

**BRIDGING THE GAP BETWEEN *DE JURE* AND *DE FACTO* PARLIAMENTARY
REPRESENTATION OF WOMEN IN AFRICA: LESSONS FROM RWANDA AND
SOUTH AFRICA**

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DECLARATION

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DEDICATION

To my parents, sister and nephew.

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I am beholden to Malebakeng Forere for literally imploring me to apply for the prestigious Centre for Human Rights masters programme. My family, albeit miles away, was my reservoir of motivation and inspiration. For that am truly grateful. To my sister cum employer, MG Tau and brothers Selimo, Willie and Tumane I truly appreciate your motivation and support.

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ACRONYMS AND ABBREVIATIONS

AU	African Union
ANC	African National Congress
AIDS	Acquired Immunodeficiency Syndrome
BPFA	Beijing Platform For Action
CCPR	Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of Discrimination Against Women
CESCR	Covenant on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
CSW	Commission on the Status of Women
DEDAW	Declaration on the Elimination of Discrimination Against Women
EAC	East Africa Community
ECOWAS	Economic Community of West African States
ECOSOC	Economic and Social Council
GA	General Assembly
GC	General Comment
GR	General Recommendation
HRC	Human Rights Committee
HIV	Human Immunodeficiency Virus
IPU	Inter-Parliamentary Union
MDGs	Millennium Development Goals
MP	Member of Parliament
NRM	National Resistance Movement
OSW	Office on the Status of Women
PCIJ	Permanent Court of International Justice
PR	Proportional representation
RPF	Rwanda Patriotic Front
SADC	Southern African Development Community
SAPs	Structural Adjustment Programmes
TSMs	Temporary special measures
UDD	Universal Declaration on Democracy
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
WNC	Women's National Coalition

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ABSTRACT

This study is predicated on a strong believe that the gender make up of African parliaments must reflect the gender demographics of African states. It is only when that is achieved that the concepts of equality, non-discrimination and democracy can gain their true meaning. As a departure point, the study makes a case that statistically women are under-represented across the overwhelming majority of African parliaments. The study asserts that the under-representation is prevalent amid the existence of international, regional and domestic instruments all providing for women's right to representation in decision-making processes. Thus, the study demonstrates that there is a gap between *de jure* and *de facto* representation. The study then argues that the convoluted ideology of patriarchy, sacrosanct cultures, inviolable religions, the constructed public/private dichotomy, low levels of education, and the negative impact of globalisation all act in concert to deny African women their rightful place in decision-making institutions, particularly parliaments. In a bid to investigate how this can be reserved, the study explores the Rwandan and South African models for purposes of gaining insights on how they have contrived to reach and surpass the critical mass of women in their parliaments. These two models demonstrate that a combination of temporary special measures and gender mainstreaming are effective tools for emancipating women and ensuring their representation in parliaments. These have to be buttressed by strong legal and institutional frameworks, which operate in a conducive socio-political environment.

CHAPTER 1: INTRODUCTION

*Patriarchy, subordination of women and the deep-rooted perception that the public domain is reserved for men and that the social contract is about the relationship between men and government and not citizens and government, come together to exclude women-notwithstanding rights guaranteed in law and the political rhetoric of good governance and participatory democracy. **

1. Setting the scene

It is undisputed that democratic governance requires representation of the interests of all and sundry in policy formulation and decision making. Yet, in Africa, women are rarities in this process.¹ Studies affirm that women make up slightly over 50 per cent of Africa's population and are the majority voters in many elections.² Their presence and representation in national parliaments, however, is far from proportional to their number. This has led to some commentators arguing that '[w]hen the composition of decision-making assemblies is so markedly at odds with the gender make-up of the society they represent; this is clear evidence that certain voices are being silenced and suppressed'.³ It is against this backdrop that the Inter-Parliamentary Union (IPU), the world organisation of parliaments, raised the issue of women's parliamentary representation at the 1995 United Nations (UN) Beijing Conference on Women.⁴ At that Conference, the IPU adopted a plan of action to address the reality of male dominance and female exclusion in parliamentary politics. That plan of action, *inter alia*, proposed the use of affirmative action and quota systems on interim basis to remedy the problem of discrimination and under-representation of women in parliaments across the globe.⁵

* J Ballington *et al* (eds) *Women in parliament: Beyond numbers* (2005) 15. The erstwhile speaker of the Parliament of South Africa, Frene Ginwala, in a foreword to the 1998 edition, makes this telling assertion.

¹ CG Bowman & A Kuenyehia *Women and law in Sub-Saharan Africa* (2003) 582.

² As above 587.

³ A Phillips 'Democracy and difference: some problems for feminist theory' in S Tamale *Towards legitimate governance in Africa: The case of affirmative action and parliamentary politics in Uganda* in EK Quashigah & OC Okafor (eds) *Legitimate governance in Africa* (1999) 225.

⁴ AM Tripp 'New trends in women's political participation in Africa' available at <<http://www.idea.int/quota/displaycountry>> (accessed 15 June 2006).

⁵ As above.

Current statistics reveal that a few African countries, notably Rwanda, Mozambique, South Africa, Burundi, and Tanzania have made inroads to accelerate women's parliamentary representation and have reached the 30 per cent target that was set more than a decade ago by the Economic and Social Council (ECOSOC) of the UN for women in parliaments following the 1995 Beijing Conference.⁶ Regrettably, these grim statistics also show that the majority of African countries are still lingering behind. Countries that have thus far not reached the 30 per cent target account for more than 90 per cent of Africa.⁷

Paradoxically, women's parliamentary under-representation occurs amid the existence of domestic, regional, and international legal regimes providing for their representation in the decision-making processes of their countries.

Domestically, constitutions, legislation, and policies guarantee equality, non-discrimination and the right to participate in government. In most African countries, the right to participate in government was granted concomitantly with the right to vote at independence. In Ghana, it was granted in 1950; in Sierra Leone in 1961; in Uganda in 1962; in Kenya in 1963; in Malawi and Zambia in 1964; in Lesotho in 1966 and so on.⁸

Regionally, the African Charter on Human and Peoples' Rights (African Charter);⁹ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol);¹⁰ declarations of the African Union (AU)¹¹ and Southern African Development Community (SADC)¹² afford women the right to representation in the decision making.

⁶ See annexure 1.

⁷ As above.

⁸ RE Howard *Human rights in Commonwealth Africa* (2005) 186. This book argues that women were permitted to hold office and stand for election on the same basis as men in many African countries at independence; however, for a number of reasons women did not make it to political offices.

⁹ African Charter on Human and Peoples' Rights O.A.U.Doc.CAB/LEG/67/3/Rev.5 (1982) (entered into force, 21/10/1986). See art 13.

¹⁰ Protocol to the African Charter on Human and Peoples' Rights, adopted in Maputo in July 2003, and entry into force on 25 November 2005 after 15 ratifications. See art 9.

¹¹ See for example, Solemn Declaration on Gender Equality in Africa, Assembly/AU/Decl 12 (III) Rev 1 (2004).

¹² See for example, Gender and Development Declaration, adopted by SADC Heads of States in 1997 available at <<http://www.sadc.int>> (accessed 10 June 2006).

Internationally, women's right to representation in political and decision-making processes, as an entitlement in its own right, was first acknowledged in the 1952 UN Convention on the Political Rights of Women (CPRW).¹³ This right is also recognised in other conventions like the international Covenant on Civil and Political Rights (ICCPR)¹⁴ and CEDAW.¹⁵ African countries have also acknowledged the 1985 Nairobi Forward-looking Strategy and, a decade later, the 1995 Beijing Platform for Action, which 'are strategic instruments that laid down the framework for women's political empowerment.'¹⁶

Against this backdrop, it is important to investigate why women are *de facto* under-represented in most African parliaments yet there are *de jure* mechanisms, which exist domestically, regionally and internationally, all aimed at ensuring their representation.

1.1 Defining terms

Political representation refers to representation of interests, ideas, values, perspectives, collectively mediated experiences, and corporeal experiences.¹⁷ The term 'special measures' in its corrective, compensatory, and promotional sense is often equated with the terms 'affirmative action', 'positive action', 'positive measures', 'reverse discrimination' and 'positive discrimination'.¹⁸ Peters defines affirmative action as 'a policy response to the fact that, despite constitutionally guaranteed equal rights for men and women, women are underrepresented in public and professional life.'¹⁹ For purposes of this study, a quota refers to a numerical reservation for women independent of the competitors' respective qualification.²⁰

¹³ Convention of the Political Rights of Women adopted by the General Assembly of the UN in 1952. See preamble and arts 1 & 2.

¹⁴ International Covenant on Civil and Political Rights, adopted 16/12/1966; G.A. Res 2200 (XXI), UN. Doc A/6316 (1966) 999 UNTS (entered into force 23/03/1976). See art 25.

¹⁵ Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18/12/1979; G.A Res 34/180 (entry into force 03/09/1981). See art 7.

¹⁶ See CR Bello 'Women and Political Participation' available at <<http://www.women'srights.net>> (accessed 15 June 2006).

¹⁷ See M Sawyer 'Parliamentary representation of women: From discourses of justice to strategies of accountability' (2000) 21 *International Political Science Review* 362.

¹⁸ I Boerefijn *et al* *Temporary special measures: Accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of all Forms of Discrimination against Women* (2004) 22. The authors argue that these different correlations emerged as a result of different translations and varied domestic application of the term.

¹⁹ A Peters *Women, quotas and constitutions: A comparative study of affirmative action for women under American, German, EC and International law* (1999) 1.

²⁰ Peters (above) 66.

1.2 Stating the Problem

The UN adopted a World Plan of Action of the International Women's Year in 1975 and article 57 thereof observed thus:

Despite the fact that, numerically, women constitute half of the population of the world, in the vast majority of countries only a small percentage of them are in positions of leadership in the various branches of government.²¹

More than two decades later, this position has not significantly changed:²²

Despite general acceptance of the need for a gender balance in decision-making bodies at all levels, a gap between *de jure* and *de facto* equality has persisted. Notwithstanding substantial improvement of *de jure* equality between women and men, the actual participation of women at the highest levels of national and international decision-making has not significantly changed since the time of the Fourth World Conference on Women in 1995...

In the light of the above, the study will explore how the gap between *de jure* and *de facto* women's parliamentary representation can be bridged thus accelerating their representation.

Article 4(1) of CEDAW enjoins state parties to take temporary special measures (TSMs) to ensure representation of women at all levels of decision-making. In Africa, the Women's Protocol obliges state parties to ensure increased and effective representation through the adoption of, *inter alia*, affirmative action policies.²³ Indeed some African countries, notably Rwanda and South Africa have heeded these calls by adopting one form or another of TSMs.²⁴

1.3 Research questions

One commentator aptly put forward a number of questions, which squarely fall within the ambit of this study when she noted and asked:

Overall, the proportion of women in legislatures is exceedingly low. The question is why and does it matter? Why should it matter; what difference does it make whether women are in legislatures and other institutions of governance or not?²⁵

These questions are central to this study and it is the business of the study to endeavour to provide answers.

²¹ See generally, G Alfredson & K Tomasevski (eds) *A thematic guide to documents on the human rights of women* (2005) 94.

²² See para G27 of UN G.A Res 23/3 adopted on 23 November 2000 on the Report of the Ad Hoc Committee of the twenty-third special session of the General Assembly (A/S-23/10/Rev.1) available at <<http://www.un.org/womenwatch/daw/followup>> (accessed 25 August 2006).

²³ Women's Protocol art 9.

²⁴ Chapter 4 of this study is devoted to exploring the models of Rwanda and South Africa.

²⁵ See foreword in J Ballington *et al* (eds) *Women in parliaments: Beyond numbers* (2005) 14.

1.4 Objectives of the study

Objectives of this analysis are two-pronged. The first one is to find out why women are generally under-represented in most African parliaments yet there are legal mechanisms, in one form or another, providing for their right of representation in the decision-making processes, particularly in parliaments. Secondly, to explore ways of bridging the gap between the *de jure* and *de facto* positions by analysing the Rwandan and South African models, as good practices that may form valuable precedents for other countries.

1.5 Methodology

Liberal feminism based on the idea that liberal ideals of equality and rights or liberties apply equally to women is the legal thought influencing this study.²⁶ Proponents of this theory subscribe to principles of equality such as equality of resources or equality of concern and respect.²⁷ The study adopts mainly a qualitative research method whereby impediments to women's parliamentary representation and implementation of TSMs in Rwanda and South Africa will be analysed. Primary sources to be consulted include international and regional treaties, constitutions, and legislation while books, articles, reports and, where apposite internet sources, will provide valuable secondary sources. The research for the study is library and desk based.

1.6 Scope delimitation

This study focuses on parliamentary representation because women are least represented in parliaments and it is where major decisions affecting them are made.²⁸ The title focuses on Africa because women's parliamentary representation in the overwhelming majority of African countries is exceedingly low.²⁹ However, this continent-wide approach has limitations: the first being that not all African countries are studied owing to time, space and resource constraints. Inevitably, therefore, some generalisations are made. Secondly, recommendations that will come out of the study will not be a 'one size fits all' model because African countries are diverse in cultures, political and legal systems to mention but a few significant differences. Another limitation is that the study, for obvious reasons, does not offer a historical account of the subject. The time focus is mainly from the early 1990's when Africa was swept by the democratisation

²⁶ K Knop (ed) *Gender and human rights* (2004) 20.

²⁷ As above.

²⁸ Statistics show that more than 90% of African countries have not reached the 30% target and about 15 countries are below 10% with the lowest at 2%. See annexure 1.

