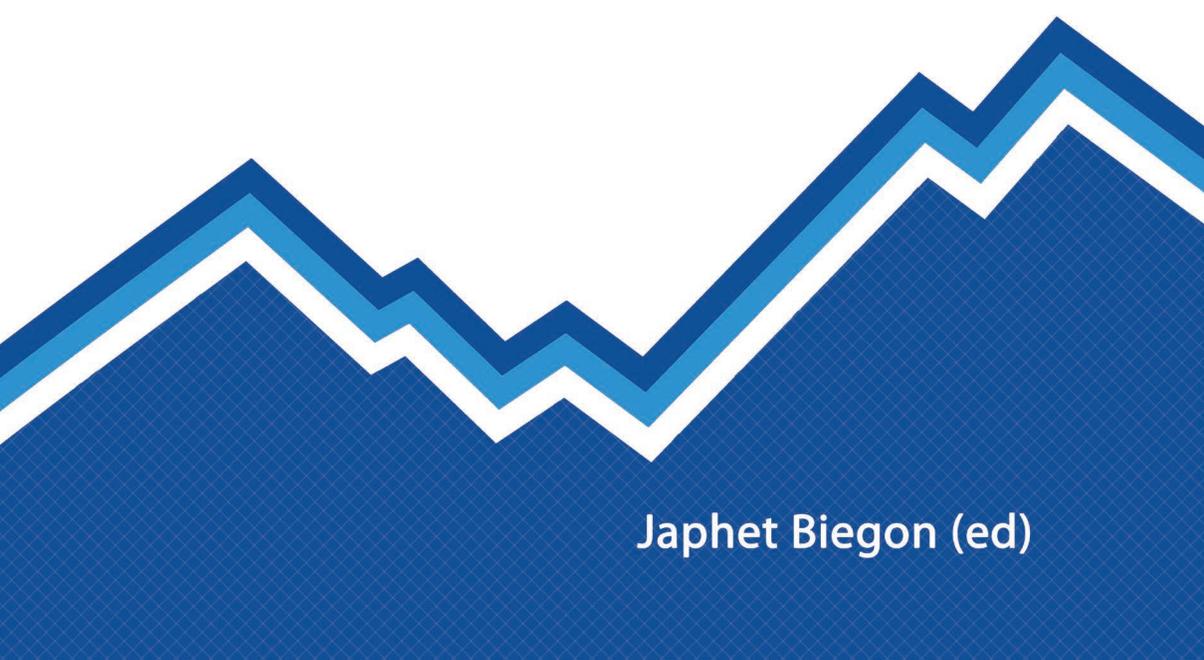


GENDER EQUALITY AND POLITICAL PROCESSES IN KENYA

Challenges and Prospects

Japhet Biegon (ed)



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Osai Ojigho is a lawyer, gender equality expert and a human rights activist. She is currently the Coordinator of the State of the Union Coalition (SOTU) based in Nairobi, Kenya. She is a member of the Nigerian Bar Association and a life member of the Pan African Lawyers Union (PALU). She is also a consulting editor with Open Global Rights, an online platform moderating debates on human rights. Osai is a founding member of the West African Women Election Observation (WAWEO) and previously worked with Alliances for Africa (AfA), African Union Human Rights Observation Mission in Mali, and the International Criminal Court. Osai has travelled widely and published extensively. Her areas of interest include the African Union, the African regional

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FOREWORD

I write this foreword shortly after the conclusion of the 27th African Union (AU) Summit held in Kigali, Rwanda, from 10 to 18 July. One of the events that I was privileged to attend on the margins of the Summit was the 3rd AU High Level Panel on Gender Equality and Women’s Empowerment. The venue of the event, Rwanda’s Parliament Buildings, had a particular symbolic significance for me and the hundreds of women and men who gathered there for the two-day event. With 51 women parliamentarians who constitute 64% of the total members in the Lower House, Rwanda is the global leader on women’s representation in parliament. This is an achievement to which all African countries should aspire. In this regard, I am encouraged to see an increasing number of African countries putting in place measures to ensure gender equality in political representation. However, these measures are not without their challenges and it is important that these measures are critically examined to determine their sustainability and impact.

In this book, a rich blend of authors examine Kenya’s efforts to achieve gender equality in political representation. It is both a timely and relevant book. It comes at a time when the African Union (AU) has stepped up its efforts to promote women’s rights and gender equality on the continent. The AU has declared 2016 ‘*The African Year of Human Rights with Particular Focus on the Rights of Women*’. This declaration has energized the campaign for universal ratification of the Protocol on the Rights of Women in Africa (Maputo Protocol). Article 9 of the Maputo Protocol enjoins State parties to, *inter alia*, “take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures” The book provides useful insights into issues entwined in implementing Article 9 of the Maputo Protocol. The lessons contained therein are pertinent to all State parties to the Maputo Protocol.

Honourable Lucy Asuagbor

*Member, African Commission on Human and Peoples’ Rights
and Special Rapporteur on the Rights of Women in Africa*

August 2016

ACKNOWLEDGMENTS

The promulgation of the current Constitution on 27 August 2010 was one of the few moments in modern history that gave Kenyan women a reason to celebrate. The Constitution is inundated with provisions that seek to protect women's rights. On representation in politics, the Constitution provides that 'the state shall take legislative measures 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'. This provision is yet to be fully implemented more than five years since the promulgation of the Constitution. The celebration and optimism that greeted the Constitution in 2010 is slowly ebbing out. This state of affairs is a stark reminder to all of us that achieving gender equality in the country remains a struggle. It is a struggle that has so far taken women to the floor of Parliament, before the Supreme Court, and on the streets of our cities and towns. It is a struggle that will continue until Kenya attains gender equality in political representation and in all spheres of life.

A collaborative initiative between the Kenyan Section of the International Commission of Jurists (ICJ Kenya) and the National Gender and Equality Commission (NGEC), the Konrad Adenauer Foundation Rule of Law Program (KAS) this publication is a modest contribution to that struggle. It examines the achievements and challenges in Kenya's determination to achieve gender equality in its political processes and explores ways of attaining this goal. All but one of the chapters contained in this volume were presented as papers during the 2015 Annual Jurists Conference held in November 2015. The title of the book is drawn from the theme of the conference: "Achieving gender equality in political processes, from theory to practice: lessons from Africa". The book is intended for a wide range of audience, including policy-makers, scholars and activists.

The book is a product of an enormous team effort. We are sincerely grateful to Japhet Biegong for his editorial work. We are also grateful to the chapter

authors: John Osogo Ambani, Patricia Kameri-Mbote, Osai Ojigbo, Dalmas Ombia, Dickson Omondi, Charles Owuor Olungah, Effie Owuor, and Katindi Sivi-Njonjo.

Finally, we are grateful to Konrad Adenauer Stiftung, the Ford Foundation Eastern Africa Regional Office and Equality Now (EN) for the partnership in convening the AJC 2015 Conference as well as for the generous financial support that led to the publication of this book. We appreciate the tireless effort of the ICJ Kenya secretariat staff led by Anne W. Nderi of the Governance Team and Elsy C. Sainna for ensuring the successful completion of this project. We thank the ICJ Kenya governing Council for their oversight and continued direction on the broader work of monitoring electoral reforms in Kenya.

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Executive Director
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Chairperson
Kenya National Gender and Equality Commission

Gender equality in political processes: An introduction

Japhet Biegon

1 Background

Around the world, the representation of women in politics is the subject of growing interest and scrutiny. This is partly related to the increasing numbers of women in political leadership and positions of authority. As Tam O’Neil and Pilar Domingo rightly observe, ‘women are more visible in public life now than they have been at any other point in modern history’.¹ The global proportion of women in national parliaments has doubled in the last two decades, from 11.3% in 1995 to 22% in 2015.² Similarly, between 1999 and 2010, the number of women holding cabinet positions worldwide increased from 9% to 17%.³ In 2015, a total of 10 women served as heads of state while 14 were heads of government. The presence of women in positions of power has largely proven to be invaluable. At the very least, women’s presence has catalyzed the broadening of priorities on the political agenda to include and give prominence to issues that were previously ignored.⁴ At best, the presence of women has brought about social transformation across a wide range of areas:

By working politically, women have driven progressive changes in women’s rights and gender relations in countries around the world – ones that would have been unthinkable let alone achievable. In most countries, urban, educated women working inside and outside the state, through a combination of long-term campaigning, and seizing opportunities, have won constitutional recognition of women’s equal status

¹ O’Neil T & Domingo P, ‘The power to decide: Women, decision-making and gender equality’, 2015.

² For comprehensive data on the proportion of women in national parliaments see <http://www.ipu.org/wmn-e/world.htm> (Accessed on 15 June).

³ O’Neil & Domingo, ‘The power to decide’, 4.

⁴ Palmieri S, Jabre K, ‘Promoting partnership between men and women in parliament: The experiences of the Inter-Parliamentary Union’ in Ballington J & Karam A (eds) *Women in Parliament: Beyond numbers* (2005) 214, 228.

with men and legal and policy reform across a range of issues, including property and inheritance, reproductive health and violence against women.⁵

Yet, even with the increasing numbers, growing visibility and recognition of their invaluable role, women are still under-represented in national politics and public life. Their numbers in elective and other political positions do not reflect the reality that women constitute half of the world's population. The low proportion of women particularly in national parliaments has persisted including in countries which have constitutions calling for affirmative action measures. The low proportion of women in parliament has equally persisted despite the fact that most countries in the world have made commitments at the international level to ensure gender equality in political processes. A total of 189 countries have ratified or acceded to the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 7 of CEDAW provides that states have a duty to ensure that women have the right to vote, participate in formulation of government policy, hold public office, and perform all public functions at levels of government. In 1995, more than 180 states adopted the Beijing Declaration and Platform for Action in which they committed to take measures to ensure women's access to and full participation in power structures and decision-making.

This book focuses on the experience of Kenya in its determination to ensure gender equality in political processes and specifically in parliament. Kenya has a Constitution that requires the State to 'take legislative measures 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'.⁶ It has ratified CEDAW as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (popularly known as the 'Maputo Protocol'). Under the Maputo Protocol, Kenya has undertaken to take specific and positive action to promote the equal participation of women in the political life of the country and to ensure the increased and effective representation and participation of women at all levels of decision-making.⁷ More than five years since it adopted the Constitution of Kenya, 2010, and several years after it ratified CEDAW, Kenya is yet to close the gender gap in political representation. To be sure, the current number of women in Parliament is

⁵ O'Neil and Domingo, 'Promoting partnership between men and women in parliament', 5.

⁶ Article 27(8), Constitution of Kenya.

⁷ Article 9, Maputo Protocol.

the highest in Kenya's history. However, the country still lags behind the 30% critical mass threshold. Efforts to implement the constitutional principle that no more than two thirds of the members of elective or appointive bodies shall be of the same gender have repeatedly failed. In sum, achieving gender parity in political representation remains an elusive goal in Kenya.

Against this background, this book examines the challenges that hinder the increased and effective representation of women in Kenya's political processes. It also analyses the performance of the affirmative action measures that have been taken to guarantee *de jure* gender equality in political representation. The book is a product of the 2015 Annual Jurists Conference organised by the Kenyan Section of the International Commission of Jurists from 24 to 27 November 2015, in Ukunda, Kenya. The conference brought together jurists, scholars, and gender activists from Kenya and other parts of Africa to explore ways of achieving gender equality in political processes in the country. All of the authors but one in this book presented papers at the conference. They were subsequently requested to rework those papers for this publication. The authors are a blend of scholars and practitioners who have closely followed and participated in the struggle for gender equality in Kenya.

2 Structure of the book

This book is composed of six substantive chapters. It has taken decades for Kenya to recognise, as it does in the 2010 Constitution, that women are entitled to equal participation in the country's political life. In Chapter Two, Effie Owuor traces the history of women's struggle for gender equality in political representation in Kenya. She asks the question: what kind of journey have Kenyan women made and why? She argues that the answer to this question is to be found in the rich narrative that revolves around the search for political inclusion. This search for inclusion has stretched Kenyan women in many different directions from the local to the international. It has shown them to be resourceful and strategic. At the same time, it has uncovered the Kenyan women's movement as sometimes flawed and contradictory.

In Chapter Three, Patricia Kameri-Mbote looks at the role that the law has played in the struggle for gender equality in political representation. She analyses the provisions of the 2010 Constitution that provide for the 'two-thirds gender rule' and the legal and political contestations that have bogged

down its implementation. She examines the role of the court in ensuring that constitutional provisions on gender equality are implemented. She also looks at attempts to amend the 2010 Constitution to address the challenges experienced in implementing the two-thirds gender rule. Her analysis reveals that gender equality in political representation is a contested terrain even in situations where there are clear constitutional provisions on the subject. In concluding her chapter, Kameri-Mbote observes that:

Gender is only one form of marginalization among many – disability, religion, ethnicity, marginalised communities and regions – where gender is also a variable. It is not possible to address gender fully in isolation of other marginalization categories.

Chapter Four considers this argument in more detail. Here, Katindi Sivi-Njonjo makes the argument that political processes, while working towards the inclusion of women as a marginalised group, can structurally exclude women sub-groups such as women with disabilities. In this regard, she examines the socio-economic factors that often impede especially the ability of specific groups of women from accessing power and positions of authority. She recommends that Kenya must go beyond the two-thirds gender rule and ensure that all women sub-groups have a fair chance of participating in the country's political life.

In Chapter Five, Dominick Omondi advances the argument that deliberate voluntary action by political parties is key to promoting women's political participation. He argues that parties occupy a preeminent position, compared to legislative measures designed to engineer social changes, which can be harnessed to enhance women political participation. Legal dictates may motivate parties and other political agencies to address women political participation and representation. Sustainability of such efforts, however, requires a belief in the value proposition of women leadership, and in particularly consensus that representation of different interest groups in politics is beneficial to democratic consolidation. While parties might be motivated by factors such as the political system and the type of electoral system, he argues that the most effective and sustainable interventions should be driven by a belief in the value of women leadership, hence voluntary action by parties to implement measures that promote gender equality in leadership.

J Osogo Ambani in Chapter Six examines the interplay between Sexual and Gender Based Violence (SGBV) and women's efforts to access political power in Kenya. He argues that SGBV perpetrated during elections is merely

a symptom of the underlying disease that is the country's long history of state violence, ethnic marginalisation, land injustices, and institutional failure. The chapter shows that once the usual triggers of general electoral violence have operated to bring about a general breakdown of law and order, SGBV has tended to set in. The very prevalence of SGBV therefore means reduced capacity for marginalised groups, including women, to fully participate in political and electoral processes.

Chapter Seven, authored by Osai Ojigho, compares Kenya's performance with other African countries, including Nigeria, Rwanda, Senegal, and Uganda. The framework of analysis in the chapter is Article 9 of the Maputo Protocol. It evaluates strategies adopted by African States to implement Article 9 and highlights good practices and opportunities for progressive change. She observes that a combination of factors contribute to a state's effective implementation of Article 9, including eradication of gender stereotypes and inhibitive cultural, religious or social structures, existence of a proportional representation electoral system coupled with a quota mechanism, an independent judiciary, and respect for the rule of law.

The recurring argument in all of these chapters revolves around the difficulties in ensuring women's representation in political processes. Even where the law provides for a favourable framework for realizing equal representation of women in political processes, there are multiple political, cultural, and socio-economic factors that impede the translation of legal provisions into tangible or concrete gains for women. This means that efforts to ensure equal representation of women in political processes must go beyond the law. The underlying impeding factors must be tackled.

Women and political inclusion in Kenya: A historical overview, 1963 – 2016

Effie Owuor

1 Introduction

Thursday, 28 March 2013, was a historic day for Kenya. A total of 349 members of Parliament presented themselves for swearing at the National Assembly buildings in Nairobi. They were the first generation of law-makers elected and nominated to the National Assembly under the Constitution of Kenya, 2010 (2010 Constitution). Simply put, they were pioneers ushering in a completely new system of governance, oversight, and legislation. Patiently waiting their turn were 87 female representatives, the largest number of women ever to serve in Kenya's Parliament. For them, the occasion was even more momentous because it was nearly half a century in the making. The aim of this chapter is to very broadly look at the fifty-three odd years (1963 to 2016) that it has taken for Kenyan women to move from the periphery towards the core of public political life in Kenya. What kind of journey did Kenyan women make and why?

The answers, the chapter argues, are to be found in a rich narrative that revolves around the search for political inclusion. This search for inclusion has stretched Kenyan women in many different directions from the local to the international, legal, and tactical. It has shown them to be resourceful and strategic. At the same time, it has uncovered Kenyan women's movement as sometimes flawed and contradictory. The evidence-base is historical and contemporary. In short, the story is a complex one. It is, however, a vital one because political inclusion continues to elude many women in Kenya. The Kenyan example may serve both as a lesson and a warning to women and their continuing struggles for political relevance.

2 Women and leadership: Pre-colonial and colonial antecedents

The modern relationship between women and leadership is rooted deep in the pre-colonial and colonial history of this country. Studies colonial Kenya have painted a picture of deeply patriarchal societies run by councils of elders with no input from women whatsoever.¹ Others disagree and have produced research to show that some women in pre-colonial Kenya wielded a great deal of power even ruling over men.² The resulting debate between these two camps is a long-running, wide-ranging one that cannot be usefully summarised here other than to note that African women's histories are notoriously difficult to tell, much less fix into a single unchanging narrative.

There is much greater consensus on the question of colonialism. Most scholars readily accept that the establishment of British rule in Kenya (and empire-wide) had a diminishing effect on women.³ The central problem for women and British colonialism was the not-so-subtle imposition of a new gender order rooted in peculiarly Victorian understandings of women as private and domestic beings.⁴ Women came to inhabit a domain that was, essentially, distanced from any real power or influence.

As it was, colonialism made it nearly impossible for non-Europeans to participate meaningfully in politics. British rule in Kenya was unyieldingly racial. At the very top of the hierarchy sat the Governor, a direct appointee of the Colonial Office in London. District Commissioners and various other administrators followed.⁵ In 1920, a limited election was held and a small number of representatives were admitted to the Legislative Council.⁶ The only people to benefit from this set up were the European settlers who by this point numbered some 30,000.⁷ They used the Legislative Council to champion self-serving

¹ For further descriptions of patriarchally organised societies in pre-colonial Kenya, see Ogot BA (ed), *Kenya before 1900*, East African Publishing House, Nairobi, 1976.

² For more details, see Kanogo T, *African womanhood in colonial Kenya, 1900 – 1950*, East African Educational Publishers, Nairobi, 2005.

³ For an overview of the intersection between colonialism and gender see Ghosh D, 'Gender and colonialism: Expansion or marginalization' 47(3) *The Historical Journal*, 2004, 737 - 755.

⁴ As argued in McClintock A, *Imperial leather: Race, gender and sexuality in the colonial conquest*, Routledge, New York, 1995.

⁵ Bates F, 'British Rule in Kenya' Washington State University, 5-6: <https://history105.libraries.wsu.edu/spring2015/2015/01/19/british-rule-in-kenya/> on 31 November 2016.

⁶ See the Kenya Gazette 14 April 1920, 'Government Notice No 126,' the Legislative Council Ordinance 1919.

⁷ Stapleton TJ, *Warfare and Tracking in Africa: 1952-1990*, Routledge, New York, 2015, 43.

legislation, including their insatiable need for labour. A handful of seats were allocated to Arab and Indian representatives.⁸ But Africans were shut out altogether.⁹ There was no African representation at all until 1944 when Eliud Mathu was appointed to the Legislative Council. Mathu's appointment underscores the fact African representation, when it finally materialised, was the preserve of African men.¹⁰

For more than two years, Mathu sat alone in the Legislative Council as the only African representative. In 1947, he was joined by Walter Odede.¹¹ Their numbers doubled in 1951 with the nomination of Wycliffe Awori and John Ole Temeno. Reforms occurred in the mid-1950s allowing for eight Africans to be directly elected to the Legislative Council by eligible African voters. A seminal generation of male politicians now emerged with Daniel Arap Moi, Masinde Muliro, Tom Mboya, Ronald Ngala, and Jaramogi Oginga Odinga all fighting and winning the fiercely contested election of 1957. African men had a small but ever increasing role in the Legislative Council; African women did not. Mathu, Odede, and Ole Temeno had no female counterparts. No women presented themselves as candidates to the 1957 electorate. Statistics from Machakos District are illustrative. Some 9000 residents of the District registered as voters.¹² Only 12 of them were women. The record does not show many women showed up to vote on the day of elections.

By the end of the 1950s, it was clear that Kenya's days as a British-ruled and settler-dominated colony were numbered.¹³ And yet, even at this critical stage, the question of representation and participation for women did not arise. Nobody thought to ask what would happen to the women of Kenya as colonial rule came to an end. Incidentally, women had made vital contributions to

⁸ See the Kenya Gazette 14 April 1920, 'Government Notice No 126,' the Legislative Council Ordinance 1919.

⁹ See the Kenya Gazette 14 April 1920, 'Government Notice No 126,' the Legislative Council Ordinance 1919.

¹⁰ For further details on Africans and the Legislative Council See Branch D, 'Loyalists, Mau Mau, and elections in Kenya: The first triumph of the system, 1957 – 1958' 53(2) *Africa Today*, 2006, 27-50.

¹¹ See the Kenya Gazette 21 March 1961, Government Notice No 1323, Election Results – National Members.

¹² Osborne M, *Ethnicity and empire in Kenya: Loyalty and marital race among the Kamba, c. 1800 to the present*, Cambridge University Press, Cambridge, 2014, 243.

¹³ For more on the process of decolonization, see, Ogot B and Ochieng W (eds), *Decolonization and independence in Kenya: 1940 – 1993*, East African Educational Publishers, Nairobi, 1995.

the very Mau Mau movement that laid the groundwork for independence.¹⁴ A small number actually went into the forest to fight. Many more provided logistical support such as food and shelter. Above all women absorbed the full brutality of British attempts to quash Mau Mau as entire communities were moved into barricaded villages blighted by rape, sexual violence, forced labour, and deprivation.¹⁵ But few of these facts appeared to make it into pre-independence negotiations; talks proceeded as if there was no political room for women in the new Kenya.

Progress – if one can describe it as such – came in May 1961, when Priscilla Abwao became the first African woman to sit in the Legislative Council. For such a pioneering figure, little is public about her life and background.¹⁶ She seems to have trained as a social worker and was also highly regarded for her pioneering efforts in women’s empowerment. The Kenya African Women’s League proposed her for nomination along with Margaret Kenyatta.¹⁷ The Governor chose Abwao.¹⁸ Her experiences indicate quite clearly that almost no power, prestige or actual influence was attached to the role of Women’s Representative. She was part of the delegation that attended the Lancaster House Conference of 1962, convened to discuss the constitutional arrangements for self-governance and independence. As the only woman in a seventy-strong team, Abwao’s input should have been much sought after. But reporting of the conference suggests otherwise. By some accounts, Abwao did not even speak during the proceedings because she was not ‘allowed to’.¹⁹ Astonishingly, her

¹⁴ For an assessment of women’s contributions to Mau Mau, see Presley C, ‘The Mau Mau rebellion, Kikuyu women and social change’ 22(3) *Canadian Journal of African Studies*, 1988, 502-527.

¹⁵ Details of the violent and atrocity-ridden suppression of Mau Mau can be found in Elkins C, *Imperial reckoning: The untold story of Britain’s Gulag in Kenya*, Henry Holt, New York, 2005. Also, Anderson D, *Histories of the hanged: Britain’s dirty war in Kenya and the end of the Empire*, Weidenfeld & Nicolson, London, 2005.

¹⁶ Kamau-Ruttenberg W, ‘Feuding in the family: Ethnic politics and the struggle for women’s rights legislation’ PhD Thesis, University of Minnesota, 2008, 78.

¹⁷ Rugere N and Mayaka-Gekara E, ‘First woman MP was a gender-rights activist and trailblazer’ *Daily Nation*, 18 November 2009— <http://www.nation.co.ke/news/politics/1064-688108-76211bz/index.html> on 31 October 2016.

¹⁸ Rugere N and Mayaka-Gekara E, ‘First woman MP was a gender-rights activist and trailblazer’ *Daily Nation*, 18 November 2009— <http://www.nation.co.ke/news/politics/1064-688108-76211bz/index.html> on 31 October 2016.

¹⁹ Ndeda M, ‘Luo women voters/aspirants and the new constitutional dispensation in the March 2013 Kenya elections: The case of Siaya and Kisumu counties’ in Thibon C, Fouéré M-A, Ndeda M and Mwangi S (eds), *Kenya’s past as prologue: Voters, violence and the 2015 general election*, Twaweza Communications, Nairobi, 2015, 212-232.

contribution was limited to submitting a written memorandum on behalf of all Kenyan African women.

The silencing of Abwao at Lancaster meant voice was not given to her progressive ideas about gender and representation. Elsewhere, she has been quoted as saying that Kenyan women were not demanding anything more than what was due to them: '[We] are not asking for a special position for ourselves, [We are asking to be] treated as equal partners in the new society which we are creating.'²⁰ Her pleas for fairness and recognition went unheard. The discussions at Lancaster yielded bitter and unpalatable fruit for Kenyan women – the product of negotiations between African and European men uninterested in women's expectations of equality.

3 The General Election of 1963: A case study in exclusion

Kenya's first General Election was held in May 1963, six months before the formal declaration of full independence.²¹ The poll serves as a perfect indicator of the subordinate niche that women were expected to occupy in Kenya's electoral politics for many decades. Voter registration had taken place in December 1962. Nearly 2.5 million people registered. From newspaper coverage, the impression is of a relatively straightforward process marred only by a few irregularities such as undelivered voters' cards.²² Unfortunately, there is no further data showing how many of these registered voters were male and female. Having registered, some Kenyan women brought up the question of nomination. They asked the Government to allocate them seats in the Legislature. Their requests were, thus, reported in the *Daily Nation* of 27 April 1963:

The government is to be pressed strongly to nominate a minimum of four women to fill seats in the new legislature. This was one of the resolutions passed during the closing stages of the second Kenya African Women's Seminar which ended at Limuru yesterday. Other resolutions approved were:

- To request that there should be a woman representative in internal organizations such as the East African Common Services Commission and in external bodies such as the United Nations.
- To ask the government for a minimum of 10% female representation on the planning committee for Kenya's independence celebrations.²³

²⁰ Kamau-Ruttenberg, 'Feuding in the family', 78.

²¹ '1963: Kenyatta to be Kenya's first Premier' BBC News— http://news.bbc.co.uk/onthisday/hi/dates/stories/may/27/newsid_2496000/2496069.stm on 31st October 2016.

²² 'Voter's roll inspection' *Daily Nation*, 15 January 1963, 4.

²³ 'Women ask for seats in Legislature' *Daily Nation*, 27 April 1963, 15

These requests, however, fell on deaf ears. They were not acted upon and elicited no response at all from either the outgoing colonial government officials or from the incoming African ones. No allowances were made for female representation.

From the outset, women seeking political positions in Kenya could not count on any affirmative provisions. They would have to contend with the vagaries and violence of Kenya's electoral process. And what violence there was! As the following report shows, not a day went by without news of one distressing account or another:

Police used tear gas yesterday to disperse pro-KANU crowds demonstrating outside a KADU leader's home following the murder of a KANU youth winger near KANU's Mombasa headquarters. The police are offering a 50 pound reward for any information leading to the arrest of the killer or killers. The murder victim, Ondiega Kwanga, a Luo was stabbed to death. Two other KANU youth wingers, also Luo, were injured – one seriously. Police received a 999 call at about 10.30 pm on Saturday and went to the scene on Saturday in Lohana Road Mombasa – and found Kwanga dead stabbed in the chest. Inquiries revealed that the three Luo and a fourth KANU supporter had been involved in a fight with a number of unknown men.²⁴

In the 1963 elections, women were neither party officials nor amongst those cleared to actually contend for seats.²⁵ Thus, the elections laid bare just how difficult it was for women to be integrated into party operations and structures. In other words, women were side-lined from politics even at the party level. This is a recurrent theme that has reverberated over the years with seemingly little progress made in the absorption of women into formal party structures. Newspaper coverage from 1963 shows a clear and consistent pattern: women were subordinate. They remained firmly in the background, reported only as singers and dancers, in essence, supporting actors to the main players.²⁶

The final question raised by the election is that of women's voting behaviour. Once again, 1963 provides the template for all subsequent general elections. With organizing and candidacy all but shut off to them, women channelled their energies into the one option left to them: turning out. Early

²⁴ 'KANU youth knifed dead in Coast brawl' *Daily Nation*, 11 March 1963, 1

²⁵ Migiro K, 'Factbox: Women in Kenyan politics in numbers' Thomson Reuters Foundation, 6 December 2013.

²⁶ 'Attack on KANU rally convoy' *Daily Nation*, 13 May 1963, 1.

electoral data in Kenya is not disaggregated by gender.²⁷ So it is not possible to say how many women turned out to vote. Anecdotal evidence suggests that Kenyan women were keen voters. They showed up early and in huge numbers. And in a rare acknowledgement of their electoral significance, parties even made arrangements for them to be transported early to the polling stations so that they could line up before the men. The result, as mentioned in reports below, was an enthusiastic turnout.

An overwhelming proportion of women seemed to be voting at the Mombasa Mainland polling stations. At the Changamwe, Port Reitz and Mariakani stations, there were long queues of women. Scattered showers over the Province did not seem to affect the number of voters. The two main parties, KANU and KADU, both had many vehicles on the roads transporting voters to the polls and in some cases to church as well. It was reported that voting finished in the Kwale District about noon yesterday with an almost “100% poll.”²⁸

Polling closed on 26 May 1963, and on 27 May 1963, the papers published news of a massive victory for the Kenya African National Union (KANU).²⁹ Those who lost the election largely accepted the results and vowed to work with KANU or to sharpen their role in opposition.³⁰ Very soon after that, the new Cabinet was announced and attention turned to the very pressing issues of self-government and independence.

For the women of Kenya, however, a dispiriting precedent had been created. In terms of representation, women fell backwards from the meagre gains that they had made with the nomination of Abwao. Abwao herself disappeared largely unheralded into the pages of history, and absence from the Legislature meant that the questions she had raised about the importance of women’s representation went unaddressed. The fledgling debate over women’s rights came to a premature halt. And as the following table demonstrates, women would continue to perform dismally in elections until the late 1990s.

²⁷ On limitations of 1963 electoral data, see, Sanger C and Nottingham J, ‘The Kenya general election of 1964’ 2(1) *The Journal of Modern African Studies*, 1964, 1- 40.

²⁸ ‘Women voters out in force in Mombasa’ *Daily Nation*, 20 May 1963, 16.

²⁹ ‘Yes now it is KANU for Kenya: Big poll victory’ *Daily Nation*, 28 May 1963, 1.

³⁰ Asingo P, ‘The Political Economy of Transition in Kenya’ in Oyugi W, Wanyande P and Odhiambo-Mbai C, *The Politics of Transition in Kenya*, Heinrich Boll Foundation, Nairobi, 17-18.

Table 1: Women's representation in Parliament, 1963-2013³¹

Parliament	Date	Constituencies (Total)	Women (Elected)	Nominated Members (Total)	Nominated Members (Female)
1 st Parliament	1963 to 1969	158	0	12	0
2 nd Parliament	1969 to 1974	158	1	12	1
3 rd Parliament	1974 to 1979	158	4	12	2
4 th Parliament	1979 to 1983	158	5	12	1
5 th Parliament	1983 to 1988	158	2	12	4
6 th Parliament	1988 to 1992	188	2	12	0
7 th Parliament	1992 to 1997	188	6	12	1
8 th Parliament	1997 to 2002	210	4	12	5
9 th Parliament	2002 to 2007	210	10	12	8
10 th Parliament	2008 to 2013	210	16	12	6

4 Not yet Uhuru: Gender and the Independence Constitution

The 1963 General Election left women floundering on the side-lines of mainstream politics. Their predicament was complicated further by the fact that the Independence Constitution, and the laws flowing from it, offered no solutions to their exclusion. If anything, the opposite was true. The Independence Constitution, it has been argued, systematically marginalised and actively suppressed women in all spheres of life.³² It is an astonishing claim to make of a document that formed the foundation of independent Kenya but there is plenty of evidence that this was indeed the case.

³¹ Kamau N, *Women and political leadership in Kenya: Ten case studies*, Henrich Böll Stiftung, Nairobi, 2010, 3.

³² Some of these arguments are captured in Cottrell J and Ghai Y, 'Constitution making and democratization in Kenya' 14(1) *Democratization*, 2007, 1-25.

It is well known that the Independence Constitution itself was constructed with no input at all from women. Far from being neutral, the Independence Constitution reflected the narrow, entrenched preoccupations of the political class. Chief amongst these preoccupations was the centralization of power as well as the maintenance of strong State structures. While Kenya's independence-era politicians were passionate freedom fighters with strong notions of racial equity, once in power they revealed themselves to be conservative and cautious. Some have even described them as autocratic and only interested in the consolidation of authority in a handful of offices, particularly the presidency.³³

Almost immediately after independence, the Independence Constitution was altered to reflect this new, illiberal age. In 1964, the post of Prime Minister was abolished.³⁴ This was followed in 1966 with the elimination of both the Upper House (the Senate) and the Provincial Assemblies.³⁵ Kenya was left with a single National Assembly dominated by representatives of the ruling party KANU. Another far reaching 1966 amendment invested all emergency powers in the President,³⁶ which meant that he could now order detentions without trial at his own discretion and without reference to Parliament.³⁷ Two years later, another shift took place when the power to elect the President was removed from the National Assembly and given to enfranchised voters. Finally, in 1969, the piecemeal adjustments were all incorporated into the Repealed Constitution.

Reformists have described these as dark days as Kenya headed down the path of repression and much diminished civil liberties. Constitutionalists bemoaned the manipulation of the Independence Constitution for naked political goals and the resulting impact on such an important document. Writing of this period, James Orenge observed that:

The Constitution of Kenya was deliberately designed to fail. We borrowed the worst features of other people's constitutions. The result is a machine without rhythm or reason. We have borrowed the American presidential system but ignored the checks and balances that make the president accountable to the American people. We have borrowed the parliamentary system from Britain but none of the parliamentary prac-

³³ Munene M, *The politics of transition in Kenya 1995 – 1998*, Quest & Insight, Nairobi, 2001, 6.

³⁴ *Constitution of Kenya (Amendment) Act No 28 (1964)*.

³⁵ See the *Constitution of Kenya (Amendment) Act (No 40 of 1966)*.

³⁶ See the *Constitution of Kenya (Amendment) Act (No 18 of 1966)*.

³⁷ See the *Constitution of Kenya (Amendment) Act (No 18 of 1966)*.

tices that make the British parliament effective. We borrowed the Bill of Rights from the Universal Declaration of Human Rights but added in all the exceptions to rights that were in common in Stalinist countries. In short, we now have a ... a Bill of Rights that reads more like a Bill of Exceptions rather than Rights.³⁸

For Kenyan women, the catastrophe of the 1963 and 1969 Constitutions lay in this deeply flawed Bill of Rights.³⁹ At first glance, the Independence Constitution displayed all the language of inclusion and equity. Chapter Five delineated a series of inalienable rights and freedoms. These rights were, very broadly, civil and political in nature and included the right to life, personal liberty, expression, assembly, association and freedom of conscience and movement. More importantly, these rights applied across the board regardless of race, tribe, political opinions *and* sex. Section 70 of the Repealed Constitution read:

Every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, or residence, or other local connection, political opinions, colour, creed or sex but subject to respect to the rights and freedoms of others and for the public interest.

The expansiveness of Section 70 was somewhat deceptive in that only a few clauses later, one ran into the controversial Section 82. Section 82(1) read progressively enough as it outlined the various categories/groups protected in their enjoyment of basic rights and freedoms. The section spelled out the circumstances under which discrimination would not be tolerated:

No persons shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or public authority.

This provision was followed by section 82(3), which read as follows:

In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

³⁸ Nasongo S and Ayot T, ‘Women in Kenya’s politics of transition and democratisation’ in Murunga G and Nasongo S (eds), *Kenya: The struggle for democracy*, Dakar Codesria Books, Dakar, 2007, 176.

³⁹ For an overview of these early constitutional shortcomings, see Republic of Kenya, *Report of the task force appointed to review laws relating to women*, 1999, 19-35.

There was a key omission from the above list. And that omission was gender. Gender discrimination, it would seem, was permissible under this particular section of the Repealed Constitution.⁴⁰ It is impossible to say how the framers of the Independence Constitution veered so sharply from the gender inclusion of Section 70 to the exclusion of Section 82. Matters deteriorated even further with later subsections that exempted certain laws from the provisions against discrimination. Laws on marriage, adoption, divorce, burial, devolution of property and other personal matters also fell under these subsections. What this meant was that it was perfectly acceptable for such laws to deviate from Section 70 and to contain elements that could otherwise be thought of as discriminatory. When taken together, all these sections and sub-sections have to be seen as forming a barrier to the equal treatment of women under the law.⁴¹ The Independence Constitution indicated that a very tough battle lies ahead. For, it would prove very difficult to undo the inbuilt prejudices and weaknesses of this early phase.

5 Beyond politics: The case study of Maendeleo ya Wanawake

With such limited access to the National Assembly, Kenyan women had to find other ways to press for equal rights, law reform and social justice. Beyond the institutions representing formal politics were a number of non-governmental and civil organizations through which women tried to effect change.

The oldest and largest of these organizations is Maendeleo ya Wanawake (MYWO). MYWO's roots are solidly colonial. It was formed in 1952 as the product of collaboration between the Department of Community Development (later Rehabilitation) and various charitable organizations increasingly concerned about the challenges faced by African women, rural women in particular.⁴² The decision was made to set up countrywide clubs that would introduce African women to Western and 'modern' techniques of food preparation, cleaning and childcare.

⁴⁰ Kibwana K, 'Constitutional development in Kenya' in Kibwana K and Peter CM (eds), *Constitutionalism in East Africa: Progress, challenges and prospects in 1999*, Fountain Publishers, Kampala, 2001, 2–3.

⁴¹ Kibwana, 'Constitutional development in Kenya', 2-3.

⁴² For history of Maendeleo ya Wanawake, see, Ndeda M, 'Women's organizing for self-improvement in colonial and post-colonial Kenya: A historical analysis' 2011 — <http://www.uonbi.ac.ke/journals/index.php/aws/article/view/1330/1116> on 20 January 2016.

Two things stand out about MYWO's early days. Firstly, it was apolitical.⁴³ MYWO's ambitions were entirely domestic. Nothing in its program of home and personal improvement included political empowerment; that simply was not on the agenda.⁴⁴ MYWO officials were able to work the political machinery of colonial Kenya to their own advantage. The Governor's wife was its ardent supporter as were others in the colonial administration. But no attempt whatsoever was made to extend their support of MYWO to broader issues of reform and representation. Secondly, MYWO was deeply paternalistic. It created and ran programs *for* African women. Occasionally, the assistance of African men (District Council members and chiefs) was sought in recruiting women to attend the meetings. Other than this, the organization was almost entirely in the hands of European women and men who decided what was best.

Limited goals and condescendence did not make for a promising beginning. Even so, the secrets to MYWO's subsequent success lay in these early years. No other organization could mobilise rural women like MYWO. It also became the training ground for a generation of women who would go on to play a critical role in Kenyan politics. Initially, the leadership of MYWO was a strictly European affair with officials from the Department of Community Development responsible for the planning and execution of all activities. By the early 1960s, the process of Africanization was in full swing. European officials and civil servants were being retired from their posts to be replaced with Africans. It was during this process that Phoebe Asiyo became the first African woman to head MYWO in 1961.⁴⁵ For Asiyo, it signalled the beginning of a remarkable political career culminating in her election to the National Assembly in 1979. As for MYWO itself, Asiyo's appointment was nothing short of radical. More used to African women as silent and passive subjects, MYWO very quickly had to get used to the fact of women's leadership.

The changes in personnel were indeed momentous. However, MYWO's mandate remained stubbornly unchanged. Africanization would not prompt MYWO to think more assertively about women and social reform. Instead,

⁴³ Aubrey L, *The Politics of Development and Co-operation*, Routledge Studies in Development and Society, New York, 1997, 46.

⁴⁴ Aubrey L, *The Politics of Development and Co-operation*, Routledge Studies in Development and Society, New York, 1997, 47.

⁴⁵ Dennis Onyango, 'Pioneer of Maendeleo ya Wanawake who broke the glass ceiling' Standard Digital, 5 February 2014— <http://www.standardmedia.co.ke/article/2000103995/pioneer-of-maendeleo-ya-wanawake-who-broke-the-glass-ceiling> on 30 October 2016.

the organization stuck with the deeply conservative agenda crafted for it during colonial times: domesticity and home life. This is not to say that it was entirely removed from political life. If anything, much of its success in earlier years could be credited to savvy political connections. Come independence, MYWO courted a high profile by closely aligning itself with President Jomo Kenyatta's Harambee – a loose political philosophy that encouraged community spirit.⁴⁶ MYWO's own mandate fitted very neatly with the President's vision of communities working together for the collective good. No one concerned themselves too much with the legal and constitutional hurdles facing women.

With the help of the Department of Social Services, MYWO expanded at a terrific pace and by the mid-1960s, it had a nearly national presence.⁴⁷ It was not, however, the only organization working with Kenyan women. Others included the Young Women's Christian Association, Anglican Mothers' Union, the Girl Guides, Dorcas Society and the East African Women's League. In 1965, a gazette notice created the National Council of Women of Kenya (NCWK), designated as an umbrella organization responsible for the overall coordination of all women's groups in Kenya. NCWK provided additional opportunities for women in leadership. Most famously, Wangari Maathai joined NCWK in 1976 and was associated with it for many years thereafter.⁴⁸

Many in the women's movement are extremely critical of these extra-political organizations and the ambiguous role that they have played in the hunt for justice, equity and reform.⁴⁹ Initially, though, through the 1970s and early 1980s, MYWO had flourished. Its secretariat, for instance, had succeeded in securing significant funding for various projects including the construction of the flagship Maendeleo House; the cost of 1.5 million dollars was met by a consortium of local and international donors.⁵⁰ By 1987, the ruling party,

⁴⁶ See the Kenya National Assembly Official Record (Hansard) December 14 1964, 448.

