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GENDER ISSUES IN ELECTORAL POLITICS IN KENYA

THE UNREALIZED CONSTITUTIONAL PROMISE

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Gender Issues in Electoral Politics in Kenya: The Unrealized Constitutional Promise

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Abstract

The road to gender equality has been long and arduous for Kenyan women's movement. While progress has been made over time, a lot remains to be done in the area of representation in elective and appointive positions. Up to 2010, the Constitution and law were cited as the biggest obstacles in the way of gender equality. The promulgation of the Constitution of Kenya 2010 contains very robust equality, non-discrimination and participation provisions. However, it did not provide clear implementation mechanisms for the affirmative action provisions for women's representation. It was hoped that the promulgation of this constitution would ensure gender equality. However, the promulgation and enactment laws is not sufficient. In the area of electoral politics, while the number of women in Parliament has increased, compliance with the constitutional rule of 'not more than two thirds of the same gender' remains a challenge because of the absence of mechanisms to ensure adherence. Not surprisingly, the earliest court matters and advisory opinions sought on the Constitution related to gender equality.

It is against this background that this Chapter analyzes the promise of gender equality and non-discrimination in electoral politics. Contextualizing the issue within history, women's struggles and the road to the Constitution of Kenya 2010, the authors identify critical milestones highlighting the role of the women's movement. This provides the backdrop against which the 2013 elections are

discussed. The authors also navigate the political and social manoeuvres that have surrounded attempts to meet the two thirds gender rule. The Chapter looks at how women fared in the 2013 elections -nominations, campaigns; the voting process; and the results of the first elections under the Constitution. The authors use gender analysis to illustrate how that politics remain a citadel of male political dominance noting that given the nature of Kenyan society, affirmative action measures and quotas remain the most effective pathways towards gender equality in electoral politics.

The authors discuss disputes that have arisen noting the lack of canvassing of the gender question as a substantive issue to buttress the point that discussions on gender in Kenya are still at the periphery. They decry the dearth of bold, transformative and path-breaking jurisprudence on the substantive gender question in electoral politics in Kenya, which in their view is what is needed to alter the political playing field and the rules of the game. In conclusion, the authors argue that in no country has gender representation in politics been achieved through the promulgation of laws alone, highlighting the need for effective implementation mechanisms; incentives for actors to follow through; and sanctions meted against those who do not comply.

1.0 Introduction

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 level the playing field such as affirmative action programmes in different fields, including politics. Frene Ginwala in her foreword in *Women in Parliament Beyond Numbers*¹, observes:

The seeds of democracy lie in the principle that the power to make decisions about people's lives, society and their country, should derive from 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 "civilised"

1 F Ginwala, "Foreword" in J Ballington and A Karam(ed), *Women in Parliament Beyond Numbers*,(2005) 14.

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.

This Chapter begins with this quotation because gender issues in electoral politics including the 2013 Kenyan elections have been unique. While election issues have been guided by traditional consideration of the issues of representation, the gender question has challenged the meaning of democracy and related questions. It is generally accepted that participatory democracy must take into consideration the voices of those who would be affected by decisions being made. The advocates of women's representation in election processes suggest that, conscious and deliberate steps must be taken to ensure that minorities and other disadvantaged groups that are marginalised are included in decision-making and mainstream development processes.² This flows from the premise that any laws passed affect all persons, even those that were deliberately left out in the formulation process.

Proponents of the traditional definition of democracy for centuries did not consider that the concept and reality of its implementation excluded the majority of the people.³ Patriarchal leadership in Kenya has for a long time refused to acknowledge this fact but the 2010 Constitution is forcing the institutions of governance to address this issue as this chapter shows. Women in Kenya have not done well in competitive politics in Kenya since independence owing to socio-cultural factors such as patriarchy, lack of adequate resources needed to garner support of the electorate, gendered power relations and roles, election violence and the fact that as argued above, democracy, leadership and elective politics have traditionally not considered women and other marginalised groups to be part of the political leadership. While women comprise more than half of Kenya's population, this is not usually reflected in competitive electoral politics or appointments in public offices.⁴ The following table shows how poorly women have performed in Kenyan parliament for the last 50 years.

2 in J Ballington and A Karam(ed), *Women in Parliament Beyond Numbers*,(2005); W Kabira, *Time for Harvest: Women and Constitution Making in Kenya* (2012); M Nzomo, *Women in Politics* (1991).

