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Patricia Kameri-Mbote

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Constitutions As Pathways to Gender Equality in Plural Legal Contexts

Patricia Kameri-Mbote¹

Professor, School of Law, University of Nairobi

pkmbote@uonbi.ac.ke

ABSTRACT

Kenya has made significant strides in overhauling its legislation to better deal with gender discrimination. However, the legislative steps taken seemingly understate the environment of legal pluralism that characterises the Kenyan state where, for instance, customary law is still pervasive and operates side by side with formal laws. The traditional approach generally gives premium to formal laws while treating customary law with scepticism or altogether disdain in the hope that all individuals will ultimately transition to formal laws. Yet, this has not necessarily been the case. Customary law continues to survive and thrive. Accordingly, this paper argues for a departure from the jaundiced view that customary law only serves to further gender inequalities. The paper argues for a more balanced approach that recognises that customary law has aspects that could be harnessed to foster gender equality and thus complement formal laws on gender equality. In rooting for an appreciation of the role and place of legal pluralism in promoting gender equality, the paper contends that formal laws in and of themselves are not enough to effectively deal with gender discrimination; the two must operate side by side, not necessarily one below the other, as has been the case.

Key Words

Discrimination, Equality, Gender, Legal Pluralism

1. Professor of Law, School of Law, University of Nairobi. Patricia is also a Senior Counsel. This paper was presented at the University of Oslo on 1st September 2017 on the occasion of the award of the honorary degree in Law to the author.

I. INTRODUCTION

Reference to gender denotes more than the physical differences between a man and a woman, encompassing social constructions of maleness and femaleness accorded to human beings in society through the socialization process², which translate into power relations between men and women.³ These relations are nuanced by social norms, cultural practices, rights, duties and obligations spelt out by society.⁴ These practices comprise gender norms, which represent the various sets of rules that prescribe what is appropriately masculine or feminine in any particular culture.⁵

In the socio-cultural context, the gender division of labour reflects power dynamics in gender relations where particular roles and activities are associated with a particular sex.⁶ The imbalance in power relations between men and women ensures that those who wield more power (predominantly men) are able to exercise control over the other (women). In essence, society members begin to associate certain activities and behaviour with a particular gender.⁷ For instance, male and female taking different career trajectories⁸, with more males taking career courses considered more masculine such as engineering, and women opting for careers and courses considered as feminine, such as teaching or nursing.⁹ Similarly, the ownership of some forms of property, such as land, is associated more with men than with women. This has implications for representation of the genders in diverse spheres and limits the potential of men and women, as well as the overall societal output.

In Kenya, law historically reinforced gender inequality through legal rules that validated social injustices leading to the marginalisation of women. Further, the legal system was an obstacle to changes required to remove the inequality in legal rules, procedures and institutions. Firstly, this was achieved through legal rules and principles in the statute books legitimating the subordination of women to men. Secondly, women's subordination was occasioned by the structure and administration of laws. Thirdly, gender inequality was ingrained by the patriarchal ordering of society, under which political, economic, legal and social standards are either set by or fixed in the interests of men. Consequently, women have been systematically removed from fully participating in the development process, despite their active participation in the production processes alongside men. Even in instances where women's legal rights have been provided for, ignorance of such rights exacerbated by illiteracy ensures that they do not benefit from such provision.

2. For further insights, see P Caplan, *The Cultural Construction of Sexuality* (London/New York: Routledge, 1987).
3. P Kameri-Mbote, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses' (inaugural lecture on 24th January, 2013) 18.
4. P Birnie. et al, *International Law and the Environment*, (3rd edition, Oxford University Press, 2009).
5. R Ryle, 'How Do We Learn Gender?' in *Questioning Gender: A Sociological Exploration* (Thousand Oaks, California: Sage Publications, 2011) 119. See also C Morris, *Psychology: An Introduction* (Englewood Cliffs, NJ: Prentice-Hall, 1988) 366.
6. J Stockard, 'Gender Socialization' in J Chafetz (Ed.), *Handbook of Gender Socialization* (New York: Kluwer Academic/Plenum Publishers, 1999) 215-227.
7. *ibid.*
8. For an analysis of the different career paths taken by men and women, see H Gleitman, A Fridlund & D Reisberg, *Basic Psychology* (New York, NY: W. W. Norton & Company, Inc, 2000) 500.
9. See, S Brehm, S Kassin & S Fein, *Social Psychology* (Boston, MA: Houghton Mifflin Company, 1999) 150-6.

It is important to point out that the effectiveness of laws in according women equal opportunities with men depends largely on the society's willingness and ability to enforce such laws. It is indeed at the point of enforcement that one gets caught up in the dichotomies and conflicts of statute law, customary law and law in practice that many women find themselves wrapped up in. It is interesting to note that there were instances when courts held that women married under customary law were not proper wives under the law, and that the payment of bride price meant that they were property incapable of owning property.¹⁰ Such perceptions invariably resulted in the perpetuation of inequalities against women. Customary laws and practices operated in personal law matters and were enforced by the courts so long as they were not repugnant to justice and morality. The repugnancy test was dependent on the opinion of the particular judge or judicial officer as to what they subjectively deemed as repugnant or offensive. Given that judicial officers are mostly products of the very patriarchal societies in which gender discrimination is normalised, a discriminatory practice could persist if the court failed to strike it down for invalidity.

It is within this context that the Constitution of Kenya 2010 intervened with expansive equality provisions, including on the basis of gender. Article 27 of the Constitution proscribes gender discrimination, provides for equality in the family, protection of the inheritance rights of spouses, protection of the rights of women to the matrimonial home and gender equality in all elective and appointive positions. Following the promulgation of the Constitution 2010, all laws including customary law are held to a higher standard, *viz*, the constitutional standard of equality such that all laws that conflict or do not conform with the Constitution are deemed invalid.¹¹ Despite these robust provisions of the law, gender equality is yet to be achieved.

It is important to point out at this juncture that Kenya has a juristic plural legal system where tiered and interactive normative systems operate under the Constitution, which recognises the other legal orders and sets the parameters for their application. Customary law and religious laws apply in some issues such as property rights, inheritance, burial and marriage. In rural areas, customary law norms are pervasive. These laws are also complemented by 'a plethora of normative orders that influence the choices' that a woman can make and decisions about her life by others.¹² These emanate from norm generating and enforcing spheres that do not fall into the categorization of law and include the family, religious groups¹³ and other social spaces that women operate in. They comprise what are called semi-autonomous social fields¹⁴ that inform human interaction.¹⁵ Women find themselves situated in the intersection between these different systems of laws and the semi-autonomous social fields. In addressing gender equality, it is therefore important to look beyond formal law.

10. See *R v Amkeyo* [1917] 7 EALR 14.

11. Constitution of Kenya 2010, Article 2 (3).

12. A. Bentzon et al., *Pursuing Grounded Theory in Law: North South Experiences in Developing Women's Law*, Tano Aschehoug, Oslo Norway & Mond Books, Harare Zimbabwe (1998) 40.

