

**GENDER DYNAMICS AND INTELLECTUAL PROPERTY  
LAW.**

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DEGREE**

**BY**

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## **DEDICATION**

This dissertation is dedicated to my Dear Mum, Teresa Njeri for having brought me into this world. For her Guidance, her profound patience and perseverance, she will always remain my number one. Mum, God bless you so much.

And to my Late Dad, Stephen Wachira for being there when you lived, May you rest in Eternal Peace. We know you are watching from above.

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**I take the blame for any other errors contained herein.**

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**Finally, I owe special gratitude to my sisters Winnie, Rose, Lydiah, Grace and Chiku. You are the best sisters anybody could ever ask for. God bless you abundantly.**

## **LIST OF ABBRREVIATIONS**

<b>IP</b>	<b>: Intellectual Property</b>
<b>IPR's</b>	<b>: Intellectual Property Rights</b>
<b>TRIPS</b>	<b>: Trade Related Aspects Of Intellectual Property Rights</b>
<b>UPOV</b>	<b>: International Convention for the Protection Of the New Varieties of Plants</b>
<b>WTO</b>	<b>:World Trade Oragnisation</b>
<b>WIPO</b>	<b>:World Intellectual Property Organisation</b>
<b>KIPO</b>	<b>:Industrial Property Office</b>
<b>IPA</b>	<b>: Industrial Property Act.</b>
<b>KCSE</b>	<b>: Kenya Certificate for Secondary Education</b>
<b>KEMRI</b>	<b>: Kenya Medical Research Institute.</b>



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## INTRODUCTION.

"Go ahead and do it. Don't ask! Its much easier to apologise than ask for permission. You can't afford to wait."

These are the words of Grace Hopper to women inventors. These words of encouragement are an echo of agony that women go through in the field of inventions and innovations due to non-recognition. It is a fallacy to argue that women are treated in an equal way in terms of recognition as their male counter parts. This is because it is well documented that all societies recognises some sort of gender differentiation stratification- a rank ordering men and women that signifies the unequal distribution of power and resources. Of continuos attention and special interest is the concentration of women in occupations with low wages, low prestige and thus hindering their inventive potential.

This inequality manifests itself in all spheres of women's lives be it social, economic political and cultural where it is magnified by a much deeper form of inequality. There are also legal constraints. Education opportunities for girls are not the same as for men. Access to resources of whatever form is hard for women due to the cultural institutions in place, which perpetuate the system of patriarchy. Emergence of capitalism has widened the gap further by placing women at the periphery in terms of access to resources.

The relegation of women to the periphery where resources seem so far has serious implications on the nature of women inventions and innovations . For instance in the field of patents, a lot of research has to be done, time and money must be present. This automatically puts out women because they play threefold roles viz.: mothers, wives and working women. The issue of time and resources is particularly very crucial especially in developing countries

where women are taken to be the custodians of the home and must take care of children and their husbands.

This dissertation is geared to establishing the constraints that the law governing intellectual property puts on women thus hindering their potential to invent and innovate.

This dissertation is divided into four chapters. Chapter one will deal with the history of women inventors and innovators. This is to create a background from which to develop analytical progress of women's inventions and innovations upto date. Chapter two will deal with law governing intellectual property law in Kenya and its impact on women inventors and innovators with a brief comparative analysis of the law in developed countries.

Chapter three will deal with he factors that hinder the advancement of women inventors and innovators Chapter four will deal with some proposals for reforming the system to take into account women's needs in the field of inventions and innovations.



## CHAPTER ONE.

### HISTORY OF WOMEN INVENTORS AND INNOVATORS.

The history of women inventors and innovators dates back to two centuries ago long even before the industrial revolution. The unique aspect of women's inventions and innovators at the time is that they were social rather than scientific inventions. The first patent on an invention was given to a woman by the United States Patents Office on May 5 1809 for the invention of a straw weaving with silk or thread.<sup>1</sup> The woman's name was Mary Kies. At the time, the requirements of patentability were not as they are now. Though the requirements of novelty and inventive step were there, they were not enforced so strictly as they are today. But the invention had to have industrial applicability. In all the years that followed, women's inventions leaned heavily on the social side and were used to uplift the standards of living for women's lot. In 1895, a list prepared by the US patent office issued a list of women patentees and the field of inventions and innovations in which they had invented or innovated.

The list reveals that women had begun inventing in other fields where only men used to have monopoly. For instance, there was even invention of one wheel vehicle by a woman in December 6<sup>th</sup> 1892 by Wilson Harriet in New York. In 1894, there was a more advanced invention of a wind motor by Rollason Sarah of England.<sup>2</sup> These patents were issued only after much lobbying by a woman who tirelessly fought for women's inventors' recognition. Her name was Charlottee Smith. She championed for the recognition of women inventors and innovations. In April 11 1891, a delegation of women inventors convened in Washington D.C headed by Charlotte Smith president of women's National Industrial League of America. She

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<sup>1</sup> Farag Moussa, Women Inventions Organisations: 1994 at pg. 26

<sup>2</sup> *Ibid* at pg.9

was not an inventor herself but she used her position to assist women get recognition and protection of their inventions and innovations tirelessly fought for women inventors' recognition.

The list of women inventors has grown longer and longer and cannot be enumerated in this chapter. Some countries have assisted women form women inventors' associations. In Finland, Vera Hjeit was the first woman to patent an invention, which was a portable carpenter's bench in 1886. In a forum of women from Asia and the Pacific in 1983, women made a historic statement that the inventive spirit knows no gender and that women's inventions must be given due recognition as that given to their male counterparts even if they are social in nature.<sup>3</sup>

In The United States, there were inventions which today astonish the technical knowledge and imagination required. The deep-sea telescope invented by Sarah Manther (1845) and improved by her daughter was a unique and important invention bringing the hull of the largest ships to view without the expense of putting them into dry dock. By this means of invention, wrecks were inspected, obstructions to navigation removed, torpedoes successfully hunted and immense savings accrued annually to the marine service. Nancy Johnson of Washington D.C was the inventor of the first ice cream freezer in the United States and was granted a patent for her invention in 1843<sup>4</sup> despite the laws that existed at that time that women could not own property. Despite the efforts of Charlotte Smith to champion for women inventors rights, women continued to face injustices and a lot of piracy from the men who demanded that the husbands names must appear in the patent letter.

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<sup>3</sup> *Ibid* at pg 65

<sup>4</sup> *Ibid* at pg.17

In 1891, Charlotte Smith formed an association for women inventors and innovators called 'Women Inventors' Mutual Aid and Protective Association Of the United States of America' but this association did not last for long and women did not enjoy an association of their own before several decades.

There is no prior documentation of women inventions prior to 1882. This can be attributed to the fact that women at the time were not allowed to own any property. Even the inventions made by women between 1809 and 1882 were documented as late as 1895. Women would be denied patents on the basis that they could not own property since they were considered not to have capacity to own property.

In Kenya, there is scanty material on women's inventions. Several factors contribute to this state of affairs. This is because the sort of inventions and innovations made by women percolate to the public domain before they are filed to be registered by the KIPO office, which deals with the registration of innovations and inventions. Another reason why the history of Kenyan innovators is blurred is because before the creation of KIPO office, the granting and registration of patents, utility models and industrial designs was done in Britain. In such a situation, the exercise was made more difficult and expensive due to the time and cost involved in obtaining an intellectual property. This meant that any women with any rights to register could not do so because of such limitations as finance, distance and time. Their innovations then could not materialise as property.

The KIPO office was established in 1991 to take over the responsibility of registering and granting patents, trademarks, utility models and industrial designs and other forms of intellectual property rights to all residents in Kenya who file for such protection. From the



women are the subject matter of Chapter Three. Property was communally owned and so anything new invented by one person was considered automatically as community property. Such inventions were basically geared towards social benefits of the community. For instance, the process of harvesting honey is so unique that though there is no scientific inventive step involved, it should be granted some form of recognition because effort has been expended to get it done. The only problem with such a process is that the rest of the public knows it and so no person can claim exclusive right to it.

There is a lot of knowledge on herbal medicine reposed in the Kenyan and generally African woman but which is not exploited because of lack of information and awareness of existence of any property in such knowledge which can be exploited.

In Kenya, women's inventions and innovations are a new concept and are not well put into focus. Their inventions and innovations are tied more to cultural functions and are not put out as inventions that have material wealth but rather are displayed as inventions and innovations of aesthetic value.

