

**UNIVERSITY OF NAIROBI**  
**INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES**

**THE CHALLENGES OF IMPLEMENTING INTERNATIONAL TREATIES: A CASE  
STUDY OF GENDER CONSTITUTIONALISM IN KENYA**

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MASTER OF ARTS IN INTERNATIONAL STUDIES  
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**DECLARATION**

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

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

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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 number one cheerleader, my dear husband Soitanae Leteipan, for his reassurance, encouragement, love and support throughout this journey. To my Mum, Mary Waitherero, thank you for your constant support and being my inspiration. Without your persistence in defying gender stereotypes, I would not have broken through the shackles of culture and patriarchy to pursue a career in law.

To my colleagues and friends who urged me to push on, I will forever be in your debt.

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I am extremely grateful for all the men and women who shared their insights on the struggle for gender equality in Kenya. Your noble work is greatly admired and appreciated.

## ABSTRACT

Gender equality is still pervasive in the Kenyan context as there is little evidence to support significant changes in patriarchal attitudes and norms of the men and women obligated to ensure its effective implementation. There are still strong cultural and social norms that perpetuate power imbalances between men and women.

This study aimed to establish the level of compliance with gender equality, and sought to determine the challenges of implementing international treaties with gender equality provisions.

The study interrogates the *de facto* equality provisions in law, policy and institutional architectures, and makes an assessment of *de jure* equality in the Kenyan context. The study confirmed that gender equality provisions were not being duly implemented by the Kenyan state, attributable to all three arms of government.

The study puts forth a proposal for improving compliance with international treaties on gender equality and concludes by making recommendations aimed at countering retrogressive and patriarchal attitudes and norms, as well as the main challenges faced in implementing international treaties. As such, this research aims to contribute to advancing gender equality and gender constitutionalism in Kenya and in other countries facing similar challenges.

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## **ABBREVIATIONS**

AU	African Union
AUC	African Union Commission
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CSW	Commission on the Status of Women
ICCPR	International Convention on Civil and Political rights
ICESR	International Convention on Economic, Social and Cultural Rights
JSC	Judicial Service Commission
SOAWR	Solidarity for Africa Women's Rights
TWG	Technical Working Group
UN	United Nations

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# 1. CHAPTER 1: INTRODUCTION

## 1.1 Background

*“...freedom cannot be achieved unless women have been emancipated from all forms of oppression...unless we see, in practical and visible terms, that the condition of women in our country has radically changed for the better and that they have been empowered to intervene in all aspects of life as equals with other members of society.”*

**President Nelson Mandela (1994)**

The promise of gender equality, gender equity and the evolution of the protection of women’s rights and women empowerment have significantly dominated scholarship over the past sixty years, and continue to have relevance today. Every State in Africa is party to at least one international treaty prohibiting discrimination on the basis of sex or providing for the equal rights of men and women to the enjoyment of all human rights.

The attainment, or lack thereof of these ideals, and the positioning of gender in international law, and within national law through constitutional protection and enforcement forms the bedrock of this inquiry.

## 1.2 The History of Codification of Gender in International Law

The global quest and agitation for gender equality gained momentum after the Second World War, and saw the emergence of norm creation within the United Nations normative framework. In its Preamble, The Charter of the United Nations<sup>1</sup>, adopted in 1945 was the first international instrument to refer specifically to human rights and to the equal rights of men and women, creating legal obligations to States to realize the principle of equality.<sup>2</sup>

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<sup>1</sup> See <http://www.un.org/en/charter-united-nations/>

<sup>2</sup> Progress Achieved In The Implementation Of The Convention On The Elimination Of All Forms Of Discrimination Against Women, Report By The Committee On The Elimination Of Discrimination Against Women, Fourth World Conference On Women, Beijing, China 4-15 September 1995, Accessed 3<sup>rd</sup> June 2016, <http://www.un.org/documents/ga/conf177/aconf177-7en.htm>

The Universal Declaration of Human Rights (UDHR)<sup>3</sup> that came into force in 1948 adopted progressive language, reaffirming the equality of rights of men and women<sup>4</sup>, asserting the principle of non-discrimination and proclaiming that everyone is entitled to the rights and freedoms without distinction of any kind, including sex.<sup>5</sup>

In 1967, United Nations Member States adopted the Declaration on the Elimination of Discrimination against Women<sup>6</sup>, further elaborated on the principle of equality of rights of men and women emphasizing that discrimination against women is an offence against human dignity and called on States to “abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women”. This can be observed as the beginning of a departure from a focus on equality of men and women to a concentration of codification of norms on women’s rights.

The U.N. General Assembly declared 1975 International Women's Year and organized the first World Conference on Women, held in Mexico City that year.<sup>7</sup> The conference discussed the historical and cultural factors that had contributed to the fostering and maintaining of the notion of the inferior roles of women and the stereotyped attitudes of men and women towards the role of women in society in a vast majority of nations throughout the world. The Conference passed a ‘Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace’, recognizing the inferior status that women held in relation to men, and elaborating on the principle of equality between men and women to mean ‘equality in their dignity and worth as human beings as well as equality in their rights, opportunities and responsibilities’, and not merely legal equality (formal equality), the elimination of *de jure* discrimination.

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<sup>3</sup> See <http://www.un.org/en/universal-declaration-human-rights/>

<sup>4</sup> In its Preamble

<sup>5</sup> Article 2

<sup>6</sup> United Nations General Assembly Resolution 2263 (XXII) A/RES/22/2263, Accessed 3<sup>rd</sup> June 2016, <http://www.un-documents.net/a22r2263.htm>

<sup>7</sup> Report of the World Conference of the International Women’s Year, Mexico City, 19<sup>th</sup> June- 2<sup>nd</sup> July 1975. Accessed 21<sup>st</sup> June 2016, <http://www.un.org/womenwatch/daw/beijing/otherconferences/Mexico/Mexico%20conference%20report%20optimized.pdf>

After the conference, the U.N. expanded the recognition of International Women's Year by declaring 1976-1985 the U.N. Decade for Women. The conference considered and approved an action plan that highlighted the need for women's rights and asserted a U.N. commitment to equality. The action plan established a series of goals within a 5-year time frame, which would be evaluated in the subsequent world conference in 1980. The action plan underscored key objectives in ensuring women's political participation, family planning decisions, equal access to education and work, as well as rights to health.

The Second World Conference that was held in Copenhagen from 14<sup>th</sup>-30<sup>th</sup> July in 1980 undertook a review and conducted an appraisal on the progress achieved since the first conference.<sup>8</sup> While noting that many countries had undertaken a number of activities and measures to establish institutional and administrative mechanisms to integrate women in development and review legislation and constitutions to guarantee and/or promote equal rights of women and men, a majority of countries had experienced tremendous challenges in implementation. This was attributed to low prioritization of issues concerning women, insufficient resourcing, lack of mechanisms at the domestic level to implement commitments, and insufficient integration into policy planning at the domestic level to ensure adequate enforcement. In certain countries, there was even 'backward' progress from what was previously observed in the last Conference, in particular the conditions of employment and education for women in the rural and the so-called marginal urban sectors had worsened. The Conference adopted a *World Programme of Action* that set national targets and strategies for the full participation of women in economic and social development and underscored the need to increase the participation of women at decision-making levels and calling for the elimination of discrimination in law and policy.

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<sup>8</sup> Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace, Copenhagen, 14-30<sup>th</sup> July 1980, Accessed 21<sup>st</sup> June 2016, <http://www.un.org/womenwatch/daw/beijing/otherconferences/Copenhagen/Copenhagen%20Full%20Optimized.pdf>

The Third World Conference was held in Nairobi, to review and appraise the achievements of the United Nations decade for Women<sup>9</sup>. Equality was further elaborated as

“both a goal and a means whereby individuals are accorded equal treatment under law and equal opportunities to enjoy their rights and to develop their potential talents and skills so that they can participate in national political, economic, social and cultural development and can benefit from its results. For women in particular, equality means the realization of rights that have been denied as a result of cultural, institutional, behavioural and attitudinal discrimination.”

It was at this Conference that the principle of equality was situated as a cornerstone for development and peace over and above equality as a right. *The Forward Looking Strategies for the Advancement of Women* were developed to reiterate the unity, inseparability and interdependence of the objectives of the decade, and to provide practical and effective guidelines for global action on a long-term basis and within the context of the broader goals and objectives of a new constitutional order. Measures for the implementation of the basic strategies at the national level included; a. constitutional and legal b. equality in social participation and c. equality in political participation and decision-making.

A Fourth Conference on Women: Action for Equality, Development and Peace took place in Beijing from 4-15<sup>th</sup> September 1995. The Beijing Declaration and Platform for Action was adopted alongside the Beijing +5 Political Declaration and Outcome<sup>10</sup>. The Platform for Action that emerged from this conference was aimed at accelerating implementation of *The Forward Looking Strategies for the Advancement of Women*, rather than replace them.<sup>11</sup> The Platform reaffirmed the universal nature of human rights as provided in the UN Charter, and a clear message echoed from the Conference “ human rights are women’s rights, and women’s rights are human

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<sup>9</sup> Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26<sup>th</sup> July 1985, Accessed 21<sup>st</sup> June 2016. <http://www.un.org/womenwatch/daw/beijing/otherconferences/Nairobi/Nairobi%20Full%20Optimized.pdf>

<sup>10</sup> See more at [http://www2.unwomen.org/~media/headquarters/attachments/sections/csw/pfa\\_e\\_final\\_web.pdf?v=1&d=20160316T150800](http://www2.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf?v=1&d=20160316T150800)

<sup>11</sup> Kelly, D.A, ‘The United Nations Fourth World Conference on Women’, *Cross Currents*, Vol 46, No. 1, (1996) 27-38.

rights”<sup>12</sup> The Platform further called for the integration of gender perspectives in legislation, public policies, programs and projects. Charlesworth observes that this approach could require countries to investigate the underlying bases of women’s subordination in the public, private, structural or systemic spheres.<sup>13</sup>

Generally speaking, the official outcome documents of these conferences are considered "soft law", meaning that they are not considered formally legally binding on nation states but are rather seen as recommendations for action. The lesser legal status of the conference declarations and programs of action explains their often preposterous length and propensity for repetition.<sup>14</sup>

Progressively, State obligations towards gender equality were strengthened through the coming into force of the International Covenant on Economic Social and Cultural Rights and the International Covenant on Civil and Political Rights, which specifically bound acceding or ratifying States to ensuring that women and men have equal right to the enjoyment of all their rights.<sup>15</sup> Despite this progress, the realization of women’s rights was deemed to be fragmented, and thus ineffective in comprehensively addressing critical violations against women, necessitating the development of a binding treaty that would give normative force to the already existing provisions on equality and non-discrimination.<sup>16</sup>

Negotiations on the text of the Convention on the Elimination of All Forms of Discrimination against Women began in 1977 and culminated in its adoption in 1979.<sup>17</sup> CEDAW has since been the primary international human rights treaty concerned with the protection and promotion of women’s rights.<sup>18</sup> The conceptualization of *discrimination against women* versus *discrimination based on gender* was noted as a conflict in the negotiation and drafting of CEDAW. It is noted that while the first position superseded in principle, the proponents of gender-based

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<sup>12</sup> Clinton, H.R, ‘Women’s Rights Are Human Rights’, *Women’s Studies Quarterly*, Vol 24, No.1/2, Beijing and Beyond: Toward The Twenty-First Century of Women (1996) 98-101.

<sup>13</sup> Charlesworth, H, ‘Women as Sherpas: Are Global Summits Useful for Women?’, *Feminist Studies*, Vol 22, No 3., (1996) 537-547

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Through UN General Assembly Resolution 34 /180

<sup>18</sup> Cusack. S, & Pusey L., ‘CEDAW and The Rights to Non-discrimination and Equality’, *Melbourne Journal of International Law*, Vol 14 (2013) 4

discrimination were successful in incorporating their point in several articles. While many articles do contain the idea of women being equal with men, the majority of delegates preferred to have an instrument that focused on women and their rights, not on both sexes.<sup>19</sup> Authors note that even after the adoption of CEDAW, some of the statements made by States inadvertently showed the lack of linguistic sensitivity regarding gender equality, while others revealed a substantive lack of understanding regarding gender-based discrimination.<sup>20</sup> This interaction of States with CEDAW will invariably influence their understanding and incorporation of the normative standards on gender at the national level.

Article 2 of CEDAW places an obligation on State Parties to codify the principle of equality domestically through their national constitutions and legislation. This provision has arguably influenced countries in Africa in the course of constitutional and legislative reform to adopt the standard espoused in the Convention on equality.<sup>21</sup> Similarly, the regional equivalent to CEDAW, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) equally binds States Parties to include in their national constitutions and other legislative instruments, the principle of equality between women and men and ensure its effective application.<sup>22</sup> This study will aim to go deeper into this line of inquiry in the assessment of State compliance with this standard, particularly in the case of Kenya.

### **1.3 Gender and Constitutions**

Constitutions have been used as important tools of governance that prescribe a State's rights and duties towards its subjects and other subjects of law, and which is made effective by additional laws and conventions, and by the politics of the country.<sup>23</sup> As

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<sup>19</sup> Zwingel, S., 'How Do International Women's Rights Norms Become effective in Domestic Contexts: An Analysis of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)?' (PhD diss., Ruhr-University of Bochum, 2005) 105

<sup>20</sup> Ibid at 101

<sup>21</sup> Bond, J.E, 'CEDAW in Sub-Saharan Africa: Lessons in Implementation', *Michigan State Law Review*, (2014) 255

<sup>22</sup> Article 2(1)(a)

<sup>23</sup> Franceschi, LG, 'The Constitutional Regulation of the Foreign Affairs Power: The Kenyan Experience' (LL.M Thesis, University of Nairobi, 1999) 49

the highest law of the land, the Constitution is a source of rights, and provides for the safeguard of persons civil rights and liberties, as well as the scope of their guarantees.

Young observes that among 194 written constitutions around the world, almost all guarantee equality in express terms, almost two-thirds entrench equality or non-discrimination guarantees on the basis of sex, while one third make express reference to gender.<sup>24</sup>

As most African countries were liberated from colonial rule, their former colonial masters bestowed upon them what have popularly now been referred to as “*Lancaster Constitutions*”, named after the Lancaster House Conference of 1960 wherein these constitutions were negotiated. A longstanding criticism of the process of the Kenyan Independence Constitution making during this era was the lack of public participation in the process. Lumumba notes that the citizenry (of Kenya) did not take part in the constitutional drafting process, nor was there a referendum to have the document endorsed by the public, and as a result the document lacked the legitimacy and moral authority from the people it sought to govern.<sup>25</sup> Lumumba suggests that this may be reason why there was lack of full implementation of the values of the Constitution, which often fell prey to mutilation to serve the selfish interests of the political class.<sup>26</sup> This would hold true particularly in the case of gender equality.

The quest for gender equality in Kenya can be traced back to the pre-colonial period.<sup>27</sup> The former Constitution of Kenya provided guarantees of fundamental rights and freedoms of the individual, which were accorded, to both men and women. Section 70 of the former Constitution provided that these rights and freedoms were guaranteed irrespective of a person’s sex. However many scholars in analysing the effect of the language and framing of gender equality deemed it non-existent. Section 82 of the former Constitution prohibited any law making a provision that was

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<sup>24</sup> Young K.G, ‘Introduction: A Public Law of Gender?’, in Young K.G, & Rubenstein K(ed), *The Public Law of Gender: From the Local to the Global*, (Cambridge, New York: Cambridge University Press, 2016), 1.

<sup>25</sup> Lumumba, PLO and Franceschi, LG, *The Constitution of Kenya, 2010: An Introductory Commentary*, (Nairobi: Strathmore University Press, 2014), 3.

<sup>26</sup> Ibid, pp. 30

<sup>27</sup> Nzomo, M, ‘The Status of Women’s Human Rights in Kenya and Strategies to Overcome Inequalities’, *A Journal of Opinion*, Vol 22, No 2 (1994) 18 noting that the struggle for women’s empowerment and rights in Africa dates back to the pre-colonial times and has taken different forms depending on the socio-economic and political circumstances.



discriminatory either of itself or in its effect. The prohibited grounds of discrimination included discrimination in terms of race, tribe, place of origin, political opinions, colour or creed, with the exception of discrimination on sex or gender specifically provided for.

Consequently, the former Constitution did not bar discrimination on the grounds of sex. Kibwana argued that the constitutional language deliberately excluded sex as a category for the purposes of barring discrimination.<sup>28</sup> The effect of this constitutional failure to explicitly outlaw discrimination on the basis of sex meant that differential treatment on grounds of sex would not equate to discrimination under the law, and sex discrimination could not be challenged in courts.<sup>29</sup> Kibwana noted that to reverse the long history of sex discrimination would require deliberate efforts to adopt clear constitutional language that would support the vindication of rights in courts.<sup>30</sup>

Personal and customary law, including laws on marriage, divorce and inheritance remained out of the purview of the (former) Constitutional threshold of freedom from discrimination further perpetuating inequalities between men and women.<sup>31</sup> By making personal and customary law the centre of exceptions to constitutional guarantees of gender equality, gender inequality was legitimized and widespread.<sup>32</sup> This was not only the case of Kenya, as Ibhawoh<sup>33</sup> rightly observes the apparent tension and inherent conflict between constitutional guarantees of gender equality in national constitutions and the traditional status of women in many African societies.

Customary and religious laws, which are based on patriarchy and an ideology of the subordination of women, therefore reigned supreme and unchallenged within the Kenyan context,<sup>34</sup> proving true the hypothesis that law as an institution to a large

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<sup>28</sup> Kibwana, K, *Women and the Constitution in Kenya* (Mimeo 1991), 2

<sup>29</sup> Nzomo, 'The Status of Women's Human Rights', 18

<sup>30</sup> *Supra*, 3

<sup>31</sup> Mucai-Kattambo V, Kabeberi-Macharia J & Kameri-Mbote P, 'Law and the Status of Women in Kenya', in Janet Kabeberi-Macharia (ed), *Women, Laws, Customs and Practices in East Africa*, (Nairobi: WLEA Publications 1995) 82

<sup>32</sup> Republic of Kenya, Report of the Taskforce Appointed to Review Laws Relating to Women, (1999)

<sup>33</sup> Ibhawoh, B, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of the Human Rights in the African State', *Human Rights Quarterly*, Vol.22, No.3, 2000 844

<sup>34</sup> Nzomo, 'The Status of Women's Human Rights', 18

degree contributes to the maintenance of the traditional male hegemony in society<sup>35</sup>. The application of African customary laws found grounding in the Judicature Act<sup>36</sup>, which stated;

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay”.

As the clamour for constitutional reforms began, women formed the critical mass to agitate to include gender equality firmly in the constitutional reform agenda. The women of Kenya had anxiously awaited the Constitutional Review Process with the hope that the constitutional review process would provide an avenue where the rights of women would be mainstreamed and constitutionalised and as a result, equality would be enshrined in the Constitution.<sup>37</sup> The Constitutional Reform Process reflects a focus on CEDAW in the constitutional drafting process.<sup>38</sup>

Feminists and Gender equality activists celebrated the Constitution of Kenya 2010 as a progressive “gender-sensitive constitution” which not only includes specific gender equality provisions but also frames the entire document in the language of human rights and principles of equity, equality and non-discrimination. A “gender-sensitive constitution” requires the “adoption of democratic principles which combine the establishment of the rule of law, gender equality and respect for the human dignity of all citizens – men and women alike.”<sup>39</sup>

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<sup>35</sup> Craig, RL, *Women’s Law: An Introduction to Feminist Jurisprudence*, (Oslo: Norwegian University Press 1989) 11-12

<sup>36</sup> Section 3(2) Cap 8 of Laws of Kenya

<sup>37</sup> Thogori J, et al, ‘Constitutionalisation of Women’s Rights in Kenya’, *Gender Gaps In Our Constitutions: Women’s Concerns in Selected African Countries*, (Kenya: Heinrich Boell Foundation 2002) 23.

