PHILOSOPHICAL ANALYSIS OF GENDER BASED AFFIRMATIVE ACTION POLICY IN KENYA WITH RESPECT TO THEORY OF JUSTICE

GERFACE OJWANG’ OCHIENG’

BA (Hons)

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DECLARATION

This thesis is my original work and has not been presented for a degree in any other university or any other award.

Gerface O. Ochieng’
C50/21636/2010

Signature____________________ Date ______________

Supervisors:

We confirm that the work reported in this thesis was carried out by the student under our supervision:

Dr. J. Mburu

Signature____________________ Date ______________

Department of Philosophy and Religious Studies
Kenyatta University

Dr. T. Namwamba

Signature____________________ Date ______________

Department of Philosophy and Religious Studies
Kenyatta University
DEDICATION

To my Mother JULIANA OCHIENG’ whose Philosophy I have always relied on,
“Whoever has a mat will always find a place to rest their head”.

This was the most difficult project to venture in, since it came at a point of transition in my life. But to God be the glory. I do thank Dr. J. Mburu and Dr. T. Namwamba for believing in me and for their intellectual support. I do appreciate and thank Dr. Owino for the intellectual intercourse we engaged in. In the course of this work I met friends who I regretted having, those who could stab you at the back, but with the sweetest of smile on their faces and velvet gloves on their hands. I also lost many friends who could not withstand the miseries which were surrounding me. However, I have to thank men and women who proved to be true buddies: The Capuchin Friars: Fr. Abel Kashweka and Fr. Arnold Shirima, true brothers who shed tears when we were patting ways. The Provincial Fr. George Muthaka and his council, the Langata community, Bishop Joe Alexandro, Fr. Godfery Odunga and Bro. Lukas Masasi. I am grateful to Fr. Mathew Maggak and Fr. Lukas Ogola (IMCs) for their support. I will always be grateful and indebted to Obrey and Michello Syiankwilimba, Teresa Anyango, Mike and Millicent Odiur, Cecilia Kananu, Boniface Mugo, Helen Mbuvi, Millicent Oloo, The Sachombes, Sr. Patricia Kyambu, and my beloved sisters Lewnida and Regina Ochieng’. Thank you everyone who supported me.
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ABBREVIATIONS/ACRONYMES

AAP: Affirmative Action Policy
AWCFS: African Woman and Child Future Service
CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women
CEO: Committee on Equal Opportunities
CIDA-GESP: Canadian International Development Agency – Gender Equality Support Program
CIC: Commission for the Implementation of the Constitution
EOC: The Equal Opportunities Committee
FIDA: Federation of Women Lawyers in Kenya
GAD: Gender and Development
GoK: Government of Kenya
ICERD: International Convention on the Elimination of all Forms of Racial Discrimination
ESP: Equality Support Program
KWFT: Kenya Women’s Finance Trust
KEWOPA: Kenyan Women Parliamentary Association
KUCCPS: Kenya Universities and Colleges Central Placement Service.
MP: Member of Parliament
SAAPs: Strong Affirmative Action Policies
DEFINITION OF TERMS

**Affirmative action** – Is an attempt to reduce or eliminate prejudicial discrimination and historical injustices

  **Weak affirmative action** – The use of policies and procedures to end discriminatory practices and ensure equal opportunity, it fall short of preferential programs.

  **Strong affirmative action** – The use of policies and procedures to favour particular individuals because of their gender, race, or ethnic background.

**Compensating Support** – Special training programs or financial backing, day-care centers, apprenticeships and tutoring designed to compensate for gender-based disadvantages.

**Constitution** – A body of fundamental principles, or established precedents according to which a state or organization is governed.

**Discrimination** – Unfavorable treatment of people on irrelevant grounds, or actions against people based on factors that cannot and should not be used to justify those actions.

**Ethics** - Moral principles that control, or influence a person’s behaviour.

**Empowerment** – A process through which men and women, acquire knowledge, skills and attitudes to critically analyze their situation and take action to change the status quo of the underprivileged and other marginalized groups.

**Formal Equality** – Careers open to all according to individual talents.

**Gender** - Culturally determined power relations, roles, or responsibilities and entitlement men and women, boys and girls have in a given society.

  **Gender Competence** – Skills and knowledge to perceive and analyze things from a gender perspective.

  **Gender Discrimination** – Unequal or preferential treatment of individuals or groups on the basis of their gender that results in reduced access to or control of resources and opportunities.
**Gender Roles** – Socially assigned roles and responsibilities as opposed to biologically determined functions.

**Gender Transformative Policy** – A policy that takes into consideration the needs of men and women, it also seeks to transform the existing relations to be more equitable through the redistribution of resources and responsibilities.

**Gender parity** – Numerical concept referring to equal number of girls, boys, men and women relative to their respective number in the population.

**Justice** – Moral rightness based on ethics, rationality and fair treatment of people.

**Corrective Justice** – Fairness and demands for civil damages caused to a particular group of people.

**Distributive Justice** – Normative principles designed to guide the allocation of benefits and burdens of economic activities.

**Morality** – Principles affirming that an action is right or wrong or a person is good or bad.

**Patriarchy** – Male dominated social relations, ownership and control of power at many levels in society.

**Policy** – A course of action adopted and pursued by a government or organizations to implement their objectives.

**Quotas** – Numerical goals of the proportional share, or part of resources allocated to a person or a group of people.
ABSTRACT

This is a multi-disciplinary research. It focuses on socio-political philosophy, with an aim of giving a philosophical analysis of gender based affirmative action policy in Kenya. It attempts to examine the nature of probabilistic moral dilemma and the inherent problems of gender based affirmative action policy that it occasions in the quest for justice. There are two kinds of affirmative action, weak and strong. This research has concentrated on the strong affirmative action (SAAP) based on uplifting the welfare of women and the girl child in the Kenyan society. SAAP is fully entrenched in the Constitution, for example, Articles 81 (b) and 27 (6). The concept of SAAP as relates to women in Kenya defeats the provision of justice as fairness, it seems to be prejudiced and unrealistic, since it is oblivious of the consequences of the policies; as they only favor women and injurious to men. Thus the concentration of SAAPs on the well being of women lapses into regressive vicious cycle by perpetuating the problem it is meant to arrest, that of discrimination. This does sacrifice meritocracy by severing reward from people of excellence, talents, and abilities to strong affirmative action, hence promoting reverse discrimination. The idea of SAAP has been therefore interrogated within fundamental philosophical issues of discrimination, justice, human rights, and stresses the principle of equal opportunity and placement. It has been informed by John Rawls’ theory of justice as fairness. This research found that strong affirmative action is not the best way possible to solve gender discriminations which are prevalent in Kenya. Because preference creates burden, and it makes a stigma on the preferred women, showing that they need special favour and the mark is borne prominently by every one of its members. It also found that SAAPs programs often fail to achieve their objectives and the compensation given of jobs and schooling is often unrelated to any suffered offenses and therefore inappropriate as a remedy for the specifiable injuries of identifiable plaintiffs. This research therefore recommends that compensation should only be done to those individuals who are the main victims of discrimination. It proposes a need to use weak forms of affirmative action policy, and replace it with a principle which will create an institution of perfect equality, admitting no power or privilege on one gender. I humbly submit that this research has offered an alternative paradigm and a philosophical discussion of SAAPs in Kenya, which is a shift from a legal platform to a moral foundation, and hence discussion of strong affirmative action in a logical way.
CHAPTER ONE

1.0 INTRODUCTION

1.1. Background of the study
Affirmative action is an attempt to address or redress the past discriminatory injustices based on gender, race and ethnicity. It takes the form of policies and programs; usually mandated by governments and designed to bring about necessary changes in colleges, businesses and other organizations. There are two kinds of affirmative action: weak and strong.

Weak affirmative action is the use of policies and procedures to end discriminatory practices to ensure equal opportunity. Strong affirmative action on the other hand is the use of policies and procedures to favor particular individuals because of their gender, race, and ethnicity. It is a preferential treatment that is usually implemented through favoring plans, quota systems and policy papers (Pojman 2006). The Kenyan situation has taken the second approach; which is the strong affirmative action, hence the incessant discussion for, and against the affirmative action policy in the country.

In Kenya, the groups considered to be marginalized are women, youth, the physically and mentally challenged people, and people from arid areas. These groups demand for affirmative action to attain justice for their current and historical plight. However this research only focuses on strong affirmative action based on uplifting the status of women and girls in Kenya.
Debates on strong affirmative action in Kenya have been there for years. For example, Affirmative Action Bill 2007 on 50 automatic seats for women in the 10th Parliament, met with strong opposition from the general public. When it was subjected to opinion polling at the national level, where the pollsters had asked the respondents of their thought on whether women deserved the 50 special seats in Parliament as proposed in the Kenyan Constitutional (Amendment) Bill 2007. Kenyans were split on the issue with 51.6% of the respondents supporting the proposal, compared to 48.4% who felt that women should compete with men in seeking votes to enter Parliament. Among those who supported the proposal, 46.8% said the special seats were necessary to ensure equal representation, another 24.1% were of the opinion that the increased representation by women would result in improved economic growth, while another 14.3% reported that the seats would assist women in fighting for their rights. Of the respondents who opposed the bill, 56.9% of them wanted women to go to the grassroots and seek for votes, while another 18.8% reported that the 50 special seats for women would have amounted to discrimination against men in Kenya (AWCFS, 2007).

The affirmative action policy has finally been entrenched in the Kenyan Constitution. The Constitution of Kenya chapter seven, article 81 (b) states, “not more than two thirds of the members of elective public bodies shall come from the same gender”. This inclusion, as impressive and welcoming as it may be, seems to negate one basic tenet of judicial justification; justice as fairness, and thus fails sensitiveness test. The clause triggered a demand from the Kenya Women
Parliamentary Association (KEWOPA) to set aside 80 seats in Parliament for women in the 11\textsuperscript{th} parliament. This according to KEWOPA was to raise the number of women parliamentarians, and to increase their contribution and influence on Parliamentary business and ensure increased attention to issues affecting women. The questions many scholars are struggling with are: do women deserve those positions because they are women, or because they are capable? Is this practice going to sacrifice meritocracy, excellence and capability for gender parity? (Putucek, 2003).

The parliamentarians in the 10\textsuperscript{th} parliament were equally divided on the Affirmative action Bill tabled in Parliament, rejecting it thrice. The legal experts and legislators who opposed the bill argued that the clause should be deleted from the Constitution. Since to meet the requirement of the constitution, then there would have been 117 parliamentarians which could have led to a blotted legislature; with pay of four billion Kenya shillings as their salary. Those who supported the clause claimed that if the requirement of the constitution was not met, then we would have had unconstitutional parliament. This stalemate made Attorney general Githu Muigai to take the affirmative action clause in the Constitution to the judiciary for interpretation.

On 11\textsuperscript{th} December 2012, the Supreme Court ruled that the two thirds gender rule could not have been achieved in the last general election of 2013, but should be achieved progressively. The five bench judge: Justices Jacktone Ojwang’ Philip
Tunoi, Smokin Wanjala, Njoki Ndung’u and Chief Justice Willy Mutunga ruled that the progressive realization of the affirmative action is not unconstitutional since the gender quota will eventually be achieved in bits through appropriate legislation (*Daily Nation 12th December 2012*). This shows how strong affirmative action policy is difficult to implement, if there are no clear guidelines of implementation.

There seems to be too much interest taken in the welfare of the girl child in the current Kenyan society. For example, The Kenya Universities and Colleges Central Placement Service (KUCCPS) always has lower cut off grades for girls than boys. The cut off grade for girls in the last intake (2014) was B- 58 points and B of 60 points for boys, regardless of the environment where the candidates studied and sat for the exams. This quota seems to be discriminatory to boys since the KNEC set the same exam meant for both boys and girls. While there has been discrimination towards the girl child in the Kenyan societies, there is a need also to realize that there are many disadvantaged boys in the current Kenyans societies without attention towards their plight, most of them ending up being unproductive to their families, and the whole nation. Therefore, despite the gains achieved by strong affirmative action policies in the country, the concentration of the policies in the uplifting of the well being of women and girls seems to negate the principle of justice as fairness. Justice as fairness is a principle according to which social goods should be distributed by ensuring that no one is advantaged or disadvantaged in a society (Rawls, 1971).
There are equally disadvantaged boys and men in the current Kenyan society, and having a policy with predetermined number of women in an organization, or state office to be absorbed leads to reverse discrimination. That is, unequal preferential treatment against men to advance the interest of women.

As stressed above, strong affirmative action violates the right of everyone to equal opportunity, consideration, and the right to maximally compete to an open position. It subordinates merit, conduct, talents and character to gender, and we only need to accept a policy that encourages hiring the most competent which is justified as part of a right to equal opportunity. Is there a need therefore of paradigm shift in approaching strong affirmative action policies in Kenya, from a political platform to a moral foundation and to discuss affirmative action in a logical way?

1.2. Statement of the Problem
The concept of strong affirmative action as relates to women in Kenya defeats the provision of justice as fairness, which is a primary political justice for the basic structure of any society (Rawls 1971). It seems to be prejudiced and unrealistic, since it is oblivious of the consequences of the policies; as they only favor women and injurious to men. The concentration of strong affirmative action policies on the well being of women, lapses into regressive vicious cycle by perpetuating the problem it is meant to arrest: that of discrimination. This does sacrifice
meritocracy by severing reward from people of excellence, talents, and abilities to strong affirmative action, thus promoting reverse discrimination.

As it is, strong affirmative action policy in Kenya vests the rights in the group rather than the individual; it therefore becomes discriminative even within the women group; it only benefits the well placed women, but not all women in the Kenyan society. Contrary to the dictates of justice as fairness which demands that all social values of income and wealth, and the bases of self – respect are to be distributed equally and be for the benefit of all, at least the disadvantaged members of the society (Rawls 1971). The more the strong affirmative action policy concentrates on the wellbeing of women, the more the right of everybody to equal consideration and equal opportunity is compromised. The research problem therefore is to examine the extent to which gender based strong affirmative action policy in Kenya is inconsistent with the theory of justice as fairness.

1.3. Objectives
1. To clarify the concept and the necessary conditions for SAAPs in Kenya.

2. To determine the underlying principles and rationale of SAAPs in Kenya

3. To determine whether or not strong affirmative action is just or not.

4. To provide a philosophical foundation for the formulation and application of SAAPs in Kenya.
1.4. Research Questions
1. Do the people of Kenya understand the implications of entrenching gender based strong affirmative action policy in the Constitution?

2. Can strong affirmative action help create a more just and diverse society?

3. Is strong affirmative action as practiced in Kenya a form of compensatory justice?

4. What are other options to pursue to have a common ground for fair competition for both women and men, and better yet, can we have a future without a strong affirmative action in Kenya?

1.5. Research Hypotheses
1. The concept of strong affirmative action in Kenya negates the principle of justice as fairness.

2. Strong affirmative action policies in Kenya do sacrifice meritocracy, and compromise the right to equal consideration and equal opportunity for men and women.

3. There is a lacuna in the strong affirmative action policies in Kenya at the level of formulation and implementation.

4. Strong affirmative action in Kenya vests the rights in the group rather than the individual; it thus becomes discriminative even within the perceived marginalized group.
1.6. **Purpose of the study**

1. This research sets a philosophical ground for discussing strong affirmative action policies in Kenya. We have to accept that legal scholars and the civil society have done a great deal of research on affirmative action in Kenya. But as Ssakazosi (1999) indicated, what needs to be done is a philosophical approach which in fact, should be an ontological ethical foundation for legal analysis of strong affirmative action for better understanding of such policies. It is my humble claim that a philosophical ground and discussion of strong affirmative action will bring meaningful understanding of such policies in the country.

2. Secondly, the study provides a common ground to deal with the conceptual dilemma which is found between proponents and opponents of strong affirmative action policies. While the proponents of this policy see it as the only policy to safeguard equal opportunity, and to protect people against discrimination, the opponents see it to be a policy that promotes reverse discrimination, and sacrifice meritocracy. Thus severing reward from people of excellence, character, talents, choices and abilities. The research therefore gives some solutions on how these policies can be approached without eliciting emotions, and tensions in the country. By this it hopes to make institutional ground level for fair competition, bringing equity in opportunities available in the Kenyan society. Raising the idea that only policy which conforms to the principles of justice as fairness should be used to bring equality in the society.
1.7. Scope and limitations
There are various groups of people considered to be marginalized in the Kenyan society: women, youth, the physically and mentally challenged, and people from arid areas. But for the purpose of this research, discrimination based on of women has been dealt with. The project has therefore discussed strong affirmative action policies based on the uplifting the wellbeing of women and the girl child in Kenya. But this study deals only with discrimination against women. It has also involved review of literature from selected primary sources in Ethics, Applied Ethics and Philosophy in general. It has also referred to secondary literatures which are related to the subject of this research, and international journal articles on affirmative action policies. Other sources of literature include anthropological and sociological texts to help us understand how different cultures relate to the issues of women and subordination. This project has also referred to the United Nations Human Rights reports, and International women conferences reports.

Since this study was Library based, it was not necessary to go the field to collect data. The research has used the literature and data which have been published.

1.8. Justification and Significance of the study
Strong gender based affirmative action has drawn various debates in Kenya, and has attracted many opinions from both the proponents and the opponents who have presented their arguments which actually appeal to our problem statement. Federation of Women Lawyers (FIDA) Kenya and KEWOPA see strong affirmative action to be the only way to bring equity in the Kenyan society, and
they advocate for its presence in government’s documents and policies. For example, they fully stress the implementation of chapter seven of the Constitution of Kenya article 81 (b) which states, “not more than two thirds of the members of elective public bodies shall come from the same gender. However, many opponents of SAAP have argued that preference of women over disadvantaged men violates the right of everyone to equal opportunity, consideration and the right to maximally compete to an open institutional position. Strong gender based affirmative action in Kenya, is therefore seen to be unjust, since the interest is fixed on the wellbeing of only women. This contradicts the principle of justice as a value which Daniel (1975) stresses that lays emphasis on the prospective quality of peoples’ lives as a whole from birth to death.

The gender choice was triggered by realization that in Kenya, affirmative action mainly takes a gender perspective. It is the most structured affirmative action policy, such that when Kenyans talk about affirmative action, it is the gender based which come into mind.
1.9. LITERATURE REVIEW

1.9.1. Review of related texts

1.9.1.1. Affirmative Action: Background

Vaughn (2008) defines affirmative action as a way of making amends for, or eradicating discrimination based on gender, race, and ethnicity. It takes the form of policies and programs usually mandated by government, designed to bring about the necessary changes in business, colleges, and other organizations. AAP was propelled to the limelight by the United States Civil Rights Act of 1964, which decreed in Title VI that “No person in United States shall, on the ground of race, color or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”. From then on affirmative action has been accepted globally.

Nonetheless, AAP started attracting public debates after 1965, when federal contractors had been subject to President Lyndon Johnson’s Executive Order 11246, requiring them to take affirmative action to make sure they were not discriminating. The executive order 11246 spearheaded the importance of affirmative action in achieving true freedom by addressing racism, to create a color blind society, by stopping discrimination in employment distribution.

However, Pojman (2006) went further to illustrate that there are two kinds of affirmative action – weak and strong. Weak affirmative action is the use of policies and procedures to end discriminatory practices and ensure equal opportunity, which Vaughn (2008) stresses that hew close to the spirit of and the
letter of the Civil Rights Act of 1964 mentioned above. Strong affirmative action on the other hand is the use of policies and procedures to favor particular individuals because of their gender, race, and ethnicity. It is a kind of preferential treatment that is usually implemented through favoring plans, quota system or other approaches. Moreover, affirmative action according to Potucek (2003) has been used as a tool to persuade governments or companies to put into consideration the needs of the minority groups in the society. He argued that affirmative action policies have had their strongest appeal when discrimination that barred groups from desirable institutions persisted; although forbidden by law.

1.9.1.2. Gender Based Affirmative Action: Women

Affirmative action on the wellbeing of women has been there for many centuries, with the first documented information going back to 2640 B.C.E. when the wife of the emperor of China pioneered the development of silk manufacture. Levinson (2003) stressed that in 400 B.C.E. the law of *epikleroi* granting women legal control of their property was established in Athens, Greece. This right was given to women at the age of 14 years, the age at which many girls got married.

However, during the nineteenth century, gender based affirmative action was triggered by the publication of Mary Wollstonecraft (1759-1797) *A vindication of the Rights of women*, and Simone De Beauvoir’s (1908 – 1986) *The second sex*. Wollstonecraft held that religious beliefs and different cultures are holding men as leaders, while subordinating women. Her publication reacted against what she saw around her, and what other philosophers of the time were putting forward. She
reacted on the views put forward by philosophers; particularly Jean-Jack Rousseau, who advocated that women’s education should be designed entirely to make them pleasing to men. “To please, to be useful to us, to make us love and esteem them, to educate us when young and take care of us when growing up, to advice, to console us, to render our lives easy and agreeable – these are the duties of women at all times, and what they should be taught from their infancy” (Wollstonecraft, 2013).

Moore and Bruder (2007) also cited Wollstonecraft ideas in their work and argued against ideologies of Rousseau and his colleagues; that educating women to be ornaments to and play things of men would have bad consequences for a society. “How could silly, vain creatures ever expected to do an adequate job of raising a family?” She expressed that “they would become mere propagators or fools.” If women have no inner resources to fall back on, they will then “grow languid, or become a spring of bitterness,” and love will turn to jealously or vanity. She suggested that women who have no other ambition than that to inflame passions will have no real strength of character, no true moral virtue, and no inner resources. It was time, Wollstonecraft argued, to restore women to their lost dignity by encouraging better ideas of womanhood.

Moreover, Pojman (2006) held that women had their history of being treated unequally in various ways; in employment and higher education. As Beauchamp (1998) stressed that statistics constitute a *prima facie* evidence of discrimination in
the society. For example, in patriarchal societies; there are data indicating that the males continue to receive the highest level salaries compared to women. He stressed that women with similar credentials and experience to those of men are commonly hired at lower positions and earn lower stating salaries than men, and promoted at one half the rate of their male counterparts. The consequence was that the gap between salaries and promotions rate was still growing at an increasing rate, hence a need to address the situation, even through legal means.