13. *ibid*.

14. S. Moore, *Law as Process: An Anthropological Approach*, (London Routledge and Kegan Paul 1978).

15. See Bentzon et al (n 12) 1., p. 41.

In a plural legal context like Kenya's, where diverse laws including the Constitution, statute law and religious laws co-exist and interact with other norm generating and norm enforcing spheres, tensions are bound to arise between the varieties of norms in their application. Some laws and norm generating spheres provide for gender equality while others allow varying degrees of gender inequality. The existence of competing and conflicting norms militates against the attainment of gender equality. It is against this background that the thesis of this paper proceeds.

This paper argues that legal pluralism can lead to gender inequalities because customary law, and some of its gender unfriendly norms, are entrenched and resilient. The semi-autonomous social fields draw mainly from living law, which is closer to customary law than formal law. Customary law and semi-autonomous social fields are the most accessible and applicable of the legal norms in private law matters for most communities. There is, therefore, a need to engage their normative content by isolating aspects that can facilitate gender equality while challenging and ousting those aspects that militate against such equality.

It is against this backdrop that this paper advances the argument that the various operative laws, including customary laws, ought to be reconfigured in a manner that ensures substantive equality and non-discrimination rather than being subjugated or wished away. This raises the need to engage the positive aspects of customary law, which can engender gender equality given the accessibility of this law to most people at local levels. Such engagement will open up opportunities to challenge and weed out negative customary law norms that perpetuate inequality.¹⁶

This paper is divided into seven parts. Part one is the introduction, while part two sets out the background and provides the context and conceptual framework for the paper. Part three analyses the constitutional provisions that provide for gender equality. Part four dissects the various laws in the post-2010 constitutional era that seek to entrench gender equality. Part five highlights the achievements for gender equality attained so far, with part six examining the prevailing challenges, which necessitate a change in the approach. Part seven concludes.

2. BACKGROUND

This paper analyses the legal terrain in Kenya, comprising of a plural legal system where different laws compete and contend for space. It employs a gender lens in its analysis. The legal tapestry of Kenyan laws comprises: the Constitution as the supreme law of the land; statutory laws; international law; customary law; religious laws, norms from other norm-generating and enforcing realms such as the community, clan and family, and the intersections between these normative orders. These laws conflict at times as they may

16. C Nyamu-Musembi, 'Pulling apart? Treatment of pluralism in CEDAW and Maputo Protocol' in A Hellum and HS Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge, UK: Cambridge University Press 2013) 203.

provide differently on the subject of gender equality. This is largely because some laws, especially customary laws, which represent the norms and practices of communities, tend to be patriarchal.

The acceptance by the colonial and post-colonial governments of the need to admit customary legal norms to govern some aspects of Africans' lives has not informed the development of law in Kenya. The reality is that introduced norms are unable to engage with and only accord a reluctant deference to the power of customary norms in specific instances. Formal law is presented as the desirable standard while the customary law norms are treated as 'the other'.

The reach of formal law in people's lives and private spaces can be broadly problematised using the public-private law dichotomy. Dawn Oliver rightly opines that both public and private law are concerned with control of the exercise of power.¹⁷ While public law is concerned with the control of the exercise of state power, private law is concerned about the exercise of private power.¹⁸ The delineation of public and private power can, however, be illusory, as both spheres interact very closely and the exercise of power in one sphere can affect the exercise of power in the other. Besides, power is exercised at different levels and in different spaces, and takes various forms, some of which are overt, while others are covert.¹⁹ In the case of gender, the public-private divide and the productive-reproductive spheres are inextricably linked, blurring the distinction between public and private power.

The pre-2010 Constitution omitted 'sex' and 'gender' from the objectionable grounds on which discrimination was proscribed. Under it, the term 'discriminatory' meant

affording different treatment to different persons attributable wholly or mainly to their respective descriptions by **race, tribe, place of origin or residence or other local connexion, political opinions, colour or creed** whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such are not made subject or accorded privileges or advantages which are not accorded to persons of another such description.²⁰

The exclusion of gender discrimination from the constitutional standard was further amplified by the exemption of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.²¹ It is in these matters that gender discriminatory customary law applies, and the exemption meant that equality provisions in the Constitution and other formal laws do not apply in spaces where women need them most.

Amendments to the Constitution in 1997 added sex to the grounds upon which discrimination was not allowed. Discrimination was defined as "affording different treatment to different persons attributable wholly or mainly to their ...race, tribe, place of origin or other local connexion, political opinions, colour, creed or **sex** ...".²² These amendments,

17. ¹⁷ *Common Values and the Public-Private Divide*, Law in Context, Cambridge University Press (1999) p. 1

18. *ibid.*

19. J Gaventa, *Finding the Spaces for Change: A Power Analysis*, (IDS Bulletin 2006).

20. Section 82 (3).

21. 1969 Constitution, s 82 (4).

22. Section 82 (3).

however, maintained the insulation of adoption, marriage, divorce, burial, devolution of property on death, and personal law matters from its application.

In the circumstances, the dalliance between constitutional norms and customary laws continued with affected persons having the option to challenge gender discriminatory norms as ‘repugnant to justice and morality’.²³ The 2010 Kenya Constitution sought to remedy this situation through expansive gender equality provisions. However, it retained customary and religious laws as applicable laws. The role of the courts in determining whether a particular religious or customary law norm should apply is dealt with on a case-by-case basis governed by the constitutional standard of equality.

Besides customary law, another legal system that deserves mention is Islam. Muslims constitute the second largest religious group in Kenya²⁴ and are exempt from the application of the Constitution with respect to personal law issues.²⁵ This means that if the parties in contest profess the Islamic faith, and submit to the jurisdiction of the Kadhi’s courts,²⁶ they are then governed by Shariah law, which does not recognise equality of the genders.²⁷ Constitutional exemptions, which leave personal law issues within the domain of customary and religious laws, have implications for gender equality. In the first instance, most discrimination against women occurs within the family with respect to inheritance rights, succession rights and sharing of matrimonial property upon divorce. The family space – considered private – can be impervious to legal intervention, ensuring that injustices persist despite equality provisions in formal law.

Secondly, where courts mediate in instances of conflicts between women’s rights and the application of discriminatory customary law norms, the assumption is that judicial officers are immune to influences by the gendered perceptions in their societies. This is not the case. Professor Ben Nwabueze states that

The judge is not of course like an oracle bellowing out divine prescriptions from its deep recesses. He is simply a product of his society and its culture, an agent whose training and work have endowed him with wisdom and learning in the traditions, philosophy and ethics of his people...²⁸

Admittedly then, it is not far-fetched to suggest that what a particular judicial officer is likely to pronounce as law, based on an interpretation of customary law or even formal law, is likely to be nuanced by their respective cultural and societal beliefs and attitudes or socialization. The upshot of this is that the courts may end up justifying and reinforcing patriarchal norms and attitudes, thus hamstringing efforts at gender equality.