<sup>38</sup> Byrnes A & Freeman M.A., ‘The Impact of the CEDAW Convention: Paths to Equality’ Background paper prepared for the World Development Report 2012, University of New South Wales Faculty of Law Legal Studies Research Paper Series, No.2012-7. Accessed 22<sup>nd</sup> July 2016. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2011655##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011655##)

<sup>39</sup> Van der Leest, K. ‘Engendering Constitutions: Gender Equality Provisions in Selected Constitutions’, *Engendering Constitutions: Gender Equality Provisions in Selected Constitutions A Comparative Study accompanied with Case Studies in: Bosnia and Herzegovina Kosovo Montenegro Serbia* (2007)

## 1.4 Background of the Research Problem

Despite the promise of a new constitutional order that codified ideal feminist principles and arguably one of the most progressive in constitutions in Africa, Kenya faced significant challenges in the implementation its international obligations on gender equality. More recently, the Supreme Court addressed a constitutional crisis regarding the implementation of the not more than two thirds gender principle espoused in Article 81 (b) of the Constitution.<sup>40</sup>

In the quest for interpretation of gender parity provisions to enhance political participation of women, the Supreme Court of Kenya was presented with a novel opportunity to interpret, give effect to and advance gender equity in the Matter of the Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate and in the Matter of the Attorney General (on behalf of the Government) as the Applicant<sup>41</sup>. However, the jurisprudence emanating from this case has been criticized heavily as being retrogressive in achieving gender equity as the court ruled that the gender parity principle is not an immediate right for women and the same is to be achieved progressively.

This experience has prompted sharp focus on the need to go beyond gender audits of the Constitution as well as the legal and policy environment to analyse the implementation of international norms on gender equality, and evaluate the level of advancement of gender Constitutionalism in the Kenyan context through judicial, legislative and executive actions or inactions. This discussion will incorporate an analysis of implementation challenges and select jurisprudence emanating from the interpretation of gender provisions in the 2010 Kenya Constitution and her obligations under the Convention on the Elimination of All Forms of Discrimination Against Women through the application of Article 2(6)<sup>42</sup> of the Kenya Constitution.

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<sup>40</sup> Article 81(b) of the Kenya Constitution 2010 on “General Principle for the Electoral System” provides that “ *not more than two thirds of the members of elective public bodies shall be of the same gender.* ”

<sup>41</sup> Supreme Court Reference No. 2 of 2012 *in the matter of the Principle of Gender Representation in the National Assembly and the Senate*, (2012) eKLR, para 11.7 pp13.

<sup>42</sup> Provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.

### **1.5 Statement of the Research Problem**

This study examines the extent of implementation of international norms on gender equality in the implementation of the Kenya Constitution, 2010.

I have examined the relevant literature in this field and I have come to the conclusion that while a significant amount of literature has been written on the women's rights constitutional journey leading up to the Kenya Constitution of 2010, there is a pending gap in literature that needs to be filled regarding the status of implementation of key constitutional guarantees on gender equality and the challenges associated with the implementation of international treaties giving rise to gender equality obligations.

### **1.6 Objectives of the Research**

The main objective of the research is to study the challenges of implementing international treaty obligations on gender equality and contribute to existing literature on the subject.

Specific objectives are as follows;

1. To analyze the extent to which constitutions in Africa reflect international standards on gender equality.
2. To examine the level of compliance of AU and UN member States with their international obligations on gender equality.
3. To examine the challenges of implementation of international norms on gender equality.
4. To examine the role of each arm of Government in advancing gender constitutionalism.

### **1.7 Research Questions**

1. To what extent do members of the UN and the AU comply with their obligations on gender equality?

2. To what extent do Constitutions and national laws reflect international standards and norms on gender equality?
3. What are the implementation challenges faced by members of the UN and the AU?
4. To what extent does each arm of government play a role in the implementation and advancement of gender constitutionalism?

### **1.8 Justification of the Research Problem**

The study aims to contribute to academic knowledge and theory building on the role of States in implementing international norms on gender equality. It further aims to assist State actors in addressing the challenges to the implementation of these norms towards the furtherance of greater protection of rights and freedoms of its citizenry.

### **1.9 Hypothesis**

- a. State parties to international treaties generally do not comply with their obligations.
- b. State parties to international treaties generally comply with their obligations.
- c. International treaties provisions on gender equality are diligently implemented in the Kenyan context.
- d. Implementation of international treaties provisions on gender equality is significantly challenging in the Kenyan context.
- e. International treaties provisions on gender equality and gender responsive constitutions are effective in advancing gender constitutionalism without judicial activism in the Kenyan context.
- f. Gender responsive constitutions and gender constitutionalism have no correlation in the Kenyan context.

### **1.10 Limitations and assumptions of the Study**

In setting out the lens through which gender constitutionalism has been advanced, I have assumed that there is a degree of commonality in the interests of women. Indeed

the assertion of commonality has been challenged as both reductionist and dismissive of the reality of difference-of class, race and sexuality, among others-in women's lives.<sup>43</sup>

In this study, I have opted to narrow my focus on the application of a gendered approach in the enforcement of Constitutional rights, principles and values concerning gender equality, with a limited analysis of the structural architecture within the framing of the Kenya Constitution 2010. My inquiry will therefore be focused on gender equality provisions of the Constitution and how they have worked in practice through judicial, legislative and executive actions or inactions.

The study anticipates challenges accessing certain high ranking judicial, legislative and executive officials as well as accessing qualitative data concerning the attitudes of these officials in employing a gendered approach in the implementation of their various mandates.

### **1.11 Theoretical Framework**

Men have historically dominated politics in the national and international arenas, while women continue to be marginalized.<sup>44</sup> At the apex of this dominance, is an acute desire by feminists to engender international relations as to unpack and resolve injustices that occur from a narrowed perspective and understanding of international relations.

The study will adopt feminist theory, which introduces a feminist perspective to international relations constructed out of the experiences of women, and premised on the understanding of the world from the perspective of the socially subjugated.<sup>45</sup> As Tickner argues, since the formation of modern State, international relations has been gendered and largely based on the experiences of men.<sup>46</sup> A common criticism levied in analysing international law and international relations by gender theorists in that

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<sup>43</sup> Irving, H. *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, (New York: Cambridge University Press 2008), 23.

<sup>44</sup> Tickner, A, 'Engendered Insecurities: Feminist Perspectives on International Relations,' *Gender in International Relations: Feminist Perspectives on Achieving Global Security*, (Columbia University Press: 1992), 3.

<sup>45</sup> Tickner, A, 'Engendered Insecurities', 3

<sup>46</sup> Ibid

the state is considered the main primary actor, particularly a masculine actor.<sup>47</sup> Besides this abstract notion about the identity of the state, most feminists believe that the state's actions and inactions are gendered.<sup>48</sup> Feminists have a common denominator as an interest in the interrogation of women's inequality and subordination to men.<sup>49</sup> Therefore typically the feminist project is one of exposing the extent and effects of masculinist bias.<sup>50</sup>

There are different branches of feminism, which will be unpacked, paving the way for the specific theoretical framework, which will be utilized in this study.

*Liberal feminism* focuses mainly on women being free to participate in public spheres, and their individuality in equal value and rights as men.<sup>51</sup> A center pillar is women's equality with men, free from past prejudices and customs.<sup>52</sup> Their ultimate goal is to reform society rather than revolutionize it, setting realistic and practical goals.<sup>53</sup> A core approach therefore, is to work within institutions to effectuate change.<sup>54</sup> Liberal feminists insist that they are not in any way "at war" with their male counterparts, and base their arguments upon a "fundamentally sexually undifferentiated human nature".<sup>55</sup> Saloom explains, in the context of international law and international relations, liberal feminists call for the change of the system rather than a total rejection of it.<sup>56</sup>

*Socialist Feminism* focuses primarily on labour and economics when exploring women's position in society and how to elevate them to an equal status to that of

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<sup>47</sup> Saloom, R, 'A Feminist Inquiry Into International Law and International Relations', *Roger Williams University Law Review*, Vol.12, Iss. 1, Article 4 (2006), 159-181

<sup>48</sup> Ibid

<sup>49</sup> Owano, N.A, 'Gender Disparities in Kenya', *Journal of Research in Gender Studies*, Vol.4(2), (2014), 298-312

<sup>50</sup> Peterson, V.S, 'Feminist Theories, within, invisible to and beyond International Relations', *The Brown Journal of World Affairs*, Vol.10, Iss.2, (2004)

<sup>51</sup> Epure, M, 'Critically Assess: The Relative Merits of Liberal, Socialist and Radical Feminism', *Journal of Research in Gender Studies*, Vol.4 (2), (2014), 514-519

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> Saloom, R, 'A Feminist Inquiry', 159-181

<sup>55</sup> Epure, M, 'Critically Assess', 514-519

<sup>56</sup> Saloom, *supra* note 47

men.<sup>57</sup> It therefore extends the critique of class into a feminist history of the material and economic subordination of women.<sup>58</sup>

*Radical feminism* adopts a rebellious and inventive ideology at its center, and focuses more on women as a group rather than women as individuals.<sup>59</sup> Radical feminism challenges traditional understandings of politics under the slogan “the personal is political” redefined as political areas of human experience previously relegated to the personal sphere.<sup>60</sup> It lays emphasis on the significance of sexual perspectives in modes of thought and challenges a masculine based world.<sup>61</sup> The power imbalance between men and women is a central theme for radical feminist thought.<sup>62</sup> For radical feminists, men as a group are the main enemy to be tackled, defeated and wistfully, perhaps even subjugated by women.<sup>63</sup> According to radical feminists, women are dominated and controlled by men.<sup>64</sup> Radical feminists often pursue practical political strategies that have the goal of gradually changing power relations between sexes, through the “cumulative effect of many small- scaled actions”.<sup>65</sup> Its advantages also include the fact that this very visible crusade can act very well as a catalyst for change in developing and third world countries, due to its separatist and revolutionary agenda.<sup>66</sup>

The study will focus on gender as a concept and tool of analysis. As Saloom rightly puts it, focusing of gender as a category of analysis is a feminist project.<sup>67</sup> Wibben gives more perspective, by stating that ‘looking at gender takes the field beyond the “women question”, making it possible not simply to identify women as a special case, but to interrogate how femininity and masculinity both produce gendered international relations’, and how gender shape concepts, ideas, and institutions central

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<sup>57</sup> Epure, *supra* note 51

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> Nachescu, V, ‘Radical Feminism and the Nation: History and Space in the Political Imagination of Second-Wave Feminism, *Journal for the Study of Radicalism*, Vol.3, No.1, (2009), 29-59

<sup>61</sup> Epure, *supra* note 51

<sup>62</sup> Saloom, *supra* note 47

<sup>63</sup> Epure, *supra* note 50

<sup>64</sup> Saloom, *supra* note 47

<sup>65</sup> Epure, *supra* note 51

<sup>66</sup> Ibid

<sup>67</sup> Saloom, *supra* note 47



to the discipline.<sup>68</sup> As Tickner submits, we cannot build a comprehensive understanding of the behaviour of States in the international system unless we include gender as a category of analysis.<sup>69</sup>

Gender in the international relations discourse provides the basis from which social and historical relations and the notions of power and power dynamics between genders can be analysed.<sup>70</sup> Scott characterizes gender as “a constitutive element of social relationships based on perceived differences between the sexes, and ...a primary way of signifying relationships of power. The terms “gender” and “sex” are often used interchangeably. ‘Gender’ is not a synonym for the term ‘sex’, or the biological difference between men and women, but instead ‘refers to a complex social construction of men’s and women’s identities...[and] behaviours... in relation to each other.’<sup>71</sup> Peterson<sup>72</sup> also notes, ‘

Gender is not simply an empirical category that refers to embodied men and women and their material activities but also a systematically analytical category that refers to constructions of (privileged) masculinity and (revalorized) femininity and their ideological effects’.

Stears notes that the beliefs about gender often give rise to certain prejudices and consequently result in justifying and legitimizing discrimination.<sup>73</sup> The understanding of and meaning assigned to gender grounds the structuring of social inequalities, results in unequal social relationships and perpetuates women’s oppression and subordination to men.<sup>74</sup>

Feminist theory in international relations is underpinned by key concepts that provide a framework for a gendered analysis;

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<sup>68</sup> Wibben, A.T.R, ‘Feminist International Relations: Old Debates and New Directions’, *The Brown Journal of World Affairs*, Vol.10. No.2, (2004), 97-114

<sup>69</sup> Tickner, J.A, ‘ Searching for the Princess? Feminist Perspectives in International Relations’, *Harvard International Review*, Vol. 21, No.4 (1999), 44-48

<sup>70</sup> Tickner, *supra* note 44

<sup>71</sup> Ruiz, T, ‘Feminist Theory and International Relations: The Feminist Challenge to Realism and Liberalism’, *Soundings Journal*, (2005)

<sup>72</sup> Peterson, *supra* note 50

<sup>73</sup> Steans.J, *Gender and International Relations: Issues, Debates and Future Directions*, (Cambridge: Polity Press, 2006) at pp.7

<sup>74</sup> Scott, *Gender and the Politics of History*, p. Scott's chapter 2, entitled "Gender: A Useful Category of Historical Analysis," *American Historical Review* (December 1986), 91(5) 1053-1075

- a. The role of masculinity: Characteristics associated with "manliness," such as toughness, courage, power, independence, and even physical strength, have, throughout history, been those most valued in the conduct of politics, particularly international politics. Frequently, manliness has also been associated with violence and the use of force, a type of behavior that, when conducted in the international arena, has been valorized and applauded in the name of defending one's country.<sup>75</sup>
- b. Patriarchy: Ruiz<sup>76</sup> offers a compelling explanation on how feminists use gender and patriarchy to describe the field of international relations; most key players in international relations are males from patriarchal backgrounds and therefore aren't trained to value and include the perspectives of women, and women are effectively excluded from the international political arena.

The study will also employ the Feminist legal theory, also known as feminist jurisprudence, which is based on the belief that the law has been fundamental in women's historical subordination.<sup>77</sup> The project of feminist legal theory is twofold. First, feminist jurisprudence seeks to explain ways in which the law played a role in women's former subordinate status. Second, feminist legal theory is dedicated to changing women's status through a reworking of the law and its approach to gender.<sup>78</sup> A "gendered analysis" of literature will be explored, which inquires the extent to which law gives rise to or emphasizes gender inequality, and the changes which are necessary in legal rules, institutions and procedures in order to remove such inequality.<sup>79</sup>

Jackson submits that;

"The purposes of feminist legal theory are to describe how women's inequality and subordination are constructed and framed in law; to reveal the ideological presuppositions and material conditions of that inequality or subordination while understanding how differently situated women may be of virtue of other important aspects of identity; and, to develop understandings of justice and remediation that will improve the lives of women and the relationships of equality between women and men. All forms of law-

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<sup>75</sup> Tickner, *supra* note 44

<sup>76</sup> Ruiz, *supra* note 71

<sup>77</sup> Fineman, M.A. 'Feminist Legal Theory', *Journal of Gender, Social Policy and the Law*, Vol.13, No. 1, (2005)13–32

<sup>78</sup> *Ibid*

<sup>79</sup> Okech Owiti, 'Research Strategies on Gender and Law', in Janet Kabeberi-Macharia (ed), *Women, Laws, Customs and Practices in East Africa*, (Nairobi: WLEA Publications 1995),15.

constitutional, statutory, or otherwise-may be seen as instruments towards those goals.”<sup>80</sup>

Feminists use three main techniques in feminist legal theory namely, ‘asking the woman question’, ‘feminist practical reasoning’ and ‘consciousness -raising’. By asking the woman question, a scholar may expose “how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups”.<sup>81</sup> In other words, this method involves analyzing “how the law fails to take into account the experiences and values” of women, or “how existing legal standards and concepts might disadvantage women.”<sup>82</sup> It is a systematic identification of the gender implications of rules and practices that might otherwise appear to be neutral and objective.<sup>83</sup> Clougherty offers further insights to adopt when asking the woman question, mainly “(i) to identify bias against women implicit in legal rules and practices that appear neutral and objective, (ii) to expose how the law excludes the experiences and values of women, and (iii) to insist upon application of legal rules that do not perpetuate women’s subordination.”<sup>84</sup>

Clougherty further notes, feminists use feminist legal methods in three ways: (i) to expose bias against women in traditional legal methods, (ii) to rebuild decisionmaking by including the woman's point of view, and (iii) to convince decision makers to employ feminist legal methods as a means to identify (and perhaps to legitimately justify) bias inherent in their decisionmaking.<sup>85</sup>

## 1.12 Methodology of Research

This research will adopt the methodology proposed by Bartlett’s *Feminist Legal Methods*, wherein she proposes a method that “provides feminists the best explanation of what is means to be ‘right’. This methodology provides feminist legal theorists with a theory of knowledge that shapes one’s view of the possibilities for legal

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<sup>80</sup> Jackson V.C, ‘Gender Equality and the Idea of a Constitution: Entrenchment, Jurisdiction, Interpretation’, in Williams, S.H (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (New York: Cambridge University Press 2009) 138

<sup>81</sup> Bartlett, K.T, ‘Feminist Legal Methods’, *Harvard Law Review*, Vol.103,No.4 (1990) 829-888

<sup>82</sup> Ibid

<sup>83</sup> Ibid

<sup>84</sup> Clougherty, L.A, ‘Feminist Legal Methods and the First Amendment Defense to Sexual Harassment’, *Nebraska Law Review*, Vol.75, Issue 1, (1996) 1-26

<sup>85</sup> Ibid

practice and reform by exposing the exclusionary practices of the existing legal structure.<sup>86</sup>

Research methods to be adopted in the research will mainly be qualitative in nature. This will involve studying case law, legislation, policy documents, scholarly works and other secondary materials.

In the context of examining gender constitutionalism within the judiciary, Cross suggests that “the most important theme is the importance of the law in determining judicial outcomes”.<sup>87</sup> Empirical study within the legal academy progressively focuses more on identifying and measuring the law as an element of judicial decision making, rather than assuming that only (or mostly) judicial ideology or preferences matter.<sup>88</sup>

Cross notes,

“Judges have long insisted that the tools of the law the text and structure of legal documents, procedural requirements, legal history, common-law reasoning, and precedent remain essential elements to fully understanding and deciding a legal controversy. Because of difficulties in quantifying legal elements for empirical study, and the consequent limited explanatory power of quantitative models of judicial decision making, the qualitative forms of legal scholarship, both theoretical and doctrinal, have ample room within which to operate and contribute to a fuller understanding of legal decisions.”<sup>89</sup>

The research will gather primary data through key informant interviews by administering questionnaires to civil society activists, lawyers and judges about their experiences of legal and human rights processes involving gender equality.

Moreover, the study will seek to investigate the patriarchal influences and gender bias in the implementation of gender equality obligations.

The geographic scope of inquiry will be limited to select urban areas.

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<sup>86</sup> Bartlett, *supra* note 81

<sup>87</sup> Cross, F.B, ‘Decision Making In The U.S. Circuits Courts Of Appeals’, *California Law Review*, Vol.91, Iss.6, (2003), 1457-1516

<sup>88</sup> Ibid

<sup>89</sup> Ibid

### **1.13 Conceptual definitions**

In the scope of the study, I shall adopt the following specific meanings to words as ascribed below:

#### **1.13.1 Formal equality**

Offers the same rights, conditions, and opportunities to women and men. It treats women and men alike, as deserving of equal and similar treatment. It finds expression in the type of constitutional provision that states simply that no right can be denied on the grounds of gender or sex.

#### **1.13.2 Substantive equality**

Recognizes that formal equality can produce unequal results; where similar treatment is offered to persons who are not similarly situated, further disadvantage for the disadvantaged may be the outcome. Substantive equality encompasses positive programs to ameliorate disadvantage.

#### **1.13.3 Discrimination against Women**

Shall mean any distinction, exclusion or 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 of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field<sup>90</sup>

#### **1.13.4 Gender**

Refers to the socially constructed attributes and roles associated with being male or female. These attributes and roles define what is expected, allowed, and valued in women and men.<sup>91</sup>

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<sup>90</sup> Article 1 Convention on the Elimination of All Forms of Discrimination Against Women

<sup>91</sup> MenEngage Alliance, 'Men, Masculinities and Changing Power: A Discussion Paper on Engaging Men in Gender Equality From Beijing 1995 to 2015', Accessed 4<sup>th</sup> August 2016.