⁴⁷ See <http://mywokenya.org/index.php/about-us/history> on 31 October 2016.

⁴⁸ Namulundah F, *Wangari Maathai: Visionary, Environmental Leader, Political Activist*, Lantern Books, New York, 2014, 37.

⁴⁹ Such criticisms are not limited or unique to Kenya. For a continent-wide assessment of the role of women's organizations and their contributions to African feminism, see Akin S, 'Beyond an epistemology of bread, butter, culture and power: Mapping the African feminist movement' 2 *Nokoko* 2011, 65-89.

⁵⁰ For a comprehensive list of Maendeleo ya Wanawake's donors, see, Aubrey L, *The politics of development co-operation: NGOs, gender and partnership in Kenya*, Routledge, London, 1997, 179-184.

KANU, had annexed MYWO. The move changed the character of MYWO, which was then described as the official voice of all women's groups in Kenya.⁵¹ This previously vibrant organization was subsumed into KANU's problematic (and even undemocratic) regulations and structures.⁵² Party officials – frequently male ones – were seconded to oversee fundraising and spending. MYWO's hard-earned financial independence was lost.

This chapter in MYWO's history was a dark one. In particular, MWYO's association with KANU had adverse effects. Individuals and organizations who disagreed with the new order in MWYO were treated ruthlessly. Such was the treatment meted out to Wangari Maathai who just a few years earlier had come close to winning the election to head MYWO itself.⁵³ Her 'mistake', as will be discussed below, was to challenge President Moi's plans to construct a high rise building complex right in the middle of Nairobi's Uhuru Park. In the process, damage was done to the case that women were trying to build for greater representation and participation in Kenyan politics. In particular, male politicians used the shambles in MYWO to disingenuously make the argument that women could not be trusted with leadership because, as a senior KANU official put it, they were 'a time bomb that can explode at any time... and are hard, decisive and very difficult to deal with.'⁵⁴ As the 1980s came to an end, MYWO tried to extricate itself from KANU. The organization expressed the desire to return to its social development roots and in the early 1990s, MYWO's non-governmental status was restored.⁵⁵

6 International influences: The United Nations world conferences on women

Kenyan women's struggles have not taken place in a vacuum. They have been shaped by global action and international thinking about the status of

⁵¹ Aubrey, *The politics of development co-operation*, 73.

⁵² Ogot B and Ochieng' W, *Decolonization and Independence in Kenya*, East African Educational Publishers, 1995, Nairobi, 208.

⁵³ Namulundah F, *Wangari Maathai: Visionary, Environmental Leader, Political Activist*, Lantern Books, New York, 2014, 48.

⁵⁴ Nzomo M, 'Kenyan women in politics and public decision making' in Mikell G (ed), *African feminism: The politics of survival in Sub-Saharan Africa*, University of Pennsylvania Press, Philadelphia, 1997, 240.

⁵⁵ Aubrey L, *The Politics of Development and Co-operation*, Routledge Studies in Development and Society, New York, 1997, 62.

women. In other words, the story of gender equality in Kenya has a large international component to it. The nature of the relationship between Kenyan women and their international counterparts is much debated.⁵⁶ Not everyone is in agreement as to whether the impact of the international gender movement has always been for the good. Controversy aside, there is a clear history of Kenyan women adopting techniques for themselves that have been tried and tested in other parts of the world. And those techniques at times have yielded important results.

6.1 *First World Conference on Women: Mexico City*

The global gender movement dates, roughly, back to 1975 when the United Nations (UN) convened a major conference in Mexico City. Timed to coincide with the International Women's Year, the Mexico City conference tackled questions of development, equity and empowerment for women.⁵⁷ It was a major shift for the UN given that its previous interests had been mostly limited to data collection and legal work. Issues overlooked by the UN's somewhat academic approach were suddenly thrust into the international limelight. The global nature of the gathering drew in women from all over the world including regions previously excluded by colonialism and civil unrest.⁵⁸ Kenya sent a substantial delegation that included Julia Ojiambo, Eddah Gachukia, and a number of other women politicians and bureaucrats.⁵⁹

With a thousand women from so many different backgrounds gathered together at a high stakes event, there was bound to be conflict. And indeed, Mexico City is often remembered for sharp exchanges and clashing opinions. Amidst the heated discussions, however, a certain consensus was forged and the Conference eventually laid down several important foundations, including:

⁵⁶ For history of feminism in Kenya and its intersection with the international movement, see, Adawo L, Gikonyo LW, Kudu RM and Mutoro O, 'History of feminism in Kenya' October 2011 <http://www.nawey.net/wp-content/uploads/downloads/2012/05/History-of-Feminism-in-Kenya.pdf> on 7 January 2016.

⁵⁷ See United Nations Entity for Gender Equality and Empowerment of Women, *The four women's conferences 1975-1995: Historical perspective*, — <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

⁵⁸ See United Nations Entity for Gender Equality and Empowerment of Women, *The four women's conferences 1975-1995: Historical perspective*, — <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

⁵⁹ The author attended the Mexico City Conference as a legal advisor on behalf the Women's Bureau of Kenya.

The declaration of the UN Decade for Women (1976 to 1985); the creation of the United Nations Development Fund for Women (UNIFEM), the premier UN agency for women and a World Plan of Action structured around women in development, gender equality, the elimination of discrimination and, peace.

The Kenyan delegates returned home with a touch of scepticism. As Gachukia later wrote, there was some doubt about the Plan of Action and its relevance to Kenya:

Although the themes of the conference – equality, development and peace – were and remain important, our priorities in Kenya were different. While for women from developed countries, the issue that resonated most was equality, in most provinces of Kenya the priority was bringing water closer to homes.⁶⁰

Misgivings aside, a process had been set in motion by Mexico City. There was no going back to a time when equality, development and peace for women were *not* global issues.

6.2 *Second World Conference on Women: Copenhagen*

Copenhagen was the venue of the Second World Conference on Women in 1980. Copenhagen's main objective was to take stock of the progress made on the action plan drawn up in Mexico City.⁶¹ The Conference opened on a triumphant note. The year before had witnessed the General Assembly's adoption of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). CEDAW has been described as 'one of the most powerful instruments for gender equality' and the delegates in Copenhagen celebrated its arrival on the international scene.⁶²

Amidst the elation, however, were real grounds for concern. As country delegations presented their status reports, it became increasingly evident that progress since Mexico had been patchy.⁶³ Specifically, there was an ever

⁶⁰ Jain D, *Women, development and the United Nations: A sixty year quest for equality and justice*, Indiana University Press, Bloomington, 2005, 70.

⁶¹ See United Nations Entity for Gender Equality and Empowerment of Women, *The four women's conferences 1975-1995: Historical perspective*, — <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

⁶² United Nations Entity for Gender Equality and the Empowerment of Women, *The four global women's Conferences 1975 - 1995: Historical perspective*, May 2000 <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 19 December 2015.

⁶³ See United Nations Entity for Gender Equality and Empowerment of Women, *The four women's conferences 1975-1995: Historical perspective*, — <http://www.un.org/womenwatch/daw/fol->

growing rift between the theory and practice of women's rights.⁶⁴ Some level of success was being achieved in delineating women's rights. The exercising of those rights lagged so far behind that Copenhagen decided upon a pragmatic plan of action that insisted on women's equal access to education, employment, and health care.⁶⁵ The plan also drew attention to the need for women to regularise their rights *vis-a-vis* property, inheritance, the custody of children, and nationality.⁶⁶ Once again, Kenya was solidly represented. The Chairperson of MYWO, Jane Kiano, led a large team. By most accounts, Kiano was a dynamic performer on the international stage.⁶⁷ And it also appears that Kenya played a central role in drawing the delegates' attention to the vexed question of female genital mutilation.⁶⁸

6.3 *Third World Conference on Women: Nairobi*

In 1985, Nairobi hosted the third in the series of global conferences. It was a tremendous moment for both the UN and Kenya. The Decade for Women was drawing to a close and Nairobi provided the opportunity for detailed assessments and evaluations. Attendees took to the task with great enthusiasm. Unfortunately, as with Copenhagen, the country data scrutinised in Nairobi revealed that only a small minority of women, mostly in the developing world, had benefitted from the attention and resources devoted to discrimination and equal access.⁶⁹ Energies turned to rethinking and retooling.⁷⁰

lowup/session/presskit/hist.htm on 31 October 2016.

⁶⁴ See United Nations Entity for Gender Equality and Empowerment of Women, *The four women's conferences 1975-1995: Historical perspective*, — <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

⁶⁵ See United Nations Entity for Gender Equality and Empowerment of Women, *The four women's conferences 1975-1995: Historical perspective*, — <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

⁶⁶ See United Nations Entity for Gender Equality and Empowerment of Women, 'the four women's conferences 1975-1995: Historical perspective', — <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

⁶⁷ Aubrey, *The politics of development co-operation*, 62.

⁶⁸ Hosken F, *The Hosken report: Genital and sexual mutilation of females*, Women's International Network News, Lexington MA, 1982, 381.

⁶⁹ See United Nations Entity for Gender Equality and Empowerment of Women, *The four women's conferences 1975-1995: Historical perspective*, — <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

⁷⁰ See United Nations Entity for Gender Equality and Empowerment of Women, *The four women's conferences 1975-1995: Historical perspective*, — <http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

Nairobi produced the Forward Looking Strategies (FLS).⁷¹ The FLS charted the path to the year 2000, defining the upcoming decade as one during which national governments would be pressed into institutionalizing women's issues in all policies and sectors.⁷² Underpinning the FLS was a bold ideological breakthrough that positioned women's concerns in all sectors of enterprise, governance and development.⁷³

For Kenyan women, the Nairobi Conference was monumental. Political rumblings in MYWO were set aside, temporarily, to play host to nearly 15,000 delegates in the city for both the governmental and non-governmental forums. The excitement was palpable as was the sense of crossing into a brave new age of women's activism. Even today, memories of the time are vivid:

Kenyan women had an opportunity to showcase their projects. It also provided an opportunity for Kenyan women to be exposed to women from developed countries and to be empowered... Indeed this conference had a lasting impact on Kenyan women. This was a great achievement by any account. Most of us will undoubtedly recall personal experiences of this great event with tremendous feelings of nostalgia. The streets of Nairobi were full of women. Kenyan men felt threatened. It was viewed by men as a threat to the patriarchal system.⁷⁴

As history would have it, the real lessons from Nairobi lay in the cumulative value of *all* the women's conferences. From Mexico to Copenhagen to Nairobi, one layer of ambitious planning was added to another, pushing stakeholders up the ladder and closer to equality. For Kenyan women, these lessons would prove extremely valuable as they entered an unprecedented and tumultuous phase of political activity.

6.4 Fourth World Conference on Women: Beijing

In 1995, arguably the most influential of all the women's conferences was held in Beijing. A total of 17,000 women made their way to China for

⁷¹ United Nations Entity for Gender Equality and Empowerment of Women, *The four women's Conferences 1975 - 1995: Historical Perspective*, —<http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

⁷² United Nations Entity for Gender Equality and Empowerment of Women, *The four women's Conferences 1975 - 1995: Historical Perspective*, —<http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> 31 October 2016.

⁷³ United Nations Entity for Gender Equality and Empowerment of Women, *The four women's Conferences 1975 - 1995: Historical Perspective*, —<http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

⁷⁴ 'Birth of a Dream: The History of FIDA' 2015, 11.

the formal meeting and another 30,000 participated in the non-governmental forum.⁷⁵ They formed the quorum for several remarkable sessions over a two-week period resulting eventually in the Beijing Platform for Action – a document so extraordinary that it continues to reverberate twenty years later.⁷⁶ Beijing's great leap forward was to finally make explicit the link between women's rights and gender equality.⁷⁷ Nothing could be achieved without re-ordering relationships between women and men in order to realise full, equal partnerships for the overall good of society. Beijing tabled gender mainstreaming; the idea that policies, programs and initiatives had to address the needs of *both* women and men in order to prosper.⁷⁸

The other important linkage made in Beijing was between mainstreaming and twelve critical areas of concern. These were identified in plenary as in urgent need of gendered interventions by government and civil society players alike: women and poverty; education and training of women; women and health; violence against women; women and armed conflict; women and the economy; women in power and decision-making; institutional mechanisms for the advancement of women; human rights of women; women and the media; Women and the environment; and the girl child.

The Beijing Declaration and Platform for Action bound signatories to a stringent review process.⁷⁹ Member states were required to produce comprehensive reports every five years outlining the steps, or lack thereof, made towards tackling the twelve areas of concern. National reports and surveys were then bundled into regional and international ones which continue to be published as a means of assessing progress.⁸⁰

⁷⁵ Reichert E, "Keep on moving forward": NGO Forum on Women, Beijing, China' 18(1) Social Development Issues, 1996, 1.

⁷⁶ United Nations Entity for Gender Equality and Empowerment of Women, *The four women's Conferences 1975 - 1995: Historical Perspective*,—<http://www.un.org/womenwatch/daw/lowup/session/presskit/hist.htm> on 31 October 2016.

⁷⁷ United Nations Entity for Gender Equality and Empowerment of Women, *Fourth World Conference on Women, 1995*—<http://www.un.org/womenwatch/daw/beijing/platform/declar.htm> on 31 October 2016.

⁷⁸ United Nations Entity for Gender Equality and Empowerment of Women, *Fourth World Conference on Women, 1995*—<http://www.un.org/womenwatch/daw/beijing/platform/declar.htm> on 31 October 2016.

⁷⁹ For the Declaration and Platform in full, see, United Nations Entity for Gender Equality and Empowerment of Women, *Fourth World Conference on Women, 1995*—<http://www.un.org/womenwatch/daw/beijing/platform/declar.htm> on 19 December 2015.

⁸⁰ For example, United Nations Entity for Gender Equality and the Empowerment of Women, *Summary report: The Beijing declaration and platform for action turns twenty*, 2015.

Kenyan women took the Beijing Conference just as seriously as they had taken Mexico, Copenhagen, and Nairobi. The Government, as Nyiva Mwendwa would later recall, put together a huge delegation outnumbered by only the Americans and Nigerians.⁸¹ As Kenya's first female Cabinet Minister (Culture and Social Services), Mwendwa herself led the team. The amount of preparatory work put in was immense and the Kenyan delegation arrived in Beijing having spearheaded regional efforts to arrive at a comprehensive African position on health, education, economic participation, empowerment, and the girl child, expressed in the Dakar African Platform for Action.⁸² More importantly, upon their return, Kenyan women immediately got to work with the Minister, proposing the idea to set up a Task Force to study the Beijing Platform with a view to speeding domestication.⁸³

Back in 1993, a task force had been set up with the mandate to review all laws relating to women in Kenya, paying particular attention to those that impaired enjoyment of their human rights.⁸⁴ Then a Judge of the Court of Appeal, I was appointed to chair the team and to deliver the technical and professional advice the Attorney General would require to domesticate CEDAW.⁸⁵ By 1995, the Task Force's thinking had expanded to include the declaration that had flowed out of Beijing. The Task Force's report, published in 1999, gave very clear recommendations that Kenya's laws would either have to be reformed or repealed to assure women of the equal enjoyment of their rights.⁸⁶ Above all, the Task Force represented many years of effort and dedication from the Secretariat and a large contingent of consultants and researchers. Scores of ordinary women interacted with the Task Force via oral and written submissions that showed a remarkable awareness of the issues discussed by CEDAW and in Beijing.

Despite the energy and commitment shown by Kenyan women, the overall perceptions of these international initiatives ranged from confusion

⁸¹ Republic of Kenya, *Kenya National Assembly official record (Hansard)*, 30 October 1996, 2393.

⁸² See, Fifth African Regional Conference on Women, *African platform for action: African common position for the advancement of women*, Dakar, 16-23 November, 1994.

⁸³ As reported in Republic of Kenya, *Kenya National Assembly official record (Hansard)*, 6 November 1996, 2506.

⁸⁴ For mandate, see, Republic of Kenya, *Report of the task force appointed to review laws relating to women*, 11-19.

⁸⁵ Republic of Kenya, *Kenya Gazette*, Notice No. 4820 of October 1993.

⁸⁶ For Task Force Recommendations see, Republic of Kenya, *Report of the task force appointed to review laws relating to women*, 329-346.

to the hostility. President Moi dismissed the entire Conference as pandering to ‘un-African’ agendas such as homosexuality and lesbianism.⁸⁷ Mwendwa was dragged over the hot coals of the Kenyan media for, apparently, taking a hairstylist along with her to China; an accusation she went to great lengths to later deny.⁸⁸ The rest of the delegates were characterized as joyriding wastrels only interested in shopping and sightseeing, forcing the Minister to come to the delegates’ defence by describing them instead as businesswomen. Furthermore, shocking levels of ignorance were displayed in the National Assembly, the very body charged with implementation of the Beijing Platform of Action. Contributing to a motion on the Beijing Platform, in 1996, Martha Karua, then the Member of Parliament (MP) for Gichugu, articulated her dismay at the situation in Parliament:

Mr Temporary Speaker Sir, I have noted from the contributions from Members, that we as Members of this House are also quite ignorant of what the Beijing Platform for Action is... If the Members of this House are not aware of such important issues then we can see even a greater need of letting the entire Kenyan population know what we are talking about when we talk about women’s empowerment.⁸⁹

Beijing demonstrated that the gap between international aspirations and local realities of the women’s movement was a very large one. The UN set in motion a very important process sketching out the parameters for the empowerment of women.⁹⁰ In Kenya’s case that meant specifically creating a framework for power, decision-making, and institutional advancement. It would, however, be incorrect to suggest foreign ownership or external control. As the subsequent section will show, Kenyan women seized the lessons from Beijing, grafted them onto their own experiences and in the end forged their own path.

7 From turmoil to triumph

Although the quest for meaningful constitutional reforms and fuller political participation for women in Kenya had been bubbling silently since the early 1960s, it would take until the 1990s for the movement to intensify into

⁸⁷ ‘Moi says no to “un-African sins” *Daily Nation*, 30 October 1995.

⁸⁸ ‘Nyiva Mwendwa: Never Give into Despair’ *The Standard*, 23 October 2008.

⁸⁹ Republic of Kenya, *Kenya National Assembly official record (Hansard)*, 6 November 1996, 2508.

⁹⁰ United Nations Entity for Gender Equality and Empowerment of Women, *The four women’s Conferences 1975 - 1995: Historical Perspective*,—<http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm> on 31 October 2016.

organized political activity. An obvious question presents itself: why was the 1990s and subsequent years so fertile for women's activism and advocacy? The answer is less obvious. As is often the case, a number of factors combined to give this era the dynamism needed to push women's issues to the forefront. These included the existence of a critical mass, gender solidarity, and the building of strategic alliances. Each of these factors is discussed below in detail.

7.1 *A critical mass*

From a very low base, the number of women in the National Assembly increased to allow for a critical mass of female representatives (and their allies) to champion gender causes in the Legislature. As Table 1 above demonstrates, the number of women in Parliament through the 1990s was small; they did not even make up 10% of the total number of legislators. Moreover, women did not benefit from any kind of affirmative action. They had instead clawed their way through the violent and chauvinistic world of electoral politics; many of them have since spoken openly about the trauma of running campaigns.⁹¹ The significance of this development was not the increased number of female parliamentarians, but, rather, their ability to keep gender issues alive in a very unsympathetic environment.

A word of caution is necessary because not all female representatives took on the mantle of women's empowerment. If anything, many of them took partisan positions which, more often than not, meant voting along party lines whatever the implication of the motion in question on gender. A study of voting patterns in the 9th Parliament is telling.⁹² During a Government-sponsored vote on decreasing the number of female legislators in the East African Legislative Assembly (EALA), some women, members of KANU, recused themselves altogether.⁹³ Another female KANU MP voted with the Government.⁹⁴ Women's representatives either abandoned or supported gender legislation when it suited them. The parliamentary core that remained constant and true to women's empowerment was very small; but, as it turns out, it had less impact.

⁹¹ Ndeda, 'Luo women voters/aspirants and the new constitutional dispensation in the March 2013 Kenya elections', 219-221.

⁹² Cited in Nasongo and Ayot, 'Women in Kenya's politics of transition and democratisation', 186.

⁹³ Nasongo and Ayot, 'Women in Kenya's politics of transition and democratisation', 186.

⁹⁴ Nasongo and Ayot, 'Women in Kenya's politics of transition and democratisation', 186.

7.2 Gender solidarity

Gender solidarity was difficult to come by in the late 1980s and early 1990s. The section above has explained the shattering effect that the politicization of MYWO had on the women's movement. As KANU tightened its grip, it dismantled an organization that had previously accommodated women regardless of background and outlook. Under KANU's influence, MYWO veered towards rigidity and intolerance. Dissenters were dealt with ruthlessly. In 1989, MYWO organized rallies against Wangari Maathai and her campaign to save Nairobi's Uhuru Park from an audacious (and illegal) land grab.⁹⁵ The public was treated to the disheartening sight of women hurling deeply personal abuse at a former colleague. To make matters worse, MYWO was riven by *internal* divisions as officials fell out in their rush for power and proximity to their (male) benefactors in KANU.

In 1992, an important shift occurred. Again, it is difficult to explain the precise timing. In February, the NCWK, an organization described as not 'having achieved much' since its formation in 1964, suddenly jolted into activity.⁹⁶ With the African Women's Development and Communication Network (FEMNET) as partner, NCWK convened the first ever National Women's Convention in Kenya.⁹⁷ The Convention's goals were overtly political and revolved around women's strategies for the General Election scheduled for the end of the year. Delegates came together not as rivals but as collaborators anxious to achieve success for all women regardless of their political affiliation. Maria Nzomo, prominent activist and key speaker at this Convention, declared that 'ethnic and other barriers were broken that day, as Kenyan women found a common link as women in their oppression.'⁹⁸ This powerful moment was reinforced years later when MYWO finally split from KANU and returned to its roots. With organizations such as Mothers in Action and Anti-Rape also cropping up, there was a renewed emphasis on women working above and beyond politics.

⁹⁵ Wangari Maathai spoke frequently about her efforts to save Uhuru Park. For an interview see, Goodman A, 'Unbowed: Nobel Peace Laureate Wangari Maathai on climate change, wars for resources, the Green Belt Movement and more' *Democracy Now!*, 1 October 2007. http://www.democracynow.org/2007/10/1/unbowed_nobel_peace_laureate_wangari_maathai on 18 February 2016.

⁹⁶ Kamau, *Women and political leadership in Kenya*, 18.

⁹⁷ Nzomo M, 'Kenyan Women in Politics and Public decision making' in Gwendolyn ed, *African Feminism: The Politics of Survival in Sub-Saharan Africa*, University of Pennsylvania Press, 1997, 243.

⁹⁸ Kamau-Ruttenberg, 'Feuding in the family', 82.

In coming together, women began to define their positions much more pointedly. Out of the first National Women's Convention held in February 1992 emerged a raft of objectives that almost foretold Beijing: The creation of a Ministry for Women's Affairs, Children and Social Services; the creation of a National Commission on Gender; the establishment of a Women's Fund; 30% representation for women in all public offices; the enactment of a Sexual Offences Act.

It is important to note that this newfound gender solidarity did not mean an absence of conflict. Gender as a mobilizing and unifying concept is powerful, but in Kenya, as in many other developing societies, it is not strong enough to overcome such divisive dynamics as class, ethnicity, and race. In other words, gender alliances were and still are somewhat fragile and prone to breakage despite the obvious evidence that women are at their effective best when defending common interests.

7.3 *Strategic alliances*

While gender solidarity gave the movement internal cohesion, strategic alliances gave Kenyan women external strength. In attaching themselves to the broader search for democracy and reform, Kenyan women avoided marginalization; their cause became relevant to the mainstream and vice versa. Once again, this trend dates back to the early 1990s. Before that, one would be hard-pressed to find any constituency that supported Kenyan women. The only people supporting women's issues were women. Most obviously, Kenyan men formed a solid and unmoving block to women's aspirations. Antipathy towards women flowed from the very highest to the lowest levels of Government. Public officials routinely revealed a lack of understanding, let alone sympathy, towards women; making the case for greater rights. At an international seminar attended predominantly by women, President Moi caused widespread outrage by proclaiming that 'you women can achieve more but because of your little minds, you cannot get what you are expected to get'.⁹⁹ The tide began to change when political energies in Kenya turned to the introduction of multi-party politics. With like-minded Kenyan women and men breaking the KANU stranglehold came the realization that, as Beijing would

⁹⁹ 'Outrage at Moi remark' 8 March 2001— <http://news.bbc.co.uk/1/hi/world/africa/1209531.stm> on 26 January 2015.

soon describe it, society as a whole benefitted from the inclusion of women.¹⁰⁰ We then begin to find male politicians in alliance with female ones actively pushing a gendered agenda. One sees this alliance in full effect in 1997 when Asiyo, then an MP for Karachuonyo, rose in the House to introduce the now legendary Affirmative Action Motion which proposed: Legislation requiring that 30% of candidates standing for local authority and national elections be female; a constitutional amendment providing for 2 female MPs per province (16 in total); and legislation mandating Government funding of national parties based on the number of women candidates fronted by the party.¹⁰¹

The motion was seconded by Kiraitu Murungi (South Imenti) who gave what may well be the first male defence of affirmative action ever heard in the House:

This motion intends to correct the present imbalance and injustice between men and women in holding senior political positions in this country. I support this motion within the general framework of constitutional and administrative reforms that we are seeking for better governance of this country... Mr. Temporary Deputy Speaker Sir, women form 52% of the population of Kenya but they have been relegated to political invisibility and tokenism.¹⁰²

Many other members of the opposition supported the historic motion, but it was ultimately soundly defeated. The vast majority of parliamentarians were completely unwilling to sign up to affirmative action. Their submissions rehashed age-old arguments that women were adequately represented by male MPs and that any increase in women's representation should be a consequence of some kind of natural evolution. As a Minister of State metaphorically explained, 'when the child is ready to be born, you do not use force, it just comes out naturally.'¹⁰³ The motion's defeat was deeply disappointing, and in the 1997 General Election, only four women were elected to Parliament.¹⁰⁴ Five women were nominated to Parliament and this was a huge leap. They had been nominated through the efforts of the Inter-Parties Parliamentary Group (IPPG), an

¹⁰⁰ See, United Nations Entity for Gender Equality and the Empowerment of Women, *Mission statement fourth world conference on women*. <http://www.un.org/womenwatch/daw/beijing/platform/> on 19 December 2015.

¹⁰¹ Republic of Kenya, *Kenya National Assembly official record (Hansard)*, 23 April 1997, 340–343.

¹⁰² Republic of Kenya, *Kenya National Assembly official record (Hansard)*, 23 April 1997, 343.

¹⁰³ Republic of Kenya, *Kenya National Assembly official record (Hansard)*, 23 April 1997 356.

¹⁰⁴ Ndeda, 'Luo women voters/aspirants and the new constitutional dispensation in the March 2013 Kenya elections', 219–221.

unlikely grouping of parliamentarians who had agreed to push through minimal constitutional reforms in view of the political violence then sweeping through Kenya and threatening to plunge the country into total mayhem.

The alliance with male parliamentarians persevered. It even thrived. Over time, it expanded to include groups such as persons with disability and indigenous people. In many ways, women were already the *de facto* spokespeople for this coalition of the voiceless and the marginalized. Some women's groups like Federation of Women Lawyers Kenya (FIDA Kenya), for instance, adopted broad social and economic justice agendas that went far beyond conventional gender considerations.¹⁰⁵ Inclusivity would go on to give the women's movement a strength and relevance that it had lacked in earlier years. Before long, women were, as one commentator has put it, 'negotiating from the center' and fighting their battles from the very heart of the constitutional review process.¹⁰⁶

By 1997, no serious political party in Kenya was without some kind of manifesto on the representation of women. They could not offer themselves to the Kenyan electorate without stating where they stood on the issue of women's empowerment and representation. Subsequent audits have shown that in actual fact, many of the parties performed very poorly on gender; their fine policies and constitutions never translated into practice.¹⁰⁷ Nonetheless, an important marker had been laid down. It became very difficult for establishment politicians to go backwards and undo the efforts made towards equal representation and affirmative action.

8 Key milestones in the journey towards equality

The story of constitutional reform in Kenya has been told many times. It is so well documented that it needs no retelling here.¹⁰⁸ Nevertheless, it is

¹⁰⁵ See Resolutions in 'Birth of a Dream: The History of FIDA' 2015, 26.

¹⁰⁶ Kabira W and Kimani E, 'The historical journey of women's leadership in Kenya' 3(6) *Journal of Emerging Trends in Educational Research and Policy Studies*, 2012, 842-849.

¹⁰⁷ For more detailed data, see, Women Shadow Parliament - Kenya and HIVOS, *The participation and representation of women in management of political parties: An unfinished agenda in Kenya* <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/RAPID-GENDER-ASSESSMENT-AND-AUDIT-OF-POLITICAL-PARTIES-IN-KENYA.pdf> on 26 January 2016.

¹⁰⁸ There are several detailed and comprehensive histories. A particularly useful one is, Media Development Association & Konrad Adenauer Foundation, *History of constitution making in Kenya*, 2012.

important to give recognition to certain moments that hold particular importance for women and their quest for greater representation. With the benefit of hindsight, these moments signal key transitions from one stage of the struggle to another. These moments, however, also reveal the fragility of the entire process and the points at which the movement might well have collapsed under the weight of infighting, confusion, and political territorialism. Either way, no consideration of the history of women and constitutional reform is complete without these milestones.

8.1 *The Constitution Review of Kenya Act, 1998*

This Act formally kicked off the constitutional review process. It laid down the legal framework for the review and rewriting of the Repealed Constitution. It would take a further two years to sort out issues of overall control of the process with heated tussles between Parliament, on the one hand, and civil society, on the other.¹⁰⁹ Eventually, ‘the people’ (as it were) won, impelling the establishment, in 2001, of a broad, inclusive, and participatory Constitution of Kenya Review Commission (CKRC). There was an inbuilt recognition of the importance of female representation. Of the 27 Commissioners appointed to run CKRC, a third were women, drawn from a broad variety of backgrounds.¹¹⁰

8.2 *Wanjiku, 1999*

Early on, President Moi gave a speech that cold-shouldered the entire exercise. He chose a telling metaphor. He asked his audience whether *Wanjiku*, a common name for women among the Kikuyu and shorthand for the ordinary citizen, belonged in the review process at all. He said: ‘If you ask *Wanjiku* what she wants to be changed in the Constitution, she will tell you that she has elected people in Parliament to deal with such questions.’¹¹¹ He went on to wonder whether a country as poor as Kenya could afford the expense of

¹⁰⁹ Media Development Association & Konrad Adenauer Foundation, *History of constitution making in Kenya*, 31-33.

¹¹⁰ Constitution of Kenya Review Commission (CKRC), *Final Report*, 2005, xvi.

¹¹¹ As reported in ‘Judith Achieng’: Women’s Caucus Calls For People-Driven Constitution’ *Inter Press Service News Agency*, 15 November 1999 — <http://www.ipsnews.net/1999/11/rights-kenya-womens-caucus-calls-for-people-driven-constitution/> on 27 January 2016.

a multi-billion shilling review process, suggesting instead that such monies were better spent on the provision of basic services.¹¹²

The President spoke of *Wanjiku* dismissively. The next few years would see determined efforts to exclude the average Kenyan from participating in the review process. The women's movement, however, would embrace the idea of *Wanjiku* wholeheartedly. There emerged the idea of the 'Wanjiku Constitution': an idealized document that would hold the solution to poverty, landlessness, illiteracy, unemployment, and lack of opportunity.¹¹³ *Wanjiku* became the much loved symbol of ordinary people's expectations of the process and many a group claimed to either speak for or represent her. In his attempts to denigrate, President Moi had quite unwittingly gifted the women's movement with an easy and relatable vehicle for the promotion of their cause.

8.3 National Constitutional Conference, 2003 - 2004

The Bomas Constitutional Conference was convened in April 2003 to discuss the Draft Constitution of Kenya by the CKRC.¹¹⁴ It continued into April 2004. For the women of Kenya, it represented not so much a turning point as the continuation of the impressive organization and tactical discipline they had displayed throughout. They lobbied to ensure that one out of every three district representatives was a woman and facilitated their attendance.¹¹⁵ More importantly, women were active monitors of the proceedings.¹¹⁶ They met every day in informal committees in order to ensure that their various interests were not being overlooked. Four key organizations provided particularly close scrutiny of the draft document: FIDA Kenya, Kenya Human Rights Commission (KHRC), League of Women Voters, and the Institute for Education and Democracy (IED).¹¹⁷ They were satisfied with most of its provisions

¹¹² 'Judith Achieng': Women's Caucus Calls For People-Driven Constitution'.

¹¹³ As reflected in Kenya Human Rights Commission, *Wanjiku's journey: Tracing Kenya's quest for a new constitution and reporting on the 2010 national referendum*, 2010.

¹¹⁴ Media Development Association & Konrad Adenauer Foundation, *History of constitution making in Kenya*, 38.

¹¹⁵ The Centre for Rights Education and Awareness (CREAW), *Constitution Making - Power Dynamics, Intrigues & Struggles Kenyan Women Reflect*, 2008, 7.

¹¹⁶ The Centre for Rights Education and Awareness (CREAW), *Constitution Making - Power Dynamics, Intrigues & Struggles Kenyan Women Reflect*, 2008, 10.

¹¹⁷ For more on these organizations and their advocacy in 2003 - 2004, see Muteshi J, 'Women's advocacy: Engendering and reconstituting the Kenyan State' in Mutua M (ed), *Human rights NGOs*

but they had serious reservations on the section on land and property rights as some of the clauses quite clearly discriminated against women.¹¹⁸

The Conference itself ended in complete shambles. A walk out by the Government delegation triggered a meltdown that would take another five years to unravel. It was another low point in the process. However, the collapse did not spell the end of activism by women. For the most part, the women's movement hung together with a tight focus on the end goals of empowerment and representation. It was, incidentally, a unity that would serve them well during another dark chapter in Kenya's history: the post-electoral upheaval of 2007 and 2008 during which an untold number of women were subjected to shocking and sustained violence.¹¹⁹

8.4 *Constitutional referendum, 2010*

4 August 2010 marked the end of an arduous and deeply troubled journey. On that day, Kenyan citizens lined up in their millions to simply vote either 'no' or 'yes' to the adoption of a new Constitution. The 'yes' vote carried the day and on 27 August 2010, the 2010 Constitution was promulgated.

Both the 2010 Constitution itself and its adoption represent the enduring commitment of women to this long-running cause. Their role was far from passive. Women were prominently represented in the Committee of Experts (CoE), which drafted the Constitution that was ultimately subjected to referendum in August 2010. Women comprised one third of the CoE and they maintained an unwavering gaze on women's issues. With input from legislators and the public, the CoE produced a draft that was sent back to Parliament for final approval before presentation to the referendum. Again, women had to be vigilant because Parliament had the power to alter the CoE Draft Constitution. It took a great deal of dedicated lobbying to ensure that the draft passed through Parliament unscathed. The run up to the referendum saw a push to mobilize women. Women's networks were reactivated for the last time. FIDA Kenya convened five National Women Strategy meetings to thrash out the

in East Africa: Political and normative tensions, University of Pennsylvania Press, Philadelphia, 2009, 131-153.

¹¹⁸ Muteshi, 'Women's advocacy', 141-144.

¹¹⁹ The sexual and gender violence that occurred in the wake of the 2007 election is extensively documented in Republic of Kenya, *Report of the Commission of inquiry into post-election violence*, 2008.

implications of ‘yes’ or ‘no’ for women.¹²⁰ A Rapid Response Unit was set up specifically to take on the media and to quickly counter misinformation or controversies surrounding the women’s agenda.¹²¹ Campaigns were initiated to register women for the vote and these met with great success. For half of the newly registered voters in many provinces were women and, for that matter, women under the age of forty.¹²² It was a huge breakthrough for an electoral system characterized by the exclusion and side-lining of women for nearly half a century.

9 Epilogue: The ‘two-thirds gender rule’ imbroglio

The 2010 Constitution is a document full of many radical changes. One of its most eye-catching features is the principle of affirmative action. Articles 27 and 81(b) set aside one third of the seats in Parliament and County Assemblies for women. The women of Kenya had, as this chapter has shown, worked very hard for this goal from the 1960s onwards in the knowledge and belief that they have an important role to play in governance and politics.

Unfortunately, much of the optimism and euphoria on display in 2010 in the wake of the ‘yes’ vote and the subsequent promulgation is no more. In 2016, Kenyan women are faced with the cold and hard truth that Articles 27 and 81(b), guaranteeing them one-third representation, have not been implemented. Currently, women’s political representation stands at 19% (86 elected and nominated female members of the National Assembly and the Senate). This percentage needs to rise by 14 points to 33%. Reminiscent of the 1980s and 1990s, the male-dominated Parliament does not seem to know how to address the issue of affirmative action.

The courts have not offered much by way of guidance, either. The Supreme Court Advisory Opinion on the Principle of Gender Representation¹²³ simply stated that by the end of August 2015, the Executive and Parliament

¹²⁰ For more on FIDA Kenya activities in the run up to the referendum, see, Maingi G, ‘The Kenya constitutional reform process: A case study on the work of FIDA Kenya in securing women’s rights’ 15 *Feminist Africa*, 2011, 63 - 81.

¹²¹ Domingo P, McCullough, Simbiri F and Wanjala B, *Women and power: Shaping the development of Kenya’s 2010 Constitution*, Overseas Development Institute, London, 2016.

¹²² ‘Facts and Figures: Kenya Referendum 2010’ *Daily Nation*, 3 August 2010.

¹²³ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Supreme Court Advisory Opinion No. 2 of 2012.

needed to arrive at a formula that would ensure the realization of the one-third gender formula. August 2015 has come and gone with no such formula being crafted. Instead, the women of Kenya have been treated to a retrogressive rhetoric that reveals continuing male anxieties about women's representation. One particularly notorious and much reviled effort was the Constitution of Kenya (Amendment Bill 2015), the so-called Chepkonga Bill of 30 April 2015.¹²⁴ The Bill sought to undermine Article 81(b) of the 2010 Constitution by describing the one-third gender process as an open-ended one subject to 'progressive implementation'. With no clear time frame, it is difficult to see how Article 81(b) would ever be realized and, indeed, non-implementation appeared to be the overall goal of the Chepkonga Bill.

Not only does the current 11th Parliament not meet the one-third gender-representation requirement, but also appears singularly unprepared to lay a legislative foundation for the 12th Parliament due in 2017. Kenyan women are yet again in an existential fight for their political lives. It remains to be seen whether their strategies and tactics of old will help them to emerge victorious.

¹²⁴ See 'Caroline Wafula: Chepkonga's Bill a 'Broken Promise' say Women' *Daily Nation*, 3 August 2015.

CHAPTER THREE

The quest for equal gender representation in Kenya's Parliament: Past and present challenges

Patricia Kameri-Mbote

1 Introduction

Political representation of women has been at the heart of feminist movements and the quest for gender equality from the beginning. The thrust of the liberal feminist movement was to get women to the public sphere as women challenged their relegation to the private sphere as appendages of the male who made decisions for them in the public sphere. The challenge of subjugation of certain groups such as women and other minorities is one that many countries have had to confront. Such groups are usually dominated by those who are in privileged positions and are favoured by existing laws and policies. This raises the need for measures to ensure that they are assisted by levelling the playing field. Such measures include affirmative action programmes in different fields including politics. In Frene Ginwala's words:

The seeds of democracy lie in the principle that the power to make decisions about people's lives, society and their country, should derive a choice by those who will be affected. For many centuries, the basis of this legitimacy was limited and many were excluded from making a choice: slaves, ..., those without property or formal education, those not 'civilized' or not part of the dominant culture or religion in society, people of colour, of a particular race, of ethnic group, indigenous people of countries and overwhelmingly, women.¹

This argument has been propounded to justify the need for participation of all members of the society in matters of governance and ensuring that all these members are given a chance to play a role in the decision-making process. Ronald Dworkin has defined affirmative action as 'programmes specially and specifically launched for disadvantaged, disabled and minority groups

¹ Ginwala F 'Foreword to the original 1998 version' in Ballington J and Karam A (eds) *Women in Parliament: Beyond Numbers*, 2005, 14.

of people in the society as effective or at least possibly effective means to a desirable social goal, namely to increase the capabilities and chances of disadvantaged, disabled and minority groups of persons so that they can participate in a greater way in development activities and in the process make this group of people realize their daily human needs'.² These development activities include politics. Corrective measures are adopted to correct injustices faced by these groups in the past, which continue to have effects in the present.

A major theme that is evident in the definitions adopted on affirmative action is the fact that what is sought is the levelling of the playing field so as to ensure that equal opportunities are provided for all. This recognizes the fact that every person has the right to equal access to self-development³ and as such this right must be respected. It has also been propounded that affirmative action programmes are important in ensuring the promotion of the welfare of members of the public because the available human resources are put into maximum use and thus waste is avoided.⁴

Some jurisprudential schools of thought have emerged to justify the necessity of affirmative action programmes. One of such theories is the distributive justice theory. Proponents of this school of thought argue that certain categories of people are to be compensated for past injustices visited upon on them. John Rawls in his book *A Theory of Justice*⁵ states that the conception of justice includes *inter alia* 'equality for all, both in the basic liberties of social life and also in distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality'.⁶ This is what has been termed to amount to positive discrimination.

Iris Marion Young in her writings argues that in order to ensure that all human beings are able to pursue their ends without hindrance, it is required that 'real participatory structures in which actual people, with their geographical, ethnic, gender and occupational differences, assert their perspectives on

² Ronald Dworkin 'Why Bakke has No Case', available at <http://www.nybooks.com/articles/archives/1977/nov/10/why-bakke-has-no-case/> on 10 June 2014.

³ Kaimenyi C, Kinya E and Samwel C, 'An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya', 3 *International Journal of Business, Humanities and Technology* 6, 2013, 91.

⁴ Nickel JW, 'Preferential Policies in Hiring and Admission', http://www.jstor.org/stable/1121772?__redirected on 10 June 2014.

⁵ Rawls J, *A Theory of Justice*, 1972, 53-54.