23. For instance, see *Virginia Edith Wambui Otieno v Joash Ochieng Ougo* [1982-88] KAR 1048.

24. Republic of Kenya, ‘Religion’ <<http://www.republicofkenya.org/culture/religion/>> accessed 2 August 2017. It indicates that up to 10% of Kenyans profess the Islamic religion.

25. Constitution of Kenya 2010, art 24 (4).

26. Constitution of Kenya 2010, art. 170 (5).

27. S Bano, ‘In pursuit of religious and legal diversity: a response to the Archbishop of Canterbury and the “Sharia debate” in Britain’ (2008) 10 (3) *Ecclesiastical Law Journal* 283.

28. B Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (St. Martin’s Press: New York, 1977) 139. Underlined for emphasis

Thirdly, the assumption that persons will choose to be governed by formal law, and will move the courts to apply and interpret formal law that has codified equality provisions, is flawed. The reality is different on account of many factors, such as lack of awareness; lack of finances to hire lawyers; the slow and complicated formal legal processes, and the disapprobation and disaffection of fellow community members who may consider it as betrayal. Further, even where an individual is able to move the court to make a decision for gender equality and order the striking down of customary law, the victory may end up being only 'pyrrhic' for the reason that disaffection in the community may complicate enforcement. Even where the decision of the court is enforced, the victorious individual may not enjoy the fruits of the judgment due to the hostility in their communities, particularly where the dispute involves family members. This speaks to the influence and force of communal or societal norms in the lives of individual members. It is important at this juncture to point out that most land disputes are resolved by community-level institutions, applying customary norms that people are more familiar and comfortable with.

3. PROVISIONS ON EQUALITY IN THE 2010 CONSTITUTION

The historical subjugation of women and the generally inferior position that society places women and girls in explains the Constitution's emphatic exposition of the rights of women.²⁹ The Constitution of Kenya 2010 has been hailed as being transformative in character.³⁰ Its text is specifically geared towards transforming societal relations within and without the family context and – by design or by nature – wherever rights may be trampled upon. This section assesses the provisions of the Constitution of Kenya that advance this transformative agenda with specific reference to women and girls.³¹ The yardstick used to measure the constitutional provisions that are helpful in rectifying societal imbalances shall be whether or not the provisions are focused on the transformation of skewed gender relations and inequalities that have resulted in exclusion on the basis of gender.³²

29. See K Njogu & E Orchardson-Mazrui, 'Gender Inequality And Women's Rights In The Great Lakes: Can Culture Contribute To Women's Empowerment?' 2 <<http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Culture-Womens-Empowerment.pdf> > accessed 2 August 2017. The author argues that through socially determined parameters, women are deemed less important if not expressly inferior to men.
30. Protection of these rights on the platform of a transformative charter like ours is the responsibility of not only the judiciary but also the Executive and Parliament. This is what is touted as constitutional dialogue where all arms of government interchangeably take the foremost role of implementation through implementation, interpretation and legislation.
31. Such transformation includes economic emancipation and grant of access to resources. Hitherto, women have been deemed to be unfit to own land, see generally P Kameri-Mbote, 'The land has its owners! Gender issues in land tenure under customary law in Kenya' UNDP International Land Coalition Workshop: Land Rights for African Development, From Knowledge to Action, Nairobi, 31 October–3 November 2005.
32. A Farahat, 'Pushing for Transformation' Völkerrechtsblog, 20 July 2017 <<https://voelkerrechtsblog.org/pushing-for-transformation/> > accessed 3 August 2017. However, it must be noted that apart from the paradigm of transformative constitutionalism, the other important aspect of transformative constitutional law that ensures transformation actually is effectuated is the need to place a positive duty on the state requiring its proactive participation.

The 2010 Constitution recognises the need to redefine and rearrange societal relations to right the wrongs in society, including gender inequalities. Article 27 provides that all persons are equal before the law. Further, Article 27 (2) provides that equality includes full enjoyment of the fundamental rights and freedoms that are provided for in the Constitution and in law. To this end, the equality clause ensures that all rights that touch on the interests of women and men are provided for. For instance, this means that all political, property, labour and socio-economic rights apply to women as much as they do to men.³³

Article 27 (6) places a positive obligation on the state to put in place legislative measures to redress past wrongs.³⁴ Beyond legislative action, the state is required to use affirmative action and policy calibration measures to ensure that inequalities are corrected. In addition to the measures under Article 27 (6), Article 27 (8) requires the state to ensure that not more than two thirds of the members of any elective or appointive body are of the same gender.³⁵ This is crucial to the realization of gender equality as it strikes at the root cause of the problem: the absence of a critical mass of women in decision-making positions. It is ironic that Parliament has failed to pass the legislation required to effect this provision of the Constitution five times in as many years.³⁶ There is a need for increased lobbying to actualise this, as well as a need for continued litigation in the courts to pressure Parliament to prioritise the same. One of the main reasons for the failure is that Members of Parliament are mainly men who stand to lose if the gender equality provisions are implemented.³⁷ The only way out is for courts to hold as unconstitutional the composition of Parliament in violation of the Constitutional principle, as that would force parties to find ways of adhering to the principle.

There are other provisions in the Bill of Rights that deal with matters that concern women. For instance, Article 53 provides for the rights of children and is of concern to women as mothers. Article 53 (b) specifically provides for every child's right to basic education. This redresses the situation where the preference has been to educate the boy child because of the expectation that the girl child would get married and her education would

33. See Articles 38, 40, 41 & 43 respectively.

34. It is argued that a truly transformative constitution requires the active involvement of the state in the implementation of the Constitutional provisions especially in the realization of such emotive issues as gender imbalance and socio-economic rights where the state is more likely to desire the maintenance of status quo.

35. This arises since the challenge over time has been the lack of representation for women in positions of influence, specifically the electoral process. See generally W Kabira & P Kameri-Mbote, 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise' in Collins Odote & Linda Musumba (eds.) *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging jurisprudence*. (Nairobi: IDLO, 2016) 206 <<http://www.idlo.int/sites/default/files/pdfs/publications/Balancing%20the%20Scales%20of%20Electoral%20Justice%20-%20Resolving%20Disputes%20from%20the%202013%20Elections%20in%20Kenya.pdf>>accessed 30 July 2017.

36. See C Mumma, *Kenya's failure to implement the two-third-gender rule: The prospect of an unconstitutional Parliament* (IDEA, Constitutionnet June 2016) available at <<http://www.constitutionnet.org/news/kenyas-failure-to-implement-two-third-gender-rule-prospect-unconstitutional-parliament>> accessed 2 August 2017.

37. P Kameri-Mbote, *Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses*, Inaugural Lecture, University of Nairobi, 24 January 2013, 19 <<http://www.ielrc.org/content/w1301.pdf>>accessed 30 July 2017.

therefore benefit her in-laws. Article 53 further makes it a right for children to be protected from harmful cultural practices, which may include Female Genital Mutilation and early marriage for the girl child (d), and obliges both parents to provide parental care (e). This provision helps legally to address the challenge of absentee fathers who abandon families, leaving women with the heavy burden of parenting.³⁸

Further, the Constitution legalises the meeting of needs that are of specific concern to women in providing for socio-economic rights.³⁹ These include the rights to education; housing; water; sanitation; health, food and welfare. In the context of the family, Article 45 provides that all parties to a marriage are equal and therefore entitled to equal rights before, during and at the dissolution of marriage.

