https://www.youtube.com/watch?v=NFLDFYyr7tQ>. Inequality based on lack of choice to devote more to one more than the other. This is egalitarian interpretation of equal concern and respect.



## THE GENESIS OF EQUALITY RIGHTS

The Republic of Kenya got her independence from the British colonial powers in 1963 with a conception of equality RIGHTS as was adopted from the British powers and mirrored in Kenya. But even despite the British belief in the Bill of Rights of 1625, still divide and rule characterised their colonial contentions pitting the poor against the rich; the powerful against the less powerful, the fortunate against the unfortunate; the able against the disabled and the majority social groups against the minority social groups. In this separatist social order egalitarianism in Kenya seeks to read the equality of rights from the standpoint that some degree of inequality is socially acceptable yet the Government must fulfil its obligations in the international human rights to which it is a party. It must respect, promote and protect the universal human rights according to the International Bill of Human Rights through ratification.

The implementation of the equality rights in Kenya encounters several kinds of resistance as we shall discuss further. The Republic of Kenya inherited authoritarianism from the British colonials from its inception. Authoritarianism and despotism that failed to respect equality of rights was perpetuated through legislative, judicial and executive bodies until 27<sup>th</sup> August 2010. Before the change of the constitution Kenyans went through several social injustices and several abuses and violations of human rights of individuals. It was from this background of inequality, social injustices among others that compelled the nation to think of another constitution especially that which will have more respect for human rights and fundamental freedoms and make them binding with full force of law.

## ANALYSIS OF INEQUALITY

By and large equality rights belong to economic, social and cultural rights, that is, to the UN Convention of Economic, Social and Cultural Rights. Therefore we can only analyse the equality rights from the bases of the three rights. Art. 23(1) of the UDHR<sup>21</sup> states that *everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment*. How many are unemployed and cannot access any employment in Kenya? Is Kenya under obligation in the international law to provide employment for her citizens and make opportunities available? Art. 23(2) states that *everyone, without any discrimination, has the right to equal pay for equal work*. The Republic of Kenya through its Salary and Remuneration Commission is working to fulfil her obligation under this provision. Art. 23(3) *Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection*. Is Kenya complying with this provision? Trade Unions and other forms of collective bargain for workers are at liberty to protect the rights of workers through strikes, picketing, and peaceful demonstrations in Kenya. Art. 23(4) *Everyone has the right to form and join trade unions for the protection of his interests*. Trade Unions in Kenya have the freedom to exercise their obligations in protecting the rights of workers through the Industrial Court which has the same ranking of the High Court.

The Republic of Kenya is making all necessary efforts to comply with its constitutional Bill of Rights and International Human Rights law. The proviso in Art. 25(1) of the UDHR states clearly that *everyone has the right to a standard of living adequate for the health and well-*

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<sup>21</sup> The Universal Declaration of Human Rights was not meant to be binding and the term declaration is not a legal term but it was meant to set up a common standard of achievement for all peoples and nations. MALCOLM N. SHAW, *International Law*, A Grotius Publication, Cambridge University Press, 1997, 4<sup>th</sup> Edition, p. 207.

*being of himself and of his family, including food, clothing, housing and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability widowhood, old age or other lack of livelihood in circumstances beyond his control.* This is the epitome or cornerstone of the United Nations law<sup>22</sup> passing from the Charter to the universal declaration of human rights then to the Bill of Human Rights.

As compared to civilised nations, Kenya has not fulfilled this provision in its legal system as required thereto. Social welfare rights<sup>23</sup> are not yet fully accommodated within the operational State system making it hard for the persons mentioned under this provision to access full protection of their equality rights. Evidently there is lack of political good will and courts cannot do much neither to enforce this provision without proper statutory law in force.

The proviso Art. 26(1) stating that *Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages* has not found its sound resonance due to the failure to sufficiently support public schools and provide enough teachers to meet the increasing needs. The Republic of Kenya has used this provision for political campaigns but it lacks clear enforceability in the operational system. To supplement this provision, the State policies have removed restrictions on private schools known as academy to accommodate large number of children who can only access education at a cost breaching the rule of free education. *The concepts of democratic citizenship and community participation have long been important background values in constitutional jurisprudence. They play a significant role in, for example, many constitutional cases that recognize the importance of equipping individuals to participate in our political system by ensuring equal access to education.*<sup>24</sup>

Given the poverty level, many families cannot afford sending their children to the academy and this is equally lack of protection of proffered equality rights under the constitutional rights. Constitutionally, it is the obligation of the Government of Kenya through its legal

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<sup>22</sup> MALCOLM N. SHAW, *International Law*, A Grotius Publication, Cambridge University Press, 1997, 4th Edition, p. 206.

