



GSJ: Volume 8, Issue 11, November 2020, Online: ISSN 2320-9186

[www.globalscientificjournal.com](http://www.globalscientificjournal.com)

## **BOOK CHAPTER**

### **Conceptual and Legal Frameworks on Gender Equality and Affirmative Action**

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#### **Abstract**

Human rights in general and gender equality in particular enjoy legal protection through codification in several international and regional treaties. Some of the treaties are corroborated by optional protocols dealing with specific issues with special emphasis. They altogether provide protection against actions and omissions that interfere with human dignity, fundamental freedoms and entitlements regarding of any irrelevant ground including sex.

Keywords: human rights, gender equality, legal frameworks.

#### **1. Conceptual frameworks**

##### **1.1. The Concept of Gender**

Gender is defined in different ways by different writers. It is defined as “socially learned behaviors and expectations associated with females and males”.<sup>1</sup> This shows that gender is a socially constructed character that we attribute to males and females. Gender can also be defined as “a set of characteristics, roles, and behaviour patterns that distinguish women from men socially and culturally and relations of power between them”.<sup>2</sup> It is a socially constructed norms and ideologies which determine the behaviour, role and actions of men and women.<sup>3</sup> These elements are socially constructed so that they are changeable in the sense that they vary from time to time and from one cultural group to the other. In other words, gender is a socially constructed cultural belief that makes distinction between male and female. For instance, there is

a belief that women are docile, submissive, patient, and tolerant of monotonous work and violence.<sup>4</sup> Similarly, it is stated that gender refers to the rules, norms and practices by which the biological differences between men and women are interpreted to result in unequal assessments, possibilities and opportunities in life.<sup>5</sup> Hence, gender is all about a learned social differences existing between men and women. As noted above, the belief or social differentiations may vary both within and between cultures.<sup>6</sup>

This is as opposed to sex which is natural and biological. Sex is biological classification of humans as male and female.<sup>7</sup> It is a natural attribute differentiated by the reproductive body parts assigned to each sex (male and female). Gender stands from sex and widens the biological differences to the irrelevant extent. Hence, gender is not what we are born with or naturally destined to. It is not what we have naturally instead what we develop through our social norms and practices. Thus, the differences prevailing between men and women are attributes that we have socially brought up. It is obvious that women and men are treated differently in the world today though efforts have been made to avert such socialized discrimination.

## **1.2. The Concept of Gender Equality**

Having said this about the concept of gender, the next question is what gender equality refers to. This concept as well is given different definitions as can be seen hereafter. Gender equality is defined as “the concept that all human beings are free to develop their personal abilities and make choices without the limitations set by strict gender roles; that the different aspirations and needs of women and men are considered, valued and favoured equally.”<sup>8</sup> Hence, gender equality implies the provision of equal opportunities for men and women to realize their individual potentials and achieve their needs putting aside of the socially developed norms and rules which downtrodden the role of women. King and Mason also provide a comprehensive definition of gender equality which is short of equality of outcomes. Accordingly, the term gender equality refers to “equality under the law, equality of opportunity (including equality of rewards for work and equality in access to human capital and other productive resources that enable opportunity), and equality of voice (the ability to influence and contribute to the development process)”.<sup>9</sup> To say there is gender equality, women should also be treated equal in the eyes of the law and be given with equal weight for their voices with their men counterparts. Furthermore, it is interestingly stated as “equal visibility, empowerment, responsibility and participation for both women and men in all spheres of public and private life”.<sup>10</sup> All these have for long been crippled

by a male dominated culture of the society across the world. A system of men domination is apparent in every culture as there is no society where women are treated equally with men.<sup>11</sup>

Hence, gender equality stands to mean equality of men and women in all aspects of life. It is a situation where men and women are treated equally by disregarding the socially established discriminatory roles assigned to men and women. For the realization of such a situation, a number of measures are being taken both internationally and nationally. Affirmative action has been taken as one of the measures to rectify the past injustices done on women and bring gender equality.