3 Ballington and Karam, above.

4 FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process* (2013); W Kabira, *Making politics Gender responsive: Towards Gender Responsive Politics* (1997); Nzomo, above.

Parliament	Period	Total No. of Constituencies	No. of Women Elected	Available Slots for Nomination	No. of Women Nominated
1 st Parliament	1963-1969	158	0	12	0
2 nd Parliament	1969-1974	158	1	12	1
3 rd Parliament	1974-1979	158	4	12	2
4 th Parliament	1979-1983	158	5	12	1
5 th Parliament	1983-1988	158	2	12	1
6 th Parliament	1988-1992	188	2	12	0
7 th Parliament	1992-1997	188	6	12	1
8 th Parliament	1997-2002	210	4	12	5
9 th Parliament	2002-2007	210	10	12	8
10 th Parliament	2007-2012	210	16	12	6

In the last 20 years, however, women in Kenya and Africa have made great progress in the area of political participation. Africa now boasts of some of the highest levels of women's representation in national assemblies in the world with women claiming over the 33 percent critical mass representation in a number of countries.⁵ This is attributable to the work of African women's movements and women's organisations that have successfully lobbied for constitutional reforms.⁶ This emerging visibility of women as political actors and adoption of policies advancing women's rights is clearly evident⁷ as is shown below:

Women in politics and decision making positions-parliamentary representation in Africa

	Country	National Assembly		Senate	
		Elections	% W	Elections	% W
1.	Rwanda	2013	63.8%	2011	38.5%
2.	South Africa	2014	41.9%	2014	35.2%
3.	Namibia	2014	41.3%	2010	23.1%
4.	Mozambique	2014	39.6%	-	-
5.	Angola	2012	36.8%	-	-
6.	United Republic of Tanzania	2010	36.0%	-	-

5 IPU, Women in National Parliaments: Situation as of December 2015 (2015), <http://www.ipu.org/wmn-e/classif.htm>, at December 4, 2015.

6 A Tripp et al, *African Women's Movements Changing Political Landscapes* (2009).

7 As above.

	Country	National Assembly		Senate	
		Elections	% W	Elections	% W
7.	Uganda	2011	35.0%	-	-
8.	Algeria	2012	31.6%	2012	6.9%
9.	Zimbabwe	2013	31.5%	2013	47.5%
10.	Tunisia	2014	31.3%	-	-
11.	Cameroon	2013	31.1%	2013	20.0%
12.	Burundi	2010	30.5%	2010	46.3%
13.	Sudan	2015	30.5%	2015	35.2%
14.	Ethiopia	2015	28.0%	2010	16.3%
15.	South Sudan	2011	26.5%	2011	10.0%
16.	Lesotho	2015	25.0%	2015	24.2%
17.	Eritrea	1994	22.0%	-	-
18.	Kenya	2013	19.7%	2013	26.5%
19.	Morocco	2011	17.0%	2009	2.2%
20.	Malawi	2014	16.7%	-	-
21.	Somalia	2012	13.8%	-	-
22.	Burkina Faso	2014	13.3%	-	-
23.	Niger	2011	13.3%	-	-
24.	Djibouti	2013	12.7%	2013	12.7%
25.	Zambia	2011	12.7%	2011	12.7%
26.	Liberia	2011	11.0%	2014	10.0%
27.	Ghana	2012	10.9%	2012	10.9%
28.	Gambia	2012	9.4%	-	-
29.	Cote d'Ivoire	2011	9.2%	-	-
30.	Democratic Republic of the Congo	2011	8.9%	2007	4.6%
31.	Mali	2013	8.8%	-	-
32.	Congo	2012	7.4%	2014	19.4%
33.	Nigeria	2015	5.6%	2015	6.5%

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

This table shows clearly that African countries have made progress towards gender equality in electoral politics with mixed results. Countries doing

poorly include: Morocco, Somalia, Burkina Faso, Niger, Djibouti, Kenya (19.7 percent), Zambia, Liberia, Ghana, Gambia, Nigeria, and Congo, among others. These countries have less than 20 percent women's representation in national assemblies. Nigeria, the most highly populated country has only 5.6 percent. However, some African countries of have done very well. These include: Rwanda (63 percent), South Africa (41.9 percent), Namibia (41.3 percent), Mozambique (39.6 percent), Angola (36.8 percent), Tanzania (36 percent), Uganda (35 percent), Algeria (31.6 percent), Zimbabwe (31.5 percent), Tunisia (31.3 percent), Cameroon (31.1 percent), Burundi (30.5 percent) and Sudan (30.5 percent). It is indeed commendable that Rwanda leads the world in women's representation in the National Assembly and that seven African countries have gone beyond the critical mass expected to have impact on legislation and other processes and another six are on their way to realising the critical mass. The associated study, however, notes that all these countries have made so much progress through use of quotas and affirmative action provisions introduced through constitutions.⁸