<sup>23</sup> Referring to minimum human social rights for individuals in need to meet common standards set up by the United Nations. Non-Discrimination of the common good (political philosophy of rhetoric) which is a claim emulated in the human rights discourse.

<sup>24</sup> MARTHA F. DAVIS, *Participation, Equality, and Civil Rights...* p. 2263.

institutions to ensure that all children are compelled to attend primary education and such education should be made accessible and free for all democratic citizens.

Art. 27(1) *Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.* The Republic of Kenya has ever since promoted and protected the cultural right but with limitation as to national interests.

Economic inequality – The Republic of Kenya has elevated number of unemployed youth making the situation of the jobless one of the most inhuman conditions. The Government is not making much effort towards creating employment and securing them. Worse still the unemployed have no any kind of social and economic support from the State. There is a big gap between the rich and the poor even if the number of the social middle class is growing.

Social inequality- gender inequality, situation of the disabled is one of the under developed areas of statutory law in Kenya, women are still not respected especially by enacted laws such as the Marriage Act of 2014<sup>25</sup>. Racial equality, religious equality, employment equality, equal opportunities, equality before the law, are still far from reality. The gap is always there and worsening with time. Discrimination is still rampant in Kenya. Housing right is one of the major challenges in Kenya. A large number of urban residents live in informal houses where water and sanitation are not guaranteed. The question of land ownership by the economically capable persons is depriving the poor of their right to houses and dignified habitat. An example is the purchase of large patches of lands belonging by community rights to the Masai community, a reality that shall see the nomadic prone Masai becoming squatters and opening up to possible future conflicts. The Government has community land ownership and private land ownership. The private land holding relies on economic status of individual

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<sup>25</sup> The Marriage Act of 2014 Laws of Kenya allows polygamous marriage and provides procedure for separation.

whereas community land holding relies on the fact that individuals live and believe in community values such as among the pastoralists.

Cultural inequality – Kenya is a multi-ethnic society with variations of cultural values. There are values attached to religious creeds, ethnic groups. The Republic of Kenya has highlighted in its laws the cultural heritages of her people. Cultural rights are honoured to an extent of allowing them to thrive almost to ethnic chauvinism. Ethnic discriminations that lead to Post Elections Violence of 2007/8 had some elements of cultural mismanagement. People eventually divided themselves along their ethnic diversities causing conflicts and violence. The cultural right needs some clear policies and laws so that it may not create discrimination, apartheid, prejudice and denial of some rights to persons due to their cultural groupings or language.

Affirming her commitments to the promotion of cultural rights Kenya under Sec. 3 of the Judicature Act 1967, provides that the High Courts shall be guided by the African Customary Law. In addition there are legislations respecting other religious legal peculiarities and cultural diversities concerning marriage<sup>26</sup> especially Islam, Christianity and Hindu as elements respecting the constitutionality of cultural rights.<sup>27</sup>

*Section 11 of the constitution on culture directs that: (1) This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.*

## THE PRACTICE OF HUMAN RIGHTS LAW IN KENYA

It would not make much intellectual sense to speak of equality rights without linking them to the concepts of universal human rights based on legal rationality theories. As has been

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<sup>26</sup> Cf. DR. PETER ONYANGO, *African Customary Law System: An Introduction*, LawAfrica Publishing Ltd (K), Nairobi, 2013.

<sup>27</sup> IDEM.

illustrated earlier human rights derive their meaning and justification from natural rights theory<sup>28</sup> whose notion relates to Western European rationality. Despite the geographical origin of human rights law, the world admittedly acknowledged the validity of the United Nations Universal Declaration of Human Rights of 1948 echoed in the Covenants which is emphatic on equality rights as birth rights which cannot be derogated by anybody or any authority or norm thereof. In Art.1 it states that *“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”*

The same sentiment is echoed in the preamble or belief of the Declaration and in the successive human rights legal instruments, the two Covenants and Conventions. The word “all” depicts the universality aspect of human rights. “Born Free and Equal” relates to our liberties and equality in dignity and rights. In the preamble State parties begins by affirming that *“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”*<sup>29</sup> Many world constitutions insert the concept of our common and shared humanity as a way of promoting a stronger sense of respecting human dignity and equality.

