

**THE EQUALITY BILL AND ITS ROLE IN
ELIMINATING DISCRIMINATION AGAINST WOMEN
IN THE EMPLOYMENT SECTOR IN KENYA.**

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**By
MOINDI K. NANCY**

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TREATIES AND CONVENTIONS

1. The Universal Declaration of Human Rights
2. The International Labour Organization
3. The Convention on the Elimination of All Kinds of Discrimination Against Women
4. The International Covenant on Economic, Social and Cultural Rights
5. Treaty of Rome
6. International Covenant on Civil and Political Rights

INTRODUCTION

THE EQUALITY BILL AND ITS ROLE IN ELIMINATING DISCRIMINATION AGAINST WOMEN IN THE EMPLOYMENT SECTOR IN KENYA.

0.0 THE BILL

In December 1999, parliament passed a motion that granted Gichugu Member of Parliament, **Hon. Martha Karua**, leave to introduce the Equality Legislation in Kenya.

While introducing the motion, Hon. Martha Karua noted that the proposed legislation would be in conformity with **s. 70 of the Constitution of Kenya**, which states that every person in Kenya is entitled to the fundamental rights and freedoms of the individual.

The proposed bill would also comply with international human rights instruments for example, **The Universal Declaration of Human Rights (UDHR)** and the **Convention on the Elimination of all kinds of Discrimination Against Women (CEDAW)** instruments to which Kenya has acceded to.

Passing of this motion instigated a big debate among Kenyans as to the effects that the Bill would have were it to become law. Our male dominated parliament was to the general view that women were not discriminated against hence the Bill did not serve any useful purpose.¹ The Muslim vehemently protested against the passing of the Bill by saying that it was against the provisions of the Holy Koran which adequately protected women of the Muslim faith.²

It is now one and a half years since the motion was passed. It now remains to be seen whether the Equality Bill will be enacted to become law.

¹ Cabinet Minister Major (Rtd) Masden Madoka as quoted in the East African Standard, Oct. 30, 2000 p. 4

² Daily Nation, October 6, 2000, back page.

0.1 DISCRIMINATION

Discrimination on the grounds of sex is rampant in Kenya in areas like employment, education and political participation.

However, this research paper will focus on discrimination against women in the employment sector. This area was chosen because there exists a deeply entrenched notion that women should not hold certain posts and thus efforts are made (consciously or unconsciously) to prevent women from entering certain employment sectors.

This treatment is not justified and therefore there is need to put into place legal machinery that will remedy this situation. The employment laws in Kenya have ensured that women remain on the peripheries of employment in this country though they constitute more than half the population of people in Kenya. This is notwithstanding the fact that they provide between 80 and 90% of labour in the subsistence production and over 70% in cash crop production.³

It is with the foregoing in mind that the **Draft Equality Bill** 2000 was written in collaboration with the Federation of Women Lawyers – FIDA (K) and the Attorney General's Chambers. It aims at redressing inequalities in order to enable women and other marginalized groups to enjoy and exercise their rights on an equal footing.

It also hopes to promote equality of access and opportunities for all persons regardless of sex, race and disability.

It is our submission that **Draft Equality Bill** is a timely piece of legislation that will address the inequalities that characterize employment of women in various sectors of our economy.

³ Mwaura D., Affirmative Action in Female headed households in Kenya. University of Nairobi, LL.B. Dissertation

0.2 THE TASK

It is no doubt that discrimination of women in employment opportunities is widespread in Kenya. Discrimination can either be *de facto* or *de jure* and in either way is unwarranted unless it is shown that the act or omission is reasonable and justifiable in the particular circumstances.

Many times law contributes to promote gender discrimination either directly through its provisions or indirectly by not having any provisions to the contrary.⁴ In other cases law may provide *de jure* equality and yet *de facto* discrimination continues to exist. Statutes and legislation intended to protect women on the basics of gender differences have been used to discriminate against them.⁵

The **Draft Equality Bill** will require the government to guarantee equal opportunities in all areas of its control. An Equality Board will be established and it will research, monitor and sensitize the public on issues of inequality will receive and investigate complaints, develop guidelines as well as design and recommend policy legislative reform.⁶

The tribunal will deliberate and rule on complaints and grant remedies according to the Equality Act.⁷

0.3 THE LAYOUT

In **chapter one**, we shall look at what discrimination means, and also the various ways in which discrimination can be classified. Thereafter, we shall look at discrimination in the workplace, the justifications for such discrimination and the Kenyan laws that are discriminatory either in their provision or in lack of the same.

⁴ Kang'ethe H.K. LL. B Dissertation, U.O.N. 2000 Women, Discrimination and the Law.

⁵ Employment Law, s. 28 of the Employment Act Cap 229 of the Laws of Kenya prevent women and children from working between 6.30 p.m. and 6.30 a.m.

⁶ The Draft Equality Bill 2000, section 22

⁷ Ibid, section 42

Chapter two will be a critical analysis of the international legal instruments that prohibit discrimination on any grounds in whatsoever. We shall look at the loopholes that are found in these instruments and why they remain illusory to most state parties, despite having quite comprehensive provisions.

In **chapter three**, we will look at the various provisions of the Draft Equality Bill. We will also attempt to see how these provisions cover for the loopholes that are found in international legal instruments.

Finally, in **chapter four**, we will have recommendations as to how the Equality Bill can be made more effective in Kenya, especially bearing in mind the socio-economic situation currently prevailing in Kenya.

LAWS AND DISCRIMINATION IN THE EMPLOYMENT SECTOR IN KENYA

1.0 INTRODUCTION

When the laws of a particular country are put in place, they are supposed to apply equally to all its subjects, regardless of colour, tribe, age or sex. Men and women are supposed to be equal in the eyes of the law. However, it is evident that many times law contributes to promote gender discrimination despite the fact that it should be doing the reverse.

The main reason for this is that although the law reflects both men's and women's needs, these needs are as perceived by men. This is not to say that there is male conspiracy against women, only that the difference between men's and women's life's experiences are so deep as to be invisible and therefore generally forgotten when laws are being made.

Despite the fact that women form the larger portion of the work force (both at home and in the economic sector) men have always been dominant in the law-making and policy-making processes. Men continue to hold higher and more important positions than women even if the latter possess the same educational qualifications and experience.

In the commercial sector, men and women are engaged in practically all branches of the clerical profession, but there is a tendency for women to be confined to more routine work, for example cleaning, packing, dusting and arranging goods, therefore leaving the administrative posts to men.¹

Discrimination can result even where rules seem to be sex-neutral because in spite of its apparent neutrality, the law in question either does not specify that women have the same rights as men or it fails to make provision for the different experiences of men and

¹ Seiso, S.M. and others; "Situation of Women in South Africa", Harare, University of Zimbabwe Publications, 1990.

women. This often works against the interest of women, as it is assumed that women are adequately protected by the existing law.

The prohibition of discrimination does not imply that no differentiation should be made between people but that such differentiation should be on the basis of objective and reasonable criteria, not on the grounds of sex, race ethnicity or colour.

In this chapter, we shall briefly look at what discrimination is, why it happens and what motivates it. We shall then look at discrimination at the work place and especially so the Kenya scenario. The provisions of law that will be critically looked at include those of the Constitution, The Employment Act and the Armed Forces Act. In concluding, we shall have a look at how women in Kenya have defied particular notions that have kept them out of particular occupations.

1.2 WHAT IS DISCRIMINATION?

Discrimination means giving of special or different treatment to certain people of countries. It is also, any distinction, exclusion, or preference made on the basis of colour, race, sex, religion or political opinion of opportunity or treatment in employment or occupation.²

Discrimination means treating one or more members of a specified group unfairly as compared with other people.³ There are basically two types of discrimination:

Direct Discrimination

In this case, a person discriminates against another if, on the grounds of sex, marital status or race, he treats that person less favourably than he would treat other persons.

Direct discrimination cannot be justified on grounds of convenience.

² International Labour Organization Article 1, Discrimination (Employment and Occupation) Convention.

³ Oxford Dictionary of Law, Oxford University Press, 1997

Indirect Discrimination

This occurs to a group of people:

- a) Which is such that the proportion of the complaints sex or racial group is smaller than the proportions of persons of the other sex or racial group who can comply with it.
- b) Which cannot be shown to be justifiable irrespective of the sex or racial group of the person to whom it is applied
- c) Which is to that person's detriment because s(he) cannot comply with it.⁴

Discrimination can also be positive or negative.

