



Revisiting affirmative action in Ethiopia: Towards gender equality and the anti-discrimination approach: The South African experience

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Acronyms

ANC	African National Congress
CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
CGE	Commission for Gender Equality
ECJ	European Court of Justice
EEA	Employment Equity Act
EPRDF	Ethiopian Peoples Revolutionary Democratic Front
MDG	Millennium Development Goals
NPW	National Policy on Women
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
TGE	Transitional Government of Ethiopia
TPLF	Tigray Peoples Liberation Front

Executive summary

Affirmative action has been and will remain one of the most controversial issues in the public discourse. Much of the controversy relates to the possible conflict with the concept of equality. Out of the broad set of questions that are dealt with under this title, this paper is to address gender-based affirmative action at the constitutional and legislative level.

The paper employs a comparative constitutional and legislative analysis with a special focus on the Constitution of the two countries. It compares the Ethiopian and South African perspectives of gender equality through affirmative action for women at the level of constitutional and legislative protection. It also addresses the existing practices and the subsequent institutional frameworks designed for the proper implementation of such protection. In this paper, I will argue that constitutional guarantee for gender equality through affirmative action is necessary but not sufficient in itself to solve the existing socio-economic and political disadvantages of women.

The paper seeks to address the reasons why the situation of Ethiopian women is still lagging behind in comparison to the situation of South African women, despite a clear constitutional protection of gender equality and affirmative action. The principal findings of this paper are these: Although Ethiopia and South Africa have similar endorsement of gender equality and affirmative actions at the level of the Constitution, the two countries, however, fundamentally vary in their protection at legislative level. Whereas South Africa has impressive pieces of legislations, Ethiopia runs short of sub-constitutional legislative protection and institutional framework. Thus, there is a need for further legislative enactments, and strong regulatory frameworks to monitor and follow up the proper implementation of the constitutionally endorsed affirmative action.

Accordingly, the structure of the paper is arranged in the following way. Chapter One discusses the conceptual and theoretical aspects of affirmative action in the light of the equality discourse. This chapter seeks to establish that despite the various arguments surrounding affirmative action, it is the best mechanism to cope with the existing socio-economic and political realities of life. And as such, affirmative action is a means to genuine equality.

Having discussed the conceptual and theoretical aspects of affirmative action and equality, Chapter Two will examine the national experiences of gender equality from the Ethiopian and South African perspectives. This chapter begins with the historical background of legalized inequality that was the order of the day in the two countries, and then turns to the constitutional responses addressed in the two countries.

Chapter Three is devoted to analyzing gender equality through affirmative action at the level of constitutional and legislative protection in a comparative approach. This chapter concludes that, taking the history of discrimination into account, constitutional protection of affirmative action is necessary but not sufficient in itself to address the existing overall disadvantages of women in Ethiopia. This, in effect, speaks for the enactment of further legislations and establishment of institutional frameworks that will implement the constitutional commitment to gender equality through affirmative action.

Introduction

The concept of affirmative action spurs greater philosophical, ideological, and lively discussions, with particular regard the examination of its special relationship with equality. Issues of equality and affirmative action raise “exceedingly complex” arguments both in the social and legal discourse. In the legal literature, a lot has been said about the concept of affirmative action and equality. But many of the arguments centre on affirmative action measures which are provided in ordinary legislation but not in the Constitution. However, my focus in this paper is to examine a constitutionally guaranteed affirmative action measures from the national experiences, namely Ethiopia and South Africa. By so doing, I will look into new insights in the legal literature from the constitutional and legislative protection of gender equality through affirmative action.

This paper is a comparative study of constitutional and legislative protection of gender equality through affirmative action in Ethiopia and South Africa. To this end, I will draw important lessons from South Africa, particularly at the level of further legislative protection and institutional framework, which can be used as best practices for Ethiopia. The starting hypothesis of the paper is this: constitutional protection of affirmative action is necessary but not sufficient to solve the existing problems facing Ethiopian women. The paper will look into the reasons why there is still wide difference between genders in Ethiopia in almost all spheres of life. More specifically, the paper seeks to examine the reasons why the situation of Ethiopian women is still lagging behind in social, economic and political spheres when compared to the situation of South African women.

Chapter One: Affirmative action and equality in general

Some challenge the permissibility of affirmative action invoking a more “exacting” constitutional inquiry. Nowadays, it has become a serious constitutional question as many affirmative action measures have been ruled out for they violate the principle of equality. The core question is: is it possible to have affirmative action measures without violating the “equal protection clause”? This chapter is to support the assertion that, properly understood, affirmative action is the proper means of ensuring genuine equality, and “not equality’s opposite.”

This chapter is divided into three main parts with two main themes. The first part is devoted to the concept of equality in general. The theme of this part is to see how we understand equality, and what affirmative action has to do with it. The second part of this chapter will take the argument one step further and explore affirmative action as a genuine response to the legacy of social disadvantages. The third part, which is an extension to the second part, will address arguments both for and/or against affirmative action.

1.1. Preliminary remark on equality discourse

Equality is usually said to be the cardinal element of human rights ideology and the telling feature of good society. Equality as a multifaceted normative concept is subject of differing opinions.¹ Equality is both a principle and a right. As a principle, equality is

¹ For a more detailed discussions of equality see generally Michel Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry*, New Haven and London Yale University Press 1991, Warwick McKean, *Equality and discrimination under international law*, Oxford: Clarendon Press, 1985, c1983, see also Sanja Baric, *The philosophical concepts of equality compared to the judicial concepts of equality as developed in the USA, Canada and Italy* Budapest: CEU, Budapest College, 1999, Klaartje Wentholt, *Formal and Substantive equal treatment: the Limitations and the protections of the legal concepts of equality*, in Titia and Rodrigues, Peter R. (Ed). *Non- Discrimination Law: Comparative Perspectives*,

meant to assist or inform law makers, courts and the executive organ to take equality into account when it comes to their respective sphere of power. Equality as a right is a substantive guarantee that individuals could invoke before courts in discrimination cases. The scope of this section is, however, limited to outlining the general equality arguments with the view to showing some of the inadequacies of the traditional understanding of equality. And as a response to this inadequacy, I will briefly discuss the “new” dimensions of equality in its substantive approach from which affirmative action can be permissible.

Equality, as Klaartje Wentholt rightly states, is “an elusive and complex concept.”² It is both “elusive” and “complex” in the sense that it is hard to pin down its meaning in any clear and understandable way. Sandra Fredman on her part notes that “the more closely we examine it [equality], the more its meaning shifts.”³ From this, it logically follows that the principle of equality is a very broad and “chameleon like” that could not have a precise meaning without examining its domains. In the legal literature, equality is commonly treated as embodying two components, namely *formal* and *substantive* equality which are the subject of discussion in the following subsection.

1.1.1. Formal equality

Formal equality, commonly called “symmetrical”, “elementary” or “traditional equality”, traces back its origin to Aristotle’s conception of justice and his assertion that ‘likes

The Hague, Kluwer International 1999, Sandra Fredman, *Discrimination law*, Clarendon Law Series, New York, Oxford University Press, 2002

² Klaartje Wentholt, Formal and Substantive equal treatment: the Limitations and the protections of the legal concepts of equality, in Titia and Rodrigues, Peter R. (Ed). *Non- Discrimination Law: Comparative Perspectives*, The Hague, Kluwer International 1999 at 53

³ Sandra Fredman, *Discrimination law*, Clarendon Law Series, New York, Oxford University Press, 2002 at 1

should be treated alike’ and *different* should be treated *differently*.⁴ This is the starting point of the equality debate centered on the Aristotelian conception of justice. Formal equality can be read as a uniform application of the law to “everyone” or “equality before the law”⁵ which is provided in many international, regional, and national instruments as a fundamental human right.⁶

Formal equality is necessary, though it is not the only one that we all need. In many countries, as history tells us, there had been and even there are still legalized inequalities which resulted in systematic exclusion of some categories of the society. For instance, slavery was legally institutionalized; women had been denied equal rights. Even in this time, there are still legal inequalities in many areas of life where many categories of the society such as women and people with disabilities are still denied equal rights. Thus, at least at the basic level, the elimination of legalized inequality and banning of discriminatory laws and practices is necessary, although it is not sufficient by itself.

Formal equality is important as a first step in discrimination law. Yet, it is knocked on its head as defective that needs “diagnosis”. The defective nature of formal equality emanates from its very nature where it remains *neutral* despite any personal difference which “...is limited to the removal of formal legal impediments.”⁷ If this is not properly addressed it would perpetuate discrimination and recurrent disadvantage.⁸ Formal equality is also criticized as “the most threatening of ideas” whereby “treating people the

⁴ Ibid at 7

⁵ Wentholt Supra note 2 at 54

⁶ See for example, Article 26 of ICCPR, Article 7 of UDHR

⁷ Sandra Fredman, *Women and the Law*, Oxford, New York, Clarendon press 1997 at 15

⁸ Fredman Supra note 3 at 1

same will mean treating some wrongly.”⁹ True, there is an inevitable danger to simply declare that everyone is “equal before the law” where simple “*identical treatment*” may sometimes mean perpetuating the already existing disadvantage. That is why Fredman suggests that in so long as “[f]ormal equality requires only consistent treatment, [it will be] ostensibly remaining neutral as to the substance outcome”¹⁰ and as such formal equality has “no background requirement of distributive justice, formal quality is satisfied whether the two parties are treated equally well or equally badly.”¹¹

What is more, the formal approach to equality, according to Carol Bacchi, is the one that “rests on an individualistic premise which grounds a gender-blind and race-blind approach to policy.”¹² The effect of this “individualistic” approach to equality resting in “gender-blind” and “race-blind” assumption is clear from what Bacchi asserts that: “[t]his equal treatment discourse continues to dominate and shape contemporary discussions of affirmative action despite the fact that in many places there is explicit acknowledgment that ‘different’ treatment will be necessary in some situations in order to achieve equality.”¹³

No doubt that the mere prohibition of discrimination and commitment to formal equality is not sufficient by itself to address the existing delicate societal problems. The legacy of historical discrimination has an adverse effect on the present institutional framework and structural design that created structural disadvantage for some categories of persons who need a special concern. Thus, the promise of formal equality is

⁹ Christopher J. Peters, Equality Revisited, Harvard Law Review Association Harvard Law Review, April 1997, 110 Harv. L Rev. 1210 at 1

¹⁰ Fredman Supra note 7 at 350

¹¹ Ibid

¹² Carol Bacchi, Policy and Discourse: Challenging the Construction of affirmative action as preferential Treatment, Journal of European Public Policy, Volume 11, Number 1, 2004 available at, <http://ejournals.ebsco.com/direct.asp?ArticleID=XCJPP518X2HN78UM6902> at 132

¹³ Ibid

inadequate to address the exiting social, economic and political reality of life. This calls for revisiting the traditional understanding of equality and a new outlook towards the substantive approach.

1.1.2. Substantive equality

As said above, the logic of formal equality works only when the starting point of equality is the same and all structural and institutional disadvantages are designed on the basis of “perfect equality”. Given the already existing social differences, substantive approach to equality appears to be the proper way of understanding equality. Substantive equality as a concept emerged at a later stage of the equality discourse. It is a mechanism of addressing the social realities of life. This form of equality, which some call “asymmetrical”¹⁴, holds that the way how persons are to be treated, is based on the already existing “difference.” The existing social “*differences*” are not inherently embodied nor are natural but rather they are the result of system and structural disadvantage.

Of course, we all are different but at the same time equality different which can better be termed as diversified. However, in the course of human history, differences changed into hierarchy that created the advantaged and the disadvantaged categories of the society which is the source of discrimination and inequality. Such differences which are the result of legacy of discrimination or social disadvantage emerged out of the diversity of human beings developed into difference and “otherness”.

To a degree that there is difference in the enjoyment of rights and distribution of benefits, power, all persons may not be in a position to equally compete on the basis of formal equality. True, material inequality can be created as a result of just effort, hard

¹⁴ Wentholt Supra note 2 at 58

work and talent. But most of the time, material inequality is attributed to some other factors which are totally foreign to the principle of “meritocracy” and individual effort or talent. Thus, taking the existing “difference” into account, employing “group conscious” measures are legitimate, fair, and morally defensible.¹⁵ By “group consciousness” measures, it means that those measures that target some specific categories of the society for the purpose of taking affirmative action measures which will be discussed in the subsequent discussion.

In conclusion, equal treatment of persons, naturally works, if all things remain equal (*Ceteris paribus*). Given the impact of systemic disadvantage, substantive equality is said to be the proper way of correcting the existing social differences in income, power, and other social benefits. By so doing, there will be redistribution of resources of the society and equalization. To this end, many modern national Constitutions have come up with an explicit recognition of not just “equality under the law” but also equality in fact.¹⁶ It is worth mentioning that the concept of substantive equality can be better understood from the perspectives of “equality of opportunity” and “equality of results” which are at the heart of the equality discourse but beyond the reach of this paper.¹⁷

In conclusion, the traditional notion of equality is inadequate to address the historical legacy of invidious and systematic discrimination suffered by some groups of

¹⁵ Ibid

¹⁶ Section 15(2) of the Canadian Charter of Right and Freedoms and Section 9(2) of the South African Constitution provides both formal and substantive equality. For an interesting decision of the Canadian Supreme Court, see generally *Andrews v. Law Society of British Columbia*, Supreme Court of Canada, 119991 1 SCR 143,

¹⁷ The meaning and application of equality of opportunities and equality of results is much debated. For an interesting discussion see Michel Rosenfeld at note 1, Chris Armstrong, *Debating Opportunities, Outcome and Democracy: Young and Phillips on Equality*, *Political Studies*, Volume 54, Number 2 June 2006, at 289-309, <http://ejournals.ebsco.com/direct.asp?ArticleID=4DB1BA938B311D06C793>

the society such as women. It has also been stated that substantive equality serves as the proper response to remedy the defects of formal equality. In the subsequent discussions, I will deal with affirmative action as one mechanism of achieving genuine substantive equality.

1.2. Substantive Equality in Context: Towards affirmative action

Affirmative action is one of the most controversial topics. Part of the controversy is attributed to the very broad nature of the concept. The very complex nature of affirmative action can, thus, be understood from its definition and the scope it covers. The following discussion is devoted to exploring the definition and the scope of affirmative action in brief.

1.2.1. Definition of affirmative action

Affirmative action has no clear and universally applicable definition.¹⁸ Many have attempted to define affirmative action from different perspectives and the way they want it, either negatively or positively. Michel Rosenfeld, quoting Greenawalt, defines affirmative action as: "...a phrase that refers to attempts to bring members of underrepresented groups, usually groups that have suffered discrimination, into a higher degree of participation in some beneficial programs."¹⁹ The above definition embodies some cardinal elements of affirmative action. These are history of discrimination, "under-

¹⁸ In the mainstream of equality, terms such as "reverse discrimination", "positive discrimination", "preferential treatment "positive action", are used interchangeably, sometimes correctly or incorrectly. The notion of affirmative action becomes even more problematic to define in the language of human rights when it is examined under the "stricter scrutiny" of "equal protection methodology". Throughout this paper I will use affirmative action to mean Policies, measures, strategies that are designed to achieve de facto equality

¹⁹ Kent, Greenawalt , Discrimination and reverse discrimination in Michel Rosenfeld, Affirmative Action and Justice: A Philosophical and Constitutional Inquiry, New Haven and London Yale University Press, 1991 at 42

representation”, and the need for increased level of participation. The logic behind this is historical discrimination leads to under-representation which speaks for “higher degree of participation”.

Likewise, Gwyneth Pitt defines affirmative action as policies or programs that are “designed to eliminate invisible as well as visible discrimination and to encourage underrepresented groups to reach a situation where they are more likely to be the best candidate for the post or place.”²⁰ For Pitt, affirmative action, as a program, has two basic components. The first component is the elimination of “visible” and “invisible” discrimination. By “visible” and “invisible” Pitt appears to imply what in the language of discrimination law, are commonly called “direct” and “indirect” discrimination.²¹ I will turn to these issues in the next chapter. The second component in Pitt’s definition is the “incentive” element. Affirmative action in this regard serves as an engine of empowerment for those who lagged behind in the overall development endeavors as a result of unequal distribution in the socio-economic and political spheres of life.

In a similar vein, Bhikhu Parekh who uses positive discrimination instead of affirmative action describes it as “a comprehensive and well-thought-out programme of action for disadvantaged groups, involving multiple strategies to tackle the diverse but interrelated causes of their disadvantage.”²² Parekh’s definition covers the causes, effects

²⁰ Gwyneth, Pitt. Can Reverse discrimination be Justified? In Bob Hepple, and Erika M. Szyszczak, (Ed). *Discrimination: the Limits of the Law: Studies in Labour and Social Law*, New York, Manssell Publishing limited, 1992 at 281. In the language of discrimination law terms such as “direct” and “indirect” discrimination, “hidden” and “masked” discrimination, “visible” and “invisible” are confusing that are used some times interchangeably and some times differently.

²¹ Article 1 CEDAW; on the definition of discrimination and for a detailed discussion of the types of discrimination see generally Titia and Rodrigues, Peter R. (Ed). *Non- Discrimination Law: Comparative Perspectives*, The Hague, Kluwer International, 1999

²² Bhikhu Parekh, A Case for Positive Discrimination in Bob Hepple, and Erika M. Szyszczak, (Ed). *Discrimination: the Limits of the Law: Studies in Labour and Social Law*, New York, Manssell Publishing limited, 1992 at 269

of past disadvantage, and the need for affirmative action. Garth Massey also defines affirmative action as “...a set of public policies, laws, and executive orders, as well as voluntary and court-ordered practices designed to promote fairness and diversity.”²³ Massey tells us that affirmative action embodies a broad range of measures which have the effect of promoting “fairness” and “diversity” which will be dealt within the subsequent discussion.