There are just innovations for which no particular rights can be granted because Kenya follows the absolute standard of novelty and inventive step, especially where patents are concerned. For instance, the unique Akamba carvings are not registered as any form of intellectual property right. No person therefore can claim exclusive right over such a carving no matter how unique and distinct or new because even when a new design is made, it is taken straight to the market and it enters the public domain and no protection can be sought thereafter. This mainly stems from a case of illiteracy in the field of intellectual property and lack of unawareness on the part of the innovators or inventors



The Akamba carvings are mainly made by the men. Women make the 'Ciondos' which are now receiving competition in Portugal because they are not registered in Kenya as part of industrial designs and so even when the Portuguese copy the design, there can be no infringement of such crafty work. There is a raging war going between the Australians and the KIPO office on the patenting of the Maasai sheep.

The Kenya Industrial Property office (KIPO) has totally ignored these homemade inventions and innovations. There are no incentives given to women innovators and Kenyan women are faced with so many problems especially financial problems to fund their projects that their potential goes off to the drain.

In other countries women have formed strong women inventors associations which look into the interests of women inventors and innovators interests. Such organisations have been of much help to boost women 's confidence and help them become self-reliant. There has not been any women inventor's association in Kenya. The any association that exists is the Kenya Association of Inventors, which was only formed in 1997 and has not become well grounded to tackle all the issues as yet. No institutional mechanism has been put in place in Kenya to deal with women inventions and innovations.

It is also important to bear in mind that women were never allowed to own property like land, cattle or any other form of property. They only had rights of access. In most Kenyan communities, property was owned communally and did not belong to one person. Any new discoveries had to be disclosed to the whole community and there were only heroic awards but not in the form of rights which excluded other people from benefiting from the right.

There was no awareness of the existence of an intellectual property right in any discovery because they did not know it was property in itself. This has greatly contributed to the lack of documentation of any innovations made by women at the time.

It is said that women discover or create new things almost daily in their daily chores but they are unaware of any rights attached to the discovery. For instance, in the rural areas, women have discovered that to cook arrowroots without them getting them soggy with water, you only need to put some leaves and salt. Another instance is the process of fermenting porridge without using any chemicals by simply putting the mixture and hanging it out in the between some banana leaves to acquire the warmth. Such discoveries are unique in their own way to women but are not documented because of various factors, which shall be discussed later in this dissertation. From this history, it is pretty clear that a lot has to be done to boost women input in the technology field.

## CHAPTER TWO

### THE LAW GOVERNING INTELLECTUAL PROPERTY IN KENYA AND ITS IMPACT ON WOMEN INVENTORS AND INNOVATORS.

Generally, the law governing intellectual property rights in Kenya is gender neutral. Protection is offered equally to both genders without any discrimination as to whether one is a woman or a man. What the law lacks is an appreciation of the uniqueness of women inventors and innovators. The law does not take into account the specificity of their different needs. This has meant that the general application of the law on paper impacts on women differently the way it does to men. This is because women are not in the same position with men as far as the distribution of resources is concerned and their role in the family radically affects their input in the world of inventions and innovations. This arises from the difference in time input by both genders. It is important to understand the nature of intellectual property rights and the implications they have when they are granted. Intellectual property rights have been defined as private legal rights, which apply to the intangible human contribution that goes into producing a particular technology.<sup>10</sup>

Legislation and case law create the legal right and define its scope. In its most basic form, an intellectual property right allows its holder to control others commercial use of the intellectual information embodied in the technology during the lifetime of intellectual property right. As a result, potential users of the information must seek permission of the holder.

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<sup>10</sup> Lyle Glowka, *A Guide to the Convention on Biological Diversity*, 1999 at pg.87



The corpus of law governing intellectual property be it patents, copyright, trade marks, utility models and industrial designs has no provisions requiring any lesser standards for women inventors or innovators depending on their specific needs. No consideration is given to the precarious position women find themselves in trying to reconcile their duties as custodians of the family matters and as innovators or as inventors. Their innovations, which they make in the course of carrying out this duty are not well protected and recognised because of the technicalities involved in acquiring protection of an intellectual property right.

In examining the law governing intellectual property rights in Kenya, it is noteworthy to bear in mind that women especially in the rural areas are mostly the custodians of the environment where most of the indigenous resources are found which would otherwise give rise to different intellectual property rights in form of genetic resources. The rural Kenyan woman however is ignorant of the existence of these intellectual property rights and has thus continued to deplete the massive bio-diversity without the knowledge of how much it holds for her benefit. Women traditionally are known to be the ones who collect firewood to meet their family needs. In this manner, they cut down trees and all other shrubs without knowledge of the property rights they would be destroying. For instance, a research carried out by the Ministry of Natural Resources in their annual report to United Nations Environmental Programme(UNEP) on the status of the forest revealed that most of the proprietors of quarry digging in Ololua forest are women and for such quarrying to take place, bio-diversity is destroyed in the process.

It is important to note that Kenya is a signatory to a number of international instruments, which govern IPR. These include WIPO, TRIPS and the WTO. These instruments contain the international law to which state parties must adhere to in protection of IPR's. TRIPS is mostly

emphatic on patents and other IP rights defined under the conventional IP regimes. The rights are primarily obtained and owned by inventors and Trans-national corporations involved in formal research sector in developed countries. Indigenous traditional knowledge is not eligible for equivalent legal protection.<sup>11</sup> In this context, women are custodians of most of the knowledge that is in bio-diversity and genetic resources. Such knowledge held in local communities could be a valuable lead to genetic resources that can be the basis for pharmaceutical, herbal medicines and other products.

When the pharmaceuticals corporations acquire such indigenous knowledge and translate it into a product, the local communities who are the repository of such knowledge cannot afford the products from such knowledge and so they lose the benefits of their knowledge. Most of the knowledge of indigenous and local communities developed and conserved through generations and attributable to identifiable individuals cannot be protected under existing IP laws. This is because whether widely known or not, once traditional knowledge is recorded and publicly disseminated, its use and application are beyond the control of the original knowledge providers.

Though there exists strong IP systems in developing countries, there is a general feeling that the characteristics and effects of IPR's are unfavourable to the interests of indigenous peoples, whose knowledge innovations and management practices are vital to the conservation and sustainable use of bio-diversity<sup>12</sup> where women involvement in IP is conspicuously pronounced. This is because western IPR regimes are based on private rights and would only recognise collectively held knowledge if the community is a company.<sup>13</sup> The international

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<sup>11</sup> David Downes, *Intellectual property Rights, A BattleGround for Trade and Bio-diversity?* pg. 11

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

women's day acknowledged that women are the custodians of bio-diversity. This assertion is buttressed by the historical fact that women relied and continue to rely on the environment for their livelihoods especially in terms of fuel, food substances and other benefits. If women are given equal access to the environmental resources in the same manner as their male counterparts, this would create an opportunity for women to advance their cause.

Again the western IPR regime is being universalised to the exclusion of other national regimes which may be in place. Some indigenous peoples of WTO members see this move as effectively invalidating their own customary regulations. Most indigenous people's unfamiliarity with what is to them an imposed system combined with their financial poverty means that they are least able to benefit from the system.<sup>14</sup> In the same vein, there is a general lack of economic self-sufficiency of many traditional communities and the glaring unequal power relations between the corporate world and the traditional communities. Besides, the high cost of litigation would make it very difficult for the communities to protect their intellectual property rights through the patent system.

The lot of indigenous people that is affected by this regime is women. This is because women have a special bond with the environment. This bond is created by the fact that women rely mostly for their sustainability on the environment. Wild fruits and firewood and medicinal value of some of the herbs is peculiarly within their knowledge. When other business-oriented people without giving women a chance to benefit from it acquire this knowledge, it becomes an exploitative regime, which does not take into account the needs of the local indigenous woman.

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<sup>14</sup> Graham Dutfield, *Intellectual Property Rights, Trade and bio-Diversity* at page 23



It should not be considered that traditional knowledge should only be protected through IPR's especially patents. Traditional knowledge can be protected by other means. The western countries believe that the only IPR's that exist are those referred to in the TRIPS and WIPO instruments. Just as local communities can learn about western based IPR systems, it is about time the lawyers and policy makers learn about how traditional communities generate, use and manage their own knowledge and protect them.