### 1.3. The concept of affirmative action

It is an obvious fact that women have been discriminated for the centuries. There have been a worldwide efforts made to rectify the centuries –long legacy of gender based injustices. In doing so, affirmative action has been taken as a vital instrument. As it is true for the concepts discussed above, the term affirmative action is defined in different ways. Accordingly, it is defined as “a deliberate move to eliminate past and present discrimination through a set of public policies and initiatives designed to help on the basis of color, creed, geographical location, race, origin, and gender, among others”.<sup>12</sup> It is also defined as a positive step taken as a compensation for past discrimination.<sup>13</sup> **National Partnership for Women and Families** best defined affirmative action as “*taking positive steps to end discrimination, to prevent its recurrence, and to create new opportunities that were previously denied to qualified women and people of color*”.<sup>14</sup> It is true that affirmative action is designed to remedy the effects of the past discrimination and to level the playing field for all persons. Therefore, its ultimate end is to achieve equality. This fact is affirmed that “*the underlying motive for affirmative action is the principle of equal opportunity, which holds that all persons have the right to equal access to self development*”<sup>15</sup>. To conclude with the **Omano Edigheji’s** definition, affirmative action can be defined as corrective measures to ensure representation of all races, genders and people with disabilities in the public service.<sup>16</sup> Hence, it is a measure taken to ensure equality of human beings by remedying the past wrongs.

The concept of affirmative action was first introduced by President John F. Kennedy in his Executive Order to redress the discrimination that continued to exist despite the establishment of civil rights laws and constitutional guarantees.<sup>17</sup> The order required federal contractors to take affirmative action to ensure equal treatment of applicants regardless of race, color, religion, sex,

or national origin. The action further extended by the Civil Rights Act of 1964 to nongovernmental contractors. The concept is now being used across the world. Women, as one subjugated section of the society, are now increasingly been the beneficiaries of affirmative action measures of governments.

However, it is worth nothing that affirmative action is not without any challenge. There are groups who doubt the positive outcome of affirmative action. Opponents of affirmative action argue that it is contradictory with the democratic concept of equality of opportunity.<sup>18</sup> It is also argued that affirmative action undermines the self-worth and self-esteem of women. Nevertheless, the fact remains that affirmative action has got international recognition in many UN documents<sup>19</sup> and is applicable in many countries of the world.

## **2. Legal frameworks**

This part reviews relevant documents pertaining to the issue under question. Accordingly, the international and regional legal frameworks governing gender equality are discussed.

### **2.1. International legal frameworks on Gender Inequality**

Like men, women are equally endowed with human rights despite the fact that they are culturally unable to fully enjoy them. Gender equality and the advancement of women's rights have attained a nearly universal commitment by UN member states.<sup>20</sup> A global effort has been made to bring gender equality. The commitments of states are expressed in the international legal frameworks (treaties) that are established to promote, *inter alia*, gender equality. These are basically international human rights instruments. These instruments have equality provisions which require *de jure* as well as *de facto* equality in signatory countries<sup>21</sup>. More importantly, when ever women are unable to get remedy for the violations of their rights at the national level they can, in theory, resort to international human rights bodies.<sup>22</sup> Some of the international legal frameworks are discussed herein under.

#### **United Nations Charter**

United Nations plays the leading role in protecting human rights in general and promoting women's rights in particular.<sup>23</sup> The UN Charter demands the equality of men and women and requires the applicability of the charter on them equally.<sup>24</sup> The charter in its preamble affirms the fact that men and women have equal rights.<sup>25</sup> It states equal eligibility of men and women to participate in any organs of the United Nations.<sup>26</sup>

As part of its effort to advance gender equality worldwide, the UN General Assembly established a new United Nations entity for gender equality and empowerment of women, which is UN Women. The establishment of UN Women was aimed at accelerating the overall UN efforts to promote gender equality and the empowerment of women.<sup>27</sup> This shows the utmost importance given to the issue of gender equality at the United Nations level.

### **Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (UDHR) was **adopted** in 1948. This declaration was the first comprehensive human rights framework. This declaration consists of equality provisions. For instance, the declaration begins with the statement that “all human beings are born free and equal in dignity and rights”.<sup>28</sup> Again, it states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex...”<sup>29</sup> By this statement, the UDHR explicitly prohibits discrimination against women with regard to the rights stated in the declaration. And it goes on to enumerate several rights which have to be enjoyed by everyone without distinction. However, UDHR has no a binding force on states as it is a mere declaration. Nevertheless, many principles of the declaration are incorporated into other subsequently made binding international human rights instruments with their own enforcement mechanisms.<sup>30</sup>

### **International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights (ICCPR) was adopted on December 1966. The convention clearly forbids any discrimination on the basis of, *inter alia*, sex in the enjoyment of rights contained in the convention.<sup>31</sup> The convention further states the ban of discrimination on the basis of sex in specific rights.<sup>32</sup> UDHR is the building block of this convention in that the latter incorporated and further elaborated principles contained in the former. Unlike UDHR, ICCPR has a binding force on state parties thereby giving better guarantee for protection of women’s rights.