1.9.1.3. Gender Based Affirmative Action in Kenya
Gender based affirmative action on the well-being of women in Kenya goes back to 1952, with the inception of Maendeleo Ya Wanawake Organization (MYWO) to deal with issues to do with women’s rights and gender equity in Kenya. It has various agenda in its mission statement, including maternal health, child health and family planning, and training women in leadership and development. There has also been a feeling that the girl child had been neglected and discriminated upon, such that from 1980s, the defunct Joint Admission Board on the selection of students joining Universities in Kenya had decreed that the cut off grade for University entry for girls will be lower than those of male students by two points. Currently the cut off grade is B- of 58 points for girls and B of 60 points for boys.

In 2003, the World Bank Report (Prem October 2003) explained that despite the grim picture in respect of gender parity; there exist vibrant civil societies which reflect a strong presence of organizations that are addressing the issue of gender equality. The report holds that these organizations provide a platform for women
to assume decision-making, access resources and legal reform. It held that FIDA (K) had undertaken legal advocacy work and provides legal aid, and Kenya Women’s Finance Trust (KWFT) provides micro-finance to women. The League of Kenya Women Voters, and the Kenya Women’s Political Caucus provide support for women wishing to enter competitive politics.

However, despite the policies mentioned above, the 7th periodic report of the government of the republic of Kenya (CEDAW) held that there is discrimination against women in Kenya, and this discrimination against women is based on sex, and fueled by a number of other non-gender factors. These include political affiliation, and ethnicity or tribal origin, and have been manifested in many forms, including gender-based violence. But it goes further to illustrate that the Kenyan government has taken a number of legislative, judicial, administrative and programmatic actions towards elimination of discrimination against women in a number of sectors, since the presentation of the last country report. It stresses that in the area of legislation, a number of laws have been passed which explicitly outlaw discrimination against women. For example, the new Employment Act, No. 11 of 2007 which came into force in December 20, 2007 expressly prohibits discrimination and harassment of actual and prospective employees on the basis of sex. Section 5(3)(a) thereof holds that:

“No employer shall discriminate directly or indirectly against an employee - on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status; in respect of recruitment, training, promotion, terms and conditions of
employment, termination of employment or other matters arising out of the employment.”

The Draft report on a Gender Audit Study of the 10th Parliament by FIDA Kenya also stressed that educating young women, and developing their self-esteem and self-sufficiency; should be a priority. In 2003, the free primary education was introduced in Kenya with an objective of enhancing access, retention and equity in education. That education for girls is one of the most crucial issues in resolving social inequity, yet there is no legal framework to enforce the principle of non-discrimination as far as a girl child is concerned.

Nonetheless, the Equal Opportunities Bill 2007, had the objective of providing equality of opportunity and to counteract direct and indirect discrimination on the grounds of gender, race, ethnicity, religion, disability or any other prohibited grounds. The Bill proposed that:

“All public bodies, employers and providers of public service make an active, targeted and systematic effort to promote gender equality in all sectors of society, enterprise and organization [Section 5(1)]....All public boards, bodies, commissions and similar bodies set up by a statute or appointed by any Minister for the purpose of public management or planning purposes shall endeavor to have an equal composition of women and men”.

A shadow report by FIDA to the 5th and 6th Combined Report of the government of the Republic of Kenya, on the CEDAW, illustrates that formulation of policy for the advancement of women has been lengthy with little tangible result. It held that the formulation of the National Policy on Gender and Development took over ten years to come in place. It stresses that the Policy has been adopted as a Sessional
Paper, but yet to be widely disseminated to Kenyans to create awareness and support for implementation. It stressed that the constitutional formulation could be the only solution to the gender parity in the country.

The Kenyan Constitution article 27 (6), has finally created a duty for strong affirmative action, a concept which is defined in Article 260, which states that:

“[…] the state shall take legislative and other measures, including but not limited to affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination.”

The Kenyan Constitution also introduces substantial guarantees to increase the representation of women in public life. Article 81 (b) requires the state to take measures to ensure that “not more than two-thirds of the members of elective or appointive bodies are of the same gender”. Separate provisions create reserved places for women in the National Assembly, Senate and County Assemblies. These provisions are having a substantial positive effect on women’s representation and role in the decision-making process at all levels of government.

There is however a Constitutional paradox here. The Kenya Constitution explains that we must treat all people equally, but strong affirmative action as supported by the same Constitution does not explicitly talk on meritocracy, especially when it comes to competitive job opportunities, where the most qualified is expected to be elected, or appointed. This creates a Constitutional tension, as many women do quote article 81 (b) mentioned above any time a commission on the selection of civil servants to the state offices do not meet the two-thirds threshold. Meanwhile
the same constitution creates a duty to treat both men and women equally, as in article: 27 (3-4) of the Kenya’s Constitution which states that:

Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.

The Kenyan Constitution Article 56 (a – e) stresses that the state shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups — participate and are represented in governance and other spheres of life. And are provided special opportunities in educational, have reasonable access to water, health services and infrastructure. It is not clear on what forms of affirmative action policies should be embraced while addressing inequality in the society. People therefore end up in a constitutional dilemma, when they use hard quotas to implement affirmative action; the constitution itself is against such hard quotas which are part and parcel of strong affirmative action policies which are discriminatory. The Kenyan Constitution Article 27 (1 – 5) states thus,

Every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms, women and men have the right to equal treatment, including…. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause 4.

Kenyans are therefore expected to embrace policies which actually strive to bring equity among men and women in this country, since human person must be treated as an end in themselves, which actually is an ontological being
1.9.1.4. Human Person as an ontological entity

Frankel (1995) held that for justice to prevail in any society there should be two principles to be followed; first, one ought to prevent persons’ lives from being less good than they would otherwise be. One ought to try and prevent harm; undeserved deprivation and any other conditions in which a person lives are less good than they could be, no matter how good, in fact, they are. Hence strong affirmative action which only concentrates on uplifting the status of women in the country should not be embraced. Secondly, to fail to do so when one can, is to treat them as less than equal persons, at least if others enjoy the benefits in question and there is no justification for this inequality on the grounds of desert. As a matter of justice persons are to be treated equally so far as they are persons, and any policy that tries to treat people as less equal is not good for the society.

On the consideration of justice, Wagner (1990), held that no one is entitled to advantages, derived from a social system that distributes life’s chances in an unjustifiable way, or unfair fashion. Thus historical injustices can only be compensated through weak forms of affirmative action policies, with clear criteria which determine when affirmative action should end. Or else, the programs will be seen to be inefficient means of compensating victims of discrimination, because the mode of compensating imposes costs which outweigh benefits. Wagner insisted that strong affirmative action policies remain abstract principles since the compensation given by affirmative action policies; like jobs and schooling is often
unrelated to any offense suffered. It is therefore inappropriate as a remedy for the specifiable injuries of identifiable plaintiffs.

Moreover, Immanuel Kant (1724–1804) argued that moral requirements are based on a standard of rationality, which he dubbed the Categorical Imperative. He maintained that moral law commands us to act not so that we become happy, but so that our action will be right. Thus, the full realization of a rational being requires that we think of supreme good as including both virtue and happiness. The Kantian theory of justice stresses that moral law does command us to strive for perfect good, and this can only take place with a good constitution. He therefore stressed that the moral worth of an action proceeds from the goodness of the will by which that action is animated. Thus, for Kant what one should do, should be done because it is right. Doing something for any other purpose – for the sake of happiness, for example, is not to act morally.

Strong affirmative action policies according to Wagner (1990) seem to imply a principle of distributive justice, which is seriously inconsistent with the principle of individualism, freedom and equal opportunity. Since the concept of right or wrong apply to individuals, not to groups. Therefore, ideas of group rights, group injury and group compensation have no place in accepted interpretation of justice.

1.9.1.5 Alternatives to Strong Affirmative Action Policies

Meritocracy should be the norm of the day. As Goldman (1979) argued, hiring the most competent is justified as part of a right to equal opportunity to succeed
through socially productive effort, and on grounds of increased welfare for all members of society. It is justified in relation to a right to equal opportunity, and application of the rule which may simply compound injustices when opportunities are unequal elsewhere in the system. The creation of more equal opportunities takes precedence when in conflict with the rule for awarding positions. Thus short-run violations of the rule are justified to create a more just distribution of benefits by applying the rule itself in future years.

Hall (2004) argued that in a democratic society that values citizens for their amount of power, having power can determine the quality of life, necessitating empowerment. He illustrates empowerment by definition as a process whereby people become strong enough to take part in, share, control, and influence direction of the critical institutions that affect their quality of life. By the way of empowering the oppressed populations must acquire the skills and knowledge necessary to enable desired quality of life. Thus strong affirmative action is not necessary for any society, but weak forms to empower the perceived weak individuals.

Hall (2004) further argued that enabling quality of life implies that an empowered person believes in his or her ability to act and this belief will be accompanied by capable action. Hence weak affirmative action was one of a number of polices designed to deter discrimination and enhance quality of life of every one in any society.
1.9.1.6. Disadvantages of Strong Affirmative Action Policies

Despite the benefits of strong affirmative action, Rachel (1993) expressed that the problem of reverse discrimination is one of the aspect of the more general problem of affirmative action, having to do with justice in the distribution of jobs and educational opportunities. As Connerly (1995) indicated, affirmative action was a technique for jump-starting the process of integrating minorities into the fabric of the society, for changing the culture of a society from an exclusive society into an inclusive one. He believed that strong affirmative action was meant to be temporary. It was meant to be a stronger dose of equal opportunity for individuals, and the prescription was intended to expire when the body politic had developed sufficient immunity to the virus of prejudice and discrimination. It was not meant to be a system of preferences that would harm innocent people. He further stressed that the rationale for affirmative action thirty years ago was a moral one. But three decades later, affirmative action has become permanent and firmly entrenched as a matter of public policy.

Skerry (1997) also argued that those who have been helped by strong affirmative action don’t want to associate with such policies which led them up ladder of success. He gives his personal experience as an example, “not long ago, a California labor organizer complained to me about how hard it was to create a Latino caucus in the state employees’ union. She recounted how time and again, after helping a member with a grievance, she would go back and ask the person to lend a hand to her effort, or at least to contribute a few dollars. The response was
always the same: “Thanks, but I got what I deserved here. I don’t see any need to contribute to your caucus.” Skerry also held that researchers with Diversity Project at the University of California at Berkeley heard something similar from a Chicana undergraduate: “Yeah, I do belong at Cal. Affirmative action may have helped me get my foot in the door, but I walked through the door by myself.” This might be the case in Kenya in the near future.

Thus affirmative action as rosy as it could be, seems to lead into a vicious cycle, such that the groups considered to be oppressors will be the oppressed in the future. As Simon (1979) argued, SAAPs confounds desert by severing reward from a person of a good character, talents, choices and abilities, and subordinating merit, conduct, talents and character to gender.

There is hostility among people of different gender brought by affirmative action. Beauchamp (1998) also held that lowering of admissions and work standards in some institutions have heightened gender hostility, and continued suspicion that well-placed women received their positions purely based on quotas, thereby damaging their self esteem and respect. As Putucek (2003) argues that the moment you protect a class in legal language, you put a stigma on them, it is thus demeaning.

Hall (2004) also argued that strong affirmative action is based on wrong policies, such that they will be in need of other policies to root them out. Since once enacted, strong affirmative action policies prove to be difficult to remove, even
after the underlying discrimination has been eliminated. Policies of strong affirmative action may also have some other shortcomings as well. For example, they confer economic advantages upon some who do not deserve them and generate court battles, jockeying for favored position by a multiple array of minorities.

1.9. Theoretical framework
This research has been informed by John Rawls (1921 – 2002) social contract theory of justice, which he coined “justice as fairness”. Rawls was an American political philosopher in the liberal tradition. He held that justice is the first virtue of social institutions. Rawls departed from the principle of utility of John Stuart Mill, which stresses that the proper course of action is the one that maximizes the overall happiness, that moral worth of an action is determined only by its resulting outcome, and that one can only weigh the morality of an action after knowing its consequences.

In the social contract, Rawls argues that the principle of justice should be determined by asking what people behind the “veil of ignorance” would agree on the rules governing their society. Thus, the veil of ignorance means, people do not know the social positions they occupy in the society, or what natural talents they posses. This will prevent them from manipulating the agreement to their personal benefit. Unlike the strong affirmative action policies in Kenya, especially the gender based affirmative action which only stress on the wellbeing of women in the country, the veil of ignorance requires people to consider the good of each
person in the society, as if it were their own. Thus the resulting contractual agreement represents equality between human beings as moral persons, man and woman as an ontological end.

Rawls stressed that the state of affairs can be called just if and only if it is contingently true, relative to some pair of criterion for evaluation of effects and attributes. That all those who are affected by it, and whose attributes are equally valuable are affected by it in an equally valuable way. Thus for Rawls, there are two principles of justice. First, each person has an equal claim to a fully adequate scheme of equal basic rights and liberties. Each scheme is compatible with the same scheme for all; and in this scheme, the equal political liberties, and only those liberties, are to be guaranteed their fair value. Secondly, social and economic inequalities are to satisfy two conditions: They are to be attached to positions and offices open to all under condition of fair equality of opportunity; and, they are to be of the greatest benefit to the least advantaged members of the society. By controlling the assignment of rights and duties throughout the whole social structure, beginning with the adoption of political constitution in accordance with which they are applied to legislation. Thus justice becomes justice as fairness.

Rawls held that justice as fairness begins generally with choices, or first principle of conception of justice which persons might make together, namely, the choice of the first principles of a conception of justice which is to regulate all subsequent criticism and reform of institutions. (Rawls, 1971).
The aim of justice as fairness, as stressed by (Kelly, 2003) is to provide an acceptable philosophical and moral standard for democratic institutions and thus to address the question of how the claims of liberty and equality are understood. Therefore, for Kenya, with democratic institutions to strive to achieve gender equity, there is a need to pursue the familiar ideas of justice as fairness. These are fundamental ideas of a just society: mostly is the conception of a society as a fair system of social cooperation over time from one generation to the next. This is a central organizing idea in trying to develop a political conception of justice for any democratic regime. A regime where citizens are considered as free and equal persons and the idea that a well ordered society is that which is effectively regulated by a public conception of justice. Hence a call for an alternative process of AA, rather than insisting on strong affirmative action; which has attracted a lot of opposition from public, and geared towards benefiting only women.

In justice as fairness, the original position of equality corresponds to the state of nature in the traditional theory of social contract, which is understood as a purely hypothetical situation, characterized so as to lead to certain conception of justice. Therefore, justice as fairness begins with the choice of the first principle of conception of justice which regulates all subsequent criticism and reform institutions. Gender based affirmative action, therefore must work for the benefit of all, without eliciting criticism due to reverse discrimination.
Rawls stressed that it is upon correct choices of a basic structure of society, its fundamental system of right and duties that justice of distributive shares depends. According to Rawls, the two structures of justice apply in the first instance to the main institutions of social systems, and their arrangement, how they are combined together. He held that this structure includes the political constitutions, which define a person’s liberties and rights, and effect life prospects. What he may expect to be, how well he may expect to be and how well he may expect to fair. Hence social institution is just if it is such that by the sequence of hypothetical agreements, we would have contracted into the general systems of rules which define it.

The intuitive idea here is that, those born into the social system at different positions, say those born into the social classes, have varying life prospects determined in rights and by the economic and social opportunities which are made available to them. Thus, the basic structure of a society favors certain men and women over others, and these are various inequalities which affect the whole life prospects which affect their whole lifestyle. These kinds of inequalities are in any society with which the two principles of justice are primarily designed. Hence, the pursuit of equality through strong affirmative action policy based on gender in Kenya, which actually appeal to many people but a source of dispute, since it vests interest in uplifting only women.
Pursuing strong affirmative action as discussed above, indicates that there are inequalities in the Kenyan society. And these inequalities must be resolved using some laid down policies and programs attached to some government institutions. But according to Rawls, an inequality is allowed only if there is no reason to believe that the institution with which inequality will be addressed, or permitting it will work out for the advantage of every person in the society. Therefore inequalities of life prospects, for example, of income wealth; which exists between social lives, must be to the advantage of everyone, men and women alike, but more to the disadvantage. This principle implies that, institutions should spread the wealth and create inequalities which will be to the greatest advantage of everyone in the society, not for the advantage of a particular group of people in the society. For example, strong affirmative action should not benefit only women in Kenya, but be to the advantage of men as well. Hence, the need to pursue weak forms of affirmative action; with clear criteria which determine when affirmative action should end, when equality has been reached.

Rawls stressed that the basic social structure is controlled by a just constitution which secures the various liberation of equal citizenship. Hence the legal order is administered in accordance with the principle of legality and liberty of conscience, and freedom of thought, which are taken for granted. (Ryan, 1995).

Rawls acknowledges that there are inequalities of wealth and accompanying inequalities in power which tend to produce inequalities of liberty. An example is
given by Daniels (1975) on universal suffrage grants, that the wealthy and the poor are identical and are having voting rights. But the wealthy have more ability than the poor to select candidates, to influence public opinion and influence selected officials. And though the wealthy and the poor are equal before the law, the wealthy have access to better legal counsel, have more opportunity to influence administration of justice, both in specific cases and in determining what crimes will be prosecuted, and have greater ability to secure laws that favour their interests. Again, the rich and the poor are equally free to express their opinions in the appropriate circumstances. Yet, the rich have more access to and control over the media and so are freer to have their opinions advanced. Thus, strong affirmative action policies in Kenya might also be discriminative even within the women groups, since the beneficiaries are rich and influential women in the society.

For the past injustices suffered by women in Kenya, it can be stressed that; compensation can be done through weaker forms of affirmative action policies. For example, coming up with clear policy stating how and when the unfair treatment of men will end having achieved equilibrium. But in the twenty first century where men and women are struggling for fewer chances in job market, strong affirmative action will not be the best approach in compensation. As Pojman (2006) stressed that normal criterion of competence is a strong *prima facie* consideration when the most important position is at stake, since treating people according to their merits respects them as persons, as ends in themselves, rather
than means to social ends. Society has given people expectations that if they attain certain levels of excellence, they will not only be awarded appropriately, but above all, fill the most important positions with the most qualified people to ensure efficiency in job-related areas, and in the society in general.

It is therefore required from the policy makers in Kenya, to have some principles that will guide the implementation of affirmative action clause in the Constitution. Such that the benefits from SAAPs in the country, will be for the advantage of everybody in the society. Just as Rawls argued, in justice as fairness, people accept in advance a principle of equal liberty, and they do this with knowledge of their particular ends. People therefore implicitly agree to conform to their conception of their good, to what their principle of justice requires, or at least not to press claim which directly violates them. It is accepted that affirmative action is a good policy, which only needs a philosophical discussion to be effective, and this will be guided by the principle of justice and fairness. It is my humble belief, that this research has laid the ground for SAAPs to be implemented in the country. Since in justice as fairness, people’s desires, and aspirations are restricted from the outset by the principles of justice which specify the boundaries that men’s system ends must respect.

The research has discussed SAAPs in Kenya keeping in mind Rawls principle of justice; that permits only those inequalities in the distribution of economic and social advantages that benefits everyone, in particular, the worst-off. As Nagel
(1975) stressed that a society satisfying the principle of justice as fairness, comes close as a society can to being a voluntary scheme.

1.10. Research Methodology
This research has been mainly a library research work, sourcing materials from primary texts. The literature gathered have been complimented with data from secondary sources, which the study accepts to be relevant and authoritative. Thus, the method which has been used is philosophical analysis and argumentation, and evaluation of documents. This method has focused on three paradigms of the study: Strong affirmative action policy, policy formation and justice as fairness, which are complementary to one another on the conceptual understanding of strong affirmative action policies in Kenya. The analysis has focused on the relationship between strong affirmative action policies in Kenya and the justice for all in the society.

The study has also involved Discourse Analysis as a method of research. Discourse analysis is a qualitative method that has been adopted and developed by social constructionists. It is a method that enables us to access the ontological and epistemological assumptions behind a project, a statement, a problem or a method of research. Discourse Analysis enable us to understand the conditions behind a specific problem and make us realize that the essence of that problem, and its resolution, lie in its assumptions; the very assumptions that enable the existence of that problem. By enabling us to make these assumptions explicit, Discourse Analysis aims at allowing us to view the problem from a higher stance and to gain
a comprehensive view of the problem and ourselves in relation to that problem. It is meant to provide a higher awareness of the hidden motivations in others and ourselves and, therefore, enable us to solve concrete problems - not by providing unequivocal answers, but by making us ask ontological and epistemological questions.

Discourse Analysis can be applied to any text, that is, to any problem or situation. It enable us ask some concrete questions about a problem. For example, do concrete consequences of upholding strong affirmative action policies in Kenya correspond to the judgments we would actually make for public policy? Such questions will give an opportunity for research, and trigger reflective thought which Dewey (1933) defined as active, persistent, and careful consideration of any belief, or supposed form of knowledge in the light of the grounds that support it and the further conclusion to which it tends.

1.12. Data Collection Procedure
The Information has been collected through review of text documents and reports on SAAPs. The method has been purely analytic which is recommended as a philosophical method of data collection. The materials which were collected and used have been proven to be relevant to the research.
CHAPTER TWO

2.0. THE BASIC CONCEPTS OF GENDER BASED AFFIRMATIVE ACTION POLICY

2.1. Introduction
Chapter one acted as a proposal to this research and introduced the problem of this study. This chapter is to clarify the fundamental concepts that explain gender based affirmative action policies. As illustrated above, affirmative action is an abstract conjoined term with three distinct words: affirmative, action and policy which need to be analyzed to give a clear picture of what gender policy this research is going to interrogate. This chapter therefore will discuss the concepts of affirmative, action, gender and policy, which narrows down to gender based affirmative action. It will also expose the various types of AAPs, and gives the determinants and moral basis of the AAPs.

2.2. Affirmative
The term affirmative means the assertion that something is the case. Modern logic allows us that there is frequently equivalence between positive looking statements; whether an assertion comes out positive or negative will depend on the way things are put and upon the menu of terms available. For example, Obrey is not sick, can be said that Obrey is healthy, or Michelo is not guilty, can be said that Michelo is innocent. In our case therefore, we assert that there has been discrimination in the society, we then have to accept the case and work towards eliminating the said discrimination. Thus, the policies put in place for institutions to act affirmatively
in employment practices to avoid discrimination on grounds of gender, race, or ethnic origin.