Negative discrimination

This accrues to a particular person "A" directly or indirectly due to the effect of negative discrimination against another person "B".

Positive Discrimination

This is intended to consciously correct existing negative discrimination. For example, provision of job quotas to women who had previously been subjected to employment discrimination constitutes positive discrimination.⁵ Positive discrimination is usually illegal as it is in itself discrimination but actions that encourage a particular group are permitted. Therefore, job advertisements, which state that applications from women and ethnic minorities are welcome, are legal but choosing a candidate for a post solely on the grounds of racial origin or sex will not be permitted in most circumstances.⁶

DISCRIMINATION AT THE WORKPLACE

Women work longer hours than men and they have greater responsibilities especially those who live in the rural areas worldwide. Although their work may not be waged or paid, this very labour is the foundation of the societies wealth. If women were paid for all they do there would be a lot of wages due.⁷

⁴ Collin, T., "Teach Yourself Employment Law", London University Press, 1989

⁵ Dahl: Tove, Steng, Women's Law: An Introduction to Feminist Jurisprudence, 1987

⁶ *Ibid.*

⁷ "All Work and no pay, Women, housework and the wages due", Falling Wall Press, London 1975

In societies all over the world there are structures that keep men and women in separate spheres, and ensure that the spheres of men are dominant and those of women subordinate. These include:

a) Gender relations

These are relations between men and women that although based on biological differences, are socially and culturally created. Women have the multiple activities they are expected to carry out, while their official sphere is the home and family.

b) Sexual Division of labour:

The division between production (paid work or economic activity) and reproduction (bearing of children) is the basis of what is known as the sexual division of labour. Women's jobs cover a narrower range of activities and echo women's reproductive responsibilities for example cleaning, caring and teaching. Pay is lower for women as they are still considered to be secondary wage earners.⁸

A lot of the work done by women "outside the labour force" for example fetching water and firewood is economically useful. By their labour, women subsidize the production and maintenance of the work force, which primarily consists of men. Because of the women's labour, society in general and employers in particular are spared the expense of the upkeep of the work place, either in terms of providing communal services or in terms of paying high wages to cover the real costs.

Therefore, it is important to value the social contribution of women for example care, sustenance and support given by women to their families and communities.

ACCOUNTING FOR DISCRIMINATION

There are various reasons as to why discrimination occurs at the work place. These are not written down in any particular document or book but they will be practised in almost

⁸ Bullock, S., Women and Work, London, Falling Wall Press, 1994

all societies, despite the level of development. However, it can be said that discrimination is normally attributed to the following factors:

a) The Dual Role Issue

Discrimination on this ground is based on the fact that women have responsibilities assigned to them in their paid employment and those associated with their position as a wife and mother. For this reason, women who decided to enter paid employment face the difficulty of balancing the responsibilities of paid work with those they have at the home front.⁹ This difficulty is made worse as the women are burdening with guilt and shame. Anything that goes wrong because a woman is engaging in a male profession (paid employment) is seen to be her problem. She is condemned because of trying to be “*what women cannot be*” and for being a woman and failing to meet her obligations as a woman.

In the past, the woman's place was taken to be at home and her entry into paid employment was received with hostility. Those who entered paid employment were either single women with no families to take care of or married women whose husbands could not support them—a stigma in most societies.

This has however changed as women enter into the job market in large numbers and more so, into the fields that were perceived to be for men only, for example, medicine, law and engineering. Despite this, it is clear that men generally hold jobs that are better paying and also those that require making of important decisions, for example, managerial positions.

b) Entry and Exit at the Workplace

Entry and exit rates and the length of stay out of the work place are important in the determination of competitiveness between men and women. Men exceed women especially in relation to continuity of service and broadness of experience. Separations,

⁹ *Ibid*, note 7

discontinuity and disassociations from work affect productivity and are generally associated with women.¹⁰

CONDITIONS PREDISPOSING DISCRIMINATION

- a. Women dominate ancillary work activities commonly under the direction of men for example nurses, where they are regarded as assistants and not independent workers.
- b. Women are supplementary family works whose earnings are intended to supplement the family income, which is implicitly presumed inadequate.
- c. Women's productivity is lower than that of men because of their dual responsibilities both at work and at home.

WHAT MOTIVATES DISCRIMINATION?

a) **Prejudice**

This is based on a personal nature. The employer does not wish to employ women; men do not wish to work with women; or customers do not wish to be attended to by women.

b) **Tradition**

This is imposed upon the employer, who may be inclined to act otherwise in its absence.

c) **Economic advantage**

In this case, the employer is aware of the discriminatory behaviour, knows that it cannot be justified on economic grounds, but abides by the prevailing practice for economic gain. For example paying different wages to men and women for the same amount of work done.¹¹

¹⁰ *Ibid*, note 7

¹¹ Becker, G. The Economics of Discrimination Chicago, University of Chicago Press 1997

Another justification given for discrimination against women in employment includes the fact that women cannot manage and supervise because of their emotional nature. In this regard *“women’s thinking is said to be too emotional, too confined to the particular, and should therefore be confined to the private sphere, and not the public...which requires a more expansive... male type of intellect.”*¹²

1.3 THE KENYAN SCENARIO

Before the coming of colonialists to Kenya, both men and women had particular roles to play in the community and each of them specialized in particular spheres. For example, women were in charge of domestic chores at home. Land was communally owned and therefore no one would claim exclusive ownership to it.

The coming of colonialist changed the situation drastically. It became increasingly common for men to leave their wives and children back at home when they left for towns to work for better and more lucrative jobs. These were the jobs being offered by the colonial government and were seen to be more prestigious than farming.

Soon, also women began to migrate to the towns in search of jobs. In addition to the fact that town life was seen to be prestigious, the colonialist had taken a lot of land from the natives and concentrated them into native reserves where the land would not meet the needs of all its occupants.

Industrialisation also had a big part to play as it created new jobs in the urban areas. This largely contributed to the rural – urban migration. This affected not only men but also women who were in search for better and well-paying jobs bearing in mind the fact their land had been taken away and they had to look for alternative sources of livelihood.

Women had less education than men and therefore went to work according to their traditional roles – as house girls, cooks, and cleaners. As far as work in the industries was

¹² From the article The Man of the Law

concerned, they were mainly concentrated in the packing and food processing sectors. This was the work that they were competent in doing, and it played a substantial role of accelerating discrimination in the employment sector in Kenya.

This situation was made worse by the laws that governed African labour in actual employment. These did not specifically consider women for the simple reason that they were not being engaged in paid employment outside their homes.¹³

As more women took up employment, there was need to come up with suitable legislation which provided *inter alia* that no young person or woman shall be employed at night in any industrial undertaking.¹⁴

As it will be seen later in this work, these laws have been used to exclude women from majority of work under the pretext of protecting them from harmful and dangerous working conditions.

LAWS AND DISCRIMINATION IN KENYA

The Constitution of Kenya

In Kenya, discrimination is outlawed by the Supreme Law of the Land, the Constitution. However, despite these provisions, discrimination especially against women in the working place continues to be rampant with employees giving invalid reasons for example “the work is not for women.” We shall later on see how women have defied this attitude by entering into jobs that were previously dominated by men.

S. 82 of the Constitution is one of the sections that provide for fundamental rights and freedoms of the individual. This section offers protection from discrimination on grounds of race, colour, race, creed, or sex... No law shall make any provision that is discriminatory either of itself, or in its effect. This essentially rules out both *de jure* and *de facto* discrimination. **S. 82 (2)** provides that no person shall be treated in a

¹³ Master and Servant Ordinance No. 8 of 1906; Resident Natives Ordinance, No. 35 of 1918; Employment of Natives Ordinance No. 10 of 1926

discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office. S. 82 (2) gives the definition of 'discriminatory' to mean affording different treatment to different persons attributable to *inter alia* sex. This eliminates discrimination on grounds of either being a man or woman. It is important to note that a major flaw in S. 82 is to the effect that discrimination is allowed in relation to matters of personal law. These include matters related to adoption, marriage, divorce, burial or devolution of property on death. Although this is outside the scope of this work, it will suffice to say that this allows for discrimination against women, as most provisions of customary law are discriminatory against women. There is therefore need to amend these provisions to ensure that discrimination is outlawed both in law and in the effect produced by the law.