In this chapter, I will examine the law governing the most common forms of intellectual property rights and how their impact on women inventors and innovators in contradistinction with men inventors and innovators. The form of rights, which I will tackle, is patents, copyrights and also plant breeders' rights.

## THE LAW GOVERNING PATENTS IN KENYA.

The Industrial Property Act Chapter 509 laws of Kenya govern patents in Kenya. The Act protects patents, industrial designs and utility models. Patents are also governed by the Paris Convention for the Protection of Industrial Property of 1883<sup>15</sup> which is administered by WIPO. The convention does not create an internationally enforceable patent right rather patent protection remains a phenomenon of national legislation and case law. Again, patents are also governed by the Trade Related Aspects of Intellectual Property (TRIPS). These instruments contain no specific provision regarding women inventors and innovators. Curiously, in the TRIPS agreement, there is mention of discrimination. In Article 27(1), the agreement provides thus:

"Patents should be available without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced".

There is no mention of gender discrimination and so one can safely assume that protection is to be afforded equally to both genders. But is this the situation on the ground? The answer to this question can only be answered by looking at the instruments themselves and discovering that their wording and expression does not envisage the protection of any local patentable material rather, it is worded to reflect the safeguarding of patents which belong to multinational corporations and western oriented inventions.

To this extent, patent protection varies from state to state. For instance in Kenya as a matter of public policy does not allow the patenting of living organisms because of the moral questions which extend to the patenting of life forms and also the question of restricted access to genetically modified materials which have been patented.<sup>16</sup>

A patent may be defined in two ways. Firstly, it is a certificate granted to a person who has developed something new. Traditionally, they were called letters patents. Secondly, it is a bundle of property rights granted for an invention, which allows the inventor to have a private monopoly of fixed duration to restrict others from making, using or selling the invention.<sup>17</sup> In exchange, the patentee's subject matter of invention is disclosed to the public. In the hierarchy of IPR's, patents are regarded as the summit and pinnacle of innovations.<sup>18</sup> This is because of the standards and procedures that are involved and which must be met to secure a patent. It is also because of the fact that patents embody innovation in the first sense.

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<sup>15</sup> *Industrial Property Systems in Kenya, Published by the KIPO Office 1998. Pg 4*

<sup>16</sup> *Ibid.*

<sup>17</sup> *William Cornish, Intellectual Property, 3<sup>rd</sup> ed. 1996, pg. 23*

<sup>18</sup> *B. Sihanya, Commenting on the High Standards of Patentability.*



In Kenya, patent law is neo-colonial issue. The Patent Registration Act Chapter 508 (now repealed) provided for grant of patents in Britain and registration in Kenya. This system had major operational and substantive weaknesses because what was patentable in Kenya was not patentable in Britain. The decision on what was patentable was left to the Britain's patent office. This system saw the perpetual relegation of traditional knowledge to the periphery of IPR. The cost of such an exercise was enormous and not many Kenyan inventors and innovators could afford the cost and so their inventions went unpatented. Again this system was an affront to Kenya's sovereignty and also especially it inhibited technology transfer to Kenya because a patent document is a source of technology.

To obtain a patent in Kenya, certain criteria must be met in accordance with the IPA. The Act outlines what is patentable in Kenya as inventions. As per the Act, an invention means a solution to a specific problem in the field of technology.<sup>19</sup> It is a new and useful art, process, machine or composition of matter, which is not obvious and is capable of being uses in trade or industry.

The criteria used to grant patents are:

- a) Doctrine of newness or the doctrine of novelty. It is defined under section 8 of the IPA as something new, which is not anticipated by prior art or technology. This is also in consonance with the TRIPS agreement, which provides for compulsory exclusion of inventions, which are not new.<sup>20</sup> In Article 27, it reads:

"Patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application".

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<sup>19</sup> Section 3 of the Industrial Property Act Chapter 509.

<sup>20</sup> TRIPS Article 27 (1)

In other words the invention must be revolutionary in character in that it is a scientific breakthrough. Our Act adopts an absolute standard of novelty as opposed to a national standard. This criterion does not augur well with the technological development in our country.

b) Inventive step. It is also called the doctrine of non-obviousness. It is stipulated in section 9 of the IPA and Article 27(1) of the TRIPS agreement. An invention should not be obvious to a Person Having Ordinary Skill in the Art (PHOSITA). This means that it must not be possible for an average expert to make the invention by mere routine. However, no parameters have been give of who such a person is. Inventive step is regarded as the most important and difficult principle of patentability.

c) Industrial applicability; It is governed by section 10 of IPA. It is also called the doctrine of utility. This means the invention can be used in any industry like agriculture, fisheries. Industrial applicability creates the social link between the inventor and the society. A patent cannot be granted if it cannot benefit the society. Industrial applicability means that the invention also ought to be reproducible. This requirement though noble is not always applicable due constraints especially of obtaining patented goods, which are quite expensive. The goods may be useful to the society but are not affordable because the buyer has to pay royalty to the patentee. Only the rich can afford the goods.

The criteria above which is expressed by the IPA is absolute and conforms with the international standards. It has failed to take into account the circumstances of the Kenyan people and the level of technological development. It is a criteria used to sideline the

knowledge that is held by the indigenous people and so it only sectarian, in that it favours only those people who are educated in a certain field.

In the context of the above, it should be noted that most of the women inventions and innovations do not have the scientific breakthrough that is required to have a patent. This means that the IPA by imposing international standards of granting patents does not take into account the special circumstances of women. Women inventions are mainly inventions based on the social conditions of life at the time and are used to improve the quality of life at the time.

This is not only a phenomenon of Kenya but it runs throughout the world. For instance, in Japan, the Japanese women inventors association reports that majority of the inventions exhibited by women are closely linked with household tasks, health and child care and are simple improvements of existing products<sup>21</sup>. For instance, Kuniko Aida invented a sophisticated feeding bottle with a thermometer and an alarm, which rings when the contents reach the right temperature. She was granted a patent, which is now in nine designated countries. The Japanese women inventors' association motto is 'let others concentrate on high technology and we housewives-inventors simply wish to make daily life easier'. Such an attitude does not give women any morale to push forward and invent in high technology.

This attitude is premised on the basis that women are never encouraged to invent. They lack self-confidence because their role as mothers and wives has always been belittled by the society and the problem is that they believe this role to be true. Typical of this attitude is

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<sup>21</sup> Farag Moussa., Women Inventions 1994. pg.24



when a woman says, " I am just a secretary or house wife". Men do not speak of themselves in this manner. This shows lack of confidence in women of their own potentials.

In the same line, the concept of inventions is a limitation to women's inventions because it encompasses technical scientific inventions. This concept should be widened to include non-technical inventions without technical processes and which are useful to the society in solving daily problems. These are more of social inventions in which women are involved in most. If allowed to patent their social inventions, women will gain more confidence and will aspire more and more to invent in the high technology field. They will cease being only mothers of children but also mothers of inventive techniques, and technology.

Apart from the criteria of patentability, there is also the procedural aspect of patents, which may discourage women from obtaining patents. The procedure of obtaining patents is very long, tedious and expensive. It requires an input of a lot of research, time and money, which unfortunately women do not have. In terms of time, women have struggled to double up as mothers, wives and inventors. Their time is shared between so many responsibilities that there is no adequate time for research to come up with patentable inventions. Those women who invest their time in research risk being 'bad mothers and disobedient wives' because they do not put in much to the family. The other dimension is the lack of resources both in form of finance and access. It is well documented that all societies recognise some sort of gender differentiation and that most exhibit some level of gender stratification- a rank ordering men and women that signifies the unequal distribution of power and resources.<sup>22</sup> Of continuous attention and of special interest is the concentration of women in occupations with low

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<sup>22</sup> *Economic Analysis of Biotech Patent protection: Yale Law Journal*, Vol.102, December 1992. Pg.156.

wages, low prestige. In such a situation, it is almost impossible for a woman to meet the procedural requirements of obtaining a patent.

In Kenya, the KIPO office, which is a government department under the ministry of Research, Technical Training and Technology, has the sole responsibility of vetting applications to grant patents. It requires that before granting a patent certain fees must be paid by the applicant. These fees are in various categories viz. filing fees, search fees, examination as to substance fees, renewal fees and the certificate fees. The cost of filing an application runs into several thousands. The KIPO office estimates the cost of obtaining a patent to be not less than twenty thousand shillings.<sup>23</sup> Such an amount of money is out of reach for most women especially those who have to rely on their husbands for economic support.

