CHIMERA OF CONSTITUTIONALY ENTRENCHED GENDER QUOTAS: THE CASE OF KENYA

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Abstract

In 2010, Kenya adopted a new constitution that in a break from the past entrenches equality and decrees against discrimination. The Constitution provides that to give full effect to the realisation of the right to equality, legislative and other measures such as affirmative action programmes and policies ‘designed to redress any disadvantage suffered by individuals or groups because of past discrimination’ shall be undertaken by the State. Further that ‘not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.’ This is a robust exposition of the right to equality and non-discrimination by any standard. It would be assumed that having constitutionalised these laudable principles, the enforcement of equality and non discrimination on grounds of sex would be easy and straightforward. However, in the short period that the constitution has been in operation, implementation of the constitutionally entrenched principle of gender equality in the areas of political representation and appointments to public offices has been resisted notwithstanding the fact of entrenchment. This chapter interrogates the chiasmus that exists between constitutional entrenchment and the practical application of affirmative action principle in a contested terrain where different variables stand in the way of the realisation of the equality and non-discrimination principles.

I Introduction

The contemporary surge in constitution making across the African continent has been motivated by the need to solve several problems, of both society and state. Yash Ghai has argued that ‘[i]n particular they aim to promote values and framework of nation building as well as to restructure the state.’ Constitutional reform in Kenya was informed by the understanding that the independence Constitution did not adequately meet the expectations of the people, including women who were left out of the power map. Constitutional reforms offered an opportunity for the country to design a system that would guarantee political stability, fair representation and sustain nation-building efforts.

The promulgation of the new Constitution, in the year 2010 was a culmination of a long struggle spanning a period of over twenty years. At the heart of this long and torturous

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journey was women’s struggle for gender equality, fuelled by a desire to free themselves from a life of patriarchal oppression and discrimination.\textsuperscript{4} The Constitution of Kenya, 2010 (Constitution) unequivocally and unambiguously provides for equality of subjects in the following terms: ‘Every person is equal before the law and has the right to equal protection and equal benefit of the law’.\textsuperscript{5} It goes on to elaborate that ‘equality includes the full and equal enjoyment of all rights and fundamental freedoms’\textsuperscript{6} and that ‘women and men have the right to equal treatment’\textsuperscript{7} and opportunities ‘in political, economic, cultural and social spheres’.\textsuperscript{8} This call to equality is further buttressed by the exhortation of the state and other persons not to directly or indirectly discriminate against any person on any ground.\textsuperscript{9} The list of objectionable grounds on which discrimination may not be based is wide and includes: ‘race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.’\textsuperscript{10} Crucially, it provides that to give full effect to the realisation of the rights guaranteed, legislative and other measures such as affirmative action programmes and policies ‘designed to redress any disadvantage suffered by individuals or groups because of past discrimination’ shall be undertaken by the State.\textsuperscript{11} Further that ‘not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.’\textsuperscript{12}

This is a robust exposition of the right to equality and non-discrimination by any standard. It would be assumed that having constitutionalised these laudable principles, the enforcement of equality and non-discrimination on grounds of sex would be easy and straightforward. However the record of achievement is poor and the value of gender equity in governance has been disregarded. The failure to mould the practices of the state to adhere to the Constitution’s stated aim of gender equity, a key feature of the egalitarian vision of the Constitution, raises the concern of whether constitutional entrenchment is ornamental without substantive bite.

The contested implementation of gender quotas in Kenya is the subject of this Chapter. The chapter is divided into five parts. Part I lays the basis for the ensuing critique. Part 2 discusses the historical place of women in public life in Kenya and the process leading to the entrenchment of gender quotas in the Constitution. The section also provides an overview of the advocacy that informed the entrenchment of gender quotas in the Constitution. Part 3 delves into an exposition of the gender quota system envisaged in the Kenyan Constitution. Part 4 interrogates the implementation of gender quotas in the quest for substantive equality. This section also addresses the legitimacy of gender

\textsuperscript{4} M Nzomo ‘Kenya: The women’s movement and democratic change’ in LA Villalon & PA Huxtable (eds) The African state at a critical juncture: Between disintegration and reconfiguration (1998) 167 (discussing the various efforts of women during the period of activism for multi-partyism in the 1990s).
\textsuperscript{5} Article 27(1) of the Constitution of Kenya, 2010 (Constitution).
\textsuperscript{6} Article 27(2) of the Constitution.
\textsuperscript{7} Article 27(3) of the Constitution.
\textsuperscript{8} As above.
\textsuperscript{9} Article 27(4) and (5) of the Constitution.
\textsuperscript{10} Article 27(4) of the Constitution.
\textsuperscript{11} Article 27(6) of the Constitution.
\textsuperscript{12} Article 27(8) of the Constitution.
quotas as an affirmative action mechanism and whether gender mainstreaming is subject to immediate or progressive realisation. Part 5 discusses lessons that constitution making in other countries can draw from the contested implementation of gender quotas in Kenya.

II The process leading to the constitutional entrenchment of gender quota

Since Kenya attained formal independence in 1963, women have sought to effectively participate alongside men in governance and decision-making in all aspects of public life. For the first three decades of post-colonial governance, progress was painfully slow. This was due to a combination of structural obstacles: deeply embedded patriarchal socio-cultural values, undemocratic institutions, buttressed by equally undemocratic and gender-blind legal and policy frameworks and low levels of civic and gender awareness. In this institutional and socio-cultural environment, it is hardly surprising that despite the active and effective role women played in colonial liberation struggles, the first post-independence government under the late President Kenyatta did not have a single woman member of parliament. The argument to justify this state of affairs was that there were no qualified women. The presence of women in politics and public decision-making institutions remained dismal several decades later, despite the large pool of highly educated women in the country.

Kenya reverted to a multi-party political system in 1992 and formally adopted a democratic stance. But in reality, democracy in Kenya remained elusive in the context of an undemocratic legal framework and political culture. There was, however, adequate political space for political mobilisation, articulation of demands, and to some extent, engagement of the intransigent state. This inspired the emergence of a progressive, feminist-led women’s movement that engaged in gender activism, gender sensitization and mobilisation, capacity building of women political leaders, socio-economic programmes for poor women, and lobbying for constitutional reform. This feminist movement—led by a cross-section of well-educated women from the academy, legal practice and national women’s NGO’s—spearheaded the 1990s women’s movement, dubbed the second liberation struggle.