⁶ Rawls J, *A Theory of Justice*, 1972, 53-54.

social issues that encourage the representation of their distinct voices'.⁷ This, therefore, necessitates the establishment of structures through which these 'distinct voices' can be heard. Lawrence Mute puts it this way:

Positive discrimination is neither weird nor cynical; it is justified. The important factor to bear in mind when deciding that a category of people should be helped through legislation (read affirmative action programme) for their good to the exclusion of the rest of the society is if such help makes the group in question to feel that they have a semblance of equality with everybody else.⁸

The justification for this, as propounded by Mute, is that justice should be used as a corrective tool to redress past injustices. The other school of thought adopted is the justification of affirmative programs on ground of utility. Proponents of this school of thought state that the welfare of the members of the society is usually promoted through the reduction of poverty and inequality.⁹ The utility approach argues that the measures adopted not only ensure the good of the person to be affected but ensure the improvement of the general welfare of the members of the public.¹⁰

This chapter looks at the issue of gender representation in Kenya. Coming against the backdrop of a fierce contestation for the implementation of the 'not more than two-thirds of the same gender' rule in the Constitution of Kenya, 2010, (2010 Constitution)¹¹ it specifically looks at gender representation in Parliament. Part I is the introduction. Part II conceptualises the issue of gender representation and highlights why it remains contentious. Part III places gender representation in Kenya in a historical context highlighting key attempts to attain equality in this realm. Part IV highlights the provisions of the 2010 Constitution problematizing the difficulties encountered in implementing the facilitative provisions. Part V looks at attempts that have been made to assault the bastion of male privilege that politics remain. Part VI con-

⁷ Young M, *Justice and the Politics of Difference*, 1990, 116.

⁸ Mute L, 'The Blind and the Law', *Unpublished LL.B Dissertation, University of Nairobi*, 1992, 25.

⁹ Mbunda LX, 'The Jurisprudence of Affirmative Action Programmes: Is there Need for Similar Programmes in Kenya?' in Y Vyas et al (eds) *Law and Development in the Third World*, Faculty of Law, University of Nairobi, 35.

¹⁰ Mbunda LX, 'The Jurisprudence of Affirmative Action Programmes: Is there Need for Similar Programmes in Kenya?' in Y Vyas et al (eds) *Law and Development in the Third World*, Faculty of Law, University of Nairobi, 35.

¹¹ Mbunda LX, 'The Jurisprudence of Affirmative Action Programmes: Is there Need for Similar Programmes in Kenya?' in Y Vyas et al (eds) *Law and Development in the Third World*, Faculty of Law, University of Nairobi, 35.

cludes that a more radical orientation is required to achieve gender equality in Kenyan politics.

2 Gender representation: Some conceptual issues

2.1 Gender

The term ‘gender’ means the state of being either male or female.¹² The male and female genders are distinguished from one another by physical, that is, biological sexual/ reproductive differences. The term ‘gender’ has, however, increasingly acquired a social meaning referring to characteristics of one’s biological sex and defining how the male and the female genders relate in society. These characteristics include gender-based division of labour where duties are allocated on the basis one’s sex. For example, the female gender is allocated duties such as cooking, washing and other domestic chores, which belong to the private/reproductive rather than the public/productive sphere.¹³ The male gender is allocated duties in the latter sphere such as decision-making in the public sector.¹⁴

Thus, when one adverts to the issue of gender today, one is not merely talking about the *physical difference* that being biologically male/female would entail. One is also talking about *social constructions of maleness and femaleness* and this often translates into *power relations* between men and women.¹⁵ Socially and culturally determined patterns of behaviour influence rights, duties, obligations, and status assigned to women and men in society.¹⁶ The roles assigned to the female gender consequently relegate their performers to positions of power/powerlessness.¹⁷ Women found no space in the powerful public/productive spheres such as politics with the situation aggravated by political philosophers and thinkers who have opined that women are only fit only for domestic and caring roles as mothers and wives.¹⁸

¹² M Becker *et al* (eds) *Feminist Jurisprudence: Taking Women Seriously, Cases and Materials*, 1994, 1.

¹³ See e.g., Brophy J and Smart C, *Women in Law: Explorations in Law, Family and Sexuality*, 1985, 43 and MacKinnon CA, *Feminism Unmodified*, 1987, 67.

¹⁴ Clarion ‘An Introduction to Gender, Law and Society: Constitutional Debate No. 11’, 2001, 2.

¹⁵ Smart C, *Feminism and the Power of Law*, 1989, 1991.

¹⁶ Mackinon C, *Women’s Lives, Men’s Laws*, 2005, 70.

¹⁷ Mackinon C, *Women’s Lives, Men’s Laws*, 2005, 70.

¹⁸ M Becker *et al* (eds) *Feminist Jurisprudence: Taking Women Seriously, Cases and Materials*, 1994, 35.

2.2 Feminism

Women's studies, therefore, emerged as a body of knowledge analysing the condition of women in society.¹⁹ When such studies were also directed to the changing of women's condition in society, then it became feminist studies.²⁰ Feminism is, therefore, a political movement, which aims at transforming gender relations for the benefit of women.²¹

Feminist scholars use *gender* as an analytical variable, a relational concept that denotes the manner in which women and men are differentiated and ordered in a given socio-cultural context.²² Sexuality appears as the interactive dynamic of gender as an inequality.²³ Sex inequality is thus influenced principally by gender relations whether the latter emerges as the congealed form of the sexualization of inequality between men and women. Gender inequality divides society into two communities of interest. The male centrally features at the top of the hierarchy of control while the female is subjugated and relegated to a secondary position. While the situation has changed over time with women taking on powerful roles in society in diverse spheres, the role of women in politics is still inoptimal as will be illustrated in this chapter.

The earliest strands of feminism focussed on the role of women in the public sphere.²⁴ A feminist, therefore, is a person who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied and that the satisfaction of these needs would require a radical change (or revolution) in the social, economic, and political order.²⁵ The term 'feminism' has generated intense debates as the movement has grown and morphed into diverse genres.²⁶ For our purposes, it is important to point out that the feminist movement, which developed in the post-industri-

¹⁹ Mackinon C, *Women's Lives, Men's Laws*, 2005, 67.

²⁰ Mackinon C, *Women's Lives, Men's Laws*, 2005, 67.

²¹ Becker M *et al* (eds) *Feminist Jurisprudence: Taking Women Seriously, Cases and Materials*, 1994, 15.

²² Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process' *University of Nairobi Law Journal* Vol 1 2003, 156.

²³ Firestone S, *the Dialectic of Sex*, 1970, 144-145.

²⁴ DiStefano C, *Configurations of Masculinity: A Feminist Perspective on Modern Political Theory*, 1991, 20.

²⁵ Delmar R 'Defining Feminism and Feminist Theory' in Herrmann A and Stewart AJ (eds) *Theorizing Feminism: Parallel Trends in the Humanities and Social Sciences*, 1994, 11.

²⁶ Kelly J, 'The Double Vision of Feminist Theory: A Post Script to the Women and Power Conference', 5 *Feminist Studies* 1, 1979, 17.

al revolution era in Europe, is not a unified movement, even though the goals of the movement are one and the same. Thus, in the movement there is a plurality of feminist theories, which have different approaches towards addressing women's problems or understanding women's experiences. Each feminist theory seeks to describe women's oppression, its causes and consequences, and, thereafter, prescribes strategies for the liberation of women.

These theories, therefore, offer critical explorations of women subordination, through exposure of women's subordination at all stages of their lives. Thus the theories offer an analysis and explanation of how and why women have less power than men and how this imbalance can be challenged or transformed. There is, therefore, a plurality of feminist theories, which reflects the fact that feminists, though having a common problem, have different approaches in handling their problems as well as different experiences.²⁷ The liberal feminist theory, which focuses on equal rights and individual choices, is the theory that most directly relates to the issue of women in politics and decision making. This theory seeks to identify ways in which law could remove the barriers that prevent women's access to, for instance, education, employment, credit, or enjoyment of civil and political rights.

Liberal feminists questioned discriminatory practices that kept women in the private/reproductive sphere while men dominated the public/productive sphere where they wielded power and made decisions that impacted on the lives of women without the involvement of the women.²⁸ Their view was that women's subordination is rooted in legal constraints, which prevent the full participation of women in the public sphere. They demanded 'equal' opportunities and equal participation in the management of the societies and increased participation in the political organs.²⁹ They believed that the provision and protection by the state of civil and political liberties would enable women to realise their full potential in all spheres. With time and upon realizing that 'equality' did not guarantee the outcomes they sought owing to the historical exclusion of women, they sought the provision of certain benefits to disadvantaged groups so as to uplift their bargaining powers to the levels of already advantaged groups.

²⁷ Kelly J, 'The Double Vision of Feminist Theory: A Post Script to the Women and Power Conference', 5 *Feminist Studies* 1, 1979, 17.

²⁸ See, for instance, Wollstonecraft A, *Vindication of the Rights of Woman*, 1792, 30.

²⁹ Wollstonecraft A, *Vindication of the Rights of Woman*, 1792, 30.

2.3 Law and the quest for gender equality

For the liberal feminists' agenda to be realized, law is a critical tool to provide for individual freedoms for all people and eliminate group-based roles and stereotypes. This explains why in many countries, legal reforms are seen as an important part of society transformation when equality is sought to be achieved. In patriarchal societies particularly, male domination is institutionalized in social, economic, political, and governance systems and needs to be accosted through overarching norms espousing the principle of equality, which subjugate other operative norms in legal pluralist contexts. 'Patriarchy' - the rule of fathers - is part and parcel of many societies in Kenya. It is a system of socio-cultural and legal relations in which men as a class have power over women as a class and includes the rule of husbands, male bosses and ruling men in most governance institutions.³⁰ Its contemporary manifestation is capitalism and all its attendant facets, especially in terms of access to and control over a society's productive resources.³¹ Thus conceived, patriarchy is a 'struggle concept' that denotes the totality of oppressive and exploitative relations which are viewed through the gender angle.³² It is, indeed, conceded that in most societies, male power is embedded and rooted in the maintenance of patriarchal social relations and institutions which are underpinned by an ideology which defines the adult male as the ultimate decision-maker, controller of material resources and controller/user of women and children's productive and reproductive capacities.³³

Kenya has juristic legal pluralism where the official legal system recognizes several other legal orders and the 2010 Constitution sets out which norms of these legal orders will apply.³⁴ The 2010 Constitution recognises religious and customary laws which must be in consonance with the constitutional standards. Patriarchy is an underlying principle in many customary laws of Kenya, which remains a major hindrance to the realization of the principle of equality. The existence of constitutional and statutory laws that validated

³⁰ Petersen H, 'Discard Yet Embrace-Customary Law', in *Changing Families: Changing Laws*, 1994, 8.

³¹ Anfred S, 'Gender, Power, Knowledge', in *Changing Families: Changing Laws*, 1994, 15.

³² McFadden P, 'Gender, Power, Patriarchy', in *Changing Families: Changing Laws*, 1994, 26.

³³ McFadden P, 'Gender, Power, Patriarchy', in *Changing Families: Changing Laws*, 1994, 26.

³⁴ See, for example, Bentzon AW *et al Pursuing grounded theory in law: South-North experiences in developing women's law*, 1998, Griffiths A, *In the shadows of marriage: gender and justice in an African community*, 1997, 70.

different treatment of men and women in Kenya until the 2010 Constitution was promulgated did not help matters.³⁵

While law is important in the quest for gender equality, it can also reinforce social injustices. Provisions in the Repealed Constitution, for instance, facilitated gender inequality in the areas shielded from the rule against discrimination. Further, a law providing for *de jure* equality between men and women does not automatically yield *de facto* equality especially where the law is gender neutral and operates in a context where gender roles are clearly set out and predetermine people's experience with and enjoyment of law.³⁶ Quite apart from the gender power relations, women have historically not participated in the making of constitutions and these are seen to be both unresponsive to their needs and experiences.³⁷

Women have been systematically removed from fully participating in the development process despite their active participation in the production processes alongside men. Even where women's legal rights have been provided for, ignorance of such rights exacerbated by illiteracy ensures that they do not benefit from such provision. The effectiveness of laws in according women equal opportunities with men depends largely on the society's willingness and ability to enforce such laws. To understand the role of law in women's lives, one needs to understand not only the intention and rationale behind the law but also the consequences of law on individuals. In many cases, despite the gender neutrality of legal provisions, equal rights and privileges cannot be assumed to have been guaranteed and realized. Gender neutral laws have, in many instances, resulted in *de facto* discrimination. As Tove Dahl aptly points out:

As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender-neutral legal machinery ... meets the gender-specific reality...³⁸

³⁵ See, for instance, Section 82 (4) of the repealed *Constitution of Kenya* (1963) which exempted a number of laws from the provisions against discrimination. These included laws of adoption, marriage, divorce, burial devolution of property on death and personal law matters.

³⁶ For a discussion on gender neutral laws, see generally 'Women, Land Rights and the Environment: The Kenyan experience', 3 *Development* 49, 2006, 43-48.

³⁷ Mackay F, Dobrowolsky A and Hart V, *Women Making Constitutions, New Politics and Comparative Perspectives*, 2003, 97.

³⁸ Dahl TS, *Women's Law: An Introduction to Feminist Jurisprudence*, 1987, 361.

Even where law clearly provides for gender equality, law's capacity to the promise is mediated by other factors such as resistance to women's entry into the political space, for instance, by men who perceive such entry as threatening. Gender equality in all realms represents a struggle for scarce resources and power and is vigorously resisted by those already privileged.³⁹ The battle of the sexes in Kenya plays out as women enter into diverse spaces that were previously exclusive male domains in the corporate and public sectors prompting the African males to consolidate their position in the one bastion of their authority where they remain dominant – politics. They are unwilling to cede ground in this realm and define the rules of the game to their advantage and the exclusion of women.⁴⁰

As I have pointed out elsewhere,⁴¹ feminist scholars discount the social contract theory which presupposes an agreement between equals in a society arguing that there is 'a historically located man' in mind in the theory.⁴² They contend that Locke's theory has an economic proprietor in mind, the Hobbesian Man is an entrepreneur, and Gauthier's is a Robinson Crusoe and so on.⁴³ Not surprisingly, and given the male orientation of the rules of the game, women's performance in politics has been dismal in the last 50 years.

Women's struggle to get into politics is not unique to Kenya. While the number of women in parliament globally doubled between 1995 and 2015, women still account for only 22% of parliamentarians.⁴⁴ The struggle to have more women parliamentarians in African countries has yielded varied results with some African countries now having the highest levels of women's rep-

³⁹ Kameri-Mbote P, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', 178.

⁴⁰ Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise, in Odote C and Musumba L (eds), *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, 2016, 177-214.

⁴¹ Kameri-Mbote P and Kabira N 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution-Making in Kenya', 14 *East African Journal of Peace and Human Rights* 1, 2008, 1-43.

⁴² Kameri-Mbote P and Kabira N 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution-Making in Kenya', 14 *East African Journal of Peace and Human Rights* 1, 2008, 1-43.

⁴³ Macpherson CB, *Democratic Theory: Essays in Retrieval*, Oxford Clarendon Press, 1973, 3.

⁴⁴ Inter-Parliamentary Union and UN Women, 'Women in Politics: 2015' - See more at: <http://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures#sthash.vXJbrlGV.dpuf> on date?

resentation in national assemblies in the world.⁴⁵ As Gretchen Bauer points out, of some African countries such as Mozambique, Namibia, Rwanda, South Africa, Tanzania, and Uganda ‘in late 2007... had national legislatures ranging from 25 to nearly 50 per cent women, placing them in the top 26 worldwide’ and ‘far above the Sub-Saharan African and world averages of about 17 per cent women in a single or lower house of parliament’.⁴⁶ This is demonstrated in Table 2 below.

Table 2: Women in politics and decision making positions-parliamentary representation in Africa

Country	National Assembly		Senate	
	Elections	% W	Elections	% W
Rwanda	2013	63.8%	2011	38.5%
South Africa	2014	41.9%	2014	35.2%
Namibia	2014	41.3%	2010	23.1%
Mozambique	2014	39.6%	-	-
Angola	2012	36.8%	-	-
United Republic of Tanzania	2010	36.0%	-	-
Uganda	2011	35.0%	-	-
Algeria	2012	31.6%	2012	6.9%
Zimbabwe	2013	31.5%	2013	47.5%
Tunisia	2014	31.3%	-	-
Cameroon	2013	31.1%	2013	20.0%
Burundi	2010	30.5%	2010	46.3%
Sudan	2015	30.5%	2015	35.2%
Ethiopia	2015	28.0%	2010	16.3%
South Sudan	2011	26.5%	2011	10.0%
Lesotho	2015	25.0%	2015	24.2%
Eritrea	1994	22.0%	-	-
Kenya	2013	19.7%	2013	26.5%

⁴⁵ See Kabira WM and Kameri-Mbote P ‘Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise, 182; Bauer G, ‘Fifty/Fifty by 2020’ 10 *International Feminist Journal of Politics* 3, 2008, 348-368; Tripp et al, *African Women’s Movements Changing Political Landscapes*, 2009, see Chapter 9 from 217.

⁴⁶ Tripp et al, *African Women’s Movements Changing Political Landscapes*, 2009, 152-156.

Morocco	2011	17.0%	2009	2.2%
Malawi	2014	16.7%	-	-
Somalia	2012	13.8%	-	-
Burkina Faso	2014	13.3%	-	-
Niger	2011	13.3%	-	-
Djibouti	2013	12.7%	2013	12.7%
Zambia	2011	12.7%	2011	12.7%
Liberia	2011	11.0%	2014	10.0%
Ghana	2012	10.9%	2012	10.9%
Gambia	2012	9.4%	-	-
Cote d'Ivoire	2011	9.2%	-	-
Democratic Republic of the Congo	2011	8.9%	2007	4.6%
Mali	2013	8.8%	-	-
Congo	2012	7.4%	2014	19.4%
Nigeria	2015	5.6%	2015	6.5%

Source: <http://www.ipu.org/wmn-e/classif.htm> (accessed January 2016)

Countries such as Burkina Faso, Congo, Djibouti, Gambia, Ghana, Kenya, Liberia, Morocco, Niger, Nigeria, Somalia, and Zambia have less than 20% women's representation in national assemblies.⁴⁷ Notable cases are Nigeria – the most populous country in Africa - which has 5.6% and Kenya, which stands at 19.6% despite the clear constitutional requirement that 'not more than two-thirds of the same gender' should be in any elective positions.⁴⁸ This is contrasted with the stellar performance of Rwanda (63%), South Africa (41.9%), Namibia (41.3%), Mozambique (39.6%), Angola (36.8%), Tanzania (36%), Uganda (35%), Algeria (31.6%), Zimbabwe (31.5%), Tunisia (31.3%), Cameroon (31.1%), Burundi (30.5%), and Sudan (30.5%).⁴⁹ Rwanda's performance is astounding as it leads in women's representation in the National Assembly worldwide.⁵⁰ Sudan and Ethiopia have also done much better than

⁴⁷ Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise', 181.

⁴⁸ Article 27 (8) *Constitution of Kenya* (2010).

⁴⁹ Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise', 181.

⁵⁰ Inter-parliamentary Union, *Women in National Parliaments: Situation as of November 1, 2015* (2015) <http://www.ipu.org/wmn-e/classif.htm> on December 4 2015.

Kenya and Nigeria. The main mechanisms used for promoting women's entrance into elective positions have been through quotas, reserved seats, and other affirmative action provisions introduced through constitutions.⁵¹

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁵² proposes differential treatment for women under Article 4 which decrees that adoption, by states parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. Indeed, even if national laws provide for equal treatment of all, those who are marginalized will continue to be relatively disadvantaged on account of historical impediments if 'equals have and are awarded unequal shares, or unequals equal shares'.⁵³

The number of women in top appointive positions in Africa has also risen as is evidenced by the rising number of women in cabinet and judicial positions.⁵⁴ Cape Verde has the highest number of women occupying ministerial positions in Africa⁵⁵ with nine out of its 17 ministers being female. This is second only to Finland which has 10 of its 16 ministerial positions occupied by women. South Africa, the second highest ranked in Africa has 15 women out of its 36 ministers.⁵⁶ Burundi, Guinea-Bissau, Rwanda, Tanzania are also among the top 20 countries globally.⁵⁷

⁵¹ Inter-parliamentary Union, Women in National Parliaments: Situation as of November 1, 2015 (2015) <http://www.ipu.org/wmn-e/classif.htm> on December 4 2015.

⁵² 1249 UNTS 13; 19 ILM 33 (1980).

⁵³ Aristotle, *The Nicomachean Ethics* (translated David Ross, revised by Ackrill JL and Urmson JO), 250.

⁵⁴ Bauer G, 'Fifty/Fifty by 2020: Electoral Gender Quotas for Parliament in east and Southern Africa' 10 *International Feminist Journal of Politics* 3, 47-367.

⁵⁵ Inter-parliamentary Union, Women in National Parliaments: Situation as of November 1, 2015 (2015) <http://www.ipu.org/wmn-e/classif.htm> on December 4 2015.

⁵⁶ Inter-parliamentary Union, Women in National Parliaments: Situation as of November 1, 2015 (2015) <http://www.ipu.org/wmn-e/classif.htm> on December 4 2015.

⁵⁷ Inter-parliamentary Union, Women in National Parliaments: Situation as of November 1, 2015 (2015) <http://www.ipu.org/wmn-e/classif.htm> on December 4 2015.

3 Down memory lane: The struggle for gender equality in elective and appointive positions in Kenya

The quest for equality in the sphere of politics in Kenya has been long and winding. Phoebe Asiyo tabled a motion for affirmative action to increase women's participation in Parliament and local authorities to at least one third (33.3%) in 1997.⁵⁸ In the same motion, she also sought to have the level of public funding for political parties linked to the percentage of women candidates fronted by the party.⁵⁹ The motion was soundly defeated.⁶⁰

In 2000, Beth Mugo tabled a similar motion which was referred to the Constitution of Kenya Review Commission (CKRC).⁶¹ CKRC's struggle with the issue of women's representation in politics is documented extensively.⁶² The last attempt to deal with this issue before the promulgation of the 2010 Constitution was the motion by Martha Karua, the then Minister for Justice and Constitutional Affairs, in the run up to the 2007 general elections. The motion sought to amend the Repealed Constitution to provide for 50 seats in Parliament for women.⁶³ In an uncanny resemblance to recent attempts to achieve gender equality in Parliament, the Bill failed to get the necessary 65% quorum for constitutional amendment resulting in the rejection of the Bill. Members had walked out leaving only 95 members at the time of the debate which was far below the 145 members needed for a vote on constitutional amendment. The then Speaker of the National Assembly, Francis Kaparo, had no option but to declare that the Bill had lapsed.⁶⁴

⁵⁸ NA Deb 23 April 1997, Vol 334 (<https://books.google.co.ke/books?id=pvGspftZ3qoC&pg=PT26&dq=National+assembly+Parliamentary+Hansards,+kenya+23+April+1997&hl=en&sa=X&ved=0ahUKEwiMj5zv2MTKAhVGVWBQKHerLAq0Q6AEIGjAA#v=onepage&q&f=false>)

⁵⁹ NA Deb 23 April 1997, Vol 334 (<https://books.google.co.ke/books?id=pvGspftZ3qoC&pg=PT26&dq=National+assembly+Parliamentary+Hansards,+kenya+23+April+1997&hl=en&sa=X&ved=0ahUKEwiMj5zv2MTKAhVGVWBQKHerLAq0Q6AEIGjAA#v=onepage&q&f=false>)

⁶⁰ Kabira WM, *Time for Harvest: Women and Constitution Making in Kenya*, University of Nairobi Press, Nairobi, 2012, 40.

⁶¹ Kabira, *Time for Harvest: Women and Constitution Making in Kenya*, 45.

⁶² Kabira, *Time for Harvest: Women and Constitution Making in Kenya*, 51; Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise', 187-190.

⁶³ The *Constitution of Kenya (Amendment) Bill No. 32 2007*.

⁶⁴ African Women & Child Feature Service, *The Kenya Constitutional (Amendment) Bill 2007: Affirmative Action Bill on 50 Special Women's Seats in Parliament, 2007*. Available at <http://www.awcfs.org/dmdocuments/research/50%20SPECIAL%20SEATS.pdf> <accessed on 3rd November 2016>

One would, therefore, have expected that with the promulgation of the 2010 Constitution, which includes a robust equality and non-discrimination provision in Article 27, these issues would be addressed once and for all. The ‘two-thirds gender rule’⁶⁵ and the call for measures of affirmative action⁶⁶ to deal with past discrimination were aimed at precisely the kind of situation that Asiyo, Mugo and Karua sought to address earlier without success. It is disheartening to note that increasing women’s representation in Parliament continues to be elusive six years after the promulgation of the 2010 Constitution.

The story of women’s struggle for equality is intrinsically intertwined with the search for a new constitutional order in Kenya. The amendment to the Repealed Constitution in the early 1990s heralded the end of the *de jure* one party State and opened the space for electoral competition through multi-partyism. It also allowed for freedoms of association and expression that had hitherto been denied.⁶⁷

When the clamour for more comprehensive constitutional reforms gained momentum, women ensured that they were included in the constitution review process and related institutions.⁶⁸ They also challenged the gender neutrality of law by insisting that they be named as women and not as part of the generic he/male. Women also called for the disaggregation of participants at the review process into ‘male leaders’ and ‘female leaders’, ‘male experts’ and ‘female experts’.⁶⁹ Additionally, women emphasized the need for a law made by the *people* as opposed to the idea that a team of experts with no interest in the communities should create the social contract.⁷⁰ Women found their space

⁶⁵ Article 27 (8) *Constitution of Kenya* (2010).

⁶⁶ Article 27 (6) *Constitution of Kenya* (2010).

⁶⁷ Articles 33 and 36 *Constitution of Kenya* (2010).

⁶⁸ Since 1997, women as a group have organized themselves to participate in the process of recreating a new social contract for Kenya. They fully participated in the initial Bomas discussions and Safari Park, I, II, III and IV. During the Safari Park Series of Review Talks, it was agreed that there would be a three-tier framework to be used to review the Constitution. The three tiers included: The District Constitutional Forums, The National Constitutional Consultative Forum and Kenya Constitutional Review Commission. It was during the Safari Park Meetings that the Constitution of Kenya Review (Amendment) Act, 1998 was formulated. During this period, women focused on ensuring their own participation in the processes, implementation of Affirmative Action policy in all structures of the Review Process and negotiating issues with other stakeholders to ensure that they are taken on board in the new social contract.

⁶⁹ Mackinnon C, *Women’s Lives, Men’s Laws*, Harvard, Belknap Press, 2005, Chapter 1.

⁷⁰ The Final Report of the Constitution of Kenya Review Commission, Approved for Issue at the 95th Plenary Meeting of the Constitution of Kenya Review Commission held on 10th February 2005.

outside the formal institutional framework and thus worked with the people-driven approach challenging the law governing the country.⁷¹

Kabira⁷² has extensively documented women's struggles through the constitution review process underscoring the high as well as the low moments in the process. Significantly, the lowest moment was when the Proposed New Constitution of Kenya (2005 Draft Constitution)⁷³ was rejected during the 2005 referendum.⁷⁴ The deferral of the Kenyan dream for a new Constitution was also a deferral of women's dream for a gender equal society. As a participant in that process, the greatest fear was that a lot of ground that had been gained in the fight for gender equality in the constitution review process would be lost. It did not escape our attention that gender continued to be a most divisive issue.⁷⁵ The Committee of Eminent Persons appointed by the President in 2006 to advice on the way forward following the defeat of the 2005 Draft Constitution in referendum found that gender was one of the nine most contentious issues in the review discourse.⁷⁶ It is important to point that the gender provisions remained largely the same up to the 2010 draft that was accepted in a referendum in that year. Experience with the implementation of the provision on equal gender representation suggests that gender is still a most divisive issue and it is not sufficient that it is addressed unequivocally in the 2010 Constitution.⁷⁷

4 Gender and the Constitution of Kenya, 2010

The 2010 Constitution was hailed as a major landmark in the quest for gender equality. It has a very expansive equality and non-discrimination provision in the bill of rights⁷⁸ and is awash with provisions that deal with women's rights to land, inheritance, equal rights in marriage, to name a few. In

⁷¹ Kameri-Mbote P and Kabira N 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution-Making in Kenya' 5-6.

⁷² See generally Wanjiku MK, *Time for Harvest: Women and Constitution Making in Kenya*.

⁷³ Kenya Gazette Supplement No 63, 22 August 2005.

⁷⁴ Kabira, *Time for Harvest: Women and Constitution Making in Kenya*, 92.

⁷⁵ See generally Kameri-Mbote P and Kabira N 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution-Making in Kenya'.

⁷⁶ See Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, 30th May, 2006.

⁷⁷ Kameri-Mbote P and Kabira N 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution-Making in Kenya', 6-12.

⁷⁸ Article 27 (4) *Constitution of Kenya* (2010).

the realm of women's representation in elective and appointive positions, the 2010 Constitution provides that '*not more than two-thirds of the members of elective bodies shall be of the same gender*'.⁷⁹ Kenya is also a signatory to international treaties that provide for equal rights of men and women in public life⁸⁰ and ratified CEDAW in 1985 in the run up to the Third Women's Conference that was held in Nairobi in the same year. Kenya also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)⁸¹ after the promulgation of the 2010 Constitution. The Maputo Protocol is very progressive and includes socio-economic rights such as water, housing, sustainable development, and food security.

The 2010 Constitution also includes the right to public participation, equity, non-discrimination, and protection of the marginalised among the national values and principles of governance.⁸² The 2010 Constitution also unequivocally and unambiguously provides for equality of subjects of law in the following terms: 'Every person is equal before the law and has the right to equal protection and equal benefit of the law'.⁸³ It goes on to elaborate that 'equality includes the full and equal enjoyment of all rights and fundamental freedoms'⁸⁴ and that 'women and men have the right to equal treatment'⁸⁵ and opportunities 'in political, economic, cultural and social spheres'.⁸⁶ This call to equality is further buttressed by the exhortation of the State⁸⁷ and other persons⁸⁸ not to directly or indirectly discriminate against any person on any ground. The listing of objectionable grounds on which discrimination may not be based is wide and includes: 'race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth'.⁸⁹ It also provides that to give full effect to the

⁷⁹ Article 27 (8) *Constitution of Kenya* (2010).

⁸⁰ See e.g. The International Covenant on Civil and Political Rights (ICCPR), 6 I.L.M. 360 (1967); and The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 8 I.L.M. 679, entered into force Jan. 27, 1980.

⁸¹ See African Union Protocol to the African Charter On Human And People Rights On The Rights of Women in Africa, adopted by the Conference of Heads of State and Government on 11 July 2003 in Maputo Mozambique and came into force in November 2005.

⁸² Article 10, *Constitution of Kenya* (2010).

⁸³ Article 27 (1), *Constitution of Kenya* (2010).

⁸⁴ Article 27 (2), *Constitution of Kenya* (2010).

⁸⁵ Article 27 (3), *Constitution of Kenya* (2010).

⁸⁶ Article 27 (3), *Constitution of Kenya* (2010).

⁸⁷ Article 27 (4), *Constitution of Kenya* (2010).

⁸⁸ Article 27 (5), *Constitution of Kenya* (2010).

⁸⁹ Article 27 (4), *Constitution of Kenya* (2010).

realization of the rights guaranteed, legislative and other measures such as affirmative action programmes and policies 'designed to redress any disadvantage suffered by individuals or groups because of past discrimination' shall be undertaken by the State.⁹⁰ Further, and as already pointed out, the 2010 Constitution categorically states that 'not more than two-thirds of the members of elective or appointive bodies shall be of the same gender'.⁹¹

These provisions are facilitative of the move towards an equal society. In the case of representation, they provide a window for the use of a variety of tools including quotas.⁹² Besides quotas, gender representation can also be achieved through reservation of seats for women as has been done in the 2010 Constitution where 47 seats are created for women. Quotas can be fixed by statute law requiring parties to adopt a certain affirmative action measure with penalties prescribed for noncompliance.⁹³ Parties can also adopt quotas aimed at creating a targeted number of female candidates for elections. This underscores the importance of clear measures to deliver the constitutional imperative of the *not more than two-thirds of the members of elective bodies shall be of the same gender*. This was clearly delivered by Article 177(1)(b) and (c) of the 2010 Constitution, which included in the composition of county assemblies '*the number of special seats members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender*'. Curiously, no similar provision was included for Parliament (National Assembly and Senate).⁹⁴

Article 90 (1) provides that '*elections for the seats in Parliament provided for under Articles 97 (1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists*'. This provision was to ensure the inclusion in the lists of women and other marginalized group to meet both the two-thirds gender rule and the constitutional requirement of inclusion.⁹⁵

⁹⁰ Article 27 (6), *Constitution of Kenya* (2010).

⁹¹ Article 27 (8), *Constitution of Kenya* (2010).

⁹² Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise', 192.

⁹³ Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise', 192.

⁹⁴ Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise', 192.

⁹⁵ Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise', 192.

The failure of parties to ensure the nomination of female candidates delivered less than the constitutional threshold of one third.

The rule of fathers is alive and well in Kenya and the narrative has been that women want free seats which they should not get as equality dictates that they fight it out with men in the ballot box.⁹⁶ However, this narrative ignores the set rules of the game in nominations and elections that favour men. It also ignores the point we raised above that politics remains the last bastion of male power and dominance and women seeking entry have to contend with the gate-keepers. The realization of the equality and non-discrimination imperatives of Article 27(8) of the 2010 Constitution requires confrontation of the patriarchal structures and other barriers that are in the way of women seeking to enter the politics arena. Articles 97 and 98 on the membership of the National Assembly and Senate, respectively, excluded facilitative provisions that would have made the realization gender equality more direct. The absence of a framework to ensure that gender equality in representation in Parliament flowed seamlessly placed potential women contestants at the mercy of party barons, a realm where very few women are significant players. The negotiation of the electoral and party rules was left to the male-dominated 10th Parliament. Not surprising, therefore, the Members of Parliament (MPs) refused to change the rules dashing the expectation that supporting laws would fill up the gap left by the 2010 Constitution.⁹⁷

Article 81 on the general principles for the electoral process reiterates the principle at Article 27 that *not more than two-thirds of the members of elective bodies shall be of the same gender*⁹⁸ while Article 90(2) charges the Independent Electoral and Boundaries Commission (IEBC) with the responsibility for the conduct and supervision of elections for seats provided in Articles 97(1)(c),⁹⁹ 98(1)(b), (c) and (d)¹⁰⁰ and Article 177(1)(b), which provides for

⁹⁶ See e.g. <http://nairobi.news.nation.co.ke/blog/city-girl-yippee-bill-flopped-women-need-no-free-seats/> (May 6th 2016)

⁹⁷ Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise', 197-198.

⁹⁸ Article 81 (b), *Constitution of Kenya* (2010).

⁹⁹ 12 members nominated by parliamentary political parties according to their proportion of members of the National Assembly to represent special interests including the youth, persons with and workers

¹⁰⁰ Sixteen women members nominated by political parties according to their proportion of members of the Senate; two members, being one man and one woman, representing the youth; and two members, being one man and one woman, representing persons with disabilities;

special seats for women in the County Assembly. This is however dependent on political goodwill of the parties. There is no sanction for not ensuring that the equality principle is achieved through nominations. The following table shows the number of women who vied for electoral positions versus men in the 2013 elections and how they fared.

Table 3: Female candidates and 2013 elections

	Governor			Senator			MP			Member of County Assembly		
	Vying	Elected	% who vied and were elected	Vying	Elected	% who vied and were elected	Vying	Elected	% who vied and were elected	Vying	Elected	% who vied and were elected
Men	231	47	20	227	47	21	1968	274	14	9287	1359	15
Women	6	0	0	17	0	0	129	16	13	623	91	15
Total	237	47		244	47		2097	290		9910	1450	
% men	97	100		93	100		94	94		94	94	
% women	3	0		7	0		6	6		6	6	

Source: FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process* (2013)

5 Claiming the 'two-thirds gender rule'

Okoth Ogendo wrote that Africans see a constitution as a 'power-map' on which framers may delineate a wide range of concerns. The process of constitution making, which involves, *inter alia*, making choices as to which concerns should appear on that map has become the central question of political discourse.¹⁰¹

From the outset, women were aware that a constitution is a political tool and the decisions made about the process were not primarily merit-based but

¹⁰¹ Okoth-Ogendo HWO, 'Constitutions without Constitutionalism: Reflections on an African Paradox', in American Council, *Constitutionalism and Democracy: Transitions in the Contemporary World*, Oxford University Press, New York, 1993, 67.

gauged for their political value and women's issues were likely to be subjugated to apparently 'greater' and more 'important' ones on the political scale. It was on account of this that they sought to be included in the process and to have their voices heard. To a great extent, they succeeded in getting to the delineation of the power map.¹⁰² Their participation in the process made them alive to the delicate balancing and negotiations between different groups. Indeed, Kenya's constitutional review process was characterized by uncertainty due to the role played by politics, ethnic interests, and political party interests, which led to constant shifting of goal posts.¹⁰³ The process of review elicited conflicts of interest between women's agenda and that of parties. For instance, women at the Bomas Constitutional Conference had to be alive to their multiple identities as women and as members of parties. In the latter role, they were obliged to champion proposals advanced by their respective parties resulting in conflicting interests where the women's agenda was different from that advanced by the political party. It, therefore, came as no surprise that the 2005 Draft Constitution was resoundingly defeated in the 2005 referendum despite its progressive provisions on women's rights.¹⁰⁴

The promulgation of the 2010 Constitution was a cause for celebration for Kenyan women as it catered for most of the concerns they had raised over the years. As pointed out above, the letter of the 2010 Constitution provides for equality of women and men in legal, political, economic, cultural and social spheres and also that 'not more than two-thirds of the members of elective or appointive bodies shall be of the same gender'. With such robust expositions, women expected to have more representatives in Parliament and other decision-making positions. In negotiating the 2010 Constitution, there were discussions about moving to a system of proportional representation but this was not adopted. The proposal for topping up to ensure that the two-thirds gender rule was achieved for Parliament was lost during the crafting of the final draft of the Constitution. The 2010 Constitution included provisions for nominations and also reserved 47 seats for women in the National Assembly.¹⁰⁵ From the 2013 elections, it is clear that these measures were insufficient

¹⁰² Kameri-Mbote P and Kabira N 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution-Making in Kenya', 3-4.

¹⁰³ Kameri-Mbote P and Kabira N 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution-Making in Kenya', 9.

¹⁰⁴ Kameri-Mbote P and Kabira N 'Separating the Baby from the Bath Water: Women's Rights and the Politics of Constitution-Making in Kenya', 12.

¹⁰⁵ Article 97 (1), *Constitution of Kenya* (2010).

to ensure women's equal participation in politics. Out of 416 elected MPs (both houses), only 86 are women (21%).¹⁰⁶

There are more women in Parliament than there were before the 2010 Constitution electoral provision came into effect. However, as pointed out above, Kenya is still lagging behind the international standard and the global average of 22%. It should also be noted that most of the women went in through nomination and reservation of seats. Only 16 women were elected as members of the National Assembly and not a single woman was elected as member of Senate as Table 3 above shows.

From the foregoing, it is clear that women's struggle for an optimal balance between those with power and those for whose benefit power is to be exercised is far from over. Women have realized that politics, like law, are masculinized and remain male spaces where women get in on men's terms.¹⁰⁷ The other lesson is that even when spelt out in a constitution, rights will not come to women automatically as those who have previously enjoyed them will be hostile to the new claimants of rights and that those rights only come alive when implementation occurs.

The implementation of the 2010 Constitution has encountered gender specific realities and power equations that do not allow for the change in systems for a gender equal society. In Okoth Ogendo's words, constitutions alone are inadequate as a lever towards achievement of balance in society.¹⁰⁸ As that reality dawned, women resorted to two institutions – the Judiciary and the Legislature - in the hope that they would disentangle the knot that dimmed their hopes for equality in politics.

5.1 Case law

It was clear from the outset that going to the first elections under the 2010 Constitution under the existing framework would not deliver gender equality. It was also not lost on Kenyans that if the two-thirds gender rule enshrined in the 2010 Constitution was not achieved in the elections, the elected Parlia-

¹⁰⁶ Kabira WM and Kameri-Mbote P 'Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise', 201.

¹⁰⁷ Smart C, *Feminism and the Power of Law*, 1989, 27-28.

¹⁰⁸ Okoth-Ogendo HWO, 'Constitutions without Constitutionalism: Reflections on an African Paradox', in Douglas Greenberg S.N. Kartz, B. Oliviero and S.C. Wheatley (Eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (OUP, New York) Chapter 4.

ment would be unconstitutional. It was within this context that the Attorney General moved to the Supreme Court to seek an advisory opinion on this point, praying that the Supreme Court resolves the ambiguity.¹⁰⁹ He sought an advisory opinion on whether Articles 27 (8) and 81(b) on gender equity ought to be achieved immediately or progressively. The Attorney General argued that the implication of Articles 27(3), 27(6), 27(8), 97, and 98 was that there were inconsistencies and this particularly arose in determining whether the two-thirds gender rule in Parliament was to be implemented immediately or progressively. He argued that for the provisions of the 2010 Constitution to be complied with, there was need to adopt other criteria and that this may necessitate an increase in the tax burden borne by the citizens. In his view, a corrective measure was needed if the constitutional requirements were to be realized. The Attorney General further reasoned that using nominations by parties to bridge the gap would result in unduly-large legislative bodies.¹¹⁰

The majority opinion in this reference determined that the two-thirds gender rule was intended to be progressively realized. In its majority opinion, the Supreme Court stated that in light of the provisions of Article 81(b) of the 2010 Constitution, and in the event that the electorate did not elect the requisite number of women, nominations would have to be done to bridge the gap and these, in the court's view, would present a constitutional crisis since the members of the National Assembly would exceed the constitutionally stipulated numbers.¹¹¹ The Supreme Court gave the Government up to 27 August 2015 to come up with legislation to effect the rule.