The IPA also excludes certain forms of inventions from patentability. These are stipulated in section 11 of the Act. These are:

- (a) Plant varieties as provided for in the seeds and plant varieties Act, but not part thereof or products of biotechnological processes.
- (b) Inventions contrary to public morality, public health and safety, principles of humanity and environmental conservation.
- (c) Any other invention that may be declared non-patentable by the ministry supervising the KIPO.

The parameters of exclusion have not been laid down and not many people can draw the line between what is a moral invention and what is an immoral invention. Whose standards are used to determine the morality of an invention?

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<sup>23</sup> KIPO Registry, Posta Sacco Plaza, Nairobi.

The duration of protection for patents is initially seven years and is subjected to renewal for two terms for five years making it a total of 17 years, This provision is currently under revision to make it 20 years.

From the above, it would be right to say that there are many legalistic, cultural and economic restraints which hinder women's development in the field of inventions as far as patents are concerned.

## THE LAW GOVERNING COPYRIGHT LAW IN KENYA.

A copyright is a right, which is created from written material, which is expressed in creativity and originality. It is the expression of an idea in an original form. Copyrights are awarded to persons who have originality in their work. The subject matter of copyrights includes literary works, artistic works and musical works. This is according to section 3(4) of the copyright Act Chapter 130 laws of Kenya. These works are protectable irrespective of their quality. Literary works include software programmes. Artistic works include photos, sculpture, applied handicraft and industrial arts.

A look at the copyrightable materials shows that there is a lacuna in the protection of indigenous works. The Act is generally not exhaustive. Protection of folklore where women feature most is provided in Section 18, which does not provide the mode of protection. It simply states that the Attorney General has power to establish regulations for ensuring efficient utilisation of folklore. The Attorney General has not done much on this subject. The obvious question would be why hasn't the Attorney General done anything about folklore? Is it because it is female dominated? Is it because it would not bring as many returns as patents and other IP rights? or is it because in concentrating on protection of folklore, the investors



who are basically concerned with high technology would run away or is because it is largely a community right which is only traceable to a group?

Folklore is an intimate part of the cultural heritage or cultural patrimony. The Copyright act does not define what folklore is. Folklore has been defined as production consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectation of such a community.<sup>24</sup>

This definition includes both individual and collective development of traditional artistic heritage. Protection of folklore presents a unique problem because of uncertainty as to the period that would be appropriate for protection. Some of the ingredients of folklore include folktales, folk poetry, riddles, folksongs and instruments of music etc. Up to how long should a tale be protected so as not to be told by another person?

It is noteworthy to bear in mind that protection of copyrightable works stems from the fact that it is original, and has commercial value to the owner. If a tale does not have commercial value, does it follow that it is not protectable? It would seem that if this were so, then no tales would be told since most of them are intended to entertain or inform because they have a moral leaning.

Another problem, which presents itself in protection of folklore, is the doctrine of tangibility/fixation or materiality. This doctrine requires that a copyrightable material must be reduced into written form or tangible form for it to be protectable. This is quite hard for

folklore especially because of the age bracket of people who tell the tales. Again there is the question of lack of awareness on the part of the storyteller about the existence of an intellectual right in the tale. In that case then, no storyteller will bother to reduce her material into writing since she is not aware that it is required to be written for it to be protected under copyright law.

Countries are supposed to develop *sui generis* mechanisms to protect folklore. They should come up with some institutional mechanism best suited to the whole society to protect in a unique way their folklore. Is our country doing what it is supposed to do to protect folklore?

This question would only receive answers from the lawmakers. However, there is a bill, which is being debated on how to protect folklore but has not been published yet. Folklore is one of the most important rights that women have in Kenya although they do not realise it. The lawmakers would argue that there has not been an effective way of protecting folklore. This argument would not stand because there is always a way in which a *sui generis* system would be developed to protect folklore. Lack of protection of folklore can only be attributed to intellectual stagnancy and lack of appreciation of folklore as a unique field of intellectual property. Kenya should borrow a leaf from their Ghana counterparts where folklore vests in the state and is protectable for the peoples' benefit in perpetuity: any person intending to use the same must pay fees, which is administered by the government.

The only question that would arise is who is the beneficiary of the money generated from such an exercise taking into account the popular struggles for democracy allegations of

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<sup>24</sup> Kumar U (1991) "Copyright Law and its Application in Lesotho: Principles of Copyright and Fields Covered by Copyright" pg.23.



official corruption. With the Kenyan experience with the management of public resources, would this be a viable model for protection of folklore?

Kenya has a ministry responsible for National Heritage and Culture. This ministry has not done anything to promote folklore and it appears that the missing link is commercial in nature in the sense that folklore is not yet viewed as a viable financial venture.

The area of folklore is the one field where if serious consideration of women peculiarities is taken into account, women would benefit immensely. This is because in almost all communities, women are great storytellers but they are bogged down by the doctrine of tangibility and fixation. This could be out of high level of illiteracy, which is not the case with men who may know how to write and reduce their material into tangible form.

## PLANT BREEDERS RIGHTS

They are recognised internationally through the International Convention for the Protection of New Varieties of Plants (UPOV). States are expected to grant and protect breeders' rights at national level for varieties, which are new, distinct, uniform and stable. This is provided for in Article 6(1) of the convention.<sup>25</sup> In Kenya, industrial property Act exempts the patenting plant varieties at section 11. These rights are protected under the seeds Variety's Act Chapter 326 laws of Kenya.

The rationale of exemption from patenting may be explained by the fact that plant varieties consist of traditional breeding, which does not involve any inventive step or scientific breakthrough to be patented. They are just plant breeders' rights. Under the TRIPS agreement,

member states are allowed to offer patent protection to all eligible inventions using genetic resources. This is provided for in Article 27(3)(b) of the agreement. The agreement also provides for a *sui generis* system of protection for such rights. Some amendments made to the UPOV convention in 1991 purported to do away with farmers' privileges because the amendments extend the plant breeders' rights to all production commercial and otherwise. Before the amendment, the convention allowed the breeder the right to exclude others from commercially marketing or selling the protected variety. This had created a farmer privilege because a farmer could save the seed to use them the following year without paying additional royalties to plant breeders. Women folk who are the custodians of bio-diversity especially in the field of seeds are in a position to benefit from trade in genetic resources. However their bargaining position is weak and thus need to be protected adequately when it comes to the issue of breeders rights.

Another issue affecting the rights of women breeders is the fact that most of the compounds derived from the plants which they guard are got from the South (developing countries) usually by a company from the North (developed countries). This way they are unable to follow any material benefits derived therefrom.

Further, the UPOV convention has a breeder's' exemption, which allows breeders to have their varieties only from modern varieties, and so the wild species are exempted. Wild species are however crucial for future innovations if modern varieties fail. This exemption works to the detriment of women who harbour a lot of knowledge on such wild species and such knowledge goes unutilised.

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<sup>25</sup> *Supra* note 5, pg.50

The use of terminator technology whereby when one discovers a new seed, it is injected so that after one planting season the farmer has to go and buy again from the patentee, has worked also to the detriment of women. Traditionally and even during the present time, women are believed to be the ones who determine which seeds to plant when. Use of such technology threatens food security due to lack of resources to buy such expensive seeds to plant the next season. This is because this system threatens the customary practice of saving and exchanging of seeds between women in traditional communities.

The UPOV convention requirement that breeders' varieties be uniform and stable means that the local communities land races that may be rich in genetic diversity are not eligible for such protection because of this genetic diversity.<sup>26</sup> This confirms the fact that the western IPR regime is not suitable for Africa and particularly Kenya. This allegation is supported by the argument that was raised by developing countries during the WTO meeting in Seattle in 1999<sup>27</sup> that the level of patent protection should be tailored to a country's economic and technological development and so should be determined nationally. This would ensure that women's rights are taken care of and they do not have to worry about buying seeds twice in a planting season.

The local communities could turn the requirement for uniformity and stability by the UPOV into an advantage as an incentive to breed genetically diversified varieties and patent them. This would only happen if a database of community and traditional knowledge is created. However, even if they patent their products, they can only be afforded protection under Plant Varieties Act. This would harm them in some way because a Trans-national corporation

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<sup>26</sup> Ibid.