In terms of decision-making, a new survey prepared by UN Women and the Inter-Parliamentary Union shows that Cape Verde has the highest number of women occupying ministerial positions in Africa with nearly half of its 17 ministers being female. With nine women, the island nation is also ranked second globally, after Finland, which has 10 of its 16 ministerial positions occupied by women.⁹ South Africa is the next highest ranked country in Africa, with 41.7 percent, or 15 of its 36 ministers being female. Rwanda has 11 of its 31 ministers as women, ahead of Burundi, Tanzania and Guinea-Bissau, which all come in the top 20 positions globally. Africa has seven countries where at least 30 percent of ministers are women, on a list that counts 30 nations meeting this threshold, suggesting it holds a quarter of the global representation and making it only second to Europe. Africa's biggest economy, Nigeria, has seven of 29 ministers as women, the same representation as the Central African Republic, and just ahead of South Sudan, which has five women out of 22 ministers. Rwanda takes the lead globally on the percentage of women in either unicameral parliament, the lower house of parliament, at 63.8 percent, or 51 of 80 seats. Sub-Saharan Africa has an average 22.4 percent

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

9 Intelligence Transfer Centre, 2015 <http://www.intelligencetransfer.co.za/conferences/7th-annual-women-in-politics-conference/?at> 2nd January 2016.

of women in a single house or lower parliament, and 20 percent in an upper house or senate.¹⁰

The increase in women's representation in the National Assemblies has been mainly due to a quota system. Some of the countries such as Kenya and Uganda have created special seats for women through the Constitution, while Tanzania and Ethiopia have used political party quotas. The Constitution of Kenya, promulgated on 27 August 2010, is a milestone in addressing the issue of affirmative action, not only for women but for many excluded groups including minorities, persons with disabilities and youth.¹¹

The necessity for affirmative action measures to ensure the representation of women and other socially excluded groups is a clear recognition of the hurdles women face in a patriarchal society like Kenya and an acknowledgement of the many inequalities that exist.

One of the most glaring impediments to women's participation in electoral politics and governance is the organization around formal political units such as political parties whose skewed nomination rules relegate women to the back as preference is given to men in leadership and flag bearing positions. Indeed political parties have been referred to as 'citadels of male political privilege'.¹² This has been further entrenched by the largely adversarial and duel like electoral system of First-Past-the-Post (FPTP) where the majoritarian winner-takes-all principle is used. This explains the use of affirmative action and quotas in many of the African countries to mitigate the impacts of this system.

In arguing a case for quotas in the Pacific Region, Lesley Clark in her *Affirmative Action-Gender Representation in Parliament: Quotas, Political Parties and Reserved Seats*, suggests, among other arguments, that quotas for women do not discriminate, but compensate for actual barriers that prevent women from their fair share of the political seats. She adds that, the presence of women gives greater legitimacy to parliament. Women's experiences are needed in political life and it is not true that men can represent women in the same way that women can represent other women.¹³ She adds that the

10 As above.

11 Articles 97 (1) (b)&(c), Article 98 (1) (b)&(c) and Article 177 (1) (b)&(c) deal with these marginalized groups.

12 M Kimmel, *Misframing Men: The Politics of Contemporary Masculinities*, Rutgers University Press, New Brunswick, New Jersey and London (2010).