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17The first liberation was from colonial oppression. The second liberation has been a struggle for substantive structural and transformative change for democratic governance, sustainable development, equity and social justice. Some of the Kenyan feminists’ political and socio-economic activities, especially in the 1990s, are well documented in M Nzomo & K Kibwana (eds) *Women’s initiatives in Kenya’s democratization* (1993); M Nzomo *et al* (eds), *Democratic change in Africa: Women’s perspective* (1993); M Nzomo (eds) *Empowering Kenya women* (1993).
The post-1991 feminist activism generated some notable successes over the years. These included remarkable improvements in civic, gender and human rights awareness strategies for policy and advocacy interventions. However, there was dismal performance in increasing women’s numerical strength in all public decision-making bodies-most notably, in parliament.¹⁸

Before the March, 2013 General Elections, the first under the 2010, Constitution, women representation in parliament had been dismal as borne out by the table below.¹⁹

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¹⁸These figures are derived from data on 188 countries, on the basis of information provided by national parliaments by 31 January 2013 and compiled by the Inter-Parliamentary Union. See http://www.ipu.org/wmn-e/classif.htm (accessed 30 February 2013).

The two decades preceding 2010 was marked by concerted and consistent efforts by Kenyan women to gain access to the centers of power. Furthermore, women’s groups in civil society engaged in gender sensitization, mobilisation and lobbying for a gender-responsive Constitution that would restore women’s rights and provide for affirmative action.

The struggle for affirmative action in Kenya can be traced to the early 1990s. In 1996, the Hon. Charity Ngilu motivated for parliamentary implementation of the Beijing Platform for Action.\(^\text{20}\) The motion did not pass. In 1997, Hon. Phoebe Asiyo tabled the first Kenya-specific affirmative action bill in parliament, but it also failed to garner support—due, to lack of support from the male dominated parliament. This resulted in the birth of the Kenya Women’s Political Caucus (KWPC), an organisation constituted to lobby for and influence issues relating to constitutional review, economic participation and legal rights of women among others.

\(^{20}\)This was a proposal for affirmative action in favour of women.
Three years later, on 20\textsuperscript{th} April 2000, Hon. Beth Mugo sponsored a bill to increase representation in decision-making organs (primarily in political parties)- not just of women, but also of other marginalized groups.\textsuperscript{21} The Bill proposed that at least 33 per cent of the total number of seats in Parliament and Local Authorities be reserved for women. It also proposed the creation of the office of district women representatives throughout the country. The Bill’s target of a significant women presence in Parliament and Local Authorities was based on the rationale that the two organs are the top governance and decision-making institutions, where the voices of both women and men have to be heard. The two organs make laws and are entry points for affirmative action. Once women occupy these organs, affirmative action can be extended to other sectors such as the provincial administration, managerial positions in the private sector and political parties, among others. In its memorandum of objects and reasons, the draft bill pointed out that ‘a greater proportion of women legislators will contribute to redefining political priorities, placing new items on the political agenda that reflect and address women’s gender specific concerns’. Although this bill would have been an important tool for enforcement of policies and implementation of programmes for actualising gender goals, it was rejected by Parliament.\textsuperscript{22}

During the constitution review process, women lobby groups lobbied for and ensured the inclusion of women in the organs of constitutional review process. During the process, human rights and more specifically the rights of women formed a cross-cutting concern. The positive indicator of this was the inclusion and acceptance of the principle of one-third women representation in the Constitutional Constituency Fora which were formed in every constituency to facilitate the work of the Constitution Review Commission (Commission) on the ground. The discussions held at this level significantly contributed towards grounding of the principles of gender equality and equity in the reform process.\textsuperscript{23}

Gender mainstreaming was recognised as an indicator of democratisation process and was included in the ‘Constitutional review process in Kenya: Issues and questions for public hearings’ the publication that formed the broad guidelines for the public as they presented their views and memoranda to the Commission, for discussion at Constituency Fora, and for the Commission itself in the collection of views.\textsuperscript{24} The National Constitutional Conference (Bomas) consisted of 629 delegates out of whom more than a third were women. The women’s movement was recognised as a nominating body and indeed nominated delegates to the conference. Each district nominated three delegates one of whom had to be a woman. Political parties, religious organisations and civil society organisations also sent women delegates. The principle

\textsuperscript{21} See WM Kabira \textit{Time to harvest: Women and constitution making in Kenya} (2012).


\textsuperscript{23} Centre for Multiparty Democracy ‘Towards a gender responsive constitutional dispensation: An interrogation of the constitution review framework and amalgamation of gains for women’ (2009) 5.

\textsuperscript{24} Centre for Multiparty Democracy (As above).
of one third representation and the attendant affirmative action was used to ensure women’s voice in the organs of the review process.\(^{25}\)

Through concerted lobbying by women leaders, affirmative action measures were included in the 2005 draft Constitution, which was subjected to a national referendum held in November 2005. The draft Constitution was rejected, putting affirmative action on the back burner once again.\(^{26}\) The next attempt to secure affirmative action was through the Constitution of Kenya (Amendment) Bill 2007 on affirmative action, which sought to create fifty automatic seats for women in the tenth parliament, along with an additional forty electoral constituencies. The bill was rejected on several grounds. These included purported lack of consultation and failure to secure broad consensus both within and outside the governing party. Some MPs also claimed discomfort with the proposed bill’s focus on women to the exclusion of other marginalized and vulnerable groups, including the physically challenged, youth, and those from minority communities and religious groups.

In August 2010, the twenty years of struggle for a new constitution yielded a very progressive legal and political instrument. The new Constitution not only provides for affirmative action, but guarantees women and men equality of rights and duties, and removes all forms of discrimination in both legal and social practice.