<sup>27</sup> B Sihanya; *Article, Negotiating Intellectual Property in Seattle and Beyond.*



would get a patent on the same product by proving usefulness, inventive step and novelty and extending the breadth of the claim to encompass traditional plant varieties.

The observation to emphasise is that there is need to protect informal knowledge, which is held collectively than privately. Private property rights afforded by patents under the UPOV convention have had massive effects both social and economic on the traditional communities. This is because they are restrictive of traditional rights.

Having looked at these laws, there is no inherent gender discrimination in them. Discrimination occurs in the requirements that are needed for one to acquire the rights. This is because of the inequities created by these laws ensures that women almost do not measure up for protection. If resources were equally distributed, then there could be equity between the two genders. For instance, if there is no requirement for tangibility in copyright, protection of folklore would be easy for women who are illiterate. However, this would not be possible because there is no way of keeping data to monitor who deserves what copyright. In the case of plant breeders' rights, there should be more local legislation to allow women to breed wild species rather than following the standards proposed by the UPOV convention.

## COMPARATIVE ANALYSIS OF INTELLECTUAL PROPERTY LAW IN DEVELOPED COUNTRIES.

In most developed countries, the law governing intellectual property rights is the same as that in developing countries. The only difference comes in because of the technological advancement of these countries and where multinational corporations own most intellectual property rights. The standards imposed for the granting of a patent are the same in developed as well as developing countries and most of the patentees can measure up to them. Due to

this disparity in technological advancement between the developed and developing countries, it is hard to compare the benefits derived by patentees of both worlds. The developed countries are at an advantage because they have the equipment to extract the developing countries' rich bio-diversity for the creation of patentable rights. The WTO meeting at Seattle late last year had to do with the north and south divide. The argument was that the North has the technology but not the resources while the South has the resources but with no technology to exploit those resources. The issue of technology transfer came in where the North was ready to part with the technology in exchange for resources. The standards set are as high and are applicable to both genders.

However in Japan, the women inventors' association has absorbed inventions belonging to women, which are not technical in nature.<sup>28</sup> The association recognises daily inventions made by women in their daily life and those standards do not apply to them in granting them patents. This shows that Japan has accepted the precarious situation of women and by accepting their inventions without applying the set standards, it's a commitment by the association to uplift the status of women in the field of inventions.

Kenya should borrow a leaf from Japan and impose standards of patentability that tally with the technological and economic development of Kenya. This would encourage them to venture more and more into the world of technology.

Another difference between the developed countries and the developing ones is the level of literacy. Most women from developing countries are illiterate and are not aware of the existence of IP. This is not so for the developed countries where the levels of literacy are high

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<sup>28</sup> Farag, Moussa; Women inventions Organisations, 1994 at pg.54.

and the education of girls and boys is equally important. Women compete on the same level as men in terms of educational opportunities and this makes them achieve the standards set for grant of IP rights.

## CHAPTER THREE

### FACTORS THAT HINDER THE EXPANSION OF WOMEN INVENTIONS AND INNOVATIONS.

The expansion of women in the field of intellectual property rights is hindered by a myriad of factors. These factors manifest themselves in various facets of a woman's life and they become overwhelming. They are intertwined with the historical development of our societies to present day patriarchal arrangements. These are perpetuated by the capitalistic regimes, which hold the arrangements of patriarchy in awe. These two factors have translated themselves into social, cultural, economic and political inequities to hinder women's development in the field of inventions and innovations. Of great importance is the societal structure, which has built in some gender specific roles, which determine what you do either as a man or woman. This cultural conditioning has seen women relegated to a peripheral corner in the world of science and in technological field.

Even today, though much of the edifice of development stands on the backs of women, they comprise the most vulnerable segment of the human society. Daily, women are confronted by a legacy of structures of inequality that retard the pace of their personal development and affords them minimal chances or fails to harness their full potential for development. The empowerment of women must therefore embrace all aspects of her life if it is to be meaningful: a new education, a new information system, a new social orientation and a reevaluation of those cultural attitudes and values relating to her political and economic marginalisation.



By having these constraints in the society, women are denied expression of a human right. Expressions through intellectual property have become part of human rights. This is because such expressions are considered as an extension of the human persona. This is found in the natural rights theory of intellectual property propounded by John Locke who says that labour provides a foundation for property and it matters not whether it is intellectual or otherwise.

In recognising this argument, the supreme court of united States held that intangible products of an individuals labour and inventions can be property subject to protection of the taking clause<sup>29</sup>.

In that regard the, lack of sufficient protection of women's inventions and innovations is a violation of a human right which can be vindicated. But the issue is whether countries perceive this contention in that perspective. In this chapter, I will consider economic, social, cultural and legal constraints, which hinder women's expansion in the field of intellectual property.

## ECONOMIC CONSTRAINTS.

In every country, there is a strong struggle for gender equality. This concept has been misconstrued to mean that women want to become like men. This concept embodies the notion that there be equal opportunities for both men and women in all sectors of political, economic, social and cultural sphere. It is a call borne out of the realisation that what men can do in those spheres; women can do it even better. As it was put succinctly by Dr, Noellen Heyzer, the executive director of United Nations Development Fund for Women( UNIFEM) during the international women's day on March 8 2000 that:

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<sup>29</sup> Ruckelshauls v Monsato co. 467 US 986



"Gender equality is not just an end in itself but it is premised on the recognition that the major crises of our times could not be addresses without making women central to their analysis and solutions".<sup>30</sup>

The situation on the ground however is that this call has not been honoured and women struggle to get their voices heard across the spectrum on a daily basis.

The international women's day on March 8 every year is a day devoted to honouring women's epic struggle for freedom and social and economic equality. The truth is that the struggle is far from over. The reality is that we live in a world where women and girls continue to comprise the majority of the world's 1.3 billion absolute poor. Their economic status continues to fall despicably. This has come about because of the economic globalisation-taking place. Within this context, economic globalisation is seen as restructuring of rights and the restructuring of relationships between monetised and non-monetised sectors of the economy. Many women experience globalisation not as an agent of progress but as a force creating or deepening existing inequities in the distribution of opportunities and resources. In many instances, globalisation has failed to generate formal employment for women, but instead shifted their work to informal and casual sectors.

In Kenya most of women work in the agricultural sector comprised of subsistence farming producing barely enough for the family. Four out of five women<sup>31</sup> in Kenya work in the agricultural sector and this is not computed in national accounts. Women contribute 70%<sup>32</sup> of the agricultural workforce, for instance picking coffee, tea, horticulture cultivation, yet they

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<sup>30</sup> Daily Nation Newspaper , March 8 2000 at pg.4

<sup>31</sup> Ministry of Agriculture, Kilimo House, the Annul reports on Farm workers published in 1998

<sup>32</sup> Department of Statistics, Herufi House, The Economic Survey issue no.16 of 1998

control only 8% of its output. There are so many conflicts in the coffee and tea industry that the returns of their labour are a negative return. They thus become economically dependent on their spouses.

Jean Vickers, quoted in the Daily Nation Newspaper of March 8 2000 speaks of... "Inequalities between men and women in the distribution of resources income assets and time." This is the crux of the matter. Women's input in form of labour is far more intense than the paid labour. More unpaid working time is required of them. Because of this, more resources and income assets accrue to men than can ever accrue to women. Structural adjustment programmes have assumed that women's time is elastic and that society can continue to benefit from their free and unpaid services. Unpaid works undertaken in the multiple roles of women provide a unique form of subsidy for trade to an extent that cannot be quantified.

The incorporation of women into unpaid agricultural work itself is jeopardised by the fact that during most of the year, women are worrying about their shambas and when the planting season will begin, digging and other chores related to farming activities and no more time can be squeezed out of them. This becomes a cycle of poverty even to the children who are born. This cycle is traceable from the cultural belief that women's work is to cultivate and take care of children regardless of their number. For women to become economically independent, they must be liberated from unreasonable childbirth practices. Because of additional demands on women's time, particular support services and investments for them are necessary if they are contributing to economic growth. Any investments, which give relief to women's schedule, provide an extra mile to her economic growth. This would significantly increase their work output and be able to participate in intellectual growth.

