

**Affirmative Action Laws and Policies: Interrogating their Effectiveness in the
Promotion of Substantive Gender-Based Equality in Kenya**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

Manani, Stacie Jessica Ongecha

100670

Prepared under the supervision of

Mabuti Mutua

January 2021

15,878 words (excluding footnotes and bibliography)

Table of Contents

ACKNOWLEDGEMENTS	iv
DECLARATION.....	v
ABSTRACT	vi
LIST OF ABBREVIATIONS	vii
LIST OF CASES	viii
LIST OF LEGAL INSTRUMENTS	ix
CHAPTER 1: INTRODUCTION.....	1
1.1. Background	1
1.2. Statement of the problem.....	3
1.3. Justification of the study.....	3
1.4. Aim and objectives	4
1.5. Research questions	4
1.6. Theoretical framework	4
1.7. Research methodology	5
1.8. Literature review	6
1.8.1. The effectiveness of gender-based affirmative action laws and policies in the promotion of both formal and substantive fairness	6
1.8.2. The shortcomings of the implementation of affirmative action laws and policies	6
1.8.3. The establishment of effective implementation mechanisms as a way forward.....	7
1.9. Hypothesis	8
1.10. Chapter breakdown.....	8
CHAPTER 2: PATRIARCHY AS THE PRIMARY CONTRIBUTOR TO GENDER DISPARITIES IN THE PUBLIC SECTOR.....	10
2.1. Introduction	10
2.2. The development of patriarchy.....	10
2.3. The impact of patriarchy on equality in the public sector	12
2.3.1. The public sector and forms of gender-based discrimination within it	12
2.3.2. Elective positions.....	12
2.3.3. Appointive positions.....	17
2.4. Conclusion.....	19
CHAPTER 3: THE LEGAL, INSTITUTIONAL AND POLICY FRAMEWORKS ON GENDER EQUALITY IN KENYA.....	21
3.1. Introduction	21
3.2. Approaches to and categories of affirmative action	21
3.2.1. Equality of opportunity.....	23

3.2.2. Gender quotas	24
3.3. Formal equality vis-à-vis substantive equality	25
3.4. Frameworks on gender equality in Kenya.....	26
3.4.1. Legal Framework.....	26
3.4.2. Institutional framework	34
3.4.3. Policy framework	35
3.5. Conclusion.....	37
CHAPTER 4: INTERNATIONAL BEST PRACTICES IN GENDER EQUALITY: A COMPARATIVE STUDY	39
4.1. Introduction	39
4.2. International best practices in gender equality	39
4.2.1. Women and their participation in public and political life	40
4.2.2. Women and the right to education.....	41
4.2.3. Women’s legal capacity and the right to access justice.....	43
4.3. Rwanda’s compliance with international best practices.....	44
4.3.1. Legal framework	45
4.3.2. Policy Framework	46
4.3.3. Institutional framework	48
4.4. Conclusion.....	49
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS	50
5.1. Introduction	50
5.2. Summary of the findings	50
5.2.1. Chapter 1 findings	50
5.2.2. Chapter 2 findings	50
5.2.3. Chapter 3 findings	51
5.2.4. Chapter 4 findings	51
5.3. Recommendations	52
BIBLIOGRAPHY	54

ACKNOWLEDGEMENTS

I have received, over the past year and throughout this project, tremendous support from a number of people to whom I would like to extend my gratitude.

Firstly, I would like to thank Mabuti Mutua, my supervisor, for guiding me in, and patiently walking this tedious journey with me. I am deeply indebted to you.

To my parents, for their support and nurture throughout the project, thank you. Special thanks to my father, B.O.M. Manani, whose unparalleled knowledge and invaluable insight have been very instrumental throughout this journey. The completion of my dissertation would not have been possible without you.

Lastly, particularly helpful to me during this time were my fellow colleagues and my brother, Wesley, whose profound belief in my work helped to keep me motivated.

DECLARATION

I, MANANI, STACIE JESSICA ONGECHA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date:8 January 2021.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

Mabuti Mutua

ABSTRACT

The aim of this research is to determine why gender-based affirmative action laws and policies seem not to yield desirable results in the public sector and to suggest necessary legal reforms. This is to be done by actualising the following objectives; to investigate the impact of patriarchy on gender equality in the public sector in Kenya; to identify and discuss the legal, policy and institutional framework on gender-based affirmative action in Kenya and its response to gender disparities in Kenya's public sector; to examine international best practices with regard to gender equality and the level of compliance with the same in Rwanda and to determine whether it offers any lessons to Kenya.

This study focuses primarily on elective and appointive positions and is conducted using doctrinal research. This approach involves the review of relevant primary and secondary sources including legislation, case law, books, journals, newspaper and other articles as well as online internet sources.

During this research, it has been observed that Kenya has rich and all-inclusive legal, institutional and policy frameworks on gender equality and equity. The unsatisfactory *status quo* highlighted above is attributable to the patriarchal approaches to constitutional interpretation, legislative processes and decision-making, which have proven to be a resistant barrier to achieving gender equality in the public sphere. Further, the manifest tension between the promotion of substantive equality vis-à-vis the promotion of formal equality has contributed to the gender disparities in the public sector as there seems to be a general endorsement of formal equality stemming from the lack of clarity in the frameworks.

For there to be observable change, it is recommended that the relevant frameworks currently in place ought to be modified to be gender-specific, expansive (taking into account the intersectional nature of discrimination) and highly specialised. Further, priority ought to be given to measures that promote equality of results, while those that promote equality of opportunity ought to take a supplementary role.

LIST OF ABBREVIATIONS

AG	Attorney General
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
FFRP	Forum for Rwandan Women Parliamentarians
GFP	Gender Focal Point
IEBC	Independent Electoral and Boundaries Commission
JSC	Judicial Service Commission
KNCHR	Kenya National Commission on Human Rights
MCA	Member of the County Assembly
MIGEPROF	Ministry of Gender and Family Promotion
NGEC	National Gender and Equality Commission
NGP	National Gender Policy
SDG	Sustainable Development Goal
UDHR	Universal Declaration of Human Rights
UN	United Nations

LIST OF CASES

1. *Centre for Rights Education and Awareness & 2 Others v Speaker of the National Assembly & 6 Others* (2017) eKLR.
2. *Coast Water Services Board v Mrs. Alome Achayo & 5 Others* (2015) eKLR.
3. *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another* (2011) eKLR.
4. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.
5. *Katiba Institute v Independent Electoral and Boundaries Commission* (2017) eKLR.
6. *National Gender and Equality Commission v Majority Leader, County Assembly of Nakuru & 4 Others* (2019) eKLR.

LIST OF LEGAL INSTRUMENTS

1. *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.
2. *Constitution of Kenya* (2010).
3. *Constitution of Rwanda* (2003).
4. *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 20378.
5. *Employment Act* (No. 11 of 2007).
6. *Independent Electoral and Boundaries Commission Act* (No. 9 of 2011).
7. *Judicial Service Act* (No. 1 of 2011).
8. *Kenya National Commission on Human Rights Act* (No. 14 of 2011).
9. *National Gender and Equality Commission Act* (2011).
10. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003, CAB/LEG/66.6.

“Women belong in all places where decisions are being made. It shouldn't be that women are the exception.”

- Ruth Bader Ginsburg

CHAPTER 1: INTRODUCTION

1.1. Background

A patriarchal society consists of a male-dominated power structure throughout the society and in individual relationships. Patriarchy has its roots in history where hominid survival was dependent on physical strength. There are conceptions of patriarchy that existed before and those that are currently in existence in this age of feminism.¹

Prior to the age of feminism, traditional patriarchy was a concept used to describe the authority of a father over the household and its members. It focused mainly on the hierarchical relationship between men in different spheres of society while the notion of male authority over women came in second place. Structural patriarchy on the other hand, is used to describe a system of male dominance and female subordination that manifests itself in the domestic as well as public spheres of life.² The term ‘group-think’, which was coined by Irving Janus, is used to describe the tendency of social groups (such as men in this case) to collectively come to decisions by ignoring obvious conflicts with their isolated views.³ This tendency in most societies is what eventually led to the evolution of traditional patriarchy, which was less harmful, to structural patriarchy. What was once a concept used to explain the hierarchical relationship between men has now been misapplied, with male dominance over women at its core.

In Kenya, these biases are rooted in cultural stereotypes seen to be against women empowerment. Gender roles are embedded in culture and tradition through socialisation of boys and girls to fit stereotypical expectations, whereby girls are confined to domesticity and boys are allowed to venture outside it.⁴ In this regard, women are expected to accept the assumption that men are thinkers, politicians, breadwinners, among

¹ Pierik B, ‘A history of patriarchy?’ Published MA thesis for Politics, Philosophy and Economics, Leiden University, Leiden, 8.

² Pierik B, ‘A history of patriarchy?’ Published MA thesis for Politics, Philosophy and Economics, Leiden University, Leiden, 12.

³ Bahlieda R, ‘The legacy of patriarchy’ in Steinberg S (ed), *Counterpoints*, Peter Lang International Academic Publishers, Bern, 2015, 22.

⁴ Murunga P, ‘The two-thirds gender rule and the question of women empowerment in Kenya’ in Kioko C, Kagumire R, Matandela M (eds) *Challenging Patriarchy*, Heinrich Boll Stiftung, Nairobi, 2020, 136.

other powerful positions, while women are said to be submissive homemakers that are dependent on men.⁵

To redress the plight of disadvantaged groups (such as women in this case), the concept of affirmative action came into existence. Affirmative action is used to refer to positive steps taken to improve the conditions of certain persons who for various historical reasons, have been excluded from enjoying the benefits of development.⁶ It was first developed in the United States by President John F. Kennedy to combat the persistent discrimination against African-Americans and has been incorporated into numerous laws and policies across the world.⁷

In Kenya, affirmative action is mainly gender-based.⁸ However, it has also found application in addressing historical marginalization of other groups such as persons with disabilities, the youth and linguistic minority groups.⁹

Rwanda has been admired for its compliance with gender-based affirmative action provisions prescribed in its laws. The Rwandan parliamentary elections of 2013 are of great importance in Rwanda's political history, actualising affirmative action requirements laid out in Article 10 of its 2003 Constitution.¹⁰ Rwanda's gender-sensitive legal and policy framework and number of women in power are impressive. Since 2003, Rwanda has consistently had the highest female representation, proportionally, of parliamentarians in the world – currently at 62 percent in the lower house.¹¹

The narrative in Kenya when it comes to both appointive and electoral positions is quite different. Despite the fact that the 2010 Constitution of Kenya (hereinafter, the Constitution) has envisioned gender-based affirmative action in, among other provisions,

⁵ Ochwada H, 'Politics and gender relations in Kenya: A historical perspective' 22 (1) *Africa Development*, 1997, 126.

⁶ Constitution of Kenya Review Commission, *Final draft*, 2005, 99.

⁷ Nzavi M, Nthigah P, Iravo M, 'Effect of affirmative action on the employment of women in the National Government, case of Ministry of Public Service, Youth and Gender Affairs in Kenya' 5(3) *Strategic Journal of Business & Change Management*, 2018, 412.

⁸ Kaimenyi C, Kinya E, Chege S, 'An analysis of affirmative action: The two-thirds gender rule in Kenya' 3(6) *International Journal of Business Humanities and Technology*, 2013, 92.

⁹ Articles 54 – 56, *Constitution of Kenya* (2010).

¹⁰ Rwanda Civil Society Platform, *Final Report: Rwandan parliamentary elections 2013*, 21.

¹¹ Abouzeid R, 'How women are stepping up to remake Rwanda' National Geographic, 15 October 2019 - <https://www.nationalgeographic.com/culture/2019/10/how-women-are-remaking-rwanda-feature/> - on 17 February 2020.

Articles 27(8) and 81(b), it seems that the desired results are not being yielded.¹² By failing to enact legislation to enforce the principle requiring not more than two-thirds of its members to be the same gender, Kenya's Parliament continues to subject women to systemic discrimination.¹³ This has been the *status quo* with particular regard to elective positions in Kenya since independence whereby men have since been the majority in Parliament despite, among others, Article 81(b) of the Constitution.¹⁴

1.2. Statement of the problem

The Constitution of Kenya Review Act (2008), while it was still applicable, provided an expansive agenda for non-discrimination, affirmative action and the inclusion of the historically marginalized and minority groups into the national fabric in the new constitutional dispensation.¹⁵ Such was envisioned in the Constitution, which calls for gender balance in electoral and appointive positions. Not more than two-thirds of the same gender should occupy prescribed positions.¹⁶ However, women in Kenya currently constitute a mere 19 percent of Parliament, falling far below the 33.33 percent constitutional requirement.¹⁷ This serves as an example of the ineffective implementation of gender-based affirmative action laws and policies in the country. In response to this problem, this research purposes to investigate the causes of the undesirable outcomes of gender-based affirmative action laws and policies in the country and aims at reaching a conclusion that envisions an all-inclusive statutory and institutional framework of gender equality and equity.

1.3. Justification of the study

This study is important because it sheds light on the complexity of the historical bias against women in Kenya. There still exist prejudices that inhibit the rise of women in the public sphere running at multiple levels. Such deep-seated patriarchy can only be effectively overcome by laws and policies that enforce gender quotas, hence the

¹² *Centre for Rights Education and Awareness & 2 Others v Speaker of the National Assembly & 6 Others* (2017) eKLR.

¹³ Manani B, 'Women, representation in elective office and the electoral process in Kenya under the 2010 Constitution: Which way for the two-thirds gender rule?' 12(1) *Law Society of Kenya Journal*, 2016, 125.

¹⁴ Kaimenyi C, Kinya E, Chege S, 'An analysis of affirmative action: The two-thirds gender rule in Kenya', 92.

¹⁵ Constitution of Kenya Review Commission, *Final draft*, 2005, 99.

¹⁶ Article 27(8), *Constitution of Kenya* (2010).

¹⁷ Okoth J, 'Kenya's parliament continues to stall on the two-thirds gender rule' *The Conversation*, 10 July 2017 -<<https://theconversation.com/kenyas-parliament-continues-to-stall-on-the-two-thirds-gender-rule-79221>>- on 18 February 2020.

motivation behind this research. In this regard, this study is particularly significant to law and policy makers as it will attempt to provide an alternative approach to the drafting and implementation of laws and policies on gender equality and equity.

1.4. Aim and objectives

The aim of this research is to determine why gender-based affirmative action laws and policies seem not to yield desirable results in the public sector and to suggest necessary legal reforms.

This will be done by actualising the following objectives:

- i. To investigate the impact of patriarchy on gender equality in the public sector in Kenya.
- ii. To identify and discuss the legal, policy and institutional framework on gender-based affirmative action in Kenya and its response to gender disparities in Kenya's public sector.
- iii. To examine international best practices with regard to gender equality and the level of compliance with the same in Rwanda.
- iv. To make recommendations for appropriate legal, policy and institutional reforms on gender-based affirmative action in Kenya.