In his dissenting opinion, however, the Honourable Chief Justice, Willy Mutunga, noted that taking the history of Kenya into account and the constitutional provisions on non-discrimination and national values, political and civil rights demanded immediate realization. It is now evident that unless the 2010 Constitution is amended to allow for nominations to top up the deficit of

¹⁰⁹ Republic of Kenya, In the Supreme Court of Kenya, (2012), *In the Matter of an Application for Advisory Opinion under Article 163 (6) of the Constitution and In the Matter of Article 8, Article 27(4), Article 27(8), Article 96, Article 98, Article 177 (1) (b), Article 116 and Article 125. Article 89 (2), Article 89 (4), and the Consequential Provisions in the Sixth Schedule Section 27 (3) of the Constitution of the Republic of Kenya and In the Matter of the Principle of Gender Representation in the National Assembly and in Senate.*

¹¹⁰ Republic of Kenya, In the Supreme Court of Kenya, (2012), *In the Matter of an Application for Advisory Opinion under Article 163 (6) of the Constitution.*

¹¹¹ Article 89 of the Constitution fixes the members of the National Assembly at 290 representing the electoral constituencies.

women members to get to the constitutional threshold, the two-thirds gender rule will remain a mirage.

15 August 2015 came and passed with no formula for attaining the requisite minimum in sight. A petition was launched at the High Court against both the Attorney General and the Commission on the Implementation of the Constitution (CIC) for failure to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the 2010 Constitution as read with article 100 and the Supreme Court Advisory Opinion.¹¹² The petitioner contended that in order to give effect to the Supreme Court's Advisory Opinion as well as the respective constitutional and legal provisions, legislative actions which may have a bearing on constitutional amendments, were required to be taken by 27 August 2015. The petition stated that 27 August 2015 was beckoning and the requisite measures were yet to be taken to bring into force the two-thirds gender rule in the National Assembly and Senate. The petitioners sought a declaration that the respondent had failed, refused and or neglected their duty. The High Court agreed with the petitioners and ruled that:

the respondents had failed, refused and or neglected to prepare the relevant Bill(s) for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion dated *11th December 2012 in Reference Number 2 of 2012*; the respondents have violated their obligation under Article 261(4) of the Constitution to “prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable Parliament to enact the legislation within the period specified”; and the respondents' failure, refusal and or neglect was a violation of Articles 27(8) and 81(b) as read with Article 100 of the Constitution and the Supreme Court Advisory Opinion dated *11th December 2012 in Reference Number 2 of 2012*.

In conclusion, the High Court directed the respondents to prepare the relevant Bill(s) for tabling before Parliament, within the next forty (40) days from the date of the ruling on 26 June 2015. This decision kicked off a flurry of activities towards passing legislative measures to abide by the above court ruling.

¹¹² *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* (2015) eKLR.

5.2 Constitution amendments

Discussions on the two-thirds gender rule have revolved around the need for a provision similar to Article 177 (b) for Parliament. However, there has been no consensus on this matter. A number of initiatives have been attempted in this regard. The first was the formation of a Technical Working Group (TWG) by the Attorney General on 3 February 2014, comprising of: the Attorney General's Office; Ministry of Devolution and Planning (Directorate on Gender); National Gender and Equality Commission (NGEC); CIC; IEBC; Office of the Registrar of Political Parties (RPP); Parliament (Justice and Legal Affairs Committee (JLAC) in the National Assembly and Committee on Legal Affairs and Human rights in the Senate.); Kenya Women's Parliamentary Association (KEWOPA); Federation of Women Lawyers (FIDA Kenya representing the civil society); and the Commission on the Administration of Justice (CAJ).¹¹³

The TWG was tasked with: Coordinating the process of developing enabling mechanisms for the attainment of the two-thirds gender rule, within 90 days effective from 11 February 2014; identifying and facilitating key stakeholder engagements towards the process of developing this enabling mechanism; organising and coordinating public participation towards the development of this enabling mechanism; engage such experts or institutions as may be necessary to facilitate this process; reviewing proposals towards the implementation of the Supreme Court's Advisory Opinion; mobilising resources towards the agenda of the TWG; and undertaking any other functions that may be necessary for the attainment of the TWG's objectives.

The TWG's proposal was a Constitutional Amendment Bill introducing a provision similar to Articles 177(1) (b), 97, and 98 of the 2010 Constitution, which would imply gender top up through party lists to address deficit of numbers to realise the not more than two thirds gender rule in Parliament.¹¹⁴ Such a bill would necessitate amendments to other laws such as the Elections Act, Political Parties Act, IEBC Act and the County Governments Act. The TWG proposal was rejected by the JLAC, which argued that nomina-

¹¹³ National Gender and Equality Commission (NGEC), *Legal Opinion on the not More Than Two-Thirds Gender Principle Bills in Parliament*, 2016 (On file with the author).

¹¹⁴ National Gender and Equality Commission (NGEC), *Legal Opinion on the not More Than Two-Thirds Gender Principle Bills in Parliament*.

tions were unpopular with MPs.¹¹⁵ JLAC preferred an amendment requiring progressive realisation of the two-third gender rule. This was effected through the Constitution of Kenya (Amendment) Bill, 2015 (the Chepkong'a Bill).¹¹⁶

There was a lot of lobbying against the Chepkong'a Bill, which was seen as a claw-back to constitutionally guaranteed rights. The result was the adoption of the TWG proposed Bill (the Duale Bill) by the Leader of Majority in the National Assembly who moved it for publication as a Government Bill. Some changes made to the Bill included: a sunset clause of 20 years; and the requirement that beneficiaries of the affirmative action seats had a maximum of two (2) terms.¹¹⁷ In the meantime, the timeline for finding mechanisms to achieve the two-thirds gender rule was extended by one more year from the date set by the Supreme Court to 27 August 2016.¹¹⁸

The Duale Bill¹¹⁹ was published on 24 July 2014. Its 1st reading was on 30 July 2015. It was introduced for 2nd reading on 22 March 2016, and debate thereon finalised on 19 April 2016.¹²⁰ From discussions in the National Assembly, the passage of the Bill seemed to be a done deal. Women were, however, aware that they could not take anything for granted. A lot of lobbying was done to marshal the requisite numbers on the day of the vote. The Bill needed the support of 233 MPs. Unfortunately, when it was put to the vote on 28 April 2016, only 195 votes were cast in its favour, 38 votes short of the constitutional threshold. The Speaker of National Assembly directed a second vote within five (5) days, on 5 May 2016. Although the requisite quorum was not attained on this day, the Speaker still directed that a vote be taken; and the Duale Bill garnered 179 votes whereupon it was stated to have lapsed. We are now back to the drawing board to search for the path towards a gender equal political field. Clearly, this is not going to be attained easily if the happenings in the National Assembly are anything to go by. Female MPs reportedly kept

¹¹⁵ National Gender and Equality Commission (NGEC), *Legal Opinion on the not More Than Two-Thirds Gender Principle Bills in Parliament*.

¹¹⁶ *The Constitution of Kenya (Amendment Bill) 2015* published by Samuel Chepkong'a, Chairperson, Justice and Legal Affairs Committee on 30 April 2015.

¹¹⁷ National Gender and Equality Commission (NGEC), *Legal Opinion on the not More Than Two-Thirds Gender Principle Bills in Parliament*.

¹¹⁸ National Gender and Equality Commission (NGEC), *Legal Opinion on the not More Than Two-Thirds Gender Principle Bills in Parliament*.

¹¹⁹ *Two-Third Gender Rule Laws (Amendment) Bill* (2015) tabled by Aden Duale, majority Leader, National assembly on 31 July 2015.

¹²⁰ National Gender and Equality Commission (NGEC), *Legal Opinion on the not More Than Two-Thirds Gender Principle Bills in Parliament*.

away from the National Assembly on the day the vote took place while others who were present abstained from voting.¹²¹ More disturbing, perhaps, is the fact that MPs defied their party leaders who had called on them to vote for the Bill.¹²²

6 Conclusion: The struggle continues

From the foregoing, it is clear, first, that gender equality in representative politics remains a contested terrain despite the clear and unequivocal constitutional provisions. This reinforces the point I made earlier about the limits of law. While legal provisions can facilitate change and transformation of society, they can also reinforce social injustices where they interplay with norms that allow for subjugation of some groups.

Secondly, courts can assist in ensuring affirmative action by charting pathways towards a gender equal society where the law is clear but there are competing narratives. For courts to assist however, they must be bold. Such boldness has, however, not been evident in Kenya's Judiciary as the Supreme Court's Advisory Opinion, discussed above, illustrates. Indeed, conservatism and self-censoring by courts can hinder constitutionalism. We are where we are because the Supreme Court refused to take a decisive position.

Thirdly, the pegging of women's participation in Parliament to costs misses the point that democracy is not cheap. Indeed, the 2010 Constitution established many institutions, such as County Assemblies and Senate, all of which have required funding. The proposals to have a sunset clause for gender top up and limiting eligibility to benefit from affirmative action to two terms are good principles to benchmark the realization of the two-thirds gender rule. It is important that beneficiaries of affirmative action see their entry into Parliament as a training ground equipping them to compete should they be interested in staying beyond the two terms.

Fourth, unless the rules of the game are changed through the adoption of provisions in the 2010 Constitution and other laws for equal treatment of men and women in politics taking into account historical disadvantages, women

¹²¹ Stephen Ole Letoo, 'Hide and seek games as Muturi 'drags' MPs to pass gender law', *The Star*, April 27, 2016.

¹²² William Mwangi, 'MPs defy Uhuru, Raila for the second time as Gender bill flops', *The Star*, May 5 2016.

will continue to be disadvantaged. Formal equality alone is inadequate to deal with entrenched social, economic and cultural handicaps. While the 2010 Constitution provides for formal equality between men and women, for instance, the realization of gender equality calls for the dismantling of structural barriers to women's enjoyment of their rights.¹²³ Substantive equality, which seeks to address the shortcomings of formal equality and ensure that equity is achieved, is needed through affirmative action to level the playing field; it being recognized that equal rights will not deal with past injustices occasioned by formal equality that does not take into account structural distinctions.¹²⁴ Even if legislations on participation in political life provide for equal treatment of women and men, women will continue to be relatively disadvantaged on account of historical impediments to their entry into the political realm. As Aristotle points out, if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints - when either equals have and are awarded unequal shares, or unequals equal shares. Further, this is plain from the fact that awards should be 'according to merit'; for all men agree that what is just in distribution must be according to merit in some sense.¹²⁵

Fifth, gender is only one form of marginalisation among many – disability, religion, ethnicity, marginalised communities and regions – where gender is also a variable. It is not possible to address gender fully in isolation of the other marginalised categories. This calls for an Equal Opportunities Act defining the different kinds of marginalisation and ranking them. This is the legislation anticipated at Article 100.

Finally, to achieve gender equality particularly in politics, women must forge alliances and networks beyond the women's groups and use measures beyond law to challenge, engage and disarm kings of the bastion of male political privilege.

¹²³ Kameri-Mbote P, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses', Inaugural Lecture delivered on 24 January 2013.

¹²⁴ See generally Cullet P, *Differential Treatment in International Environmental Law: A New Framework for the Realisation of Sustainable Development*, 1998, p. 549-582

¹²⁵ Aristotle 'The Nichomachean ethics' quoted in Cullet P *Differential Treatment in International Environmental Law: A New Framework for the Realisation of Sustainable Development*, 1998,

The path towards inclusive democracy in Kenya

Katindi Sivi-Njonjo

1 Introduction

In order to build inclusive democracies, both women and men need to be meaningfully involved in political processes regardless of their age, gender, ethnicity, religion, social status or level of education. Inclusive democracy encompasses all spheres of life (political, economic, and social). Inclusive democracy does not just mean political participation and progress. It also encompasses economic and social justice to all sections of the population, because it is effective in ensuring groups are empowered to participate in democratic processes. Power structures created by inclusive democracies must, therefore, empower all people and promote their welfare.

In working towards the inclusion of women as a marginalised group, political processes can structurally exclude women sub-groups such as women with disabilities or those who are young, poor, or from minority groups. This is why political representation and participation of women sub-groups is generally low in many countries. It is therefore not enough to promote a seat at the table for those marginalised. As women are not a homogenous group, deliberate effort must be taken to ensure that women sub-groups have an equal opportunity at the table. This means addressing the rules and practices that prevent marginalised groups such as women and women sub-groups from achieving active participation in the political arena.

This chapter seeks to demonstrate the extent to which Kenya's democracy has been inclusive or exclusive when it comes to issues of gender. The chapter begins by defining inclusive democracy, giving the characteristics that enhance inclusion in effective democracies and mechanisms. The chapter then reviews Kenya's democratic path since independence to determine if the steps taken by Government have been sufficiently inclusive. It finally highlights the current status of Kenyan women in economic and social sectors of society to

determine if the country is truly on the path of achieving inclusiveness and gender-parity.

The chapter draws upon secondary sources including journal articles and policy documents. The secondary sources are complimented by primary data contained in the 2009 Census and other surveys. These myriad sources of information provide a broad cross section of perspectives, observations and analyses. It is noteworthy that the available gender disaggregated data is not also disaggregated by age, ethnic affiliation or disability. This has restricted the extent to which limits the chapter could make conclusive analyses of the level of inclusiveness of women subgroups such as women with disability or women from minority groups.

2 Defining inclusive democracy

Inclusive democratic government is ‘built on the principle that political power is dispersed and shared in a variety of ways, to protect minorities and to ensure participation and free speech for all citizens. Inclusive democracy emphasizes the quality of representation by striving for consensus and inclusion, not the brute electoral force of the majority. An inclusive democracy also appreciates the need to promote civil society organisations, open media, rights-oriented economic policy and separation of powers. It thus creates mechanisms for the accountability of the majority to the minorities.’¹

Inclusive democracy, therefore, means sharing of power and authority by, among others, all ethnic, gender, religious, cultural, and regional groups through measures such as proportional representation (PR),² decentralisation, and constitutional provisions for affirmative action. A well performing democratic system is judged by the extent to which all individuals are treated on equal terms so that their welfare progresses through these democratic processes. For democracy to be inclusive, therefore, it has to factor in the effective participation and progress of all peoples to ensure that the underprivileged, marginalised, and the excluded are especially considered or prioritised. The inclusion of different groups often contributes to the preservation of their

¹ United Nations Development Programme, *Human development report 2000: Human rights and human development*, Oxford University Press, New York, 2000, 57.

² Bhattachan KB, ‘Expected model and process of inclusive democracy in Nepal’ International seminar on - The Agenda of Transformation: Inclusion in Nepali Democracy, Kathmandu, 24-26 April 2003.

identities and enables them to obtain equality with other groups in the particular state.³ It is, however, important to note that effective participation is possible if certain preconditions are met, including education of the masses and removal of gross inequalities in wealth.⁴

2.1 Decentralisation

Decentralisation is an arrangement under which power is devolved to the regions.⁵ It allows government to come ‘closer to people’.⁶ In decentralised systems, there is ‘greater local control over decisions which impact on citizens’ daily lives’.⁷ Decentralisation also allows for policies to be locally adapted. However, equal power in the regions may not be sufficiently sensitive to the peculiar cultural needs of a community.⁸

Before the enactment of the 2010 Constitution, there existed a structure of administrative decentralisation. However, the local authorities lacked the financial and political independence necessary for effective decision-making.⁹ This limited the extent to which the authorities could promote governance at grassroots level and the extent to which citizens could effectively participate in decision-making.¹⁰ There was also little participation in local government affairs.¹¹

The 2010 Constitution has established a devolved system of government aimed at expanding the democratic space and enhancing inclusion of

³ See Ghai Y (ed), *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states*, Cambridge University Press, Cambridge, 2000.

⁴ See generally, Acemoglu D, Naidu S, Restrepo P and Robinson JA, ‘Democracy, redistribution and inequality’ National Bureau of Economic Research Working Paper No. 19746 (2013).

⁵ Kombe W and Namangaya A, ‘Decentralisation and urban governance: Trends and lessons from cities in Tanzania’ in Dick E, Gaesing K, Inkoom D and Kausel T (eds), *Decentralisation and regional development: Experiences and lessons from four continents over three decades*, Springer International, Basel, 2016, 73.

⁶ Rajasekhar D and Satapathy S, ‘The functioning of Grama Panchayats in Karnataka’ in Joseph TM (ed), *Local governance in India: Ideas, challenges and strategies*, Concept Publishing Company, New Delhi, 2007, 364.

⁷ Haysom N, ‘Nation building and constitution making’ Seminar on Conflict Resolution and Peace Building in Multi-Cultural Societies, L’aubier, 11-18 February 2003, 15.

⁸ Ghai (ed), *Autonomy and ethnicity*.

⁹ Kangu JM, *Constitutional law of Kenya on devolution*, Strathmore University Press, Nairobi, 2015, 77.

¹⁰ Kangu, *Constitutional law of Kenya on devolution*, 78-80.

¹¹ Kanyinga K, *Kenya: Democracy and political participation*, Open Society Foundations, Nairobi, 2014, 19-20.

previously marginalised areas and groups.¹² Devolved governments, under the new structure, revolve around three core values: democratic principles and the separation of powers; reliable sources of revenue and autonomy to govern and provide effective service delivery; and the inclusion of not more than two-thirds of the members of representative organs from the same gender.¹³ Although the structure to support devolution is very much in place, there have been tensions between those who want a centralised government and the supporters of devolution.¹⁴

2.2 *Proportional representation*

PR is a type of electoral system in which political parties gain nomination seats in proportion to the number of votes cast for them.¹⁵ It opens doors to political participation of groups based on gender, caste and ethnicity, region, religion, and/or dis/ability. The 2010 Constitution establishes a two-round system for the presidential elections and a first-past-the post (FPTP) system for National Assembly, Senate, and county assembly elections, albeit with gender quotas. According to Karuti Kanyinga, the 2010 Constitution, therefore, fails to radically alter the electoral system from that which obtained prior to its enactment.¹⁶

2.3 *Affirmative action*

Since decentralisation or PR measures may not do full justice to some groups, for substantive equality and equity to be achieved, measures such as affirmative action policies are usually taken. This is done with the aim of improving participation opportunities for historically excluded or under-represented groups. The 2010 Constitution provides for equal enjoyment of all rights and freedoms without any discrimination on the basis of a wide range of fields including race, ethnicity, gender, pregnancy, marital status, and religion.¹⁷ It also requires the establishment of affirmative action programmes to address cases of disadvantage arising from past discrimination.¹⁸

¹² Kangu, *Constitutional law of Kenya on devolution*, 93.

¹³ See Kangu, *Constitutional law of Kenya on devolution*, 95-124.

¹⁴ Kanyinga, *Kenya*, 19-20.

¹⁵ Kanyinga, *Kenya*, 19-20.

¹⁶ Kanyinga, *Kenya*, 20.

¹⁷ Article 27, *Constitution of Kenya* (2010).

¹⁸ Articles 27, 55 and 56, *Constitution of Kenya* (2010).

3 Inclusive democracy and the electoral system: Historical overview

Although Kenya holds periodic elections, the country's performance on women's representation has been dismal compared with her East African neighbours and also compared with the proportion of women to men in the country.¹⁹ The two main reasons accounting for women's exclusion from higher elective offices are patriarchal culture and the electoral system.²⁰

The electoral playing field has always been tilted heavily in favour of men due to: the persisting social resistance and/or lukewarm acceptance of women's participation in political leadership; the culture of electoral violence that tends to be harsher towards female than male candidates; feminisation of poverty that renders women more financially constrained than their male counterparts; lack of adequate political socialisation for leadership that manifests itself in women's exclusion from strategic political information and general inability in the art of public oratory and populist campaigning; and women's marginality in mainstream party hierarchy and hence inability to shape rules of engagement which are defined and organised around male norms and values.²¹

The main systems used in Kenya to elect political leaders have revolved around the FPTP electoral system, PR system, and the party system.

3.1 *First-past-the post system*

In a FPTP system, the winning candidate is the one who gets the largest number of votes in an election and the rest of the votes garnered by the other candidates do not count. This system encourages a majoritarian or 'winner-take-all' mentality. The system is generally unfavourable for increasing the participation of women and other marginalised groups in elective leadership especially in patriarchal societies like Kenya.

¹⁹ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges: A gender audit of Kenya's 2013 election process*, 2013, 2.

²⁰ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 2.

²¹ Nzomo M, 'Taking stock-women's performance in Kenya's parliamentary politics in the 2002 general elections' in Nzomo M (ed), *Women in politics: Challenges of democratization in Kenya*, Heinrich Böll Foundation, Nairobi, 2003, 17.

3.2 *Proportional representation system*

The PR system has also been used in Kenya since independence. Although the true essence of PR is that every vote counts and everyone should have the right to fair representation, the system has not fully achieved these goals in Kenya because the reserved seats are allocated to parties based on the number or the proportion of elective seats won, rather than the number of votes received.²² Thus, the big political parties that have more ‘male capture’ have tended to reward their cronies who are not necessarily from the marginalised groups.²³ Additionally, only 12 PR seats were reserved between 1963 and 2013.²⁴ These were too few to make a difference and increase the number of women representation.

Clearly, FTPT and PR systems have been ineffective in enhancing women’s political representation in Kenya. It is quite astonishing to note that while women make up over 50% of Kenya’s population,²⁵ they only form 47% of the registered voters²⁶ and 10% of elected public officials.²⁷ Decision-making is certainly not representative if over half the population is not represented in governance structures. Between 1963 and 2012, Kenyan voters only elected 50 women (including the re-elected) to Parliament.²⁸ Only 25 women were nominated to Parliament through the PR system throughout this period, which translates to merely 21% female political representation over nearly 50 years of independence.²⁹

3.3 *Political parties*

Parties are the main pathway for women’s entry into the political arena. Countries can restore public trust in representative structures and reduce the concentration of political power by developing stronger vehicles for formal political participation through parties.³⁰ It is on this basis that women need to join parties

²² Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 9.

²³ Geisler G, *Women and the remaking of politics in Southern Africa: Negotiating autonomy, incorporation and representation*, Nordiska Afrikainstitutet, Uppsala, 2004, 113.

²⁴ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 56.

²⁵ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 1.

²⁶ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 1.

²⁷ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 2.

²⁸ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 2.

²⁹ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 56.

³⁰ Oyugi J, ‘Redefining women’s political participation through party politics: The context of Kenya’s political transition’ in Nzomo (ed), *Women in politics*, 37.

in large numbers and also be key decision-makers within parties so as to change their existing institutional and structural discriminatory practices.³¹ However, parties in Kenya are not yet able to fulfill the ideal functions of political education, mobilisation, and representation of diverse interests.³² Some of the challenges facing women in Kenyan parties include; over-concentration of party powers, low degree of institutionalisation, and irresponsible party policies.³³

Party centralisation refers to the distribution of control over decision-making among the levels of the party hierarchy. Most Kenyan parties have a strong center of political power, which may exist in the form of a national executive council, political bureau or even summit. These centers of power control party strategy, organisation and decision-making. Parties determine the level of accommodation of the women's agenda by how they organise and manage their affairs particularly during the recruitment, retention, and transitioning of women to high levels of decision-making.

The degree of institutionalisation depends on the extent to which party rules are entrenched and followed. Highly institutionalised parties are bureaucratic systems full of formalised, explicit rules accompanied by legal-rational authority. A low degree of institutionalisation signifies a patronage-oriented system where there is *ad hoc*, pragmatic decision-making. There are far less clear rules, and even where they exist, they are not carefully followed. This is accompanied by traditional authority or charismatic leadership and loyalty to those in power is paramount. Because of weak institutionalisation:

Political parties in Kenya tend to bias candidate nomination in favor of those who have accumulated personal political capital and resources based upon personal status or external group support. In most cases, the beneficiaries of these biases are men. Party elections are also held arbitrarily and at the party officials' whims. In some cases, the elections are never held altogether. Thus women, as newcomers to parties, who have fewer resources find it more difficult to catch up with established men.³⁴

An audit of parties in Kenya revealed that women are not only poorly represented in their structures, but they mostly occupy low positions where

³¹ The Women Shadow Parliament – Kenya 'The participation and representation of women in management of political parties: An unfinished agenda in Kenya' <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/RAPID-GENDER-ASSESSMENT-AND-AUDIT-OF-POLITICAL-PARTIES-IN-KENYA.pdf> on 25 January 2016.

³² Friedrich Ebert Stiftung, *Institutionalizing political parties in Kenya*, 2010, 8-11.

³³ See Oyugi, 'Redefining women's political participation through party politics', 37-40.

³⁴ Oyugi, 'Redefining women's political participation through party politics', 50.

they cannot influence key decisions.³⁵ Women on average comprised 77% of party secretariats, 30% of party founding members, 26% of National Delegates Conferences/Congresses, 17% of National Governing Councils, 17% of heads of party branches, and 18% of National Executive Committees. However, as shown in table 4, this varies widely across parties. This performance of women in parties is attributed to the challenges discussed earlier in this chapter.

Table 4: Women's representation in political parties

Political party	Founding members			Representatives in NDC			Rep in NGC			Rep. in NEC			Rep. in Secretariats			Head of party branches		
	Women	Men	% of women rep	Women	Men	% of women rep	Women	Men	% of women rep	Women	Men	% of women rep	Women	Men	% of women rep	Women	Men	% of women rep
NARC	1		100				70	130	35	4	16	20				10	30	25
FORD – P	1	3	25	200	870	19	20	301	6	3	30	9				4	103	4
LDP	1	3	25															
KANU		2	-	1200	3000	29				2	37	5						
NPK	1		100	30	30	50	8	7	53	8	7	53						
FORD – K	5	7	42	700	2900	19	7	213	3	6	40	13	2	3	40			
Saba saba	3	6	33				12	24	33	2	10	17						
KENDA	1	3	25										8		100	6		100
LPK	1	1	50	325	325	50	30	30	50	7	7	50				20	20	50
FORD – A										5	19	21					39	-
PICK		3	-															
Shirikisho	1	5	17	33	72	31				4	25	14					7	-
Total	15	33	31	2488	7197	26	147	705	17	41	191	18	10	3	77	40	199	17

Source: The Women Shadow Parliament – Kenya (WSP-K)

4 Inclusive democracy and the 2010 Constitution

The 2010 Constitution of Kenya incorporates the mechanisms that have been used elsewhere in the world to include marginalised groups. The 2010 Constitution has progressive provisions on human rights, equality, and inclusion.

³⁵ See Oyugi, 'Redefining women's political participation through party politics', 41.

4.1 Affirmative action

The 2010 Constitution enshrines the ‘two-thirds gender rule’. This principle is expressed in two parts of the 2010 Constitution: the Bill of Rights and the general principles of the electoral system. The principle dictates that ‘not more than two-thirds of the members of appointive and elective bodies shall be of the same gender.’³⁶ These provisions require the State to take legislative and other measures designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination.³⁷ Separate provisions create reserved positions for women in the National Assembly, Senate, and county assemblies.³⁸

4.2 Equality and non-discrimination

The 2010 Constitution provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres. Equality is defined as a fundamental right and it implies similarity of treatment.³⁹ The 2010 Constitution prohibits discrimination on the basis of, among others, disability and age.⁴⁰ It demands participation, inclusiveness, and protection of minorities and marginalised groups⁴¹ and demands that legislative and policy measures be taken to facilitate their implementation.⁴² This inclusion is extended to the following: persons with disabilities (PWDs), youth, and minorities and marginalised groups.⁴³

4.2.1 Persons with disabilities

The 2010 Constitution provides for the right of persons with disabilities (including women with disabilities) to be treated with dignity and respect. It states that every person with disability has the right to access educational institutions, public places, transport, and information.⁴⁴ The article further

³⁶ Articles 27(8) and 81(b), *Constitution of Kenya* (2010).

³⁷ Article 27(6), *Constitution of Kenya 2010*.

³⁸ Articles 97(1)(b), 98(1)(b) - (d), and 177(1)(b), *Constitution of Kenya* (2010).

³⁹ Article 27(3), *Constitution of Kenya* (2010).

⁴⁰ Article 27(4), *Constitution of Kenya* (2010).

⁴¹ Article 56, *Constitution of Kenya* (2010).

⁴² See, for example, Article 100, *Constitution of Kenya* (2010).

⁴³ Article 100, *Constitution of Kenya* (2010).

⁴⁴ Article 54, *Constitution of Kenya* (2010).

bestows upon the State the duty of ensuring that persons with disabilities occupy 5% of positions in appointed and elected bodies.⁴⁵

4.2.2 Youth

The 2010 Constitution recognises the rights of the youth⁴⁶ (including young women) and places an obligation on the State to take measures, including affirmative action programmes, to ensure that they have: access to education and training and opportunities to associate; to be represented; to participate in political, social, economic and other spheres of life; to have access to employment; and to be protected from harmful cultural practices and exploitation.⁴⁷

4.2.3 Minorities and marginalised groups

The 2010 Constitution demands that the State puts in place affirmative action programmes designed to ensure that minorities and marginalised groups (including women) participate and are represented in governance and other spheres of life.⁴⁸ The State is obliged to provide special opportunities in educational and economic fields, in employment, and in developing cultural values, languages, and practices of minorities and marginalised groups.⁴⁹ The State must also ensure that they have reasonable access to water, health services, and infrastructure.⁵⁰

4.3 *Implementation of rights and fundamental freedoms*

The 2010 Constitution imposes an obligation on State actors to address the needs of all vulnerable groups in society, including women.⁵¹ It demands recognition of human rights as one of the ground-rules for national development and actualisation of fundamental rights and responsibilities for both men and women.⁵² To fully realise this gain, there is a need to integrate

⁴⁵ Article 54(2), *Constitution of Kenya* (2010).

⁴⁶ The term ‘youth’ in the Constitution is defined as “all individuals in the Republic who (a) have attained the age of eighteen years; but (b) have not attained the age of thirty-five years.

⁴⁷ Article 55, *Constitution of Kenya 2010*.

⁴⁸ Articles 27(6) and 56(a), *Constitution of Kenya 2010*.

⁴⁹ Article 56 (b), (c), (d), *Constitution of Kenya 2010*.

⁵⁰ Article 56(d), *Constitution of Kenya 2010*.

⁵¹ Article 21(3), *Constitution of Kenya* (2010).

⁵² Article 21(3), *Constitution of Kenya 2010*.

the promotion and protection of human rights into national policies and to support the inclusion of human rights provisions through legislation.

The 2010 Constitution provides that every citizen has the right to make political choices, which include the right to form and participate in forming a political party.⁵³ Every citizen has the right to participate in the activities of or recruit members for a political party.⁵⁴ The provision further secures the right to free, fair, and regular elections based on universal suffrage and the free expression of the will of electors. It secures the right of women to participate as voters and in leadership.⁵⁵

4.4 *The 2013 General Elections*

The aforementioned inclusive constitutional principles have improved the percentage of elected women across the board.⁵⁶ The policies significantly increased women's representation through nomination of women to between 19% in Parliament and 35.5% in the County Assemblies (see table 3). This is a great improvement from the earlier nominations of 1.4% in 50 years.

While these improvements are remarkable, it is a dismal performance compared to our regional counterparts. As shown in figure 1 between 2008 and 2013, women comprised only 10% of the then Tenth Parliament of Kenya compared with Rwanda's 56%, Tanzania's 36%, Uganda's 35%, and Burundi's 30%.⁵⁷

The data presented also confirms that affirmative action policies are indeed increasing the representation of formerly marginalised sub-groups of women like the youth. Table 4 above shows the number of youths who were either elected or nominated in various positions during the 2013 elections. A total of 439 young people began serving in the county or national governments in various positions whether it was governor, senator, members of the National Assembly, women's representatives or county assembly representatives.

⁵³ Article 38(1)(a), *Constitution of Kenya 2010*.

⁵⁴ Article 38(1)(b), *Constitution of Kenya 2010*.

⁵⁵ Article 38(3), *Constitution of Kenya (2010)*.

⁵⁶ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 47.

⁵⁷ Federation of Women Lawyers (FIDA) Kenya, *Key gains and challenges*, 2.

Table 5: Youth Representatives Elected or Nominated in March 2013

Position	Male total in position	Youth Male	%	Female total in position	Female youth	%	Total no. of youth
Members of National Assembly (elected)	274	19	6.9%	16	1	6%	20
Women Representatives (elected)	-	-		47	8	17%	8
Members of National Assembly (nominated)	7	3	42.9%	5	2	40%	5
Senator (elected)	47	3	6.4%	-	-	-	3
Senator (nominated)		1		18	7	39%	8
Governor	47	1	2.1%	-	-	-	1
County Assembly Representatives (elected and nominated)	1368	19	1.4%	753	375	50%	394
Total Candidates	1743	46	2.6%	839	393	47%	439

Source: Youth Agenda (2013)

Whereas there were no young women elected or nominated out of the dismal 4.5% before 2012, the performance of young women elected or nominated in positions of power significantly rose to 47% (see table 4). The provisions also demonstrate the correcting nature of these inclusive policies so that where young women had no chance of political participation, they now can be involved.

It is interesting to note that although men have always had an upper hand in political representation in Kenya, young men only formed 2.6% of all elected or nominated positions in the 2013 elections. More deliberate efforts need to be made in order to also increase the inclusion of young men in political processes.

5 Inclusive democracy and socio-economic status

The socio-economic factors that enhance inclusion of groups in political processes include access to resources and education. Lack of access therefore

further disadvantages minority and marginalised groups and limits their participation in political processes.

5.1 *Financial resources*

Finances have a central role to play in politics. The finances required for politics can be categorised according to the electoral phases. The pre-polling phase requires enormous resources for nominations and campaigns. Finances in the polling phase are mainly for logistical purposes – to mobilise agents and to personally monitor the elections. Resources may be needed for the post-polling phase to celebrate if the candidate has triumphed. For those who have lost, finances may be required to file petitions if they deem the polls to have been irregular.

According to Miruka, politics may appear to require such a large financial outlay because of three main reasons. First, there are legitimate but unnecessary expenditure items that candidates must budget for such as nomination fee at party and electoral commission level, transportation mainly to cover vast areas during campaigns, allowances for agents and campaigners, publicity material to publicise your candidature, hiring meeting venues etc. Second are the legitimate but borderline items (in the sense that they are not obligatory but are specific to the culture of Kenyan politics) on which money is spent which include donations to harambees and other welfare causes such as funerals and weddings as well as entertainment and food for ‘supporters’. Third, are the illegitimate expenditures that are clandestine, criminal and immoral such as bribery of voters with cash and material handouts, hiring of thugs to intimidate, sabotage and even physically brutalise opponents etc.

Finances to fund elections usually come from three main sources. Personal coffers (savings, sale of property, utilisation of personal vehicles, hotels etc), cash or utilities mobilised privately or through fund raising events with the help of close associates (who believe in the competence of a candidate, are simply friends or expect favours once their candidate succeeds) or the political party advances (mostly given to candidates with high chances of making it. There is evidence that lack of resources constrains women’s participation in politics:

Women tend to lack finance which is necessary to boost them into political leadership. This factor is closely related to culture” because “due to cultural gender bias, women have less access to credit, education and employment opportunities. Yet in Kenya, economic empowerment seems to be a prerequisite to political participation

and leadership”. The text gives the example that “election campaigns in Kenya tend to concentrate on ‘dishing’ out handouts rather than in spelling out individual manifestoes and strategies for development.”⁵⁸

Women candidates in the 2002 General Elections cited lack of resources as cited by 15.6% of the respondents.⁵⁹ In another study of the 2007 elections conducted by Youth Agenda on the election success of young people, giving hand-outs and the money required for nominations (cited by 12 % of the respondents) was an impediment in the candidates’ success.⁶⁰ In Mbeke’s view:

The Kenyan political landscape is characterized by patronage and cronyism networks that stifle participation by inexperienced youth and women. Criticism of political parties revolves around the fact that they are personal properties of powerful politicians and exhibit arbitrary, autocratic and unaccountable tendencies. Apart from being avenues to personal power, many of the parties are platforms for extorting money from people with political ambitions. Women and youth leaders rarely have the kind of resources needed to grease the networks of political patronage.⁶¹

Poverty is mainly attributed to several things, including low access to income earning opportunities and informalisation of work. At independence, native Kenyans who predominantly lived in rural areas had inadequate training and consequently lacked appropriate skills to manage the jobs left by the colonial regime. High rural-urban migration caused urban and rural unemployment due to sudden labour force growth in urban areas and reduced labour force in rural areas. Employment opportunities for Kenyans were increased through replacement of non-citizens as envisaged in *Sessional paper no. 10 of 1965*. This Kenyanisation policy increased the proportion of the natives employed in the public service, which rose from 14.6% to 97% between 1964 and 1971. The policy however did not create additional jobs.

Most women could not take advantage of these job opportunities because they either had minimal education or remained in rural areas to take care of homes and farming as men migrated to work in cities:

Apart from lack of physical and human assets, women are generally immobile because of greater responsibilities for childcare, household provisioning, doing house-

⁵⁸ Association of African Women for Research and Development, *Women’s political leadership in Kenya: Involvement, challenges and the way forward*, 1998.

⁵⁹ Okoth OJ, ‘Report on practical and strategic issues for women candidates in 2002 General Elections’ (2002).

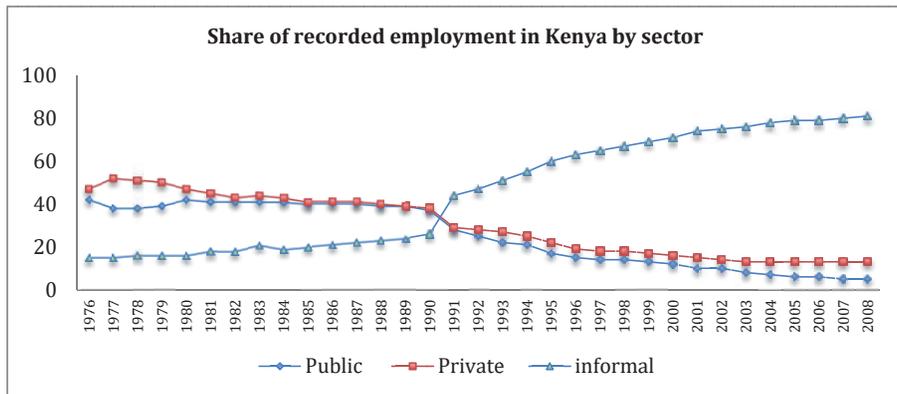
⁶⁰ Sivi-Njonjo K, *Youth situation analysis 2014*, Youth Agenda, Nairobi, 2014.

⁶¹ Mbeke PO, ‘The impact of the mass media on youth participation in the 2007 Kenya general elections in Nakuru district’ Phd Thesis University of Nairobi, 2010, 30.

hold chores and home-based agricultural activities. The cultural norms are such that women find it hard to venture out to look for work or, in certain traditions to mix with men. This prevents them from gathering information on job opportunities. They are cut off from channels of communication, or the information they receive is filtered through the (male) head of household or community leaders.⁶²

Figure 2 shows a constant decrease of formal sector employment (both public and private⁶³) and the growing significance of informal sector employment. Rapid growth in informal employment in Kenya (from 1991 onwards) coincided with the period when the Kenyan labour market started suffering formal sector employment losses triggered by liberalisation policies, renewed government strategies towards promotion of growth and development of the informal and jua kali sector (1992), and broadening of the definition and more consistent capturing of informal sector data in the national statistics. As a result, the average growth of the informal sector between 1990 and 1999 averaged at 27.67% per annum while the formal sector employment shrunk from 74.4% of total employment in 1990 (private and public employment combined) to 18% in 2008.⁶⁴

Figure 2: Share of recorded employment in Kenya by sector



Source: Kenya Institute for Public Policy Research and Analysis, *Kenya economic report 2013: Creating an enabling environment for stimulating investment for competitive and sustainable counties*, 2013.

⁶² Kiriti TW and Roy KC, 'Gender inequality and poverty: The Kenyan case' in Brenos RV (ed), *Focus on poverty*, Nova Science Publishers, New York, 2006, 20.

⁶³ The country's private sector contributes to 97% of GDP and provides 80% of formal employment. See African Development Bank, *2014-2017 Country Strategy*.

⁶⁴ Omolo J, 'Youth employment in Kenya: Analysis of labour market and policy interventions' FES Kenya Occasional Paper No. 1 (2011).

The informal sector jobs are precarious in nature as they are characterised by job insecurity, poor wages and terms and conditions of employment, lack of social protection, weak safety and health standards, and low job tenure. Even though informal sector employment has been a key driver to reducing unemployment in Kenya, informality remains a major productivity trap but the ‘working poor’ cannot afford not to be engaged in some economic activity. As shown in table 6, informal employment is most prevalent among women than among men. It is also most prevalent among 15 to 24 year olds than older age groups. Employment in the informal economy is more pronounced in rural areas (87%) and peri-urban areas (79%) than the urban areas (53%).

Table 6: Informal employment in Kenya by age and gender

Age-group	15-64	15-35	15-24
Informal employment in percentage	77.1	77.4	84.3
Male	71.4	72.4	81.6
Female	83.4	82.6	87
Urban areas	52.8	54.3	84.2
Peri-urban areas	78.5	79	63.4
Rural areas	86.9	87.7	91.3

Source: Kenya Institute for Public Policy Research and Analysis, *Kenya economic report 2013: Creating an enabling environment for stimulating investment for competitive and sustainable counties*, 2013.

As evidenced above, the feminisation of poverty therefore renders women more financially constrained to manage a campaign than men.

5.2 Marginalisation and unequal access to opportunities

It is impossible to build a modern nation on the basis of exclusion and inequality. The ‘trickle down’ economic discourses adopted at independence by most African countries concentrated on economic growth because it was thought that as the country grew richer, its wealth would trickle down to benefit the poorest sections of society. Through Sessional Paper No. 10 on African Socialism and its application to planning in Kenya of 1965, Kenya made a decision to invest the bulk of its resources in the agricultural potential areas with the hope that the rest of the regions would benefit from the proceeds of that investment. Many decades later the neglected regions remained underdeveloped.

Table 7 shows investment in schools and housing in Kenya's eight regions in 1970. The data confirms the fact that investment was not in proportion to the population of the regions and also the fact that the bulk of the resources went to high potential areas. Much more secondary school and housing investment therefore went to Central and Nairobi regions. Investment in primary schools was concentrated in Eastern and Central regions of the country. As evidenced in the table, very little investment (if any) was made in the Northern region of the country, which still has low access to social amenities five decades after independence.