Economic problems facing women today also stem from the land problems we are experiencing today. This is because of the laws of succession in place. Traditionally, every woman had access to land by virtue of marriage, birth, adoption or belonging to that community.<sup>33</sup> With the coming of the institution of absolute proprietorship, women have been denied access to land in many instances and have become squatters with no land rights.

When a woman is a widow, she may hold the land only on behalf of her children. If not so, the land may be taken away from her by male relatives of her late husband. This gives women a lesser bargaining position within and outside the family circles because her economic livelihood has been taken away. The question of land is tied to customary beliefs that women are not allowed to inherit ancestral land, which is traditionally passed through the male descendants. This has denied women economic power in form of financing to enhance any ideas of innovations and inventions they have and so they cannot expand their knowledge on these ideas.

The land tenure in existence assumes that men and women have equal chances of buying land and having it in their names. This is not true since women do not have the money to buy such land and if they do, very few women understand the land transaction without male intervention at some point. It is also ironical that when women buy such land, they end up registering it in the husband's name. Most husbands will not allow their wives to buy property in their own names and so the woman perpetually remains economically dependent.

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<sup>33</sup> H.W.O Okoth Ogendero: *Tenants of the Crown* pg. 45



Other institutions have facilitated women's economic suppression. This is mainly the financial institutions, which deny women financial access unless they are married and the husband acts as the guarantor. If not married, the woman must have a male relative to carry out the transaction with her. The banks do not allow another woman to act as guarantor. This is not a law! It is just a tradition to ensure that the status quo of male domination is maintained. Apart from this setback, most women do not have security to obtain credit facilities and so depend on their husbands to get the money. Without land, which is the most permanent asset in Kenya and the most used collateral in Kenya, it hard for women to obtain credit.

This means that women have a great stake in land. Women work on land more than any other sector of the economy. Male migration to urban areas has left women in charge of small scale farming activities. Any land reforms on land issues must then take into account the position of women in relation to land. Land registration and adjudication adopts registration of land in the name of the head of the family. Women's legal rights in such a system are not defined and so land is not counted as one of their economic assets to be used to access credit.

As rural women become land-less, they start migrating to the urban areas, a phenomenon described as 'exploding cities in unexploding economies' characterised by unemployment, housing shortage and poverty springs up. Women in the process lose their potential of being inventors, innovators and they stop to dream. When all other problems on women are getting some meagre attention, no attempts are being made to address the gender gap in property matters, The right to property is a constitutional right which must be respected.

It is hoped that the commission<sup>34</sup> appointed to inquire into the land reform question will come a recommendation on administrative and legislative reforms to give women full and equal access to economic resources including the right to inheritance and land ownership and property in general.

The question of access and ownership is tied to the notions of patriarchy and capitalism. Patriarchy is a fluid and shifting set of social relations in which men oppress women and exercise varying degrees of power and control.<sup>35</sup> Patriarchy arrangement stems from patrilineal society where the man is the head of the household and controls the use and access to resources.

In the predominantly patriarchal Kenyan society, the undisputed household head was a male. He owned land inherited through the male lineage system. His superior position was prescribed by culture, cemented by social values attitudes and practices.<sup>36</sup> This arrangement has woven itself into other sectors of society including working places, political arena, and virtually in everything, it has become a consideration that one can only hold a certain office or occupy a certain portfolio if they are of a certain gender. This is so despite the very many human rights instruments, which have been ratified, and abolishes discrimination on basis of sex.

Another form of economic discrimination manifests itself in the sector of employment. Men dominate the formal sector of employment, which is better paying, and relatively more stable in terms of providing finance to pursue their interests. This gives them an undue advantage

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<sup>34</sup> Commission on Land Reform Formed in May the year 2000

<sup>35</sup> *Yale Law Journal; Economic Analysis of Patent Protection. Vol. 102 December 1992 No.3*

<sup>36</sup> Eugene Cotran; *Restatement of African Customary Law: pg 11*

over women because women do not have the resources to pursue innovative interests. Though this trend is changing, it is at a very slow pace and the fact that the many women live below poverty line is not in dispute. Again, it is not in dispute that even though many women are employed, they occupy the lowest job categories that are low paying. Most of them are secretaries, tea-makers or sweepers. Their presence or absence has no impact on the company's policy of employment.

Women comprise less than a quarter of the civil service with the majority clustered in the lowest job group. They are grossly underrepresented in the administration, with only two female Permanent Secretaries, one Provincial Commissioner and three-District Commissioner. There is one female Judge of appeal out of 10 male judges of appeal, 5 out of the 29 high court judges are women and 6.1% of ambassadors and high commissioners are women. These statistics show that not very many women hold executive portfolios.<sup>37</sup>

It is important to note that intellectual property involves the expending of resources and time, which most women do not have because of their economic predicament and so cannot advance in the area of intellectual property.

These economic constraints are worsened by the existing social and cultural attitudes, which are discussed herein below.

## **SOCIAL AND CULTURAL CONSTARINTS.**

Social and cultural constraints constitute a major drawback to the empowerment of women. Society has institutionalised norms which women are supposed to follow failure to which women are ostracised by the rest of the society. They become shunned and are labelled as



rebels, defiant and disobedient. These norms are in the form of handed down traditions, which the society does not want to let go in case women become more empowered than men do. Such institutionalised norms are embedded in the notions of patriarchy where the man is the ultimate control.

In Kenya, men still have not shed this superiority notion that they remain at the apex and that women are subordinate to them. The cultural attitude that the woman's role is seen solely in the context of maintaining the house still has roots in our country. Some men still view women as persons whose lives must be under control of a man. This has greatly affected the potential development of women intellectually because their confidence gets eroded. Cultural conditioning has led to economic deterioration of women. Control of and access to property is a key to social empowerment, a key which is often denied women through patriarchal social-legal structures including some family units defined and institutionalised by law.

The pernicious influence of the official code of customary law is most keenly felt in the area of property relations, unfortunately, this aspect of their status happens to be the most neglected. Generally, African women contribute to their family's wealth as much as their husbands do yet, the customary rules do not seem to recognise this special fact. In most settings, the husband has a formal job and the wife attends to chores at home. These chores are viewed as a matter of obligation to be performed regardless of whether the woman wants it or not. Our society still lives in the mediocre times when women used to be viewed as chattels. Though this view is fading, it is doing so at a snail's pace and has generated so many conflicts, which have resulted to major violence against women. Many women have then chosen to remain subdued in their economic depression to avoid any conflicts with their

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<sup>37</sup>Supra note 2 pg. 3

husbands and to conform to the society's expectation. But this is being done at the expense of women's rights, which are deemed inalienable.

This has been worsened by the fact that even daughters who are growing up believe that the father is always right, is powerful and will make everything all right. The father is brought out as the ultimate authority in the house especially when it comes to decision making. The child believes that women are there to obey men and learns to differentiate that the one with a strong voice is the more powerful one than the one with a weak voice. A woman's power begins in the home. If a girl was brought up believing that women are not capable, they grow up despising themselves as women and despising other women as well. This hinders their potential abilities in the field of inventions and innovations.

The difficult task lies in changing people's cultural attitude to accommodate the equal status that women share with men. Unless the pace of dynamism of the society is increased to reflect the changes that are taking place in the society, then women are going to lag behind in the field of intellectual property rights. As far as the social constraints are concerned, the structures of the society are that if and when a chance arises, boys are taken to school in preference to the girls. This kind of giving preference to the male gender creates a social disparity which casts light that in our society, men are more valuable than women.

Currently, even though the enrolment of girls in school is at par with that of boys, very few girls finish school as the boys do. This is attributed to many factors. The most common factor is unwanted pregnancies, which seem to be attributed only to one person, the girl. The boy who is the father of the child does not suffer the same attack as the girl. For him, nothing changes and every thing goes on as planned. The parents see the only chance for the girl as

getting married and the girl's education comes to a standstill. Even those girls that do not drop out of school, there is some unwritten law that says that they should not get engaged in science subjects because they have been made to believe that science subjects is the domain of boys only. The self-confidence of a girl when eroded at such an early age, it becomes difficult to instil it again. Even though girls have made significant strides in education, there is overwhelming evidence that they are not yet out of the woods. Wide disparities exist between boys and girls in terms of participation in the school system and performance in the national examinations.