S. 84 gives the high court original jurisdiction in cases where one feels that their fundamental rights have been violated, or are likely to be violated.

The Employment Act

In Kenya, the employment rules and procedures are provided for by the Employment Act.¹⁵ The laws and provisions in the act appear to be gender neutral, except in a few situations where some provisions apply only to women and children. The fact that these laws apply only to women is discriminatory in itself. For these reasons, our employment legislation is deficient in ensuring a labour system based on equal opportunities for both men and women.

Although these rules were originally intended to be for the protection of women and children, we shall see that they have been used by the employers to deny women entry into the employment sector absolutely. This greatly limits the kind of jobs that women are eligible for. This, coupled with the age-old notion that a woman's place is at home places women at a great disadvantage as compared to their male counterparts. This

¹⁴ Employment of Women, Young Persons and Children's Ordinance, s. 5

¹⁵ Chapter 226, the Laws of Kenya

happens even when it is evident that both the man and woman are equally qualified for a particular job.

S. 28 of the Employment Act provided that women cannot work between 6.30 p.m. – 6.30 a.m. in an industrial undertaking. An industrial undertaking is defined to include mines, quarries, and construction work. Exceptions to this rule include where women are working in a managerial capacity; women engaged in health and welfare services; a woman who in the course of her studies spends a period of training in the underground parts of a mine; or a woman who enters the mine, for the purpose of a non-manual reason.

The above provisions clearly show that women are not to work in a wide range of jobs. This is made worse by the fact that employers have misused this provision to ensure that women are not employed in these sectors at all, even though work can be done in shifts with the women working during the day. In an economy like ours, where jobs are scarce, this provision is discriminatory against women.

S. 7 (2) of the Employment Act provides that a woman employee shall be entitled to two (2) months maternity leave with full pay, provided that a woman who has taken maternity leave shall forfeit her annual leave in that year.

Every employee is entitled to twenty-one (21) days leave with full pay and this means that a woman has only one month in addition to the normal leave during her pregnancy. This is not enough and was the main reason why **Honourable Charity Ngilu** in November 1998 tabled a motion urging the government to amend this section in order to grant women employees, both in the public and private sectors two months mandatory leave, excluding their annual leave.¹⁶

The then Minister for Labour while claiming that he supported the motion, said *inter alia*

¹⁶ Constitutional Gains, Private Losses, 1998 FIDA (K) Annual Report on the Legal Status of Women in Kenya.

“... the provisions of section 7(2) of the Employment Act adequately cover, protect and safeguard the interests of the female employees. The two months are deemed sufficient for a female employee to recover both psychologically and physiologically to resume normal productive work”

He went on to say that increasing maternity leave would be to the detriment of the employers interest, and that it would not be cost-effective in view of Kenya's level of development.¹⁷

If the policy makers do not see such laws as discriminatory, then no one else can bring a change that is effective and to the advantage of women at the work place.

S. 9 Employment Act provides for housing for male employees. Women are not catered for because there is an assumption (wrong) that a married woman lives in her husband's house and that the women are their husband's dependants. This is outright discrimination on grounds of sex.

Further more the **Government Civil Service Regulations L 31** exclude married women from earning house allowance unless they can show that they are the sole supporters of the household.¹⁸ This does not apply to men.

The Armed Forces Act

The Armed Forces Act¹⁹ has provisions which offer differential treatment to women. These are couched in terms that are ostensibly for the benefit of the women but which have the effect of disadvantaging women. As a basic rule, a woman who is married may not be conscripted into the armed forces. This, again, does not apply to men. Women are not allowed to have children while in the armed forces.

¹⁷Parliamentary Debates, November 4 1998 as quoted in the 1998 FIDA (K) Annual Report on the Legal Status of Women in Kenya.

¹⁸ Kabeberi, J.M., Women, Laws, Customs and Practice in East Africa, Laying the Foundation, Women and Law in East Africa, 1995.

There is little opportunity for promotion for the woman as they do not undergo the same training as their male counterparts. Women therefore belong to women service corps and their roles are restricted to the provision of traditional women's skills, for example cooks, typists, nurses and secretaries. The subordinate role of the woman vis-à-vis the man is thus imported into the armed forces.

DEFIANCE OF THE NORM?

More and more women are now entering into job opportunities that were previously predominated by men. Fields like medicine, law, and engineering now have considerable number of women although it is still clear that women are perceived to have different capabilities as compared to those of men.

In Kenya the Kenya Bus Service now employs women drivers. Much to the consternation of the members of the public. About 10 years ago, it would have been a great spectacle to see a woman drive a bus. A Kenya Bus Service director, asked why they did not employ women as drivers said, "*...the public would be scared...*"²⁰

It would appear that the public is no longer scared.

Taxi companies are also employing women, although this was a job only for men.

¹⁹ Chapter 199 of the Laws of Kenya

²⁰ As quoted in Sex, Discrimination and the Law, Ngugi W.W. LL.B. Dissertation 1986

1.4 CONCLUSION

That women are discriminated against in employment is incontestable. Discrimination occurs in the selection, interviewing and hiring process, in the assignment of responsibilities, in promotions and in pay. The effect of past discrimination has meant that progress in respect of equal opportunities for women has been painfully and intolerably slow in many areas.

We have seen that discrimination against women in the employment sector is facilitated by laws (or misconstruction of the same) attitudes and prejudices which need to change. This is because these undermine opportunities for women not only in securing the employment they desire, but also of achievement in their vocations once such employment is secured.

Since history has shown that amendment and repeal of discriminating laws will not remedy these imbalances, new social policies should be put in place to ensure speedy realization of gender equity. It is for this very reason that the Equality Bill was drafted and we wait to see whether it will indeed bring about the required change especially as concern employment of women in Kenya.

In the next chapter, we shall look at the provisions of International Instruments that prohibit discrimination against women at their work place. We shall also analyze the same and identify their loopholes.

CHAPTER TWO

INTERNATIONAL LEGAL INSTRUMENTS THAT PROHIBIT DISCRIMINATION AGAINST WOMEN IN THE WORK PLACE

2.0 INTRODUCTION

In the previous chapter, we looked at what discrimination means, conditions that predispose discrimination and the various provisions of Kenyan laws that have discriminatory effects on women.

In this chapter, we look at international instruments' provisions especially regarding discrimination at the work place. Other statutes that prevent discrimination also looked at.

Further, we shall look at the shortcomings of these provisions and see why despite an important form of legislation; they bring about little or no change on the situation of women in the employment sector.

Despite ratification by many countries we shall see that these instruments are left in the shelves to acquire dust. Most countries are quick when it comes to signing and ratifying such instruments, but are very reluctant to make these alive by incorporating them into their national laws or by abiding by their provisions.

Further, the fact that there is no machinery set up to ensure that these provisions are adhered to gives a chance to countries to escape the obligations that have been imposed upon them by these instruments.

2.1 THE INTERNATIONAL LABOUR ORGANIZATION

The process of developing and implementing international labour standards may seem as removed from everyday working lives of women but this is where it both starts and ends. It is the issues identified at the workplace that provide the impetus for setting standards.

The International Labour Organization, (hereinafter the ILO) is the United Nations specialized agency on labour. It was set up in 1919 to improve living and working conditions and to promote social justice. It provides the means for the social partners, that is, workers, employers and governments to come together to look into issues of concern to develop a labour convention if applicable and then to promote its implementation. Other activities of the ILO are to collect, analyze and disseminate information on social and labour matters, to organize meeting to work out new ideas, and also to provide services like workers education to member states.

Once a country ratifies a convention, the government concerned must make regular reports to the ILO on the measures it has taken to apply it. Even in the case of an unratified convention, governments may be called upon to report on the relevant law and practice in these countries and to explain what is preventing or denying its ratification.

The ILO touches on many factors that affect women (and men) at the work place. These are briefly discussed below.

1. Promoting Equal Opportunities

All labour standards aim to improve working condition for all workers but in recognition of the deeply entrenched and systematic discrimination against women in employment, and the particular demands of their reproductive role, the ILO has approved special instruments to combat discrimination and respond to women's specific needs.

Convention No. 11 Discrimination (Employment and Occupation) 1958 and **Recommendation No. 11** aim to promote equality of opportunity and treatment in employment and occupation. This refers to both accesses to employment and conditions of work.