In the light of the above discussions, affirmative action can be defined as the common name of the broad range of measures that take the history of discrimination and social disadvantage into account and are designed for combating the existing *de facto* inequality and thereby ensuring the full and meaningful enjoyment of human dignity, security and free development of human personality of the disadvantaged ones.²⁴ Thus, affirmative action is “an instrument of equality and not equality’s opposite.”²⁵

Some national laws and also some instruments of international law show examples of the “end-means” approach to equality and affirmative action. Canada and South Africa are typical examples in this regard. Likewise, Article 4 of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), which upholds that special measures-better to call them affirmative action measure, are outside the definition of discrimination as is defined in Article 1 of CEDAW.²⁶ By the same token, the UN Human Rights Committee reaffirmed that “[t]he principle of equality sometimes requires States Parties to take affirmative action in order to diminish or

²³ Garth Massey, Thinking about Affirmative Action: Arguments Supporting Preferential Policies, National Council for Research on Women in Review of Policy Research, Volume 21, Number 6, November 2004 at 783

²⁴ Bacchi Supra note 12 at 137

²⁵ Massey Supra note 23 at 784

²⁶ 1249 United Nations Treaty Series(UNTS) I-20378, entered into force 3 September 1981

eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant[ICCPR].”²⁷ From this, it arguably follows that affirmative action is an extension and not an exception to the concept of equality in its substantive approach.

In contrary, there are many who consider affirmative action as an exception to the principle of equality. Bacchi, for example, asserts that affirmative action measures are “exemptions to anti-discrimination statutes, indicating that they [affirmative action] were [sic] considered to be exceptional, temporary and challengeable on law.”²⁸ At any rate, it can be said that, whereas genuine substantive equality is the norm, affirmative action is the driving engine. This implies that affirmative action can be used as a means to achieve genuine equality.²⁹ This is what I would call the interplay between affirmative action measures and equality having an end- means relationship.

To deal with the issue whether affirmative action establishes a right or a privilege is beyond the ambit of this paper. But, it can be said that affirmative can create or establish a right or a privilege but itself cannot be “a right” or “a privilege”. It may be asserted that affirmative action measures, at least those of non-preferential ones (i.e. not giving directly procedure to everyone) are derivative or implicit in the social and economic rights which are commonly called positive rights.³⁰

Generally, affirmative action can be defined as a broad range of measures that take past disadvantage into account and strive to correct these problems. The above working definition does not, however, give us a full-fledged understanding of what

²⁷ From No.10 of General Comment 18: Non-discrimination, adopted by the Human Rights committee at its 37th session in 1989, UN Doc.CCPR/c/21/Rev.1/Add 1pp4 cited in Anne Peters, Women, quotas, and constitutions: a comparative study of Affirmative action for women under American, German, EC, and international law, The Hague, Kluwer Law International, 1999 at 265

²⁸ Bacchi Supra note 12 at 133

²⁹ Fredman Supra note 3 at 22

³⁰ By Positive Rights, I mean those rights that call for active State involvement to secure the material, intellectual conditions for a dignified life. Such rights include, the right to education and the right to health

affirmative action is about. Discussing the types of measures to be taken, the degree of permissibility, the potential beneficiaries, and its duration gives a broad understanding of affirmative action. The next discussion is, thus, devoted to addressing these points.

1.2.2. The Scope of affirmative action

For the purpose of this paper, by scope of affirmative action I mean three things which can be reduced to: the types of measures to be taken, the beneficiaries, and the duration of affirmative action.

1.2.2.1. What measures does affirmative action include?

Affirmative action measures can be taken either on the basis of voluntary initiatives of the private sector or as a part of the public policy where the state directly takes part in such programs.³¹ Voluntary affirmative action programs are outside the scope of this paper. I limit my discussion to the areas where there is government involvement in taking appropriate measures. The role of the state in this regard can be either regulating the private sector such as by introducing mandatory affirmative action measures or such measures that may be taken directly by the state itself. The introduction of mandatory affirmative action measures within the private sector, in most countries, could be challenged as unconstitutional on the potential conflict with the constitutional protection of individual liberty.

The next issue is what sorts of programs affirmative action includes. Affirmative action measures run from the spectrum of programs, including but not limited to training, mainstreaming, budgeting, setting goals and all the way to the most controversial parts-

³¹ Daniel N. Lipson, Where's the Justice? Affirmative Action's Served Civil Rights Root in the Age of Diversity, Politics, Volume 6, Number 4 December 2008, at 692 available at <http://ejournals.ebsco.com.direct.asp?ArticleID=4F4E9E6631C446374667>

that is preferential treatment, “Plus-factors”, set-asides and quotas.³² I am of the view that the focus of affirmative action should not be at the final phase of affirmative action measures that is preferential treatment. Instead, affirmative action measures should commence at the early phase so that such measures will have no “deleterious effect” on the part of the other candidate. The policy of affirmative action may start to operate beginning from birth or even during pregnancy by treating the would-be child as having equal worth and dignity-both male and female.

When the state is directly involved in training, mainstreaming or budgeting, such measures are less controversial and it is hard to bring a case on discrimination. These types of affirmative action policies are almost in harmony with the principle of equality. Allocating funds for women’s programs, for example, are less “suspect” as a violation of the “equal treatment clause.” The duty of the state is more than a “night-watchman”, and the allocation of resources in areas where there exists social problems, I argue, is perfectly within the proper limit of the powers of the state. In the extreme manifestation, affirmative action also extends to preferential treatment and setting quotas, commonly called “reverse discrimination”.³³ Although such programs are more controversial, they are nevertheless, under the domain of affirmative action measures when they are objectively justified and proportional.³⁴

In conclusion, affirmative action includes a very wide range of measures that can serve as a tool for combating *de facto* inequality. Affirmative action measures apply in

³² See Michel Rosenfeld at note 1 at 44, Anne Peters, Women, quotas, and constitutions: a comparative study of Affirmative action for women under American, German, EC, and international law, The Hague, Kluwer Law International, 1999 at 21-22

³³ For a detailed and interesting discussion see Alan .H. Goldman Justice and Reverse Discrimination Princeton, New Jersey Princeton University press, 1979; See also Fullinwider *infra* note 34

³⁴ Robert K. Fullinwider, The Reverse Discrimination Controversy: A Moral and Legal Analysis, Rowman & Allanheld, Totowa, New Jersey, 1980 at 12

many areas of life such as education, political participation, employment and economic empowerment. Thus, any measure that ensures or promotes the full and meaningful enjoyment of basic human rights of some disadvantaged category of society remain within the proper limits and may serve as affirmative action measures.

1.2.2.2. Who are the beneficiaries of affirmative action measures?

Beneficiaries of affirmative action programs are those addressees of such programs that are directly related to the history of discrimination in a given society.³⁵ In some countries, the beneficiaries of affirmative action measures are specified either in their Constitutions as is in Ethiopia and South African, legislations or other policies. International law is also one legal source that provides for the beneficiaries of affirmative action, such as women in CEDAW. Thus, depending on the specific grounds of disadvantage, there are some “designated groups” who are the beneficiaries of affirmative action.

Who needs what types of affirmative action measures largely depends on the types of discrimination and the existence of historical exclusions. It, however, makes sense to say that “sex-conscious” and “race-conscious” forms of affirmative action are particularly necessary in that discrimination based on sex or race was the order of institutionalized forms of discrimination in many parts of the globe in the human history. Due to the recent development and paramount importance, people with disabilities are also the beneficiaries of affirmative action measures, which is beyond the reach of this paper.

³⁵ See Goldman Supra note 33 and Ibid at 66

The most problematic aspect of affirmative action is how to the design appropriate measures so that they will be accorded to the right persons and that it will address all forms of discrimination suffered by the particular group and its present or future effect in a particular society.³⁶ In this regard, it is imperative to note Sandra Fredman's warning on the importance of adjusting legal instruments to the inevitable multiplicity of discrimination problems. In giving her own solution to the "multiplicity of discrimination problems" Fredman suggest that: "law must be more specific about the factors which make up particular types of discrimination and recognize that multiplicities of forms of discrimination exist."³⁷ It is common that people have multiple identities and can be discriminated against on different attributes. That is why Parekh stated it as: "[e]very society today, be it rich or poor, developed or developing, capitalist or communist, including large sections of men and women who are disadvantaged and unable to develop their human potentials."³⁸

As is evident form the previous discussions, affirmative action measures are targeted at those who are in a disadvantaged position as a result of their vulnerability. The next important question is whether affirmative action measures are targeted at a group or are individual claims.³⁹ There are two lines of arguments in this regard. These are individual claim and group claim to affirmative action.

Some say that affirmative action measures have to reach to the real beneficiaries who have actually undergone the history of discrimination.⁴⁰ This is to mean that affirmative action measures are to be accorded based on individual proof of past

³⁶ See Goldman Supra note 33 at 8

³⁷ Fredman, Supra note 3 at 224

³⁸ Parekh, Supra note 22 at 261

³⁹ Fullinwider Supra note 34 at 57

⁴⁰ Goldman Supra note 33 at 76

discrimination which can best be termed as individualistic approach to affirmative action. For those who support individualistic approach to affirmative action, their discontent is on the fear that a group-based affirmative action runs the risk of benefiting some undeserved individuals who are by definition within the group but who did not suffer any history of discrimination, such as women who were in the privileged position.⁴¹ Those who advocate proof of individual discrimination for the purpose of affirmative action greatly owe their debt to “the traditional liberal individualistic approach” of benefits.⁴²

Those who support the group-based affirmative action, on the contrary, claim that so long as there was group discrimination, it is equally desirable to award group-based benefits. Alan H. Goldman shows how group-based affirmative action can be justified in that:

[t]he original first-order discrimination for which this policy [affirmative action] attempts to atone was made on the basis of race and sex; that only programs that employ these broad criteria can create equality of opportunity and give fair share of power to all women and blacks by granting them desirable positions of responsibility quickly; or that insuperable administrative difficulties are avoided by stating the policy in terms of such easily identifiable characteristics as race or sex.⁴³

The two rationales provided by Goldman are based on the history of group-based discrimination and the feasibility of administrative cost. The first ground that is the *prima facie* history of discrimination. It is generally true that discrimination based on race or sex or other social status was targeted on the basis of group membership and identity. For example, black people were discriminated against because of their easily identifiable color and inferior status. Women were discriminated against on the ground of their sex. As such all black and all women need to be given special attention.

⁴¹ Michel Supra note 1 at 296

⁴² Paul Brest and Miranda Oshige, Affirmative Action for whom? , Stanford Law Review, Vol. 47 No. 5, May, 1995 available at <http://www.jstor.org/stable/1229177> Accessed at 27/12/2008 specifically at 858

⁴³ See Goldman Supra note 33 at 8

Group-based affirmative action measures may raise problems of justice and justification.⁴⁴ Namely, within the group there might be cases where some might have suffered more severe and systematic forms of discrimination while others are relatively better. It is clear that in many parts of the world, for example, the forms of discrimination suffered by privileged women is less compared to those from the lowest segment of the society.

The second basis of group-based claim of affirmative action is on the ground of administrative feasibility. If there are many people who deserve affirmative action, as a matter of policy or legislative drafting, it is desirable to make affirmative action a group claim. From the administrative point of view, this is also an efficient and economical way of addressing social problems in a collective way than individually.⁴⁵

I claim that by definition, affirmative action is a group claim. First, as is evident from the human history, many of the invidious and systematic forms of discrimination were targeted not just on individuals but rather on a group basis. Typical cases are with respect to women where almost throughout the world they were discriminated against because of their sex. Slavery, the most egregious form of discrimination, was also based on group identity. People with disability are also discriminated against based on their physical attribute. Second, as I pointed out above, when we talk about affirmative action we are dealing with measures to be taken either at the constitutional or legislative or policy level. It is far from clear how the policy of affirmative action could be crafted so that the measures will exclude the “creamy layer” segment of the society so that affirmative action will reach to the real beneficiaries. To me, it appears that, as a matter

⁴⁴ For an interesting discussion on group-based affirmative action see Goldman Supra note 33 at 76

⁴⁵ See Ibid at 94

of constitutional making or legislative enactment or policy formulation, affirmative action should be made on a group basis and the wider discretion be left to the courts to deal with individual cases.

1.2.2.3. How long should affirmative action continue?

The third important component on the scope of affirmative action is the timing aspect. Stated otherwise, for how long should affirmative action measures continue to operate? True, by definition, affirmative action is meant to be a temporary measure as is stipulated in Article 4(1) of CEDAW in so far as it states that “these measures shall be discontinued when the objectives of equality of opportunities and treatment have been achieved.” But how the law should, then be formulated to make it definitive? And when can we say that the objectives of equality of opportunities and treatment will be achieved?

It seems to be difficult to provide a time frame within which such programs are to be stopped. This is a matter of empirical investigation into the whole realities of life that cannot be reduced to a simple elimination of a single fact of inequality. Thus, it makes sense to say that, so long as there is social inequality no doubt that affirmative action programs still continue to apply. In this respect, it is apparent that putting a “deadline” as to when to terminate affirmative action seems unrealistic. The viable solution is to set goals that are subject to periodic review and assessment of the measures taken. Affirmative action is aimed at solving centuries-old social problems. There fore, it is not a one-time or short-term action. It is an on-going mechanism until the accomplishment of its goal of achieving *de facto* equality. As will be discussed in chapter three, a similar approach is adopted in the South African and Ethiopian constitutional framework. The

measures to be taken are for an indefinite period of time with the meaning of Section 9(2) and Article 35(3) Constitution, respectively.

1.3. Arguments around affirmative action

As said above, the concept of affirmative action spurs greater philosophical, theoretical, moral, and even legal arguments in the equality discourse. Generally, there are two arguments around affirmative action. These are arguments against and/or for affirmative action measures.

1.3.1. Arguments against affirmative action

Many contend that affirmative action is not a desirable policy to pursue any more. The following addresses some of the commonly known arguments against affirmative action.

1.3.1.1. Reverse Discrimination Argument

The first group of arguments against affirmative action departs from its narrowest definition, restricting its meaning to “preferential treatment”, i.e. giving treatment of one person over another based on non-merit or generally known requirements.⁴⁶ This assertion holds that as affirmative action distributes benefits based on sex, race or other grounds, it is a simple means of reversing what has been done in the past. Thus, affirmative action is attacked as contrary to logic and common sense. This argument holds that if the past historical discrimination was wrong, present affirmative action measures, particularly those of preferential treatment are equally wrong. Any deviation from this amounts to reverse discrimination. At the heart of this argument, there lies what might be called repeating the same mistake for what has been morally and legally

⁴⁶ Fullinwider Supra note 34 at 13

condemned. The reverse discrimination argument suggests that under the banner of affirmative action, it is in effect furthering another form of discrimination. The reverse discrimination argument seems to heavily rely only on the legal prohibition of discrimination and equal treatment methodology.

1.3.1.2. “Counterproductive” argument

The other argument against affirmative action is the “counterproductive” argument. It claims that affirmative action is “counterproductive” to the public in general. The society is spending unnecessarily for it could have been used for other productive purposes. Opponents also argue that affirmative action is counterproductive to the beneficiaries: it has a negative effect on them by potentially filling them with the sense of inferiority and putting them in the chronic cycle of dependency. Some say that “[u]sing race or gender preferences stigmatizes beneficiaries and ultimately undermines their self-confidence and self-esteem.”⁴⁷

The “counterproductive” argument is based on the belief that affirmative action program creates a condition of uncertainty on the recipients as they will be unsure of their success whether it is due to their personal effort or is a result of external support.⁴⁸ Some go on to argue that affirmative action “may encourage the divisive identity politics, and they [affirmative action measures] may stigmatize and foster antagonism toward members of the group they are intended to benefit.”⁴⁹ For some, awarding positions and

⁴⁷ Leonard Read, What is wrong with Affirmative Action? In Linda Hamilton Krieger, Civil Rights Perestorika Intergroup Relations After Affirmative Action, California Law Review, Vol. 86, No. 6, Dec., 1998, at. 1251-1333 Published by: California Law Review, Inc. available at <http://www.jstor.org/stable/3481107> Accessed: 27/12/2008 10:15 at 1259

⁴⁸ Ibid

⁴⁹ Brest and Oshige, Supra note 44 at 858

opportunities based on non-merit or competence is inefficient and economically unwise.⁵⁰

1.3.1.3. The “innocent victim” and personal responsibility argument

Some oppose affirmative action on the ground that the present generation could not be held responsible for the past discrimination that was done by the great grand parents. The defense they posit is that even if there were any discrimination, the present generation was not the ones involved in such discrimination and should not be made liable.⁵¹ The “innocent victim” argument also focuses on the idea that there is no clear and empirical evidence that shows the effect of past discrimination [if at all] on the present generation for the claim of affirmative action.⁵²

What is more, some argue that despite the existence of the effects of the history of discrimination on the present generation, it is the responsibility of the discriminated to take actions and be- up-to the denied “economic and educational opportunities.”⁵³ The “innocent victim” argument focuses on the individualization of “guilt”, refutes any responsibility, and labels it as unfair where “the cure was [sic] worse than the disease.”⁵⁴ Such line of argument seems to ignore the effects of past discrimination on the present generation both on those who are discriminated against and who came from the society who had a dominant position.

⁵⁰ Fullinwider Supra note 34 at 86

⁵¹ Goldman Supra note 33 at 103

⁵² Kim Forde-Mazrui, Taking Conservatives Seriously: A moral justification of Affirmative Action and Reparation, , California Law Review, Vol. 92, No. 3, May, 2004, available at <http://www.jstor.org/stable/3481453>, Accessed: 26/03/2009 05:49 at 692

⁵³ Ibid

⁵⁴ Massy Supra note 23 at 783

Some of the above critiques against affirmative action are said to be weak arguments. They are weak in the sense that their underlining justifications do not depend on social reality as such. They are more of rhetoric based on abstract logic than conclusions from real premises. The next part provides a brief overview of arguments in favour of affirmative action.