1.5. Research questions

- i. What has been the impact of patriarchy on gender equality in Kenya's public sector?
- ii. What are the legal, policy and institutional frameworks on gender-based affirmative action in Kenya?
- iii. What are the international best practices with regard to gender equality and what is the level of compliance with them in Rwanda?
- iv. What are the recommendations for reform on the legal, policy and institutional framework on gender-based affirmative action in Kenya?

1.6. Theoretical framework

Feminist jurisprudence reflects the different movements in feminist thought. However, the point of convergence of feminist legal theories is the belief that society, particularly

its legal order, is patriarchal.¹⁸ Catherine MacKinnon, a proponent of radical feminism, argues that feminists should concentrate on identifying dominance, rather than the differences between men and women because gender equality issues embody questions about the distribution of public goods between the sexes.¹⁹ Radical feminism is therefore predicated on the social dominance theory which was formulated by Jim Sidanius and Felicia Pratto in 1999.²⁰

The social dominance theory focuses on both individual and structural factors that contribute to various forms of group-based oppression as it sheds light on the general human tendency to form and maintain group-based hierarchies.²¹ Institutions disproportionately allocate public goods with the dominant groups receiving desirable goods while the less powerful groups receive the undesirable goods.²² Because this allocation is done by institutions in a systematic manner, the social dominance theory regards systemic institutional discrimination as one of the major forces behind systems of group-based hierarchy.²³

This theory argues that there are three types of group-based hierarchy – the ‘age system’, ‘patriarchy’ and ‘arbitrary-set system’.²⁴ Of relevance to this study is the group-based hierarchy founded on patriarchy. The social dominance theory can, therefore, be used to explain the disproportionate distribution of public goods among men and women in Kenya as has been discussed above.

1.7. Research methodology

This study will be conducted using doctrinal research. This approach will involve the review of relevant primary and secondary sources including legislation, case law, books, journals, newspaper and other articles as well as online internet sources.

¹⁸ Freeman M, *Lloyd's Introduction to Jurisprudence*, 9th ed, Sweet & Maxwell Ltd, London, 2014, 1081.

¹⁹ Freeman M, *Lloyd's Introduction to Jurisprudence*, 1085.

²⁰ -<<https://study.com/academy/lesson/social-dominance-theory-definition-examples.html>>- on 18 March 2020.

²¹ Sidanius J, Pratto F, Laar C, Levin S, ‘Social dominance theory: Its agenda and method’ 25(6) *International Society of Political Psychology*, 2004, 846.

²² Sidanius J *et al.*, [‘Social dominance theory: Its agenda and method’, 847.

²³ Sidanius J *et al.*, ‘Social dominance theory: Its agenda and method’, 847.

²⁴ Sidanius J *et al.*, ‘Social dominance theory: Explorations in the psychology of oppression’, 150.

1.8. Literature review

1.8.1. The effectiveness of gender-based affirmative action laws and policies in the promotion of both formal and substantive fairness

A major debate on the affirmative action has always surrounded its effectiveness in the promotion of both substantive and formal equality. While discussing the pre-2010 legal regime, Benard Manani²⁵ submits that law can be an instrument for oppression when its only concern is to focus on the formal notions of the rule of law while largely ignoring substantive justice. The statutory regime prior to 2010 was gender-neutral as the laws and policies at the time perceived men and women as formally equal. Manani asserts that this presumption of formal equality has proven to be problematic because by asserting formal equality of the sexes, the law fails to entrench mechanisms for affirmative action for women. He further asserts that the Constitution departs from this assumption. Beyond formal equality, it espouses values of substantive equality that are anchored on recognition and affirmation of the needs of marginalised groups such as women.

According to Kristina Meshelski,²⁶ numerous observers that are against affirmative action believe that it is a violation of equality of opportunity and therefore a violation of procedural fairness. They argue that this is so because equality of opportunity requires the establishment of fair procedures according to which citizens compete for various rewards. Meshelski, while recognising that this is an accurate assertion, points out that proponents of affirmative action merely counter that procedural justice should be ignored for the time being because current societal conditions in terms of equality are far from ideal.

These and other similar articles will play an important role in guiding the analysis of the effectiveness of gender-based affirmative action laws and policies in the promotion of both procedural and substantive equality.

1.8.2. The shortcomings of the implementation of affirmative action laws and policies

As has been discussed above, gender-based affirmative action is incorporated into Kenya's legal and institutional frameworks. However there seems to be a problem with regard to achieving the desired outcomes. The shortcomings of gender-based affirmative

²⁵ Manani B, 'Women, representation in elective office and the electoral process in Kenya under the 2010 Constitution', 2016.

²⁶ Meshelski K, 'Procedural justice and affirmative action' 19(2) *Ethical Theory and Moral Practice*, 2016.

action laws and policies, particularly in the public realm, are discussed by Lawrence Ikamari and Evans Kilonzo.²⁷

In the pre-2010 legal regime, the Presidential Decree of 20 October 2006 was a manifestation of the Government's commitment to implement affirmative action in the recruitment and promotion of women specifically to senior positions in the public sector. Additionally, the Affirmative Action Bill of 2007 proposed the creation of 50 special seats for women in Parliament. Despite this and other affirmative action laws and policies enacted post-2010, Kilonzo and Ikamari argue, affirmative action is bound to fail in the long run due to lack of proper implementation and incorporation in legal, policy and institutional frameworks. This can be inferred from the fact that although women are seemingly making strides in entering previously male-dominated professions, they still remain grossly under-represented in political, senior management and public decision-making processes. This article is important in demonstrating the difficulty that presents itself during the implementation of gender-based affirmative action laws and policies, especially in a patriarchal society.

1.8.3. The establishment of effective implementation mechanisms as a way forward

As has been discussed above, it is clear that there is need for effective implementation mechanisms for gender-based affirmative action. This can only be made possible if law and policy makers approach the issue accordingly in relation to the society they are in. D.C. Matthew, in citing Robert Taylor, identifies three approaches to affirmative action; forward-looking approaches which aim at achieving a gender-blind society, backward-looking approaches which aim at redressing past inequalities and diversity approaches which aim to produce diversity in institutions.²⁸ Affirmative action policies should therefore be formulated with due consideration given to what they aim to achieve. In this regard, Matthew follows Robert Taylor's lead in dividing affirmative action policies into five categories including, *inter alia*, equality of opportunities and gender quotas.²⁹

This article is important as it provides a guiding template for analysing the approach to affirmative action that Kenya has embraced and the category of laws and policies therein.

²⁷ Kilonzo E, Ikamari L, 'Impact of affirmative action on quality of service delivery in the public service sector of Kenya: A comparative case study on the Ministry of State in the Office of the President and Ministry of Higher Education' 6(3) *Journal of Education and Practice*, 2015.

²⁸ Matthew D, 'Rawlsian affirmative action: A reply to Robert Taylor' 3(2) *Critical Philosophy of Race*, 2015, 326.

²⁹ Matthew D, 'Rawlsian affirmative action', 326 – 327.

It will also be useful in the recommendation of an alternative approach the State should adopt.

The literature discussed above has aided in shedding light on the shortcomings of affirmative action laws and policies in achieving the desired outcomes. Additionally, it has drawn attention to the ongoing debate regarding whether or not the said laws and policies have been effective in the promotion of substantive equality between the sexes, which is the crux of this research.

1.9. Hypothesis

This study is premised on the hypothesis that despite entrenching affirmative action in legal, policy and institutional frameworks in Kenya, its realization particularly for women in the public sphere continues to encounter challenges because of the absence of proper implementation mechanisms.

1.10. Chapter breakdown

Chapter 1 has given a brief introduction to the paper, highlighting patriarchy as the primary factor affecting gender equality in the public sector. The Chapter has also laid down the justification for this research project as well as the methodology that will be applied in analysing the nuances of gender inequality in Kenya's public sector.

Chapter 2 delves into a discussion on patriarchy as the primary factor behind gender inequality in the public sector. The Chapter begins by looking at development of patriarchy and then proceeds to analyse a number of cases concerning both elective and appointive positions. The focus here is not so much the holdings of the cases but rather the factual bases, which serve to highlight how patriarchal approaches to decision-making and interpretation of the Constitution and other legislation negatively impact the realisation of gender equality in the public sector.

Chapter 3 is an analysis of the legal, institutional and policy framework on gender equality and equity in Kenya and its response to gender disparities in the public sector. This Chapter discusses the various approaches to affirmative action and then proceeds to analyse the various gender-based affirmative action frameworks in Kenya to determine which approaches have been embraced. Additionally, there is a discussion on formal vis-à-vis substantive equality in relation to the various frameworks of and approaches to affirmative action that have been discussed and the effectiveness of the same.

Chapter 4 is an analysis of the international best practices regarding gender equality and the level of compliance with the same in Rwanda. This Chapter examines the legal, institutional and policy frameworks on gender equality and equity in Rwanda in light of the international best practices with the intention of determining whether they offer any lessons to Kenya on the subject.

Chapter 5 concludes this research, giving a summary of the findings in the preceding Chapters as well as general recommendations on the same.

CHAPTER 2: PATRIARCHY AS THE PRIMARY CONTRIBUTOR TO GENDER DISPARITIES IN THE PUBLIC SECTOR

2.1. Introduction

As was discussed in Chapter 1, patriarchy has gradually evolved from a concept that was used to describe the authority of a father over a household as well as over other men in society, into the dominant ideology of humankind. It is now a concept that has, over the years, been responsible for generating all the major institutions in society. It is now like a ‘set of Russian dolls with capitalism, politics, education and religion all nested within it’.³⁰ Thus, patriarchy is arguably the biggest contributor to gender inequality in the public sector, which in general terms, consists of governments and all publicly controlled or publicly-funded entities that deliver public programmes, goods or services.³¹

This chapter focuses on the development and entrenchment of patriarchy from a Kenyan perspective. It then proceeds to analyse how patriarchal approaches to decision-making and interpretation of legal instruments such as the Constitution have adverse effects on equality in the public sector. This is in particular regard to appointive positions and elective positions. The Chapter focuses on the public as opposed to the private sector because statistically, lack of compliance with requirements of gender equality is more pervasive in the public sector.³² Furthermore, there is only so much the State can do when it comes to compliance with gender quotas in the private sector due to the principle of non-interference with the internal workings of private entities.³³

2.2. The development of patriarchy

In Kenya, as was discussed in Chapter 1, the subordination of women in the pre-colonial era was encouraged by narratives and wise sayings, which painted women and their presumed characteristics in a negative light, while doing the exact opposite for their male counterparts.³⁴ Over the years, and after acquiring a trans-generational character, these sayings along with the cultural division of roles according to gender gained the authority

³⁰ Bahlieda R, ‘The legacy of patriarchy’, 41.

³¹ The Institute of Internal Auditors, *Supplemental Guidance: Public sector definition*, 2011, 3.

³² *Centre for Rights Education and Awareness & 2 Others v Speaker, the National Assembly & 6 Others* (2017) eKLR.

³³ *Coast Water Services Board v Mrs. Alome Achayo & 5 Others* (2015) eKLR.

³⁴ Okoth G, ‘Patriarchy and democracy in Africa: Reflections on the underlying influence of Islamic and indigenous African traditions on women participation in Kenyan politics’ in Kioko C, Kagumire R, Matandela M (eds) *Challenging patriarchy: The role of patriarchy in the roll-back of democracy*, Heinrich Boll Stiftung, Nairobi, 2020, 91.

of 'tradition', and traditions have come to constitute the ideology of most societies in Kenya.³⁵ Consequently, these traditions have resulted in the undermining of women's expertise and leadership qualities, particularly in the pre-colonial and colonial era. This is not to say that women did not hold positions in political decision-making processes. In some communities such as the Giriama, Kikuyu and Gusii communities, women played significant roles in leadership.³⁶

This changed upon the arrival of the white man. Although gender disparities existed in the pre-colonial era, they were exacerbated during colonialism. The colonialists approached social, political and economic issues with ethnocentrism, thus interpreting African institutions in light of Western values.³⁷ In the colonialists' conception of gender relations, real power was vested in men and in this regard, the colonial government enacted laws which facilitated the marginalisation and disempowerment of women in matters taxes, labour, ownership of land, among others.³⁸ Women were also restricted to rural areas whereas men were required to work for the colonial government on settler farms and industries,³⁹ a further indicator of the restriction of women to the private sphere.

During the nationalist struggle, women actively participated in the decolonisation of Kenya. Although this was initially met with resistance from men, in due course women came to be perceived as allies as was evidenced by the Mau Mau movement.⁴⁰ However, upon the attainment of independence, political power was essentially transferred to a few men who inherited the colonial administrative apparatus, in complete disregard of the fact that women had also fundamentally contributed to the nationalist struggle.⁴¹ This has since been the *status quo*, effectively confining women to the private sector.

³⁵ Ochwada H, 'Politics and gender relations in Kenya', 126.

³⁶ Ochwada H, 'Politics and gender relations in Kenya', 127.

³⁷ Skard T, *Women of power: Half a century of female presidents and prime ministers worldwide*, 1st ed, Bristol University Press, Bristol, 2014, 56.

³⁸ -<<https://www.youtube.com/watch?v=B1PV1krkUi4>>- on 22 August 2020.

³⁹ -<<https://www.youtube.com/watch?v=B1PV1krkUi4>>- on 22 August 2020.

⁴⁰ Ochwada H, 'Politics and gender relations in Kenya', 130.

⁴¹ Ochwada H, 'Politics and gender relations in Kenya', 131.

2.3. The impact of patriarchy on equality in the public sector

2.3.1. The public sector and forms of gender-based discrimination within it

The public sector, as has been mentioned in the introduction, consists of governments as well as publicly funded or publicly controlled entities. In Kenya, these exist on a national and county level. Normally, the public sector constitutes the following; core government, parastatals and public enterprises.⁴²

Presently, gender discrimination when it comes to equitable access to opportunities in the public sector may take two forms; adverse effects (indirect) discrimination and systemic discrimination. Adverse effects discrimination essentially presumes abstract similarity among individuals and ignores the existence of group-based differences. It occurs when a law or policy, that while neutral on its face and applying equally to all individuals, has disproportionately detrimental effects on some groups, such as women.⁴³

Systemic gender-based discrimination, on the other hand, is a structural phenomenon that combines direct and indirect discrimination.⁴⁴ This form of discrimination ties in with Kimberle Crenshaw's theory of intersectionality, which posits that the traditional way of thinking of discrimination fails to embrace the complexities of the compound nature of discrimination and only serves to further entrench it.⁴⁵ The intergenerational effects of systemic gender-based discrimination make a recurrent cycle of gender inequality⁴⁶ which also presents itself in access to opportunities in the public sector as shall be demonstrated subsequently.

2.3.2. Elective positions

Political participation is good for democracy. However, most democracies including Kenya's are plagued by systemic inequalities, one of the most persistent being in relation

⁴² The Institute of Internal Auditors, *Supplemental Guidance: Public sector definition*, 2011, 4.

⁴³ Sheppard C, 'Systemic discrimination and gender inequality: A life cycle approach to girls' and women's rights' in Mendes E, Srighanthan S (eds) *Confronting discrimination and inequality in China*, University of Ottawa Press, Ottawa, 2009, 233-234.