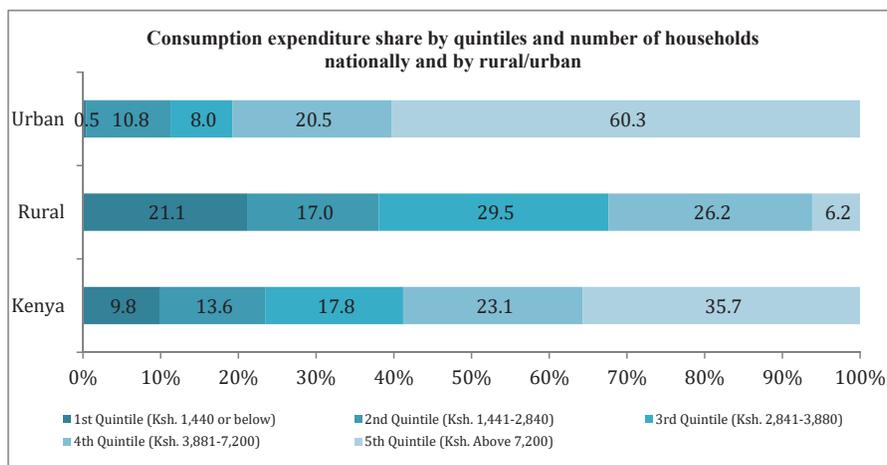
Table 7: Distribution of social services by region in Kenya in 1970

	Percentage of total pop in 1969	Percentage of school expenditure (1970)		Percentage of NHC housing expenditure (1970)
		Primary	Secondary	
Rift Valley	20.4	14.7	12.1	6
Nyanza	19.4	16.1	13.1	1.2
Eastern	17.4	20.2	13.6	2.4
Central	15.3	24.9	22.9	15.1
Western	12.3	13.1	10.1	2.9
Coast	8.6	6.3	9.3	7.2
Nairobi	4.4	4.4	18.7	65.2
North Eastern	2.2	0.3	0.2	0
	100	100	100	100

Source: Nellis JR, 'The ethnic composition of leading Kenyan Government positions' The Scandinavian Institute of African Studies Research Report No. 24 (1974).

Another result of the policy choices made at independence was the stark differences in consumption that were created among the various segments of the society. As illustrated in figure 3, the consumption expenditure share of the fifth quintile (the richest) in urban areas (with expenditures of Ksh 7,200 or more) is almost 10 times more than the consumption expenditure share of the same quintile in rural areas. The expenditure share in the fifth quintile in urban areas is also 121 times more than the expenditure share of the first quintile (that spends Ksh 1,440 or less) in urban areas.

Figure 3: Consumption expenditure share by quintiles and number of households nationally and by rural/urban



Source: Kenya National Bureau of Statistics and Society for International Development, *Exploring Kenya's inequality: Pulling apart or pooling together?* Abridged Version, 2013.

More importantly though is the fact that improved access to essential social amenities such as electricity and access to schools (that improve the lives of citizens to participate better in social and political matters) were restricted entirely to the wealthier quintiles. As shown in table 7, services were much more available to top quintiles than to the bottom ones.⁶⁵

Table 8: Access to selected services by wealth quintile

Quintile	Bottom			
Year	93	98	2003	2005
Electricity	0	0	0	0
NER (Prim)	71	76	61	73
GER (Prim)	100	101	91	118
NER (Sec)	4	4	4	6
GER (Sec)	14	9	9	16
Quintile	Second			

⁶⁵ World Bank, *Kenya poverty and inequality assessment, Volume I: Synthesis Report*, 2008 <http://siteresources.worldbank.org/INTAFRREGTOPGENDER/Resources/PAKENYA.pdf> on 25 January 2016.

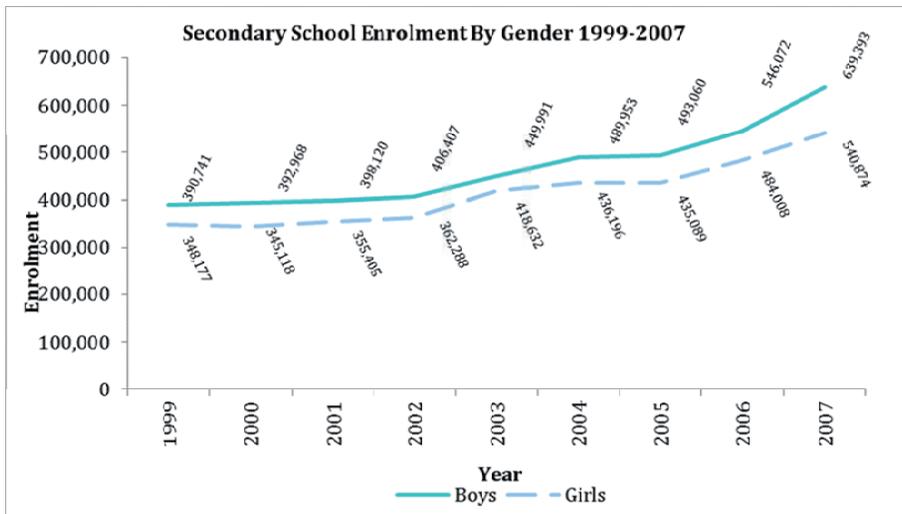
Year	93	98	2003	2005
Electricity	0	0	0	5
NER (Prim)	74	85	80	80
GER (Prim)	103	113	116	125
NER (Sec)	6	5	7	12
GER (Sec)	13	18	19	34
Quintile	Third			
Year	93	98	2003	2005
Electricity	0	0	0	8
NER (Prim)	72	88	84	84
GER (Prim)	100	119	120	119
NER (Sec)	5	9	12	21
GER (Sec)	15	21	22	50
Quintile	Fourth			
Year	93	98	2003	2005
Electricity	1	2	4	20
NER (Prim)	76	90	88	86
GER (Prim)	103	119	125	118
NER (Sec)	6	12	16	30
GER (Sec)	15	23	29	59
Quintile	Top			
Year	93	98	2003	2005
Electricity	47	60	57	53
NER (Prim)	81	90	86	89
GER (Prim)	106	110	106	109
NER (Sec)	17	22	29	52
GER (Sec)	37	44	41	84

Source: World Bank, 2008

Kenya Government expenditure on education, health and other social services substantially decreased due to rising pressure from the World Bank and the IMF to reduce government expenditure within the Structural Adjustment Programmes (SAPS). Extremely low per capita incomes limited the ability of many communities and households to contribute more private funds to the education of their children. The additional burden on low-income

households had a negative effect on school enrolment, especially enrolment of girls.⁶⁶ As shown in figure 4, the gross enrollment ratios started declining but worse was the fact that the already consistently low enrollment rates of girls dwindled even further and the gap between boys and girls increased. The rise in enrollment in 2003 is attributed to the FPE policy in the Kibaki regime, which resulted in a surge in enrolment in secondary schools. Other improvements post this period are attributed to the Secondary Schools Bursary Fund (SEBF), devolved funding such as CDF that opened up access to secondary school facilities in rural areas and subsidised secondary education.

Figure 4: Secondary School Enrolments by Gender, 1999-2007



Sources: K’olich, ‘Education: Adequate and equitable provision?’ in Sivi-Njonjo K, Kitonga A and Ponge A (eds), *Youth research compendium*, Institute of Economic Affairs, Nairobi, 2011.

In understanding access to education at lower levels, table 9 compares access to education nationally, in Embakasi constituency (which has the best access to education in Kenya) and in Turkana County (which has the least access to education in Kenya). The data, which is aggregated by gender and region and sub-regions shows that Loima Constituency in Turkana County has the lowest proportion of individuals with secondary education in Kenya at 0.8%. This is 79 times less than the proportion in Embakasi West Con-

⁶⁶ Kiriti T and Tisdell C, ‘Gender inequality, poverty and human development in Kenya: Main indicators, trends and limitations’ Social Economics, Policy and Development Working Paper No. 35 (2003).

stituency in Nairobi County, which is at 63%. If an individual comes from a female-headed household in Loima Constituency, the share increases to 120 times less than an individual in Embakasi West Constituency or 28.5 times less than an average Kenyan.

Table 9: Access to education

County/ Constituency/ Wards	None (male)	None (female)	Primary (male)	Primary (female)	Second- ary+ (male)	Second- ary+ (female)
Kenya	23.5	26.8	51.8	52.2	24.7	21.0
Rural	27.7	31.2	54.9	54.4	17.4	14.4
Urban	14.4	17.2	45.2	47.2	40.4	35.6
Embakasi County	9.0	8.4	25.4	30.8	65.6	60.8
Turkana County	80.5	83.9	15.3	13.7	4.2	2.4
Loima Constituency	92.3	93.8	6.6	5.7	1.1	0.5
Kotarak/Lobei	96.3	96.9	3.1	2.9	0.5	0.3
Turkwel	86.3	89.4	12.1	9.9	1.7	0.7
Loima	94.9	96.2	4.2	3.3	0.9	0.6
Lokiriama/ Lorengippi	96.1	96.9	3.0	2.7	0.9	0.4

Source: Kenya National Bureau of Statistics and Society for International Development, 2003.

The outcome of marginalisation and socio-economic exclusion of some regions and of women has affected the effective participation of certain groups such as people from certain regions (especially minority groups and those that were historically marginalised). As shown in table 10, political appointive positions have favoured men more than women.

Table 10: Women in public office

Public office	Women	Men	Total	Percentage women
Ministers	7	35	42	16.6
Assistant ministers	6	45	51	11.8
Permanent secretaries	6	36	42	18.8
Provincial commissioners	0	8	8	0
Ambassadors / High Commissioners	11	37	48	22.9
Court of appeal judges	1	9	10	10
High court judges	16	31	47	34

With fewer women participating in public service, women sub-groups are more disadvantaged. This can be deduced from the number of minority groups employed in the civil service such as the Somali, MijiKenda and Turkana who are grossly under-represented compared to the Kikuyu, Kalenjin and Luo (see table 11). Whereas there were many other factors at play, this pattern of ethnic composition in the civil service coincides with the level of investment made in the regions after independence (see table 6).

Table 11: Ethnic over/under-representation of various ethnic groups in the civil service

Ethnic group	National composition ⁶⁷	Proportion of tribes in the civil service ⁶⁸	Over/under-representation
Kikuyu	17.15	23.4	6.25
Luhya	13.82	12.5	-1.32
Kalenjin	12.86	16.3	3.44
Luo	10.47	12.7	2.23
Kamba	10.07	10.2	0.13
Somalis (but the results are contested)	6.17	5.2	-0.97
Kisii	5.71	7.5	1.79
MijiKenda	5.07	3.2	-1.87
Turkana	2.56	1.6	-0.96

Source: Kanyinga, 2014

6 Conclusion: Are we there yet?

As demonstrated in the paper, Kenya's transition to a democracy did not initially create opportunities for all sections of society. However with the new Constitution, inclusion of minorities and formerly marginalised groups is significantly improving. For this trend to be maintained it is imperative that Kenya takes a number of measures.

Firstly, the country should invest in equitable access to socio-economic factors as a pre-requisite to effective participation. Socio-economic invest-

⁶⁷ See Kanyinga, *Kenya*.

⁶⁸ Njoroge K, 'How ethnic groups have colonised the Civil Service' *Business Daily*, December 2015.

ments to achieve equitable access to public goods should be adequately met as a pre-requisite to equal participation of all segments of the society. As reiterated earlier, these investments will empower minority and marginalised communities to take advantage of opportunities that arise such as jobs, board positions or even public office, otherwise dominant and privileged groups will keep overshadowing the processes. While de-centralised funds and particularly the Equalisation Fund is set-aside for this purpose, prudent use of these resources is critical to avoid wastage.

Secondly, there must be an understanding that adequate budget allocation that is shared equitably and not equally will result in equal opportunities for all to participate. There is a resource sharing mechanism in place to help allocate public resources to de-centralised levels. However, at the county level, leaders in their bid to be politically correct tend to divide resources equally to the sub-regions instead of allocating resources according to need. As such they entrench the inequalities that have always existed instead of correcting the problem. This has to change especially through the planning and budget allocation stages in order to give all citizens a fair chance at accessing public goods.

Thirdly, there must also be an understanding that there are multiple layers of exclusion. Whereas there is space at the table for women to participate in political processes because of the constitutional provisions, many politicians seek to control the process in a way that the outcome favours 'insiders' or the politically correct women. Mechanisms have to be put in place at all levels to deliberately ensure that apart from achieving the two thirds gender rule, other women sub-groups have a fair chance of participating and being included in the political processes if democracy is to be truly inclusive.

Fourthly, the country needs to generate disaggregated data. It is impossible to effectively have inclusion if there is no precise data of who is excluded. Deliberate effort has to be made to have disaggregated data by gender, age, ability and other minority sub-categories so that it is easy to have targeted planning.

Fifthly, there should be promotion of a wide understanding of gender inclusion at devolved levels. Few people in the county governments understand gender mainstreaming that would help enhance gender inclusion in political processes. Government institutions with this mandate like the National Gender and Equality Commission needs to work with county governments in producing gender sensitive rules and regulations that can be followed.

Finally, support should be provided to female candidates vying for political positions. Since most women shy away from politics because of lack of resources, or the lack of political socialisation and knowledge or even limited public oratory skills, the on-going efforts can be scaled up to fully support women in these areas in order to increase their chances of being successful in their political campaigns.

CHAPTER FIVE

The role of political parties in promoting women's political participation

Dickson Omondi

1 Introduction

In both democratic theory and practice, there is little controversy on the pivotal role of political parties in advancing the ideals of representative democracy. Historically, a strong link exists between the emergence of parties, the extension of popular suffrage, and the growth of representative democracies.¹ Parties have become the primary vehicle for political organization and mobilization in competitive elections, an essential feature of representative democracies. Parties and elections are a key feature of democratic governance. Limited government, rule of law, political rights and freedom, common citizenship, equality under the law, social inclusion, accountable governance, free and fair elections, and popular participation are some of the other key precepts underpinning liberal democracies.² While all these remain important subjects and prospects for scholarly enterprise, this chapter focuses on the functioning of parties in promoting equitable participation of citizens in democratic institutions and processes.

Specifically, the chapter addresses women's political participation in Kenya. The discussion is relevant given the dichotomy between the ideals outlined in the Constitution of Kenya, 2010, (2010 Constitution), on the one hand, and the prevailing challenges in achieving equitable participation and representation of women in political leadership, on the other. The 2010 Constitution provides that all public elective and appointive bodies shall be comprised of not more than two thirds of either gender.³ This goal has not been

¹ Duverger M, *Political parties: Their Organization and Activities in a Modern State*, Methuen, 1954, xxiii.

² Bastian S & Luckham R, *Can democracy be designed? the politics of institutional choice in conflict-torn societies*, Zed Books, 2003, 17.

³ Article 81 (b), *Constitution of Kenya* (2010).

attained fully. This has in turn led to public debate⁴ and efforts by various actors, such as the National Gender and Equality Commission (NGEC) and the Kenya Women Parliamentarians Association (KEWOPA), to propose solutions to what is evidently a complex problem. The problem strides complex political, legal and socio-cultural factors. Key amongst these is the design of a country's electoral system, that is, the methods that a country uses to translate votes into electoral seats.⁵ Legal frameworks for elections play an important role in either promoting or hindering the goal of increased women's political participation. Across the world, evidence suggests that countries that adopt list proportional representation electoral systems fare better in fostering inclusive politics, and particularly in advancing women's political participation.⁶ The pertinent question is to examine what mechanisms would predispose majoritarian electoral systems, such as Kenya, towards similar outcomes. Beyond legislative measures, such as quotas, there is increasing focus on the role of parties in promoting women's political participation. This chapter contributes to the discourse on the role played by parties in promoting equitable political representation.

The chapter argues that deliberate voluntary action by parties is key to promoting women's political participation. The chapter contends that political parties occupy a preeminent position, compared to legislative measures designed to engineer social changes, which can be harnessed to enhance women's political participation. Legal dictates may motivate political parties and other political agencies to address women's political participation and representation. Sustainability of such efforts, however, requires a belief in the value proposition of women leadership, and in particular, consensus that representation of different interest groups in politics is beneficial to democratic consolidation. While parties might be motivated by factors such as the political system and the type of electoral system,⁷ the chapter argues that the most effective and sustainable interventions should be driven by a belief in the

⁴ Oluoch F 'Debate rages on Bill to amend gender balance rule in Kenya's parliament' *The East African* 30 May 2015.

<http://www.theeastafrican.co.ke/news/Debate-rages-on-Bill-to-amend-gender-balance-rule-in-Kenya/-/2558/2734844/-/jm5eg8z/-/index.html> on 4 March 2016.

⁵ International Institute for Democracy and Electoral Assistance, *Electoral system design: the new international idea handbook*, International Institute for Democracy and Electoral Assistance, 2005, 5.

⁶ International Institute for Democracy and Electoral Assistance, *Electoral system design*, 61.

⁷ International Institute for Democracy and Electoral Assistance, *Political Parties in Africa through a Gender Lens*, International Institute for Democracy and Electoral Assistance, 2013, 54.

value of women leadership, hence voluntary action by parties to implement measures that promote gender equality in leadership. The chapter thus suggests a number of possible interventions that parties can undertake to promote women's political participation.

The chapter is divided into four sections. This section provides an introduction to the discussion topic and outlines the core argument. Section two reviews the role and functioning of parties in Kenya. It attempts to problematize and contextualize gender disparities in parties through the prism of intra-party democracy. Section three outlines proposals for voluntary action by parties to increase women's political participation. The last section concludes by noting the need for broader and concerted efforts to promote women's political participation.

2 Role and functioning of political parties in representative democracies

Representative democracies are built on the foundational precept of citizens transferring their political power to chosen representatives through an election process.⁸ Parties play by far the most important role in organizing participation in representative democracies, suggesting that their existence is a necessity for the functioning of such political systems.⁹ Parties have been defined as permanent associations of citizens formed with the express purpose to form government through elections, in order to resolve societal problems.¹⁰ Parties exist as organizations that aim to exert public influence on the formation of public opinion, and hence require permanent organizational structures and programs.¹¹ Parties are organized for the deliberate purpose of accessing and controlling state power, thus requiring an organizational structure, the recruitment of cadres, fundraising and the enactment of procedures for internal governance.¹² Parties execute functions that include recruitment, in-

⁸ Thesing J and Hofmeister W, *Political parties in democracy*, Konrad-Adenauer Stiftung, 1995, 12.

⁹ Thesing and Hofmeister, *Political parties in democracy*, 12.

¹⁰ Hofmeister W and Grabow K, *Political parties: function and organization in democratic societies*, Konrad Adenauer Stiftung 2011, 12.

¹¹ Thesing and Hofmeister, *Political parties in democracy*, 13.

¹² Weiner M, *Party building in a new nation: the Indian National Congress*, University of Chicago Press, 1967, 1-2.

terest aggregation and influencing government.¹³ Considering the electoral function, parties have an important role in nominating leaders, candidates and officials. Ideally, the electoral function of parties should be conducted through clear, open, and democratic procedures.¹⁴ To evaluate the ability of parties to safeguard the ideals of popular participation, inclusive politics and representation, it is imperative to review their operations, the organizational structures in place, and the manner in which they conduct their internal business.

Central to the question of party organization and functioning is the principle of intra-party democracy. Intra-party democracy refers to the wide range of methods parties use to involve members in core deliberative and decision-making processes.¹⁵ It aims at enabling active and full participation of the party's rank and file in making decisions on issues, activities and individuals.¹⁶ Intra-party democracy strengthens the concept of sovereignty and power emanating from the party's membership. Thus, it seeks to moderate elite capture of the party and safeguard the democratic character of party organs and structures, circumscribe the rights and duties of members, and ensure fair nomination of candidates for political office.¹⁷

Parties often struggle to effectively execute these important functions.¹⁸ Whether in their ability to effectively organize for governance, to execute their interest aggregation and articulation function, political communication or fostering political participation, party performance remains sub-optimal.¹⁹ To be able to analyse how well parties can meaningfully address questions of inclusion, party organization is a good analytical departure point. Party organization is often a key factor in determining intra-party democracy, particularly how party decision-making measures on a three point criteria of inclusiveness, centralization and institutionalization.²⁰ Low levels of inclusiveness, institu-

¹³ Hague R and Harrop M, *Comparative government and politics: an introduction*, Palgrave Macmillan, 1998, 131.

¹⁴ Norris P, *Building Political System: Reforming Legal Regulations and Internal Rules*, International Institute for Democracy and Electoral Assistance, 2004, 38.

¹⁵ Thesing and Hofmeister, *Political parties in democracy*, 15.

¹⁶ Thesing and Hofmeister, *Political parties in democracy*, 15.

¹⁷ Thesing and Hofmeister, *Political parties in democracy*, 15.

¹⁸ Chege M, *Political Parties in East Africa: diversity in party systems* International Institute for Democracy and Electoral Assistance, 2007, 54 - 55.

¹⁹ Webb P, 'Political Parties and Democratic Disconnect: A Call for Research' in *Democracy and political parties*, Hansard Society, 2007, 6 - 10.

²⁰ Scarrow S, *Political parties in theoretical and practical perspective: Implementing intra-party democracy*, National Democratic Institute for International Affairs, 2005, 6.

tionalization and decentralization pose significant challenges to transparency, affect the legitimacy of decision-making processes in general, and candidate selection processes in particular.²¹ Many parties struggle to develop a robust party organization and internal party democracy. The dictates of modern struggles for more open political systems, however, require that parties embrace more openness, tolerance and promote broader participation.²² Arguably, there is a strong relationship between weak party organization and the ability of parties to promote inclusive politics. Efforts to promote increased women's political participation should, therefore, be contextualized within the realities of party performance. The goals of equitable gender participation and representation in parties and stronger party organizations should be pursued contemporaneously. The tendency to prioritize other party programs over those that seek to promote women, youth, and other traditionally excluded groups is counterproductive to the ideals of strong parties in modern political systems shaped by progressive political ideas.²³

2.1 *Functioning of political parties in Kenya*

The history of political organizations and parties in Kenya predates independence and is a subject that has been covered in greater detail by others.²⁴ It is a history checkered by challenges in the ability of parties to effectively organize and strengthen their internal capacities to effectively discharge their mandates. First, parties in Kenya rate poorly on internal party organization. They have generally failed to adopt inclusive decision making procedures, are unable to effectively mobilize party members, and do not maintain active membership registers.²⁵ A low membership base affects the parties' ability to raise financial resources that would facilitate more effective methods of candidate selection such as party caucuses, systems of constituency delegates, open interviews by party tribunals, and selection by independent boards.²⁶ In the instances that parties attempt to organize democratic internal elections, they have to contend with the challenge of verifying the participation of genuine

²¹ Ashiagbor S, *Selecting candidates for legislative office*, National Democratic Institute, 2008, 2.

²² Thesing and Hofmeister, *Political parties in democracy*, 15.

²³ Thesing and Hofmeister, *Political parties in democracy*, 15.

²⁴ See, for example, Wanjohi N, *Political parties in Kenya: formation, policies and manifestos*, Views Media, 1997, (Passim).

²⁵ Chege, *Political parties in East Africa*, 47.

²⁶ Chege, *Political parties in East Africa*, 45.

membership.²⁷ Internal organizational weaknesses have left party decision-making prone to abuse and control by party elite. Unfortunately, while such problems generally result in a weak party system, historically excluded groups such as women, youth and persons with disabilities tend to bear a disproportionate burden of neglect. Parties generally fail to prioritize their participation and representation. Worse still, disorganized party processes tend to favour those with more financial resources and foster patronage networks.

Second, parties tend to have overly centralized decision-making processes, with personality influence the dominant characteristic.²⁸ What emerges is a system of patronage where the party leaders ‘own’ the parties with little regard for the participation of members in substantive decision-making. The pattern is that of highly centralized decision-making, with tasks such as the nomination of candidates coming under the strong influence of party leaders.²⁹ The reality of ethnic based politics tends to reinforce these challenges, resulting in weak institutionalization of parties. Third, parties tend to exhibit weak institutionalization. Institutionalization refers to the degree to which a political party formalizes internal decision-making procedures and establishes coordinated structures across its membership.³⁰ Where most parties elaborate formal rules in internal party documents, fidelity to rules and process is generally low. A weak institutional base reinforces personality-driven decision-making. Such is the case particularly in nomination of candidates where laid-down procedures and rules are rarely adhered to.³¹ More recently, the phenomenon of party breakdown, and the emergence of new parties continues to undermine institutional capacity of parties. Parties rarely get a chance to properly develop formal structures and expand their organizational network, before a decision is made to dissolve or fuse into a new entity. Weak institutionalization directly links to factionalism, administrative and structural deficits, vote buying, vio-

²⁷ Wanyama F, ‘Voting without institutionalized political parties: primaries, manifestos and the 2007 General Elections in Kenya,’ in Kanyinga K and Okello D (eds), *Tensions and reversals in democratic transitions: the Kenya 2007 General Elections*, Society for International Development, 2010, 61-100.

²⁸ Chege, *Political parties in East Africa*, 45.

²⁹ Friedrich Ebert Stiftung, *Institutionalizing political parties in Kenya*, Friedrich Ebert Stiftung, 2010.

³⁰ Scarrow, *Implementing intra-party democracy*, 6.

³¹ Oyugi W, ‘Politics of Transition in Kenya, 1992-2003: democratic consolidation or deconsolidation?’ in Oyugi W, Mbai C and Wanyande P (eds), *The Politics of Transition in Kenya: From KANU to NARC*, Heinrich Boll Foundation, 2003, 345-376.

lence and imposition of candidates by party leaders.³² It is a truism that disorganized candidate selection processes greatly disadvantage women, youth and other historically excluded groups.

In the period following the re-introduction of multiparty politics in 1991, Kenya has attempted several legislative interventions to consolidate the party system. These efforts intensified in the period preceding the 2007 elections, leading to the enactment of the Political Parties Act, 2007. The Political Parties Act, 2007, was designed to promote more professional parties through the establishment of a more stringent regulatory regime. Following the disputed 2007 presidential elections and its violent aftermath, a dominant theme of reconstruction efforts was the need to achieve a more inclusive society, and in particular to address decades of marginalization targeting youth, women, persons with disabilities, and ethnic minorities. As a result, the 2010 Constitution sets out broad and specific principles that seek to create a more equal and inclusive society. In particular, the 2010 Constitution sets out a specific requirement that not more than two-thirds of the members of public elective and appointive bodies shall be of the same gender.³³ In recognition of the fact that the 2010 Constitution is a statement of basic principles, Article 100 sets the expectation that legislation will be enacted to elaborate constitutional provisions to promote women's representation in Parliament. The agenda for gender equity in political participation and representation is similarly reflected in the Political Parties Act, 2011, (PPA), which requires parties to ensure that not more than two-thirds of the members of their governing bodies are of the same gender.³⁴ The PPA also requires parties to utilize at least 30 percent of funds received from state coffers for purposes of promoting the representation of women, persons with disabilities, youth, ethnic and other minorities and marginalized groups in elective politics at both national and county levels. The legal framework in Kenya thus represents a bold attempt at socially engineering changes to promote equitable participation of both women and men in politics.

³² Oloo A, 'The Contemporary Opposition in Kenya: Between Internal Traits and State Manipulation' Murunga G and Nasongo S (eds), *Kenya: The Struggle for Democracy*, CODESRIA, 2007, 90-127.

³³ Article 81(b), *Constitution of Kenya*, (2010).

³⁴ Section 7 (2) (d), *Political Parties Act* (2011).

2.2 *Legal reform and women's political participation*

The efficacy of engineering behavioral change through legislative means is an interesting subject. The women movement has been particularly adept at pursuing social change through legal mobilization, reform of legal institutions, governmental structures, and private organizations.³⁵ Backed with proper sanctions, law is instrumental in promoting changes in the way a society relates on a particular issue. The goal of more equitable gender participation and representation in public affairs can, in this view, be achieved through the force of legislation. Parties and the electoral process need only comply with legal requirements to promote equitable gender representation, any value conflicts are trumped by the threat of legal consequences. The 2010 Constitution, in outlining provisions that require equitable gender representation in public bodies, is arguably premised on this view that law can be instrumental in promoting social change. Yet, it also reveals significant shortcomings by not providing for an effective implementation and monitoring regime. This has led to the current problem, whereby requirements for equitable gender representation in Parliament remain unrealized, and without the immediate threat of any adverse legal consequences.

An alternative perspective in this debate presumes that law should follow societal changes. Thus, if societal norms and values are at conflict with law there is a general threat to compliance and implementation of sanctions.³⁶ In this vein, it is more difficult to achieve gender equity in a society that is deeply patriarchal in its structural set-up and operation. The clash of values boils down to resistance to change and law. This seems to be the problem in Kenya where there is not sufficiently mobilized moral sentiments to demand for immediate realization of equity in political participation and representation.³⁷ Two problems thus present in the Kenyan context. First, the law is not determinate in providing a clear implementation framework to ensure realization of gender equity principles in political leadership. Moreover, the framers of the 2010 Constitution anticipated that legislative measures to increase women's political participation would be of temporary nature, or put differently, would

³⁵ Anleu S, *Law and Social Change*, SAGE, 2009, 170.

³⁶ Anleu, *Law and social change*, 198.

³⁷ Kilonzo S and Maseno L, 'Engendering development: demystifying patriarchy and its effects on women in rural Kenya' 32 *International Journal of Sociology and Anthropology*, 2011, 52-53.

constitute affirmative action measures.³⁸ This means that a long-term solution to the inherent gender inequalities in political leadership is yet to be achieved. It is arguable that a lasting solution would be to adopt a proportional representation system with party 'zebra' lists. The efficacy of such systems is evident in the Nordic countries (Finland, Norway, and Sweden), which have achieved remarkable strides in promoting gender equity in politics and public affairs.³⁹ The Kenyan legal framework, however, provides for a majoritarian electoral system which tends to accentuate stakes around electoral outcomes, thus creating a tension with any goals to effect principles of gender equality.

Secondly, the Kenyan society is deeply entrenched and structured along lines of patriarchy. Patriarchy has a strong influence on the nature of societal organization and decision-making, particularly in defining a dominant role for the male gender in key areas of resource ownership, control and decision-making.⁴⁰ The public domain is largely constructed as an exclusive male territory, with the end result that the male gender dominates the political sphere at the expense of the female gender.⁴¹ As a key institution involved in organizing public associational life, the structure and historical experiences of parties tend to reinforce patriarchy and gender inequalities in political participation and representation. Political party structures and leadership positions are dominated by the male gender. Parties also exhibit brinkmanship behaviour in the manner that they designate women to deputy positions rather than ultimate leadership for formal positions created in their structures. On face value, such parties meet requirements of the PPA, requiring that party organs are comprised of no more than two thirds of either gender, without having to confront the larger goal of ensuring meaningful and substantive participation of women. The most powerful party organs or those at the top of leadership hierarchies thus reflect the pervasive reality of women underrepresentation.⁴² The patriarchal nature of parties coincides with negative cultural stereotypes on women's political leadership.

It is thus obvious that law – on its own - does not provide an effective

³⁸ Article 27, Article 81 (b) and Article 177 (1) (b), Constitution of Kenya (2010).

³⁹ Dahlerup D, 'Women in Nordic Politics – A Continuing Success Story?' <http://kvinfo.org/history/women-nordic-politics-continuing-success-story>, on 1 March 2016.

⁴⁰ Mitullah W, 'Gender and democratisation in Kenya: the unbalanced equation', in Mushi S, Mukandala R and Yahya-Othman S (eds), *Democracy and social transformation in East Africa*, East African Educational Publishers, 2004, 153-178.

⁴¹ Mitullah, *Gender and democratisation in Kenya*, 154.

⁴² Mitullah, *Gender and democratisation in Kenya*, 154.

remedy for historical gender imbalances in political leadership. Not only is the Kenya legal framework for elections ambiguous and ineffectual in providing for immediate realization of gender equity in political leadership, but worse still, the societal norms and values are not generally supportive of women's leadership. These suggest an important role for parties in efforts to promote gender equitable political participation and representation. As key institutions that facilitate representative democracy, and in particular electoral activities, parties hold the key to ensuring participation of women in meaningful numbers at both primary and general election levels. However, their most important actions remain outside of legal regulation, namely a belief in the value proposition of women's leadership that spurs voluntary action.

3 Voluntary action by political parties to promote women's political participation

The concept of voluntary action by parties is posited in the ordinary English usage and meaning of the words. It requires that parties take deliberate steps, not driven by fear of legal sanctions or penalty, to promote women's political participation. It does not replace argumentation for legal or endogenous pressures to engender equality in leadership, rather it suggests the complementary value of voluntary action in an arena that is characterized by lack of legal determinism. Numerous, it has been stated that a proportional representation system based on zebra party lists provides the most effective method to address gender imbalances in political participation and representation.⁴³ Use of legislative quotas is also a common approach for achieving gender equity in political participation and representation. Aligned to the concept of affirmative action, this strategy is also effective but often risks creating an undesired perception of tokenism, with candidates chosen through such quotas viewed as inferior representatives. In the Kenyan case, the law on its own is not sufficient to bring about gender equitable participation and representation, leading to the suggestion of voluntary action by parties as a complementary avenue for the promotion of women's political leadership.

A key question, however, is what would inspire voluntary action by parties. At first instance, parties that are acutely aware of the moral aspects and direction of the debate would stay ahead of the change curve. Belief by the

⁴³ International Institute for Democracy and Electoral Assistance, *Electoral system design*, 61.

party leadership in the moral arguments favoring gender equity in political leadership could well be the instigating factor. An interesting research area is to examine the suggestion of advantages in electoral outcomes for parties that lead the way in increasing women's political leadership and participation.⁴⁴ While ethnic identity remains a strong driver of voter behaviour in Kenya, there might be benefits accruing to parties that mobilize female voters in greater numbers and that evidence visible support to increase the participation and representation of women in party structures and leadership positions. Evidence of a correlation between support for women's participation and electoral outcomes could, therefore, be the strongest motivating factor for voluntary action by parties. On the balance, it seems that voluntary action by parties remains the most underutilized strategy – and theorized subject – compared to the array of legislative measures that have been proposed to achieve gender equitable political representation in Kenya.

3.1 *Strategies for increasing women's political participation*

The range of possible interventions by parties to promote women's participation is indeterminate. Parties can innovate in a variety of ways in the periods prior, during, and after elections to promote women's political participation. While the tendency is to focus on support during the active campaigning period of the electoral calendar, a long-term strategy will provide better results by deepening the parties' support on core areas pertinent to organization and preparation of female political leaders. An electoral cycle approach thus provides a focused entry-point to structure broad and concerted efforts to promote women's political participation.⁴⁵

3.1.1 Pre-election period

The pre-election period is arguably the most important phase for parties desiring to promote women's political participation. Attention to party building activities during this period is generally higher, there is less competition for resources, and the stakes are generally lower compared to the electioneer-

⁴⁴ National Democratic Institute and United Nations Development Programme, *Empowering women for stronger political parties: a guidebook to promote women's political participation*, National Democratic Institute and United Nations Development Programme, 2012.

⁴⁵ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 17.

ing period. Most importantly, parties can take advantage to implement far-reaching measures that confront the systemic and structural barriers to women's political participation. The range of possible actions include; reform of party by-laws, policy and other internal documents to be responsive to the desire for gender equity, measures to promote more meaningful participation of women in party organization, and the recruitment and preparation of women for leadership roles.⁴⁶ All these require financial resources, thus, establishing the importance of adequate financial resources across all the electoral phases.

Party constitutions and policy documents

Internal party documents play an important role in structuring the organization and management of party activities. They provide the institutional framework for party operations. The party constitution, internal by-laws, manifesto and other policy platforms provide the first evidence of the party's commitment and resolve to promote gender equity in political leadership. Often, these may borrow from broader legislation, the political system and legal framework for elections. However, they provide the real test of a party's commitment and outline the vision and rules for achieving gender equity.⁴⁷ While the greater challenge is examining the extent to which parties implement these commitments, it is important that parties guarantee unequivocal support for gender equality through policy statements,⁴⁸ practical goals to increase women's leadership in internal party bodies, and suggestions for gender responsive policy platforms across political, economic and social sectors. The process of drafting a gender equality statement enables the party to better understand and develop strategic interventions to address existing inequalities.⁴⁹ The ultimate test is to ensure that effective strategies for implementation and monitoring buttress these broad policy objectives. Without effective implementation, these commitments may well be considered as brinkmanship intended to portray the image of a gender-responsive party for purposes of electoral mobilization. However, party constitutions and policy documents play an important

⁴⁶ National Democratic Institute, *Win with women global action plan* National Democratic Institute, 2005.

⁴⁷ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 17.

⁴⁸ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 17.

⁴⁹ Kandawasvika-Nhundu R, *Political parties in Africa through a gender lens*, International Institute for Democracy and Electoral Assistance, 2013, 39.

role in setting goals and targets for better inclusion of women and other traditionally marginalized groups in party activities and leadership positions. Parties should therefore not shy away from using policy documents to set goals for achieving gender parity.

Women's participation in party structures

Parties that implement strategies to increase the role of women in party structures and processes may arguably also excel better in attracting and fielding formidable female candidates. The traditional approach to including women in the party processes is through establishment of a women's wings or leagues that operate alongside other substantive party organs. There are merits in comparing women's wings, as one strategy for promoting women's participation, against strategies that mainstream women's participation in all party organs.⁵⁰ Women's wings can be quite powerful in internal advocacy efforts to increase women's political participation, on the other hand, they can lead to sidelining of women's issues to the wing.⁵¹ A mix of the two strategies could well help harness the advantages inherent in both strategies.

a) Guaranteeing meaningful women's participation in party structures

Meaningful participation demands that women access, occupy and influence the real decision-making organs of the party.⁵² It is, therefore, important that measures address access to both substantive positions in the structure of parties and in meaningful numbers to be able to influence, through voting and other preference expression rules, decision-making. To begin with, one of the key considerations should be to reverse the pattern of appointing women to deputize male office holders. The use of voluntary quotas should, therefore, be used to ensure that substantive positions (such as party leader, chairperson, secretary general, organizing secretary, treasurer, and director of elections) are shared amongst both male and female leaders to reflect equity. This would be a powerful demonstration that women's leadership is valued and desirable.

⁵⁰ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 20.

⁵¹ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 20.

⁵² National Democratic Institute, *Win with women global action plan*, 6.

Quotas could also be used to achieve a threshold that guarantees that women are able to practically influence the decisions of party organs. In order to achieve these, parties may find it necessary to reform internal by-laws and policies. The important challenge is to fully implement such laws and policies. Auditing and other forms of evaluation mechanisms may thus be important to provide a baseline and help set targets. Ultimately, it is only meaningful representation in the real decision-making bodies that can enable women to influence important decisions on recruitment and nomination, the party election platform and its broader agenda. Parties should, therefore, ensure that women's participation in decision-making bodies meet a 30 percent quota.⁵³ Achieving this quota at party level will help with setting goals for national elections.

b) Strengthening women's leagues

Women's party structures – commonly referred to as women's leagues, congresses or wings - play an important role in mobilizing women's participation in party processes. However, they often encounter critical challenges that impede their effective participation. Their effectiveness in party matters and influence compared to other structures is questionable.⁵⁴ This closely correlates to patriarchal biases that reserve the public sphere as a male domain. The value proposition of women's participation is minimalist, with women seen only as voters, or necessary additions to demonstrate the progressiveness of the party. In reality, the priority attached to resourcing their functioning and activities remains minimal. Further, their role in mainstream party organs is often limited to token representation. As a result they face hurdles in galvanizing support and influencing decision-making. Moreover, the mere existence of women's leagues may also contribute to balkanization and relegation of gender issues to the women's leagues.⁵⁵

Strong women bodies can exert positive pressure to address and give voice to societal problems. The case of the African National Congress Women's League (ANCWL) in South Africa is instructive. The ANCWL contributed immensely to the freedom struggle in South Africa and effectively organ-

⁵³ Kandawasvika-Nhundu, *Political parties in Africa through a gender lens*, 86

⁵⁴ Kandawasvika-Nhundu, *Political parties in Africa through a gender lens*, 66

⁵⁵ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties* 20.

ized to demand for women's representation in the freedom party's nomination lists and decision-making processes.⁵⁶ The success achieved is demonstrated in voluntary quotas that the party started implementing to increase women's leadership, even prior to the adoption of the 1996 Constitution.⁵⁷ The voluntary quota (at least 30 percent of candidate list) was reflected in the African National Congress's (ANC) Adopted List Process for the 1993 elections, and subsequently increased to 50% women candidates in the 2009 elections.⁵⁸

The important lesson from South Africa is that a strong women's league can both strengthen overall party operation as well as the participation and representation of women in the party. Significant efforts should, therefore, be expended to support and strengthen women's structures within the party. Adequate financial and human resources should be availed to party women's leagues to ensure they are fully resourced and can conduct organizational development and strengthening activities. Parties in Kenya can similarly tweak the use of voluntary quotas to increase the number of women sitting in mainstream party organs through nomination by the women's leagues. Rather than designating only a few representatives, women's leagues should be allowed to nominate enough members – at least one third – in all decision bodies to enable them effectively influence preference-forming and decision-making. This would strengthen the position of women's leagues in party affairs, reinforce their role in organizing female party members, and ultimately ensure that the party is gender responsive in internal organization and external policy outlook.

Recruiting and preparing female leaders

Parties play an important role in nominating candidates for elective and other public offices. There is a suggested link between the number of female candidates vying for seats and those that eventually win.⁵⁹ The larger the number of female candidates, the greater the number of women elected. A convenient excuse advanced by parties holds that women are largely uninterested

⁵⁶ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 103.

⁵⁷ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 103.

⁵⁸ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 103.

⁵⁹ Federation of Women Lawyers, *key gains and challenges: a gender audit of Kenya's 2013 election process*, FIDA, 2013, 51.

or unavailable to contest for elective offices. Yet, there is a steady growth of qualified women taking up leadership positions in other social and economic sectors. The opportunity, therefore, exists for parties that are committed to increase the number of women contesting seats by broadening recruitment to previously untapped networks of female leaders.