1.3.2. Arguments for affirmative action

Many criticize the concept of affirmative action as a whole on the ground that it violates the ontological principles of equal treatment and non-discrimination.⁵⁵ One of the commonly heard accusations against affirmative action is premised on the understanding that affirmative action measures are special beneficial treatments that persons have beyond and above ordinary universal individual rights-what has been stated above as the principle of equal treatment. In the public discourse, affirmative action is usually given “negative connotation”. This is, however, a superficial assessment of the concept taking the various policies that affirmative action includes and aspires for. There are many justifications in support of affirmative action as the appropriate way of solving the real problems of social inequality. I will, however, deal only with some of the most commonly known arguments in favour of affirmative action.

1.3.2.1. Remedial nature

Affirmative action measures are defended from the perspective of corrective and distributive justice that holds affirmative action is intended to compensate for those who have undergone systematic history of discrimination. The “compensatory” nature of

⁵⁵ Fullinwider *supra* note 34 at 158

affirmative action mainly focuses on the reparation for past mistakes to certain groups of people. It is suggested that affirmative action is a “vehicle” for “leveling the playing field” and/or as an entitlement repayment for the “sins of the past”.

The remedial nature of affirmative action seems to denote the “tortuous” type of liability where the wrong-doer or those who benefited from past discrimination have to make good the damage sustained by the victim. On its face value, the remedial nature of affirmative action seems to be a “backward looking” to rectify the past wrongs. A closer look, however, reveals that the focus is on the impact of the past disadvantage on the present generation, which is the very basis of affirmative action claims. Thus, affirmative action is both back-ward looking and, to use the words of R.Dworkin, “forward-looking”.⁵⁶ From this, it logically follows that affirmative action is “a fair price to pay, a down-payment on a better future” and a means of forming good society founded on true equality.⁵⁷

1.3.2.2. Diversity and social utility

Some defenders of affirmative action emphasize that affirmative action is justified as it brings different types of people from different social strata so that there will be diversification of “professionalism” and creativity which is “financially beneficial to the country”⁵⁸ In the words of F. Michael Higginbotham “[f]ailure to provide adequate education and employment opportunities to such a large portion of the population would

⁵⁶ R. Dworkin Race and the Use of the Law, February 2003, in Massy Supra note 23 at 795

⁵⁷ Ibid

⁵⁸ F. Michael Higginbotham, Affirmative Action in the United States and South Africa: Lessons from the Other Side, Temple International and Comparative Law Journal, Fall 1999, 13 Temp. Int’l & Comp. L.J 187at 11

be harmful to the country's economic competitiveness and productivity.”⁵⁹ The diversity argument seems to focus on the utilitarian calculation of social benefit. Although social benefit is not a bad thing but this utility calculation may run the risk of using the beneficiaries as an instrument rather than the center of the policy.

It is argued that basing affirmative action benefits on diversity to the educational or the organization premises that the primary objective is not to the beneficiaries but to the organization.⁶⁰ This is an “instrumentalist” view that affirmative action beneficiaries are used as tool for the benefit of others. Daniel N. Lipson shows how the US policy of affirmative action has been changed from rights-based claim-rooted in the 1964 Civil Rights Act towards a “utilitarian approach” of the diversity argument.⁶¹

Be that as it may, as Josepe Lefevere convincingly states, if properly understood, affirmative action can be a good thing to address societal problems as a whole.⁶² For Lefevere, “[t]he most justification of the importance of diversity in the professions...are based on the correct and important ideas that society will be better if the potentials of all its citizens are developed.”⁶³ In this regard, affirmative action brings a societal good that “should be valued by all members of the society and that its value is so great that is outweighs any claim that the individual merit should the sole basis for membership in the professions.”⁶⁴ Such measures also give an incentive for others to come to the socio-

⁵⁹ Ibid

⁶⁰ Massy Supra note 23 at 783

⁶¹ Lipson Supra 32at 692

⁶² Josepe Lefevere, The Value of Diversity: A Justification of Affirmative Action, *The Journal of Social Philosophy*, Volume 34, Number 1, 2003 at 126 available at <http://ejournals.ebsco.com/direct.asp?ArticleID=QLKYRF2YBJUL3PPMOJDR>

⁶³ Ibid

⁶⁴ Ibid at 125

economic and political mainstreams-what some call affirmative action as a “role model”.⁶⁵

1.3.2.3. Equality and justice

Affirmative action measures are questions of just and equal distribution of resources.⁶⁶

What equality means is clear from what has been said in the first part of the discussion. To reiterate, equality does not mean just *equality in law* but also *equality in fact*. From this it follows that it is vitally important “not only to guarantee equality, but also to combat the perpetuation of traditional attitude so as to ensure access to equal opportunities for population against which there is discrimination.”⁶⁷

It is also clear from what has been said that equality *in fact* focuses on the level of treatment to be based on the already existing realities of life. This in effect calls for taking some affirmative measures to the disadvantaged group and thereby properly responding to the social difference. That is why Garth Massy contends that “[a]ffirmative action’s principal and most important intention is ... to overcome the legacy of unequal opportunity and to ensure access to valued opportunities....”⁶⁸

The need for affirmative action measures is also a question of justice. What is justice and what justice really means in light of affirmative action is debatable. It is not the purpose of this paper to address the theory of justice and its application.⁶⁹ But for the

⁶⁵ R. Roosevelt Thomas, Jr, Affirmative Action: From the Perspective of Diversity, *Phylon* ((1960-1)), Vol 49, No.3/4 Autumn-Winter, 2001 Published by Clark Atlanta University at <http://www.jstor.org/stable/3132624> Accessed on 02/01/2009

⁶⁶ For an interesting and detailed discussions of Libertarian Justice and Affirmative, Contractarian Justice and Affirmative Action, Utilitarian Justice and Affirmative Action, Egalitarian Justice and Affirmative Action, see Michel Supra note 1

⁶⁷ E. Serdjenian, Inventory of Affirmative Action in Europe in Bacchi Supra note 12 at 137

⁶⁸ Massy Supra note 23 at 783

⁶⁹ For an interesting analysis of the Rawls version of Justice as Fairness in light of affirmative action See Ibid at 792

purpose of this paper, I use justice to mean fair and legitimate claim over the existing resources, be it in social, economic or political spheres. Yet, still we face another dilemma when we ask a further question “fair” and “legitimate” for whom. It might be argued that using affirmative action measures by itself is unjust for it will be to the detriment of the other party who is not preferred. This is due to the fact that affirmative action does bring more injustice to the other party than it brings any justice to the beneficiaries. Here it can, however, be argued whether justice actually requires treatment of all persons on an equal basis and whether all forms of differential treatment amounts to injustice. Implicit in this is the moral duty of the community to take the initiative to help for those who are in a disadvantaged position so as to benefit everyone and give a fair share of social, economic and political advantage for those who were and are discriminated against.⁷⁰

Banning discriminatory laws and outlawing discriminatory practices are not on their own sufficient to eradicate these severe practical inequalities resulting from past and /or present discrimination nor can they put the disadvantaged group to the position that they can equally compete and participate on “equal footing” with their own counterparts. There is one more to do for what Phillips calls “a great deal of unfinished business.”⁷¹ That is to see equality in fact not just equality in law.⁷² Thus, despite frequent critique, affirmative action it is the best strategy to achieve genuine *de facto* equality. Affirmative

⁷⁰ Parekh Supra note 20 at 264

⁷¹ Anne Phillips, Which Equalities Matter? In Chris Armstrong, Debating Opportunities, Outcomes and Democracy: Young and Phillips on Equality, Political Studies, Volume 54, Number 2, June 2006 at 304 <http://ejournals.ebsco.com/direct.asp?ArticleID=4DB1BA938B311D06C793>

⁷² For more detailed analysis see Wentholt supra note 2

action, properly understood, is by no means to discriminate one group from the other but rather to the contrary.

As stated above, a substantive approach to equality is the plausible response to the existing systematic and invidious forms of discrimination. Within the context of substantive equality affirmative action is a permissible measure that is meant to achieve “true equality”. The next chapter covers how these “equality problems” are addressed in the national constitutional framework by introducing the experiences of South Africa and Ethiopia.

Chapter Two: Gender equality in the Ethiopian and South

African constitutional framework: A constitutional analysis

In the preceding chapter, it has been discussed that within the context of substantive equality, affirmative action is the best mechanism of achieving *de facto* equality. It has also been pointed out that as a result of historical and institutional discrimination, women are at the heart of the beneficiaries of affirmative action measures. Against this backdrop, this chapter is devoted to specifically addressing gender equality in the Ethiopian and South African constitutional framework.

Before I proceed to the constitutional responses of the two countries, it is imperative to deal first with what motivated the Ethiopian and South African constitutional framers to include gender equality, and of course, affirmative action during the constitutional making. A brief historical background of the two countries and the road to equality is in order.

2.1. Institutionalized inequality and the legacy of discrimination: A brief historical overview

In many countries women have been reduced to the rampant and lowest status of humanity. Women have been made subservient to the orders and control of their husbands either by law or through deeply rooted practice. The same was true in Ethiopia and South Africa. Ethiopian and South African women have undergone systematic and institutionalized discrimination that has put them into the poorest categories of the society.

2.1.1. Women in South Africa

For a long period of time, South African women have been the victim of discrimination and domination. The apartheid regime had introduced a state policy that created legalized inequality between the black and the white community.⁷³ Although all South African women were subjected to segregation and discrimination, black women were highly exposed to invidious and systematic forms of discrimination both on the grounds of sex and on the grounds of race.⁷⁴

At a more specific level, women were denied equal access to education, employment, political participation, and all other social services that were reserved for the white people, and mainly to the white male society.⁷⁵ To borrow the words of Wing and De Carvalho: “black women are [were] in the unique position of being the least equal of all groups in South Africa. They have been oppressed by whites on the basis of race, and they have been oppressed by men, both white and black, on the basis of gender.”⁷⁶ When discrimination based on sex “intersects” with race, and further “intersects” with poverty, the effects on the lives of women are disastrous.⁷⁷

Traditionally, women were deemed as naturally inferior and meant to be at the behest of their husbands and fathers, and even to their brothers.⁷⁸ Women in South Africa

⁷³ See Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa*, *North Carolina Journal of International Law & Commercial Regulation Inc.*, 1, 26 N.C.J. Int'l L. & Com. Reg. 693 Summer, 2001 at 2 and the following.

⁷⁴ Lundy R. Langston, *Affirmative Action, A Look At South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?* *Washington College of Law, American University, The American University International Law Review*, 13 Am. U. Int'l L. Rev. 333, 1997 at 2

⁷⁵ Concerning the South African state policy of apartheid regime and its strategy of segregation see generally, *Ibid*

⁷⁶ Andrien Katherine Wing and Eunice De Carvalho, *Black South African Women: Towards Equal Rights*, *Harvard Human Rights Journal*, 8 Harv.Hum.Rts. J.57,1995 at 2

⁷⁷ On the legacy of apartheid for women see generally Andrews, *supra* note 73.

⁷⁸ Penelope Andrews, *Stepchild of National Liberation: Women and Rights*, in Penelope Andrews and Stephen Ellmann (Ed), *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, Witwatersrand University Press, , Ohio University Press, Athens,2001at 327

were subjected to traditional cultural practices and customary laws which in 1988 were legalized.⁷⁹ This legalized inequality coupled with traditional thinking and cultural practice relegated women to the lowest status.⁸⁰ As pointed out by Celina Romany, the apartheid regime “buttressed by customary law and patriarchal family, women in South Africa occupies the lowest position.”⁸¹ This is the worrisome part of the South African history and the apartheid regime, particularly, where legalization of the policy of segregation divided the people based on race. Women were the most affected categories of the policy of segregation.⁸²

2.1.2. Women in Ethiopia

All Ethiopian people who did not belong to the privileged or higher class were relegated to the lowest status.⁸³ Many women in Ethiopia have “little independent decision making on most individual and family issues.”⁸⁴ Although there were not race-relations, similar to South African women, all Ethiopian women were/are discriminated on the grounds of being women. And as such, “[l]ow status characterizes virtually every aspect of girl’s and women’s lives.”⁸⁵ Ethiopia introduced the 1960 Civil Code of the Empire that legalized the unequal treatment of men and women which reconfirmed the “patriarchal” family.⁸⁶

⁷⁹ Wing and Eunip.De Carvalho supra note 76 at 2

⁸⁰ Andrews supra note 73 at 3

⁸¹ Celina Romany, Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender, Brooklyn Law school, Brooklyn Journal of International Law, 21 Brooklyn J. Int’l L. 857,1996 at 4

⁸² Andrews supra note 73 at 2

⁸³ Needles to mention, during the autocratic regime of Haileselassie and the dictatorial regime of the Derg regime, there was marginalization of different ethnic groups who were totally left behind any form of social, economic and political development of the country.

⁸⁴ Paper on Women’s Empowerment in Ethiopia, New Solutions to Ancient Problems, Pathfinder International Ethiopia, 2007 at 2

⁸⁵ Ibid at 5

⁸⁶ Patriarchal family is the traditional belief that advocates the subjugation and domination of women. With the meaning of Article of 189(1), married women were forced to have the domicile of their husbands. Articles 635(1) and 635 (2) also provide that “the husband is the head of the family” and “the wife owes

With the meaning of Article of 189(1) of the 1960, married women were forced to have the domicile of their husbands. Articles 635(1) and 635 (2) also provide that “the husband is the head of the family” and “the wife owes him obedience on all lawful things which he orders.” A clearer aspect of the patriarchal nature of the Ethiopian civil code is also reflected in Article 644(1) when it provides that “the husband was to give protection to his wife” which assumes women as weak and worthy of protection. Moreover, by virtue of Article 644(2), the husband was empowered to “watch over her [his wife’s] relations and guide her in her conduct.” As such, women during the imperial regime were relegated to the lowest status and occupied inferior position.⁸⁷

After the overthrow of the imperial regime in 1974, Ethiopia entered to another form of oppression and ruthlessness that furthered the subjugation of women. During the 17 years of the Derg regime (1974-1991) it was impossible to talk of any human rights issues in the country, let alone to take women’s suffering as a matter of public concern. What is more, during the Derg, the 1960 civil code of the Empire was still applicable under the military discretion and the patriarchal family was in operation.

In summary, in the two countries, women had similar history of oppression in spite of the different race relations. Women were the poorest and the most disadvantaged segment of the society. In the early 1990’s the two countries entered to a “new chapter” of their history. In what follows, I will examine the changes brought in the two countries

him obedience on all lawful things which he orders.” Moreover, by virtue of Article 644(2), the husband was empowered to “watch over her [his wife’s] relations and guide her in her conduct.” See generally Carole, Pateman, *The Fraternal Social Contract* in Robert E. Goodin and Philip Pett(Eds) *Contemporary political Philosophy: An Anthology*, Blackwell Philosophy Anthology, 1997 at 46

⁸⁷ Yeshe. H. Mariam, *Ethiopian Women in the Period of Socialist Transformation*, *Economic and Political Weekly*. Vol, 29 No. 44, Oct 29, 1994, at WS57-WS62 at <http://www.jstor.org/stable/44011966>, Accessed on 17/03/2009 at 05:33 at 57

and the current situations of gender equality in the two countries with regard to their constitutional making.

2.2. From legal inequality to “equal protection methodology”: A constitutional response from gender perspective

In 1990s, apartheid in South Africa and the dictatorial regime in Ethiopia came to an end, which paved the way for new era of democratization and constitutional making in the two countries. Of course, the Constitution of the two countries used the advantage of looking the lessons of different countries’ Constitutions and the already existing international human rights instruments. The 1990s might be called the era of “constitutional making” where many countries, especially Post-Communist countries enacted new Constitutions.⁸⁸

In the history of Ethiopian and South Africa constitutional development, the issue of equality in general and gender equality in particular is a relatively recent phenomenon. Until recently, the “women’s question” was not given due attention.⁸⁹ During the struggle for justice and equality, in the two countries, women played a big role and contributed much effort to the downfall of the oppressive regimes.⁹⁰ In South Africa, women were the main agents in mobilizing, undertaking underground struggle against apartheid, in

⁸⁸ The 1990s is usually called the age of constitutional making as many countries including post-Communist countries adopted new democratic Constitutions after the downfall of communism.

⁸⁹ It was during the late downfall of the Derg regime that the women’s question of began to be taken seriously. Soon after the downfall of the Derg regime, the Transitional Period Charter of Ethiopia was proclaimed. The Peace and Democracy Conference, convened on July 1-5 (1991), in its preamble declared ‘Starting of a new chapter in Ethiopian history in which freedom, equal rights and self-determination of all People shall be the governing principle of political, social and economic life.

⁹⁰ On the role of women in the South African Constitutional making see generally, Penelope E. Andrews, Constitution-making in South America: article: striking the Rock: Confronting gender equality in South Africa, 1998 University of Michigan Law School, Michigan Journal of Race & Law, Spring, 3 Mich. J. Race & L. 307,1998, at 3 and the following.

general and the struggle for gender equality. Similarly, Ethiopian women played a big role in the fight against the dictatorial regime in Ethiopia which paved the way for the making of new Constitutions in the two countries. The next discussion is devoted to exploring what new changes the two countries brought for the women's question and the centuries-old sufferings and plights. The gender dimension of the two countries during their transition to democracy and their early phase of constitutionalism in the early 1990 till the final phase of their promulgation of new Constitutions will not be addressed here. And my focus is on the final Constitution of the two countries.

The significance of guaranteeing gender equality is underlined by the belief that, in one way or another, any type and pace of development is connected to gender equality. The issue of gender equality is vital to the increasing demands of the society for goods as well as services. Consequently, equal treatment and equal opportunities of women is not only, and not even primarily the interest of women, but that of the whole society.

