

UNIVERSITY OF NAIROBI
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STUDIES

IMPLEMENTATION OF INTERNATIONAL TREATIES: A FOCUS ON THE IMPACT
OF CEDAW IN KENYA

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DECLARATION

I, LILLIAN MATAGARO hereby declare that this research project is my original work and has not been presented for a degree in any other University.

Signed.....Date.....

LILLIAN MATAGARO

This project has been submitted for examination with my approval as University Supervisor;

Signed.....Date.....

PROFESSOR MARIA NZOMO

DEDICATION

I would like to thank my precious husband Gilbert Nyandigisi for his patience and continued support as I undertook this project. My precious babies you can now have me to yourselves!

To Elizabeth Muhia, for encouraging and pushing me to complete the study.

ACNOWLEDGEMENT

I am deeply grateful to my supervisor, Professor Maria Nzomo, for her useful insights and expert opinion regarding the status of women in the country and the obstacles and challenges faced by women activists in their quest for gender equality. Her invaluable contribution transformed a muddled script to a coherent methodical inquiry.

I am equally indebted to Patricia Nyaundi, CEO, Kenya National Commission on Human Rights, for her inestimable contribution to this research.

ABSTRACT

Women's rights have continually been violated in Kenya over the years. Kenya acceded to CEDAW in 1984 in order to ensure gender equity and equality. In an effort to implement the Convention, Kenya has undertaken several strategies from legislative, policy to programmatic. The process has been slow noting that CEDAW was acceded to 26 years ago.

This study sought to establish how effective CEDAW has been in enhancing the rights of women in Kenya. It sought to determine the legal instruments, policies and other measures that have been put in place to eliminate discrimination against women and to ensure gender equality and whether these were effective in achieving their intended results.

An examination of the effects of patriarchy on the rights of women was also undertaken. Kenya just like most African states is a deeply patriarchal society. Women's rights continue to be subjugated to date on a daily basis owing to this phenomenon. The political and public processes (law making and policy implementation) as well as the socioeconomic processes are compromised by patriarchal influences.

This study confirmed that women continue to be discriminated against regardless of their educational, economic or professional status. Women activists have over the years tried to agitate for the recognition of women's rights and despite facing a lot of opposition from the political establishment, piecemeal legislation has continued to be passed ultimately culminating in the passing of the 2013 pro-women Constitution.

The study also found that the courts have in interpreting the law been very restrictive in their approach thus denying women their rights. However a few judicial officers have used their discretion in reaching magnanimous decisions by referring to CEDAW.

Given that patriarchy or male dominance is a deeply rooted dynamic in Kenyan society, the study found that it is not just enough to enact legislation or formulate policy. This must go hand in hand with the creation of awareness both at the time of creating policy, enacting the law and after the law has been passed as a way creating knowledge and ensuring acceptance of the law. Beneficiaries of the law (women) as well as the enforcers of the law (judiciary, Police, immigration officers and the executive in general) as well as the citizens of Kenya need to be aware of their rights and respect these rights to ensure a cohesive and fair society. Affirmative action as provided in the Constitution and other laws needs to be implemented to ensure a critical mass of women is present in decision-making to push women's agenda forward. Further women placed in such capacities should use their platforms to protect the gains achieved but even more important to devise mechanisms that will effectively ensure the gender equality question is addressed.

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ABBREVIATIONS

UN	United Nations
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
COK	Constitution of Kenya
CSW	Commission on the Status of Women
DEDAW	Declaration on the Elimination of All forms of Discrimination against Women
DEVAW	Declaration on the Elimination of All forms of Violence against Women
EFA	Education For All
FGM	Female Genital Mutilation
FKE	Federation of Kenya Employers
ICCPR	Convention on Civil and Political rights
ICESR	Convention on Economic, Social and Cultural Rights
ILO	International Labour Organization
KEPSA	Kenya Private Sector Alliance
KESSP	Kenya Education Support Program
KEWOPA	Kenya Women Parliamentary Association
MOE	Ministry of Education
MOH	Ministry of Health
NAAIA	National Accelerated Agriculture Inputs Access
NHSSP	National Health Sector Strategic Plan
TSC	Teachers Service Commission
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties

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CHAPTER 1:

1.0 Introduction

International law is a unique type of law as it extends its jurisdiction beyond national borders to govern the conduct of sovereign states and non-state actors for instance international nongovernmental organizations, multinationals as well as individuals. Over the years, different human rights instruments have been adopted with the aim of imposing obligations on states parties for the protection of human rights and the minimum standards to be complied with in the enforcement of such protection.¹

CEDAW is one such instrument which provides minimum standards for the protection of women's rights. However the adoption of international instruments by states is of minimum value if it is not accompanied by enforcement or effective implementation. The enforcement of treaties is the duty of states once ratification or accession is undertaken.² Governments are therefore obliged to ensure that such instruments are fully implemented.

Background:

1.1 Historical development of women's rights worldwide

The United Nations is the bedrock for basic human rights. The Preamble to the Charter states in candid terms that the objective of the Treaty is to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women”. Article 1 of the Charter asserts this fact by articulating that one of the purposes of the U.N is the achievement of cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction on various grounds including sex.

Several Treaties and Declarations championing human rights have been promulgated under the

¹ Evans M. D., (ed) *International Law*, Oxford, Oxford University Press, 2010

² Shaw M. N, *International Law*, Cambridge, Grotious Publications Ltd Cambridge, 2008

auspices of the U.N. The Universal Declaration of Human Rights (UDHR)³, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic and Social Rights (ICESR) most often referred to as the Bill of Rights underscore the need for the protection, respect and fulfillment of human rights inclusive of the need to recognize women's rights as well. Other international human rights instruments⁴ and regional instruments⁵ also buttress the protection of the human rights of women.

In order to jumpstart the process of actual realization of the protection of women's rights, the United Nations formed a Commission to analyze the political status of women. This happened as a result of a summit⁶ convened by the United Nations where women participants insisted that the principle of equal rights of men and women be enshrined in the United Nations Charter.⁷ Initially this Commission was established as a sub-unit of the Human Rights Commission. As a result of further agitation by women⁸ in this Commission, the Commission on the Status of Women (CSW) was established in 1947 which was of equal status to the Human Rights Commission within the United Nations. The mandate of the CSW was to prepare recommendations and reports for the Economic and Social Council with a view to advancing women's rights in the field of politics, business, social life and education.⁹ However, a need was felt to deal with discrimination against women in a comprehensive manner. Thus the General Assembly on 5th December 1963 adopted Resolution 1921 (XVIII)¹⁰ in which it mandated CSW to prepare a draft

³ Adopted by the United Nations in 1948

⁴ For instance the Equal Remuneration Convention, 1951; Minimum Age for Marriage and Registration of Marriages, 1962; Convention on the Nationality of Married Women, 1957; Maternity Protection Convention, 1952

⁵ The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, 2003 (Maputo Protocol), Council of Europe on Preventing and Combating Violence Against Women and Domestic Violence

⁶ Held in San Francisco

⁷ Based on a motion by Bertha Lutz, the Brazilian delegate to the United Nations

⁸ 7 members from Denmark, Dominican Republic, Lebanon, France, Poland, India, China

⁹ ECOSOC Resolution 48 (IV) of March 29, 1947

¹⁰ www.un.org/documents/resga.htm last updated 10/2/2013

declaration that would comprehensively articulate gender equity and equality. The Declaration on the Elimination of All Forms of Discrimination Against Women (DEDAW) was then adopted by the General Assembly on 7th November 1967. However despite the promulgation of DEDAW, women's rights continued to be violated all over the world. The U.N therefore undertook to prepare a binding treaty to give normative force to the provisions of DEDAW.

In 1979, the Convention Against All Forms Discrimination Against Women (CEDAW) was adopted. This was a monumental gain for women's rights as it created enforceable obligations to ratifying or acceding states. The U.N continues to exercise its mandate to protect human rights by convening international conferences and undertaking research to discuss topical and emerging issues. For instance in 1993 at the World Conference on Human Rights in Vienna, the Vienna Declaration and Programme for Action was adopted which declared women's rights as human rights.¹¹ Similarly in Nairobi and Beijing several milestones geared towards improving the plight of the woman were agreed upon. For instance in the former, the Nairobi Forward Looking Strategies For the Advancement of Women¹² were adopted and in Beijing, the Declaration and the Platform for Action was agreed upon which deals with strategies for removing hurdles for women in 12¹³ crucial areas in the human rights fields with specific reference to CEDAW.

1.2 Women's Rights In Kenya

Kenya is a parliamentary system of democracy that is modeled on the British Westminster system of government. There is strict separation of powers between the judiciary, executive and legislature. Kenya has a common law legal system and the principal sources of law are the

¹¹ Article 18 which states "the human rights of women and the girl child are an inalienable and invisible part of universal human rights."

¹² The Strategies had a time limit of 15 years and dictated the need for states to undertake Constitutional and legal steps to eliminate all forms discrimination against women, tailor national strategies to facilitate the participation of women, to promote peace and development as well as other recommendations on gender empowerment, health, education and employment.

¹³ The 12 crucial areas include: women and poverty; education and training of women; women and health; violence against women; women and armed conflict, women and the economy; women in power and decision making; institutional mechanisms for the advancement of women, women and the media, women and the environment and the girl child.

Constitution, statutes, customary law, common law¹⁴ and international treaties.¹⁵ Before 27th August, 2010, international treaties ratified by Kenya could not be directly enforced in the domestic courts unless they had been incorporated into domestic law by legislation. However, after the passage of a new Constitution, international treaties now have the force of law after ratification by the state.

1.2.1 Pre colonial Kenya:

In order to appreciate women's status in Kenya, one needs to understand the history of Kenya and the journey women have had to make from pre-colonial to colonial to postcolonial times. Women's status in Kenya as is generally in the rest of Africa subordinate to that of men. This status is a consequence of patriarchy, poverty and autocracy and this dates to pre-colonial times. Before the British colonized Kenya in 1890, Kenya had its own legal system based on the different customs and cultural practices. Communities were governed by councils of elders, consisting mainly of elderly men in the community. These elders performed both civic and spiritual duties but in essence the community determined the powers exercisable by the elders. These powers included keeping peace, settling disputes (including marriage, divorce, the marital status of women, the rights of children, inheritance, election of customary heirs and land), performance of rituals, protection of gods, shrines and guarding against drought, famine and other disasters.¹⁶ The land tenure system was communal and land rights were transferable from one generation to the next. Although the notion of land ownership as exclusive ownership did not exist there was a difference between primary and secondary interests in land.¹⁷ Women generally only had secondary rights or interests in land; these were often of uncertain duration, subject to change and dependent on the maintenance of good relations with the clan, family or person through whom women obtained their access to land.¹⁸ While the control of the land was

¹⁴ The Judicature Act Cap 8, section 3

¹⁵ Article 2(6), Constitution of Kenya, 2010

¹⁶ www2.unhabitat.org/publication/hs66702e/rr_chp2.pdf last updated 10/2/2011

¹⁷ *ibid*

¹⁸ *ibid*

vested in men, women controlled the households. The role of women and girls was to farm the family land, harvest, care for the children, maintain the homestead, and tend to their husbands. Interestingly, women were economically empowered as they sold their produce in the markets.

1.2.2 Colonial period:

During the colonial period, Kenya continued to apply customary law but subject to the repugnancy clause. If customary law was repugnant to statute law it was void and therefore inapplicable. Customary land tenure was treated as inferior to statutory and common law tenure as it was seen as a form of tenure that lacked security and hindered investment. The British alienated all the fertile land in Kenya for their use. British structures and policies focused on making a clear distinction between public and private life, guided by an ideology that perceived men as public actors and women as private performers.¹⁹ The new role of men as public actors meant a direct relationship to capital hence control of resources. Women were increasingly branded as private performers; they lost control over their produce and reproductive labours and were no longer “owners”.²⁰ The new land redistribution policies directly affected women as they lost access to and control of the land and hence they became more economically dependent on the men.²¹ This led to an intensification of the existing domestic patriarchy which was reinforced by the newly imposed colonial social institutions.

The colonial policy on education further subjugated the position of the woman. As was the case in Britain at the time, education opportunities were disproportionately provided to boys. Missionary education for women focused primarily on how to be good homemakers and wives. This lack of opportunities combined with a political system based on educational credentials

¹⁹ Tamale S, *When Hens Begin to Crow*, Kampala, WestView Press, 1999, p 9

²⁰ www2.unhabitat.org/publication/hs66702e/rr_chp2.pdf last updated 10/2/2013

²¹ Mbote P.K, Women, Land Rights and the Environment, *The Kenyan Experience Development*, Vol 49 Number 3, 2006

played a big role in reproducing gender inequalities.²² Women thus played only marginal roles in decision-making processes and in the designation of political priorities at the time.²³

1.2.3 After independence:

After Kenya gained her independence in 1963, a patriarchal order emerged, where the male dominated the female. Colonialism had instilled a feeling of superiority of men over the women. This order suppressed women by restricting the full development of their potential, preventing them from exercising their rights and usurping their rights to self-determination. The few “lucky” girls who managed to go to school in this period were those whose parents were involved in mission work and had interacted with missionaries during the colonial period. Many girls were not sent to school and were married off as early as 12 years old. As a result many local communities²⁴ are still struggling with the practice of child marriages.

In the postcolonial era, Kenyan women have made few gains in their struggles for human rights as their rights are continually violated rather than protected. Many factors are attributed to this. Nzomo lists them as “autocratic African governments, characterized interalia by manipulative tendencies, intolerance, harassment and muzzling of those who do not support the status quo, on the other hand, underdeveloped economies built upon patriarchal societies with high illiteracy rates for women, which possess extremely low levels of gender, civic and legal rights awareness.”²⁵ The Women In Law and Development Meeting in Africa (WILDAF) held in March, 1993 in Nairobi reaffirms this by stating that the major factors that contribute to the violation of human rights in Africa are; the lack of legal, gender and civic rights awareness, retrogressive socio-cultural attitudes and values, and inadequate discriminatory frameworks.²⁶

²² Op citation

²³ Tamale S, *When Hens Begin to Crow*, Kampala, WestView Press, 1999, p 9

²⁴ For example the Maasai, Samburu, Keiyo, Marakwet

²⁵ Nzomo M, *The Status of Women’s Human Rights in Kenya and Strategies to Overcome Inequalities*, Issue, A *Journal Of Opinion*, Vol 22, No 2, 1994 p 17-20

²⁶ *ibid*

During the ten years of the Women's Decade²⁷ the Kenyan government adopted a Women in Development Policy (WID) policy position and created and /or promoted national machineries to promote and coordinate programmes for women.²⁸ Despite the proliferation of women's groups and policies geared to enhance the status of women, women rights continued to be infringed owing to interference and the lack of serious commitment by government. While the women's movement in Kenya remained weak throughout the decade and government action was largely unresponsive to women's issues, the end of the women's decade conference saw the emergence of a new awareness and self-assertiveness among Kenyan women, both individually and in groups.²⁹ Over the years specific gains in relation to women's rights have been made owing to various factors including the agitation of women's rights activists, academia, pro women's rights parliamentarians and recommendations from the CEDAW Committee. The situation seems to have improved somewhat after the general elections in 2013 with an increase in the number of women elected representatives and appointments of women to top public office in different sectors.

1.3 The United Nations Convention Against All Forms Of Discrimination Against Women (CEDAW)

CEDAW is one of the 5 treaties³⁰ that implement the United Nations Universal Declaration of Human Rights (UNDHR). UNDHR from the outset enshrines "the equal rights of men and women" and addresses both equality and equity issues. All these human rights instruments provide a framework for states within the U.N system to promote, respect and fulfill human rights. The spirit behind the entire corpus of human rights treaties is that human rights are universal, inalienable and indivisible. Consequently, the universality of human rights means that

²⁷ 1975 -1985

²⁸ Nzomo M, The Impact of the Women's Decade on Policies , Programs and Empowerment of Women in Kenya, Issues, *A Journal of Opinion*, Vol XVII/2, 1989 p 14

²⁹ *ibid*

³⁰ The others are the Convention on Civil and Political Rights, Convention on Economic, Social and Political Rights, Convention on the Elimination of Racial Discrimination and Convention Against Torture

human rights apply to every single person by virtue of their humanity.

CEDAW was adopted by the United Nations General Assembly on 18th December, 1979 and came into force on 3rd September, 1981.³¹ It is the most comprehensive international agreement on the basic human rights of women. CEDAW emerged from the First World Conference on Women, held in Mexico in 1975³² owing to the fact that existing human rights instruments failed to adequately address the specific human rights violations and challenges that women faced. The Convention therefore amalgamates provisions from other human rights instruments concerning discrimination against women and adds further provisions to create an all embracing document of redress for combating discrimination against women. It is for this reason that it is referred to as a "Bill of Rights" for women as it in essence prescribes an international standard for protecting and promoting women's human rights. 187 countries³³ have ratified this treaty, some subject to certain declarations, reservations and objections. Any state that ratifies the treaty is required to enshrine gender equality in its national laws, repeal all discriminatory provisions in its laws and enact appropriate provisions to guard against discrimination practiced against women by individuals and organizations.

In states where the Convention has been ratified and subsequently implemented it has served as a useful tool in opposing the effects of discrimination, which include violence against women, poverty, discrimination in employment, lack of legal protections and lack of property rights among others.³⁴ The treaty has also played an important role in the drafting, reform, and judicial interpretation of gender equality provisions in domestic statutes of many countries.³⁵ Brazil, Colombia and South Africa provide good examples of how CEDAW has been used at the drafting stage; Costa Rica, France and Argentina offer useful illustrations of how CEDAW has

³¹ UN Treaty Collection. Ch IV 8, as at 27/6/2013.

³² *ibid*

³³ UN Treaty Collection. Ch IV 8 status as at 27/6/2013.

³⁴ Marin R. et al, *Constitutional Domestic Application of International Gender Norms*, Knop K, (ed) Gender and Human Rights, Oxford, Oxford University Press, 2004

³⁵ *ibid*

contributed to constitutional reform efforts. CEDAW has also influenced constitutional jurisprudence globally by providing great opportunities to expand the principles of equality and nondiscrimination. However despite such achievements a lot still needs to be done in various jurisdictions to uphold the status of the woman.

Kenya acceded to CEDAW in 9th March 1984 without any reservations. By virtue of the 2010 Constitution, CEDAW was automatically domesticated. However, prior to 2010, legislative action in terms of implementing CEDAW had been piecemeal and adhoc. There was marginal law reform with respect to gender equity and equality. Various amendments have been proposed to several legislation for instance the Marriage Act,³⁶ Law of Succession Act and the Penal Code to conform to CEDAW but these have not been made to date. New legislation has also been enacted e.g. Employment Act³⁷, Sexual Offences Act, 2006,³⁸ and the Children's Act³⁹ to mention a few. However, in spite of these legislative efforts, residual forms of discrimination persist and the women protection regime in Kenya remains under inclusive, underutilized and inadequate. The problem of inadequate resources also exists and frustrates the implementation process. Expansion and by extension effectiveness of the various institutions and measures put in place is also greatly affected. The patriarchal socialization of Kenya on gender issues is a factor that disadvantages women and renders them unequal partners in decision-making at all levels of life. Entrenched patriarchal attitudes discourage women from reporting cases of violation and limited resources hinder their capacity to meaningfully assert their role in public life. Lack of awareness of their rights also hinders women from participating in political, social and economic engagements.

³⁶ The Marriage Bill and Matrimonial Property Bills are in Parliament pending debate

³⁷ Section 5 of the Employment Act, Act No. 11 of 2007, prohibits discrimination in employment based on sex and pregnancy amongst other factors, the same section provides for affirmative action in certain situations, section 6 prohibits sexual harassment in employment, section 29 extends maternity leave to three months and provides for paternity leave

³⁸ Act No. 3 of 2006. The main aim of this Act is to consolidate all sexual offences, create new offences that were not in the Penal Code e.g. gang rape, sexual exploitation, sexual harassment, deliberate transmission of HIV/AIDS etc, and to expressly provide for the minimum sentences for sexual offences

³⁹ This Act put together provisions of various laws that affected children, and also gives effect to the provisions of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child

1.4 Statement of the research problem

Despite international and national legislative efforts, government and civil society nonlegislative action, women in Kenya continue to have a subordinate social and economic status and are marginal in leadership positions in the country and in international organizations. As a result women have little influence over allocation of resources and policies despite the fact that these decisions often disproportionately affect them. In addition, women continue to be violated in the public and private spheres for instance they are subjected to inhumane cultural practices such as female genital mutilation, forced marriages and generally other abuses such as gender based violence, rape, sexual slavery ,forced prostitution among others⁴⁰. Research has established that two thirds of world's 771 million illiterate adults are women, 70% of the world's 1.3 billion poorest people are female and millions of girls and women are denied equal access to education, health, property and legal action.⁴¹ Statistics in Kenya mirror these findings too.⁴² This study therefore seeks to establish why despite Kenya's ratification of CEDAW, women's rights in Kenya continue to be violated.

This research will analyze the reasons as to why states ratify human rights treaties yet continue to be egregious violators of what they seek to protect; it also examines the effects of these treaties on the states vis a viz sovereignty. The provisions of CEDAW shall be analyzed with a view to establishing the obligations of state parties in addressing the plight of the woman. The implementation process will then be examined - the legislative efforts and policy decisions by the Kenyan government and reference to CEDAW by the Kenyan courts to establish the extent to which the Convention has been implemented. Patriarchal influences on the enjoyment of women's rights shall also be explored to establish the impact of the Treaty in Kenya.

1.5 Objectives of the research

The general objective of the research is:

⁴⁰ www.un.org/womenwatch/daw/ last updated 10/12/2012

⁴¹ ibid

⁴² Institute of Economic Affairs- Kenya, *Profile of Women's Socio-Economic Status in Kenya*, 2008 pg 18 - 38

- a) To investigate the impact of CEDAW in protecting the rights of women in Kenya.

The specific objectives of the research are:

- a) To examine how underlying factors specifically patriarchy affect the rights of women in Kenya
- b) To critically examine Kenyan legislation that seeks to promote equality, equity and outlaw discrimination based on sex
- c) To establish policy implementation efforts by the government and concrete action undertaken to effect the Convention.
- d) To establish the use and application of the Treaty by courts when making decisions
- e) To suggest effective strategies to ensure proper implementation of the Convention

1.6 Research questions

Some of the questions that will guide this study are-

- a) What drives states to be parties to international instruments?
- b) Are international instruments binding or enforceable against states parties?
- c) What are the obligations of states parties under CEDAW?
- d) Are CEDAW provisions being respected and implemented to the letter? Are they having maximum impacts intended?
- e) Does patriarchy play a role in the gender equality question?
- f) What role does the governance culture play on the implementation of CEDAW?
- g) What policy and legislative measures has Kenya taken to implement the Treaty?
- h) Have there been any significant changes in women sectors or programmes?
- i) Are these changes attributed to CEDAW?

- j) What challenges if any has the Government faced in implementing CEDAW provisions?

1.7 Hypotheses

- a) Patriarchy has contributed to the subjugation of women in Kenya and has been a barrier to the implementation of CEDAW
- b) The governance culture has resulted in the effective implementation of CEDAW in Kenya
- c) The implementation of CEDAW is positively correlated with the existence of related laws and policies

1.8 Justification

In Africa as indeed in all parts of the world, women are the pillar on which the fabric of society is built. Both the public and private spheres are made possible by women, although in the former, women's marginalization is regrettable. Women form half of the earth's population and their input to various sectors e.g. the economy, health, education, politics etc cannot be gainsaid. This research will therefore benefit this significant section of the Kenyan population and by extension the country as a whole.

The expected end product of this study is to illustrate how the Convention has impacted women's rights in Kenya. Findings therefore will provide government with necessary information on how to accelerate the process of enhancing women's rights and create awareness to the general public as to the issue of women's rights generally.

The research will also provide input for a broader understanding of the opportunities for global governance.

1.9 Literature Review

1.9.1 Introduction

Numerous studies have been undertaken on the subject of human rights treaties since the adoption of the UNDHR. In the last three decades, research has been done on the impact of these

treaties on a global level, regional level as well as the domestic level possibly due to the increased number of human rights treaties and the corresponding adoption of them by state parties.⁴³ Similarly, a lot of studies have been undertaken regarding the influence of international instruments particularly CEDAW on women's rights.⁴⁴

Most of these studies identify factors that are conducive to treaty ratification and the impact of ratification, and most conclude that that ratification has an impact in the presence of other factors on the implementation of treaties.

The Kenyan government ratified CEDAW in 1984 but there has been limited research that has been undertaken in relation to its specific impact on the status of Kenyan women. Literature done on women's rights in Kenya tends to be focused on women's rights generally⁴⁵, or with regards to a certain sector for instance land, politics, education⁴⁶ etc and again the studies are not

⁴³Marin et al, *Constitutional Domestic Application of International Gender Norms*, Knop K,(ed), Gender and Human Rights, Oxford, Oxford University Press; Barasa N. Treaty Reporting Mechanism under the African Human Rights Charter, LLM Thesis, University of Nairobi, 2009 , Lifongo M, Theory of Enforcement of International Human Rights Law, unpublished thesis, Faculty of Law, Lund University, 2001

⁴⁴Cook J.R, *Human Rights of Women: National and International Perspectives*, Philadelphia, University of Pennsylvania Press, 1994 pp 228-229; Byrnes A. et al, *The Impact of the CEDAW Convention: Paths to Equality*, A World Development Report 2012; Wolfgang et al, *Human Rights of Women, International Instruments and Experiences*, Zed Books 2002, Bamforth N. (ed) Sex Rights, The Oxford Amnesty Lectures (ed), Oxford, Oxford University Press, 2005; Cook J. R, Reservations to the CEDAW, *Virginia Journal of International Law*, Vol 30, No. 3, 1990, p 643 – 716

⁴⁵Nzomo M, The Status of Women's Human Rights in Kenya And Strategies To Overcome Inequities, *A Journal of Opinion*, Vol 22, No. 2, 1994 p 17-20; Mbote P.K *Recent Development Women's Rights in Kenya, Law and the Status of Women in Kenya*, Macharia J. (ed), Women Laws, Customs and Practises in East Africa: Laying the Foundation, 1996; Muthangani M, Recent developments in Kenya : Womens Rights in Kenya: A Review of Government Policy, 8 *Harvard Human Rights Journal* 179, 1995 ; Gutto S, *The Status of Women on Kenya: A Study of Paternalism, Inequality and Underprivilege*, (Paper presented in a Conference on Assembling and Collecting Data on the Participation of Women in Kenya Society, 11-15th August; Srujana K., *Status of Women in Kenya: A Sociological Study*, Delhi, Kaluja Publications, 1996

⁴⁶ Mbote P.K, Women, Land Rights and the Environment: The Kenyan Experience Development, *Palgrave Macmillan Journals*, Vol 49, No. 3, 2006; Chege F et al, Girls and Women's Education in Kenya, Gender Perspectives and Trends, 2006 in www.creawkenya.org/creaw-publicationss/the-status-of-women-and; Nzomo M, The Impact of the Women's Decade on Policies Programmes and Empowerment of Women in Kenya, *ISSUE*, Vol

specifically focused on CEDAW. This study therefore complements existing studies on the status of Kenyan women and proceeds on the assumption that despite findings based on previous studies as to why states ratify treaties and their impact at the domestic level, a closer examination is needed with regards to a specific treaty viz a viz the situation on the ground, in this case CEDAW in relation to Kenyan women.