²⁹ See annexure 1. Since the under-representation cuts across the majority of countries, a continent-wide approach is appropriate.

wave thus opening up democratic space for multi-partyism.³⁰ In the final analysis, the study hopes to illuminate lessons from Rwanda and South Africa.³¹

1.7 Literature survey

There is plethora of literature on political representation of women but most of the work does not focus on Africa. The study by the United Nations Development Programme (UNDP) asserts that until gender parity is attained in governance, women cannot reach full equality with men in any sphere.³² Some studies have focused on how quotas can increase women's political representation but omit to address the current impediments to women accessing parliaments while others have focused on impediments in isolation of the *de jure* mechanisms put in place.³³ The work edited by Ballington discusses the implementation of quotas as measures that can increase the number of women in politics, but focuses mainly on 'success stories' and does not cover countries where *de facto* representation is exceedingly low.³⁴ Studies on obstacles facing women in their quest for parliamentary representation focus mainly on western countries; consequently, they do not address peculiar obstacles to African women.³⁵ Peters has written widely on the use of affirmative action policies and quotas in constitutions as methods of ensuring increased representation of women in politics, albeit her work presents a western view.³⁶ Tamale opines that affirmative action has changed the situation in Uganda but acknowledges that the Ugandan model is not a perfect model.³⁷

³⁰ E Chole & J Ibrahim *Democratisation Processes in Africa: Problems and Prospects* (1995) 4.

³¹ Rwanda and South Africa are used as the main case studies, for lessons, on the basis of the following considerations: Firstly, both countries have successfully made strides to exceed the 30 percent threshold with Rwanda being the country with the highest number of women in parliament not only in Africa but globally. Secondly, these two countries have adopted different types of TSMs, Rwanda using largely constitutional quotas while South Africa uses affirmative action. Finally, Rwanda represents Francophone Africa and civil law jurisdictions while South Africa represents Anglophone Africa and common law jurisdictions. Where apposite, lessons will be drawn from other countries.

³² UNDP report 'Women's political participation and good governance: 21st Century challenges' (2000) 12 available at <<http://www.magnet.undp.org>> (accessed 23 August 2006).

³³ JS Foster *et al Women in politics and decision-making: A gendered political analysis* (2005). This book presents case studies conducted in 4 SADC countries. It focuses mainly on the factors that underlie women's participation in parliaments and how NGO's can assist capacity building of aspiring women parliamentarians.

³⁴ J Ballington *et al* (eds) *The implementation of quotas: African experiences* (2004).

³⁵ J Ballington *et al* (eds) (2005) *Women in parliaments: Beyond numbers*. The authors use examples from Arab states, Ecuador and Indonesia, which may not necessarily be relevant in the African context.

³⁶ Peters (n 19 above).

³⁷ S Tamale *When Hens begin to crow: Gender and parliamentary politics in Uganda* (1998) 23.

Charlesworth³⁸ and Cook³⁹ provide valuable feminist perspectives on human rights issues facing women, which have a bearing on their capacities to be parliamentary representatives. On Rwanda, albeit hailed a success story, it nevertheless faces a number of challenges regarding the sustainability of its laudable number of women in parliament.⁴⁰ Justice Ngcobo provides useful insights into the South African legal framework and the concept of affirmative action.⁴¹

It is worth noting that scholarship on this subject is mainly presented by social scientists; consequently, it has shown paucity in bringing intricate human rights issues surrounding this area to the fore. This study attempts to fill this gap by addressing the subject from a human rights perspective. A rights-based approach cannot be overemphasised, Charlesworth rightly observed that, 'because women in many societies are starting in such a disadvantaged position, rights discourse offers a significant vocabulary to formulate political and social grievances which is recognised by the powerful.'⁴²

1.8 Overview of chapters

This study consists of five chapters. The current one is introductory: providing the background, the statement of the problem, research questions and a statistical overview of women in parliaments across Africa (the *de facto* position). Chapter two provides a conceptual and normative framework of the study where concepts, international, regional, and domestic efforts that form the linchpin of the study are discussed. In a nutshell, it presents the *de jure* position. The third chapter attempts to understand the causes of the 'gap' between *de jure* and *de facto* positions by grappling with different impediments to women's parliamentary representation. Chapter four is devoted to analysing TSMs as methods of accelerating *de facto* representation thus bridging the gap. It further analyses TSMs in Rwanda and South Africa and illuminates lessons. The last chapter provides general conclusions and recommendations.

³⁸ H Charlesworth 'The public/private distinction and the right to development in international law' (1992) 12 *Australian Yearbook of International Law* 190.

³⁹ RJ Cook 'Women's international human rights law: The way forward' (1993) 15 *Human Rights Quarterly* 232.

⁴⁰ J Mutamba 'Strategies for increasing women's participation in government: case study of Rwanda' a paper presented at the expert group meeting on democratic governance in Africa held in Arusha Tanzania 6-8 December 2005.

⁴¹ S Ngcobo 'The meaning of article 4(1) of the UN Convention on the Elimination of All Forms of Discrimination Against Women: a South African perspective' in I Boerefijn (n 17 above) 181.

⁴² H Charlesworth quoted in Cook (n 39 above) 232.

CHAPTER 2: THE CONCEPTUAL AND NORMATIVE FRAMEWORK

2. Introduction

The right to representation in decision-making processes, as encapsulated in numerous human rights instruments, finds its conceptual basis in the concepts of equality for all, non-discrimination, gender, and democracy. It is apposite to trace this conceptual basis and to provide the normative account of this right at the international, regional, and domestic strata. The chief aim, therefore, is to demonstrate that women have a *de jure* right of representation in parliaments.

2.1 The conceptual framework

A conceptual paradigm relevant for an inquiry into the representation of women in parliaments has to be both legal and political. It inevitably has to take into account human rights concepts of gender equality and non-discrimination as well as the concept of democracy.

2.1.1 The two faces of equality

The meaning of equality has occupied the minds of scholars since the days of Aristotle who defined it thus:

[J]ustice seems to be equality, and it is, but not for everyone, only for equals. Justice seems to be inequality, since indeed it is, but not for everyone, only for unequals.⁴³

This Aristotelian definition is what has come to be known as formal equality. It has been expounded upon as follows: 'things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness.'⁴⁴ This form of equality is the bedrock of mainstream equality thinking in law. Based on this form of equality, women are treated differently or unequally with men in parliamentary representation in Africa, simply because they are women. This notion of equality, as one commentator laments, is 'an abstract, universalistic notion that places blinders on status distinctions in that it treats inequalities as differences.'⁴⁵

⁴³ Aristotle *Politics*, translation C Reeve in B Vrancken 'Reviewing affirmative action: Comparative study of the conditions applied by the European Court of Justice and other legal systems' (2001) *International Yearbook of Regional Human Rights Masters Programmes* 103.

⁴⁴ P Westen 'The empty idea of equality' (1982) 95 *Harvard Law Review* 543.

⁴⁵ S Tamale 'Conceptualising women's human rights in Eastern Africa' in *Feminist leadership in Eastern Africa: Opportunities and challenges* Report of workshop held at Entebbe Uganda on 22 September -3 October 2003.

Another aspect of formal equality is prohibition of direct discrimination elaboration of which is found in numerous international instruments and national constitutions.⁴⁶ 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. The Constitutional Court of South Africa warned that insisting on formal equality might actually reinforce inequality.⁴⁷ In the context of women's parliamentary representation, insisting that they compete with their male counterparts on equal footing (formal equality) is ignoring the fact that since independence they have been excluded in mainstream politics.

The paucity or dearth of formal equality has led to the coining of a 'notoriously elusive' concept of substantive equality.⁴⁸ This form of equality deals not with differences but with disadvantages. Its chief aim is equality of outcomes. This means that different people are accorded different treatment but this is not a simple task hence it is referred to as the 'equality paradox'.⁴⁹ Deciding what type of different treatment to afford disadvantaged groups and for how long seems to be a daunting task.⁵⁰ The CEDAW jargon refers to this type of equality as 'de facto equality' and it effectively requires the elimination of gendered marginalisation of women. How this type of equality can be achieved in African parliaments is the quest for this study.

2.1.2 Non-discrimination

Inextricably linked to the concept of equality is the right not to be discriminated against, *inter alia*, on the grounds of sex. CEDAW articulates a comprehensive definition of discrimination.⁵¹ Underrepresentation of women in many African parliaments, *prima facie*, suggests that they are discriminated against on the basis of their sex. Sex is a suspect ground and once there is a distinction based on sex then, unless the contrary is established, there is unfair discrimination.⁵² According to the concept of non-discrimination, therefore, women have the right to partake in parliamentary politics without any discrimination but in reality, this is not the case.

⁴⁶ Direct discrimination is that which is based on listed grounds such as sex. See also art 26 ICCPR & art 9(3) of The Constitution of South Africa 1996.

⁴⁷ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

⁴⁸ P Hunt *Reclaiming social rights: International and comparative perspectives* (2004) 89.

⁴⁹ Vrancken (n 43 above) 107. Substantive equality will be explored in chapter 4 when discussing TSMs.

⁵⁰ As above.

⁵¹ See art 1 of CEDAW.

⁵² Many legal systems incorporate this formulation of unfair discrimination. See art 9(5) of SA Constitution.

2.1.3 Conceptualising gender

The study on women's right to parliamentary representation inevitably calls for consideration of the concept of gender.⁵³ Meena aptly defines it as:⁵⁴

Socially constructed and culturally variable roles that women and men play in their daily lives. It refers to a structural relationship of inequality between men and women as manifested in labour markets and in political structures, as well as in the household. It is reinforced by custom, law and specific development policies. Whereas sex is biological, *gender* is acquired and constructed by society.

The exclusion of women in parliamentary politics, it would seem, is the result of gender roles society has ascribed to them, which are antithetical to the concept of equality as envisaged in human rights instruments.⁵⁵ Some commentators submit that a gender paradigm relevant for African women must of necessity address elements of indigenous culture that oppress them; religion, which dominates their morality; capitalism, which relegates them to the bottom of the gender hierarchy; imperialism, which imposes political structures that dictate their existence; and neo-colonialism, which comes in the form of globalisation.⁵⁶ An analysis that lacks this multifocal approach, it is further argued, can only be 'superficial and truncated', in the African context.⁵⁷

2.1.4 Democracy and women's right to parliamentary representation: The link

Democracy is an 'essentially contested concept', which is age-old without proper meaning. It means different things to different people in different parts of the globe.⁵⁸ Nevertheless, the most basic of its multiple meanings suffices.⁵⁹ It is instructive to note that the Universal Declaration on Democracy (UDD) states that:

The achievement of democracy presupposes a genuine partnership between men and women in the conduct of the affairs of society in which they work in equality and complementarity, drawing mutual enrichment from their differences.⁶⁰

⁵³ Tamale (n 37 above) 27 argues that a study of women's representation in legislatures has to go beyond numbers and inquire into the gender dynamics at play.

⁵⁴ R Meena *Gender in Southern Africa: Conceptual and theoretical issues* in B Twinomugisha 'Barriers to the protection of rural women's right to maternal health care in Uganda' (2005) 11 *East Africa Journal of Peace and Human Rights* 67, 85.

⁵⁵ FD Gaer 'Mainstreaming a concern for human rights of women: Beyond theory' in M Agosin (ed) *Women, gender, and human rights: A global perspective* (2002) 99.

⁵⁶ Tamale (n 37 above) 3.

⁵⁷ Tamale (n 37 above) 3. This study will attempt to adopt this multifocal approach in the next chapter, where it discusses a host of impediments to women's parliamentary representation.

⁵⁸ Owing to space constraints, this study will not attempt to debate which of the multiple definitions of democracy is correct. A working definition will suffice.

⁵⁹ Democracy means a 'government in which supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections.' See 'Striking the root: Democracy' available at <<http://www.Strike-the-root.com>> (accessed 24 August 2006). This definition uses the term 'people', which is inclusive of women.

⁶⁰ The IPU Council adopted this declaration on 16 September 1997, available at <<http://www/ipu.org/conf-e/98.pdf>> (accessed 24 August 2006). See principle 4.

The fact that the gender composition of parliaments is so at odds with the gender composition of societies signifies that participatory democracy has not yet set in.⁶¹ The concept of democracy will, therefore, only assume true and dynamic significance when men and women with equitable regard for their interests and aptitudes decide upon political policies and national legislation jointly.⁶² The Commission on Human Rights (CHR) endorsed this view when it noted that democracy and human rights are interdependent.⁶³ The UN Commission on the Status of Women (CSW) adopted Agreed Conclusions (1997/2), which accentuated that attaining the goal of equal participation of men and women in decision making was important for strengthening democracy and achieving the goals of sustainable development.⁶⁴ It follows that there can be no genuine democracy when women are under-represented in parliaments. Put differently, democracy and the right of representation are inseparable ideals.

2.2 The normative framework

Numerous international, regional, and domestic instruments provide for gender equality, non-discrimination and recognise the right of citizens to participate in government either directly as the elected or indirectly as the electorate.

2.2.1 Binding international and regional instruments

Starting in 1945 with the UN Charter,⁶⁵ following the atrocities of World War II, the world nations saw it apposite to reaffirm faith in the fundamental human rights and in the 'equal rights of men and women'⁶⁶ without distinction as to, *inter alia* sex.⁶⁷ This faith in human rights culminated in the elaboration of the Universal Declaration of Human Rights (UDHR) in 1948.⁶⁸ From the very first article, this Declaration, which is now arguably binding,⁶⁹ proclaims that 'all human beings

⁶¹ See UNRISD report 'Gender Justice, development and rights: Substantiating rights in a disabling environment' available at <<http://www.unrisd.org>> (accessed 10 October 2006).

⁶² See generally, 'An approach to democracy: Gender partnership' available at <<http://www.ipu.org/issue/women.htm>> (accessed 24 August 2006).

⁶³ See resolution 2003//36 of the CHR available at <<http://www.unhchr.ch>> (accessed 24 August 2006).

⁶⁴ See report of expert group meeting held in Addis-Ababa Ethiopia 24-27 October 2005 'Equal participation of women and men in decision-making processes, with particular emphasis on political participation and leadership' available at <<http://www.un.org/womenwatch/daw>> (accessed 10 July 2006).

⁶⁵ Charter of the United Nations, 59 Stat.1031, TS. 993 adopted 26 June 1945, entered into force 24 October 1945.

⁶⁶ See preamble of the UN Charter.

⁶⁷ See arts 1(3) & 55(C) of the UN Charter.

⁶⁸ Universal Declaration on Human Rights, adopted 10 December 1948; UN.G.A Res. 217 A (III), UN.GAOR, 3rd Sess, UN. Doc. A/810 (1948).