⁴⁴ Sheppard C, Sheppard C, 'Systemic discrimination and gender inequality', 235.

⁴⁵ Crenshaw K, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' University of Chicago Legal Forum, 1989, 167.

⁴⁶ Sheppard C, Sheppard C, 'Systemic discrimination and gender inequality', 238.

to gender.⁴⁷ Even though women actively participated in the decolonisation process,⁴⁸ the establishment of Kenya as a nation-state reduced their participation in politics.⁴⁹

Despite the entrenchment of gender quotas in the post-2010 constitutional regime, women's access to formal political participation is still difficult to gain. This may be attributable to tradition which, as an ideology, has played down women's expertise and leadership qualities as was mentioned earlier. These stereotypes have facilitated men's access to power while doing the exact opposite for women through the entrenchment of vertical division of labour. Almost without exception, the higher up one moves in the political hierarchy, the fewer women there are.⁵⁰

In a quantitative study carried out during the 2017 General Elections, it was discovered that women are perceived through various valence, media and patriarchal frames that play a role in their participation (or non-participation) in politics as follows:⁵¹

- i. Media frames: These are perceptions relayed to the public by the media. They include, among others, the 'attribution of responsibility' frame which denotes blame on female politicians for participating in or starting certain political conversations.
- ii. Valence frames: These are used alongside media frames and are more so methods of relaying information rather than frames in themselves. Information about female politicians under this category can be relayed in either a neutral, negative or positive manner.
- iii. Patriarchal frames: These include, among others; the 'cheerleader' frame which portrays women leaders as mere supporters of the agendas of their male counterparts; the 'place of marriage' frame, which links women to their husbands' name and community, and; the 'iron maiden' frame which often paints female politicians in a defiant light.

⁴⁷ Coffe H, Bolzendahl C, 'Gender gaps in political participation across Sub-Saharan African Nations' 102(2) *Social Indicators Research*, 2011, 245.

⁴⁸ Ochwada H, 'Politics and gender relations in Kenya', 130.

⁴⁹ Skard T, *Women of power: Half a century of female presidents and prime ministers worldwide*, 61.

⁵⁰ Skard T, *Women of power: Half a century of female presidents and prime ministers worldwide*, 69.

⁵¹ Mudavadi K, 'Patriarchy and print media coverage in Kenya: An analysis of newspaper framing of women politicians in pre-and-post 2017 general election' in Kioko C, Kagumire R, Matandela M (eds) *Challenging patriarchy: The role of patriarchy in the roll-back of democracy*, Heinrich Boll Stiftung, Nairobi, 2020, 110.

The most dominant frames in the 2017 General Elections were the ‘attribution of responsibility’ frame, the ‘iron maiden’ frame and the neutral frame.⁵² Leaders such as the late Dr Joyce Laboso who won the gubernatorial seat in Bomet County, a male-dominated area, were portrayed in the ‘iron maiden’ frame. Other frames that featured in the aforementioned elections were the ‘place of marriage’ frame with regard to politicians such as Mary Ojode (widow of the late Hon. Orwa Ojode, Ndhiwa Member of Parliament).⁵³

This framing of women places them in some form of double-bind whereby on one hand, they are supposed to comply with the female role by promoting women’s demands and being warm and cooperative while on the other hand, they are also supposed to comply with the role of politician by promoting the policies of their parties.⁵⁴ These paradoxical demands often cause personal conflict for aspiring female politicians, who eventually opt not to vie for political seats.⁵⁵ Nonetheless, because formal politics is often characterised by patronage and fraternalism, most women who opt to vie for political seats despite the difficulties that may present themselves rely on support from the male patrons of the political parties they seek to join and are eventually resigned to the ‘cheerleader’ role⁵⁶ as discussed earlier.

These societal dynamics are in conflict with the realisation of the gender equality as enshrined in the Constitution and have been the triggers of numerous court cases. This is because the patriarchal biases discussed above make this realisation a particularly taxing affair as will be demonstrated by the factual bases of the cases discussed below.

Because of the aforementioned social biases, for instance, the electorate alone cannot ensure realisation of the two-thirds-gender rule. It is upon political parties during nomination of party members to ensure compliance with the gender quotas because they are essentially the gate keepers to political office.⁵⁷

Nevertheless, most political parties do not have clear policies on how women get selected for nomination⁵⁸ and this was the basis of the petition in *Katiba Institute v Independent*

⁵² Mudavadi K, ‘Patriarchy and print media coverage in Kenya’, 111-113

⁵³ Mudavadi K, ‘Patriarchy and print media coverage in Kenya’, 114.

⁵⁴ Skard T, *Women of power: Half a century of female presidents and prime ministers worldwide*, 78.

⁵⁵ Bahlleda R, ‘Ladership’, 159.

⁵⁶ Okoth G, ‘Patriarchy and democracy in Africa’, 97.

⁵⁷ *Katiba Institute v Independent Electoral and Boundaries Commission* (2017) eKLR.

⁵⁸ Okoth G, ‘Patriarchy and democracy in Africa’, 97.

Electoral and Boundaries Commission.⁵⁹ In this case, the Petitioner's claim was that because the Respondent as well as political parties are bound by the Constitution, it is the Respondent's duty to put in place mechanisms to ensure nomination lists by political parties comply with the gender quotas in the Constitution. It was also the Petitioner's claim that the Respondent had failed to do so and that the nomination lists were in contravention with the two-thirds-gender requirement. The Petitioner was of the view that the Respondent should have, therefore, rejected the nomination lists. In opposition, the Respondent was of the view that until legislation actualising it was enacted, the two-thirds-gender rule cannot be implemented and as a consequence, the Respondent had no obligation to ensure that nomination lists complied with the same. In allowing the petition, the High Court pointed out that the absence of legislation is no excuse and that the Respondent is under an obligation to ensure compliance with the two-thirds requirement. The High Court ultimately held that the Respondent had the constitutional obligation to reject non-compliant nomination lists.

The failure to enact a legislative instrument actualising the gender quotas as required by Article 100 (as read with the Fifth Schedule) of the Constitution has been a thorn in our country's flesh for years. This was the basis of the petition in *Centre for Rights Education and Awareness & 2 Others v Speaker, the National Assembly & 6 Others*.⁶⁰ The First Respondent submitted that there was no constitutional provision requiring Parliament to pass legislation to give effect to Article 81(b) of the Constitution. This averment was made despite the requirement by the Supreme Court that the required legislation should have been enacted by 27 August 2015⁶¹ (a deadline which Parliament extended to 27 August 2016 and still failed to enact any legislation). The High Court found Parliament to be in violation of Articles 21(3) and 100 of the Constitution and issued an order of mandamus directing Parliament and the Attorney General (hereinafter 'AG'), to take steps to ensure that the required legislation was enacted within 60 days of the date of the order. To this day, no steps have been taken thus it can be inferred that the realisation of gender equality and equity in the public sector is not a matter of urgency in our country.

⁵⁹ (2017) eKLR.

⁶⁰ (2017) eKLR.

⁶¹ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

This view is supported by the majority opinion in the Supreme Court’s Advisory Opinion of 2012.⁶² The AG moved the Supreme Court on two grounds; firstly, that ambiguity arises when the provisions of Articles 81 (b) and 27 (8) of the Constitution are read against the content of Articles 97, 98 and 177(1)(b), and; secondly, that there was no implementation mechanism in place as required by the Constitution. The question before the Court was whether realisation of both the soft and hard quotas in the Constitution are subject to immediate or progressive realisation. The majority opinion was of the view that the Constitution declares both general principles as well as prescribed norms and that its interpretation should contribute to the development of both without favouring either one. Article 171(2) of the Constitution was used to illustrate this position. It was stated that so far as the Judicial Service Commission (hereinafter ‘JSC’) is concerned, it is for certain that the gender equity requirement is immediately realisable. This is because the normative prescription is clear and readily enforceable – the required number of male and female (a total of three) members is specified and the mechanism of bringing them to office clearly defined. However, were the provisions of Article 171(2) in line with the two-thirds requirement under Article 27(8), they would have provided for four positions for women out of the total eleven. The attainment of the number of four, in the opinion of the majority, can only be progressive being dependent on the State’s further action. Ultimately the Court found that hard quotas are subject to immediate realisation while soft quotas are subject to progressive realisation. The Court then proceeded to set the date for enactment of legislation to enable realisation of soft quotas on 27 August 2015. As has been mentioned, the required legislation has not been enacted to date.

The Courts’ reasoning in some of the cases discussed above as well as many others has had the effect of entrenching the difficulty women experience in not only accessing but also maintaining positions in formal politics as was demonstrated in *National Gender and Equality Commission v Majority Leader, County Assembly of Nakuru & 4 Others*.⁶³ In this case, there was an impugned resolution in the County Assembly of Nakuru, the effect of which twelve Members of the County Assembly (MCAs) were de-whipped. The evidence tabled in the High Court demonstrated that the impugned resolution was made shortly after the female nominated MCAs raised a complaint with the Party leadership regarding the Majority Leader. The substantive outcome of the resolution was that the

⁶²*In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

⁶³ (2019) eKLR.

number of female nominated MCAs reduced from twenty-five percent to zero percent, bringing the total number of women in the County Assembly down to ten percent from thirty-five percent. In allowing the petition, the Court stated that it is not enough for the Respondents to state that the actions they took were gender-neutral. This is because if the substantive effects of the action are negative in terms of substantive gender equality, the action is unconstitutional even if it was formally neutral.

2.3.3. Appointive positions

The biases discussed at length above affect women's access to public sector employment as well, as was demonstrated in the *Coast Water Services Board case*.⁶⁴ In this case, the Petitioner claimed that the appointment of the Second, Third and Fourth Interested Parties to the Board of Directors was irregular and illegal because not only had the Respondents handpicked them, they failed to comply with the constitutional gender equity requirements. The Court found the Respondents to be in violation of the same and ordered that the appointments be declared null and void. The factual basis of this case is a classic example of the entrenchment of fraternalism and patronage in the public sector as was discussed earlier in the chapter.

Positions in the Judiciary are not subject to elections rather, they are appointive. The JSC, a public entity responsible for interviewing and recommending individuals for nomination to various positions therein, has been subject to numerous legal proceedings for its alleged non-compliance with the two-thirds gender rule when it comes to recommendation of candidates. The same shall be discussed subsequently.

i) Patriarchal approaches to interpretation of gender quotas enshrined in legal instruments

A classic illustration of patriarchal approaches to interpretation of gender quotas enshrined in various legal instruments was in the case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another*.⁶⁵ The factual basis of this case was that in 2011, the JSC recommended five persons to the President for appointment as Judges of the Supreme Court. Of these five, one was a woman while the rest were men. The primary issue before the Court was whether in doing so, the JSC was in violation of Article 27(8) of the Constitution. The Court stated that when a decision or

⁶⁴ *Coast Water Services Board v Mrs. Alome Achayo & 5 Others* (2015) eKLR.

⁶⁵ (2011) eKLR.

a law is challenged as being in contravention of equal protection, the question for determination is not whether it resulted in equality, rather whether the differentia bears a just and reasonable relation to the object of the particular law or decision. The Court then proceeded to state that the law of equality permits many inequalities and that mere differentia do not amount to discrimination unless they are proven to be unreasonable and arbitrary.

Furthermore, the High Court questioned the privileging of gender vis-à-vis other prohibited grounds for discrimination by asking whether a female applicant from Western Province (as it then was) should be given an edge over a qualified individual from a marginalised area such as Eastern Province (as it then was). The Court also stated that the blanket application of gender quotas would ignore the disparities that exist within the protected group. In taking this stance, the Court failed to conceptualise the relationship between the right to non-discrimination and affirmative action in light of substantive equality. Affirmative action is an expression of equality rather than an exception to it therefore, by requiring justification for a constitutionally-sanctioned measure such as this, one would be undermining substantive equality.⁶⁶

Ultimately, the Court found that because immediate enforcement of affirmative action measures is unrealistic and unreasonable, gender quotas are subject to progressive realisation and as such, they do not place any binding obligation on the State or on JSC.

ii) The weight of competence vis-à-vis the weight of gender equality as considerations for appointment

The issue of competence and merit taking precedence over the two-thirds-gender requirement or vice versa seems to appear in most of the cases regarding the JSC. The same issue was discussed at length in *FIDA v AG* above as well as in *National Gender and Equality Commission & Another v Judicial Service Commission & 2 Others*.⁶⁷ In 2016 following the retirement of the Chief Justice, Deputy Chief Justice and a Judge of the Supreme Court, vacancies were announced. Interviews were conducted and Hon. Justice Lenaola was recommended for the position of Judge. The Petitioners claimed that a lady should have been recommended in his place in line with the two-thirds gender requirement.

⁶⁶ Ochieng W, 'Chimera of constitutionally entrenched gender quotas: The case of Kenya' 46(53) *Zambia Law Journal*, 2015, 76.

⁶⁷ (2017) eKLR.

The Court ruled that the wording of Paragraph 13 of the First Schedule to the Judicial Service Act (JSA) as well as Article 166(3) of the Constitution require the JSC to consider competence as the first criteria before considering any other criteria including gender. The Court found that the JSC made all necessary considerations in line with the JSA and Article 166(3) thus the appointment of Justice Lenaola was not unconstitutional.

Admittedly, competence is a key requirement for consideration when it comes to recommending and appointing individuals to positions in the public sector. However, this requirement tends to ignore or somewhat trivialise the historical reality that many women in this country have not been afforded equal opportunities to access institutions that would contribute to increasing their competence. Amartya Sen argues that freedom requires one to be able to exercise their agency, particularly in the public sphere and that such agency is dependent on one's access to education and literacy.⁶⁸ For women, this is hindered by what Colleen Sheppard terms the 'life cycle approach' to discrimination which focuses on the trajectory of an individual's life and how key events and transitions in their life may affect this trajectory.⁶⁹ This approach examines the participation (and non-participation) of individuals public institutions by highlighting the relational and systemic dimensions of inequality they may face. Sheppard argues that because young girls are often denied equal educational opportunities, there is a negative impact on their employment opportunities later in life. She further points out that to be able to increase women's competence when it comes to employment, it is not only required that they gain full access to educational domains traditionally dominated by men, but also that fair treatment and elimination of gender-based stereotyping is guaranteed.⁷⁰

2.4. Conclusion

From the above, it may be inferred that the working of a participatory democracy has made limited impact in challenging gender disparities in Kenya's public realm. In this sense, patriarchal approaches to constitutional interpretation, legislative processes and decision-making have proven to be a resistant barrier to achieving gender equality in the public sphere.⁷¹ It may be argued, from these discussions, that formal equality is subtly endorsed and given priority over substantive equality. In conclusion, therefore, while

⁶⁸ Hicks D, 'Gender, discrimination and capability', 147.

⁶⁹ Sheppard C, Sheppard C, 'Systemic discrimination and gender inequality', 237.

⁷⁰ Sheppard C, Sheppard C, 'Systemic discrimination and gender inequality', 239.