In this thesis, “impact” of a treaty basically refers to any influence that the Convention may have in the realization of the norms that it espouses in Kenya. This influence may have occurred as a result of the work of international mechanisms for norm enforcement such as reporting or because treaty norms have been internalized within the Kenya legal and social system.

The impact of a treaty can be measured in two ways, either through its acceptance by a state or by its implementation within the confines of a state.⁴⁷ The first measure is easy to establish. State parties may ratify or accede to an international instrument. The United Nations Secretary General is the depository of all instruments of ratification or accession and an examination of its records can easily ascertain this measure. The second gauge however is not as straightforward. This is because different jurisdictions have different legal systems and women’s legal status within them differs greatly owing to other factors other than laws. At a glance it can be said that CEDAW has had a significant impact on various states as it has led to the enactment of gender sensitive legislation, the repeal of discriminatory laws, the formulation of pro-women policies and implementation of programmes that enhance the status of women in the political, social and economic sectors. It is however risky to make a general assumption such as this as the different states of this world just like individual human beings differ greatly. Religious, economic, social and political differences exist and to make general postulations over them may result in propagating the very inequities that these international instruments seek to address.

XVII/2, 1989, Maria Nzomo, Beyond The Women’s Decade: Women’s Political Participation in Kenya, *WAJIBU*, Vol. 7 No. 4, 1992

⁴⁷ Brownlie I, *Principles of Public International Law*, Oxford, Oxford University Press, 2003

A calculated study on the second measure which is the nexus of this study requires three aspects to be tackled:

- The incorporation of the Convention into domestic law by the legislature. Here the study shall look at laws that have been enacted or reviewed after the ratification of the Treaty and whether this is directly attributable to CEDAW.
- The influence of the Convention in the formulation of policies, mechanisms and programs within the country shall also be looked at.
- The use of the Convention by local courts or tribunals shall be scrutinized. Here the study will examine judicial decisions that invoke the Convention in reaching a binding decision.
- Most important underlying factors such as patriarchy and governance culture that may affect the efficacious implementation of the Treaty shall also be examined.

An analysis of what motivates states to become parties to Conventions as well as their legitimacy at domestic level is useful in setting the pace for the study.

1.10 The motivation of states when becoming parties to Conventions

When a state ratifies an international treaty or Convention, it assumes a legal obligation to implement the rights contained in that treaty. This is in accordance with article 26 of the Vienna Convention on the Law of Treaties (VCLT)⁴⁸ which states that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁴⁹ It is therefore an intriguing phenomena as to why a state may choose to restrict its independence or autonomy by signing, in particular a human rights Convention as opposed to say a mutually beneficial commercial agreement. For many states the decision to accept human rights obligations is attributable to

⁴⁸ Adopted by the United Nations on May 23rd 1969

⁴⁹ The principle of *pacta sunt servanda* is embodied in article 26 and it endorses the view that public commitments made by a nation should be honoured

many factors. There are different theories of international relations that explain state motivation to enter into treaties and they include rationalism, constructivism, liberalism and institutionalism.

Rationalism is rooted in the assumption that states follow consistent well-ordered preferences to engage in a cost benefit analysis of their actions⁵⁰. When applied to treaty ratification, rationalism suggests that a state will ratify only when ratification yields material benefits to it (economically, politically, diplomatically or otherwise); or when a more powerful state or group of states coerce it to do so for example, either ‘by escalation of the benefits of conformity or the costs of nonconformity through material rewards and punishments⁵¹ or through economic sanctions or military force. In sum, most commentators agree that rationalism advances the view that a state commits itself to international legal obligations by ratifying a treaty only if there is a clear objective reward or self-serving outcome⁵². At the same time as Oberdoster opines ‘[ultimately], rationalism predicts that a powerful state will ratify a treaty that promotes its interests and a weaker state will ratify it, if pressured by a greater power⁵³. The assumption here is that a state is either democratic or responsive to its citizenry and would consider the preferences of its citizens hence choose to ratify or not ratify a treaty in accordance with those preferences. Rationalism therefore shares the cost benefit approach to treaty ratification with realism.

Traditional realism arguments also posit that states will only act in their own interest, and that they will only ratify agreements that directly serve that interest; however that interest may be defined.

⁵⁰ Keohane R.O, “*Realism, Neorealism and the Study of World Politics*”, Keohane R.O (ed), Neorealism and It’s Critic’s, Columbia, Columbia University Press 1986 1, 7-8

⁵¹ Goodman R et al, “How to Influence States: Socialization and International Human Rights Law 54 *Duke Law Journal* 1 621, 2004,p 633

⁵² Chayes A et al, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard, Harvard University Press, 1995

⁵³ Oberdoster U, “Why Ratify? Lessons from Treaty Ratification Campaigns , 61 *Vanderbilt Law Review* 681, (2008),

In contrast to the advocates of rationalist-realist theories constructivists agree that a state may also ratify a treaty if it has normative reasons to do so⁵⁴. This theory has been much invoked in relation to the ratification of human rights treaties. In this context, it has been argued by some observers that it is perfectly possible for a state to ratify such treaties if it believes that it is normatively right to do so, even if there is no direct material benefit to be gained from protecting human rights domestically or in some cases, even in the absence of any serious intention to implement the norms⁵⁵. Crucially constructivism suggests that state power and interests – the focus of realism and rationalism “are not the only or even central influences on states, but rather that normative arguments and considerations can, and often do, shape state behavior⁵⁶. As Risse and Sikkink point out, “a state may ratify a treaty in part because of its commitment to the norms and ideas embodied in the treaty.”⁵⁷

Somewhat related to the constructivist argument is the theory that states ratify treaties to express a political position. In this sense ratification serves as a political expression when states intend to send a signal to a perceived audience, either other states in the international system or a domestic political constituency. It has been argued that by ratifying a treaty, a state may be seeking to benefit from the positive reaction and perceptions of other states in the system towards the act of ratifying the treaty in question.⁵⁸ For example, a state may ratify a treaty in order to obtain a gain in international reputation or primarily satisfy the demands and expectations of political significant groups or constituencies within its own population.⁵⁹ Furthermore, it has been observed that at the international level, this kind of “signal sending” suggests that states learn from the ratification status of other states; but it also means that by ratifying a treaty one state

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Risse T et al, *Introduction in :The Socialization of International Human Rights Norms into Domestic Practices: Risse T et al (eds), The Power of Human Rights , International Norms and Domestic Change*(Cambridge, Cambridge University Press, 1999), 1, 7.

⁵⁷ Ibid

⁵⁸ Brownlie I, *Principles of Public International Law*, Oxford, Oxford University Press, 2003

⁵⁹ Ibid

may consequently change the circumstances of the international system for the other states⁶⁰. Thus the higher the number of ratifying states, the more likely that non-ratifying states will be inclined to join the bandwagon. This could be possibly why CEDAW has been ratified by most states regardless of its implementation domestically.

Relativists on the other hand focus on the role of domestic politics and constituencies. They argue that individuals and private groups are the key actors in state behavior and that while states themselves remain significant, [state] preferences are determined by domestic politics rather than material factors like relative [state] power⁶¹. A liberal theory of ratification thus predicts that states ratify treaties when powerful domestic actors lobby for ratification and where those actors are more readily able to express preferences to their governments.⁶² A good example of this is when say the Labour party is in power in the U.K.; the rights of the workers are likely to be foremost on their agenda. They are therefore likely to ratify international instruments that protect workers' rights. Similarly lobby groups in the petroleum or gas sectors may influence their governments to ratify or not ratify a treaty based on their business interests.

It is important to note that irrespective of the theories enumerated above, the acts of signing and ratifying treaties are exercises in sovereign power and discretion. Conventional thinking is that given that it is a state's prerogative to sign or ratify a treaty, state motivation can only be looked at from a purely political perspective. That while international factors play a part in the decision-making process of whether to sign or to ratify a treaty, domestic considerations remain paramount to understanding treaty compliance. Attention must therefore be directed at the modes of domestic political decision-making and the dynamics of domestic politics to discern the motivations for treaty ratification and post ratification compliance.

⁶⁰ Op citation Risse p 7

⁶¹ Abbott K, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal conflicts 93 *American Journal International Law* 361, 1999 366 quoted in David Schleicher, "Liberal International Law Theory and the United Nations Mission in Kosovo: Ideas and Practice *Tulane Journal of International and Comparative Law Vol 14*, 2005

⁶² Moravcsik A, Taking Preferences Seriously: A Liberal Theory Of International Politics 51 *International Organization*, 1997, pp 513 – 514

1.11 Domestication of international human rights law

A state's consent to be bound by a treaty can be conveyed in several ways, by signature, ratification, acceptance, approval and accession.⁶³ Except for definitive signature, all these refer to activities undertaken at the international level requiring the execution of an instrument and the deposit of such an instrument with the depository of the treaty.⁶⁴ In Kenya the power to negotiate, enter into and ratify treaties and international agreements is assigned to the national executive.⁶⁵ Previously, there was no law governing the negotiation, signing and ratification of treaties, leaving these to be governed by unwritten customs and conventions.⁶⁶ The practice was for the Ministry of Foreign Affairs, the Attorney General (department of Treaties and Agreement) and the relevant line ministry experts to negotiate the treaty in question.

Once a treaty is ratified by a state the next step is incorporation of the respective treaty into its domestic law to enable its implementation or enforcement. There are a number of ways to do this and they include adoption, incorporation, transformation, passive transformation and reference. States may in reality apply more than one of these methods. Traditionally, scholars posit two approaches in respect of the reception of international law into the national legal system, characterizing countries as either monist or dualist⁶⁷. Monists view international and national law as part of a single legal order. Under this approach, international law is directly applicable in the national legal order. There is no need for any domestic implementing legislation as international law is immediately applicable within the national legal systems. This is because there is an automatic incorporation of the treaty provisions once they have been ratified and published in the

⁶³ Vienna Convention on the Law of Treaties, article 11 provides that "the consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any means if so agreed.

⁶⁴ Article 1(b)

⁶⁵ Section 4(1) Treaty and Ratification Act, No. 45 of 2012

⁶⁶ Most former British colonies adopt this method for instance Nigeria, Lesotho, Swaziland, Zambia, Lesotho, Gambia.

⁶⁷ Steiner H.J et al, *International Human Rights in Context: Law, Politics, Morals*, Oxford, Oxford University Press, 2000, p 987

official gazette. Indeed, to monists, international law is superior to national law.⁶⁸ This approach is common in Switzerland, France, Netherlands, Mexico, and some francophone African countries. Kenya by virtue of article 2(6) of the Constitution has adopted the monist approach.⁶⁹ Dualists on the other hand view international and national law as distinct and separate legal systems. To them for international law to be applicable in the national legal order, it must be received through domestic legislative measures, the effect of which is to transform the international rule into a national one. It is only after such transformation that individuals within the state may benefit from or rely on the international – now - national law. To the dualists, international law cannot claim supremacy within the domestic legal system, although it is supreme in the international legal system. Dualism requires the express legislative enactment of treaty provisions before they become domestic law. This method of incorporation is commonly applied in the United Kingdom, commonwealth systems and Scandinavian countries.

This kind of debate or comparison is important as it determines the extent to which individuals can rely on international law for the vindication of their rights within the national legal system, and has implications for the effectiveness of international law, which generally lacks effective enforcement mechanisms. It is worth noting however that international law does not dictate that one or the other of the aforesaid methods should be used. What matters most is the internalization of international legal obligations within national laws, and their subsequent implementation by national courts and quasi-judicial bodies. It follows, therefore, that the method by which treaties become national law is a matter in principle to be determined by the Constitutional law of a ratifying state, rather than a matter ordained by international legal order.⁷⁰

The benefits of incorporation are obvious. The fact that international human rights instruments are internalized into domestic law gives national authorities the opportunity to afford legal

⁶⁸ Myres M, “The Impact of International law upon national law: A policy-oriented perspective”, *South Dakota Law Review*, 425: 27 – 31, 1959

⁶⁹ Article 2(5) of the Constitution states that the general rules of international law shall form part of the law of Kenya’ and Article 2 (6) of the Constitution states “Any treaty or Convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” Therefore any human rights instruments ratified or acceded to by Kenya becomes part of Kenyan law, unless it is in conflict with the Constitution.

⁷⁰ Op citation Myres, p 30

redress in cases of human rights violations before such cases are taken to regional or international judicial or quasi judicial bodies for resolution. For litigants or complainants therefore, the option of settling disputes at the national level is more attractive as it results in the saving of time and money.

1.12 The domestication of international human rights treaties by Kenya

1.12.1 Relationship between international law and domestic law - 1963 to 2010

As a general rule, international law including human rights law was not an automatic source of individual rights and duties enforceable in Kenya unless Parliament enacted specific legislation incorporating it into Kenyan law. This was in consonance with the dualist approach that Kenya followed. This principle had its foundation in the Kenyan Constitutional system where the making and ratification of treaties fell in the province of the executive and the making and modification of law fell within the province of Parliament. So a treaty which had not been incorporated into our municipal law could not operate as a direct source of individual rights and obligations under that law.

Incorporation in Kenya would be done in two ways. Either by annexure of the entire text (verbatim) of the treaty within a statute⁷¹ or by enacting an autonomous local statute and incorporating the treaty provisions in a way suitable to the Kenyan context.⁷² If the former method was adopted the legislation implementing any international instrument would state “that the instrument or selected parts of it have the force of law in Kenya” and the annexure would form part of a Schedule to the domesticating Act.

1.12.2 International Customary Law

There is divergence of views whether incorporation by legislation is necessary for customary international law to be enforceable in countries that adopt the dualism approach. The prevailing

⁷¹ East African Community Mediations Act, Cap 4, Treaty for the Establishment of the East African Community, Cap 2

⁷² The Bretton Woods Agreements Act, Cap 464, Laws of Kenya, Eastern and Southern Africa Management Institute Act, Cap 4 of the Laws of Kenya;

position was that it was necessary, unless the judiciary developed the common law to conform with customary international law. In contrast English authorities such as *Trendtex Trading Corporation V Central Bank of Nigeria*⁷³ and *Triquet V Bath*⁷⁴ established that customary international law automatically constitutes part of English law unless it conflicts with legislation. By virtue of the Judicature Act⁷⁵, the position in England and the commonwealth would apply in Kenya. Based on the aforementioned jurisprudence, customary international law therefore would be applicable in Kenya during this period whether or not it was incorporated into Kenyan law.

1.12.3 Legal position from August 2010

In accordance with article 2(5) of the Constitution, the general rules of international law are part of Kenyan law. Further, article 2(6) provides that any treaty or convention ratified by Kenya becomes part of Kenyan law. Therefore any human rights instruments once ratified or acceded to by Kenya immediately become part of Kenyan law,⁷⁶ unless they are in conflict with the Constitution. As alluded to earlier, this is the monist approach and is a departure from the dualist approach adopted by Kenya before the promulgation of the 2010 Constitution.

1.12.4 Theoretical framework

In many jurisdictions where there have been arguments for legislative and other efforts dealing with the impact of international human rights instruments, many scholars have borrowed from theoretical schools of thought to substantiate their arguments. These theories are numerous and varied, aimed at explaining a particular situation or issue at hand. Kaplan⁷⁷ in defining a theory states that “ a theory is a way of making sense of a disturbing situation so as to allow us most effectively to bring to bear our repertoire of habits, and even more importantly, to modify habits

⁷³ [1977] 2WLR 356

⁷⁴ (1976) 3 BURR 1478; 97 ER 936 (Courts of Kings Bench)

⁷⁵ Judicature Act, Chapter 8 of the Laws of Kenya, section 3

⁷⁶ This makes sense as the Treaty and Ratification Act, 2012 (section 7 – 9) puts in measures to address executive abuse by insisting on Cabinet and Parliament approval of a treaty before ratification

⁷⁷ Kaplan, A, *The Conduct of Inquiry: Methodology for Behavioral Science*, San Francisco, CA Chandler , 1964, p9

or discard them altogether, replacing them with new ones as the situation demands”. Theories therefore assist us in interpreting, criticizing and unifying behavior and guiding the enterprise of discovering new and more powerful generalization. In this regard, two broad theoretical frameworks have been considered in this study, feminist theory and the theory on cultural relativism.

1.12.5 Theory of cultural relativism:

When people are born, they are introduced into an existing culture with its own laws and principles. To them, since the culture and traditions that go with it are sanctioned by the society within which they live, then the traditions can only be the right way to abide by. It is often argued that it is upon socialization and exposure to other cultures that one gets a better understanding of what is and what is not right according to other societal standards generally and thus one begins to question one’s own culture within which one has been brought up.

The principle behind the theory of cultural relativism was established by Franz Boaz. This principle stated that an individual human’s beliefs and activities should be understood by others in terms of that individual’s own culture. It is premised on the fact that “all cultures are different, thus, a person outside a particular culture cannot judge it”.⁷⁸ Hence imposing a majority point of view on a society with different cultural perceptions is unjust. With regard to the international legal perspective on the theory of cultural relativism, Joyner and Dettling refer to the works of Adda Bozeman⁷⁹ and state as follows -

“Profound differences between western legal theories and structures and those in Africa, China, India and Islam must preclude attainment of a universalistic legal system of predominantly western orientation.”

In order to fully understand a culture, one must be a product of that culture. “A culture produces its own unique mode of thought that acts as a schematic guide for conceptual thinkingcross

⁷⁸ Boas F, *Race, Language and Culture*, New York, Columbia University, 1940

⁷⁹ Joyner C et al, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law*, *California Western International Law Journal*, 1990 pp 275 -314

cultural equivalents for certain moral, legal and political concepts meaning would be filtered through the first culture's unique linguistic-conceptual structure"⁸⁰. As a consequence, arriving at a universal meaning in an international legal text containing moral and political values is futile since all political and legal principles are determined and informed "by substratal cultural forces."⁸¹

The Second World War popularised the concept of cultural relativism, with American anthropologists being opposed to the proposition of universality and reclaim of nonwestern cultures. However, following the world war, cultural relativism came to be misunderstood by some people to mean that all cultures were both separate and equal and that all value systems were equally valid, irrespective of the differences that existed amongst the systems. This, however, was the principle behind the theory of moral relativism. According to Kluckhohn⁸² the concept of culture is subject to misinterpretation and there was fear that the principle of cultural relativity would weaken morality. In distinguishing the two principles, he notes that stating an individual or community can adopt a particular form of conduct or action because it is relative and the other community is undertaking the conduct or action is not what cultural relativism is all about. He notes that one must determine the appropriateness of the custom or practice and evaluate how the custom or practice would fit into another group's customs or habits and in particular, whether it would make sense to adopt the particular custom or practice, given the existing circumstances in the particular community. The main essence of his argument was that although there may be no universal moral standards, the fact that people have moral standards is universal and hence, a community does not embrace any custom or practice for the sake of it when it comes to morality.

The cultural functions of polygamy in societies where it is practiced are diverse. Polygamy is seen as necessary in many groups as a window to enjoying the benefits of marriage, as it is seen

⁸⁰ ibid

⁸¹ ibid

⁸² Kluckhohn C. et al , *Culture*, New York, Meridian Books, 1952

to guarantee marriage for certain classes of women who might otherwise not be eligible for marriage for instance girls who get pregnant out of wedlock, spinsters and even widows or divorced women who then were able to get a second chance at marriage. Wives and children were also viewed as a form of wealth and elevated the status of the family in society. Marrying several women therefore displayed the wealth of a family and guaranteed the pride of the family in a community. In agricultural communities, human labour was essential and polygamy provided more hands to work in the fields and produce more food or more cash crops for sale. Women and children were also considered safer in larger households and were protected from aggressors. Polygamy also provided a form of birth control as it allowed the spacing of children by virtue of sexual taboos attached to sex during breastfeeding. There are also abundant cultural myths surrounding the need to practice polygamy including the belief that men are naturally polygamous. More frequently stated is the belief that polygamy is sanctioned by religion whether Christianity, Islam or African sects. Polygamy can therefore be understood as a specifically cultural practice, yet the revelation does little to further the debate surrounding the practice.

The Muslim community also sanctions the wearing of veils by women in public. A woman is prohibited from venturing into public spaces without covering her face. In the stricter sects for instance in the Coastal parts of Kenya as well the Northern parts of Kenya total veiling is required. There are abundant religious and cultural myths surrounding this practice and include protection of modesty, women's vulnerability to harm and men's predisposition to sin.

Two submissions have been made with regard to the theory of cultural relativism. Firstly that in view of the fact that we live in multicultural world with people having been raised in varied or even a series of varied cultures, one cannot make judgment on the culture of another society as such person only views such culture through the eyes of the culture within which he was brought up. Secondly, it has been stated, as seen before, that what is considered as upright or moral is premised on western ideals and values deriving from Judaic or Christian perspectives and should thus not be imposed on non-Christian or nonwestern societies.

Susan Okin is a major critic of this theory. She asserts that the subjugation of women by men by relying on religion and culture is wrong and calls on liberal democracies to protect the individual rights of all women within their borders. She states that individual rights are sacrosanct in liberal

democracies and emphasizes that any culture or religion that deprives women of human dignity is not worthy of being recognized. Okin categorically condemns as sexist and illiberal clitoridectomy, polygamy, arranged marriages of teenage girls and veiling. She even goes as far as calling on governments to intervene in the religious life of certain denominations to eradicate such practices.

Her critics who are predominantly cultural relativists on the other hand point out that she is extreme and ignorant of certain fundamental principles and point out that cultural practices such as veiling enable Muslim women who would otherwise stay at home because of their religious convictions about female modesty to go out into the world, acquire an education, and participate in public life.

The question that begs is, is this theory valid or applicable in our present day society and legal system? There have been criticisms by legal scholars against cultural relativism which is seen as tolerant to what are considered as repressive and inappropriate cultures. On the other hand, it is often viewed that most of these claims are not made by those affected or even the indigenous persons but rather, by those outside that particular cultural setting. In many instances, it has been thought by those “affected” that those opposed to the idea of cultural relativism and further, those that support western notions manipulate and justify the reason for their interventions and actions which are seen as oppressive and a form of neo-colonialism. This was the general feeling in the 1993 World Health Conference on Human Rights in which most women argued that such interventions by Western countries was a form of neo-colonialism and that if any changes were to occur, the same would occur from within the communities and not through outside interventions.⁸³ Further, it has been felt that the third world countries have been unable to voice their concerns in the international settings particularly in influencing the enactment of instruments affecting them and their cultures. However, there has been a change in this trend over the recent years, particularly with the increasing agitation for the protection of the rights of vulnerable groups such as women and children. This can be seen in areas such as FGM law, and minimum age for marriage law.

⁸³ WHO:1993

1.12.6 Liberal feminism

Liberal feminists argue that women and men are inherently equal and the same and therefore deserve the same rights as men. N. Lacey states “liberal feminism deals with the notion that liberal ideals of equality and rights and liberties apply to women.”⁸⁴ Cook reaffirms this by stating that “liberal feminism is particularly associated with formal equality and equality of opportunity”⁸⁵. This school therefore believes that for equality to be realized, the same has to be enacted or promulgated into law.

Another concept propagated by liberal feminists is that of individualism. Cain asserts this by saying “liberal feminism theory is based on individual choice and promises equal rights and equal opportunity.”⁸⁶ The view of individuality tries to understand how the individual is not allowed to achieve the promises of liberal society given the structural constraints of society.⁸⁷

The substantive provisions of CEDAW are also based on the concepts of liberal feminism. The definition of discrimination in article 1 as “the impairing or nullifying the recognition, enjoyment or exercise by women..... on a basis of equality of men and women” follows the liberal feminism principle. Similarly the provisions on equality that cut across the different sectors are concepts of this school of thought. The application of the liberal feminist’s equal protection principle can be applied to basic issues like voting, enrollment in school or admission to university. Article 7 is another example of liberalist feminist theory. This article requires states to ensure that women have the same rights as men to vote and to participate in nongovernmental organizations.⁸⁸

Critics of liberal feminism argue that the entire premise of liberal feminism is flawed because the rights that women wish to enjoy are created by males. Furthermore critics point out that this

⁸⁴ Lacey N et al *The Politics of Community: A Feminist Critique of the Liberal Communitarian Debate*, Toronto, University of Toronto Press, 1993

⁸⁵ Cook R, Reservations to the CEDAW *Virginia Journal of International Law*, Vol 30, No 3, 1990, pp 643 – 716

⁸⁶ Cain P. A, *Feminism and the Limits of Equality*, 24 G.A L REV, 803, 829, 1990

⁸⁷ Eisenstein Z. R, *Feminism and Sexual Equality*, *Yale Law Journal*, p 114 1986

⁸⁸ Article 7

approach relies on male dominated institutions to enact and enforce change. To them the state is not a neutral party but is based on a patriarchal system and hence is incapable of enforcing the rights of women. A liberal model fails to reform institutional arrangements that privilege some and disadvantage others.⁸⁹ Therefore the liberal feminist approach does not give women the rights and protection they deserve.

According to Charlesworth et al⁹⁰ “in the major human rights treaties, rights are defined according to what men fear will happen to them, those harms against which they seek guarantees”. The primacy traditionally given to civil and political rights by Western international lawyers and philosophers is directed towards protection for men within their public life – their relationship with government.⁹¹ The same importance has not been generally accorded to economic and social rights which affect life in the private sphere where women are the primary players. In line with this thinking therefore, the sphere where women need protection the most is not addressed in most human rights treaties.

Finemann reiterates the aforementioned arguments by elucidating that “the male human is seen as the model and or standard for the human experience and as the subject for whom human rights have been established. Thus, many believe that when we speak of equality between men women what we are taking about is making men equal to men, the standard.”⁹² This is understood as meaning that for there to be equality between, women need to be more like men”.

A key limitation of liberal feminism has been cited as its individualism. That it’s focus on individual interest ignores historical injustices perpetrated against women. Therefore, women’s under representation in occupations and spheres can be explained and legitimated in the context of liberal theory when it is viewed as product of autonomous individual choices.⁹³

⁸⁹ Fineman M. A, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *Yale J. L & Feminism* 1, 19, 2008

⁹⁰ Charlesworth H et al, *The Gender of Jus Cogens*, Vol 15 *HUM. RTS. Q.* 1993, pp 63, 65

⁹¹ *ibid*

⁹² *Op citation* Finemann

⁹³ *ibid*

Another critique is its reliance on differentiating between the public and private spheres. Typically, liberal political thought assumes the world to be divided into public and private spheres and issues; and hence, liberal principles apply primarily to the public world while private lives and private spheres are properly subject to the regime of individual autonomy and negative freedom.⁹⁴ Analytically, it has been doubted whether a clear public/ private boundary can be delineated.⁹⁵ The public private dichotomy has unfortunately tended to characterize women's lives as private hence outside the scope of political intervention and thus rendering women invisible and resulting in a lot of inequities.