*All human beings have equal worth and importance and are therefore equally worthy of concern and respect by the Government and other individuals*<sup>30</sup>.

The repealed constitution of the Republic of Kenya under its chapter V had a proviso on *“protection of fundamental rights and freedoms of the individual”* which was not respected

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<sup>28</sup> RICHARD N. RWIZA, *Ethics of Human Rights: The African Contribution*, CUEA Press, Nairobi, Kenya, 2010, p. 26.

<sup>29</sup> The Preamble of the UN Universal Declaration of Human Rights, adopted on 10<sup>th</sup> December 1948 and quoted severally by human rights law scholars.

<sup>30</sup> RONA K.M. SMITH & CHRISTIEN VAN DER ANKER, *The Essentials of Human Rights*, Hodder Arnold, Oxford University Press, USA, 2005, p. 108.

*the Governments in power*<sup>31</sup>.” It was just good in papers since it was entrenched in the document by the colonial power with sole intention to protect the human rights of the White minorities living in Kenya as “White Settlers” and business communities composed of Indo-Pakistani people. Actually the provision had nothing to represent promotion and protection of equality rights or the rights of the citizens and non-citizens. However, the provision served human activists and lawyers to bring their case to court against the authoritative Government which adversely was not honoured.

The independent government made use of the Bill of Rights just to protect the powerful individuals and their interests but not the poor. Socio-economic rights are constitutional rights but with no enforcement<sup>32</sup>.

One of the challenges of enforcing equality rights is based on the perception citizens and juridical operators have of them. They have accepted with little critical analysis the doctrine of categorical division of power<sup>33</sup>. The legislature and the judiciary were at the mercy of the executive (under the repealed constitution) which could circumvent the law to favour the interests of the elite.

Exploring theoretical underpinning of the constitutional protection in Kenya it is clear that courts are made to decide sometimes on cases that belong to political branches. In the Republic of Kenya the judiciary is left out of retributive decisions handled exclusively by the executive and the legislature. In this case judicial contribution is restricted and limited only to

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<sup>31</sup> The Constitution repealed on 27<sup>th</sup> August 2010 and replaced by the new constitution which highlights the same human rights provisions under chapter IV. Articles 70-86 of the repealed document talks of protection of human rights but avoids the equality of rights.

<sup>32</sup> FONS COOMANS (Ed.), *Justiciability of Economic and Social Rights: Experience from Domestic Systems*, Oxford University Press, UK, 2006, p. 1.

<sup>33</sup> IDEM.

advisory opinion at request or when there are petitions or disputes making the role of court in equality rights extremely limited.<sup>34</sup>

Given the state of affairs no any individual could challenge the Government or the State in court under the repealed constitution. Social welfare right in Kenya was a far-fetched dream idea frustrated by lack of technicality and procedures.

Politically Kenya shifted from multiparty to one party system<sup>35</sup> making several changes in the original constitution as means to exploit the general will of the people in order to stay longer in power. Art. 1 of the repealed constitution states that Kenya is a sovereign Republic empowering the Government against the citizens. In this situation the enforceability of equality rights was not only a sheer dream but also a risk especially to the opposition that struggled for democratic space, the rule of law and constitutionalism in Kenya. Kenya ratified the UN Convention Against Torture and Other Cruel, inhuman or degrading treatments (CAT) on 23<sup>rd</sup> March 1997<sup>36</sup> but still it could systematically engage in the breach of its obligations under the CAT. The right to the secure protection of the law; fair hearing under the principle of *audi alteram partem*, protection from discrimination were all adversely violated by the Government.

It was possible to formulate constitutional provisions on social welfare rights in a manner that would make them efficient in minimum core of welfare rights via judicial action in the face of resistance from the political branches. However, how could this be done if the judges were appointed by the President who could determine their decisions in court? The judiciary was reduced to a tool for political class, the elite and the discretion of the President.

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<sup>34</sup> FONS COOMANS (Ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, Oxford University Press, UK, 2006, "Social Welfare Rights", p. 120.

<sup>35</sup> Repealed Section 2(A) by 12 of 1991, s.2.

<sup>36</sup> PROF. KIVUTHA KIBWANA, *Fundamental Rights and Freedoms in Kenya*, Oxford University Press, Nairobi, 1990, p. 6.



Human rights remained a discourse only for international relations but not a topic that the ruling elite would address. This is a contradiction to the Kenya being a signatory to almost most of the International Bill of Human Rights except some Optional Protocols. Kenya ratified ICESCR and ICCPR in 1976; ICEDW in 1984, CRC in 1990, CAT in 1997, and ICERD in 2001.