### III Quotas as an affirmative action measure in the Constitution

A central concern for women campaigning for the recognition of gender rights in the new Constitution was that constitutional recognition of the right to equality should not be limited to a right to formal equality.\(^{27}\) The idea that women should be able to secure rights only when they could demonstrate that they were similar to men was the antithesis of what women struggled for. Instead, it was hoped that there would be recognition that the oppression of women was a structural part of a system which necessitated the adoption of substantive equality that would help ensure that constitutional rights could be used to address real disadvantage.\(^{28}\) The need for constitutional entrenchment of this particular principle was significant as it meant that affirmative action and other special measures taken to achieve equality were not to be viewed as exceptions but as an intrinsic part of the right to equality.

Affirmative action measures are designed to accelerate the achievement of equality. They are particularly geared towards reversing the legacies of inequality and discrimination. In the case of women’s right to participate in public life, affirmative action

\(^{25}\) Centre for Multiparty Democracy (As above).


measures address the issue of under-representation occasioned by discriminatory laws, customs, religion, patriarchy and the public/private divide.

Affirmative measures are endorsed in various international instruments and are further elaborated upon in general comments (GC) and general recommendations (GR) of different treaty bodies.\textsuperscript{29} Article 4(1) of CEDAW referred to as the affirmative action provision reads:

\begin{quote}
Adoption by States Parties of temporary special measures aimed at accelerating \textit{de facto} equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when objective of equality of opportunity and treatment have been achieved.
\end{quote}

The Committee on CEDAW has echoed this provision on various occasions. In GR No 5 the Committee ‘[r]ecommends that state parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women’s integration into education, the economy, politics and employment.’\textsuperscript{30} GR No 23 states that ‘[u]nder Article 4, the Convention encourages the usage of temporary special measures in order to give full effect to Articles 7 and 8.’\textsuperscript{31} GR 25 clarifies what temporary special measures are and notes that ‘[s]tates parties that adopt and implement such measures under the Convention do not discriminate against men.’\textsuperscript{32} The UN Human Rights Committee (HRC), in its GC No 25 on article 25 of the International Covenant on Civil and Political Rights (ICCPR) dealing with participation in political and public life noted that, ‘[a]ffirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens’.\textsuperscript{33} The African Women’s (Maputo) Protocol also enjoins states parties to take ‘specific positive action’ to promote participative governance and the equal participation of women in the political life of their countries through ‘affirmative action’.\textsuperscript{34}

Affirmative action can therefore be said to envisage ‘a policy response to the fact that, despite constitutionally guaranteed equal rights for men and women, women are underrepresented in public and professional life.’\textsuperscript{35} Temporary special measures are therefore, corrective, compensatory and promotional in nature.\textsuperscript{36} Affirmative action is

\begin{footnotes}
\item[29] In particular the HRC and Committee on CEDAW.
\item[30] Committee on CEDAW, \textit{Temporary special measures}, GR No 5 UN Doc. HRI/Gen/1/Rev.4.
\item[31] Committee on CEDAW, \textit{Political and public life}, GR 23 UN Doc. HRI/Gen/1/Rev.1.
\item[32] Committee on CEDAW, GR 25 para18.
\item[33] Human Rights Committee, \textit{Participation in political and public life}, GC No 25 UN Doc. HRI/Gen/1/Rev.4; GC No 18 on Non-discrimination also advocates for implementation of TSMs.
\item[34] See art 9(1) of the Protocol to the African Charter on the Rights of Women in Africa.
\end{footnotes}
therefore an overarching umbrella concept that covers all measures geared towards redressing past and current discrimination. Quotas and reserved seats fall within its generic meaning.

Quotas may be defined as an affirmative measure that establishes a fixed percentage or number for the nomination or representation of a specific group most often in the form of a minimum percentage. Quotas operate as numerical reservation for the targeted group independent of the competitors’ respective qualification. They are generally used to increase the participation of under-represented groups in decision-making positions, for example, in parliaments, governments and local councils. Quotas can be designed as gender-specific or gender-neutral. Quotas for women require a minimum number or percentage of women. Gender-neutral quota provisions set a minimum and maximum for both sexes. In the case of gender-neutral quota provisions, the quota sets a maximum for both sexes, which quotas for women do not.

Gender quotas are an effective way of attaining ‘real equality’, that is, ‘equality of results.’ They are corrective and compensatory in nature with the paramount objective of addressing under-representation of women in public life occasioned by a variety of structural, ideological and psychological obstacles. There are two broad types of gender quotas, namely, mandatory quotas, usually laid down in constitutions or electoral laws and voluntary party quotas adopted by political parties out of their own volition. With reserved seats, a certain number of seats are set aside for women and this is usually done through constitutional provisions or legislation.

The Constitution promises new avenues for giving women greater participation in political and administrative processes at all levels in the country. These gains are provided for through the inclusion in the bill of rights of a legally binding affirmative action principle, backed by additional protocols guaranteeing the implementation of affirmative action through quotas and reserved seats in all appointive and electoral processes. The affirmative action provisions bind the state to ensure access to gender


39 Peters (n 35 above) 66.


45 Dahlerup(As above).
equity and to provide measures to correct historical imbalances suffered by all minorities and disadvantaged groups.\textsuperscript{46}

Several articles of the Constitution of Kenya, 2010, including but by no means limited to Articles 27(3), 27(6), 81(b), 177(b) and 197, stand out as key markers of the women’s caucus victory in Kenya’s quest for gender equality and equity in representation at the two distinct but independent levels of government in Kenya: National and County. Article 27 (3) states that ‘the state shall take legislative and other measures including affirmative action programmes and policies to redress any disadvantage suffered by individuals or groups because of past discrimination’, while Article 81 (b) states that ‘not more than 2/3 of members of elective public bodies shall be of the same gender’ and Article 177 (b) and 197 states ‘that gender principles must apply in county assemblies and the county executive committee’. However the Constitution fails to spell out how to effect these provisions. This is only cured in respect to county assemblies where the Constitution provides that a county assembly consists of special seats to ensure equitable representation of men and women.\textsuperscript{47}