1.12.7 Cultural feminism

This theory states that women are different from men and that the legal system fails to recognize the important differences between men and women. That women reason differently from men hence that difference should be accepted, appreciated and valued. In this regard women should be valued in the law by factoring their strengths and contributions to society. In summary, the goal of cultural feminism is not to merely identify the unique traits of women but to appreciate and incorporate these traits in the law. To them equality thus can only be achieved by valuing the societal roles of women and men.

Cultural feminists critique liberal feminism for failing to recognize and value the difference women bring to the table.⁹⁶ The legal system is currently a male dominated system. Therefore to give women equal rights to men will not give women the equality that they deserve.

Cultural feminists assert that women work hard, but have little to show for it. That domestic duties within their homes are not appreciated even by their own families and the patriarchal societies in which they live. Many women are not given the training or opportunity to work outside the home; women in developing countries only participate in employment at half the rate

⁹⁴ ibid

⁹⁵ ibid

⁹⁶ Cook R, Reservations to the CEDAW *Virginia Journal of International Law*, Vol 30, No 3, 1990, pp 643 – 716

of men.⁹⁷ Those women that do work outside the home earn significantly less than men; women in industrial countries only receive 51% of male wages.⁹⁸

Some of CEDAW's articles include the cultural feminist approach to women's work in the home and the role that women play as mothers. For instance, Article 5 (b) states that nations must take all appropriate measures to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in upbringing and development of their children....". The obligation to recognize the unique role of women as bearers of children is an endorsement of the cultural feminist theory.

Article 14 is also based on the cultural feminist theory. The article grants special recognition to the value and rights of rural women. Here the Convention mentions the work that women do for the family as part of their roles as mother, wife or sister. Specifically CEDAW requires states parties to take into account "the significant roles which rural women play in the economic survival of their families including their work in the non monetized sectors of the economy."⁹⁹ The cultural feminist theory evident in articles 5 and 14 helps to give the Convention a different perspective on possible solutions to gender inequality.

Proponents of cultural feminism use the term "equity" rather than "equality". Facio and Morgan assert that cultural feminists prefer the use of the term equity as this requires that each person is given according to their needs.¹⁰⁰ That the objective is not to treat women the same as men but instead giving women what they need.

1.13 Conceptual Issues

In this study the following words will take the specific meanings as ascribed to them in this context.

⁹⁷.VanBurkleo F. S, *Belonging to the World: Women's Rights and American Constitutional Culture*, 2001, 304 -05

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Fascio A et al, *Equity or Equality for Women: Understanding CEDAW's Equality Principles*, *Alabama Law Review*, Vol 60 pp 1133

1.13.1 Nondiscrimination

In this study, the meaning of non-discrimination is that as defined in Article 1 of CEDAW.

Article 1 “For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion , restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality with of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

1.13.2 Equity¹⁰¹

Equity means fairness of treatment for women and men according to their respective needs. This may include equal treatment or treatment that is different but which is considered equivalent in terms of rights, benefits, obligations and opportunities.

1.13.3 Equality¹⁰²

Equality means that all human beings, both women and men are entitled to develop their personal abilities and make choices without the limitations set by stereotypes, gender roles and prejudices.

1.13.4 Substantive equality¹⁰³

The concept of substantive equality takes into account the biological differences between men and women, as well as socially constructed differences as regards the roles and tasks that have been ascribed to men and women. CEDAW forbids discrimination based on sex. Substantive equality allows for varied treatment of women for reasons of protection for instance of maternity

¹⁰¹ ABC of Women’s Workers Rights and Gender Equality, ILO, Geneva, 2000, p 48

¹⁰² *ibid*

¹⁰³ *ibid*

functions and correction for instance affirmative action aimed towards the achievement of de facto equality.

1.14 Methodology of Research

The study used a combination of both secondary and primary methods of data collection to achieve a comprehensive study. Secondary data was collected through literature research of both published and unpublished material. Documents, articles, and textbooks have been analyzed to better understand Kenya's position with regards to women's rights. The research also examined the Government and civil society country reports submitted to the CEDAW Committee in order to see how international pressure has motivated legal changes in Kenya. Internet research was also carried out to supplement existing materials.

Primary data was obtained through indepth interviews from key informants and observation. The researcher purposely selected respondents who participated in the sessions. 5 preliminary interviews were conducted and thereafter 2 subsequent interviews with 2 of the 5 key informants to clarify certain issues. The key informants included officers from the Ministry of Labour, Social Securities and Services, the NGEC, and the State Law Office.

The research utilized the historical research method (Aminzade1992; Elder, 2003) to establish Kenya's sequential legal reforms in consonance with international legal reforms as well as socio political developments in relation to women's rights.

1.14.1 Scope of the research:

This study is a qualitative study that relied chiefly on desk research as well as the expert opinions of professionals well versed with the gender situation in Kenya and who included officials from NGEC, the Ministry of Labour and Social Securities and Services, academia and the State Law Office. Hence, the selection excluded the general corpus of women who constitute the Kenyan population. Based on the study's qualitative approach, precautions should be taken in generalizing the findings of this study to all Kenyan women across the classes. Given these limitations, however, the study provides direct evidence concerning general gender discrimination in the country.

1.15 Chapter Summary:

The study is divided into 6 chapters. Chapter 1 provides the context in which the study is set, the focus and objectives of the study and other preliminary issues including the hypotheses, research questions and justification. The chapter also contains the literature review and provides an analysis as to why states enter into treaties. The domestication of treaties is also illustrated by the elucidation of the dualism and monism debate. This background is necessary in bringing an understanding as to why and how CEDAW has been applied within Kenya. Further feminist theories are discussed to better understand the status of women globally and within Kenya.

Chapter 2 examines the influence of patriarchal tendencies on women's rights in Kenya and how the governance culture affects the implementation of CEDAW in the country. Chapter 3 outlines the obligations of state parties to CEDAW and thereafter sets out in detail the legal and policy framework in Kenya. Specific attention is given to the legislative environment and practice with a view to establishing the influence of CEDAW on the enactment, repeal or amendment of legislation. Government policies and measures are also looked at with a view to establishing their genesis or direct relation to CEDAW Chapter 4 analyzes the use and application of CEDAW by courts in Kenya. Judicial action is also scrutinized with the intention of establishing the influence of CEDAW on court decisions. Chapter 5 provides a summary of the findings of the study. The sixth and final chapter outlines conclusions and sets out recommendations on the way forward in ensuring maximum and efficacious implementation of CEDAW.

CHAPTER 2: PATRIARCHY AND GOVERNANCE CULTURE IN KENYA

2.1 Conceptualization of patriarchy/male dominance:

Kenya like many African societies is a patriarchal society. Despite government interventions especially during the Women's Decade and thereafter, gender inequality prevails in the country. A majority of Kenyan women face inequities on a daily basis for instance rural women who are subjected to harmful and cultural practices, women professionals who constantly face discrimination at the point of recruitment, promotion or training; or sexual harassment from their bosses/male colleagues at their various places of work; and even the women placed at key decision-making roles such as politicians, technocrats and academicians who for their lack of numbers are constantly unable to push pro-women agendas. All these phenomena are an indication of the entrenched patriarchy or male dominance in Kenyan society.

Patriarchy or male dominance has been cited as a major obstacle to gender equality in most parts of the world. Friedl¹⁰⁴ defines male dominance as “a situation in which men have highly preferential access, although not always exclusive rights, to those activities to which the society accords the greatest values, and the exercise of which permits a measure of control over others.” It is significant that Friedl recognizes that men are favored in terms of accessing certain economically and socially significant materials and rights, such as access to land and property. In Kenya for instance the property legal regime up until 2012 when the new land laws were passed, inordinately favored the male ownership of land and property. This was also evidenced in the financial sector where banks and other lending institutions would place stringent conditions on the provision of loans or credit. Many women for lack of asset ownership in terms of not having their names on the title deeds could thus not access such facilities.

The spiral of poverty among Kenyan women was thus propagated as women were not able to economically develop themselves. The current land and property legal regime as articulated in the next chapter seeks to resolve this by recognizing the rights of a spouse (whether in the title deed or not) hence obligating a potential buyer or lending institution to ensure that a spouse is consulted before any transaction is entered into. However based on the common practice in the

¹⁰⁴ Friedl E., *Women and men: An Anthropologists View*, New York, Holt, Rinehart and Winston, 1975, p 7

country, women who are financially dependent on their husbands will continue to endorse, albeit reluctantly (despite their legal rights) the transactions that their husbands decide to undertake.

Such skewed relations are also highlighted by Divale and Harris¹⁰⁵ who define male dominance as an “institutionalized complex” consisting of asymmetrical frequencies of sex linked practices and beliefs...”. The practices and beliefs, in this case would instill prestige and status to the male gender and devalue the contributions and capabilities of females. The private/public dichotomy debate has always been relevant with regards to women’s rights and CEDAW as a legal regime has been able to address this in its provisions which require states to recognize the unique roles that women play such as maternity, as homemakers and as caregivers. These roles (fetching water and firewood over long distances, subsistence farming, cooking, tending to the young, taking care of the sick and elderly), in as much as they are physically taxing and consume an inordinate amount of a woman’s time are not valued in society as there is no financial value placed on them. On the other hand, men’s role in the public domain which essentially has a financial implication is highly valued and is ultimately able to propagate the unfortunate notion that men’s role and position in the society is higher than that of women.

CEDAW obligations on the protection of the employment rights of women during and after maternity require states not to discriminate against women when they are pregnant and when they resume work after maternity. Most Kenyan women make an overwhelming contribution in the Kenyan economy as businesswomen, farmers, academics and professionals and contribute significantly to the gross national product. However because their percentage in formal employment is much less than that of men especially in the higher cadres, much of their contribution in the economic sphere is undervalued hence leaving women without the benefit of decision-making power. Kenyan industry mirrors the general mentality that the society places on women’s contribution to the formal economy. Employers for the longest time have always looked at young female employees as potential liabilities as it is commonly believed that they

¹⁰⁵ Harris D et al, Population, Warfare and the Male Supremacist complex, *American Anthropologist* Vol 78 Issue 3 pp 538

will “soon get pregnant and require time off for maternity and lactation”¹⁰⁶. To date this mindset prevails in industry with the Federation of Kenyan Employers (FKE) and Kenya Private Sector Alliance (KEPSA) agitating for an amendment to the maternity provisions in the recently enacted Employment Act which grants women three months maternity leave in addition to annual and sick leave.

Many constraints have also prevented Kenyan women from exercising economic and educational influence. Women cannot pursue further education because their husbands require them to stay at home and fulfill their matrimonial duties. A man will easily accept a scholarship opportunity to further his studies abroad but a woman is required to seek the consent of her husband and sometimes the extended family before considering such an opportunity. More often than not such a woman will be refused based on filial loyalty and duties. Similarly better job opportunities abroad and locally have been forfeited by women because their husbands or families feel that such opportunities are bound to destabilize the family union. One of the key informants, a legal draftsman stated that she had to forego a more lucrative posting at the Foreign Affairs Ministry because her husband claimed that he could not follow her to that country and could also not be able to take care of their two young children alone.

In order to understand gender inequality and inequity, it is important to delineate the root causes of patriarchy. This can only be done by understanding the cultural context in which the dominance manifests itself. The underlying factors that undermine the recognition and enjoyment of the rights of women can be categorized into two – social and political factors.

2.1.1 Social factors:

Derogatory treatment of women prevails in the Kenyan society just like in most African societies because it is considered to be part and parcel of the accepted cultural practice. Many of the cultural practices in the country are unwritten and therefore are legitimated by the social

¹⁰⁶ Business Daily, *Business Owners Cry Foul Over Maternity Leave Plan*, by Isabella M, 2009, p 1

endorsement they receive at the community level. As a result, the subservient status of women is deeply entrenched in tradition and cannot be eradicated without cultural resistance. In order to understand gender equity and equality, it is important to delineate the root cause of patriarchy. This can only be done by understanding the cultural context in which patriarchy manifest itself. Because cultures have their own organized systems which determine how members of that particular culture behave towards each other and towards their environment, they have the potential of empowering and disempowering men and women. Due to the patrilineal nature of the Kenyan culture, women have been denied many capabilities. They have less access to education, skills, development, economic opportunities and participation in decision-making. The Nairobi Forward Looking Strategies for the Advancement of Women(1985) have reiterated the need for women to be given the opportunity to reach their full potential. The meeting affirmed:

“..social and economic development should be encouraged to secure the participation of women as equal partners with men in the fields of work, equal access to all positions of employment, equal pay for work of equal value, and equal opportunities for education and vocational training”

Tradition is another impediment when it comes to the enforcement of fundamental human rights and freedoms as articulated in international Conventions. The Kenyan shadow periodic reports¹⁰⁷ to the CEDAW Committee acknowledge that although there are laws which criminalize practices such as FGM, its implementation is still a problem because the practice is deeply embedded in culture. The reports also cite culture as a great hindrance to the outlawing of polygamy as recommended by the CEDAW Committee.

Another practical argument is that tradition and culture has a major influence on the implementation and enforcement of norms contained in human rights instruments. This explains

¹⁰⁷ Shadow Reports are normally undertaken by a host of civil society organizations. These reports are complementary to the formal state report presented to the CEDAW Committee by the government and are geared to ensure accountability of the reporting process.

the reasons why certain states reserve human rights treaties. In Kenya the government has publicly opposed FGM but no serious legal action has been taken on the perpetrators. It is a classic case of where laws clash with cultural norms and religious beliefs – discriminative practices which continue to persist due to the patriarchal influences in society.¹⁰⁸

Culture and tradition also have a permeative influence on the legal regimes of most countries. In Kenya just like in most Africa countries, customary law forms part of the law of the state. For the longest time, Kenya's longstanding pluralistic legal system recognized customary law to coexist alongside statutory law to the extent that the customary provisions were not repugnant to morality. However based on the decisions of the courts, finding a balance within such a system is difficult with the male dominated courts ruling in favour of entrenched traditions. The Kenyan legal system has in some instances contributed to the continuation of cultural practices that discriminate upon women by reinforcing those elements that place women in a subordinate position. The Law of Succession provides for equal inheritance rights for female and male heirs but terminates the rights of widows if they remarry. Moreover, a widow cannot be the sole administrator of her husband's estate unless she has her children's consent. The law also allows the relevant Cabinet Secretary to exempt certain communities from the provisions of the Succession Law and in such cases for customary law to apply which most often than not provides for male inheritance only.

Cultural biases prevent women from reporting injustices and violations especially when they relate to sexuality. For instance it is viewed as unnatural and disrespectful for a married woman to assert her rights as against her husband. Hence cases of spousal abuse and property confiscation are rarely reported. Some women are expected to hand over their salaries to their husbands the moment the money reflects in their accounts and thereafter are required to "borrow" any money they need from their husbands. The country has passed laws protecting

¹⁰⁸ FGM persists due to several reasons- In Islamic society FGM was prescribed by the Islamic religion in hadiths where Mohamed supposedly said "If you must cut, cut very little". Culturally it is practiced as it ensures the marriageability of the girl since it prevents girls from having excessive sexual emotions thus ensuring their virginity at the time of marriage. Other reasons are that FGM protects family honor within the community and are a rite of passage of the girl into womanhood.

women against harmful cultural practices such as the Prohibition of Female Genital Mutilation Act and the Sexual Offences Act but these laws are to date being undermined by implementation challenges. The problems are myriad and include paternalistic attitudes by judicial staff who prefer to mete out the least form of punishment on offenders; harassment of the victims by the Police, corruption of enforcement or implementing officers, high costs and long delays of the judicial process and strict evidentiary procedures. As much as the Constitution provides that any suit alleging a breach of a fundamental right or freedom is to be free, if the suit is brought under another statute for instance the Sexual Offences Act, Prohibition of Female Genital Mutilation Act, Employment Act etc, the victim has to pay the legal fees which in most cases is prohibitive. There was a proposal to provide for spousal rape in the Family Protection Bill but this was removed because it was too controversial and would have direly affected the chances of the Bill being passed by the male dominated Parliament.¹⁰⁹

Similarly other factors curtail efforts to address the subjugation of women. This is why certain cultural practices are predominant in rural areas where illiteracy levels are high and thus women are more vulnerable to succumb to such practices. The Prohibition of Female Genital Mutilation Act, prohibits any person from conducting a cultural practice on a woman against such a woman's consent. The Constitution similarly prohibits cultural practices likely to undermine the dignity of any person undergoing the practice. However, many girls and women undergo circumcision, widows undergo widowhood rites or their property is taken over by greedy in-laws because such women are not aware of their rights and the legislations in place and where they know their rights, some are not willing to go to court because of fear of being ostracized by the community. It is worthy to note that ignorance of the law is not limited to the victims only but also to implementing actors as well.

2.1.2 Political factors:

¹⁰⁹ See Association for Women's Rights in Development, (AWID), www.awid.org>Library

Achieving men's and women's equality in the political realm is a goal towards which Kenyan women have moved with considerable difficulty over the past few decades.¹¹⁰ Like women in many parts of the world, Kenyan women have had a difficulty penetrating the patriarchal decision-making structure and processes of the state and party.¹¹¹ Barasa affirms this by stating that gender inequality in Kenya is largely a sociocultural and political problem. She observes that women are excluded from adequate participation in political structures and processes.¹¹²

Historical evidence is illustrative. Most Kenyan communities were headed by male clan elders and affairs tended to be controlled by this select group. This may be explained by the deep-rooted patriarchal ideology which defines gender relations in most African societies and which determined the social, economic and political organization of pre-colonial Kenyan societies, leading to the social, economic and political subordination of women. During colonialism, gender inequalities were enhanced. Colonial policies implemented in Kenya just like in Britain at the time were skewed in favor of men. Educational policies subjugated the status of the woman as formal educational opportunities were focused on boys while girls were taught how to be good homemakers and wives. Property ownership was also biased as men owned the land hence controlled the resources. In essence therefore, the Government of post-independence Kenya acted as if the question of gender equity was irrelevant. Thereafter, despite women participating in the independence struggle in various capacities such as reconnaissance officers or spies as well cooking for the Mau Mau soldiers, the post-independence government did not appoint any woman in any key position. The Moi government followed suit and likewise did not incorporate women in top leadership positions up until the 90's.

¹¹⁰ Nzomo M, *The Impact of the Women's Decade on Policies , Programs and Empowerment of Women in Kenya, Issues A Journal Of Opinion Vol XVII/2, 1989*

¹¹¹ _____, *Women, Development and Democracy in Africa in Democratic Theory and Practice in Africa*, W. Oyugi and A. Gitonga (eds), Nairobi, Heinemann, 1987

¹¹² Barasa N. *Lost Between Rhetoric and Reality: What Role for The Law and Human Rights in Redressing Gender Inequality?*, *Kenya Law Reports*, 2008; at <http://www.kenyalaw.org/klr/index.php?id=874>

After the United Nations Decade for Women and the reintroduction of multiparty democracy, women from different backgrounds such as the media, academia, industry, and other professionals sought to assert their rights publicly. They agitated for the implementation of the Nairobi Forward Looking Strategies and other international instruments and sought to hold the government accountable to its obligations under these international consensus agreements. It is however important to note that despite this growing awareness and agitation of political rights, women have continually faced numerous challenges for instance violence, male resistance to their participation, gender role stereotypes, limited resources to enable their participation and political structures and processes that impede their participation at the political arena. Such challenges have led to their low numbers within the political establishment.

Women's organizations are a significant tool for ensuring the protection of women's rights in any society. In a largely patriarchal society such as Kenya, the political and social environment in which such organizations operate is a major constraint on their effectiveness. The Kenyan government like many other governments globally has employed several tactics to prevent women's political participation and decision-making. Nzomo confirms this by stating that "since men dominate the channels of access to power, they continue to employ outdated sociocultural excuses in order to exclude women from political and other public decision-making positions".¹¹³ She attributes this stronghold on power to the "male dominated political system (the state), where men are not willing to give up on their privileged positions which they have historically enjoyed as the authoritative decision makers in the public private spheres."¹¹⁴

The challenges that the women's movement has faced include the divide and rule mechanism used by the government to neuter the effectiveness of women's organizations. MYWO was the first national woman organization in Kenya. The Moi government must have noticed its potential in influencing the national politics at the time hence its decision to formally incorporate it as an arm of the ruling party KANU. The effect of this action was to make it pro-establishment as it

¹¹³ Nzomo M, Women, Development and Democracy in Africa in *Democratic Theory and Practice in Africa*, W. Oyugi and A. Gitonga (eds), Nairobi, Heinemann, 1987

¹¹⁴ *ibid*

would have been virtually impossible for its leaders to attack the incumbent political leadership. The other tactic was to appoint women leaders to MYWO considered to be sympathetic to the political cause to maintain the status quo.

Another approach employed by the government was to limit the sphere of operation and influence of the women groups. In general women groupings in Kenya are constrained by the fact that their enabling constitutions do not permit them to engage in political matters. This disability on the capacity of female headed and female run institutions to push political agendas has resulted in a paucity of women representation in the political arena as compared to other jurisdictions which in the recent past have markedly increased their numbers of women representation. It is notable that in some jurisdictions, political groupings established by women have been able to move pro-women reforms in laws and policies in such governments. In Kenya however, the Constitution and the Political Parties Act prohibit the formation and registration of a political party by one gender.

There are many illustrative examples of the challenges that the women's movement has had to face. Wangari Maathai a Nobel Peace prize winner who established the Green Belt Movement in 1977 for purposes of conserving the environment and empowering women used this platform in 1989 to prevent government excesses. She sought by way of injunction to stop the government from erecting a skyscraper within the city. Her efforts were attacked by the legislature with Parliamentarians reducing her noble efforts to those of a frustrated divorcee. As Nzomo aptly puts it "an issue of national importance was thereby reduced to a personal gender issue between Maathai and male members of the political system."¹¹⁵

In 1996, Honorable Charity Ngilu currently the Cabinet Secretary for Housing moved a motion in Parliament for the implementation of the Beijing Platform for Action but the motion failed. In 1997, Honorable Phoebe Asiyo a long standing Parliamentarian in Kenyan politics tabled the First Affirmative Action Bill in Parliament. The Bill similarly did not see the light of day. In 2003, Njoki Ndung'u currently a judge of the highest court of Kenya, the Supreme Court tabled

¹¹⁵ ibid

the Sexual Offences Bill. The Bill faced vehement opposition from the male Parliamentarians as they perceived it as a form of political persecution.¹¹⁶ Some of the MP's claimed that its passage would encourage women to make false rape allegations in order to punish men. The Bill was finally passed but as a result of intense lobbying by the civil society and women Parliamentarians.

In 2007, the then Minister of Justice and Constitutional Affairs, Honorable Martha Karua tabled the Constitutional (Amendment) Bill on affirmative action aimed at creating 50 automatic seats for women in the 10th Parliament and creating 40 additional constituencies in Kenya. She defended the creation of 50 special seats as an affirmative action issue which sought to put women's representation in Parliament at par with their population size. This move led to an uproar in Parliament where the majority male Parliament contended that the Minister had personalized the Bill. Parliament on this occasion too declined to pass the Bill. The Minister however received considerable support from women in the civil society, former MPs, women bodies such as MYWO, FIDA; academia, and the media. Despite the fact that it didn't pass, this created the opportunity for other female members of Parliament to push for an increase in the number of women in Parliament. While all this was happening the women's movement was focused on the top most law of the country. Women activists mobilized themselves strategically to ensure that women's issues were addressed in the pending Constitution. This was finally realized with the passing of a comprehensive Constitution¹¹⁷ that by all intents is viewed as a pro-women document.

Women outside of the political establishment but in key decision-making positions have also faced challenges from the predominantly male establishment (state). Sarah Cheserem, the chairperson of the Salaries and Remuneration Commission has been touted as incompetent and a

¹¹⁶ The Bill was proposed at a time when the current South African President Jacob Zuma, was being tried for rape and Museveni's chief opponent Kizza Besigye was being prosecuted for rape. According to Njoki Ndung'u these events negatively impacted the expeditious passage of the Bill. See Association for Women's Rights in Development, AWID, www.awid.org>Library

¹¹⁷ It should be noted that the CEDAW Committee on several occasions put the Kenyan delegation to task over the Constitutional process and recommended the fast-tracking of the same.

busybody by Parliamentarians for agitating for the reduction of State Officers perks and remuneration. Incidentally the very persons labeling her as incompetent are the very ones who vetted her and recommended her as being competent and suitable for the office. Gladys Boss Shollei, the Deputy Chief Registrar of the Judiciary is currently being persecuted by the Judicial Service Commission for being corrupt, a hard liner and uncooperative. The very qualities that got her the position; being pro-reform and hardworking are the same qualities being skewed to portray her as incapable due to her alleged intolerance and incapability to work as a team member.

The other side of the coin is that women's groups have very little impact at the national level. This essentially means that the movement has been unable to effectively make positive political impact at the national level as it is unable to pass, retain or abolish legislation intended to ensure gender equity and equality. Historically these failures include the abolition of the Affiliation Act which imposed financial responsibility on fathers who sired children out of wedlock¹¹⁸, denial of housing allowance to married women in the Public Service¹¹⁹, inability of married women to contribute to the National Hospital Insurance Fund unless they were the sole breadwinners in a family, disqualification from certain courses for women civil servants and the lack of adequate maternity leave.

The Family Bills¹²⁰ initially brought to Parliament in 2000 have never been passed to date. They have continually been shot down for being too extremist. Several male Parliamentarians have publicly stated that the Marriage Bill is bad and is a plot by women to rob men of their wealth.¹²¹

¹¹⁸ This Act was abolished 10 years after its enactment by a male dominated Parliament on the pretext that it encouraged promiscuity and enslaved men to women

¹¹⁹ Civil Service Code of Regulations barred married women from earning this allowance. The reasoning was that they would be profiting twice from the system.

¹²⁰ Marriage Bill, Matrimonial Property Bill, Equal Opportunities Bill, Family Protection Bill

¹²¹ People Magazine, *Male MP's in Panic over Marriage Bill*, Anthony Mwangi, July 17, 2013. Comments by the Members of Parliament for Turkana North, James Lemenen; Kitutu Chache North, Jimmy Angwenyi and Igembe South, Mithika Linturi on Tuesday July 16th 2013 during the introduction of the Marriage Bill in the National Assembly.

The private sector too has on several occasions called for the amendment of the Employment Act to reduce the 3 months paid maternity leave citing economic unsustainability. A key informant also stated to the researcher that a key industry chief slyly mentioned to her on one occasion that the law confirms why many institutions prefer to promote men rather than women to top decision-making positions as “institutions cannot run themselves for three months”. This evidences the fact that governance decisions have played a role in disempowering women’s mechanisms deemed to be supportive of women’s interests and anti status quo (patriarchy).