Conditions that prevail before one enters into employment should be fair and non-discriminatory. For example, they should be based on one's qualifications and not on one's sex, colour or religion. Equal opportunities should be provided for anyone who wishes to be employed.

Thereafter, conditions at work should not be discriminatory. A pregnant woman should not be dismissed simply because of the fact that she is to become a mother. She should not be given work that may be dangerous to either her or the unborn baby. There should be no sexual harassment of the employee and no one should be mistreated in case they turn down sexual advances by their employers.

2. Pay Inequality

According to the Liberal Economists, labour should be paid with regard to what is being performed rather than who is performing the work.¹

The gap between men's and women's pay is one aspect of unequal opportunities. Generally, women are paid less than men and it reflects the value given by society to women's skills and work. The ILO **Convention No. 100 Equal Remuneration (1951)** lay down the principle of equal pay for work of equal value. Thus, ratifying states agree to promote the principle of equal pay for work of equal value and make sure that it is applied to all workers by means of national laws, wage fixing machinery or collective agreements.

¹ Mungai J.W., Discrimination of women and disabled persons in the employment sector. University of Nairobi, LL.B., Dissertation. 2000

3 . Maternity Rights and Protection

Women come into the labour force both as workers and as women. Maternity protection is essential to the achievement of equal opportunities in order to ensure that women are not disadvantaged in relation to their biological functions of child bearing and breastfeeding.

Convention No. 103 Maternity Protection covers issues like protection against dismissal, conditions at work for pregnant women, paid leave and breaks for nursing a child.

Employers use pregnancy as a reason to terminate individual contracts or dismiss a pregnant woman. Pregnancy is used as a means of frustration therefore leading to constructive dismissal whereby the worker has no option but to stop work. For example, Mrs L worked as a sales and marketing executive for a period of 4 years. She then asks for maternity leave. Her contract is the terminated on the grounds that she is 'no longer able to carry out her duties because she was expecting.'

This is very discriminatory and it is hoped that the Equality Bill will iron out such situations.

4. Family Responsibilities

The **ILO Convention No. 156** recognizes that workers who are responsible for children or other family members may have difficulties in carrying out their jobs. Therefore states must make it possible for such people to work without discrimination and also help eliminate the conflict between their employment and family responsibilities by promoting workplace and community planning measures to respond to the needs of workers with families.

5. Leave Arrangements

Either parent should have leave of absence immediately after the period of maternity leave.

2.2 CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

This is also known as the women's convention or the International Bill of Rights for Women. It has the most-comprehensive provisions that prohibit all kinds of discrimination against women. It came into force in 1979 and is one of the most ratified conventions.

It was the first international convention to embody the concept that rights are basic values shared by every human being, no matter what their gender, race, religion, culture, or age is. It discloses women's equality in the broader context of poverty, race, armed conflict and development and confronts certain issues for the first time for example, the need to modify social and cultural patterns².

CEDAW has the most reservations. Kenya reserved article 13, which provides that

“Governments will act to eliminate discrimination against women in the economic and social areas and an equal right to participate in recreational activities, sports and cultural life”

It is yet to be known why Kenya attached this reservation to this article. Maybe the economic, social and political situation would account for this reservation. Only a well-developed country would be able to guarantee to eliminate discrimination against women in the economic and social areas.

Under **Article 18(1) CEDAW**, state parties are required to submit periodic reports on the legislative, judicial and administrative or other measures, which they have adopted for consideration by the CEDAW committee. Kenya submitted its first report to CEDAW in 1997, 7 years after ratifying the convention.³

² The tribune: A Woman and Development Quarterly Newsletter 58 New York: International Women's Tribune Centre

³ Institutional Gains Private Losses. The 1998 FIDA (K) Annual Report on the Legal status of Kenyan women p. 41.

The provisions of CEDAW are wide, covering almost all areas of a person's life. A. 2 is the undertaking that states agree to pursue a policy of eliminating discrimination against women. It goes on to provide in other articles to ensure full development and achievement of women⁴ to take temporary special measures aimed at accelerating defector equality between men and women,⁵ modify cultural patterns to remove costmary practices that are based on the superiority or inferiority of either of the sexes⁶, eliminate trafficking, prostitution of women,⁷ enable women participate in public life at the international level⁸, grant women rights to change their nationality⁹. Equal opportunities in education, employment, Medicare, participation in economic and social life and equality before the law.¹⁰

The section that is of much relevance to our discussion is Sec. 11, which deals with employment. It provides *inter alia* that governments will eliminate discrimination against women in the workplace. Women will have the same employment rights as men as well as maternity leave and special protection against harmful work during pregnancy. The rights provided include to the right to work as inalienable right of all human beings, right to choose professional employment, right to equal remuneration and safety in working conditions.

States are required to take appropriate measures to prevent dismissal on such grounds as pregnancy. Childcare facilities should be provided to enable parents combine family obligation with work responsibilities.

A COMPARATIVE ANALYSIS OF THE ILO CONVENTION AND CEDAW

Having looked at the provisions of two major international instruments, that is the ILO and CEDAW, it is prudent at this point to do a comparative analysis of the same.

⁴ Art. 3

⁵ Art. 4

⁶ Art. 5

⁷ Art. 6

⁸ Art. 7,8

⁹ Art. 9

We notice from the above discussion that the ILO has wide provisions which cover practically all the areas of work. These include equal pay, maternity rights, equal opportunities at the work place, to mention but a few.

Unlike the ILO convention CEDAW primarily deal with discrimination against women in all areas of her life including education, marriage, participation in public life, health nationality and not to forget employment. However, it is important to note that the provisions prohibiting discrimination at work place are quite wide, and in actual fact they embody those that are contained in the ILO Convention.

A few examples will suffice to illustrate the aforementioned fact. In both the ILO Convention and CEDAW, there are provisions that relate to equal opportunities, equal remuneration for work of equal value. Maternity rights and protection and leave arrangements especially during the period of maternity. CEDAW has more detailed provisions regarding maternity protection. For example, it stresses the fact that no one should be dismissed on grounds only that she is expecting or because of her marital status.

All in all, we can see that the provisions overlap with each other and the effect of this is that the governments, which are parties to both instruments, will have the same obligations under different instruments.¹¹ Thus there might arise a situation whereby country A has signed instrument X and country B has signed instrument Z, but in essence what is contained in those instruments is basically the same, save the name of the document.

This will now beg the question as to whether there was indeed any need to come up with CEDAW when it was quite clear that what is hoped to achieve was already covered in the ILO convention.

¹⁰ Art. 10-15

It is proposed that there was need to come up with the convention as it was to help further the development of women's rights, emancipation of women, and the growing political importance of women's issues.¹²

Under Article 15 CEDAW, state parties undertake to submit to the secretary general of the United Nations, for consideration by the committee, a report on the legislative, judicial administrative or other measures which they have adopted to give reflect to the provisions of the convention. This was to try and bring about compliance with the provisions of the convention. We however note that Kenya made its first report to CEDAW seven years after ratifying the same. This was after much pushing from non-governmental organization like FIDA (K) who even made a shadow report.

The report that a state makes in pursuance of this requirement may not reflect the true state of facts as they stand. The report may state the law, which is usually different from practice. A state will do so simply because it is required to comply, and not because it has taken up the measures that it purports to have taken. This will especially happen when it has certain conditionalities to meet for example, before resumption of financial aid.

Under the ILO commissions have been established which scrutinize the government reports on the execution of agreements before being passed to the general conference.

What can be decided from the above discussion is that there is no effective machinery which will ensure that states comply with their obligations under particular conventions. Furthermore, there are no remedies provide for those whose rights have been violated. These rights therefore remain illusory, and far removed from the ordinary man on the street. As we shall see later, the only way that these provisions can become a reality if is if they are transformed into the national law of means of a special statute.

¹¹ Guide to Travaux preparatoires of the United Nations Convention on Elimination of all forms of Discrimination Against Women. Martinus Nijhoff Publishers.

We will now have a look at the provisions of the Universal Declaration of Human Rights

2.3 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The rights and freedoms contained in the UDHR appertain to all human beings without distinction of any kind like sex, colour, race, language, religion, political or other opinion, national or social origin, property both or other status.¹³

Of most relevance to our discussion is Article 23, which provides *inter alia* that everyone has the right to work, to free choice of employment, to job and favourable conditions of work and to protection against employment. This primarily means that every person regardless of their sex can choose the kind of work they want to do. This therefore removes the stereotypes that prevail in the employment sector in Kenya, for example. That women should be nurses and teachers while men should be doctors and engineers. Provided that one has not the specific qualifications then they should not be stopped from pursuing whatever area they wish to simply on the grounds of sex.