In addition, the general principles that are embedded within the constitutional architecture recognise equality and non-discrimination as key to social justice. Foundationally, Article 10 (2) (b) recognises equality and non-discrimination as national values and principles of governance that bind all state organs, state officers and public officers. It must be noted that these find expression in other provisions. Foremost, Article 60 (f) provides that among the principles of land policy is the elimination of gender discrimination in law, customs and practices related to land and property in land. Secondly, Article 81(b) reinforces Article 27 (8) by stating that not more than two-thirds of the members of elective public bodies shall be of the same gender. Thirdly, Article 91 (1) (f) requires that political parties respect and promote human rights and fundamental freedoms, and gender equality and equity. In particular, Article 90 (2) (b) of the Constitution mandates political parties to ensure that each party list for nominations comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed.⁴⁰ This is to curb the pernicious practice where parties may opt to include female candidates among the nominees but below the list of male candidates, with the consequence that the female candidates have little chance of being nominated since those higher up in the list are normally prioritised based on the number of positions available for the party.

On representation in county governments, the Constitution requires that there be a particular number of special seats for members as is necessary to ensure that no members of the same gender comprise more than two-thirds of the elective body.⁴¹ Further, it specifically provides that no more than two-thirds of the members of any county assembly or county executive committee members shall be of the same gender.⁴² With respect to allocation of public finances, though couched in a generic manner, the Constitution provides for affirmative action in respect of disadvantaged areas and groups during the allocation

38. It has been argued that the normative couple headed family ensures that children are emotionally stable. For challenges that beset families dealing with absentee fathers, see K Elishiba & K Kisilu, 'Challenges Facing Nuclear Families with Absentee Fathers in Gatundu North Central Kenya' (2010) 10 (2) *Journal of the African Educational Research Network* 15.

39. Constitution of Kenya 2010, Article 43.

40. *ibid* article 90 (2) b.

41. *ibid* article 177 (1) b.

42. *ibid* article 197 (1).

of funds.⁴³ It is also required that the chairperson and the vice-chairperson of the various commissions and independent offices established under the Constitution be of opposite genders.⁴⁴ In this last respect, a practice is emerging where, invariably, all chairpersons are male and the deputies are female.

Other provisions that are important in the attainment of gender equality include those on citizenship. More specifically, the provision that Kenyan citizenship is not lost through marriage or dissolution of marriage.⁴⁵ This is important because, previously, most women lost their citizenship upon marriage to a foreigner, and were expected to assume the citizenship of their husband. It was unclear what would happen to such women upon divorce. In similar terms, a provision was introduced stipulating that either a father or a mother who is a Kenyan citizen by birth can grant citizenship to their child, whether born within or outside Kenya.⁴⁶ This is an improvement from the former situation where only a father could pass on citizenship to a child.

Article 40 (1) of the Constitution is also critical because it provides that every individual (irrespective of gender) has a right, either individually or in association with others, to acquire and own property of any description in any part of the country. This means that the right to own property is guaranteed for all, irrespective of their gender.

Article 59 establishes the institutional framework for the implementation of the equality agenda. The Kenya National Human Rights Commission and the National Gender and Equality Commission have subsequently been established to ensure that citizens realise the rights provided for in the Bill of Rights. Additionally, Chapter 5 on Land and Environment provides that Parliament shall enact legislation to regulate the recognition and protection of the matrimonial property; the matrimonial home, both during and on termination of marriage; and the rights of dependants of deceased persons, including spouses, in actual occupation of land.⁴⁷ These provisions address matters that would have been dealt with under customary law previously and, therefore, provide a pathway for engaging customary norms with a view to making them gender sensitive.

It is clear from the above discussion that at a general level, the Constitution effectively provides for equality and non-discrimination. It significantly hoists these principles above all laws and requires that all laws must conform to its provisions.

4. LAWS AND POLICIES PROMOTING EQUALITY POST-2010 CONSTITUTION

Following the promulgation of the 2010 Constitution, Parliament enacted various laws to implement its provisions. The legal regime governing marriage was overhauled through the Marriage Act 2014 Act No. 4 of 2014, which provides for five marriage types, namely:

43. *ibid* article 203 (1) h.

44. *ibid* article 250 (11).

45. *ibid* article 13 (3).

46. *ibid* article 14 (1).

47. *ibid* article. 68 (c) iii and iv.

those conducted in accordance with the rites of Christian tradition (Christian marriages); civil marriages; those conducted in accordance with customary rites relating to any community in Kenya (customary marriages); those conducted in accordance with the Hindu rites and ceremonies, and those conducted in accordance with Islam (Islamic marriages). In addition, the Act recognises the differences in the forms of marriages. For instance, Christian, civil and Hindu marriages are monogamous under the statute, while customary and Islamic marriages are polygamous or potentially polygamous. The Act requires all marriages – including customary ones – to be registered.

The Land Act No. 6 of 2012 and the Land Registration Act No. 3 of 2012 were passed to guide the protection and administration of private and public land and the registration of land in Kenya respectively. Importantly, they contain provisions that seek to entrench equality in landholding between both men and women in light of the inequalities in terms of holdings. Section 79 (3) of the Land Act 2012 provides that a ‘charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons’. This seeks to ensure equality of both men and women in determining dealings with land and matrimonial property. There is also the Matrimonial Property Act No. 49 of 2013, which seeks to provide a regime for regulation of matrimonial property between and among spouses in both monogamous and polygamous marriages. Section 12 (1) of the Matrimonial Property Act 2013 (MPA) reiterates the need for spousal consent for transactions relating to matrimonial property during the subsistence of a monogamous marriage. Similarly, section 12 (5) of the MPA also requires the written and informed consent of a spouse before a lease or a charge over a matrimonial home.

Section 11 of MPA, on the other hand, secures land and property rights of women by providing that, during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account, including (a) the customary law relating to divorce or dissolution of marriage, and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife or wives, or former wife or wives. Other laws include the Community Land Act 2016⁴⁸ and the Law of Succession Act,⁴⁹ among others.

On electoral politics, the Political Parties Act⁵⁰ and the Elections Act⁵¹ also demand the implementation of affirmative action provisions in favour of women⁵², who are the ones that have traditionally been underrepresented in politics. Political parties are now under a legal obligation to ensure that their nominees including women and meet the two-thirds gender principle.