⁶⁹ See for example, MN Shaw *Introduction to international law* (1998) 452.

are born free and equal in dignity and rights.⁷⁰ It further provides that ‘everyone has a right to take part in the government of his [or her] country, directly or through freely chosen representatives’.⁷¹ These two instruments state assert that men and women are equals in all spheres of life. It is only proper, therefore, if patterns of representation of both men and women in African parliaments reflect this equality.

The UN in 1952, for the first time, promulgated a binding convention specifically guaranteeing women’s right to political participation and representation, namely the Convention on the Political Rights of Women (CPRW).⁷² This Convention reaffirms the principles of equality and non-discrimination provided for in both the UN Charter and the UDHR.⁷³ It further provides for women’s eligibility to hold public office and to exercise public functions.⁷⁴ The UN General Assembly (GA) reinforced this Convention by adopting resolution 58/142 on women and political participation, which calls on member states to increase women’s political participation.⁷⁵

The UDHR, being ‘softlaw’⁷⁶ had to be translated into a legally binding instrument hence the elaboration of the twin Covenants in 1966.⁷⁷ Common article 2 of these Covenants enjoins state parties to guarantee rights enunciated therein without any discrimination and to adopt legislative and other measures to give effect to these rights. General Comment (GC) No 4 of the Human Rights Committee (HRC) spells out some of the ways of achieving this.⁷⁸ Notably, article 25 of the ICCPR reiterates article 21 of the UDHR.⁷⁹ Although these instruments do not specifically

⁷⁰ See arts 1 & 2 of the UDHR.

⁷¹ See art 21(1) of the UDHR. When the UDHR was drafted ‘man’ was taken to be a generic term referring to both males and females. Feminist challenge this as gender insensitive. See for example, Cook (n 44 above).

⁷² See n 13 above.

⁷³ See preamble of the CPRW.

⁷⁴ See arts, 2 & 3 of the CPRW.

⁷⁵ See n 61 above.

⁷⁶ Softlaw in the form of declarations is non-binding and is indicative of states moral commitments. In 1966 when the covenants were passed, the UDHR had not yet attained its customary international law status. However, subsequently, its provisions were reproduced in various international instruments as well as national constitutions and as such it transformed to customary international law and binding in terms of article 38(1)(b) of the ICJ statute.

⁷⁷ ICCPR & ICESCR.

⁷⁸ GC No 4 of the HRC recommends, for eg, affirmative action as a means of ensuring equality between men and women in the enjoyment of civil and political rights. See also GC No 18 & 28.

⁷⁹ See also General Principles on Freedom and Non-Discrimination in the Matter of Political Rights, ECOSOC Resolution 1786 referred to in N Jayawickrama *The judicial application of human rights law: National, regional and international jurisprudence* (2003) 791.

refer to 'women', they employ generic terms like 'everyone' and 'every citizen', which are inclusive of women.

Despite the elaboration of the binding twin Covenants, discrimination against women continued unabated. This state of affairs led to the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women in 1979, which was preceded by the 1967 Declaration on the Elimination of Discrimination Against Women (DEDAW).⁸⁰ CEDAW is arguably the most important international human rights treaty for women and for that reason; it is dubbed the international Bill of Rights for women.⁸¹ As the phraseology suggests, CEDAW deals with all forms of discrimination against women in all spheres of life. It explicitly covers women's right to equality and non-discrimination in public and political spheres with regard to the following: the right to be eligible for election to all publicly elected bodies; the right to participate in the formulation of government policy and its implementation; and the right to hold public office and perform all public functions at all levels of government.⁸² CEDAW also imposes certain obligations on state parties, such as eradicating direct and indirect discrimination and implementation of both concepts of equality in national laws.⁸³

The Committee on CEDAW has passed several General Recommendations (GR) worthy of mention.⁸⁴ These are GRs No 5, 8, 23 and 25, the first two introduced TSMs while GR No 23 specifically deals with participation of women in political, and public life. GR No 25 defines the contours of *de facto* equality as employed in article 4(1).⁸⁵ Arguably, the CEDAW regime provides the most comprehensive way of emancipating women and ensuring their equality in all spheres of public life. However, it is diluted and paralysed by reservations against its substantive articles.⁸⁶

⁸⁰ As at 24 September 2006, CEDAW had 184 state parties. In Africa, Sudan and Somalia have not ratified it, available at <<http://www.un.org/womenwatch/daw/cedaw/states.htm>> (accessed 24 September 2004).

⁸¹ Bello (n 16 above).

⁸² See arts 7 & 8 of CEDAW.

⁸³ Arts 7 & 8 must be read in conjunction with arts 1-5 & 24.

⁸⁴ GRs are interpretations of treaties made by the treaty bodies to assist state parties in the implementation of their obligations. They have status of 'soft law' and state parties are expected to act on them in good faith. See HB Schopp-Schilling 'The role of the Convention on the Elimination of All Forms of Discrimination Against Women and its monitoring procedures for achieving gender equality in political representation' available at <<http://www.idea.int>> (accessed 10 July 2006).

⁸⁵ GR No 5 deals with art 4(1) and calls for the application of TSMs in, for eg, the area of politics. GR No 8 deals with art 8 and recommends the use of art 4(1) as regards the representation of women at the international level.

⁸⁶ CEDAW is one of the most reserved UN conventions. See generally RJ Cook 'Reservations to the Convention on the Elimination of All forms of Discrimination Against Women' (1990) 30 *Virginia Journal of International Law* 643. See also S Tamale 'Think globally, act locally: Using international treaties for women's empowerment in East Africa' (2001) *Agenda* 50 98.

2.2.2 The right to representation in the African human rights system

At the heart of the African human rights system lies the African Charter.⁸⁷ It makes a somewhat scant reference to women's rights in article 18, which groups women with children.⁸⁸ It has been lamented that this article is too broad thus putting women's rights in a 'legal coma'.⁸⁹ Some commentators are, however, optimistic about its 'untapped potential' and condemn its vilification.⁹⁰ Article 13(1) gives every citizen the right to participate freely in the government either directly or through freely chosen representatives. Thus, it conforms to the concept of formal equality but it is wanting, as it does not recognise the imbalances of the past, which have placed African women in a precarious and disadvantaged position *vis-à-vis* men regarding representation in parliaments. Put simply, it fails to cater for substantive equality.

The above and many other criticisms levelled against the Charter led to the negotiation and promulgation of a specific African instrument addressing African women's rights.⁹¹ This instrument, designated the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)⁹² is the most progressive and unapologetic binding instrument to address women's rights.⁹³ It adjures state parties to adopt affirmative action policies to ensure representation of women in decision-making institutions.⁹⁴

2.2.3 Non-binding instruments

Several international conferences have been held to discuss how women's rights may be promoted and have resulted in a number of declarations.⁹⁵ These UN led conferences started

⁸⁷ The African human rights system comprises the African Charter and other human rights instruments adopted under the auspices of the erstwhile OAU and now AU.

⁸⁸ WILDAF 'The African Charter on Human and Peoples' Rights and the Additional Protocol on Women's Rights' available at <<http://www.wildaf.org.zw/news4.html>> (accessed 25 July 2006).

⁸⁹ H Onoria 'Introduction to the African System of Protection of Human Rights and the Draft Protocol' in W Benedek (2002) *The Human Rights of Women* 233.

⁹⁰ L Kois 'Article 18 of the African Charter on Human and Peoples' Rights: A progressive approach to women's human rights' (1996) 3 *East Africa Journal of Peace and Human Rights* 92. Kois argues that this article should be interpreted in a manner that will allow for optimal utilisation of its potential, which is the incorporation of the international framework.

⁹¹ For a general overview of the history and contents of the Protocol see M Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40-52.

⁹² n 10 above.

⁹³ This instrument is groundbreaking for addressing for the first time issues of HIV/AIDS, abortion, reproductive autonomy, negative globalisation and so on.

⁹⁴ See art 9 of the Women's Protocol.

⁹⁵ Tripp (n 4 above) 9 asserts that international pressure resulting from the world conferences added impetus to women's demands for equality in the political sphere.

back in 1975 in Mexico, then Copenhagen in 1980; in Nairobi in 1985; in Beijing in 1995; and Beijing +5 in 2000.⁹⁶ Declarations and platforms for action given birth to at these conferences touch on the issue of women's political representation, albeit in varying degrees.⁹⁷ Amongst them, the Beijing Platform for Action (BPFA) is the most ambitious to empower women and eliminate discrimination against them.⁹⁸ It is worth noting that the international community through the Millennium Development Goals (MDGs) hopes to achieve gender equality by 2015.⁹⁹ To sum, although non-binding, all these efforts reflect a significant shift and co-operation of the international community towards substantive equality between sexes in all spheres of life.

2.2.4 The AU and SADC commitments

The AU plays the role of a torchbearer on issues of women's empowerment. The commitment to gender equality as one of the principles in its Constitutive Act;¹⁰⁰ the elaboration of the Women's Protocol;¹⁰¹ the adoption of the Solemn Declaration on Gender Equality;¹⁰² and the initiation of gender mainstreaming,¹⁰³ bear testimony of its leading role.¹⁰⁴ It is hoped that these commitments will trickle down to member states.

At the SADC level, political commitment to gender equality was demonstrated by adopting the Gender and Development Declaration.¹⁰⁵ Indeed, this has started to yield results in some countries, for example, the highest court of Lesotho, in a case that challenged the

⁹⁶ For texts of these declarations, see generally G Alfredsson & K Tomasevski (n 21 above) 71-102.

⁹⁷ See for eg, UN Political Participation World Plan of Action of the International Women's Year (1975) para 57; UN Nairobi Forward-looking Strategies for the Advancement of Women (1985) para C2; and the UN Beijing Platform for Action (1995).

⁹⁸ See Schopp-Schilling (n 84 above). Area 'G' of the BPFA spells out goals and actions to be taken in order to increase women in decision-making processes.

⁹⁹ MDGs are 8 goals to be achieved by 2015 that respond to the world's main development challenges. See generally UNIFEM 'Pathway to gender equality: CEDAW, Beijing and MDGs' available at <<http://www.unifem.org>> (accessed 15 August 2006).

¹⁰⁰ See art 4 (l) Constitutive Act of the African Union CAB/LEG/23.15 (26 May 2001) reprinted in C Henys (ed) *Human rights law in Africa* (2004) 181-187.

¹⁰¹ n 10 above.

¹⁰² n 11 above.

¹⁰³ For a definition of gender mainstreaming see 'Gender mainstreaming: An overview' available at <<http://www.un.org>> (accessed 10 August 2006).

¹⁰⁴ Despite these inroads, women are still under-represented within the AU structures. See K Stefiszyn 'The African Union: Challenges and opportunities for women' (2005) 2 *African Human Rights Law Journal* 358.

¹⁰⁵ For SADC commitments generally See A Molokome 'Women's participation in politics and public life: A key to the advancement of women' in Boerefijn (18 above) 181. See also J Ncube 'Fast tracking to equality: The SADC gender journey' available at <<http://www.pambazuka.org>> (accessed 20 June 2006).

constitutionality of gender quotas, acknowledged this Declaration.¹⁰⁶ Regrettably, other African sub regions do not have clear commitments to gender equality in politics.¹⁰⁷

2.2.5 National commitments

Although couched differently, African constitutions have clauses on equality, non-discrimination and citizen's right to participate in government and decision-making processes.¹⁰⁸ Others have gone a step further to entrench affirmative action and quota provisions aimed at accelerating women's presence in parliaments.¹⁰⁹ Additionally, others have enacted specific legislation on affirmative action and quotas. Thus, there is no African country without *de jure* mechanisms.

2.3 Conclusion

Women's right to parliamentary representation is unwaveringly grounded in the concepts of equality for all, non-discrimination, gender, and democracy while international, regional, and domestic instruments buttressed by the AU and SADC declarations provide its normative foundation. This right is recognised and provided for in all African constitutions, albeit in varying degrees. Paradoxically, the gap between *de jure* and *de facto* positions remains despite this conceptual and normative basis.

¹⁰⁶ *Molefi Ts'epe v The Independent Electoral Commission & others* (unreported) available at <<http://www.idea.int/quota/displaycountry>> (accessed 15 June 2006).

¹⁰⁷ ECOWAS has a gender mainstreaming policy but it is limited to the Secretariat. See ECOWAS gender policy available at <<http://www.thecommonwealth.org>> (accessed 18 August 2006). The EAC gender equality efforts are mainly in socio-economic development. See Treaty Establishing the East African Community (1999) reprinted in Henys (n 100 above) 634-39.

¹⁰⁸ C Heyns & W Kaguongo 'Constitutional human rights law in Africa' *African Human Rights Law Journal* (forthcoming). The authors present an overview of the content of all African constitutions.

¹⁰⁹ See generally, Ballington (n 34 above).

CHAPTER 3: 'UNDERSTANDING THE GAP': IMPEDIMENTS TO WOMEN'S PARLIAMENTARY REPRESENTATION IN AFRICA

3. Introduction

A perfunctory and cursory review of statistics of women in African parliaments suggests that the equality promise made by international, regional and domestic human rights instruments is almost rhetoric.¹¹⁰ It is thus important to investigate the conceptual and material reasons for the exclusion of women in parliaments, which causes the disparity between *de jure* and *de facto* representation. This study rests on a simple thesis that *de jure* measures are inadequately translated into *de facto* representation because there are a host of impediments, which preclude women from accessing parliaments. These impediments create a gap between what the law provides and what prevails in actuality. They may differ from country to country but there are common denominators that can conveniently be categorised as legal, political, socio-cultural, economic and other impediments.

3.1 Legal impediments

It may sound paradoxical to suggest that the law itself actually creates or contributes to the gap between *de jure* and *de facto* situations. Indeed, many constitutions prohibit discrimination and promote equality. However, a closer scrutiny reveals that there are discriminatory laws that are allowed override constitutional declarations against discrimination.¹¹¹ These include personal status laws, customary laws, citizenship laws and common law. Thus, the law gives equality with one hand and takes it with the other hence the failure to have *de facto* representation. The following examples illustrate this point:

3.1.1 Constitutional law

Non-discrimination articles of some constitutions in Africa¹¹² prohibit discrimination but at the same time have far-reaching *provisos* that put the so-called personal laws¹¹³ beyond the reach of such articles. They prohibit discrimination but in the same token condone it when perpetrated under customary and personal laws. This exclusion renders the rights of women, including the

¹¹⁰ This is more apparent when attention is paid to the fact that more than 90% of African countries have not reached the 1995 ECOSOC target of 30% women in parliaments. However, statistics also show an upward trend of women in some countries albeit peripheral. For further statistics, see annexure 1.