A good starting point is taking deliberate measures to identify, recruit, and prepare women for leadership. Across the world, there are examples of parties and political organizations that are involved in similar initiatives. In the United States, Early Money is Like Yeast (EMILY's List) is a formidable organization committed to promoting women leadership. The organization runs a political opportunity program that identifies, recruits and trains women leaders to run for political office.⁶⁰ Parties can borrow from such strategies to increase the number of women running for or appointed to public offices. Parties can tap into networks of women's organizations, civil society groups, women's business associations and others to identify women leaders interested in public leadership. A key priority should also be to focus on young women who face dual marginalization.

There are many examples of targeted training programs to build the capacity of female aspirants on a variety of topics related to both running an election campaign and performance in leadership roles.⁶¹ Parties should develop their own training modules to empower a cadre of ready candidates. Maintaining a list of trained women leaders, with their qualifications, can also help parties nominate the most deserving and qualified women for elective or appointive offices.⁶² Following elections, parties that win are responsible for making a large number of appointments to various cadres of State/public service, ranging from diplomatic postings, to boards of public bodies. An up-to-date list of qualified women can help mitigate patronage networks that benefit non-party members, and instead seat credible and committed women leaders to available appointments. Mentoring programs that pair aspiring women leaders with their more experienced counterparts can also help build confidence and offer valuable practical perspectives and tips for running successful campaigns.⁶³

⁶⁰ Available at <http://emilyslist.org/pages/entry/what-we-do> on 12 January 2016.

⁶¹ Examples include The National Democratic Institute (NDI) and Kenya Women Parliamentarian Association (KEWOPA) women leadership programs.

⁶² National Democratic Institute, *Win with women global action plan*, 5.

⁶³ National Democratic Institute, *Win with women global action plan*, 6.

Funding women's leagues

A recurrent complaint by women seeking to engage in political leadership is lack of finances. This relates to the existential fact that most women do not own property in African societies.⁶⁴ The patriarchal nature of society discriminates against, and limits women's access to and control of the means of production. The impact of property ownership and control stretches beyond the private sphere into the public sphere,⁶⁵ thus impacting women's political participation. Although it is arguable that parties do not generally have sufficient resources to fund their activities, it is similarly obvious that priority to fund women's leagues or wings remains low compared to other party organs, if at all existent.

Based on funding sources, there are two main tracks of financing political party activities. The first is funding derived from public coffers. Where available, state funding offers a direct opportunity to fund women's political activities. The PPA provides that state funding in Kenya shall be used for purposes that promote historically excluded groups including women.⁶⁶ Parties committed to women empowerment have the opportunity to fully comply with this requirement, in particular to fund activities of the women's leagues. Regulatory agencies such as the Registrar of Political Parties can play an important role in monitoring implementation of these provisions to ensure funds are properly utilized to support women's empowerment activities. With slight tweaks of the law, state funding of parties can also be used as an incentive to promote women's political empowerment. For example, parties that nominate large numbers of women candidates can be apportioned extra monies from the Political Parties Fund.⁶⁷ In Burkina Faso, the law provides that parties will receive more state funding if they achieve a 30 percent threshold in the number of elected women candidates.⁶⁸ The second avenue for funding women's activities derives from private sources of funding. Parties can voluntarily set a specific percentage of money derived from private sources to support activities of women's structures. Innovative fund-raising activities and partnerships

⁶⁴ Kameri-Mbote P, *The land has its owners! Gender issues in land tenure under customary law in Kenya*, https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/191/Gender_customary.pdf?sequence=1, on 12 January 2016.

⁶⁵ Kameri-Mbote, *The land has its owners*, 6.

⁶⁶ Section 26 (1) (a), *Political Parties Act* (2011).

⁶⁷ The fund is established under Section 23, *Political Parties Act* Cap 7B (Revised 2012).

⁶⁸ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 103.

with non-governmental organizations can also play an instrumental role in ensuring that women's party structures are adequately resourced. A combination of public and private funding can, therefore, play an important role in institutionalizing women's empowerment activities within the party. Parties should simultaneously design robust monitoring indicators to ensure that money designated for supporting women's bodies are used for the intended purposes. In other words, there should be mechanisms to ascertain that commitments are implemented accordingly.

Reforming nomination rules and practices

Outside of funding, one of the most problematic encounters for aspiring women politicians is the complexities surrounding internal party nominations. Informality and lack of clear nomination rules is one of the factors that contributes to poor representation of women.⁶⁹ Most women also complain that the corruption attendant to nomination processes undermine their chances of securing nomination tickets. This suggests that an important goal should be to improve nomination processes to guarantee democratic, transparent, and just outcomes. In this respect, parties should take additional measures to improve the chances of women candidates succeeding at this phase.

It is important for parties to ensure that their nomination rules reflect commitments for gender equitable leadership. Setting voluntary quotas is one option parties can utilize to increase the number of female candidates. To illustrate, South Africa's ANC has successfully implemented voluntary quotas in successive elections to increase women candidates. In the 2003 national elections, the ANC Adopted List Process set a one-third quota for women on party lists, which was subsequently raised to 50 percent for the 2009 election.⁷⁰ Parties in Kenya can equally determine specific quotas for women in their slate of candidates. While this is more difficult to implement in majoritarian systems, a commitment by parties to run women in winnable constituencies can lead to a significant increase in the number of elected women.

Party nomination rules can also be designed to provide incentives for female candidates. Waiver or lowering of nomination fees for women is a potential strategy for addressing concerns over low financial capacity. The

⁶⁹ Chege, *Political parties in East Africa*, 45.

⁷⁰ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 103.

People's Democratic Party (PDP) of Nigeria has, for example, used this strategy to support female candidates. While there might be value in using nomination and campaign rules to set ceilings for campaign expenditure in favor of women, it must be noted that this is not provided for in the Kenya's campaign financing legislation, neither is there an effective framework to date to monitor and regulate the use of money in politics and campaigns.⁷¹ Political and campaign financing laws are generally used to control sources, usages and accountability measures associated with money controlled by parties and candidates. Regulation can be designed to include affirmative action measures for women, youth, persons with disabilities and other minorities. Parties can borrow such measures in their internal practices, particularly to promote women's political participation. For example, parties can give direct tickets in constituencies that are held by women in order to ensure they retain their seats.⁷² To promote acceptability, the issuance of direct tickets may be limited to two electoral cycles for each candidate.

Equally important, party nomination rules should ensure that candidates put on lists are drawn from amongst its active membership. This will encourage persons interested in securing list nominations to invest in party activities and institutions such as the women's leagues. It will also address apathy and complaints such as have emerged following the nomination of candidates for party list elections following the 2013 elections.⁷³ As such, nomination rules should specify clear criteria/ a clear criterion to engender predictability and consistency in the methods used to pick candidates for list systems.

3.2 Electoral period

The electoral period is characterized by the nomination of candidates, vote canvassing, and culminates in election-day processes that include voting, counting and tabulation of votes, and announcement of results. This is typically a volatile and highly staked period in the electoral calendar - most women complain of unfair electoral practices, lack of adequate resources and support, violence, and negative stereotyping of women's leadership. Support

⁷¹ Only recently, however, the Independent Electoral and Boundaries Commission of Kenya put in place some campaign financing regulations, see the Kenya Gazette Supplement No 176 (Acts No 42) 27 December 2013.

⁷² Kandawasvika-Nhundu, *Political parties in Africa through a gender lens*, 86.

⁷³ The Nation Team, 'As it happened: Day 2 of primaries' *Daily Nation* Friday January 18 2013, <http://www.nation.co.ke/news/politics/1064-1668598-j4ao38/index.html> on 29 October 2016.

at this stage is, therefore, critical and will most certainly test the party's commitment to its own policy statements. Various complex factors will come into play, such as the role of money in politics, geopolitical considerations and projections on viability of competing candidates on the party ticket, and the intensity of societal norms, standards and attitudes towards women's leadership. In most electoral districts, party and ethnic identity are a major determinant of voter preferences. Parties should generally be least worried about the viability of female candidates against their opponents if they take into account that most primaries determine the eventual winner in ethnically homogenous constituencies. These should, therefore, encourage parties to pursue positive action measures to promote female candidates.

3.2.1 Funding women candidates

Lack of adequate finances is a pervasive challenge hindering female candidates. This arguably correlates to women's societal position and status in economic activities. Parties committed to increasing women's political participation, therefore, have an important role to financially support female candidates. Parties that access state funding are required to utilize at least thirty percent of the funds to promote the participation of women, among other traditionally excluded groups. Parties can utilize this money to support women's participation in skill building activities, preparation of policy and other strategy documents, among others. Money received from the state can, therefore, be used as seed money to invest in female political leaders at the party level, in effect complementing money received from private sources.

The most significant expenditures related to campaigns are, however, incurred during the electoral period. Parties generally rely on the resources of individual candidates to fund campaign activities.⁷⁴ Moreover, parties will generally have competing priorities for funding at this time. It is, therefore, important for parties to think of sustainable strategies to financially support female candidates during this period. A permanent special fund to support female candidates is one option that parties should consider. Lessons and examples can be drawn from the operation and set-up of similar funding net-

⁷⁴ Mwaura Kimani and Christine Mungai, 'Price tag of 2012 election likely to hit \$ 130 million' *The East African*, February 5 2012, <http://www.theeastafrican.co.ke/news/Campaign-finance-Price-tag-of-Kenya-2012-presidential-race/2558-1320582-yx0ycz/index.html> on 29 October 2016.

works in other jurisdictions. In Canada, the Liberal Party established a fund, the Judy LaMarsh Fund, to support female candidates.⁷⁵ The fund assists to cover campaign costs and subsidies for women candidates.⁷⁶ In the United States, EMILY's List is a powerful example of sustained efforts to financial support female candidates. An acronym for Early Money is Like Yeast, the network has excelled in fundraising from private sources to support progressive Democratic women seeking elective office.⁷⁷ While EMILY's List is not specifically managed as a party fund, parties committed to women's political empowerment can replicate similar strategies to establish internal party funds. Innovations can ensure that funds raised are put into low-risk investments to fund female candidates. Parties that establish a women's fund and invest seed money are likely to put a better case when externally fundraising to support female candidates.

3.2.2 Public education

The social and cultural context in Kenya is characterized by negative stereotypes on women's political leadership. Politics is largely viewed as an arena reserved for the male gender.⁷⁸ Female politicians, thus, have to confront negative attitudes and general resistance against their leadership ambitions. Socio-cultural institutions such as marriage, family status, and responsibilities are many times framed negatively to attack women's leadership. Parties and senior male political leaders can play an important role in countering this negative stereotypes through targeted public messages and campaigns. Political education is one of the key roles parties are entrusted to play in democratic governance.⁷⁹ Indeed, party leaders have a duty to take on new issues and articulate positions on social changes.⁸⁰ The duty of creating positive awareness on women's leadership should, therefore, not be left solely to civic education providers. Parties can equally contribute to this important role by integrating gender-specific messages in their campaign platforms and rhetoric. The

⁷⁵ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 30.

⁷⁶ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 30.

⁷⁷ National Democratic Institute & United Nations Development Programme, *Empowering women for stronger political parties*, 30.

⁷⁸ Mitullah, *Gender and democratisation in Kenya*, 154.

⁷⁹ Hofmeister and Grabow, *Political parties*, 37.

⁸⁰ Hofmeister and Grabow *Political parties*, 37.

leadership of parties can also act as an important bridge to cultural institutions such as community council of elders. Besides parties, cultural institutions in many respects play a gatekeeping role in promoting political leadership. Targeting and soliciting their support can, therefore, lead to greater endorsement for female political leaders. The duty of confronting negative cultural stereotyping is shared; parties committed to women empowerment must implement deliberate measures to educate the public on the need for more inclusive leadership.

3.3 Post-election period

The post-election period is a time when parties can be detracted from institutional building activities for a variety of reasons. In the immediate post-election period, the party that wins the elections deals with the herculean task of setting up the executive arm of government. On the other hand, losing parties might suffer diminution in morale and commitment to long-term activities. Yet, this period is also important for the fact that parties will be implementing commitments made before and during the electoral period. The post-election period is, therefore, an opportunity to make good on pledges and commitments to increase women's political participation, promote visibility activities for elected female leaders, and document experiences and learning.

3.3.1 Monitoring and evaluation

Translating party commitment to gender equity in political leadership into action is often a task fraught with many challenges, least of all, finding effective mechanisms to ensure implementation.⁸¹ The rhetoric and policy documents of parties often seem to indicate a great degree of commitment to ensuring women's political empowerment. The reality is that most fail to meet set commitments and targets. Parties should, therefore, seek to strengthen their ability to monitor and evaluate steps taken to implement their commitments. A robust monitoring framework can help identify whether the party is on track, point out gaps in implementation, and focus efforts on achieving results.

Monitoring can help track gender disaggregated data on key benchmarks such as women's participation and representation in party structures.⁸² Importantly, it can also help to document challenges, brainstorm alternative meas-

⁸¹ Kandawasvika-Nhundu, *Political parties in Africa through a gender lens*, 54.

⁸² Kandawasvika-Nhundu, *Political parties in Africa through a gender lens*, 87.

ures, and document learning for future initiatives. A formal evaluation process and report can also help generate wider audiences and attention to measures that seek to promote gender equity in political leadership. In this sense, the monitoring and evaluation process may provide a basis for advocacy efforts to increase women's political participation. Even though monitoring and evaluation is here discussed in the context of the post-election period, it is important that parties consider these as ongoing processes throughout the electoral cycle.

3.3.2 Performance and visibility of women in leadership

Parties can play an important role in demonstrating the value-proposition of women's leadership, as part of broader strategies to confront negative stereotyping. The post-election period offers a unique opportunity for parties to step up training and skill-building activities for women elected to leadership positions. Training can help newly elected members understand their roles, the party's parliamentary agenda, and the workings of Parliament or the county assemblies. Parties can further enhance visibility for elected women by nominating them to important parliamentary or county assembly sectoral or departmental committees. Active advisory and expert services should be availed by the party to ensure that newly elected women excel in their policy-making and representative roles.

To enhance interaction between newly-elected women and their constituencies, parties can help organize constituency and membership outreach activities. Organizing structured forums for newly-elected women to engage constructively with their constituents, civil society, community, and business leaders, among other groups, can help dispel notions of disengaged and underperforming women. Newly-elected women can utilize the forums to find out citizen concerns and priorities, to share party programs, as well as provide information on their legislative work. In other words, such meetings will facilitate two-way communication and feedback between citizens and women in leadership, an integral component of representative democracy.

4 Conclusion

Achieving gender equity in political leadership is not an easy task. It requires broad and concerted efforts by a various actors and institutions. There is promise in legislative interventions, particularly the choice of appropriate

electoral systems and utility of legislative quotas. Parties have an important role in efforts to promote women empowerment. Voluntary action on their part can improve the quality of women's participation in party structures and processes, increase the number of qualified women running for elective offices, and ultimately the performance of elected women. This chapter has offered some thoughts on a number of measures that parties in Kenya and elsewhere can voluntarily pursue. The list is not exhaustive, and will hopefully motivate parties and intermediary organizations to prioritize party building activities as a viable option to pursue the goal of women's political empowerment.

The roots and effects of electoral sexual and gender-based violence on women's political participation in Kenya

Ƴ Osogo Ambani

1 Introduction

Various hypotheses have been formulated to explain electoral violence in Kenya. One hypothesis states that violence as a political weapon has origins in the colonial state.¹ Equally, there is the view that violence is caused by power struggles among and between the main ethnic groups.² Another hypothesis is that electoral violence happens because of inequalities in the distribution of resources, particularly land. This hypothesis is normally supported by the fact that for certain historical reasons, the land question has become a central political mantra in certain parts of the country such as Coast and Rift Valley, hence the perennial conflicts.³ There is also the issue of general institutional failure, which has resulted, among other things, in poor administration of elections.⁴ As I demonstrate in this chapter, experience has shown that once these triggers operate to occasion the breakdown of rule of law, there is every likelihood that Sexual and Gender-Based Violence (SGBV) will swing into action.

¹ Kitale C, 'Internal Displacement in the Kenyan Context: Challenges of Justice, Reconciliation and Resettlement', Published Master of Arts Thesis, Institute of Social Studies, The Hague, 2011, 7.

² Yamano T, Tanaka Y and Gitau R, 'Haki Yetu (It's our right): Determinants of Post-Election Violence in Kenya', *National Graduate Institute for Policy Studies, GRIPS Discussion Paper 10-20*, 2010, 2.

³ Yamano T, Tanaka Y, and Gitau R, 'Haki Yetu (It's our right)', 3.

⁴ Klopp, J 'Ethnic Clashes' and Winning Elections: The Case of Kenya's Electoral Despotism' 35 *Canadian Journal of African Studies* 3, 2001, 473-480.

SGBV, which is violence targeted at a person because of their gender,⁵ has occurred in nearly all electoral contests since the introduction of multi-party politics in 1991. In these contexts, SGBV is ‘used as a tool of gender oppression as well as political ethnic intimidation.’⁶ It is used to punish ‘perceived or imagined political divergence.’⁷ During electoral conflicts, women are, for instance, raped ‘simply’ because they belong to a group that ‘harbours divergent political views from the perpetrators.’⁸ Therefore, SGBV is the enforcement of power hierarchies and structural inequalities created and sustained by belief systems, cultural norms, socialization⁹ and political processes. Although SGBV is a continuous violation with the dubious credential of being capable of coexisting with both peace and war, its manifestation is heightened during political processes. The problem is exacerbated by the reality that most of this violence is perpetrated or condoned by the State itself.

This chapter argues that as manifested during electioneering, SGBV is merely a symptom of the underlying disease that is the country’s long history of state-violence, institutional decay, ethnic marginalisation, and land injustices, which simultaneously worsen women’s already sorry status. The very prevalence of SGBV, therefore, means reduced capacity for marginalised groups, including women, to fully participate in political and electoral processes. The chapter first interrogates the historical causes of ‘electoral SGBV’ along the themes of state-violence, institutional failure, and multi-sectional marginalisation.¹⁰ It then discusses the impacts of electoral SGBV on women’s political participation in Kenya before making some concluding remarks. Ultimately, it is suggested that although SGBV as an aspect of electoral transition is unique in many respects, its resolution calls for a comprehensive

⁵ Tiessen R, and Thomas L, ‘Gender Insecurity and the Enduring Impacts of Sexual and Gender-Based Violence Northern Uganda’ in Buss D, Lebert J, Rutherford B, Sherkey D and Aginam O (eds), *Sexual Violence in Conflict and Post-Conflict Societies: International Agendas and African Contexts*, Taylor & Francis, 2014, 70.

⁶ Kitale C, ‘Internal Displacement in the Kenyan Context’, 23.

⁷ Kitale C, ‘Internal Displacement in the Kenyan Context’, 23.

⁸ Kitale C, ‘Internal Displacement in the Kenyan Context’, 23.

⁹ Agency for Cooperation and Research in Development (ACORD), ‘Pursuing Justice for Sexual and Gender Based Violence in Kenya: Options for Protecting and Compensating Survivors of Sexual and Gender Based Violence’, Development Research Series ISSN - 1812-1276, March 2010.

¹⁰ SGBV is also a function of the society’s own traditions, worldviews and practices. This aspect is not covered in the present chapter. For a discussion on cultural sources of SGBV see, for example, Aura, R ‘Situational Analysis and the Legal Framework on Sexual and Gender-Based Violence in Kenya: Challenges and Opportunities’ available at www.kenyalaw.org/kl/fileadmin/pdffdownloads/Situational_Analysis_and_Legal_Framework_-_Aura.doc on 25 July 2016).

multi-sectional approach that is alive to Kenya's turbulent history and social, cultural, and political context. The conclusion is that to completely alleviate electoral SGBV, it is important to address the legacies of past violence, and to alter the political, social, and economic circumstances, which perpetuate inequities, and, therefore, ethnic and political violence.¹¹

2 SGBV as part of the culture of state-violence

To have some appreciation of the culture of violence in Kenya, a brief historical analysis is necessary. In this regard, Kenya's history easily falls into two broad categories: the colonial and independence periods.

2.1 *The colonial period*

The modern history of SGBV in Kenya dates back to the colonial period. Africans' resistance to colonial rule was met with real force and it is in the details of these engagements that explanations for today's culture of state-violence, including SGBV, are to be found. Indeed, in the course of extinguishing resistance, colonial authorities invariably perpetrated acts meeting the contemporary thresholds of extra-judicial killings, enforced disappearances, torture, racial segregation, ethnic divisions, forced evictions, and SGBV, among other inhumane interventions.¹²

It is documented that colonial authorities sanctioned or acquiesced to acts amounting to SGBV against native Africans including sodomy, castration, rape, and defilement.¹³ SGBV was used by colonial administrators to 'discipline', humiliate, and cause fear among dissidents and would-be dissidents. In the *Mau Mau* camps established by the colonial Government, there were rampant cases of men being castrated and women being raped to confess their alleged membership to the liberation organisation.¹⁴ It is also on record that women and girls who often acted as couriers of food and other provisions

¹¹ See Thomas K, Masinjila M, and Bere E, 'Political Transition and Sexual and Gender-Based Violence in South Africa, Kenya, and Zimbabwe: A Comparative Analysis' 21(3) *Gender and Development*, 2013, 521.

¹² Thomas K, Masinjila M, and Bere E, 'Political Transition and Sexual and Gender-Based Violence in South Africa, Kenya, and Zimbabwe: A Comparative Analysis', 188.

¹³ 'Mau Mau Uprising: Bloody history of Kenya conflict', BBC News, 7 April 2011 - <http://www.bbc.com/news/uk-12997138> on 29 October 2016

¹⁴ Government of Kenya, *Report of the Truth, Justice and Reconciliation Commission*, 2013, 721.

to the *Mau Mau* found themselves victims of sexual violence.¹⁵ These violations were often committed by security agents with the full knowledge of the larger colonial administration.

2.2 *The independence period*

It is possible to classify Kenya's independence history into the four political regimes under the following presidents: Jommo Kenyatta (1963 - 1978), Daniel Moi (1978 - 2002), Mwai Kibaki (2002 - 2013), and Uhuru Kenyatta (2013 - to date). However, the current President's era is still 'history in the making', thus, not ripe for full analysis.

2.2.1 The Kenyatta regime as continuation of colonial policy

At independence in 1963, President Kenyatta inherited a political outfit that had, for about sixty years, experienced unprecedented social and political turbulences. In essence, what the British bequeathed was an invented and unpopular State socialized to resort to violence and repression as a means of self-perpetuation.¹⁶ Regrettably, this design proved useful to President Kenyatta who, because of dwindling support and unpopular policies, invariably found it necessary to suppress increasing criticism and quell ideological opposition to his Government ruthlessly.¹⁷ Under this systemic scheme, political dissidents were often arrested and detained without being afforded fair trial.¹⁸ Invariably, the victims would be tortured. Between 1966 and 1978, for instance, torture was given fresh impetus first through the enactment of 'favourable' legislations¹⁹ and then by the visitation of actual brutality on real or perceived opponents.

During Kenyatta's era, SGBV as a tool of political violence featured most prominently in the context of the 'Shifta War'. Immediately upon independence, Kenya had to take part in a costly war²⁰ meant to contain secessionist Kenyan Somalis in the Northern Frontier Districts.²¹ The secessionists

¹⁵ Government of Kenya, *Report of the Truth, Justice and Reconciliation Commission*, 722.

¹⁶ Mbembe A, *On the Postcolony*, University of California Press, Oakland, 2001, 24-25.

¹⁷ *Africa Research Bulletin: Political, Social, and Cultural Series*, 1994, 31-32.

¹⁸ *Africa Research Bulletin: Political, Social, and Cultural Series*, 1994, 31-32.

¹⁹ For example, *Preservation of Public Security Act* (Act No. 18 of 1966).

²⁰ It is estimated that between 2000 and 7000 people lost their lives during these atrocities.

²¹ Cited in Mburu N, *Bandits on the border: The last frontier in the search for Somali unity*, The Red Sea Press Inc, 2005, 165.

favoured a reunion with their ‘brothers’ and ‘sisters’ in the region to create what was envisioned to be the greater Somalia. In pacifying this movement, the Kenyatta administration ended up employing violence and other inhumane policies.²² Although State security agents were deployed to the affected regions (Garissa, Wajir and Moyale) to end the secessionist movement, as was the pattern since the pre-colonial days, the deployed security officers ended up committing horrendous atrocities against the residents.²³ There are official records of flagrant instances of mass killings, torture, and disturbing cases of SGBV.

According to the Truth, Justice and Reconciliation Commission (TJRC), during the Shifta War, ‘women and men were sexually tortured to humiliate, intimidate, and coerce them to extract information from them.’²⁴ In most cases, the atrocities followed a predictable pattern. Men would first be forcefully driven to a central location for interrogation. Security agencies would then return to rape, assault, and defile their women, before herding their ‘victims’ towards the interrogation camps.²⁵ Sometimes members of the community would be forced into camps so as to cut food supplies from the combatants. While in these camps, further atrocities would still be committed. The TJRC found that rape would be perpetrated in the full view of the husbands and relatives of the women in these camps.²⁶ One witness testified before the TJRC that security officers cut her private parts and mutilated her breasts.²⁷ In nearly all these ‘episodes’, security officers did not exempt pregnant women, even those about to deliver.

2.2.2 The Moi regime: In the footsteps of Kenyatta

Like Kenyatta’s era, throughout the reign of President Moi, independent politicians, critical lawyers, and sceptical academics, among other dissenting voices, would be arrested under one excuse or another and detained often without trial, tortured or even assassinated. The process of power consolidation also meant discouraging or even eliminating opposition to Government. President Moi’s prominent political detainees include the 1982 Air Force mu-

²² Mburu, *Bandits on the border*, 165.

²³ Government of Kenya, *Report of the Truth, Justice and Reconciliation Commission*, 725.

²⁴ Government of Kenya, *Report of the Truth, Justice and Reconciliation Commission*, 725.

²⁵ Government of Kenya, *Report of the Truth, Justice and Reconciliation Commission*, 725.

²⁶ Government of Kenya, *Report of the Truth, Justice and Reconciliation Commission*, 725.

²⁷ Government of Kenya, *Report of the Truth, Justice and Reconciliation Commission*, 728.

tineers, *Mwakenya* members, academics, university students, and several pro-democracy advocates.²⁸

In December 1991, President Moi yielded to political pressure and accepted to amend section 2A of the Repealed Constitution hence restoring multi-party politics.²⁹ However, the re-introduction of multi-party politics did not necessarily carry with it the magic of democratic revival and political liberation as had been anticipated.³⁰ Instead, competitive politics proved to be an additional incentive for further violations. In both the 1992 and 1997 elections, the State [through the ruling party, Kenya African National Union (KANU)] engineered inter-ethnic violence especially against communities that supported opposition political parties.³¹ The 1992 and 1997 elections resulted in deaths, displacements, sexual violence (mostly rape, assault and defilement) and wanton destruction of property.³² Women were raped even in 'broad daylight'.³³ Reports show, for instance, that Kikuyu women were raped by Kalenjins in Burnt Forest area,³⁴ and by the Pokot in Laikipia,³⁵ while the Teso raped Luhya women in the Cherangani Hills area.³⁶ These incidences were as a result of the ethnic conflict fuelled by the State to ensure the continuance of its rule.³⁷

²⁸ Adar KG and Munyae IM, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001': <https://www.csbsju.edu/Documents/Peace%20Studies/pdf/Human%20Rights%20Abuse%20in%20Kenya%20Under%20Moi.pdf> on 5 November 2016.

²⁹ Kenya Human Rights Commission, *Taking these Rights Seriously: Civil Society Organisations' Parallel Report to the Initial State Report of the Republic of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights*, October 2008, 12.

³⁰ Kenya Human Rights Commission, *'Taking these Rights Seriously'*, 12.

³¹ Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, 2003, 20 - 21. See also Kenya Human Rights Commission and Article 19, *Media censorship in plural context; A report on the Kenya Broadcasting Corporation*, 1998.

³² For a detailed account of the 1992 and 1997 clashes, see *the Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya (The Akiwumi Report)*, 1999. Also, Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya, September 1992.

³³ Nyukuri B, 'The Impact of Past and Potential Ethnic Conflicts on Kenyan's Stability and Development' USAID Conference on Conflict resolution in the Greater Horn of Africa, June 1997, 21.

³⁴ International Federation for Human Rights and Kenya Human Rights Commission, *'Massive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes: Absence of Political and Humanitarian Responses'*, April 2007, 12.

³⁵ International Federation for Human Rights and Kenya Human Rights Commission, *'Massive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes'*, 13.

³⁶ International Federation for Human Rights and Kenya Human Rights Commission, *'Massive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes'*, 13.

³⁷ Asylum Aid, *'No upright words: The human rights of women in Kenya'*, February 2001, 39.

2.2.3 Kibaki and the consolidation of state-violence

The Kibaki administration continued the tradition of orchestrating gross human rights violations. Throughout this period, main human rights reports were replete with cases of State violations.³⁸ The usurpations in the Kibaki era ranged from suppression of the freedoms of speech, assembly, and association, right to muzzling of the media.³⁹ The Kibaki administration also sanctioned the ‘shoot to kill’ policy against persons found in possession of firearms and other criminals. Some of these killings were in the form of summary executions.⁴⁰

The lowest ebb in all these atrocities was reached in *Operation Okoa Maisha*, a Government initiative to rid the Mt Elgon region of the guerrilla movement, Saboat Land Defence Forces (SLDF). Human rights investigators recorded a high prevalence of SGBV cases during Operation Okoa Maisha.⁴¹ For example, a security officer was spotted holding apart the legs of a man while another man clubbed his genitals.⁴² However, the Government did not impose a moratorium on forced evictions, and the alleged perpetrators of SGBV, including the police and other law enforcement officials, were hardly ever brought to justice.⁴³ The Government conducted investigations into these violations but the report of the investigations was never made public.

Similar atrocities were witnessed in the disarmament exercise carried out in Mandera County in 2008. It has in fact been observed that ‘this operation was planned as less a law enforcement action than a deliberate and brutal attack on the local civilian population that unfolded systematically over the course of several days.’⁴⁴ Army and police personnel descended on ten villages, rounded up and tortured the male population as others raped and beat the women in their homes as they ransacked the houses and looted various

³⁸ See Stella Cheronu, ‘Kenya on the Spot over Human Rights Violations’ Daily Nation, November 8 2015, <http://www.nation.co.ke/news/Kenya-on-the-spot-over-human-rights-violations/1056-2947716-7kllm1/index.html> on 5 November 2016.

³⁹ See Stella Cheronu, ‘Kenya on the Spot over Human Rights Violations’ Daily Nation, November 8 2015, <http://www.nation.co.ke/news/Kenya-on-the-spot-over-human-rights-violations/1056-2947716-7kllm1/index.html> on 5 November 2016.

⁴⁰ Asylum Aid, ‘No upright words’, 9.

⁴¹ Asylum Aid, ‘No upright words’, 9.

⁴² Government of Kenya, *Report of the Truth, Justice and Reconciliation Commission*, 505.

⁴³ Amnesty International, *State of the World’s Human Rights*, 2009.

⁴⁴ Human Rights Watch, ‘Bring the Gun or You’ll Die: Torture Rape and Other Human Right Violations by the Kenyan Security Forces in the Mandera Triangle’, 29 June 2009.

properties.⁴⁵ The then Minister of Internal Security made a promise that there would be an inquiry into the human rights violations in the course of the operation but no official follow-up has since been made.⁴⁶

Just like the 1992 and 1997 electoral contests, the 2007 general elections were also marred with violence. In fact, the highest electoral casualties in the history of Kenya were witnessed during the 2007/8 post-election violence (2007/8 PEV). In this conflict, about 1200 people lost their lives and roughly 350 000 others were forcefully displaced.⁴⁷ It is important to note that the 2007/8 PEV was the first time the issue of SGBV was given keen attention. The body deployed to investigate these skirmishes, the Commission of Inquiry into Post-Election Violence (CIPEV), reported ‘wrenching tales of rape, gang rape, sexual mutilation, loss of body parts, and hideous deaths.’⁴⁸ At the same time, the Nairobi Women’s Hospital Gender Violence Recovery Center recorded an upsurge of cases of female victims of SGBV. The health facility attended to over 650 SGBV cases arising directly from the 2007/8 PEV.⁴⁹ These acts ‘were not just one-off tragedies but major life-changing events.’⁵⁰ CIPEV heard stories of

[f]amily members being forced to stand by and witness their mothers, fathers, sisters, brothers, and little children being raped, killed, and maimed: innocent victims contracting HIV/AIDS after being sexually assaulted because the breakdown of law and order and the deteriorating security situation kept them from accessing medical care soon enough to prevent it: husbands abandoning their wives who had been defiled, and the inevitable psychological burden of powerlessness and hopelessness that left individuals who had experienced sexual violence feeling alone, isolated, and unable to cope, not just for one moment in time, but possibly forever.⁵¹

These and other moving testimonies elevated the discourse on SGBV in Kenya, particularly as an aspect of electioneering. Consistent with the country’s history of violence, CIPEV’s respondents, mostly victims of sexual violence, cited personnel from the Administrative Police (AP), General Service Unit (GSU), and the Kenya Army as major perpetrators of SGBV.⁵² Yet when

⁴⁵ Human Rights Watch, ‘*Bring the Gun or You’ll Die*’.

⁴⁶ Human Rights Watch, ‘*Bring the Gun or You’ll Die*’.

⁴⁷ See Yamano T, Tanaka Y, and Gitau R, ‘Haki Yetu (It’s our right)’, 2.

⁴⁸ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 2008, 237.

⁴⁹ See, Thomas, K, Masinjila, M and Bere, E ‘Political Transition and Sexual and Gender-Based Violence in South Africa, Kenya, and Zimbabwe’, 525.

⁵⁰ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 236.

⁵¹ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 237.

⁵² *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 253 – 258.

victims reported violations related to SGBV, security officers reportedly refused to attend to them.⁵³ There were cases when security officers asked complainants to report crimes other than SGBV.⁵⁴ Security officers are also said to have solicited for bribes before initiating investigations into cases of SGBV.⁵⁵ At times, security agents showed ethnic biases by acting with hostility to individuals they perceived to be from ethnic groups or parties that they did not approve of.⁵⁶ Other times, security agents released alleged perpetrators of SGBV without offering justifiable explanations.⁵⁷ That officers from different security units were accused of both perpetrating and failing to respond to the calls of victims of SGBV is illustrative, simultaneously, of the culture of state violence, impunity, and institutional failure.

3 SGBV and the 'ethnicisation' of politics

This part shows that the reason why violence, including SGBV, attends electoral contests in Kenya is the long history of ethnic divisions, which date back to the colonial era. Once the inter-ethnic tensions bring about a breakdown of law and order, SGBV thrives unabated.

There is near consensus that the ethnic character of today's elections has explanations that date as far as the colonial era.⁵⁸ The official nod for colonialism in Africa was given at the Congress of Berlin held in 1895.⁵⁹ A major agenda item at this gathering of imperialists was the partition of Africa among European powers.⁶⁰ The partition was done with little knowledge of the continent, especially its hinterlands. Besides the coastal regions, which the colonists had prior knowledge of, there was little else in their contemplation.⁶¹ Until the Scramble, the colonial map of Africa – with the notable exception of the strategic seaports on the West and East African coasts and colonies in

⁵³ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 256.

⁵⁴ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 253 – 258.

⁵⁵ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 256.

⁵⁶ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 256.

⁵⁷ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 256.

⁵⁸ Kitale C, 'Internal Displacement in the Kenyan Context', 7.

⁵⁹ Wesseling H, *Divide and Rule: The Partition of Africa, 1880-1914*, Praeger, Westport, 1996.

⁶⁰ Wesseling H, *Divide and Rule: The Partition of Africa*.

⁶¹ Meredith, M, *The State of Africa: A History of Fifty Years of Independence*, Jonathan Ball Publishers, Cape Town, 2005, 1.

South Africa and Egypt – was blank.⁶² Most of the partitioning was, therefore, executed mechanically with little or no regard for the human realities on the ground. As Martin Meredith documented,

[w]hen marking out the boundaries of their new territories, European negotiators frequently resorted to drawing straight lines on the map, taking little or no account of the myriad traditional monarchies, chiefdoms and other African societies that existed on the ground. Nearly one half of the new frontiers imposed on Africa were geometric lines, lines of latitude and longitude, others straight lines or arcs of circles.⁶³

In the end, some roughly 10 000 African polities had been amalgamated into forty European colonies and protectorates, which would later provide the basis for the modern nation-states of Africa, including Kenya. Some African societies with a lot in common were rent apart; others with nothing or little networks were fused together. For instance, the Kenyan Maasai, oblivious of the happenings in Berlin, soon found their kinsmen on the southern side falling in Tanganyika (German territory). Similarly, the Somali people would [by dint of colonialism] become subjects of Britain (British Somaliland and Kenya), Ethiopia, France (Djibouti), and Italy (Italian Somaliland).⁶⁴ These peoples would soon need official travel documents to cross boundary lines for the much-cherished traditional ceremonies or to graze animals.⁶⁵ Ultimately, the new boundaries divided unified ethnic groups and trading networks, while forcing together other groups of Africans who would have preferred to remain separate.⁶⁶

The resultant artificially crafted entities called for sensitive politics and tender administration for their viability. But such gentle stewardship would not be forthcoming either from the colonial authorities or subsequent independent governments. As a result of this neglect, Africa is today witnessing nations such as Somalia which struggle to become states, while States like Nigeria and Kenya have yet to attain nationhood.⁶⁷ One might justifiably argue that there could be as many nations in Kenya as there are ethnic groups. Understandably, therefore, the country's socio-political dialogue is filled with inter-ethnic suspicions; the most volatile being the fear of political domination

⁶² Elkins, C, *Britain's Gulag: The Brutal End of Empire in Kenya*, Jonathan Cape, London, 4-5.

⁶³ Meredith, *The State of Africa*, 1.

⁶⁴ Mazrui, A, *The Africans: A Triple Heritage*, Little Brown & Company, New York, 71.

⁶⁵ Cited in Mburu, *Bandits on the Border*, 23.

⁶⁶ Elkins, *Britain's Gulag*, 4, 5.

⁶⁷ Mazrui, *The Africans*, 71.

by the major ethnic communities.

In a desperate attempt to put the largely hostile natives under political control, the colonial Government resorted to 'divide and rule' tactics. This entailed pitting one community against another, the design being to divert attention away from the imposition of foreign rule.⁶⁸ These measures succeeded to the extent that by the time of independence, Kenya was more of a collage of different ethnic groups than a unified nation.

What the founding President, Kenyatta, inherited was, therefore, a fragile and delicate society in which regional or inter-ethnic suspicions, divisions, and conflicts had incredible potential. As I already indicated, immediately upon becoming independent, Kenya took part in a costly war⁶⁹ meant to contain secessionist Kenyan Somalis in the Northern Frontier Districts.⁷⁰ The secessionists favoured a reunion with their 'kin' in the region to create what was envisioned to be the greater Somalia. The new African leadership ended up employing inhuman policies to suppress the attempted secession thus catalysing ethnic hatred.⁷¹

Despite the potential of ethnicity to fuel suspicion, hatred or even violence, Kenyatta did little to assuage these tensions. Instead, he entrenched nepotism and other forms of ethnic exclusions. He did this by entrusting members of his Kikuyu community with plum Government positions at the expense of nation-building and inclusiveness. His inner circle consisted 'of loyal ministers and officials, predominantly Kikuyu from his home district of Kiambu, whom he entrusted with the administration of the country'.⁷² Like Kenyatta before him, President Moi handed out key State positions to Kalenjin members and promoted his tribal interests at every opportunity.⁷³ Moi also used State power to undermine the patronage networks of the old Kikuyu elite established during Kenyatta's regime and to cripple the business interests of his opponents.⁷⁴ Similarly, Kibaki entrusted strategic Government positions

⁶⁸ Konrad Adenauer-Stiftung, *The Invisible Violence in Kenya: A Case Study of Rift Valley and Western Regions*, 2011, 9.

⁶⁹ It is estimated that between 2000 and 7000 people lost their lives during these atrocities.

⁷⁰ Cited in Mburu, *Bandits on the border*, 165.

⁷¹ Cited in Mburu, *Bandits on the border*, 165.

⁷² Meredith, *The State of Africa*, 264.

⁷³ Meredith, *The State of Africa*, 384.

⁷⁴ Meredith, *The State of Africa*, 384. See also Wrong, M, *It's Our Turn to Eat: The Story of a Kenyan Whistle Blower*, Harper Perennial, 2010, 127.

with Kikuyu and Meru speaking people mainly from the Mount Kenya region.⁷⁵ This cue has been followed by President Uhuru Kenyatta.⁷⁶

But it is in electoral contests that ethnic tensions are most accentuated. As soon as the African nationalists earned the latitude to form nation-wide parties in 1960, the ugly face of ethnicity in Kenya's politics reared its ugly head. The Kenya African National Union (KANU) - launched in May 1960 - revolved around the dominant Luo-Kikuyu axis led by James Gichuru, Oginga Odinga, and Tom Mboya, while the Kenya African Democratic Union (KADU) - founded shortly thereafter - dovetailed around leaders championing the interests of minority ethnic communities led by Ronald Ngala, Daniel Moi, and Masinde Muliro.⁷⁷ As Jackton Ojwang accurately depicted,

[t]he imminence of independence ... sparked off numerous racial and ethnic suspicions as well as leadership rivalries. Group-Captain Briggs and his forum, the United Party, upon return from London approached the smaller ethnic groups who already had their own suspicions, urging them to combine with whites to oppose the Luo and Kikuyu politicians.⁷⁸

In June 1966, the 'Little General Elections' pitting Kenya Peoples Union (KPU) - headed by Odinga (a Luo from Siaya) - against KANU - under Kenyatta (a Kikuyu from Kiambu) - signaled yet another triumph of ethnicity over ideology. This regrettable 'feat' would be repeated in almost all future political contests.⁷⁹

As I pointed out earlier, despite Moi yielding to political pressure in December 1991 to accept the restoration of multiparty politics, this did not establish a decent society founded on democratic principles. It has instead become a truism that 'since the onset of multi-party politics in the 1990s, Kenya's elections have been marred by episodes of violence'.⁸⁰ Return of competitive politics proved to be an additional incentive for further ethnic cleavages and

⁷⁵ Kenya Stockholm Blog, 'Jomo was the Pioneer of Tribalism in Kenya' 27 April 2013 <https://kenyastockholm.com/2013/04/27/kikuyunization-of-government-started-with-mzee-jomo-kenyatta/> on 12 May 2016.