The Ethiopian and South African Constitutions have guaranteed gender equality as a "founding provision" and as one fundamental constitutional right. In 1995, Ethiopia promulgated new Constitution. After one year that is in 1996 South Africa promulgated new Constitution which, as Andrews points out, "has been "hailed" as one of the most impressive documents for the wide range of rights protections it affords."⁹¹ What is more, it is also "hailed" for its commitment to the modern conception of equality, in general,

⁹¹ Penelope E. Andrews, Gender Relevant Legislative changes in Muslim and non-Muslim Countries: "Big Love"? The Recognition of Customary Marriage in South Africa, Washington and Lee University School of Law, Washington and Lee Law Review, 64 Wash& Lee L.Rev.1483 Fall, 2007 at 4

and for its “professed commitment to gender equality”, in particular, which is the subject of discussion in the following section.⁹²

2.2.1. The right to equality in the South African Constitution

In the South African Constitution, gender equality occupies a prominent place. As pointed out by Irving, during the post-apartheid South African “constitutional making”, women were actively taking part to make sure the issue of gender equality was to be given due attention and significance.⁹³ South African women from different categories of the society came to the conclusion that there is a need for an organized women’s movement to strategically solve their problems. Such movement was followed by the formation of Women’s National Coalition “to represent the collective demands of South African women” which was then followed by the adoption of Women’s Charter that paved the way to the strife negotiation in the constitutional making.⁹⁴ As such, the overriding significance given to the issue of equality and its spirit permeated the Constitution and extended to gender equality, too. The preamble, recalling the historical unjust relationships and the price paid for it, declared freedom, justice and equality as the founding principles.⁹⁵ It also sets a goal “to heal” the past unjust relationships.

Apart from the preamble, the South African constitutional response to the historical legacy of discrimination is clear from the “founding provisions”. To this end, s.1 (a) provides that “[h]uman dignity, the achievement of equality, and the advancement

⁹² Suzanne A. Kim, *Betraying Women in the name of Revolution: Violence against women as an obstacle to democratic nation-building in South Africa*, *Yeshiva University, Cardozo Women's Law Journal*, 8 *Cardozo Women's L.J.* 1, 2001, at 2

⁹³ Sandra Liebenberg (Ed) *The Constitution of South Africa from Gender Perspective*, In Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge, Cambridge University Press, 2008 at 16

⁹⁴ Wing and Eunice De Carvalho *supra* note 76 at 17

⁹⁵ See the preamble of the Constitution of the Federal Democratic Republic of Ethiopia and see also the preamble of the Constitution of the Republic of the South Africa, 1996(Act 108 of 1996)

of human rights and freedoms” are the founding values of the South African State. These are the direct response to past historical legacy of the apartheid regime.

The South African constitutional response to the various forms of discrimination is clear for what Abdelrahman rightly states “South Africa’s history of racial disadvantage, segregation, and discrimination under the Apartheid system motivated the drafting of a Constitution founded on the principle of non-racialism and non-sexism and equality.”⁹⁶ When we look at s.1 (a) in light of gender equality, it is clear that women as human beings are worthy of dignity, equality and the respect of their basic rights and freedoms. This constitutional commitment is a remarkable change in the lives of all South African women in general, and South African black women, in particular.

The major constitutional development of post apartheid South Africa is also reaffirmed under s. 1(b) which bans any form of discrimination based on sex and race. The right to equality in South Africa is given much emphasis when s. 1(d) guarantees universal adult suffrage that was only the right of the white South African settlers during the apartheid regime. As founding principle, the concepts of “dignity” “equality” and “freedom” are a point of references that guide State organs and even private persons.

A further commitment to equality in the South African constitutional development is also reflected in s.7 (4) when “dignity” equality” and “freedom” are underscored as “democratic values” and the rights of “all peoples”. No doubt, these all have a clear impact on the respect and the protection of women’s rights as fundamental rights. These constitutional commitments tell us that women have equal worth in dignity, freedom and

⁹⁶ Aliaa Abdelrahman, Affirmative Action in The United States and South Africa: Why South Africa should not follow in our Footsteps? New York Law Journal of International & Comparative Law, 19, NY.L.Sch.J.Int’l & Comp.L.195,1999 at 3

respect to their person. My focus in this paper is, however, limited to the concept of equality.⁹⁷

The South African Constitution is acknowledged as one of the world's best models in its approach to equality and non-discrimination. This is true in that it enshrines detailed provisions on the right to equality both in its formal and substantive approach which are foreign in many constitutional democracies.⁹⁸ The governing substantive provision of the right to equality in South Africa is s. 9(1) which reads: "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." This type of formulation of equality seems to remind one of what has been discussed in the preceding chapter-the formal approach to equality. From s 9(1), it holds true that what is required under the said provision is the rational connection between the measures taken and the means to achieve such measures.⁹⁹

The South African Constitution does not guarantee just formal equality, but it also provides a substantive equality within the meaning of s. 9(2). It reads: "[e]quality includes the full and equal enjoyment of all rights and freedoms. To 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."¹⁰⁰ As said in chapter one, substantive approach to equality is the proper

⁹⁷ In jurisprudence of South Africa Constitutional Court and Canadian Supreme Court, dignity is relevant in equality cases. But the discussion on the role of dignity in equality cases is outside the scope of this paper.

⁹⁸ Penelope Andrews, "Democracy Stops at my Front Door": Obstacles to Gender Equality in South Africa, Loyola University Chicago Loyola University Chicago International Law Review, 5 Loy. Int'l L. Rev. 15, Fall / Winter, 2007 at 5

⁹⁹ Harksen v Lane NO 1997 (11) BCLR 1489 (CC) (edited) at para 53 cited in National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 CC (edited) at para 17 and for the interesting analysis see at para 18, see also Prinsloo v Van der Linde 1997 (3) SA 1012 (CC) (edited) Word document at para 8-12 and the subsequent analysis of s 8(1) of the interim constitution of 1993 that is the same *verbatim* of s 9(1) of the final constitution.

¹⁰⁰ Article 9(2) of the South African Constitution of 1996

mechanism of solving existing social problems in a given society within which affirmative action is said to be permissible. That is why Saras Jagwanth underscores how substantive equality is of pivotal importance in so far as she notes:

[a]n important element of the substantive equality model-is of importance to addressing previous disadvantage-is its asymmetrical application. Under asymmetrical model, not all differentiations on the listed or unlisted grounds are equally problematic. Using this approach, it matters whether the discrimination being complained of is designed to remedy the wrongs of the past or whether it is designed to perpetuate an existing position of privilege.¹⁰¹

On the South African commitment to substantive equality is clear from the detailed and critical interpretation of the South African Constitutional Court that, in several judgments, made it clear that the traditional approach to equality should be revitalized. For example, in *National Coalition for Gay and Lesbian Equality v. Ministry of Justice*, the Court has adopted a substantive approach to equality. The case concerns a court referral by the Witwatersrand High Court for the confirmation of an order made on the constitutionality of a criminal prohibition of the act of sodomy between men. In this case, the Ackermann J, writing for the majority, noted that a mere formal approach to equality does not solve the “past unfair discrimination [which] frequently has ongoing negative consequences.”¹⁰² That is why Ackermann J reasoned that “[t]he desire for equality is not a hope for the elimination of all differences”¹⁰³ but rather it is how to address the existing difference to create a society founded on genuine equality.¹⁰⁴ In a concurring opinion, Justice Goldstone emphasized that, “identical treatment [of persons] in all circumstances”, does not work until the goal of genuine equality is to be achieved.

¹⁰¹ Saras Jagwanth, Affirmative Action in a Transformative Context: The South African experience, Connecticut Law Review, 36 Conn. L.Rev.725, Spring, 2004 at 3

¹⁰² See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 CC (edited)

¹⁰³ Ibid at para 22

¹⁰⁴ For a deeper and interesting critical analysis on the purpose of the South African equality in its substantive approach See generally *Minister of Finance and Other v F J van Heerden* (CCT 63/03) [2004] ZACC 3 (29 July 2004)

Although s. 9 is the major point of reference to the South African equality discourse, there are also other constitutional provisions that implicitly embody the right to equality. In all the bill of rights, the right to equality is implicit or presumed without express mention made to equality. It is true that the bill of rights in the South African Constitution incorporates the three categories of rights commonly called the first, second and third generation of rights. Unlike many other liberal Constitutions, the Ethiopian and South African Constitutions are best known for the detailed substantive provisions of the three categories of rights on the Constitutional level as part of basic rights. Whether all such rights are justiciable depend on the power of the courts of the respective countries.

¹⁰⁵ In this regard the South African courts play active role in safeguarding the bill of rights than Ethiopian courts with any established jurisprudence on rights related cases.

Except for some provisions that specifically deal with some categories of persons such as “every citizen”, “every child”..., which even have a “universalizing” effect within such category, many of the constitutional provisions are crafted in an “everyone” language.¹⁰⁶ From this, it logically follows that *equal enjoyment* of these rights is taken for granted. When the Constitution, for instance, provides that everyone has the right to privacy, it means that everyone had equal right to the right to privacy.¹⁰⁷

2.2.2. The right to equality in the Ethiopian Constitution

In the Ethiopian constitutional framework, beginning from the preamble all the way to the substantive provisions of the Constitution, equality is recognized as a value and as a

¹⁰⁵ There is a debate on whether courts should handle cases on socioeconomic rights as such rights require the discretion of the state.

¹⁰⁶ On the position of the South African Constitutional court see *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) (edited) at para 42

¹⁰⁷ A similar formulation can also be adopted for other basic rights.

right. The preamble reads: “We, the Nations, Nationalities and Peoples of Ethiopia: ...[f]irmly convinced that the...full respect of individual and people’s fundamental freedoms and rights, to live together on the basis of equality and without any sexual, religious or cultural discrimination...” is the basis for good society. Thus, one can say that gender-based discrimination offends the constitutional commitment to build a society founded on equality within the meaning of the preamble.

Article 25 of the 1995 Ethiopian Constitution is the governing provision on the right to equality. It states that:

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to **all persons equal and effective protection** without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status.¹⁰⁸ (Emphasis Added)

In sharp contrast to the South African approach, the Ethiopian Constitution has no detailed provision on the right to equality. From the reading of Article 25, it may be tempting to say that the Constitution guarantees only “equality before the law” and non-discrimination. For example, Fasil Nahum understands the right to equality stipulated in Article 25 of the Ethiopia Constitution as “equality before the law”.¹⁰⁹ A close reading of the second sentence, however, reveals that, even in the Ethiopian context, there is a leeway to read substantive approach into the equality clause. The phrase that “the law shall guarantee to all persons equal and *effective protection* without discrimination” seems to imply that the Ethiopian Constitution guarantees both formal and substantive equality.

¹⁰⁸ Article 25 of the Ethiopian Constitution

¹⁰⁹ Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* N,J Lawrenceville Newjercey, the Red Sea Press Asmara Eritrea, 1997 at 122

To me it appears that when Article 25 of the Ethiopian Constitution guarantees “equal and effective protection” of rights, there cannot “*effective protection*” unless there is differential treatment based on the existing social differences which as said in chapter one is at the heart of substantive equality. This wording suggests that a substantive approach to equality should be read into the whole provision of Article 25 to give a meaning to it. This is consistent with the UN Human Rights Committee General comment No.18; on the Principle of non-discrimination.¹¹⁰ The Committee outlines that taking some measures that are “objective” and “proportional” is consistent with ICCPR. The Committee noted that “[t]he enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance.”¹¹¹ Thus, I argue that Article 25 of the Ethiopian Constitution has to be read broadly so as to include both formal and substantive equality. This is true in that Article 25 of the Ethiopian Constitution is crafted in a similar fashion to Article 26 of the ICCPR.¹¹² This line of argument is in conformity with the whole purpose of the Ethiopian Constitution when seen in light of the preamble as well as the historical background of the Ethiopian Constitution.

Apart from Article 25, the Ethiopian Constitution enshrines a separate provision that specifically recognizes the rights of women by virtue of Article 35. One may pose a question why does the Ethiopian Constitution incorporate a separate provision dealing with the rights of women while Article 25 of the Ethiopian Constitution has already

¹¹⁰ UN Human Rights Committee General comment No. 18: Non-discrimination, Thirty seventh session (1989)

¹¹¹ UN Human Rights Committee General comment No. 18: Non-discrimination, Thirty seventh session (1989) Para 8

¹¹² Article 26 of the ICCPR provides that “All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as...sex... or other status.”

guaranteed them. First by virtue of Article 7(2) of the Ethiopian Constitution there is a gender reference made to the effect that “[p]rovisions of this Constitution [Ethiopian Constitution] set out in the masculine gender shall also apply to the feminine gender.” What is more, a quick look at Article 35 of the Ethiopian Constitution reveals that the separate provision on women’s right is more of a repetition to what has been guaranteed under Article 25 and other provisions of the Constitution. But a separate provision on women’s right is not without merit. Having a separate provision on women’s rights on the constitutional level is to give more emphasis to the historical legacy of discrimination suffered by women in Ethiopia. The very provision of Article 35, which will be dealt with in the next chapter, also includes affirmative action for women, which is not the case in South Africa.

It is true that Article 25 and 35 of the Ethiopian Constitution are the main governing provisions on the right equality. There are also other constitutional provisions that have embodied the right to equality. In a similar fashion to the South African constitutional approach, “Fundamental rights and Freedoms” of the Ethiopian Constitution are phrased in the “everyone” language. And hence, the right to equality is impliedly guaranteed in other provisions of the Constitution.

In summary, the constitutional right to equality, both in its formal and substantive approach, as I have argued above, is of pivotal importance to the Ethiopian and South African women. As stated *supra*, a constitutional recognition of the right to equality is the first major constitutional development in the two countries. A constitutional right to equality means an end to the century’s old inequality and the subjugation of women, at least from the legal point of view. Whether the constitutional right to equality has made

any practical change in the lives of Ethiopian and South African women will be examined in the subsequent chapter.

2.3. The sphere of application of the right to equality: The public/private divide

One important aspect of the equality discourse is with respect to the sphere of application of the right to equality. At the heart of this discourse, there lies what is commonly called divide between the public-private spheres.¹¹³ Public sphere mainly deals with cases where the discrimination is attributed to the State and its machineries-what is in its narrower approach called the “state action doctrine”.¹¹⁴ “The State action doctrine” is an American terminology that denotes, for the purpose of discrimination cases, the claimant has to prove that the state has involved in the given act of discrimination. Private sphere, on the other hand, is a situation where the source of discrimination emanates from private individuals in their private capacity and the subject of the dispute is on matters of private law domain.¹¹⁵ In the case of public sphere, state actors can discriminate when legislative organ makes a law or when the judiciary applies the law or when executive branch implements the law.¹¹⁶ Of course, by state machineries, it is meant to imply organs of the State and all its administrative units including but not limited to the legislative judicial and executive organs. Thus, the legislative organ cannot make laws which are

¹¹³ On the Public/ Private divide See Margaret Thornton, The Public/Private Dichotomy: Gendered and Discriminatory, Journal of Law and Society, Vol. 18, No. 4, Blackwell Publishing on behalf of Cardiff University Winter, 1991, available at

<http://www.jstor.org/stable/1410319> Accessed: 27/03/2009 18:36 at 449

¹¹⁴ See M. Tushnet. The issue of state action/horizontal effect in comparative Constitutional law. International Journal of Constitutional Law, Volume 1, Number 1 January 01, 2003 available at <<http://ejournals.ebsco.com/direct.asp?ArticleID=G2L1BKCR5C82RJNG6X8J>

¹¹⁵ See Thornton, supra note 113

¹¹⁶ When the dispute involves between private persons and the machineries of the State, there is grey area to determine whether the case involves a vertical or horizontal application. However, a discussion of such issues is outside the scope of this paper.

discriminatory; the court cannot apply laws in a discriminatory; the executive cannot enforce laws and policies in a discriminatory fashion. Of course, discrimination is not only attributed to state agencies. In the case of private sphere, there are cases that amount to discrimination when companies or private employers discriminate against employees either directly or indirectly. Private discrimination in the daily lives of individuals can be gross when it comes to women as many women have multiple attributes.¹¹⁷

Concerning the scope of application of equal treatment and non-discrimination, the South African Constitution is very clear from the reading of s. 9(3). As per s. 9(3), discrimination by the state is constitutionally prohibited. The very Article reads: “[t]he State **may not unfairly discriminate** directly or indirectly against anyone....” (Emphasis added) From the thrust of s.9 (3), it is clear that discrimination by the State machineries is constitutionally banned. Such obligations on the state organs can also be seen in light of s. 8(1) where “[t]he bill of rights [equality being the opening of the bill of right] applies to all law[s], and binds the legislature, the executive, the judiciary and all organs of the State”¹¹⁸ But one may ask what it means to say “the State may not unfairly discriminate”. Does it mean that discrimination is possible if it is fair?

With respect to what amounts to “unfair discrimination”, it is clear from the jurisprudence of the South African Constitutional Court’s decision. In *Hugo v. The State President of the Republic of South African and others*, the South African Constitutional Court, upheld the Constitutionality of the Presidential Act that grants pardon to “all

¹¹⁷ Johanna E. Bond, International Intersectionality: A Theoretical and Pragmatic exploration of Women's International human rights violations, 2003 Emory University School of Law, Emory Law Journal, Winter, 52 Emory L.J. 71, 2003 at 6

¹¹⁸ On the Concept of vertical and horizontal application of the Bill of rights in general and on the Constitutional analysis of s.8 and s.39 see generally S Woolman, 'True in Theory, True in Practice: Why Direct Application Still Matters' in S Woolman and M Bishop (Ed) Constitutional Conversations, Pretoria University Law Press, Pretoria, 2008

mothers in prison...with minor children under the Age of 12” as a “fair discrimination”.¹¹⁹ The facts of the case are simply put: In 1994 President Nelson Mandela pardoned a prisoner mother with children younger than 12-years-old. The same pardon did not, however, apply to male and widow prisoners. *Hugo* and others who were prisoners at that time objected the Act of the President as “unfair discrimination”. In this case, the court made it clear that what amounts to unfair discrimination is when the discrimination is made based on “unreasonable grounds”. And as such, taking the purpose of the South African Constitution to promote equality, the Court held that the President’s Act is “fair discrimination” and constitutionally permitted.¹²⁰ In *Hugo*, in a separate concurring opinion, O’Regan J commented that: “the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair.”¹²¹ Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair.”¹²²

Regarding the standards of “unfair discrimination” in *Harksen v. Lane*, the Constitutional Court has developed a two-tier degree of scrutiny to test “unfair discrimination”. These are “whether the differentiation amounts to “discrimination” and, if it does, whether... it amounts to “unfair discrimination”.”¹²³ From this, it logically follows that in the words of the Constitutional Court, any form of discrimination or

¹¹⁹ President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1, 18 April 1997

¹²⁰ Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design*, Cambridge, Cambridge University Press, 2008 at 62

¹²¹ See also the unfairness analysis in the case of NCGL supra note 102 at para 26 and 27 in when Ackermann held that “[t]he impact is severe, affecting the dignity, personhood and identity of gay men at deep level” which “deeply impaired their fundamental dignity” and declared the act to be unfair.