### **1.13.5 Masculinity**

Is the particular pattern of social behaviours or practices that is associated with ideals of how men should behave and their position with gender relations. Masculinity is rational concept, defined in opposition to femininity and expectations of how women should behave. A common feature of masculinity is the equation of manhood with dominance, toughness and risk-taking.<sup>92</sup>

### **1.13.6 Power**

Refers to the ability to make decisions about one's life and the capacity to influence and/or effect desired goals. All relationships are affected by the exercise of power, which in turn is profoundly shaped by social identities, including gender, race, class, sexual orientation, age, religion, nationality, etc. Gender inequalities are defined by "power over," or controlling forms of power, whereas efforts to increase women's empowerment and promote gender equality seek to promote alternative forms of power: power to, power with, and power from within, which focus on using individual and collective strengths to work towards common goals without coercion or domination.<sup>93</sup>

### **1.13.7 Patriarchy**

Refers to a traditional form of organizing society, which often lies at the root of gender inequality. According to this kind of social system, men, or what is considered to be masculine, are accorded more importance than women, or what is considered to be feminine.<sup>94</sup>

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<https://www.unfpa.org/sites/default/files/resource-pdf/Men-Masculinities-and-Changing-Power-MenEngage-2014.pdf>

<sup>92</sup> Ibid

<sup>93</sup> MenEngage Alliance, *supra* note 91

<sup>94</sup> UN Women Gender Equality Glossary, 3<sup>rd</sup> August 2016.  
<https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36>

### 1.13.8 Gender Equity

Denotes an element of interpretation of social justice, in the fair and just distribution of benefits, opportunities and rewards between men, women, boys and girls under the law and in practice by mainstreaming gender into various areas of policy, and in public and private life.<sup>95</sup>

### 1.13.9 Gender Equality

Gender equality is about transforming the ways individuals experience and express power in their lives, relationships, and communities, and the power structures that shape the relations between women and men. It involves increasing individual autonomy and self-efficacy, and ensuring that individuals have equal opportunities to make choices in their lives and to participate in key domains of society. Although gender equality is most often associated with the advancement and empowerment of women, it is a much broader enterprise that seeks to advance societies as a whole. To this end, moving toward gender equality also entails supporting individuals whose identities do not fit within the traditional gender binary.<sup>96</sup> Gender equality is not a women's issue and should concern and fully engage men as well as women.<sup>97</sup>

## 1.14 Literature Review

A number of authors have over the years undertaken studies on the development of women's constitutional agency in Kenya<sup>98</sup> and the status of women's rights in the Constitution<sup>99</sup>. Similarly, some studies have been undertaken on the extent of

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<sup>95</sup> Martin O, 'The African Union Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation', IDEA (2013), 5. Accessed 3<sup>rd</sup> August 2016. <http://www.idea.int/resources/analysis/loader.cfm?csModule=security/getfile&pageid=58486>

<sup>96</sup> MenEngage Alliance, *supra* note 91 at 15

<sup>97</sup> UN Women Gender Equality Glossary, Accessed 3<sup>rd</sup> August 2016. <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36>

<sup>98</sup> Mutua A, et al, 'Gender Equality and Women's Solidarity Across Religious, Ethic and Class Differences in the Kenyan Constitutional Review Process', *William and Mary Journal of Women and The Law*, Vol 13, (2006-2007)

<sup>99</sup> Thogori J, et al, 'Constitutionalisation of Women's Rights in Kenya', *Gender Gaps In Our Constitutions: Women's Concerns in Selected African Countries*, (Kenya: Heinrich Boell Foundation 2002), Kibwana, K, *Women and the Constitution in Kenya* (Mimeo 1991), Nzomo, M, The Status of Women's Human Rights in Kenya and Strategies to Overcome Inequalities *A Journal of Opinion*, Vol 22, No 2, 1994, Mucai-Kattambo V, Kabeberi-Macharia J & Kameri-Mbote P, 'Law and the Status of

implementation of Kenya's implementation of her obligations under the CEDAW convention.<sup>100</sup>

Many authors have noted the role of law in the reinforcement of injustices and marginalization leading to the subjugation of women<sup>101</sup>. Often *de jure* treatment under the law that provides for gender neutrality may result in *de facto* discrimination in its effects.<sup>102</sup> Okech-Owiti makes a case for an inquiry into what injustices are intertwined within legal systems, institutions and the extent of their operation, noting the structure and administration of laws can perpetuate the subordination of women to men.<sup>103</sup>

Mbote submits that in order to fully appreciate the role of law in women's lives, one needs to understand the law's intention and rationale, as well as the consequences on law on individuals.<sup>104</sup> As such, many studies have been undertaken highlighting the application and discriminatory nature of customary laws that remained one of the central issues in the constitutional review process.<sup>105</sup> Prior to the new Constitutional dispensation, judges had made some attempts to develop family laws and bridge the gaps in both statutory customary laws.<sup>106</sup> To cure the injustices regarding the right of women to inherit, courts invoked international instruments to avert discrimination.<sup>107</sup> Few studies have been undertaken post the 2010 Constitution to review the judicial role in effectively annihilating discriminatory laws and practices through judicial pronouncements.

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Women in Kenya', in Janet Kabeberi-Macharia (ed), *Women, Laws, Customs and Practices in East Africa*, Nairobi: WLEA Publications 1995)

<sup>100</sup> Matagaro L, 'Implementation of International Treaties: A Focus on the Impact of CEDAW in Kenya', (MA IS Thesis, University of Nairobi, 2013).

<sup>101</sup> Kameri-Mbote P, et al, 'Gender, good governance and separation of powers' *Gender and Constitution Making in Kenya: Perspectives on Gender Discourse*, (Kenya: Heinrich Boell Foundation 2002)

<sup>102</sup> Ibid

<sup>103</sup> Okech Owiti, 'Research Strategies on Gender and Law', *supra* note 79

<sup>104</sup> Mbote, 'Gender, Good governance', *supra* note 101

<sup>105</sup> Ibid

<sup>106</sup> Deputy Chief Justice Rawal, '*Women in the Law: A study in progress towards Gender Equality across the Commonwealth*', (Speech presented at the 19th Commonwealth Conference Held in Glasgow Scotland 12-15th April, 2015). [http://www.judiciary.go.ke/portal/assets/filemanager\\_uploads/Speeches%20and%20Presentations/Address%20by%20the%20Deputy%20Chief%20Justice%20Kenya%20CLC%202015%20Women%20in%20Law.pdf](http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Speeches%20and%20Presentations/Address%20by%20the%20Deputy%20Chief%20Justice%20Kenya%20CLC%202015%20Women%20in%20Law.pdf)

<sup>107</sup> Ibid. In her paper Justice Rawal discusses the cases of *Mary Rono V Jane Rono & Another (Civil Appeal no 66 of 2002)* and *In Re Estate of Lerionka Ole Ntutu (2008)*eKLR



Despite the constitution sitting at the peak of the political and legal hierarchy as the supreme law of the land, there are limits to what a constitution can do. Irvin<sup>108</sup> notes that constitutions are not self-executing, and to be effective, it requires institutions of implementation and enforcement, as well as political and legal will. It requires a culture of constitutionalism in which constitutional authority is recognized and respected. Irvin makes important observations in the pursuit for gender constitutionalism and notes,

“ In authorizing and constraining the exercise of public power, it creates opportunities or openings for embedding policies in laws made pursuant to the powers it grants to the institutions of government it establishes. A constitutional gender audit needs to be aware of the potential in a constitution for either supporting or obstructing progressive policies along these lines.”

Although many constitutions mirror existing values, many including the Kenya Constitution of 2010 represent aspirations. Irvin argues that a constitution’s purpose, however, cannot be principally aspirational, and goes on further to suggest that if it is to have efficacy, it cannot be a manifesto of ideals.<sup>109</sup>

The presence of a Constitution does not in of itself guarantee legitimacy of a Government. Arguably, a constitutional Government is one that lives by the Constitutional spirit that originated it; one that lives the spirit of the constitution; constitutionalism.<sup>110</sup> In a literal sense, constitutionalism can be said to be an evaluation of the extent to which the form, substance and legitimacy of constitutional principles is embodied in constitutional practice.<sup>111</sup> Katz argues that the practice of constitutionalism must embrace a political structure that respects the rule of law, in which the Government reflects the values and aspirations of the community.<sup>112</sup> Following Katz analogy, I have coined a phrase that I intend on exploring in this study, *gender constitutionalism* that connotes the adherence to a constitutional

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<sup>108</sup> Irving, H. *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, (New York: Cambridge University Press 2008), 32.

<sup>109</sup> Ibid 24-25

<sup>110</sup> Lumumba, PLO & Franceschi, LG, *The Constitution of Kenya, 2010: An Introductory Commentary*, (Nairobi: Strathmore University Press, 2014) 4

<sup>111</sup> Ibid

<sup>112</sup> Katz SN, *Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience*, (Washington, D.C: The German Historical Institute 1994)14.

system of government that respects and advances constitutional principles and values of gender equality and equity.

The Kenya Constitution creates a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.<sup>113</sup> The Constitution places a further obligation on all State organs and all public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.<sup>114</sup> Justice Makau notes that this duty of care extends to obligations imposed by international instruments created by Article 2 (6) of the Constitution, which recognizes international law as part of the corpus of law that applies in Kenya.<sup>115</sup>

Justice Kamau notes the following a key roles of the judiciary within the ambit of the interpretation of the Constitution; ensuring that women's rights commitments are implemented; ensuring accountability for human rights violations; protection of vulnerable groups; ensuring non-discrimination in acting on cases of sexual violence; and informing the legal system's response to gender based violence.<sup>116</sup> The study will lend itself to analyze these key roles further in a wide range of women's rights adjudication as provided in the Constitution.

The intended inquiry on gender constitutionalism will adopt a framework for a feminist constitutional analysis that lends relevance to the present inquiry within the Kenyan context. Baines and Rubio-Marin set out a "feminist constitutional agenda", in which they propose a approach that would address constitutional agency, constitutional rights, constitutional structured diversity, constitutional equality with special attention to reproductive rights and sexual autonomy, women's rights within

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<sup>113</sup> Article 21(1)

<sup>114</sup> Article 21(3)

<sup>115</sup> Justice James Aaron Makau, "*Role of Judges in Realizing States' Responsibility to Eliminate Violence against Women: Perspectives from C.K. & Others v. Commissioner of Police & Others [Meru Pet. 8 of 2012]*" (Conference paper delivered at the 2013 Women and Justice Conference in New York.) <http://kenyalaw.org/kenyalawblog/role-of-judges-to-eliminate-violence-against-women/#sthash.baN4QsXY.dpuf>

<sup>116</sup> Ibid

the family and women's socioeconomic development and democratic rights.<sup>117</sup>

### **1.15 Chapter Outline**

The Study will incorporate the following chapters;

- I. Chapter One introduces the topic of the research study by first setting the broad context of the research study, the statement of the problem, justification, theoretical framework, literature review, hypotheses and the methodology of the study.
- II. Chapter Two provides the background of the women's rights movement in constitution making in Africa and the extent to which constitutions in Africa reflect regional and international treaty obligations on gender equality.
- III. Chapter Three examines the level of compliance and challenges of AU and UN member States with their regional and international treaty obligations on gender equality.
- IV. Chapter Four provides an analysis of jurisprudence in Kenya on gender equality, as well as the policy approach within each arm of Government in advancing gender equality and gender constitutionalism.
- V. Chapter Five includes a presentation of the findings, data and analysis.
- VI. Chapter Six provides conclusions of the study, gives recommendations and provides suggestions on areas for further study.

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<sup>117</sup> Baines B. & Rubio-Marin R., "Towards a Feminist Constitutional Agenda", in Baines B. & Rubio-Marin R. (ed), *The Gender of Constitutional Jurisprudence*, (Cambridge: Cambridge University Press 2005) 4

## 2. CHAPTER 2: GENDER EQUALITY IN CONSTITUTIONS OF AFRICAN COUNTRIES

In the development of the world's first constitutions, little consideration was given to the notion of gender equality.<sup>118</sup> As the concept of gender equality gained momentum within the international arena, drafters of constitutions progressively included *de jure* gender equality constitutional provisions in an attempt to protect women's rights.<sup>119</sup> However, *de facto* gender equality remains a pervasive issue throughout the world, and most certainly in Africa.<sup>120</sup> By signing onto CEDAW, States acknowledge the realities of discrimination against women and acquiesce to counter this reality with mechanisms with legal and constitutional measures to provide impetus to facilitate implementation. This Chapter aims to provide a snapshot of constitutional protection of gender equality in constitutions around Africa and the role of women in constitutional reform aimed at achieving gender equality.

### 2.1 Women and Constitution Building

In the last decade of constitutional reform efforts in Africa, the scope of women's constitutional agency has widened, as more women have been continuously involved in drafting, civic engagement, awareness raising and advocacy for inclusion of a gendered perspective to the drafting of constitutions. Banda notes 'women friendly' constitutions in Southern Africa; mainly the constitutions of Namibia, Malawi and South Africa that were drafted in the 1990s reflect the knowledge and sacrifices made by women during the struggles for liberation, which led to independence, as well as reflect the intersectionality of multiple forms of discrimination against African women based on sex, race and class.<sup>121</sup> These constitutions provided that in the event of a conflict between cultural norms and equality/non-discrimination provisions, the latter would take precedent. These progressive constitutions are widely attributed to

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<sup>118</sup> Irving, H. *Gender and the Constitution*, *Supra* note 47

<sup>119</sup> Lucas, L.E, 'Does Gender Specificity In Constitutions Matter?', *Duke Journal of Comparative & International Law*, Vol. 20, No,1 (2009)

<sup>120</sup> 'Mapping the Impact of Gender Equality Provisions and Constitution Making', University of Pennsylvania Law School (May 2016)

<sup>121</sup> Banda, F, 'Women, Law and Human Rights in Southern Africa', *Journal of Southern African Studies*, Vol.32, No.1, (2006),16

the substantial input from women in their negotiations.<sup>122</sup> In the case of the post apartheid South African constitutional drafting process, women had strong presence on crucial drafting committees that resulted in strong guarantees of gender equality and protections against discrimination.<sup>123</sup>

In the converse, the Botswana, Lesotho, Zambia and (the former) Zimbabwe constitutions do not provide for standard of adherence of customary law with the principles of gender equality and non-discrimination.<sup>124</sup> Banda<sup>125</sup> notes that, much like the inaugural constitution of Kenya, these Lancaster constitutions were drafted at the time of political handover, and maintained the gender provisions that were outlined by the British.

A few examples of the participation of women in constitution making in recent times in Africa are considered below;

### ***Tanzania***

During Tanzania's constitutional reform process of 2012, 11 out of 30 representatives who were appointed into the Constitutional Review Commission were women. Apart from formal inclusion in the constitutional review process, networking, coalition and movement building within women's rights networks saw a rise in reflection of demands of gender equality being reflected in the final constitutional texts. For instance, the advocacy efforts of The Network of Women and the Constitution (*Mtandao Wa Wanawake na Katiba*), consisting of more than 50 women's groups culminated in most of their demands reflected in the proposed Tanzania Constitution.<sup>126</sup>

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<sup>122</sup> Ibid at 17.

<sup>123</sup> Hart, V, 'Democratic Constitution Making', *United States Institute of Peace*, Special Report 107 (2003). Accessed 17<sup>th</sup> August 2016. [http://www.peacemaker.un.org/sites/peacemaker.un.org/files/DemocraticConstitutionMaking\\_USIP2003.pdf](http://www.peacemaker.un.org/sites/peacemaker.un.org/files/DemocraticConstitutionMaking_USIP2003.pdf)

<sup>124</sup> Banda, F, 'Women, Law and Human Rights' supra note 121

<sup>125</sup> Ibid

<sup>126</sup> Allen M, *Women and Constitution Building in 2014*, in ed. Annual Review of Constitution Building Processes: 2014 International IDEA (2015)

The proposed constitution includes several provisions that affirm the importance of equality and non-discrimination, which strengthens the constitution as a framework for advancing gender equality aims.<sup>127</sup> The preamble refers to sex discrimination, and article 6 identifies gender equality as a principle of good government. Article 33 prohibits discrimination on the basis of sex, and prohibits laws that are discriminatory on their face or in their effect. This supports efforts to achieve de facto equality and to reform legislation that has a harmful impact on women and girls. Article 33(5) defines discrimination as including discrimination on the basis of sex, and article 33(6) specifies that special measures intended to address specific societal problems will not be considered discriminatory. This provision allows the state to pursue laws, policies and programmes that aim to accelerate the achievement of substantive equality.

### *Zimbabwe*

The recently passed Zimbabwe's Constitution of 2013, significantly advances the constitutional protection of gender equality in the country. It uses gender-inclusive language, contains extensive equality and non-discrimination clauses, recognizes a range of critical social and economic rights, and provides for women's participation and representation in government. Constitution complements its substantive approach to gender equality with a robust framework for the recognition and protection of human rights.

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<sup>127</sup> Ibid at 24

Country	Equality Provision	Non-discrimination Provision
Angola	✓	✓
Benin		
Botswana	✓	✓
Burkina Faso	✓	✓
Burundi	✓	✓
Cameroon	✓	
Central African Republic	✓	
Chad	✓	✓
Comoros	✓	
Republic of Congo	✓	✓
Democratic Republic of Congo	✓	✓
Cote d'Ivoire		
Djibouti		
Equatorial Guinea	✓	✓
Eritrea		✓
Ethiopia	✓	✓
Gabon		
Gambia	✓	✓
Ghana	✓	✓
Guinea	✓	✓
Kenya	✓	✓
Liberia	✓	
Malawi		✓
Mali	✓	✓
Mauritania	✓	
Mozambique	✓	✓
Namibia	✓	✓
Niger	✓	✓
Nigeria	✓	✓

Rwanda	✓	✓
Senegal	✓	✓
Seychelles	✓	
Sierra Leone	✓	✓
Somalia		✓
South Africa	✓	✓
South Sudan	✓	
Sudan	✓	✓
Suriname	✓	✓
Swaziland	✓	✓
Tanzania	✓	✓
Togo	✓	✓
Uganda	✓	✓
Zambia	✓	✓
Zimbabwe	✓	✓

**Table 1: Gender Equality Provisions in Constitutions in Africa**

(Information sourced from: *‘Gender Equality and the Constitutions of Africa’* by Huckerby, J<sup>128</sup>)

## **2.2 The Influence of CEDAW in Shaping the Gender Discourse in African Constitutions**

Codification of the principle of equality of men and women is an express requirement levied upon State parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol).<sup>129</sup>

<sup>128</sup> Prepared for UN Women. Accessed 8<sup>th</sup> August 2016. [http://www.onu.cl/onu/wp-content/uploads/2016/06/GenderEqualityProvisions-Africa\\_J.pdf](http://www.onu.cl/onu/wp-content/uploads/2016/06/GenderEqualityProvisions-Africa_J.pdf)

<sup>129</sup> Under Article 2(a) of CEDAW provides State Parties commit “to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle. Article 2(1)(a) of the Maputo Protocol provides that State parties should include in



Indeed, a legal and constitutional framework that guarantees gender equality is fundamental towards its actualization, as constitutions have been observed to be the underlying basis of State accountability. CEDAW has been a catalyst for advocacy at the national level in the context of drafting and reforming national constitutions and laws.<sup>130</sup>

As of July 2016, 51 African countries have signed and ratified CEDAW, and 3 have not signed and neither ratified.

Countries that have ratified CEDAW (51)	Countries that have signed but not ratified CEDAW (0)	Countries that have neither signed nor ratified CEDAW (3)
<ul style="list-style-type: none"> <li>- Algeria</li> <li>- Angola</li> <li>- Benin</li> <li>- Botswana</li> <li>- Burkina Faso</li> <li>- Burundi</li> <li>- Cameroon</li> <li>- Central African Rep.</li> <li>- Cape Verde</li> <li>- Chad</li> <li>- Comoros</li> <li>- Congo</li> <li>- Cote d'Ivoire</li> <li>- Dem. Rep. of Congo</li> <li>- Djibouti</li> <li>- Egypt</li> <li>- Ethiopia</li> </ul>		<ul style="list-style-type: none"> <li>- Sahrawi Arab Dem. Rep</li> <li>- Somalia</li> <li>- Sudan</li> </ul>

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their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application.

<sup>130</sup> Bayefsky, A.F, Reid D and Blamforth K, 'The CEDAW Convention: Its Contribution Today', Vol.94, (2000),197-203.