¹¹¹ M Karl *Women and empowerment: Participation and decision making* (1995) 11. It is worth mentioning that some Constitutions in Africa totally prohibit discrimination and have no *provisos* on non-discrimination clauses. For eg, art 21 of the Constitution of Uganda 1995 and art 9 of the Constitution of South Africa 1996.

¹¹² See for eg, art 82(2) of the Constitution of Kenya, art 18(3) of the Constitution of Lesotho and art 5 of the Constitution of Libya.

¹¹³ Personal laws include laws on marriage, divorce, adoption, devolution of property, contracts etc.

right to representation, meaningless because discrimination against them remains constitutionally sanctioned.¹¹⁴

3.1.2 Citizenship law

The centrality of citizenship when it comes to standing for elections and participating in parliaments cannot be gainsaid. Constitutions jealously reserve the right to vote and to be voted for citizens only. The African Commission on Human and People's Rights (African Commission) in *Legal Resources Foundation v Zambia*,¹¹⁵ where former President Kenneth Kaunda had been disenfranchised by legislation, noted the centrality of citizenship with respect to participating in democratic processes such as voting and standing for elections. In some countries, women married to aliens lose their birth citizenship;¹¹⁶ in others, foreign women lose their husbands' citizenship upon divorce;¹¹⁷ and in others, as was the case in *Attorney General v Dow*¹¹⁸ cannot pass it to their children. All these issues adversely affect women more than men, thus 'access to citizenship is a highly gendered process.'¹¹⁹ With this multiplicity of hurdles presented by citizenship laws, it becomes a mammoth task for women to participate in democratic processes and be members of parliaments because citizenship is a minimum requirement.¹²⁰

3.1.3 Common law

The quantum or litmus test for equality is legal capacity. In its general sense, capacity refers to the ability to accept and to exercise the rights and responsibilities of an adult in one's society.¹²¹ In many legal systems in Africa, common law governs legal capacity and gives women the status of minors, who have no ability to undertake legally enforceable obligations without the

¹¹⁴ MA Freeman 'Measuring equality: A comparative perspective on women's legal capacity and constitutional rights in five commonwealth countries' (1990) *Commonwealth Law Bulletin* 1418, 1423.

¹¹⁵ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 paras 52 & 64.

¹¹⁶ W Langley 'The rights of women, the African Charter and economic development of Africa' (1987) 7*Boston College Third World Law Journal* 215.

¹¹⁷ With respect to women's nationality disability in Rwanda, Burkina Faso and Gabon, See CEDAW Report, 10th Session UN Doc. A/46/38, (1991) paras 131 & 237. See also RJ Cook 'International human rights law concerning women: Case notes and comments' (1990) 23 *Vanderbilt Journal of Transitional Law* 779. Cook discusses cases lodged before different UN treaty bodies, regional bodies and domestic courts, concerning disparate treatment afforded to foreign spouses and concludes that women have a disadvantaged status and suffer discrimination.

¹¹⁸ *Attorney General v Dow* (2001) AHRLR 99 (BwCA 1992).

¹¹⁹ R Prokhovnik 'Public and private citizenship: From gender invisibility to Feminist inclusiveness' (1998) 60 *Feminist Review* 84, 85. See also C Stratton 'The right to have rights: Gender discrimination in nationality laws' (1992) 77 *Minnesota Law Review* 197-239.

¹²⁰ See A Gouw 'Beyond equality and difference: The politics of women's citizenship' (1999) *Agenda* 40 54-58.

¹²¹ Freeman (n 114 above) 1419.

consent and aid of their husbands cum guardians.¹²² Women are thus minors in perpetuity, from childhood to womanhood.¹²³ One judge bewailed that women's minority status is 'both illogical and anachronistic' because the same women are sometimes judges, magistrates or advocates entrusted with deciding other peoples' cases yet they cannot act alone for themselves in matters involving them personally.¹²⁴

This common law principle of legal capacity is thus blatantly discriminatory in that it subjects women to the guardianship of their husbands or fathers. Tamale notes that some women have to seek consent of their husbands to run for public office.¹²⁵ The fact that the law subordinates women to men renders their right to partake in politics vacuously hollow in cases where men do not give their consent.¹²⁶

3.1.4 Customary law

One of the relics of colonialism in Africa is dual legal systems comprised of the 'received law' and the indigenous law.¹²⁷ It is in the latter where discrimination against women is more pronounced. In many African countries, for example, the customary law principle of male primogeniture governs inheritance and succession, and effectively prohibits women from owning property.¹²⁸ Those who challenge it are perceived to be 'misguided elite women aping western concepts'.¹²⁹ Customary law is also notoriously discriminatory in areas of marriage, divorce, guardianship, custody and so on. Albeit some of these issues do not bear a direct link to women's right to parliamentary representation, when taken together, customary law sanctioned

¹²² MA Freeman & AS Fraser 'Women's human rights: Making the theory a reality' in L Henkin & JL Hargrove (eds) *Human rights: An agenda for the next century* (1994)106.

¹²³ WC Maqutu *Contemporary family law of Lesotho* (1992) 61.

¹²⁴ *Masebota Khuele v BEDCO* (unreported).

¹²⁵ Tamale (n 37 above).

¹²⁶ D Shabangu 'Review of the political situation of women in Swaziland' in JS Foster *et al Women in politics and decision-making: A gendered political analysis* (2005) 110. Shabangu notes that one of the legal constraints is that women 'cannot make independent decisions and these in turn impacts on the freedom they have in terms of participating in political life and in positions of power per se.'

¹²⁷ For example, South Africa is governed by both Roman-Dutch common law and customary law and Rwanda is governed by Civil law received from Belgium and customary law. Banda argues that because the colonizers were not many they could not administer the received law through out the territories hence the operation of two systems. See F Banda 'Global standards: Local values' (2003) 17 *International Journal of Law, Policy and the Family* 5.

¹²⁸ This principle was invalidated by the South African Constitutional Court in *Bhe v Magistrate Khayalitsha* 2005 (1) 580 (CC), however it is still widely practised in many countries across Africa. See also the Zimbabwean case of *Magaya v Magaya* Judgement No SC 210/98/Civil Appeal No 635/92 (unreported) and Tanzanian case of *Ephraim v Pastory & Another* 87 ILR 106.

¹²⁹ See Cook (n 39 above) 246.

discrimination renders women 'weak' in society and makes them practically unfit for parliament.¹³⁰

To sum, constitutions guarantee equality and non-discrimination, but in reality, watered-down non-discrimination clauses, biased citizenship laws, antiquated common law, and patriarchal customary law all work in concert to disempower women, thus making it arduous for them to enter and remain in mainstream politics. Parliaments are arenas for the powerful and influential in all societies. It follows that women, weakened by legal systems, will find it laborious to access parliaments. This perpetuates the gap between *de jure* and *de facto* representation thus rendering the former almost rhetoric.

3.2 Political impediments

Studies have shown that women find it much more challenging to engage in politics in polities characterised by want of democratisation and freedom of speech.¹³¹ In countries that are relatively democratic, the nature of politics, types of electoral systems, party politics and lack of political will have often proved to be obstacles to women's parliamentary representation.

3.2.1 Masculine model of politics

In most countries, men overwhelmingly dominate the political landscape. They formulate the rules of the political game and define the standards of evaluation.¹³² Since they head political parties, they decide who should make it to parliament.¹³³ Men's politics are characterised by 'winners and losers, competition and confrontation, which are alien to women, who prefer mutual respect, collaboration and consensus building'.¹³⁴ This male gladiatorial model politics sets a high threshold for women and disdains them thus making it difficult for the majority of women to access decision-making bodies like parliaments.

¹³⁰ See J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons' (2000) 6 *Buffalo Human Rights Law Review* 65.

¹³¹ Shabangu (n 126 above) 120.

¹³² G Geisler 'Troubled sisterhood: Women and politics in Southern Africa: Case studies from Zambia, Zimbabwe and Botswana' (1995) 94 *African Affairs* 545, 566. The author found out that men require women to be 'absolutely spotless' before they can accommodate them. Shabangu (n 125 above) 103 states that a female Swazi MP was 'thrown' out of Parliament simply because she did not cover her head with a headscarf or hat. This shows that men define the standards.

¹³³ G Geisler 'A second liberation': Lobbying for women's political representation in Zambia, Botswana and Namibia (2006) 32 *Journal of Southern African Studies* 69, 78.

¹³⁴ N Shvedova 'Obstacles to women's participation in parliaments' in J Ballington *et al* (eds) *Women in parliament: Beyond numbers* (2005) 35-36.

3.2.2 Type of electoral system

Research demonstrates that electoral systems have a direct impact on women's parliamentary representation.¹³⁵ Proportional representation (PR) systems are more accommodating for women than the majoritarian systems; in countries where the PR system is used, women's parliamentary representation is higher.¹³⁶ Political parties also play a crucial role in advancing or impeding women's representation. They are 'gatekeepers' in the process of candidate selection and usually perceive men to be more viable and better candidates than women.¹³⁷

3.2.3 Lack of political will

Political will or want thereof makes political parties that have gender quotas to put women at the bottom of their party lists.¹³⁸ The African National Congress (ANC) party list for the first democratic elections of South Africa had only two women in the top 30.¹³⁹ In subsequent years, more women have made it to the top of the list hence the marked increase in the number of female ANC members of parliament (MPs).¹⁴⁰ This clearly demonstrates that the organisation of political parties and political will can advance or impede women in their quest for parliamentary representation.

Want of political will at the level of government to implement its binding obligations under international and regional instruments is another problem area.¹⁴¹ CEDAW adjures state parties to adopt TSMs such as affirmative action, quotas or reserved seats in a bid to improve women's representation in decision-making processes but a few countries in Africa have met this obligation.¹⁴² Some countries operate a dualist system that requires domestication of international instruments into the national legal system. It would seem that others ratify these

¹³⁵ See Report on 'Women in Parliament of Australia' (2001) 12 available at <<http://www.slsa.sa.gov.au>> (accessed 20 September 2006).

¹³⁶ See (n 64 above) 16.

¹³⁷ T Sacchet 'Political parties: When do they work for women? Paper presented at an expert group meeting in Addis-Ababa Ethiopia 24-27 October 2005 available at <<http://www.un.org/womenwatch/daw>> (accessed 25 July 2006).

¹³⁸ See generally M Caul 'Political parties and the adoption of candidate gender quotas: A cross national analysis' (2001) 63 *The Journal of Politics* 1214-1229.

¹³⁹ Only Winnie Mandela and Albertina Sisulu were in the top 30 of the ANC list. See AM Goetz 'Women in politics and gender equality in policy: South Africa and Uganda' (1998) 76 *Review of African Political Economy* 241.

¹⁴⁰ See Sacchet (n 137 above).

¹⁴¹ See generally AF Bayefsky 'Making the human rights treaties work' in L Henkin & JL Hargrove *Human rights: An agenda for the next century* (1994) 229-251.

¹⁴² See art 4(1) of CEDAW.

instruments for what may be termed 'political correctness' because they do not domesticate them. One commentator noted poignantly that, 'without domestication, excellent regional agreements signed by African leaders are useless nationally, except as fashionable showpieces on the international good governance catwalk.'¹⁴³ Lack of political will is, therefore, a factor that blocks the way for women in their quest for parliamentary representation. Over and above want of political will, An-Na'im identifies practical impediments such as lack of human and material resources for implementation of human rights instruments.¹⁴⁴ Perhaps all these demonstrate the Achilles heel of the human rights paradigm.¹⁴⁵

3.3 Socio-cultural impediments

Culture is sacrosanct and deeply entrenched in African societies and it sometimes sanctions discriminatory practices against women.¹⁴⁶ It permits 'insidious malignant sexism' against women.¹⁴⁷ It is not surprising that for example, the Ugandan Constitution provides for affirmative action for women in recognition of the imbalances created by history, *tradition and custom*.¹⁴⁸ Culture is a set of rarely static ideas and attitudes shared by a group of people. These ideas and attitudes exist locally, ethnically, nationally or even globally and they shape peoples' identity and the way they behave individually and collectively.¹⁴⁹ Culture defines the roles of men and women in society and places them within the so-called public and private domains respectively.

3.3.1 The public/private dichotomy

Feminists like Charlesworth¹⁵⁰ draw a distinction between two spheres of societal life, public and private spheres, while others contend that the distinction is rather blurred.¹⁵¹ The public/private

¹⁴³ T Mutasah 'SADC and human rights: Bridging the credibility gap' available at <<http://www.newzimbabwe.com>> (accessed 20 June 2006).

¹⁴⁴ A An-Na'im 'The legal protection of human rights in Africa: How to do more with less' in A Sarat & TR Kearns *Human rights concepts, contests, contingencies* (2000) 108. See also C Beyani 'Towards a more effective guarantee of women's rights in the Africa human rights system' in RJ Cook (ed) *Human rights of women: National and International perspectives* (1996) 285-306.

¹⁴⁵ Bayefsky (n 141 above). Cultural relativism also impedes the idea of equality for all. See CM Cerna 'Universality of human rights and cultural diversity: Implementation of human rights in different socio-cultural contexts' (1994) 16 *Human Rights Quarterly* 740.

¹⁴⁶ P Norris & R Inglehart 'Cultural obstacles to equal representation' (2001) 12 *Journal of Democracy* 126.

¹⁴⁷ CE Ukhun & NA Inegbedion 'Cultural authoritarianism, women and human rights issues among the Esan people of Nigeria' (2005) 5 *African Human Rights Law Journal* 129, 133.

¹⁴⁸ See arts 32(2) & 33(6) & (7) of the 1995 Constitution of Uganda (emphasis added).