¹²² Supra note 119 at para 112

¹²³ Supra note 99 at para 45

differentiation made on the ground of discrimination those listed under s. 9(3) of the South African Constitution, is “immediately suspect”.¹²⁴ Should there be any differentiation made, it would be discrimination and would be scrutinized whether it is unfair discrimination. As said above, all forms of differentiation do not amount to “unfair discrimination”. The unfairness analysis embodies different factors. To measure whether the differentiation made is fair or unfair is to be decided on a case by case basis.¹²⁵ Some of the factors employed in the above case are: history of discrimination and the purpose of the measure as the predominant ones.¹²⁶ In this regard, it is worth mentioning the position of the South African Constitutional Court in the *Harksen* case. In this case, *Goldstone J* argued that “[i]n the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination.”¹²⁷

The South African Constitution is also unique in that the sphere of application of unfair discrimination extends to the private domain, called “horizontal application” of the bill of rights. This is true from the reading of s. 8(2) of the South African Constitution “[a] provision of the bill of rights (equality among others) binds a natural or juristic person, if and to the extent that, it is applicable, taking into account the nature of the right

¹²⁴ As pointed out by Andrews, discrimination for women based on sex or gender is “Constitutionally suspect” as discrimination based on race. See generally Andrews, *supra* note 73

¹²⁵ It is important to note that in the jurisprudence of the South African Constitutional Court the role of dignity in the general equality analysis and the determination of unfairness has been given more attention see generally *Prinsloo v Van der Linde* *supra* note 98, *Harksen* *supra* note 98 and on the critique of the courts approach to dignity and the alternative solutions see generally Murray Wesson, *Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and South African Constitutional Court* (forthcoming 2009)

¹²⁶ *Supra* note 99 para 51

¹²⁷ *Ibid* at para 50

and the nature of the duty imposed by the right.”¹²⁸ This is particularly important from the point view of long term effect of the law on the society, like that of Ethiopia and South Africa, where the law may reduce the discriminatory effect of the deeply rooted tradition of discrimination.

One important aspect of the above constitutional provision is its binding nature to “natural” and “legal persons”. Besides, private individuals it covers private entities which are the creation of the law such as business organizations. Consequently, the prohibition of unfair discrimination in hiring, promotion and transfer or other employment relations is binding for private companies and private individuals, too. To this end, there is a strong preventive or prohibitive constitutional device to tackle any form of discrimination within the meaning of s. 9(4) (3) of the South African Constitution. It states that: “[n]ational legislation must be enacted to prevent or prohibit unfair discrimination.” Thus, under the South African constitutional framework, there is no room for unfair discrimination both in the public and the private spheres.

The Ethiopian Constitution does not, at least on the surface of the Constitution, prohibits private and public discrimination. Nevertheless, consistent with the previous broad interpretation of Article 25, I argue that the by way of “purposive interpretation”, in Ethiopia both public and private discrimination should be prohibited. This line of argument has a constitutional basis. First, with the meaning of Article 13, it is the duty of the State to ensure the observance of the constitutional rights for which the right to equality is the cornerstone. It is legitimate to say that ensuring the observance of the Constitution means that the State is under obligation to take any measure including but

¹²⁸ For the various forms of interpretation of the above Provisions of the South African Constitution see Woolman, *supra* note 118

not limited to making laws that prohibit any form of discrimination both in the public and the private spheres. Secondly, Article 9(2) imposes constitutional obligation to all citizens, organs of the State, political organizations and other associations “to ensure the observance of the Constitution and to obey it”. The above incumbent obligation is due to the whole Constitution, thus, it necessarily applies to all fundamental rights and freedoms, including the right to equality.

One may question what would happen if the above South African cases were to be brought before the Ethiopian courts. I am not aware of any such case in Ethiopia. In this regard, it seems too early to raise such question in respect of Ethiopia where the right to equality is in its infancy. But, this does not mean there will not be any such cases in the future. Although the Ethiopian Constitution does not employ the term “unfair discrimination” by the private sphere, similar to South African Constitution, in Ethiopia, a similar decision could be reached.

In conclusion, the South African Constitution is crafted in an unequivocal manner to prohibit both public and private discrimination. As such, the right to equal treatment and the prohibition of unfair discrimination applies both to the public and the private sphere. Unlike the South African Constitution, the Ethiopian Constitution does not clearly provide the application of the right to equality and non-discrimination to the private sphere. Nevertheless, this does not imply that discrimination is allowed. By way of “constructive interpretation”, the sphere of equal treatment and non-discrimination may still apply in such cases. The possibility of such judicial interpretation cannot be excluded in spite of the lack of relevant cases.

2.4. Forms of discrimination prohibited

In non-discrimination law, there are two commonly known forms of discrimination. These are direct and indirect discrimination-which are commonly used European terminologies in equality law. Comparatively disparate treatment and disparate impact are terminologies used in US equality discourse. As said in the previous chapter, direct discrimination is a situation where the law by itself is discriminatory. This is to say that the ground of discrimination is based on a specific attribute, such as sex, race...so properly called legal inequality. Indirect discrimination, on the other hand, is a case where a "facially neutral" law has a "disparate impact".¹²⁹ By "disparate impact", it is meant that the ground of discrimination is based on group attributes where the law or practice apparently seems to be neutral but its effect is different when applied to different groups of people.¹³⁰ A typical case of indirect discrimination is on employment where the employer regulates full-time workers and part-time workers as many part-time workers are usually women.

S. 9(3) of the South African Constitution states that" [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex...." What is more s.9 (4) of the South African Constitution maintains that "[n]o one may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection(3)" provided above. In the South African constitutional framework, both direct and indirect forms of discrimination are prohibited within the meaning of s. 9(3) and 9(4) of the South African Constitution.

¹²⁹ Matteo Borzaga, Company and Labor law: Accommodating differences: Discrimination and equality at work in International Labor law, 2006 Vermont Law School, Vermont Law Review, , 30 Vt. L. Rev. 749, Spring, 2006 at 9

¹³⁰ Ibid

An interesting aspect of the South African Constitution, in this regard, is its application of both direct and indirect discrimination to the public and private domains which are pointed out above. The prohibition of both direct and indirect discrimination is vitally important as it “implicitly acknowledges the invidiousness and tenacity of institutionalized discrimination.”¹³¹ The prohibition of both direct and indirect discrimination shows the thoughtful reflection of the proper responses of the history of institutionalized and systematic discrimination suffered by women. Concerning indirect discrimination, the South African Constitutional Court, in *City Council of Pretoria v. Walker*, has acknowledged that the conduct which appears neutral, may, nonetheless, result in discrimination where the given practice or law has different effect when applied to different persons such women and men.¹³²

Compared to South Africa, the Ethiopian Constitution seems to prohibit only direct forms of discrimination which might lead to the conclusion that there is no prohibition of indirect discrimination. But this does not mean that there is no constitutional problem to discriminate indirectly. In line with the “purposive approach” to constitutional interpretation adopted above, it is possible to read into Article 25 of the Ethiopian Constitution as prohibiting both direct and indirect forms of discrimination. In this respect, I am not aware of any judicial interpretation or the drafting history of the Ethiopian Constitution.

2.5. Grounds of discrimination prohibited

In discrimination law, one of the core questions is how to identify the grounds of discrimination so that any other possible ground of discrimination is to be prohibited.

¹³¹ Andrews supra note 78 at 335

¹³² Cited in Jagwanth, supra note 101 at 3

There are two ways to address the grounds of discrimination. These are exhaustive listing and open-ended listing. Exhaustive listing means, the law specifically addresses and lists *all* grounds of discrimination that are prohibited. In such a case, there is no way for the court to add further grounds of discrimination. In case of open-ended listing, on the other hand, the law enumerates *some* of the grounds of discrimination prohibited but the details are left to be determined in a case by case basis. In such a case the law is not restrictive in its interpretation that gives wider room for courts to include further grounds that are not listed in the non-discrimination law.

One may ask whether “exhaustive” or “open-ended” listing is advisable. I contend that open-ended listing is advisable, particularly on the level of constitutional formulation. It is not easy to know and specifically list all the grounds of discrimination in real life. The human person is faced with the multitude of attributes that may be grounds of discrimination in one way or the other. There can be many other grounds of discrimination in the near future that do not amount to discrimination during the enactment of the law. In this regard, there are some differences between old and new Constitutions on their respective position of exhaustive or open-ended listing on the possible grounds of discrimination where many new Constitutions adopt open ended listing for the issue of open-ended listing is an emerging approach in the discrimination law.

The constitutional responses regarding the grounds of discrimination in the two countries are fundamentally the same. S. 9(3) of the South African Constitution provides that “[t]he State may not unfairly discriminate ...**on one or more ground, including** race, gender, sex...” and enumerates sixteen grounds of discrimination. (Emphasis

added) From the formulation of the Constitution, it is clear that the Constitution is well drafted in two senses. First, the Constitution goes on to mention some of the generally prohibited historic grounds of discrimination in real life. Secondly, the open-ended formulation is a good strategy to include any possible form of discrimination in the future. Such formulation also gives to individuals and to courts the possibility to invoke any other grounds that are not mentioned in the Constitution. In a similar fashion, Article 25 of the Ethiopian Constitution identifies ten prohibited grounds of discrimination and ends with an open-ended phrase that is “...or other status”. So far, I am not aware of any additional grounds found by the courts in the two countries.

From the preceding discussions, it makes sense to conclude that in the Ethiopian and South African constitutional framework, the two countries are similar with respect to the grounds of discrimination.

2.6. Multiple-discrimination

As noted above, a single person, say a woman may be black, disabled, ethnic minority, and many more attributes for what Rangita de Silva de Alwis has called “multiple forms of discrimination.”¹³³ No doubt, in real life, a given person may experience various forms of discrimination at the same time what are called to be “multidimensional” forms of discrimination. Exclusion and restriction based on one or more of the following such as sex, race, religion, ethnicity, age, sexual orientation or many other grounds have been and are still prevalent in many societies. It is true that women are commonly the subject of

¹³³ Rangita de Silva de Alwis, Mining the intersections: Advancing the rights of Women and Children with disabilities within an interrelated web of human rights, 2009 Pacific Rim Law & Policy Association, Pacific Rim Law & Policy Journal, January, 2009, 18 Pac. Rim L. & Pol'y 293 at 3

“multiple forms of discrimination.”¹³⁴ As I stated it above, women in Ethiopia and South Africa were subjected to many forms of discrimination. To this end, constitutional banning of the various forms of discrimination is of pivotal importance to the meaningful enjoyment women’s basic rights.

Many dealing with multiple discrimination call attention to that prohibiting the various forms of discrimination may not prevent persons from discrimination, if they have multiple attributes that might be a ground for discrimination. In this regard, it is imperative to note Sandra Fredman’s alternative solution to the inevitability of multiple-discrimination problems. Fredman suggests that: “law must be more specific about the factors which make up particular types of discrimination and recognize that multiplicities of forms of discrimination exist.”¹³⁵

One of the most difficult aspects of non- discrimination law is, however, on the burden of proof of the various forms of discrimination. In ordinary procedure, it is common that the complainant who alleges has to prove the existence or non existence of the alleged fact. But in many discrimination cases, it is very hard to prove discrimination as many of the grounds are hidden. If the claimant is required to prove discrimination before courts and establish liability on the part of the other party this would be almost impossible. Thus, in discrimination law, one possible strategy is to distribute the burden of proof to the other party once a *prima facie* case is established.

One imperative aspect of the South African Constitution is its explicit constitutional formulation of shifting the burden of proof to the defendant. S. 9(5) of the South African Constitution states that “[discrimination on one or more of the grounds

¹³⁴ Ibid at 2

¹³⁵ Fredman supra note 3 at 224

listed in subsection 3 is unfair unless it is established that the discrimination is fair”. In *Hugo*, the South African Constitutional Court held that the President has to prove that the discrimination is fair.¹³⁶ The Court reasoned that the Presidential Act has established a *prima facie* case where the other party shares the burden of proof. From the Constitutional Court’s ruling, it is clear that discrimination is presumed to be unfair unless proven otherwise. This is the typical instance of diverting the burden of proof in the jurisprudence of the South African Constitutional Court. The Ethiopian perspective is not clear with respect to the burden of proof. The Constitution does not address on how to prove discrimination.

¹³⁶ Irving *supra* note 120 at 194

Chapter Three: Transition from equal treatment to affirmative action: Gender equality further considered

Due to the various forms of historical discrimination suffered by some categories of persons, such as women, affirmative action was said to be the proper mechanism to address the existing social inequalities. In the preceding chapter, it has been discussed that women in Ethiopia and South Africa have been at the heart of historical discrimination. To this end, the two countries have constitutionally banned any form of discrimination. But equal treatment and the mere prohibition of discrimination are not by themselves sufficient for the achievement of genuine equality. This chapter, thus, seeks to look into the constitutional and legislative responses of gender equality through affirmative action in the two countries.

3.1. Affirmative action in the Ethiopian and South African constitutional framework

There are many views on the “constitutionalization” of fundamental rights in the constitutional scholarship. In light of the arguments enumerated in chapter one, regarding the temporary character of affirmative action, its constitutional status also raises question marks. As constitutional framers respond to the social demands during the constitutional making, there is usually a need to give affirmative action a constitutional status because Constitution is usually written in critical times and social crisis such as revolution, war or radical social and political changes. A country which came out of such crisis usually has the strong pressure to constitutionally solve those factors such as the problem of equality that motivated before and during the constitutional making.

3.1.1. Affirmative action in the South African Constitution

As Jagwanth rightly states, affirmative action in South Africa forms “part of the right to equality” in its substantive approach.¹³⁷ This emanates from s. 9(2) of the South African Constitution which provides 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.”¹³⁸ Thus, one important feature of the South African Constitution is its explicit guarantee of equality in its substantive approach.

The wording of the South African constitutional framework raises the question whether affirmative action might be understood as “presumptively unfair” within the meaning of s. 9(5) of the South African Constitution. Concerning this issue, it is clear from the South African Constitutional Court in the leading affirmative action case, *Minister of Finance and Others v. Van Heerden*. The Case was about the constitutionality of Political Office-Bearers Pension Fund that provides a differential contribution for “old” and “new” members of the Parliament between 1994 and 1998. In this case, Moseneke J, writing for the majority, notes that “I cannot accept that our Constitution at once authorizes measures aimed at redress [ing] of past inequality and disadvantage but also labels them as presumptively unfair.”¹³⁹ From Moseneke J, affirmative measures are mandated by the South African Constitution and they are not in violation of equality and as such are presumptively fair. Thus, any types of measures that can bring *de facto*

¹³⁷ Jagwanth supra note 101 at 1

¹³⁸ On the Constitutional status of affirmative action in South Africa see generally, Lundy R. Langston, Affirmative Action, A Look At South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field? Washington College of Law, American University, The American University International Law Review, 13 Am. U. Int'l L. Rev. 333, 1997

¹³⁹ Supra note 104 at para 33

equality are within the proper limits of substantive equality and pass constitutional *muster*.

In above case, the Court applied three-tier standard of enquiry to determine whether affirmative action measures fall within the scope of s 9(2). In the words of Moseneke J, the three level testes are: “[t]he first yardstick related to whether the measures targets persons or categories of persons disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether measure promotes the achievement of equality” of the group.¹⁴⁰ The three level standard of inquiry can be summarized into two main tests. These are the existence of historical discrimination or unfair disadvantage and the purposes of the measure to be taken. By applying the above tests, any measure can be determined whether it is constitutionally permitted or not.

In the Heerden case, the Court was also faced with one major issue on how to understand affirmative action and equality the way how affirmative action and equality are understood that is That is whether affirmative action falls under s.9 (2) or under s. 9(3) of the Constitution. In this regard, it is crucial to point the concurring arguments marshaled by Mokgoro J, and Sachs J that followed a different constitutional rout to affirmative action analysis in light of s.9(2) and s.9(3) of the South African Constitution. For Mokgoro J whereas “[s]ection 9(2) is forward looking and measures enacted in terms of it ought to be assessed from the perspective of the goal intended to be advanced,” when assessing a measure under section 9(3),” on the other hand, “the focus is on the group or person discriminated against.”¹⁴¹ From Mokgoro J, it follows that s.9 (2)

¹⁴⁰ Ibid para 37 and 38

¹⁴¹ Ibid Para 78 and 79 For a further analysis see the subsequent paragraphs

provides the goals to be achieved and is “forward looking”, similarly to the characterization affirmative action by Ronald Dworkin.¹⁴² For Mokgoro J, measures under s.9 (3) are intended to remedy historical exclusion and marginalization of some categories of persons in compliance with the dominant views on the “the remedial nature of affirmative action.”¹⁴³

The opinion of Sachs J is qualitatively different in this regard. For him s. 9(2) and s.9 (3) are “cumulative, interrelated and indivisible.”¹⁴⁴ The main focus of his argument is the assertion that affirmative action could not be seen separate from substantive equality and the measure to be taken within the meaning of s.9(3) form part and parcel of the main goal set out by s.9(2). That is to say affirmative action measures provided for under s.9 (3) are intended to implement the goals of substantive equality enshrined in s.9(2). The Ethiopian judicial approach regarding affirmative action is not known yet.¹⁴⁵ But this does not mean that the Ethiopian Constitution may not give rise to progressive interpretation. In the subsequent analysis, I will attempt to demonstrate how a possible “purposive approach” to constitutional interpretation might bring progress in the Ethiopian context.