It is important to also note the violence and intimidation perpetrated against female candidates for elective positions. In 2002, Yvonne Khamati who intended to vie for the Makadara constituency seat was beaten up by the supporters of her male rival; during the same period, Beth Mugo currently a nominated Member of Parliament and former Minister of Public Health was threatened and her supporters stoned.¹²² On the eve of political party nominations in 2013 in Kandara Constituency, the sitting MP found her name printed on packs of condoms distributed among voters written “A gift from Alice Muthoni Muthoni Wahome, let us do family planning”.¹²³ Police blamed male candidates vying against her who were hoping to destroy her chances of reelection. Monica Chepkok candidate for women’s representative for Uasin Gishu county claimed that she lost her seat because her party UDM gave her less funding for her campaign as compared to her male counterparts running for other seats.¹²⁴ Another female candidate claimed that she was persuaded and coerced by elders and opinion shapers in her county to pull out of the political race as it was unsuitable for women to participate in competitive politics.¹²⁵ Linah Chebii Kilimo, chairperson to KEWOPA summarizes these hardships by stating “most women candidates had to withdraw from seeking elective positions

¹²² womensenews.org/.../women-candidates- posted on December 27, 2002

¹²³ Barnabas Bii, Institute for War and Peace Reporting (IWPR), *Female candidates claim discrimination in Kenyan Elections*, IIC ACR Issue 348 at iwpr.net/.../female-candidates-claim-discrimination posted on May 17, 2013

¹²⁴ *ibid*

¹²⁵ *ibid*, Grace Tallam who was vying under UDF in Nandi County. She lost by very few votes to the incumbent politician

because of physical and psychological violence meted against them resulting in less representation at the county and Parliamentary levels.”¹²⁶

By vying for the top seats in the country all these women have set an important precedent and have shown that given the chance, women can equally become presidents and leaders in their own right.

The challenge facing Kenyan women politically is not unique to women in Kenya alone. Several studies from other African countries indicate the same predicaments for women across the continent. Tamale¹²⁷ in her research on the political situation in Uganda established that women parliamentarians are frequently subjected to humiliating sexual stereotypes, derogatory remarks and sexual harassment. Nzomo confirms this by stating that “it is evident that educated women and gender activists who have shown interest in politics have been assaulted physically to teach them to stay out of politics.”¹²⁸ Kenya acceded to CEDAW in 1984, it took 26 years for a comprehensive document articulating CEDAW values to be passed in Kenya in the form of a Constitution. It is common knowledge what the Kenyan citizenry had to undergo for this document to be passed. Women activists had to be assertive and especially vigilant to ensure that women’s rights first, were included in the original document and secondly were retained during the stakeholder forums and redrafting stages so that the gains were not removed.

Structural and institutional biases against female participation also cause women to be underrepresented in important decision-making positions. It appears that the amount and type of education made accessible to most women is inappropriate or inadequate to equip them for

¹²⁶ibid

¹²⁷ Tamale S, *When Hens Begin to Crow*, Kampala, WestView Press, 1999

¹²⁸ Nzomo M, Women, Development and Democracy in Africa in *Democratic Theory and Practice in Africa*, W. Oyugi and A. Gitonga (eds), Nairobi, Heinemann, 1987

participation in the spheres of power in public life¹²⁹. It is no longer possible to argue that there are no qualified women to occupy key decision making positions. With the increasing number of highly skilled and educated women in the country it is perplexing that the top public sector and private sector jobs continue to be held by men. It is evident that there are subtle barriers in the employment structure that discriminate against women regardless of their educational capabilities, especially with high level positions. Women tend to occupy the lowest paying jobs, lowest status and most stereotyped positions in both the public and private sectors as illustrated in the data below

Table 1: Distribution of civil service workforce by job categories and sex, June 2010

DISTRIBUTION OF CIVIL SERVICE WORKFORCE BY JOB CATEGORIES AND SEX, JUNE 2010

JOB GROUPS	FEMALE	MALE	TOTAL	% FEMALE
P and above	810	2, 392	3202	25.3
J - N	16,822	22,684	40,506	41.5
H and below	20,581	35,225	55,806	36.9
Total	38,213	61,301	99,514	38.4

Source: Ministry of Gender, Children and Social Development

All the above illustrations indicate that the implementation of international instruments is subject to local dynamics. And since the machinery for implementing human rights norms are locally generated this makes CEDAW open to the influence of local traditions and attitudes, politics and governance culture.

¹²⁹ *ibid*

2.2 Summary:

This chapter gives an indepth examination of the social and political factors that impact on the enjoyment of the fundamental rights and freedoms of women. One of the objectives of the study was to establish how patriarchy affects women's rights in Kenya. It has been established that patriarchy has greatly contributed to the subjugation of women in the Kenyan society. It does not matter whether the woman is highly educated or illiterate; rich or poor; employed or unemployed or living in the rural areas or in the urban areas. All these women continue to face discrimination in one form or the other. Examples abound, women and girls undergo undignified cultural practices like FGM and wife inheritance all in the name of culture and tradition, some are beaten by spouses as an illustration of "affection", some are barred by their families from accessing training or employment opportunities, others denied funding by their nominating political parties and others beaten or intimidated in their quest for political office.

Patriarchal underpinnings in the public and private sector have resulted in the dearth of women participation especially at top decision-making positions. What is automatic for men is not so for women for instance education and training opportunities, job opportunities, promotion, access to health and credit facilities. The first hypothesis was whether patriarchy has contributed to the subjugation of women in Kenya and has been a barrier to the implementation of CEDAW. The foregoing confirms this hypothesis.

The other hypothesis was with regards to the governance culture in Kenya and whether this culture has resulted in the effective implementation of CEDAW in Kenya. It has been established that the pre-colonial authorities did not recognize the rights of women in Kenya, similarly the colonial and postcolonial governments marginalized women in governance and in other areas. As a result pro-women legislation was minimal further reinforced by the public service's formulation of discriminatory policies. In addition, intimidation of all forms –psychological, violence and harassment has prevented women from effectively involving themselves in positions of influence. Any attempt by the few women Parliamentarians to push for progressive rights legislation has been countered by an all male dominated legislature. The marriage Bills continue to lie in Parliament owing to resistance by a selfish male majority. The third hypothesis

is thus disconfirmed. Governance culture in this country has not resulted in the effective implementation of the Treaty, if anything, it has frustrated the efforts to implement the Treaty.

CHAPTER 3: CEDAW AND KENYA'S LEGAL AND POLICY FRAMEWORK

3.1 Introduction:

CEDAW is the bedrock for women's rights in Kenya. In its 30 articles it articulates women's rights and the mechanisms that states should employ to respect, protect and fulfill such rights. It also sets out the institutional framework to achieve these goals. The commitment of the Kenyan government to ensure compliance with CEDAW is evidenced by the various measures it has undertaken to ensure gender equity and equality. These measures can be categorized as policy, legislative and adjudicative. Legislative measures include any law passed by both Parliament and the respective County Assemblies. Policy measures on the other hand include different policies formulated by the national government, county governments, and different state organs with the objective of achieving their respective goals with regards to the gender issue

This chapter will set out in detail state obligations under the CEDAW and examine the legislative and policy efforts by the legislative and the executive arms of government to enforce CEDAW. The next chapter will then deal with the adjudicative measures.

For the purposes of convenience and clarity, the National Policy on Gender and Development, Sessional Paper No. 2 of 2006 on Gender Equality and Development, Vision 2030 and the Constitution will be dealt with separately and the other sectoral policies and laws will be discussed thereafter under the subsections dealing with the obligations under CEDAW and the rights addressed by them.

3.2 Obligations of state parties under CEDAW

Human rights Conventions give rise to different obligations on the part of states depending on the type of the rights guaranteed and the problem it was meant to address.¹³⁰ Under each of the core human rights treaties including CEDAW, states are encumbered with three main obligations

¹³⁰ Steiner, H. J et al, *International Human Rights in Context: Law, Politics, Morals* Oxford: Oxford University Press, 2000

namely to respect, protect and fulfill human rights. The obligation to respect requires a state to abstain from any conduct or activity of its own that violates human rights. The obligation to protect shifts the focus of responsibility by compelling the state to prevent violations by non-state actors including individuals, groups, institutions and corporations. Finally duty to fulfill obligates the state to take whatever measures are needed to move towards the full realization of human rights. CEDAW as opposed to earlier human rights instruments merges the private-public debate that other treaties differentiate. CEDAW makes it very clear that its responsibilities extend to private as well as public life. Historically one of the biggest obstacles to realizing women's rights has been the perception that states should not interfere in the private realm of family relations. CEDAW recognizes that unequal power relations within the private sphere contribute very significantly to gender inequality in all aspects of women's lives, and intends to correct this balance by requiring states to take measures that will correct this power imbalance.¹³¹

The obligation of states under CEDAW is articulated in general terms as well as specific terms. Articles 2, 3, 4, and 5 provide the general obligations of states and articles 6 to 16 articulate state duties in relation to specific rights. The Convention states that parties are legally obliged to eliminate all forms of discrimination against women in all areas of life; to ensure women's full development and advancement to enable women to exercise and enjoy their human rights and fundamental freedoms in the same way as men and lastly the Convention requires states to file reports showcasing their implementation efforts with the CEDAW Committee regular intervals.¹³²

Article 2 of CEDAW obligates states parties to condemn discrimination against women in all its forms and engage by all appropriate means a policy of elimination of discrimination against women.¹³³ To achieve this, a state should ensure that an appropriate legal framework is in place. This framework should ensure the inclusion of the principle of equality and nondiscrimination in the national Constitution, policies as well as other laws and the establishment and maintenance

¹³¹ www.un.org/womenwatch/daw/cedaw last updated 10/12/2012

¹³² Article 18 "...state parties have to report within a year of after the Convention went into force, thereafter at least every four years and further whenever the Committee so requests."

¹³³ Article 2 of CEDAW

of tribunals and other institutions that ensure the protection of women's rights. States are also under obligation to repeal or modify all discriminatory laws and to abolish any discriminatory customs or practices. This Article further requires states to refrain from discriminating against women and also to take appropriate measures to eliminate discrimination against women by non-state agents that is, individuals, organizations and enterprises not forming part of government. The effect of this requirement is that state parties are responsible for securing the rights of women in all governmental and private organizations.

Article 3 is not confined to prohibiting discriminatory laws and practices. It requires state parties to undertake measures in all fields to ensure the advancement and development of women to guarantee the enjoyment of human rights and fundamental freedoms on an equal basis with men. Party states have to make sure that there is no obstacle barring women from enjoying their rights. This in turn entails an obligation of changing or modifying laws and practices that are overtly discriminatory as well as those that are neutral on their face and have discriminatory effect. Therefore this article will catch discriminatory practices that may not be covered by the definition under Article one.¹³⁴

One tangible way of achieving the full advancement and development of women is as provided in article 4. States are required to introduce temporary affirmative action to speed up the process of achieving defacto equality between men and women. Such action according to this Article is not discriminatory but a process intended to facilitate substantive equality by taking into cognizance that women have suffered historical inequality for a long time. Therefore to attain substantive equality, women are granted not only formal equal opportunities but also a truly equal start in addition to an enabling environment in which they can attain equality of results.¹³⁵ This Article further indicates that such measures should be discontinued once equality is achieved.

¹³⁴Cook J.R, *Human Rights of Women: National and International Perspectives*, Philadelphia, University of Pennsylvania Press, 1994, pg 236

¹³⁵ www.quotaproject.org/.../CS last updated 6/7/2011

States are required to help modify social norms under Article 5. The Article obligates state parties to modify social behavior to eliminate prejudices and stereotypes that propagate the notion of superiority of men over women.¹³⁶ This article further requires that parental responsibility is promoted¹³⁷ and maternity respected.¹³⁸

The specific provisions of CEDAW which deal with certain rights, reiterate the general obligations elaborated above. Under Article 6, states are required to protect women from all forms of trafficking and prostitution. Activities such as trafficking of women and exploitation of prostitution are sex based discriminatory activities that harm women, and therefore violate women's fundamental equality rights.

Articles 7 and 8 of CEDAW give women fundamental political rights and international representational rights. These articles refer to the participation of women in the public and political sector. Women are bequeathed with the right to vote, the right to be eligible for election to all publicly elected bodies, the right to participate in the formulation of government policy, the right to hold public office and perform all public functions at all levels of government, the right to participate in nongovernmental organizations (NGO's) and associations concerned with the public and political life of the country; and the right to represent the national government at the international level and to participate in the work of international organizations.¹³⁹ Article 9 addresses women's nationality rights and mandates that women will have equal rights with men to acquire, change or retain their nationality and that of their children.¹⁴⁰ Women can therefore on marrying confer their nationality to their husbands or children and are also shielded from losing their nationality upon marriage especially in countries without dual nationality provisions.

¹³⁶ Article 5(a)

¹³⁷ Parental responsibility refers to the common responsibility for raising children

¹³⁸ Article 5 (b)

¹³⁹ CEDAW partly incorporates the 1952 Convention on the Political Rights of Women.

¹⁴⁰ Article 9

State responsibilities in the massive sector of education are outlined in the next Article.¹⁴¹ It obligates states to end discrimination in education, including in professional and vocational training.¹⁴² To ensure that women and girls receive equal education, states are required to ensure equal access of women and children to curricula, teaching staff, scholarships, and other means of receiving an equal education.¹⁴³ In addition states have an affirmative duty to eliminate stereotyped concepts of the roles of men and women through the revision of textbooks and teaching methods.¹⁴⁴ Article 10 provides for protections in the education sector. Finally, states are required to establish programs to reduce female dropout rates in various institutions.¹⁴⁵

Article 11 requires state parties to eliminate discrimination in the field of employment. The right to similar treatment as men in all aspects of employment rights is articulated in the following 5 subarticles. The first is with regards to access to employment opportunities and obligates states to ensure the same selection criteria for men and women.¹⁴⁶ The right to free choice of profession and employment, job security, benefits of service and access to training at all levels is also guaranteed.¹⁴⁷ Benefits and conditions of service, social security in retirement, unemployment, sickness, and old age on the same basis as men is provided for. The right to equal pay for equal work on the same basis with men is also guaranteed.¹⁴⁸ Equal rights in employment also entitles women to social security and protection of health including maternal health and safe working conditions.¹⁴⁹

¹⁴¹ Article 10

¹⁴² Article 10(a)

¹⁴³ Article 10(b – d)

¹⁴⁴ Article 10(c)

¹⁴⁵ Article 10(f)

¹⁴⁶ Article 11 (1) (b)

¹⁴⁷ Article 11 (1) (c)

¹⁴⁸ Article 1 (d)

¹⁴⁹ Article 11 (2) (e) and (f)

The treaty also focuses on women's health care. It requires steps to eliminate discrimination in health care in order to ensure equal "access to health care services, including those related to family planning."¹⁵⁰ Related to this, states are required to provide appropriate services connected to the pregnancy period, pregnancy and lactation as well as granting free services where necessary.¹⁵¹

Article 13 covers social and economic rights.¹⁵² This Article requires that women be assured the same rights as men in all areas of social and economic life. These rights include the right to family benefits,¹⁵³ the right to bank loans, mortgages and other forms of financial credit,¹⁵⁴ the right to participate in recreational activities, sports and all aspects of cultural life.¹⁵⁵ Article 14 of CEDAW deals with the rights of rural women. This article is very elaborate and articulates a number of issues that are geared towards uplifting the status of the rural woman such as participation in development planning, access to health care including family planning, social security protection, formal and non-formal education and training, freedom to organize self-help groups and cooperatives, access to economic opportunities through employment or self-employment, access to credit and loans and adequate living conditions particularly in relation to housing, sanitation, electricity, water supply, transport and communications. Under CEDAW women are accorded equal rights before the law.¹⁵⁶ This is with regards to any procedure in the courts and tribunals. Women are empowered to conclude contracts, administer property and relocate to any location that they choose. The Convention prohibits child marriages and requires the free consent of adults before marriage. This article further confers equal rights and

¹⁵⁰ Article 12 (1)

¹⁵¹ Article 12(2)

¹⁵² Article 13

¹⁵³ Article 13(a)

¹⁵⁴ Article 13(b)

¹⁵⁵ Article 13(c)

¹⁵⁶ Article 15

responsibilities before, during and after marriage with regards to children, property and family responsibilities.¹⁵⁷

State parties to CEDAW are obligated to implement its provisions. To ensure accountability they are required to submit national reports to the CEDAW Committee, on measures that they have taken to comply with their treaty obligations.¹⁵⁸ The Treaty mandates that a state should submit the report a year after it ratifies the treaty and thereafter at least every four years or whenever the Committee so requests.¹⁵⁹ Article 17 establishes the CEDAW Committee to evaluate progress made in the implementation of the Convention by the United Nations and the individual states. The Committee is also required to report annually to the General assembly, and to make suggestions and general recommendations based on the state reports.¹⁶⁰

3.3 National Policy Initiatives

3.3.1 The National Policy on Gender and Development

The government formulated the National Policy on Gender and Development in 2000. The main objective of the Policy is to ensure women's empowerment by mainstreaming the needs of women, men, girls and boys in all sectors of development in the country and for the cited parties to participate and benefit equally from development initiatives. The Policy takes cognizance of the existing situation of Kenyan women with respect to the enjoyment of their human rights and their participation in the effort towards sustainable development. It also underscores social, cultural, legal, and political factors that perpetuate inequalities.

The Policy framework then underlines the need to focus on empowerment strategies that demonstrate understanding of essential linkages within sectors. In addition it recognizes that

¹⁵⁷ Article 16

¹⁵⁸ Article 18

¹⁵⁹ Reports are required to indicate the legislative, judicial, administrative or other measures that a state has taken to give effect to CEDAW. The reports may also indicate any challenges the state faces in implementing the Convention

¹⁶⁰ Article 21. The report is forwarded to the General Assembly through the Economic and Social Council. The report is also transmitted the Commission on the Status of Women

gender is central and cross-cutting, and therefore program strategies should incorporate gender equality as a goal. To achieve these, mechanisms aimed at achieving gender balanced development through the removal of disparities between men and women are required to be put in place.

3.3.2 Sessional Paper No. 2 of 2006 on Gender Equality and Development

This Policy forms part of the government's effort to address gender concerns as articulated in international human rights instruments that Kenya has signed or acceded to. It provides a framework for gender mainstreaming and recognizes that socio-cultural attitudes held by men and women, and socialization processes are of great significance in determining the unequal status between men and women. It also recognizes that development initiatives impact differently on men and women.

Just like the National Policy on Gender and Development, the Sessional Paper underlines the need to focus on empowerment strategies that incorporate gender issues. It sets out the need to establish mechanisms to promote gender balance in decision-making for instance the appointment or election of women to national and international bodies.

The Policy also proposes the establishment of institutions by which government objectives with regards to gender can be achieved. The Department of Gender, the gender desks in every Ministry as well as the predecessor to the NGEN are products of the Policy. These institutions support gender mainstreaming in all government ministries, advice on the impact of all government policies on women, monitor the situation of women, formulate policies and implement strategies to eliminate gender based discrimination.

3.3.3 Vision 2030:

Vision 2030 is a key national tool that sets out the national vision to be realized by the year 2030. This Vision is to be achieved through three key pillars, economic, social and political pillars. The first pillar seeks to ensure achievement and sustainability of an average economic growth of over 10 % per annum over the next twenty-five years. The second pillar seeks to build a just and

cohesive society, with equitable social development, and a clean and secure environment. The third pillar aims at producing a democratic political system that nurtures issue-based politics, the rule of law, and protects all the rights and freedoms of every individual and society.

The social pillar has identified gender concerns and in particular equity in power and resource distribution between the sexes as a priority. Its intent is to increase the opportunities for women in the economic, social and political decision-making processes. It seeks to do this by ensuring higher representation of women in Parliament, improving access to business opportunities, health services, education services, housing and justice to all disadvantaged groups including women, persons with disabilities, the youth, people living in arid and semi-arid lands (ASALS) etc, minimizing vulnerabilities through prohibition of harmful cultural practices such as Female Genital Mutilation /Cutting(FGM/C), increasing school enrollment for girls and children from nomadic communities and poor rural and slum communities, attaining gender parity and fairness in the delivery of justice including up scaling training for people with disabilities and special needs.¹⁶¹

Under Vision 2030 several flagship projects are to be undertaken under the auspices of the three pillars. The Women's Enterprise Fund and the Social Protection Fund are projects contemplated under the social pillar and were required to be implemented within the first five year medium term plan (2008-2012). The first Fund is in operation currently and has enabled thousands of women to access loans or credit to start businesses hence improve their economic status. The second Fund is intended to support the destitute in Kenya but is yet to be established. This latter Fund is contemplated under article 43(3) of the Constitution.

Vision 2030 also plays a key role in the attainment of the MDG's. MDG No. 3 commits Kenya to promote gender equality and women empowerment as an effective way to combat poverty, hunger and disease and to stimulate sustainable development.

¹⁶¹ The 7th Periodic Report of the Government of the Republic of Kenya on Implementation of the International Convention On The Elimination Of All Forms Of Discrimination Against Women, pg 8

3.4 The Constitution:

State parties to CEDAW are obligated to ensure that their respective Constitutions incorporate the principle of equality of men and women. CEDAW further requires states to take all necessary measures including legislation to eliminate discrimination against women and to ensure the enjoyment of human rights by women on an equal basis with their male counterparts.

The Constitution is the supreme law of Kenya and forms the basis upon which the other laws can regulate various aspects of human behavior and relationships. It creates fundamental rights and freedoms of citizens and determines the legal relationship between citizens and the state and also between citizens themselves. Kenya's system of government is a devolved one. The Constitution contemplates two levels of government, the National government and the County governments¹⁶². Under Article 174(e) the objects of devolution are to protect and promote the interests and rights of minorities and marginalized communities. The Senate on the other hand is tasked with the responsibility of protecting the interests of the counties and their governments.¹⁶³ Many women fall under this categorization hence the county governments and the Senate are tasked with the responsibility of protecting their rights.

Article 185(2) of the Constitution empowers county governments to make any laws with respect to the powers and functions conferred to county governments under the Fourth Schedule. Gender or women's rights are not listed as one of the functions of county governments under the Fourth Schedule but by virtue of article 174 and gender being a crosscutting issue, legislation passed by Parliament and the County Assemblies should address gender concerns. Up until this moment no county Assembly has passed any law as yet therefore the legislation to be considered will be legislation passed by Parliament to effect CEDAW obligations.

Article 21(4) of the Constitution states that "the State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms". In relation to CEDAW, Parliament and County Assemblies are therefore tasked with the

¹⁶² The First Schedule to the Constitution lists the 47 counties. Article 176(1) states that there shall be a county government for each county.

¹⁶³ Article 96(1) of the Constitution

responsibility of ensuring that women's rights are protected under Kenyan laws. Despite Article 2(6) providing automatic incorporation of treaty law provisions into Kenyan law, Article 27 (4) goes further by obligating the law making machinery to consciously enact municipal law that reflects international law. This provision is important because it enables the internalization of international obligations and makes it possible for a wider spectrum of persons to be aware of their rights.

Article 28 of the Constitution affirms that every person has inherent dignity and compels persons, institutions and the State to respect and protect that dignity. Any action therefore by any person or entity to subjugate women or discriminate against women is a direct violation of this Constitutional principle. Article 27(1) states that every person is equal before the law and has the right to equal protection and equal benefit of the law. It goes on to explain that equality includes the full and equal enjoyment of all rights and fundamental freedoms. The Constitution under article 27(3) stipulates the right to equal treatment between men and women, including the right to equal opportunities in the political, economic, cultural and social spheres. Sub-articles 4 and 5 of that article prohibit the state or any other institution or person from discriminating directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. This is in consonance with Article 1 and 2 of CEDAW that describe discrimination and prohibit discrimination in all its forms.

Article 27(6) of the Constitution requires the state to take legislative and other measures including affirmative action to redress historical inequities. Under article 4 of CEDAW such measures are geared towards accelerating defacto equality between men and women and are to be discontinued once the objectives of equality of opportunity and treatment are achieved. Similarly sub-article 8 obligates the state to take legislative and other measures to implement the principle that no more than two thirds of the members of elective or appointive bodies shall be of the same gender. This Article entrenches a Presidential Directive issued in 2006¹⁶⁴ which required that 30% of appointments and promotions in the Public Service should be relegated to

¹⁶⁴ The Directive was issued by the former President, His Excellency Mwai Kibaki

women. The Directive also mandated that 30% of the composition of Constituency Development Committees should comprise of women.

Under Article 21 (3) of the Constitution, all state organs and public officers have the duty to address the needs of vulnerable groups within society, including women, older members of the society, persons with disabilities, children, youth, members of minority and marginalized communities. This Article is important because for a long time women have been subjected to multiple discrimination since in addition to being women, some are disabled, some are young, elderly or members of minority ethnic groups hence subject to discrimination at manifold instances.

Under Article 22(1) of the Constitution, a person whose rights have been denied, violated or threatened may petition the court for redress. A crucial factor is addressed in Article 22(3) which provides that no fee should be charged in such a case and the petition should not be subject to rigid formalities and procedural technicalities. Many women are poor or otherwise illiterate and therefore cannot afford to hire legal counsel to represent them. Also by simplifying court processes, possible litigants can easily approach the court for remedies otherwise not available to them.

Article 43 outlines the economic and social rights of every Kenyan citizen. These include the right to the highest standard of health, adequate housing, reasonable standards of sanitation, freedom from hunger, right to clean, safe and adequate water, social security and education. The major problem with the implementation of these rights is that such implementation is dependent upon the resources that the Kenyan government may claim to have. Article 21(2) of the Constitution states that the State through various measures including legislation and policy shall ensure the realization of these rights progressively. Article 20(5) also gives the state leeway to “legitimately” prove if called upon that it doesn’t have the resources to provide these rights.

Rights at family level are guaranteed under Article 45(3) of the Constitution. In this case the husband and the wife are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage. As will be seen when looking at the marriage laws currently in place, women before the promulgation of the Constitution were de jure discriminated against in

family settings. Abortion is also permitted if the life or health of the mother is in danger or if permitted under a written law.¹⁶⁵ This provision is geared to address the huge number of illegal abortions procured in underground clinics especially for women who have been raped. No law as yet has been drafted to address the instances when abortion is lawful other than the abovementioned Constitutional provision.

Under Article 53(d) every child has the right to be protected from abuse, neglect, harmful cultural practices, violence, inhuman treatment, punishment and hazardous or exploitative labour. Children also have the right to be detained separately from adults by taking into account the child's age and sex. The Article further provides that children are entitled to parental care and protection from both parents. This latter provision is important as will be established later in the chapter because under the Children's Act 2001, parental responsibility is a choice for the father whilst it is a legal responsibility for the mother.¹⁶⁶

With regards to state institutions, the Constitution under Article 91(1) (f) obligates every political party to respect and promote fundamental human rights and freedoms and gender equality and equity.¹⁶⁷ Affirmative action in the structure of various state organs is depicted in different articles for instance, Article 175(c) which states that no more than two thirds of the members of representative bodies in each county government shall be of the same gender. Similarly under article 197(1) the provision reads that not more than two thirds of the members of the county assembly or county executive committee shall be of the same gender. Article 97(1) (b) gives the composition of the National Assembly and guarantees 47 seats for women. The Constitution also guarantees 18 exclusive seats for women in the Senate.¹⁶⁸ Under Article 127(c) (1) the Parliamentary Service Commission shall constitute a minimum of 4 women out of a maximum of 9. The Judicial Service Commission also guarantees a minimum of four women its composition

¹⁶⁵ Article 26(4)

¹⁶⁶ Section 24(3) provides, "Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently not married each other, the mother shall have parental responsibility at the first instance, the father shall subsequently acquire parental responsibility in accordance with section 25."