However, this assertion of affirmation should be based on facts, and not on ethical subjectivism championed by Jeans–Jacques Rousseau (1712 – 1778), or on cultural relativism. Ethical subjectivism means that what I feel is right is right, or what I feel is wrong is wrong. As Boss (2008) asserted that in ethical subjectivism, individuals create their own morality. There are no objective truths, only individual’s opinion or preferences. Here the correct position on the moral issue is simply a matter of personal feeling rather than shared values. But what is right for me may be wrong for you, depending on our respective feelings. Thus, ethical subjectivism does not provide guidance to reaching a moral decision when there is a question of what to do.

Nonetheless, cultural relativism defines a moral community in ethnocentric terms; someone or something has moral value only because a society grants it. Boss (2008) stressed that the power of our cultural worldview is more pervasive in our moral thinking than most of us realize. For example, many people while giving lip service to the universal principle of equality, in their everyday lives implicitly adopt the prevailing cultural view of their moral community. It is henceforth required from people to be aware of how the cultural definition of the moral community shapes viewpoints of moral issues, to avoid being mired in doublethink. Therefore, when we affirm that gender discrimination has been
taking place in Kenya, we must have the facts with us before taking a cause of action.

2.3. Action
In the concept of this research, action is defined as what a person does as a moral agent, as opposed to what happens to an agent, or what happens in agent’s head. Hence the action theory which studies the ontological structure of human action, the process by which it originates, and the ways in which it is explained. According to Audi (1995) most of human acts are acts of commissions; which constitutes a class of events in which a subject brings about. Consequently, in moving one’s finger, one brings it about that one’s finger moves, when the change brought is ongoing process, the behaviour is called activity, for example, writing.

An action of omission occurs when an agent refrains from performing an action of commission, since actions of commission are events. The question of their ontology is in part the matter of the general ontology of the change. An important issue here is whether what occurs when an action is performed should be viewed as abstract or concrete. On the first approach, actions are understood either as propositions like entities as species of universal, namely, an act-type, for example, moving a finger.

Audi (1995) went further to illustrate that actions are explained by invoking the agent’s reason for performing them. Characteristically, a reason may be understood to consist in a positive attitude of the agent toward one, or another
outcome, a belief to the effect that outcome may be achieved by performing action in question. Frequently more than one course of action is available to an agent, thus deliberation is needed here. Deliberation is the process of searching out and weighing the reasons for and against given alternatives. When successfully concluded, deliberation usually issues in a decision, by which an intention to undertake one of the contemplated action is formed. The intention is then carried out when the time of action comes. As with intention, an agent simply having a reason is not enough to explain one’s behaviour, but some features must be addressed

2.3.1. Features of Action
Here, we discuss what distinguishes action from other sorts of events of which a person may be the subject; such as sensations, perception, feelings, unbidden thoughts, trembling, reflex action. Kim (1995) held that two main answers have been offered, first, what marks an event as an action is something extrinsic to the event, namely it’s having been caused in the right sort of way by the subject’s desires, intention and belief. The right sort of causal connection is important, because for example, the fact that a desire to go to the library results in such acts of falling asleep while studying; does not make the event of sleeping an action. This sort of view seems, however, not to cover spontaneous action whose occurrence is not explained by antecedent motives of the agent. The other kind of account finds the mark of an action in the intrinsic nature of the event, rather than
in something external to it. The idea here is an event, is an action because it is, or it begins with a special sort of event.

Ethically, we have voluntary and involuntary actions, these refer to the fact that certain actions are, or are not subject to our will. By the will, I mean, our ability to control ourselves, to be masters of ourselves, to do what we want to do, rather than having it forced on us. As Fagothesys (2000) stressed, voluntary acts are acts that we consciously control and deliberately will, and for which we are held responsible. These acts constitute human conduct; and thus form the subject matter of Ethics which W. D. Ross (1877 – 1971) held that we have duties concerning our actions. These duties are: First, a duty of nonmaleficence, in other words “do no harm”, the second is a duty of beneficence, stressing the need to increase happiness. These two duties are also recognized by Utilitarians. Utilitarians are a group of philosophers like Jeremy Bentham (1748 – 1832) and John Stuart Mill (1806 – 1873), who held that actions are right in proportion to their tendency to promote happiness, and wrong as they tend to produce the reverse. The third duty is the duty of fidelity which arises from the past commitments and promises. We have a duty to our colleagues, to our parents, and to our children, independent of the pleasure we may get from them at the moment. The fourth duty is that of gratitude, which is evoked when we receive gifts, or unearned favors and services from others. The fifth duty is the duty of reparation, which is also based on the past actions; this requires us to make up for past harms we have caused others. For example, affirmative action is an attempt to make up for the past harms to women
and the minority groups. Finally there are two ongoing duties: these are self-improvement and justice, self-improvement as a moral duty requires that we strive to improve our moral knowledge and our virtue. Thus self-improvement demands that we work to overcome our ignorance by becoming well-informed about moral issues and that we be open to new ideas. Justice on the other hand requires that we give each person equal consideration (Boss 2008). As will be discussed in chapter three, the laws and social institutions are generally the agencies for balancing conflicting interests; hence the issue of justice is closely tied with a good society.

Human beings are the only beings who can think; therefore, we have freedom of action at a given time, just in case more, or one alternative action is what is open to us. We continually have the impression of having more than one alternative of action open to us, we cannot claim that our action are determined. As Kim (1995) stressed that determinism is the thesis that holds that given the state of the world, at any particular time, the laws of nature determine everything that happens, thereafter down to the last detail. The essential premises of the argument that determinism is incompatible with freedom of action are two: A, no one ever has it open to him or her to make true a preposition that contracts the law of nature, B, it follows that C one cannot have it open to one at a given time to perform a certain action. Thus, from first A – C and determinism, it follows that one never has it open to him/her to do anything other than what one actually does.
Our actions must also aim at some good, as Aristotle (384 - 322) in *Nicomachean Ethics*, held that living a good life: the life of virtue is our most important human activity. In *Nicomachean Ethics* book I chapter I, Aristotle (350 BC) opens with a powerful dictum that “every art, every inquiry and similarly every action and pursuit is thought to aim at some good, and for this reason the good has rightly been declared to be that at which all things aim.” Hence our actions must be aimed at the ultimate end, which is self sufficient and final, that which is desirable in itself, and never for something else.

The end of an action would be aimed at doing what is right too, hence Kant’s (1724 – 1804) categorical imperative which commands an action as necessary of itself without reference to another end, that is objectively necessary. It is categorical because it applies to all rational beings, and it is imperative because it is a principle on which we ought to act. Thus, the basic formulation of the categorical imperative is that “act only on that maxim whereby you can at the same time will that it should become a universal law.” According to Kant, everything in nature works according to the law, and as rational beings having the faculty of acting according to the conception of the law, we need therefore to act following the law of nature which pertains to human behaviour.

One must also have a motive or a reason for acting in the way one does, and one acting in that way for those reasons which aim at achieving some good. For example, the reasons for Christine going to the library was to study. She went to
the library to study, that is; she intended to go to the library. Metaphysically, the issue here is whether they are essentially nomic. That is, whether the truth of one then entails that the case is subsumable under causal law, which dictates that whenever motive of the same sort as those the explanation cites occur in the sufficiently similar circumstance, they casually necessitate an action of the same.

Affirmative action is therefore an action aimed at overcoming the effects of past types of discrimination within the society and especially in the workforce, by allocating jobs and resources to members of specific groups, such as minorities and women. It is intended for a purpose and it is guided by reasons, since it occurs whenever an organization goes out of its way to ensure that its practices operate without disadvantaging either gender, or any ethnic group which may lead to present discrimination. It is an action which should be taken by being conscious of the existence of everybody in the society, taking each individual human person as an end in her/himself, and as a moral agent.

2.4. Policy

A policy is a course, or principle of action adopted by individual or an organization. Mbaï, (1999) and Ngethe, (1999) defines public policy as a broad government statement, written or unwritten, which outlines how a government intends to deal with specific social, political or economic issues. There are two categories of policies; regulative and development policies. Regulative policies comprise the Laws, Acts of Parliament and Sessional Papers. While the
development policies include National Development Plans, Sector Plans, Sessional Papers or Reports of Presidential Working, Parties, or Commissions Plans. The process by which policies are arrived at is broadly referred to as the public policy-making process. Mbai (1999) specified five stages of the public policy process. These include: the analysis of various policy options, selecting the most effective policy option, the actual choice or legitimation, the design and implementation of a policy program, and the evaluation of the program(s).

There are two main models of public policy; the society-centred and the state-centred. Each of these approaches has constituent strands, but for the purpose of this research, we will dwell on the society-centred model, since this model is what is relevant to the concept of affirmative action, which is formed to bring equity in the distribution of economic goods, and resources in a given society.

2.4.1. Society-Centred Public Policy
Soludo and Ogbu (2004) hold that the distinguishing feature of this model is the assumption that policies are an outcome of conflicts, interests and negotiations between individuals and social groups within a given society. The origin of ideas and pressure for policy formulation is traced to the forces within the society, as opposed to originating from state officials or bureaucracies. Similarly, initiatives for policy reforms, amendments and changes are attributed to certain societal forces: individuals, civil society and other interest groups in the society, who want to maximize their benefits from the existing, amended or new policies.
In this model, public policy results from conflicts, bargaining and coalition formation among a potentially large number of societal groups organized to protect, or advance particular interests common to their members. Soludo and Ogbu (2004) further explain that such interests are usually economic, but could also be based on shared neighbourhood, region, ethnic, religious, values, professional or other issues. For example, any marginalized group of people can come up with affirmative action which will support their effort to be considered, while distributing economic goods, and resources. The role of the State in this model is to provide the overall framework within which societal groups resolve conflicts, negotiate, bargain, form coalitions and battle over policy outcomes. The initiative for policy is generated by the society and is influenced by the interests and resources of the various groups.

Public policy-making is a political process at every stage. The fact that different individuals and groups in a society will generally tend to push for their special interests in the policy-making process means that rationality alone cannot account for policy outcomes. Interested individuals and groups use their resources, statuses and power, for example; economic, political, ethnic, and so on to influence the process and its outcomes to their advantage.

2.4.2. Policy Problem and Implementation

According to Lindblom (1968), the policy makers are not faced with a problem. Instead they have to identify and formulate their problem, for example, in December 2007 after the general election, rioting broke in dozens of Kenyan
cities. What was the problem? Maintaining law and order? Lawlessness at the fringe of otherwise relatively peaceful reform movements? Or urban disorganization? The concrete observable problem here is riot itself. But perhaps the riots are just symptomatic of a real problem to be solved. Thus, a problem for example of gender discrimination in our case, needs to be defined for easier handling while forming an affirmative action policy that will try to tackle it. A problem therefore becomes a new opportunity, not an old sore, and the problem must be clearly stated and be in the mind of the policy makers before coming up with a policy program. As Jurgen Habermas (1976) contended that:

Only the administration itself can investigate itself to an extent which could induce political reflection and contribute to reducing that reflection deficit. In this sense “politicization” amounts, in final analysis, to linking scientific self-investigation to structural selection, a linkage that could place in question the classical differentiation of experience and action, knowledge and decision, truth and power (Habermas, 1976).

Hill and Hupe (2006) also contended that the process of policy making is ultimately expressed in the continuum between policy and action, which is implementation stage. They insist that in the implementation stage, policy making continues. Implementation failure can be seen for instance as a result of poor chain of command and the problems with structures and role, or as a result of difficult human relations between people, or the environment. As a result of poor information flows or learning problems, the culture of an organization, or subconscious forces, groups thinking, ego defenses or repressed sexual instincts of the people involved. As a result of a self-referencing system or as a result of power in hand or around the implementation process. Therefore, for affirmative action
policy makers to be able to come up with a policy which will be successful, they must put into consideration the above mentioned reasons for possible implementation failure, or else the policy will eventually fail to achieve its goal, or we end up in a vicious cycle, by having a gender based affirmative action today; which will need another gender based affirmative action to affirm the today’s perceived discriminator, in our case men.

Affirmative action policy is therefore a government policy of positive discrimination, by the use of legal measures and moral persuasion that favours members of a minority ethnic group, or women in such areas of employment and education. It is designed to counter the effects of long term discrimination against such groups. Hence, affirmative action includes any program or policy that attempts to ameliorate past and present inequalities by devoting resources toward ensuring that people are not discriminated against on the basis of their gender, racial group or ethnic group.

However, for affirmative action policy to be effective, we must put into perspective Rawls (1971) second principle of justice, that is “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to offices open to all”. For example, the inequalities brought by affirmative action policy can only be justified if they serve the general welfare, since Rawls model for justified inequalities involves
incentives, when the extra benefits offered some increases their productivity in such a way that everyone benefits.

2.5. Affirmative Action Policy
Affirmative action is therefore a way of making amends for, or eradicating discrimination based on gender, race, and ethnicity, it includes positive steps taken to hire persons from groups previously and presently discriminated against. AAP is therefore those results oriented actions which a contractor by virtue of its contracts must take to ensure equal employment opportunity. Where appropriate, includes goals to correct underutilization, correction of problem areas and so on. It may also include relief such as back pay, retroactive seniority, make-up goals and timetables. As stressed by Fleming, Gill, and Swinton (2009), affirmative action is a preventive procedure designed to minimize probability of discrimination. It is the deliberate undertaking of positive steps to design and implement employment procedures so as to ensure that the employment system provides equal opportunity to all.

In African countries; especially Kenya, affirmative action policy is geared towards the uplifting of the wellbeing of people from the minority groups in the country, as stated in the Constitution of Kenya Article 56 (a - e). “The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields…, have reasonable access to water, health services and infrastructure”. The minority
groups here are; women, youth, people living with disabilities and people from the Arid North of Kenya. Thus, affirmative action policy in Kenya is therefore fully entrenched in the Constitution and needs to be adhered to, and a breach of it can easily lead to court interpretation and rulings. This makes AAPs in Kenya be of a stronger form as will be discussed further.

2.5.1. The Typology of Affirmative Action
Due to incessant disagreement between proponents and the opponents of affirmative action policy, and although the arguments may have remained similar for the last generation, the context in which such arguments have been framed has changed. Sandler (2004) held that affirmative action resulted in the revision of standards and practices to ensure that institutions were in fact drawing from the largest marketplace of human resources, and ensuring that they do not inadvertently foreclose consideration of the best-qualified persons by untested presuppositions which operate to exclude women and minorities. Francis (1993) stressed that affirmative action was justified as a corrective form of discriminatory processes. But the controversy continued, terms like “reverse discrimination,” “special rights,” “quotas,” and “qualifications” were all repeatedly invoked in the discussions of affirmative action. And whereas affirmative action was once based on the notion that governmental policies might be developed to help create a just community, the language of equity has been replaced by the conservative demand for individual rights. As Tierney (1997) argued, many government affirmative action policies were then seen not as helpful but as intrusive, on those who became
their victims. He held that affirmative action, then, had been critiqued either as a tool to help tighten social bonds, or as a weapon that retards individual liberty.

The theoretical implications of affirmative action and the current contexts are thus twofold: first, and most importantly, as Hollinger (1996) noted, affirmative action needs a coherent theory, since many theories have proved elusive, largely because the people who support affirmative action disagree among themselves about what it is and why we need it. Secondly, what we mean by merit in public higher education also has been brought into question. He therefore suggests that questions about whether a citizen merits a public education contradict what we have meant by participation in a democracy. Thus, there was lack of an analytical framework with which to discuss affirmative action in a legalistic way and academia, there was a need therefore to develop policies that support the idea. The discussion continued and the scholars could not agree on what form of affirmative action policies could be pursued to end discrimination in the societies.

However, in 1998, there was a breakthrough in the discussion of affirmative action policy; when Louis Pojman introduced a clear distinction on the types of affirmative action, which could help in the formulation and implementation of policies regarding affirmative action. He therefore came up with two types of affirmative action, the two forms of affirmative action are: weak affirmative action and strong affirmative action.
2.5.2. The Weak Affirmative Action

Weak AA is the use of policies and procedures to end discriminating practices and ensure equal opportunities. This draws close to the civil rights of 1964 as quoted above. Weak AA can involve many strategies for expanding equal opportunity, but it stops short of preferential treatment. Pojman (2006) illustrated that weak AA means policies that will increase opportunities of disadvantaged people, in our case, women. It includes such things as dismantling of segregated institutions, widespread advertisement to groups not previously represented in certain privileged positions, and scholarships for disadvantaged classes. For example, the poor, and even using diversity in under-representation of groups with a history of past discrimination as a tie breaker when candidates for these goods and offices are equal.

Thus, the goal of weak AA as Pojman (2006) illustrated is equal opportunity to compete, not equal results. We therefore seek to provide each citizen regardless of gender, or ethnic group a fair chance to the most favoured positions in the society. Weak AA is hardly controversial, because it uses policies to ensure equal opportunities without demanding that women be preferred over men, for example. It gives people equal chance in the society.
2.5.3. The Strong Affirmative Action

As stated above, strong affirmative action is the use of policies and procedures to favour particular individuals due to past discrimination because of their gender, race and ethnic background. It is a kind of preferential treatment that is usually implemented through favouring plans, quota systems or other approaches. The quota system therefore means an organization has predetermined number of percentages of minority group, or women in our case; to be hired for public offices. Strong affirmative action has met with opposition throughout the world, hence, the continuous debates on affirmative action policy.

Boss (2008) held that affirmative action is a philosophy that is concerned with the righting of perceived historical wrongs against people of a specific gender, race or ethnic group; it seeks to eliminate the innate advantages of those who are not identified as having been wronged in an attempt to level the playing field. Strong affirmative action is therefore widely opposed by many who see it as reverse discrimination, that is, preferential treatment against some people, mostly men in the Kenyan situation. The main charge here is that preferential treatment on the basis of gender is always wrong, it is just immoral when used against men as it is when used against women.

Across the world, strong affirmative action policies have been widely opposed as the programs often fail to achieve their objectives. McHugh (2005) also claimed that the objection for strong affirmative action is that, although it is a compensatory program, there are no criteria which determine when affirmative
action should end. As Sniderman and Piazza (1993) contended that the programs are inefficient means of compensating victims of discrimination because the mode of compensation imposes costs which outweigh benefits, and a decision to compensate one group, for example; women without including all other similarly disadvantaged groups or individuals is capricious and arbitrary. Strong affirmative action therefore compromises the integrity of unaided; but otherwise successful group members, while creating self-doubt for the beneficiaries, enmity, mistrust, and resentment among the general public. Amy (2006) also insisted that these programs spawn a “victim mentality”, and thus they encourage stigmatization among recipients and violates fundamental ideals of fairness, justice, and meritocracy by discriminating against innocent persons of perceived discriminating gender.

2.6. The Term Gender
As discussed in chapter one on the scope and limitation of this research, this work will dwell on affirmative action based on gender. However, we cannot interrogate gender based affirmative action policy in Kenya without exploring the term gender to understand it clearly. The term gender has been widely used over the past three decades. According to Waylen (1996) it was utilized by social scientists, to describe a fundamental axis of social differentiation alongside class and race. However, the construction of gender differences was seen in terms of boys and girls being socialized into different roles. Nonetheless, of particular importance was the notion of gender as a social construct, and therefore observed gender
differences as products of social relations. Philosophically, as emphasized by More and Bruder (2007), a person’s gender is the person’s biological sex as constructed, understood, interpreted and institutionalized by a society.

Sterba (1998) emphasized that the understanding of gender has become sophisticated and complex, that the influence of other disciplines and deconstructive and psychoanalytic theories have moved to be stressed towards an analysis of the construction of gendered subjectivities. That, the influence of Freud, Lacan and Derrida, and French feminists like Kristeva and Irigaray has changed the perspective of seeing gender. As a result, attention has been focused on the ways in which masculinity and femininity are constructed in the individual subject, rather than seeing gender as a set of roles into which people are socialized.

Feminists have characterized gender relations as relations of inequality and subordination. Thus, the 1970s was dominated by feminists academics searching for origins of unequal gender relations and trying to find explanations, and cause of these relations and subordinations. Thus, radical feminists argue that gender divisions are most profound divisions within society that all societies are patriarchal. They believe that men as a group oppresses women and those men benefit from this oppression. But, socialist feminists often use gender relations in spheres of production, that is, the reproduction of the labour force in domestic sphere, and links between them. But liberal feminists see socialization of men and women into different roles reinforced by discrimination, prejudice and irrationality
as responsible for unequal position in the society. Thus, the solutions to inequality are changes and the promotion of equal opportunities, allowing access to public offices and facilities on the same terms as men.

However, for the sake of this research, the term gender is used following social scientists construction, which used the work of Engels, that gender relations is on the sphere of production, that is paid employment and production of labour force in the domestic sphere. This research will take this position as a paradigm related to women in Kenya, seeking to end discrimination upon them in areas of employment and education.

2.6.1. Gender Based Affirmative Action
The historical gender based affirmative action on the wellbeing of women was triggered by several publications of feminist philosophers and theologians. In “Beyond God the Father” for example, feminist theologian Mary Daly detailed the psychological and political ramifications of father religion for women, she held that:

If God in his heaven is a father ruling his people, then it is the nature of things and according to divine plan and the order of the universe that society be male dominated. Within this context, a mystification of roles takes place: The husband dominating his wife represents God himself. The images and values of a given society have been projected into the realm of dogmas and Articles of Faith, and these in turn justify the social structures which have given rise to them and which sustain their plausibility (Daly 1968).

As discussed in chapter one, Mary Wollstonecraft (1759-1797) in A vindication of the Rights of women, also held that religious beliefs and different cultures are holding men as leaders, while subordinating women. Her publication reacted
against what she saw around her, and what other philosophers of the time were putting forward. She reacted to the views stressed by philosophers; particularly Jean-Jack Rousseau, who advocated that women’s education should be designed entirely to make them pleasing to men. “To please, to be useful to us, to make us love and esteem them, to educate us when young and take care of us when growing up, to advice, to console us, to render our lives easy and agreeable – these are the duties of women at all times, and what they should be taught from their infancy” (Rousseau, 1964).