For instance, in the 1999 KCSE examination results, more boys had grade A than girls despite the fact that most girls' schools had led in the examinations. According to the subjects, girls only outdid boys in art subjects like Home Science, English, Kiswahili, Music, Typing and Office practice.<sup>38</sup> They however performed dismally in sciences like mathematics where only 20% of the girls pass as compared to 35 % of the boys who performed well in mathematics. Despite the fact that women perform very well in art subjects they are not empowered to carry on and exploit those areas they are very well conversant with.

Most girls' schools are poorly equipped with laboratory facilities, which are effective for teaching science subjects. Added to these is the lack of role models for the girls and lack of clear policies on gender issues. In Kenya there is nothing like a gender responsive curriculum and so many of the contents of the subjects favour boys with many texts using gender-biased illustrations. The overall impact of this lacuna is that girls see science subjects as made for boys only.

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<sup>38</sup> The Kenya National Examination Council 1999 Results



Another dimension of this argument is the fact that the traditional gender roles which girls are expected to perform in the domestic circles distract them. This is so by denying them a chance to have private studies or do assignments thus contributing to their poor performance.

Statistics indicate that only 35 % of the girls reach standard eight even after an equal enrolment in standard one. Access, retention and completion rates for girls in the school system is very small. This situation is improving with the passage of time but a lot is still to be done. Universities are now admitting women in the lucrative courses of pharmacy, engineering and medicine with a lower grade than men. This could be disastrous because of the quality of professionals who are going to be produced. This criteria may also stigmatize the girl by making her feel like she has become what she is through the mercy of others because she is not good enough.

## LEGAL CONSTRAINTS

In tandem with the social structure of the society, the legal system has towed in the same line by being discriminative to the women. Those who promulgate laws would like to maintain their interests and shield them from any external attacks. Thus, they will do whatever they can to ensure that no change of laws takes place. This is evidenced by the rejection of the Marriage Bill by the legislature in 1967.<sup>39</sup> It was rejected on the grounds that the bill if enacted will give women too many rights and disable the men. The rights in question included rights of maintenance after divorce and independent acquisition of property. Men felt threatened and voted against the bill. At that time, there were no women legislators.

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<sup>39</sup> Journal of African Law and Administration 1967

Though the enactment of legislation may not be a panacea for women's problems, it could be a starter to bigger reforms. If the laws provide for justiciable actions, which are perpetrated, against women, they can be enforced by a court of law. A recurrent theme of feminist jurisprudence is that the law fails to take seriously events, which affect women's lives. The law trivialises or simply ignores events that have a profound effect on women's consciousness, physical well being and freedom. Gender discrimination persists in legal academia, corporations, public sector, public employment and the judiciary.

Ironically, our law seems buttress the existing inequities between men and women. Only recently that the constitution was amended to provide for non-discrimination on the basis of gender. The basic law in the land, which validates all other laws, had omitted to provide for non-discrimination on the basis of sex. Many people may argue that it is an obvious thing that women should not be discriminated against simply because they are women. However, one thing that is not clear is whether the omission was accidental or by design. Suffice it to say that the constitution had trivialised such an issue failed to provide for it expressly.

With the current wave of reforms in the constitution, the Wanjiku driven call may be useless because nobody is telling the women every thing about these reforms and how they are going to affect them. How many women in Kenya know the constitution of Kenya has a clause that allows for discrimination in areas that relate to marriage, divorce, adoption, devolution of property and customary and personal law- the areas that affect women in a significant way?<sup>40</sup> This was evidenced in the S.M.Otieno case<sup>41</sup>. After long deliberations by the courts, and after the legal dust had settled, the court of appeal, the highest court in the land decided that Wambui being the wife of Luo man was subject to the dictates of Luo customary law making

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<sup>40</sup> The constitution of Kenya Section 82(4)

her wishes and of those her children irrelevant. In effect the highest court in the land declared that the supreme law in the land- the constitution allows for discriminatory laws relating to burial rites and in effect in other personal matters.

This decision had an economic dimension woven into it. It meant that women have limited access to property especially land. In almost all societies, there is customary laws bars daughters form inheriting land. This is highly discriminative especially when looked into in the social economic context. This remains so despite the fact that there is a law that stipulates how property devolves in family, the Succession Act, Chapter 160 Laws of Kenya. The reality is that the Succession Act does not apply to agricultural land<sup>42</sup> when it comes to inheritance and so daughters can not inherit agricultural land. This is irony because most women live in rural areas. Without this basic right to property, how can women venture in the field in the intellectual property?

Another legal constraint is the issue of migratory laws. Many men can go outside the country to hunt for fortunes without having their wives give permission. The immigration department won't ask for the permission from the wife. For a woman, it is exactly the opposite. A woman will not have her passport signed by the immigration department before the husband gives her permission. Her fundamental right of movement is restricted and she cannot pursue her interests as well as a man can do. If her husband refuses to sign the documents, the woman cannot be allowed to leave. This is a discriminatory law that should be done away with. The argument given by the department is that it is in the interests of the family unit. The woman is seen as the one responsible of maintaining the family unit and her departure mean that it will breakdown. The man is not held as having the same responsibility.

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<sup>41</sup> *Wambui Otieno v Joash Ougo Ochieng and Others* Civil Appeal No. 1987



Another legal constraint though not in a form of legislated law is the requirement by the banks as part of their policies that when a woman applies for credit, her husband or any other male relative must accompany her to sign the documents in order to obtain credit. This policy lowers the esteem of women to obtain financial assistance because the banks have no confidence in holding them accountable for the credit that they borrow.

Women advancement becomes then hindered in consideration of their families and they are given difficult choices. They are made to choose either their families or their career advancement. Many because of fear of being admonished as being disobedient choose their families and their dreams die with the family.

#### POLITICAL CONSTRAINTS.

Though there is no direct connection between political participation and intellectual property, the indirect connection could be said to be the root of all problems. The most glaring problem is the absence of women in the law making process. This adversely affects all the efforts women may put in their potentials because the law does not protect them since the law is made by a male dominated legislature and women's interest are not considered. For instance, there is debate that since the Social Democratic Presidential candidate, Charity Ngilu does not have a university degree, she should not be fit to run for presidency<sup>43</sup>. The politicians are pegging her abilities on the presence of a degree. This is a ridiculous campaign aimed to humiliate and shut out women from participating in the political field.

Tied to this argument is the primitive thinking that women are naturally mothers and wives and so are not suitable to hold public offices. Women participation in politics is minimal in

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<sup>42</sup> *Law of Succession Chapter 160 section 32*

Kenya having only two women permanent secretaries and no woman holds a ministerial portfolio. Even the obvious ministerial portfolio that should be headed by a woman, that is the Ministry of Youth and Women affairs, is headed by a man. This is irony because women themselves better understand such affairs.

All these factors negatively on the development of women in all fields and reforms are necessary to change this position. Recommendations for reforms are the subject of the next chapter.

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<sup>43</sup> Daily Nation Newspaper, 23<sup>rd</sup> of July 2000

## **CHAPTER FOUR.**

### **PROPOSALS FOR REFORM.**

The previous chapters have dwelt on the inadequacies of the general IPR regime in addressing women's problems. These inadequacies are curable if the authorities concerned are determined to cater for women's rights without holding back. Drastic reforms need to be carried out to fill in the lacuna that has gripped the system in order to take care of women's problems.

These reforms may take various forms. They may be legislative reforms, social reforms and many others. If any reforms are to be undertaken, they must encompass the whole spectrum of social relations set up. They must address political, economic, social and cultural marginalisation of women in order to bring to the fore the various aspects which place women inventors and innovators in a situation of obscurity. The reforms must be whole as opposed to piece meal.

To be able to appreciate the nature that reforms should take, it is important to note that women's innovations and inventions are unique in their own right and less technical due to gender stereotyping as discussed in chapter Two. In the same way, reforms must take the same approach in order to address specific issues relating to women so that their needs may be met adequately. Proposals for reform are discussed herein below.



## **Organisational reforms.**

It is curious to note that until 1996, inventors and innovators did not have an organisation of their own from which they could monitor the progress of women inventors and innovators. This type of deficiency has denied women a chance of expressing themselves to the public or to hold exhibitions to make the public aware of their progress in intellectual property. If Kenyan women had an association, it would provide them with an opportunity to display their works for all to see. An association would also boost women's confidence because they would share their experiences and the problems they are facing with their inventions and innovations. In cases where there are women associations, they are problems of understaffing. This affects the efficiency of dissemination of information and the general breakdown of flow of business in such associations. For instance, the Women Inventors Association of the Philippines is composed of women only. It had to close down for some time because it did not have enough personnel to run its affairs.