13 L Clark, *Affirmative Action-Gender Representation in Parliament: Quotas, Political Parties and Reserved Seats* (2006) 2-3.

history of women's representation in parliament proves that there are no other alternative methods for significantly increasing the number of women in parliament in a short period of time. Further that the countries that include women in their decision making have an advantage over those that limit themselves to men's perspectives and solutions and that the leadership style of women which stresses consensus, collaboration and partnership is more likely to avoid intra and inter country conflicts with the resulting economic and social costs.¹⁴

Scholars such as Kathleen Fallon argue that transition to democracy opened up new possibilities for women to fight for political rights in Ghana and elsewhere in Africa.¹⁵ Using proportional representation and party lists in electoral systems offers more opportunities for women to be included in political leadership. In this regard, many scholars note that quotas are often the most immediate and most successful tools for increasing the number of women in national office.¹⁶

We agree with Tripp *et al*¹⁷ that women's movements in Africa, particularly in countries that have had no major political upheavals are the reason why governments have adopted policies and constitutional provisions related to gender equality and affirmative action policies and strategies for women's representation in political institutions. These policies have increased women's representation even in countries that have not been democratic, those that have risen from the ashes (such as Uganda, Rwanda, Mozambique, and South Africa) and those that have had some level of stability (like Kenya and Tanzania). With regard to Kenya, the women's movement contributed immensely to the adoption of the affirmative action provisions in the constitution.¹⁸

This chapter is divided into six parts. Part one is the introduction. Part two discusses the path towards gender electoral related provisions in the Kenyan Constitution, 2010 highlighting the role of the women's movement in securing the same. Part three focuses on the provisions of the Constitution of Kenya 2010 addressing the gender question in elective politics. This leads to Part

14 As above 4.

15 Fallon, *Getting Out the Vote: Women's Democratic Political Mobilization in Ghana*. (2003) 8(3) *Mobilization: An International Quarterly*, 273-296.

16 Tripp, n 6; Mi Yung Yoon (2004); Fallon, as above; Gretchen Bauer; and Hannah Briton 2006.

17 As above.

18 W Kabira, above n 4; Kimani & Kabira, *The Historical Journey of Women's Leadership in Kenya* (2012) 3(6) *Journal of Emerging Trends in Educational Research and Policy Studies* (JETERAPS) 842, 849.

four which looks at how women have fared in election processes, including the implementation of legislative frameworks, nominations, campaigns and actual elections and results of the 2013, which were the first under the Constitution of Kenya, 2010. Part five looks at cases that have come before the courts on gender and elections under the 2010 Constitution, noting the lack of canvassing of gender as a substantive question in election disputes which buttresses the fact that affirmative action measures and quotas remain the most effective pathways towards gender equality in electoral politics as shown in the introductory section. Part six concludes.

2.0 Towards Gender Electoral Related Provisions in the Kenyan Constitution: The Role of the Women's Movement

2.1 1991-1997

The period between 1992 and 2010 will go down in history as one when the women's movement in Kenya focused on issues of elections and women's representation with immense energy. The Kenya African National Union (KANU) had found it necessary to append the umbrella women's organization *Maendeleo ya Wanawake* to itself so that they could use them for mobilising political support but not to have women participate as candidates in the electoral process.¹⁹ From the moment Section 2A of the Kenyan Constitution was repealed in December 1991, women's voices from within and outside the Women's Movement were strong and consistent, particularly on the issues of representation in political institutions such as political parties, Parliament and local governments. They lobbied to influence changes particularly in the electoral processes.²⁰ The objective was to increase women's power and influence by working towards ensuring a critical mass of at least 33 per cent women's representation in parliament and other political and public decision-making bodies. The publication of a paper by Maria Nzomo entitled "Women in Politics" in 1991²¹ detailing the global problem of absence of women in leadership positions and the desire to ensure a critical mass of women in leadership if any gains were to be realised, was significant.

19 Nzomo, as above, n2.

20 Wachira & Mbugua, *Gender and Democracy: An Analysis of Kenya's Political Parties Manifestos (1996)*; W Kabira & M Masheti, *ABC of gender analysis (1995)*; W Kabira, *Making politics Gender responsive: Towards Gender Responsive Politics (1997)*; M Gituto & W Kabira, *Affirmative Action: The Promise of a New Dawn*. Nairobi (1998).

21 Nzom, as above, n 2.

On 22 February 1992, a women's convention to discuss their representation in political parties and legislative bodies was organised at the Kenyatta International Conference Centre. The meeting brought together Kenyan women from all walks of life to dialogue with each other on the women's agenda in the democratisation process. This set the agenda for women's mobilisation to participate in the electoral processes and can be cited as one of the definitive moments that have brought women to where they are²². This meeting, organised by FEMNET and the National Council of Kenya, included political luminaries, Martha Karua, Phoebe Asiyo, Julia Ojiambo, and Wangari Maathai, among others, who set the pace for the struggle.