Philosopher Simone de Beauvoir (1953) also in the Second Sex was well aware of the function of patriarchal religion as legitimizer of male power. She wrote that:

Man enjoys the great advantage of having a god endorsed the code he writes; and since man exercises a sovereign authority over women it is especially fortunate that this authority has been vested in him by the Supreme Being. For the Jews, Mohammedans, and Christians, among others, man is master by divine right; the fear of God will therefore repress any impulse to revolt by the downtrodden female (Simon de Beavoir 2012).

Therefore, as Ackerly (2008) expounded, the women needed experience based inquiry of many differently situated informants. They needed a device that teaches them to see invisible privileges which is pedagogy, and fosters their reflection on that which is concealed by those privileges and a shared theoretical objective of emancipatory theories that free everyone, not just the privileged or visible, but also among the oppressed and the marginalized.
However, most feminist attempt to formulate an adequate conception of sexual equality run up against recognition that the baseline for discussion of equality typically has been male standard. As illustrated by Catherine MacKinnon that:

Men’s physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, and their perspectives and concerns define equality in scholarship, their experiences and obsessions define merit, their objectivication of life define art, their military service defines citizenship, their presence defines family, their inability to get along with each other – their wars and rulerships – defines history, their image define god, and their genitals define sex (Mckinnon, 1987).

Gender based affirmative action to uplift the wellbeing of women in the societies was therefore inevitable. Hence, gender based affirmative action is a philosophy that is concerned with the righting of perceived historical wrongs against people of a specific gender.

2.6.2 Historical Existence of Discrimination against women in Kenya
Affirmative action, as discussed earlier refers to voluntary and mandatory efforts undertaken by state, and local governments, private employers, and schools to combat discrimination, and to promote equal opportunity in education and employment for all. Thus the goal of affirmative action is to eliminate discrimination against women and ethnic minorities, and to redress the effects of past discrimination. This is with a goal of equal opportunity, which seeks to achieve a system where each individual is given the same treatment as any other individual in the society. Kenya has not been exceptional, hence the inclusion of Affirmative action policy in the Constitution. Article 27 (6) of the Constitution of
Kenya states “To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination”.

In Kenya there has been historical discrimination, against women. According to Kaimenyi (2013), Kenyan men made decisions in the society and set the rules that the community was to live by. This was through councils of elders that existed in most societies. Few women occupied public positions of power. The one common position was that of medicine-woman. Generally the place of women was largely in the house and looking after the welfare of her homestead. Men on the other hand were generally their own masters. They dictated what was permissible and what was not. Men were the warriors of the community, decision makers, and heads of families and in that capacity; they dictated what was expected of the family.

The World Bank report on Kenya’s gender disparity also indicated that the economic and social inequalities within Kenya made the disparities more extreme compared to many countries of the world. It held that women were poorer than men and suffer more severely from the ill effects of economic down turn. The report showed that 52.5% of Kenyan males in rural areas and 49.2% of those in urban areas live beneath the poverty line. In both instances, the statistics for females were higher by 54.1% of rural and 63.0% of urban women and girls who live beneath the poverty line. While poverty had been identified as an area of
concern for the country as a whole, it did wear a predominantly female face. The report claimed that with the patriarchal nature of the Kenyan societies inhibiting women’s attempts to escape poverty, it is a matter of concern to uplift the status of women through empowerment. It also held that by 1998, the number of female headed households had grown to 31.7% of the population. Out of these, 79.5% were beneath the poverty line (The World Bank, 2003)

2.7. The Moral Basis of Affirmative Action
Although numerous individuals may be viewed as supporters or detractors of affirmative action, no individual or group has been responsible for articulating one position. Unlike human capital theory or critical race theory, for example, where we discover a canon from individuals who coined the frameworks, affirmative action is not marked by a canon. Indeed, as Hollinger (1996) observed above, one of the central problems for affirmative action has been the inability to develop a cohesive, analytical framework. Nevertheless, over the last 30 years, authors such as Francis (1993), Crosby (1989), and Sandler (1975) have articulated three rationales for the creation and implementation of affirmative action. These have become the moral basis for affirmative action: first is compensation, which refers to addressing previous discrimination and correction, the second one is diversification, which concerns the importance of creating a multicultural society. And the third one pertains to the alteration of present discrimination, through Equal Opportunity (EO) argument. In one sense we might think of these as distinct but interrelated rationales as past, present, and future-oriented reasons for
implementing affirmative action. All three mentioned above narrows down to creating a world where each individual is treated as an end in him/herself through equal opportunity.

2.7.1. The Equal Opportunity (EO)

Equal opportunity is based on the assumption that the world will work in a fair and just manner and that an organization is not systemically sexist. Individuals might act unjustly, but the system is basically fair. As Pojman (2006) argued that human nature is roughly identical, so that on a fair playing field, the same proportion from every gender, race and ethnic group would attain the highest position in every area of endeavor. It would follow that any inequality of results itself is evidence for inequality of opportunity.

The proponents of EO urge us to get beyond gender criteria in assignment of offices and opportunities, and treat each person not as an average man or woman, but as a person judged on his or her own merits. As Simon (1979) argued, through philosophical analysis of AA, that the distinction between affirmative action as an obligatory remedy and as a permissible but nonobligatory legislative goal, will help us understand the theory of fairness, or preferential programs. Namely, that the male applicants whom are burdened are often not responsible for past discrimination. Otherwise qualified males must not shoulder the burden of past discrimination, and lose the most from reverse discrimination. Respect for persons therefore entails that we treat each person as an end in him or herself, not simply as means to be used for social purposes. The Kenyan case is not exceptional, thus
EO can be achieved through compensation of the victims of the known historical injustices.

A compensatory argument focuses on a victim who has been injured, and the injury requires some form of redress. The individual or group who committed, or contributed to the injury must pay the compensation. A discussion of compensation focuses on several interrelated issues: who the victim was, who was at fault, what precisely the fault was, and how the fault should be redressed. Tierney (1997) held that compensatory arguments are most easily used when an identified individual suffers a loss at the hands of another party. For instance, if a woman is not given tenure because the department chair is biased against women, then the victim was treated wrongly, and compensation is the granting of tenure by the university, and possibly additional compensation from the department chair, as well. As with any issues of justice, multiple ramifications exist. On the one hand, an individual who has been unduly harmed deserves to have that harm redressed.

In effect, we have two competing claims, both of which are just: A group that has been excluded from EO in the past deserves redress, and a group that fears exclusion based on a strong affirmative action policy in the present also deserves consideration. Because of such concerns and the legal decisions; that I will discuss in chapter four, compensation is most often not the central rationale for an affirmative action plan in Kenya. However, compensation is the most vociferously challenged rationale for the development of a plan. As Pojman (2006) reiterated
that critics of affirmative action often overlook other arguments in favor of objection that two wrongs do not make a right. Or that membership in a group that seeks victim status is potentially harmful, and relegates individuals to second-class status in an organization ostensibly committed to merit. From this perspective, what some might call the psychodynamics of hatred has permeated society in general and academe in particular, so that individuals in multiple groups deserve compensation.

Another way to promote EO is to be aware of diversification procedure. Diversification is perhaps the most difficult issue to consider because it raises issues of quotas, and optimal gender levels in companies, departments, schools, and institutions. An argument based on diversification looks at the present context in which an organization exists, and concludes that it is unjust and most likely does not meet the needs of the workforce of the future. As I will discuss in chapter four, education has often been seen as a primary vehicle for redistributing opportunity so that no one is disadvantaged.

Pojman (2006) argued that it is important that we learn to live in a pluralistic world, learning to get along with other genders, races, conditions and cultures. We should therefore have schools and employment situations fully integrated as possible. He stressed that, in a shrinking world, we need to appreciate each other’s gender, culture and specific way of looking at life. As Martin Heidegger (1914) stressed in his work “Being-with Others” and “Being-oneself” that man is able to
relate himself to his fellowmen only because his own being is in advance disclosed to him as being with. This becomes fundamental structure of man as self existent foundation of personal relations and human society. Heidegger held that as man/woman is never wordless subject, but in advance understands himself/herself as “I-myself-with”, and being with can be modified according to the basic possibilities of existence, for example, man or woman can be with others in an owned or a disowned way.

Thus, diversity is an important symbol and educative device, since diversity of ideas challenges us to scrutinize our own values and beliefs, and diverse customs to have aesthetic and moral value, helping us to appreciate the novelty and beauty in life of others. Just as Ackerly (2008) insisted that differences in social, economic and political spheres are sources of injustice, when they become a means of oppression, hence a need to create a just society by allocation of means for the satisfaction of human needs. This includes affirmative action programs which has a concept of justice as its maxim of operation.

2.8. Conclusion
This Chapter has discussed the concepts of affirmative action policy, affirmative action is meant to make up for or eliminate minority and gender discrimination, which is a form of unwarranted mistreatment. Weak affirmative action is generally not controversial, because it uses policies and procedures to ensure equal opportunity without demanding that one group be preferred over another. On the other hand, strong affirmative action is controversial because it makes use of
minority and gender preferences. Affirmative action is therefore pegged on three moral bases of compensation, diversity and equal opportunity which narrow down to the principle of justice. Hence, affirmative action policy is a way of making amends for, or eradicating discrimination based on gender, race and ethnicity. It takes the form of policies and programs; usually mandated by government and designed to bring about necessary changes in colleges, businesses and other organizations. The next chapter will discuss theory of justice as a philosophical basis for gender based affirmative action. It will stress the importance of using justice as a matrix for any given policy.
CHAPTER THREE

3.0. THEORY OF JUSTICE AS PHILOSOPHICAL BASIS FOR AFFIRMATIVE ACTION POLICY

3.1. Introduction
The last chapter discussed gender based affirmative action, stressing the importance of treating each individual in the society equally; this is to protect the rights of individuals and to do justice to all in any society. This chapter will therefore explore one theory of justice as put forward by John Rawls as the philosophical basis for gender based affirmative action policies in Kenya. Justice is the foundation and proper virtue of political association. According to Aristotle in *Nicomachean Ethics* 5.6, it is the condition which free men establish among themselves when they share a common life in order that their association brings them self-sufficiency. Hence the regulation of their relationship by laws, the establishment by law, and equality before the law. Thus, the need of having rights, fairness, and equality to be upheld in any society. People will think it’s unjust to have their rights violated, for example, being thrown in prison without being found guilty in a court of law, or being unfairly harmed by someone unwilling to pay compensation for the harm done. Or being unfairly treated as an inferior who isn’t hired for a job, despite being the most qualified person for the job, which is contested by opponents of AA.

Theories of justice are not necessarily moral theories because justice is a bit more specific and could even be separate from morality entirely, since they touch on the
rights of individual person. Affirmative action is therefore a public policy designed to compensate the victims of injustice. In line with the idea of justice, this chapter will discuss the concept of justice as illustrated by Rawls’ distributive justice as fairness as basis of coming up with any AAPs.

3.2. The Concept of Justice
Justice is closely connected to respect for rights, it is giving people what they deserve. Etymologically, the word which corresponds to Just; points to the connection of the positive law, or that which was in most cases the primitive form of law – authoritative custom. Thus Justum is a form of Jussum, that which has been ordered. Originally, it meant only the mode of doing things, but it later came to mean the prescribed manner in which the recognized authorities: patriarchal, judicial, or political would enforce their law. According to Ryan (1995), the primitive element in the formation of the notion of justice was conformity to the law. It constituted the entire idea among the Hebrews, up to the birth of Christianity. As might be expected in the case of a people whose laws attempted to embrace all subjects on which precepts were required and who believed those laws to be a direct emanation from the Supreme Being, they did believe in the justice of the law.

Other nations, like Romans and Greeks, who knew their law had been made originally and still being made by men, were not afraid to admit that those men might make bad laws, might do by the law, the same things, and from the same motives, which if done by individuals without sanction of law, would be called
unjust. Hence the same sentiment of injustice came to be attached, not to all violations of the law, but only violations of such laws as ought to exist. Including such ought to exist but do not; and to laws themselves if supposed to be contrary to what ought to be the law. Therefore, the idea of legal constraint is still the generating idea of the notion of justice, though undergoing several transformation before that notion, as it exist in an advance state of society becomes complete.

The Greek Political theory and Roman law had sophisticated ideas about justice in its various aspects, but did not embrace our conception of individual rights. However, Tuck (1979) stressed that the subjective understanding of rights, whereby the right-holder may stand on his rights, or not as he chooses, was not a Roman law. Neither Plato nor Aristotle held that justice was a matter of individual rights. In the Republic, Plato (429 – 347 B.C.E.) confided the power to the Guardians and Auxiliaries. And his insistence on an aristocratic form of government may seem to imply that only philosophers are entitled to rule, or have a right to govern. According to platonic thought, States need good governors who can impose laws within the realm of justice. In the Republic Plato (429-347 B.C.E) describes the nature and origin of justice, as what stands half-way between the best thing of all, to do wrong with impunity, and the worst, which is to suffer wrong without the power to retaliate. In discussion with Glaucon, Plato held that what people say to do wrong is, in itself, a desirable thing; on the other hand, it is not at all desirable to suffer wrong, and the hurt to the suffer outweighs the advantage to the doer. Consequently, when men had a taste of both, those who
have no power to seize the advantage and escape the harm, decide that they would be better off it, and they made a compact neither to do wrong, nor to suffer from it. Hence they began to make laws and covenants with one another, and whatever the law prescribed; they called lawful and right. That is, what is right or justice is, and how it came into existence. Hence Justice is accepted as a compromise, and valued, not as good in itself, but for lack of power to do wrong.

Nonetheless, Aristotle (384 – 322 B.C.E.) in Nicomachean Ethics book 5 allocates authority to classes and individuals according to a rational, and morally acceptable scheme, according to justice, but not to protect individual. But Ryan (1995) stressed that we do not call anything happening to the individual wrong, unless we mean to imply that a person ought to be punished in some way. Or other by doing it, if not by law, by the opinion of his fellow creatures: if not by opinion of his fellow human beings, but by reproaches of his own conscience. Thus, the real turning point of the distinction between morality and simple expediency came into existence. However, it is but of the notion of duty in every one of its forms that a person may rightfully be compelled to fulfill it. By duty, I mean a thing which may be exacted from a person, as one exacts a debt. Reasons of prudence, or the interest of other people, may militate against actually exacting it, but a person himself, is clearly understood would not be entitled to complain.

David Hume (1711 – 1776) in An Enquiry Concerning the Principles of Morals, stressed that justice is artificial virtue, which produces approbation by a human
contrivance; he held that external actions are praised only because they are signs of virtuous motives. He argued that no action can be virtuous unless there are in men some motives which produces it, other than the desire to do it is virtuous. Though an action may be done from a sense of duty alone, there must be some motives which usually prompts men to perform actions of a kind. Or a kind of action would not be a duty where justice is concerned, however, there is no motive preceding the regard for justice itself, which by prompting men to perform just actions makes just actions meritorious.

Temkin (1995) also believed that there is intimate connection between the notions of justice and equality. The idea of equality is properly regarded as one aspect of the wider idea of justice. He stressed that the core of the egalitarian concern is the view that at least in some cases it is unjust for some to be worse off than others through no fault of their own.

It is therefore clear that, whether the injustice consist in depriving a person of a possession, or in breaking faith with him, or in not treating him worse off than he deserves. Or as worse than what other people who have greater claims, in each case the suppositions implies two things. One, a wrong done, and secondly, some assignable person who is wronged. Injustice may also be done by treating a person better than others, but the wrong here is to his competitors, who are also assignable persons. Justice therefore implies something which is not only right to do, and wrong not to do, but which some individual person can claim from us; as his moral
right. No one has a moral right to our generosity or beneficence, because we are not morally bound to practice such virtues towards any given individual.

3.3. Approaches to the Concept of Justice

3.3.1 Utilitarianism
There are different conceptions of the principle of justice, one of them being Utilitarianism. Classical utilitarianism took root in the late half of 19th century and early half of 20th Century. It is associated with philosophers like Jeremy Bentham (1748-1832), James Mill (1773-1836) and John Stuart Mill (1806 – 1873), Henry Siggwick (1838 – 1900) and G. O. Moore (1873 – 1958). The basic idea of utilitarianism is that, the right thing to do is what produces the most good. Since this is in fact the way many people approach ethical decisions.

Mill stressed that Utility, or the greatest happiness hold that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness, I mean intended pleasure and the absence of pain. Thus the goal of life is happiness according to utilitarians. Both Mill and Jeremy Bentham offer little proof of the assumption that happiness is the goal of life. They rest on the claim that by natural constitution of human frame, we embrace these ends and they assert that fundamental principles are not susceptible to direct proof. Mill argues that the question of the ultimate ends are not amiable to direct proof, but he offers as an argument the fact that people universally do desire happiness. Thus, the end or a goal of human life is taken to be happiness, and we
know this because people do desire happiness; because doing so appears to be natural to us.

Utilitarians believed that the rightness of acts is determined by their contribution to happiness. This makes utilitarianism a form of teleology, from the word telos meaning the end. Such that the end determines what is right. The right is determined by calculating the amount of good produced. Thus the good is prior to the right and the right is dependent upon it. As Mill puts it, “actions are right in proportions as they tend to promote happiness”. This raises a question: must the results of each action be calculated to determine its overall utility, and therefore to decide whether it is right act? No, because in most instances the results of our actions are often hidden, we only realize the result after acting in a given way (Lebacqz, 1986)

Traditional notion of justice also appear to be flouted by utilitarianism, which claims that the right act is whatever maximizes the good. Individual rights or claims would be overridden by consideration of happiness of others. For example, if bloodshed of threatening tribe riot could be averted by framing and killing an innocent person, it seems that utilitarian would have to say it is “right”, to do so, so long as the greater good required it. All the individual rights and claims would be ignored. Because of such apparent implications of utilitarian theory, issues of justice have consistently been a stumbling block for utilitarianism (Sterba, 1986).
As stated above, utilitarianism has attracted opposition; John Rawls (1971) too stressed that utilitarianism fails to take seriously the distinctness of persons. He held that maximization of preference-satisfaction is often taken as prudent in the case of individuals. People may take on greater burdens, suffering or sacrifice at certain periods of their lives so that their lives are overall better. The complaint against utilitarianism is that it takes this principle, commonly described as prudent for individuals, and uses it on an entity, society, unlike individuals in important ways. While it may be acceptable for a person to choose to suffer at some period in her life; so that her overall life is better, it is often argued against utilitarianism that it is immoral to make some people suffer so that there is a net gain for other people. In the individual case, there is a single entity experiencing both the sacrifice and the gain. Also, the individuals, who suffer or make the sacrifices, choose to do so in order to gain some benefit they deem worth their sacrifices. In the case of society as a whole, there is no single experiential entity: some people suffer, or are sacrificed so that others may gain. Furthermore, under utilitarianism, there is no requirement for people to consent to the suffering or sacrifice, nor is there necessarily a unified belief in the society that the outcome is worth the cost. (Zalta, 2014)

3.3.2 Libertarian/ Entitlement Justice
Libertarian justice advocates for a right to private property. This was championed by Robert Nozick (1974). The theory consists of three principles: a principle of justice in acquisition, a principle of justice in transfer, and a principle of justice in
rectification. The first of these principles specifies the severally necessary and jointly sufficient conditions for an individual to become a legitimate owner of an object which has not previously been owned by any individual. Amongst the objects to which this principle is meant to be capable of applying, are portions of the earth’s surface, that is, areas of land.

Secondly, Nozick (1974) argues that a minimal state would emerge from legitimate exercise of Lockean natural rights. By Lockean natural rights, I mean radical views by John Locke (1632-1704) that government is morally obliged to serve people; namely by protecting life, liberty, and property. He explained the principle of checks and balances to limit government power. He favored representative government and rule of law. Locke denounced tyranny, and he insisted that when government violates individual rights, people may legitimately rebel. In *Two Treatise of Government* published 1690, Locke established that private property is absolutely essential for liberty: every man has a property in his own person. Thus nobody has any right to others but to himself. The labour of his body and the work of his hands are properly his. He continues: the great and chief end, therefore, of men uniting into Commonwealths, and putting themselves under Government, is the preservation of their property.

Thirdly, Nozick principle of justice in rectification is stated thus: victims of an injustice or those descendants of victims of the injustice, whose situation is worse than it would have been; had the injustice not been done, are morally entitled to receive from perpetrators of the injustice, or from any descendants of the
perpetrators who have benefited from the injustice. Sufficient compensation must be done accordingly to bring the victims or their descendants to the level of well-being that they would have enjoyed had the injustice not been done (Conway 1990).

The Lockean force is what triggered Libertarian justice. Nozick (1794) stressed that market forces and the advantages of monopoly with respect to providing protection would first lead to emergence of a dominant protection agency. Nozick claims that this agency, by legitimately exercising the Lockean natural rights if its members would be morally justified in prohibiting independents from employing certain risky procedures provided adequate compensation is by the agency to those independents.

Nozick (1974) stresses that the risky procedures that can be legitimately prohibited provided adequate compensation is paid, are those that meet these two conditions: first, they tend to cause general harm, and secondly, either they violate the procedural rights of the members of a dominant protection agency to have their guilt fairly determined, or they are in illegitimate exercise by independents of Lockean natural rights.

Sterba (1986) stressed that according to Nozick, it is by passing on the risky procedures used by independents and prohibiting the use of some such procedures provided adequate compensation is paid, in that a dominant protection agency come to possess the two essential characteristics of a minimal state: that is, it
maintains a *de facto* monopoly and it protects the rights of everyone in a given territory.

However, there are good reasons to resist Nozick’s argument for the minimal state. Sterba (1986) argues that while the prohibition with compensation that Nozick justifies do not violate anyone’s right, all things are considered, they constitute rights-violations. By contrast, the disadvantages incurred by probation supporting the exercise of Lockean property rights, according to the standard of libertarian view, do not result from even *primafacie* rights-violations. Consequently, unless it can be shown that such violations occur, Nozick’s argument for the emergence of minimal state cannot be extended to support the kind of compensation that is characteristics of a welfare state.