⁷¹ Okoth G, 'Patriarchy and democracy in Africa', 97.

women have managed to participate in the public sphere to a limited extent, they still remain subordinated under this patriarchal milieu.

CHAPTER 3: THE LEGAL, INSTITUTIONAL AND POLICY FRAMEWORKS ON GENDER EQUALITY IN KENYA

3.1. Introduction

Affirmative action is a term used to refer to positive steps taken to improve the conditions of certain persons who for various historical reasons, have been excluded from enjoying the benefits of development.⁷² Essentially, it refers to policies and practices intended to create equal opportunity and maximum diversity.⁷³ As was demonstrated in Chapter 2, stereotypes against women have contributed to demeaning them and shunning their enthusiasm to participate in public life. Consequently, affirmative action in Kenya is mainly gender-based.⁷⁴

This Chapter highlights and discusses the various approaches to and categories of gender-based affirmative action that are most relevant to Kenya. It then proceeds to analyse the various legal, policy and institutional frameworks on gender equality in light of the said approaches and categories. Finally, the Chapter makes a brief discussion regarding substantive vis-à-vis formal equality in relation to the frameworks that have been analysed, with the aim of determining their effectiveness in the promotion of both.

3.2. Approaches to and categories of affirmative action

Affirmative action, gender-based or otherwise, seeks to achieve equality, which can either be in the form of opportunity or results. Equality of opportunity entails giving each person an equal chance to develop his or her ability⁷⁵ and is usually an individualistic concept.⁷⁶ On the other hand, equality of results focuses on giving each person a relatively equal share of income and status regardless of their abilities,⁷⁷ and is normally a group-based concept.⁷⁸ In this regard, affirmative action can embrace various approaches to ensuring this equality is attained. These approaches may be; backward-looking, that is, they aim to redress past injuries; forward-looking, that is, they aim to achieve a colour-

⁷² Constitution of Kenya Review Commission, *Final draft*, 2005, 99.

⁷³ Nayyar D, 'Discrimination and justice: Beyond affirmative action' 46(42) *Economic and Political Weekly*, 2011, 55.

⁷⁴ Kaimenyi C et al, 'An analysis of affirmative action', 92.

⁷⁵ Joseph L, 'Some ways of thinking about equality of opportunity' 33(3) *The Western Political Quarterly*, 1980, 397.

⁷⁶ Krook M, Lovenduski J, Squires J, 'Gender quotas and models of political citizenship' 39(4) *British Journal of Political Science*, 2009, 786.

⁷⁷ Joseph L, 'Some ways of thinking about equality of opportunity', 397.

⁷⁸ Krook M et al, 'Gender quotas and models of political citizenship', 786.

and-gender-blind society; diversity-oriented, that is, they aim to produce diverse work and other places, and; *presentist*, that is, they aim to neutralise the effects of ongoing discrimination where there is no sense that this will lead to a gender-and-colour-blind society.⁷⁹

Affirmative action laws and policies can be further grouped into a number of categories from the weakest to the strongest, that is;⁸⁰

- i. Category 1: Formal equality of opportunity, that is, the elimination of legal barriers to the access of public goods by underrepresented groups;
- ii. Category 2: Aggressive formal equality of opportunity, which entails creating awareness through sensitivity training so as to supplement formal equality of opportunity;
- iii. Category 3: Compensating approach, that is, special programs designed to help underrepresented groups compete effectively for public goods;
- iv. Category 4: Soft quotas, which advocate for positive discrimination in favour of underrepresented groups in selection processes and;
- v. Category 5: Hard quotas, which entail placement of a particular number of minorities in proportion to the population at large.

These are categorised from weakest to strongest in the sense that the stronger the category of positive intervention is, the more likely it is to violate the principle of equality of opportunity,⁸¹ which shall be discussed subsequently. In this case, therefore, hard quotas are deemed to be in the greatest violation of equality of opportunity while formal equality of opportunity is compatible with it.

Of focus in this paper are Categories 1 and 2 (equality of opportunity) as well as Categories 4 and 5 (quotas).

⁷⁹ Matthew D, 'Rawlsian affirmative action', 326.

⁸⁰ Taylor R, 'Rawlsian affirmative action' 119(3) *University of Chicago Press*, 2009, 478.

⁸¹ Meshelski K, 'Procedural justice and affirmative action', 428.

3.2.1. Equality of opportunity

Equality demands for both equality of opportunity and equality of results.⁸² Equality of opportunity is usually in support of people being able to attain social goods on the basis of their natural abilities or actual achievements, rather than on the basis of arbitrary descriptive factors such as race, religion, gender, etc. On the other hand, equality of results posits that pre-existing inequalities that may come about purely because of these descriptive factors should be viewed as obstacles to one nurturing their natural abilities, thus compromising their chances of successfully competing for social goods. Because of this, there must be some compensation (affirmative action) in order that all individuals have an opportunity to compete for various positions in society regardless of their social circumstances.⁸³ The word ‘opportunity’ in this context should not be taken to mean ‘chance’. It implies a choice that is made freely available to an individual and is either secured or rejected through his or her own will.⁸⁴

The central point of formal equality of opportunity is to liberate citizens’ natural abilities with the aim of enabling them to compete for the aforementioned positions. Equality of opportunity ensures that traits such as gender play no role in assignment of positions because to do so, according to its proponents, would be to mark some citizens as inferior on the basis of these traits.⁸⁵ In essence, its central point is captured by pure proceduralism, which asserts that fair distribution (of social goods, for instance) is simply whatever emerges from fair procedure.⁸⁶

Under ideal societal conditions, equality of opportunity would require only Category 1 interventions,⁸⁷ that is, the removal of legal barriers that inhibit the access, by underrepresented groups, to positions in society. A good illustration is the removal of segregation laws. The said ideal conditions are satisfied when the following is met; full compliance with the principle of non-discrimination; favourable conditions, that is, the absence of adverse historical contingencies such as severe underdevelopment, and; that there is no unrectified legacy of past injustices.⁸⁸ Equality of opportunity rules out stronger categories of positive intervention as they violate its essence, that is, pure

⁸² Taylor R, ‘Rawlsian affirmative action’, 480.

⁸³ Joseph L, ‘Some ways of thinking about equality of opportunity’, 394.

⁸⁴ Green S, ‘Competitive equality of opportunity: A defence’ 100(1) *University of Chicago Press*, 1989, 10.

⁸⁵ Taylor R, ‘Rawlsian affirmative action’, 485

⁸⁶ Meshelski K, ‘Procedural justice and affirmative action’, 433.

⁸⁷ Taylor R, ‘Rawlsian affirmative action’, 480.

⁸⁸ Matthew D, ‘Rawlsian affirmative action’, 326.

proceduralism, as well as the associated ideals of gender-and-colour blindness. In this regard, proponents of equality of opportunity such as John Rawls argue that the strongest categories of positive intervention, that is, both soft and hard quotas, are needed only when difficulties of access to positions cannot be overcome by either Category 1 or Category 2 interventions.⁸⁹

Unfortunately, many societies around the world are not perfectly aligned with these ideal conditions and this is the basis upon which the tensions between formal and substantive equality exist.⁹⁰ In Kenya, as discussed in Chapter 2 for instance, still exists non-ideal conditions, in the sense that the legacy of sexism lives on in the form of systemic discrimination. This tension is demonstrated by the subtle endorsement of formal over substantive equality of opportunity. In many jurisdictions around the world, equality of opportunity is deemed as a constitutional essential, which is usually immediately realised at the early stages of the legislative process while substantive equality, which is considered to be nonessential, is realised in the latter stages of the legislative process or, at times, not even embodied in laws and policies at all.⁹¹

3.2.2. Gender quotas

3.2.2.1. Party quotas

Party quotas normally require that women constitute at least 25 percent of a parties' candidates list.⁹² Depending on the jurisdiction, these quotas may take an either gender-specific or gender-neutral approach, specifying the minimum representation of each gender or providing that neither gender can account for more than a particular proportion of the party's candidates.⁹³ This type of quota is usually adopted voluntarily by political parties⁹⁴ and is implemented in various ways.

⁸⁹ Taylor R, 'Rawlsian affirmative action', 493.

⁹⁰ Taylor R, 'Rawlsian affirmative action', 482.

⁹¹ Meshelski K, 'Procedural justice and affirmative action', 430.

⁹² Valiente C, 'The women's movement, gender equality agencies and central-state debates on political representation in Spain' in Lovenduski J (ed) *State feminism and political representation*, Cambridge University Press, Cambridge, 2006, 174.

⁹³ Friedenvall L, Dahlerup D, Skjeie H, 'The Nordic countries: An incremental debate on political representation in Italy' in Dahlerup D (ed) *Women, quotas and politics*, Cambridge University Press, Cambridge, 2007, 55.

⁹⁴ Krook M et al, 'Gender quotas and models of political citizenship', 785.

3.2.2.2 Legislative quotas

These address party nomination processes and are passed by national parliaments and require mandatory compliance by all parties.⁹⁵ The language of legislative quotas is generally gender-neutral, referencing the ‘underrepresented gender’.⁹⁶ This type of quota is usually accompanied by sanctions for non-compliance and is subject to oversight by external bodies⁹⁷ such as national courts.

3.2.2.3 Reserved seats

Reserved seats are also mandated by national parliaments and reverse mechanisms of elections by establishing seats that only women are eligible for. These may be implemented either through direct elections by the electorate or indirect elections by the parties or members of parliament.⁹⁸ While reserved seats are beneficial in the sense that they increase the number of women in national parliaments, they are also detrimental because they tend to isolate women in politics as opposed to integrating them into the political parties as such.⁹⁹

3.2.2.4 Soft quotas

These are not normally labelled as ‘quotas’ by the jurisdictions that use them as these jurisdictions generally reject the idea of affirmative action as a means of increasing women’s political participation. Despite this however, they are usually employed to at least stimulate, if not guarantee the election of more women.¹⁰⁰ This type of quota is also voluntarily adopted and rarely entails sanctions for non-compliance.

3.3. Formal equality vis-à-vis substantive equality

From the discussion above, it may be inferred that equality of opportunity primarily yields formal equality while gender quotas primarily yield substantive equality. It has been argued that as such, there is a connection between formal equality and direct discrimination and a similar connection between substantive equality and indirect

⁹⁵ Krook M et al, ‘Gender quotas and models of political citizenship’, 785.

⁹⁶ Giraud I, Jenson J, ‘Constitutionalising equal access: High hopes, dashed hopes?’ in Klausen J, Maier C (eds) *Has liberalism failed women? Assuring equal representation in Europe and the United States*, Palgrave, New York, 2001, 72.

⁹⁷ Krook M et al, ‘Gender quotas and models of political citizenship’, 786.

⁹⁸ Krook M et al, ‘Gender quotas and models of political citizenship’, 784.

⁹⁹ Skard T, *Women of power: Half a century of female presidents and prime ministers worldwide*, 78.

¹⁰⁰ Krook M et al, ‘Gender quotas and models of political citizenship’, 786.

discrimination.¹⁰¹ The connection between formal equality and direct discrimination exist in the sense that direct discrimination fosters formal equality but does not address the underlying factors that hinder the enjoyment of equal opportunities. On the other hand, indirect discrimination fosters substantive equality in the sense that it recognises that equal treatment on its own can result in unfavourable outcomes for vulnerable groups¹⁰² and therefore advocates for the adoption of positive intervention to ensure equal results as well.

Because it advocates for neutrality, formal equality entrenches equal treatment as opposed to equal outcomes. As such, under formal equality, affirmative action is regarded as an exception the principle of non-discrimination, which, as a derogation from an individual right, must be interpreted restrictively.¹⁰³

Substantive equality requires more than protective action (which guarantees equal treatment) alone; it also requires positive action (which guarantees equal outcomes).¹⁰⁴ According to proponents of substantive equality, neutrality only serves to further entrench gender disparities as it fails to take into account the nuanced realities of both genders.¹⁰⁵ Consequently, under substantive equality, affirmative action measures are not regarded as an exception to the non-discrimination principle, rather, it is an application of the same.

3.4. Frameworks on gender equality in Kenya

3.4.1. Legal Framework

The approaches embraced by the legal frameworks on an international and local level vary. As shall be demonstrated, the legal framework generated locally is largely gender-neutral and provides primarily for legislative quotas (a good example being the two-thirds gender rule), with the occasional provision for reserved seats and party quotas. On the other hand, the legal frameworks developed on international and regional levels are largely gender-specific, embracing primarily the compensating approach to equality as discussed above in the sense that they advocate for special programs designed to help

¹⁰¹ Gedin H, 'Formal or substantive equality? - Gender equality in European Community law' published, University of Lund, Lund, 2009, 46.

¹⁰² Kinyanjui S, Kameri-Mbote P, 'The constitutional promise: Realising the right to gender equality and non-discrimination in Kenya' 19 *East Africa Law Journal*, 2018, 22.

¹⁰³ Gedin H, 'Formal or substantive equality? - Gender equality in European Community law' published, University of Lund, Lund, 2009, 44.

¹⁰⁴ Kinyanjui S *et al*, 'The constitutional promise', 21.

¹⁰⁵ MacKinnon C, *Toward a feminist theory of the state*, 1st ed, Harvard University Press, Cambridge 1991, 216.

women compete effectively for public goods. In this sense, frameworks on a local level are geared towards substantive equality because they focus on ensuring equality of results while those generated at a regional and international level are geared towards formal equality as they advocate for making women be better-equipped to compete for public goods.

3.4.1.1. Local legal framework

i) The Constitution

The historical subjugation of women explains the Constitution's emphatic exposition of the rights of women.¹⁰⁶ The Constitution has been hailed as being transformative in nature and this section of the Chapter assesses its provisions that advance this transformative agenda with specific regard to women.

Article 10 of the Constitution lists down national values and principles of governance under which the principles of equality and non-discrimination are included. This provision is further supported by the equality clause under Article 27, which provides that everyone, that is, both men and women, is deserving of equal opportunities and equal treatment before the law. As such, both the State and non-state actors are prohibited from discriminating against citizens on a number of grounds including sex. Article 27(6) as read with 27(8) places an obligation on the State to adopt legislative and other measures, including affirmative action, to promote equality and non-discrimination and, more specifically, to ensure that there is compliance with the two-thirds gender rule in elective and appointive bodies. Further, the State and all public officers are obliged to address the needs of vulnerable groups in society including women.¹⁰⁷ Parliament was therefore required to enact legislation to promote the representation of women in Parliament¹⁰⁸ five years ago pursuant to the Fifth Schedule to the Constitution.¹⁰⁹ Unfortunately, as was demonstrated in Chapter 2, this is yet to be done.¹¹⁰

The Constitution makes provision for reserved seats for women. Article 97(1)(b) of the Constitution reserves 47 seats in the National Assembly for women representing Counties

¹⁰⁶ Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 5(1) *Oslo Law Review*, 2018, 27.

¹⁰⁷ Article 21(3), *Constitution of Kenya* (2010).

¹⁰⁸ Article 100, *Constitution of Kenya* (2010).

¹⁰⁹ Article 261(1), *Constitution of Kenya* (2010).