## CONSTITUTIONALITY OF THE BILL OF RIGHTS

The equality rights as experienced in the Kenyan context draws its fundamental inspirations from the constitution that was promulgated on August 27<sup>th</sup> 2010 with a dedication of Chapter Four to the Bill of Rights. Section 19(1) *The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic, and cultural policies.* The constitutional Bill of Rights provisions make it mandatory that the government cannot interfere with its obligations to promote and protect human rights and cannot make legislations that are inconsistent with the constitution. The Bill of Rights highlights most of the International Bill of Human Rights anchored on the UDHR of 1948 and the UN World Conference in Vienna in 1993 on the Declaration and Programme of Action reaffirming that all Human Rights were universal, indivisible, interdependent and interrelated<sup>37</sup> and its appeal to all Governments to take all appropriate measures in compliance with their international obligations and with due regard to their respective legal systems to counter intolerance and related violence based on religion or belief<sup>38</sup>. Under subsection (2) its states that *recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.*

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<sup>37</sup> MALCOLM N. SHAW, *International Law*, A Grotius Publication, Cambridge University Press, 1997, 4<sup>th</sup> Edition, p. 208.

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The constitution of 2010 creates a shift in State power under Section 1(1) by stating that the sovereignty “*all sovereign powers belong to the people of Kenya and shall be exercised only in accordance with this constitution*”. By this provision the executive shall not enjoy absolute powers especially over human rights. Such people’s power is exercised either directly or through democratically elected members, a provision that highlights democracy in sharing of power as opposed to the repealed constitution.

The Bill of Rights under Section 19(3) states that rights and fundamental freedoms belong to each individual and are not granted by the state; do not exclude other rights and fundamental freedoms and are only subject to limitations contemplated in the constitution.

The constitution also defines the applicability of the Bill of Rights under Section 1 (1) “*The Bill of Rights applies to all law and binds all State organs and all persons; (2) Every person shall enjoy rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the rights or fundamental freedoms*”. This is affirmation of the International Bill of Human Rights in its entirety.

Bill of Rights in the constitution of Kenya is a radical departure from the previous constitution not only in respect of its enforceability but also in the breadth and scope of its recognition, promotion and protection of rights. Under Section 255(1)(e) requires a referendum for the approval of any alteration.

## JUDICIAL ENFORCEABILITY OF THE EQUAL RIGHTS

The shared contention that enforceability of equality rights can best realised through judicial contribution is true. The example is the European Convention on Human Rights and Fundamental Freedoms that created the European Human Rights Court of Human Rights whose mandate includes monitoring the implementation of human rights in the member

States. Probably, the African Court of Human and People's Rights based in Arusha could serve the same purpose to accelerate the implementation of Human Rights within its member States. However, the assumption that Kenyan Judicial Authority can superimpose itself over other State organs may only result into further constitutional conflicts. The constitution has a provision on the Bill of Rights and some clauses empowering the courts to be the overseers of human rights violations but with less authority. Under Sec. 172(1)(a) Judges are recommended by the Judicial Service Commission to be appointed by the President only after the approval by the National Assembly. Under the same Section, ss. 2(b) the commission is to be guided by the promotion of gender equality.

The constitution under Section 20(3) states that in *applying a provision of the Bill of Rights court shall-* (a) *develop the law to the extent that it does not give effect to a right or fundamental freedom;* and (b) *adopt the interpretation that most favours the enforcement of a right or fundamental freedom.* The court shall develop the law to the extent that it does not give effect to a right or fundamental freedom is a claw-back clause that tends to contradict the duty of the court to develop the law towards promoting and protecting rights and fundamental freedom which is again corrected in clause (b) stating the enforcement.

In view of the judicial enforceability of the Bill of Rights the constitution has empowered the Judiciary as an independent State organ to promote and protect human rights including equality of rights and social welfare rights. In Section 20(4)(a), *a court, tribunal or other authority is mandated with the interpretation that includes the values that underlie an open and democratic society based on human dignity, equality, equity, and freedom...*In this provision the judiciary is obliged by the constitution to interpret the law in a manner that shall promote and protect equality of rights of every individual.