**3.3.3. Welfare Liberal Justice**

Welfare liberal justice is based on the economic framework that each society has its laws, institutions, and policies, which results in different distributions of economic benefits and burdens across members of the society. These economic frameworks are the result of human political processes and they constantly change both across societies and within societies over time. The structure of these frameworks is important because the economic distributions resulting from them fundamentally affect people’s lives. Arguments about which frameworks and resulting distributions are morally preferable and they constitute the topic of distributive justice. Principles of distributive justice are therefore best thought of as providing moral guidance for the political processes and structures that affect
the distribution of economic benefits and burdens in societies. Advocates of welfare-based principles do not believe that the primary distributive concern should be material goods and services only. They argue that material goods and services have no intrinsic value but are valuable only in so far as they increase welfare. Hence, they argue that distributive principles should be designed and assessed according to how they affect welfare, either its maximization or distribution. (Zalta, 2014)

Welfare liberal justice was championed by John Rawls. Rawls (1971) argues that principles of justice are those principles that free and rational persons, who are concerned to advance their own interests would accept in an initial position of equality. This research which interrogates affirmative action, found welfare liberal justice most appealing, since one of the objectives of the work is to determine whether, or not strong affirmative action is just in bringing equality in the Kenyan society. Thus Rawls’ theory of justice as mentioned earlier in the theoretical framework has been the guiding principle of this thesis.

3.4. Rawls’s Theory of Justice
As discussed in chapter one, John Rawls was an American political philosopher in the liberal tradition. He differed with the Utilitarianism championed by John Stuart Mill. Utiliterians argues that every action must lead to the maximization of pleasure which is good. Rawls described his theory of justice as Justice as Fairness, in his book a Theory of Justice (1971). Rawls argues that the society is rightly ordered, and therefore just when it’s major institutions are arranged so as to
achieve the greatest net balance of satisfaction summed over all the individuals belonging to it. Thus, to be disadvantaged in Rawls’ scheme of things is to have suffered in some way, from having less than one’s fair share of the primary goods. This measure, according to Rawls, ought to be determined by two principles that would be selected in the original position. The first principle dictates that each member of society be granted every shareable personal liberty, a liberty being shareable just in case one’s exercising of it; would not prevent others from doing so. The second principle states that the primary goods are to be distributed in an egalitarian fashion, unless an unequal distribution would leave everyone with more of these goods than they would otherwise have their own effort. In addition, it mandates that every advantage is to be the reward of holding a position for which all members of society have the equal opportunity to compete.

3.4.1. The Two Principles of Justice
Rawls’s two principles of justice basically apply to the basic structure of the society. They govern the assignments of rights and duties, and to regulate the distribution of social and economic advantages. The first principle states that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. The second principle states that social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be everyone’s advantage, and (b) attached to positions open for all. (Rawls 1971)

Rawls (1971) held that the two principles presuppose that the social structure can be divided into two more or less distinct parts, the first one applying to the one,
and the second to the other. They distinguish between those aspects of the social system that define and secure the equal liberties of citizenship and those that specify and establish social and economic inequalities. The liberties stressed by Rawls are basic liberties of citizens, which are political liberty: liberty to vote and to be eligible for public office. Together with freedom of speech and assembly, liberty of conscience, and freedom of thought, freedom of the person along with the right to hold personal property, and freedom from arbitrary arrest and seizure as defined by concept of the rule of law. These liberties Rawls stressed, are all required to be equal by the first principle, since citizens of a just society are to have the same basic rights.

According to Rawls, the second principle applies in the first approximation to the distribution of income and wealth, and to the design of the organizations that make use of differences in authority and responsibility, or chains of command. He stressed that while the distribution of wealth and income need to be equal, it must be to everyone’s advantage and at the same time, positions of authority and offices of command must be accessible to all. The second principle is applied by holding positions open, and then, subject to this constraint, arranges social and economic inequalities so that everyone benefits. (Rawls, 1971)

According to Kelly (2003), the two principles of justice are adopted and applied in a four-stage sequence. In the first stage, the parties adopt the principles of justice behind a veil of ignorance. Limitations on the knowledge available for the parties
are progressively relaxed in the next three stages: the stage of the constitutional
convention, the legislative stage in which laws are enacted as the constitution
allows and as the principles of justice require and permit, and the final stage in
which the rules are applied by administrators and followed by the citizens
generally and the constitution and laws are interpreted by members of the
judiciary. Thus at this last stage, everyone has complete access to all the facts. She
stressed that the first principle applies at the state of the constitutional convention,
and whether the constitutional essentials are assured in more, or less visible on the
face of the constitution, and in its political arrangement and the way these work in
practice. By contrast, the second principle applies at the legislative stage and it
bears all kinds of social and economic legislation and on the many kinds of issued
arising at his point.

However, these principles are arranged in a way that the first principle is prior to
the second. The ordering means that a departure from the institutions of equal
liberty required by the first principle cannot be justified by, or compensated for, by
greater social and economic advantage. The distribution of wealth and income, and
hierarchies of authority, must be consistent with both the liberties of equal
citizenship and equality of opportunity. For example, affirmative action policy
makers must have in mind the equality of all citizens, since any policy must do
justice to all in the society. Injustice, then, is simply inequalities that are not
beneficial to all in the society.
Nonetheless, we have to realize that the general conception of justice imposes no restriction on what sort of inequalities are permissible, it only requires that everyone’s position be improved. We need not to suppose anything as drastic as consenting to a condition of slavery. But these principles of justice are justified because they would be agreed to in an initial situation of equality; the original position.

3.4.2. The Original Position
Rawls first suggested a new way to learn about principles of justice, the original position. The original position asks us to imagine that a group of people will get to decide the principles of justice. These people don’t know who they are; what he calls a ‘veil of ignorance’, they are self-interested, and they know everything science has to offer. He argues that in a veil of ignorance, they couldn’t be as biased towards their gender, profession, race, age, or social status; because they wouldn’t know which categories they belong to. The original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood to as a purely hypothetical situation characterized so as to lead to a certain conception of justice.

Among the essential features of this situation as mentioned above is that; no one know his place in the society, his class position or social status, nor does anyone knows his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like.
Kelly (2003) stressed that the original position models two things: first it models what we regard – here and now – as fair conditions under which the representatives of citizens viewed solely as free, and equal persons are to agree to the fair terms of social cooperation as expressed in by the principles of justice; whereby the basic structure is to be regulated. Secondly, it models what we regard – here and now – as acceptable restrictions on the reasons on the basis of which the parties; as citizens representatives, situated in those fair conditions, may properly put forward as principle of justice and reject others.

As far as self-interest is concerned, Rawls argues that they will want principles of justice that will fairly distribute certain goods that everyone will value. Rawls called these goods primary social goods, that is; things that every rational man is presumed to want. These goods normally have a use whatever person’s rational plan of life. For example, the chief primary goods at disposition of society are rights and liberties, powers and opportunities, income and wealth. There are other social primary goods such as health and vigor, intelligence, and imagination. These are natural goods, their possession are also influenced by the basic structure of the society. One may regard oneself only as an arbitrary member of the society whose distributive principles are to be determined. The veil of ignorance prevents bias from influencing one’s decision making. That is not to say that self-interest will not play a role, it will be limited.
He further stressed that the people in the original position will discuss which principles of justice are best before voting on them, and the best principles worth having will reach a Reflective Equilibrium (RE). By RE, I mean a process of justification which requires a continual interaction between the formulation of theoretical principles, and a consideration of pre-theoretical commitments. The most intuitive principles will be favored, and the less incompatible intuitive principles will have to be rejected; in order to maintain coherence.

Rawls stressed that it is only in the original position that his theory of justice is yielded, since original position is the appropriate initial status quo which insures that the fundamental agreement reached in it are fair. This gives the name “justice as fairness”.

As stressed above, Rawls disagrees with utilitarians that economic inequality is justified if it maximizes happiness. He rather argued that by providing rewards to being productive members of societies, it is useless if such inequality doesn’t help those who are the worst off. He stressed that the principle of utility is incompatible with the conception of social cooperation among equals for mutual advantage. It appears to be inconsistent with the idea of reciprocity implicit in the notion of a well-ordered society.

It is supposed that the parties in the original position are rational, whereby rationality as distinguished from reasonableness is understood in the way familiar from economics. Hence, the parties are rational in that they can rank their final
ends consistently; their deliberation is guided by such principles as: to adopt the most effective means to one’s ends and to select that alternative most likely to advance those ends. To schedule activities so that ceteris paribus, more rather than less of those ends can be fulfilled. The parties in the original position are not swayed by any psychologies: In the first part they think the same of the persons they represent. Their reasoning aims at selecting principles of justice that best secure those persons’ good, their fundamental interest, and ignoring any inclinations that might arise from envy or any special aversion to uncertainty, and the like.

Secondly, as argued by (Kelly 2003), the parties in the original position consider the psychology of the citizens in the well ordered society of justice as fairness: that is, the psychology of the people who grow up and live in a society in which the two principles of justice effectively regulate the basic structure, and in which this fact is publicly recognized. Rawls thinks that redistribution of wealth and taxes are justified if it is the best way for the worst off to benefit from social and economic inequalities. He thinks total economic equality is just, but he argued that a capitalistic system might actually be better and help the worst off by rewarding productive behavior to give an incentive to increase productivity and therefore prosperity.

Rawls (1971) argues that the original position guarantees the selection of fair distributive principles. It does so by compelling one to opt for principles whose
application would provide each member of one’s society with enough of the primary goods to realize his plan of life. Being ignorant to which groups one belongs, one would not, as a rational agent, Rawls presumes one to be, select principles whose application would leave some members of his society disadvantaged. For to do so, would be to put oneself at risk of being unable to realize one’s goals, a risk to which a rational agent would be averse.

For all one knows behind the veil, one may be a member of any disadvantaged group. Being a woman in Kenya should not drive one to opt for gender based affirmative action policy which will be disadvantageous to men of this nation; by alienating men from public offices. Self-interest would thus dictate that one does not form such a group, mandating instead that one secure for each member of society enough of the primary goods to realize his plan of life. A just distributive principle, according to Rawls, is such that a rational agent would choose it if the operation of his self-interest were limited in this manner.

The main idea in the original position is thus that; since everyone is to give an undertaking in good faith, and not simply make the same choice, no one is permitted to agree to a principle if they have reason to doubt; that they will be able to honor the consequences of its consistent application. Hence gender based affirmative action, should always strive to bring equality to every gender, by doing so the policy will be deemed just in Rawlsian terms.
3.5. Rawls Theory of Justice and Affirmative Action Policies

Rawls’s theory of justice as fairness has implications on affirmative action policies, even though he never addressed the issue of AAP in his writings. The goal of affirmative action policies, in Rawls’ terms, are to be understood as being designed to secure compensation, for those who were harmed by a violation of their rights as human persons. One of the measures of primary goods to which those principles entitle them, as well as a remedy for the effects of their deprivation is stated clearly in Rawls book, Theory of Justice 1971. They, then, require us not only to change current distributional practices so as to make them fair, but also to help those disadvantaged by past injustices become capable of utilizing the assets such a change would bring their way.

According to Allen (2005), one way of achieving this goal is to mandate that the administrators of educational, governmental, and business institutions to employ affirmative action as aggressive means of recruiting the victims of injustice. This practice is supposed to ensure that such persons, who might otherwise be ignorant of the academic and employment opportunities thereby offered, are made aware of their existence and encouraged to take advantage of them.

Allen (2005) continued to illustrate that the second form of affirmative action should dictate that a member of a disadvantaged group be given a sought after position in the event that he is as qualified as other aspirants. The idea here is to compensate a victim of injustice by having his disadvantaged status serve as a tie-breaker. The justification typically offered for this policy is that any victim of
injustice who holds his own against those who possess their fair share of the primary goods would, *ceteris paribus*, be better qualified had his victimization not occurred. Such a person, it seems reasonable to suppose, would have outdone his rivals, but for him being disadvantaged, this having kept him from more fully realizing his potential. This method is meritocratic and should always be desired for justice for all.

Finally, there is a third version of affirmative action, which this research will challenge, that which allows the use of college admission and hiring quotas. This practice would provide redress to the members of disadvantaged groups by lowering the grades of a particular group of people due to discrimination they suffered. An example is the KUCCPS affirmative action policies in Kenya, where female candidates are being admitted with two points lower than that of the male students. Included here are also policies, which in lieu of set asides place the victims of injustice at a competitive advantage over other aspirants to these positions, allowing them to be filled by individuals whose qualifications are not higher than or equal to those of their rivals. This version is not meritocratic, though it is being practiced in Kenya by KUCCPS as mentioned above. This will be challenged in chapter five.

According to Daniels (1975), Rawls’ substantive doctrine is a rather pure form of egalitarian liberalism, whose controversial elements are its egalitarianism, its anti-perfectionism, and the primacy it gives to liberty is more egalitarian about liberty
than other goods. Justice as “the first virtue” of social institutions in Rawls terms is thus measured not by their tendency to maximize the sum, or average certain advantages, but by their tendency to counteract the natural inequalities deriving from birth, talent, and circumstances, pooling those resources in the service of the common good, and the common good is measured in terms of a very restricted, basic set of benefits to individual; which are personal and political liberty, economic and social advantages, and self-respect.

Being fair is what Rawls calls a rational individual to be in the original position. In choosing principles of remedial justice, the first and second principles of justice are to act as constraints, besides those imposed by the veil of ignorance, on what measures may be chosen. The first principle and the veil of ignorance play roles of protecting liberties. According to Rawls (1971), the first principle dictates that each person engage in an institution, or affected by it has an equal right to the most extensive liberty compatible with a like liberty for all. The second principle which states that inequalities as defined by the institutional structure, or fostered by it are arbitrary, unless it is reasonable to expect that they will work out to everyone’s advantage. And provided that the positions and offices to which they attach, or from which they may be gained are open to all. Thus affirmative action policy should be attached to government institution that is going to promote equality in the distribution of the primary goods for all individuals in the society, by implementing that policy. The second principle is therefore to ensure that no one or a group is favored over another. This provision is in keeping with Rawls’
assumption that those adopting the original position are committed to upholding the terms of whatever agreement is thereby reached.

But while fairness commands that the beneficiaries of injustice abdicate their ill-gotten gains, it does not require additional sacrifices on their part. In particular, it does not require that they forfeit any rights others possess. To expect them to do so is only to invite further claims of injustice, preventing the establishment once and for all a level playing field. For instance, it will be illogical to bypass men of this nation in appointive and elective positions, since the Kenyan Constitution dictates that at least a third of the people to fill in such positions must come from the opposite gender. The process of selecting principles of justice is rendered pointless, unless it is assumed that its outcome will lead to as much equality as possible. The question, then, we must ask of a proposed means of redressing injustice is: would strong affirmative action in Kenya lead to some members of society being deprived of the measure of primary goods to which they are entitled according to the first and second principles of Rawls theory of justice?

Gray (2011) realizes that a Rawlsian can evade this horn by pointing out that the first principle covers only the sort of liberties enumerated in the Bill of Rights, for example, Article 17, which talks about the right to property, Article 25 which stresses the right to social welfare, and Article 26 dealing with the right to education, as discussed in chapter two. It is not intended to apply to one’s business dealings. But even if such activities did fall under the first scope, the practices that
Gray mentions would not thereby be protected. The liberties they entail are not shareable: allowing employers to hire whomever they please licenses them to confine the members of a given gender, or minority group, say for example, to low-paying jobs, thus preventing them from becoming employers themselves. The first principle would place restrictions upon hiring practices to create a just society whatever means.

3.6. Rawls’ Just society
In a Rawlsian society, compensatory justice would not be affected by requiring some members to sacrifice important elements of personal fulfillment, only one of which, it should be noted, is financial. Nonetheless, Thomas Nagel (1991) misses this later point in defending strong affirmative action which is not meritocratic. He argues that it is probably not unjust, since it remedies a grave social evil, and is only a temporary deviation from a meritocratic system that is itself morally indefensible. Moreover, the sacrifices required of its victims are not so great, given that they retain the general social dominance, out of which a situation requiring affirmative action arose. A society exhibits pure procedural justice in case it utilizes a system of distributing its primary goods, such that the resulting allocation is fair; whatever it turns out to be. Such a system would be consistent with the two principles of justice as fairness.

Rawls (1971) further notes that a key element of a fair distribution system is education for all, which underwrites equality of opportunity. A just society, he contends, would prepare its youth to meet the competitive demands of adulthood.
It would be necessary to add that, in the case of victims of injustice; the required education would have to address not only their academic deficiencies but also help establish the self-esteem they are likely to be lacking. Obviously, these measures would have to go beyond providing such persons with the educational opportunities all others enjoy, since they are unlikely to be able to take advantage of them as a certain amount of remedialization. The victims of injustice, in other words, are owed more in the way of education of each individual in the society than that which fair equality of opportunity would require, were no such persons exist.

That some individuals are unable or unwilling to take advantage of educational opportunities does not cancel a society’s obligation to make them universally available. The fact that schooling fails to improve the prospects of some persons should not weaken our resolve to educate those who would thereby benefit. From the perspective of the original position, one could only arrange access to all of the opportunities of which one might turn out to be capable of taking advantage. One could not attempt to tailor one’s options to suit a particular set of abilities. Moreover, that educational efforts are going to be wasted on a particular individual is not something that can be predicted. Each person is thus owed the opportunity to benefit, to the extent to which he is capable, from a good education.

A Rawlsian society would therefore compensate the victims of injustice by redoubling its efforts at providing high quality, universal primary and secondary
schooling to all. This has been championed in Kenya by president Kibaki’s government with free primary education. To someone in the original position, this endeavor would appear highly desirable. Since therein, it is not known who would be educationally disadvantaged, but for its existence, it would be understood as a safeguard against historical injustices such as sexism and poverty, in the case of this research. By determining anyone’s share of the primary goods and leaving nature and one’s efforts as the deciding factors; so long as the playing field is level for all. But not having strong affirmative action which is geared towards uplifting economic status of only one particular gender. Rawlsian affirmative action thus would begin at the schoolhouse.

According to Rawls, justice is no longer one value to be weighed alongside others, but rather a standard by which we assign weight to other values. If affirmative action policy is unjust for example, there is no separate set of values one can appeal to in the hopes of overriding justice in a given society, for the legitimate weight is attached to these other values is established by their location within the theory of justice to protect human rights of every moral agent.

3.7. A critique of Rawls’ Principle of Justice
According to Rawls, justice is considered to be the first virtue of social institutions. He consider justice to be the standard by which we assign weight to other values, it is no longer one of the principles of rights relevant to political theory, but rather is the organizing concept used to define and integrates all such principle. However, Michael Sandel (1982) argues that justice is not the first virtue
of social life, to be valued for its own sake but rather, remedial virtue, remedying a flaw in social life. Drawing partly on Rawls’ own account of the circumstances of justice, Sandel argues that justice is only needed where there is an absence of the more noble virtues of benevolence or goals, there would be no need to claim one’s right’s or to appeal to other people’s duties. Thus an increased concern with justice can, in some circumstances, reflect a worsening of a moral situation, rather than a moral improvement. He gives an example of a family set up, where justice is not needed, and where preoccupation with justice may diminish the sense of love and solidarity, and thereby lead to more conflict.

Nonetheless, the argument put forward in this research is that justice is essential in societies, especially in human society where people have no, or have less regard for human rights. As stressed by Edwin Baker (1985) that justice does not displace love or solidarity, and that nothing in the primacy of justice precludes people from choosing to forego their rightful claims in order to help others. He stressed that justice simply ensures that these decisions are genuinely voluntary, and no-one can force others into accepting a subordinate position. According to Baker, the primacy of justice enables loving relationships, but ensures that these are not corrupted by domination and subordination.

Sandel (1982) interprets Rawls to require that the empirical circumstances make justice burdensome. He argues that the priority of justice will exist only where a
high degree of scarcity and conflicting demands, together with an absence of benevolence, thus making justice the most pressing social priority.

It has to be understood that a person’s benevolent communal sentiments, religious principles or other rational life-plans might cause her to choose a lesser position or a smaller set of benefits. This situation as stressed by BaKer (1985) is not inconsistent with the priority of justice as long as established institutions would be allowed to successfully claim a more equitable position, or set of benefits. No conflict exists between justice and communal sentiments. The structures still recognizes the priority of justice, since the individual just claims, if made, would prevail. For example, if women in Kenya demand justice for their past and current alienation from public offices, they would not be wrong. The problem will arise when they use policies which will extend the discriminatory practices to the other gender. If a policy is unjust for example, there is no separate set of values to which one can appeal in the hopes of overriding justice, for the legitimate weight attached to these other values is established by their location within the best theory of justice.

3.8. Conclusion.

This chapter has discussed the theory of Justice as developed by Rawls. The next Chapter will discuss how this theory of justice is replicate in the Kenyan society by gender based affirmative action practiced.
CHAPTER FOUR

4.0. EXAMINATION OF GENDER BASED AFFIRMATIVE ACTION POLICIES IN KENYA

4.1. Introduction
Chapter three discussed Rawls theory of justice as the governing principle in any society. Rawls stressed that justice is the first virtue of social institutions, which should be promoted by any policy enacted in a given setup. Thus to find a justification of a given policy, we must look for a workable conception of justice, hence our choice of Rawls Theory of justice. This chapter will therefore examine the socio-political factors that have shaped the attitudes towards gender based affirmative action in Kenya. It will assess the various approaches of gender based AA in the country, whether they promote justice as fairness or they lead to reverse discrimination. The chapter will therefore dwell on the gender based affirmative action from 1952, with the inception of Maendeleo Ya Wanawake Organization (MYWO), Affirmative Action Bills, Kenya Universities and Colleges Central Placement Service (KUCCPS), gender policies, up to the culmination of gender based affirmative action policy in the Kenyan Constitution. Its aim is to see how gender based AAPs in Kenya has its greatest influence on the citizenry. It will thus focus on strong affirmative action policies for women in Kenya, since there is a need to understand the determinants of affirmative action policies in the country; for one to come up with a clear basis for implementation of AAPs in the country.
4.2. Maendeleo Ya Wanawake Organisation

Gender based affirmative action on the wellbeing of women has been there in Kenya since pre-independence. With the establishment of Maendeleo Ya Wanawake Organisation (MYWO), women’s agenda was taken into consideration. MYWO is a women’s NGO that deals with issues to do with women’s rights and gender equity in Kenya. It is a non-profit voluntary women’s organization with a mission to improve the quality of life for the communities, especially women. MYWO is managed from the headquarters by an elected governing body and employed staff. The organization has branches in every administrative unit of the country, with more than 25,000 groups affiliated to it, and over 4 million individual members.