<ul style="list-style-type: none"><li>- Equatorial Guinea</li><li>- Eritrea</li><li>- Gabon</li><li>- Gambia</li><li>- Ghana</li><li>- Guinea</li><li>- Guinea- Bissau</li><li>- Kenya</li><li>- Lesotho</li><li>- Liberia</li><li>- Libya</li><li>- Madagascar</li><li>- Malawi</li><li>- Mali</li><li>- Mauritania</li><li>- Mauritius</li><li>- Mozambique</li><li>- Namibia</li><li>- Niger</li><li>- Nigeria</li><li>- Rwanda</li><li>- Sao Tome &amp; Principe</li><li>- Senegal</li><li>- Seychelles</li><li>- Sierra Leone</li><li>- South Africa</li><li>- South Sudan</li><li>- Swaziland</li><li>- Tanzania</li><li>- Togo</li><li>- Tunisia</li><li>- Uganda</li></ul>		
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- Zambia		
- Zimbabwe		

‘Source: United Nations Treaty Collection, July 2016

**Table 2: Status of Ratification of CEDAW by African Countries**

Efforts to promote the respect for and observance of the principle of equality through constitutional protection in Africa has been frustrated and undermined by a practice of a few individual States entering reservations to exclude its application in the domestic context.<sup>131</sup>

The Vienna Convention on the Law of Treaties (1969) defines a reservation as,

“a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>132</sup>

Cook notes the “constant tension between encouraging universal participation in a human rights convention and protecting the integrity of the convention”.<sup>133</sup>

Article 28 of CEDAW and Article 19(c) allow for State parties to make reservations on the treaty, however restricts reservations that are incompatible with the object and purpose of the Convention.

The CEDAW Committee has written and extensively commented on reservations<sup>134</sup>. It has noted<sup>135</sup> that a number of States justify reservations on the Convention on the

<sup>131</sup> Ferreira GM & Ferreira-Snyman MP, ‘The impact of treaty reservations on the establishment of an international human rights regime’, *The Comparative and International Law Journal of Southern Africa*, Vol.38, No.2, (2005), 148-183

<sup>132</sup> Article 2(1)(d)

<sup>133</sup> Cook, R.J, ‘Reservations to the Convention on the Elimination of all forms of Discrimination Against Women’, *Virginia Journal of International Law*, (1990) 650

<sup>134</sup> Statements on Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women adopted by the Committee on the Elimination of Discrimination Against Women A/53/38/Rev.1 (1998)

<http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/Reservations-English.pdf>,

ground that national law, tradition, religion or culture, justifications of which are not compatible with the Convention principles. These reservations affect the efficacy of the Convention whose objective is to end discrimination against women and to achieve *de jure* and *de facto* equality for them. Cook offers an additional approach in determining whether a reservation is incompatible with a treaty:

"If, within the reserving state, the impact of the reservation is minor, ... the reservation can be tolerated in the name of promoting universal membership in the Convention. If, however, the impact on women is significant in denying equality or equality of opportunity with men, the reservation must be rejected and the cause of integrity of the Convention must prevail. The significance of a reservation is determined prospectively by an interaction of qualitative and quantitative factors."<sup>136</sup>

Within the African continent, Egypt, Libya, Tunisia, Mauritania and Niger have all made reservations on Article 16, on account of its conflict with *Sharia Law*. These States parties cite Sharia (a) as a basis of all state law; or (b) as regulating matters of personal status (marriage, divorce, custody, guardianship and adoption, inheritance).<sup>137</sup> Niger specifically entered reservations to Article 16 (equality in marriage) on the more general ground that the law of the various religious and ethnic communities in the State determines matters of personal status. In the case of Mauritania, Constitutional provisions privilege Sharia Law.<sup>138</sup>

The Committee has noted that many of the countries who enter reservations on Articles 2 and `16 "hold patriarchal belief in the structure of the family which places a father, husband or son in a favourable position" and has gone to observe that reservations to CEDAW show the state's unwillingness to accept women's rights, limit the application of universally accepted human rights norms and ensure the continued subjugation of women in that country.<sup>139</sup>

"Reservations to articles 2 and 16 perpetuate the myth of women's inferiority, entrenches and reinforce the inequalities in the lives of millions of women at the national level and throughout the world. They continue to be treated in

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<sup>135</sup> Statements on Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women adopted by the Committee on the Elimination of Discrimination Against Women A/53/38/Rev.1 (1998) Available at

<http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/Reservations-English.pdf>

<sup>136</sup> Cook, 'Reservations' *supra* note 133 at 679

<sup>137</sup> Freeman, M.A., 'Reservations to CEDAW: An Analysis for UNICEF', United Nations Children's Fund (UNICEF), Gender, Rights and Civic Engagement Section, Division of Policy and Practice (New York: 2009).

<sup>138</sup> *Ibid*

<sup>139</sup> *Supra* note 135

both public and private life as inferior to men, and to suffer greater violations of their rights in every sphere of their lives.”<sup>140</sup>

The CEDAW Committee has indicated that both Articles 2 and 16 of CEDAW are “core provisions” and particularly Article 2 is “central to the objects and purpose of the Convention”.<sup>141</sup>

According to the Committee, “States parties which ratify the Convention do so because they agree that discrimination against women in all its forms should be condemned and that the strategies set out in article 2, subparagraphs (a) to (g), should be implemented by States parties to eliminate it.”<sup>142</sup> Similarly, the Committee has stated that “reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible.”<sup>143</sup> State parties to the Convention have equally questioned the validity of religious based reservations because they contradict the very purpose of the Convention.<sup>144</sup>

Keller<sup>145</sup> refers to reservations on Articles 2 and 16 of CEDAW the “usual suspects”. Keller observes that the Committee has concluded that reservations to CEDAW Articles 2 and 16, and overbroad reservations, are impermissible, however because there is no enforcement mechanism in CEDAW, Committee’s recourse is to merely request States parties to remove such reservations, either in its general comments or in responses to individual state reports.<sup>146</sup>

The former Egyptian Constitution<sup>147</sup> did not prohibit gender discrimination, and as authors observed, even seemingly gender-neutral laws have been applied to stifle

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<sup>140</sup> *Supra* note 135

<sup>141</sup> *Ibid*

<sup>142</sup> *Ibid*

<sup>143</sup> Keller, L.M, ‘The Impact of States’ Parties Reservations to the Convention on the Elimination of all forms of Discrimination Against Women’, *Michigan State Law Review*, (2014), 309-326

<sup>144</sup> Brandt M & Kaplan J.A, ‘The Tension between Women’s Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia’, *Journal of Law and Religion*, Vol.12, No.1, (1995-1996), 105-142

<sup>145</sup> *Supra* note 143

<sup>146</sup> *Ibid*

<sup>147</sup> 1971 as amended up to 2007

women and restrict women's rights and freedoms.<sup>148</sup> The political revolution in 2011 in Egypt created momentum for constitutional review and a constitutional moment was created that had the potential to reshape the gender justice agenda. Women increasingly played a significant role in the drafting of the Egyptian Constitutions of 2012 and 2014, which influenced in a great deal the progressiveness of constitutional protection of gender equality.<sup>149</sup> The 2014 Constitution<sup>150</sup> pledges the State's commitment to achieving equality between women and men in all civil, political, economic, social, and cultural rights,<sup>151</sup> outlaws discrimination on the basis of sex, and commits the State to take all necessary measures to eliminate all forms of discrimination<sup>152</sup>.

Despite the undoubted progress in the inclusion of gender sensitive provisions in the 2014 Egyptian Constitution, the Constitution does not meet the threshold of anti discrimination against women as outlined in Article 1 of CEDAW, and neither has Egypt lifted its reservation on Articles 2 and 16 of the Convention. Furthermore, as authors note, these provisions remain largely ineffective in their implementation.<sup>153</sup> The conflict between the Constitutional provision for equality and *Sharia* is inherent in the Constitutional text, as it is noted that,

“While Article 93 purports Egypt's commitment to upholding international agreements that it has ratified, the preamble indicates that “[t]he principles of Islamic Sharia are the principle source of legislation.” Upon ratification of an international treaty, it is expected that the provisions of the treaty will possess the same force as domestic law. However, this potential incongruity between international norms and religious doctrine can provide a loophole for the violation of women's international human rights.”<sup>154</sup>

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<sup>148</sup> *Supra* note 144

<sup>149</sup> *Supra* note 120 ‘Mapping the Impact’ at 65 noting the critical role in reform played by women such as Dr.Moushira Khattab, Dr.Hola El-Sadda, and Dr. Mervat Tallawy among others.

<sup>150</sup> Constitution of the Arab Republic of Egypt of 2014 Available at [https://www.constituteproject.org/constitution/Egypt\\_2014.pdf](https://www.constituteproject.org/constitution/Egypt_2014.pdf)

<sup>151</sup> Article 11

<sup>152</sup> Article 53

<sup>153</sup> *Supra* note 120 ‘Mapping the Impact’ at 66

<sup>154</sup> *Supra* note 120 ‘Mapping the Impact’ at 72

In the case of Tunisia, the Government adopted a decree-law<sup>155</sup> in 2011 lifting the reservations to article 16 of CEDAW, however only officially transmitted it to the UN on 17<sup>th</sup> April, 2014, approximately 4 months after the adoption of the new Constitution.<sup>156</sup> The 2014 Constitution of Tunisia prescribes, “*All citizens, male and female, have equal rights and duties, and are equal before the law without any discrimination*<sup>157</sup>, and guarantees equality of opportunities between men and women.<sup>158</sup>” Constitutions that only guarantee equality before the law are important, but are ultimately a weak form of protection, as they do not mandate positive steps to ameliorate gender inequality.<sup>159</sup>

### **2.3 Case-Law Shaping Constitutional Implementation and Discourse on Gender Equality in Africa**

#### **Nigeria- *Mojekwu v. Mojekwu***

This case heard in the Court of Appeal in Nigeria involves a father who attempted to impose the *Nrachi* custom, which involved the performance of a ceremony by which a man could keep one of his daughters unmarried perpetually in his home to raise children for him. The Court in referencing Article 5 of CEDAW, declared the custom unenforceable and found it to be discriminatory and in violation of the right to marry and freedom of association.

#### **Zambia – *Sara Longwe v Intercontinental Hotels***

This case involved the challenging of a policy at the Intercontinental Hotel in Lusaka that prohibited women from entering the hotel unless accompanied by a man. The Plaintiff in this case, Sara Longwe was denied entry to the hotel bar for this reason,

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<sup>155</sup> ‘Tunisia: Landmark Action on Women’s Rights: First in Region to Lift Key Restrictions on International Treaty’ Human Rights Watch.

<http://www.legislation.tn/sites/default/files/journal-officiel/2011/2011F/Jo0822011.pdf>.

However, according to the withdrawal notification, Tunisia’s general reservation is still in place: ‘The Tunisian Government declares that it shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of Chapter I of the Tunisian Constitution’.

<sup>156</sup> *Supra* note 120 ‘Mapping the Impact’ at 27

<sup>157</sup> Article 21

<sup>158</sup> Article 46

<sup>159</sup> Women’s Human Rights and National Constitutions Guidance Note UN Women 2012 at 5

and sued the hotel for unlawful discrimination. The respondent (Intercontinental Hotels Limited) averred that the petitioner had no right to cite conventions which Zambia had not yet domesticated in local law and which the Court, therefore, had no jurisdiction to apply. However, the Court was alive to its discretion to apply the undomesticated conventions, which the country had ratified.

In his seminal ruling, Musumali J held:

“It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony of the willingness of the State to be bound by the provisions of such a document. Since there is willingness, if an issue comes before court by which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that treaty or Convention in my resolution of the dispute.”

The case was decided in favour of the petitioner and the High Court found that the hotel’s exclusion policy amounted to discrimination contrary to the Constitution and could no longer be applied, and ordered that the policy be “scrapped forthwith”.<sup>160</sup> In his seminal decision, the judge held that:

“In deciding an issue not covered by domestic legislation, a court could take judicial notice of international treaties and conventions, like the African Charter on Human and Peoples’ Rights and the Convention on the Elimination of All Forms of Discrimination against Women, when they had been ratified without reservation by a state, indicating its willingness to be bound by their provisions ...”

The Court therefore pointed to the importance of the concepts of judicial discretion and ‘judicial notice’, which could be invoked as a tool in instances where an issue that a Court has to adjudicate upon is not already covered by domestic legislation.<sup>161</sup>

Hasungule in noting the common law principle of *stare decisis*<sup>162</sup> to the effect that the Sara Longwe High Court decision was not binding on another High court, the gains of

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<sup>160</sup> Longwe v Intercontinental Hotels [1993] 4 LRC 221 (High Court of Zambia)

<sup>161</sup> Hasungule, M, Domestication of International human rights law in Zambia, in ed.Killander M, *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press (2010) 75

<sup>162</sup> Is the doctrine of precedent that stems from the latin phrase “to stand by things decided”. The principle [promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.](#)



the Sara Longwe decision were shortly lived, as a similar challenge in *Elizabeth Mwanza v Holiday Inn Hotel*<sup>163</sup> was mounted unsuccessfully wherein a petitioner had tried to enter the Holiday Inn and she was blocked by hotel security, based on a hotel security policy that restricted entry to unaccompanied women to certain parts of the hotel.

### **Zambia- Edith Zewelani Nawakwi v Attorney- General**<sup>164</sup>

In this case of Edith Nawakwi was a Zambian citizen, who was a single parent with two children filed a lawsuit against the government premised on a decision of the Chief Passport Officer not allowing her to include her children on her passport without consent of their biological father with whom she no longer had contact.<sup>165</sup> The consent of the other parent was demanded of female guardians only while male guardians did not have to produce consent of the mothers of their children when applying to add them to their passports.<sup>166</sup> The Court determined that Edith had been unfairly discriminated against, and that “discrimination is unacceptable and untenable legally or otherwise in these times of enlightenment”.<sup>167</sup>

### **Tanzania- Ephraim v Pastory**<sup>168</sup>

This case involved a woman who was the beneficiary of land bequeathed from her father, who then later sold the said piece of land to a third party. This sale was challenged by the nephew of the woman on the basis of customary law that provided that women could inherit land for use but could not alienate it if there was a male relative alive. The primary court agreed with the nephew and ordered Pastory to return the purchase money to the buyer.

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<sup>163</sup> *Elizabeth Mwanza v Holiday Inn Hotel*, 1997/HP/2054 (unreported)

<sup>164</sup> *Edith Nawakwi v Attorney- General*, 1991/HP/1724 Accessed <http://www.zambialii.org/zm/judgment/high-court/1991/6/6.pdf>

<sup>165</sup> *Supra* note 161

<sup>166</sup> *Ibid*

<sup>167</sup> *Supra* note 164

<sup>168</sup> *Ephraim v. Pastory* [1990] LRC 757

The matter was eventually heard by the Court of Appeal who applied the principles of non-discrimination as provided in the International Covenant on Civil and Political Rights, the Convention on the Elimination of all forms of Discrimination Against Women to which Tanzania was a signatory too, further noting that the Constitution was built on the Universal Declaration on Human Rights (which provided for equality between men and women), setting aside the judgment of the lower court.

### **Botswana- Unity Dow v Attorney General of Botswana**

This case involved a Botswana woman who had married an American citizen with whom she had three children, two of whom had been born and raised in Botswana after the adoption of the Citizenship Act. The 1984 Citizenship Act denied citizenship to children of a woman married to a foreigner, while children married to a foreigner were granted citizenship-which formed the bedrock of Unity Dow's challenge of the law. Dow claimed that the Citizenship Act discriminated against women and violated the equal protection provisions both under Botswana's constitution and international law, including CEDAW, which Botswana had acceded to. Although the Botswana Constitution did not explicitly prohibit discrimination on the basis of sex, the High Court held that the principle was implicit within the spirit of the Constitution and thereby declared certain provisions of the Citizenship Act unconstitutional.<sup>169</sup> The Court and in its obiter stated,

“ [i]t is difficult if not impossible to accept that Botswana would deliberately discriminate against women in its [Constitution] whilst at the same time internationally support non-discrimination against females or a section of them”

When the case was appealed, the Court of Appeal affirmed the High Court's decision and relying on international commitments made by Botswana that affirmed the principles of equality and non-discrimination.

### **Kenya- Rono v Rono**

This case involved a dispute arising from the distribution of property of the estate of a polygamous man who died intestate, leaving behind 2 widows and 9 children. The

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<sup>169</sup> Bond, 'CEDAW in Sub-Saharan Africa' Supra note 21 at 248

first widow had 3 sons and 2 daughters, and the second widow has 4 daughters and no sons. The High Court, in its judgment applied both customary law (that daughters have no share of the deceased's inheritance), and the Law of Succession Act, which gave the court discretion to distribute the deceased's estate while taking into account the wishes of the parties. The Court observed that Statute Law recognized that both sexes were eligible for inheritance and that the deceased treated his children equally. The judge then went ahead to determine that all daughters would get equal shares and that all sons would also get equal shares. However, the sons would get larger portions based on the presumption that the daughters would have an option to marry and thus inherit from their husbands' families. The Court therefore awarded the daughters 5 acres each (total 30 acres), and the Sons 30 acres each (total 90 acres). The 1st wife was allocated 20 acres and the 2nd wife 50 acres.

The second family lodged an appeal on the grounds that the High Court erred in its application of customary law, whereas the applicable law was the Law of Succession Act. In its judgment, the Court of appeal noted that the Judicature Act had circumscribed the application of customary law in so far as it was not repugnant to justice and morality. It also noted that Section 82 of the then Constitution, outlawed discrimination on grounds of sex. Furthermore, the court considered the applicability of international law in the matter and observed that Kenya was party to the ICCPR, ICESCR, CEDAW and the ACHPR, which required states to take steps to eliminate discrimination on grounds that included sex.

In deciding whether Kenyan courts could rely on international law to resolve domestic disputes, the Kenyan Court of Appeal emphasized the international dimension in interpreting a provision of domestic law. In adopting this provision, “[t]he country was moving in tandem with emerging global culture, particularly on gender issues”.<sup>170</sup>

The Court of Appeal therefore reordered the distribution of the land equally between the widows (30 acres each), 2 acres to be held equally in trust for the beneficiaries,

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<sup>170</sup> 1 KLR 803, 813 [2005]

and the remaining portion of 160 acres to be shared equally between the remaining children-thus each would get 14.44 acres.

### **Zimbabwe- Magaya v Magaya**

This case involved a polygynous man who died leaving two sets of children. At the meeting held to appoint a heir, the eldest son refused to be heir saying that he was not prepared to take on the responsibility of looking after the family. It then passed to his sister Venia. A younger brother challenged this appointment arguing that Shona customary law did not recognize the right of a woman to inherit. Venia Magaya argued that of all the children she had been the one who had looked after her parents. She contended that the Shona rule of primogeniture constituted discrimination because of her sex and gender. This discrimination was untenable in light of Zimbabwe's commitment to uphold human rights principles. The Supreme Court found for her brother. In so doing it pointed to section 23(3) (a) (b) of the Zimbabwean Constitution, which ring-fenced customary law from the non-discrimination provision. Tamale notes the serious setback in the advancement of women's rights in Zimbabwe and the African continent as a whole as a result of this unprogressive jurisprudence.<sup>171</sup> She further notes that this case "demonstrates that the struggle for women's human rights confronts resilient structures and institutions of patriarchy whose primary role is to maintain the status quo."<sup>172</sup>

### **Egypt- Case No.23 of the 16<sup>th</sup> Judicial Year<sup>173</sup>**

Interestingly, when this court was faced with the question of the right to marry, it stressed that the right to marry is protected both by Islamic Sharia and by international instruments, including CEDAW.

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<sup>171</sup> Tamale S, 'Think Globally, Act Locally: Using International Treaties for Women's Empowerment in East Africa', *Agenda: Empowering Women for Gender Equity*, No.50, African Feminisms One (2001), 97-104

<sup>172</sup> Ibid

<sup>173</sup> 1995 Supreme Constitutional Court

## 2.5 The Influence of Maputo Protocol in Shaping the Gender Discourse in African Constitutions

The African Charter on Human and People’s Rights offered little attention to women’s rights and gave no attention to gender equality. Women’s Rights Organizations<sup>174</sup> in the continent therefore called for stronger protection through a Protocol. Indeed, the reasoning offered for the need of a separate Protocol are in consonance with those provided in the preamble of CEDAW, namely that despite the existence of human rights instruments such as the African Charter, ‘women in Africa continue to be victims of discrimination and harmful practices’.<sup>175</sup> Indeed, the Protocol is said to be an elaboration of an already existing obligation on the African Continent under CEDAW, and regarded as a domestication of CEDAW on the African Continent.<sup>176</sup>

As of July 2016, 49 African countries have signed on to the Maputo Protocol, 37 countries have ratified it, and 2 have not signed and neither ratified.