¹⁶⁷ Article 91(1)(f)

¹⁶⁸ Article 98(1) (b) (c) (d)

and is required to be guided by the principles of gender equality when exercising its functions.¹⁶⁹The Public Service Commission just like the other state organs is required to ensure fairness and nondiscrimination by according men and women equal opportunities for appointment, training and advancement at all levels of the public service¹⁷⁰. This was not the practice before as the PSC was riddled by a lot of nepotism, favouritism and bias in the processes of selection and promotion and the DPM, bias in the provision of training opportunities.

Under Article 10(2) of the Constitution all state organs, state officers, public officers or any person should be guided by the national values and principles of governance whenever they make or interpret any laws including the Constitution or when making and implementing public policy decisions. These values and principles include human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination and protection of the marginalized. In a nutshell the legislature should take these values into cognizance when enacting laws; the executive when making subsidiary legislation or policy decisions and when implementing policy decisions for instance the National Police Service, Prisons department, the Kenya Defence Forces, parastatals and other public entities and officers; as well as the judiciary when interpreting any law.

The Constitution is indeed a justiciable Bill of Rights. Chapter 4 details the specific rights and fundamental freedoms that are to be enjoyed by every person. These rights include the right to human dignity, right to equality and freedom from discrimination, right to economic and social rights, right to marriage and to found a family and the right to access justice among others.

Part 3 of chapter 4 has a specific thrust as it applies specifically to persons considered vulnerable¹⁷¹ to ensure that their fundamental rights and freedoms are indeed protected. This is very significant for women since women are subjected to multiple forms of discrimination based on sex, age and disability.

¹⁶⁹ Article 171

¹⁷⁰ Article 232

¹⁷¹ Children, youth, persons with disabilities and older persons

It is noteworthy that the rights and freedoms cited in the Constitution may be restricted by law as long as the restriction is reasonable in an open and democratic society.¹⁷² Article 24 (4) on the other hand states that the provisions on equality shall be qualified to the extent strictly necessary for the application of Muslim law to matters of personal law for instance marriage, divorce and inheritance. It is yet to be seen how the Kadhi courts under the new Constitutional dispensation will treat this discretion bearing in mind that the Quran has certain laws that are evidently considered discriminatory.¹⁷³ As stated earlier under Article 2 of the Constitution, the Constitution is the supreme law of the land and any law contrary to the Constitution including customary law is void to the inconsistency and similarly any action by a person or a state organ contrary to the Constitution is void of effect. Furthermore citizens, state officers, public officers and state organs have the duty of ensuring the observance of such guarantees of equal rights.

In addition to the rights enumerated above, the Constitution recognizes the importance of culture as the foundation of the Kenyan nation and as the cumulative civilization of the Kenyan people and nation.¹⁷⁴ Culture is therefore a key component of the Kenyan society. Polygamy has been stated in various fora including the oral submissions to the CEDAW Committee to be part of African hence Kenyan culture. The Kenyan delegation in its defence when presenting the 7th Report to CEDAW regarding its stand on polygamy stated that polygamy does not offend the Constitution and is a culturally accepted practice.¹⁷⁵ The Penal Code on the other hand prohibits bigamy. The Marriage Bill currently in Parliament cures this variance by appreciating and

¹⁷² Article 24(1) COK

¹⁷³ Quran sura Allows a Muslim man to marry a Christian woman but a Muslim woman cannot marry a Christian man; similarly Sura 4:34 permits men to beat a wife if the husband notes rebellion or disrespect from his wife, on the other hand the Quran is silent on whether the woman too can beat her husband if she senses the same behavior or attitude from her husband, under the divorce laws a man can automatically divorce his wife by pronouncing talak 4 times but the woman cannot divorce her husband unless she proves grounds for divorce and the court pronounces a decree in her favour; it is evident here that under Islam women do not have equal rights prior to marriage, during marriage and after dissolution of the marriage

¹⁷⁴ Article 11(1) COK

¹⁷⁵ A polygamous union conducted under the various customary laws is legal. The Marriage Bill currently in Parliament seeks to entrench such unions under written law. The CEDAW Committee however continues to pressure the government to address this cultural practice deemed to be discriminative against women.

providing for polygamous unions under customary settings but explicitly prohibiting polygamy in Christian and civil unions.

From the foregoing, it is clear that the Constitution has gone out of its way to guarantee equality and prohibit discrimination based on sex. As alluded earlier, the Constitution requires the enactment of municipal law to entrench the international commitments it has undertaken. The next part will look at the manner in which CEDAW provisions and Constitutional guarantees have been enacted in Kenya's laws. In like manner reference shall also be made to the relevant policies.

3.5 Domestic laws and policies with relation to CEDAW obligations

3.5.1 Exploitation of women and trafficking in women:

Exploitation of women is a major vice that faces many women in Kenya. Statistics depict that prostitution is on the increase especially amongst teenage girls.¹⁷⁶ CEDAW under article 6 obligates state parties to take all appropriate measures including legislation to suppress all forms of trafficking in women and exploitation of prostitution of women. The Penal Code under sections 153 and 154 prohibits the act of prostitution. Men and women who engage in the vice are subject to criminal sanctions under the Act.

The Sexual Offences Act and the Children's Act also criminalize such activities. The Sexual Offences Act addresses crimes against the girl child that are outlawed in the CRC which Kenya has ratified. Article 11 of the CRC mandates state parties to take measures to combat the illicit transfer of children abroad. The Sexual Offences Act likewise outlaws child trafficking and child sex tourism.¹⁷⁷ Article 34 of CRC further requires state parties to protect children from all forms of exploitation and sexual abuse. Specifically state parties are mandated to take appropriate measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices and the

¹⁷⁶ GTZ, *A situational analysis of sexual and gender based violence in internally displaced persons camps after post election violence in Kenya*, February 23, 2009, pg 6-10

¹⁷⁷ Section 13 and 14

exploitative use of children in pornographic performances and materials. The Sexual Offences Act systematically addresses all these areas in its provisions. Section 9 prohibits attempted defilement of minors, section 11 criminalizes indecent acts with a child, section 12 prohibits the promotion of sexual offences with children, section 15 criminalizes child prostitution and section 15 prohibits child pornography.

Trafficking in persons especially women and children is rampant in Kenya. Kenya is considered a high risk zone since it is a source country, transit country and a destination country. In addition to internal trafficking of girls, Kenya is a source country for women and girls being trafficked to Europe and a transit route for women being trafficked to Europe and the Middle East.¹⁷⁸ The Counter Trafficking in Persons Act¹⁷⁹ provides a legal framework for the prevention and remedy of trafficking in women. The Children's Act as stated in the previous paragraph addresses trafficking in children. The enactment of the Counter Trafficking in Persons Act was therefore a welcome reprieve as the Children's Act did not cater for women above the age of 18 years who were being subjected to this vice.¹⁸⁰ Initially the Immigration Act was the law that was applied to address incidences of trafficking but it was found to be ineffective as it mainly targeted the victims of trafficking rather than the traffickers since its provisions dealt with issues of fraud, forgery of passports or visas and impersonation.

Despite these legal regimes, exploitation of women and prostitution continues unabated and this is because the root causes of the vice namely poverty, unemployment and corruption have not been addressed. Incidences of poverty in Kenya are estimated at 56% of the population of approximately 40 million people¹⁸¹ and the number of poor people continues to rise by the day. Non legal measures addressing the root cause of prostitution should therefore be implemented for instance creating more job opportunities, economically empowering such women and

¹⁷⁸ The 7th Periodic Report of The Government Of The Republic Of Kenya On Implementation Of The International Convention On The Elimination Of All Forms Of Discrimination Against Women, 24th March, 2010, pg 23

¹⁷⁹ Act No. 8 of 2010

¹⁸⁰ The Children's Act defines a child as person below the age of 18 years

¹⁸¹ The Republic of Kenya, 2006, "A Report on the African Charter on Human and Peoples Rights"

stamping out corruption especially with regards to law enforcement personnel such as immigration officers and police officers.

3.5.2 Participation of women in Public and Political Life:

The Third Millennium Development Goal articulates the promotion of gender equality and empowerment of women. On the other hand the Beijing Platform for Women For Action (BFA) outlines the right to representation and participation in decision-making as a critical area of concern for women. CEDAW under Articles 7 and 8 buttresses these protections by obligating states to take all the necessary measures to ensure equal participation of women in political and public life. The Constitution provides that every citizen of Kenya has the right to be registered as a voter, to vote by secret ballot in any election or referendum and to be a candidate for public office or within a political party.¹⁸² The Constitution further mandates every political party to respect and promote the fundamental rights and freedoms of Kenyans as well as promote gender equality and equity in its operations. Such provisions assert the right of all persons including women to be involved in key decision making. The Elections Act¹⁸³ affirms this right by asserting that any adult citizen has the right to vote in any election or referenda. The Political Parties Act¹⁸⁴ also provides for the equal participation of men and women in the formation, management and participation in political parties. It is a requirement under the Act that all political parties should address gender equality by expressly providing for one third membership of women in their Constitutions. The law also specifically prohibits the registration of a party founded on gender or a party that propagates gender based propaganda.¹⁸⁵

The percentage of women in public and political life has been very low over the years. Women have continued to face discrimination with regards to nomination and election to political offices. They face numerous challenges such as violence or threats of violence, lack of resources and discrimination from the electorate including their fellow women who prefer to vote for men even

¹⁸² Article 91, COK

¹⁸³ No 24 of 2011, Laws of Kenya

¹⁸⁴ No. 10 of 2007, Laws of Kenya

¹⁸⁵ Section 14

incompetent men rather than their fellow women. However a marked improvement has been seen after the March 4th 2013 elections. Most of the Constitutional thresholds have virtually been realized which visibly elevates the number of women in elected and appointed positions in the public sector. The number of women in Parliament has increased as there are currently 18 women in the Senate and 455 women in the National Assembly. County Assemblies too have attempted to adhere to minimum limits set out for women in the Constitution and other laws. The executive also mirrors this trend as there are currently 6 women Cabinet Secretaries as opposed to 12 male Cabinet Secretaries and 7 women Principal Secretaries out of a maximum of 26.

Appointments to Commissions established under the new Constitution and implementing laws for instance the Kenya National Commission on Human Rights, the Truth Justice and Reconciliation Commission, National Commission and Integration Commission, the National Land Commission, the Commission on the Implementation of the Constitution, the Independent Electoral and Boundaries Commission, the National Police Service Commission, the Salaries and Remuneration Commission, the Judicial Service Commission, the National Commission on Gender and Development, taskforces for the resolution of specific issues for instance the taskforce to implement article 34 of the Constitution (Freedom of the Media), taskforce on the devolution of government have all been constituted to adhere to the one third gender rule and the requirement that the chair and deputy chair should be of opposite gender.

With regards to appointments at the international level, Kenya has not performed very well. Since 2006, out of the 40 ambassadorial postings, women comprised only 27.5%.¹⁸⁶ The Report attributes this dismal indicator to the lack of political will. Ambassadors and High Commissioners are yet to be appointed by the current government at the time of doing this research but it is likely that the bare one third threshold will be met just to avoid constitutional challenge.

The CEDAW Committee in its recommendations has indicated the need to increase the number of women in decision-making positions and the need to develop programs aimed at encouraging

¹⁸⁶ Joint Submission Shadow Report to the United Nations Committee on the Elimination of discrimination Against Women, 17th January to 4th February, 2011

women to take decision-making positions. It can be seen from the foregoing that affirmative action is greatly needed since none of the women in the Senate was elected, all are nominated by political parties to satisfy Constitutional provisions intended to achieve gender parity. Similarly in the National Assembly the increased number of women Parliamentarians is greatly attributed to the guaranteed 47 women representatives, the nominees from political parties and the need to satisfy the one third gender rule. However the fact that member of Parliament (MP's) fall in this docket and ward representatives who have to be elected, it can be safely stated that the new legal frameworks intended to boost the participation of women on the same basis as men have played a crucial role.

The IEBC played a vital role prior to the 2013 elections in sensitizing the electorate on their civic and political rights via various fora for instance the media, barazas and literature. The large turnout in the registration of voters and the consequent voting data especially in relation to women are an indication of the usefulness of such mechanisms.

Other organs too have played a role in enabling higher representation of women in political and public office. The Kenya Women Parliamentary Association (KEWOPA) whose objective is to support women's advancement in key decision-making positions especially in politics is one such organ. Under the (KEWOPA 2006-2010) Strategic Plan, the vision is to ensure that men and women are to be equitably represented in Parliament and in relevant decision-making bodies in which men and women are equal partners at all levels of leadership. Strategies put in place to achieve this include sourcing finances to enable more women to join politics as the lack of resources is one of the hindrances to more effective participation of women in politics and the mentoring of young women who wish to create a career in politics.

3.5.3 Equality in education:

Education is a key factor for the realization of the equal enjoyment of human rights by women. Without education, people are unaware of their rights. Education therefore opens doors for rationalized thinking and reasoning hence providing opportunities for girls and women to learn and understand their rights and to be able to recognize laws and social attitudes that are

prejudicial to the enjoyment of their rights. For that reason education serves as a useful tool in emancipating women from historical discrimination and disadvantage.

Realizing the crucial role of education, CEDAW guarantees the equal right of women in the field of education under article 10. Similarly the third Millennium Development Goal is to achieve and to guarantee equal access to education for boys and girls alike.¹⁸⁷ The UDHR affirms this by asserting that everyone has a right to education and that elementary education shall be free and compulsory.¹⁸⁸ The ICESCR recognizes the right of everyone to education while Article 28 of the CRC points out that each child has a right to education and proper measures should be taken to encourage regular attendance at school and reduce dropout rates. The Kenya Bill of Rights guarantees the right of every person to education.¹⁸⁹ It further gives every child the right to free and compulsory basic education. The Children's Act too incorporates the constitutional entitlements to education for every child. The Basic Education Act¹⁹⁰ similarly asserts the right of every child to free and compulsory basic education. This Act goes into detail to provide for the guiding principles to be observed in the provision of basic education which include the elimination of discrimination based on gender, the rights of the youth to access basic education, and the rights of every child regardless of sex in public schools to equal standards of education. The government is further obligated to provide adequate human, financial and other resources to meet the education needs of all children.¹⁹¹ The Universities Act also promotes gender equity and equality by setting out these values as part of the objectives of university education.¹⁹² In section 3(2) of the Universities Act all Universities are mandated to uphold Constitutional

¹⁸⁷ United Nations Millennium Declaration, 8th September, 2000

¹⁸⁸ Article 26 of UDHR

¹⁸⁹ Article 43(1)(f) Constitution of Kenya

¹⁹⁰ Act No 14 of 2013, Laws of Kenya

¹⁹¹ The CEDAW Committee has on several occasions put the government to task over its inability to effectively implement its policies in the education sector to ensure that girls access education on an equal basis with boys

¹⁹² Section, 3(1) Act No. 42 of 2012, Laws of Kenya

principles of nondiscrimination, equity and inclusiveness. The Borstal Institutions Act¹⁹³ similarly provides for the educational rights of all inmates.

It is established that challenges facing the education sector include access, equity and equality. To address this, the government introduced free primary education in 2003 and subsidized secondary education in 2008. The effect of these 2 initiatives has been visible. At the preschool stage, the gender gap in enrolment rates remains at 2% and 4%¹⁹⁴ owing to the prohibitive nature of fees not subsidized by government since parents prefer to keep their children at home until they attain the requisite age to qualify for primary school. At primary level the ratios increase significantly and are more or less the same for boys and girls but at secondary level the ratio drops to a comparative ratio of 48% for girls and 54% for boys.¹⁹⁵ Reasons for this vary and include teenage pregnancies and early marriages among others. At the higher levels that is university and tertiary institutions, the transition rates are also lower for girls as compared to boys.

The government has formulated several documents to address gender and education and they include the National Plan of Action on Education For All, (2003 – 2015), the Report of The Education Sector Review (2003), Ministry of Education Strategic Plan (2006 – 2011), Sessional Paper No. 1 of 2005 and the Kenyan Education Sector Support Program (KESSP). The main objective of Sessional Paper 1 of 2005 (referred to as the Policy Framework for Education, Training and Research) is to achieve Education For All (EFA) by the year 2015 in order to accord every Kenyan their right to attain education and training regardless of their socioeconomic status. The government has allocated resources to the educational sector to ensure that education and training embrace equity issues such as equal opportunity for all in access, retention, transition and completion and to eliminate gender and regional disparities at all levels

¹⁹³ Cap 92, Laws of Kenya

¹⁹⁴ GOK , Education Facts and Figures 2002-2008, Nairobi: Education Management Information Systems (EMIS), Ministry of Education, (2009)

¹⁹⁵ *ibid*

of education by 2015.¹⁹⁶ It is not clear whether these funds are sufficient, what with the constant labour unrest bedeviling the sector over the low salaries paid to teachers.

This Policy notes that education is necessary for the protection of democratic institutions and human rights and sets out to provide every Kenyan with basic quality education and training including two years of preprimary education, 8 years of primary and four years of secondary or tertiary education, the realization of universal access to basic education and training to ensure equitable access to education and training for all children. In order to implement these policies the MOE has established a National Taskforce for Gender and Education and a ministerial Taskforce on Gender and Education and gender points in all counties with the common aim of addressing gender issues in education at all levels.

Further and in order to meet its policy objectives the government introduced affirmative action in the provision of education at all levels by lowering the entry cutoff points for girls for entry into secondary and university institutions. Other mechanisms by the government aimed at ensuring access and equality are the provision of secondary school and university bursaries for poor students, provision of financial support to targeted boarding schools in arid and semiarid areas, and ensuring that girls who drop out of school due to pregnancy or early or forced marriages can go back to school. At the higher levels, the Ministry has introduced gender balanced intake of preservice teacher trainees and gender responsive deployment of teachers.

The Ministry of Education has also developed a Career Guide Book¹⁹⁷ to guide students on making informed choices with regards to their dream careers. The Career Book serves as reference point for students by outlining a list of careers and the specific requirements for each of the careers. The Career Book notably does not designate any career on perceived sex roles. The government has also removed Value Added Tax on sanitary towels and provides free towels to some selected approved public schools. This is a reprieve to many middle income and low income families who struggle with the monthly purchase of this commodity. This translates to fewer girls missing school when they have their periods on account of not having sanitary

¹⁹⁶ Sessional Paper No. 1 of 2005 on A Policy Framework for Education, Training and Research, pg 1 and 14

¹⁹⁷ Career Guide Book 2007

towels. Such efforts are derived from the various Policies formulated by the government to encourage gender parity in the education sector.

3.5.4 Health:

The health situation of the Kenyan population, to a large extent, is characterized by low life expectancy, high maternal and infant mortality rate and high morbidity from preventable diseases, including HIV/AIDS.¹⁹⁸ Access to health care is characterized by strong regional and income disparities as well as gender specific and sociocultural factors that hinder access for various vulnerable and marginalized groups.¹⁹⁹ In many areas, the poor and those in arid and semiarid areas cannot access health care or have to walk for long distances to get to hospitals or health care centres that have poor facilities and are understaffed. It is unfortunate that most who fall in this category are women and children.

The Kenya Demographic and Health Survey of 2008 shows that whereas there has been some decline in levels of childhood deaths compared to the rates observed in the previous surveys of 2003 and 1998 (from 77 deaths per 1,000 live births in 2003 to 52 deaths per 1,000 live births in 2008), the situation is such that at least 1 in every 14 children born in Kenya during the period between 2003 and 2008 died before reaching their fifth birthday.

Access to basic reproductive health services for women is also very limited, especially in rural areas. The unmet need for family planning is high and unsafe abortion is a major problem, predominantly for poor and unmarried women, leading to high maternal mortality, infections and infertility. Certain churches such as the Catholic church and African sects prohibit their adherents from using contraceptives. What is essentially a personal choice becomes an institutional prerogative. This has implications for the wellbeing of the woman as natural family planning has been evidenced to have a higher failure rate as compared to contraceptives thus resulting in many unplanned pregnancies.

¹⁹⁸ <http://www.health.go.ke/hpdcon.htm>

¹⁹⁹ *ibid*

CEDAW under article 12 obligates state parties to eliminate discrimination against women in the provision of health services including those related to family planning. Also states are to ensure that women have appropriate services in connection with pregnancy, confinement and the postnatal period and where possible ensure they have adequate nutrition during pregnancy and lactation. The MDGs also offer protection for women in the health sector by targeting the reduction of maternal mortality ratio by three quarters between 1994 and 2015.²⁰⁰ Article 43 of the Constitution accords every person the right to the highest attainable standard of health which includes the right to health care services, including reproductive health care. Abortion is also permitted under article 26 if the health or life of the mother is in danger or if prescribed under an Act of Parliament. No Act has been enacted to implement this. Section 63 of the Penal Code likewise allows abortion only in cases where the physical or mental health of the mother is in danger. The right of a woman to procure an abortion is internationally recognized and expressly provided for, for instance the United Nations Human Rights Committee's Declarations²⁰¹ which advocate for the right of a woman to abort in case of a rape related pregnancy and also the Protocol to the African Charter on the Rights of Women in Africa. In this regard Kenyan laws do not conform to international standards that allow abortion at the woman's prerogative especially if the woman was raped.

Owing to the problems bedeviling the health sector, the Ministry of Health together with development partners developed a National Health Sector Strategic Plan (NHSSP I and II) with a view to restructuring the health sector service delivery. This Plan embodied wider issues of equity, social justice and democracy and also espoused principles such as community and private sector participation and decentralization.²⁰² The NHSSP targets accessibility of health services to all Kenyans and proposes to implement the Kenya Essential Package for Health (KEPH). The KEPH focuses on the health needs of individuals but also has a specific coverage for girls in their early child development, adolescence and their adult reproductive health. The President

²⁰⁰ Millennium Development Goal No. 5

²⁰¹ United Nations Human Rights Committee, General Comment 28

²⁰² <http://www.health.go.ke/hpdcon.htm>

made a public decree of free maternal health care in his inaugural speech in April this year. This has been effected from June 2013 by the MOH in all public health facilities.

3.5.5 Rights of Rural women:

80% of the population of Kenya resides in the rural areas and most of those who live in the rural areas are women.²⁰³ The main economic activity in the rural areas is agriculture and 75% of the agricultural labour is provided by women.²⁰⁴ However women predominantly produce food crops for domestic consumption while the men engage in commercial farming. This has resulted in women utilizing outdated farming technology and earning less income than men. Further rural women only own 5% of agricultural land therefore access to credit facilities is limited as they lack adequate collateral. As a result of the foregoing, most women in the rural areas are poor and incapable of making life changing decisions. CEDAW under article 14 recognizes the challenges faced by rural women hence the comprehensive manner in which it details the areas of concern and measures to cater for this vulnerable group. Article 21(3) of the Constitution obligates state organs and public officers to address the needs of vulnerable groups and includes women in this classification. CEDAW too recognizes rural women as a vulnerable category of persons.

The government has undertaken reforms in the agricultural sector aimed at reducing poverty, increasing food security and improving agricultural management. The government has put in place the Strategy for the Revitalization of Agriculture (SRA)²⁰⁵ which elaborates reforms in the agricultural sector including those targeted at women. The Strategy aims at encouraging farmers to shift from subsistence to market oriented production by adopting modern farming methods. This programme is intended to create an enabling environment for farmers by improving support services such agricultural extension services, providing farmers with marketing facilities and to forge a link between agriculture and other sectors with a view to enhancing gains benefits to be derived from farming. The SRA is also intended to contribute to the ERS and MDG goals of reducing the Kenyan population which lives below the basic poverty line.

²⁰³ <http://www.health.go.ke/hpdcon.htm>

²⁰⁴ *ibid*

²⁰⁵ http://www.siteresources.worldbank.org/INTKENYA/Resources/donor_statement_agriulture.pdf

Another project to benefit farmers is the National Accelerated Agriculture Inputs Access (NAAIA) which is intended to improve farmer access to farm inputs such as fertilizer, pesticides and equipment to improve agricultural production. This initiative has assisted many farmers including women as it has made farm inputs less costly and has also assisted stockists of such commodities to stock goods using a voucher system hence economically empowering them.

The government is addressing the electricity concerns in rural areas through the Rural Electrification Programme. This project has seen the electrification of many rural areas in the country hence elevating the quality of life for most rural families. The project has also promoted small scale agricultural industries in the rural areas. Rural women used to spend a lot of precious time looking for firewood for their domestic use and for fuel to cure tobacco and other cash crops.

Through the Ministry of Cooperatives and Development the government has eased the requirements for women's membership in rural cooperative societies to enable women access agricultural credit and loans, marketing facilities and technology. Similarly the Cooperative College of Kenya offers training for cooperatives. This type of capacity building is intended to provide opportunities for women to participate in gainful agricultural activity as well other income generating activities.

The reorganization of the National Hospital Insurance Fund to enable persons from the formal and informal sector to have access to quality and affordable care is another initiative attributable to the government. The Fund covers a portion of the inpatient costs in accredited hospitals. This initiative touches on CEDAW's obligations for state parties to ensure the access of women to healthcare facilities in general as well as the obligation to specifically cater for rural women under article 14. It also conforms to Article 43(1)(a) of the Constitution. The biggest problem is that NHIF is bedeviled by a lot of corruption that has resulted in the loss of millions of contributor's money. It is hoped that the proposal by the government to have the Kenya Revenue Authority to collect and manage the Fund will bring an end to this state of affairs.

The National Land Policy, the Land Act and the Land Registration Act (both passed in 2012) affirm women's right to acquire, hold and dispose of property. The same instruments protect

matrimonial property and land from disposal by requiring spousal consent before a sale is undertaken. Such legal protections afford women especially rural women who rely on family land, the opportunity to better their lot by being able to access larger credit based on the security created by land. Similarly it prevents women from being rendered homeless and poor by husbands who arbitrarily sell family property. It should be noted that these provisions in the law are as result of concerted effort by women's rights groups to protect women's rights in property.

The Constituency Development Fund Act and the Children's Act have also ensured the provision of greater resources for women and girls living in the rural areas. The Women Enterprise Fund has also played a key role in rolling out finances to women's associations in the villages.

Despite the legislative and policy efforts undertaken by the government to address the needs of rural women it is noted that poverty is a key obstacle in the realization of equality between men and women at the rural level. This is because most women who reside in the rural areas are more concerned with fending for their families and in essence find awareness campaigns a waste of their time.