The article goes on to provide that “everyone, without discrimination, has the right to equal pay for equal work”¹⁴. This is very much in line with the provisions of the Equal Pay Act of UK whose main goal was to ensure that men and women doing the same or broadly similar work, or work which has been rated equivalent, receive the same pay¹⁵. This outlaws unequal pay on grounds of sex or any other grounds whatsoever.

Article 23 (3) provides that everyone who works has the right to just and favourable remuneration ensuring for himself and his family on existence worthy of human dignity and supplemented, if necessary by other means of social protection.

¹² Ibid, note 1

¹³ Art. 2 UDHR

¹⁴ Art. 23 (2) UDHR

¹⁵ supra, note 3

This might be difficult to implement in a developing country like ours where ones earnings are hardly enough to cater for himself, leave alone his family. About half of the Kenyan population lives below poverty level. Workers are paid according to the posts they hold in total disregard to factors such as the number of mouths they have to feed.

However, there is established in Kenya a social security fund which caters for the needs of employees after they have ceased being in paid employment.

AN ANALYSIS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Our next analysis will be on the UDHR, which comprises 2 main categories of rights, civic and political on the one hand, and economic, social and cultural rights on the other hand.

The UDHR was initially not intended to be legally binding but rather a guiding light to all those which endeavoured to raise mans material standard of living and spiritual conditions. It was a common standard of achievement for peoples of all nations.

With its constant repetition and reaffirmation in subsequent instruments, universal and regional in national constitutions, it is now argued that the UDHR at least units essential principles has become part of customary international law binding on all states without their express consent.

However, the declaration has no institutional mechanism for enforcement of rights unless there is a threat to international peace and security.

Like the ILO¹⁶ and CEDAW¹⁷ the UDHR has a provision that relates to equal pay. In the provisions of article 23, everyone has the right to equal pay for equal work, and the right to just and favourable remuneration.

¹⁶ ILO Convention No. 100 Equal Remuneration (1951)

¹⁷ Article 11, CEDAW

2.4 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

This takes for first part of the declaration. However, since it is outside the scope of this research, it will suffice to mention that its structure goes beyond the declaration in that it requires the state to provide a remedial system in the event of violations of rights.

Article 2 provides that state parties should ensure to all persons within their territory the rights recognized by the covenant and adopt such legislative or other measures as may be necessary to achieve that goal. Further any person whose rights are violated shall have an effective remedy and that the competent authorities shall enforce such remedies when granted.

The covenant is binding upon state parties as opposed to the UDHR which is a mere reference point. Therefore, all non-member states cannot be obligated unless it becomes customary international law.

2.5 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

The preambular provision of the covenant declares that in accordance with the UDHR, the idea of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his every social and cultural rights as well as his civil, and political rights.

While the first generation rights generally require governments to abstain from under interference with the liberty of the subjects the second-generation rights call for definitive action, forward planning and expenditure of resources to make their enjoyment possible.

Part 3 of the covenant enumerates the specific rights for example, the right to work, just and favourable conditions of work, rest and leisure, right to form and join trade unions

and go on strike, right to social security, special protection of the families mothers and children and adequate standard of living, including food, clothing and housing.

The greatest challenge regarding economic, social and cultural rights is identifying effective appropriate approaches to implementation. That is to say, the means by which such rights can be given effects and governments be held accountable to fulfill their obligations.

States and international community continue to tolerate or too often breach of economic, social and cultural rights which if they occurred in relation to civil and political rights would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. States have not consistently followed up their rhetorical support for economic, social and cultural rights. This could be attributed to the fact that it will require governments to set aside fords for such purposes.

There is established a Commission on Economic, Social and Cultural Rights which monitors the compliance of state parties with their obligations under the covenant. State parties are required to submit initial reports within two (2) years while subsequent reports at five year intervals.

This system provides to be quite ineffective. For example, Kenya does not comply with its reporting obligations. Reports thus become overdue by it to eight (8) years under the reporting procedure of the ICCPR and the ESCR respectively.¹⁸

Regional instruments prohibiting discrimination against women in the work place will now be looked at.

¹⁸ Andreadssen ., Swinhart T., Human Rights in Developing Countries 1990, Year Book page 220

2.6 THE EQUAL PAY ACT AND SEX DISCRIMINATION ACTS (U.K)

These came to force in the UK in 29 December 1975. The main reason for their enactment was that there was compelling evidence of unequal pay and unequal conditions in employment, unequal access to the market place in general and to certain sectors in particular¹⁹.

This came after a long struggle for the women who were regarded as having no legal personality in most areas of public law particularly if married. Although single women could vote, in elections “a married women’s status was entirely merged in that of their husband that she was incapable of exercising all public functions.”²⁰ This was so despite the fact that words importing the masculine gender were to include females for all purposes conceded with the right to vote in elections.

1. Background

With the advent of new international organizations in the post war period, there has been an increasing international emphasis on human rights including the idea of equality.

The UK legislation on equality of the sexes implements the spirit of the International Declaration on Human Rights. The **UN Charter** and the **Universal Declaration of Human Rights (UDHR)** and **CEDAW** prohibit sex discrimination. The ILO has a convention on equal pay for work of equal value. The **European Convention on Human Rights** outlaws discrimination on grounds on sex and provides enforcement machinery.

2. The Goals

It aims to prohibit unequal treatment of the sexes in certain well-defined areas of the economy and in education. The equal pay legislation ensures that men and women doing

¹⁹ O’ Donovan K., S2y2czak E; The Quest for Equality. P. 21

²⁰ The Queen –v- Harrald (1872) LR 7 QB 79

the same or broadly similar work or work which has been rated equivalent, receive the same pay.

3. Mechanism

In the case of unequal pay, there is a right of individual complaint to an industrial tribunal. There must be a male comparator employed in the establishment by the same employer. There is no possibility of basing a claim on what the employer might have paid a 'hypothetical man'.²¹

The Equal Opportunities Commission is the body that was created by the 1975 Act to assist in the enforcement of the legislation. It can assist individuals in bringing complaints against discriminatory advertisements, seeking an injunction to restrain persistent discrimination, issue non-discriminatory notices and enforce them, and issue codes of practice.²²

The individuals who bring the complaints bear the burden of proof.

When a woman is employed, her contract of employment is deemed to include an 'equality clause' which ensures that where she performs like work to that performed by men, she is entitled to terms not less favourable than those under which a man would be employed. It is this clause which gives the woman worker the right to take a complaint to a local industrial tribunal which complaint may include a claim for arrears of remuneration or for damages. An appeal lies to the Employment Appeal Tribunal.²³

Whereas the ILO Convention talks of 'equal pay for work of equal value' some international documents talk about 'equal pay for equal work'.²⁴ Equal pay for equal work produces a notion of comparison of the way in which the work is performed. For example two (2) jobs will be equal when a male and female cabin attendant serve the

²¹ Equal Pay Act 1970 s. 1 (6)

²² Sex Discrimination Act 1975) S. 56, 62, 67, 70, 72, 75

²³ Almquist F, *Discrimination in Employment* Stockholm, Sweden 1978 at p. 139

²⁴ Article 119 the treaty of Rome

passengers on the same aircraft in the same way during the same trip.²⁵ On the other hand, the concept of 'work of equal value' as envisaged by the ILO and the Equal Pay Act is more general encompassing also a comparison between the values of various jobs. Thus, two jobs may be said to have the same job value, even though they look very different, if they are considered to have the same value to the enterprise – either because they require equal qualifications or have the same market value.

2.7 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

This generally outlaws all types of discrimination.

Article 18(3) states that the states shall ensure the elimination of every discrimination against women and also the rights of women... as stipulated in the international Declarations and Conventions²⁶.

Article 28 provides that every individual should respect and consider his fellow human beings without discrimination.

2.8 INTERNATIONAL LAW AND MUNICIPAL LAW IN KENYA

We have noted that Kenya has ratified various international instruments. It is evident that there is a lot of difference in ratifying a treaty and actually implementing its provision in that state. This therefore creates a need of domesticating public international law with the exception of customary international law whose application is automatic.