¹⁴⁹ See TW Bennette *Human rights and African Customary Law* (1999) 9.

¹⁵⁰ Charlesworth (n 38 above) 190.

¹⁵¹ AM Tripp *Women in Politics in Uganda* cited in Overview paper of the expert group meeting on democratic governance in Africa held in Arusha Tanzania 6-8 December 2005.

dichotomy based on gender explains male dominance in all areas of power and authority.¹⁵² This dichotomy is designed in such a way that:

The public realm of the work place, the law, economics, politics and intellectual and cultural life, where power and authority are exercised, is regarded as the natural province of men; while the private world of the home, the hearth and children is seen as the appropriate domain of women.¹⁵³

Inevitably, because men and women occupy different realms in society, they have gender roles designed to suit their respective realms.¹⁵⁴ Women in the private or family domain are mothers, caregivers, and do general household chores while men are in parliaments, governments, business, and so on. The private sphere is, therefore, apolitical and the inverse is true about the public sphere. This apolitical and political nature of these two spheres has resulted in asymmetric value of the work done by men and women; greater significance being attached to the public, male world than to the private, female one.¹⁵⁵ Men are associated with production and women with reproduction.¹⁵⁶ Ostensibly, law closely regulates the public sphere to maintain the *status quo* while the private sphere is unregulated. The latter is given impetus by the privacy of domestic life that characterises the private sphere.

The bi-polarisation of these two spheres is thus gendered and discriminatory and has far-reaching consequences for women in that it permanently puts the majority of them in the home while it allows men to venture into politics.¹⁵⁷ The few who contrive to get out of the private sphere through engaging in petty businesses or education find the highly regulated public sphere hostile, with its discriminatory laws.¹⁵⁸ The public/private divide is a common phenomenon in all societies and is one of the major impediments to women aspiring to be parliamentarians.

¹⁵² Charlesworth (n 38 above).

¹⁵³ H Charlesworth 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 613, 626. For the history of the public/private dichotomy see MJ Horwitz 'The history of public/private distinction' (1982) 6 *University of Pennsylvania Law Review* 1423-1428.

¹⁵⁴ Gender roles are learned in accordance with one's identity as being either 'masculine' or 'feminism', See L Richardson *The dynamics of sex and gender: A sociological perspective* (1988) 3.

¹⁵⁵ Charlesworth (n 38 above).

¹⁵⁶ L Frank 'History and current context of the participation of women in politics and decision making in Namibia' in JS Foster *et al Women in politics and decision-making: A gendered political analysis* (2005) 86.

¹⁵⁷ M Thornton 'The public/private dichotomy: Gendered and discriminatory' (1991) 4 *Journal of Law and Society* 448, 450. See also S Welch & P Secret 'Sex race and political participation' (1981) 34 *The Western Political Quarterly* 5, 7. The authors argue that 'women have been socialised to believe that politics is a man's game.'

¹⁵⁸ Shabangu (n 126 above) 103.

3.3.2 Religion

Religion is another force within the social fabric of society that spells out different roles for men and women. In delimiting the roles of women, religion concomitantly defines their status, which is incompatible with power and decision making. It subordinates women and makes men 'heads' or all institutions.¹⁵⁹ It is not surprising that some religions show ambivalence about women becoming priests. A male chauvinist commenting on gender roles said, '... I do not see gender equality succeeding because don't the scriptures in Ephesians 5:22-23 command women to submit to their husbands and men to love their wives?'¹⁶⁰ An-Na'im notes that the Islam based *Shari'a* law disqualifies women from holding high-ranking public office.¹⁶¹ Religious orthodoxy, therefore, relegates women to the status of subordinates and contributes in making them unfit for decision-making in general.

3.3.3 Patriarchy

At the core of the political, socio-cultural and religious practises lies a convoluted ideology of patriarchy.¹⁶² Lerner succinctly defines it in the following prose:

Patriarchy in its wider definition means the manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general. It implies that men hold power in all the important institutions of society and that women are deprived of access to such power.¹⁶³

The way in which the world order is organised seems to fit this feminist definition of patriarchy. Statistics of women in the three arms of government, the economic sector and major international institutions all corroborate the ideology of patriarchy.¹⁶⁴ Patriarchy functions through a set of complex and often sophisticated set of rules, practices, rituals and conventions, which localise or domesticate women and place them within the private domain.¹⁶⁵ Rich's definition of patriarchy offers insight on how the system operates. He defines it thus:

¹⁵⁹ See B Gallaway & L Creevey 'The Heritage of Islam: Women, religion, and politics in West Africa' in CG Bowman & A Kuenyehia (eds) *Women and law in Sub-Sahara Africa* (2003) 592. See also M Afkhami 'Gender apartheid, cultural relativism, and women's human rights in Muslim societies' in M Agosin (ed) *Women, gender, and human rights: A global perspective* (2002) 234.

¹⁶⁰ Quoted in Shabangu (n 126 above) 103.

¹⁶¹ A An-Na'im 'The rights of women and international law in the Muslim context' (1987) 9 *Whittier Law Review* 491, 493. He notes that the sources of disqualification are Qur'anic and Sunna statements 2:282 & 4:34.

¹⁶² See generally B Agarwal (ed) *Structures of patriarchy: The state, the community and the household* (1990) 1-27.

¹⁶³ G Lerner *Reconceptualising the family* (2000) 65.

¹⁶⁴ See H Charlesworth 'Transforming the united men's club: Feminist futures for the United Nations' (1994) 4 *Transitional Law and Contemporary Problems* 421, 433. See also R Murray 'A feminist perspective on reform of the African human rights system' (2001) 1 *African Human Rights Law Journal* 207.

¹⁶⁵ Lerner (as 163 above) 67, argues that practises such as payment of dowry or *lobola* are used to entrench the system of patriarchy whereby women are required to breed on behalf of men in lieu of the dowry.

A familial-social, ideological, political system in which men by force, direct pressure or through ritual, tradition, law, language, customs, etiquette, education, and the division of labor, determine what part women shall or shall not play in which the female is everywhere subsumed under the male.¹⁶⁶

This definition succinctly illustrates how patriarchy functions. Since different roles for men and women are ingrained in societal life, men prefer to maintain the *status quo* of dominance and are unwilling to relinquish it.¹⁶⁷ It therefore becomes difficult for women to get out of the private domain into a historically entrenched male paradigm. As Tamale notes, even the few who take up the gauntlet and contrive to get through find the rules of the game complex and difficult to comprehend thus making their representation unsustainable.¹⁶⁸

3.4 Economic impediments

Politics belong to the public realm of societal life, which realm is compatible with the market and financial resources; most things in this realm revolve around the use of money. It follows that women in order to 'intrude' into this realm have to have financial resources to sustain costly political campaigns and other incidental matters. Yet, in Africa, women are generally visited by problems of poverty, unemployment and lack of financial resources. Perhaps customs, traditions, and religion, which relegate them to the private realm of the family and hearth, give impetus to and exacerbate their poverty. One scholar referred to this phenomenon as, 'the feminization of poverty and unemployment'.¹⁶⁹ Thus, poverty hinders African women who would otherwise embark on parliamentary politics. Their lack of access to and ownership of productive resources severely limits their political capacity.¹⁷⁰

3.4.1 The impact of Globalisation

Globalisation is an essentially contested phenomenon. Some argue that it means 'increased growth, opportunity, and prosperity while to others it denotes an orgy of greed and inequality'.¹⁷¹

Ali Mazrui has argued that one of the repercussions of this phenomenon is that it promotes

¹⁶⁶ A Rich quoted in F Bari 'Women's political participation: Issues and challenges' available at <<http://www.un.org/womenwatch/daw>> (accessed 20 September 2006).

¹⁶⁷ See M Nzomo 'Kenyan women in politics and public decision making' in G Mikell (ed) *African feminism: The politics of survival in Sub-Sahara Africa* (1997) 234.

¹⁶⁸ Tamale (n 37 above) 75, notes that the Ugandan Parliament uses exclusively English language and intricate rules, which took her aback the first time she visited the house.

¹⁶⁹ Shvedova (n 134 above) 42.

¹⁷⁰ Bari (n 166 above) 5. See also L Powell *et al* 'Male and female differences in elite political participation: An examination of the the effects of socio-economic and familial variables' (1981) 34 *Western Political Quarterly* 31, 33. The authors argue that women with high levels of income have increased opportunities in political participation.

¹⁷¹ S Musungu 'Economic integration and human rights in Africa: A comment on the conceptual linkages' (2003) 3 *African Human Rights Law journal* 89.

enlargement of economies while concomitantly stimulating fragmentation of ethnic and cultural scale.¹⁷² In line with this view, the Special Rapporteur on globalisation, Oloka-Onyango has noted that ‘globalisation has caused global conditions of inequality and discrimination to worsen’ and that among ‘the distinct groups of society upon whom globalisation's impact has been most telling, women clearly stand out’.¹⁷³ For example, ‘under the yoke of the structural adjustment programmes (SAPs)¹⁷⁴ globalisation renders African women in the informal sector invisible through concepts such as ‘efficiency’, ‘stabilization’, and ‘cost-effectiveness’.¹⁷⁵ It is for these reasons that the Women’s Protocol calls on state parties to ensure that negative effects of globalisation are minimised.¹⁷⁶ The phenomenon of globalisation, therefore, adds greater complexities to the quest for equality, particularly in the economic arena, but also within the context of culture and politics.¹⁷⁷ Thus, women disempowered by globalisation forces will almost invariably not make it to parliaments.¹⁷⁸

3.5 Other impediments

Additional to specific impediments explored above are other impediments, which also contribute and exacerbate the gap between *de jure* and *de facto* women’s parliamentary representation.

3.5.1 Illiteracy and limited access to education

Majority of women in Africa are illiterate and generally have limited access to education.¹⁷⁹ It is in recognition of this fact that Uganda formally introduced affirmative action for females in higher education.¹⁸⁰ Increasingly, parliaments are becoming complex and professionalized mainly because running a modern state requires a certain level of exposure and comprehension of national, regional and indeed global issues. It follows that education becomes central in order for

¹⁷² A Mazrui quoted in J Oloka-Onyango ‘Who’s watching ‘big brother’? Globalisation and the protection of cultural rights in present-day Africa’ (2005) 5 *African Human Rights Law Journal* 11.

¹⁷³ J Oloka-Onyango & D Udagama ‘The realisation of economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights’. A report submitted by Special Rapporteur on Globalisation E/Cn.4/Sub.2/2000/13 paras 26 & 30.

¹⁷⁴ As above, para 34. The Rapporteur define SAPs as conditionalities attached to aid packages to developing countries by multilaterals.

¹⁷⁵ As above, para 28.

¹⁷⁶ Art 19(f) of the Women's Protocol.

¹⁷⁷ Oloka-Onyango & Udagama (n 173 above) para 30.

¹⁷⁸ It is worth noting, however, that as much as globalisation marginalises and excludes women, it has qualities that liberate and empower people. See Oloka-Onyango (n 172 above) 4.

¹⁷⁹ For example, Tamale notes that in Uganda more than 90% of women are illiterate or semiliterate. Tamale (n 37 above) 75.

¹⁸⁰ See Bowman & Kuenyehia (n 1 above) 602.

one to have the requisite exposure. Some scholars argue that '[j]ust as education has been a key to the liberation of colonised peoples, it is a key to the liberation of women from subjugation by men.'¹⁸¹ Women's limited access to education in the majority of African countries means that they are not competitive and viable candidates for parliaments and unless the situation is reversed, men will continue to dominate all institutions.

3.5.2 Negative media coverage of women politicians

In its dual role of being 'a chronicler of current events and informer of public opinion', the media has become a force that shapes peoples' understanding and perceptions about public life and the political process.¹⁸² Research has established that the media usually portray aspiring women politicians negatively thus discouraging them to pursue politics and shaping the perceptions of the general citizenry into believing that women are incompatible with politics and decision making.¹⁸³ The question is why do the media portray women so negatively? It has been observed that the media itself is male-dominated and is a patriarchal tool that serves as a conduit for perpetuation of gender subordination and the gendered public/private dichotomy.¹⁸⁴ The media in Africa, therefore, plays an unfortunate role in keeping women out of parliaments.

3.5.3 Psychological hindrances

With so many systems working against women: law, religion, custom, media, and so on, women end up having psychological hindrances such as lack of confidence and the perception of politics as 'dirty'.¹⁸⁵ These individual constraints thus inhibit women from engaging in mainstream politics.

3.6 Conclusion

A multifocal approach to the understanding of the root causes of the gap between *de jure* and *de facto* positions reveals that a number of impediments account for this disparity. The laws, customs, religions, political parties, the ideology of patriarchy, the gendered public/private dichotomy, globalisation and the media all play a role in keeping women out of politics thus making it difficult for their *de jure* right to representation to translate into *de facto*. This begs the question: how can this gap be bridged?

¹⁸¹ MA Freeman & AS Fraser (n 122 above) 107. See also W Rule 'Why women don't run: The critical contextual factors in women's legislative recruitment' (1981) 34 *Western Political Quarterly* 60, 68. He argues that lack of education is a factor that inhibits women in legislative recruitment process.

¹⁸² See Shvedova (n 134 above) 47; Tamale (n 37 above) 183. See also report of International Council on Human Rights Policy titled 'Journalism, media and the challenge of human rights reporting' (2002) 9.

¹⁸³ This was established by Tamale in her analysis of the role of the Ugandan media on issues involving women politicians in Uganda. See Tamale (n 37 above) 183-193.

¹⁸⁴ Tamale (n 37 above) 196.

¹⁸⁵ See Shvedova (n 134 above) 45.

CHAPTER 4: 'HOW TO BRIDGE THE GAP': RWANDA AND SOUTH AFRICA IN PERSPECTIVE

4. Introduction

The previous chapter demonstrated that women's *de jure* right to parliamentary representation does not *ipso facto* translate into *de facto* representation due to a number of impediments that militate against it. This right as enshrined in many constitutions is fundamental but incomplete.¹⁸⁶ At that level, it represents a starting point, a bare minimum.¹⁸⁷ This part of the study grapples with what has come to be known as temporary special measures (TSMs) as possible solutions for bridging the gap between the *de jure* and *de facto* positions. It first provides an overview of these measures and some controversies surrounding them. It then proceeds to investigate how Rwanda and South Africa have contrived to reach and surpass the critical mass of 30 per cent.¹⁸⁸ In the final analysis, this chapter hopes to provide invaluable precedents for the countries that have not reached the critical mass.