48. No. 27 of 2016.

49. Cap 160 Laws of Kenya.

50. Cap 7B Laws of Kenya.

51. Cap 7 Laws of Kenya.

52. Elections Act 2011, s. 34–6.

At a policy level, there is the National Land Policy⁵³, which recognises the inequalities between genders in terms of land ownership and seeks to streamline the same.⁵⁴ Additionally, there are draft policies on Equality and on Gender and Development, which are being finalised to implement general equality provisions and gender equality specifically. Further, Kenya is among countries that have committed to implement the United Nations 2030 Agenda under which the Sustainable Development Goals (SDGs) were crafted. The SDGs rallying call of leaving no one behind is imperative for equality initiatives at the national level. Goal 5 specifically focuses on ensuring gender equality.⁵⁵

5. ACHIEVEMENTS

Various achievements have been attained in the quest for gender equality following the promulgation of the 2010 Constitution. They have, however, not been without challenges, as will be illustrated in the next section. It begins, however, with a more general discussion of the various gains that have already been achieved.

Most notable is the fact that there are now the seats of Women's Representative in each of the 47 administrative units – counties – headed by a governor. These seats were created to increase the number of women in the National Assembly, where they had been historically underrepresented. Though, contrary to what many believe, men are not restricted from vying for the Women's Representative positions, all the 47 Women Representatives in the 2013 and 2017 elections are women. The Parliament elected in 2013 had a total of 86 women parliamentarians as against 263 men parliamentarians, consisting of 47 Women County Representatives, 16 elected members and five nominated members of the National Assembly, and 18 nominated Senators.⁵⁶ The members of Parliament elected in 2017 recorded an increase in the number of elected women to 24 in the National Assembly, raising the number of women to 76, still short by 41 seats of making 117, or one-third, of the 349 MPs – 290 elected, 47 woman representatives and 12 nominated members. Further, unlike in 2013 when no women were elected as Senator and Governor out of the 47 Senators and Governors, the 2017 elections recorded three women elected as Senators and three as Governors.

There are also more women in the position of Members of County Assemblies (MCAs) due to the implementation of the constitutional requirement that no more than two-thirds of either gender fill these roles. While not many women have been elected, political parties have had to nominate women to bridge the gap in the county assemblies as provided for in the Constitution. Additionally, more women are occupying appointive positions in both the national and county governments due to the gender equality provisions in the Con-

53. Sessional Paper No. 3 of 2009.

54. Paras 24 (c), 25 (f), 170 (e) & 183 (e).

55. Available at <<http://www.undp.org/content/undp/en/home/sustainable-development-goals.html>> accessed 4 August 2017.

56. J Nyang'aya, 'Opinion: Why more women should be elected' *The Standard*, (Nairobi 22 March, 2017) <<https://www.standardmedia.co.ke/article/2001233539/opinion-why-more-women-should-be-elected>> accessed 4 August 2017.

stitution. For instance, despite the fact that we are yet to meet the threshold of one-third women, there are increasingly more women serving as cabinet secretaries, principal secretaries and heads of departments and commissions.

This demonstrates a gradual acceptance that gender representation is an important constitutional principle that needs to be attained. The situation is the same outside the legislature and the executive. For instance, women have ascended to leadership positions in the Judiciary⁵⁷ where in the past most of them were largely serving in the subordinate courts.⁵⁸ There are now women judges at the Supreme Court, at the Court of Appeal and at the High Court,⁵⁹ a clear break away from the past when men dominated these positions with women largely making up the magistracy.⁶⁰ The Kenya Women Judges Association, whose mission is the enhancement and protection of human rights with special focus on gender parity and access to justice for men and women, has been a critical actor in pushing for more women in senior positions in the Judiciary.⁶¹ Women occupy the Constitutional positions of the Deputy Chief Justice (also the Deputy President of the Supreme Court) and the Chief Registrar of the Judiciary. Indeed, while the gender representation rule is yet to be met, great strides have been made since the promulgation of the 2010 Constitution. It is hoped that greater representation of women in the Judiciary and particularly in the High Court,⁶² the Court of Appeal⁶³ and the Supreme Court⁶⁴, whose decisions are both of a binding nature and more authoritative, will lead to decisions that are alive to the gender disparities in society and will assail the dominant patriarchal attitudes. It also illustrates that women have equal employment opportunities so long as they are qualified, which is borne out in the advertisements for jobs indicating that the judiciary is an equal opportunity employer.

Other important milestones that have been made in the Executive and Civil Service include the establishment of a Ministry responsible for Public Service, Youth and Gender affairs⁶⁵, and the establishment under it of the State Department of Gender Affairs. The

57. For a similar argument within Africa generally, see J Dawuni & A Kang, 'Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa' (2015) Faculty Publications: Political Science 70.

58. For an assessment of the underrepresentation of women in the Judiciary, see W Kamau, 'Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions' in *Gender and Judging* (London: Oxford Hart Publishers, 2013).

59. *ibid.*

60. P Kameri-Mbote & M Akech, *Kenya: Justice Sector and the Rule of Law – A review by AfriMAP and the Open Society Initiative for Eastern Africa* (Nairobi: Open Society Foundations, March 2011) 112; VOA, 'Kenya Women's Groups Want More Female Judges' (VOA, March 20, 2011) <<https://www.voanews.com/a/157718.html>> accessed 4 August 2017.

61. Available at <<http://kwja.org/about-us/>> accessed 4 August 2017.

62. See e.g. Emeka-Gekara Mayaka, 'Kenya gets 28 new High Court judges' *Daily Nation* (Nairobi, 22 August, 2011) <<http://mobile.nation.co.ke/news/1950946-1223326-format-xhtml-iknys0z/index.html>> accessed 4 August 2017. Out of the 28 appointed judges, 13 of them were women.

63. 7 out of the 22 Court of Appeal judges are women. See, <<http://www.judiciary.go.ke/portal/page/court-of-appeal-judges>> accessed 4 August 2017.

64. 2 out of the 7 Supreme Court judges are women.

65. Ministry of Public Service, Youth and Gender Affairs <<http://www.psyg.go.ke/2016-02-05-06-32-50/gender-affairs-pr.html>> accessed 4 August 2017. The State Department of Gender Affairs was established vide Executive Order No. 1/2016 and is charged with coordinating and overseeing gender mainstreaming policies and programmes within the government and monitoring Kenya's compliance with international instruments.

Department is charged with, among others, the responsibility of promoting gender equality and empowerment of women in Kenya, and of ensuring that gender is mainstreamed in all activities carried out by Ministries, Departments and Agencies, County Governments and, in the private sector, by establishing national principles and a national gender action plan. In this regard, the process of putting in place the National Gender Equality and Women's Empowerment Policy⁶⁶ to replace the 2006 one,⁶⁷ and of responding to issues addressed in the 2010 Constitution, is at an advanced stage.

The representation of women in the executive arm of government, the civil service and the private sector has grown. The private sector also appears slowly to be responding to the challenge of gender inequality⁶⁸, with studies indicating that greater representation of women on boards ensures not only gender equality but also better decision-making and increased productivity.⁶⁹

Women's land rights and right to matrimonial property, which have traditionally been tilted against women, are better protected normatively in the current laws. Matrimonial property, including land and the home on which it is built, cannot be disposed of without spousal consent,⁷⁰ and this has meant that banks now require borrowers to indicate their marital status and prove consent before lending money on the security of the matrimonial property. A transaction made without such consent is null and void.