### **International Covenant on Economic Social and Cultural Rights (ICESCR)**

International Covenant on Economic Social and Cultural Rights (ICESCR) was adopted at the same time with ICCPR. Like the previous documents, ICESCR overtly requires state parties to guarantee nondiscrimination on the basis of, *inter alia*, sex in the exercise of rights included in the convention.<sup>33</sup> Economic, social and economic rights are positive rights so that state parties

are duty bound to take positive steps to realize them without discrimination between men and women. This convention is also an extension and elaboration of rights contained in the UDHR. Like ICCPR, it has binding nature thereby giving rights better protection on the ground.

### **Convention on the Elimination of All Forms of Discrimination against Women**

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the General Assembly on December 1979. CEDAW is the most important and comprehensive international treaty promoting women's rights. Currently, it has 189 ratifying and acceding member states. CEDAW is often known as "the international bill of rights for women".<sup>34</sup> It is a major milestone in explicitly prohibiting any form of discrimination against women. The convention represents a major achievement in the course to attain gender equality and empowerment of women.<sup>35</sup> The Optional Protocol adopted in 1999 allows women to submit complaints in the international judicial bodies in case their rights contained in the treaty are violated. One crucial part of the CEDAW is that:

*"States Parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".<sup>36</sup>*

This provision has a paramount importance as it stresses on the main cause for gender-based discriminations across the world. It is true that the main challenges of women's rights are the deeply-rooted cultural beliefs and practices. Hence, the above stated provision commits state parties to work on the decisive factor that still challenges the effort of maintaining gender equality.

Further, the convention obliges state parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.<sup>37</sup> This is a significant protection toward women's rights, unlike other human rights instruments which govern a state and its citizens.<sup>38</sup> On top of all, CEDAW plainly acknowledges the need to take affirmative action to achieve gender equality by requiring state parties to "adopt temporary special measures aimed at accelerating *de facto* equality between men and women".<sup>39</sup> Hence, CEDAW is the most comprehensive international bill of rights devoted to the maintenance of gender equality.

By subscribing to those international instruments member states undertake to make necessary legislative reforms domestically for the realization of those terms of the treaties. Unlike UDHR, ICCPR, ICESCR and CEDAW require member states to submit their progress in the implementation of rights contained in the instruments to the Secretary-General of United Nations, who will transfer the report for respective mechanisms for consideration. After a review by the concerned bodies, recommendations will be sent to the reporting states for better improvement. By doing so, the above mentioned international legal instruments govern gender equality. However, it is worth noting that they are not the only instruments which stand to maintain gender equality. It is also important to note that there are additional conferences and resolutions undertaken to protect women's human rights thereby to further promote gender equality.<sup>40</sup> Despite the fact that a number of international treaties are made to entitle equal enjoyment of human rights for men and women, both *je jure* and *de facto* inequalities remain intact across the world.<sup>41</sup>

## **2.2. Regional legal frameworks on Gender Equality**

There are also several regional/continental human rights instruments dealing in one way or another with gender equality. For the purpose of this chapter only the major regional instruments will be discussed.

### **Convention for the Protection of Human Rights and Fundamental Freedoms**

Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter European convention) was concluded under the Council of Europe, which is one of the regional arrangements for protecting human rights in Europe. It was adopted in 1950 and entered into force on 3 September 1953. The convention deals with the rights of women under several articles. It prohibits discrimination on the basis of, *inter alia*, sex in the enjoyment of rights incorporated in the convention.<sup>42</sup> Rights guaranteed by the convention are further extended by additional protocols, most importantly, Protocol No.12 to the European convention, which was opened for signature on 4 November 2000 in Rome. This protocol prohibits discrimination on the basis of sex and recognizes the measure to be taken by state parties in the endeavor to promote equality.<sup>43</sup>

The convention has established controlling machineries and now all complaints are being directly referred to the European Court of Human Rights in Strasbourg, France. This Court is the

first permanent human rights court working on a full-time basis.<sup>44</sup> Hence, the convention with its enforcement mechanism tries to address human right issues (including equality issues) in the continent.