4.1 Defining temporary special measures

TSMs are those measures designed to accelerate the achievement of equality. They are particularly geared towards reversing past and current inequality and discrimination. In the case of women's right to parliamentary representation, TSMs address the issue of under-representation occasioned by discriminatory laws, customs, religions, patriarchy, and the public/private divide. Cook defines TSMs in the following words:

Generally speaking, temporary special measures are time-limited positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group numbers into the mainstream of political, economic, social, cultural and civil life.¹⁸⁹

TSMs are, therefore, corrective, compensatory, and promotional in nature.¹⁹⁰

¹⁸⁶ See RL Hillock 'Establishing the rights of women globally: Has the United Nations Convention on the Elimination of All forms of Discrimination Against Women made a difference?' (2005) 12 *Tulsa Journal of Comparative and International Law* 481, 482.

¹⁸⁷ HB Schopp-schilling 'Reflections on a general recommendation on article 4(1) of the Convention on the Elimination of all forms of Discrimination Against Women' in Boerefijn (n 18 above) 22.

¹⁸⁸ Other countries include Mozambique, Tanzania, Burundi and Seychelles but of practical reasons, they cannot form part of this chapter. See annexure 1.

¹⁸⁹ R Cook 'Obligations to adopt temporary special measures under the Convention on the Elimination of All forms of Discrimination Against Women' in Boerefijn (n 18 above) 119.

¹⁹⁰ Schopp-schilling (n 187 above).

4.2 Types of temporary special measures

There is a wide spectrum of TSMs but for purposes of this study, only affirmative action, quotas and reserved seats are relevant:

4.2.1 Affirmative action

Affirmative action is an overarching umbrella concept that covers all measures geared towards redressing past and current discrimination.¹⁹¹ Its meaning is rather perplexing because there is a vast array of inconsistent practices and analogous terms that fall under its rubric.¹⁹² It was coined in the United States (US)¹⁹³ and its equivalent in the United Kingdom (UK) is positive action.¹⁹⁴ Quotas and reserved seats fall within its generic meaning.

4.2.2 Gender quotas and reserved seats

Different scholars have defined gender quotas differently but for purposes of this study, they refer to a numerical reservation of women in parliaments independent of their political skills and traits.¹⁹⁵ They are an effective way of attaining 'real equality', that is, 'equality of results'.¹⁹⁶ They are corrective and compensatory in nature with the paramount objective of addressing under-representation of women in parliaments occasioned by a variety of structural, ideological and psychological obstacles. Gender quotas thus change the history of women.¹⁹⁷ 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.¹⁹⁸ With reserved seats, a certain number of seats are set aside for women and this is usually done

¹⁹¹ It has also been defined as a temporary measure for attaining the 'long-belated justice' in both the public and private spheres. See UNDP report (n 35 above) 21.

¹⁹² JV White 'What is affirmative action?' (2004) 78 *Tulane Law Review* 2117, 2168 asserts that affirmative action has various 'policy definitions' but enjoys no clear legal definition. See also M Rosenfeld *Affirmative action and justice: A philosophical and constitutional inquiry* (1991) 42.

¹⁹³ MS West 'The historical roots of affirmative action' (1998) 10 *La Raza Law Journal* 607, 608. The author argues that affirmative action has its roots in slavery in that it was coined to correct the inequalities created by slavery in the US.

¹⁹⁴ A Peters 'The many meanings of equality and positive action in favour of women under European community law: A conceptual analysis' (1996) 2 *European Law Journal* 178. See also RB Ginsburg & DJ Merritt 'Affirmative action: An international human rights dialogue' (1999) 21 *Cardozo Law Review* 252.

¹⁹⁵ See Peter (n 19 above).

¹⁹⁶ D Dahlerup 'Quotas are changing the history of women' in J Ballington *et al* (eds) *The implementation of quotas: African experiences* (2004) 17.

¹⁹⁷ As above. See also BM Kethusegile-Juru 'Quota systems in Africa: An overview' in J Ballington *et al* (eds) *The implementation of quotas: African experiences* (2004) 22-28.

¹⁹⁸ D Dahlerup 'Increasing women's political representation: New trends in gender quotas in J Ballington *et al* (eds) *Women in parliament: Beyond numbers* (2005) 142.

through constitutional provisions or legislation.¹⁹⁹ These measures have been criticised in that they may be interpreted as creating a ceiling for women or may be abused to promote token women.²⁰⁰ In quelling this view, it can be argued that it is better to have an imperfect system for allowing representation of women than no system at all.²⁰¹ *De jure* mechanisms may 'only freeze the advantages that men have over women in parliamentary politics but cannot reverse past inequalities.'²⁰² It is therefore important to have TSMs to correct past inequalities and allow women to be represented in decision making.

4.3 Temporary special measures in international instruments: A synopsis

TSMs are endorsed in various international instruments and are further elaborated upon in general comments (GC) and general recommendations (GR) of different treaty bodies.²⁰³ Article 4(1) of CEDAW referred to as the affirmative action provision reads:

Adoption by States Parties of temporary special measures aimed at accelerating 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 objectives of equality of opportunity and treatment have been achieved.

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.'²⁰⁴ 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.'²⁰⁵ GR 25 clarifies what TSMs are and notes that '[s]tates parties that adopt and implement such measures under the Convention do not discriminate against men.'²⁰⁶

The UN Human Rights Committee (HRC), in its GC No 25 on article 25 of the ICCPR dealing with participation in political and public life noted that, '[a]ffirmative measures may be taken in

¹⁹⁹ Dahlerup (n 198 above) 142.

²⁰⁰ Karl (n 111 above) 70.

²⁰¹ See Danhlerup (n 198 above) 144.

²⁰² GA Spann 'Affirmative action and discrimination' (1995) 39 *Howard Law Journal* 1, 10.

²⁰³ In particular the HRC and Committee on CEDAW.

²⁰⁴ Committee on CEDAW, *Temporary Special Measures*, GR No 5 UN Doc. HRI/Gen/1/Rev.4

²⁰⁵ Committee on CEDAW, *Political and Public Life*, GR 23 UN Doc. HRI/Gen/1/Rev.1

²⁰⁶ Committee on CEDAW, GR 25 para 18.

appropriate cases to ensure that there is equal access to public service for all citizens'.²⁰⁷ The Women's Protocol also enjoins state 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'.²⁰⁸

It is thus incontrovertible that TSMs are incorporated in major international human rights instruments and that treaty bodies charged with the interpretation of such instruments see them as solutions for reversing discrimination against marginalised groups like women, in politics. However, the vexed question is whether these TSMs are binding.

4.4 The binding nature of temporary special measures

It is a trite principle of international law, which was established by the Permanent Court of International Justice (PCIJ) as far back as 1925 that, '[a] state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken'.²⁰⁹

Some scholars have argued that TSMs are not binding upon state parties and 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'.²¹⁰ Cook, however, makes a compelling submission to the contrary. She convincingly argues that there is a need:²¹¹

[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.

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

²⁰⁷ Human Rights Committee, *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.

²⁰⁸ See art 9(1) of the Women's Protocol.

²⁰⁹ *Case concerning the exchange of Greek and Turkish populations* (PCIJ) (1925) (Serie B) 20, cited in Peters (n 18 above) 259.

²¹⁰ Peters (n 18 above) 261; See also the language in GR No 23.

²¹¹ Cook (n 189 above) 129. See also R Holtmaat 'Building blocks for a general recommendation on article 4(1) of the CEDAW Convention' in Boerefijn (n 18 above) 205.

the Convention.²¹² TSMs are such appropriate measures to achieve the objective of elimination of discrimination and promotion of *de facto* equality in political and public life. In that light, therefore, they are binding upon state parties.

4.5 The rationale behind temporary special measures

Resorting to a graphic metaphor of competitors in a race, the former US President justified affirmative action when he said, '[y]ou do not take a person who has been hobbled by chains and liberate him and then say, you are free to compete with others, and still believe [that you are] being fair.'²¹³ Albeit simplistic, this metaphor highlights that *de jure* equality is not enough to achieve *de facto* equality, that it is thus justified to resort to other measures (in our case TSMs) in order to realise true equality in parliamentary representation.

From a philosophical perspective, the rationale for TSMs rests in the theories of social justice such as compensatory or corrective justice, distributive justice, and utilitarian or liberal theories.²¹⁴ Compensatory justice justifies the inclusion of women in politics through TSMs as compensation for the historic wrongs of exclusion and discrimination.²¹⁵ Since women make up more than half of populations of many countries, it is only just that TSMs be implemented to allow for their proportionate representation in decision making.²¹⁶ Distributive justice rationale justifies TSMs in that they ensure accommodation of peculiar and discrete interests of women.²¹⁷

In line with this theory, the Beijing Platform For Action (BPFA) notes that:

Women's equal participation in decision making is not only a demand for justice or democracy, but can also be seen as a necessary condition for women's interests to be taken into account.²¹⁸

TSMs also afford women necessary numbers to effect changes for their constituency in parliaments. They allow them to have a 'critical mass', which enables them to form solidarity and champion rights of other women.²¹⁹

²¹² See art 7 of CEDAW (emphasis added).

²¹³ President Lyndon Johnson quoted by C Bacchi 'The practice of affirmative action policies: Explaining resistance and how these affect results' in Boerefijn (n 18 above) 77.

²¹⁴ F Raday 'Systematizing the application of different types of temporary special measures under article 4 of CEDAW' in Boerefijn (n 18 above) 35.

²¹⁵ However, others are opposed to this view. See for example. K Sullivan 'Sins of discrimination: Last terms affirmative action cases' (1986) 100 *Harvard Law Review* 83.

²¹⁶ TM Franck 'Democracy as a human right' in L Henkin & JL Hargrove (eds) *Human rights: An agenda for the next century* (1994) 73.

²¹⁷ Cook (n 189 above) 121.

²¹⁸ See para 181 of the BPFA.

²¹⁹ D Drude 'From a small to a large minority: Theory of critical mass' (1998) 11 *Scandinavian Political Studies* 275-298. See also JS Jaquette 'Women in power: From tokenism to critical mass' (1997) 108 *Foreign Policy* 23, 25.

4.6 Controversies surrounding temporary special measures

Although plausible and laudable, TSMs have attracted much opprobrium and ambivalence in some quarters. For example, conservative, liberal, and critical legal thinkers in the US have labelled quotas an ‘anathema’ and ‘pariah’ amongst policies designed to redress past discrimination.²²⁰

4.6.1 How long is ‘temporary’ and what is ‘special’?

TSMs have raised a vexed question of how long is ‘temporary’ and what is ‘special’?²²¹ This question arises because, generally, women lack traits and skills of political life since they have over time, been relegated to the so-called private sphere. Now, the question is, for how many generations should TSMs be implemented so that women can be said to have gained enough political skills and true equality? Provisions on TSMs do not answer this directly since they are generally ‘indefinite’, ‘open-ended’, ‘indeterminate’, they have no specified cut of date or ‘sunset clauses’.²²² This, however, should not be a cause for concern because article 4(1) of CEDAW gives direction on the temporal nature of TSMs when it states that, ‘these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved’. It follows that the duration of TSMs should be informed by functional results or outcomes rather than pre-determined time frames.²²³ They should be discontinued when equality is achieved in terms of numbers. As to what is special, GR No 25 of the Committee on CEDAW states that the real meaning of ‘special’ in the formulation of article 4(1) is that the measures are designed to serve a specific goal.²²⁴

4.6.2 Temporary special measures and the dilemmas of representation

One of the rationale behind TSMs is that they allow women to have a critical mass necessary for them to form solidarity and be voices of other women, but the question is whether they really represent other women and if so how? Scholars have identified two types of political representation as ‘standing for’ representation and ‘acting for’ representation.²²⁵ The former

²²⁰ D Rosenblum ‘Parity/disparity: Electoral Gender inequality on the tightrope of liberal constitutional traditions (2006) 39 *Davis Law Review* 1119, 1133.

²²¹ M Freeman ‘Temporary special measures: How long is temporary and what is special?’ in Boerefijn (n 18 above) 97.

²²² M Bossuyt ‘The concept and practice of affirmative action’ in Boerefijn (n 18 above) 71. See also Cook (n 189 above) 127. She defines ‘sunset clauses’ as those ‘clauses that have predetermined dates on which the sun will set on the legislation.’

²²³ Schopp-schilling (n187 above) 29. See also Committee on CEDAW GR No 25 para 20.

²²⁴ Committee on CEDAW GR No 25 para 21.

²²⁵ Tamale (n 37 above) 72.

denotes 'social representation' while the latter refers to 'opinion representation'.²²⁶ With respect to women who get to parliaments through TSMs, it is difficult for them to purport to 'act for' or represent other women's opinions because women are not monolith: they have different classes, races, religions, ethnicities, and so on that make their opinions diverse.²²⁷ With respect to 'standing for' representation, however, it is possible for women parliamentarians to articulate issues peculiar to women as a group such as inequality, discrimination, under-representation and so forth, which affect the generality of women. Thus, they 'stand for' and not 'act for' other women.

4.6.2 "Reverse discrimination"

Those apathetic about TSMs such as Newton²²⁸ have often invoked pejorative terms like 'reverse discrimination' to describe them.²²⁹ Rejecting this term in a vitriolic tone, Fetzer laments:

"Reverse discrimination" is a covert political term which should be rejected by any serious academician or lay-person. It is an obstacle to change in the lengthy struggle for shared power...²³⁰

This term is fundamentally flawed especially when attention is paid to a pure textual reading of article 4(1) of CEDAW, which states in categorical terms that TSMs shall not be considered discrimination as defined in the Convention. What is discriminatory is determined by the aim of the measure put in place. TSMs for women's parliamentary representation are not discriminatory because their chief aim is to redress past and continuing discrimination against women not to discriminate against men.