In its quest for equality, the government has also put in place affirmative action measures aimed at levelling the playing field and achieving equality of opportunities in education. This has had a positive effect in bridging the gender disparity in schools.⁷¹ Thus, women applying for government-sponsored programs at public universities are admitted with a point lower than their male counterparts⁷² in order to increase the number of women enrolling for University education. Further, in light of the low economic position of women over the years due to historical inequalities, in 2016 the government launched the National Gender Affirmative Action Fund (NGAAF)⁷³ as a means of complementing other affirmative action measures by the National Government. Some of the objectives of the Fund are: to enhance women's access to finances for economic empowerment initiatives through a revolving fund;⁷⁴ support value addition initiatives by affirmative action groups; enhance

66. On file with author.

67. Kenya National Policy on Gender and Development 2000.

68. J Barsh & L Yee, *Women Matter: Unlocking the full potential of women at work* (McKinsey & Company, April 30, 2012) <http://www.hydroone.com/WTTE/Documents/Unlocking_full_potential_of_women_at_work_v2.pdf> accessed 6 August 2017.

69. *ibid.* See also, F Lagerberg, 'Women in Business: The Value of Diversity' (Grant Thornton, September 29, 2015) <<https://www.grantthornton.global/en/insights/articles/diverse-boards-in-india-uk-and-us-outperform-male-only-peers-by-us%24655bn/>> accessed 6 August 2017.

70. Matrimonial Property Act 2014, s. 12 (1) & 12 (5).

71. V Shawiza, 'Gender Parity in Girl Child Education in Kenya Narrows' (Soko Directory, November 30, 2016) <<http://sokodirectory.com/2016/11/gender-parity-girl-child-education-kenya-narrows/>> accessed 6 August 2017.

72. J Onsongo, 'Affirmative action, gender equity and university admissions – Kenya, Uganda and Tanzania' (2009) 7 (1) *London Review of Education* 71, 74.

73. The Public Finance Management (National Government Affirmative Action Fund) Regulations, 2016, Regulation 3.

74. *ibid* Regulation 6 (2) a.

access to critical services by survivors of gender based violence, female genital mutilation and early and forced marriages;⁷⁵ support affirmative action measures for marginalised groups, orphaned children and those in child-headed homesteads; and support civic education and community sensitization on government programmes and policies such as the 30 per cent procurement reservations for women, youth and persons with disabilities, or the existence of other government social economic empowerment opportunities such as Uwezo Fund and Women Enterprise Fund.⁷⁶ The board established to oversee the NGAAF had disbursed about \$60 million dollars by the end of the 2017 financial year in June.

Besides the NGAAF, there are also parallel affirmative action funds that have been in place for a longer period; these include the Women Enterprise Fund⁷⁷ and the Uwezo Fund.⁷⁸ Estimates from government indicate that as of the year 2016, nearly 9 billion Kenya shillings had been disbursed through the Women Enterprise Fund since the Fund was established in 2008.⁷⁹ Similarly, over 5.3 billion Kenya shillings had also been channelled through the Uwezo Fund to various women and youth groups.⁸⁰

Further, the government has also used public procurement (a major revenue base) as an instrument of social policy to influence socio-economic development⁸¹ by providing for local Access to Government Procurement Opportunities (AGPO).⁸² In this scheme, 30 per cent of all public procurement opportunities are reserved for youth, women and persons with disabilities.⁸³ This has had the effect of ensuring that more women are able to win government tenders, which is key to economic empowerment. It is worth noting that other countries have replicated this scheme, including South Africa.⁸⁴

75. *ibid* Regulation 6 (2) d.

76. *ibid* Regulation 6 (2) e.

77. Women Enterprise Fund is a semi-autonomous agency within the Ministry of Public Service, Youth Affairs and Gender Affairs and was established in 2007 with the objective of providing accessible and affordable credit to support women and expand business for wealth creation. <<http://www.uwezo.go.ke/>> accessed 4 August 2017.

78. The Uwezo Fund is a flagship economic empowerment programme launched on 8th September 2013 and established through Legal Notice No. 21 of the Public Finance Management Act 2014 under Kenya's economic blueprint, the Vision 2030. <<http://www.uwezo.go.ke/>> accessed 4 August 2017.

79. D Psirmoi, 'Kenyan government disburses Sh25 billion to women and youth' (The Standard, October 2, 2016) <<https://www.standardmedia.co.ke/m/article/2000218061/kenyan-government-disburses-sh25-billion-to-women-and-youth>> accessed 4 August 2017.

80. *ibid*.

81. S Arrowsmith, 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) *The Law Quarterly Review* 235.

82. <<http://agpo.go.ke/pages/about-agpo>> accessed 6 August 2017.

83. See, Constitution of Kenya 2010, art. 227 & The Public Procurement and Disposal Preference and Reservations Amendment Regulations, 2013.

84. P Bolton, 'Government Procurement as a Policy Tool in South Africa' (2006) 6 (3) *Journal of Public Procurement* 193; Also see, Constitution of the Republic of South Africa 1996, sec. 217 (3).

6. CHALLENGES

The relationship between different norms in plural legal systems is complex and dynamic, embedding political and social contestation.⁸⁵ The mobilization of law and culture by state and customary law can lead either to inclusion or exclusion.⁸⁶ This contestation can be a challenge to the quest for gender equality even where the state law explicitly provides for equality. It is at this point that the rhetoric of gender equality encounters the reality of gendered experiences of state and customary law. This partly explains why challenges still abound in the quest for gender equality, despite the achievements attained and outlined above. These challenges appear in the form of gendered perceptions and stereotypes that may have been peddled for a long time, in the lack of political goodwill, in intersectional discrimination, and a lack of knowledge and awareness of the position of state and customary law on gender.

The push for and the subsequent amendment to the land laws, through the Land Laws (Amendment) Act 2016 – effectively whittling down the protections accorded to women with respect to matrimonial property barely three years after they were enshrined in law – illustrate the tension between gender equality and gender-neutral norms. Section 31 of the Land Laws (Amendment) Act 2016 deleted section 93 (3) of the Land Registration Act (LRA), which required a lender or transferee to ensure that a borrower or transferor had spousal consent or to ascertain whether the transferor or borrower had the property registered individually. Effectively, therefore, the amendment removed the duty to inquire on the part of lenders and transferees. In its place, the amendment provided that if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses, then such property would be regarded as matrimonial property and dealt with in accordance with the Matrimonial Property Act 2013. Moreover, section 11 of the Land Laws (Amendment) Act 2016 deleted spousal rights over matrimonial property from the list of overriding interests over registered land, meaning that they would no longer be automatically assumed to exist in cases where they were not noted on the register.⁸⁷ This effectively reduced the protection of the rights of women to land, particularly in situations where their names are not included in the title documents as joint-owners of the land. Such legislative claw-backs are indicative of the contestations that still abound over the rights of women to property. This is hardly surprising since women's rights to land was one of the nine most contentious issues in the Constitution before it was passed in a referendum in 2010. Those opposed to women's rights to land are quick to lay their claim in customary law. Yet this is the most prevalent law in rural areas where women work on land and have access to such land unless the relationship through which they claim the right turns sour (marriage or relationships with other members of the family).