Whereas international law determines the validity of treaties, and remedies available for its breach, it is the national legal system which determines the status or force of law which will be given to a treaty within a particular legal system, that is, whether national judges and administrators will apply norms of a treaty in a specific case.²⁷

²⁵ Supra, note 6

²⁶ This include supplements to the ACHPR including the UDHR, ICESCR, ICCPR, and CEDAW

²⁷ Mulei C: International Union Rights. 2nd Quarter 1992

It has been the practice of states to adopt international rules by transforming or incorporating them in their municipal systems. The practice in Kenya is that rules of customary international law will be interpreted as part and passed of the Kenya's law if they are not in conflict with either an act of parliament or judicial decisions of the highest court of the land.

As regards treaty law, where there is a conflict between such rules and municipal law, the municipal law of Kenya will be held to prevail. In **Okunda -v- R**²⁸ it was held that:

“The provisions of a treaty entered into by the government of Kenya don't become part of the municipal law of Kenya, save in so far as they are made such by the law of Kenya. If provisions of a treaty...are in conflict with the constitution, then to the extent of such conflict, such provisions are void.”

2.9 OBSERVANCE ENFORCEMENT OF INTERNATIONAL LAW

In contrast to municipal law, no effective international machinery has yet been developed for application and enforcement of international law.

What, then, ensures that rules of international law are observed and enforced by states? There are various reasons. For example that human kind is compelled as a reasonable being to believe that order other than chaos is the governing principle of the world.

There is what is called “enlightened self-interest” which is the attitude if risking of losing through application of law may be offset by the advantages accruing to one and all from living in a society in which dispute can be peacefully settled under the same set of rules of law.

The other factor playing a part in promotion of obedience to international law is the world public opinion, which finds expression in forums like the United Nations General

²⁸ East African Law Reports 1970 p. 453

Assembly. The reactions and statement of peoples on a global, scale act as a deterrent towards breach of international law.

2.10 CONCLUSION

The web legislation that prohibits discrimination at the work place is wide and comprehensive. Legislation is no doubt the main political instrument for bringing about social and economic change.

Laws however, should be effective, in that they should bring about the desired change. Otherwise they will be of no use of the citizens. Loopholes in the laws need to be addressed so as to ensure that no one escapes their obligation as imposed on them by the laws. Only then will the law become in effective tool for change.

CHAPTER 3

THE EQUALITY BILL: WHAT DOES IT PROVIDE?

3.0 INTRODUCTION

The Equality Bill was drafted by FIDA (K) and the A.Gs chambers after the equality motion was tabled in parliament. The Attorney Generals Chambers had set up task forces to review the laws relating to children, to persons with disabilities and to women.

The issues addressed in the Equality Bill built both on the rights guaranteed in the constitution of Kenya and fulfill international Human Rights Commitments undertaken by the Government of Kenya.

Its aim is to better protect women, the disabled and other marginalized groups in society. The Bill recognizes the inherent dignity and equal and inalienable rights of all human beings. It calls for equal opportunities without discrimination based on race, colour, ethnic origin, religion, age, sex, marital status, family status, disability or conviction for an offence for which pardon has been granted.

OBJECTS

The objects of the Equality Bill are outlined as follows

1. To give effect to
 - (a) the letter and spirit of the constitution
 - (b) the promotion of substantive equality
 - (c) equal enjoyment of all rights and freedoms by every person.

2. It aims to prevent, prohibit, and provide for the redressing on discrimination based on sex and other grounds in line with international law and treaty obligations binding on Kenya.

How does it intend to do this?

1. Provide remedies for victims of discrimination and persons whose right to equality is infringed;
2. Preventing and prohibiting discrimination;
3. Address and eliminate the imbalances and inequalities existing in all spheres of life as a result of discrimination.

3.1 SUMMARY OF ITS PROVISIONS

The draft Equality Bill defines discrimination as “an act or omission including any condition, requirement, policy situation rule or practice that has or is likely to have the direct or indirect effect of unjustly or unfairly causing disadvantage.”¹

The Bill goes on further in characterizing discrimination as the “failure to reasonably accordable the specific needs of disadvantaged persons or group of persons.”

It imposes binding obligations on the state, and in the event of conflict with existing legislation, exception the constitution of Kenya or an Act of Parliament expressly amending the Equality Bill., the provisions of the Equality Bill shall prevail.

The Bill has provisions, covering various areas of our economy these shall be briefly looked at.

1. Employment

This is provided for under s. 7 of the Draft Equality Bill. An employer may not discriminate against persons in the terms and conditions in which employment is offered. For example, an advertisement requesting for workers of a particular sex or colour is prohibited under this section.

¹ Section 2, Draft Equality Bill.

Employers are prohibited from paying employees differently for work of equal value. This provision is in conformity with Article 23 (2) of the Universal Declaration of Human Rights.

Parents are entitled to specific periods of maternity and paternity leave without having to forfeit other employment benefits. The instances in which discrimination is outlawed include unfair or unjust advertising, recruitment, terms and conditions on which employment is offered, pay, promotion, accommodation, leave and provision for time for breastfeeding.

It is important to note that the number of days of maternity leave are proposed to be increased from sixty to ninety, including ten days of paternity leave. This should be given without forfeiting other employment benefits.

The Employment Act² provides that after getting maternity leave, the worker (woman) has to forfeit her annual leave. This is what the Equality Bill proposes to amend.

Further, nursing mothers are to be given time off work to go and breastfeed for up to one year after the birth of the child. This time should be about two hours each day. This is another provision that is not found in the Employment Act and may prove difficult to implement especially bearing in mind the economic situation in Kenya. It would be seen as taking up too much time (and thus money) from the employer without doing the work one is required to do.

Employees might take advantage of this time to go and carry out other activities which may enhance their financial position. Implementing this provision may mean reporting to work late, having an early lunch break or leaving employment earlier than the rest of the employees work may therefore neglected and it is the employer who will have to bear its brunt.

² Chapter 226 of the Laws of Kenya

As mentioned earlier³ parliamentarians saw the two months provided for maternity leave quite sufficient and therefore no need was seen to increase this to three months.

As pertains, paternity leave, this is a foreign concept in the Kenyan society where the work of nursing and taking care of the baby are left entirely to the mother. Even though this leave is granted to men not many of them would see the need to take it and would rather opt to continue working.

However, this is slowly changing and presently, only a few non-governmental organizations give paternity leave.⁴

Education

The Equality Bill prohibits educational institutions from refusing applications from potential students and from limiting access to education by denying scholarships, bursaries and other available financial assistance. The Bill prohibits the favourable segregation of learners with special needs until special schools or programs based on disability or educational capability.⁵

Students with special needs and pregnant students should be allowed accommodation. In such situations, necessary facilities should be provided for children with special needs. Admission of students to learning institutions should be fair in both terms and conditions. This means that using grounds such as sex, colour or tribe for admission of students is outlawed.

Pregnant students should not be expelled or subjected to detriment on the same ground or on any other ground.

S. 8 (f) provides that students with special needs should not be favourably segregated based on their disabilities and educational interests or capabilities. How so? Students

³ Supra, note 19

⁴ For example, FIDA (K)

⁵ S. 8, Equality Bill

with special needs should be provided of well equipped schools, they may be forced to go into one school or another.

It is proposed that children with special needs need be put in special schools which can provide learning facilities specifically for them. This will be much cheaper than installing such equipment in all schools or having to employ teachers who have done special education to all schools in case they happen to have disabled students.

This will not be viable economy-wise as a lot of money would be required for such facilities to be installed in all schools. Socially, disabled children are able to relate better with their disabled counterparts as opposed to those who are not physically disabled. This will reduce cases of inferiority complex among the disabled students.

Section 8 (g) and (h) provide that modes of dressing relating to cultural and religious diversity should be allowed. For example, Muslims should be allowed to put on their headgear even when putting on school uniform.

Evaluation procedures and assessments should not discriminate against any person under this provision principles and agents are prohibited from discrimination against persons by refusing applications for accommodation or lease, or in terms on which accommodation is offered.⁶

4. Goods and Services

No person may discriminate whether directly or indirectly, in the provision of goods, services and facilities, or act in such a manner as to make them unavailable. There should be no discrimination in the terms on which such goods, services and facilities are made available.⁷

⁶ Sec. 11 Equality Bill

⁷ Sec. 13 Equality Bill

5. Associations

Associations may not discriminate in the manner that members are recruited and processed. They may not refuse to consider an application for membership in the association. This prohibition also applies to the conduct of professional associations like the Law Society of Kenya.