The National Assembly is made up of representatives of the 290 constituencies in the country who are elected directly by voters.\textsuperscript{48} In addition, each of the 47 counties elects one woman to represent it in the National Assembly meaning that 47 seats are reserved for women.\textsuperscript{49} Further, political parties are allowed to directly nominate 12 members to the National Assembly ‘to represent special interests including the youth, persons with disabilities and workers.’\textsuperscript{50} The quota system is also adopted for Senate which consists of 47 members directly elected by voters in the counties each county being a single member constituency together with 16 women representatives, two youth representatives, a man and a woman, two disabled persons representatives, a man and a woman, and the speaker.\textsuperscript{51} Unlike in the National Assembly where the 47 women representatives are elected, the 16 in the Senate are nominated by political parties on the basis of the proportion of the seats held by their members in the Senate.\textsuperscript{52} The public service, constitutional commissions and independent offices are also required to be gender responsive.\textsuperscript{53}

The sum import of this structure is that the Constitution envisages gender quotas and reserved seats to ensure that women are included in decision making processes. The obligation is imposed as regards appointive and elective positions. Thus one would

\textsuperscript{47}Article 177(1)(b) of the Constitution stipulates that: ‘A county assembly consists of the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.’
\textsuperscript{48}Article 97 of the Constitution.
\textsuperscript{49}Article 97(1)(b) of the Constitution.
\textsuperscript{50}Article 97(1)(c) of the Constitution.
\textsuperscript{51}Article 98 of the Constitution.
\textsuperscript{52}Article 98(1)(b) of the Constitution.
\textsuperscript{53}Article 250 (11) of the Constitution stipulates that: ‘The chairperson and vice-chairperson of a commission shall not be of the same gender.’
assume that these constitutional guarantees assure Kenyan women of an opportunity to participate in the governance process.

IV Quotas in practice: Challenges to implementation and enforcement

The Constitution expressly recognises the need for measures to ameliorate disadvantages produced by past discrimination. The reason for this is undoubtedly that the Constitution ushered in a new dispensation of freedom, equality and democracy which is a departure from the previous order characterised by injustice and inequality. The question that follows is whether the entrenchment of affirmative action principles guarantees the attainment of critical mass by women in appointed and elective positions as had been hoped? The implementation of the gender quotas since the promulgation of the Constitution in 2010 suggest that the Kenyan women’s hard won provisions could be reversed, if there is no counter-veiling force against a resurgent patriarchal system.

The government has not been gender responsive in making appointments to public bodies in many instances. Moreover the achievement of the quota in respect to representation in parliament has been deferred. Judicial interpretation of equality constitutes an important site of struggle as regards the pace, nature and extent of national reconstruction as envisaged in the Constitution.54 As a result, the search for the real meaning of what equality entails and how it should be interpreted and applied in practice is crucial. Where failure to adhere to the text and spirit of the Constitution with regards to stipulated gender quotas has been challenged in court, the courts have adopted a conservative jurisprudence that stifles the realization of gender equity in representation. The decision of the High Court in FIDA and Others v the Attorney General and Others55 and the Supreme Court’s Advisory opinion on the principle of gender representation in the national assembly56 on how Article 27(8) of the Constitution is to be implemented are good examples of the fallacy of realization of gender equity through the entrenchment of gender quotas.

IV A FIDA and Others v the Attorney General and Others57

The factual basis of the petition was that on 15 June, 2011, the Judicial Service Commission (JSC) recommended five persons to the President for appointment as judges of the Supreme Court. Of the five recommended for appointment, one was a woman and four were men. The petitioners alleged

54 Arato ‘Post-sovereign constitution-making in Hungary: After success, partial failure, and now what?’(2010) 26 South Africa Journal of Human Rights 19. Andrew Arato argues that courts have a special role to play in providing closure to issues left open or incompletely tackled during constitution-making processes.
57 Fida case (n 55 above).
that the JSC, in making its recommendations to the President, violated the Constitution and fundamental rights and freedoms of women in not taking into consideration the correct arithmetic/mathematics of the Constitutional requirements on gender equity. In summary, the issue was whether the JSC violated the provisions of Article 27(6) of the Constitution which provides that ‘[t]o give full effect to the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination’, Article 27(8) of the Constitution, which provides that ‘the State shall take legislative and other measures to implement the principle that no more than two-thirds of the members of elective or appointive bodies shall be of the same gender’, and Article 172(2)(b) that provides for gender equality in judicial service.

1 Gender quotas as aspirational measures and not concrete rights

The High Court, in dismissing the petition, ruled that affirmative action measures envisaged in article 27 of the Constitution are not rights qua rights but are rather ‘inspirational’ (sic), only creating a ‘legitimate expectation on the part of the citizens that the government would indeed formulate and undertake legislative and policy measures’. The court by this argument subtly endorses formal equality as it purports that the only aspect of the equality clause that is enforceable is the prohibition of sex-based discriminations. However, can mere prohibition of sex-based discrimination address imbalances of the past?

Formal equality fails to acknowledge that there are social and economic disparities between groups and individuals in society that may not necessarily be remedied by prohibiting sex-based discrimination. In the context of women’s representation in decision making bodies, insisting that women compete with their male counterparts on equal footing is ignoring the fact that women have been excluded from mainstream public affairs since independence. It is this realisation that informs the Constitution’s textual embrace of substantive equality. That by endorsing affirmative action, the Constitution is not only focused on differences but also disadvantages. The chief aim of entrenchment of affirmative action is to ensure equality of outcomes and the elimination of gendered marginalisation of women.

The substantive equality approach requires the right to equal treatment to be applied in its social context, including the recognition of past and existing social, political and economic disparities. This also places the remedial and restitutionary potential of the equality guarantee and ensures that addressing past and existing patterns of disadvantage is a central function of the right. In this regard, the focus of substantive

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58 Fida case (As above).
60 The Canadian Supreme Court has endorsed a substantive approach to equality and argued that affirmative action should not be seen as an exception to equality, but as a means of effecting equality in a substantive sense. See for example Canadian National Railway Co v Canada (Canadian Human Rights
equality is on the impact or consequences of the discriminatory measure rather than whether there is similar treatment between similarly situated or analogously placed group of people. The focus on impact and context is particularly important for people from previously disadvantaged groups such as women, since they are often the ones adversely and disproportionately affected by neutral or similar treatment. Given the enduring legacy of inequality, the equality clause has a dual function. Its ‘primary purposes’ are to both proscribe discrimination against people who are members of disfavoured groups and ‘to permit positive steps to redress the effects of such discrimination’.