¹¹⁰ *Centre for Rights Education and Awareness & 2 Others v Speaker, the National Assembly & 6 Others* (2017) eKLR.

and are filled through elections. In addition, Article 97(1)(c), allocates twelve seats for nominated members to the National Assembly who are nominated on the basis of proportion of party membership. These nominations are based on political party lists submitted prior to the elections, and which, under Article 90(2)(b), are required to alternate between male and female candidates. Additionally, Article 98(1)(b) of the Constitution reserves 16 seats for women in the Senate which are filled through party-based nominations, according to the proportion of each party's elected membership in the Senate. Under Article 98(1)(c) and (d), two seats are reserved for the youth, and two for persons with disabilities. In each case, the two seats are to be allocated to a man and a woman. With regard to independent Commissions, the Constitution requires that the positions of Chairperson and Vice-chairperson be occupied by persons of the opposite gender.¹¹¹ Unfortunately, provisions such as this tend to entrench indirect discrimination because while they may seem neutral on the face of it, there is an emerging practice whereby invariably, all chairpersons are male and all vice-chairpersons are female.¹¹²

The Constitution also provides for legislative quotas which are generally termed as the 'two-thirds gender rule' in Kenya. Under the guiding principles for the electoral system, it is required that not more than two-thirds of the members of the elective public bodies shall be of the same gender.¹¹³ This rule is further reiterated in Articles 177(1)(b) and 197(1)(a) regarding the membership of County Assemblies and County Executive Committees.

By providing for reserved seats and legislative quotas as well as mandating the creation of implementation mechanisms for the same, the Constitution can be said to be prioritising substantive over formal equality.

ii) Political Parties Act

The Code of Conduct for Political Parties under the First Schedule of the Act requires political parties to respect and promote gender equality and equity. In this regard, compliance with the two-thirds gender rule is a requirement for both provisional¹¹⁴ and full registration¹¹⁵ of political parties. Furthermore Section 9(1A) as read with Paragraphs 24 and 25 of the Second Schedule requires the constitutions or other relevant laws of

¹¹¹ Article 250(11), *Constitution of Kenya* (2010).

¹¹² Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts', 30.

¹¹³ Article 81(b), *Constitution of Kenya* (2010).

¹¹⁴ Section 6(1), *Political Parties Act* (No. 11 of 2011).

¹¹⁵ Section 7, *Political Parties Act* (No. 11 of 2011).

political parties to ensure compliance with the two-thirds gender rule with regard to party membership. With regard to the Office of the Registrar of Political Parties, it is required that the appointment of the three Assistant Registrars ensures not more than two are of the same gender.¹¹⁶

Section 23 of the Act establishes the Political Parties Fund which is meant to fund purposes that are compatible with democracy, including promoting the representation of women in Parliament and the County Assemblies.¹¹⁷ In order to receive funding, political parties ought to meet the aforementioned requirements in regard to the two-thirds gender rule otherwise they risk being excluded from accessing the Fund.¹¹⁸

In view of the emphasis placed on compliance with the two-thirds gender rule (a legislative quota) throughout the Act, the Act entrenches substantive equality over formal equality.

iii) Elections Act

This Act establishes a level playing field for candidates in competitive elections by setting out provisions that promote an atmosphere beneficial to women's engagement in politics.¹¹⁹ The Electoral Code of Conduct under the Second Schedule to the Act requires registered political parties, referendum committees and their officials, as well as candidates to commit themselves to promote gender equality. Paragraph 16 of the Second Schedule specifically requires these persons to, *inter alia*, facilitate the full and equal participation of women in political activities.

Section 36(1)(e) as read with Section 36(7) of the Act provides for the allocation of special seats to women pursuant to the two-thirds gender rule under Article 177(1)(b) of the Constitution. Additionally, Section 37(1) requires that in the event these seats become vacant, their re-allocation ought to be made to the same gender that was initially occupying them, thus sustaining the two-thirds gender requirement.

By including the observation of gender equality in the Electoral Code of Conduct, the Elections Act entrenches substantive equality over formal equality with regard to electoral processes.

¹¹⁶ Section 33(2), *Political Parties Act* (No. 11 of 2011).

¹¹⁷ Section 26(1), *Political Parties Act* (No. 11 of 2011).

¹¹⁸ Section 25(2)(b), *Political Parties Act* (No. 11 of 2011).

¹¹⁹ National Gender and Equality Commission, *Status of equality and inclusion in Kenya*, 2016, 49.

iv) Judicial Service Act

The Judicial Service Commission is the body responsible for ensuring independence and accountability within, as well as effective administration of the Judiciary. As such, it is responsible for the nomination judges and other judicial officers for appointment, as well as their removal.¹²⁰ The activities of the Commission are guided by both the Constitution and the Judicial Service Act. The objectives of the Act include facilitating the promotion of gender equity in the Judiciary as well as the removal of historical factors of discrimination.¹²¹

In nominating applicants to judicial positions, the Commission is required to nominate the most qualified persons, taking into account a number of other considerations including gender.¹²² Although, as was discussed in Chapter 2, the High Court interpreted this provision to mean that merit and qualifications take priority over gender as a consideration for nomination,¹²³ it is still commendable that the Act recognises it as a consideration. Similarly, pursuant to Paragraph 10(2) of the Third Schedule to the Act and in considering candidates for promotion, the Commission ought to take into account, among other things, gender.

With regard to the appointment, discipline and removal of judicial officers and staff as well as the removal of judges, the Act provides for the accommodation of gendered perspectives and input. Sections 31(3) and 32(1) require the relevant panels created for such purposes to be gender-representative. The Act, under Section 34(1) establishes the National Council on the Administration of Justice whose duty is to ensure a co-ordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system.¹²⁴ The Act requires not more than two-thirds of the members of the Council be of the same gender, effectively ensuring the participation of women in public decision-making processes of the Council.

¹²⁰ Article 172(1), *Constitution of Kenya* (2010).

¹²¹ Section 3(j) and (k), *Judicial Service Act* (No. 1 of 2011).

¹²² Paragraph 14(1) of the First Schedule, *Judicial Service Act* (No. 1 of 2011).

¹²³ *National Gender and Equality Commission & Another v Judicial Service Commission & 2 Others* (2017) eKLR.

¹²⁴ Section 35(1), *Judicial Service Act* (No. 1 of 2011).

Finally, the Act, under Section 47(1), empowers the Commission to make regulation for the better carrying out of the purposes of the Act. The Act requires these regulations to provide for a number of issues, among them being gender mainstreaming.¹²⁵

From the reading of these provisions, it can be argued that the Judicial Service Act promotes both formal and substantive equality. Within the Commission itself, it promotes substantive equality through the inclusion of women in the Council as well as the various *ad hoc* panels by entrenching the two-thirds gender rule. With regard to the nomination of judges and other judicial officers for appointment, the Act promotes formal equality over substantive equality as it prioritises merit and qualifications as considerations for nomination.

v) Employment Act

The Employment Act caters for the principle of equality and non-discrimination. It calls for the Cabinet Secretary, labour officers and employers to promote equality of opportunity within the employment sphere so as to eradicate discrimination. Furthermore, the Act lists a number of prohibited grounds for discrimination, which include sex. Employers are therefore prohibited from directly or indirectly discriminating against employees and prospective employees on the basis of their sex. This is in respect to matters arising out of the employment.¹²⁶

Section 5(4) of the Act clarifies what does not amount to discrimination, under which affirmative action measures, consistent with the elimination of discrimination in the workplace, fall.

It is clear that the Act entrenches both formal and substantive equality; formal equality in the sense that it expressly calls for the promotion of equality of opportunity and, substantive equality in the sense that it not only recognises descriptive traits as prohibited grounds for discrimination, but also provides for affirmative action as a measure of promoting equality and non-discrimination in the workplace.

3.4.1.2. International and regional legal framework

As has been stated earlier, by virtue of Articles 2(5) and 2(6), general rules of international law as well as instruments that have been ratified by the State are applicable

¹²⁵ Section 47(2)(i), *Judicial Service Act* (No. 1 of 2011).

¹²⁶ Section 5(3), *Employment Act* (No. 11 of 2007).

in Kenya. Numerous international and regional instruments recognise and affirm the equality of men and women as shall be demonstrated below.

i) Convention on the Elimination of All Forms of Discrimination of against Women

Many legal instruments embody a gender-neutral approach to equality and non-discrimination as has been demonstrated by Kenya's local instruments above. The Convention on the Elimination of All Forms of Discrimination of against Women (CEDAW), in its Preamble, affirms the recognition that the realization of equality for women requires more than formal equality which assumes uniformity of circumstances between men and women.¹²⁷

Article 2 of the Convention requires State Parties to condemn all forms of discrimination against women. The Committee on the Elimination of Discrimination against Women (hereinafter 'the Committee) in its General Recommendation No. 28 outlined the scope of obligations imposed on State Parties in this regard.¹²⁸ State Parties have the tripartite obligation to respect, protect and fulfil the rights of women under the Convention.

Article 4 of the Convention requires adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women and that such measures shall not be considered discriminatory. The adoption and implementation of such measures may lead to questions surrounding merit vis-à-vis the appointment of lesser-qualified individuals. Such questions need to be reviewed carefully for gender bias as they are normatively and culturally determined. For appointment, selection or election to public and political office, factors other than qualification and merit may also have to play a role.¹²⁹

Article 7 (b) requires States Parties to ensure that women have the right to participate fully and be represented in public policy formulation. In this regard, they have a responsibility both to appoint women to senior decision-making roles and to consult and incorporate the advice of groups which are broadly representative of women's views and interests.¹³⁰ Similarly, political parties have a responsibility to ensure that women are

¹²⁷ Kinyanjui S *et al*, 'The constitutional promise', 23.

¹²⁸ CEDAW General Recommendation No. 28, *The core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, 9.

¹²⁹ CEDAW General Recommendation No. 25, *Article 4, Paragraph 1, of the Convention (temporary special measures)*, 2004, 23.

¹³⁰ CEDAW General Recommendation No. 23, *Political and public life*, 1997, 26.

included in party lists and nominated for election.¹³¹ Additionally, pursuant to Article 8, States Parties are required to take all appropriate measures to ensure to women the opportunity to represent their Governments at the international level on equal terms with men.

Articles 10 and 11 of the Convention require girls and women to be afforded equal opportunities within the educational and employment sectors respectively. Moreover, Article 15 requires State Parties to recognise and protect women's legal capacity by allowing them to conclude contracts and to administer property as well as treating them equally in all stages of procedure in courts and tribunals. These provisions contribute to increasing women's agency thus enabling them be better-equipped to compete for public goods.

ii) The Banjul Charter¹³² and the Maputo Protocol¹³³

The Banjul Charter under Article 18 requires State Parties to ensure the elimination of every form of discrimination against women and to ensure the protection of the rights of women and children as stipulated in international declarations and conventions.

Similar to CEDAW, the Maputo Protocol recognises in its Preamble, the need for a gender-specific instrument to redress discrimination against women.¹³⁴ Under Article 2 of the Protocol, State Parties are required to combat discrimination against women by, *inter alia*; including in their national constitutions and other legislative instruments, if not already done, the principle of equality; incorporating affirmative action in instances where discrimination of women in law continues to exist and; committing themselves to modify the social and cultural patterns of conduct of women and men through public education, information and communication strategies, with a view to eliminate harmful cultural and traditional practices.

¹³¹ CEDAW General Recommendation 23, 28.

¹³² African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

¹³³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, CAB/LEG/66.6 .

¹³⁴ Kinyanjui S *et al*, 'The constitutional promise', 23.

The Maputo Protocol, like CEDAW, obliges State Parties to take specific positive action to promote the equal participation of women in the political life of their countries through affirmative action, as well as engaging them in public decision-making processes.¹³⁵

Finally, Articles 12 and 13 of the Protocol also call for girls and women to be afforded equal opportunities within the educational and employment sectors respectively. Moreover, Article 8 of the Protocol requires State Parties to ensure equal protection before, and benefit of the law to women through undertaking a number of measures including reforming existing discriminatory laws and practices in order to promote and protect the rights of women.

3.4.2. Institutional framework

3.4.2.1. National Gender and Equality Commission

The National Gender and Equality Commission (NGEC) is established by the National Gender and Equality Commission Act (NGEC Act)¹³⁶ as one of the successor commissions pursuant to Article 59(4) of the Constitution. The Commission's general mandate is to promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution.¹³⁷ In this regard, it is guided by a number of principles, including the principles of impartiality, gender equality and gender equity.¹³⁸

In discharging its mandate, the Commission has a number of functions¹³⁹ including, among others; coordinating and mandating the mainstreaming of gender issues and ensuring State compliance with international instruments regarding matters equality and non-discrimination that have been ratified by Kenya.

3.4.2.2. Kenya National Commission on Human Rights

Kenya National Commission on Human Rights (KNCHR) is an independent institution created under the Constitution¹⁴⁰ and established by the Kenya National Commission on Human Rights Act (KNCHR Act)¹⁴¹ pursuant to the Constitution. Its general mandate is

¹³⁵ Article 9, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*.

¹³⁶ Section 3, *National Gender and Equality Commission Act* (2011).

¹³⁷ <https://www.ngeckkenya.org/about/15/mandate>- on 10 October 2020.

¹³⁸ Section 7(b), *National Gender and Equality Commission Act* (2011).

¹³⁹ Section 8, *National Gender and Equality Commission Act* (2011).

¹⁴⁰ Article 59(4), *Constitution of Kenya* (2010).

¹⁴¹ Section 3, *Kenya National Commission on Human Rights Act* (No. 14 of 2011).

to oversee Government compliance with human rights.¹⁴² In fulfilling its mandate, KNCHR is guided by a number of principles including the principles of gender equality and equity.¹⁴³

Although the Commission is not mandated to directly receive and investigate complaints regarding alleged violations of gender equality and equity,¹⁴⁴ it can work with NGEC to ensure efficiency effectiveness and complementarity in its functions.¹⁴⁵ The Commission may, however, conduct investigations on matters gender where the transfer of such matters to the NGEC may result in a delay of justice for the parties involved.¹⁴⁶ The Commission is also empowered to require any public or private institution to provide special reports on matters relating to the institution's implementation of the principle of equality and equity including gender equity.¹⁴⁷

3.4.2.3. Independent Electoral and Boundaries Commission

The Independent Electoral and Boundaries Commission (IEBC) is an independent commission established under Article 248 of the Constitution. It is generally mandated to conduct and supervise elections and referenda to elective bodies at both national and county levels.¹⁴⁸ In discharging its mandate, it is guided by various principles including those of gender equality and equity, under which it is required to ensure compliance with the two-thirds gender rule with regard to public elective bodies.¹⁴⁹ The IEBC is also required, in this regard, to ensure that the nomination lists of political parties are compliant with the two-thirds gender rule and as such, should reject all non-compliant nomination lists.¹⁵⁰

3.4.3. Policy framework

Majority of the relevant policies in Kenya, as shall be demonstrated subsequently, embody Category 3 measures. In this regard, many policies effectively entrench formal equality because by enabling women be better-equipped to compete effectively for public goods, they endorse equality of opportunity as opposed to equality of results.