Non-profit making and voluntary associates are exempt from the above provisions to the extent that they may restrict membership and the provision of benefits and services to persons of a particular sex or marital status.⁸ There is also a provision against discrimination in the appointment of persons to public office⁹

6. Property

There should be no discrimination in any manner in respect to land and property. This is a right that is enshrined in the Constitution of Kenya.¹⁰ One should be able to alienate his interests as they wish. There ought to be no wrongful eviction, and all are entitled to enjoy their matrimonial property.

7. Health Care

Discrimination is prohibited in refusing access to facilities of health care; in terms and conditions in which the services are provided; in the quantity and nature of healthcare provided and in the amount of health care benefits provided.¹¹

8. Professions

No professional body shall discriminate in any manner in recruiting members to the profession in any manner. Thus discrimination is prohibited in the recruiting training terms and conditions of membership or by denying any benefit or facility provided by the body.¹²

⁸ For Example, Membership to FIDA (K) is limited to women lawyers and women law students.

⁹ Sec. 14, Equality Bill

¹⁰ Sec. 75, Constitution of Kenya

¹¹ Sec. 10, Equality Bill

¹² Sec. 13, Equality Bill

9. Public Offices

No person or appointing authority shall discriminate in the appointment to public offices any person on any of the grounds prohibited in the Equality Bill.¹³

3.1.1 ITS MACHINERY

The main purpose of the Equality Bill, as we have seen above¹⁴ is to eliminate discrimination in all areas. How then does it propose to work so that its not another of the many laws enacted and then left to acquire dust on the shelves?

The Equality Bill envisages the establishment of an Equality Board¹⁵ which will consist of members from various educational and religious backgrounds, with members from both sexes. One person with a disability should be included in the Board.

3.1.2 FUNCTIONS OF THE EQUALITY BOARD

There are various functions that the Equality Board is expected to carry out, and all these are geared towards eliminating discrimination against members of minority groups or sexes.

The Board is expected to work towards elimination of all forms of discrimination and to promote equality of opportunity between persons of different status. It will be required to investigate and try to conciliate allegations of discrimination and further to establish educational or other programmes for the above named purposes.

It will have the duty of advising the government on the working of the Act, and reveal equality laws and policies in addition to any guidelines towards the elimination of discrimination in promotion at work for example in recruitment and pay equity. The board is expected to work alongside the government and its agencies and nothing in the bill should be construed as authorizing the disregard by the Board of any enactment of the law.

¹³ Sec. 14, Equality Bill

¹⁴ Op.cit. p. 2

¹⁵ Part IV of the Equality Bill

Complaints to the Board

This is covered under Part V of the Equality Bill. Any person who alleges discrimination as per section 6 of the Equality Bill may lodge a written complaint setting out details of the alleged at within twelve (12) months from the date of the alleged act. However a complaint brought out of time may be accepted if at all the Boards discretion especially if it was delayed because of a good reason.¹⁶

A complaint can be lodged by the person who was discriminated against or by another person acting on their behalf.¹⁷

On receipt of the complaint, the Board shall investigate the complaint. If according to it there is no discrimination then it shall give its reasons to the complainant and take no further actions.

Mediation

The Board should as far as possible try to solve the problem through mediation. Present should be the complaint, the subject matter of the complaint and any other persons whose presence is deemed important. A mediation notice will thereafter be given and any person who fails to comply with it shall be guilty of an offence. After settlement by mediation, a written agreement to that effect should be registered with the tribunal.¹⁸

What if a matter cannot be solved by mediation?

If a matter cannot be solved by mediation, the Board will write a report to that effect giving its recommendations. A copy of the report should be given to both parties. After this has been done, proceedings can be initiated under the Equality Tribunal.

¹⁶ Sec. 31, Equality Bill

¹⁷ Sec. 32, Equality Bill

¹⁸ Sec. 37, Equality Bill

3.1.3 THE EQUALITY TRIBUNAL

Constitution

The Equality Tribunal¹⁹ shall be constituted of five (5) members of each gender appointed in consultation with the Judicial Service Commission and the Law Society of Kenya. Their purpose is to assist the tribunal in the performance of its functions. It is to be noted that the members of the tribunal shall be engaged on the same terms as judges of the high court. The chairperson should be a judge of the High Court with security of tenure as provided in the constitution.²⁰

Jurisdiction

The tribunal should be a superior court of record and has all powers as conferred by the act and inherent in such a court.

It may hear and determine complaints referred to it by the board and can make declarations and orders.²¹

The orders that can be granted by the tribunal include an order to pay damages in the form of an award to a body or organization responsible for discrimination. Compensation also be given in respect of any proven financial loss, emotional and psychological suffering as a result of the discrimination in question.

An order to restrain discriminatory practices and giving of directions for steps to be taken can also be given. Other orders that the tribunal can make include orders to make available specific opportunities unfairly denied to the complainant; special measures to redress the discrimination in question; an apology to an individual or group of persons discriminated against or suspension of the licence of the alleged discriminator.²²

¹⁹ Established under section 42 of the Equality Bill

²⁰ Sec. 62 of the Constitution of Kenya.

²¹ Sec. 46 of Equality Bill

²² Sec. 46 of Equality Bill

It is important to note that the tribunal will have no criminal jurisdiction.

Proceedings of the tribunal are to be held in public. However, the tribunal may direct that the hearing should be held in camera and thereafter restrict publication of evidence given before the tribunal.²³

The decisions of the tribunal shall be final. They cannot be challenged, appealed against, reviewed, quashed or called in question in any court on any account whatsoever. They also cannot be subject to prohibition, mandamus or injunction in any court. The exception shall be where matters of law are concerned and the same shall be referred to a two judge bench of the high court.²⁴

The order will bind all parties before the tribunal, and also all persons summoned to appear as parties, whether they appeared or not.

3.1.4 DEFENCES

All along, we have adopted a one sided approach in analyzing the Equality Bill, in that we have looked at it from the complaints point of view and how they can be assisted as victims of discrimination. We shall now look at the defences that are available to a alleged discriminator.

In the face of a complaint of discrimination, it may be argued that the act or omission is reasonable and justifiable in the circumstances.²⁵ In determining whether the act is reasonable and justifiable, the following factors may be taken into account:

- a) The purpose of discrimination;
- b) The nature and extent of the discrimination and the resultant disadvantage;
- c) The relationship between the discrimination and its purpose;
- d) Whether a less harmful option exists to achieve the same purpose.²⁶

²³ Sec. 52 of Equality Bill

²⁴ Sec. 57 of Equality Bill

²⁵ Sec. 18 (1) of Equality Bill

²⁶ Sec. 18 (2) of Equality Bill

The perpetrator of the discrimination is expected to make all reasonable efforts at accommodation short of undue hardship. The issue of reasonable accommodations may in certain circumstances pose difficulties since assessment requires the balancing of the financial resources of the perpetrator. It may simply be argued that there is no economically viable alternative short of discrimination at which point the complainant is left without a remedy. This may be particularly true during times of economic hardships as is currently the position in Kenya.

From the defence available to an alleged discrimination, it is obvious that the complainant has a heavy burden of proof to discharge and to counter these defences in order to receive a judgement in her favour. This may prove difficult especially for complainants who are not represented by an advocate and may be ignorant of the task that lies ahead of them. It is proposed that an advocate be provided for the complainant in order to increase the chances of winning a case in which discrimination is alleged.

3.2. THE EQUALITY BILL: AN APPRAISAL

From the above discussion, it is clear that the Equality Bill will provide effective protection against discrimination while promoting equality of opportunity.

However, there may arise a problem with its workability. Some of these issues are briefly discussed below.

Even if the Bill is passed into law, there may be problems in implementation of its provisions especially in regard to those areas that require the government to provide funds in pursuit of the goals. For example, as regards discrimination in the employment sector, it may prove difficult for the government and its agencies to increase the maternity leave from sixty (60) to ninety (90) days as this will involve more expenditure on the part of the government or on the employers themselves.

Another issue will be the giving of the time (2 hours) each day for breastfeeding mothers for up to one year after birth of the child. Many employers would find this difficult to implement and may decide to settle for male employees who will not require such time off.