The issue of whether TSMs constitute reverse discrimination arose in the celebrated Lesotho case of *Molefi Tsepe v The Independent Electoral Commission and Others*.²³¹ 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

²²⁶ As above 87.

²²⁷ Tamale (n 37 above) 74.

²²⁸ LH Newton 'Reverse discrimination as unjustified' (1973) 83 *Ethics* 308-312.

²²⁹ This point is made by Freeman (n 221 above) 99. See also BR Taylor *Affirmative action at work: Law, politics, and ethics* (1991) 111; DM McConell 'Title VII at twenty-The unsettled dilemma of 'reverse discrimination' (1983) 19 *Wake Forest Law Review* 1073-1103.

²³⁰ PL Fetzer 'Reverse discrimination': The political use of language (1992) 17 *Thurgood Marshall Law Review* 293.

²³¹ *Molefi Tsepe case* (n 105 above).

bodies/affairs, this should not be done to his detriment and in a discriminatory manner'.²³² Citing the Constitution of Lesotho, CEDAW, ICCPR, African Charter, SADC Declaration on Gender and Development and MDGs the Appeal Court held that Lesotho was justified in adopting TSMs and that they do not constitute discrimination against the applicant rather they promote restitutionary equality justified in a democratic society.

Fetzer notes that 'in the final analysis, allegations of 'reverse discrimination' are primarily based on the desire to maintain the status quo' and that the term is nothing but a 'political language'.²³³

4.6.4 Feminist critique of temporary special measures

Astonishingly, not all feminists support TSMs. Rees is one such feminist who has strenuously critiqued TSMs, particularly affirmative action.²³⁴ These critics argue that affirmative action is fundamentally flawed because it does not alter organisational culture and that it is assimilationist and hence limited in the impact it can have on women's lives.²³⁵ TSMs have also been criticised for targeting women as a category thus ignoring the differences amongst them and that they augment the 'constructed identity'.²³⁶ 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'.²³⁷ Critics further argue that the way to eliminate discrimination against women and to ensure equality of sexes in all areas of public life is through gender mainstreaming and education.²³⁸ Without discussing the merits or demerits of these arguments, it suffices to note rudimentarily that although it is true that these measures suggested by sceptic feminists can eliminate discrimination, they focus on current discrimination while TSMs primarily target historic and continuing discrimination. It follows that in order to redress past and continuing discrimination and to ensure *de facto* parliamentary representation of women, both TSMs and gender mainstreaming are necessary. It is on this note that the study turns to the cases of Rwanda and South Africa.

²³² *Molefi Tsepe case* para 13.

²³³ Fetzer (n 230 above) 315.

²³⁴ T Rees *Mainstreaming equality in the European Union: Education, training and labour market policies* (1998) 34.

²³⁵ As above.

²³⁶ See Bacchi (n 213 above) 86.

²³⁷ J Oloka-Onyango & S Tamale 'The personal is political', or Why women's rights are indeed human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 691, 697.

²³⁸ Rees (n 234 above). Gender mainstreaming is defined as 'a process that involves assessing implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels.' It seeks to remove obstacles that disadvantage women. See Gaer (n 55 above) 98.

4.7 Women's parliamentary representation in Rwanda

Rwanda is a country emerging from one of the most brutal and horrendous conflicts in recent history.²³⁹ The 1994 genocide claimed many lives of ordinary Rwandese men and women and shattered most political and economic institutions.²⁴⁰ In an effort to resuscitate the political landscape, the transition government led by the Rwanda Patriotic Front (RPF), through the Ministry of Gender in collaboration with women's groups carried out a study on women's participation in politics.²⁴¹ The study revealed that women accounted for 18 per cent of parliamentary seats prior to the genocide and 25.7 per cent after the genocide.²⁴² In the aftermath of the genocide, females (women and girls) made up 70 per cent of the population.²⁴³ These grim statistics led to debates on the adoption and implementation of gender quotas to reflect the gender demographics of the society in public institutions.

4.7.1 TSMs within the legal framework

Rwanda like other African countries has international obligations to ensure equality between men and women in all areas of societal life. It is a party to CEDAW having been the first African country to ratify the Convention in 1981.²⁴⁴ At the regional level, Rwanda is party to the Women's Protocol, which like CEDAW obligates state parties to adopt TSMs to ensure participation and representation of women in decision-making bodies.²⁴⁵ At the domestic level, Rwanda has incorporated gender quotas in both the Constitution and the electoral law, non-implementation of which attracts sanctions.²⁴⁶ Article 9(4) of the Constitution requires that women hold at least 30 per cent of positions in all decision-making organs. Article 82 states that

²³⁹ Noted in *Prosecutor v Akayesu* available at <<http://www.ictj.org>> (accessed 25 July 2006).

²⁴⁰ See generally G Prunier *The Rwanda crisis: History of a genocide* (1999).

²⁴¹ J Kanakuzwe 'The challenge of implementation of quotas in Rwanda' in Ballington *et al* (eds) *The implementation of quotas: African experiences* (2004) 96.

²⁴² As above.

²⁴³ E Powley 'Rwanda: Women hold up half the parliament' in J Ballington *et al* (eds) *Women in parliament: Beyond numbers* (2005) 158.

²⁴⁴ Rwanda ratified CEDAW on 2 March 1981. See CE Welch 'Human rights and African women: A comparison of protection under two major treaties' (1993) 15 *Human Rights Quarterly* 549, 566.

²⁴⁵ Rwanda ratified the Women's Protocol on 25 June 2004, available at <<http://www.africanunion.org>> (accessed 12 September 2006).

²⁴⁶ See global database of quotas for women available at <<http://www.quotaproject.org>> (accessed 12 June 2006).

the Senate shall be composed of 26 members of whom 30 per cent shall be women²⁴⁷ while article 54 enjoins political parities to promote gender equality in their recruitments.²⁴⁸

Rwanda's new constitutional dispensation ushered a quota regime, which was a major watershed that saw women hold 48.8 per cent of parliamentary seats in the 2003 elections; the highest number of women in parliament not only in Africa but globally.²⁴⁹ Due to the adoption of TSMs, Rwanda is the closest country to male/female parity in parliamentary representation.²⁵⁰

4.7.2 The institutional framework for women's political emancipation

The Ministry of Gender has acted as a conduit for the views of women in Rwanda by proposing adoption of quotas; repealing of discriminatory laws; promulgation of electoral quota laws and formulation of the gender policy.²⁵¹ Another important institution for women's political emancipation is a constitutional body called the Gender Observatory Office whose primary role is to monitor compliance with quota laws at all levels.²⁵² In Rwanda, 'radio messages are taken to be the gospel truth because radio is seen as a symbol of authority'.²⁵³ This power of the radio was exploited during the genocide to play a catastrophic role of mobilising one faction of society to massacre another.²⁵⁴ In the post-genocide era, this power of the media has been effectively mobilised to play a positive role of promoting gender equality.²⁵⁵ Constitutional Commissions like the Legal and Constitutional Commission, the Electoral Commission and the Commission on Human Rights are instrumental in promoting gender equality in various state institutions.²⁵⁶ Together, these institutions bolster women's parliamentary representation in Rwanda hence its remarkable achievements.

²⁴⁷ See arts 9(4) & 84 of the Constitution of Rwanda 2003 available at <<http://www.ipu.org>> (accessed 15 June 2006).

²⁴⁸ See arts 82 & 54 of the Constitution of Rwanda 2003.

²⁴⁹ See annexure 1.

²⁵⁰ Kanakuze (n 241 above) 98.

²⁵¹ Mutamba (n 40 above) 9.

²⁵² This office is established by art 185 of the Constitution of Rwanda 2003. See Kanakuze (n 241 above) 98.

²⁵³ Mutamba (n 40 above) 19.

²⁵⁴ See JF Metzli 'Rwandan media and the international law of radio jamming' (1997) 91 *American Journal of International Law* 628, 630.

²⁵⁵ Mutamba (n 40 above) 19.

²⁵⁶ UNIFEM Report 'Gender mainstreaming and women's empowerment strategies in Rwanda' (2002) 17.

4.7.3 Strengths and challenges

The strength of the system in Rwanda is that quotas are provided for in both the Constitution and the electoral laws. These quotas are not only for parliament but for all decision-making bodies.²⁵⁷ Thus, they create a situation where women hold at least 30 per cent of positions in all public institutions, the effect of which is to create a gender equal society. The fact that there is a quota observatory office and that non-compliance with the quota laws attracts sanctions ensures compliance. Underpinning these strengths is the political commitment exhibited by all stakeholders including the current president.²⁵⁸ In his speech in 1999, President Paul Kagame noted that:

The question of gender equality in our society needs a clear and critical evaluation in order to come up with concrete strategies to map the future development in which men and women are true partners and beneficiaries.²⁵⁹

Despite these commitments and laudable achievements, Rwanda still faces enormous challenges that have an impact on women's capacity and ability to take advantage of these legal and institutional frameworks.²⁶⁰ For example, women are still the majority in the informal sector making up 90 per cent of the work force in agriculture where their work is unremunerated.²⁶¹ Women also face problems of illiteracy, gender-based violence and so forth.²⁶² The current regime is criticised for suppressing freedom of expression.²⁶³ All these have the effect of weakening and discouraging women who would otherwise take advantage of the quota regime.

4.8 Women's parliamentary representation in South Africa

South Africa is a country that endured acute discrimination of blacks along racial lines and women on gender basis under the apartheid system.²⁶⁴ Under this system, the black majority and women were disenfranchised.²⁶⁵ It is unsurprising that women held a mere 2.8 per cent of

²⁵⁷ See (n 247 above).

²⁵⁸ Mutamba (n 40 above) 9.

²⁵⁹ President Kagame quoted in UNFEM Report (n 256 above) 16.

²⁶⁰ Kanakuze (n 241 above) 97.

²⁶¹ As above.

²⁶² As above.

²⁶³ Powley (n 243 above) 155.

²⁶⁴ For the chequered history of the apartheid regime, see generally NR Mandela *Long walk to freedom* (1995). See also judgement of Justice Mahomed in *AZAPO v President of the Republic of South Africa* 1996 (4) SA 671(CC) para 1.

²⁶⁵ I Currie & J De Waal *The Bill of Rights handbook* (2005) 2.

parliamentary seats during the apartheid regime.²⁶⁶ In a bid to claim their rightful place in the decision-making processes in the new South Africa, post the apartheid regime, women formed an umbrella body called the Women's National Coalition (WNC), which was to champion gender equality and the adoption of TSMs (in particular affirmative action) in the new constitution.²⁶⁷ This led to the elaboration of a gender sensitive constitution that saw women take their rightful place not only in parliament but also in the executive and other decision-making institutions, after the historic elections of 1994.²⁶⁸

4.8.1 TSMs within the legal framework

Before exploring the domestic legal framework, it is apposite to note that South Africa has an international obligation to ensure that women are represented in decision making and public life in general. This obligation stems specifically from the accession to CEDAW²⁶⁹ and the ratification of the Women's Protocol.²⁷⁰

At the apex of the South African legal regime is the 1996 Constitution, predicated and anchored on the principles of human dignity, equality, non-racialism and non-sexism.²⁷¹ Recognising 'the invidiousness and tenacity of past institutionalised discrimination', article 9(2) of the Constitution provides for the adoption of TSMs.²⁷² It proclaims that '[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' Linked to this provision is a constitutional requirement of representativity, which requires that all public institutions must be representative of the gender and racial diversity of South Africa's society.²⁷³ TSMs, in particular affirmative action, is implemented through three pieces of legislation, namely the Electoral

²⁶⁶ See M Myakayaka-Manzini 'Women empowered: Women in parliament in South Africa' available at <<http://www.idea.int>> (accessed 10 October 2006).

²⁶⁷ See M Myakayaka-Manzini 'Political party quotas in South Africa' in J Ballington *et al* (eds) *The implementation of quotas: African experiences* (2004) 58.

²⁶⁸ The 1994 elections were the first democratic elections where citizens of all races voted. Women then made 27% of parliamentary seats compared to 2.8% under the apartheid regime. See Goetz (n 139 above).

²⁶⁹ It acceded to CEDAW on 15 December 1995.

²⁷⁰ It ratified the Women's Protocol on 17 December 2004.

²⁷¹ See arts 1& 2 of the Constitution, Act 108 of 1996.

²⁷² See PE Andrews 'Striking the rock: Confronting gender equality in South Africa' (1998) 3 *Michigan Journal of Race and Law* 307, 327.

²⁷³ Ngcobo (n 41 above) 188.

Act,²⁷⁴ the Employment Equity Act²⁷⁵ and the Promotion of Equality and Prevention of Unfair Discrimination Act²⁷⁶ that focuses on the elimination of unfair discrimination in general.²⁷⁷

Of particular importance to the adoption of TSMs in South Africa is the political commitment that was exhibited by the very first democratically elected government under the leadership of President Nelson Mandela.²⁷⁸ In a conference on affirmative action, he said:

We have to pay special attention to the question of affirmative action to enable women to take their rightful place in every area of public and private life ... [A]partheid and patriarchy have combined in unholy matrimony, and begotten an intolerable degree of inhibition on the creative capacities of the majority of South African women.²⁷⁹

This political commitment coupled with a strong institutional framework buttress affirmative action in South Africa.

4.8.2 The supporting institutional framework

Three main constitutional institutions have a pivotal role in the promotion of gender equality. Directly charged with the mandate of promoting gender equality is the Commission for Gender Equality.²⁸⁰ The Human Rights Commission²⁸¹ supports it in its general human rights promotion and protection mandate. Lastly, the Office of the Public Protector works in synergy with the other two commissions.²⁸² The national Office on the Status of Women (OSW) that administers a gender mainstreaming policy also works in synergy with these institutions.²⁸³ The judiciary plays a significant role in upholding the constitutional provisions on affirmative action.²⁸⁴ Together these institutions ensure the smooth implementation and respect for TSMs in South Africa.

²⁷⁴ Act 73 of 1993 as amended. This Act has an Electoral Code of Conduct item 6 of which enjoins political parties to facilitate the full and equal participation of women in political activities. Ngcobo (n 41 above) 193.