¹⁴² -<https://www.knchr.org/About-Us/Establishment>- on 10 October 2020.

¹⁴³ Section 7(b), *Kenya National Commission on Human Rights Act* (No. 14 of 2011).

¹⁴⁴ Section 8(d), *Kenya National Commission on Human Rights Act* (No. 14 of 2011).

¹⁴⁵ Section 8(h), *Kenya National Commission on Human Rights Act* (No. 14 of 2011).

¹⁴⁶ Section 57(2), *Kenya National Commission on Human Rights Act* (No. 14 of 2011).

¹⁴⁷ Section 26(i), *Kenya National Commission on Human Rights Act* (No. 14 of 2011).

¹⁴⁸ Article 88(4), *Constitution of Kenya* (2010).

¹⁴⁹ Section 25(b), *Independent Electoral and Boundaries Commission Act* (No. 9 of 2011).

¹⁵⁰ *Katiba Institute v Independent Electoral and Boundaries Commission* (2017) eKLR.

3.4.3.1. National Policy on Gender and Development (2019)

The primary aim of this Policy is to promote equality of opportunity and results, among men and women, with regard to access to and control of public resources on both the national and county levels.¹⁵¹ To actualise this aim, the Policy has laid out a number of objectives which includes, *inter alia*, to facilitate implementation of the Constitution and to domesticate the international and regional obligations and commitments that promote gender equality.¹⁵²

In this regard, the Policy is guided by a number of principles which include, among others, equality, equity and non-discrimination as well as the inseparability of the private and public spheres of life,¹⁵³ which contributes greatly to the inclusion of women in public and political decision-making processes.

3.4.3.2. National Policy and Action Plan on Human Rights (2014)

The ultimate goal of this Policy is to provide a framework for the integration and mainstreaming of human rights in development planning, implementation and evaluation in all sectors in order to fully implement the Constitution.¹⁵⁴

The Policy recognises that the challenges that women encounter are fuelled primarily by cultural prejudices, discrimination against them in public and political decision-making processes, employment, among others.¹⁵⁵ To address these challenges the State, through creation of this Policy, commits to take measures to ensure that all women and men have the right to equal treatment, including the right to equal opportunities in all spheres.

3.4.3.3. Kenya Vision 2030

This is Kenya's long-term development blueprint and it recognizes the importance of non-discrimination and harmony across the various social divides in the country.¹⁵⁶ Vision 2030 undertakes to integrate gender mainstreaming in four key areas, namely; opportunities, empowerment, capabilities and vulnerabilities.¹⁵⁷

Similarly, Vision 2030 aims to eliminate gender disparities in all sectors of the country and has incorporated a number of strategies to that effect. The strategies include, among

¹⁵¹ State Department for Gender, *National policy on gender and development*, 2019, 13.

¹⁵² State Department for Gender, *National policy on gender and development*, 2019, 28.

¹⁵³ State Department for Gender, *National policy on gender and development*, 2019, 29.

¹⁵⁴ Department of Justice, *National policy and action plan on human rights*, 2014, 6.

¹⁵⁵ Department of Justice, *National policy and action plan on human rights*, 2014, 33.

¹⁵⁶ National Gender and Equality Commission, *Status of equality and inclusion in Kenya*, 2016, 50.

¹⁵⁷ Government of Kenya, *Kenya vision 2030*, 2007, 133.

others, increasing the number of women in Parliament and increasing the literacy level of women,¹⁵⁸ which will play a contributory role in increasing their agency. Furthermore, it has incorporated flagship projects aimed at increasing women representation at the executive level in all branches of Government and the private sector, as well as expressly providing for affirmative action as an initiative to aid in ensuring the participation of women in all decision-making processes.¹⁵⁹

3.4.3.4. United Nations Agenda 2030

The Constitution provides that general rules of international law are applicable to Kenya¹⁶⁰ and as such, the UN Agenda 2030 is applicable. The Agenda is grounded in the UDHR and other international human rights treaties. Agenda 2030 aims to, among others, ensure the universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination.¹⁶¹ The UN Agenda 2030 introduced the Sustainable Development Goals (SDGs), under which Goal 5 specifically envisions gender equality and the empowerment of women and girls. The main objectives under this Goal include, among others to ensure full participation of women as well as equal opportunities for leadership in public decision-making processes.¹⁶²

3.5. Conclusion

Based on the discussions above, it may be concluded that with regard to striving towards gender equality, Kenya takes a hybrid approach in the sense that the varying approaches to equality feature within her jurisdiction. Kenya's frameworks all enshrine the various approaches to affirmative action, that is, equality of opportunity and of results, as well as a number of gender quotas, the most notable being reserved seats and legislative quotas. Because the frameworks are very rich and all-inclusive, it may be inferred, as it was in Chapter 2, that the difficulties experienced in achieving gender equality are attributable to flawed interpretation of the said frameworks. Lastly, the tension that exists between the promotion of both formal and substantive equality within the frameworks as has been demonstrated, may be a contributory factor to the difficulty experienced. This is because there is general lack of clarity with regard to whether the ultimate aim is to achieve equality of opportunity or equality of results. As has been demonstrated in this Chapter,

¹⁵⁸ Government of Kenya, *Kenya vision 2030*, 2007, 134.

¹⁵⁹ Government of Kenya, *Kenya vision 2030*, 2007, 136.

¹⁶⁰ Article 2(5), *Constitution of Kenya* (2010).

¹⁶¹ United Nations, *United Nations agenda 2030*, 2015, 5.

¹⁶² United Nations, *United Nations agenda 2030*, 2015, 20.

equality of opportunity will still result in disadvantage to women because the systemic discrimination they are subjected to hinders the development of their capabilities, which is essential in enabling them compete effectively for public goods. Given the historically systemic discrimination women in Kenya are subjected to, which consequently affects their agency negatively, the ideal would be to promote equality of results as opposed to equality of opportunity. This tension serves to further hinder this process as it has been demonstrated that the majority interpret and apply the provisions under these frameworks in a manner that prioritises equality of opportunity as opposed to equality of results.

CHAPTER 4: INTERNATIONAL BEST PRACTICES IN GENDER EQUALITY: A COMPARATIVE STUDY

4.1. Introduction

Post-World War II, there was a mere three percent of women in the existing governments at the time and as such, there were also very few female delegates to the United Nations. This gave rise to the need to fight for gender equality in political participation, eventually leading to the inclusion of the Commission on the Status of Women in the UN Charter and on the basis of its proposal the UN Convention on Women's Political Rights was adopted.¹⁶³ The second wave of feminism during the 1960s and 1970s brought about the various International Women's Conferences which assessed developments and adopted new action plans on gender equality, leading to the emergence of numerous women's organisations.¹⁶⁴ During this era, the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) was adopted in 1979. As was discussed in Chapter 3 of this paper, this instrument comprises provisions on women's civil-political as well as socio-economic rights.

CEDAW, although it might not be the primary cause of the improvement in matters gender equality over the years, is the basic instrument that sets out international best practices in gender equality and has widespread legitimacy on an international level. It will therefore be the metric used in this Chapter to assess the effectiveness of the measures taken by Rwanda in ensuring gender equality within its jurisdiction.

4.2. International best practices in gender equality

The Committee on the Elimination of Discrimination against Women (hereinafter, 'Committee') is a body of independent experts established under Article 17 of CEDAW which is charged with monitoring the implementation of CEDAW.¹⁶⁵ In discharging its mandate, The Committee has published numerous General Recommendations on the implementation of CEDAW and these serve as guiding tools for the international best practices.

Article 4 of the Convention requires adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women and to effect

¹⁶³ Skard T, *Women of power: Half a century of female presidents and prime ministers worldwide*, 57.

¹⁶⁴ Skard T, *Women of power: Half a century of female presidents and prime ministers worldwide*, 58.

¹⁶⁵ <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx> - on 3 December 2020.

the structural and socio-cultural changes necessary to correct the effects of discrimination against women. Further, as a permanent measure, Article 4 requires State Parties to put in place measures that provide for non-identical treatment of men and women due to their biological differences. These provisions are in line with the tripartite obligation of State Parties to respect, protect and fulfil the enjoyment of women's rights under Article 2. Further under Article 2, State Parties are required to implement measures that; are comprehensive, in that they apply to all spheres of both public and private life; identify women within their jurisdictions as the right-bearers; ensure women have access to information about their rights and are able to effectively claim those rights, and; are action-and-results-oriented.¹⁶⁶ To be able to actualise this, State Parties are required to establish or strengthen effective national machinery, institutions and procedures with adequate resources and authority to; comprehensively monitor the situation of women, advise on the impact on women of government policies and help to formulate new policies and strategies aimed at eradication of discrimination against women.¹⁶⁷

In line with the aforementioned requirements of State Parties by the Convention, the main areas of focus in this Chapter will be international best practices in; education, access to justice and public and political participation.

4.2.1. Women and their participation in public and political life

The Convention requires States Parties to ensure that women have the right to participate fully and be represented in public policy formulation at all levels.¹⁶⁸ In this regard, they have a responsibility both to appoint women to senior decision-making roles and to consult and incorporate the advice of groups which are broadly representative of women's views and interests.¹⁶⁹ Similarly, political parties have a responsibility to ensure that women are included in party lists and nominated for election.¹⁷⁰ Additionally, pursuant to Article 8, States Parties are required to take all appropriate measures to ensure to women the opportunity to represent their governments at the international level on equal terms with men and without any discrimination.

The Committee in its General Recommendation No. 23 recommends, as a best practice, that States should take appropriate measures, including the enactment of appropriate

¹⁶⁶ CEDAW General Recommendation 28, 25.

¹⁶⁷ CEDAW General Recommendation No. 6, *Effective national machinery and publicity*, 1988, 1.

¹⁶⁸ Article 7(b), *Convention on the Elimination of All Forms of Discrimination Against Women*.

¹⁶⁹ CEDAW General Recommendation 23, 26.

¹⁷⁰ CEDAW General Recommendation 23, 28.

legislation, to ensure that organisations within their jurisdictions which may not be directly subject to the Convention abide by the principles outlined in Articles 7 and 8 of the Convention. Further, it requires that where a State Party wishes to make reservations on Articles 7 and 8, it must explain the reason for and the effect of such reservations and, in the event the reservations are grounded in customary stereotyped attitudes towards women, the State Party ought to take steps towards the removal of such reservations.

In particular women in rural areas are inadequately represented as civil servants and elected representatives at community-level decision-making. This may be due to various factors such as lack of language and literacy, limited mobility and discriminatory gender stereotypes.¹⁷¹ To address this, the Committee recommends, as best practices, that States; establish quotas and targets to facilitate the representation of rural women in decision-making processes and; establish gender-responsive decision-making structures.¹⁷²

As has been discussed extensively in the preceding Chapters, various civil and socio-economic factors play a role in increasing women's agency and making them better-equipped to compete for public goods. To make women better-enabled to participate in public and political life both nationally and internationally as required by Articles 7 and 8 of the Convention, the Committee requires State Parties to ensure that all barriers inhibiting women's right to equality are overcome, including those resulting from, *inter alia*, illiteracy,¹⁷³ and impediments to women's legal capacity and access to justice. Seeing as literacy and legal capacity play a contributory role in encouraging women's participation in public and political life, the international best practices in these areas shall be discussed in subsequent sections of this Chapter as well.

4.2.2. Women and the right to education

Girls and women have the right to be afforded equal educational opportunities as their male counterparts.¹⁷⁴ Education empowers girls and women to claim and exercise their rights on equal footing with their male counterparts. According to the Committee in its General Recommendation No. 36, the right to education is multidimensional,

¹⁷¹ CEDAW General Recommendation No. 34, *The rights of rural women*, 7 March 2016, 53.

¹⁷² CEDAW General Recommendation 34, 54.

¹⁷³ CEDAW General Recommendation 23, 45.

¹⁷⁴ Article 10, *Convention on the Elimination of All Forms of Discrimination Against Women*.

encompassing the right of access, rights within education and rights through education.¹⁷⁵ The best practices under each category shall be discussed in detail subsequently.

4.2.2.1. Right of access

This right entails the physical and economic access to available educational infrastructures in place. Further, it entails not only attendance to school, but also retention of students as well as smooth transition processes from one level of education to another.¹⁷⁶

Physical access requires the provision by the State, of adequate functional educational facilities and programmes to cater to the needs of girls and women. Additionally, it requires the establishment of an enabling environment. In line with the foregoing, the Committee recommends, among other measures, the following; that adequate budgetary, human and administrative resources are put in place to accommodate the education of girls and women; that schools are located a safe distance from students' homes; provision of opportunities of access to programmes for continuing education, particularly adult literacy programmes for women, and; capacity building for teachers to encourage them to ensure a supportive learning environment for girls and women.¹⁷⁷

Economic accessibility requires education to be affordable for all. The Committee recommends that education at the primary and secondary level be free and compulsory. This recommendation stemmed from the observation that majority of the time, free education comes with hidden cost whereby access is monetised through, for instance, the requirement that parents cater to school uniform costs. This often results in parents choosing which of their children to send to school, with preference given to male children.¹⁷⁸ To overcome this, the Committee recommends that States, among other measures; implement universal free and compulsory education without hidden costs from the pre-school level to secondary level as well as affordable tertiary education; introduce measure that ensure that girls and women from lower economic strata are not adversely

¹⁷⁵ CEDAW General Recommendation No. 36, *The right of right of girls and women to education*, 27 November 2017, 14.

¹⁷⁶ CEDAW General Recommendation 36, 15.

¹⁷⁷ CEDAW General Recommendation 36, 32.

¹⁷⁸ CEDAW General Recommendation 36, 37.

affected when it comes to accessing education and, conduct targeted campaigns to overcome male preference.¹⁷⁹

4.2.2.2. Rights within education

These rights place a corresponding obligation on States to make education acceptable in form (content) as well as substance (quality). This was envisioned by the Committee as a means of combating the stratification of knowledge. Stratification is problematic as it tends to direct girls towards what are deemed as low-status occupations.¹⁸⁰ This, in turn, has adverse effects on their overall agency and reduces their chances to access public goods. In light of this, the Committee recommends that a full range of technical and vocational subjects are offered particularly in single-sex schools to ensure that girls can participate in male-dominated areas. Additionally, the Committee recommends, in its General Recommendation No. 34, training for teachers as well career counselling for parents and students so as to correct entrenched stereotypical perceptions regarding careers.

4.2.2.3. Rights through education

The widespread ideology that men ought to be the breadwinners has contributed greatly to the vertical and horizontal sex-segregation of labour, whereby men are given preferential treatment and opportunities in employment even where both sexes hold the same qualifications.¹⁸¹ According to the Committee, this is linked to socialisation processes in educational institutions that produce and maintain sexual division of labour which consequently propels men to the public sphere while keeping women in the private sphere. As such, it is recommended that, among other things, teachers adopt constructivist teaching methods aimed at empowering girls and women to participate equally with men.¹⁸²

4.2.3. Women's legal capacity and the right to access justice

The right to access justice is essential for the realisation of the other rights of women under the Convention. Similar to the right to education, it is a multidimensional right encompassing the following components; justiciability, which requires unhindered access to justice by women as well as empowerment to claim their rights; physical and financial

¹⁷⁹ CEDAW General Recommendation 36, 39.