Countries that have ratified the protocol (37)	Countries that have signed but not ratified the Protocol (15)	Countries that have neither signed nor ratified the protocol (2)
<ul style="list-style-type: none"> <li>- Angola</li> <li>- Benin</li> <li>- Burkina Faso</li> <li>- Cameroon</li> <li>- Cape Verde</li> <li>- Comoros</li> <li>- Congo</li> <li>- Cote d’Ivoire</li> <li>- Dem. Rep. of Congo</li> <li>- Djibouti</li> <li>- Equatorial Guinea</li> </ul>	<ul style="list-style-type: none"> <li>- Algeria</li> <li>- Burundi</li> <li>- Central African Rep.</li> <li>- Chad</li> <li>- Ethiopia</li> <li>- Eritrea</li> <li>- Madagascar</li> <li>- Mauritius</li> <li>- Niger</li> <li>- Sahrawi Arab Dem. Rep</li> </ul>	<ul style="list-style-type: none"> <li>- Botswana</li> <li>- Egypt</li> <li>-</li> </ul>

<sup>174</sup> WiLDAF-West Africa, *The Participation of African Women in all Spheres of Society is Essential for the Development of Africa*, <http://wildaf-ao.org/eng/spip.php?article299>.

<sup>175</sup> Preamble to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003)

<sup>176</sup> Supra

- Gabon	- Sao Tome & Principe	
- Gambia	- Somalia	
- Ghana	- Sudan	
- Guinea	- South Sudan	
- Guinea- Bissau	- Tunisia	
- Kenya		
- Lesotho		
- Liberia		
- Libya		
- Malawi		
- Mali		
- Mauritania		
- Mozambique		
- Namibia		
- Nigeria		
- Rwanda		
- Senegal		
- Seychelles		
- Sierra Leone		
- South Africa		
- Swaziland		
- Tanzania		
- Togo		
- Uganda		
- Zambia		
- Zimbabwe		

‘Source: African Union Commission, July 2016

**Table 3: Status of Ratification of the Protocol on the Rights of Women by African Countries**

Article 2 of the Protocol seeks to address issues concerning gender equality, and obligates States to ensure that their national constitutions contain the fundamental

principle of equality between men and women, and that this principle be effectively implemented through laws and regulations through the integration of a gendered perspective into all laws, policies and other spheres of life, by demanding punishment for those who continue to discriminate.<sup>177</sup> Article 2(1)(d) places an expectation of equality of outcomes, as Article 2(2) requires the elimination of social and cultural stereotypes which reinforce inequality.

De Jure stipulations may exist on paper but the reality for the majority of African women in that de facto inequality still prevails.<sup>178</sup>

Experiences shared by women's rights organizations in advocacy aimed at urging States to ratify the Protocol, show continued strong resistance from patriarchal attitudes and institutions.<sup>179</sup> As a strategy to dismantle patriarchy, these organizations have embarked on power mapping exercises aimed at identifying leaders at all levels who were believed to be crucial in ratifying and implementing the Protocol.<sup>180</sup>

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<sup>177</sup> The Centre for Human Rights, *Impact of the Protocol on the Rights of Women in Africa on violence against women in six selected Southern African countries: An advocacy tool* (Cape Town: ABC Press, 2009) 15

<sup>178</sup> Welch, C.E, 'Human Rights and African Women: A Comparison of Protection under Two Major Treaties', *Human Rights Quarterly*, Vol.15, No.3, (1993), 549-574

<sup>179</sup> 'Breathing Life Into the Protocol', SOAWR Members Meeting Report , 9

<sup>180</sup> Ibid

### **3. CHAPTER THREE: CHALLENGES OF COMPLIANCE OF AU AND UN MEMBER STATES WITH THEIR REGIONAL AND INTERNATIONAL TREATY OBLIGATIONS ON GENDER EQUALITY**

#### **The African Union Architecture on Gender Equality**

##### **The Constitutive Act of the African Union (AU)**

One of the main objectives as set out in Article 3 of the AU Constitutive Act of the African Union is the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments. Among the governing principles of the AU is the promotion of gender equality, respect for democratic principles, human rights, the rule of law and good governance and promotion of social justice to ensure balanced economic development.<sup>181</sup>

##### **African Charter on Human and Peoples' Rights (1981)**

The African Charter, otherwise referred to as the Banjul Charter does not make specific reference to gender, but provides for the prohibition of discrimination based on sex.<sup>182</sup> The Charter establishes the African Commission on Human and Peoples' Rights<sup>183</sup> and mandates The Commission in the performance of its protective<sup>184</sup> and promotional mandates<sup>185</sup> to,

“draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of

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<sup>181</sup> Article 4(l) –(n)

<sup>182</sup> Article 2

<sup>183</sup> Article 30

<sup>184</sup> Provided in Article 45(2) to ensure protection of human and peoples' rights through the Communications Procedure, otherwise known as the Individual Complaint procedure wherein persons whose human rights have been violated by a party to the Charter can seek adjudication and redress based on certain criteria provided for in the Charter.

<sup>185</sup> Provided in Article 45(1)(a) and (b) of the Banjul Charter and includes undertaking studies and research on human rights, norm creation, country missions et cetera.



various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the...Charter are members”.

In addition, the Charter provides room for norm creation under Article 61, and provides that,

“The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and people’s rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.”

Article 62 of the Banjul Charter obligates State parties to submit a report on the legislative or other measures taken to give effect to the rights and freedoms recognized and guaranteed in the Charter every two years.

### **Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) (2003)**

The Protocol supplements the Charter, and creates obligates for State parties to ensure among other things, the elimination of discrimination against women<sup>186</sup>, equality of men and women before the law<sup>187</sup>, that men and women enjoy equal rights in marriage<sup>188</sup> and that law enforcement organs are equipped to effectively interpret and enforce gender equality rights.<sup>189</sup> In addition, Article 2(2) places an obligation on States to,

“[m]odify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men”.

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<sup>186</sup> Article 2

<sup>187</sup> Article 8

<sup>188</sup> Articles 6 and 7

<sup>189</sup> Article 8 (d)

The African Commission has also developed guidelines for State reporting under the Maputo Protocol pursuant to Article 26 of the Protocol as read together with Article 62 of the Banjul Charter, obliging every State party to the Protocol to submit a report on the legislative, judicial, administrative and other measures taken with a view to ensure the full realization of the rights and freedoms contained in the Protocol every two years. Therefore, when reporting to the Commission, a State must submit its report in two parts; part A dealing with rights as provided in the Banjul Charter, and B, dealing with the rights in the Maputo Protocol.<sup>190</sup>

### **Solemn Declaration on Gender Equality in Africa (SDGEA) (2004)**

Considered soft law owing to its unbinding nature, the SDGEA was adopted by AU Heads of State and Government reaffirming commitments to the principle of gender equality as enshrined in Article 4 (1) of the Constitutive Act of the African Union, as well as other existing commitments, principles, goals and actions set out in the various regional, continental and international instruments on human and women's rights. States committed themselves to continue to expand and to accelerate efforts to promote gender equality at all levels, and to build on the progress that has been achieved in addressing issues of major concern to the women of Africa. Despite numerous commitments by States to eliminate gender inequality, women continue to be discriminated against in all spheres of life.<sup>191</sup>

The AU issued Guidelines for Reporting on the AU Solemn Declaration on Gender Equality in Africa<sup>192</sup> to assist AU Member States in reporting to make operational paragraph 12 of the SDGEA wherein the Heads of States and Government commit themselves to report annually on progress made in gender mainstreaming and to support and champion all issues raised in the Declaration, both at the national and regional levels, and to regularly provide each other with updates on progress made during Ordinary Sessions of the Assembly. As of 2013, Kenya was among countries

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<sup>190</sup> Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>191</sup> *Supra* note 177 'Impact of the Maputo Protocol' at 14-15

<sup>192</sup> Adopted at The First African Union Conference of Ministers Responsible For Women and Gender, Dakar, Senegal, 12-15 October 2005, AU/MIN/CONF/WG/2(1)

that had not submitted any report on the implementation of SDGEA since reporting started in January 2007.<sup>193</sup>

### **African Union Gender Policy (2009)**

The AU Gender Policy encapsulates Decisions and Declarations of the Assembly of the Heads of State and Government of the African Union<sup>194</sup> and other global commitments on gender and women's empowerment.<sup>195</sup> It provides an operational framework aimed at accelerating the realization of gender equality, fairness between men and women, non-discrimination and fundamental rights in Africa.

The policy focuses on closing the equality gap between men and women and addressing gender inequalities that have resulted in women's disempowerments and the feminization of poverty.<sup>196</sup>

The AU Gender Policy offers a framework for the enforcement of standards on gender equality as well as a monitoring and evaluation framework to ensure the follow up of progress in realizing gender equality.

### **Africa Women's Decade (2010-2020)**

The African Women's Decade aims to advance gender equality by accelerating implementation of Dakar, Beijing and AU Assembly Decisions on Gender Equality and Women's Empowerment. It provides a road map for the realization of the objectives of the decade. At the national level, committees take responsibility for the development of the annual work plans and budgets for the committees at all levels and the preparation of annual reports on the activities on the implementation of the Decade. At regional levels, the Regional Economic Communities oversee the setting

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<sup>193</sup> Supra note 95 '*AU Mechanisms to Foster Gender*' at 13

<sup>193</sup> Supra note 91 '*Men, Masculinities and Changing Power*'

<sup>194</sup> For example The Dakar Platform for Action (1994). Accessed 20<sup>th</sup> August 2016. [http://www.un.org/en/africa/osaa/pdf/au/cap\\_women\\_dakar\\_1994.pdf](http://www.un.org/en/africa/osaa/pdf/au/cap_women_dakar_1994.pdf)

<sup>195</sup> Such as The Beijing Platform for Action (1995) as provided in the Preamble to the AU Gender Policy

<sup>196</sup> Introduction to the AU Gender Policy

up of working committees for the African Women's Decade, support advocacy campaigns and prepare annual reports on the activities on the implementation of the Decade.<sup>197</sup>

### **African Charter on Democracy, Elections and Governance (ACDEG) (2007)**

The ACDEG Lists as one of its objectives “to promote gender balance and equality in the governance and development processes” and “the promotion of gender equality in public and private institutions” as an implementing principle for State parties to the Charter. Article 8 obliges State parties to eliminate all forms of discrimination based on gender, and to adopt specific legislative and administrative measures to guarantee to rights of women and other marginalized groups in electoral and governance processes. More so, States are required to entrench the principle of the supremacy of the Constitution in the political organization of the State.<sup>198</sup>

### **African States Compliance with Gender Equality**

Despite undertaking several legal and constitutional reforms, African countries are often considered to be among the States with the worst compliance records in the area of gender equality.<sup>199</sup>

Despite a majority of African States having ratified treaties guaranteeing the equality of men and women and reflected the principles of equality and non-discrimination into their constitutions at the domestic level, the persistence of deep-rooted adverse and patriarchal attitudes and firmly entrenched stereotypical behavior with respect to

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<sup>197</sup> Supra note 95 ‘*AU Mechanisms to Foster Gender*’ at 15

<sup>197</sup> Supra note 91 ‘*Men, Masculinities and Changing Power*’

<sup>198</sup> Article 10

<sup>199</sup> Based on data from “*Women, Business and the Law 2016: Getting Equal*” (2015) The International Bank for Reconstruction and Development/The World Bank. Accessed 21<sup>st</sup> September 2016. <http://wbl.worldbank.org/~media/WBG/WBL/Documents/Reports/2016/Women-Business-and-the-Law-2016.pdf>

the role of women and men in the family and society limit the implementation of the ideals of gender equality.<sup>200</sup>

The international human rights system is built on legal principles and using legal language, but is inherently political. Majority of players in positions of power at the international and regional levels are men, adopting patriarchal patterns and structures in decision making on compliance with gender equality, arguably limiting its effective implementation.

CEDAW and the Maputo Protocol outline several obligations to States that are signatories. These obligations fall into two categories, that of means, and that of results.<sup>201</sup> The former requires States to allocate resources to create the means to enable equality, while the latter implies the provision of means to ensure equality in results.<sup>202</sup>

In its General Obligation No.28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women<sup>203</sup>, the Committee elaborated on nature of the State obligation on sex-based discrimination. It provided, that discrimination based on sex covers gender based discrimination against women.<sup>204</sup>

The nature of the obligation towards non-discrimination entails the following;

**On the obligation to respect,**

- States must refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights.

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<sup>200</sup> Ssenyonjo, M, 'Culture and the Human Rights of Women in Africa: Between Light and Shadow', *Journal of African Law*, Vol 51, No.1, (2007), 51

<sup>201</sup> Partners for Law in Development, 'CEDAW: Restoring Rights to Women', (2004) 32

<sup>202</sup> Ibid

<sup>203</sup> CEDAW/C/2010/47/GC.2 Adopted in the Forty-Seventh Session of the Committee on the Elimination of Discrimination Against Women 4-22 October 2010

<sup>204</sup> Para 5

**On the obligation to protect,**

- States must protect women against discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women.<sup>205</sup>
- States are to abstain from causing discrimination against women through acts or omissions. Discrimination can occur through the failure of States to take necessary legislative measures to ensure the full realization of women's rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws
- States are obliged to react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors.

**On the obligation to fulfill,**

- States are to take steps to ensure that women and men enjoy equal rights de jure and de facto. This entails obligations of means or conduct and also obligations of results.
- States are to design public policies, programmes and institutional frameworks that are aimed at fulfilling the specific needs of women leading to the full development of their potential on an equal basis with men.

In addition, States are required to be vigilant, and continuously condemn discrimination, and proclaim their total opposition to all form of discrimination against women to all levels and branches of Government, to their population and to the international community.<sup>206</sup>

In addition to General Comment no.28, the Committee has also developed General Comment No.25 and General Comment No.19 to further elaborate on State obligations regarding discrimination against women on the basis of sex and gender.

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<sup>205</sup> Noting the role of patriarchy in socially constructing feminine and masculine roles/

<sup>206</sup> GC Para 15

General Comment no.28 outlines specific implementation parameters<sup>207</sup> for State parties to the Convention on appropriate measures for a State to ensure its compliance, which include;

- “(a) Abstaining from performing, sponsoring or condoning any practice, policy or measure that violates the Convention ;
- (b) Takes steps to prevent, prohibit and punish violations of the Convention by third parties, including in the home and in the community, and to provide reparation to the victims of such violations;
- (c) Fosters wide knowledge about and support for its obligations under the Convention;
- (d) Adopts temporary special measures that achieve sex non-discrimination and gender equality in practice.

In addition, States parties should also adopt other appropriate measures of implementation such as:

- (a) Promoting equality of women through the formulation and implementation of national plans of action and other relevant policies and programmes in line with the Beijing Declaration and Platform for Action, and allocating adequate human and financial resources;
- (b) Establishing codes of conduct for public officials to ensure respect for the principles of equality and non-discrimination;
- (c) Ensuring that reports of court decisions applying the provisions of the Convention on the equality and non-discrimination principles are widely distributed;
- (d) Undertaking specific education and training programmes about the principles and provisions of the Convention directed to all government agencies, public officials, and in particular the legal profession and the judiciary;
- (e) Enlisting all media in public education programmes about the equality of women and men, and ensuring in particular that women are aware of their right to equality without discrimination, of the measures taken by the State party to implement the Convention, and of the concluding observations by the Committee on the reports of the State party;
- (f) Developing and establishing valid indicators of the status of and progress in the realization of human rights of women, and establishing and maintaining databases disaggregated by sex and related to the specific provisions of the Convention.”<sup>208</sup>

This article refers in 2(a) to “practical” as well as legal realization of non-discrimination: constitutions, laws, regulations and other written policies will not be enough. States parties must ensure that their administrative and judicial systems are

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<sup>207</sup> GC Para 37

<sup>208</sup> GC Para 38

designed to deliver on the obligation. This means training and monitoring even the lowest level administrative staff, those who deal with the public as well as those who make the policies, to understand the requirement to not discriminate. It means making sure that programmes to deliver services are equally accessible to women in terms of location, hours, and cost. It probably means some reallocations of resources to meet this obligation.<sup>209</sup>

Addressing prevailing gender relations and the persistence of gender-based stereotypes is one of the prevailing obligations that emanate from CEDAW. The Convention creates a due diligence obligation<sup>210</sup>.

CEDAW's obligations on equality to State parties can be categorized as *formal equality/de jure* equality, wherein States are obligated to treat men and women as equals, *substantive equality*, wherein States are obliged to take measures to ensure substantive/*de facto* equality between men and women<sup>211</sup> and *transformative equality*, wherein States are obligated to transform institutions, systems and structures that cause or perpetuate discrimination and inequality.<sup>212</sup>

Scholarship on compliance with gender equality obligations paints an unnerving picture. Authors have attributed a challenge on compliance with treaties such as CEDAW and the Maputo to 'entrenched traditional attitudes regarding women'<sup>213</sup>. Zwingel<sup>214</sup> supports this theory, by asserting that a State's compliance with CEDAW can be partly attributed to ideology and a "*cultural match* or the affinity between

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<sup>209</sup> Dr. Freeman, M, 'State Obligations under Article 2-5 and 24: policy measures in Public and Private Spheres of Life', The Optional Protocol to CEDAW: Mitigating Violations of Women's Human Rights, International Training Seminar for NGOs and Women's Rights Activists, 13-15 March, 2003, Berlin, Germany.

<sup>210</sup> Holtmaat, R., 'Preventing Violence against Women: the Due Diligence Standard with respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention', *Due Diligence and Its Application to Protect Women from Violence*, Nijhoff Law Specials, Benninger-Budel, C., ed., Leiden, Netherlands, Brill/Martinus Nijhoff Publishers, 2008.

<sup>211</sup> As Morgan, M.I explains in 'Equity or Equality for Women? Understanding CEDAW's Equality Principles', *Alabama Law Review*, 2009) pp. 1133-1170, this would involve actions by the State to achieve equality of opportunity between men and women, and actions by the State to correct the inequalities of power between men and women.

<sup>212</sup> Cusack, S & Pusey, L, 'CEDAW and the Rights to Discrimination and Equality', *Melbourne Journal of International Law*, Vol.14, (2013) 1-39

<sup>213</sup> Banks, A.M, 'CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa', *Fordham International Law Journal*, Vol.32. Iss.3, Article 2(2008) noting sentiments in Dormady, V.A, ' Status of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1998', 33 Int'l L.637, 639 (1999)

<sup>214</sup> Zwingel S, *Supra* note 19 at 220



international and national norms on gender relations”. She highlights sentiments by Cortell and Davis<sup>215</sup>, who assert that an international norm is most likely to be implemented in a domestic context if it “resonates with domestic political discourse, understanding, beliefs and obligations”. Consequently, compliance will be unlikely if there is a disconnect between the prescribed international norm and the cultural norms in the domestic context.

Following this analogy, and the inference of the culture of patriarchy and the subordination of women in most African cultures in the implementation (or lack thereof) of CEDAW obligations, it is unlikely, or near impossible to expect African States to comply. However in some African countries, this logic has not found application. In South Africa for instance, Zwingel notes that a cultural match has not been a decisive factor in good compliance of the State, noting the significant progress in domesticating CEDAW in legislation and using the gender equality principles espoused therein as a reference point in a post-apartheid regime transformation.<sup>216</sup>

The CEDAW Committee’s powers are limited to making recommendations to State parties, but such recommendations are unenforceable. The Committee itself recognizes that most effective means of enforcement of treaty obligations is through the political will of States through voluntary, domestic channels.<sup>217</sup> Absent a voluntary process, enforcement is undertaken through a combination of coercion, pressure, and acculturation.<sup>218</sup>

Hathaway offers an integrated theory in explaining State compliance with international obligations, and argues that ‘compliance not only depends upon a State’s

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<sup>215</sup> Cortell, A.P & Davis J.W, ‘Understanding the Domestic Impact of International Norms: A Research Agenda’, *International Studies Review*, Vol.2, No.1, (2000) 65-87

<sup>216</sup> Zwingel S, *Supra* note 19 at 229. Explains that in the context of regime transformation from apartheid to democracy CEDAW was ratified, which prompted the reform of laws to confront gender based discrimination and to make the legal system more gender neutral. In addition, she notes that the Government introduced special temporary measures to promote compliance, such as establishing a monitoring committee for obligations under CEDAW, and training the NGO Sector in the meaning and use of CEDAW.