⁷⁶ Kenya Stockholm Blog, 'Jomo was the Pioneer of Tribalism in Kenya' 27 April 2013 <https://kenyastockholm.com/2013/04/27/kikuyunization-of-government-started-with-mzee-jomo-kenyatta/> on 12 May 2016.

⁷⁷ Asingo P, 'The Political Economy of Transition in Kenya' in Oyugi W, Wanyande P and Mbai C, *The Politics of Transition in Kenya: From KANU to NARC*, Heinrich Boll Foundation, 2003, 17.

⁷⁸ Ojwang J, *Constitutional Development in Kenya: Institutional Adaptation and Social Change*, Africa Centre for Technology Studies Press, Nairobi, 1990, 45.

⁷⁹ See Hornsby, *Kenya: A history since independence*, I.B. Tauris, London, 2012, 163.

⁸⁰ Government of Kenya, *Report of the Truth, Justice and Reconciliation Commission*, 735.

violence. In both the 1992 and 1997 general elections, the State engineered inter-ethnic violence especially against communities that supported opposition parties.⁸¹ Once ethnic tensions had prompted the breakdown of law and order, the stage was set for all manner of violations, including mass killings, displacements, and wanton destruction of properties. Reports indicate flagrant cases of SGBV, including gang rape, rape, assault, and defilement, in both 1992 and 1997 ethnic clashes.

The 1992 ethnic clashes were mainly a result of the conflicting claims to land by the Kikuyu and the Kalenjin in the former Rift Valley Province.⁸² They took place before and after the 1992 multi-party general elections and occasioned ‘gender vulnerability’ with women suffering more.⁸³ Women were ‘abused, violated, embarrassed and at times raped in broad daylight during the clashes.’⁸⁴ In Kipuput village in Enoosupukia area, for example, members of the Kikuyu community were attacked by groups of Maasai morans while women who had taken refuge in a nearby Catholic Mission were attacked and forced to flee from a place they had thought was safe.⁸⁵ This period was marred by many other instances of SGBV. In Burnt Forest area in the former Uasin Gishu District, Kalenjin men attacked houses belonging to the Kikuyus and killed people, burning their houses and properties.⁸⁶ Women were also raped.⁸⁷ Kikuyu women in the former Laikipia District were not spared either. Pokot men raided their homes and raped them before killing whoever was in the vicinity, especially their husbands.⁸⁸ It was the same case in Cherangani Hills in the former Trans Nzoia District where members of the Teso community looted properties, assaulted, and raped Luhya women in the former Chepsiro Location.⁸⁹ The abuses continued even in internal refugee camps

⁸¹ Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission, 2003, 20 - 21.

⁸² Asylum Aid, ‘No upright words’.

⁸³ Nyukuri B, ‘The Impact of Past and Potential Ethnic Conflicts on Kenyan’s Stability and Development’, 21.

⁸⁴ Nyukuri B, ‘The Impact of Past and Potential Ethnic Conflicts on Kenyan’s Stability and Development’, 21.

⁸⁵ Klopp J, ‘Ethnic Clashes’ and Winning Elections’, 495.

⁸⁶ International Federation for Human Rights and Kenya Human Rights Commission, *Massive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes*, April 2007, 12.

⁸⁷ International Federation for Human Rights and Kenya Human Rights Commission, *Massive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes*, 12.

⁸⁸ International Federation for Human Rights and Kenya Human Rights Commission, *Massive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes*, 12.

⁸⁹ International Federation for Human Rights and Kenya Human Rights Commission, *Massive In-*

where the victims of the ethnic clashes had fled to for safety. In the camps, men and women were

[f]orced to share the often congested sleeping places in close proximity with one another with little or no privacy...As a result...sexually transmitted diseases and HIV/AIDS were passed...with...women being the most affected victims of the circumstances.⁹⁰

Members of the Kikuyu community fled to Maela Camp, which had been set up to accommodate them as they could not return to their homes. The setting of the camp led to many Kikuyu women being raped by the men within the camps, local residents, and even security personnel.⁹¹ Part of the problem was that women had to travel long distances each day for their food rations. Since they got back very late they became constant victims of attack.⁹² They could not report these violations for fear of further attacks.⁹³ Being victims of State-sponsored clashes, the women had no one to turn to.⁹⁴ At the same time, their political representatives were using ethnic loyalties and divisions to achieve their personal political goals.⁹⁵

The months before the 1997 general elections saw a reproduction of the 1992 scenario.⁹⁶ The inter-communal attacks began with a Kikuyu woman being attacked in her home, raped, and some of her livestock stolen by members of the Kalenjin group in Rift Valley.⁹⁷ Raping and killing women became one of the attacking 'weapons' developed by the conflicting ethnic groups.⁹⁸

The 2007/8 post-election violence saw SGBV take another dimension and get to unprecedented levels. The CIPEV heard life-shattering accounts of 'women who had been gang raped and mutilated, the accounts of ethnically driven sexual violence against certain men...'⁹⁹ Raping became

[a] form of punishment for perceived or imagined political divergence. Some wom-

ternal Displacements in Kenya Due to Politically Instigated Ethnic Clashes, 12.

⁹⁰ Nyukuri B, 'The Impact of Past and Potential Ethnic Conflicts on Kenyan's Stability and Development', 21.

⁹¹ Asylum Aid, 'No upright words', 46.

⁹² Asylum Aid, 'No upright words', 46.

⁹³ Asylum Aid, 'No upright words', 46.

⁹⁴ Asylum Aid, 'No upright words', 39.

⁹⁵ Kibwana K, *Sowing the Constitutional Seed in Kenya*, Claripress, Nairobi, 1996, 165.

⁹⁶ Asylum Aid, 'No upright words', 41.

⁹⁷ Asylum Aid, 'No upright words', 41.

⁹⁸ Article 19, *Kenya: Post-Election Political Violence*, 1998, 26.

⁹⁹ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 239.

en were raped simply because they came from a community that harbours divergent political views from the perpetrators.¹⁰⁰

Rape also acquired another dimension in the ethnic conflict and became ‘a tool of gender oppression as well as political ethnic intimidation... also used as a tool for revenge against a target community.’¹⁰¹ The perpetrators were ‘motivated by a desire for power and domination... rape and gang rape [were] meant to injure, control and humiliate, while violating the survivor’s physical and mental integrity.’¹⁰² The result was that the women who were raped were

[o]stensibly paying for the sins of those who apparently stole the election... [They were]... taken as pawns in a war or conflict situation they [had] no idea about or [were] simply passive participants in. Nevertheless, they [paid] the ultimate price through their bodies.¹⁰³

In Eldoret, for example, a group of Kalenjin men gang raped a Kikuyu woman before killing her husband.¹⁰⁴ SGBV in the ethnic conflict context was in fact manifested in the family. In Eldoret still, a Kikuyu man abandoned his Luhya wife but returned two days later threatening to kill and ‘sodomize’ her. He said he ‘regretted marrying a Luhya’ and went ahead to throw her belongings out of their house and did not allow her to see her children.¹⁰⁵

4 Land, marginalisation, and SGBV

There is a strong connection between vulnerability to SGBV and economic marginalisation. This section analyses this link.

Inequality in landholding is part of the explanation for the current socio-economic inequalities behind most electoral skirmishes in Kenya. In fact, unequal distribution of land in a major way accounted for the 1992, 1997, and 2007 electoral clashes. Despite recent efforts to curb inequalities, such as decentralisation and devolution of resources, the desired socio-economic equilibrium is yet to be attained.¹⁰⁶

¹⁰⁰ Kitale C, ‘Internal Displacement in the Kenyan Context’, 23.

¹⁰¹ Kitale C, ‘Internal Displacement in the Kenyan Context’, 23.

¹⁰² Agency for Cooperation and Research in Development (ACORD), ‘Pursuing Justice for Sexual and Gender Based Violence in Kenya’, 23.

¹⁰³ Kitale C, ‘Internal Displacement in the Kenyan Context’, 23.

¹⁰⁴ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 264.

¹⁰⁵ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 246.

¹⁰⁶ Mukabi F, Barasa P and Chepng’eno V, ‘Devolved governance in Kenya; Is it a false start in democratization for development’, *4 International Journal of Economics, Finance and Manage-*

The 1991 ethnic clashes, for example, were primarily due to the conflicting claims to land in the Rift Valley between the Kalenjin and the Kikuyu dating back to the colonial period.¹⁰⁷ During the colonial period the Government evicted local ethnic communities from their land in order to pave way for European settler occupation. Since the transition at independence did not adequately address these historical injustices, the 1992 clashes saw '[t]he Kalenjin who considered the land in the Rift Valley as theirs, [drive] out more than a quarter of a million Kikuyu and killed 1,500.'¹⁰⁸ The ethnic violence was observed by some to be a form of 'ethnic cleansing'.¹⁰⁹

It was no different in the 1997 ethnic clashes. In Mombasa, for example, the Luo and the Kikuyu, who were referred to as 'up-country' people, were attacked by up to a 100 armed raiders who destroyed their homes and businesses. Land disputes were at the centre of the clash which saw young men trained in a forest near Likoni and offered 'a reward of Kshs. 10,000 for each Kikuyu they killed, and twice as much for each Luo.'¹¹⁰ Leaflets were also circulated warning the 'up-country' ethnic groups to go back to their 'ancestral homes'.¹¹¹

While both men and women have suffered historical injustices related to the land question, colonial and post-colonial land policies disproportionately heightened women's economic calamity. Colonialism escalated women's already sorry economic situation by aggravating the African system of patriarchy whereby ownership of property was reserved only for male heirs.¹¹² Under this system, access to land was always through male relatives.¹¹³ Although traditional cultures gave men dominance over land, they had mechanisms of ensuring that the interests of women such as access to natural resources were guaranteed.¹¹⁴ These safeguards were hardly secured by the new land law regimes introduced by the colonists. With the introduction of individual land

ment 1, 2015, 27 - 37.

¹⁰⁷ Asylum Aid, 'No upright words', 39.

¹⁰⁸ Asylum Aid, 'No upright words', 40.

¹⁰⁹ Asylum Aid, 'No upright words', 40.

¹¹⁰ Asylum Aid, 'No upright words', 41.

¹¹¹ Asylum Aid, 'No upright words', 41.

¹¹² Sigot A, Thrupp L and Green J (eds), *Towards Common Ground: Gender and Natural Resource Management in Africa*, Africa Centre for Technology Studies Press, Nairobi, 1995, 5-6.

¹¹³ Sigot, Thrupp and Green, *Towards Common Ground: Gender and Natural Resource Management in Africa*, 5-6.

¹¹⁴ Bonye S and Kpieta A, 'Women, ownership and access to land in the upper East Region of Ghana', 2 *International Journal of Humanities and Social Science* 9, 2012, 69.

tenure, and the registration of such claims, men were given more control over land than ever before. By registering male heads of households as title holders, the colonial land policy subordinated women's property interests even further.¹¹⁵ The shift from the traditional system that reckoned multiple and overlapping interests in land to the colonial one pegged on individual and absolute title devalued the unregistered claims of many family members, particularly the women.¹¹⁶ Thus, whenever disputes arise over ownership of land, it is likely that courts of law will uphold the interests of the registered proprietors, usually the men.¹¹⁷ This way, nearly all other interests stemming from customary law are extinguished.¹¹⁸

In addition to these dangers of individual ownership and registration, women's interests are further frustrated by the diminishing significance of customary mechanisms for supervising the exercise of male authority over land.¹¹⁹ This is more the case since the larger family networks, which erstwhile approved dealings in land, are no longer active.¹²⁰ In the absence of these mechanisms, registered proprietors of land have been able to freely transfer interests, in the process weakening the protection of the unregistered interests of family members.¹²¹

The disinheritance of women had become so severe that in the wake of the 2007/8 PEV, reform of women's rights to land was rated an indispensable aspect of the reconciliation process.¹²² This claim is understandable given the fact that 'customary law, which often discriminates against women and limits their land and property rights, governs at least 65% of land in Kenya'.¹²³ More-

¹¹⁵ Nyamu C, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?' *Harvard International Law Journal*, 2000, 407.

¹¹⁶ Nyamu, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?', 407.

¹¹⁷ Nyamu, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?', 407.

¹¹⁸ Nyamu, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?', 407.

¹¹⁹ Nyamu, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?', 408.

¹²⁰ Nyamu, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?', 408.

¹²¹ Nyamu, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?', 408.

¹²² See Federation of Women Lawyers Kenya and International Women's Human Rights Clinic, *Women's land and property rights: Promoting gender equality*, 2009, 10.

¹²³ Gaafer R, 'Women's land and property rights in Kenya, Center for Women's Land Rights' 14

over, ‘official landholding by women, either as individual or joint owners, does not exceed five percent’.¹²⁴ This is notwithstanding the fact that women provide about 80% of agricultural labour.¹²⁵ This situation is not helped by the fact that women continue to bear the effects of bad culture and unequal access to educational and public service opportunities. In the hands of culture or personal law, women experience many violations. Culture is responsible for violations such as unequal access to property and natural resources, GBV, and harmful cultural practices like domestic violence, forced marriages, and female genital mutilation (FGM), among others, which hamper women’s economic advancement.¹²⁶

Colonialism further alienated the already culturally marginalized female gender. For instance, colonial activities led men to the urban areas leaving women-headed homesteads in the rural areas.¹²⁷ This not only put pressure on the wives to take up more roles on the domestic front but also restricted women’s movements, additionally tempering with their capacity to improve their livelihoods.¹²⁸

When formal schooling was introduced, it is boys rather than girls who were encouraged to join.¹²⁹ This meant that women remained illiterate and, therefore, incapable of effectively taking part in modern social, political, and economic activities.¹³⁰ Eventually, girls were allowed to go to school but not without resistance from the native communities, which invariably perceived the new education (offered by missionaries) as informed by the bad intentions of ‘spoiling’ good village girls.¹³¹ But the education offered by colonial schools was not completely progressive, either. The syllabus that the girls were exposed to in schools was designed to cultivate their domestic skills for

October 2014 www.landesa.org on 12 May 2016.

¹²⁴ Nyamu C, ‘How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?’, 407.

¹²⁵ See Federation of Women Lawyers Kenya and International Women’s Human Rights Clinic, *Women’s land and property rights*, 10.

¹²⁶ Third and fourth periodic reports of States parties submitted to the Committee on the Elimination of Discrimination against Women, 5.

¹²⁷ Kamau N, *Women and political leadership in Kenya*, Heinrich Boll Foundation, Nairobi, 2010, 14.

¹²⁸ Kamau N, *Women and political leadership in Kenya*, 14.

¹²⁹ Kamau N, *Women and political leadership in Kenya*, 15.

¹³⁰ Kamau N, *Women and political leadership in Kenya*, 15.

¹³¹ Kamau N, *Women and political leadership in Kenya*, 15.

their roles as wives and mothers.¹³² While some girls got jobs as nurses and teachers, the ‘missions hoped that this would be for about two to three years only before marriage. In the missions, as in the villages... women were not expected to combine marriage and carriers’.¹³³

For the above reasons, women have historically been unable to compete favourably for high-ranking Government positions. For instance, ‘Kenya’s early independence history was marked by a conspicuous absence of women in the political arena’.¹³⁴ Indeed,

[i]t was not until 1969 (Second Parliament) that Grace Onyango was elected Member of Parliament for Kisumu Town constituency. In 1974, the number of elected women MPs rose to four when Chelagat Mutai (Eldoret North), Grace Onyango (Kisumu Town), Nyiva Mwendwa (Kitui West) and Julia Ojiambo (Busia Central), successfully fought their way into the august House. Dr Eddah Gachukia, a renowned educationist and Rose Waruhiu, were nominated, raising the number of MPs to six. This number later dropped to five after Chelagat Mutai went into exile, soon after her election.¹³⁵

Not even the re-introduction of multi-party politics fully ameliorated this gendered plight. ‘During these years of turbulence and ethnic fighting, women who tried to campaign for women’s rights or run for public offices were harassed and silenced.’¹³⁶ A case in point is Ojiambo. The ‘local KANU leadership was not pleased when she led a programme of civic education in the rural area of Western Kenya’ with the result that the nomination process was ‘full of heavily orchestrated violence and corruption’ by her opponent.¹³⁷ She eventually won the election by a margin of 7,000 votes but her opponent was declared the winner.¹³⁸ Her efforts to find an explanation were met with ‘hostility and a wall of silence.’¹³⁹ Adelina Mwau, a candidate who contested for the seat of Member of Parliament (MP) in 1997 elections in Kaiti Constituency

¹³² Kamau N, *Women and political leadership in Kenya*, 15.

¹³³ Kamau N, *Women and political leadership in Kenya*, 15.

¹³⁴ Centre for Rights, Education and Awareness and Association of Media Women in Kenya, *Running for political office: A handbook for women candidates*, Heinrich Boll Foundation, Nairobi, 2008, 9.

¹³⁵ Centre for Rights, Education and Awareness and Association of Media Women in Kenya, *Running for political office*, 9.

¹³⁶ Kamau, *Women and political leadership in Kenya*, 16.

¹³⁷ Asylum Aid, ‘*No upright words*’, 94.

¹³⁸ Asylum Aid, ‘*No upright words*’, 94.

¹³⁹ Asylum Aid, ‘*No upright words*’, 94.

in the former Eastern Province, met the same fate.¹⁴⁰ Despite having paid the required fee for nomination as a candidate, she did not get any financial support from her party to facilitate her campaign.¹⁴¹ On the day of elections, the polling stations in which she had strong support received the ballot boxes late, hence a lower voter turnout especially in the case of women.¹⁴² The KANU candidate in that election was found 'directing the distribution of ballot boxes' but was not disqualified.¹⁴³

Generally, women have continued to be outside mainstream leadership. Their participation in political activity and influence has also been minimal. This is despite the fact that statistical data indicates that they comprise about 52.5% of the national population.¹⁴⁴ Although the number of women parliamentarians has risen almost steadily since independence, their participation (going by composition) has remained insignificant compared to that of men. By 2012, only 50 parliamentary seats had been occupied by women since independence. Only 44 female candidates offered themselves as parliamentary candidates out of a total of 1035 that participated in the 2002 general elections.¹⁴⁵ Even in civic elections, the unfortunate trend of marginalization has been growing. In the 2002 general elections, out of the 7009 civic candidates, only 381 were female.¹⁴⁶ The rest, 6625, were male.¹⁴⁷ The 2013 general elections saw 775 women out of a total of 11713 candidates contest for elective positions other than that of woman representative.¹⁴⁸

A combination of the above factors have consigned women to subordinate social and economic status where all manner of misery is possible. For instance, one of the key discoveries of CIPEV was that there is a strong link between vulnerability to SGBV and economic marginalisation.¹⁴⁹ It would appear that the more economically marginalised a person is, the more likely s/he will suffer SGBV and the risk is higher for women. The basis of this deduction

¹⁴⁰ Asylum Aid, *'No upright words'*, 95.

¹⁴¹ Asylum Aid, *'No upright words'*, 95.

¹⁴² Asylum Aid, *'No upright words'*, 95.

¹⁴³ Asylum Aid, *'No upright words'*, 96.

¹⁴⁴ Federation of Women Lawyers Kenya, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 1 October 2013, 1.

¹⁴⁵ Kamau, *Women and political leadership in Kenya*, 10.

¹⁴⁶ Kamau, *Women and political leadership in Kenya*, 10.

¹⁴⁷ Kamau, *Women and political leadership in Kenya*, 10.

¹⁴⁸ Federation of Women Lawyers Kenya, *Key Gains and Challenges*, 50.

¹⁴⁹ Report of the Commission of Inquiry into Post-Election Violence (CIPEV), 244, 251.

is that nearly all female victims of electoral SGBV in Kenya are/were residents of rural or informal settlements. In the case of the 2007/8 PEV, for example, Amnesty International interviewed women in informal settlements who had suffered physical, sexual, and other abuse¹⁵⁰ due to their gender and some owing to their ethnic origin.¹⁵¹ These women were not able to obtain medical, legal or other redress due to the fact that they inhabited informal settlements, where there is lack of access to basic services like hospitals and education.¹⁵² The Report of the Commission of Inquiry into Post-Election Violence carried accounts of women that had been gang-raped by security officers in Kibera slums as they ransacked their houses and looted various properties.¹⁵³

5 SGBV and institutional failure

Another explanation for electoral violence and the attendant SGBV is the failure of State institutions. The weak nature of Kenya's institutions has meant that they have failed to adequately respond to widespread cases of violence. For example, security agencies seemed completely unprepared for the 2007/2008 PEV. Reports document many instances when victims called on the police for help to no avail. A seventeen-year-old-girl was gang-raped by seven AP officers as she fled from her sister's house, which had been attacked by raiders in Eldoret.¹⁵⁴ Female victims of SGBV particularly reported a general reluctance by the police to register their complaints. A woman living in Mathare went to Pangani Police Station to report a rape incident as she had been able to identify her attackers, but the police refused to register her complaint. She stated that they 'told me that they do not want to listen to cases about rape. If it is robbery I should report and I reported and they gave me an OB number.'¹⁵⁵ A female resident of Kibera, who had been gang-raped, went to Kilimani Police Station and was told 'to choose between the two, either the issue of the house being burned or being raped.'¹⁵⁶ A forty-year-old lady in

¹⁵⁰ Amnesty International, Kenya: *Briefing to the Committee on the Elimination of Discrimination against Women* 48th session January 2011, 2010, 7.

¹⁵¹ Amnesty International, Kenya: *Briefing to the Committee on the Elimination of Discrimination against Women*, 7.

¹⁵² Amnesty International, Kenya: *Briefing to the Committee on the Elimination of Discrimination against Women*, 7.

¹⁵³ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 253 – 255.

¹⁵⁴ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 255.

¹⁵⁵ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 256.

¹⁵⁶ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 256.

Mombasa, who had been raped, made a police report only to see the offender being ‘set free shortly thereafter.’¹⁵⁷

In cases where security agents responded, their lack of professionalism and absence of institutional accountability resulted in wanton brutality that included injury, rape, gang rape, defilement, and murder, among others. For instance, security personnel are reported to have (gang) raped women indiscriminately during the 2007/2008 PEV.¹⁵⁸ No action was taken against the security officers.¹⁵⁹ The CIPEV heard that of the violations committed, there were ‘4 by the GSU, 2 by Administrative Police, and one by the Kenya Police. The gang rapes perpetrated by the GSU involved 2 to 4 officers, 3 to 7 in the case of the Administrative Police (AP) and 2 in the cases of the Kenya Police.’¹⁶⁰

State failure also resulted in inaction in the sense that very few arrests, prosecutions, and conviction followed PEV.¹⁶¹ The 2007/8 PEV highlighted not only prosecutorial weaknesses but also judicial shortfalls. As Evelyn Asaala found,

[a] majority of the cases reported to the authorities during the PEV period were hardly investigated and/or prosecuted. For example out of the 6081 cases that were reported, the police prosecuted only 366 cases. For the few cases the police prosecuted, a majority of them ended up in acquittals with only six successful convictions. Although the police blame this on a lack of resources, lack of forensic laboratory with trained personnel and adequate equipment, this study has established the following as the main contributing factors: poor investigations, corruption and incompetence within the police officers, lack of legitimacy and local ownership and lack of political will.¹⁶²

6 Impact of electoral SGBV on women’s political participation

In the preceding sections, I have discussed the main factors that facilitate electoral SGBV. These factors are themselves sufficient to undermine wom-

¹⁵⁷ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 260.

¹⁵⁸ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 244.

¹⁵⁹ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 249.

¹⁶⁰ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 252.

¹⁶¹ *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 36-257.

¹⁶² Asaala E, ‘Prosecuting the 2007 post-election violence-related international crimes in Kenyan courts: Exploring the real challenges’ in Mbonenyi M, Asaala E, Kabau T and Waris A (eds) *Human rights and democratic governance in Kenya: A post 2007 appraisal*, Pretoria University Law Press, Pretoria, 2015, 361.

en's effective participation in political processes. For instance, women's long social, cultural, and economic marginalisation consigns them to subordinate roles, where they cannot influence decision-making. Presented as domestic rather than public beings, 'helpers' rather than leaders, 'objects' rather than 'rights-holders', women have little or sometimes no chance in electoral contests. I need not reiterate that without having access to the means of production like land and capital, women find it extremely difficult to raise resources for electoral campaigns. Indeed, finances are a major challenge for female political candidates 'given the gender dimensions of wealth distribution in Kenya.'¹⁶³ As a former Mayor of Kisumu correctly established, 'a woman will have nothing not even a title deed to charge to get that loan.'¹⁶⁴

The above notwithstanding, electoral SGBV is itself capable of, and has in fact frustrated women's political activities. Actual violence visited upon female political candidates has in the past intimidated and humiliated them out of their political aspirations. Linah Kilimo, a former MP and chair of the Kenya Women Parliamentary Association, noted that 'most women candidates had to withdraw from seeking elective positions because of physical and psychological violence meted against them, resulting in less representation at the county and national assembly level.'¹⁶⁵ Institutionalised electoral SGBV discourages its victims¹⁶⁶ and deters prospective female politicians. The clear message electoral SGBV sends to female politicians is that politics is not for their kind. Although some women have braved these ills and proceeded to contest elections, the fear of violence (which violence may be physical, sexual, or psychological)¹⁶⁷ appears to perpetually haunt them. In this regard, Mwau, a nominated MP in the 9th Parliament, confessed as follows:

That's [violence] what I fear most because these elections are going to be very hard for women, because they can use violence, which has a gender aspect to it because women have really come up so they can use the tool of rape as a weapon to silence women. Me I actually fear that most but am trying to...I have youth, young people

¹⁶³ Nyokabi K, 'Women and political leadership in Kenya: Ten case studies', Heinrich Boll Foundation, 2010, 7.

¹⁶⁴ As per the interview in Nyokabi K, 'Women and political leadership in Kenya: Ten case studies', 70.

¹⁶⁵ See, for instance, the story of Janet Chepkwony in Baranabas Bii 'Female candidate claim discrimination in Kenya elections' *Global Voices Africa*, 17 May 2013.

¹⁶⁶ See, for instance, the story of Janet Chepkwony in Baranabas Bii 'Female candidate claim discrimination in Kenya elections' *Global Voices Africa*, 17 May 2013.

¹⁶⁷ As per the interview in Nyokabi K, 'Women and political leadership in Kenya: Ten case studies', 72.

and am trying to say lets use politics without violence so for me it's truly a challenge.¹⁶⁸

Besides intimidating, deterring, and humiliating female political candidates, the threat of electoral SGBV has impelled that they fortify their security by taking measures such as hire of bodyguards and purchase of security gadgets. Such measures increase the cost of electoral campaigns, further heightening women's political calamity. Additionally, to avoid falling victims to electoral SGBV, female political candidates reportedly minimise evening political activities and reduce campaigns in volatile areas, measures that only benefit their male opponents. In end, electoral violence, and especially SGBV, is partly responsible for women's poor political performance discussed earlier in this contribution.

7 Conclusion

A major finding of this study is that there is a striking connection between general electoral violence and SGBV as a phenomenon of electioneering. The study has highlighted that once the usual triggers of electoral violence have operated to bring about a general breakdown of law and order, SGBV has tended to set in and in disturbing proportions. In this sense, SGBV has manifested itself during electioneering as an opportunistic form of violence that exploits cracks in the pillars of law and order. Electoral SGBV has taken advantage of Kenya's history of State-violence, it has thrived in the context of major ethnic divisions, it has benefited from perceived injustices on the question of land, and it has capitalized on the failure of institutions. The very existence of these causes is evidence of the stumbling blocks women have to surpass to effectively participate in electoral processes. Ironically, SGBV is compatible with both war and peace. This is because its root-causes; social, legal, and cultural superstructures that disproportionately elevate the male gender, apply in both contexts. In and of itself, electoral SGBV is capable of inducing fear in female political candidates, causing them to abandon their political aspirations. Electoral SGBV also increases the cost of electoral campaigns, further complicating women's already difficult situation. The ultimate result of electoral SGBV is the invisibility of women in political contests.

¹⁶⁸ As per the interview in Nyokabi K, 'Women and political leadership in Kenya: Ten case studies', 72.

Given the above findings, a proper solution to electoral SGBV is therefore to seek a comprehensive answer to the challenges posed by the culture of State-violence, to mend the many historical inequities especially on ethnic and gender grounds, to fix the land problem and to revitalize critical institutions of democracy such as the Judiciary and the electoral management body. Even more importantly, there is need to work on ensuring gender equality by changing both the legal and cultural foundations responsible for women's subordinate status.

Beyond Kenya:

The impact of Article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on women's political participation in Africa

Osai Ojigho

1 Introduction

In recent times, there has been greater scrutiny and more calls for greater representation of women in leadership and decision-making. Between 2000 and 2015, Africa has had four women heads of state: Sirleaf Johnson (Liberia); Joyce Hilda Banda (Malawi); Catherine Samba-Panza (Central African Republic); and Ameenah Gurib-Fakim (Mauritius). More women in Africa are now Members of Parliament (MP) and represent their constituencies at local government and provincial levels compared to 50 years ago. However, in terms of gender representation, men still overwhelmingly occupy more leadership positions in political life and in government. This gender imbalance still occurs despite numerous policies, programmes, treaties *et cetera* aimed at increasing women's access to participation and retention of political office. Not all countries are at the same level, however. Rwanda is the global leader on women's representation in Parliament at 64%.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was adopted by the African Union (AU) in response to demands by women's groups for an instrument that addresses the rights of women extensively within the African context. Despite the provisions of equality and non-discrimination in the African Charter on Human and Peoples' Rights (African Charter), the emancipation of women and their struggle for political power at national, regional, and continental levels were not articulated in detail, and this limited the actualisation of women's rights. The need to recognize women's role in society, promote their rights,

and protect them against discriminatory and harmful practices contributed to the drafting of the Maputo Protocol and subsequent advocacy for its adoption, ratification, and implementation.

This chapter focuses on the implementation of Article 9 of the Maputo Protocol, which provides for the promotion and protection of women's right to participate in political and decision-making processes. It evaluates strategies adopted by African states to implement Article 9 of the Maputo Protocol and highlights good practices and opportunities for progressive change.

2 The African Union and the quest for gender equality in political representation in Africa

The Organisation of African Unity (OAU), established in 1963, was the premier pan-African institution for the newly independent African states. The OAU served as a united front against colonialism and played an instrumental role in ridding the continent of apartheid. Gender equality was not a priority in the OAU. It was neither mentioned in its Charter nor was it prominent in the implementation of its activities.¹

Africa witnessed a dramatic shift with regards to gender equality and women empowerment when the OAU transformed into the AU.² The AU Constitutive Act specifically lists the promotion of gender equality as a key principle on which it is based and should function.³ This provides the foundation to hold each of its member-states to act on gender equality as a core obligation. The AU has further developed and supports a robust legal and policy framework for promoting and protecting gender equality, women's empowerment, and the human rights of women.

¹ See Haastrop T, 'Where global meets local – The politics of Africa's emergent gender equality regime' in T Murithi (ed) *Handbook of Africa's International Relations*, 2004, 104-105; Packer C & Rukare D, 'The New African Union and its Constitutive Act' 96(2) *The American Journal of International Law*, 2002, 365; The OAU Charter is available at— http://www.au.int/en/sites/default/files/treaties/7759-sl-oau_charter_1963_0.pdf on 25 July 2016.

² Olowu D, 'Mainstreaming women, equating men: Charting an inclusionary approach to transformative development in the African decade for women' 15 *Law, Democracy & Development*, 2011, 5-6.

³ Article. 4(1), Constitutive Act of the African Union.

2.1 African Union's gender framework and machinery

The AU's main treaty on gender equality, women's rights, and empowerment is the Maputo Protocol.⁴ It has been described as one of the most progressive instruments on women's human rights.⁵ This is due to the fact that it comprehensively covers a number of rights including women's sexual and reproductive health rights.⁶

Other instruments are the Solemn Declaration on Gender Equality in Africa (SDGEA), adopted in 2004, and the AU Gender Policy, adopted in 2009. The SDGEA embodies the commitments made by all the AU member states to improving women's rights, sustaining campaigns against gender-based violence, promoting gender equality in their countries and mainstreaming gender in all aspects of governance including the peace processes among others. The AU Gender Policy sets the 50/50 gender-parity principle as a key component for achieving an enabling political environment for gender equality.⁷ At the level of the African Union Commission (AUC) this has been achieved with equal representation of women and men in the current secretariat leadership.

In monitoring the implementation of gender equality standards, the AU's Women, Gender and Development Directorate (WGDD) serves as the main coordinator at the AUC secretariat.⁸ The African Commission on Human and Peoples' Rights (African Commission) has the mandate to evaluate state compliance through the state reporting system⁹ and to review complaints of human rights violations.¹⁰ In addition, the African Commission established a

⁴ It was adopted during the 2nd Ordinary Session of the Assembly of the AU in July 2003 in Maputo, Mozambique and came into force in November 2005 at a record-breaking speed.

⁵ Mohammed F, '11 Years of the Maputo Protocol: Women's Progress and Challenges' available at — <http://www.awid.org/news-and-analysis/11-years-maputo-protocol-womens-progress-and-challenges> on 25 July 2016. See also Sibanda N, 'African Women's Rights Protocol Most Progressive Women Rights Instrument,' Her Voice Her Peace She Matters Weblog, 25 January 2015 — <http://hervoiceherpeacehematters.org/african-womens-rights-protocol-most-progressive-women-rights-instrument-did-you-know/> on 25 July 2016.

⁶ Article 14, *Protocol to the African Charter on human and peoples' rights on the rights of women in Africa (Maputo Protocol)*, 11 July 2003 — http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf on 2 November 2016.

⁷ African Union, *Gender Policy*, 2009 — http://www.un.org/en/africa/osaa/pdf/au/gender_policy_2009.pdf on 2 November 2016.

⁸ <http://www.au.int/en/wgd> on 25 July 2016.

⁹ Article 62, *African Charter on Human and Peoples' Rights*, 28 June 1981; see also African Commission on Human and Peoples' Rights, *State Reporting Procedure – Information Sheet*, No.4.

¹⁰ Articles 47-49, 52 & 55, *African Charter on Human and Peoples' Rights*.

special mechanism in the role of the Special Rapporteur on Rights of Women, ‘to place particular emphasis on the problems and rights specific to women in Africa.’¹¹ The African Court on Human and Peoples’ Rights can decide on human rights cases and is specifically mentioned as the main body responsible for interpreting the Maputo Protocol.¹² Various departments at the AUC have gender focal points for addressing specific gender issues. One of the 14 AU Specialized Technical Committees (STCs) focuses on gender and women empowerment.¹³ There are also officers with a gender specific mandate, including the Special Envoy on Women, Peace and Security,¹⁴ and the AU Goodwill Ambassador on Ending Child Marriage in Africa.¹⁵

In 2009, the AU declared 2010 - 2020 the African Women’s Decade (AWD).¹⁶ This was to accelerate progressive implementation of Gender Equality and Women Empowerment (GEWE) schemes at national levels including the ratification of relevant AU instruments on gender and women’s rights by member states.¹⁷ Due to the slow pace of implementation, and in order to focus more attention to achieving gender equality, the AU in the 5th year of the AWD declared 2015 as the Year of Women Empowerment and Development towards Africa’s Agenda 2063.¹⁸ The AU has also declared 2016 the Year of Human Rights particularly women’s human rights.¹⁹

AU adopted the AU Agenda 2063 on 27 June 2013. It has seven aspirations with Aspiration 6 dealing with women and youth. Agenda 2063 mirrors the AU’s Vision for an ‘integrated, people-centered, prosperous Africa, at peace with itself.’²⁰ By 2063, Africa targets to have 50/50 gender parity in elective posts and appointive offices in both public and private sectors. This

¹¹ See <http://www.achpr.org/mechanisms/rights-of-women/> on 25 July 2016. The current Special Rapporteur is Lucy Asuagbor.

¹² Article 27, *Maputo Protocol*.

¹³ <http://www.au.int/en/organs/stc> on 25 July 2016.

¹⁴ Currently, Ms. Bineta Diop (Senegal).

¹⁵ Currently, Ms. Nyaradzayi Gumbonzvanda (Zimbabwe).

¹⁶ Assembly Dec. 487 (XIX). See also UN Women <http://www.unwomen.org/en/where-we-are/africa#sthash.ot3kadIH.dpu> on 25 July 2016.

¹⁷ African Union, *The African Women’s Decade: Grassroots Approach to Gender Equality and Women’s Empowerment (GEWE)*, 2—<http://pages.au.int/carmma/documents/african-womens-decade> on 2 November 2016.

¹⁸ See more at <http://agenda2063.au.int/en/about> on 25 July 2016.

¹⁹ AU’s Concept paper on Declaration of 2016 as African Year of Human Rights available at <http://bit.ly/1SofISI> on 25 July 2016.

²⁰ Agenda 2063, A shared strategic framework for incisive growth and sustainable development, Background Note, August 2013.

will require concerted efforts led by the AUC itself to support national systems as they reform their processes to reaching the target. Periodic reporting under the SDGEA will inform on where states' progress and where attention is still needed to overcome challenges.

At the level of the Regional Economic Communities (RECs), there are specific institutions implementing regional gender frameworks. These include: the Economic Community of West African States (ECOWAS) Commission's Social Affairs and Gender Department; the Southern Africa Development Community's (SADC) Gender Unit; and the East African Community's (EAC) Gender and Community Committee. The SADC region, through its Gender Policy and the Protocol on Gender and Development, has advocated for the 50/50 parity rule especially around representation of women in politics and decision-making.²¹

At the domestic level, most, if not all, African states have national gender machineries to implement national gender policies and their government's international, continental and regional commitments to gender equality and women's empowerment.

2.2 *The Maputo Protocol*

African states are signatory to a number of international treaties including the United Nations (UN) Convention on the Elimination of Discrimination Against Women (CEDAW), which is the 'international bill of rights' on women's rights. The CEDAW addresses practices, policies and laws that unfairly treat men better than women. However, in recognition of the unique historical and cultural inequalities that African women face in their communities, it was clear that an instrument that addresses these concerns within an African context was not only necessary but also critical if women and girls in Africa were to enjoy their full human rights.

The Maputo Protocol was negotiated by Africans for Africa and provides the continent's standard on women's rights and gender equality. The Maputo Protocol is an extensive Treaty covering several aspects of women and girls'

²¹ See Southern African Development Community (SADC) and Southern African Research and Documentation Centre (SARDC), *SADC Gender Monitor 2013 Women in Politics and Decision-Making Positions*, 2013 http://www.sadc.int/files/1214/0558/8114/SADC_GENDER_MONITOR_2013_-_ENGLISH.pdf on 25 July 2016.

lives. It specifically addresses a number of issues ranging from discrimination to sexual and reproductive health rights with clear measures that state parties should take to bring life to the provisions and the enjoyment of the rights it guarantees. The Maputo Protocol, while emphasising the principle of gender equality and the main obligation of states to combat all forms of discrimination against women,²² provides for a variety of rights ranging from right to dignity, to economic and social welfare rights.²³ The Maputo Protocol makes one of the most progressive provisions on women's health and reproductive rights which not only provides the right for women to control their fertility but also rights to access information about their health status and that of a partner if infected with sexually transmitted diseases.²⁴ Its specific mention of women's access to medical abortion in certain cases²⁵ has been the most controversial provision. The pro-abortion provision of the Treaty has attracted intense debates by some religious and conservative groups opposed to this right.²⁶ The Maputo Protocol also makes detailed provisions in areas specific to African women's experiences by addressing issues on treatment of widows,²⁷ protection of elderly women,²⁸ and harmful practices.²⁹ States are obligated to provide appropriate remedies to women whose rights have been violated³⁰ and to report on their implementation of the Maputo Protocol.³¹

2.3 Status of ratification of the Maputo Protocol

In July 2004, all the African heads of state undertook to sign and ratify the Maputo Protocol by the end of that year.³² However, only 37 states,³³ out

²² Article 2, *Maputo Protocol*.

²³ Article 3-23, *Maputo Protocol*.

²⁴ Article 14, *Maputo Protocol*.

²⁵ Article 14(2) (c), *Maputo Protocol*; The African Commission has adopted General Comment No. 2 on Article 14 (1) (a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa to provide guidelines for States in implementing women's sexual and reproductive health rights.

²⁶ See the East African Center for Law and Justice (EACLJ), 'The Maputo Protocol in Line with the New Constitution' 8 December 2011— <http://eacj.org/constitution/20-constitution-feature-articles/39-the-maputo-protocol-in-line-with-the-new-constitution.html> on 25 July 2016.

²⁷ Article 20, *Maputo Protocol*.

²⁸ Article 22, *Maputo Protocol*.

²⁹ Article 5, *Maputo Protocol*.

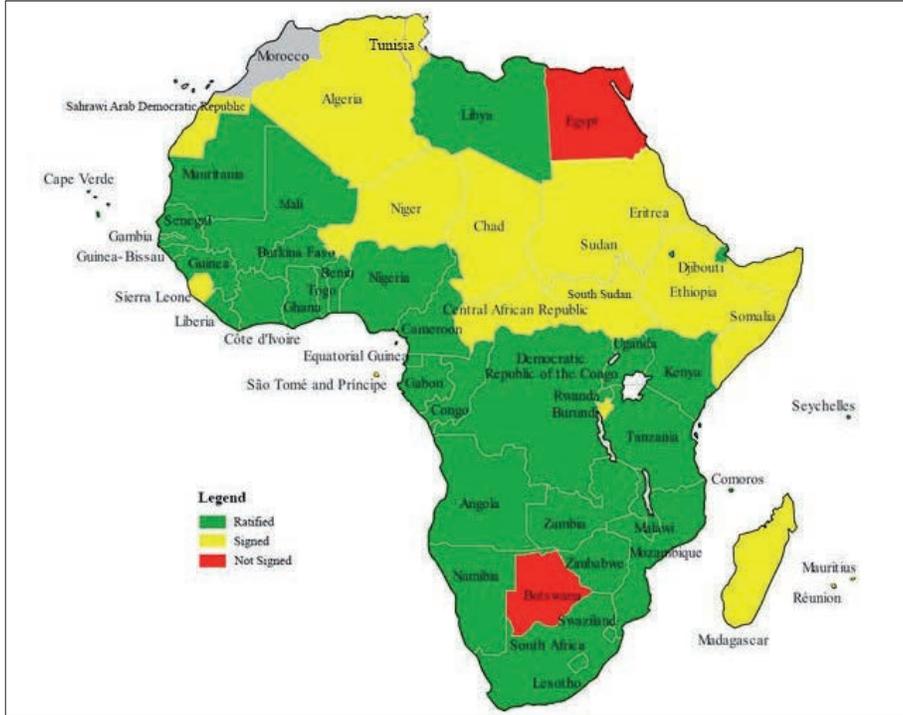
³⁰ Article 25, *Maputo Protocol*.