### **European Social Charter**

This charter is also another protection of human rights in general and women's rights in particular. It was adopted in 1961. The preamble of the charter guarantees enjoyment of social rights without discrimination on grounds of race, color, sex, religion, political opinion, national extraction or social origin.<sup>45</sup> The charter provides special protection for employed women.<sup>46</sup> Moreover, it guarantees fair remuneration for the works of women through recognizing the right of men and women workers to equal pay for work of equal value.<sup>47</sup> The charter is reopened for signature in Strasbourg on 3 May 1996 with some necessary revisions.

### **Charter of Fundamental Rights of the European Union**

This charter was also proclaimed in December 2000 in the same region. The charter under chapter three devoted to equality. The charter plainly prohibited discrimination on the basis of sex.<sup>48</sup> It affirms equality of men and women in all areas, including employment, work and pay.<sup>49</sup> The Charter allows affirmative action as a means to achieve gender equality stating that "the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex".<sup>50</sup> The charter has a paramount importance in making the utmost significance of fundamental rights more visible to the European Union's citizens through codification of materials from various sources.<sup>51</sup>

### **American Convention on Human Rights**

American Convention on Human Rights is an important instrument in the inter-American system existing under the auspice of the intergovernmental organization known as the Organization of American States. In the effort to advance regional standards, American Convention on Human Rights was adopted in 1969 following the European regional human rights treaty. It was entered into force on 18 July 1978. Like all other human rights instruments, this convention also obliges state parties to respect rights and freedoms contained in the instrument and ensure full enjoyment of them by all persons without distinction based on irrelevant grounds, including sex.<sup>52</sup> The convention also prohibits women trafficking, which is now one of the major bottlenecks in the protection of women's rights.<sup>53</sup> Under the convention, state parties are duty bound to make sure



that their measures taken during state of emergency do not involve discrimination in any ground, including sex.<sup>54</sup> Hence, it guarantees equal protection of rights of men and women.

The convention also established its own enforcement mechanism. The Inter-American Commission on human rights composed of seven members is mainly mandated to promote respect for and defense of human rights.<sup>55</sup> It has also Inter-American Court of Human Rights which receives cases from the States Parties and the Commission.<sup>56</sup>

### **African Charter on Human and Peoples Rights**

Following the 1969 American Convention on Human Rights, African Charter on Human and Peoples Rights (hereafter African Charter) was adopted by the members of the former Organization of African Unity (OAU)-now the African Union-in Nairobi on June 27, 1981 and entered into force on October 21, 1986. It is the youngest of the regional mechanisms and also the most widely accepted of the regional charters, with 53 ratifications or accessions.<sup>57</sup>

The charter ushered a new era as regards human rights in the continent. It was induced by international and regional human rights conventions, including those discussed above. The African Charter entitles everyone to the rights contained in the charter without discrimination in any ground including sex.<sup>58</sup> Also, it bounds states to remove all forms of discrimination with respect of, *inter alia*, sex.<sup>59</sup> Above all, African Charter obliges states to eliminate discrimination made against women and ensure the protection of women's rights incorporated in the international declarations and conventions.

To substantiate the African Charter in the protection of women's rights, Protocol on the Rights of Women in Africa (hereafter African Women's Protocol) has been endorsed in 1995. The African Women's Protocol is the first regional human rights treaty in Africa which provides a range of women's rights specifically.<sup>60</sup> This Protocol prohibits harmful practices which adversely affect women's rights.<sup>61</sup> Most importantly, this protocol requires states to take positive action including affirmative action in order to promote political participation of women in their country.<sup>62</sup> Special protection is also given to elderly women, disabled women and women in distress.<sup>63</sup> Generally, the African regional human rights system gives a due legal protection for women's rights and thereby aiming to maintain gender equality.

The charter established the African Commission on Human and People's Rights with the objective of promoting and protecting human rights in the African perspective. In doing so, the

commission is mandated to interpret the charter and to receive complaints from states and individuals.

To conclude, human rights in general and gender equality in particular enjoy legal protection through codification in several international and regional treaties. Some of the treaties are corroborated by optional protocols dealing with specific issues with special emphasis. They altogether provide protection against actions and omissions that interfere with human dignity, fundamental freedoms and entitlements regarding of any irrelevant ground including sex.<sup>64</sup>

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