3.5.6 Equality in marriage:

Family relations in Kenya are predominantly based on cultural practices or religious beliefs. Patriarchial underpinnings based on male headship also affect the marriage setting irrespective of the type of marriage thus affecting the rights of men and women in such a relationship. This is evidenced even by the various laws that govern marriage and family relations for instance the Marriage Act,²⁰⁶ African Christian Marriage and Divorce Act²⁰⁷, Matrimonial Causes Act²⁰⁸, Subordinate Courts (Separation and Maintenance) Act²⁰⁹, Maintenance Orders Enforcement Act²¹⁰, Mohammedan Marriage and Divorce Registration Act²¹¹, Mohammedan Marriage,

²⁰⁶ Cap 150, Laws of Kenya

²⁰⁷ Cap 151, laws of Kenya

²⁰⁸ Cap 152, Laws of Kenya

²⁰⁹ Cap 153, Laws of Kenya

²¹⁰ Cap 154, Laws of Kenya

Divorce and Succession Act,²¹² Hindu Marriage and Divorce Act,²¹³ Hindu Succession Act²¹⁴. Currently customary law on marriage is not codified and varies from community to community. However the African Christian Marriage and Divorce Act provides for formalization of traditional marriages. In Kenya cohabitation is legally recognized by the courts under the “presumption of marriage” principle. The effect of such recognition is that women who are not married under custom or statute law are protected. The problem with the current law is that it does not provide for the registration of such unions and if a judge “finds” that such a woman is not a “wife”, she cannot enjoy the legal benefits of being a wife. However the Law of Succession in such instances is able to protect the interests of children born under such unions by allowing them to inherit the property of the deceased party. This accords protection to women who are not married either customarily or under statute.

The laws currently in place also reflect patriarchal tendencies with regards to responsibilities to the offspring of sexual unions. For instance the Children’s Act²¹⁵ discriminates against children who are born out of wedlock as it accords automatic parental responsibility to mothers but with regards to the fathers, they only become accountable when they apply to the court for parental responsibility. Further inequality of spouses exists and this often leads to other forms of discrimination and domestic violence. If a woman is considered to be insubmissive she is subject to the wrath of her spouse and other extended family members especially if she is illiterate or economically dependent on her husband. The Sexual Offences Act in this context despite comprehensively providing for sexual offences which offences are normally targeted at women,

²¹¹ Cap 155, Laws of Kenya

²¹² Cap 156, Laws of Kenya

²¹³ Cap 157, Laws of Kenya

²¹⁴ Cap 158, Laws of Kenya

²¹⁵ Act No. 8 of 2001

does not provide for spousal rape. The Family Protection Bill²¹⁶ though which is currently in Parliament is intended to address such situations within the family setting.

Having said that, there is a proposed Marriage Bill intended to consolidate all laws relating to marriage into one statute. The Bill provides for equal rights between men and women to enter into a marriage in other words equal rights to choose a spouse with full and free consent as well as similar rights and responsibilities during and after the dissolution of the marriage. The Bill also provides for the mandatory provision of registration of marriage and the recognition of polygamous unions.

3.5.7 Division of matrimonial property:

The law that applies to the division of matrimonial property is an archaic one courtesy of the Judicature Act. The law that applies to the division of matrimonial property is section 17 of the Married Women Property Act of 1882 of the United Kingdom, a statute of general application in Kenya pursuant to section 3 of the Judicature Act. The English have since repealed the Act and enacted the Matrimonial Property and Proceedings Act of 1970 while Kenyans still use the Act that was enacted in the 1800's.

Under the current legal regime, if a party wants to have matrimonial property divided, he or she has to make an application under section 17 of the Married Women Property Act of 1882. Section 17 of this Act provides that regarding a question between husband and wife as to the title or possession of the property either party may apply to the court for an order. Together with this provision another source of law for the distribution of matrimonial property are the cases that the court has determined. The current legal regime poses a serious challenge to the administration of justice in this area of the law. The circumstances in Kenya have changed greatly just like in English society and there is need to address the current socioeconomic conditions that prevail in this country.

²¹⁶ The CEDAW Committee has severally called on the Kenyan government to ensure the passage of the Family Bills – Marriage Bill, Matrimonial Property Bill and Family Protection Bill, CEDAW/C/KEN/Q&/7 (response to 7th Government report). It still does not provide for rape but caters for other forms of abuse targeted at women within the family setting. However the male dominated Parliament continues to dilly dally in its consideration of the same.

The Matrimonial Property Bill which is currently in Parliament seeks to address gender and equity issues with regards to matrimonial property. The Bill retains the purpose that necessitated the enactment of the Matrimonial Property Act, 1882, which was to enable women to own property. It provides for the same rights of both spouses to acquire, own, manage administer and dispose of property. It also gives a definition of matrimonial property. Matrimonial property is defined to include the matrimonial home, movable and immovable property owned by both or either spouse and acquired during the subsistence of the marriage, or any other property acquired during the subsistence of the marriage.

According to the Bill, property that is acquired before the subsistence of the marriage is not matrimonial property and this type of property may be shielded from matrimonial suits upon separation or divorce by the signing of prenuptial agreements. The Bill also provides that matrimonial property shall vest in the spouses in equal shares, irrespective of the contribution made by either of the parties towards the acquisition of the property. This is a welcome provision especially in light of the Court of Appeal ruling in 2001²¹⁷ that overturned previous equitable jurisprudence on division of matrimonial property.²¹⁸ This more recent determination by the Court states that only financial contribution is taken into consideration in division of matrimonial property suits. The Bill also recognizes the application of customary laws in the division of matrimonial property. It states that customs will only be applicable if they do not violate Constitutional principles.

3.5.8 Land and property rights, succession:

Land rights are a very contentious issue in a society like Kenya where around 87% of the population depends on agriculture. Only 10% of Kenyan women own title deeds, thereby minimizing their opportunities to access credit.²¹⁹ CEDAW in addition to the general prohibition of discrimination against women in all fields imposes an obligation on states to ensure the equal

²¹⁷ Peter Mburu Echaria Vs Priscilla Njeri Echaria Civil Appeal No. 75 of 2001

²¹⁸ Appeal Court decisions in Kivuiti Vs Kivuitu and Muthembwa Vs Muthembwa ruled that upon the dissolution of marriage a woman is entitled to 50% of the matrimonial property

²¹⁹ Kenya Vision 2030: A Globally competitive and Prosperous Kenya(2008) pg 117

treatment of women in land and agrarian reforms and resettlements. The Constitution under article 60(1) provides that land in Kenya belongs to the people of Kenya as a nation, as communities and as individuals and vests in the national and county governments as the case may be in trust for the people of Kenya. The National Land Commission is then vested with the power to administer land on behalf of the Kenyan people. Further Article 60 (1) (f) provides for the equitable, efficient, productive and sustainable use and management of land in accordance with the principles of elimination of gender discrimination in law, customs and practices related to land and property.

The National Land Policy²²⁰ recognizes the obvious inequitable access to land for women as an issue that deserves special attention and mandates the state to enact, repeal and enforce laws to protect land rights of women. In particular the Policy obliges the state to review the Law of Succession Act and enact a Matrimonial Property law and other related laws to protect the rights of widows and divorcees by providing for co-ownership of property. The Policy further requires the state to provide for joint spousal registration and documentation of land rights and joint consent of land disposals. This provides an opportunity for the state to prioritize gender reforms in the area of land and property rights for the benefit of women's equal access, control and ownership of land. The Policy also recognizes the existence of informal settlements and prescribes an inventory of genuine squatters. This is very important for the identification of women living in informal settlements for the purposes of benefiting from urban land reforms suggested by the Policy.

The Land Act²²¹ and Land Registration Act were enacted in 2012 as result of the National Land Policy and the need to conform to the new Constitution. The Land Act prohibits discriminatory laws, practices and customs with regards to land and property in land. The two Acts further create statutory rights to land for spouses. Such rights affect all land and not just matrimonial property. Where land is held in the name of one's spouse but the other spouse has contributed to the productivity, upkeep or improvement of the land, the contributing spouse is deemed to have

²²⁰ Sessional Paper No. 3 of 2009

²²¹ Act No. 6 of 2012, Laws of Kenya

acquired an ownership interest in the land and these ownership interests are recognized as if they were registered. Further dispositions of land including the sale, transfer, lease and charges of any land or dwelling house held in the name of one spouse require the consent of the other spouse. A lender or purchaser is also now under a duty to inquire whether the consent of the other spouse or spouses has been obtained when purchasing or encumbering family property.

The Law of Succession Act²²² provides for issues relating to intestate and testamentary succession and the administration of estates of deceased's persons. Section 35 of the Act provides that where a spouse dies intestate leaving a spouse and a child or children, the surviving spouse shall be entitled to the personal and household effects of the deceased absolutely; and a life interest in the whole residue of the net intestate estate. It further states that if the surviving spouse is a woman, that interest shall determine upon her remarriage. This in itself is a discriminatory provision as it does not apply to men when they remarry. Subsection 5 of this section provides that when a person dies intestate, the property shall devolve to the children in equal shares without making distinction as to the sex of the child. Despite a general trend towards recognizing the rights of the girl child, many courts still disregard this provision and discriminate against the girl child by relying on outdated customary provisions. These provisions are contrary to the current Constitution that outlaws discrimination based on sex and asserts equality of both genders before the law. Section 32 of the Law of Succession Act provides that the provisions of the Act shall not apply to agricultural land or crops or to livestock which is situated in such areas as the Cabinet Secretary may by notice in the Gazette specify. Section 33 then provides that the law applicable in such cases shall be the customary law of the deceased person. These clauses just like section 35(5) discriminate against women as they exact the application of discriminatory customary law on property. Women living in such areas often miss out on the opportunity to inherit their parent's property as their customary regimes may not allow for them to inherit. Effort should therefore be made to review the succession Act to conform to the current supreme law of Kenya.

²²² Cap 160, Laws of Kenya

Formulation of legislation and policies is a great start towards eliminating discrimination against women in the land and property sector. However without proper implementation of these policies and laws, the objective of realizing gender equity may never be really achieved.

3.5.9 Nationality

The Constitution under article 14 provides that any person born of a Kenyan parent acquires Kenyan citizenship. Article 15 provides that foreigners may acquire Kenyan nationality. These include persons married to Kenyans, residents of over 7 years and foreign adopted children. The provision does not make any distinction between the sexes on the acquisition and transfer of nationality. Article 13(3) of the Constitution further provides a guarantee in relation to nationality and stipulates that Kenyans of either sex are not to be deprived of their nationality due to marriage to or divorce from a foreign national. The Constitution also recognizes dual citizenship hence Kenyan women married to foreigners can retain their Kenyan citizenship if they wish to acquire their husband's citizenship. Similarly foreign women can retain their citizenship and apply for Kenyan citizenship too. This was not the case before as such women had to denounce their citizenship to apply for the other citizenship.

The Kenya Citizenship and Immigration Act²²³ mirrors the Constitutional provisions and entitles Kenyan men and women alike to grant their spouses their nationality. Further children whether adoptive, legitimate or illegitimate acquire their parents' nationality under the Act.

Before the promulgation of the new Constitution and the Kenya Citizenship and Immigration Act unmarried women had to obtain the consent of their fathers to obtain passports while married women had to obtain the consent of their husbands. Interestingly, husbands did not have to seek their wives consent. Similarly when travelling abroad married women had to obtain the written consent of their husbands. These barriers are not there anymore. Women are now able to get their passports and need only to lodge copies of their marriage certificates when applying for the passports. However this requirement is still discriminatory for women who are married customarily especially in view of the fact that the Marriage Bill which mandates all types of

²²³ No. 12 of 2011, Laws of Kenya

marriages to be registered is taking so long to be passed.²²⁴ The other problem is with regards to single mothers who intend to get passports for their children and are unable to produce marriage certificates and birth certificates that indicate the father of their children. Such lacunae should be effectively addressed by the laws as well government machinery administratively.

It is notable that the CEDAW Committee had on several occasions called for the amendment of law relating to the nationality.²²⁵

3.5.10 Employment Rights

CEDAW under article 11 recognizes the equal right of women as men in the field of employment. This right is recognized in article 27(3) of the Constitution that recognizes the right of men and women to equal treatment including the right to equal opportunities in various spheres including the economic sphere. Article 41 of the Constitution buttresses this by recognizing the right to fair remuneration and reasonable working conditions for every worker regardless of their gender.

The Employment Act²²⁶ which conforms to the principles of the 1998 ILO Convention²²⁷ which Kenya has ratified outlines in a comprehensive manner protections that are geared to protect female employees. The Act prohibits the discrimination of women in accessing employment or in security of employment as well as discrimination in respect of training, promotion; and terms and conditions of employment.²²⁸ Subsection 4 of the same section creates sanctions against an employer who discriminates against an actual or prospective employee based on their sex. In addition section 29 of the Employment Act grants women 90 days maternity leave and men 14 days paternity leave. Women can now benefit from the emotional and physical support of their

²²⁴ The previous chapter illustrated the reasons as to why pro-women laws take long to be passed or in other instances are even repealed

²²⁵ www.un.org/..daw/cedaw/..recomm.htm last updated on 8/7/2013

²²⁶ No. 11 of 2007

²²⁷ Article 2 of the Convention provides that states parties as well as non-state parties are obligated to eliminate discrimination in employment and occupation

²²⁸ Section 5(3)(a) and (b)

husbands in their immediate days of confinement. It is noteworthy that the 90 days leave is in addition to annual leave or sick leave. These provisions comply with articles 5(b) and 11(2) (b) of CEDAW that require the appreciation of maternity as a social function. It has also eliminated the injustices that female employees have had to undergo when they were granted limited periods of leave to recover and tend to their little ones. Section 54(4) of the Employment Act stipulates that all men and women performing work of equal value shall be paid equal remuneration. The Act also prohibits unfair termination of employment which includes termination on the basis of sex, going on leave, pregnancy or any reason connected with pregnancy.²²⁹The private sector to date is not happy with these provisions and has severally called on the government to reduce the period for maternity leave or alternatively disallow annual leave once maternity leave has been granted in any particular year citing economic reasons.

The Employment Act like the Sexual Offences Act prohibits sexual harassment. Under section 6 of the Employment Act, sexual harassment is prohibited. The Act defines sexual harassment to include the use of language, whether written or spoken, of a sexual nature. Further under section 6(2) an employer of more than 20 employees is required to develop a policy on sexual harassment in a participatory process.

Legislative developments have facilitated positive changes in people's perceptions and attitudes about women's rights in employment. This has in turn shaped employment practices in both the public and private sectors in favour of women's employment rights. Statistics illustrate that the number of women entering wage employment has been increasing gradually with a total of 521,796 females in 2004 to a total of 574,655 in 2007.²³⁰

There has also been an increase in the number of women employed at the judiciary. There have also been administrative efforts to improve and increase women's participation in the Kenya Defence Forces and the National Police Service. Women are now allowed to serve alongside their male colleagues in the Army, Air Force and Navy. The Kenya Defence Forces and National Police Service Service are also committed to complying with the one third gender rule. Women

²²⁹ Section 46(a), (b) and (g)

²³⁰ The National Bureau of Statistics, Statistical Abstract, 2008 pg 254

soldiers are now being sent on United Nations missions abroad and are considered for appointments and promotion on an equal basis with their male counterparts. Similarly in the National Police Service women are increasingly being appointed to more senior positions than was the case before.

The shortcoming of such statistical data is that it does not aggregate the number of women undertaking domestic duties such as raising children and tending to the sick and elderly. This is clear indicator that their roles as family care givers is yet to be recognized as work yet these roles consume a lot of women's energy, time, emotions and opportunities that would otherwise be spent in productive activities.²³¹ Women also work as farm labourers in family and commercial farms where they constitute 70% of the labour force; but the extent of their labour contributions in the agricultural sector is not adequately remunerated.²³²

The biggest challenge to increased women's participation in the labour force is limited by opportunities for education. The data presented under education depicts high enrollments for both boys and girls at elementary level but the transition to secondary school then to university drastically reduces which translates to fewer job opportunities for women and if such opportunities are available at a much lower level than their male counterparts. Other obstacles to employment are poverty such that few girls go beyond primary school level. Where resources are scarce parents prefer to educate their sons rather than their daughters translating to fewer women qualifying for meaningful wage employment.

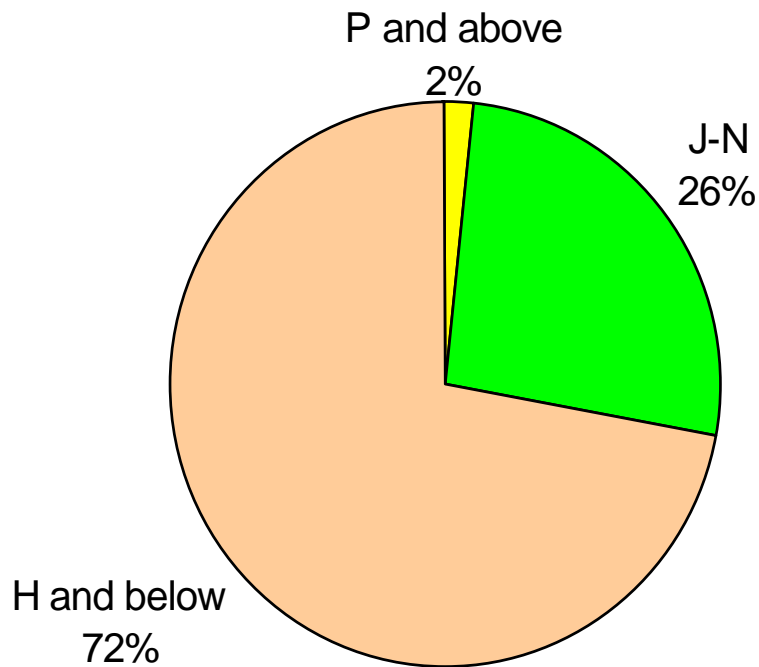
The following data depicts the dismal participation of women in top positions or decision-making positions in the public and private sector.

²³¹The 7th Periodic Report of The Government Of The Republic Of Kenya On Implementation Of The International Convention On The Elimination Of All Forms Of Discrimination Against Women, 24th March, 2010 pg 40

²³² Ibid pg 42

Figure 1: Distribution of Women in Civil Service by Categories

DISTRIBUTION OF WOMEN IN CIVIL SERVICE BY JOB CATEGORIES



Source: Ministry of Gender, Children and Social Development

Table 2: Proportion of persons operating Enterprises by sex and region

Proportion of persons operating Enterprises by Sex and region

Agriculture, Forestry and Fishing		KENYA	RURAL	URBAN
	MALE	50.3%	50.5%	43.5%
	FEMALE	49.7%	49.5%	56.5%

	TOTAL COUNT	148,085	143,435	4,649
Mining And Quarrying	MALE	79.2%	80.7%	54.3%
	FEMALE	20.8%	19.3%	45.7%
	TOTAL COUNT	15,196	14,301	895
Manufacturing	MALE	48.4%	42.7%	70.9%
	FEMALE	51.6%	57.3%	29.1%
	TOTAL COUNT	239,326	191,515	47,812
Construction	MALE	53.3%	0.0%	99.4%
	FEMALE	46.7%	100.0%	0.6%
	TOTAL COUNT	3,472	1,608	1,864
Transport, storage, Communication	MALE	72.5%	65.4%	91.1%
	FEMALE	27.5%	34.6%	8.9%
	TOTAL COUNT	18,869	13,663	5206
Wholesale, Retail trade	MALE	39.3	39.6	38.6
	FEMALE	60.7	60.4	61.4
	TOTAL COUNT	1,536,114	1,000,598	531,516
Finance/Insurance services	MALE	80.3	80.3	80.2
	FEMALE	19.7	19.7	19.8
	TOTAL COUNT	54,036	32,612	21,424
Electricity, Gas, Water	MALE	83.7	81.0	84.7

	FEMALE	16.3	19.0	15.3
	TOTAL COUNT	28,579	7,414	21,165
Community/Social services	MALE	690	77.1	61.1
	FEMALE	31.0	22.9	38.9
	TOTAL COUNT	145,272	71,600	73,673
Not Classified	MALE	44.9	42.3	48.0
	FEMALE	55.1	57.7	52
	TOTAL COUNT	120,036	65,424	54,612
TOTAL	MALE	46.0	43.7	45.5
	FEMALE	54	56.3	54.5
	TOTAL COUNT	2,360,742	1,513,558	741,392

Source KIHBS, 2009/2010

3.5.11 Violence Against Women:

Violence against women is widespread in Kenya and is unfortunately considered as an acceptable behavior by the society. International treaties recognize violence as a pervasive violation of human rights and a major impediment to achieving gender equality. Conventions or agreements to outlaw violence against women that Kenya has ratified include the Beijing Declaration and Platform For Action,²³³ the Rome Statute,²³⁴ which includes sexual violence,

²³³ Adopted in 1995

²³⁴ Rome Statute of the International Criminal Court (ICC),1998

rape, sexual slavery, enforced prostitution, forced pregnancy within the definition of crimes against humanity and war crimes, and the Beijing Review (Beijing+5) that stipulates the criminalization of violence against women and for the adoption of measures to end violence against women on the basis of racial grounds and included honour crimes. CEDAW does expressly prohibit violence against women, however DEVAW and the Protocol to CEDAW which Kenya is yet to ratify requires states to pursue a policy of eliminating violence against women.

According to the 2003 Demographic and Health Survey about half of the women in Kenya have experienced physical abuse from the age of 15 years. 26% of women have encountered marital violence that encapsulated emotional abuse, 40% physical abuse and 16 % have experienced sexual violence within their marriage. According to the Survey, there was a 12% increase in the total of sexual crimes reported each subsequent year. The Nairobi Women's Hospital which is the main hospital in Kenya that deals with cases of sexual violence against women records that it has treated over 9000 rape survivors since 2001. A Report done on victims of post - election victims in 2008²³⁵ establishes that women constitute 68.9% of internally displaced persons. These women suffer a myriad of problems for instance loss of family members, associated trauma, disrupted social ties, malnutrition, deteriorating health and HIV infections as a result of rape during the post-election violence and even as they continue to stay in the temporary camps. The Truth Justice and Reconciliation Act²³⁶ was enacted in 2008 and its main objective is to establish an accurate, complete and historical record of violations and abuses of human rights and economic rights. The recently released report by the TJRC should be the basis upon which the government establishes mechanisms to ensure equity in the promotion of human rights and fundamental freedoms.

The Sexual Offences Act provides a comprehensive legal regime for sexual offences and prescribes commensurate sanctions for them. It prescribes minimum sentences and therefore ousts arbitral judicial discretion where magistrates or judges would prescribe lenient sentences to

²³⁵ GTZ, *A Situational Analysis of sexual and Gender based Violence in Internally Displaced Persons camps After Post election Violence in Kenya*, February 23, 2009 pg 10

²³⁶ Act No. 6 of 2008

offenders. Under section 7 and 19 of the Act persons with disability are catered to by requiring special protection when addressing their needs owing to their higher degree of vulnerability. The Act also creates sexual offences relating to persons in position of authority and trust and extends liability to other legal persons like companies and expressly provides sanctions against them.

The Act however has certain shortcomings such as the provision dealing with sexual harassment which makes only persons in position of authority or public officers liable for harassment²³⁷ and section 38 that makes it a criminal offence to make false allegations. The former provision does not criminalize the actions of male colleagues or peers in an office setting while the latter provision may prevent genuine complainants from reporting for fear of reprisals. Despite the comprehensiveness of this law, it has not been implemented to the advantage of those it seeks to protect owing to various reasons for instance ignorance of the provisions of the Act by enforcement officers and the society and fear of reporting violations by victims due to cultural reasons. The Sexual Offences Regulations and the Sexual Offences Dangerous Offenders DNA Data Bank Regulations have also been enacted under the auspices of the main Act to enable better implementation of the Act. A research undertaken by FIDA-K²³⁸ identified institutional challenges on the implementation of the Sexual Offences Act for instance the Taskforce on the Implementation of the Sexual Offences Act was set up 2007 but it is only in 2010 that the said Taskforce started working on a national framework and guidelines for administration of sexual violence. Further the Taskforce was mandated to conduct civic awareness on the Act but had not done that even when its term was renewed in 2011.

The 2003 Survey also shows that 1 in 10 adolescents are subjected to varied violations of rights including sexual abuse as well as exposure to harmful cultural and violations of rights such as early marriage and FGM. FGM is considered by many communities in Kenya as a religious obligation or a rite of passage into womanhood and ensures girl's virginity and consequently her value and that of her family.²³⁹ Circumcision is also considered to increase the likelihood of good

²³⁷ Section 23

²³⁸ FIDA-K, *Research on the Implementation of the Sexual Offences Act* - Justice Sector, 2010

²³⁹ Among the Somali, Maasai and Kisii FGM prevalence is over 90%

marriage prospects. Also underpinning the practice are prescribed gender roles and understandings of men and women's sexuality²⁴⁰. The Children's Act prohibits forced and early marriages but communities which practice circumcision tend to marry off their girls after circumcision as the girl is now considered a woman.

The Maputo Protocol on the Rights of Women in Africa asserts that FGM is a violation of women's sexual and reproductive rights and an assault on their physical integrity. CEDAW under article 5(a) requires state parties to outlaw cultural practices that are based on the inferiority and superiority of the sexes. FGM is prohibited in Kenya under the Prohibition of Female Genital Mutilation Act.²⁴¹ The Act also imposes criminal sanctions on persons who commit the offence abroad with a view to avoiding the law.²⁴²

The Witness Protection Act²⁴³ was enacted to provide for the protection of witnesses in criminal and other proceedings. Many women victims of sexual abuses, domestic violence and other acts of violence have been enduring a lot of torment without seeking redress for fear of reprisals. The Act establishes a Witness Protection Program which includes protection of witnesses from identification²⁴⁴, special commercial arrangements for witnesses requiring protection²⁴⁵ and immunity of witnesses from legal proceedings.²⁴⁶ It is unfortunate that this law is not known to many what with the statistics depicting the amount of violence meted against women. It is therefore incumbent on the Witness Protection Agency to sensitize the citizenry on its existence and its role.

²⁴⁰ Wangila M. N, *Female Circumcision: the Interplay of Religion, Culture and Gender in Kenya*, Nairobi, Orbis Books, 2007

²⁴¹ Act No. 32 of 2011

²⁴² Of importance is the CEDAW Committee's input in agitating for the passing of this law. CEDAW/C/KEN/CO/6

²⁴³ No. 16 of 2006

²⁴⁴ Part II of the Act

²⁴⁵ Section 26, No. 16 of 2006, Laws of Kenya

²⁴⁶ Section 34, No. 16 of 2006, Laws of Kenya

The HIV and AIDS Prevention and Control Act's main objective is to promote women's protection against rape and other sexual abuses as well as other abuses related to sex and gender. It prohibits a person from knowingly infecting another with HIV²⁴⁷, provides measures for the protection and promotion of public health and for the appropriate treatment, counseling, support and care of persons infected or at risk of HIV and AIDS infection, prohibits discrimination at the workplace, schools, health institutions including any restriction on travel or denial of burial services and exclusion from credit and insurance services on the grounds only of actual, perceived or suspected HIV status. The Act also prescribes criminal sanctions for such discriminatory acts and practices.