MYWO was registered in 1952, with a vision to create a society in which women have equal opportunities, and are empowered to make choices in matters that directly affect them socially, economically and politically. And with a mission to nurture and empower women through various capacity building and interventions, that promote women’s rights, sustainable livelihoods, and political standing in the Kenyan society. It has a national membership and an NGO which seeks to unify, nurture and empower women socially, economically and politically, to be able to deal with the unique challenges they face in societies.
MYWO was first organized by the Department of Community Development and Rehabilitation within the Colonial government. At the time of independence, the leadership of the organization was turned over to African women. The new independent government rewarded MYWO’s efforts by funding their projects and distinguishing the role of the organization as a welfare agency. Over time, MYWO’s grassroots network expanded to former eight provinces of the country which is now divided into forty seven counties. The leadership was made up of a chain of elected representatives from the smallest administrative unit up to the national level.

MYWO involvement in women empowerment and development issues run over six decades. At Kenya’s independence, MYWO played a role in building the country through its countrywide network. MYWO joined President Jomo Kenyatta’s rallying cry of self-help, and efforts in women’s mobilization were instrumental in building schools, clinics, and community centers across the country. By the mid 1970s, MYWO had raised enough money to build Maendeleo House in Nairobi’s Central Business District.

The leaders were strongly influenced by the United Nations Declaration of the Decade for Women (1976-1985), following the World Conference for Women held in Mexico City. Correspondingly, MYWO oriented its programs towards social welfare of women while providing a prominent voice for grassroots women’s organizations. Hence the programs and project activities of MYWO are
designed and executed by the National Secretariat, while it is staffed by the organization’s technical professional team, led by an Executive Director. The Executive Director and the Heads of Departments together form the management team that coordinates programs, design and implement them. The management team also provides leadership and technical competency for resource mobilization and management.

MYWO’s main programmes are: Reproductive Health, Women and Development, Economic Empowerment, Education, HIV/AIDS, Gender and Governance, and Research and Development. MYWO has different projects which are in line with her mission of empowering women, the projects are: Peace Building and Conflict Resolution. This project is a joint initiative between National Steering Committee (NSC) on Peace-building and Conflict Management, a Secretariat in the Ministry of State for County Administration and Internal Security, and the United Nations Development Programme (UNDP) – Kenya Country Office, on one hand, and MYWO on the other hand. Its broad objective is to enhance the visibility and participation of MYWO leadership and entire membership across the country-wide structures, and in the active promotion of peace building and conflict management processes in Kenya. The major activities involve building the capacities of MYWO members in particular, and women in general with a view to develop and implement their peace building projects, based on obtaining security challenges in their own local contexts.
MYWO also engages in civic education, a program sponsored by United Nations Fund for Population (UNFPA) and United Nations Children Education Fund (UNICEF) whose objective is to contribute to abandonment of Female Genital Mutilation (FGM) in one generation, with demonstrated success in 17 countries in Africa. In Kenya, FGM program is currently being implemented in Samburu, Baringo, Mt. Elgon, West Pokot, Kuria and Migori districts. It is involved in promotion of good cultural practices and sensitizing community on cultural practices that infringe on Human Rights. The program also encourages formation of parents and youth support groups, promoting alternative rite of passage (ARP) for girls, and capacity building through training of trainers on the prohibition of FGM act, and the related laws.

With support from UN WOMEN, women are being sensitized on the principles of equal gender representation at all levels of leadership. MYWO has implemented this program on enhancing Women’s Participation in Political Progress. The project is aimed at instilling aspects of democratic governance, transparency and accountability in all areas of government. Thus MYWO is a strong movement on uplifting the welfare of women and is recognized in all government institutions and levels of governance. (http://mywokenya.org/index.php/ke).

It should be admitted that MYWO is a very good avenue to address the issues affecting women in the country. It was, and still remain a positive step in the advancement of women’s agenda which everyone actually can support since it
falls under weak form of affirmative action policy. Nonetheless, with the second category avenues like pushing of women’s numerical numbers to increase in public appointive and elective posts through Bills in Parliament and the inclusion of gender based affirmative action in the Constitution, is a wanting situation. That needs more research before being pursued by citizens of a given country. Because strong affirmative action as mentioned earlier stagnates economic development of a given gender which it is not directed to. And in most cases, while appointive offices are being filled, the most qualified people are left out with a view that the selecting committee is fulfilling the Constitutional gender thresh hold. Another program which is also pursued by women in Kenya is the Kenya Universities and Colleges Central Placement Service’s affirmative action policy.

4.3. Kenya Universities and Colleges Central Placement Service (KUCCPS)
The Kenya Universities and Colleges Central Placement Service was established as a Body Corporate under Section 55 of the Universities Act No. 42 of 2012, with its functions being, among others to co-ordinate the Placement of Government Sponsored Students to Universities and Colleges. A placement Policy and procedure for placement was subsequently developed and approved by the Board of the Placement Service. KUCCPS took over from the defunct Joint Admission Board (JAB). The students selected by KUCCPS enjoy easier education funding from the government, unlike self-sponsored students. Regular students who qualify get between Sh40, 000 and Sh50, 000 from Higher Education Loans Board (HELB) to fund their education. In addition, the government pays Sh6,000 in
tuition fees per semester while the rest is sent to the students account to cater for their expenses in the colleges.

In the announcement for this year’s (2014) intake based on the total declared capacity for degree programmes under Government sponsorship, and the performance analysis of the 2013 K.C.S.E Examination results, the Placement Service had set the cut off point for admission to degree programmes at B of 60 points for male candidates and B- of 58 points for female candidates. (advert_kuccps.pdf)

This research posits an argument that the KUCCPS affirmative action policy lead to reverse discrimination. Two points lower for women than that of men, bring a lot of concern of justice to the men of this nation, as this leads to reverse discrimination. Take for example, a boy who grew up in the remote village of Tana River or West Pokot, or a boy who has been studying in a village secondary school and get a mean of B- of 58 points, fails to join a public university under KUCCPS, while a woman who had an opportunity to study at Starehe girls or Alliance girls gets a B- of 58 finally gets a chance to join the public university under KUCCPS. Between these two people who needs affirmative action? Is it the boy who learned under hardship or a girl who studied under good condition? The traditional affirmative action of KUCCPS thus proves to be unjust and discriminatory to the men of this nation. By discrimination here, it means actions which go against the moral ideal of equality. In this context, equality can be specified as equal rights, equal access to public realm, public goods, offices, equal
treatment under the law, hence leading to equality of citizenship. This will be discussed further in the chapter that follows. However, the World Bank also gave a report on the Kenya gender parity which acted as a catalyst for Kenyans to push for gender equity.

**4.4. The Kenya Strategic Country Gender Assessment**

The Kenya strategic Country Gender Assessment Report by the World Bank begins by providing a country’s context: detailed country gender equality and equity profile, including an assessment of the cost of gender exclusion. The report which was published in October 2003 was given at a time of transition from the Kenya African National Union (KANU) government led by former president Moi, and the National Rainbow Coalition (NARC) party led by former President Mwai Kibaki. The transitional processes presented opportunities and challenges. More than ever, Kibaki’s regime illustrated the importance of an established gender responsive, legal policy, and institutional framework. When the new permanent secretaries were first named, there were at least five women, four of whom held strategic portfolios. Two of them were later removed. Thus, by the time of publication of the report, of the twenty four permanent secretaries, three were women. But since there were no quotas or policy on affirmative action, it was not possible to say whether or not more women were to be appointed to senior decision making positions. It was also not possible at that point in time to state authoritatively the institutional and legal framework the Government was to adopt vis-a-vis gender. It was therefore proposed that there exist national gender
machinery, the Women’s Bureau, to be elevated from a division within a department to a full department. And the minister for Gender, Sports, Culture and Social Services had committed to establishing a gender commission.

Again at the time of going to print the report, 23rd October 2003, Parliament was debating the National Commission on Gender Bill to establish a Gender Commission. This was in keeping with the commitments made by the Government when it presented its third and fourth reports to the UN’s Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) in New York on January 2003.

Nonetheless, the report also indicated that the NARC government made commendable efforts in ensuring women’s representation in the Cabinet with three women cabinet ministers and three assistant ministers, the highest ever in the history of the country. However, much was still needed to be done in ensuring gender parity in decision making in the country, in respect of both elective and appointive positions. A legacy of systemic, institutionalized and legalized gender bias, weak national gender machinery and lack of a national policy on gender were some of the challenges the NARC Government faced in redressing the balance, and ensuring an equitable sustainable policy and legal framework.

The report also stressed that women and girls formed majority of the population. Standing at 50.5%; and harnessing their economic potential and institutionalizing gender-responsive policy and law making were key elements in creating a
prosperous Kenya, with a sustainable economic future. It held that, while women had been able to organise at the community level, and although they were the major economic contributors at all levels, they had limited economic control at the household level.

At the national level, the report claimed that women’s access to and control over resources was virtually non-existent. They only owned 1% of the registered land, yet they formed 75% of the agricultural labor force. The report claimed that women’s ability to organise at the community level had also not translated into political clout. They only constituted 8.1% of the leadership in the local authorities after the 1997 general elections. Local authority reform and community access to, and control over resources were therefore, important factors in ensuring gender parity.

In examining women’s access to and control over property, the three types of law come into play: matrimonial, family and succession laws. Kenyan law by then recognized four types of marriages: African Customary, Muslim, Hindu, Christian and Civil marriages. Under African customary and Muslim law, women enter potentially polygamous unions. And since there was no legal requirement that all marriages be registered, it was possible for a woman to enter a polygamous union without knowing it. Under the old Constitution of Kenya on African customary law, women had no property rights in marriage. The law was also silent on what happens upon the dissolution of the marriage. According to the report, not only did the old Constitution discriminate against women, but also provided a legal
framework that institutionalised their impoverishment. Section 82(4(b)) of the old Constitution provided that the prohibition on discriminatory laws (contained in section 82(2)) does not apply to personal and customary law. These were the areas of law that affected women the most, as they relate to marriage and devolution of property (inheritance).

This can be argued that goes against Lockean ideologies as stated in chapter three, that men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one deny himself of his natural liberty, and puts on the bonds of Civil Society is by agreeing with other men to enjoin and unite into a community, for their comfortable, safe, and peaceful living amongst one another, in a secure enjoyment of their properties, and a greater security against any that are not of it (John Locke, 1690). Thus women had to champion through political avenues to be heard and to allowed access to public institutions. This triggered the formation of Kenya Women Parliamentary Association (KEWOPA) which would champion unending quest for women to be heard, and their plight be addressed through AAPs, and Bills touching on family life. With such avenues, the government would be forced to put into perspective the gender issues for the advantage of women.
4.5. Kenyan Women Parliamentary Association (KEWOPA)

This is a cross-party women’s political caucus. Kenya Women Parliamentary Association (KEWOPA) is one means of ensuring that the issues affecting women are integrated into legislation. KEWOPA is an important partner for many donors and organizations concerned with good governance, and the rights of women and children in Kenya. Because its membership is made up of all women parliamentarians in the country, it is a strategic player in the Kenyan women’s movement.

KEWOPA’s capacity building strategy applies to supporting the MPs directly in order that they can manage the competing demands of their parliamentary duties, political party responsibilities and constituency roles. For efficient delivery of services by the women MPs, KEWOPA ensures the following: First, each MP must have a competent staff that can manage her schedule as well as liaise with the KEWOPA secretariat, media and other actors. KEWOPA provides training on parliamentary processes; results based management and other professional skills to MPs’ personal assistants in order that they can provide specialized services MPs require. Secondly, in order to participate effectively in parliament, MPs must have access to relevant information upon which they can base their interventions and lobbying. KEWOPA therefore provides research and produces policy briefs on key issues. The capacity building and technical support received by KEWOPA members as well as other parliamentarians have actually resulted in creating a
powerful lobby group within parliament, despite their minority status. This has been evident through their substantive contribution to parliamentary businesses.

One of the major focus for KEWOPA in 2011 was to ensure the full implementation of the current Constitution. Nine KEWOPA members were on the Constitutional Implementation Committee (CIC), which is the most strategic forum for making sure that the gender gains are not lost. Linked to this, is the continued work on the so called ‘Family Bills’: the Matrimonial Property Bill, the Marriage Bill and the Family Protection Bill. According to the report by FIDA on the 10th parliament, the Marriage Bill which is already presented to the floor of the 11th National assembly seeks to address some of the gender inequalities witnessed in Kenya’s marriage laws, and as such is supposed to promote gender equality and development. Some of the critical issues addressed in the Bill include but not limited to: payment of dowry, marriages by virtue of cohabitation and polygamous marriages. Further, the Bill comprehensively addresses the rights and responsibilities of married couples including: the right to maintenance and the right to pledge the credit of one’s spouse. Addressed also are ways of handling matrimonial disputes, divorce, matrimonial property, and the maintenance and custody of children. (A Gender Audit Study of the 10th Parliament, pp. 22-23)

A major focus of the KEWOPA’s secretariat is to ensure that issues pertaining to women are addressed at parliamentary level, and to identify the best means to lobby for women’s issues with all MPs and not just women alone. Taking into
account the importance of working with men as a means of addressing the inadequate numbers of women MPs, KEWOPA has continued to work with male MPs as gender advocates to pass various bills pertaining to gender parity.

Given the need to increase women’s perspective, and recognizing the significant challenges that women have in gaining a place in parliament in the first place, one of the focus areas for KEWOPA is to keep the existing women MPs in parliament. To achieve this, KEWOPA supports the MPs in their constituencies. Thus, one innovative constituency-level intervention funded by Gender and Governance Program (GGP) in 2010 was to address accountability within the management of Constituency Development Funds (CDFs), which is one of the mechanisms to devolve decision-making to local level. Local CDF committees, under the patronage of an MP, make decisions about how funds are used, then Project Management Committees (PMCs) are set up for each project, for example, a school, or a public latrine. The PMCs, comprising of local community members, often lack the necessary management skills, KEWOPA thus undertakes project management trainings for PMCs in each of the KEWOPA member’s constituency, for them to deliver quality services to their constituents (www.gendergovernancekenya.org)

Such activity not only reinforces good governance, but it also reflects well on the MP’s performance. The trainings have, in some cases, led to greater transparency especially in relation to procurement processes which are potential areas for
corruption. Prior to every PMC’s training, the facilitators and the MP go through the key CDF paperwork in the constituency before deciding on which weak areas to focus on during training.

Another real KEWOPA success story is the formation of The Equal Opportunities Committee (EOC). The EOC was set up in 2008, after concerted lobbying and efforts funded by the Canadian International Development Agency – Gender Equality Support Programme (CIDA-GESP). One aspect of its work was the investigation, reporting and making recommendations on all aspects of discrimination, including gender, disability and ethnicity. KEWOPA supports the committee in strategic planning, capacity building to enable its members to understand the EOC mandate, by highlighting the bills that need to be brought to parliament and providing expert advice, research and tools to empower the members. (www.kewopa.org) KEWOPA therefore remains an important union for female MPs, with the main objective of making sure that women’s agenda is put into perspective, and all Bills affecting women are pushed to go through in Parliament.

4.5.1. The Kenya Constitutional (Amendment) Bill No. 32 2007
The Affirmative Action Bill of 2007 was presented to the 9th Parliament after women had launched a strong petition to collect one million signatures to support their desire to see parliament pass it. It was also after culmination of various public rallies, road shows and other initiatives by women and their male supporters to gain support for the Affirmative Action bill 2007. The bill no 32 2007 on
Affirmative Action sought to create 50 automatic seats for women in the 10th Parliament and create additional 40 constituencies in the country. This was a Government bill tabled by the then Justice and Constitutional Affairs Minister Hon. Martha Karua. The bill was seconded by the then Attorney General Amos Wako and supported by former Finance Minister Amos Kimunya who argued that the Kibaki’s government wanted to leave a legacy of affirmative action for women. The minister who tabled the motion defended the creation of 50 special seats for women as an affirmative action issue, which sought to put women’s representation in Parliament at par with their population size.

As discussed in chapter one, Affirmative Action Bill 2007 on 50 automatic seats for women in the 10th Parliament met with strong opposition from the general public, and within the Parliament. MPs accused the Attorney General and the Minister for Justice and Constitutional Affairs of sneaking the affirmative action clause into the Constitutional of Kenya (Amendment) Bill 2007 and chided Wako for drafting a flawed affirmative action bill. Members of parliament from across the political divide had vowed to shoot down the Amendment Bill 2007, unless critical provision on nomination methodology was addressed. The clause on the 50 seats representation by women failed to elaborate on how the seats were arrived at and who qualifies to any of the seats.

Secondly, MPs from both divide had asked “why was the clause sneaked and put together with a bill that seeks to increase the number of constituencies? MPs
argued that the Bill clashed with Section 53 of the Old Constitution, which gives political parties the authority to nominate MPs. Further, the bill did not address the course of action if a party leader failed to embrace the affirmative action. This left room for party leaders to award their cronies the nomination slots. The MPs also argued that the bill was highly defective because it did not include the disabled, the visually impaired, the youth, those from minority communities and religions.

Those who proposed the bill however argued that women make up to 52% of the Kenyan population, but were underrepresented in parliament. Of the 222 MPs in the 9th Parliament, only 18 were women; 10 were elected and 8 nominated. The story in local authorities was also the same. Women held an insignificant 377 out of 2,837 civic seats. There was also the realization that women should be evaluated on the basis that they did not get similar opportunities in comparison to their male counterparts earlier in life.

During debate on the bill, women camped outside the Parliament building. The scores of women in the civil society, former MPs, women bodies especially, Maendeleo ya Wanawake Organization members, the National Women Coordinating Committee, educationists, and media specialists, all pitched for the endorsement of the Constitution of Kenya (Amendment) Bill 2007. They wanted to see MPs entrench into the statues a law that would enhance affirmative action in terms of representation in Parliament. All these arose from the acknowledgement that Kenya’s Parliament stand as the odd one out in the region with the least
number of women legislators. The 18 Women MPs in the 9th Parliament constituted (8.1%) of the members which compared unfavorably with the desires of global figures of 30 per cent. Compared to other countries in the region, for example, Rwanda and Uganda, of which had better women representation. The Kenyan Parliament had insignificant number of women MPs.

Women leaders had vowed not to relent in their quest for 50 special parliamentary seats. Led by the then convener of the National Women Coordinating Committee, Mrs. Ida Odinga, they lobbied for the adoption of the bill as part of affirmative action that would guarantee wider political representation for women. The women leaders argued that getting women into institutions of governance; such as political parties needs a conducive norm rules and practices that are inclusive and must address the creation of political space on the concerns of women in Kenya. Political structures, they argued are the major obstacles to women’s advancement in politics, primarily because they are dominated by men whose style of politics is based on competition and confrontation. The bill stressed that men formulate the rules in political arena, which include electoral rules. Thus, women advocated for the recognition of women’s role in governance, and this called for policies such as affirmative action to provide an enabling condition needed for establishing the legitimacy of women as political actors and to institute their right to political office and other institutions of governance.
4.5.2. The Equal Opportunities Bill 2007

This Bill presented to the 10th Parliament seeks to promote equal opportunities for all persons, to prohibit discrimination and provide remedies for victims of discrimination, and for related purposes of ending discrimination in places of work and academia. The objective of the Bill was to provide for equality of opportunity and to counteract direct and indirect discrimination on the grounds of gender, race, ethnicity, religion, disability or any other prohibited grounds.

The Bill proposes that: first, all public bodies, employers and providers of public service make an active, targeted and systematic effort to promote gender equality in all sectors of society, enterprises and organizations [Section 5(1)]. Secondly, all public boards, bodies, commissions and similar bodies set up by a statute, or appointed by any minister for the purpose of public management or planning purposes shall endeavor to have an equal composition of women and men [Section (1)]. Thirdly, all authorities or organizations which are to suggest members of boards and commissions shall suggest both a woman and a man and if more than one seat is to be filled, an equal number of women and men shall be suggested. In case of an uneven number of members, only one more of one gender than of the other gender may be suggested [Section 6(2)]. And all boards, committees, commissions or similar management authorities within the Public State administration should have an equal composition of women and men [Section 7(1)].
Fourthly, all boards, executive committees or similar collective managements of independent institutions, partnerships and private and public limited companies which do not fall under the public administration should, as far as possible, have a balanced composition of women and men [Section 7(2)]. Fifth, all ministries, state institutions and public enterprises shall on every second year before the 1st of September give a report on gender equality [Section 8(1)].

The Bill also states clearly that, no person shall do any act which: is likely to offend, insult, humiliate or intimidate another person or group of persons on account of their gender, race, ethnic origin, or religion. Action which is done with the intention of inciting gender, racial or religious hatred is also prohibited [Section 10(1)]. And Offensive behaviour is prohibited (Section 10). Further discrimination is prohibited in education (Section 12), health services (Section 13), property (Section 16), appointment in public office (Section 21) among others.

The bill also provides for the establishment of a board to be known as the Equality Board whose amongst other functions will be: to hear and determine complaints of discrimination or contravention of this Act referred to it by any person. Implement programs aimed at the elimination of all forms of discrimination and promote equality of opportunity between persons of different states, receive, investigate and as far as possible conciliate allegations of discrimination. Its mandate is also to develop, conduct and foster research and educational programmes and other programmes for the purpose of eliminating discrimination and promoting equality
of opportunity and good relations between persons of different status. The board’s function is also to review quality laws, and policies, and to champion for adherence to the clause of gender equity in the Constitution.

4.6. The Constitution of Kenya
A commitment to the principles of equality and non-discrimination is woven throughout the Kenyan Constitution. Driven at least in part by a desire to counteract the ethnic and regional tensions which played such a decisive and destructive role in the 2007 post-election violence, the Constitution reflects a widely held belief that guarantees equality, equitable distribution of resources and balance of power. That represents the best way to reduce the influence of ethnicity, and gender disparity on political decision making, and thereby secure a peaceful future for the country.

Thus, the preamble of the Constitution matches recognition of Kenya’s ethnic, gender, cultural and religious diversity with a determination to live in peace and unity, and equality is listed as one of the six essential values upon which governance should be based. These expressions of principle are given legal force in Article 10 (2) (b), which includes human dignity, equity, social justice, equality, non-discrimination and protection of the marginalised among the national values. There are the principles of governance that are to be used in applying, and interpreting the Constitution and other laws, in making or implementing policy decisions. This is further emphasized in Article 20 (4) (a) which lists human dignity, equality and equity as values to be promoted in interpreting the Bill of
Rights. Article 21 (3) which states that “all State organs and all public officers have the duty to address the needs of vulnerable groups within the society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic group, religious or cultural communities”.