Equality is violated not only when persons in analogous situations are treated differently, but also in the event of a failure to treat differently persons whose situations are significantly different. The substantive equality approach makes plain that remedial measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination are not an infringement on the right to equality but a means to promote and achieve it. The notion recognises the extent to which opportunities are determined by individuals' social and historical status, including gender, as part of a group. It recognises that discriminatory acts are part of patterns of behaviour towards groups, such as women. It holds that as the non-discrimination principle is in itself insufficient to achieve true equality in a historically oppressed society, affirmative action measures are required to distribute social goods. Affirmative action measures therefore seek to correct imbalances where factual inequalities exist. Thus quotas should not be viewed as aspirational but as enforceable rights aimed at remedying problems of deep-rooted privilege and to achieve justice. They are indispensable and part of the attainment of equality. It is this approach that preserves the dual function of the equality clause, namely to both allow differential remedial measures and to prevent discrimination.

2 Gender quotas as requiring progressive realisation

The Court further held that even these ‘inspirational (sic) affirmative action measures’ are not to be immediately expected, since, they, like socio-economic rights, are subject to the scheme of ‘progressive realisation’. Accordingly, affirmative action measures are by their nature progressive in character, since enactment of legislation and formulation of policies is the basis of determining the realization and achievement of such rights. The Court also noted that, to say that article 27 gives an immediate and enforceable right to any particular gender in so far as the realization of gender equity in representation in public service institutions is concerned is unrealistic and unreasonable.

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Certain rights in the Kenyan Constitution contain ‘internal limitations’. This means that the rights can be limited by reference to the factors contained in the very provision giving effect to the right concerned without the need to invoke the general limitation clause to justify the limitation. In relation to the socio-economic rights in the Constitution, for instance, this internal limitation clause requires the state to take reasonable legislative and other measures, within its available resources to achieve the progressive realization of these rights.\(^63\) This concept has been borrowed from the International Covenant on Economic, Social and Cultural Rights.\(^64\) The notion involves recognizing that the full realization of these rights may not be possible at a particular point in time: Yet, it nevertheless imposes an ‘obligation to move as expeditiously and effectively as possible towards that goal’.\(^65\) It also requires that deliberately retrogressive measures should not be taken and that they be carefully justified if they become necessary.\(^66\) The notion of progressive realization was thus developed in the context of a scarcity of resources and the recognition that fully realising these rights will only be possible over time. It was designed also to ensure that such rights remain meaningful whilst recognising the pragmatic difficulties of ensuring their full and immediate implementation.\(^67\)

The High Court’s decision that the notion of progressive realization is applicable beyond the express context of socio-economic rights and to the equality principle is not founded on any clear textual pointers. Article 21 of the Constitution provides for a scheme of progressive realization and confines this scheme to socio-economic rights under article 43 of the Constitution only. The High Court purported to extend this scheme to the equality provisions under article 27 and also erroneously purported that the attainment of the gender quota in every State or public office has to await progressive measures, an interpretation not supported by the text in question.\(^68\) Article 27 of the Constitution is clearly an enforceable provision and subject to immediate realization. The provision is not suspended and the claim to progressive realization is misplaced. Moreover, the court also failed to critique whether the decision by the state was a deliberately retrogressive measure and should have imposed a strict justification requirement for such a measure to be constitutionally justified.

3 \hspace{1em} **Whether gender quotas imposes a binding obligation on the state**

Even more detrimental to the general principle of equality and non-discrimination, the High Court resolved that, article 27 ‘imposes no duty on the part of the government

\(^{63}\) Article 20(5) of the Constitution.

\(^{64}\) See Article 2 of the International Covenant on Economic, Social and Cultural Rights.


\(^{66}\) As above.


other than the requirement to progressively take legislative and other measures to implement the said principle’ and further that article 27 ‘does not address or impose a duty upon the Judicial Service Commission in the performance of its constitutional, statutory and administrative functions.’\(^69\) The Court also suggested that Kenyan women should wait for the state to institute legislation and other measures to promote gender equity in elective and appointive offices. Through this ruling, the Court largely ignores the necessity of affirmative action in creating a critical mass of women, whose agency can catalyze cultural change - a measure which could improve women’s chances of being elected to public office and cut short the waiting period for cultural change.

The approach embraced by the court is not novel and has been embraced by some scholars who have argued that temporary special measures are not binding upon state parties to CEDAW. This argument seems to be buttressed by a pure textual reading of article 4(1) and the language employed by the Committee on CEDAW, which merely ‘encourages states parties to adopt temporary special measures’.\(^70\) Cook, however, makes a compelling case to the contrary. She argues that there is need: ‘[T]o look beyond the mere text of article 4(1) to the overall object and purpose of the Women’s Convention, since a principle of interpretation is that all articles of a convention are to be read in the light of its object and purpose.’\(^71\) The paramount objective and purpose of CEDAW, as the phraseology suggests, is the elimination of all forms of discrimination against women and the amelioration of their disadvantaged position in society. Article 7 dealing with participation in political and public life provides that ‘states parties shall take all appropriate measures …’ to achieve the objectives of the Convention.\(^72\) Temporary special measures are such appropriate measures to achieve the objective of elimination of discrimination and promotion of \textit{de facto} equality in political and public life. In that light, therefore, they are binding upon state parties.

Equality as a justiciable right confers legitimate constitutional entitlements and corresponding obligations, and may be directly relied upon to found a cause of action in the courts against duty-bearers. The equality provision creates a positive obligation and can be violated by mere inaction. Practically, it has the function of putting beyond question the legitimacy and importance of the pursuit of remedial or restorative objectives and thus cannot be argued to be ‘inspirational’. Clearly, the purpose of the provision is to enable state organs to proactively combat existing discrimination through affirmative measures. The obligation to proactively take measures to address inequalities is triggered and gives rise to claims in the courts for positive action to be taken by the state and other duty-bearers. In this way, the right to equality becomes not only a shield that can be used to defend gains secured by vulnerable groups, but also a

\(^{69}\) As above.