At Policy level, the government through the National Commission on Gender and Development has developed a National Framework on Gender Based Violence to form the basis of realization of instances of sexual violence and to strengthen responses to stem out the vice. An Anti- FGM Policy has also been formulated to address the vice. The Policy proposes alternative rites of passage and asserts the need to create awareness amongst FGM practicing communities on the hazards of the practice.

The National Legal Aid and Awareness Programme (NALEAP) was officially launched in 2008 where six pilot projects were created to carry out its mandate. The Steering Committee tasked with establishing it was comprised of government and civil society and facilitated its establishment. It has however been faced with several problems including lack of resources since it is funded by donors and insufficient staff and has therefore not been able to achieve its objectives. The effect is that poor women who are victims of human rights abuses have not been able to adequately access its services and therefore continue to suffer.

The Nairobi Women's Hospital through its Gender Violence Recovery Centre (GBRC) established in 2001 provides free medical treatment and psychological support to survivors of gender based violence. Since its inception it has provided free comprehensive treatment to over 26,000 survivors. In conjunction with the MOH under the National Policy on Gender Based

²⁴⁷ Section 26, Cap

Violence, the GVRC has duplicated its services regionally in Kenya²⁴⁸ The GVRC has developed a computerized data system on GBV that has been used to influence key national initiatives for instance the enactment of the Sexual Offence Act, establishment of recovery centres within Kenya and as evidence in court cases. The GVRC has also trained police officers countrywide on how to manage gender friendly desks at the police stations and collaborated with institutions offering nursing courses to develop an appropriate curriculum.

3.6 Institutions geared towards protection of human (women) rights

In order to achieve its goals in ensuring that women and men alike enjoy their human rights, the government has put in place several institutional mechanisms with different but complementary roles namely the National Gender and Equality Commission (NGEC), the Kenya National Commission on Human Rights (KNCHR) and the Department of Gender and Social Development in the Ministry of Labour, Social Securites and Services. These institutions have been able to establish certain mechanisms to elevate the status of women in Kenya for instance establishment of gender units in all government ministries or institutions, the National Anti-FGM Coordinating Committee, the Gender and HIV Aids Subcommittee mandated to develop strategies for gender mainstreaming into the Kenya National HIV/AIDS Strategic Plan and the Taskforce on Sexual Violence. This study will focus on the NGEC, the KNCHR, and the Department of Gender in the Ministry.

3.6.1 Kenya National Commission on Human Rights (KNCHR)

The Kenya National Commission on Human Rights is established under Article 59 of the Constitution. Its mandate is to promote and develop a culture of human rights within Kenya. It is also tasked with promoting gender equity and equality generally and to mainstream such issues in national development. KNCHR may on its own motion or upon complaint investigate alleged abuses of human rights and secure appropriate redress for victims. The Commission also acts as the principle organ of the state in ensuring compliance with human rights treaties. The predecessor to the KNCHR played a key role in the post-election violence. This is evidenced in

²⁴⁸ At Kenyatta National Hospital , Nairobi, Moi Referral Hospital Eldoret, Taita Taveta District Hospital and Biafra Clinic in Nairobi

the 3 cases against prominent persons in Kenya before the ICC. Among the crimes that they are being accused of is rape, genocide and forceful eviction. The Commission has also played a key role locally by instituting cases in the local courts on behalf of human rights victims (of whom a considerable number are women), undertaking research on its own or with other institutions over the human rights situation in Kenya, investigating human rights abuses and publicly releasing the findings so as to hold the government accountable and collaborating with government to ensure that human rights are appreciated and engendered too.

3.6.2 The National Gender and Equality Commission (NGEC)

This Commission is also a creation of the Constitution. It is contemplated under article 59(5) where Parliament is empowered to restructure the Kenya National Human Rights and Equality Commission by creating other commissions if doing so would ensure the effective discharge of their mandates in promoting human rights. This Commission as opposed to the KNCHR which deals with human rights generally is tasked with addressing gender issues. Under its constituting Act, the Commission is required to promote gender equality and freedom from discrimination in accordance with article 27 of the Constitution. To achieve this it is required to monitor, facilitate and advise on the integrations of the principles of equality and freedom from discrimination in all national and county policies, initiate and advocate for legal reform on issues affecting women and to formulate laws and policies that eliminate all forms of discrimination against women, advise the government in establishing and strengthening institutional mechanisms which promote gender equality and equity in all spheres of life in particular access to education, healthcare, nutrition, shelter, employment and control of economic and national resources, and to create public awareness on gender issues as well as undertaking research activities in gender issues. The Commission like the KNCHR acts as a principal organ of the state in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination. In conjunction with the previous Ministry of Gender, Children and Social development, the predecessor to the Commission formulated several policies such as the National Policy on Female Genital Mutilation and Sessional Paper No. 2 of 2006 on Gender and Equity.

3.6.3 Department of Gender:

The Department formulates Policy and gives general policy direction on matters relating to gender. It also acts as the parent Ministry for all gender related issues for instance the pushing of gender legislation and sub-legislation. In that regard, the NGEC falls under its purview.

It should be noted that all these institutions are tasked with creating awareness among Kenyan citizens as to the rights of women as espoused in CEDAW and national laws. However, they have not been able to discharge this mandate owing to the reasons outlined in the next part.

3.7 Challenges faced by government institutions in ensuring gender equality and equity:

A key informant stated that the key challenge that the women's cause faced is lack of political will. This is manifested in many ways whereby there is lack of support from the political leadership which would ensure that the roles and work of key institutions in addressing the gender problem are taken seriously and that there was real potential for development collaboration with other players in government.

Changes in government and national commitments owing to differing political party priorities also poses a problem as it has led to frequent restructuring in the machinery that deals with gender issues. For instance the current Jubilee government has done away with the autonomous Ministry of Gender, Children and Social Development and has now moved the Department of Gender (formerly in that docket) to the Ministry of Labour, Social Securities and Services.²⁴⁹ In addition the leadership of these machineries is constantly changing resulting in a lack of continuity.

Another challenge faced by the national machinery is lack of resources. Shortage of funds has impacted on staffing and implementation of programmes at the national as well as county level. Many Ministry cuts have also affected gender mainstreaming in sectoral ministries such as health and education. There is also an evident lack of well trained staff to deal with gender related

²⁴⁹ Similarly the autonomous machinery geared to deal with gender issues keep changing. For instance the former National Commission on Gender and Development established in 2003 has now been replaced by the National Gender and Equality Commission established in 2012.

issues. Such challenges ultimately affect delivery of forecasted outputs. Where staff are not well informed on the laws, their specific roles and agenda, it is then very difficult for them to create awareness of the laws, policies and programs among the citizenry as well.

Also owing to the lack of funds, it has been very difficult for these institutions to create awareness at the grassroots level. In as much as the government through various media has tried to educate the Kenyan citizenry on the gains espoused in the Constitution and its implementing laws, these efforts have not been well coordinated to achieve the maximum impacts intended. Also due to the poverty levels especially in the rural areas and the urban slums, not many women have been available to be educated on their rights. There is also a common misconception and distrust of the government as most citizens believe that the laws are there to benefit the select few and not the common man.

Further the absence of sex disaggregated data is also another challenge. Despite the progress achieved, gaps in sex disaggregated data and information persist in certain areas such as wage differentials, health indicators, decision-making, and violence against women. This lack of information inhibits the construction of appropriate tools for planning and programming. It also constrains development of effective monitoring systems.

Monitoring progress in achieving gender equality is a major challenge. The government has generally tended to monitor progress as recommended under the 3 main strategic objectives in the Beijing Platform for Action. Monitoring progress of these efforts may give positive results but does not provide information on impacts of activities. The definition of outcome indicators, tracking of data against these outcomes and the establishment of causal links between policies, programmes and results remains problematic.

Ensuring accountability where there are multiple actors responsible for promoting gender equality and women's empowerment remains a key challenge. The government (Department of Gender) and the NGEN demonstrate accountability through publications in their websites and periodic reports to CEDAW. Accountability systems for scrutinizing the gender equality activities reported are limited to a few active NGO's such as FIDA, COVAW and CREAM.

Having said that, the increase in the number of gender units in the different ministries and parastatals provides a key opportunity for achieving prescribed goals if efforts are supported politically and there is sufficient coordination and collaboration.

3.8 Summary:

One of the objectives of this study was to critically examine Kenyan legislation that seeks to promote equality, equity and outlaw discrimination based on sex. The other objective was to establish policy implementation efforts by the government to effect CEDAW. This chapter set out these efforts in detail; documents like the National Policy on Gender and Development, Vision 2030, the Constitution and others were examined.

CEDAW requires state parties to enact laws including their Constitutions, formulate policies and carry out other measures in order to implement its provisions. Kenya promulgated a new pro-women Constitution in 2010 which expressly forbids discrimination on many grounds one of them being sex and provides for equitable opportunities for all. The Constitution also automatically makes CEDAW part of Kenyan law. Equitable laws and policies have also been passed and formulated respectively to implement CEDAW requirements. However, these laws have not been enforced in the country. The gains that women would have enjoyed by virtue of the existence of these laws and policies are nonexistent. A myriad of factors have been elucidated for this state of affairs and they include constant changes in the machinery and leadership of gender mainstreaming institutions, lack of resources to effect the programmes contemplated in the policies and legal frameworks, lack of skilled personnel, lack of awareness of the legal and policy frameworks, victimization of victims and lack of sex disaggregated data. All this boils down to the lack of political will and patriarchal tendencies in government.

The evidence set out in this chapter shows that regardless of the numerous laws and policies affirming and protecting the rights of women in the country, women's rights continue to be violated on a daily basis. CEDAW's fundamental objective is to eliminate all forms of discrimination against women by utilizing different measures to achieve this goal. Kenya in trying to fulfill this objective has put in place several mechanisms but this objective has not been realized. The hypothesis therefore that the implementation of CEDAW is positively correlated

with the existence of laws and policies is disconfirmed. It is evident that the laws are mere words on paper, not the sword of Damocles.

CHAPTER 4: USE OF INTERNATIONAL INSTRUMENTS BY KENYAN COURTS

4.1 Introduction:

Courts are useful tools in creating jurisprudence and providing a legal framework for the advancement of human rights and fundamental freedoms. Judicial officers wield a lot of influence in any democracy as they are discharged with the monumental yet noble task of interpreting the laws of the country. The Kenyan legal system is such that upper court decisions are binding on lower courts. Similarly courts at the same level have persuasive force on each other and a judge may resort to the reasoning of another judge in coming up with a decision as long as this decision abides with that of the higher courts. It is therefore very important to have an impartial and highly qualified judiciary that is guided by the promotion of the rule of law.

Kenya has in the recent past had a radical reform of the judiciary to ensure that judicial officers subscribe to their oath of office and legal mandate. Similarly reforms have been focused on the recruitment processes to ensure that only the most highly qualified jurists of integrity are appointed more so at the higher levels. Historically appointments to the judiciary have been wanting. Appointments were based on patronage by the political establishment, favoritism, paternalism, bias and corruption. This resulted in an arrogant, corrupt, partial, inefficient and sometimes unqualified bench hence necessitating the radical purge in 2003.²⁵⁰

To effectively deal with gender inequalities, courts must of essence be sensitive to the rights of women. Kenya has had several court cases in which CEDAW has been used as a tool. Unfortunately in relation to case law, there has not been a rich history of referring to international Conventions or progressively protecting women's rights. This can be ably illustrated in the following examples with the decisions ranging from the Supreme Court of Kenya to the lower magistrates courts.

4.1.1 Federation of Women Lawyers Kenya (FIDA-K) & 5 others V AG & Another [2011]Eklr

²⁵⁰ Long delays, corruption of judges and magistrates, loss of court files are just but some of the problems that plagued the judiciary

In this case, FIDA petitioned the Court for the correct interpretation and effect of article 27 of the Constitution. The facts were that the Judicial Service Commission (JSC) had recommended to the President for appointment, 5 persons as judges of the Supreme Court. Of the 5, 4 were men and 1 a woman. Also recommended were nominees for Chief Justice and deputy Chief Justice positions, a man and woman respectively. The petitioners alleged that the JSC in making the recommendations to the President violated the Constitution and the fundamental rights and freedoms of women in not taking into consideration the correct arithmetic of the express provisions of the Constitutional requirements on gender equity. The Court ruled that the JSC had not violated the Constitution. That the Constitutional thresholds addressed in article 27(8) were future obligations to be realized progressively to address historical injustices. The court said that it was thus the duty of government to seek the intervention of Parliament to enact laws to address the gap.

Through this ruling, the High Court largely ignored the necessity of affirmative action in creating a critical mass of women, whose agency can catalyze cultural change – a measure which could improve women’s chances of being elected to public office and cut short the waiting period for tangible equitable change.

4.1.2 In the matter of the principle of gender representation in the National Assembly and the Senate [2012] EKL^R²⁵¹

The Attorney General moved the Supreme Court for an advisory opinion on two issues one of them being whether article 81(b) as read with article 27(4), 27(6), article 27(8), article 96, article 97, article 98, article 177(1)(b), article 116 and article 125 of the Constitution of the Republic of Kenya required progressive realization of the enforcement of the one third gender rule or required the same to be implemented during the general elections scheduled for March 4th, 2013 or in stages through legislative, policy or other measures.

According to the majority opinion, it was held that the provisions of article 81(b) which reads “not more than two thirds of the members of elective public bodies shall be of the same gender”, was a future obligation. The court opined that the word “shall” connotes the future and is to be

²⁵¹ Supreme Court of Kenya Advisory Opinion No. 2 of 2012

progressively realized. The court further stated that article 81(b) was not capable of immediate realization without certain measures being taken by the state.

From these two decisions of the superior courts in the country, it can be concluded that despite CEDAW forming part of the law of the country, there is obvious resistance to the equal enjoyment by women of rights previously exclusively enjoyed by men.

4.1.3 Estate of Mutio Ikonyo V Peter Mutua Njui P & A Cause No. 203/98

The judge held that the objector was not entitled to the deceased's estate as she was a married woman.

4.1.4 Mumo V Makau CA 56/01 {2001} LLR 3650 (CAK)

3 court of Appeal judges (all male) decided that it was against Kamba customary law for the appellant, a married woman, to inherit her deceased's father's property.

4.1.5 Mary Njoki V John Kinyanjui and others (Unreported Civil appeal Case No. 71 of 1984)

The appellants claim to the deceased's property was rejected despite her cohabitation with him. The court was of the view that cohabitation and repute alone were not enough to constitute a marriage. According to the court, it was necessary for such cohabitation to be accompanied by a ceremony or ritual requirement.

The determination of what constitutes a legal relationship can be pretty harsh on women. The parties to such relationships could be those in the process of concluding customary marriages but not having completed the process or persons who come to live together outside a formal marriage. In the event of such cohabitees acquiring property together or bringing their individually owned property to the union, questions as to property rights are bound to occur in the event of a death or such marriage turning sour. It is unfortunate therefore that more often than not, it is the women who get the short end of the stick.

4.1.6 Beatrice Wanjiru Kimani V Evanson Kimani Njoroge. (Unreported) High court Civil Case No. 1610 of 1995

The parties in this suit had been married for 16 years with some periods of separation in between. The wife was a high school teacher, while the husband had a better paying job as a US embassy staff member. The property in dispute included five pieces of land and a house all registered in the name of the husband; as well as a business dealing in auto parts and hardware. The wife alleged that she partly financed the purchase of these properties by taking out loans from Mwalimu Savings and Co-operative Society on four occasions and on this basis she sought a half-share in the property. The husband denied that the wife made any contributions towards the purchase of the properties, adding that two of the properties were acquired when their relationship was strained and marked by repeated separations, and therefore she had not collaborated with him in any way toward the acquisition of the property. He alleged that other than paying the house-maid's salary, the wife had made no contribution towards household expenses and the children's welfare.

The judge accepted the husband's argument and ruled that the wife had no interest whatsoever in the property; as the parties were unlikely to have cooperated in acquiring property together in view of the strained relationship. That despite her having custody and taking care of the children during the periods of separation, she was not regarded as a contributor at all, since the husband had sent money for their schooling. The judge ruled that a wife's contribution cannot be presumed by stating:

“Contribution of whatever form must be proved on evidence unless it is admitted. There is no presumption that every wife is an automatic asset. A wife, whether she be a working woman or a housewife must be considered on the basis of her individual worth.”

The effect of this judgment brings to the fore the public/private debate where for many years international instruments and municipal laws have sought to protect the interests of men because their participation is more visible on the public arena. Women's contribution is belittled despite its being physically, and emotionally taxing to the women and of great importance to the family

and society. It is therefore necessary for the implementers of the law to be conscious of the needs of women in order to dispense justice to the women of this country. In any case, men are able to effectively participate in their public roles owing to the support that they receive from their spouses whether such wives are working women or housewives. As the old adage goes “behind every successful man there is an even more successful woman.”

4.1.7 Tabitha Wangechi Nderitu V Simon Nderitu Kariuki (1997) Civil Appeal No. 203 (Nairobi)

The insistence on strict proof on contribution is echoed by the judge’s sentiments in reaching the judgement.

“A wife must prove that she contributed directly or indirectly to the acquisition of the assets. It is not enough for her to simply show that during the period under review she was sitting on the husband’s back with her hands in his pockets. She has to bring evidence to show that she made a contribution towards the acquisition of the properties”.

Despite this decision by the court, it is noteworthy to note the minority opinion by Kwach J. A, that nonmonetary contribution should be taken into account. He stated:

*“A wife’s contribution and more particularly a Kenyan African, will more often than not take the form of a backup service on the domestic front rather than a direct financial contribution. It is incumbent therefore upon a trial judge to take into account this form of contribution in determining a wife’s interest in the assets under consideration”.*²⁵²

4.1.8 Echaria vs Echaria, Civil Appeal No. 75 of 2001 (judgement issued on 2nd February, 2007)

The facts of the case were that Peter Echaria, a civil servant got married to his wife Priscilla in 1964. She had a career of her own first as an education officer, then as a management consultant but had to stop working to accompany her husband abroad when he was assigned to a diplomatic

²⁵² Incidentally Kwach JA in this case considered bearing children as a form of contribution.

posting. This was to have painful consequences. When they divorced in 2001, the court had to determine the division of 118 acres of land which was their joint property.

The husband's advocate, Dr. Kamau Kuria (incidentally a family law lecturer and a human rights activist) deponed to the court that "*according to the law, contribution means financial contribution and if there is no financial contribution, the woman is entitled to nothing.* He further asserted that "*CEDAW and other international instruments are merely progressive notions and a useful pointer as to the future*".

The court in its judgment held that "*the beneficial share of each spouse to matrimonial property depends on his or her proven respective portions of financial contribution either direct or indirect towards the acquisition of property.*"

The High Court judgment (which resulted in the present appeal) had recognized the nonmonetary contribution of the wife. This Court of Appeal decision is therefore a drawback in the sense that the principle of non-monetary contribution as decided in *Kivuitu vs. Kivuitu*²⁵³ (a previous high court decision) and affirmed in the initial High Court decision on this case were mere obiter (not binding) and were thus effectively overruled by this decision. The drawback caused by this decision has left huge legal vacuum in the area of matrimonial property. It is clear from the foregoing that there is a rift between the judges with regards to "contribution" with the pro women rights judges acknowledging nonmonetary contribution and the anti-women's rights judges opting for strict proof of financial contribution.

It is noteworthy that despite CEDAW being part of the evidence adduced in court, the court opted to ignore its provisions and go on a biased frolick of it's own. It beats logic that for a couple which has been married for a certain period, say ten years, one would construe that only one party could lay claim to the family property in case of any eventuality. It is my submission that the burden of proof should shift to the party claiming that the non-title holding spouse has no

²⁵³ In *Kivuitu V Kivuitu*, Justice Omollo in his ruling reasoned that nonmonetary contribution did amount to contribution for purposes of apportioning assets between differing spouses

entitlement to the family's assets rather than having a blanket rule that the spouse who did not contribute financially derives no benefit.

This case took 6 years to be determined, it is a wonder how the wife would have survived in the interim if she was a woman of "small means".

4.1.9 Omambia V R Criminal Appeal No. 47/95

In this case, the Court of Appeal decided that touching a woman's bottom and bosom did not amount to indecent assault as women's buttocks are not part of their private parts.

The Constitution affirms the right to dignity. In addition to criminal sanctions, a complainant in such a case should have a civil remedy in the form of a declaration of the violation of a Constitutional right.

4.1.10 Stephen Mwendo Koti V R

Here the appellant had been charged with indecently assaulting one Susan Muteti, the complainant by touching her private parts. It emerged in evidence that Mwendo was who was drunk went to Muteti's house and touched her underpants. The Resident Magistrate convicted him for the offence and jailed him for 3 years but on Appeal the High Court overturned the decision by citing the Court of Appeal decision in the Omambia case.

4.1.11 Wilma Achieng Case Number 177736198

A husband tortured his wife, Wilma Achieng by beating her and lacerating her private parts in a very brutal attack. He was punishing her for coming home late and for failing to account for her whereabouts between 1 p.m and 8 p.m on December 6, 1997. The man admitted committing the offence but remained unrepentant claiming it was consistent with his Luhya community way of doing things. He was fined Kshs 10,000 which he promptly paid, went home and beat his still sick wife. He was rearrested, charged with assault and eventually jailed for 6 months.

He was released shortly afterwards through a Presidential pardon in December 1999. This case shows that there is need to reassess the case histories of prisoners who really deserve to be

pardoned. Further it illustrates a serious need of legal reform to address penalties on grave offences such as the one cited in this case to avoid the violation of the fundamental rights and freedoms of persons especially of women.

4.1.12 R. M & Cradle V AG Civil Case 1351 of 2002;[2006] eKLR

The case was brought by a mother on behalf of her child against the Attorney General, although several notable non-governmental organisations also joined in the case as interested parties. The child involved had been born out of wedlock despite the mother and father living together at the time of the birth. The father who had paid the hospital expenses after the birth, and who had shaved the child's head and named her after his mother in accordance with his tribe's customary law, disappeared when the child was approximately four months old. Because the father thereafter failed to give any parental support, the mother brought this case to challenge section 24(3) of Kenya's Children Act, which places parental responsibility for children of unwed parents solely with the mother. She argued that this was discrimination as it violated international instruments that Kenya had ratified as well as the Constitution because it disadvantaged her child as compared to children with married parents.

The Court resolved that Kenyan law did not unfairly discriminate against children born out of wedlock. Specifically, the Court stated that the Children's Act should be viewed as a collection of the "best provisions" from international conventions and prior Kenyan law, and held that it does not offend the Constitutional principles of equality and non-discrimination because some distinctions such as the one at issue before the court were reasonable and legitimate.

4.1.13 R. v. Hans Vriens, CMC Criminal Case No. 1380/2001.

In this case the accused, a Dutch national was accused of sexually molesting the complainants. The accused had established a girls' boarding school in one of the slums. It was alleged that he had classified these students into 2 categories, as "virgins" and "non-virgins" and had also exposed them to pornographic material. It was further alleged that he had taken some of the girls with him for holidays in Mombasa where he had introduced them to his friends as "spring chickens" which was, incidentally, the name of the school. During the investigations, the police continually harassed the young girls, including continually arresting and charging members of their families on fabricated criminal charges. At one point, witnesses were arrested while they were going to the court to give evidence. They included 9 and 10 year old orphaned girls.

Unfortunately, due to poor investigations and interference by the police, the accused was acquitted on all counts.

Lastly male arrogance and insensitivity were clearly elucidated in the advice issued by a former Chief Justice of Kenya, Kitili Mwendwa who is quoted to have advised magistrates that “girls and women do tend to tell an entirely false story which is very easy to fabricate, but extremely difficult to refute” thus branding women and girls as liars.

To effectively deal with gender inequities, courts must of essence be sensitive to the rights of women. These cases show the importance of having a perceptive bench. Sensitive judicial officers are important in the realization of women’s rights. All these decisions were made by the various courts many years after CEDAW had been acceded to by the State but none of the judicial officers sought to use its provisions to protect or affirm the rights of women. The conservativeness of the Kenyan bench as well as their restrictive approach has therefore militated against the incorporation of human rights through case law. It has been argued that the domination of men in the judiciary may be to blame for the failure to embrace international provisions on human rights.

However there are a few cases where courts have based their decisions on international instruments as follows:

4.2. 0 Rono V Rono AHRLR 107 (KeCA 2005), (Mary Rono V William Rono C.C.A. No. 66 of 2002)

In this matter the 2nd widow and her children (4 daughters) dissatisfied with the decision of the High Court that granted the 1st wife and her 5 children (three sons and two daughters) larger shares of the deceased property based on Keiyo customary law appealed to the Court of Appeal. The lower court had opined that the girls were entitled to lesser shares since they would be married in the future anyway yet interestingly they were to share the burden of the deceased’s liabilities equally with the brothers. The Court of Appeal overruled this judgment and ordered the equal distribution of shares between all the children by stating that by subscribing to

international instruments in this case the UDHR, ICESCR, ICCPR and CEDAW, Kenya was under obligation to ensure the protection of the rights of the woman and the child as stipulated in these instruments. Justice Waki in extending his argument had this to say regarding the monist dualism debate:

“There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that is that both international customary law and treaty law can be applied by states courts where there is no conflict with existing law, even in the absence of implementing legislation.”

He also went further to elucidate principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms which states:

“It is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislations or common law prevailed over this tradition”.

This decision was made immediately after the combined 3rd and 4th Report of the republic of Kenya presented to the CEDAW Committee. In its recommendations to Kenya, the committee stated that it was concerned that CEDAW as yet had not been incorporated into local law and its provisions had as yet not been invoked before the courts. Similarly the Committee voiced its concerns²⁵⁴ that Kenya still adopted customary laws and practices that discriminate against women in such areas as marriage, divorce, burial and devolution of property and death and recommended that such laws should be eliminated. This decision is therefore a landmark ruling

²⁵⁴ General Comment 207

as the highest court has affirmed the principle of women's equality in one of the most contentious areas of the law especially at the time when the new Constitution had not been passed.

4.2.1 Re Estate of Lerionka Ole Ntutu (Deceased) [2008] EKLK²⁵⁵

This was also a succession matter. The deceased was a Maasai by tribe and died leaving several wives and children. The sons to the deceased contended that they had the sole rights to inherit their father's property as under Maasai customary laws daughters had no right to inherit their father's property. Justice Rawal in upholding the objector daughters' arguments on their right to inherit their father's property relied in the earlier decision of Rono V Rono and stated that Kenya had a duty to respect international obligations which included protection of women's rights as espoused in CEDAW. She further stated that the Constitutional amendment to section 82(3) to include sex as one of the grounds of discrimination was informed by an appreciation of such obligations. In her closing remarks she stated

“ Kenya was aware of the discriminatory treatment of women in all aspects of customary and personal laws. Hence Kenya knowingly and rightly took a bold step to eliminate discrimination of all manners and types against women. That is where the country's' aspiration has reached and is rightfully intended to stay... The Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own... Thus in my opinion, the provisions of section 82(4) (b) was not and cannot have been made to deprive any person of their social or legal right only on the basis of sex. Finding otherwise would be derogatory to human dignity.”