<sup>217</sup> 30-31<sup>st</sup> Sessions of CEDAW

<sup>218</sup> Banks, A.M, ‘CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa’, *Fordham International Law Journal*, Vol.32. Iss.3, Article 2(2008)

decision to commit, but commitment also depends upon the decision to comply'.<sup>219</sup> Apart from legal enforcement at the domestic level through use of a country's legal system to enforce the terms of international treaties, Hathaway argues that collateral consequences can also play a role in the implementation of international norms. She submits,

“Collateral consequences.....arise when domestic and transnational actors premise their actions toward a state on the state's decision to accept or reject international legal rules. The reactions of these actors to the state's actions can affect, among other things, foreign investment, aid donations, international trade, domestic political support, and political contributions, and hence create powerful incentives for states to commit to and comply with treaties.”

Merry contends that the domestic reception of international legal norms “falls along a continuum depending on how extensively local cultural forms and practices are incorporated into imported institutions”.<sup>220</sup> In her analogy, she compares jurisdictions based on such factors as whether international human rights law has been “rejected”, “ignored” or “subverted”<sup>221</sup> whether a process of “replication” is to be found in which “the imported institution remains largely unchanged from its transnational prototype” and any adaptation is “superficial and primarily decorative”; or whether “hybridization” can be identified, meaning that there is “a process that merges imported institutions and symbols with local ones, sometimes uneasily.”<sup>222</sup>

In analyzing Merry's analogy, McCrudden<sup>223</sup> notes the case of *Masupha v Senior Resident Magistrate for the Subordinate Court of Berea*<sup>224</sup> wherein a Lesotho High Court, in upholding customary law rights relating to male succession to chieftainship, relied on the fact that, in acceding to CEDAW, the government had entered reservations, as it was permitted to do under CEDAW, which specifically excluded

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<sup>219</sup> Hathaway, O.A, ‘Between Power and Principle: An Integrated Theory of International Law’, *The University of Chicago Law Review*, Vol.72, No.2, (2005), 469-536

<sup>220</sup> Merry, S.E, ‘Transnational Human Rights and Local Activism: Mapping the Middle’, *American Anthropologist*, Vol.108, No.1, (2006), 38-51

<sup>221</sup> Ibid at 40 where Merry explains means seized and transformed into something quite different from the transnational concept, out of the reach of the global legal system but nevertheless called by the same name. She gives an example of those who talk about women's human rights under Sharia in northern Nigeria envision a different set of rights from those articulated in international human rights conventions.

<sup>222</sup> Supra Merry at 44

<sup>223</sup> McCrudden, C, ‘Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW’, *The American Journal of International Law*, Vol.109, No.3, (2015) 534-550

<sup>224</sup> L.S.H.C 9 (58) Lesotho 2013

matters concerning customary practices relating to succession to the throne and to chieftainship. The Court referred to CEDAW and the Government's reservation as a reason why it should not interfere with the Executive and the Legislature in this matter, and as McCrudden rightly puts it, "these cases to defend the status quo rather than change it."

In another explanation, States' compliance with gender obligation will vary depending on States' international positions and aspiration to improve their international prestige and status.<sup>225</sup>

The fact that there are no sanctions attached to failing to comply with reporting obligations is seen as a major weakness in the enforcement and implementation system.<sup>226</sup>

In conclusion, to ensure compliance, it has been argued that a stronger enforcement framework ought to be adopted by the AU, for example moving beyond reporting obligations and fact-finding missions, to the imposition of sanctions for human rights violations and non-compliance with gender equality principles.<sup>227</sup>

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<sup>225</sup> Aydeyeva, O.A, 'Does Reputation matters for States' compliance with International treaties? States enforcement of anti-trafficking norms', *The International Journal of Human Rights*, Vol.16, No.2, (2012), pp.298-320

<sup>226</sup> Gawanas, B, 'The African Union: Concepts and implementation mechanism relating to human rights'. Accessed 13<sup>th</sup> September 2016.

[http://www.kas.de/upload/auslandshomepages/namibia/Human\\_Rights\\_in\\_Africa/6\\_Gawanas.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gawanas.pdf)

<sup>227</sup> Ibid

## 4. CHAPTER 4: AN ASSESSMENT OF THE ARCHITECTURE OF GENDER CONSTITUTIONALISM IN KENYA

### 4.1 Legal Architecture

#### The Kenya Constitution, 2010

As observed in earlier chapters, the Kenya Constitution of 2010 contains solid constitutional safeguards for the promotion and protection of gender equality, and is framed in gender sensitive language. Fitzgerald notes a commitment to the principles of gender equality and non-discrimination is woven throughout the Constitution and reflects a widely held belief that guarantees of equality and equitable distribution of resources and balance of power are important tenets to securing a peaceful future.<sup>228</sup>

The Preamble to the Constitution recognizes equality as an essential value on which government should be based. The national values and principles of governance espoused in Article 10 include equity, equality and non-discrimination, which is further strengthened and complimented by Article 27 on Equality and freedom from discrimination. It provides that “*women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres*”<sup>229</sup>, and prohibits the State from discriminating either directly or indirectly against any person on the ground of sex<sup>230</sup>. Article 27(5) explicitly imposes an obligation on the State to give full effect to the realization of these rights through legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. In the application of the Bill of Rights, the Constitution imposes an obligation on courts, tribunals or other authority to promote the values of equality and equity.

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<sup>228</sup> Fitzgerald.J, ‘The Road to Equality? The Right to Equality in Kenya’s New Constitution’, *The Equal Rights Review*, Vol.5, (2010), 56. Accessed 3rd September 2016.[www.equalrightstrust.org/ertdocumentbank/err\\_issue05.pdf](http://www.equalrightstrust.org/ertdocumentbank/err_issue05.pdf)

<sup>229</sup> Article 27(3)

<sup>230</sup> Article 27(4)

The Constitution also guarantees equal rights for men and women during a marriage and upon its dissolution.<sup>231</sup> In addition, the Constitution imposes an obligation on States to put in place affirmative action programmes designed to ensure the participation of minorities and marginalized groups in governance and political life.<sup>232</sup> The Constitution defines “*marginalised group*” as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)<sup>233</sup>. “*Affirmative action*” as envisioned by the Constitution includes any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom.<sup>234</sup>

Gender equality and equity within the ambit of political participation is expressly provided for in the Constitution. The general principles for the electoral system mandates compliance with principle that “*not more than two thirds of the members of elective public bodies shall be of the same gender*”,<sup>235</sup> and obligates the State to take legislative and other measures to ensure that this principle is implemented.<sup>236</sup>

Article 197(1) states that “*not more two-thirds of the members of any county assembly or county executive committee shall be of the same gender*”. When addressing itself on the composition of commissions and independent offices, the Constitution directs that “*the Chairperson and vice-chairperson of a commission shall not be of the same gender*”.

Furthermore, the Constitution outlined principles of devolved government to include that “*no more than two-thirds of the members of representative bodies in each county government shall be of the same gender*”.<sup>237</sup>

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<sup>231</sup> Article 45(3)(f)

<sup>232</sup> Article 56 (a)

<sup>233</sup> Article 260 on Interpretation

<sup>234</sup> Article 260 on Interpretation

<sup>235</sup> Article 81(b)

<sup>236</sup> Article 27(8)

<sup>237</sup> Article 175(c)

In addition, every political party is specifically required to “*respect and promote gender equality and equity*”<sup>238</sup>, and is prohibited from being founded on gender<sup>239</sup> (to the exclusion of others).

### **Judicial Service Act 2011**

The Judicial Service Act contextualizes the societal challenges of gender equality and equity, and proposes a corrective implementation framework in order to effectively address it through judicial actions. Through Section 3, this Act compels the Judicial Service Commission and the Judiciary to facilitate the promotion of gender equity in the Judiciary. In the discharge of their mandate, the JSC and the Judiciary is obligated to consider social and gender equity and to remove any historical factors of discrimination. The Act invokes the gender parity principle in appointments to the Chief Justice and Deputy Chief Justice.<sup>240</sup>

### **Kenya Citizenship and Immigration Act 2011**

The Kenya Citizenship and Immigration Act operationalizes key Articles of the Constitution giving effect to gender equality. For example, Section 11 provides that citizenship can be acquired through marriage, absence of discrimination based on sex, therefore a woman can pass citizenship to her spouse in the same way that a man can pass citizenship to his spouse. The Act affirms the equal rights of citizens irrespective of their sex or gender.<sup>241</sup> In addition, dual citizenship is safeguarded in Section 8, thereby mitigating risks of women being stateless upon denouncing their nationality upon marriage. This Act can be read to effectively domesticate Article 2 of CEDAW on non-discrimination, and Article 9 of CEDAW on nationality.

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<sup>238</sup> Article 91 (1)(f)

<sup>239</sup> Article 91(2)(a)

<sup>240</sup> Section 31.

<sup>241</sup> Section 22

## **Marriage Act No.4 of 2014**

The Marriage Act guarantees equal rights and obligations at the time of marriage, during marriage and at the dissolution of marriage.<sup>242</sup> This section domesticates Article 16 of CEDAW that obligates states to accord men and women the same responsibilities during marriage and at its dissolution.

## **Matrimonial Property Act No.49 of 2013**

The Matrimonial Property Act is a law aimed at providing for the rights and responsibilities of spouses in relation to matrimonial property. The most controversial section of the Act is Section 7 on “Ownership of matrimonial property”, which states that the ‘ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition’. Although providing *de jure* equality in law, the Marriage and Matrimonial Property Act is discriminatory in effect, disproportionately affecting persons of the female gender. Authors note that these laws effectively deny women the right to marital property upon divorce or death of their spouse, unless they can prove they made a contribution to the acquisition of the property during their marriage.<sup>243</sup> Moreover, discrimination is perpetuated against spouses whose contribution to the acquisition of such property is indirect and not capable of valuation in monetary terms.<sup>244</sup> The consequences are dire considering the historical discrimination against persons of the female gender regarding land ownership, as the major ethnic groups in Kenya share a patriarchal culture in which men own—formally or informally—the key productive assets such as land, livestock and medium to large businesses,<sup>245</sup> and 3% of land is owned by women.<sup>246</sup>

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<sup>242</sup> Section 3

<sup>243</sup> ‘UN Human Rights experts urge Kenya to repeal discriminatory sections in the Matrimonial Property Act’ Accessed 16<sup>th</sup> September 2016.

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14254&>

<sup>244</sup> Republic of Kenya, Sessional Paper No.3 of 2009 on National Land Policy (August 2009) para 224

<sup>245</sup> ‘Women, Business and the Law: Removing barriers to economic inclusion’, The International Bank for Reconstruction and Development/ The World Bank (2012) <http://wbl.worldbank.org/~media/WBG/WBL/Documents/Reports/2012/Women-Business-and-the-Law-2012.pdf>

<sup>246</sup> Ibid

## **The Political Parties Act 2011**

The Political Parties Act compels political parties to respect and promote gender equality and equity<sup>247</sup>, and creates an implementing framework for the gender parity principle to parties' membership lists and governing bodies.<sup>248</sup> It places an obligation on political parties to ensure that their constitutions are aligned to the Kenya Constitution with regard to the not more than two thirds gender principle with regard to their membership.<sup>249</sup>

## **4.2 Policy Architecture**

### **The Kenya National Policy on Gender and Development (NPGD)**

The Kenya National Policy on Gender and Development in effect since 2000 constitutes the core policy framework for ensuring gender equality in Kenya. It has within its objectives, to guarantee the equality of men and women before the law and to enable men and women to have equal access to, participate in and benefit equally from economic and employment opportunities and initiatives. The Policy spells out the approach of gender mainstreaming and empowerment of women, girls, boys and men in all policies, planning and programming in Kenya and puts in place institutional mechanisms to ensure effective implementation.

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

The Sessional Paper provides the operational framework for gender mainstreaming in national policies, planning, strategies and programming in Kenya. Much like the National policy, the sessional paper recognizes the gender equality as a right to men, women, girls and boys, necessary to ensure their equal participation and benefit from development initiatives.

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<sup>247</sup> Section 5

<sup>248</sup> Section 7(2)

<sup>249</sup> Section 9



## The Vision 2030

Vision 2030 is a key national tool that sets out a national vision to transform Kenya into a middle-income country providing quality life to all its citizens to be realized by the year 2030<sup>250</sup>. Often described as ambitious<sup>251</sup> the “Vision 2030” is an economic development blueprint, which identifies gender as a priority. The Vision 2030 is expected to be an avenue for meeting of the Millennium Development Goals (MDGs) that emphasize gender equality.

The Vision sets out three pillars and seven sectors through which it will be achieved, namely the economic, social and political pillars, and the infrastructure, tourism, agricultural, trade, manufacturing, business and financial services sectors.<sup>252</sup> Within the ambit of the social pillar, Vision 2030 seeks to engender just, cohesive and equitable social development. Efforts are aimed at redistribution of power and resources between the sexes through the increased participation of women in all economic, social and decision-making processes. Increased representation of women in parliament is highlighted as a specific strategy within the social pillar. The 2030 goal for equity and poverty elimination encompasses attaining gender parity and fairness in the delivery of justice. The Women’s Enterprise Fund and the Social Protection Fund is the main flagship project for gender.

The political pillar envisions a country with a democratic system that entrenches equality irrespective of gender. Among its guiding governance principles is constitutional supremacy<sup>253</sup> and equality of citizens, asserting, “*Kenya shall be a nation that treats its women and men equally. It will not discriminate any citizen on the basis of gender*”.

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<sup>250</sup> Kenya Vision 2030 The Popular Version (2007) Available at <http://www.vision2030.go.ke/about-vision-2030/>

<sup>251</sup> ‘Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation’, The National Women’s Steering Committee & Institute of Economic Affairs, (May 2015). <http://www.ieakenya.or.ke/newsevents/cost-of-implementing-the-constitutional-two-third-gender-principle#>

<sup>252</sup> See [www.vision2030.go.ke/pillars/](http://www.vision2030.go.ke/pillars/)

<sup>253</sup> Elaborated as “The Supremacy of the constitution shall be respected at all times This will guarantee individual rights as stated in the Bill of Rights”

## National Land Policy

The Constitution provides for the explicit elimination of gender discrimination in law, customs and practices related to land and property in land.<sup>254</sup> The National Land Policy contains important gender and equity principles, noting the adverse effects of culture and traditions that favour male inheritance, and customary practices that discriminate against women in relation to land ownership and inheritance<sup>255</sup>.

### 4.3 Institutional Architecture

#### National Gender and Equality Commission

The Constitution established the Kenya National Human Rights and Equality Commission, whose functions included “*to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development*”.<sup>256</sup>

The Constitution provided for Parliament to create commissions to distribute the functions of KNHREC. In line with this Constitutional provision, Parliament established the National Gender and Equality Commission<sup>257</sup>. Authors suggest that this is in line with submissions from Kenyans to the Constitution Review Commission where “women wanted a Gender Commission”.<sup>258</sup> In asking for a Gender commission the people submitted that

- “ the Commission should develop a policy on protection and promotion of women’s rights and facilitate the repeal of all laws that have provisions discriminative in terms of gender;

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<sup>254</sup> Article 60 (1)(f)

<sup>255</sup> *Supra* note 242 at para 220

<sup>256</sup> Article 59(2)(b)

<sup>257</sup> Act No.15 of 2011 Laws of Kenya

<sup>258</sup> Lumumba, PLO & Franceschi, LG, *The Constitution of Kenya, 2010: An Introductory Commentary*, (Nairobi: Strathmore University Press, 2014) 260

- most customary laws and practices which clearly discriminate against women in general and the girl child should be eradicated.”<sup>259</sup>

The functions of the Commission are as provided in Section 8 of the NGEC Act 2011, which states as follows:-

- To promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution;
- Monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;
- Act as the 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 and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities, and children;
- Co-ordinate and facilitate mainstreaming of issues of gender, persons with disabilities and other marginalised groups in national development and to advise the Government on all aspects thereof;
- Monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution;
- Investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned;
- Work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws;
- Co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination;
- Conduct and co-ordinate research activities on matters relating to equality and freedom from discrimination as contemplated under Article 27 of the Constitution;
- Receive and evaluate annual reports on progress made by public institutions and other sectors on compliance with constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination;

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<sup>259</sup> Proceedings of Consultative Meeting of Women Representatives at the Constitution of Kenya Review Commission, held at KCC, Mbagathi on 6<sup>th</sup> May 2005. Constitution of Kenya Review Commission.

- Work with the Kenya National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration in the protection and promotion of rights related to the principle of equality and freedom from discrimination;
- Prepare and submit annual reports to Parliament on the status of implementation of its obligations under this Act;
- Conduct audits on the status of special interest groups including minorities, marginalized groups, persons with disabilities, women, youth and children;
- Establish, consistent with data protection legislation, data bases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination for these interest groups;
- Perform such other functions as the Commission may consider necessary for the promotion of the principle of equality and freedom from discrimination; and
- Perform such other functions as may be prescribed by the Constitution and any other written law.

### **Judicial Service Commission**

Within the judicial arm of government, The Judicial Service Commission is required to promote gender equality in the performance of its functions.<sup>260</sup> The Judicial Service Act further obligates the JSC to make regulations for gender mainstreaming in the Judiciary. In processing applications for judicial appointments, the JSC is required to take gender into account.<sup>261</sup>

The case of *Federation of Women Lawyers and 5 others v The Judicial Service Commission and Another*<sup>262</sup> brought into perspective the implementation of gender equality within judicial service appointments. The JSC on 15<sup>th</sup> June 2011 made 5

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<sup>260</sup> Article 172 (2)(b). The JSC functions include to recommend to the President persons for appointment as judges; reviewing and making recommendations on the conditions of service, preparing and implementing programmes for the continuing education and training of judges and judicial officers , coordinating matters to do with discipline of judicial officers and advising the national government on improving the efficiency of the administration of justice.

<sup>261</sup> Section 14

<sup>262</sup> Petition 102 of 2011 [2011] eKLR

recommendations to the President for appointment of judges to the Supreme Court of Kenya. Only 1 out of the 5 was a woman. As a result the recommendations fell below the Constitutional mandatory minimums. FIDA Kenya challenged these recommendations on the basis that it violated the Constitution by failing to take into account the requirement on gender parity.

The High Court dismissed the case, holding the view that affirmative action measures as envisioned in Article 27 are social and economic in nature and can only be achieved progressively. The Court made the conclusion that Article 27 in so far as it relates to gender equality in public services is an unreasonable and unrealistic expectation, stating in its obiter,

“To the Petitioners and supporters we advise you to keep your feminine missiles to their launch pads until the State acts on policies and programmes as envisioned in Article 27(6) and (8) and the Legislature has legislated accordingly to set the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution...”

As observed by Oganyo<sup>263</sup> the decision of the court did a disservice to the interpretation of the principles of equality and non-discrimination.

### **State Department of Gender**

The state department of Gender affairs was created from the Ministry of Devolution and Planning in November 2015, to promote gender mainstreaming in national development processes and champion and socio-economic empowerment of women. Among other roles, the department is charged with the responsibility of expanding credit financing to women for enterprise development and ensure equality in gender representation in all public appointments.<sup>264</sup>

The State Department of Gender is the technical lead with regard to gender mainstreaming in policies and programmes within the Government, and it is also

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<sup>263</sup> Oganyo, R.A, ‘Justiciability of Justice: The Role of the Judicial Service Commission in Kenya in the Decisional Independence of Judicial Officers’, (LLM Thesis, University of Nairobi, 2014)

<sup>264</sup> About State Department of Gender Affairs available at <http://www.psyg.go.ke/2016-02-05-06-32-50/gender-affairs-pr.html> Last accessed on 18th September 2016

responsible for monitoring compliance with International conventions that Kenya is signatory to.