²⁷⁵ Act 55 of 1998.

²⁷⁶ Act 4 of 2000.

²⁷⁷ For further analysis of these legislation see Ngcobo (n 41 above) 188.

²⁷⁸ Others describe Nelson Mandela as an 'embodiment of human rights' see Banda (n 127 above) 1, referring to an article in *The Independent on Sunday* 6 December 1998.

²⁷⁹ President Nelson Mandela quoted in H Booyen 'Affirmative action: A gender perspective' (1996) 21 *South African Yearbook of International Law* 154.

²⁸⁰ Established by art 186.

²⁸¹ Established by art 184.

²⁸² Established by art 182.

²⁸³ Myakayaka-Manzini (n 256 above) 2.

²⁸⁴ V Mokgoro 'Constitutional claims for gender equality in South Africa: A judicial response' (2003) 67 *Albany Law Review* 565-573.

4.8.3 Strengths and challenges

Like the Rwandan system, the strength of the South African model lies in a strong constitutional commitment to implement TSMs and further elaboration of specific legislation.²⁸⁵ This is buttressed by a conducive political climate and strong institutional framework. To ensure a broad-based gender equality agenda the OSW administers a gender mainstreaming policy, which strengthens affirmative action. All this is made possible by the ruling party acting as a torchbearer by adopting a 30 per cent quota in its party list, which ensures that not less than 30 per cent of the parliament is made up of women.

TSMs have enabled South African women to enjoy a critical mass, which has given them leverage in spearheading gender-sensitive legislation.²⁸⁶ They succeeded in pushing for far-reaching pieces of legislation²⁸⁷ and these included the Choice on Termination of Pregnancy Act,²⁸⁸ which provides women with favourable conditions to access abortion; the Domestic Violence Act,²⁸⁹ which protects women from abuse perpetrated by their partners; the Maintenance Act,²⁹⁰ which improves the position of women dependant on maintenance from their erstwhile partners; and the Recognition of Customary Marriages Act.²⁹¹ Currently female MPs are pushing for the adoption of the Sexual Offences Bill, which amongst others advocates for marital rape. All these demonstrate that women elected through TSMs champion laws and policies favourable to the generality of women, which hitherto were considered irrelevant.²⁹²

Despite these achievements, political emancipation of women in South Africa is marred by horrendous human rights abuses in the form of gender-based violence.²⁹³ Other problems

²⁸⁵ This point is also acknowledged in the UNIFEM study titled 'Bringing equality home: Implementing the Convention on the Elimination of All forms of Discrimination Against Women' (1998) 17.

²⁸⁶ See S Hassim 'Women and electoral politics in South Africa: 1994-1999' a paper presented at UNRISD workshop New York 3 June 2000 available at <<http://www.unrisd.org>> (accessed 10 October 2006).

²⁸⁷ See S Jagwanth and C Murray 'Ten years of transformation: How has gender equality in South Africa fared' (2002) 14 *Canadian Journal of Women and the Law* 254-259.

²⁸⁸ Act 92 of 1996.

²⁸⁹ Act 116 of 1998.

²⁹⁰ Act 99 of 1998.

²⁹¹ Act 120 of 1998.

²⁹² For more advantages of having a critical mass of women, see generally IPU survey 'Politics: Women's insight' (2000) available at <<http://www.ipu.org/wmn-e/world.htm>> (accessed 10 October 2006).

²⁹³ South Africa country report on human rights practices released by the Bureau on Democracy, Human Rights (2006) available at <<http://www.state.gov>> (accessed 21 August 2006).

include high prevalence of HIV/AIDS²⁹⁴ and low levels of education amongst black women.²⁹⁵ These have a circumscribing effect on women who would ordinarily take advantage of the political opportunities presented by TSMs.

4.8.4 Lessons learnt

There are six important lessons to be learnt from the adoption and implementation of TSMs in Rwanda and South Africa. The first one is that TSMs must be incorporated in the constitution in order to make them 'unchallengeable' from claims that they constitute 'reverse discrimination' and to protect them from easily being amended or repealed.²⁹⁶ This is of particular importance when attention is paid to the fact that Ghana²⁹⁷ and Egypt²⁹⁸ once had TSMs for parliamentary representation of women but were later repealed. Secondly, political parties being vehicles to parliaments must adopt quotas to ensure that women are adequately represented in their party lists. Thirdly, TSMs must be implemented within an enabling socio-political environment where all discriminatory laws are repealed. Customary and religious discriminatory practices must be constitutionally outlawed. Fourthly, TSMs must be accompanied by gender equality policies such as gender mainstreaming and gender equality promoting laws (equality laws). Fifthly, there must be strong institutional frameworks in charge of implementing TSMs and ensuring their compliance by all stakeholders. Lastly, all these must be underpinned by a strong political commitment emanating from the head of government oozing down to public institutions and officials.

4.9 Conclusion

In order to redress past discrimination against women in parliamentary representation caused by a host of impediments and to bridge the gap between their *de jure* and *de facto* positions, it is apposite to resort to robust compensatory measures in the form of TSMs. Indeed, international instruments and treaty bodies see them as one of the answers but not a panacea to women's under-representation in decision-making bodies. These measures are not discriminatory as claimed by some sceptics but are aimed at accelerating equality between men and women. General comments and recommendations as well as judicial pronouncements confirm this point.

²⁹⁴ Treatment Action Campaign *Equal treatment Newsletter* (2005) 3.

²⁹⁵ Hassim (n 286 above).

²⁹⁶ See *Molefi Tsepe* case (n 105 above).

²⁹⁷ Tamale (n 37 above) 23.

²⁹⁸ G Abou-Zeid 'Introducing quotas in Africa discourses in Egypt' in J Ballington *et al* (eds) *The implementation of quotas: African experiences* (2004) 47. Gender quotas were introduced in 1976 and cancelled in 1986.

It is worth reiterating that these TSMs are binding upon state parties, however, they have a margin of appreciation, so to speak, as to which type of TSMs to adopt and how to formulate them. The cases of Rwanda and South Africa have showed that states can adopt any form of TSM to suit their peculiar situations, informed by historical and other factors.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Overall conclusion

A contextualisation of women's right to representation has revealed that indeed they have a *de jure* right to representation in decision-making organs, which has its conceptual basis in the concepts of equality for all, non-discrimination and democracy. Its normative basis is found in a wide assortment of binding international, regional and domestic instruments. It is recognised in all African countries, albeit in varying degrees.

Despite all these, the overwhelming majority of African parliaments have not reached the 'critical mass' of 30 per cent women representation that, over a decade ago was agreed upon as a compromise percentage when radical feminists were advocating for a 50 per cent quota in 1995 in Beijing.²⁹⁹ This study has demonstrated that there is a gap between what the laws require (*de jure*) and what prevails in actuality (*de facto*).

A multifocal approach to the understanding of the root causes of this gap has revealed that a host of impediments act in concert to deny women their right to participate and be represented in parliaments. Culprits include constitutions that guarantee equality and non-discrimination yet they have caveats that permit discrimination under customary and personal laws, which adversely discriminate against women. Biased citizenship laws, antiquated common law, and patriarchal customary law, which all disempower women, thus making it arduous for them to enter and remain in mainstream politics. This perpetuates the gap and renders women's right to representation almost rhetoric.

Other impediments include sacrosanct customs, inviolable religions, the convoluted ideology of patriarchy, the gendered public/private dichotomy, negative globalisation and the media. All these work in cohorts to sustain the gap between the *de jure* and *de facto* positions.

Resort to international and regional instruments has shown that one of the effective ways of addressing the under-representation, which causes the disparity between the *de jure* and *de facto* situations, is to adopt and implement TSMs. These measures are not an option for state parties to CEDAW, ICCPR and the Women's Protocol.³⁰⁰ They are binding and all African

²⁹⁹ See generally, H Pietila & J Vickers *Making women matter: The role of the United Nations* (1996). The authors discuss outcomes of UN world conferences on women.

³⁰⁰ Incidentally, all but two African countries, Sudan and Somalia are state parties to CEDAW. See n (80 above).

countries have international obligations to adopt, on interim basis, one form or another of these measures.

The cases of Rwanda and South Africa have confirmed that, indeed, TSMs are an answer, but not necessarily a panacea, for bridging the gap between the *de jure* and *de facto* positions of women in parliaments.

Although criticised for promoting tokenism and creating a ceiling for women, TSMs are well grounded in the various theories of social justice such as compensatory or corrective justice, distributive justice, and utilitarian or liberal theories. They have practical advantages of creating a critical mass, which helps in women's pursuit of gender sensitive legislation and policies. The cross-pollination and fertilisation of the strengths of the Rwandan and South African models form the linchpin for recommendations made below.

5.2 A catalogue of recommendations

Recommendations for bridging the gap must be made in light of the identified variety of impediments to women's parliamentary representation. It is from that premise that a hybrid of the Rwandan and South African model is recommended. This hybrid model focuses on the strengths of the two countries.

A departure point is to create an enabling political and social environment within which women can freely exercise their *de jure* right to representation in parliaments. All discriminatory laws must be repealed and gender equality laws and policies must be promulgated in order to achieve a conducive socio-political environment. A gender mainstreaming strategy must be employed to address, particularly, effects of discriminatory religious and customary practices; the gendered public/private divide and so forth. Affirmative action in education as it is the case in Uganda can also help to empower women. As noted earlier, education has been a key to the liberation of colonised peoples, it will also be a key to the liberation of women from subjugation by men.³⁰¹

The above must be accompanied by the adoption of TSMs, preferably in constitutions where they will enjoy protection from political manipulation.³⁰² As it is the case in Rwanda, there must be a quota in the constitution that specifies that women are entitled to at least 30 per cent representation in all decision-making institutions in order to met the critical mass threshold. This

³⁰¹ MA Freeman & AS Fraser (n 122 above) 107.

³⁰² See the cases of Ghana and Egypt (n 297 & 298 above).

will help to create gender equal societies where women enjoy representation not only in parliament but across all decision-making bodies.

To be effective, these TSMs must be introduced in a bottom-up approach where women groups take rigorous part in their formulation, as was the case in Rwanda and South Africa in order to avoid a top-bottom approach that is seen to be the weakness of the Ugandan model.³⁰³

Political parties, being 'gatekeepers' of parliaments in that they decide who makes it into their party lists or who becomes a candidate must be required by law to adopt gender quotas non-compliance of which must attract sanctions. This has to be buttressed by strong institutional frameworks that will ensure compliance.

To adopt these recommendations and see them to fruition there has to be a strong political will exhibited by those in the ivory towers.

It is worth noting that these recommendations do not constitute a 'one size fits all model' since Africa is diverse in political, legal and cultural systems to mention but a few significant differences.³⁰⁴ They are, however, a modest way of demonstrating how the gap between *de jure* and *de facto* women's parliamentary representation, which cuts across the majority of African countries, can be effectively bridged.

Word count: 17 955

³⁰³ S Tamale 'Introducing quotas: Discourses and legal reform in Uganda' in *Ballington et al* (eds) *The implementation of quotas: African experiences* (2004) 40.

³⁰⁴ This was acknowledged as one of the limitations of this study in para 1.6 above.

“Annexure 1”

Statistical overview of the number of women in African parliaments

	Country	Last elections	Number of seats	Number of women	% of women
1	Rwanda	09 2003	80	39	48.8
2	Mozambique	12 2004	250	87	34.8
3	South Africa	04 2004	400	131	32.8
4	Burundi	07 2005	118	36	30.5
5	Tanzania	12 2005	319	97	30.4
6	Seychelles	12 2002	34	10	29.4
7	Uganda	02 2006	322	89	27.6
8	Namibia	11 2004	78	21	26.9
9	Tunisia	10 2004	189	43	22.8
10	Eritrea	02 1994	150	33	22.0
11	Ethiopia	05 2005	529	116	21.9
12	Guinea	06 2002	114	22	19.3
13	Senegal	04 2001	120	23	19.2
14	Equatorial Guinea	04 2004	100	18	18.0
15	Mauritius	07 2005	70	12	17.1
16	Zimbabwe	03 2005	150	24	16.0
17	Cape Verde	01 2006	72	11	15.3
18	Angola	09 1992	220	33	15.0
19	Sudan	08 2005	450	66	14.7
20	Sierra Leone	05 2002	124	18	14.5
21	Guinea-Bissau	03 2004	100	14	14.0
22	Malawi	04 2004	191	26	13.6
23	Gambia	01 2002	53	7	13.2
24	Zambia	12 2001	158	20	12.7
25	Liberia	10 2005	64	12	12.5
26	Niger	11 2004	113	14	12.4
27	Burkina Faso	05 2002	111	13	11.7
28	Lesotho	05 2002	120	14	11.7
29	Botswana	10 2004	63	7	11.1
30	Ghana	12 2004	230	25	10.9
31	Djibouti	01 2003	65	7	10.8
32	Morocco	09 2002	325	35	10.8
33	Swaziland	10 2003	65	7	10.8

34	Central African Republic	05 2005	105	11	10.5
35	Mali	07 2002	147	15	10.2
36	Gabon	12 2001	119	11	9.2
37	Malta	04 2003	65	6	9.2
38	Cameroon	06 2002	180	16	8.9
39	Togo	10 2002	81	7	8.6
40	Congo	05 2002	129	11	8.5
41	Cote d'Ivoire	12 2000	223	19	8.5
41	Kenya	12 2002	219	16	7.3
42	Sao Tome and Principe	03 2006	55	4	7.3
43	Benin	03 2003	83	6	7.2
44	Madagascar	12 2002	160	11	6.9
45	Chad	04 2002	155	10	6.5
46	Nigeria	04 2003	360	23	6.4
47	Algeria	05 2002	389	24	6.2
48	Libya	03 2006	760	36	4.7
49	Comoros	04 2004	33	1	3.3
50	Egypt	11 2005	442	9	2.0
51	Dem. Republic of Congo*	?	?	?	?
52	Somalia*	?	?	?	?

*At the time of completion of this study, the Democratic Republic of Congo's parliamentary election results were pending and Somalia had no effective parliament.

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