South African is, thus, a typical example to say how affirmative could be part of the substantive equality and a model for comparative constitutional study. This means that affirmative action and equality have an end-means relationship- affirmative action

¹⁴² Dworkin Supra note 56

¹⁴³ Goldman Supra note 33

¹⁴⁴ Ibid Para 136

¹⁴⁵ There is one case in Ethiopia on the issue of non-discrimination based on linguistic criteria for the candidacy of the 2000 Election. Neither the recommendation of the Council of Constitutional Inquiry nor the final decision of the House of the Federation is helpful for the analysis of equality and affirmative action. The case was more of self-determination to the right to linguistic autonomy that arises on the inevitable conflict between individual and group rights that have constitutional recognition. See Decision of House of the Federation on ‘Constitutional Dispute Concerning the Right to Elect and be Elected in Benishangul Gumuz Regional State’, 13 March 2003 (05 Megabit 1995 Ethiopian Calendar).

being the means and substantive equality being the end.¹⁴⁶ The South African approach can be taken as the best practice in the constitutional scholarship for affirmative action measures cannot be ruled out on the ground of equality as their purpose is to bring about true equality. This is what in the previous chapter has been called the interplay between equality and affirmative action. And to put in the words of Andrews, “the inclusion of protective measures or affirmative action is of potentially great value to women”¹⁴⁷ as affirmative action is “an important weapon for tackling structural discrimination in a comprehensive manner, as well as shielding affirmative action programs from constitutional challenge.”¹⁴⁸

3.1.2. Affirmative action in the Ethiopian Constitution

One of the historic developments brought about by the Ethiopian Constitution is the commitment to redressing the historical exclusion of women. As pointed out in chapter two, Ethiopian women have been subjected to systematic and invidious forms of discrimination. Thus, with the view to redressing the historical legacy of discrimination, the Ethiopian Constitution enshrines affirmative action for women as one constitutional provision. The governing constitutional provision is Article 35(3). It reads as:

[t]he historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.¹⁴⁹

The Ethiopian approach to affirmative action is more open, direct indicating more policy than enforceable right character as the purpose of the provision is “to provide special

¹⁴⁶ A similar position is adopted by the South African Constitutional Court. See for example Supra note 103

¹⁴⁷ Andrews supra note 78 at 335

¹⁴⁸ Ibid at 336

¹⁴⁹ Article 35(3) of the Ethiopia Constitution

attention”. One may argue that this is not that much a legal right; rather it is policy directive. The purpose of affirmative action measures in Ethiopia is stated in the Constitution as providing “special attention to women so as to enable them to compete and participate on the basis of equality”. Unlike the South African approach; the Ethiopian Constitution is different in two senses. First, in stark contrast to the South African Constitution, affirmative action in Ethiopia is not placed under the heading of the right to equality. It is, instead, in a separate provision as part of the provision on the rights of women provided for under Article 35 of the Ethiopian Constitution. Having a different location of the right to equality and that of affirmative action in the Constitution, one may raise question on the possible interpretations to be adopted with regard to the different or similar nature of these rights. In line with the arguments developed in chapter one, affirmative action in Ethiopia cannot be seen separate from the right to equality, though different places in the Constitution.

A decisive feature of the Ethiopian perspective on affirmative action is placing affirmative action in the Constitution as part of human rights. Affirmative action in Ethiopia is given constitutional status as part of the Fundamental Rights and Freedoms. Secondly, in the Ethiopian constitutional framework, the constitutional formulation reveals—at least on the surface of the Constitution it is by definition for women within the meaning of affirmative action because there is no similar provision enacted in order to promote the equality of any other social groups.¹⁵⁰ But this does not imply that women are the only beneficiaries of affirmative action. Consistent with our previous

¹⁵⁰ There are also other categories of persons in Ethiopia that are “entitled” to some measures that similar to affirmative action for women. See for example Article, 41, 61(2) and 89 of the Ethiopian Constitution. What is more, there are other positive state obligations that are “affiliated” to affirmative action which are beyond the coverage of this paper.

interpretation on Article 25 of the Ethiopian Constitution and the possibility of reading in, it is possible to argue that other “categories of persons” can also be the beneficiaries of such measures. Of course, compared to South Africa, this is a striking feature of the Ethiopian perspective on affirmative action where affirmative action in South Africa is formulated in general terms as “categories of persons” where the actual beneficiaries are to be determined by further legislations. The next discussion will be devoted to dealing with the nature of affirmative action in the two countries, namely permissible and mandatory affirmative action measures.

3.2. Permissible v. mandatory affirmative action measures

By permissible affirmative action measures, it means that there is constitutional endorsement but no obligation to take such measures. But, nevertheless, it is constitutionally encouraged to do so.¹⁵¹ By mandatory affirmative action, on the other hand, it is meant that measures that are not just constitutionally endorsed but are also required. In the language of the South African Constitution, affirmative action seems to be permissible but not required. S.9 (2) of the South African Constitution reads: “[t]o promote the achievement of equality, legislative and other measures **may be taken.**” (Emphasis added) The phraseology of “may be taken” in the above provision appears to have a constitutional bearing where affirmative action seems to be permissible.¹⁵² The types of measures to be taken are left to the margin of appreciation for the State. However, it is worth remarking that despite the permissible formulation of affirmative

¹⁵¹ But one thing is certain with respect to the position of affirmative action in the two countries. The Constitutional endorsement of affirmative action is a remarkable development and praiseworthy in the equality discourse. To be sure, it is a major departure and even a model for other countries.

¹⁵² Of course, in light of the above discussions on the South African perspective on equality, that is its commitment both to formal and substantive equality, one can, however, well argue that even the South African Constitution still imposes positive duty on the State take affirmative action measures

action in South Africa, the South African Constitutional Court has established incumbent duty on the part of the state to take all necessary measures to eradicate *de fact* inequality.

In comparison to the South African Constitution, the Ethiopian perspective on affirmative action is qualitatively different. Affirmative action in Ethiopia is guaranteed as an “entitlement” by virtue of Article 35(3) of the Ethiopian Constitution. It reads: “[t]he historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, **are entitled** to affirmative measures....” (Emphasis added) In the language of the Constitution, the qualifying phrase “are entitled” is worthy of consideration here. Entitlement is sometimes related to “rights”, and some times related to benefits.¹⁵³

In this regard, there is a qualitative difference between the Amharic and English version of Article 35(3) of the Ethiopian Constitution. The Amharic version employs “right” instead of “entitlements” used in the English version.¹⁵⁴ It is worth noting that although the Ethiopian Constitution makes affirmative action by regulating it under the heading of “democratic rights”, it, nevertheless, creates positive obligation on the part of the state to take such measures in stead of guaranteeing an individual right. In addition, Article 89(7) of the Ethiopian Constitution imposes obligation on the government to “ensure the participation of women in equality with men in all economic and social development endeavours.”

¹⁵³ In the “rights discourse” and “jural correlatives”, there are legal terms such as entitlements, benefits, rights, privileges and claims that are used interchangeably, differently and even sometime correctly or incorrectly when they came to application. For an interesting analysis on “jural correlatives” see generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, The Yale Law Journal, Vol. 26, No. 8 (Jun., 1917), at. 710-770, The Yale Law Journal Company, Inc. <http://www.jstor.org/stable/786270>, Accessed: 28/03/2009 15:13

¹⁵⁴ Amharic is the national working language of the Federal government of Ethiopia. Within the meaning of Article 106 of the Ethiopian Constitution, a reference is made with respect of finality clause which stated that “[t]he Amharic version of this Constitution [Ethiopian Constitution], shall have final legal authority.” This definitely adds complexity to the constitutional anomaly.

From a comparative perspective, the conclusion is, in the South African constitutional framework, affirmative action is by definition permissible or constitutionally authorized but it is not required. Unlike the South African approach, the Ethiopian Constitution is formulated in a phrasing “are entitled” that suggests the creation of rights, and it certainly creates automatic positive obligation of the state.

It has been concluded above that the scope of equality and non-discrimination is applicable both to the public and private domains. It raises the question whether the scope of affirmative action extend to the public and private spheres, too. The South African perspective on affirmative action appears to authorize the state to take any “legislative and other measures” within the meaning of s. 9(2) of the South African Constitution. On this ground, the state is authorized to take any measures it deems necessary either at the level of legislative protection or in the form of policy measures. Some of these measures can be sponsored directly by the State, or the State can make a law that obliges the private sector to take affirmative action measures.

The Ethiopian Constitution, on the other hand, is not clear whether the Constitution imposes obligation both on the public and the private sector, except it simply states that “...women are entitled to affirmative measures....” Consistent with the previous interpretation on the scope of application of the right to equality, it seems to me that the State is under constitutional obligation to take any measures, including but not limited to making laws and policies that can bind both the public and the private sector to take affirmative action measures.

In nutshell, constitutional recognition of affirmative action is necessary but not sufficient for the full realization of genuine *de facto* equality. At the heart of this thesis,

two issues are analyzed. First, one of the basic natures of Constitutions is their generality. This is true in that constitutional provisions are usually expressed in general terms which require the enactment of further legislation which are necessary for their proper implementation. Secondly and more importantly, in Ethiopia and South Africa, affirmative action measures are expressed in such a way that further specific laws are necessary to implement the constitutional commitment. Thus, the next subsection is devoted to analyzing gender-based affirmative action at the level of legislative protection, and the existing institutional framework to follow up proper implementation.

3.3. Affirmative action beyond constitutional commitment: At the level of Legislative protection, and institutional framework

Although Ethiopia is ahead in the constitutional protection of gender equality through affirmative action, in practice, the difference is significant. Ethiopia is in significant delay in comparison to South Africa with respect to guaranteeing substantive equality to women through affirmative action. According to the Global Gap Report, South Africa ranks 6th which is a remarkable change in closing gender gap while Ethiopia ranks 122 out of 133 countries, slipping 9 places from 2007.¹⁵⁵ This is due to the absence of clear and comprehensive legislative protection, and institutional framework for the proper implementation of gender equality through affirmative action enshrined in the Ethiopian Constitution. The wide gap in gender equality is, thus, attributed to the lack of commitment and “political will” on the part of the government. The absence of strong

¹⁵⁵ Global Gender Gap Report, World Economic Forum, Geneva, Switzerland, 2009 available at <http://www.weforum.org/pdf/gendergap/report2009.pdf>, last accessed on Tuesday, November, 03, 2009 at 7:06 PM

women's associations to make organized campaign is also another reasons for the existence of wider gap between sexes in Ethiopia.

In this section, I will argue that constitutional commitment to gender equality through affirmative action is necessary but not sufficient in itself for addressing the existing gender-based discrimination. I will show this by exploring the legislative protection of affirmative action and the institutional frameworks for proper implementation in Ethiopia and South Africa perspective. In so doing, I shall import best practices from the South African model of legislative protection and institutional framework to the extent relevant for the proper implementation of gender equality through affirmative action in Ethiopia. In the subsequent section, I will discuss three areas of concern, namely affirmative action in education, employment, and political representation.

3.3.1. Affirmative action in education

It is “axiomatic and self-evident” that education is a key for personal development and a means for the socio-economic and political advancement of a country.¹⁵⁶ Education is particularly important for women for it helps women to develop the necessary skill and knowledge, to have awareness on family planning and to the overall health of the whole family. It is well noted that “educating women is educating the society.” A recent study has shown that “[a] well educated woman positively influences both her own and her partner's chances of a long life.”¹⁵⁷ Education paves the way for gainful employment¹⁵⁸,

¹⁵⁶ Federal Democratic Republic of Ethiopia, Education and Training Policy, Addis Ababa, 1994, ST. George Printing Press at 4

¹⁵⁷ BBC news <http://news.bbc.co.uk/2/hi/health/8291667.stm> on Page last updated at 23:26 GMT, Monday, 5 October 2009 00:26 UK

¹⁵⁸ Ibid

for it is the key factor for acquiring the necessary skill and knowledge, crucial for effective political participation for it serves as a tool for exchange of ideas and information. To achieve these, quality education must be accessible and equitable to the whole population.

Similar to women all over the world, education was not equally accessible for Ethiopian and South African women. It is well documented that the “Bantu Educational Act of 1953” racially classified the educational system in South Africa which relegated the back South African in general and back South African women, in particular, to the lowest status.¹⁵⁹ Thus, during apartheid, education was mainly limited to the white-male minority of the South African people. In a similar fashion, the historical legacy of male dominated educational system in Ethiopia buttressed by the traditional thinking on the role and capacity of women systematically excluded Ethiopian women from the educational benefits of the country.

The main reason for the prevalent gender gap in education is also greatly attributed to the prejudices and stereotypical view of the society on women. The absence of clear and comprehensive laws that deal with educational equality is another factor affecting gender equality in education. The other core problem with gender equality in education is with respect to implementation of the existing few educational laws and policies- in particular due to lack of responsibility in the execution, and also due to lack of awareness and participation of the public at large. Lack of commitment, confidence, and effort on the part of some women also affects the educational performance of many women.

¹⁵⁹ Ritumetse Obakeng Mabokela, ‘We cannot Find Qualified Blacks’.” Faculty Diversification Programmes at South African Universities, Taylor & Francis, Comparative Education, Vol. 36.No. 1, Feb. 2001 at 95-112 Ltd available at <http://www.jstor.org/stable.3099853> accessed on 31/03/2009 09:00

3.3.1.1. Educational equality through affirmative action

After 1990s, Ethiopia and South Africa took some measures to achieve gender equality in education. In 1993, long before the adoption of the new Constitution¹⁶⁰, the Transitional Government of Ethiopia (TGE) adopted the National Policy on Women (NPW). The NPW was adopted with the view to addressing the deeply rooted socio-economic and political exclusion of women. The NPW recognizes the historical legacy of discrimination which systematically excluded and marginalized women in social spheres of life, among which education is at the forefront.¹⁶¹ The NPW notes the need for the inclusion and participation of women in the educational sector as a necessary condition for the overall development of the country. It is safe to say that, taking the historical marginalization of women, the NPW is a remarkable development for Ethiopian women for which one of its promises is taking affirmative action in education.

More importantly, in 1994, the TGE adopted Educational and Training Policy (ETP) which emphasizes the need for educational reform which among other things is to make education inclusive.¹⁶² The ETP also reiterates the historical inaccessibility of education for Ethiopian women which provides that “special attention shall be given to

¹⁶⁰ As said above, a more important constitutional development of the two countries is the adoption new Constitutions that categorically outlawed any form of discrimination in all fields. As such, discrimination in education was by necessary implication constitutionally banned. To this end, s. 29 of the South African Constitution guarantees everyone the right to basic education, and to a further education which the state must take in a progressive manner to make education available and accessible to all. In Ethiopia, although there is no comparable right to education under the Constitution, there is a general duty of the state within the meaning of Article 41 of the Constitution which deals with Economic, Social and Cultural Rights. Article 41(3) of the Ethiopian Constitution states that “[e]very Ethiopian national has the right to equal access to publicly funded social services”, for which, education in Ethiopian is one of the “publicly funded social services.” Article 41(4) of the Ethiopian Constitution also imposes obligation on the state “to allocate ever increasing resources to provide to the public health, education and other social services.”

¹⁶¹ Progress made in the implementation of the Beijing Platform for Action (Beijing+10), Ethiopia, Prime Minister’s Office/ Women’s Affairs Sub-Sector, March 2004 at 3

¹⁶² Federal Democratic Republic of Ethiopia, Education and Training Policy, Addis Ababa, 1994, ST. George Printing Press.

women.”¹⁶³ At the heart of the ETP is the requirement of affirmative action measures for women to achieve “true equality” and the financial support to be given for female students.¹⁶⁴

Ethiopian and South Africa are also members of many International and Regional human rights instruments which guarantee gender equality through affirmative action. One of such human rights instruments is CEDAW which specifically address women’s rights, and the obligations of States Parties to eradicate gender-based discrimination by taking all possible measures, including affirmative action in all spheres of life, including education.¹⁶⁵ To this end, Article 4(2) of CEDAW makes it clear that affirmative action does not amount to discrimination.

The two countries are also committed to the Beijing Platform for Action and the Millennium Development Goals (MDG). The Beijing Platform for Action introduces the need for taking affirmative action as a mechanism of narrowing the gap in gender equality in education. The MDG: Goal 3 also underscores the need for the promotion of gender equality and the empowerment of women in education, among other areas. Yet, although there are some recent developments regarding access to education, Ethiopian women still lag far behind compared to their male counterparts.

In the South African context, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)¹⁶⁶ provides an implementing legislation “[t]o give effect” to the constitutional commitment of gender equality through affirmative action

¹⁶³ Federal Democratic Republic of Ethiopia, Education and Training Policy, Addis Ababa, 1994, ST. George Printing Press at 29

¹⁶⁴ Federal Democratic Republic of Ethiopia, Education and Training Policy, Addis Ababa, 1994, ST. George Printing Press at 32

¹⁶⁵ 1249 United Nations Treaty Series(UNTS) I-20378, entered into force 3 September 1981

¹⁶⁶ Promotion of Equality and Prevention of Unfair Discrimination Act, 2000

measures.¹⁶⁷ One important feature of the PEPUDA is its scope of application where within the meaning s.5 (1) of the PEPUDA, “binds the State and all persons”, which is quite similar to the South African constitutional formulation. As will be clear in the subsequent discussion, the scope of application of the PEPUDA also extends to all persons except where and to the extent the Employment Equity Act is applicable.¹⁶⁸ It is, thus, safe to say that the PEPUDA is equally applicable in education. S. 6 of the PEPUDA prohibits “unfair discrimination against any person” which is also the exact *replica* of the South African Constitution. S. 14 of the PEPUDA provides that taking affirmative measures “designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination” falls within the proper sphere of equality. In Ethiopia, one of such practical steps is the lower point passing mark for female students.¹⁶⁹ But up to now, there is no any financial support given for female students in Ethiopia.