\(^{70}\) Peters (note 35 above) 261; See also the language in GR No 23.


\(^{72}\) See art 7 of CEDAW.
sword to secure proactive affirmative state action to achieve equality. Seen in this light, government and other institutions to whom the duty applies have not only an obligation to increase the representation of under-represented groups, but need to find ways of ensuring the full and meaningful participation of these groups. Thus, the High Court failed to provide an interpretation that preserves the internal coherence of the equality clause as a whole and failed to convincingly situate the affirmative action clause in a comprehensive, inclusive and integrative notion of substantive equality.

The Constitution sought to bring about marked changes in the area of women’s rights in Kenya. The State and State organs are enjoined to pursue measures that ensure that women are not overlooked. It thus imposes specific requirements in relation to participation in government. However, decisions such as the Fida case have substantial implications for the status of women, as what the decision does in effect is to wipe out the gains in the Constitution and slow down the efforts to secure and advance the rights of women. The judgment will, in effect, have a stultifying effect on gender mainstreaming and participation of women in public life.

4 The court questioned the privileging of gender vis a vis other forms of inequality

The High court purported to question the merits of the provisions and stated thus:

The fact that our Constitution was ratified by a majority of Kenyans does not mean or prove that its provisions are just and fair despite its many virtues. It might be argued that these defects can be traced to a flaw in the consent or ratification processes. One may ask why should a lady judge from Central, Western, Nyanza and Rift Valley Provinces get an edge over a male judge from upper eastern or Northern Kenya who may actually have faced tougher and more difficult conditions in terms of economic, social, political and environmental struggle.

This in effect is to question the constitutional privileging of gender equality through constitutional entrenchment while other facets of inequality have not received equal attention in the Constitution. The point of criticism is that affirmative action is under-inclusive in that it does not recognise that other minority groups (and even males in certain situations) may be disadvantaged.

Gender quotas are not discriminatory because their chief aim is to redress past and continuing discrimination against women not to discriminate against men. If we take the actual exclusion of women as the starting point, that is, if we recognize that many barriers exist that prevent women from entering the realm of public life, then quotas are not seen as discriminating (towards men), but instead, as compensation for all the obstacles that women are up against. A measure which has as its object the amelioration of conditions of disadvantaged individuals or groups does not violate the

74 Fida case (n 55 above).
equality guarantee and by definition cannot constitute discrimination.\textsuperscript{75} The Court failed to conceptualise the relationship between the right to non-discrimination and affirmative action in the light of the underlying notion of substantive equality. Remedial measures are not derogation from, but a substantive and composite part of, the equality envisaged by the provisions of article 27 of the Constitution and the Constitution as a whole. The whole structure of the equality clause and the important aim of substantive equality would be undermined by an approach which requires the justification for a constitutionally sanctioned affirmative action measure. Colleen Sheppard has argued thus:\textsuperscript{76}

\[E\]quity programs should be understood as integral to, and consistent with, legal guarantees of equality for historically disadvantaged groups in society, thereby rejecting the view that affirmative action is a source of discrimination. Thus, affirmative action is presented as an expression of equality, rather than an exception to it.

The issue of whether quotas constitute reverse discrimination arose in the celebrated Lesotho case of \textit{Molefi Tsepe v The Independent Electoral Commission and Others}.\textsuperscript{77} In that case, a man challenged the constitutionality of a law that reserved one-third of local government seats for women. He argued that the said law was discriminatory because it denied him opportunity to stand in his home division, which was one of the reserved divisions for women. He further argued that ‘while there is nothing wrong in increasing the participation of women in public bodies/affairs, this should not be done to his detriment and in a discriminatory manner’.\textsuperscript{78} Citing the Constitution of Lesotho, CEDAW, ICCPR, African Charter on Human and Peoples Rights, SADC Declaration on Gender and Development and Millennium Development Goals; the Court of Appeal held that Lesotho was justified in adopting temporary special measures and that they do not constitute discrimination against the applicant rather they promote restitutionary equality justified in a democratic society.

Gender quotas as remedial measures are therefore not a deviation from nor are they invasive of the right to equality. The High Court’s approach amounts to an oppositional reading of the Constitution which frustrates the egalitarian vision of the Constitution and its broader social justice imperatives. It is unacceptable to argue that the Constitution

\textsuperscript{75}John Kubai Mwai & 3 Others v Kenya National Examination Council & 2 Others, Petition No. 15 of 2011 the High court stated that: ‘The special provisions of Article 27(6) make it a unique set of constitutional provisions. When the Constitution was adopted, the framers knew, and clearly had in mind, the different status of persons in the society and the need to protect the weak from being overrun by those with ability. They had in mind the history of this country, both the differences in endowment either by dint of the region where one came from or as a function of other factors, which might necessitate special protection. Rightly or wrongly, and it is not for the courts to decide, the framers of the Constitution manifestly regarded as inadequate a blanket right to equal treatment, and their intention was to remedy the perceived societal inequalities thus recognising the necessity of corrective measures, namely those envisaged in article 27 (6), which were at the same time given the status of constitutional guarantee. It was out of the realization that unequal people cannot be treated equally.’


\textsuperscript{77}Molefi Tsepe v The Independent Electoral Commission & Others, [2005] LSHC 96.

\textsuperscript{78}Molefi Tsepe case (as above) para 13.
authorises measures aimed at redress of past inequality and disadvantage but go ahead to label them as unfair. To allow the judiciary to second guess an unambiguous text of the Constitution is to insinuate that courts can ignore constitutional provisions that are not palatable to them, an absurd proposition. Rights, duties, privileges, benefits or disadvantages flowing from the Constitution having received explicit constitutional imprimatur cannot be subject of challenge. The court's role in interpretation of the Constitution is to give force and effect to the fundamental objectives and aspirations of the Constitution and not otherwise.\textsuperscript{79} This avoids the danger of distorting the normative unity or the value coherence of the Constitution. Given that one of the goals of constitutional reforms was the hope that the Constitution would play a socio-political integrative role this should not fall prey to narrow ideological hijacking by patriarchal jurisprudence.