Proving that discrimination occurred might be difficult, especially since this burden lies squarely on the person who is alleging that they have discriminated against. As we have already seen, the defences available to the employer are many and in many cases, the employer can actually convince the tribunal that in doing a particular act he was not discriminating but acting in the interests of his company or organization.

For example, an employer can simply say that he refused to take up a certain applicant because he did not need any more employees. He may also say that the applicant was not qualified according to their standards or requirements. It is now upon the applicant to show otherwise. Evidence both documentary and oral will be needed and this will not be an easy task to carry out.

The issue of cost has not been mentioned in the working of the Equality Tribunal. It would appear, however, that the complainant has to bear all the costs before the Equality Board. This is something that will discourage many prospective applicants because the costs may prove to be prohibitive and they may end up losing the case in the long run.

The economic situation in Kenya might prevent complainants from bringing complaints of discrimination. Presently jobs are very hard to come by and once one gets an employment opportunity, they will choose to stay and preserve despite the harsh conditions that may prevail at the workplace. Thus even though a woman is discriminated against, she will not complain as this will be risking her job - probably her only source of livelihood. Those who will be brave enough to bring such complaints will probably be financially secure so that in case they lose their jobs because of complaining, they will have something to fall back on.

3.3 CONCLUSION

The Equality Bill is meant to salvage all alienated groups from discrimination, segregation and marginalisation. It covers most areas in which discrimination may occur, including, educational institutions and in employment. This Bill, if passed into law, will guarantee rights and confirm the dignity of each Kenyan.

Therefore, in accordance with international law and national policy principles, each Kenyan citizen will have the same claim to essential and internationally recognized rights, regardless of any differences in ethnicity, status, ability or belief.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.0 CONCLUSION

In this work, we first began by looking at what discrimination means, and factors leading to discrimination, especially at the workplace. Laws of Kenya that have discriminatory effects against women were analyzed. The need for coming up with a legislation that will ensure speedy realization of gender equality was realized.

Thereafter, we looked at the international instruments that prohibit discrimination, especially at the workplace. The loopholes that were found in these instruments were analyzed, in a bid to see whether the Draft Equality Bill 2000 will cover these in its provisions.

The provisions of the Equality Bill were then looked at. Like any other law, we saw that the Equality Bill has its own shortcomings. However, this is not to belittle the same, because change can only come about through such measures.

In concluding, it is pertinent for us to ask certain questions pertaining to this work.

1. **Is there a domestic impact on Kenya's ratification of the International Legal Instruments?**

As we have mentioned earlier, there is all the difference in the world in ratifying a convention and in implementing it within the state party. It is the national legal system which determines the status or force of law which will be given to a convention within a

particular legal system, i.e. whether national judges and administrators will apply the norms of a treaty in a specific case.¹

When treaty norms become domestic law, national judges and administrators will apply them and individuals in the ratifying state may receive rights as a result of the treaty/convention provisions.

We can therefore conclude that unless the provisions of an international instrument are incorporated into a states municipal law, ratifying serves little or no purpose in changing the situation of that country vis-à-vis the provisions. A country like ours does not submit the required reports on the steps it has taken in conformity with the provisions of a particular legal instrument.²

2. Does the Equality Bill conform to International Standards?

In answering the above question, it is our submission that despite its shortcomings, the Equality Bill conforms to international standards. It is important to note that the Bill was drafted with such instruments as the CEDAW and the ICESCRs in mind.

The provisions of the Bill are wide and cover all areas including education, health, clubs and associations, and employment. It also caters for all categories of marginalized groups including women, children, pastorolists and members of religious minorities. More, it is specific to Kenya such that it does not have provisions that would be difficult to implement to Kenyans. None of its provisions is meant to offend any tribe, political preference or religious affiliation.

¹ Mulei C., International Union Rights, 2nd Quarter 1992, Vol. 1, Issue 2, Journal of the International Centre for Trade Union Rights.

² Kenya submitted its first report to CEDAW in 1997, 7 years after ratifying the convention.

3. Is it necessary to have the Equality Legislation in Kenya?

Legislation is no doubt the main political instrument for bringing about social and economic change.³ However, we see that the law, like society at large, has always been ambivalent in its attitudes to women at work.

It is clear that while in some cases women are treated as equals to the men in other cases they are patronized or protected as some kind of inferior beings.⁴ In yet others, they are subjected to blatant sex discrimination. Rules and principles of law which are apparently asexual have a pronounced tendency to impact differently upon women.

It is important to note that most of our laws were developed in a different social and technological age from the one we live in presently, such that some 'protective' provisions can be rightly said to have outlived their usefulness.

With reference to the Employment Act⁵ the fact that women were prevented from working during evening hours was to ensure that they could go back to their homes in order to go on with their duties as wives and mothers. Although this was done with a good intention, we see that its effects are discriminatory against women.

There are unmarried women who may be willing and able to work during the prohibited hours.

The law also recognizes certain of the physiological differences between the sexes. Of paramount importance is the maternal function. The law should recognize the physical realities of this function by providing that women should not work for reasonable periods before and after confinement. Further, they should have income maintenance during pregnancy. The provisions relating to this in the Employment Act represent some recognition of those requirements, although they still fall short of the ideal.

³ Mulei C, International Union Rights, 2nd Quarter 1992 Vol. 1 issue 2 Journal of the International Centre for Trade Unions Rights.

⁴ The Employment Act of Kenya, groups women together with children

⁵ Cap 226 of the laws of Kenya

It is proposed therefore that the provisions in the Equality Bill that deal with maternity should be encompassed and strictly adhered to by employment policies in Kenya. Thus adequate protection will be provided for working mothers.

The present legislation relating to discrimination in the employment sector reflect the fact that they are unable to adequately deal with the situation. No attempt at all is made to remove the causes of discrimination or to redress the effects of past injustices.

It is because of this that one comprehensive act which deals with discrimination on grounds of sex, race, religion...is preferable⁶. It is hoped that the enactment of the Equality Bill into law will remedy this situation. This Bill as we have seen will state that it is not permissible to discriminate on grounds of sex, or on any other ground prohibited by the Bill. The Equality Bill has done so in clear and unequivocal terms and it is backed by realistic and effective enforcement procedures which will provide a meaningful remedy for the victim of discrimination and a real incentive to the discriminator to mend his ways.

4. Are the inadequacies in the international instruments adequately addressed in the Equality Bill?

The main inadequacy that was evident in the international instruments was that they lacked an efficient enforcement machinery.

This has been catered for by the Equality Board and tribunal whose functions we have already looked at. Remedies are available to the complainant and there are orders that can be granted against the discriminator. One who refuses to abide by these orders will be held to be in contempt of court.

If women are to fully participate in policymaking and implementation, it is important that impediments which prevent their participation are eliminated. A number of these arise

⁶ Section 23, the Draft Equality Bill

from societal attitudes on the role and place of women others can be found in roles which place barriers to the advancement of women.⁷

While we acknowledge the limitations of a purely legal strategy in emancipating women from their present chains of oppression, we at the same time believe that law reform is a necessary starting point. Women, like all other oppressed groups in society, need the positive backing of the law, a minimum guarantee for their *de jure* equality and freedom.

Having seen how discriminatory and inadequate Kenya's laws are for women, it cannot be overemphasized that there is need for a law that will prohibit discrimination against women and other marginalized groups.

This is the function that the Equality Bill proposes to serve, once it becomes law.

4.1 RECOMMENDATIONS

1. The Equality Bill is a timely piece of legislation that will prohibit discrimination to any one on the grounds of sex, colour, religion or political affiliation. Our first and most important recommendation is that it should be passed into law. All interests groups, churches, and non-governmental organizations should lobby for this bill until it is passed as law.
2. Law alone proves not sufficient for changing the social and cultural practices that are deeply rooted in our societies. It is important that we have legal awareness programmes to educate the marginalized groups like women, children, pastorolists, and members of religious minorities of their rights in law. In particular, this should relate to discrimination against women in the employment sector.

⁷ Women, Laws, Customs and Practices in East Africa, Laying the Foundation Ed. Janet Kabebera-Macharia, 1995

3. Legal awareness should be taught in schools and churches in order to change the society as a whole.

4. The government and prospective employers should be encouraged to embody the provisions of the Equality Bill, failing which they shall be held liable according to its provisions.

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