The other challenge is the absence of political will to implement the constitutional provisions, which is exemplified by the failure to enact the two-thirds Gender Bill,⁸⁸ nearly

85. International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, (2009) ATAR Roto, Versoix, Geneva Switzerland

86. *ibid.*

87. See, Land Registration Act 2012, sec 28 for the list of overriding interests over registered land.

88. <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/Two-ThirdGenderRuleLaws__Amendment_Bill2015.pdf> accessed 6 August 2017.

two years after the constitutional deadline.⁸⁹ The Bill was supposed to implement the two-thirds gender principle by providing for mechanisms through which the state and other actors will implement the principle with respect to the National Assembly and Senate. In fact, there was a case lodged in court seeking a declaration that the 11th Parliament was unconstitutional for failure to meet the required threshold established in the Constitution and failure to pass the law needed to effect it.⁹⁰

Indeed women continue to face more hurdles than men in their quest for greater participation in competitive electoral politics, due to a lack of adequate finances and political violence.⁹¹ There were reports of violence and intimidation aimed at women candidates vying for various electoral seats during the campaigns leading up to the August 2017 elections.⁹² Women generally also have lesser financial clout and this militates against their ability to conduct effective political campaigns in a context where campaigns are predicated on the size of one's wallet.⁹³ In addition, the triple roles played by women and the characterisation of women in politics as being of loose morals, rebellious or headstrong, and their consequent exposure to ridicule, all conspire to negatively affect women's prospects of being voted into office.⁹⁴ It is not unusual for a women to lose the opportunity to run for election in their constituencies of origin where their spouses are from another constituency, the narrative being that they left their constituency of birth and moved to that of their husband and that is where they should seek to be elected.⁹⁵

Unscrupulous persons have abused the public procurement opportunities reserved for women by fronting⁹⁶ them for the sole purpose of winning tenders⁹⁷ with no intention of passing the benefits to women. In other cases, women who are able to bid competitively

89. The deadline for the passage of the legislation was August 2015.

90. S Ndonga, 'Petition on two thirds gender principal due in court Monday' (Capital News, September 4, 2016) <<http://www.capitalfm.co.ke/news/2016/09/petition-two-thirds-gender-principal-due-court-monday/>> accessed 6 August 2017.

91. K Migiro, 'Cash, sexism and violence keep women out of Kenyan politics' (Reuters, February 20, 2013) <<http://www.reuters.com/article/us-kenya-elections-women-idUSBRE91J0KO20130220> > accessed 6 August 2017.

92. S Muhindi, 'CS criticizes violence on women aspirants' (The Star (Nairobi) 22 April, 2017) <http://www.the-star.co.ke/news/2017/04/22/cs-criticises-violence-on-women-aspirants_c1547691> accessed 6 August 2017.

93. *ibid.*

94. ENCA, 'Kenyan women politicians endure hate campaigns' (ENCA, August 4, 2017) <<http://www.enca.com/africa/kenyan-women-politicians-endure-hate-campaigns> > accessed 6 August 2017.

95. Embu county governor aspirant Cecily Mbarire was decampaigned on the basis that she had been married outside the Embu community and was thus undeserving of her seat. The same argument was peddled against former National Assembly Deputy Speaker Hon. Joyce Laboso who was seeking the Bomet County gubernatorial seat. See, <<http://www.bungejournal.co.ke/2016/07/20/why-women-aspirants-are-not-out-of-the-woods-yet/>> accessed 6 August 2017. Also see, F Kipkemoi, 'Don't fight me because my husband is Luo, says Laboso' *The Star*, (Nairobi 15 June, 2016) <http://www.the-star.co.ke/news/2016/06/15/dont-fight-me-because-my-husband-is-luo-says-laboso_c1368961 > accessed 6 August 2017.

96. ⁹⁶ See, Bolton (n 78) above for more insights on 'fronting', which basically means that undeserving categories of persons bid for tenders at the expense of vulnerable groups.

97. G Omondi, 'Women take up Sh27bn tenders in four years' *Business Daily*, (Nairobi 5 August, 2017) <<http://www.businessdailyafrica.com/news/Women-Sh27bn-tenders-four-years/539546-4045888-1764iu/index.html>> accessed 6 August 2017.

for tenders have hijacked the reserved procurement opportunities, thus circumventing the intended purpose of levelling the playing field and promoting equality.⁹⁸ Additionally, there have been concerns that the procurement opportunities reserved for women, youth and persons with disability have been less than the stipulated 30 per cent.⁹⁹

Another challenge is women's general lack of awareness of their rights, which means that they do not seek redress for rights' violations in courts or through other avenues.¹⁰⁰ The high levels of illiteracy among women and their relegation to the private reproductive sphere, mean that they are barely aware of their rights with respect to land and property holding and therefore do not seek to actualise them. Indeed, most women have access to land owned by men in their lives and only realise that their rights are tenuous when their relationship with the landowner ceases.

The situation is complicated by the operation of diverse norms that are in contest for supremacy, resulting in contradictions. For instance, the provision that the chair and deputy chair of any body should be of different genders has invariably resulted in the female deputy phenomenon. This replicates the position in the household where the man is usually the head and the woman is the assistant. In the case of the Chief Justice and the Deputy Chief Justice, this situation has been given some semblance of permanence with advertisements for the post of the Deputy Chief Justice attracting mainly women and those of the Chief Justice attracting mainly men. Women's entry into high offices in the public sphere is also affected by the need to ensure that all appointments reflect the ethnic composition of Kenya. Men from dominant ethnic groups have already taken up many of these positions and when vacancies arise, they are likely to be filled by men from ethnic minorities and not by women from the dominant ethnic groups, even where the women are highly qualified.

Yet another area where challenges remain on account of the plurality of norms is the realization of socio-economic rights. Take the example of water: Access to this essential resource is governed by a variety of norms, including international norms, statutory/national norms, and community-based norms.¹⁰¹ Indeed, women's human right to water is violated as women are unable to access the resource on account of the disproportionate burden of collecting water for domestic use that women bear as opposed to men. Moreover, since the societies are patriarchal, the male members of the various communities constitute the informal regulators of how the water resource is accessed and used. The analysis further lays bare the complex interplay of the subsisting local, national and international norms and institutions that shape access to water. The overlapping legal and insti-

98. E Mutai, 'The rich take up tenders for women, youth' *Business Daily*, (Nairobi 3 April, 2017)

<<http://www.businessdailyafrica.com/economy/rich-take-tenders-women-youth/3946234-3876506-o991x6z/index.html>> accessed 6 August 2017.