3.3.1.2. The lower point admission: Challenges and opportunities

In Ethiopia, one practical measure of affirmative action is the lower point passing mark for female students at grade ten, twelve, and university level which is mandated by the Higher Education Proclamation No.351/2003. The Proclamation, which among other things, provides different assessment for female students. It also provides “special support” to be given for female students when they join university.¹⁷⁰ The lower point admission for grade ten and grade twelve is usually decided by the Ministry of Education

¹⁶⁷ For further details on the scope of application and the need for the enactment of the Act, see the preamble of the Act.

¹⁶⁸ Section 5(3) of the PEPUDA

¹⁶⁹ It is very important to point out that in Ethiopia; there is no any piece of legislation concerning affirmative action in education. The exiting measures are left to the discretion of the Ministry of education.

¹⁷⁰ Article 33(1) of Higher Education Proclamation No.351/2003

on annual basis. At grade ten, the passing mark for female students is usually lower than male students. For example in 2009/2010, the passing grade point for female students at grade ten was 2.0 and above out of 4.0 while 2.29 and above was for male students.¹⁷¹ The application of the lower passing mark also continues at grade 12 where, in 2009/2010, the passing mark for female students was calculated as: In the Natural Science stream, 150/500 and above was the passing mark for female students whereas 180/500 and above was the passing mark for male students. In the Social Science stream, 180/500 and above was the passing mark for female students whereas 205 and above was for male students.

The Ministry of education has also a policy that gives preferential treatment for women in the placement of universities and choice of stream for those who join the higher institution. As per the internal policy of the Ministry of education, 25% of the total number of students is set-aside for female students. In the same fashion, universities have adopted the 25% set-aside for female students in the departmental choice. The lower grade point is also applicable in universities that the minimum passing mark of female students who are attending university is usually lower than male students. In this regard, there are some noticeable differences from university to university and from year to year which is outside the scope of this paper.

In summary, the lower point admission is both an opportunity and a challenge for female students. The lower point admission opens many opportunities for women. It helps many women to have access to the educational benefits of the country. Many women who were previously excluded from the educational opportunities are now

¹⁷¹ It is imperative to note that the passing mark is usually determined on a year-by-year basis where there is no uniform application all the time. It is also good to note that the lower point admission is without prejudice to differential application to underdeveloped regions.

joining the academic world. In Ethiopia, for example, in 2009/2010 the total admission to higher education was 74,001. Among these, women constitute 19,443 which, of course, are still less than half.

All that said, one may ask on the practical effect of the above commitments. In gender gap, Ethiopia ranks 130 out of 134 countries whereas South Africa stands 43 in educational attainment which huge differences of the two countries which came out of similar history.¹⁷² To be fair, there are some remarkable developments with respect of the participation of women in education. Although there is no official disaggregated data on the number of female students who joined, and those who have completed their studies, there are noticeable developments that many students have begun to be the beneficiaries of educational opportunity.¹⁷³

The lower point admission can also be a challenge for female students unless they are backed by necessary tutorials and other educational supports. A big concern of the lower point admission is on the practical implication of such measures on the educational performance of women. To do justice to the paper, further research is necessary to look into the effects of lower point admission on the future academic performance of women. A second year management student at Mekelle University College of Business and Economics in an interview on the effectiveness of lower passing mark for female students says:

Admitting female students on lower passing mark is both good and bad. It is good because it helps many women to join higher education. It is also bad because it has many challenges from teachers, male students. Some teachers may assume that female students can not perform well as many are admitted on lower grade point. Male students could also develop a sense of

¹⁷² Supra note 155

¹⁷³ Of course, even without the need for affirmative action, many women are performing very well and scoring high grades.

ambivalence towards female students and may tend to underestimate the academic performance of female students.¹⁷⁴(Translation mine)

It is true that the negative attitude of teachers and male students may create hostile classroom environment that is not conducive for women. At worst, some female students may perceive themselves as academically weak to compete with male students. Such kind of perception may degrade the confidence and effort of female students, which in effect will adversely affect their academic performance. From the thrust of the foregoing discussion, one can say that despite some remarkable developments, Ethiopian women still lag far behind in gender equality in education.

3.3.2. Affirmative action in employment

Another area of application of affirmative action is the field of employment. Women in Ethiopia and South Africa have for long time been the victims of exclusion and marginalization in the labour market.¹⁷⁵ They were relegated to the “non-rewarding” jobs which are highly “expected to take responsibility for the wifely tasks: the house work, the child care, and the general emotional welfare of the husband and children.”¹⁷⁶ The fact that women are excluded from the formal labour market means that there is under-utilization of the labour-force-with regard to that women constitute more than 50% of the total population.¹⁷⁷ In most families, it is the husband who is the breadwinner of the family and the one who controls financial issues. It is common parlance in Ethiopia that

¹⁷⁴ Interview made with Lemlem Kahsay, Second year management student, September, 17/2009 at 9:15 Am

¹⁷⁵ But this does not in any way imply that women have contributed nothing to the labour market. What is disturbing is the paradox between the heavy works women perform and the “remuneration” and reward they get from the society.

¹⁷⁶ B. Deckard, The Women’s Movement, in Richard A. Wasserstorm, Racism, sexism, and preferential treatment: An approach to the Topics, in Robert E. Goodin and Philip Pett (Ed) Contemporary political Philosophy: Anthology, Blackwell Philosophy Anthology, 1997 at 579(582)

¹⁷⁷ Plan 2009-2010 International Federation of Red Cross and Red Crescent Societies

the status of women in the society is greatly determined by the “vocation and success of her husband.”¹⁷⁸

Many women do not engage in the gainful labour market because they do not have the required knowledge and skill where, as said supra, they have been excluded from the educational opportunities. Despite the required knowledge and skill, many women do not engage in gainful employment due to the stereotypical views against women. Having this in mind, the crux of the following discussion is meant to analyze the existing employment legislations and their respective positions on affirmative action in Ethiopia and South Africa.

3.3.2.1. Affirmative action in public and private sector

The application of affirmative action in the field of employment is the subject of strong challenges.¹⁷⁹ Nevertheless, in the labour market, affirmative action continues to be an important engine. Affirmative action in employment helps to bring the underutilized labour of many previously excluded categories of the society to the labour market. By so doing, previously marginalized people will have independent income and will be a “value added” to the national economy. What do the legal regimes in Ethiopia and South Africa

¹⁷⁸ Richard A. Wasserstorm, Racism, sexism, and preferential treatment: An approach to the Topics, in Robert E. Goodin and Philip Pett (Ed) Contemporary political Philosophy: An Anthology, Blackwell Philosophy: Anthology, 1997 at 579(582)

¹⁷⁹ One potential challenge to the application of affirmative action in employment is rested on the freedom of contract which holds that the employee and the employer should be given the “free choice” to determine the terms and conditions of their employment relations. This is premises on the fact that to the extent possible the law should not disturb the labour market. Thus any legal imposition and restriction on the part of the part of the employer’s undertaking may be taken unnecessary market intervention. This argument is also supported by the theory of market efficiency where employing less qualified person under the guise of affirmatives action is inefficient and costly for the economy. This challenge rests in the assertion that many women lack the relevant education and experience to be hired. The other strong challenge for the application of affirmative action in employment is the possible violation of equal treatment for the male candidate.

say concerning affirmative action in employment will be the thrust of the following discussion.

In Ethiopia, the Labour Proclamation No. 377/2003, which is regulated the private sector, can be taken as one of the most “traditional liberal” anti-discrimination law regulating the labour market. The proclamation addresses only the principle of equal treatment and the prohibition of discrimination in employment. Article 14(1) (B) of the Proclamation provides that “[i]t shall be unlawful for an employer” to “discriminate against female workers, in matters of remuneration, on the grounds of their sex.” Similarly, Article 87 of the same Proclamation provides prohibition of discrimination against women “regarding employment and payment, on the basis of their sex.”¹⁸⁰ But as said above, the mere prohibition of discrimination and equal treatment is not enough to eradicate the established norms of discriminatory practices in the society.

Thus, in the labour market, there is no law governing the application of affirmative action mandated by the Constitution. This is a clear deviation from the constitutional mandate and an indication of less concern in the marginalized groups of the society in the labour market. The Proclamation falls short of imposing positive obligations on the private sector. This results in the practical exclusion of women from the formal and paid labour market where Ethiopia ranks 92 out of 134 countries in economic participation and opportunity for women.¹⁸¹

In the Public sector, the Civil Service Proclamation 262/2002(Amended as Federal Civil Servants Proclamation No.515/2007) provides affirmative action measures

¹⁸⁰ Sadly, the effect of violation of the law is simply a ground for the employee to terminate the employment relation without notice with the meaning of Article 31(1) of the said Proclamation.

¹⁸¹ Supra note 155

for women.¹⁸² Article 13 of the Civil Servants Proclamation provides a preferential treatment for women candidates who have “equal or close scores” over male candidate. It is worth remarking that, as seen in chapter one, such kinds of preferential treatment are the most challenged parts of affirmative action measures.¹⁸³ Preferential treatment, in this regard, does not necessarily mean hiring unqualified candidate. What it basically means is, upon the fulfillment of minimum requirements, which are necessary for performing the job, and accompanied by subsequent training, affirmative in employment is desirable and can be effective as well.

But there are inevitable problems with respect to the application, and the possible legal remedies to be awarded in case of violation of the law. First, the language of the Proclamation which provides “equal or close scores” is a very vague term. “Equal or close score” for one institution may be different for another institution which leads to different interpretation of the same law. The Proclamation also failed to answer as to who will be preferentially admitted if the candidates who are entitled to preferential treatment have one or more grounds of discrimination. For example, does it mean that every woman should be preferentially admitted to the vacant position?

Regarding the above issue, a similar case was brought before European Court of Justice (ECJ) in *Kalanke*, where the German law, providing preferential treatment for women, was challenged as violating the European Equal treatment Directive.¹⁸⁴ The Case deals with a German law which provides automatic preference to be given for women

¹⁸² The application of affirmative action for people with disabilities is outside the scope this paper.

¹⁸³ For arguments against affirmative in general and preferential treatment in particular, see chapter one this paper.

¹⁸⁴ European Communities Council Directive of 9 February 1977 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions(76/207/EEC)

candidates when they are equally qualified and there is under-presentation. The ECJ held the law as violating the EC Treaty for it provides automatic preference for women. In the Kalanke case the ECJ held that automatic preference “for appointment and promotion goes beyond equal opportunities and overstep the limits of the exception in Article 2(4) of the directive.”¹⁸⁵ In another decision of similar issue, the Marschall case, the ECJ endorsed the preferential treatment for women where the law provides “Saving clause” unlike the Kalanke case which saved the law from nullification.¹⁸⁶

In comparison to Ethiopia, South Africa has enacted legislations that provide equality and prohibition of discrimination in employment that can be taken as the best model in the case of non-discrimination law.¹⁸⁷ One of such legislations is the Employment Equity Act (EEA) which is best known for its detailed and comprehensive approach on non-discrimination and employment equality, and of course affirmative action. The EEA basically has two basic levels of protection. The first is the principle of equal treatment and prohibition of “unfair discrimination” in employment. The second and most important part of the Act is the obligation to take affirmative action both in the private and public sector. S. 13 of the EEA provides an obligation on the part of “every designed employer” to take affirmative action measures for persons from “designated groups”.¹⁸⁸

S. 15 of the Act defines affirmative action as “measures designed to ensure that suitably qualified people from designated groups have equal employment opportunity and

¹⁸⁵ For detailed analysis of the Judgment see EC Court of Justice 17 October 1995, C-450/93, Kalanke

¹⁸⁶ See generally EC Court of Justice 11 November 1997, C-409/95, Marschall

¹⁸⁷ There are three main legislations that deal with employment relations in South Africa. These are the Labour Relations Act and its Amendments, Basic Conditions of Employment Act, and Employment Equity Act.

¹⁸⁸ As to those who belong to a “designed employer” and “designed group” see the definitional part of the EEA.

are equitably represented in all occupational categories and levels in the workforce of a designated employer.” S. 15(2) of the act goes on to specify areas of action where the “designated employer” should take. These can be summarized as: elimination of employment barriers, diversification of the workforce, reasonable accommodation, equitable representation, training programs, and target quotas.¹⁸⁹ From this, it follows that the EEA, have effectively addressed the application of affirmative action in employment can be said as one of the most advanced pieces of legislations in the field of employment where South Africa ranks 61 out of 134 countries in economic participation and opportunity for women.¹⁹⁰ As the next section demonstrates, the EEA is also remarkable in its enforcement mechanisms.

3.3.3. Affirmative action in political representation

The full participation and inclusion of everyone in the country’s political process is one important aspect of “democratic legitimacy”.¹⁹¹ Political exclusion of women “inevitably raises questions regarding the nature of representation” itself.¹⁹² To a degree that a certain category of the society is excluded from the mainstream of politics, the system is illegitimate and democratically deficient.

3.3.3.1. Women and equal political representation

Equal political participation is one dimension of the general “equality argument” where women have to take part in representation in the political affairs of the country. The

¹⁸⁹ South Africa has also adopted the White paper on the strategies to take affirmative action in the Public Service. For detailed analysis see, General Notice, Notice 564 of 1998, *Government Gazette*, Vol.394, 23 April, 1998-No.18800

¹⁹⁰ *Supra* note 155

¹⁹¹ Joshua Cohen, *Deliberation and Democratic Legitimacy* in Robert E. Goodin and Philip Pett(Ed) *Contemporary political Philosophy: An Anthology*, Blackwell Philosophy: Anthology, 1997at 143

¹⁹² Fiona Beveridge, Sue Nott and Kylie Stephen, *Mainstreaming and the engendering of policy-making: A means to an end?* *Journal of European public policy* 7:3 Special issue 385-405at 387

argument for political representation rests in the “politics of presence” where women have to be actually represented in order to voice the deep concern of their affairs.¹⁹³ That is why Anne Phillips argues “[w]hen policies are worked out for rather than with a politically excluded constituency, they are unlikely to engage with all relevant concerns.”¹⁹⁴ Thus, the fact that there are many women in the parliament means that they can reflect the views and interests of women and “[t]he presence of women in national assembly can mean that greater prominence is given to gender issues.”¹⁹⁵

Of course, the fact that there are many women in parliament does not necessary mean that they reflect the views of all women. First, the experiences and needs of women are not the same. For example, the interests of urban women are not the same to rural women. Second, women who enter the national parliament represent the whole population and not single constituency or category of people. This is what the “free mandate” principle dictates in the discourse of political representation. For example, Article 54(4) of the Ethiopian Constitution provides that “[m]embers of the House [of Representatives] are representatives of the Ethiopian People as a whole.” Rather, as said above, equal political representation is a question of equality and political legitimacy. Thus, affirmative action in political representation has to be seen in light of the assertion

¹⁹³ For an interesting discussion of “the politics of ideas and the politics of presence” see generally Anne Phillips, *Dealing with Difference: A Politics of ideas or a Politics of Presence?* in Robert E. Goodin and Philip Pett (Ed) *Contemporary political Philosophy: An Anthology*, Blackwell Philosophy: Anthology, 1997, See also, Keith J. Bybee, *Splitting the Difference: The Representation of Ideas and Identities in modern democracy*, 22, *Law and Soc. Inquiry* 389, 1997

¹⁹⁴ Anne Phillips, *The Politics of Presence*, in Fiona Beveridge, Sue Nott and Kylie Stephen, *Mainstreaming and the engendering of policy-making: A means to an end?* *Journal of European public policy* 7:3 Special issue 385-405 at 387

¹⁹⁵ Pippal Norris, *women politicians: Transforming Westminster* in Fiona Beveridge, Sue Nott and Kylie Stephen, *Mainstreaming and the engendering of policy-making: A means to an end?* *Journal of European public policy* 7:3 Special issue 385-405 at 389

that “the inclusion and participation of everyone in public discussion and decision making requires mechanisms for group representation.”¹⁹⁶

3.3.3.2. Women empowerment and political quota: Affirmative action in politics?

Women have systematically been excluded from both national and international political affairs which have produced the domination of men in all machineries of the government.¹⁹⁷ The major causes for the political exclusion of women are: the traditional thinking and cultural prejudices, religious views and the strong challenge from parents and husbands which almost all assume that a good woman is the one who takes good care of the family. As said above, the status and social respect of a woman is determined by role she plays at home and the family responsibility she is in charge. In a more prevalent fashion, the gender dimension of politics has been predominantly practiced in Ethiopia and South Africa-labeling politics as the men’s profession.

There are two main strategies to address the existing political exclusion of women. These are empowerment and political quota.¹⁹⁸ Empowerment of women is at the heart of achieving gender equality in politics. Empowerment is the whole process of capacity building to create conducive environment for the free and full participation of women in politics. It increases the level of participation of women in the overall political sphere of their country. Political quota is another mechanism which paves the way for

¹⁹⁶ Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship* in Robert E. Goodin and Philip Pett (Ed) *Contemporary political Philosophy: An Anthology*, Blackwell Philosophy: Anthology, 1997 at 2571

¹⁹⁷ Beveridge Supra note 192 (Internal quotation omitted)

¹⁹⁸ The empowerment and representation of women was emphasized during the 1995 UN Conference, Beijing Platform for Action.

genuine and effective participation of women in politics.¹⁹⁹ It is one form of affirmative action which requires that certain numbers of seats in parliament are reserved for women. Of course, political quota is one of the most challenged forms of affirmative action measures.²⁰⁰ As noted in chapter one, quotas are usually challenged as violating the “ontological principle of equality”. Quotas are also attacked as bringing unqualified people to the political mainstream which will result in poor service to the society. Be that as it may, quotas are important, at least temporarily to bring the historically marginalized and excluded categories of the society to political arena.

Political quota can be expressed either in the Constitution or in legislations, or in the policy and strategy of political parties.²⁰¹ Where quotas are expressed in the Constitution, or are mandated by legislations, they have a binding nature and all political parties are under obligation to take such measures. Where political quotas are voluntarily adopted as the policy of the party, there is no legal obligation on the party when it fails to implement its promises.²⁰² By and large, they are usually adopted to mobilize the populace during the political campaign to get vote, particularly, when there are a large number of voters who will be beneficiaries of quotas, such as women.