The right to equality and non-discrimination is expressed in Article 27 (1-8) of the Constitution and clearly states:

Every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres… A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in the clause. To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

This is further stressed in article 27 (7) holding that any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need. It represents a substantial improvement on the right as provided in Article 81 (b) of the Constitution stating that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

One can say that the clause quoted above on affirmative action is gender neutral, but the argument I put across here is that, affirmative action is Kenya today is synonymous to women. Such a move to put more interest on one gender grounds
the notion of justice into subject-centered concept of justice. As stressed by Buchanan (1990) that the fundamental equality of persons can be supported in coherent moral political theory in two ways: the first framework operates with a very broad conception of fairness, according to which treating persons as fairly by addressing within limit those morally arbitrary disadvantages that significantly impede their flourishing. The second framework accommodates in a different way the considered judgment that noncontributors have rights. Instead of attempting to ground all basic entitlement of fairness, it maintains the respect and concern for persons as their foundation. Thus we need to strive to opt for AA policies which will work for all in the society, with an aim of doing justice for all.

Article 27 begins with a guarantee of equality before the law, equal protection, and benefit of the law, this is a guarantee which is not present in the previous Constitution. Nonetheless, equality is defined as including full and equal enjoyment of all rights and freedoms. These provisions provide important additional protection which goes beyond the protection from discrimination provided in Article 27 (4) as stated above. The Constitution significantly expands the list of protected groups from that found in the previous Constitution. The list grants substantially increased protection to women, who are likely to benefit from protection on grounds of pregnancy and marital status. In addition, it prohibits discrimination on grounds of disability and age, neither of which is included in the list of protected groups in the previous Constitution.
In common with the previous Constitution, the current Constitution prohibits both direct and indirect discrimination, though no definition of either term is provided in the document. And even if the Constitution does not cover segregation, harassment, or victimization, the fact that some of these forms of discrimination are covered in other Kenyan legislation governing specific areas of life, makes them prohibited. Article 259 (4) (b) explains this exclusively that “the word “includes” means “includes, but is not limited to”.

As explained above, Article 27 (6) creates a duty for affirmative action, a concept which is defined in Article 260; as any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom. Article 27 (6) states that “[…] the State shall take legislative and other measures, including, but not limited to affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination,” is of importance to our study as it protects both gender.

However, part 3 of the Bill of Rights in the Constitution imposes specific affirmative action requirements on the state in relation to groups with particular characteristics, including the youth and marginalised groups. And Constitution defines a marginalised group in Article 260 to mean a group of people who because of laws or practices before, on, or after the effective date of the
Constitution, were or are disadvantaged by discrimination on one, or more of the
grounds in Article 27 (4).

Indeed, Article 24 (2-3) set out detailed requirements applicable to legislation, the
state or persons seeking to justify the limitation of freedom. Secondly, it includes
dignity, equality and freedom as the bases of a democratic society, raising the
possibility that the equality desired need to ensure that the enjoyment of rights and
fundamental freedoms by any individual does not prejudice the rights and
fundamental freedoms of others.

Article 27 (3) also provides a broad guarantee of equal treatment of women and
men “including the right to equal opportunities in political, economic, cultural and
social activities”. This is stressed in Article 81 (b) of the Constitution, where
gender equality features prominently. In Article 45 (3) equal rights for men and
women are guaranteed during a marriage and at its dissolution; equality between
male and female parents and spouses is guaranteed in the acquisition of citizenship
through birth and marriage; and the “elimination of gender discrimination in law,
customs and practices” related to land is included among the principles of land
policy.

As mentioned above, the supremacy of the Constitution as established under
Article 2 in particular, which covers even the customary law, significantly extends
the right to non-discrimination in a range of areas of law, governing personal and
family relationships and property rights. The constitution further in Article 27 (3–
4) stresses the importance of equal treatment, it states “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres, and that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. This has lead to difficulty in implementation of the affirmative action clause in the Constitution, since the AAPs in Kenya seems to work towards uplifting the economic status of only the female gender.

4.6.1. Implementation of Affirmative Action Clause in the Constitution of Kenya
Implementation of the affirmative action clause in the Constitution has not been easy, and it will continue to illicit mixed reaction from the general public, since the Constitution itself does not give a methodology to be employed in applying the said clause. As mentioned above, Article 27 of the Constitution provides that every person is equal before the law, and has the right to equal protection and equal benefit of the law. Article 27 (4) specifically prohibits any form of discrimination either direct or indirect on the basis of gender, race, sex or any other grounds. And even though Government policy is well grounded on the provisions of the Constitution to protect all citizens, article 27 (6) and (7) impose on the state the obligation to take legislative and other measures, including affirmative action programmes and polices designed to redress any disadvantage suffered by
individuals, or groups of individuals because of past discrimination. And this has been given a notch higher in Article 81 (b), which has triggered the attention of most Kenyans, including the Commission for the Implementation of the Constitution’s (CIC) led by Mr Charles Nyachae. The principle of affirmative action in respect to gender representation in elective and appointive bodies as prescribed in Article 81(b) of the Constitution posted a challenge in light of the provisions of Article 97 of the Constitution on the membership of the National assembly. Article 81 (b) reiterates and reinforces the principle of affirmative action as prescribed in Article 27 (8) of the Constitution, which provides; in addition to the measures contemplated in clause (6). Article 81 (b) “the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

The two-thirds gender ratio is also a requirement at the county level and is adequately provided for in the constitution. Article 175 (c) states that “County governments established under this Constitution shall reflect the principle that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender”. According to Article 177 (1), a county assembly consists of, among other members: First, are members elected by the registered voters of the wards. Each ward constituting a single member of a constituency who is elected on the same day of general election with Members of Parliament, being the second Tuesday of August, in every fifth year. Secondly, is
the number of special seat members necessary to ensure that no more than two-thirds of the memberships of the assembly are of the same gender. Thirdly, is the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament. Article 197 (1) also stresses this principle and states that “Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender”.

There are many other provisions in the Constitution that address the principle of affirmative action. Nonetheless, Article 97 of the Constitution does not provide a methodology to be used to ensure implementation of Article 81 (b) in the event that a result of an election for the National Assembly, any appointive or elective office does not achieve the required constitutional gender ratio prescribed by Article 81(b). Unfortunately, none of the State organs charged with the responsibility of implementing the Constitution has a practical solution to this difficulty. Even when the clause was taken to Supreme Court for interpretation as mentioned in chapter one, the Judges ruled that the two-thirds ratio would be achieved progressively, the five bench judge: Justices Jacktone Ojwang’ Philip Tunoi, Smokin Wanjala, Njoki Ndung’u and Chief Justice, Willy Mutunga ruled that the progressive realization of the affirmative action is not unconstitutional, since the gender quota will eventually be achieved in bits through appropriate legislation. Consequently, the Elections Bill could not be finalized to give effect to the contingency which was likely to be faced in light of Article 81(b) of the Constitution.
CIC also had considered different interpretations to the effect that: first, the two-thirds principle expressed in Article 81(b) is progressive and does not require immediate realisation. Secondly, the principles of affirmative action and the two-thirds gender ratio demanded realisation in the last election as well as all future elections to the National Assembly.

However, CIC was of the views that: first the principles of affirmative action and gender ratio prescribed in Articles 27(8) and 81(b) of the Constitution are not progressive. They demanded immediate realization if the latter and the spirit of the Constitution are to be respected. Secondly, the use of the word “progressive” in the Constitution is specific to those provisions to which the principle of progressive realization applies. Thirdly, the Elections Bill cannot be finalized without providing an effective mechanism for the implementation of Article 81(b) of the Constitution, which clearly requires that electoral system provides a mechanism for achieving the two-thirds gender ratio.

CIC and other stakeholders have explored various options, but none would effectively address the requirements of Articles 27(8) and 81(b) of the Constitution. Consequently, CIC was of the opinion that the most prudent option would be to import the provisions of Article 177(1) (b) of the Constitution to the provisions of Article 97 of the Constitution (with necessary modifications). The effect of the proposed amendment would be that, if the required gender ratio was not achieved through the elections, political parties would be required to nominate
additional Members of Parliament to meet the gender requirement in the Constitution.

Thus, the implementation of the two thirds ratio poses a challenge to the citizens of this nation, including strong affirmative clauses in the Constitution and the Bills yet to be passed in the National Assembly. With the spirit of the constitution, the National Gender and Equality Commission was formed to look at the needs of the marginalized groups and gender issues in the country.

**4.7. National Gender and Equality Commission (NGEC)**
The National Gender Equality Commission (NGEC) is a Constitutional Commission established by an Act of Parliament in August 2011, as a successor commission to the Kenya National Human Rights and Equality Commission. Pursuant to Article 59 of the Constitution, NGEC derives its mandate from Articles 27, 43, and Chapter Fifteen of the Constitution; and section 8 of NGEC Act of 2011, with the objectives of promoting gender equality and freedom from discrimination. The NGEC mandate is to: first promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution. Secondly, to monitor, facilitate and advise government on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions. Thirdly, to act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality, and freedom from discrimination and relating to special interest groups, including
minorities and marginalized persons, women, persons with disabilities, and children.

The fourth function of the NGEC is to co-ordinate, and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof. And to monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution. The fifth function is to investigate on its own initiative, or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination, and make recommendations for the improvement of the functioning of the institutions concerned. And to work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 (3) of the Constitution, which states that “The State shall provide appropriate social security to persons who are unable to support themselves and their dependants”; and other written laws.

The NGEC also co-ordinates and advises the government on public education programmes; for the creation of a culture of respect on the principles of equality, and freedom from discrimination. It conducts, and co-ordinate research activities on matters relating to equality, and freedom from discrimination as contemplated under Article 27 of the Constitution. It also receives and evaluates annual reports on progress made by public institutions and other sectors on compliance with
constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination.

The commission further works with the National Commission on Human Rights, the Commission on Administrative Justice, and other related institutions to ensure efficiency, effectiveness and complementarity in their activities. It endeavors to establish mechanisms for referrals, and collaboration in the protection, and promotion of rights related to the principle of equality and freedom from discrimination. The commission also prepares and submits annual reports to Parliament on the status of implementation of its obligations under this Act. It also conducts audits on the status of special interest groups including minorities, marginalised groups, and persons with disabilities, women, youth and children.

More importantly, the commission establishes consistent data protection legislation, databases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination for these interest groups in Kenya.

Thus the overreaching goal for NGEC is to contribute to the reduction of gender inequalities and the discrimination against all; women, men, persons with disabilities, the youth, children, the elderly, minorities and marginalized communities. (The National Gender and Equality Commission Act, 2011).
4.8. Gender Based Affirmative Action Policies in Kenya and the Concept of Justice
As discussed above, all the avenues which have been pursued by Kenyans with a hope of realizing gender equality in the country have proved to elicit emotions among the citizens of this nation. This is due to lack of moral and philosophical basis for AAP before coming up with a particular policy. But above all, the affirmative action policies in the country fall under the strong type of AA, which is always deemed to be an unjust practice. What is injustice in this sense? Aristotle's justice in the political sense can be of help here, justice is equal treatment under law for all citizens. Thus injustice is the violation of that equality, discriminating for or against a group of citizens, favoring them with special immunities and privileges, or depriving them of those guaranteed to the others.

Strong AAPs as discussed earlier use preferential procedures to favour particular individuals because of their gender, race and ethnic background. It is a kind of preferential treatment that is usually implemented through favoring plans, quota systems, and other approaches. The quota system in the Kenyan situation means that an organization or elective commission has predetermined number of percentages of women to be appointed for a public office. As stressed in Article 81 (b) of the Constitution; that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender, makes affirmative action in the country be of the strong type. The Question which this thesis is forwarding is that,
do we elect people for professional office because of their gender, or because they merit such positions? The tentative answer is that, meritocracy should be the norm of the day.

If there are ten men and five women for an interview for public offices, and there are only five slots to be filled, and during the interview, the first woman becomes number eight, and the second number ten. Following the dictates of the Kenyan Constitution, three men and two women will be chosen for the slots. And the men who were fourth to the seventh position will be automatically dismissed. In this case, the AAP in the constitution has violated the rights of these applicants for equal consideration, and the rights to maximally compete for an open position, thus violating their rights too for equal opportunity. It can be easily argued that injustice has been done to the individuals who are skipped to give way for the less competent persons to fill positions for public offices.

As discussed earlier, injustice done here is in treating a person better than others, and it is universally accepted that the wrong done to a competitor is injustice, since people in an interview are all assignable persons. Justice therefore implies something which is not only right to do, and wrong not to do, but that which some individual person can claim from us; as his/her moral right. No one has a moral right to our generosity or beneficence, because we are not morally bound to practice such virtues towards any given individual. Hence our moral responsibility
to uphold the rights of each individual person in the society, whether one is a woman or man.

It can therefore be stressed that affirmative action in Kenya undermines the regime of merit, which requires neutral distribution of social rewards according to objective criteria. This, lead to reverse discrimination to men of this nation, since, when a policy restrict people to choose a particular number of women to public positions and qualified men are skipped, then it can be categorically contested that those men skipped have suffered discrimination. As Newton (1973) stressed, just as the previous discrimination did, this reverse discrimination violates the public equality which defines citizenship, and destroys the rule of law for the areas in which this favors are guaranteed.

The support women have enjoyed through AA, and marginalization of men has led to the formation of Maendeleo Ya Wanaume Organization (Movement for the Development of Men) in Kenya. Led by Mr. Nderitu Njoka, Maendeleo ya Wanaume organization fights for the rights of men in this Nation. This was after realization that men are becoming “an endangered species”, since gender based affirmative action in Kenya only concentrates on the wellbeing of women and the girl child.

Speaking on 15th May 2013 after rescuing Mr. Francis Ndung’u who had been locked in the house in the outskirts of Kikuyu town since November 2012, Mr. Nderitu Njoka stressed that there are many men who are suffering in Kenya, being
battered by their wives, and even ending up being denied opportunity to seek medical attention like the case of Mr. Ndung’u. He held that there are many men who have mysteriously died having finished building good rental houses, or their modern homes. He also confirmed that Kenya being a patriarchal society, there are many cases of men being mistreated without being reported; this is due to humiliation men get having reported such cases. And it was a time the government put in place policies that will work towards the uplifting the wellbeing of men in the Kenyan society, (Citizen T.V. 9:00 pm news: 15th May 2013).

Logically it can be emphasized that, all discrimination is wrong prima facie, because it violates justice, and that goes even to reverse discrimination too. Since no violation of justice among the citizens may be justified which may overcome the prima facie objection by appeal to the ideal of equality, for the ideal is logically dependent upon the notion of justice. Reverse discrimination, then, which attempts no other justification than an appeal to equality, is wrong. Since the practice of reverse discrimination undermines the foundation of the very ideal in whose name it is advocated. It hence destroys justice, law, equality and citizenship itself, and replaces them with power struggles and popular contests. Thus strong gender based AAPs in Kenya is an unjustified practice which should not be encouraged by any policy.
4.9. Conclusion

This Chapter has explored the gender based affirmative action in Kenya; it has traced the measures which have been taken in the country to put an end to gender discrimination. Beginning from Maendeleo Ya Wanawake Organization (MYWO), affirmative action bills, Joint Admission Board’s gender policies, and the culmination of gender based affirmative action policy in the Constitution. It has concluded that AA in Kenya contravenes theory of justice by treating some citizens better than others, making it an unjust policy.

The next chapter will therefore stipulate the findings, and give out some recommendations on how AAPs can be pursued in Kenya without violating the rights of individual citizens from getting just treatment. It will also give the general conclusion of the whole thesis.
CHAPTER FIVE

5.0. FINDINGS, RECOMMENDATIONS, AND GENERAL CONCLUSION

5.1. Findings
Gender based affirmative action policies have been studied by scholars in many fields, but within philosophy, the major focus has been on determining the philosophical principle of merit. Here, AAP necessitates a discussion about the philosophical principle of merit, which states that the effectiveness of a policy is irrelevant if the fundamental, underlying assumptions about the policy are flawed. Public policies are reflections of philosophical principles that the general citizenry believe to be true and important.

The texts and documents which have been analyzed on this subject have led to the realization that strong affirmative action is not the best way possible to solve gender discriminations which are prevalent in Kenya. It is a policy which perpetuates the problem of marginalization it is meant to solve through reverse discrimination.

This research also found that gender based affirmative action is fully protected by the Constitution, and is a requirement which every public office, or appointive body must adhere to. Such that the former president Kibaki’s appointment of the County Commissioners in 2012, was a tool of heated discussion, with the Civil Rights activists going to court challenging the process of appointment the president used. The court ruled that it was unconstitutional. This was because the
president did not meet the demands of Article 81 (b) of the Constitution which states that not more than two thirds of the members of elective public bodies shall come from the same gender.

The argument put across by this research is that the current women in the Kenyan society have not suffered any harm like the old women of 1950s and 60s. The environment has been so conducive for women to advance academically and economically, it is a matter of concern to compensate the direct victims of discrimination, not extending the benefits to those who have least suffered from the said discrimination. This is what has triggered discontent with affirmative action policies around the world, to the extent of taking the cases to the courts for those who feel to have been harmed by AAP. It has also triggered a demand of compensation for the suffering they have encountered by the implementation of the AAPs. The court cases have been seen across the world, but for the purpose of this research, this chapter will discuss a few which are deemed relevant to the study.

5.1.1. Court Cases Regarding Strong Affirmative Action Policy
While doing research for this thesis, I found that around the globe, affirmative action has been a tool of contention, such that there have been many court cases which will be mentioned in this research to act as a cautionary measures to Kenyans before hopping for SAAPs in the country. It should be understood that, prior to the passage of the Civil Rights Act of 1964, President Kennedy first used the term affirmative action in 1961 in his Executive Order No. 10,925. Its original
intention was not to set up quotas, preferential treatment, or that Darwinian misnomer protected classes. Kennedy’s order sought to use the power of the executive branch and the federal government to monitor and intervene, if necessary, in cases of blatant racial and gender inequalities and discriminatory practices. And even with the passage of the Civil Rights Act of 1964, which gave rise to affirmative action and equal opportunity as distinct legislative philosophies, quotas and preferential treatment were not intrinsic to its application (JOHNSON, J. (1964), *Executive Order 11246*)

Just as Marable (1996) asserted that while advocates argue that affirmative action programs are an important step towards uprooting prejudice and discrimination, and ultimately eliminating gender inequality. The critics argue that these programs spawn a “victim mentality”, encourage stigmatization among recipients, and violate fundamental ideals of fairness, justice, and meritocracy by discriminating against innocent persons.

With above conceptual dilemma, court cases regarding affirmative action began in the 70s when the Supreme Court eliminated inflexible quota in the first famous case known as Bakke case in the United States. Allan Bakke was a white man who applied for admission to the Medical School of the University of California at Davis. Only one hundred slots were available and there were many other applicants. His grades and admission test scores however were good. The medical school denied him admission, and granted admission to several others whose
grades and scores were lower than his. As it turned out, the school had reserved sixteen of the available slots for minority students, many of whom had lower grades and test scores than Bakke. He sued the School, claiming that he has been denied admission because of his race. His case went all the way to the Supreme Court, which was strongly divided but eventually decided in his favour. The majority opinion said that preferring members of a group solely on account of their gender, race or ethnic origin is clear cut instance of discrimination. The court found that quota systems like the one used at the Davis Medical School are unconstitutional, but that in some situation the use of race, gender or minority status in admissions decisions may be permissible. (Holzer – Neumark 2000)

There was another case in the City of Richmond, which has become to be known as Richmond versus Croson. This case involved affirmative action programs at the state and local levels, a Richmond program setting aside 30% of city construction funds for black-owned firms was challenged. Skerry (1997) argued that for the first time, affirmative action was judged as a “highly suspect tool.” The Supreme Court ruled that an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota. He maintained that affirmative action must be subject to strict scrutiny and is unconstitutional, unless gender and racial discrimination can be proven to be widespread throughout a particular industry. The Court also maintained that the purpose of strict scrutiny is to smoke out illegitimate uses of gender or race by assuring that the legislative body is pursuing a goal important enough to warrant
the use of a highly suspect tool like affirmative action. The test also ensures that the means chosen fit this compelling goal so closely, that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Kenya will not be exceptional, and we have had the same problem of affirmative action in the country, just like the case of the U.S.A. When the Kenyan 10th Parliament was divided on the Affirmative Action Bill presented to it on the Article 81 (b) quoted above. The stalemate was taken to the Kenyan Supreme Court for interpretation as discussed in chapter one and chapter four. And the five bench judge ruled that the two-thirds gender rule could not have been achieved in the last general election, but should be achieved progressively. They held that the progressive realization of the affirmative action is not unconstitutional since the gender quota will eventually be achieved in bits through appropriate legislation (Daily Nation 12th December 2012). Thus strong AAPs are unjustified and will continue to have opposition throughout the globe unless we chose mild forms of AAPs to affirm women in the country. Hence strong forms of gender based affirmative action have no moral values, and as rational individuals, we should not opt for such policies.
5.1.2. Moral Theories of Opposition to Strong Affirmative Action Policy
There has been strong opposition to the practice of strong affirmative action, as claimed by Vaughn (2008) that the opposition to strong affirmative action is pinned on utilitarian principle, that those who favour gender preference are simply wrong about the consequences of the policies. Since the consequences are either not as beneficial as supposed, or are actually injurious. The opponents try to undermine the diversity arguments by insisting that gender diversity does not necessarily result in diversity of ideas or outlooks. That there is no scientific evidence supporting the notion that diversity yields benefit in education or learning, and giving priority to gender diversity in workplace, would severely undermine competence and efficacy which are highly valued by the society.