4.2.2 Re Wachokire [2002]²⁵⁶

Jane Watiri, a daughter to the deceased petitioned the court to award her half of the parcel of land that belonged to her late father on which she lived with her four children. Her brother objected by arguing that he had been cultivating the larger portion of the land even when his

²⁵⁵ High Court Cause No. 1263 of 2000

²⁵⁶ Succession Cause No. 192 of 200, Chief Magistrates Court at Thika, August 19, 2002

father was alive. His evidence was that under Kikuyu customary law, unmarried women lacked equal inheritance rights due to the fact that they would eventually get married and would then have land in their husband's name. The Chief Magistrates Court ruled that this customary law violated article 15 of CEDAW which provides for equal legal capacity of women and men specifically with regards to contract making and the administration of property as well as Article 18(3) of the Banjul Charter and Article 15(1)(3) of the Constitution.

These three cases are very significant because by applying CEDAW across the board irrespective of the specific cultural systems, the courts accomplished what the legislature had not been able to do at the time (incorporate ratified international treaties in to Kenyan law) that is pronounce that women just like men have equal rights before the law.

4.2.3 In the matter of the principle of gender representation in the National Assembly and the Senate [2012] EKL²⁵⁷

The dissenting but minority opinion of the President of the Supreme Court should be mentioned here.

According to him, the Supreme Court has the duty to defend the Constitution and to ensure that all the bodies that are constituted under its authority are done constitutionally. According to him therefore, a Parliament and Senate that do not adhere to the one third gender rule would be unconstitutional. He stated *“from article 27 of the Constitution of Kenya, and from the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), it was clear that the disenfranchisement of the Kenyan women in the political arena is a form of discrimination. CEDAW applies through the operation of article 2 (6) of the Constitution of Kenya having been acceded to by Kenya on March 9, 1984. These provisions collectively call for the immediate removal of this discrimination through the empowerment of women representation in political office, with CEDAW calling for stopgap measures to be put in place to reverse the negative effects on our society through the operation of this systemic discrimination”*.²⁵⁸

²⁵⁷ Supreme Court of Kenya Advisory Opinion No. 2 of 2012

²⁵⁸ It should be noted however that this was the dissenting opinion by the Chief Justice in this matter. The rest affirmed the ruling in the FIDA case expounded herein-before.

4.2.4 C.K et al V the Commissioner of Police/ Inspector General of Police, the Director of Public Prosecution, Minister of Justice, National Cohesion and Constitutional Affairs, Petition No. 8 of 2012²⁵⁹

This suit was filed in the High Court of Meru by the petitioners and the Kenya National Commission on Human Rights as amicus curiae. The Court held that the neglect, omission, refusal and failure by the Commissioner of Police, Director of Prosecutions and the Minister of Justice to conduct prompt, effective, proper and professional investigations into the first 11 petitioners complaints of defilement violated the petitioner's fundamental rights under Articles 21(1), (3), 27, 28, 29, 48, 50 (1), (d) of the Constitution of Kenya and the general rules of international law embodied in the treaties that had been ratified by Kenya and which form part of the law of Kenya as per Article 2 (5) and 2 (6) of the Constitution of Kenya. The Conventions that the Court relied on included The African Charter on Human and Peoples' Rights, CEDAW and the ICCPR.

4.3 Summary:

This chapter has shown with great clarity how seemingly sound laws can be applied selectively by biased judges. The repugnancy clause was to protect claimants from the excesses of cultural traditions and laws. Closed-minded judges have however restrictively applied the law to deny women their fundamental rights and freedoms. Daughters have been denied rights to inheritance owing to Kenyan customary laws, Muslim widows get a smaller portion of their deceased husband's property as compared to their sons despite having contributed to the acquisition of the same, women are denied statutory rights of participation at the public arena and even violence against women is condoned by the appropriation of lenient sentences by an insensitive bench.

Even with the new Constitution which voids any provision that is contrary to its provisions, some judges have continued to apply the law restrictively. A few progressive judges have been frustrated in their progressive interpretations as enunciated in *The matter of the principle of*

²⁵⁹ C.K and 11 others V Commissioner of police/Inspector General of the National Police service and 3 others [2013] ECLR

*gender representation in the National Assembly and the Senate,*²⁶⁰ *Nderitu V Nderitu,*²⁶¹ and *Echaria V Echaria*. It is unfortunate that the decisions of such judges did not prevail as they were the minority decisions of the court.

It is clear therefore that the institutions discharged with the responsibility of interpreting the law have failed in their responsibility by not ascribing to the spirit and letter of the law. The first hypothesis – whether the implementation of CEDAW is positively correlated with the existence of related laws...” is thus disconfirmed. This is because despite the existence of equitable laws in the country and Kenya being a party to CEDAW, the judiciary has failed to respect, protect and fulfill the rights of Kenyan women.

²⁶⁰ Where the Chief Justice (Mutunga) elucidated the need to ascribe to international standards in interpretation of the law and affirmed that the one third gender rule should apply immediately rather than progressively as decided by the other judges.

²⁶¹ Justice Kwach acknowledged that nonmonetary contribution amounted to contribution for purposes of distribution of property between spouses.

CHAPTER 5: RESEARCH FINDINGS

5.1 Introduction:

This chapter extrapolates in general the findings garnered from key informants as well as desk research conducted by the researcher. The key informants include experts from the National Gender and Equality Commission, the Ministry of Labour and Social Services and the State Law Office. It also outlines the summary of findings obtained in relation to the objectives of the study, the hypothesis guiding the study as well as the theoretical framework.

5.2 The Impact of CEDAW in Kenya:

One of the factors that influence the impact of the law is the awareness that the society has of the law and whether or not the members of the society align their actions to the provisions of the law. It is whether this law has brought about a change linked to the law that would determine whether or not it has the intended impact. To ascertain this several factors were investigated such as change in laws and policies to align with provisions of CEDAW and awareness of the Kenyan society of the provisions of CEDAW and implementing laws, the use of the Convention by the courts in reaching decision levels and the influences (patriarchy) on the enjoyment of women's rights.

5.2.1 CEDAW and Kenya's Legal and Policy framework:

The study has established the numerous efforts by the government over the past decade to engender its laws, policies and programmes. Notable is the passing of the 2010 Constitution which expressly prohibits discrimination based on sex and sets out with great clarity protections of women in various spheres. The Constitution has been hailed in various fora as a landmark document on human rights. The Constitution notably makes international treaties that Kenya has ratified a part of the Kenyan law automatically and as if to avoid doubt requires the state to enact local legislation to give effect to the international obligations that it has ascribed to. Legislation has also been passed to implement the new Constitution for instance the Land Act, Land Registration Act, the Political Parties Act and institution establishing Acts²⁶² which have ensured

²⁶² Acts that establish Commissions contemplated under the new Constitution for instance the National Land Commission, The Commission on the Implementation of the Constitution, The Kenya National Commission on

the 30% incorporation of women in their governance mechanisms. These laws have to a large degree provided for the recognition and protections of the rights of women. The study has also established legislative efforts by the Kenyan legislature prior to the passing of the pro-women Constitution for instance the Sexual Offences Act, Prohibition of Female Genital Mutilation Act, amendments to the Law of Succession, Employment Act and others. It has been ascertained that such changes are attributable to a number of combined factors namely agitation by women activists as well as international pressure in the form of recommendations by the CEDAW Committee.

Policy efforts geared towards addressing gender concerns like the National Policy on Gender and Development, Sessional Paper No. 2 of 2006 and sectoral policies such as the Land Policy, policies in the health and education sectors have also been delved into. Court decisions over the last decade and also after the promulgation of the Constitution have also been elucidated.

5.2.2 Awareness of the CEDAW

Awareness of the law in most jurisdictions encompasses a number of assumptions one of these being that every person has access to the law. The laws in Kenya are published by the government printer through the State Law Office. International treaties ratified by Kenya are available at the National Council of Law Reporting or at the Ministry of Foreign Affairs. The maxim applicable in Kenya with regards to awareness of the law is that ignorance of the law is no defence, with the assumption being that all Kenyans have access to the laws and further, that these people are able to read and understand what the law stipulates.

Access to the law by Kenyans is restricted owing to a number of factors. First most citizens do not know where to go to purchase the Acts at the government printers. The printers are also situated in Nairobi so Kenyan's in other parts of the country are not able to easily access the point of sale. The NCLR posts all laws and treaties in the Kenya Law Reports database. A good number of Kenyans do not have access to computers and therefore cannot access the law through

Human Rights, The National Gender and Equality Commission, The Salaries and Remuneration Commission and others.

the internet. Most women especially poor women in the urban and rural areas in Kenya are more concerned with putting food on the table rather than attending sensitization seminars occasionally conducted by civil society organizations or government. This further explains the reason for the low levels of awareness of CEDAW or local laws that protect women's rights.

Two objectives of this study were to investigate Kenyan legislation and policies that seek to promote equality, equity and outlaw discrimination. These objectives were based on the premise that if the legislature enacted appropriate laws and the executive similarly formulated and implemented appropriate policies, then CEDAW could be said to have had an impact in Kenya. CEDAW requires all parties to enact laws, policies and use other appropriate measures to prohibit discrimination based on sex and to ensure gender equality. It also requires state parties to ensure that that the same is done in their Constitutions. The assumption is that when the laws are in place they can be used as tools to protect the rights of women.

The study revealed that the 2010 Constitution prohibits discrimination based on sex, articulates gender equity and equality and by so doing recognizes, respects, fulfills and protects the rights of women. Other laws passed by the Kenyan legislature either before its promulgation or after its passing do the same. However much is yet to be done in order to align conflicting provisions in other laws to conform to the Constitution. The government has also formulated several general gender policies as well as sectoral gender policies. The study has however established a mismatch on the ground with what is on paper. What are essentially good laws and policies are negated by the lack of enforcement and implementation. Several factors have been cited such lack of political good will with gender related programmes not being well resourced in terms of staff and financial budgets, bias and insensitivity on the part of judicial officers, lack of awareness of the Treaty and implementing laws among the citizenry as well as implementing officers, corruption amongst enforcement officers and generally administrative challenges in Ministries and parastatals such as lack of coordination and lack of sufficient skills on gender issues.

The theoretical frameworks adopted by the study can explain the trends above. Liberal feminism adopts as its stand that reforms in the legal framework are bound to protect women's rights and elevate their status. The prohibition of discrimination on various grounds including sex, pregnancy and marital status in the new Constitution as well as other entitlements in other laws such as the right to vote, right to be elected, access to education, health and others are all examples of liberal feminism. The idea is to entrench equality rights in the law in order to ensure the protection, respect and fulfillment of women's rights. The caveat is that such laws have to be systematically implemented to produce tangible results. Enforcement in Kenya has been plagued with a myriad of challenges. Male dominated institutions resist the implementation of these rights. The state (based on a patriarchal system) resists any gains that women may enjoy and hence renders such laws useless. As Finemann suggests "The liberal model fails to reform institutional models that privilege some and disadvantage others."²⁶³

Many of the countries of this world are faced with this challenge. They are quick to enter into treaties but not as enthusiastic when it comes to implementation. The administrative process of making treaties where government officials attend international fora without technically assessing the implications of the agreements that they enter into plays into the dynamics of the whole process. Ceaseless to say Kenya has the laws on paper but women continue to face discrimination in different spheres of their lives. Testing therefore the hypothesis that "the impact of CEDAW is positively correlated to the existence of related laws and policies" is disconfirmed.

The theory of cultural feminism casts light on the differences between men and women. Kenyan laws have tried to address these differences in various ways as illustrated in the preceding chapters. The Employment Act accords women three months maternity leave in addition to their annual leave and sick leave, it also prohibits the employment of women in certain undertakings like underground mining. It also requires employers to be sensitive to the needs of pregnant

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women. The Constitution also equally apportions parental responsibility among the parent's regardless of whether they are married or not. Some court decisions have also recognized the importance of the contributions that women make in the home – that despite such contributions being nonfinancial, they play a role in the improvement of the family status.

Cultural feminists claim that women work hard and have little to show for it. As shown in previous chapters women have had to make sacrifices for the sake of their families but this is not recognized. On some occasions women are bypassed on training or promotion opportunities because of their nurturing responsibilities. In the agricultural sector especially in the rural areas, women play a crucial role as subsistence farmers but it is very difficult for them to access credit in order to improve their livelihood as commercial farmers. Cultural feminists call for the recognition of the roles of women as important roles without which society cannot effectively function. In this regard it is for the state to prohibit any discriminatory practices aimed at belittling the responsibilities of women in society.

5.3 The Courts and CEDAW:

Another objective was to establish the use and application of the Treaty by courts when making decisions. Courts are a creation of the law. Courts as institutions of the state are deemed to be the protectors of liberties and are in essence required to do as mandated. It has been established that courts are not neutral since they too are based on patriarchal systems. It does not help that the composition of the judiciary is dominated by male judges especially at the higher levels and court practice is such that the decisions of the higher courts bind the lower courts. It is unfortunate that the courts tend to be restrictive in their interpretation of the law and this has resulted in injustices against women. The progressive approach would be to use CEDAW to address the rights of women rather than local laws especially when they contradict international standards. The previous chapter has shown that this is seldom done.

Liberal feminism criticisms are confirmed - that the state not being a neutral party is incapable of enforcing women's rights. Further, liberal feminism focus on the individual fails to address historical injustices. The decisions of the High Court and the opinion by the Supreme Court on the representation of women in the judiciary and Parliament respectively echo the criticism

leveled against liberal feminism. That the system's myopic view is unable to go through the dungeons of history to address the injustices that it has perpetrated over the years.

The cultural feminist theory aims at the recognition of women's unique traits and their incorporation in the law. To them equality can only be achieved by valuing the societal roles of women and men. In *Kivuitu V Kivuitu* the court affirmed the contributions of women by not necessarily focusing on the financial contribution to the matrimonial property but also on nonmonetary contributions. Equitable parental responsibility decisions also confirm cultural feminists assertions. The obligation to recognize the common responsibility of men and women in the upbringing and development of their children is an endorsement of this theory. This was affirmed in the decision of the court in *R.M V AG* as outlined in the previous chapter.

5.4 Patriarchal influence/governance culture on women's rights:

The study has identified a number of issues key among them that women in Kenya face a lot of gender inequities and the main cause of such inequities is a deep rooted culture of patriarchy which crosscuts various spheres of the Kenyan society. Key informants and literature illustrated women's experiences as being characterized by negative cultural and traditional practices towards women, lack of adequate awareness or ignorance as to their legal rights owing to limited educational opportunities, structural financial barriers and political intimidation as obstacles that militate against their equal participation in various spheres.

The study has also revealed the display of tokenism in terms of putting a few women in decision making and political positions as showcases. The political system is one of the most powerful structures of gender inequality in Kenya. The entry into politics by women has been bedevilled by many challenges ranging from structural, economic and legal. The women's movement has been continually fought by the state to maintain the status quo. This is confirmed by the hostility of men toward women who dared to enter into politics. It is evident that Kenya has experienced some marked increase in women's participation in leadership and public decision making after

the March 2013 elections. The number of women in Parliament has increased from 18 out of 204²⁶⁴ in 2002 to 473 out of 2236 members in 2013²⁶⁵. Out of 18 Cabinet Secretaries 6 are women and 7 female Principal Secretaries have been appointed out of a maximum of 26. There are also over 20 women Commissioners/chairpersons/deputy chairpersons manning the 12 Commissions and Independent Offices established directly by the Constitution. For the first time in the history of the country, the Deputy Chief Justice of the Supreme Court is a woman and there are two women judges at the Supreme Court. Similarly the Chief Registrar of the judiciary is a woman. The Deputy Speaker of the National Assembly is also a woman. Likewise, at the grassroots womens' participation has increased remarkably with the establishment of county governments and Constitutional requirements on their numbers. However this increase still falls short of the 30% target envisaged by the Constitution and also that achieved by other countries in the Continent.

In addition, where women have succeeded in taking decision-making posts they are ignored or given not so powerful dockets. For example, during the Moi era women ministers were often given the dockets of Sports and Culture, a propagation of the patriarchal attitude that women are physically or intellectually incapable. The Jubilee government however has dispelled this retrogressive mentality by appointing women to the powerful dockets of defence, devolution and planning, housing, East African community affairs and environment. However patriarchal attitudes can still be perceived as the new government is now being criticized for not appointing the appropriate candidates for certain positions like the docket of Defence which required "a man". We are yet to see whether these positions will be sustained since political appointments in Kenya are the sole prerogative of the premier.

Evidence in the previous three chapters has established that women lag behind in decision making. Although clear legal systems are in place to address women's participation in policy

²⁶⁴ 8.8%

²⁶⁵ 21.1%

making, the implementation of this policy is derailed by gender discrimination in all sectors. The dilemma women face in Kenya is how to change the attitudes and perceptions that they cannot perform or engage in full decision making. Namibia and South Africa have Constitutions that provide for affirmative actions to enhance the numbers of women in policy and decision-making positions. In South Africa, 20% of parliamentary seats and 50% of local governing councils seats are reserved for women.²⁶⁶ Angola, Tanzania, and Zimbabwe also have quota legislation guaranteeing certain numbers of women in legislative assemblies.

The importance of such provisions cannot be gainsaid. Six African countries are leading in terms of women's representation in their National Assemblies due to affirmative action provisions and quotas. These countries are Rwanda leading with 48.8%, Mozambique with 34.8% and South Africa with 32.8% of women representation in Parliament. Burundi has 30.5% of women in Parliament and Seychelles has 29.4% of women in Parliament.²⁶⁷ The former President's (Honorable Kibaki) decree later reinforced in the 2010 Constitution called for a 30% threshold. The Jubilee government has tried to comply with this quota with the appointments into the executive but falls short at an average of 26.9% but is a start for a country known to relegate women to the periphery in the public and political arena.²⁶⁸ It is hoped that this trend will be mirrored by the private sector too despite the disappointing Supreme Court decision to the effect that the quota is to be realized progressively. The first hypothesis that patriarchy has contributed to the gender inequalities in Kenya and is a barrier to the implementation of CEDAW is therefore confirmed.

Also based on the foregoing evidence, the second hypothesis - that governance culture has resulted in the effective implementation of CEDAW is disconfirmed. The facts on the ground are a proof to this. The political dispensation as exemplified in chapter 2 has on numerous

²⁶⁶ <http://sgo.sagepub.com/content/early/2011/05/2158244011410715.full#ref-1> last updated on 15/4/2013

²⁶⁷ <http://sgo.sagepub.com/content/early/2011/05/2158244011410715.full#ref-8> last updated on 15/4/2013

²⁶⁸ Parliamentary representation is even lower at 21.1%

occasions frustrated and resisted the various efforts to implement the Convention in Kenya. Thus it is safe to say that the governance culture has negatively affected the implementation of CEDAW in the country.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.0 Introduction:

This chapter concludes by providing the way forward as far as respecting, fulfilling and protecting the rights of women and outlines areas for further research.

6.1 Conclusions:

From the findings of this study, it is clear that women continue to face gender inequalities on a daily basis in Kenya. Men are the beneficiaries of such a state of affairs and are unwilling to change the status quo. Patriarchy is the causal factor for the dismal participation of Kenyan women in the economic, social and political arenas. For there to be any visible change in the status of women, there should be a marked rise of women participation at top decision making levels. With entrenched patriarchal interests in Kenya's Parliament, the tyranny of female numbers can be the only redeeming factor. Achieving a critical mass in the government is mandatory, is not a future requirement as postulated by the judiciary but an urgent and immediate requirement. In addition, any woman in leadership should use the public platform to push for agenda relevant in enhancing the status of women in general.

This study focused on government efforts to implement CEDAW. It is postulated that research on the efforts by nongovernmental institutions to implement CEDAW should be researched to complement this study.

As a consequence of the foregoing, the following are recommended.

6.2.0 Legal reform:

In light of the challenges faced by girls and women in the Kenyan society, it is paramount that the application of laws is done on an equal basis between men and women. Also gaps in existing legislation should be addressed in order to facilitate the protection of the enjoyment of fundamental rights for women. Inconsistencies in existing legislation and the Constitution must be addressed to allow for equality before the law. Statutory provisions and legal practice that amounts to discrimination of women in matters related to inheritance, sexual abuse, age of marriage etc should be repealed to ensure that there is equality before the law.

It is also imperative that the government ratifies other complementing international instruments like DEVAW and the Protocol to CEDAW which address violence against women since CEDAW does not expressly prohibit this offence.

6.2.1 Reform in Education:

The MOE ought to ensure that the education sector conforms to the legislative and policy framework in place. This calls for improved quality management of free primary education as well as the creation of viable and transparent reporting mechanisms. The TSC should equitably distribute teachers among the counties to ensure that equity and cohesiveness are maintained in the education sector. There should also be more women in school boards and parent teacher associations so that girl friendly policies are implemented. Such policies include reentry of teenage mothers after maternity and bursaries to orphaned or poor girls. The Ministry of Education dictates that each school BOG or PTA should have at least 1/3 women representation regardless of their literacy levels, to ensure equitable representation of the concerns of female students.

The current quota system should be reviewed by the MOE so that girls from marginalized areas do not miss out on secondary and university education. Similarly school feeding programmes should be increased to encourage children from the arid areas to attend school.

To address the needs of disabled children, the MOE/TSC should train more teachers to deal with disabled children and build more schools for them. The government can partner with various agencies to develop user friendly facilities such as ramps for those with wheelchairs, spacious and easily accessible toilets, braille books and computers for the blind etc, This will enable the integration of such students and encourage parents with disabled children to take them to learning institutions.

In order to address all the above mentioned interventions, Parliament should allocate adequate resources to the MOE to cater for books, facilities and any other needs geared towards improving the education sector.

6.2.2 Information/sensitization/decision making:

The government should put in effective mechanisms to ensure the sensitization of Kenyan citizenry of women's rights. The political leaders especially should be sensitized as to the "power" in ensuring the protection of women's rights. The government should also engage civil society in coming up with strategies and mechanisms for the dissemination of information on human rights at grassroots level.

6.2.3 Training of enforcement officers:

Police officers should be trained on women's rights and gender sensitivity. This will enable them to deal with cases of sexual and gender based violence in a manner that preserves the dignity of the victims. They should also be trained on post trauma counseling to add value to their enforcement roles. They should also be trained to detect cases of human trafficking especially for sexual exploitation and enable them to take the necessary action.

6.2.4 Decision-making:

There must also be more inclusion of women in decision-making structures so as not to disenfranchise women from the process of formulating policies.

6.2.5 Outreach programmes

The government and civil society should dialog with such institutions as the Catholic church, Muslim and Hindu faiths which prohibit artificial family planning, accept FGM and child marriages respectively in order to create awareness amongst their leaders concerning the violation of women's rights.

6.2.6 Health:

Following the government policy of granting free maternal health services to women, Parliament should ensure that adequate budgetary allocation to reproductive health is increased. It is not enough to offer free delivery services whilst not catering for prenatal care which is essential for ensuring safe delivery. THE MOH should also ensure that hospitals are well equipped and staffing levels conform to international standards. Similarly CEDAW obligations of postpartum care and adequate nutrition should be progressively realized by introducing mechanisms to address this. It is noted that the Bungoma county has allocated funds for free formula milk to all women who deliver in public hospitals. Other counties should follow this lead and implement programmes intended to address the reproductive health needs of women. CDF and county funds should be well utilized to ensure the establishment of accessible and well equipped health facilities and pharmacies as well as employment of well-trained medical staff. Ambulances should also be equitably distributed to ensure emergency health care is given to patients.

Further, the MOH should ensure that information on contraceptives as well as the contraceptives are within the reach of Kenyans including those at the grassroots.

6.2.7 Violence against women:

The legislature should introduce stiffer penalties for perpetrators of sexual abuse. Marital rape should also be criminalized. The Children's Act as well as the Prohibition Against Female Genital Mutilation Act should be strictly enforced so that girls have the right to choose whom to marry, when to get married; as well as the right to decline circumcision. Alternative rites should be sought as passage to adulthood for these girls.

The IEBC and the National Police Service should deal resolutely with cases of electoral violence against women. The IEBC should employ all means to avert political violence even if it means disqualifying candidates who sponsor violence.

The government should also create safer public zones by undertaking street lighting programmes, clearing garbage and bushes which provide hiding areas for attackers and improving the public transport system especially to residential areas to prevent the risk of assault for women commuters and pedestrians.

6.2.8 Economic growth:

Economic growth in the country should also be linked with wellbeing of women. The government must be able to appreciate the value added to the growth of the economy through the informal sectors, which are mostly operated by women. This on its own should be an incentive for the government to domesticate and implement international instruments to which it is a party and which are aimed at elevating the status of Kenyan women.

6.2.9 Research:

The National Commission on Gender and Development is tasked with the responsibility of conducting research on gender issues.²⁶⁹ It should form links with academia and research institutions to achieve this role because as it is there is disaggregated data on gender issues and for such information to be relevant and effective in elevation the status of women in Kenya, there has to be proper organization and coordination from a central point.

²⁶⁹ Section 6(1)(h)

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APPENDIX: QUESTIONNAIRE
KEY INFORMANT INTERVIEW SCHEDULE

SECTION A:

1. Sex
2. Age
3. Marital status Single Married Widowed
4. Highest level of university education?
 - a. Bachelors
 - b. Masters
 - c. Doctorate
5. Occupation

SECTION B:

6. What are the main legislative measures undertaken by the legislature for the promotion of gender equality or women empowerment in the past 10 years?
7. Have you seen a difference in the pattern in the legislative framework with regards to laws affecting the rights of women since the passing of the Constitution in 2010?
8. Does Kenya have a national policy on gender equality or women empowerment?
9. What are the other policy efforts undertaken by the executive to promote gender equality in the past 10 years?
10. Have the efforts in 6, 7, 8 and 9 above been influenced by CEDAW?
11. Is there a strategy for the implementation of the policies enumerated above?
12. What institutional organs are there to ensure implementation of CEDAW? Are these institutions effective ?
13. Are they well-resourced to discharge their mandates?
14. Are there mechanisms at the various ministries to promote gender mainstreaming?

15. What are the capacity levels of the staff promoting gender mainstreaming?
16. Are men involved in the gender mainstreaming process?
17. What mechanisms have been established for monitoring and evaluation of these strategies?
18. What are the major reforms that have resulted as a result of implementation of the laws and policies?
19. What have been the priority areas for the past 5 years and the next 5 years and what measures have been put in place to address these priority areas?
20. In your opinion, how effective has the department of Gender, Gender Commission, the State Law Office (as the case may be) been effective in addressing the issue of gender equality and nondiscrimination?
21. What are the challenges or obstacles that the government has encountered in the implementation of the abovementioned policies and laws?
22. What are the lessons learnt in the implementation of laws and policies relating to gender equity and empowerment ?