The court shall be guided by the following provisions under Section 20(5); (a) It is the responsibility of the State to show that the resources are not available; (b) In allocating the resources the State shall give priority to ensure that the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals, and (c) *the court, tribunal or other authority may not interfere with a decision by the State organ concerning the allocation of the available resources, solely in the basis that it would have reached a different decision.*

The judicial enforceability is limited under subsection (c) conditioning it not to interfere with the State with a decision by the State organ concerning the allocation of the available resources. This is a claw-back clause which gives carrot and stick at the same. The claw-back approach to human rights tends to recognise equality rights and at the same time takes them away from individuals.

## PROGRESSIVE ACHIEVEMENT OF EQUALITY RIGHTS

Generally it is agreed that only through democracy and rule of law that human rights can be effectively enforced and implemented. The lack of appropriate judicial tradition of protection of socio-economic rights and other rights in Kenya is one of the hindrances to the full implementation of the Bill of Rights and Equality Rights in particular. There is lack of long standing judicial tradition in promoting and protecting human rights. An example is the affirmative action requiring women to hold 1/3 of legislative assemblies. At the request for advisory opinion on the rule, the Supreme Court ruled that this provision shall be implemented progressively and not immediately on the Advisory Opinion Application 2 of 2012.<sup>39</sup>

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<sup>39</sup> <<http://kenyalaw.org/caselaw/cases/view/85286>>

*In its majority opinion the Court acknowledged the, “social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society and its resultant diminution of women’s participation in public affairs has had a major negative impact on the social terrain as a whole.”<sup>40</sup>*

*Despite this, majority of the Court was also of the opinion that the one third gender principle as provided for by the constitution could not be enforced immediately and was to be applied progressively: progressively being by 27 August 2015. The court stated that, “legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015.”<sup>41</sup>*

Equality rights are to be claimed from the Government and in this case it is difficult for individuals to take the Government to court since Governments have more capacity than mere individuals.

Several human rights lawyers with international recognition have agreed that the progressive and gradual achievement of equality rights is acceptable due to various pressures and collateral damages that may come along with the process.

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<sup>40</sup> <<http://www.mzalendo.com/blog/2012/12/14/on-the-supreme-courts-majority-opinion-on-the-one-third-gender-rule/>>; <<http://www.judiciary.go.ke/portal/one-third-gender-rule.html>>

<sup>41</sup> IDEM.

## EQUALITY AND FREEDOM FROM DISCRIMINATION

Section 27(1) *Every person is equal before the law and has the right to equal protection and equal benefit of the law; ( b ) equality includes the full and equal enjoyment of all rights and fundamental freedoms; (3) men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres*<sup>42</sup>. This section is defining the equality rights and freedom from discrimination.

## FACTORS MAKING ENFORCEABILITY OF EQUALITY RIGHTS DIFFICULT

The new constitution addresses some of the listed elements of enforcement requirements of equality rights. Legal security of tenure for judges; availability of service materials and infrastructures; affordability of the adequate housing; habitability of the adequate housing; accessibility of housing; location of the house at a place of employment; respect for cultural heritage.

The doctrine of the separation of State powers among the judiciary, executive and legislature is still creating heat in Kenya after the promulgation of the new constitution. Still the executive and the legislature regard the judiciary as a subordinate State organ that should be subjected to the control of the other organs. This is a drama that will not see the full independence of the judiciary.

Courts handle cases brought before them for adjudication, advisory opinion, interpretation, *inter alia* but judges use their discretion to refrain from actions that may put them in conflict with the interests of the executive, the legislature or any other political branch. Separation of State powers, autonomy and independence of judges under the principle of impartiality of judges are key frustrations facing the judicial enforceability of human rights in Kenya.

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<sup>42</sup> PROF. WANGARI MAATHAI, "Women Match Slow in Kenya", in the New Africa, November 1, 2010. <http://web.b.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=5&sid=b3a35656-c8bd-4b55-b6f0-3042867216c1%40sessionmgr114&hid=103>.

Human rights awareness must be raised by both the State organs and None State Actors alike among the populace especially political leaders. Institutionalizations should promote education on human rights and fundamental freedoms to empower individuals defend their rights, claim them and demand them from the State. The approach to the enforcement of the Bill of Rights must be based on respect, protection and fulfilment of human rights. There must be full enjoyment of economic, social and cultural rights and participation of individuals and groups in the socio-economic sphere<sup>43</sup>.

There is cost on the part of the State to ensure that there is full enjoyment of socio-economic rights. For instance, everyone is entitled to decent housing that will promote his or her human dignity may require funds from the State. Social security for unemployed citizens shall require the State to allocate some social welfare funds to this cause. However, given the poverty level in Kenya and low economic growth may not enable State authority to guarantee the protection of basic equality rights.