#### 4.4 Gender Equality in Kenya viewed holistically: Are we there yet?

The World Bank asserts that Kenya has in the recent years made the highest number of changes compared to 38 other world economies with regard to achieving a greater level of legal gender equality and reduction of legal differentiation between men and women.<sup>265</sup> In reaching this conclusion, the World Bank explores women’s legal ability to interact with public authorities and the private sector in the same way as men; women’s ability to access and use property based on their ability to own, manage, control and inherit it; restrictions on women’s work, such as prohibitions on working at night or in certain industries; an examination of personal income tax credits and deductions available to women relative to men; identifies minimum loan thresholds in private credit bureaus and public credit registries, and tracks bureaus and registries that collect information from microfinance institutions; and lastly, considers the ease and affordability of accessing justice by examining small claims courts, as well as a woman’s ability to testify in court and initiate court proceedings.<sup>266</sup>

An extract of the World Bank’s findings are below that provide perspective in this inquiry;

<b>ACCESSING INSTITUTIONS</b>		
<b><i>Rights of married and unmarried women</i></b>	<b><i>Unmarried</i></b>	<b><i>Married</i></b>
1. Can a woman apply for a passport in the same way as a man?	Yes	Yes
2. Can a woman travel outside the country the same way as a man?	Yes	Yes
3. Can a women travel outside her home the same way as a man?	Yes	Yes
4. Can a woman get a job or pursue a trade or	Yes	Yes

<sup>265</sup> Women, Business and the Law: Removing barriers to economic inclusion, The International Bank for Reconstruction and Development/ The World Bank (2012) (Available at <http://wbl.worldbank.org/~media/WBG/WBL/Documents/Reports/2012/Women-Business-and-the-Law-2012.pdf>)

<sup>266</sup> Ibid

profession the same way as a man?		
5. Can a woman sign a contract in the same way as a man?	Yes	Yes
6. Can a woman register a business in the same way as a man?	Yes	Yes
7. Can a woman be “head of household” or “head of family” in the same way as a man?	Yes	Yes
8. Can a woman confer citizenship on her children in the same way as a man?	Yes	Yes
9. Can a woman open a bank account in the same way as a man?	Yes	Yes
10. Can a woman choose where to live in the same way as a man?	Yes	Yes
<b>Number of inequalities in accessing institutions</b>	<b>0</b>	<b>0</b>
<b><i>Division of responsibility within marriage</i></b>		
11. Can a woman convey citizenship to her non-national spouse?	Yes	
12. Are married women required by law to obey their husbands?	No	
13. Do married couples jointly share legal responsibility for financially maintaining the family’s expenses?	Yes	
<b><i>Constitutional Rights</i></b>		
14. Is there a non-discrimination clause covering gender or sex in the constitution?	Yes	
15. Does the constitution guarantee equality before the law?	Yes	
16. Are either customary or personal law valid sources of law under the constitution?	Yes	
17. If either customary or personal law are valid sources of law, are they considered invalid if they violate constitutional provisions on non-discrimination or equality?	No	
<b>USING PROPERTY</b>		
<b><i>Marital Property Regime</i></b>		
18. What is the default marital property regime?	Separation of property	
19. Who legally administer joint marital property?	The original owner	
20. In the case of dissolution of marriage, who is entitled to ownership of the marital home?	Both spouses	
<b><i>Joint titling</i></b>		
21. For property acquired during the course of marriage, is there a legal presumption of joint ownership between the husband and the wife?	No	
22. Does joint titling of major assets(such as land or the marital home) exist for married couples?	Yes	
23. If joint titling exists for married couples, is it the default for marital property?	No	

<b><i>Rights over moveable and immovable property</i></b>	<b><i>Moveable</i></b>	<b><i>Immovable</i></b>
24. Do unmarried men and unmarried women have equal ownership rights to property	Yes	Yes
25. Do married men and married women have equal ownership rights to property?	Yes	Yes
<b><i>Inheritance Rights</i></b>		
26. Do sons and daughters have equal inheritance rights to property from their parents?	Yes	Yes
27. Do female and male surviving spouses have equal inheritance rights to property?	Yes	Yes
28. In the case of death of one of the spouses, does the surviving spouse, regardless of gender, have equal inheritance rights to the marital home?	Yes	
<b>Number of Inequalities regarding property</b>	<b>0</b>	<b>0</b>

**Table 4 Economy Table 2012**

**Source: World Bank Women, Business and the Law 2012**

What the World Bank analysis failed to take into account is that *de jure* equality in the law may not necessarily result in *de facto* equality. The most recent survey **Women, Business and the Law 2016** undoubtedly shows the progressive understanding of this phenomenon, as the World Bank expands gender equality indicators as captured below;

<b>ACCESSING INSTITUTIONS</b>		
<b><i>Constitutional Rights</i></b>		
1. Does the Constitution contain a clause on non-discrimination?	Yes	
2. If yes, does it mention gender?	Yes	
3. Does the Constitution contain a clause on equality?	Yes	
	<b>Recognized</b>	<b>Invalid</b>
4. Is customary law recognized/invalid if it violates provisions on nondiscrimination or equality?	Yes	Yes
5. Is personal law recognized/invalid if it violates provisions on nondiscrimination or equality?	Yes	No
<b><i>Quotas</i></b>		
6. What are the quotas for women on corporate boards?	No quota	
7. What are the quotas for women in parliament	33% <i>*(at least-emphasis mine)</i>	



8. What are the quotas for women in local government?	33% <i>*(at least-emphasis mine)</i>	
9. What are the quotas for women on candidate lists for parliament?	No quota	
10. What are the quotas for women on candidates lists for local government?	No quota	
<b><i>Rights of married and unmarried women</i></b>	<b><i>Married</i></b>	<b><i>Unmarried</i></b>
11. Can a woman apply for a passport in the same way as a man?	Yes	Yes
12. Can a woman apply for a national ID in the same way as a man can?	Yes	Yes
13. Can a woman travel outside the country the same way as a man?	Yes	Yes
14. Can a women travel outside her home the same way as a man?	Yes	Yes
15. Can a woman get a job or pursue a trade or profession the same way as a man?	Yes	Yes
16. Can a woman sign a contract in the same way as a man?	Yes	Yes
17. Can a woman register a business in the same way as a man?	Yes	Yes
18. Can a woman open a bank account in the same way as a man?	Yes	Yes
19. Can a woman choose where to live in the same way as a man?	Yes	Yes
20. Can a woman confer citizenship on her children in the same way as a man?	Yes	Yes
21. Can a woman be “head of household” or “head of family” in the same way as a man?	N/A	N/A
<b><i>Division of responsibility within marriage</i></b>		
22. Do spouses have equal rights to convey citizenship?	Yes	
23. Are wives required to obey their husbands?	No	
24. Must spouses jointly financially maintain the family?	Yes	
<b>USING PROPERTY</b>		
<b><i>Marital Property Regime</i></b>		
25. What is the default marital property regime?	Partial community of property	
26. Who administers marital property?	Both must agree	
<b><i>Protecting a wife’s interest</i></b>		
27. If the husband administers property, is spousal consent required for major transactions?	N/A	
28. Are there special provisions governing the marital home?	Yes	

29. Does the law provide for valuation of nonmonetary contributions?	Yes	
<b>Property Rights</b>	<b>Married</b>	<b>Unmarried</b>
30. Do men and women have equal ownership rights to property?	Yes	Yes
<b>Inheritance Rights</b>		
31. Do sons and daughters have equal inheritance rights?	Yes	
32. Do female and male surviving spouses have equal inheritance rights?	No	
<b>GOING TO COURT</b>		
<b>Equality of Access</b>		
33. Are customary courts recognized?	No	
34. Are personal law courts recognized?	Yes	
35. Is a women's testimony afforded equal weight to that of a man?	Yes	
<b>Judicial Representation</b>		
36. How many justices are on the constitutional court? *(Supreme Court?)	7	
37. Of those, how many are women?	2	
38. Is the Chief Justice a woman?	No	
<b>Efficiency of Procedure</b>		
39. Is there a small claims court/fast track procedure?	Yes	
40. If yes, what is the maximum amount (% GNI/capita)?	43%	
<b>PROVIDING INCENTIVES TO WORK</b>		
41. Are childcare payments tax deductible?	No	
	<b>Men</b>	<b>Women</b>
42. Are there tax deductions or credits specific to men/women?	No	No
<b>Childcare and education</b>		
43. Is childcare subsidized or publicly provided?	Yes	

44. Is primary education free and compulsory?	Yes
<b><i>Financial support and care</i></b>	
45. Does the Government provide a child allowance to parents?	No
46. Must employers provide leave to care for sick relatives?	No

**Table 5: Economy Table 2016**

**Source: World Bank Women, Business and the Law 2016**

#### 4.5 Threats to Gender Constitutionalism

##### *Gender parity in Political and Governance Spaces*

Gender parity has undoubtedly been a thorn in the flesh in the quest for gender constitutionalism in Kenya. Since the promulgation of the Constitution, there have been three major litigious attempts to challenge the lack of implementation of the gender parity principles as outlined in the Constitution. These cases are namely, *Centre for Rights Education and Awareness (CREAW) & 7 Others v The Attorney-General*<sup>267</sup>, which challenged the constitutionality of Presidential nominations of the Chief Justice, Attorney-General, Director of Public Prosecutions, and Controller of the Budget mainly on the grounds that they failed to meet the threshold of gender parity as provided in the Constitution as all the candidates nominated were men, *Federation of Women Lawyers and 5 others v The Judicial Service Commission and Another* discussed in earlier in this chapter and *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*.<sup>268</sup> The common thread of the judgments is an unpopular view that gender equity is to be achieved progressively, despite the language in the Constitution connoting mandatory obligations for its immediate enforcement. The Chief Justice Willy Mutunga held a contrary view in his dissenting opinion, commenting in obiter,

“ Substantive equality involved taking certain measures, including affirmative action, to reverse negative positions that have been taken by society’ and that “where such

<sup>267</sup> Petition No.6 of 2011, [2011] eKLR

<sup>268</sup> Advisory Opinion No.2 of 2012, [2012] eKLR

negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive.”

These cases elaborate on the constitutional crisis created by the lack of adherence to gender equality and gender parity principles, and the judicial pronouncements demonstrate in the very best a nonchalant attitude of Courts in the upholding of the values of the Constitution, and at worst a sheer contempt for the Constitution, particularly on gender equality.

Nonetheless, the Advisory Opinion prompted a legislative effort to secure the two-thirds gender principle as outlined in the Constitution. On 3rd of February 2014, the Attorney General constituted a Working Group on the Implementation of the Supreme Court Ruling on the Attainment of the Two-Thirds Gender Principle. The membership comprised of the Attorney General’s Office, Ministry of Devolution and Planning (Directorate on Gender), National Gender and Equality Commission (NGEC as Convener), Independent Electoral and Boundaries Commission, Office of the Registrar of Political Parties; Commission on the Implementation of the Constitution; Commission on Administrative Justice; Parliament (Committees on the Implementation of the Constitution and Legal Affairs, respectively); Kenya Women’s Parliamentary Association and FIDA –Kenya.

In pursuit of the Constitutional requirement on public participation, the Technical Working Group (TWG) invited members of the public to submit proposals on a mechanism for the attainment of the Two-third gender in the National Assembly, the Senate, and representation of marginalized groups in line with Article 100 of the Constitution.<sup>269</sup> The TWG made the following key proposals<sup>270</sup>;

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<sup>269</sup> Open Call to the Public for Proposals on the attainment of the Supreme Court Advisory Reference No. 2 of 2012 on the Two-thirds Gender Principle, in line with Article 10 of the Constitution available at <http://www.ngeckkenya.org/news/6069/open-call-to-the-public-for-proposals-on-the-attainment-of-two-thirds-gender-principle> last accessed on 17th September 2016.

<sup>270</sup> Joint Press Statement on the Realization and Implementation of the Two-Thirds Gender Principle, Ministry of Devolution and Planning available at <http://www.devolutionplanning.go.ke/wp-content/uploads/2015/04/Joint%20Press%20State.pdf>

1. **Option 1:** To amend the Political Parties Act, IEBC Act and the Elections Act so as to provide an opportunity for more women to participate in the elective politics at every level.
2. **Option2:** Lifting of the inclusions of Article 177 to Articles 97 and 98 to achieve Two-Thirds representation in Parliament through nominations, in the event that Two-Thirds Gender principle is not achieved through the normal election process.

However on 30<sup>th</sup> April, 2015 **The Two Third Gender Rule Laws (Amendment) Bill 2015**, otherwise referred to as a the Chepkonga Bill<sup>271</sup> was introduced to Parliament proposing the progressive realization of this principle-through a parallel process and at the expense of that of TWG.<sup>272</sup>

The second option proposed by the TWG was received with resistance, with critics leveling criticism on the basis of a bloated budget to support it. This argument, labeled as “hypocritical, misleading and fallacious”<sup>273</sup> was negated by an empirical study conducted by the Institute of Economic Affairs<sup>274</sup> pegging the burden on each taxpayer at approximately 57 Kenyan shillings in order to implement the two-thirds gender principle.

The Advisory Opinion prescribed a timeframe for the necessary legislative measures to be put in place, with a set deadline of 27<sup>th</sup> August, 2015, renewed for a year to 27<sup>th</sup> August 2016. The TWG Bill was defeated in two attempts on 28<sup>th</sup> April 2016 and 5<sup>th</sup> May 2016. The deadline has since passed plunging the country further in a constitutional crisis and quagmire, thereby entrenching abject impunity on gender equality.

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<sup>271</sup> [http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/TwoThirdGenderRuleLaws\\_Amendment\\_Bill2015.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/TwoThirdGenderRuleLaws_Amendment_Bill2015.pdf)

<sup>272</sup> In Article 3(2)

<sup>273</sup> Kennedy Kimani, ‘One Step Forward, Two Steps Back with Regards to Gender Equality in Kenya’, Institute for Education in Democracy. Accessed 21<sup>st</sup> September 2016. <http://iedafrica.org/index.php/component/content/article/118-homepage/158-one-step-forward-two-steps-back-with-regards-to-gender-equality-in-kenya>

<sup>274</sup> Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation, The National Women’s Steering Committee & Institute of Economic Affairs, (May 2015). See <http://www.ieakenya.or.ke/newsevents/cost-of-implementing-the-constitutional-two-third-gender-principle#>

#### 4.6 Patriarchy, masculinities and masculine norms affecting Gender constitutionalism in Kenya

Patriarchy and masculinities have undoubtedly played a part in the quest of gender constitutionalism in Kenya. Patriarchal attitudes and norms can be observed in both men and women charged with the responsibility of implementing gender equality, and is evidenced in the gender insensitive language and attitudes displayed when creating or implementing norms on gender equality.

In the consideration of the Marriage Bill, arguments presented by male and female members of parliament were indicative of patriarchal undertones. In the consideration of a clause requiring a wife's consent for the introduction of a second wife for example, Mr. Chepkonga, the Chairperson of the Justice and Legal Affairs Committee is reported to have said,

“Any time a man comes home with a woman, that would be assumed to be a second or third wife. Under customary law, women or wives you have married do not need to be told when you're coming home with a second or third wife. Any lady you bring home is your wife.”<sup>275</sup>

Another male Member of Parliament, Junet Mohammed is recorded to have commented, “*When you marry an African woman, she must know that a second one is on the way, and a third wife...this is Africa*”<sup>276</sup>.

Within the context of constitutional implementation of gender equality, I hold the view that there has been a preoccupation with the numbers; getting more women into the fold of decision making and political spaces, which forms the bedrock of the ‘*critical mass theory*’ of which threshold after which women's numerical presence is deemed to accumulate to influence, and women will incorporate women's experiences into decision making.<sup>277</sup> While increasing participation is critical to reach the ideals of

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<sup>275</sup> John Ngirachu, “New law allowing polygamy passed”, Daily Nation, 20<sup>th</sup> March 2014

<sup>276</sup> “Kenyan Parliament passes polygamy law”, Aljazeera, 21<sup>st</sup> March 2014

<sup>277</sup> ‘Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership’, Report of the Expert Group Meeting, Addis-Ababa, Ethiopia, United National Division for the Advancement of Women (DAW), Department of Economic

equal participation of women and men in decision making and political processes, a focus should be on both men and women in decision making roles relinquishing patriarchal attitudes and masculinities that are to the detriment of the equal protection of women. Indeed, authors aver that women's inequality cannot be addressed simply by increasing the participation of women, as this will most likely result in the success of those women who are male-centered and male-identified, who conform to patriarchal values and do not necessarily threaten patriarchal order.<sup>278</sup> Case in point is criticism levied on Hon. Justice Njoki Ndungu, for not aligning her position on the immediate realization of gender parity, unlike her male colleague Hon. Chief Justice Mutunga. This is more so owing to the fact that Hon. Ndungu served as a member of the Committee of Experts<sup>279</sup> that ushered in the new constitutional dispensation of 2010, and in her role as former member of Parliament, was the architect of amendments to the Political Parties Act 2007 on affirmative action measures for women in political participation.<sup>280</sup>

While it is arguable that women do have some shared life experiences that may inform their judicial reasoning<sup>281</sup> these view points are not automatically brought on board to the bench. Research from South Africa does not support this notion, and suggests that no solid evidence supports the assertion that for example in the magistracy that is occupied by almost 40% women, justice dispensed in that part of the legal system has become more understanding of women's problems and perspectives, nor that female magistrates have been particularly active in challenging patriarchal attitudes, legal rules or interpretations.<sup>282</sup> A commonly held view is that judicial neutrality does not exist in adjudication; it cannot be divorced from values, prejudices and assumptions held by a judge.<sup>283</sup> Indeed the ideological perceptions,

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and Social Affairs (DESA), Economic Commission for Africa (ECA), Inter-Parliamentary Union (IPU) EGM/EPDM/2005/REPORT

<sup>278</sup> Johnson, A.G, 'The Gender Knot: Unraveling Our Patriarchal Legacy', 3<sup>rd</sup> Edition, (Philadelphia: Temple University Press, 2014) 3-23

<sup>279</sup> Appointed via Gazette Notice No. 1739, Vol.CXI-No.17 pursuant to Section 8 of the Constitution of Kenya Review Act, 2008.

<sup>280</sup> *Judicial Profiles*, 'Hon.Lady Justice Njoki.s.Ndun'gu, Judge of the Supreme Court of Kenya'. Accessed 15<sup>th</sup> September 2016. <http://kenyalaw.org/kl/index.php?id=3327>

<sup>281</sup> Reynolds JR, and Keith S. "Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis." (2002) pp.665–702

<sup>282</sup> Dawuni, J, *Gender and the Judiciary: An Introduction*. In Bauer, Gretchen and Dawuni, Josephine (eds). In *Gender and the Judiciary in Africa: Moving from Obscurity to Parity?* New York; Routledge

<sup>283</sup> Miller, A.S, 'The Myth of Neutrality in Constitutional Adjudication' *University of Chicago Law Review*, Vol.27, Iss.4 (1960)

values and commitments on gender equality may influence judicial outcomes more than the sex of an adjudicator. As has been observed, women judicial officers often have to conform and assimilate to masculine judicial norms and modes of thinking to navigate the judicial terrain.<sup>284</sup>, and may adopt a masculinized way of thinking as a result.

#### 4.7 Kenya’s Reporting Status of Various Gender Equality Related Instruments

<b>Kenya’s Reporting Status of Various Gender Equality related instruments</b>		
Reporting Status on AU Protocol under Article 9 of SDGEA Reports	Not reported since 2005	4 reports due
Reporting to the CEDAW Committee	Combined 3 <sup>rd</sup> and 4 <sup>th</sup> periodic reports Combined 5 <sup>th</sup> and 6 <sup>th</sup> periodic reports	
Reporting under Article 26 of the Maputo Protocol	No report since 2010	2 reports due

**Table 6**

<sup>284</sup> K. Mack & S. Roach Anleu, ‘Skills for judicial work: Comparing women judges and women magistrates’, in U. Schultz & G. Shaw (eds.), *Gender and Judging*, 2013, pp. 227-228.