99. A Odhiambo, 'State firms face tender sanctions over special groups' *Business Daily*, (Nairobi 24 February, 2014)

<<http://www.businessdailyafrica.com/news/State-firms-face-tender-sanctions-over-special-groups/539546-2220420-slpfok/index.html>> accessed 6 August 2017.

100. E Kimani & L Maina, 'Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy, and Disenfranchisement' (2010) 19 *Journal of Ethnic & Cultural Diversity in Social Work* 256, 265.

101. A Hellum, P Kameri-Mbote & Barbara van Koppen (eds), *Water is Life: Women's human rights in national and local water governance in Southern and Eastern Africa* (Weaver Press: Harare, 2015).

tutional norms governing water as a resource can be traced to the history of these countries. As former European colonies, they had their own customary law, western-imposed colonial law, and subsequently developed post-independence legislation.¹⁰² In this instance, intersecting plural legal norms mediate women's access to water and, rather than facilitate access, result in a matrix of barriers that makes access difficult.

The plurality of norms and institutions¹⁰³ ensures that while the state is the main duty bearer in terms of the various human rights, specifically access to water, it is not the sole regulator of the water resource.¹⁰⁴ The existence of community-based, national and international norms and the concomitant institutions impel the adoption of a legal pluralist approach to enhance access to water as a resource.¹⁰⁵ The case studies further reveal that the state is to a great extent incapable of providing water, due to the pluralistic legal terrain that places it largely outside the domain of water provision.¹⁰⁶ The plural norms and institutions in these states are not synchronised and the result is a broken or absent system of water provision, making access to water unaffordable as private water companies become the key water service providers.

The situation is complicated by the likelihood of conflict between the local community-based norms on how water is accessed on the one hand, and the national and international norms on the other. Most disputes regarding water access are normally resolved using local community norms embedded in mechanisms and rules of accessing water.¹⁰⁷ These case studies illustrate the intersectional vulnerabilities of poor women in the countries studied.¹⁰⁸ Most significantly, the case studies focus attention on how different women experience marginalization, which is linked to the gender aspects of their identities. The author finds that the rights-based approach adopted by law fails to take into account the productive uses of water and the special needs of sanitation for women.

102. For instance, the Water Service Act 1997 in South Africa operationalises the right to water, a right also incorporated in the Constitution. The Constitution of Kenya 2010 also provides for the right to water, and the legislation (Water Act 2002) is in the process of being aligned to conform to the Constitution, the 2013 Zimbabwean Constitution recognises the right to water as does the Malawi Water Resources Act 2013 and the Gender Equality Act of 2013.

103. *ibid* 5–8.

104. Hellum *et al* (n 101). For instance, in Chapter 12 (particularly pages 394–7), the case study from Domboshawa Communal Area in Zimbabwe shows how residents have invested in different forms, norms and institutions that govern the use of water. The same result is obtained from the case study of Marakwet County in Kenya as highlighted in Chapter 6 generally and particularly on page 181. Chapter 11 similarly illustrates how residents of Harare high density areas (suburbs) are resorting to prevailing customary norms and practices to address water shortage. An admission of the conflicting norms that are not recognised by municipal authorities and national government in Harare is made on page 377.

105. *ibid* 29. The authors, while making observations over the various case studies generally, argue that there is need for an integration and harmonization of local, national and international norms (what we call a 'legal-pluralist approach') so as to enhance access to water in developing countries.

106. *ibid* 5, 6.

107. *ibid* 192–4, where the authors examine the norms governing ownership and access to water in Marakwet County in Kenya. They note that water is considered a sacred resource and is governed by particular community-based norms, usually by men to the exclusion of women.

108. *Ibid* 24–6, 63.

7. CONCLUSION

This paper has examined the gender equality question in Kenya and how formal law has provided for equality and non-discrimination, seeking to mainstream gender equality in the various spheres of the society. The paper has also noted that despite the provision for equality and non-discrimination on the basis of gender in formal law, gender equality is yet to be fully realised due to the existence and influence of conflicting formal and informal norms, which operate contemporaneously in a plural legal context. In personal law matters, customary law and religious law norms and norms from semi-autonomous social fields – on entitlements, processes and dispute resolution – remain deeply embedded in the fabric of society and in people's daily lives. They are also generally more accessible than formal law norms in constitutions and other laws. Formal law norms are, unlike their customary law counterpart, removed from the society and must find their pride of place in people's lives. The capacity of formal law to change discriminatory practices and bring about equality is therefore limited. This calls for engaging, harnessing and applying aspects within customary law and semi-autonomous social fields that can facilitate the entrenchment of gender equality. For instance, where customary law provides for access rights to key resources by women, such access should be harnessed rather than replaced with an alien formal law norm.

So far, not much research has been done to explore the aspects of customary law that can be used to promote gender equality. The time has come for research to consider the influence of customary law on people's lives and in determining the access to and control of resources, and their participation in decision-making. The increase in women elected to governorship, the Senate and the National Assembly in the 2017 elections, despite the failure of Parliament to pass law to provide mechanisms for meeting the two-thirds gender rule, already points to extra-legal factors that promote gender equality. These need to be explored and built upon. A failure to explore the issues ignores existing power relations and the dynamism of existing hierarchical and asymmetrical norms. This approach also fails to take into account the economic inequalities between individuals due to historical and social reasons.¹⁰⁹

In the meantime, there is a need to reconfigure the laws/legal norms and influential norms in the semi-autonomous social fields in a manner that ensures that they promote gender equality in the overarching legal and normative terrain. This requires a constructive engagement of normative orders that do not promote gender equality, rather than a demonizing thereof. It is worth noting that the norms have persisted despite the expectation that they would fall into disuse and give way to the introduction of formal law espousing normative equality. Their resilience speaks to their persuasive force and effect among a sizeable part of the population. Demonizing normative orders that are ubiquitous and that people identify with can lead to people living outside the purview of formal law, presenting daunting challenges to the implementation and enforcement of equality and non-discrimination norms in instances where the flouting of such is the rule rather than the exception.

109. Some of these historical and social reasons include but are not limited to: apartheid, colonialism, historical injustices, slavery, and gender.

The Constitution, especially one that was so broadly negotiated and deliberated, is a good point to start the process of reviewing laws that do not promote equality. The process of engaging the laws constructively will facilitate the move towards gender equality. While this may take time, it ensures that there is agreement that gender equality is a desirable destination. It also ensures buy-in by proponents of the affected normative orders. This forestalls rebellion where customary law adherents are forced to change without any meaningful engagement. The acceptance of alternative dispute resolution mechanisms in the Constitution, including traditional dispute resolution, is, for instance, a window of opportunity for bringing the two orders together.

For the success of the reconfiguration that this paper proposes, civic education is critical. This will entail the engagement of tenets in customary law and semi-autonomous social fields alongside formal laws. Constructive engagement can be hindered by hierarchical ordering of norms that postures equality frameworks in constitutions and formal law as superior to other norms. Civic education can be used to break down the barriers between the normative orders, emphasizing the commonality of the equality tenets in all the legal orders while isolating and dealing with tenets that go against these accepted norms.