¹⁸⁰ CEDAW General Recommendation 36, 60.

¹⁸¹ CEDAW General Recommendation 36, 77.

¹⁸² CEDAW General Recommendation 36, 81.

accessibility by women to justice systems; availability of courts and quasi-judicial bodies throughout urban and rural areas; good quality justice systems adhering to international standards of, among others, competence, efficiency and impartiality; provision of remedies, and; accountability of the justice system.¹⁸³

The Committee has observed that a number of States have statutory provisions, regulations and procedures which may be discriminatory against women either directly or indirectly. To address this, the Committee recommends, among other measures, the abolition of discriminatory barriers to access to justice and the protection of girls and women from texts and norms that create barriers to their access to justice.¹⁸⁴ This also highlights the issue of stereotyping and gender bias in the justice system, which distorts decision-making processes as was demonstrated in Chapter 2 of this paper. It is recommended that State Parties adopt capacity-building for all justice system personnel so as to incorporate gendered perspectives and to eliminate stereotypical perceptions.¹⁸⁵

4.3. Rwanda's compliance with international best practices

Similar to numerous other countries with patriarchal societies, some of the main problems affecting women in Rwanda include poverty and unequal work opportunities as well as lack of education,¹⁸⁶ factors which significantly hinder the development of their agency. Despite this, Rwanda still boasts of having its legislature majority female, with 62 percent of its composition being women.¹⁸⁷ After the 1994 genocide, gender equality became one of the main political issues and several steps were taken to expand women's rights and to increase their participation in public and political life.¹⁸⁸ In the past two decades, a lot of improvements with regard to representation of women in governance have been noted in Rwanda. This is attributed to the newly-adopted roles of women as well as the State's overall commitment to gender equality,¹⁸⁹ evidenced by the expansive appropriate legal, institutional and policy frameworks in place.

¹⁸³ CEDAW General Recommendation No. 33, *Women's access to justice*, 3 August 2015, 14.

¹⁸⁴ CEDAW General Recommendation 33, 25.

¹⁸⁵ CEDAW General Recommendation 33, 29.

¹⁸⁶ Wallace C, Haerpfer C, Abbott P, 'Women in Rwandan politics and society' 38(4) *International Journal of Sociology*, 2008/2009, 119.

¹⁸⁷ Abouzeid R, 'How women are stepping up to remake Rwanda' National Geographic, 15 October 2019 - <https://www.nationalgeographic.com/culture/2019/10/graphic-shows-women-representation-in-government-around-the-world-feature/> - on 10 December 2020.

¹⁸⁸ Debusscher P, Ansoms A, 'Gender equality policies in Rwanda: Public relations or real transformations?' 44(5) *Development and Change*, 2013, 1114.

¹⁸⁹ Debusscher P *et al.*, 'Gender equality policies in Rwanda', 1119.

4.3.1. Legal framework

Rwanda, like Kenya, is a signatory to CEDAW, the African Charter on Human and Peoples' Rights (Banjul Charter) and the Maputo Protocol.¹⁹⁰ As such, the relevant provisions discussed in Chapter 3 regarding Kenya's legal frameworks developed on the international and regional levels apply *mutatis mutandis* to Rwanda.

On a national level, the most prominent instrument on matters equality and non-discrimination is the Constitution of Rwanda (referred to in this Chapter as 'Rwanda's Constitution'). The State commits to upholding a number of fundamental principles including eradication of discrimination as well as equitable power sharing, requiring at least 30 percent of positions in all decision-making organs to be occupied by women.¹⁹¹ More specifically, Articles 15 and 16 provide for the right to equality and non-discrimination for all Rwandans. In this regard, it is required that political organisations reflect the complementarity of men and women¹⁹² and to desist from basing themselves on ethnicity, sex, or any other division that would amount to discrimination.¹⁹³ Additionally, Article 75 provides that of the 80 Deputies in the Chamber of Deputies, 24 of them should be women. Emphasis is also placed on the requirement that, regardless of the 24 reserved seats, 30 percent of the Chamber's composition ought to be female. In further compliance with international best practices, Article 20 provides for the right to education for all Rwandans irrespective of their gender. The provision, unlike its Kenyan counterpart, specifically calls for free and compulsory primary education.

The blanket requirement to have at least 30 percent of positions in all decision-making organs in Rwanda being occupied by women is an assertive step taken by the State towards gender equality. Unlike Kenya's two-thirds gender rule, this requirement applies to all State and Non-state organs and takes gender-specific approach as opposed to a gender-neutral approach. Further, unlike its Kenyan counterpart,¹⁹⁴ this requirement under Rwanda's Constitution is not subject to progressive realisation. Instead, it is required that it is enforced immediately.

¹⁹⁰ Abbott P, Rucogoza M, 'Legal and policy framework for gender equality and the empowerment of women in Rwanda' Institute of Policy Analysis and Research – Rwanda, 2011, 6 - <https://core.ac.uk/download/pdf/43540646.pdf>- on 10 December 2020.

¹⁹¹ Article 10, *Constitution of Rwanda* (2003).

¹⁹² Article 56, *Constitution of Rwanda* (2003).

¹⁹³ Article 57, *Constitution of Rwanda* (2003).

¹⁹⁴ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

4.3.2. Policy Framework

There are numerous appropriate policies in place for matters gender equality in Rwanda. These have been for the last 20 years, spearheaded by Vision 2020, Rwanda's framework of development. Alongside the six pillars of the development framework, Vision 2020 has detailed three cross-cutting issues, one of them being gender equality.¹⁹⁵ In order to ensure gender equality and equity, the State commits to continuously update and adapt its laws on gender. In particular, among other measures, the State also commits to promote equal education opportunities for women and to adopt positive discrimination policies in favour of women.¹⁹⁶

In the spirit of Vision 2020, the State has enacted numerous policies on gender over the years, of which the most outstanding shall be discussed subsequently.

4.3.2.1. National Gender Policy

The National Gender Policy (NGP) upholds the State's commitment to eliminate discrimination against women in Rwanda and entails, among others, the following guiding principles; the inclusion of gender mainstreaming in development processes; an examination of Rwandan cultures to determine which ones should be perpetuated or done away with in light of gender equality and, the promotion of affirmative action in favour of women.¹⁹⁷

The overarching objective of the NGP is the promotion of gender equality and equity across all development sectors through clearly defined gender mainstreaming processes. The policy aims to do this by adopting various strategies including, among others; institutional capacity building for gender sensitisation for all stakeholders in the implementation of gender policies; continued revision of gender discriminatory laws; adopting measures for increased access, performance and retention of girls and women in education at all levels and; encouraging the involvement of men in all matters gender equality.¹⁹⁸ The strategies adopted by the NGP reflect Rwanda's compliance with the international best practices discussed earlier.

¹⁹⁵ Abbott P, *et al* 'Legal and policy framework for gender equality and the empowerment of women in Rwanda', 11.

¹⁹⁶ Ministry of Finance and Economic Planning, *Rwanda vision 2020*, 2000, 23.

¹⁹⁷ Ministry of Gender and Family Promotion, *National Gender Policy*, 2010, 19.

¹⁹⁸ Ministry of Gender and Family Promotion, *National Gender Policy*, 2010, 20.

4.3.2.2. Gender Equality Strategy

The mission of the Strategy is to incorporate gender mainstreaming into development projects so as to accommodate the unique needs of girls, women, boys and men.¹⁹⁹ As such, the Strategy has four main objectives, three of which shall be discussed owing to their relevance to this paper.

The first objective entails ensuring all development programmes mainstream gender and women empowerment. It is therefore required, *inter alia*, that sufficient budgetary allocation is made for gender mainstreaming and that gender-related training programmes are provided for all institutions.²⁰⁰

The third objective of the Strategy deals with increasing the capacity of a holistic understanding of gender, taking into account the intersectional nature of discrimination. Gender-based discrimination is often coupled with other cross-cutting factors such as age, religion, disability, etc. in view of this, it is required that gender-sensitisation training is modified to include the aforementioned cross-cutting factors.²⁰¹

Lastly, the fourth objective of the Strategy is focused on engaging men and boys in gender equality advocacy and action. In this regard, among other measures, workshops and learning sessions that challenge patriarchal thinking are to be regularly carried out across all sectors.²⁰²

4.3.2.3 Girls' Education Policy

This Policy was developed in 2008 under Rwanda's Ministry of Education. The overall objective of the policy is to promote sustainable action aimed at the progressive elimination of gender disparities in the education sector.²⁰³ The State has been committed to actualising this objective by adopting affirmative action strategies which include; lower cut-off points or supplementary points for girls' entry into higher levels of education; provision of fee-free education for at least 20 girls who qualify for science and technology education each year, and; provision of remedial classes for girls who are at

¹⁹⁹ United Nations Development Programme, *Gender Equality Strategy: UNDP Rwanda (2019 – 2022)*, 2018, 9.

²⁰⁰ United Nations Development Programme, *Gender Equality Strategy: UNDP Rwanda (2019 – 2022)*, 2018, 13.

²⁰¹ United Nations Development Programme, *Gender Equality Strategy: UNDP Rwanda (2019 – 2022)*, 2018, 16.

²⁰² United Nations Development Programme, *Gender Equality Strategy: UNDP Rwanda (2019 – 2022)*, 2018, 20.

²⁰³ Ministry of Education, *Girls' Education Policy*, 2008, 12.

risk of dropping out of secondary education, with particular emphasis on re-entry of girls who drop out due to pregnancy.²⁰⁴

4.3.3. Institutional framework

Rwanda, unlike Kenya, has numerous specialised institutions with different mandates all under the umbrella of gender equality and equity:

- i. The Directorate of Gender Promotion and Women Empowerment is established under the Ministry of Gender and Family Promotion (MIGEPROF). It is the national machinery with portfolio to oversee all interventions related to gender equality and women's empowerment and it develops policies regarding the same.²⁰⁵
- ii. The National Women's Council is a forum for women empowerment and active participation in national development. They are tasked with the mobilisation of women as well as advocacy for women's rights and policy development and implementation.²⁰⁶
- iii. The Gender Monitoring Office is established as a specialised organ under Rwanda's Constitution.²⁰⁷ It is generally mandated to ensure that systems are in place for monitoring and evaluating the implementation of gender mainstreaming. More specifically, it is tasked with ensuring the collection of gender disaggregated data is done to enable the monitoring the implementation of gender equality.²⁰⁸
- iv. The National Gender Cluster is a collaborative forum between the government, civil society and private actors. It is chaired by the Minister for Gender and Family Promotion and its primary function is to encourage implementation of the National Gender Policy through identifying gaps in the pursuit of gender equality, lobbying and advocacy for women's rights.²⁰⁹
- v. All government and public sector institutions have Gender Focal Points (GFPs) at the operational level. They consist of government employees whose functions

²⁰⁴ Ministry of Education, *Girls' Education Policy*, 2008, 14.

²⁰⁵ <https://www.migeprof.gov.rw/gender-promotion>- on 12 December 2020.

²⁰⁶ <https://www.cnf.gov.rw/index.php?id=10>- on 12 December 2020.

²⁰⁷ Article 139(2), *Constitution of Rwanda* (2003).

²⁰⁸ <https://gmo.gov.rw/index.php?id=560&L=2>- on 13 December 2020.

²⁰⁹ Abbott P, *et al* 'Legal and policy framework for gender equality and the empowerment of women in Rwanda', 11.

include; ensuring that gender-disaggregated data is collected and ensuring that all policies, programmes, projects and budgets are gender responsive.²¹⁰

- vi. Lastly, the Forum for Rwandan Women Parliamentarians (FFRP) is a body tasked with advocacy and lobbying for women's rights with specific regard to ensuring gender equality is upheld in legislative drafting.²¹¹

4.4. Conclusion

It has been demonstrated in this Chapter that Rwanda has complied with the international best practices in gender equality to a satisfactory standard. In conclusion, therefore, there are some lessons Kenya could borrow from Rwanda on the subject. Firstly, Rwanda's various frameworks are more specific in the sense that they expressly advocate for the promotion of women in the public sector; for instance, as opposed to using gender-neutral language, its 30 percent rule specifically refers to women. Moreover, the specific gender quotas within its frameworks are subject to immediate realisation unlike those in Kenya's frameworks. In the same vein, Rwanda's frameworks are not only expansive but also highly specialised. They are expansive in that the strategies of operation adopted by the State are vast and all-encompassing. The institutional framework demonstrates the highly specialised nature of Rwanda's framework in that, inasmuch as all the aforementioned institutions are generally geared towards the promotion of gender equality, they have specific differentiated mandates. The policy framework also demonstrates this highly specialised nature seeing as there are specific policies addressing different issues affecting girls and women, for instance, the Girls' Education Policy. Lastly, other elements that feature in Rwanda's frameworks but are absent in Kenya's frameworks are the requirements for gender-responsive budgeting and the inclusion of boys and men in the gender equality discourse, which have been highly emphasised.

²¹⁰ Organisation for Women in Science for the Developing World, *Report of the Gender Equality and the Knowledge Society (GE-KS) in Rwanda*, 2016, 18.

²¹¹ -<https://www.migeprof.gov.rw/gender-promotion>- on 13 December 2020.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

The aim of this research was to determine why gender-based affirmative action laws and policies seem not to yield desirable results in the public sector and to suggest necessary legal reforms. This was to be done by actualising the following objectives; to investigate the impact of patriarchy on gender equality in the public sector in Kenya; to identify and discuss the legal, policy and institutional framework on gender-based affirmative action in Kenya and its response to gender disparities in Kenya's public sector; to examine international best practices with regard to gender equality and the level of compliance with the same in Rwanda and to determine whether it offers any lessons to Kenya. The preceding Chapters have dealt with the aforementioned objectives in detail. This Chapter gives a summary of the findings in the preceding Chapters as well as recommendations on the same.

5.2. Summary of the findings

5.2.1. Chapter 1 findings

Chapter 1 briefly shed light on the fact that the gender disparities that have been plaguing Kenya's public and private sectors from as early as the pre-colonial era still exist. With regard to the public sector – the primary focus of this research – the narrative in Kenya when it comes to gender equality in both appointive and electoral positions is disheartening. Despite the fact that measures put in place to promote gender equality and equity have been espoused in Kenya's rich legal, institutional and policy frameworks, it seems that the desired results are not being yielded. To further understand the reason behind this, the social dominance theory was discussed at length in the first Chapter as a possible cause for the unsatisfactory *status quo*.

5.2.2. Chapter 2 findings

As has been mentioned, patriarchy was hypothesised to be the primary cause of the gender disparities present in Kenya's public sector. Chapter 2 discussed, at length, the development of patriarchy in Kenya. The conclusion to this Chapter pointed out that while gender disparities as a result of patriarchy were present in the pre-colonial era, they were exacerbated by colonialism and, even further, after the attainment of independence, when political power was vested in a few individuals, all of whom were men. Women in

Kenya have since been either completely excluded from access to public and political decision-making processes or granted limited access. This can be attributed to the patriarchal framing of women in society.