5 The court also criticised quotas for ignoring differences between women

In this regard the court stated:\textsuperscript{80}

It is also clear and we have taken judicial notice that young girls from Turkana, Pokot, Masai, Boran, Kuria and Northern Kenya and the whole of Coast Province suffer hardships that make them disadvantaged. If the point is to help the disadvantaged it should be based on something more than a female gender and unless one carries out an affirmative action from the grass root it would be difficult for the deserving persons to benefit from any kind of affirmative action. If the formula and criteria is not set properly, affirmative action would benefit an already advantaged lot.

The argument by the court is that for the quota to intend to affirm all women then it is over-inclusive in that it deems all women to be disadvantaged. This echo assertions by La Noue and Sullivan\textsuperscript{81} who are of the view that as a means of combating discrimination, law works through the creation of protected classes, but this may result in only rough justice, since not all members of a class are equally placed. The creation of privileged classes has been intended to secure equal treatment for individuals in the long run, but as it is never possible to define the classes so exactly that only the most deserving benefit, the short-run results may be open to criticism.\textsuperscript{82} In other words, within a protected group, some people may not have been disadvantaged. Secondly, it is often found that better-off people within the categories are benefited while those most in need

\textsuperscript{79} Article 2(3) of the Constitution provides that: ‘The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.’ See also Re: Harmonised Draft Constitution of Kenya: Bishop Kimani & 2 Others v The Attorney General, Mombasa CCP No. 669 of 2009 http://www.kenyalaw.org/caselaw/cases/export/70143/pdf (accessed 7 July 2013) where Ibrahim J observed that: ‘Courts must be wary to undermine the presumption of constitutionality of legislation and must reject any invitation to question or interpret the constitutionality of the Constitution itself’.

\textsuperscript{80} Fida case (n 55 above).


\textsuperscript{82} M Banton Discrimination (1994) 73-4.
are not.\textsuperscript{83} It is very likely that preferential treatment plans will benefit some persons who have not been subject to any significant discrimination or injustice, just as some persons who have been subject to discrimination will not receive such benefits because they do not belong to the ‘right’ groups.\textsuperscript{84} However, Oloka-Onyango and Tamale argue lucidly ‘that it makes pragmatic political sense to retain the category of women despite the multiplicities that exist within this category’.\textsuperscript{85}

**IV B Supreme Court’s advisory opinion on the principle of gender representation in the National Assembly and in the Senate**\textsuperscript{86}

The provision for ‘not more than two thirds of any gender’ in appointive and elective decision-making positions was the subject to judicial consideration as to its enforcement in the elective representation context. The absence of implementing mechanism was the basis upon which the Attorney General moved the Supreme Court to seek an advisory opinion praying that the court determines an inherent ambiguity in the constitutional provisions on representation in both the National Assembly and the Senate. The first hurdle is that, whereas the principle of affirmative action is clearly embedded in the bill of rights, a simple political arithmetical calculation reveals a deficiency in the formula for attaining this goal in key political institutions. The basis for this is that, the formula for the composition of parliament does not add up to the one third critical mass threshold needed in the newly created senate and the reconstituted national assembly. The combined quota strength of nominated, reserved and proportional representation seats only guarantees women 13.5 percent of national assembly seats and 26 percent of senate seats.\textsuperscript{87} Moreover, by implicitly endorsing the single member district constituencies, the drafters of the Constitution significantly constrained Kenya’s options on mechanism or formula for effecting the provisions on gender equity. It is generally agreed that a proportional representation system of election could be less adversarial, makes more votes count and is amenable to various affirmative action formulas; however, Kenya’s options are limited by the Constitution’s provisions in Article 89 and 97(1)(a). Article 89 fixes the maximum number of seats in

\textsuperscript{83}CL Bacchi *The politics of affirmative action* (1996) 27; R Kennedy ‘Persuasion and distrust: A comment on the affirmative action debate’ in JF Donohue (ed) *Foundations of employment discrimination* (1997) 62. Kennedy in the context of affirmative action for blacks in the United States argues, however, that even if affirmative action frequently aids those blacks who need it least, it is unpersuasive as an objection to affirmative action because (a) it ignores the large extent to which affirmative action has opened up opportunities for blue-collar black workers; and (b) it assumes that affirmative action should be provided only to the most deprived strata of the black community or to those who can best document their victimization (while in many circumstances affirmative action has developed from the premise that special aid should be given to strategically important sectors of the black community — for example, those with the threshold ability to integrate the professions) and (c) the fact that the black middle class has primarily benefited indicates only the necessity for additional social intervention to address unmet needs in those sectors of the black community left untouched by affirmative action.


\textsuperscript{86}Advisory Opinion (n 56 above).

\textsuperscript{87}For more details, see articles 97 and 98 of the Constitution.
Parliament at 290. The Articles’ key provisions implicitly tie constituencies to geospatial grids and populations, instead of communities of interests, regardless of their geographical locations. Indeed, Article 90 only provides for a limited application of proportional representation, for nominations to Parliament, that is, only 12 seats in a 290 seat Parliament. Even if all the 12 seats were allocated to women only, and not other groups that have experienced historical discrimination, Kenya would still have a deficit of about 85 women representatives in order to fulfill the current Constitutional requirements on gender equity and representation. Indeed it is to be noted that the March 2013 election confirmed these fears as women left to their own devices could not garner the shortfall in the number of seats required to attain the one third threshold through the universal competitive electoral process.