Libertella et al (2008) stressed that the proponents of strong affirmative action support the role model argument that states that preferential policies can have great social utility by creating role models for women, whose self esteem and hopes of success have been dimmed by generations of discrimination. Thus demonstrating to young ones that significant achievement is possible. The argument I put forward here is that the best role models in education are people who are exemplary, the most competent, knowledgeable, inspiring and decent, of whatever gender. Thus having role model of one’s own type is having a genuine good person of any gender, to emulate; these are people who are good in virtue and merit. And the best way to create role models is to promote people because they are best qualified for a job not because they belong to a particular gender.
Vaughn (2008) also insisted that preference makes distinguished women’s achievement under cloud. It hence imposes presumed inferiority. He stressed that preference creates burden and it makes a stigma on the preferred women. He stressed that the women group given special favour by the community is marked as needing special favour and the mark is borne prominently by every one of its members. He continues to contend that there is also non – consequentialist argument for strong affirmative action based on the notion of compensating justice. That historically women were the victims of discrimination by men, but as discussed above, justice requires that members of the female gender be compensated for the past mistreatment, thus gender preference is morally permissible. The concern I extend here on gender preference, is that men who suffer because of compensatory justice; since they are well qualified but denied a job, has nothing to do with the past discrimination on women. And the women who benefit from compensatory justice have suffered very little from discrimination, hence gender preference is unjust.

Even though gender based affirmative action was seen as a technique for jump-starting the process of integrating women into the fabric of a society, for changing the cultures from an exclusive society into an inclusive one, strong affirmative action is immoral. As Vaughn (2008) illustrated that SAAP is notorious for touching off strong feelings that evoke simplistic, knee-jerk answers to questions like; can affirmative action help create a more just and diverse society, or does affirmative action lead to a less just one, divided by gender, race and culture?
Patrick Hall (1991) reiterated that the irony is that SAAPs and equal opportunity acts were originally intended that people be judged on their qualifications as individuals without regard to race, sex, or age. But the policy as it has evolved requires that women and so-called protected classes be judged with such differences in mind. But the use of quotas and preferential hiring is extremely problematic, and at best represents only a pyrrhic victory.

Nonetheless, the ideal that triggered gender based affirmative action is that all persons deserve equal respect and equal opportunity in employment and in education. It was essentially an expression of the fundamental moral principle that equals be treated equally. Two people should not be treated differently unless there are relevant differences between them that should justify dissimilar treatment. This is the idea that influenced Civil Rights Act of 1964 which decreed that:

“It shall be unlawful employment practice for an employer to fail or to refuse to hire or discharge any individual otherwise to discriminate against any individual with respect to his compensation, terms condition or privileges of employment because of such individual’s gender race, colour, religion, or national origin. Or to limit segregated or classify his employees or applicants for employment opportunities, or otherwise adversely affect his status as an employee because of such individuals’ sex, race, colour, or religion”

This should be the underlying factor in the pursuit of equality in Kenya. Strong gender based AA should not be used if it leads to reverse discrimination.

This research also found that SAAPs programs often fail to achieve their objectives. For example, we use a policy to affirm a particular group of people, and after sometimes we again use the same program to uplift the status of the
previously perceived oppressor. We therefore end up in a vicious cycle. Secondly, although SAAP program is a compensatory, there are no criteria which determine when affirmative action program should end. For example, the defunct JAB which has been replace by KUCCPS affirmative action was introduced in 1980s, up to now we still use the same program despite the gains the girl child has received in the current society. Thirdly the programs are an inefficient means of compensating victims of discrimination, because the mode of compensation imposes costs which outweigh benefits. A decision to compensate one group, for example, women without including all other similarly disadvantaged groups or individuals is capricious and arbitrary.

Fourthly SAAP compromises the integrity of unaided but otherwise successful group members while creating self-doubt for the beneficiaries, enmity, mistrust, and resentment among the general public. And the distribution of benefits is often inversely related to the economic need or the extent of injury of the beneficiary. Hence the distribution of benefits rewards individuals who have not suffered injury and therefore have no grounds for compensation. For example, women benefiting from KUCCPS’s affirmative action program have not suffered any discrimination to deserve such benefits. Fiththly, the compensation given of jobs and schooling is often unrelated to any suffered offenses and therefore inappropriate as remedy for the specifiable injuries of identifiable plaintiffs. Since under SAAPs, the costs of compensation are distributed in a fashion unrelated to responsibility for the
original injury. Thus the benefits of reverse discrimination are insufficient to justify the violation of individual rights or the harm done to innocent individuals.

In the sixth place is the realization that SAAP compromises rationally relevant criteria of merit, and it poses a capricious and arbitrary injury to important social norms, since it implies a principle of distributive justice that is seriously inconsistent with principles of individualism, freedom, and equal opportunity. And as discussed earlier in chapter three, our concepts of right, wrong and justice apply to individuals, not to groups. Therefore, ideas of group rights, group injury and group compensation have no place in accepted interpretation of justice.

5.2. Recommendations
These are recommendations which this research deem useful to policy makers in Kenya and all citizens of this grate nation, to consider while selecting a type of affirmative action to uplift social and economic status of any marginalized group in the country. AA as mentioned earlier is notorious for eliciting emotions, and prone to controversies. These recommendations are discussion against the arguments by the proponents of affirmative action policy. They are on compensation, KUCCPS, affirmative action Bills, and the Constitution of Kenya.

5.2.1. On compensation
The proponents of strong affirmative action policy hold a belief that the policy is meant to compensate the victims of past discrimination, which in the case of this research are women. But such a move of extending compensation to those who
have not suffered discrimination in the past ignores, rather than rectifies the enormous discrimination that has existed in the past. Even though justice demands some restitution, it must be restitution that is not susceptible to criticisms. Despite an almost universal failure to consider how this might be achieved, it can be easily accomplished by designing affirmative action programs that make more of an attempt to abide by the principles of restitution. In particular, this requires more of an attempt to first compensate those individuals who are the main victims of discrimination, and secondly to ensure that such compensation is provided by those who have been its main beneficiaries especially the men who discriminated upon these women. The first objective therefore requires programs that provide benefits to older women, Kenyan women in their late fifties and sixties. The second requires an arrangement that ensures that they are funded by the government, for example being given upkeep benefits to help them sustain themselves since they don’t have any source of income.

Furthermore, as Simons (1979) argues with respect to the group fairness, one does not automatically compensate for wrongs to some members of a group by benefiting other members who did not suffer any harm. And with respect to individual fairness, not every woman is a direct victim of discrimination, and not every man is direct beneficiary of the said discrimination. Moreover, in practice SAAPs only benefit some well to do women at the expense of some men who deserve to be considered in public positions.
On the other hand, when an individual has been hired to fill a position that the victim should have filled, the redress appears to right one wrong with another. Hiring a person because of his skills, not because of his gender and create another wrong—letting another individual go because of nothing that had to do with his/her work. As Tierney (1997) contended, the problem multiplies when we move from compensation of the individual to compensation of the group. A strong AA plan has at times used the rationale of compensation to increase the numbers of minority and female students in institutions of higher learning. For example, the KUCCPS’s cut off grade for girls has been two points lower than that of boys joining public universities. And as I insisted earlier, the current women in Kenya have not been victimized through discrimination in education and segregation; such that the claim of discrimination has not impacted on every aspect of a woman’s life from schooling to employment, for them to demand SAAPs in the country. Thus, a demand for compensation is unjustified, unless we compensate the direct victims of discrimination.

5.2.2. On Kenya Universities and Colleges Central Placement Service (KUCCPS)

As mentioned earlier, the KUCCPS’s affirmative action policy leads to reverse discrimination. What is needed then is for the KUCCPS members to consider each student as an individual who deserves a place in the university, taking into account the condition on which these students studied, and their family background. This is practically being used by HELB while giving out money for students. The students, who come from poor families, get large sum of money compared to
students who come from moderate or rich families. KUCCPS should therefore seek to have in their data base the information of each student sitting for Kenya Certificate of Secondary Education (KCSE). To be included here are the family background, the location of the school they are studying, and the mode of studies: is the student a day scholar or in boarding schools, and any other challenges the students are facing in their life. The information should be given by schools’ heads as they register students for exams. This will make it easy for KUCCPS to evaluate the strength of each person joining the university, rather than setting a cut off grade that affect the whole nation, without considering the capacity of every student who sat for the KCSE exams. With the mentioned information in the JAB’s data base, each student will have equal consideration before picking them to join public universities. Hence, equal treatment under the law, leading to equality of citizenship.

As Newton (1973) stressed, all discrimination is wrong *prima facie* because it violates justice, and this include reverse discrimination being done by KUCCPS. No violation of justice among Kenyans may be justified, even by appeal to the ideal of equality, for that ideal is logically dependent upon the notion of justice. Thus reverse discrimination which is suffered by men of Kenya has no justification even through an appeal of equality, it is wrong. Thus, for KUCCPS members to defend themselves against the accusation of promotion of reverse discrimination through the idea of gender equality is wrong. They need to stipulate some working formula by asking themselves, do we discriminate against men by
lowering the entry grade to female candidates? For women who have been perceived to be historically oppressed, the question is, what amount of discrimination can wipe out the initial discrimination? For more than twenty years of JAB’s recruitment, which now being extended by KUCCPS, the lowering of entry grade for female students has done more harm than good to male students who have struggled to get places in universities by working hard in school, even in difficult situations.

The philosophy behind KUCCPS’ affirmative action policy is that, the procedure is compensatory to the girl child who had been discriminated upon. But according to the compensatory theory, it is the direct victim of discrimination who should be compensated. These should be old women in their fifties and sixties as mentioned above. These are women who were taking care of animals when their male siblings were going to schools, or those old women who were married off while teenagers for their parents to get dowry to take their male siblings to school, not the current Kenyan girl child. Or else we will be telling our sons that their mothers and sisters are not strong academically, such that we need a policy to lower their grades to find opportunity in the public universities.

5.2.3. On Constitutional Amendment Bills
The affirmative action bills presented to the floor of the National Assembly are always meant to work for the benefit of womenfolk in the country. However, such a move by women themselves to fight for more seats in Parliament and for favors contravenes the fundamental requirements of a just society. According to Rawls
(1971), the society is typically characterized by a conflict as well as an identity of interests. Therefore it must have a set of principles for assigning basic rights and duties for determining the appropriate distribution of the benefits and burdens of social cooperation. These, according Rawls (1971), are the principles of distributive or social justice which specify the kinds of social cooperation that can be entered into and the forms of government that can be established. Thus, a society is not well organized unless: first, its members know and accept the same principles of social justice, and secondly the basic social institutions generally satisfy these principles.

It is therefore required that if the Kenyan society is to be well organized, its members including women, must determine by rational reflection what are to be their principles of justice. If the principles selected are to be reasonable and justifiable, they must be selected through a procedure that is fair. And if the selection of justice is to be fair, the possibility of bias operating on their selection must be removed, hence in the selection of the principles, no one should have insider’s knowledge. For example, having affirmative action entrenched in the Constitution to benefit only one gender. There is a need to be ignorant of individual’s needs and one’s own wealth, status, abilities, intelligence, inclinations, aspirations, and even beliefs about goodness before coming up with SAAPs. This is what Rawls (1971) termed as the veil of ignorance, that must select the principles as if people were behind the veil. This is to ensure that nobody
is advantaged or disadvantaged in the choice of principles by his or her own unique circumstances.

When the Kenyan women go to the street demonstrating and collecting a million signatures for affirmative action to be put in place for their own sake, do they strive to create a just Kenyan society? According to Rawls, they do not; since they do not follow the two principle of social justice discussed in chapter three; first which requires that each person has an equal right to the most extensive basic liberty compatible with a similar liberty for others. And being aware of the second principle of social justice that all social goods, for example, opportunities, income which are social and economic inequalities, be arranged so that they are both reasonably expected to be for everyone’s advantage and attached to positions and offices open to all. This corresponds to Aristotle’s (384 – 322) teleology which states that the good is that all things aim. Kenyans as rational beings must therefore strive for the good of each individual as end, not as means to an end. Not to come up with policies which only advantage a particular gender, but to come up with policies which will work for the good of the whole citizenry; following the spirit and the letter of the Constitution.

5.2.4. On the Constitution
As has been discussed on CIC, the affirmative action clauses in the constitution seem to put Kenyans at a conceptual dilemma, since while it is a positive step to include minority groups into the general fabric of the Kenyan society, the clauses on the other hand seems to fuel discrimination. The concern here is that while
taking positive measures as by the spirit of the Constitution, would such measures be Constitutional when they violate the rights of others when it comes to appointive positions? Meritocracy should always be considered first, the most competent candidates at the top should be taken for any position. But when the candidates at the top of the list are skipped in favour of a candidate possessing reasonable competence, then the practice is discriminatory. Are the rights of those skipped violated? Yes. This is so, because the affirmative action measures violated the rights of those individuals on the ground of ability. As Simon (1979) held that violation of the right of an applicant to equal consideration must be stopped. He stressed that meritocracy must be upheld and the most competent person is to be chosen for an open position. Failure to do that, the procedure shall have severed reward from a person’s character, talents, choices and abilities, and thus subordinating merit, conduct, and character to gender, ethnicity or race.

Furthermore, Eastland–Bennett (1979) also stressed that in practice, strong affirmative action becomes problematic and much reviled worldwide since the most competent individuals are often not selected for appointive positions. Kenya will not be exceptional if the citizens allow themselves to follow the dictates of the Constitution to the latter.

Even though Article 24 of the Constitution acts as a shield for governmental actors accused of discrimination in various circumstances, the diverse measures should be sanctioned by law. There has to be a demonstration that they are designed to
meet a legitimate governmental objective. As stressed by Pojman (2006) that diversity for diversity sake is a moral promiscuity, since it obfuscates rational distinctions, and undermines treating individuals as ends, thus treating them as mere means to the goals of social engineering. Unless those hired are most qualified, the diversity factor threatens to become fetish.

Although many would agree that when an injustice is found, it ought to be rectified, the precise solution is what creates controversy. For example, suppose that a department has always been composed of men and that the hiring has occurred informally through word of mouth. What needs to occur is to ensure that the bias no longer exists, and that everyone is given an equal opportunity. One might argue that minimum procedures need to be put in place that is formal rather than informal. Advertise the position in a newspaper, or journal. If the bias is intentional, for instance, if women candidates’ files are removed from consideration, then the procedure must be corrected, and, conceivably, previous candidates need to be compensated. Another argument might be made that targets need to be devised so that the department is clear about what needs to be achieved. An additional suggestion might be to develop a minority hiring plan that rewards departments with an extra position if they find a minority candidate. Thus, the exact nature of the corrective action may differ dramatically depending on the assumptions and goals of those who draw up the plan.
It is only through natural selection that one finds himself male or herself female. This state of affairs should be appreciated as a gift of being in a particular gender, and as citizens of a given nation both genders must be affirmed. Thus the Constitution must always strive to address the plight of people in the society, not only stressing the importance of uplifting one gender only. For instance, there are millions of Kenyan men in their late thirties and early forties who are struggling to live a meaningful life in Kenya today, but they have no avenue to address their difficulties since the affirmative action policies in Kenya today only stress the importance of addressing the plight of women and the girl child.

5.3. The future of Strong Affirmative Action Policies in Kenya
We can summarize the ideas behind strong affirmative action in two ways: process and outcome. Tierney (1997) insisted that when procedures that ensure equal treatment are absent, we may say that process-based discrimination exists. When we look at results, for example, the number of women in a faculty or in a department, and find none, we may have outcome-based discrimination. Then we claim process based discrimination, we must show how the structures in use have generated unfair outcomes. The assumption therefore is that if we change the processes, then discrimination will be eliminated, or at least reduced. Outcome-directed procedures are more goal oriented and direct. Percentages, targets, and numbers that an organization needs to meet are put into place before coming up with affirmative action policy.
One may argue that affirmative action is a Eurocentric ideology which I have brought into the Kenyan society, but I have to insist that we are in a global village and there is no harm borrowing ideas in one part of the world to answer the problem affecting us at the local level. As Nussbaum (2006) stressed, the precontractarian natural law tradition, represented by the ancient Greek and Roman Stoics and early modern successors such as Hugo Grotius and Samuel Pufendorf, holds that relations between states, like the rest of the world of human affairs, are regulated by “natural law,” that is, binding moral laws that supply normative constraints on states, whether or not these dictates are incorporated into any system of positive law. Grotius’ version of this approach has had enormous influence on the history of thought about global principles. For Grotius, all entitlements in the international community, including national sovereignty itself, derive ultimately from the dignity and the sociability of the human being. Hence the dignity of people restored or destroyed by strong affirmative action in one part of the world, can influence choices made by people on another part of the globe as a cautionary measure, or used to enhance livelihood of particular group of people. This research therefore stipulates some recommendations to the Kenyan citizenry. That even though there has been discrimination against women in the past, there is a need not to fuel such discrimination against men while using SAAPs today.

This research proposes a need to use soft or weak forms of affirmative action, since as discussed in chapter two, weak AA uses policies and procedures that ensure equal opportunities, but it stops after sometimes, and falls short of
preferential treatment. Thus the goal of weak AA in Kenya will be equal opportunity to compete, not equal results. We therefore seek to provide each citizen regardless of gender, or ethnic group a fair chance to the most favored positions in the society. Weak AA is hardly controversial, because it uses policies to ensure equal opportunities without demanding that people of a particular gender be preferred over the other. It gives people equal chance in the society. This will help the policy makers in the country to come up with procedures on how and when the implementation of a particular policy will last.

What the government should do is to create a level playing field for all Kenyans of different gender to grow economically educationally and socially. Men and women alike need to be affirmed and their status uplifted if they live under poverty line. If we concentrate only on one gender, then, this will lead to social disparity where we will end up having many educated women with less educated men. These were not, and still not the basis of affirmative action. Because rather than reacting to individual incidents of discrimination, affirmative action called for plans that created change, it was a policy designed to look at the past and present forms of discrimination with developed guidelines, such that when the even playing field is achieved then, the policy must be stopped. The assumption here is that, affirmative action tries to help those who are helpless, such that when they have been affirmed then they must be left to fend for themselves.
However AA also works against the designated group to be affirmed. As Thomas Sowell (2004) argued, affirmative action ultimately harms women by reinforcing the idea in them and in society at large that they are societal victims. In this light, even when women reach a goal without the support of societal policies, their achievements are diminished and discredited. In effect, men are able to operate successfully in a meritocracy, but women are deficient. Such deficiencies have resulted into claims that the beneficiaries of AA are not fit to be in position they hold. It is a mistaken policy that seeks to help them but is ultimately harmful. Rather than preferential policies, the critics suggest that individual self-reliance and familial responsibility are needed. Thus the policy makers in Kenya must be held accountable for coming up with SAAPs without time frame when the policy will stop. Strong AA should not be used, but a mild form of AA will suffice for any marginalized group in the country.

5.4. General Conclusion
From the introduction of this research, it clearly stipulated that the discussion would be gender based affirmative action policy in Kenya. It defined AA as a way of making amends for, or eradicating discrimination based on gender, race and ethnicity. And it always takes the form of policies and programs; usually mandated by governments and designed to bring about necessary changes in colleges, businesses and other organizations, which is further divided into two kinds: weak and strong. Weak affirmative action is the use of policies and procedures to end discriminatory practices and ensure equal opportunity. Strong affirmative action
on the other hand is the use of policies and procedures to favor particular individuals because of their gender, race, and ethnicity. It is a preferential treatment that is usually implemented through favoring plans, quota systems and policy papers. This thesis stressed that the Kenyan situation has taken the second approach; which is the strong affirmative action. This has brought with it a lacuna in the country, leading to a moral dilemma; whether to use affirmative action policy to end discrimination in the country, or to address such issues in a different way.

As discussed earlier, strong gender based affirmative action on the wellbeing of women emerged after publications of Feminist philosophers and theologians. People like Mary Daly (1968) who detailed the psychological and political ramifications of father religion. And Mary Wollstonecraft (1759-1797) with *A vindication of the Rights of women*, whose publication reacted against what she saw around her, and what other philosophers of the time were putting forward. Especially Jean-Jack Rousseau, who advocated that women’s education should be designed entirely to make them pleasing to men. Philosopher Simone de Beauvoir (2012), *The Second Sex* publication also acted as a catalyst to champion women’s rights. However strong gender based affirmative action policy is widely opposed by many who see it as reverse discrimination, and spawn a victim mentality to the recipients. Thus they encourage stigmatization among recipients, and violate fundamental ideals of fairness, justice, and meritocracy by
discriminating against innocent persons. It thus becomes an unjust policy in Rawlsian terms, which need not be opted for by people of a given nation.

John Rawls' justice as fairness, as I discussed earlier, is having implications on affirmative action. With introduction of the idea of original position, I accept that I have assumed the original position in order to choose a conception of justice for my society. Thus, I am submitting myself to the following constraints and the conditions of the original position. First, I am subject to the veil of ignorance, I find myself defined solely as a moral personality. Thus I am rational, separate from others, none envious, possessing a normal risk aversion, possessing a sense of justice and a capability to pursue some plan that will further what I perceive to be my own good. Secondly, I am desirous of the maximum amount possible of the primary good. No matter what my conception of the good, these resources will be useful to me in my efforts to achieve it, hence I desire as many of them as possible. Thirdly, because I know nothing about which specific identity I posses, I could be anyone in my society. And when I choose a conception of justice, I must take into consideration the general needs and interests of each person in the society, and each persons' right as a moral personality, no matter what his social position or conception of the good. Hence creating a just society, which Rawls (1971) contends, to prepare its youth to meet the competitive demands of adulthood.

Thus, when Kenyans seek to address gender discrimination through legal means, Bills and Constitution, we need to put in mind that justice requires us to treat
equals equally. As I discussed earlier, we need to be very clear on what form of AA we are going to choose with a clear time frame when the policy will stop, when the level ground has been achieved for people of all genders to affirm themselves. Even though article 81 (b) states that “not more than two thirds of the members of elective public bodies shall come from the same gender”, there is no methodology on how to go about the clause. Article 97 of the Constitution does not provide a procedure to be used to ensure implementation of the constitution. It became difficult even for CIC and the supreme court of Kenya to come to a clear decision how to meet the gender threshold.

What Kenyans require is use of weak affirmative action policies, and procedures to ensure equal opportunities, which will stop after sometimes, and fall short of preferential treatment. The aim is of creating equal opportunity to compete, not equal results. And a policy which will work to the advantage of all in the country without regards for one’s gender. This thesis therefore humbly submits that the information given here will be useful to policy makers in Kenya, the students and all Kenyans in academia.
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