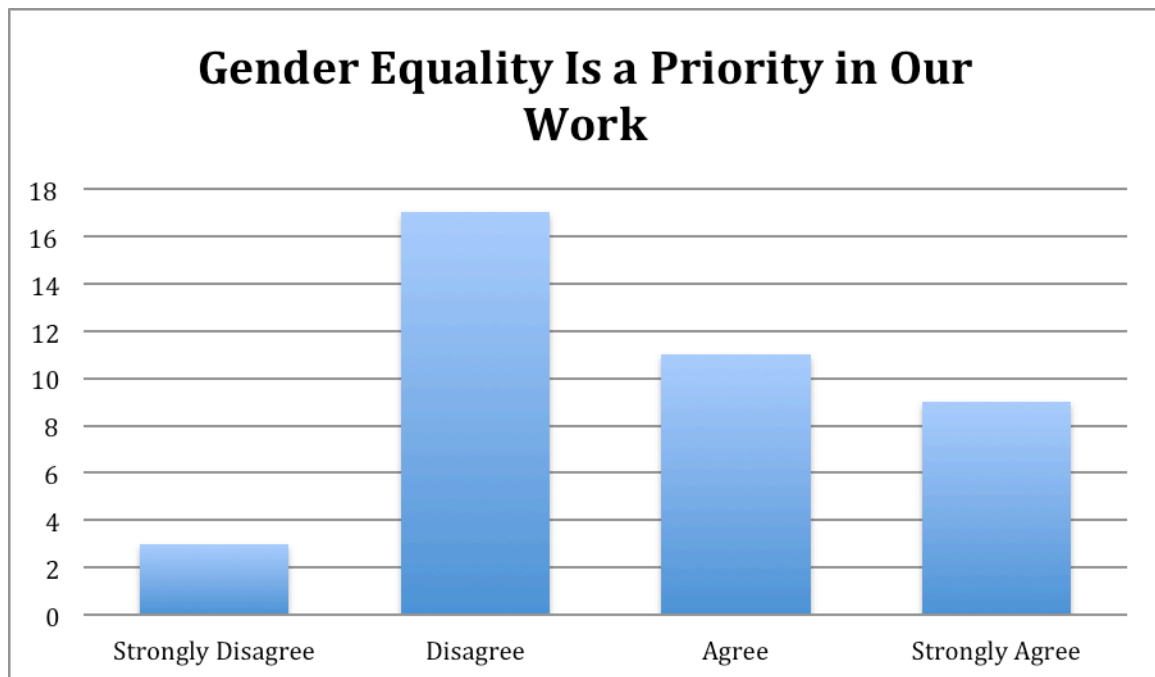


## 5. CHAPTER 5 RESEARCH FINDINGS AND ANALYSIS

### Gender equality is a Priority in our work

The survey results support interviewee perceptions that gender equality is not a priority in their work. The figure below depicts that most respondents who answered the question disagreed.

One participant commented, “*We only really hear of gender when we are asked to contribute to a Government report to the UN*” which would suggest that it is not a common phenomenon in their every day business.



### What are the major challenges in the implementation of Gender equality?

Interviewees supported the perception that inadequate financing towards government projects and programs geared towards implementation of gender equality in different government sectors contributed to the lack of implementation.

An equally large number of those interviewed held the opinion that lack of political will was the major challenge faced in the implementation of gender equality.

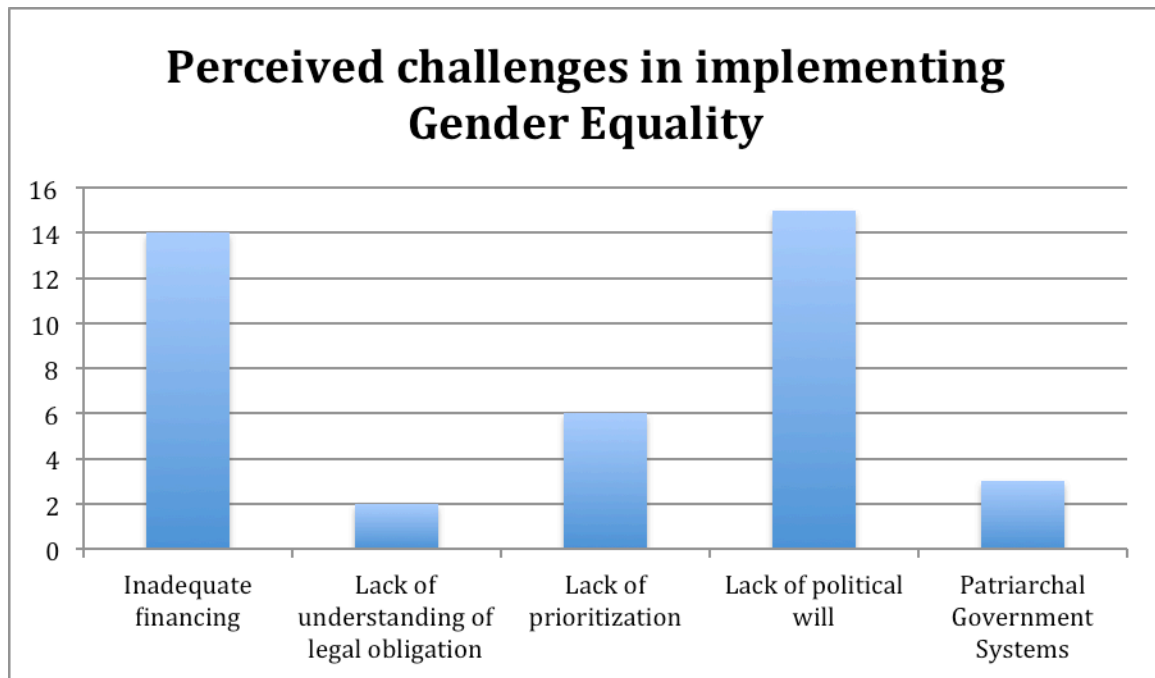
One interview commented, “ *Gender equality is not high in the agenda of politicians, in fact for most politicians it is not in their agenda at all*” which would suggest that lack of political will coupled with lack of prioritization are major contributing factors to the lack of implementation of gender equality.

Participants were generally of the view that within all the three major arms of government, implementation of gender equality was anecdotal. Some participants held the view that the “*people in power come from a society that does not value gender equality generally*” suggesting that the wider social context in which these perceptions of gender equality were perpetuated reflected within Government agencies and duty bearers tasked with the implementation of gender equality.

Wafula<sup>285</sup> suggests that the lack of compliance with gender equality obligations on the part of the State is attributable to the lack of commitment or otherwise commonly referred to as lack of political will on the part of the political leadership on the country. He notes that male dominance continues to thrive within the realm of politics and obstructs the quest for gender equality in Kenya.

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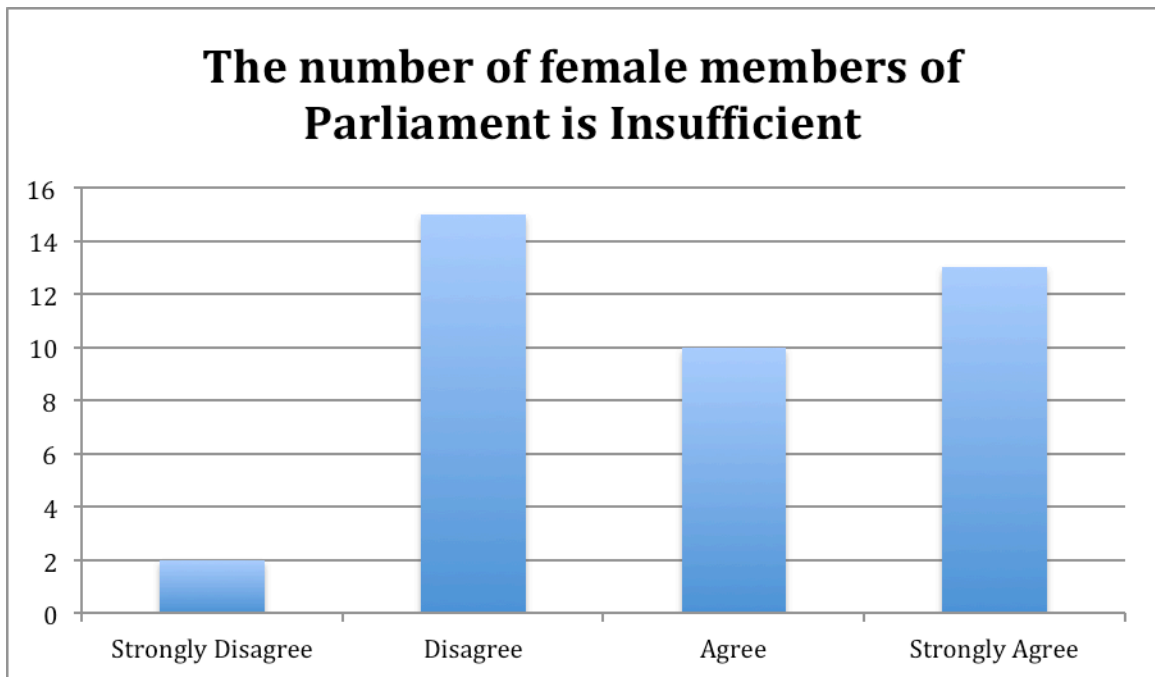
<sup>285</sup> Wafula, K.A., ‘The State of Compliance In the International Gender Related Instruments in Africa: The Case of Kenya’ (MA Thesis, University of Nairobi, 2015)



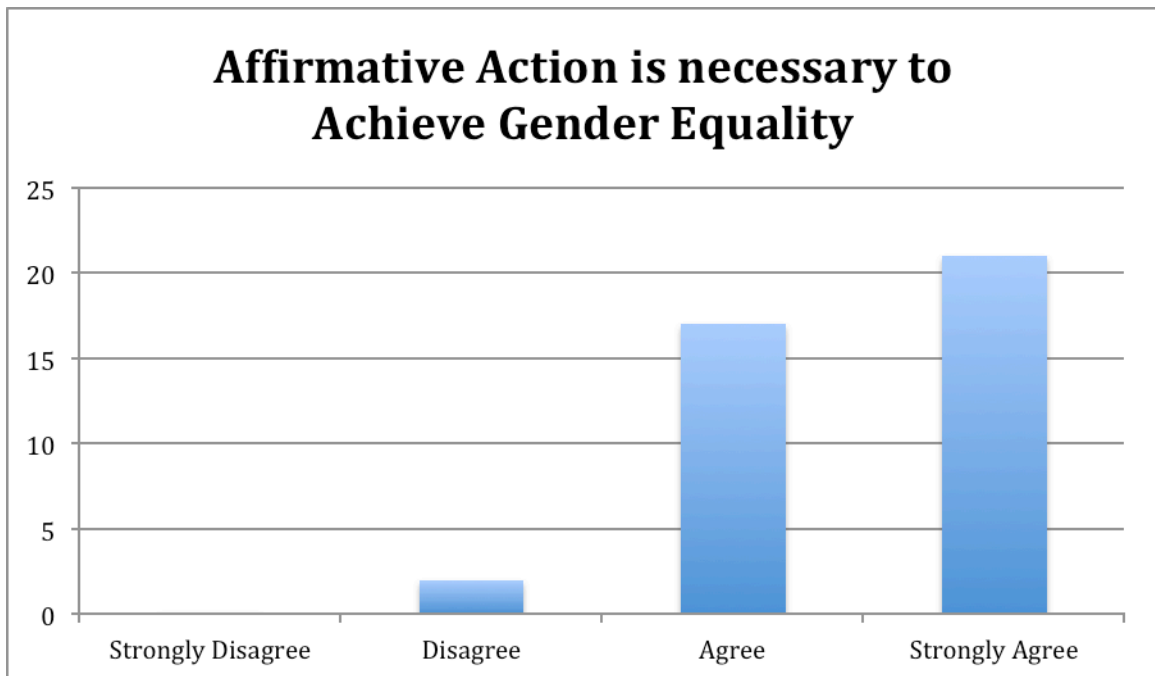
Participants were generally of the view that most duty bearers understood the laws governing gender equality, national, regional and international in nature, however the challenge was the willingness to implement them. One respondents comments are indicative of this general observation, *“What we lack is not laws and policies, in fact we have some of the best laws and policies on gender in the continent; what we lack is good will of politicians to implement the laws. They will often say that the Government doesn’t have money, but some of the implementation measures do not necessarily require money, like making sure appointments in Cabinet live up to the gender parity principle”*.

A few respondents held the view that patriarchal institutions and attitudes contributed to the lack of implementation of gender equality. Those that did, argued that the duty bearers charged with the implementation of gender equality had prejudiced attitudes and bias towards gender equality, which were manifested in the lack of seriousness accorded to achieving gender equality.

**Perceptions on whether the number of female members of Parliament is insufficient**



**Attitudes towards Gender Equality and Affirmative Action in political participation**



The responses from male and female respondents in favour of affirmative action was not based on that fact that it was seen as a measure to correct gender inequalities in political participation, but more so because certain gender stereotypes of femininity were favourable within the political space, for example women are seen to be “more peaceful”, “kinder” and “more diplomatic” than their male counterparts. Female respondents particularly, indicated that more women needed to be in parliament to “*fight for the wellbeing and rights of other women*”.

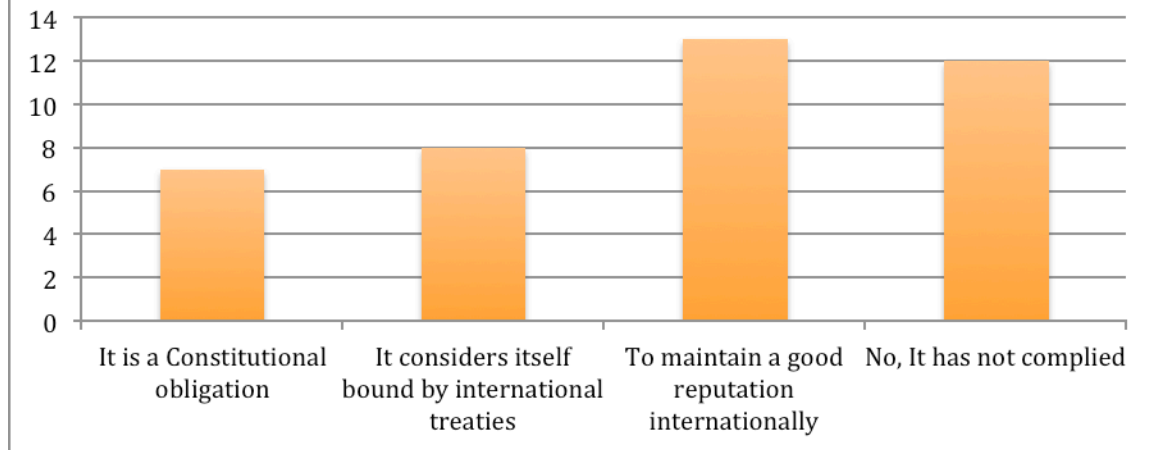
The respondents who were against affirmative action equally based their position on the fact that men are more suited for the job, because “*politics in Kenya is a dirty game*” and “*one cannot be weak to survive in politics*”.

Responses received implied that there was a strong resistance to gender equality and unprogressive attitudes towards affirmative action; often seen as operating unfavourably for men and favouring women. As one respondent stated;

“ *We gave them (women) the Women Rep Seat and now they are greedy and want more seats in parliament handed to them without working for it. They must work for it just as we do.*”

The conceptual and normative understanding of gender was noted to be lacking within the stakeholders interviewed. Gender is often seen as synonymous to women and at times assigned the meaning of “against men”, proving a considerable challenge to any attempts to implement gender equality.

## Why Does the Kenya Government comply with its International Gender Equality Obligations



### Conclusions Based on the Data

The data set in this study provides considerable evidence to support the claim that implementation of international treaties provisions on gender equality is significantly challenging in the Kenyan context. The appreciation of gender equality is relatively weak and inconsistent among duty bearers.

The data collected in this study appears to support the conclusion that Government's actions compliance with gender equality obligations is conditioned by gender stereotypes. A possible explanation is that the systems and institutions charged with the mandate of implementing gender equality are inherently patriarchal; and contribute to the sustenance of male privilege and inequitable norms.

My research supports the argument that the lack of political will or the unwillingness of men to support efforts to make gender equality a reality particularly within the political participation realm is the manifestation of selfish interests of politically masculinized individuals who inherently have an acute desire to maintain rather than

redistribute power. Achieving gender equality is seen as a significant threat to maintaining status quo of privilege and power.

Additionally, there is a profound level of impunity and lack of accountability with regard to the lack of enforcement of constitutional safeguards on gender equality.

## 6. CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

This Chapter concludes by making recommendations for the effective implementation of gender equality.

### Conclusion

Gender equality is still pervasive in the Kenyan context as there is little evidence to support significant changes in patriarchal attitudes and norms of the men and women obligated to ensure its effective implementation. There are still strong cultural and social norms that perpetuate power imbalances between men and women. While men usually have more agency than women in their lives, men's decisions and behaviours are also profoundly shaped by rigid social and cultural expectations related to masculinity.<sup>286</sup>

Welch<sup>287</sup> observes that a central problem may exist with the norm of non-discrimination, and constitutionally guaranteed equal opportunity cannot quickly change deeply engrained cultural norms, which reinforces the old cliché that changing the law is easier than changing society.<sup>288</sup> Gender-neutral constitutional language may not suffice if the goal desired is real equality in terms of proportion. Perhaps a norm of the widest possible participation rather than a legalistic emphasis on nondiscrimination, could lead to results more compatible with equality between the sexes.<sup>289</sup>

Gender inequalities are constructed and perpetuated by unequal and unjust power relations between men and women, as well as among men and women<sup>290</sup>; and therefore to correct these inequalities would necessitate transforming gender norms and the underlying power relations, structures and systems that maintain inequalities between men and women.<sup>291</sup> The hypothesis of this research is confirmed, to the extent that gender responsive constitutions and gender constitutionalism have no

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<sup>286</sup> MenEngage Alliance, *supra* note 91 at 7

<sup>287</sup> Ibid

<sup>288</sup> Allot, A, *The Limits of the Law* (London, Butterworth, 1980), 76-100

<sup>289</sup> Welch, 'Human Rights and African Women' *Supra* note 178

<sup>290</sup> MenEngage Alliance, *supra* note 91 at 16

<sup>291</sup> MenEngage Alliance, *supra* note 91 at 13



correlation in the Kenyan context. It will indeed take a significant concerted effort on duty bearers to make the gender provisions in the Constitutions a reality. Therefore as a society, we must deeply reflect on the latter, beyond policies and laws, to a genuine transformative justice agenda, grounded on genuine attempts to achieve gender equality, through effective implementation of constitutional safeguards by all three arms of government.

Broadly, the following recommendations have emanated from the research;

### **6.1 Further research**

While this project set out to contribute to knowledge to inform policy formulation and national debates in so far as gender equality is concerned and provided valuable insights on the same, it does not provide a holistic account of the complex questions surrounding patriarchy and male dominance of duty bearers obligated to implement gender equality obligations that stem from Kenya's acquiescence to international treaties and as provided in her constitution. Therefore, there is need for further research to look into these complex questions more broadly. Continuous monitoring and evaluation of the implementation of gender equality must be undertaken, to move from de facto equality to de jure equality, thereby achieving equality in results and not just equality in laws and policies.

### **6.2 Dismantling patriarchal attitudes and norms**

A strategy to dismantle patriarchy and tackle it in all its forms should be implemented nationwide to improve efforts at advancing gender equality.

### **6.3 Training of Duty Bearers**

There is need for targeted training and capacity strengthening on gender equality, power dynamics and the effects of patriarchy among duty bearers charged with responsibilities to implement gender equality in the different arms of government.

#### **6.4 Increasing awareness and conscious raising**

As evidenced in the research, societal attitudes and dispositions that maintain patriarchal attitudes and norms need to be tackled with effectively through increasing awareness on gender equality and raising the collective consciousness of Kenyans to embrace the principle. These efforts can be initiated by the State, civil society organizations, religious leaders, media et cetera.

#### **6.5 Strengthening accountability for gender equality violations**

Accountability for violations of the principle of gender equality needs to be strengthened. Lack of implementation and poor interpretation of the principle of gender equality, coupled with the culture of impunity and contempt for the rule of law continues to threaten the full realization of this principle. Therefore accountability measures should be strengthened, both domestically and within regional and international treaty mechanisms to compel the State into action. Institutions and individuals with a mandate related to the implementation of gender equality must be subject to regular evaluation of their impact and performance towards substantive and transformative equality. There must be consequences to the lack of implementation of gender equality principles at all levels. Political vigilance of the citizenry of Kenya is necessary to hold duty bearers accountable.

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