In Ethiopian and South Africa, political quotas for women are adopted voluntarily by the ruling parties, Ethiopia Revolutionary Democratic Front (EPRDF) and African

¹⁹⁹ Hannah E. Britton Coalition Building, Election Rules, and Party Politics: South African Women’s Path to Parliament, Indiana University Press, Africa Today, Vol.49. No. 4(Winter, 2002) at 52 available at <http://www.jstor.org/stable/4187530> Last accessed on 28/12/2008,13:55

²⁰⁰ Ibid at 53

²⁰¹ Drude Dahlerup and Lenita Freidenvall, Quotas as a “Fast Track” to equal representation for women, International Feminist Journal of Politics 7:1, at 32 Available at <http://dx.doi.org/101080/1461674042000324673>, Last accessed on June 4./2009

²⁰² Ibid at 40

National Congress (ANC), respectively.²⁰³ As remembered from the previous discussion, the Constitutions of the two countries, apart from recognizing affirmative action in general, do not specifically provide political quota.²⁰⁴ In South Africa, the application of political quota begins right after the transition of the country to democratic order in 1994 general election where ANC adopted 30% reserve seats in national parliament. The 30% quota helped South Africa to move from 141st to 7th in world in terms of the share of women in national parliaments.²⁰⁵ In the second democratic election (1999), ANC also adopted quota for women in national parliament which has remarkably increased the level of participation of women in the country's political life. In the third democratic election (2004), ANC raised the level of women's participation to 50% which is one of the best models with respect to gender equality in political participation in the world. Similarly in 2009, the 50% quota for women was applied which has radically increased the number of women in national and provincial parliaments.

Although Ethiopia conducted the first democratic election in 1994, political quota for women has never been adopted either in the form of legislation or by voluntary political parties. It is in 2004 where EPRDF has adopted a 30% quota for women in national parliament and Tigray Peoples' Liberation Front (TPLF) 50% in regional councils.²⁰⁶ It is worth remarking that the new trend followed by the EPRDF is "breaking news" to the issue of political equality in Ethiopia. As a result of this, the number of

²⁰³ This time, it is only ANC and EPRDF that adopted voluntary quotas in South Africa and Ethiopia. No other political party has followed a similar trend so far.

²⁰⁴ It is imperative to note that in Ethiopia, there is a constitutional quota where at least 20 per cent of the total seats for the national parliament are reserved for minority nationality within the meaning of Article 54(3) of the Ethiopian Constitution.

²⁰⁵ Britton *supra* note 199 at 33-57

²⁰⁶ TPLF is the ruling party in one of the Regional Stats called Tigray and a coalition member of EPRDF. By the way, the 30% quota for women in national parliaments is adopted in Ethiopia as per the Beijing Platform for Action on the World Conference on Women, 1995.

“women parliamentarians” has remarkably increased.²⁰⁷ What does political quota mean for women is clear from the report of Inter-Parliamentary Union.

As per the report of the Inter-Parliamentary Union on “world classification”, South Africa ranks 3rd and Ethiopia ranks 42nd out of 134 countries in the world on “women in national parliaments”.²⁰⁸ South Africa also ranks 5th whereas Ethiopia ranks 74th out of 134 countries in political empowerment of women in general.²⁰⁹ The report indicates that in both lower and upper Houses, South Africa shows a remarkable increase in the number of women in parliament. In the Lower House, 44.5% and in the Upper House 29.6% of the total seat is occupied by women.²¹⁰ Accordingly, during the 2005 general election to the National Parliaments, 21.9% seats in the Lower House, and 18.8% seats in the Upper House, are occupied by women.²¹¹

The next big question is whether the 30% quota for women in national parliament really makes a difference for Ethiopian women. The 30% quota for women in national parliament is just the beginning of affirmative action in political representation. It is true that due to quota system, many women have joined the traditionally male dominated political stream. This has benefited many women to become parliamentarians and have started to take part in the political process of their country. The mere presence of 30% women in national parliament is not enough to say that women have been effectively represented compared to the proportion of women to men of the whole population.²¹²

And as such, it is difficult to talk about gender equality in political participation is

²⁰⁷ Women and Gender: Women’s Role in legislative, Managerial levels seen to improve, The Daily monitor, African News, Monday, May 14, 2007 at 1

²⁰⁸ Women in National Parliaments: World Classification, situation as of 31 July 2009, at <http://www.ipu.org/wmn-e/classif310709.htm>. Last accessed on Sunday, October, 2009 at 6:35 Pm

²⁰⁹ Supra note 155

²¹⁰ Supra note 208

²¹¹ Ibid

²¹² See Dahlerap and Lenita Freiddenvall, Supra note 201 at 32

ensured in Ethiopia. Thus, 30% women in national parliament will definitely form “political minority” and their voices can easily be outvoted by male majority in the parliament.²¹³

Equal political participation of women should also be applied to the lowest administrative unit (local district) where women at the grassroots level can be empowered. This is particularly true for women in the rural area that the most exploited groups of the Ethiopian society exist. The 30% quota benefits only urban women which are loyal to the party. The 30% quota for women can in effect be used as a barrier unless it is understood as the minimum guarantee. The main solution, I believe, is empowerment of women through a subsequent training programs and capacity building. Hence, it is necessary to build the capacity and competence of women with the view to enabling them to freely compete and participate on “equal footing” with men. Thus, instead of rigid quotas, education and empowerment in politics is the key way to political participation. If women get to the parliament through quotas, without knowledge and social skill they will be with some exception-only “rubber stamps” and second rank participants.

It is also worth noting that political quota by the main ruling parties may have impact on other political parties in the future. The fact that the ruling party adopts quotas for women, the ruling party can use it as strategy to get the vote of the women. This in effect may lead to the adoption of political quotas by other political parties. Of course, some political parties can totally oppose such quotas to create policy difference with the ruling party. But, presently, in Ethiopia, no opposition political party adopts political quota for women. Nor is there any explicit opposition to it. It is also destabilizing that no

²¹³ Hannan Pitikn, The Concept of representation, in Anne Phillips, *Dealing with Difference: A Politics of ideas or a Politics of Presence?* in Robert E. Goodin and Philip Pett (Ed) *Contemporary political Philosophy: An Anthology*, Blackwell Philosophy: Anthology, 1997 at 176

other political party, except the ruling party, has more than two women who entered the parliament. In the future, some political parties may adopt a similar policy like the ruling party to get the vote of women, particularly where women form a large number of the society.²¹⁴ Or, it may be used to create policy difference by arguing for or against political quota.

What is more, recently, the Ethiopian Electoral Board has designed a formula for “party finance” for the upcoming 2010 general election, and one formula for increased budget for a political party is the inclusion of women in the parties list of candidates for election.²¹⁵ This will definitely have a positive effect on many political parties as the budget formula can be used as an incentive for political parties to include women in their party candidate list to get increased funds.

In a nutshell, Ethiopia did not establish sufficient legislative protection of affirmative action as per the constitutional requirement. Thus, there is a need “to give practical effect” to the constitutionally mandated affirmative action measures in the field of political representation. In contrast, South Africa has enacted several legislations that are intended to “give effect” to the constitutional commitment of gender equality through affirmative action. The following sub-section is devoted to looking into enforcement mechanisms and institutional frameworks for affirmative measures in the two countries.

²¹⁴ Britton Supra note 199 at 55

²¹⁵ It is worth noting that electoral system also affects the level of participation of women in national parliaments. Many argue that generally it is proportional representation is the best system for group representation. See generally Cass R. Sunstein, *Preferences and Politics* in Robert E. Goodin and Philip Pett (Ed) *Contemporary political Philosophy: An Anthology*, Blackwell Philosophy: Anthology, 1997, at 169, see also Britton at Supra note 197 33-57

3.4. Enforcement mechanisms: What Lessons from South Africa?

It is a common parlance that “to give a practical effect” to constitutional provisions, ordinary laws and policies, there is a need to have strong enforcement mechanisms by establishing institutional frameworks. This is because lack of mechanisms of enforcement and sanction makes a law to be a “dead letter”. In this respect, South Africa is not just a model on the protection of gender equality through affirmative action at the level of the Constitution and legislations but is also celebrated for its constitutional and legislative establishment of institutional frameworks of equality bodies. Hence, one of the major departures between Ethiopia and South Africa is on the existing enforcement mechanisms of gender equality, in general, and affirmative action, in particular.

South Africa has designed institutional organs that are empowered to oversee the proper implementation of legislations that deal with gender equality through affirmative action. The institutional frameworks established by the PEPUDA, and EEA are of particular importance. The PEPUDA mandates the establishment of Equality Review Committee by the Minister for Justice and Constitutional Development within the meaning of s.37 of the PEPUDA. The Committee has the mandate, among others, to give advice to the Minister for Justice as to the enforcement of the PEPUDA, submit regular reports, and analyze the impact of other laws on equality.²¹⁶ The PEPUDA also provides standing to both the private individuals and public interest litigation to bring action when there is violation of the Provisions of the PEPUDA by virtue of s.20.(1)²¹⁷

²¹⁶ For a detailed analysis of the Act, see Section 33 of the Act which specifically provides on the powers and responsibilities of the Equality Review Committee.

²¹⁷ It is crucial to note that the Act also gives standing to the African Human Rights Commission and to the Commission for Gender Equality to bring action in the event of violation of the Act. One the detailed description of who has standing to bring action, see s.20 of the Act.

In a similar vein, the EEA has established the Commission for Employment Equity within the meaning of s.28. The Commission has the mandate to give advice to the Minister for Labour, and has the power to follow up the proper implementation of the EEA. The EEA has also established strong monitoring and enforcement mechanisms which can be cited as “the best practice” in the field of employment law. First, the EEA has given the power to any employee or trade union to bring complaints on the possible contravention of the provisions of the EEA.²¹⁸ There is also a Labour Inspector that has the power to monitor the implementation of the EEA within the meaning of s.35. S.43 of the EEA also established Director-General which has the power to “conduct a review” whether the employer is in compliance with the EEA. These equality bodies are established to follow up the proper implementation of the specific legislations in South Africa. The EEA also provides sanctions in the form of punishment in the event of violation.

In contrast, Ethiopia failed to provide a specific and sufficient legal remedy for the violation of the existing few legislations. In the case of the public sector, it is doubtful whether courts can order for the reinstatement of the aggrieved party or award only compensation. Ethiopia is not just far behind in the legislative protection of gender equality through affirmative but also has no clear and comprehensive institutions.²¹⁹ Thus, in Ethiopia, the constitutional commitment to gender equality through affirmative action is not effectively implemented. This is due to the absence of specific implementing laws to determine the contents and extent of affirmative action measures and the possible

²¹⁸ Section 34 of the Act

²¹⁹ Of course, there are some political institutions such as the Ministry of Women’s Affairs. But such organ is by definition political and all their decisions have political motive than addressing women’s concern in an organized and independent way.

measures in the event of violation. This speaks for a substantial change and enactment of further legislative protection and instructional arrangement with the view to ensuring effective enforcement gender-based affirmative action.

In conclusion, South Africa and Ethiopia are similar in that both countries have recognized affirmative action on the constitutional level. The South African perspective on affirmative action is different from Ethiopia in three major aspects. First, affirmative action in South African is part of the wider solution to all disadvantaged categories of persons exposed to unfair discrimination. In contrast, in Ethiopia, affirmative action is by definition for women. Secondly, affirmative action in South Africa is permissible whereas in Ethiopia it is mandatory which have a qualitative difference with respect to the duty of the State. Thirdly, the Ethiopian and South African jurisprudence of affirmative action has one significant difference with respect to the role and space of the judiciary. The South African Courts in general and the South African Constitutional Court in particular, have developed solid case laws that can be taken as best practices in equality and affirmative action jurisprudence. In contrast, although the Ethiopian Constitution is in force for more than a decade, Ethiopian Courts have not developed any jurisprudence on equality.²²⁰

²²⁰ It is crucial to note that, in Ethiopia, the respective role of the Courts and the House of the Federation is not clearly demarcated for there is a Constitutional debate whether courts can apply and interpret the Constitution.

Conclusion and the Way forward

The paper intended to offer new insights to the most controversial issues in the public discourse, namely equality and affirmative action. Equality was said to be a very complex and controversial concept, and so does affirmative action. Part of the controversy was attributed to the meaning and application of the two concepts. At a more specific level, formal equality was said to be the first step in non-discrimination law, though it is not the only thing that we need. This calls for revisiting the traditional approach and shifting towards the substantive approach within which affirmative action might be permitted. The conclusion that one can draw is -affirmative action is the proper and effective mechanism of addressing the deeply rooted legacy of discrimination.

A significant conclusion of this paper is that the institutionalized inequality was the main cause for the existing gender inequality in Ethiopia and South Africa. The patriarchal family the regimes developed was also said to be another cause for women subordination. All in all, Ethiopian and South African women were under the yolk of subjugation which resulted in the male dominated society. These were the starting points for gender inequality in the two counties.

With the view to addressing the existing equality problems, the Constitutions of the two countries came up with an extensive rights-protection that can be ranked among the most modern Constitutions in the world. One of the innovative aspects of the two Constitutions is their explicit Constitutional commitment to gender equality. From a comparative perspective, unlike the Ethiopian Constitution, the South African Constitution is very clear with respect to three important things: firstly, it recognizes both formal and substantive equality which is a significant development in the area of equality

law. Secondly, with respect to the prohibited forms of discrimination the South African Constitution is very clear in that it prohibits both direct and indirect discrimination. Thirdly, in South Africa, the scope of application of the right to equality and non-discrimination extends both to private and state action; in Ethiopian there is no such formulation. Such approach is also endorsed by the South African Constitutional Court's jurisprudence in several decisions.

At the level of constitutional protection, the two countries are similar in that both have endorsed affirmative action as a response for the historical legacy of discrimination. Unlike other constitutional countries, there is an explicit constitutional endorsement of affirmative action in the Ethiopian and South African Constitutions, though the way how it is constitutionally entrenched is qualitatively different.

The constitutional recognition of affirmative action of the two countries differs in two crucial aspects. These are, on the beneficiaries and the nature of obligation of the state. Affirmative action for women in the South African constitutional framework is part of the wider solution for all "categories of persons" disadvantaged by "unfair discrimination". This general approach to affirmative action in South Africa is owing to the history of discrimination of different groups of people during apartheid regime-and as such a general solution to the wider problems. But in Ethiopia, women are the "named beneficiaries" of affirmative action measures. On the nature of obligation, while the Ethiopian Constitution provides affirmative action as a mandatory state obligation, in South Africa it is permissible which is encouraged but not formulated in a mandatory language. The different social and political structure at the revolutionary changes and consequent differences in the constitution resulted in different methods of protection-

South Africa proceeds on the way of legal rights, Ethiopia rather proceeds on the policy and state-obligation path, creating rather social ‘entitlements’.

The conclusion that one can validly draw from the whole discussion of the paper is this: a constitutional commitment for gender equality through affirmative action could be the first step in the discourse of non-discrimination law. Worth yet, this constitutional commitment has to be put into practice through further legislations and its implementation has to be backed by strong institutional frameworks. In this regard, a special attention was given to affirmative action in the field of education, employment and political participation. Relevant laws and practices were assessed and compared in the two countries to draw the best practice possible.

One may ask why Ethiopia still lags far behind while it has a similar period of transition to democratization with South Africa. The reason is simple and clear: This is due to the different “political will” taken by the two countries, and also that the background and problems were different. From the comparative study of the two countries, it was concluded that South Africa has one of the most advanced pieces of legislations with respect to gender equality through affirmative action on the level of legislative protection, and institutional frameworks to monitor the proper implementation of the constitutional commitment to gender equality. The PEPUDA and EEA are some of such legislations that have brought promising developments in narrowing gender gap in South Africa. The institutional frameworks established by these laws make South Africa to be a model with respect to gender equality.

While South Africa has made remarkable developments by enacting several pieces of legislative measures to ensure gender equality, Ethiopia still lacks the “political

will” to ensure gender equality on the ground by further legislations. Of course, there are some inevitable differences in the two countries on their level of economic development which may affect the type of measures to be taken. True, this time, South Africa is one of the fastest growing countries in the world. Despite such differences, it is crucial to underline that, without gender equality and the full participation of women, every developmental effort is highly likely to fail. But thus far, Ethiopian women are not, in any fundamental way, the beneficiaries of the constitutionally guaranteed affirmative action measures, despite some promising developments. Ethiopia has, thus, failed so far to realize its undertakings.

Thus, further legislative and institutional measures are necessary to bring about *de facto* equality in all spheres of life. Everyone should also play a role in achieving gender equality. The state in this regard is the primary organ having the obligation to take all possible measures to achieve true equality. In the struggle for gender equality, the role and space of men is also crucial. Men have to be taught that the issue of gender equality is not just the concern of women but rather a sign of good society founded on the spirit of equality and dignity. If men are not taught on the need for gender equality, they may be resistant to any change, and may delay the pace for narrowing the existing gender gap in the society. Other stakeholders and civil society organizations should also play a great role through teaching, educating, campaigning, and awareness raising to create critical mass.

More importantly, the role and space of organized women’s participation is highly necessary. I believe that the lasting solution for the overall socio-economic and political problems of women is the mobilization and creation of independent women’s

associations who can take gender equality very seriously. If women are organized, they will have a strong bargaining power and even can lobby the government to take radical measures to narrow the gender gap. The impressive development made in South Africa is the result of massive lobbying and mobilization of South African women that influenced the government to enact many pieces of legislations and policy measures to bring about *de facto* equality. Thus, women should take the lead as the main agents in the struggle for gender equality.

In conclusion, the viable solution to the existing overall gender inequality is to have an integrated approach that all stakeholders should take part in the struggle for gender equality. The state, Non Governmental Organizations, women themselves and the society as a whole should make a joint effort to bring about true equality. Much remains to be done, in this regard.

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