The majority in the advisory opinion determined that the two thirds rule was intended to be progressively realised. They noted that it is the specifically reserved seats that amount to ‘hard quota’ that must be complied with but that the general constitutional principle that a body had to have at least a third of a particular gender was a ‘soft quota’ that was to be subjected to further moulding through enactment of legislation or any other measures hence had to wait till the state takes such measures.\(^8\) In his dissenting opinion however, the Honourable Chief Justice, Dr. Willy Mutunga noted that taking the history of Kenya into account and the constitutional provisions on non-discrimination and national values, political and civil rights demanded immediate realisation.\(^9\)

The majority’s distinction between hard quotas and soft quotas harkens to Dworkin’s postulation that law consists of more than just a set of valid legal rules but contained also ‘standards that do not function as rules, but operate differently as principles, policies and other sorts of standards’.\(^10\) Robert Alexy has elaborated on this distinction by classifying constitutional rights norms into rules and principles: ‘the distinction between rules and principles is a basic pillar in the edifice of constitutional rights theory’.\(^11\) Unlike rules, which are definitive commands, norms ‘which are always either fulfilled or not’, principles can be ‘satisfied to varying degrees’ depending on what is factually and legally possible in a particular case.\(^12\) A constitutional rule is therefore something like article 177(1)(c) of the Constitution—‘[a] county assembly consists of the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.’ The application of rules like these entails subsumption. If a rule is valid and applicable, it is required to do exactly what it demands be done. If this is done, the rule is complied with; if this is not done, the rule is not complied with.\(^13\) A constitutional principle, on the other hand, is relatively easily identified as the Constitution self-consciously characterises some of its provisions

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\(^8\) Advisory Opinion (n 56 above) para 68-71.
\(^9\) Advisory Opinion (n 56 above).
\(^10\) R Dworkin *Taking rights seriously* (1977) 22.
\(^11\) R Alexy *A theory of constitutional rights* (trans Rivers) (2002) 44. There are no other norms, according to Alexy, ‘Every norm is either a rule or a principle’ 48.
\(^12\) Alexy (As above) 48-49.
\(^13\) Subsumption involves the comparison of abstract norms with the concrete facts in a given case to determine the applicability of the norms. See R Alexy ‘On balancing and subsumption: A structural comparison’ (2003) 16 *Ratio Juris* 433.
as such: for example, the ‘[n]ational values and principles of governance’ listed in article 10; or the ‘[g]eneral principles for the electoral system’ listed in article 81.

The majority’s postulation that article 81(b) of the Constitution which provides that – ‘[t]he electoral system shall comply with the principle that no more than two-thirds of the members of elective public bodies shall be of the same gender’; and article 27(8) that commands the state - ‘to take legislative and other measures to implement the principle that no more than two-thirds of the members of the elective and appointive bodies shall be of the same gender’ are principles and not rules fails to capture the special normative weight of constitutional rights. Specifically, article 27(8) is part of the right to equality and freedom from discrimination and this enshrinement as a fundamental right in a Constitution grants the provision a special status: it involves an assertion that such rights are norms to which the state must comply.

The question that this jurisprudence begets is that must the country wait for policies and laws to be passed for women to benefit from the equality and non-discrimination clause entrenched in the Constitution? The situation gets murkier if it is considered that parliament can resist enacting the envisaged laws expeditiously. The decision by the court gives a carte blanche to the legislators and state functionaries as the rights can lie in limbo at their pleasure. In fact, the failure to have specific mechanisms in the Constitution for attainment of the gender quota means that feminist activists have to go back to the trenches to lobby for enactment of requisite legislation for the fruits of the gender quota to be realised. Thus in the Kenyan case, Constitutional entrenchment is not enough to realise gender equity in representation.

V Lessons for constitution making from the Kenyan experience

Evidence from Kenya reveals that, while quota laws may be constitutionally entrenched, their enforcement can prove extremely difficult. The two judgments by Kenyan courts bring to the fore questions about the efficacy of the Constitution as an instrument for securing equality and social justice for people that have historically been assigned to the bottom of the social ladder. Though gender quotas have led to remarkably rapid increases in women’s representation in some cases, the realization of their fruits has also failed in other cases.
The main lesson is that, in order to be effective as regards elective position, a quota system must be compatible with the electoral system in place. If gender quotas are applied, they must be compatible with the electoral system if they are to be effective. Knowledge of different electoral quota systems shows that the result of a specific system is partly dependent on how compatible it is with the electoral system. Where a

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country adopts single member constituency electoral system then implementation of the gender quota is difficult.\textsuperscript{98} In general, it is easier to construct a quota system that is compatible with a proportional representation (PR) electoral system,\textsuperscript{99} since it is possible to introduce a greater number of candidates on party lists and since parties consciously try to balance their lists in order to win seats. In countries with PR electoral systems, candidate quotas are most often used for the party lists (the candidate stage), either voluntarily by the political parties or compulsorily by legal requirement. In general, it is much more complicated to construct gender quotas that are appropriate for single member constituency electoral systems. In most plurality/majority systems the parties only select one candidate per party and electoral district, and, consequently, it is not possible to introduce both men and women at the same time, as in a PR system. The law establishing quotas must be carefully worded. Interpretation of certain words or phrases may lead to detrimental results for the intended beneficiaries of the law. Conservative courts can take advantage of ambiguities in the language of a constitutional provision in order to suspend or frustrate the realization of gender quotas. This mischief can only be curbed by the adoption of explicit rules about the implementation of gender quotas.

**References**

**Books**


\textsuperscript{98} The system is based on a single-member constituency and pays attention to geographical representation. The principle underlying the SMP is simple: the winner is the candidate who receives a minimum of one more vote than each of the other candidates, and does not have to obtain more votes than all the others combined.

\textsuperscript{99} There are two types of PR systems –the ‘open list’ or ‘preferential’ and the ‘closed list’ or ‘non-preferential’. In the open list, electors are given the choices between casting a vote for a party or for a candidate. A vote cast for a candidate will result in that candidate moving higher up the ranking order. The open list allows voters to choose their preferred candidate within the party. Closed list PR systems are characterised by the following features: They are not constituency-based; voting is party-based (not candidate-based); party headquarters finalise the list of candidates and rank them; parties may have as many candidates as there are seats in parliament; and the allocation of seats to a party is, as closely as possible, proportional to the percentage of votes received.


**Book chapters**


**Journal articles**


Other publications

Committee on CEDAW, *Temporary special measures*, GR No 5 UN Doc. HRI/Gen/1/Rev.4.
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