It was found in Chapter 2 that the interpretation of the provisions under the relevant frameworks through a patriarchal lens has greatly contributed to maintaining the unsatisfactory *status quo* when it comes to gender equality in Kenya's public sector.

5.2.3. Chapter 3 findings

Kenya has rich legal, institutional and policy frameworks on gender equality and equity. All frameworks have affirmative action enshrined within them. Under Chapter 3, a more detailed analysis of the relevant frameworks in Kenya revealed that the frameworks provide for gender quotas as the primary approach to ensuring gender equity in Kenya, particularly in the public sector. The types of quotas that feature the most are legislative quotas and reserved seats.

It was concluded in Chapter 3 that the failure to yield desirable results does not stem from the lack of an all-inclusive framework for the promotion of gender equality, rather, from the manifest tension between the promotion of substantive equality vis-à-vis formal equality. Given the historically systemic discrimination women in Kenya are subjected to, the ideal would be to promote equality of results as opposed to equality of opportunity. This tension serves to further hinder this process as it has been demonstrated that the majority interpret and apply the provisions under these frameworks in a manner that prioritises equality of opportunity as opposed to equality of results.

5.2.4. Chapter 4 findings

Owing to its international legitimacy, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) alongside the General Recommendations issued by the Committee on the Elimination of Discrimination against Women were used in Chapter 4 as the benchmark of international best practices in gender equality. Rwanda was the country under study in the Chapter with the aim of determining its level of compliance with these international best practices and whether or not there are any lessons Kenya could borrow.

It was found in this Chapter that Rwanda has complied with the international best practices in gender equality to a satisfactory standard. In conclusion, therefore, there are

some lessons Kenya could borrow from Rwanda on the subject. Firstly, Rwanda's various frameworks are more specific in the sense that they expressly advocate for the promotion of women in the public sector; for instance, as opposed to using gender-neutral language, its 30 percent rule specifically refers to women. In the same vein, Rwanda's frameworks are not only expansive but also highly specialised. Lastly, other elements that feature in Rwanda's frameworks but are absent in Kenya's frameworks are the requirements for gender-responsive budgeting and the inclusion of boys and men in the gender equality discourse, which have been highly emphasised.

5.3. Recommendations

In order to attain the ideal, that is the promotion of substantive equality, the following recommendations should be adopted:

- i. Presently, as was demonstrated in Chapter 3, the legal, institutional and policy frameworks on gender equality and equity in Kenya are primarily gender-neutral. As is the case with Rwanda's 30 percent rule, these ought to be gender-specific, addressing the promotion of women, in particular, in public and political decision-making processes. More specifically given the historical and systemic difficulties women face in this regard, the relevant frameworks ought to further entrench, as the primary measure, gender quotas in the form of reserved seats and legislative quotas tailored to accommodate women with regard to elective and appointive positions.
- ii. As has been ordered by the High Court and Supreme Court in numerous cases discussed in Chapter 2, Parliament ought to enact appropriate legislation for the actualisation of gender equality and equity in Kenya. In addition to enactment of specific legislation as is required by the Constitution, amendments ought to be made to Kenya's various frameworks. Borrowing from Rwanda, the frameworks ought to be expansive, taking into account the intersectional nature of discrimination and the cross-cutting issues affecting women. In the same vein, the provisions in the relevant legal instruments ought to be interpreted in such a manner that they require immediate as opposed to progressive realisation. Moreover, provision should be made for the enactment of more specialised policies, particularly in areas of girls' and women's education and economic

empowerment as well as the establishment of highly specialised institutions in the field of gender equality, as is the case in Rwanda.

- iii. It has been demonstrated in this paper that compensatory approaches to affirmative action play a role in increasing women's agency in the sense that they make them better-equipped to compete for public goods with their male counterparts. As such, compensatory approaches help to promote equality of opportunity which, although not the ideal, still ensures gender equality in society to some extent. Consequently, compensatory approaches should be adopted as supportive measures to the gender-specific quotas discussed above, as opposed to being given priority over the quotas as is the *status quo*.
- iv. Chapter 2 of this paper demonstrated at length how social and cultural perceptions contribute greatly to the subordination of women in the public sector in that, decision-making processes conducted through a patriarchal lens often result in detrimental outcomes for women. One of the international best practices discussed in Chapter 4 entails implementation of capacity building programmes and gender sensitisation so as to challenge patriarchal ways of thinking as well as social and cultural patterns of conduct. Consequently, this best practice ought to be expressly entrenched in Kenya's legal, institutional and policy frameworks as is the case in Rwanda.
- v. Borrowing from Rwanda, the various frameworks in Kenya ought to have express requirements for the inclusion of boys and men in advocacy for gender equality. The engagement of men in gender equality may include supporting women's initiatives, governmentally established men's groups and various campaigns that engage men in combating violence against women.
- vi. Lastly, the actualisation of gender mainstreaming and gender equality in general requires not only funding but also political will. Gender-responsive budgeting is an international best practise that ought to be expressly provided for in Kenya's appropriate laws and policies.

BIBLIOGRAPHY

1. Abbott P, Rucogoza M, 'Legal and policy framework for gender equality and the empowerment of women in Rwanda' Institute of Policy Analysis and Research – Rwanda, 2011, -<https://core.ac.uk/download/pdf/43540646.pdf>- on 10 December 2020.
2. Abouzeid R, 'How women are stepping up to remake Rwanda' National Geographic, 15 October 2019 - <https://www.nationalgeographic.com/culture/2019/10/how-women-are-remaking-rwanda-feature/>- on 17 February 2020.
3. Bahlieda R, 'Ladership' in Steinberg S (ed), *Counterpoints*, Peter Lang International Academic Publishers, Bern, 2015.
4. Bahlieda R, 'The legacy of patriarchy' in Steinberg S (ed), *Counterpoints*, Peter Lang International Academic Publishers, Bern, 2015.
5. Bahlieda R, 'The new patriarchy' in Steinberg S (ed), *Counterpoints*, Peter Lang International Academic Publishers, Bern, 2015.
6. Campbell R, Childs S, Lovenduski J, 'Women's equality guarantees and the Conservative Party' 77(1) *The Political Quarterly*, 2006.
7. Coffe H, Bolzendahl C, 'Gender gaps in political participation across Sub-Saharan African Nations' 102(2) *Social Indicators Research*, 2011.
8. Constitution of Kenya Review Commission, *Final draft*, 2005.
9. Crenshaw K, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' University of Chicago Legal Forum, 1989.
10. Debusscher P, Ansoms A, 'Gender equality policies in Rwanda: Public relations or real transformations?' 44(5) *Development and Change*, 2013.
11. Department of Justice, *National policy and action plan on human rights*, 2014.

12. Engels F, *The origin of the family, private property and the state*, Resistance Books, Chippendale, N.S.W., 2004.
13. Freeman M, *Lloyd's Introduction to Jurisprudence*, 9th ed, Sweet & Maxwell Ltd, London, 2014.
14. French M, *Beyond power: On women men and morals*, Summit Books, New York, 1985.
15. Friedenvall L, Dahlerup D, Skjeie H, 'The Nordic countries: An incremental debate on political representation in Italy' in Dahlerup D (ed) *Women, quotas and politics*, Cambridge University Press, Cambridge, 2007.
16. Gedin H, 'Formal or substantive equality? - Gender equality in European Community law' published, University of Lund, Lund, 2009.
17. Giraud I, Jenson J, 'Constitutionalising equal access: High hopes, dashed hopes?' in Klausen J, Maier C (eds) *Has liberalism failed women? Assuring equal representation in Europe and the United States*, Palgrave, New York, 2001.
18. Government of Kenya, *Kenya vision 2030*, 2007.
19. Green S, 'Competitive equality of opportunity: A defence' 100(1) *University of Chicago Press*, 1989.
20. Hicks D, 'Gender, discrimination and capability: Insights from Amartya Sen' 30(1) *Journal of Religious Ethics*, 2002.
21. Joseph L, 'Some ways of thinking about equality of opportunity' 33(3) *The Western Political Quarterly*, 1980.
22. Kaimenyi C, Kinya E, Chege S, 'An analysis of affirmative action: The two-thirds gender rule in Kenya' 3(6) *International Journal of Business Humanities and Technology*, 2013.
23. Kameri-Mbote P, 'Constitutions as pathways to gender equality in plural legal contexts' 5(1) *Oslo Law Review*, 2018.
24. Kilonzo E, Ikamari L, 'Impact of affirmative action on quality of service delivery in the public service sector of Kenya: A comparative case study on the Ministry of

- State in the Office of the President and Ministry of Higher Education’ 6(3) *Journal of Education and Practice*, 2015.
25. Kinyanjui S, Kameri-Mbote P, ‘The constitutional promise: Realising the right to gender equality and non-discrimination in Kenya’ 19 *East Africa Law Journal*, 2018.
 26. Kittilson C, *Challenging parties, changing parliaments: Women and elected office in contemporary Western Europe*, Ohio State University Press, Columbus, 2006.
 27. Krook M, Lovenduski J, Squires J, ‘Gender quotas and models of political citizenship’ 39(4) *British Journal of Political Science*, 2009.
 28. Lerner G, *The creation of patriarchy*, Oxford University Press, New York, 1986.
 29. Manani B, ‘Women, representation in elective office and the electoral process in Kenya under the 2010 Constitution: Which way for the two-thirds gender rule?’ 12(1) *Law Society of Kenya Journal*, 2016.
 30. Matthew D, ‘Rawlsian affirmative action: A reply to Robert Taylor’ 3(2) *Critical Philosophy of Race*, 2015.
 31. Meshelski K, ‘Procedural justice and affirmative action’ 19(2) *Ethical Theory and Moral Practice*, 2016.
 32. Ministry of Education, *Girls’ Education Policy*, 2008.
 33. Ministry of Finance and Economic Planning, *Rwanda vision 2020*, 2000.
 34. Ministry of Gender and Family Promotion, *National Gender Policy*, 2010.
 35. Mudavadi K, ‘Patriarchy and print media coverage in Kenya: An analysis of newspaper framing of women politicians in pre-and-post 2017 general election’ in Kioko C, Kagumire R, Matandela M (eds) *Challenging patriarchy: The role of patriarchy in the roll-back of democracy*, Heinrich Boll Stiftung, Nairobi, 2020.
 36. National Gender and Equality Commission, *Status of equality and inclusion in Kenya*, 2016.

37. Nanyar D, 'Discrimination and justice: Beyond affirmative action' 46(42) *Economic and Political Weekly*, 2011.
38. Njenga M, Karanja N, Prain g, Lee-Smith D, Pigeon M, 'Gender mainstreaming in organisational culture and agricultural research processes' 21(3) *Development in Practice*, 2011.
39. Nzavi M, Nthigah P, Iravo M, 'Effect of affirmative action on the employment of women in the National Government, case of Ministry of Public Service, Youth and Gender Affairs in Kenya' 5(3) *Strategic Journal of Business & Change Management*, 2018.
40. Ochieng W, 'Chimera of constitutionally entrenched gender quotas: The case of Kenya' 46(53) *Zambia Law Journal*, 2015.
41. Ochwada H, 'Politics and gender relations in Kenya: A historical perspective' 22 (1) *Africa Development*, 1997.
42. Okoth G, 'Patriarchy and democracy in Africa: Reflections on the underlying influence of Islamic and indigenous African traditions on women participation in Kenyan politics' in Kioko C, Kagumire R, Matandela M (eds) *Challenging patriarchy: The role of patriarchy in the roll-back of democracy*, Heinrich Boll Stiftung, Nairobi, 2020.
43. Okoth J, 'Kenya's parliament continues to stall on the two-thirds gender rule' The Conversation, 10 July 2017 -<<https://theconversation.com/kenyas-parliament-continues-to-stall-on-the-two-thirds-gender-rule-79221>>- on 18 February 2020.
44. Organisation for Women in Science for the Developing World, *Report of the Gender Equality and the Knowledge Society (GE-KS) in Rwanda*, 2016.
45. Owono N, 'Gender disparities in Kenya' 4(2) *Journal of Research in Gender Studies*, 2014.
46. Pierik B, 'A history of patriarchy?' Published MA thesis for Politics, Philosophy and Economics, Leiden University, Leiden.
47. Rwanda Civil Society Platform, *Final Report: Rwandan parliamentary elections 2013*.

48. Sheppard C, 'Systemic discrimination and gender inequality: A life cycle approach to girls' and women's rights' in Mendes E, Srighanthan S (eds) *Confronting discrimination and inequality in China*, University of Ottawa Press, Ottawa, 2009.
49. Sidanius J, Cotterill S, Sheehy-Skeffington J, Kteily N, Carvacho H, 'Social dominance theory: Explorations in the psychology of oppression' in Sibley C (ed), *The Cambridge Handbook of the Psychology of Prejudice*, Cambridge University Press, Cambridge, 2016.
50. Sidanius J, Pratto F, Laar C, Levin S, 'Social dominance theory: Its agenda and method' 25(6) *International Society of Political Psychology*, 2004, 846.
51. Skard T, *Women of power: Half a century of female presidents and prime ministers worldwide*, 1st ed, Bristol University Press, Bristol, 2014.
52. State Department for Gender, *National policy on gender and development*, 2019.
53. Taylor R, 'Rawlsian affirmative action' 119(3) *University of Chicago Press*, 2009.
54. The Institute of Internal Auditors, *Supplemental Guidance: Public sector definition*, 2011.
55. United Nations, *United Nations agenda 2030*, 2015.
56. United Nations Development Programme, *Gender Equality Strategy: UNDP Rwanda (2019 – 2022)*, 2018.
57. Valiente C, 'The women's movement, gender equality agencies and central-state debates on political representation in Spain' in Lovenduski J (ed) *State feminism and political representation*, Cambridge University Press, Cambridge, 2006.
58. Wallace C, Haerpfer C, Abbott P, 'Women in Rwandan politics and society' 38(4) *International Journal of Sociology*, 2008/2009.
59. Wilkinson R, Pickett K, *The spirit level: Why greater equality makes societies stronger*, 1st ed, Bloomsbury Press, New York, 2010.
60. -<<https://study.com/academy/lesson/social-dominance-theory-definition-examples.html>>- on 18 March 2020.

61. -<<https://www.youtube.com/watch?v=B1PV1krkUi4>>- on 22 August 2020.
62. -<https://www.knchr.org/About-Us/Establishment>- on 10 October 2020.
63. -<https://www.ngeckkenya.org/about/15/mandate>- on 10 October 2020.
64. -<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx>- on 10 October 2020.
65. -<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/CEDAWIndex.aspx>- on 3 December 2020.
66. -<https://www.cnf.gov.rw/index.php?id=10>- on 12 December 2020.
67. -<https://www.migeprof.gov.rw/gender-promotion>- on 12 December 2020.
68. -<https://gmo.gov.rw/index.php?id=560&L=2>- on 13 December 2020.
69. -<https://www.migeprof.gov.rw/gender-promotion>- on 13 December 2020.