Another aspect of organisational reform is in the area of exchange programs. If Kenya could hold exchange programmes with other countries, it would be exposing women to variety and to different experiences of other women. The exchange of ideas would improve the creativity and boost the inventive spirit of women.

Again, the KIPO office should run an information bulletin featuring in each issue successful women inventors as role models. From such issues, other women will be encouraged to join the IPR regime and invent more and more. The bulletin should also be a guide to women on how to secure protection of their creativity so that equal protection can be afforded. The

bulletin should be given to women free of charge so that accessibility to information does not become an issue.

There should be also reforms in the form of incentives. Creativity is a unique aspect of a person. Women who have done well in the area of inventions or innovations should be awarded to create an incentive for more creativity and encourage other women to join the 'train' of inventions and innovations. In Japan, when the women's organisation was only one year old that is on November 25 1987 WIPO awarded the organisation a gold medal. This kind of incentive would encourage women to dare and invent in other more challenging areas of intellectual property.

Further, there should be a change in the interpretation of the concept of inventions, which is usually a limitation to women inventors and innovators. This concept needs to be widened to include inventions which are not so technical and which can be useful to society. The present notion is that an invention has to have scientific breakthrough and this discourages women who have not met that standard. Kenya by adopting the international standards of patentability only does a lot of disservice to its citizens especially women who fail to meet those international standards. Kenya should adopt an IPR regime, which is consistent with its economic and technological age so as not to strain its citizens. The standards, which are imposed, must be in consonance with the technology advancement and be compatible with the different peculiarities of a country. A down top approach should be used so that standards of patentability are progressively imposed depending on the level of knowledge acquired gradually by those involved. Any modifications adopted in the standards both at the international and national level should be geared towards alleviating the problematic

treatment of indigenous rights over knowledge so as to enhance benefits flowing back to the creators and conservators of traditional or informal knowledge.

Another area that needs reform has to do with information technology awareness. There should be in place a database of community and traditional knowledge from which any benefactors have to pay for in order to access it. This would ensure that the owners of the knowledge would benefit from it because they would be selling it off. A database also ensures that information is handed down to many generations and is traceable from a particular source. This would render it eligible for protection under the current IPR regime. In tandem with this reform, there should be a requirement that a certificate of origin be submitted with an application for a patent. This is the only way to make patent law compatible with indigenous system. This is to oblige patent application based on use of genetic resources or traditional knowledge to include evidence of prior informed consent of the country of origin or the local community concerned. This would go a great length to protect indigenous knowledge.

There is also need to create awareness on the existence and importance of traditional knowledge so that ways can be worked out of harnessing the traditional knowledge so as to create intellectual property rights. The private sector should liaise with the government office to implement the traditional rights and benefit owners of that knowledge.

### **Economic Reforms.**

This is one area that needs a thorough scrutiny. This is to facilitate the equitable distribution of resources between the two genders. Financial institutions must review their policies on credit to give equal access to credit facilities without placing stringent measures on women



who want to obtain credit. Such measures, as the presence of a husband or a male relative should be done away with to boost the economic independence of women.

Again, cultural institutions and adherencies, which deny women the right to own property because they are women, should be abolished to give a free leeway for women who want to own property. Such institutions such the elders who dictate on the rights of women should be consistent with modern developments, which are taking place in the economic arena. They should thus give equal measure of considerations to both men and women. The family institution must stop being an oppressor or an excuse for women's backwardness. Instead, the family, if anything should be the first supporter of any woman's endeavours. This is because the woman will be carrying out her projects for its interests. The mere fact that a woman has a family should not be a reason for her being tied down.

Another area of economic reform is in the area is the granting of equal opportunities for both men and women in holding executive positions in the labour market to boost their income. Further, such opportunities give other women a role model with which to identify with. In this way, the confidence and esteem of women will be increased.

## **Legal Reforms**

The enactment of gender neutral laws is not the panacea of women's problems. However, it is the starting point of fighting women's problems. As said earlier, laws in Kenya are generally gender neutral and provide equal protection to both men and women. However, there are some legal restraints, which hinder the development of women, the world over. Such restraints include the migration laws that require that a woman may not have her passport stamped unless so approved by the husband. This is a clear breach of the freedom of

movement.. The migration office may argue that this is in the interest of the family. The question is, isn't the man responsible for the family in the same measure as the woman to require her permission? These migratory laws limit the chances of women's development both economically and academically.

Another area of legal reform involves the repealing of Section 82(4) of the constitution which allows for discrimination of women in personal matters and leaves it to customary law to solve. This section should be removed from the basic law of the land and be buried a natural death. Such draconian laws should not be allowed to be in our books.

Further, it would a lot of good to have KEMRI made autonomous so that a law be passes empowering it to handle indigenous knowledge to ascertain the presence of valuable medicinal or other properties of herbal medicines from which the Northern corporations rely on. As of now there is no policy framework empowering or requiring KEMRI to carry out any research or do any analysis to verify the quality and value of medicinal herb. In place, the large pharmaceuticals just enter into pacts with the indigenous people and pay them a meagre sum of money for information worth more benefits if it was handled in right way using the right channels.

In the same vein, the government has not been keen on protecting indigenous knowledge and has no policies to ensure that traditional knowledge is not exploited without the accruing benefits lowing to the beneficiaries. The government must develop interest in traditional knowledge and come up with its own system of protection instead of relying on the western IPR regime which has already proved very unsuccessful in dealing with indigenous knowledge.

These legal reforms can only work in an environment where the cultural attitudes have faded and regard for women is greater. This is because the society is the one that delineates on who acquires what and when. The cultural tendencies of regarding women as inferior to men must be challenged and be challenged. These changes must go in hand with social reforms, which culminate with the placement of many girls in school and the follow up of the same to see that they finish their education. Equal opportunities for education and advancement should be on merit and not gender.

### **Political reforms**

Women should be given equal opportunity to participate fully in political decision making. This can only happen if all girl children are given an equal chance to attend school and gain knowledge for the to qualify for public offices. Women should support their fellow women to enable them attain that goal of holding public office. The wrangles that gripped the Women political caucus during its elections were a let down to all women. However, this should not be used to discredit the organisation because every other political organisation has its problems and the women's organisation should not be seen as an exception. If parliament is serious on giving equal opportunities to women, it should unanimously pass the Equality Bill, which was moved by Honourable Martha Karua in parliament as a private motion bill early this year.

More women should be elected to hold public offices especially those portfolios that concern their affairs. This would ensure that their affairs are thoroughly investigated and steps taken to alleviate the status of women. The President should appoint more women to the cabinet



since it's the executive that makes policy decisions. This would ensure that matters concerning women are well taken care of.

## **CONCLUSION**

From the above discussions it is right to conclude that women are a disadvantaged lot in the field of intellectual property rights. Firstly, it is because the standards imposed of attaining intellectual property rights are so high considering the peculiar position that women find themselves in especially in playing a number of roles at the same time. Harmonisation of these standards would do a great deal in giving women a chance to prove their abilities.

The laws in Kenya on intellectual property are gender neutral. However, the promulgation of gender neutral laws is not a cure to the other conflicting choices that women must make. In the past, a lot of laws have been made to accommodate women's needs but the society and its prejudiced attitudes has not changed. As long this is the case, then the fight for women's recognition of IPR rights is far from over. This is because of the societal structure, which accords men greater preference in terms of economic advantages, compared to women.

Men have very high chances of accessing credit facilities than women. Men also have more time to advance their knowledge than women. This is based on the wrong assumption that women are born with an inherent instinct of caring for children and the maintenance than men and so most their time is devoted to the family. This is a brainchild of gender stereotyping and has nothing to do with inherent characteristic.

The institution of patriarchy has also led to the underdevelopment of women's potential to innovate. This institution has been perpetuated for the interests of men who believe that

women are inferior to men. The tragedy is that women believe this self-cultured believe to be true and they live to it with fervour. Those who defy are labelled as rebels are often ostracised and not regarded highly because of their defiance to what is termed as a natural setting for which man plays no part. The main conclusion therefore is that though the laws in Kenya are gender neutral, they do not take care of specific women's needs. A lot therefore remains to be done and a lot of good will is therefore required.

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