Kenya needs to enact more focused legislations to safeguard and protect the rights of the minorities, and other citizens with low security such as girl child and other vulnerable members of the society. By extension such human security must also be extended to aliens, migrants and refugees. For instance, some refugees are known to be staying in the camps and living in horrendous conditions for quite too long while camps are meant only for a short period of time<sup>44</sup>. Human security is at risk and it is within the State obligations at the international law to guarantee such securities whenever they are threatened.

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<sup>43</sup> MARTHA F., DAVIS, "Participation, Equality, and the Civil Rights to Counsel: Lessons from Domestic and International Law", Yale Law Journal, USA, June 1, 2013, p. 4.

<sup>44</sup> PROF. EDWIN O. ABUYA, "From Here to Where? Refugees Living in Protracted Situations in Africa", in EDWARDS, A. & CARLA, F. (Eds.), *Human Security and Non-Citizen Law, Policy and International Affairs*, Cambridge University Press, 2010, PP. 125-165. Cited page 125 "some refugee situations have considerable time to resolve."

African treaty lacks an express provision that deals with the education and trainings especially of refugees.

It would be appropriate for Kenya in the new constitutional dispensation premised on the rule of law, human rights and constitutionalism to ratify Optional Protocols and other related international law conventions<sup>45</sup>.

Creating a framework for complainant mechanism is a necessary cause that must be fulfilled in light of the new constitution. The provision for the Commission for the Administration of Justice is one of the constitutional achievements that can see the office of ombudsman coming up with a functional and effective framework for complainant mechanism<sup>46</sup>. This can be supported by the constitutional provision on the access to justice holding the Government accountable of its obligations and commitment to human rights under Section 48.

In support to professor T. W. Bennett, African Customary Law should not be ignored in the African legal systems such as Kenya. It would create more jurisprudence on human rights and how to translate it into the domestic system. He said that an absence of rules and an emphasis on tradition do not mean that the individual will suffer mistreatment.<sup>47</sup>

## **CONCLUSION**

It is apparently clear by the constitution that the Bill of Rights rules that the State is charged with the duty to promote and protect equality rights and ensure that every individual also does the same. One of the achievements of the constitution of 2010 includes devolution of resources to the counties and sharing of State powers among constitutional organs. The same constitution makes it obligatory to enact legislations that would create appropriate institutions

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<sup>45</sup> THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, Nairobi, 2005, pp. 1ff.

<sup>46</sup> Cf. *Op. Cit.*, Preface.

<sup>47</sup> T.W. BENNETT, *Human Rights and African Customary Law: Under the South African Constitution: Law Series of the Community Law Centre, University of the Western Cape, JUTA & Co. Ltd.*, 1995, p.3.



such as Constitution Implementation Commission, Kenya National Human Rights and Equality Commission, Ethics and Anti-Corruption Commission, National Lands Commission, National Cohesion and Integrity Commission, National Revenue Commission, Salary and Remuneration Commission, Judicial Service Commission, Office of Ombudsman, Independent Boundary and Elections Commission, National Police Service Commission (under the sixth Schedule). Kenya has institutions that if properly managed and appropriately empowered can contribute a great deal to the implementation of the human rights.

Equality rights appertain by essence to human rights that are difficult to enforce especially in conditions of inequality, corruptions, impunity and historical social injustice. Despite the constitutionality of the equality provisions and relevant legislations, still its enforceability is faced with various substantial challenges that may require more discussions and debates. The judiciary does not have full power to protect and promote equality provisions without the good will of the executive and parliament. It is also a reality that the judiciary requires more enacted laws to deal with complaints of human rights including Human Rights Act.

While it makes reasonable meaning to rule that equality rights can only be implemented in a progressive manner it is also imperative to admit that the State still needs to show its commitment to its obligations in the international law. The political will is the bottom line of all the human rights allegations especially concerning the most enchanted equality rights. Ever since the adoption of the UNCESC Rights in 1966 the proponents have been persisting on the oversight and judicial body that will foresee its implementation by States<sup>48</sup>.

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<sup>48</sup> See, e.g. MICHAEL J. DENNIS AND DEVID P. STEWART, "Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate Rights to Food, Water, Housing, and Health?" in <[http://heinonline.org/HOL/Page?handle=hein.journals/ajil98&div=44&g\\_sent=1&collection=journals#472](http://heinonline.org/HOL/Page?handle=hein.journals/ajil98&div=44&g_sent=1&collection=journals#472)>.

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