³¹ Article 26, *Maputo Protocol*.

³² Article 9, *SDGEA*.

³³ Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Comoros, Congo, Côte d'Ivoire, Djibouti,

of the 54³⁴ AU member-states had ratified the Maputo Protocol as of October 2015.³⁵ Only Botswana and Egypt have neither signed nor ratified the Maputo Protocol. Interestingly, both countries have ratified CEDAW.³⁶ Sierra Leone is the latest country to ratify the Maputo Protocol.³⁷



Protocol Watch Map: Source: SOAWR (<http://www.soawr.org/content/protocol-watch>)³⁸

Democratic Republic of the Congo, Equatorial Guinea, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Sierra Leone, Senegal, Seychelles, South Africa, Swaziland, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

³⁴ Note that Morocco is not a member of the AU. South Sudan, Africa's newest country is its 54th member.

³⁵ African Union, *Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2* —<http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> on 2 November 2016.

³⁶ African Union, *Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2* —<http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> on 2 November 2016.

³⁷ It signed the Treaty in July 2015 and deposited its ratification instrument on 30 October 2015.

³⁸ Note that at the time of writing, Sierra Leone had ratified but this had not been updated on the map.

The ratification status of the Maputo Protocol is still wanting. By 2005, only 17 countries had ratified the Maputo Protocol.³⁹ Between 2006 and 2010, 12 new ratifications were made. Between 2011 and 2015, only 8 additional ratifications were made. Notably, not a single new ratification was received in 2013 and 2014. 2015 had two signatures, Tunisia and Sierra Leone. Sierra Leone went ahead to give the Maputo Protocol the sole ratification for the year 2015. As the pan-African instrument on women's human rights, the AU needs to mobilise the remaining states to adhere to their commitments under the SDGEA to ensure each AU member-state has ratified the Maputo Protocol.

3 Women's right to participate in politics and decision-making under the Maputo Protocol

Article 9 of the Maputo Protocol provides that:

- (1) States parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:
 - a) women participate without any discrimination in all elections;
 - b) women are represented equally at all levels with men in all electoral processes;
 - c) women are equal partners with men at all levels of development and implementation of state policies and development programmes.
- (2) States parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

Article 9 unequivocally places on states the obligation to create a level-playing field for inclusive participation and representation of women in the governance of their countries and at all levels of decision-making. The state can adopt a number of measures to make this operative. Affirmative action and legislation are the main ways through which this right can be promoted, protected, and achieved.

³⁹ The status list of countries that have signed and ratified/acceded to the African Women's Protocol is available at http://www.au.int/en/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa_12.pdf on 25 July 2016.

Article 9(1) focuses on political life and the various roles women play in the electoral cycle such as candidates, campaigners, voters, and electoral officers. It also highlights the equal partnership required between women and men in the development of their countries. This reiterates the commitment made by African states to ensuring that African women fully participate as equal partners in Africa's development.⁴⁰

Article 9(2) is a response to the limited number of women in political and public life. It further acknowledges that to address the historical exclusion of women in leadership positions, states need to act to ensure an 'increase' in the number of women as well as their 'effective' occupation of decision-making positions. It thus places emphasis on substantial and positive change through the representation and participation of women in decision-making at all levels. Therefore, women numbers should not only increase but women should have the enabling environment and support to impact on policies and decisions affecting their communities.

The African Charter on Democracy, Elections and Governance (ACDEG) complements Article 9 of the Maputo Protocol. The ACDEG urges states to improve the equal participation of women in decision-making processes.⁴¹ The ACDEG enjoins states to 'create the necessary conditions for full and active participation of women in the decision-making processes and structures at all levels as a fundamental element in the promotion and exercise of a democratic culture'.⁴² It specifically tasks states to adopt 'possible measures to encourage the full and active participation of women in the electoral process and ensure gender parity in representation at all levels, including legislatures'.⁴³ Article 7 of CEDAW similarly provides that 'states parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country'. These provisions, read together with Article 9 of the Maputo Protocol, reinforce the commitments of African states to build a continent where gender equality exists and thrives.

Article 26(1) of the Maputo Protocol urges states parties to report on their implementation of the Protocol in their state reports to the African Commis-

⁴⁰ Paragraph 8 of the Preamble, Maputo Protocol.

⁴¹ Article 29, *African Charter on Democracy, Elections and Governance (ACDEG)*, 30 January 2007 —<http://www.achpr.org/instruments/charter-democracy/> 2 November 2016.

⁴² Art 29(2), ACDEG.

⁴³ Art 29(3), ACDEG.

sion. To facilitate state-reporting, the African Commission developed some guidelines but to date only four countries, Burkina Faso, Malawi, Nigeria, and Senegal, have reported accordingly. These state-reports highlight successes in advancing gender equality and women's political participation through the enactment or amendments of laws.⁴⁴ However, the state-reports have inadequate information on the effectiveness of the respective national laws and how they are contributing to positive social change.

It is instructive that enacting laws is one thing while actual change in cultural notions of the role of men and women in society is another.⁴⁵ For changes in law and institution of quotas to be effective, it is equally important that education and awareness-raising programmes aimed at changing gender stereotypes as well as creating an enabling environment for women representatives, leaders, and political aspirants be undertaken.⁴⁶

3.1 Affirmative action

Affirmative action has been described as 'any measure, beyond simple termination of discriminatory practice, adopted to correct for past or present discrimination or to prevent discrimination recurring in the future'.⁴⁷ It has also been defined as 'positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded'.⁴⁸

Proponents of affirmative action argue that it is an effective tool for correcting imbalances in society. Critics see it as negative discrimination and fight against it. While Article 9 is silent on the timeframes within which affirmative action should apply, it is generally seen as a temporary measure, which should end once substantial equality is achieved and has been sustained

⁴⁴ African Union, *Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 —<http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> on 2 November 2016.

⁴⁵ Olga M, *The African Union's Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation*, 2013, 7.

⁴⁶ Olga M, *The African Union's Mechanisms to Foster Gender Mainstreaming and Ensure Women's Political Participation and Representation*, 8.

⁴⁷ US Civil rights Commission 1977 quoted in Yasin A "Affirmative action for women in higher education and the civil service: The Case of Ethiopia" available at <http://hdl.handle.net/11245/1.399519> on 25 July 2016.

⁴⁸ Robert F, 'Affirmative Action' in N Zalta *The Stanford Encyclopedia of Philosophy*, 2014.

over time.⁴⁹ The objective of applying such temporary measures is to accelerate equal participation of women in the political space and other fields, therefore the non-presentation or unavailability of evidence of past discrimination against women should not deter states from improving the position of women in society.⁵⁰

Affirmative action is not discrimination against men. In the case of *Molefi Ts'epe Ts'epe v The Independent Electoral Commission and Others*,⁵¹ the Court of Appeal of Lesotho held that the application of affirmative action through a local government law reserving seats for women to ensure higher representation of women in local government was permissible under the Constitution and did not amount to discrimination on basis of sex. The Lesotho Local Government Election Act of 1998⁵² had designated one-third of seats in each council to be reserved for women. In the *Litjotjela Number 5 Electoral Division*, where Mr Ts'epe had expressed interest to stand as a candidate, he was informed that only women candidates could vie in that electoral division. He instituted an action at the High Court alleging that the designation of specific seats for women was unconstitutional and violated his constitutional rights as a citizen to participate in the government of his country and his right to freedom from discrimination. His action was dismissed at the High Court and he subsequently appealed. In making its above finding in favour of affirmative action, the Court of Appeal referred to Lesotho's commitments under the International Covenant on Civil and Political Rights (ICCPR); CEDAW; the African Charter; the SADC Treaty⁵³ and the SADC Declaration on Gender and Development. It is instructive that at the time of the action, Lesotho had not yet ratified the Maputo Protocol.⁵⁴

There was recognition that although the population of women in Lesotho stood at 51%, only 12% of representational seats in the National Assembly were occupied by women. The Court of Appeal recognised that the first

⁴⁹ General recommendation no.25 on article 4(1) of the CEDAW on Temporary measures, para. 20.

⁵⁰ General recommendation no.25 on article 4(1) of the CEDAW on Temporary measures, Para. 18.

⁵¹ (2005) AHRLR 136 (LeCA 2005).

⁵² Section 26(1A), *Lesotho Local Government Election Act*, No. 6 of 2004; See also the *Lesotho Local Government Act*, No. 6 of 1997 which gave powers to the Minister of Local Government to create councils.

⁵³ Article 6(2), *Southern African Development Community (SADC) Treaty on Gender Equality* 2008.

⁵⁴ Lesotho ratified the Maputo Protocol on 26 October 2004 and deposited the instrument of ratification on 5 November/2004.

democratic local government elections offered the State the opportunity to level matters for the female gender. The reservation of council seats was also rotational meaning that in the next elections, the seats reserved for women would be opened up while new reservations would be applied in other election divisions. So that at any given election cycle, one-third of the seats would be reserved for women. This reservation of seats was also a temporary measure meant to lapse after three electoral cycles. It was also noted that two-thirds of the other seats were available for both men and women to contest openly for and that there was another council seat that Ts'epe could also apply for in the same electoral district. While there was in fact a limitation to the enjoyment of Ts'epe's rights, this limitation was reasonable and justified.

The above case practically adopted CEDAW provisions⁵⁵ that temporary special measures such as affirmative action aimed at accelerating substantive equality between women are not discriminatory. Article 9 of the Maputo Protocol, therefore, reinforces this assertion by specifically requesting states to adopt affirmative action as a tool for promoting and enforcing women's participation in politics, governance, leadership, and decision-making.

3.2 Quotas and electoral systems

A number of states have adopted quotas as a form of affirmative action to push for social change in their countries. Legal and policy reform is an essential act by governments to either amend or repeal laws that are discriminatory to women or to enact new ones that reflect gender equality principles and fulfil their obligations under international law. One interesting dimension is the role conflict has played in overhauling existing structures thereby creating opportunities and entry points for women to engage not only in the post-conflict rebuilding of their countries but also to occupy the new governance structures.

When applied within a political context, quotas have been described as a 'system put in place by an authority or an organ to promote or reduce a trend deemed to be too slow, or too fast.'⁵⁶ Another way to look at quotas is what they seek to achieve. They aim to correct an imbalance such that in relation to

⁵⁵ Article 4, CEDAW.

⁵⁶ UN Women, *Reflexions on Gender Parity in Africa: Gender Parity in Senegal Dakar*, 2011, 12.

political and decision-making, there is an equitable or acceptable representation between men and women.⁵⁷

Quotas have been used by a number of states to specifically increase the number of women in governance particularly in Parliament. Quotas may be classified into three:

1. Constitutional quotas: The provisions are entrenched in a country's constitution and often include reserving seats in government for women. Constitutional quotas are available in countries such as Uganda,⁵⁸ Kenya,⁵⁹ and Rwanda.⁶⁰
2. Electoral quotas: Some states prefer to include quotas in laws which guide the conduct of elections such as in Sudan⁶¹ and Senegal.⁶²
3. Political party quotas: This is more of a voluntary type as the percentages of candidatures reserved for women in the internal rules of political parties are subject to change and are not regulated by law. Such quotas exist in the African National Congress (ANC) (South Africa),⁶³ United Democratic Front (UDF) (South Africa), Malawi Congress Party (MCP) (Malawi), and the Front for the Liberation of Mozambique (FRELIMO) (Mozambique).⁶⁴

The electoral system adopted in a country may either inhibit or promote affirmative action. Globally, there exist a variety of electoral systems. According to Kemi Ogunsanya,⁶⁵ there are four main types of electoral systems: Single Member Plurality (SMP), Single-Member Majoritarian (SMM), Proportional Representation (PR), Party List System, and Mixed-Members Pro-

⁵⁷ Sawadogo L, 'Quotas: Une prime à la médiocrité féminine ou véritable enjeu démocratique?' Le Pays du 30 janvier 2008 (Burkina Faso) quoted in UN Women, *Reflexions on Gender Parity in Africa: Gender Parity in Senegal Dakar*, 2011, 13.

⁵⁸ Art. 180(2)(b), *Constitution of Uganda*, 1995.

⁵⁹ Articles 27(8), 81(b) & 97, *Constitution of Kenya*, 2010.

⁶⁰ Article 9(4), *Constitution of Rwanda*.

⁶¹ Section 29(2) (b) of the National Elections Act, No. XI of 2008 of Sudan provides for 25% of Women members of the national legislature to be elected on the basis of proportional representation at the state level from separate and closed party lists.

⁶² Electoral Law 92-16 of 1992, as amended by law 2012-01 of 2012 of Senegal.

⁶³ See Rule 6, African National Congress (ANC) Constitution, as amended and adopted at the 52nd ANC National Conference, December 2007.

⁶⁴ See Abreu A 'Political Party Quotas in Mozambique: The experience of the FRELIMO party' in Ballington J, *The Implementation of quotas: African Experiences*, 2004, 62-65.

⁶⁵ Ogunsanya K, "Women and Elections in African Politics," in *Elections and Constitutional Democracy in Africa* 2 *Conflict Trends*, 2006, 16-17.

portionality (MMP).⁶⁶ In the plurality/majority systems, the candidate with the most votes in a contest wins. The most common sub-form is the First-Past-The-Post (FPTP).⁶⁷ For the PR system, seats are allocated based on a percentage or proportion of votes gained by contesting parties and avoids the winner-takes-all-mentality. Usually, parties will be asked to prepare lists from which the mixed systems have a combination of the majority and proportional systems. Depending on the electoral system adopted, the opportunities for women political representation and participation may increase or decrease. Experience has shown that proportional systems tend to have more women in government than other systems.⁶⁸

4 Country analysis

This section examines how selected African states are implementing Article 9 of the Maputo Protocol.

4.1 Senegal

Senegal signed the Maputo Protocol in December 2004, and deposited its instrument on 30 January 2005. In 2010, Senegal passed the Gender Parity Law,⁶⁹ which instituted absolute gender parity in all wholly or partially elected institutions. The law made it compulsory for all candidates' lists drawn up by parties to be alternatively comprised of both male and female candidates.⁷⁰ This method described as 'zebra stripping' enables women to feature alternatively in frontline and deputizing positions thereby preventing a situation where they are placed in the bottom of the list.⁷¹ Parties whose candidates' lists are not gender-parity compliant are rejected.⁷² In line with its Gender

⁶⁶ For more information about electoral systems see International Institute for Democracy and Electoral Assistance (IDEA), *Electoral System Design: The New International IDEA Handbook*, 2005; Norris, 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' 18 *International Political Science Review*, 1997, 297-312.

⁶⁷ International Institute for Democracy and Electoral Assistance (International *IDEA*), *Handbook of electoral system design*, 28—<https://www.hks.harvard.edu/fs/pnorris/Acrobat/stm103%20articles/IDEAs%20Handbook%20of%20Electoral%20System%20Design.pdf> on 2 November 2016.

⁶⁸ Htun M, 'Women in political power in Latin America' 16 *Europe (OSCE countries)*, 2005, 14.

⁶⁹ Law No. 2010-11 of 28 May 2010.

⁷⁰ Article 2, Senegal Gender Parity Law 2010.

⁷¹ UN Women, *Reflections on Gender Parity in Africa: Gender Parity in Senegal Dakar*, 2011, 19.

⁷² Article 2, Senegal Gender Parity Law, 2010.

Parity Law, 2012, Senegal amended its Electoral Law of 1992,⁷³ which in Article L.145 implements the gender parity principle by ensuring that all parties submit candidates' lists alternately composed of people of both sexes for the general elections. Senegal has a mixed electoral system and the candidates list applies to both positions available in proportional seats as well as majority seats in the various constituencies. The gender-parity law has seen an increase in the number of women occupying seats in Parliament from 22.7% in 2011, to 42.7% in 2015.

4.2 Nigeria

Nigeria was one of the first countries to sign and ratify the Maputo Protocol depositing its instrument of ratification on 18 February 2005.⁷⁴ Since the 1999 general elections, when the country concluded its transition from military to civilian rule, there have been attempts to improve gender equality in Nigeria. The National Gender Policy set a target minimum of 35% affirmative action in favour of women to bridge gender gaps in political representation in both elective and appointive posts at all levels by 2015.⁷⁵ It also encouraged the adoption of special measures, including quotas, for achieving this objective.⁷⁶ Despite the existence of the National Gender Policy, women's representation in Nigeria's Parliament has remained below 10%. Under the Government of former President, Goodluck Jonathan, the highest number of women appointed at any one time increased to 33% when he appointed 14 female ministers out of 42 ministerial posts.⁷⁷ However, this was still below the 35% recommended by the National Gender Policy.

The 2015 elections show a decline that had started since the 2007 and 2011 elections. The current Cabinet of President Muhammadu Buhari has 6

⁷³ Law 92-16 of 1992, as amended by law 2012-01 of 2012.

⁷⁴ African Union, *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* —<http://www.achpr.org/instruments/women-protocol/ratification/on> 2 November 2016.

⁷⁵ Objective 5(b), National Gender Policy.

⁷⁶ Objective 5(b), National Gender Policy.

⁷⁷ See 'The United Nations System in Nigeria: Gender Equality Briefing Kit' available at—http://www.undp.org/content/dam/nigeria/docs/IclusiveGrwth/UNDP_NG_inclusiveGrwth_Gender-Briefing-Kit230513.pdf on 25 July 2016; see also Caleb J, 'Empowering women: The Jonathan approach' available at —<http://www.vanguardngr.com/2014/03/empowering-women-jonathan-approach/> on 25 July 2016.

women in the 36 ministerial positions.⁷⁸ At 17% this is also quite disappointing. Nigeria does not have a quota system in any of its laws and parties are not obligated to maintain voluntary quota lists. In addition, Nigeria observes a FPTP electoral system. These factors contribute to the low representation of women in elective and appointive positions.

The Electoral Reform Committee (ERC) set up to investigate and make recommendations on the conduct of the 2007 elections made a significant recommendation that to address the poor representation of women in governance as well as inclusion of minority groups, Nigeria needed a different electoral system.⁷⁹ It further suggested a mixed system incorporating the FPTP and a modified PR for federal, state, and local government legislative elections.⁸⁰

4.3 Uganda

On 22 July 2010, Uganda ratified the Maputo Protocol.⁸¹ However, it already had a legal framework for enhancing women's participation in politics and decision-making. Article 32 of the Constitution of Uganda, 1995, (as amended) provides for affirmative action by the State to redress imbalances faced by groups marginalized on any grounds including gender. Article 33(5) of the 1995 Constitution further reiterates that women have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom. The 1995 Constitution then expressly reserves one seat in each district for women,⁸² thereby automatically creating 112 women district representatives in parliament, from the 112 districts in Uganda. The mode of selection and election of these women district representatives is reinforced in Article 11 of the Parliamentary Elections Act, 2001. Despite operating a FPTP electoral system, the effect of the reserved seats have ensured greater repre-

⁷⁸ Odunsi W, 'Change team unveiled: See full list of Buhari's Ministers and their portfolios' Daily Post, 11 November 2015 —<http://dailypost.ng/2015/11/11/change-team-unveiled-see-full-list-of-buharis-ministers-and-their-portfolios/> on 2 November 2016.

⁷⁹ Electoral Reform Committee of Nigeria, *Main Report, Vol. 1*, 2008, 231—<http://eie.ng/wp-content/uploads/2014/03/JusticeMohammedUwaisReport.pdf> on 2 November 2016.

⁸⁰ Electoral Reform Committee of Nigeria, *Main Report, Vol. 1*, 2008, 52—<http://eie.ng/wp-content/uploads/2014/03/JusticeMohammedUwaisReport.pdf> on 2 November 2016.. See also Nwankwo O, 'Reviewing the 50+ Years of Women's Participation in Politics in Nigeria' 2 *WAC-SERIES*, 2011, 20.

⁸¹ African Union, *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* —<http://www.achpr.org/instruments/women-protocol/ratification/> on 2 November 2016.

⁸² Article 78(1) (b), *Constitution of Uganda*.

sentation of women in Uganda's Parliament and contributed to upholding its international obligations under CEDAW and the Maputo Protocol.

4.4 Kenya

After years of campaigning for change, Kenya promulgated a new Constitution on 27 August 2010⁸³ and ratified the Maputo Protocol on 6 October 2010.⁸⁴ Article 27(8) of the 2010 Constitution states 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.'⁸⁵ The 2010 Constitution also requires the electoral system to comply with the 'two-thirds gender rule.'⁸⁶ In this regard, 47 special seats are reserved for women in the National Assembly from the 47 counties⁸⁷ and another 16 seats in the Senate allocated using nominated candidates list distributed on the basis of a proportional system.⁸⁸ Kenya adopted PR using party lists for the parliamentary elections⁸⁹ and parties were obligated to provide lists that included alternates between male and female candidates with the exception of the women-only nominated list for the Senate.⁹⁰ The progressive 2010 Constitution definitely transforms representation of women in Kenya's Parliament after many years of stagnation.⁹¹ As a result of the change in law, 86 women became representatives in Kenya's 11th Parliament.⁹² This number supersedes the total number of women elected into Kenya's Parliament since independence.⁹³ It also shows the impact law reform and gender sensitive leg-

⁸³ See Republic of Kenya, *Kenya Gazette*, Notice no. 6465 of May 2013.

⁸⁴ African Union, *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* —<http://www.achpr.org/instruments/women-protocol/ratification/> on 2 November 2016.

⁸⁵ Article 90(2) (b) and 97, *Constitution of Kenya*; Section 25(2), *Political Parties Act*; Section 36(2) *Elections Act*.

⁸⁶ Article 81(b), *Constitution of Kenya*.

⁸⁷ Art. 97(1) (b), *Constitution of Kenya*.

⁸⁸ Art. 98(1) (b), *Constitution of Kenya*.

⁸⁹ Art. 90(1), *Constitution of Kenya*.

⁹⁰ Art. 90(2) (b), *Constitution of Kenya*.

⁹¹ Nzomo M, 'Women in Political Leadership in Kenya: Access, Agenda Setting & Accountability' available at— https://ke.boell.org/sites/default/files/uploads/2014/01/women_in_political_leadership_in_kenya-_access_influence-.pdf on 25 July 2016.

⁹² Association of Media Women in Kenya, *86 and Counting: Women Leaders in the 11th Parliament, 2014*— http://amwik.org/wp-content/uploads/2015/04/86_and_counting_bookweb_09_03_15.pdf on 25 July 2016.

⁹³ Association of Media Women in Kenya, *86 and Counting: Women Leaders in the 11th Parliament, 2014*, foreword— http://amwik.org/wp-content/uploads/2015/04/86_and_counting_book-

isolation can have on women's representation. Although Kenya is primarily a FPTP system, its adoption of party lists based on PR for certain seats in Parliament makes its electoral system a mixed one.

4.5 Rwanda

Rwanda ratified the Maputo Protocol on 25 June 2004.⁹⁴ Article 10(4) of the Constitution of Rwanda, 2003, revised in 2015, provides that Rwanda 'commits itself to building a State governed by the rule of law, a pluralistic democratic Government, equality of all Rwandans and between men and women which is affirmed by women occupying at least thirty percent (30%) of positions in decision-making organs'.⁹⁵ This is further emphasised in the composition of political organisations which must not only reflect the unity of Rwanda but also the equality and complementarity of women and men in their composition and leadership.⁹⁶ At least 30% of representatives in the lower chamber of Parliament, known as Deputies, must be women.⁹⁷ Similarly, in the Senate, the 2003 Constitution provides that a minimum of 30% of elective and nominated positions must be for women.⁹⁸ A combination of the constitutional quotas as well as the PR electoral system that Rwanda applies contribute to the overwhelming numbers of women in Parliament making it the global leader in women representation.

5 Representation of women in politics and decision-making in Africa

Rwanda remains the global leader in women's representation in Parliament. Earlier, in 1995, Europe dominated the top 5 global rankings between 30% and 40% of women in parliament, with Sweden leading at 40.4% fol-

web_09_03_15.pdf on 25 July 2016.

⁹⁴ African Union, *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* —<http://www.achpr.org/instruments/women-protocol/ratification/> on 2 November 2016.

⁹⁵ Constitution of the Republic of Rwanda of 2003 (as revised in 2015).

⁹⁶ Article 56, Constitution of Rwanda; See also Organic Law no. 19/2007 of 04/05/2007 modifying and complementing Organic Law no. 16/2003 of 27/06/2003 governing political organizations and politicians; Organic Law No. 03/2010/OL of 18/06/2010 repealing Organic Law no. 17/2003 of 07/7/2003 governing presidential and legislative elections as amended and complemented to date, *Official Gazette*, Special Issue, 19 June 2010.

⁹⁷ Article 75, *Constitution of Rwanda*.

⁹⁸ Article 80, *Constitution of Rwanda*.

lowed by Norway, Finland, Denmark and Netherlands.⁹⁹ In 1991, Seychelles had 45.8% representation of women in Parliament but the figure fell to 27.3% after the 1993 elections.¹⁰⁰ It was the highest ranking African country, at 7th position. Mozambique and South Africa were next at 25.2% and 25%, respectively, holding 12th and 13th positions, respectively, in the global ranking.¹⁰¹ Next in rank were Eritrea (21% - 16th), Namibia (18.1% - 20th), Uganda (18.1% - 20th), Tanzania (17.5% - 22nd), Chad (17.3% - 23rd), Rwanda (17.1% - 24th), and Zimbabwe (14.7% - 29th). These were Africa's top 10 out of 177 countries assessed worldwide. In 1995, three African countries, Comoros, Djibouti, and Mauritania did not have a single female MP.¹⁰²

By the end of 2005, the Maputo Protocol had come into force, and Africa had undergone a number of elections. Some shift in the rankings based on women's representation in Parliament showed Rwanda on the top of the ranking table with 48.8% out of the 187 countries reviewed.¹⁰³ It was followed by Mozambique (34.8% - 10th), South Africa (32.8% - 14th), Burundi (30.5% - 18th), Tanzania (30.4% - 19th), Seychelles (29.4% - 20th), Namibia (26.9% - 24th), Uganda (23.9% - 32nd), Tunisia (22.8% - 36th) and Eritrea (22% - 38th).

By the end of 2015, with 37 ratifications to the Maputo Protocol, the rankings have shifted again and significantly improved. Rwanda still leads and has consistently risen. It has surpassed the 50/50 AU gender parity principle at 63.8% with the highest number of women in parliament in the world's history.¹⁰⁴ Four African countries are in the top 10 global rankings showing a dramatic shift in just 20 years. There are more African women in parliament than ever before.

⁹⁹ Inter-Parliamentary Union, *Women in Parliaments, 1945-1995: Worldwide Statistical Survey*, 1995.

¹⁰⁰ Inter-Parliamentary Union, *Women in Parliaments, 1945-1995: Worldwide Statistical Survey*, 1995. See also archival table of women in parliaments as at 1 January 1997 available at <http://www.ipu.org/wmn-e/arc/classif010197.htm> on 25 July 2016.

¹⁰¹ Inter-Parliamentary Union, *Women in Parliaments, 1945-1995: Worldwide Statistical Survey*, 1995. See also archival table of women in parliaments as at 1 January 1997 available at <http://www.ipu.org/wmn-e/arc/classif010197.htm> on 25 July 2016.

¹⁰² Inter-Parliamentary Union *Women in Parliaments, 1945-1995: Worldwide Statistical Survey* (1995).

¹⁰³ See IPU archival table as at 31 December 2005 available at <http://www.ipu.org/wmn-e/arc/classif311205.htm> on 25 July 2016.

¹⁰⁴ 'Women secure 64 per cent of seats in Rwandan parliamentary elections' available at <http://www.rw.one.un.org/press-center/news/women-secure-64-cent-seats-rwandan-parliamentary-elections> on 25 July 2016.

Not all countries have experienced such a dramatic rise like Rwanda. It came out of crisis with 17.1% parliamentary representation of women in 1995, 48.8% in 2005, and an impressive 63.8% in 2015. Senegal is one of the few countries that has dramatically doubled the number of women in Parliament in the last 5 years moving from 19.2% in 2005 to 42.7% in 2015. In the same period, Kenya witnessed an over 60% increase in the representation of women in Parliament, from 7.1% to 19.7%. Lesotho, Malawi, Mozambique, Namibia, South Africa, Tunisia, and Uganda have been rising steadily. Others, like Liberia and Mauritius, have experienced fluctuations. Seychelles fluctuated between 1991 and 2005 but its performance has since been rising. Its global ranking moved from 20th to 4th in the 2015 rankings. It is now the second leading African country on women's representation in parliament. Other countries, such as Eritrea and Nigeria, have either stagnated or declined. Eritrea has not had elections since 1994 and the number of women in its Parliament has remained at 21%. Its global rank has fallen from 16th to 62nd. Nigeria has not been inspiring at all - apart from slight increases between 1999 and 2007, recent elections show a downward trend. Representation of women in Nigeria's Parliament was at its highest at 7%, in 2007, and currently 5.6% stands at, after the March/April 2015 elections. A country like Comoros which had no single woman in Parliament, in 1993, after the first elected woman gave up her seat for a ministerial appointment,¹⁰⁵ has maintained 1 woman out of 33 in the National Assembly (3%) for over 15 years. Djibouti and Mauritania, which had no women in parliament in 1995, had risen to 12.7% and 25.2%, respectively, in 2015. Overall, the African continent has fared much better than other regions of the world.

States with the most dramatic changes share certain qualities in common, one of which is the application of quotas in their electoral processes. In Kenya, for instance, the 2010 Constitution provides for special seats for women. This is a novel concept that has dramatically changed the face of governance in the country. Senegal's parity law, enacted in 2010, was definitely a winner for women in the subsequent elections. The combination of quotas and PR in Rwanda, together with a stable economy, has given women an enabling environment to thrive and contribute to the governance of their country.

In contrast, states that have little or no form of positive action to promote women's participation in the political and decision-making processes struggle

¹⁰⁵ See Inter-Parliamentary Union, *Women in Parliaments, 1945-1995: Worldwide Statistical Survey*, 1995, 103.

when it comes to increasing the political representation of women. For example, Nigeria, which runs the FTFP model and does not have the principle of affirmative action engrained in its Constitution and electoral laws has failed to significantly increase the number of female parliamentarians in the previous elections.¹⁰⁶ In fact, many women failed to emerge from the party primaries reducing their chances of contesting for the available positions.¹⁰⁷

Women heads of state are slowly emerging on the continent. Ellen Johnson Sirleaf became Africa's first elected female President when she took power in Liberia on 16 January 2006. About six years later, on 8 April 2012, Africa saw its second female Head of State, Joyce Banda of Malawi. Catherine Samba-Panza became the first female Head of State of the Central African Republic, when she was elected President of the Transitional Government on 23 January 2014.¹⁰⁸ Ameenah Gurib-Fakim became the first female President of Mauritius on 5 June 2015.¹⁰⁹ From 1994, when Specioza Wandira Kazi-bwe of Uganda became the first African woman to hold the position of Vice President,¹¹⁰ a few other women have followed suit with Samia Suluhu Hassan becoming the most recent as the first female Vice President of Tanzania after her party won the 2015 General Elections. It is important to note that the newly elected Vice President of Tanzania started her incursion into politics as a beneficiary of special seat reserved for women by the Constitution.¹¹¹ This shows that quotas, when applied appropriately, provide women the platform to engage in the political sphere and gain experience to vie for higher positions.

¹⁰⁶ Sogbesan H, 'Analysis: 2015 elections hold no promise for improved women representation in Nigerian politics' available at <http://www.premiumtimesng.com/features-and-interviews/179136-analysis-2015-elections-hold-no-promise-for-improved-women-representation-in-nigerian-politics.html> on 26 November 2015.

¹⁰⁷ Sogbesan H, 'Analysis: 2015 elections hold no promise for improved women representation in Nigerian politics' available at <http://www.premiumtimesng.com/features-and-interviews/179136-analysis-2015-elections-hold-no-promise-for-improved-women-representation-in-nigerian-politics.html> on 26 November 2015.

¹⁰⁸ Katz A, 'Meet Catherine Samba-Panza, Central African Republic's New Interim President' Time, 23 January 2014—<http://world.time.com/2014/01/23/meet-catherine-samba-panza-central-african-republics-new-interim-president/> on 2 November 2016.

¹⁰⁹ Carey S, 'Mauritius gets its first female president' New African Magazine, 4 June 2015—<http://newafricanmagazine.com/mauritius-gets-its-first-female-president/> on 2 November 2016.

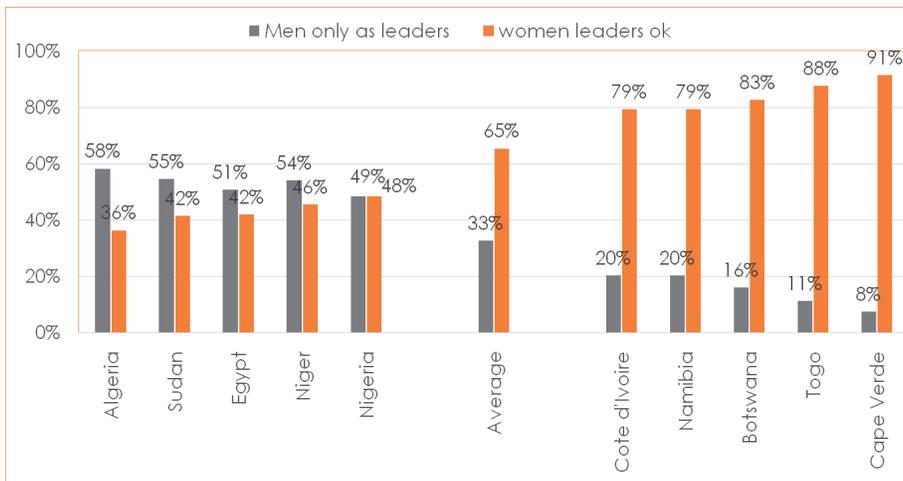
¹¹⁰ Ogunsanya K, "'Women and Elections in African Politics,'" in *Elections and Constitutional Democracy in Africa* available at <http://www.accord.org.za/publications/conflict-trends/downloads/425-conflict-trends-2006-2;> http://www.accord.org.za/images/downloads/ct/ct_2006_2.pdf on 25 July 2016.

¹¹¹ Section 66(1) (b), *Constitution of Tanzania*.

Comparing the status of women in parliaments to women in the overall leadership of their counties is illustrative. While the quota system effectively brings more women into parliament as representatives of their communities there is still an absence of women in the top hierarchy within the houses of assembly and ultimate leadership of their country as presidents or heads of states.

Generally, across Africa, the perception of women as leaders is changing. In a survey conducted by Afrobarometer in 2014/2015, respondents were asked to select if they thought ‘men make better political leaders than women, and should be elected rather than women’ or if ‘women should have the same chance of being elected to political office as men’.¹¹² The results show that of the 34 countries polled, 68% believed that women can and should be given an opportunity to hold political office.¹¹³

Perception of Women as Leaders – Afrobarometer Survey 2014/2015¹¹⁴



¹¹² See Chingwete A et al, *Support for African Women’s Equality Rises: Education, Jobs and Political Participation Still Unequal*, AfroBarometer, 2014.

Available at http://afrobarometer.org/sites/default/files/publications/Policy%20paper/ab_r5_policy-paperno8.pdf on 2 November 2016.

¹¹³ Chingwete A et al, *Support for African Women’s Equality Rises: Education, Jobs and Political Participation Still Unequal*, 2 Available at http://afrobarometer.org/sites/default/files/publications/Policy%20paper/ab_r5_policypaperno8.pdf on 2 November 2016.

¹¹⁴ Abel O ‘Democracy and democratic governance in Africa: Evidence from Afrobarometer’ presentation at the SOTU Continental Compliance Report Launch on 29 October 2015, Nairobi-Kenya.

However, women who desire to participate in the political space or aspire for leadership face a number of challenges particularly social barriers. Some of these include discriminatory family status, unequal caregiving responsibilities, violence, stereotypes, and marginalization in parties.¹¹⁵

The experiences of women aspirants are well documented with many facing multiple barriers. Lack of access to electoral financing and poor lobbying skills are considered to be some of the main barriers for women seeking political office.¹¹⁶

Women occupying nominated or special seats also face another challenge while in office. Their seats are often treated as subsidiary unlike women who win competitive seats after ‘battling’ their male colleagues. The latter are usually seen as more worthy colleagues by their male counterparts. In Kenya, there was an outcry when women’s county representatives refused to use the term ‘women’ to classify their positions in Parliament. They complained that they wanted to be recognised as representatives only. The backlash was fierce. Women activists could not comprehend why they rejected the ‘label.’ The women’s county representatives felt that they were being marginalized in their assemblies and wanted to show that they deserved to be there.

There is an active debate on the question whether an increase in numbers of women in parliament will translate to better policies and in particular an improvement in the lives of women. It is widely recognised that a ‘critical mass of women’ with the support of women’s groups can encourage the full participation of women in governance,¹¹⁷ however, women need to navigate the legislative space so that they advance the interests of women and ensure qualitative participation of women in decision-making.¹¹⁸ Rebecca Kadaga, former Speaker of Uganda’s Parliament, argues that focus should shift from increasing the number of women in governance institutions to enhancing the

¹¹⁵ Thematic analysis: eliminating discrimination against women in political and public life with a focus on political transition – Report of the Working Group on the issue of discrimination against women in law and in practice (A/HRC/23/50 – year 2013) http://www.ohchr.org/Documents/Issues/Women/WG/A.HRC.23.50_English.pdf 13-17

¹¹⁶ United Nations Division for the Advancement of Women (DAW), *Report of the Expert Group Meeting on Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership*, 2005 —<http://www.un.org/women-watch/daw/egm/eql-men/FinalReport.pdf> on 2 November 2016.

¹¹⁷ Ogunsanya K, ‘Qualifying Women’s Leadership in Africa’ *Conflict Trends*, 2007, 50, 51.

¹¹⁸ Ogunsanya K, ‘Qualifying Women’s Leadership in Africa.’

quality of their participation.¹¹⁹ A study by Mzalendo Trust on women's contributions in Kenya's Parliament, between 2013 and 2015, found that contrary to popular opinion female parliamentarians do not only represent women's agenda but represent all the challenges faced in their counties including problems that affect the men and that their contributions are equally as valuable regardless of whether they were elected, nominated or selected through affirmative action measures.¹²⁰

The quality *versus* quantity debate is, therefore, simplistic particularly when it is recognised that governments have an obligation to ensure '*increased and effective representation... of women at all levels of decision-making.*'¹²¹ This translates to both a commitment to increase the numbers and at the same time ensure qualified input, which is influential and impactful. The commitment is for both. And both are achievable. The state, in ensuring effective representation, must build the capacity of both male and female representatives so that they can carry out their tasks appropriately. Inexperience in legislative affairs should not be a yardstick for dismissing the potential contribution each representative (whether male or female) brings to development.

6 Conclusion

Quotas are important but not enough. Society's support is necessary for women politicians especially those who join state political institutions through affirmative action measures. The role of parties in ensuring better representation of women in politics too cannot be overemphasised. The lack of internal democracy in many parties has led to the eclipsing of women in granting party nomination slots. If parties' constitutions include gender-parity clauses, the emergence of women on party platforms will increase, ensuring that more women vie as candidates in elections. An increase in the number of women nominees enhances the chances of their election.

¹¹⁹ Kadaga R, 'Women's Political Participation in East Africa with Specific Reference to Uganda' Paper presented at the 10th Commonwealth Women's Affairs Ministers Meeting, Dhaka, Bangladesh, 17-19 June 2013, available at: <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/Womens-Political-Leadership-in-East-Africa-with-Specific-Reference-to-Uganda.pdf> on 25 July 2016.

¹²⁰ Mzalendo, 'Debunking Myths: Women Contributions In Kenya's 11th Parliament' available at http://info.mzalendo.com/media_root/file_archive/Debunking_Myths_on_Women_MPs_report.pdf on 25 July 2016.

¹²¹ Article 9(2), Maputo Protocol.

Financing of electoral campaigns is one of the limitations women face when contesting elections. It is not clear however, whether state financing of parties will ensure that women contestants access the funds allocated to their parties. Will state machinery be sufficient to hold parties accountable for the funds received and to ensure that both men and women have equal access to them? Should a cap on campaign money be set so as to limit the excessive spending that goes on during the campaigns prior to election date? It is important to determine whether to fund parties from a specified pool or whether donors and sponsors should channel their funds to women in order to level the playing field.

A combination of factors contribute to a state's effective implementation of Article 9 of the Maputo Protocol. These include: elimination of gender stereotypes and inhibitive cultural, religious, and social structures; the establishment of an independent judiciary; and insistence on the rule of law. Therefore, the critical step is an enabling environment built on foundations of democracy and good governance, and a government model that is responsive to the needs of all citizens – both women and men. The regional and international structures provide support for strengthening these standards at national level. Africa has the resources and the ability to accelerate gender equality and improve women's participation in politics and decision-making. The change is already happening, and 50/50 parity is possible and can be maintained. It is not just fair; it is the right thing to do.

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This book focuses on Kenya's experience in its determination to ensure gender equality in political processes and specifically in Parliament. Kenya's 2010 Constitution requires the State to 'take legislative measures 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'. Kenya has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). Under these frameworks, Kenya has undertaken to take specific positive action to promote the equal participation of women in politics and to ensure increased and effective representation and participation of women at all levels of decision-making.

Against this background, this edited volume examines the status of implementation of affirmative action measures, including the 'two-thirds gender rule', and the factors hindering increased and effective representation of women in Kenya's political processes. The book is a product of the 2015 Annual Jurists Conference organized by the Kenyan Section of the International Commission of Jurists from 24 to 27 November 2015, in Ukunda, Kenya.



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