1997 was another landmark year when Hon. Phoebe Asiyo, then a Member of Parliament for Karachuonyo, tabled a motion on affirmative action in Parliament. Her motion called for Parliament to increase the number of women parliamentarians by 18, made up of at least two from each of the eight provinces, and an extra two from the Rift Valley Province due to its population size and diversity. Hon. Asiyo's motion also included a proposal for an amendment to the Constitution to provide for two parliamentary constituencies in each province exclusively for women candidates, and for legislation for funding for all registered political parties. Significantly, the motion also required that the level of public funding for political parties be linked to the percentage of women candidates fronted by the party.²³

The motion was discussed at various fora by women's organisations that also appeared before the national assembly to support the motion. The few women parliamentarians, including those in the ruling party, supported the motion. However, it was defeated. The motion did plant a seed that grew a strong political women's movement.

After the defeat of the affirmative action motion, women recognised that although there was no statutory clause barring them from participating in politics, the political climate, cultural attitudes, and other related factors would continue to hinder their participation in the electoral process. They knew that this had to change because, promises to women by those running for office over the years never yielded results in getting their issues on the

22 Kabira, as above, n 2.

23 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=0ahUKewiMJ5zv2MTKAhVgWBQKHerLAq0Q6AEIGjAA#v=onepage&q&f=false>, at 20th December 2015.

table. They had to find a way to get to the centre of leadership. Women's organizations came together as the women's 'political caucus' after the defeat of Asiyo motion in 1997²⁴ declaring that there was no such thing as being non-political because as Janet Kirna noted, *by making a decision to stay out of politics, you are allowing others to shape politics and exert power over you*".²⁵ The consciousness of women's status and desire to change the situation became the driving force in the struggle by women for representation in elective positions. They understood that *true emancipation begins neither at the polls nor at the courts, it begins in a woman's soul*.²⁶

2.2 Kenyan Women in the Review Process

The involvement of women in the Constitution Review Process was the result of clamour by women's organisations, civil society and opposition parties to have an inclusive and comprehensive review of the constitution, popularly known as the people driven process by the *Ufungamano* led processes and the People's Commission of Kenya that was chaired by Oki Ooko Ombaka.²⁷ This was after a long struggle by women's organisations under the leadership of the Women Political Caucus. The Constitution of Kenya Review Bill (1998) ensured women's representation at all levels through affirmative action using women's organisations as nominating body mechanisms. Use of the quota system re-configured the traditional definition of representation and democracy. However, this was challenged by the ruling party KANU which introduced a motion in parliament to remove the Kenya Women's Political Caucus from the process of coordinating women's nomination to the CKRC. During the second reading of the Constitution of Kenya Review Commission (Amendment) Bill (1998), Hon. Amukowa Anangwe, the then Minister for Cooperative Development in contributing to the motion, said:

Sir, I can see that they have created space for women's organisations in the review process which is fine. But many of the women's organisations represented in this bill are all urban based. They speak one language. They all reside in urban areas and yet the bulk of Kenyan women reside in rural areas. All I am trying to say is that, as we restructure representation of the various actors and interest groups like Kenyan Women's Political Caucus,

24 W Kabira, above, n 2.

25 K Weeks, *Women Know Everything*, (2007) 324.

26 As above, 172.

27 CKRC, *The People's Choice*, Report of the Constitution of Kenya Review Commission. Mombasa, Kenya. (September 2002).

League of Kenya Women voters, Collaborative Centre for Gender and Development, Federation of Women Lawyers and the National Council of Women of Kenya should be represented by one person. The other four places should go to *Maendeleo ya Wanawake* which has grassroots support. Therefore, they have no right to take the places which should really be due to groups which are in the rural areas.²⁸

Some men however supported the Bill. Hon. Mukhisa Kituyi, then Member of Parliament for Kimilili said:

I wish to inform my eloquent colleague that *Maendeleo ya Wanawake* is a member of the Kenya Women's Political Caucus and its chairlady voluntarily and freely declared support to the position that they should mobilise the numbers through the Kenya Women's Political Caucus. If they are not complaining, what is the problem with the male honourable members who are complaining on their behalf?²⁹

Hon. Martha Karua explained to Parliament that:

When the discussion on the constitution review process began, women were not there; Women lobbied to get space for themselves; That the emergence of self-proclaimed advocates of rural women were nowhere to be heard; That women reject those divide and rule tactics; That the Women's Political Caucus, of which she was a member, was the largest umbrella organization and included *Maendeleo ya Wanawake*, Muslim Sisters Network, Federation of Women's Lawyers and League of Kenya Women Voters. That the KWPC had already sent letters to all women organizations all over the country including those at the grass roots level. Those women did not need to be directed and divided by dictators.³⁰

Martha drew the attention of the members to the definition of the Caucus in section 2 of the Bill and how the definition referred to those organizations in Part C of the first schedule which included:- Kenya Women's Political Caucus; *Maendeleo ya Wanawake*; League of Kenya Women Voters; Collaborative Centre for Gender and Development; Widows and Orphans Welfare Society of Kenya (WOWESOK); Federation of Women Lawyers, Kenya Chapter; National Council of Women of Kenya; Muslim Consultative Council Sisters Network. She concluded by saying that the list was not exhaustive and so: "Let

28 NA Deb 24 November 1998, Vol. 2215.

29 As above.

30 As above.

no woman fear and let no person instil fear in women that they are going to be left out”.³¹ In addition, Martha noted, “Let political parties give us one third of the 13 slots they have ... to show that they are committed to the principle of Affirmative Action.”³²

The motion to amend the Bill on 24 November 1998 was defeated but that was not the end of the resistance to women’s inclusion. When women’s organisations nominated commissioners, KANU Parliamentarians declared the nominees unacceptable. Kenyan women knew, as Achebe would say that, “*history is also that dusty road in my town and in every villager (woman) living and dead, who has ever walked on it. It is my country, my continent, yes, in the world. That dusty little road is women’s link to the other destination*”.³³ The little dusty road that women walked and whose experience they identified with was to later be confirmed by women’s views throughout the country as they participated in the review process. They had all walked that little dusty road and understood the experience that women leaders were talking about.

The review Bill had structures that ensured women’s participation at different levels and thus women’s agency through its own representatives was able to shift social power by challenging the long held concepts of democracy and representation and social inequality through this process. The agency would move systematically to ensure change in the electoral process through the CKRC. The first draft of the Constitution, referred to as the *Ghai* Draft³⁴ contained provisions, which prohibited discrimination against women and was premised on the principle of equality. The draft incorporated three electoral systems that would have been beneficial to women namely, a Mixed Member Proportional Representation (MMPR) system, a hybrid FPTP system and the Proportional Representation System (PR).³⁵ The *Ghai* Draft also proposed in Article 77(2) that political parties were to ensure that at least one third of the candidates contesting for direct elections and 50 percent of those in proportional representation were women. Normally, political processes such as constitution making exclude women, either intentionally or by default but women’s agency had defined its vision and mission as it got involved in the centre of the process. The women’s agency freely and optimally utilised all

31 NA Deb 24 November 1998.

32 Kabira, above, n 2.

33 C Achebe, *Home and Exile* (2000).

34 Constitution of Kenya Review Commission, *The Draft Bill to Amend the Constitution, 2002* (hereinafter *Ghai* draft).

35 K Muli, “Mixed Member Proportional Representation,” in *Safeguarding Women’s Rights-Training Manual*, 57.

opportunities available to pursue their goals throughout the struggle to get into the process and expand their freedoms.

The various drafts of the constitution generated in the review process: Ghai (2002); Bomas (2004); Wako (2005); Harmonised (2009) and the final referendum draft (2010) included many gains for women due to the solidarity of women at every stage. Women commissioners in the CKRC ensured that the structures and process of collecting, analysis and interpretation of the views of Kenyans was done. In addition, women were included in the massive civic education that took place at various stages in the process. The rules and regulations governing the review process also took gender into consideration ensuring a strong presence of women's representatives at the National Constitutional Conference (NCC) at Bomas of Kenya. At the NCC in 2003-2004 women were represented in all the critical committees including: Committees on *Representation; Legislature; Devolution; Bill of Rights; and Constitutional Commissions*. Women also chaired critical committees such as the ones on representation of the people and the Bill of Rights. This ensured that their issues were taken on board. It is through this process that they brought in critical perspectives on electoral issues such as MMPR in party lists; women's representation in the devolved governments; affirmative action; and women's rights in the Bill of Rights, among other issues³⁶.

The Bomas draft had many gains for women, but as the process went through other stages, between the 2005 and 2010 referendums, the gains were reduced. Some of the gains that were lost were provisions on the implementation of mechanisms for affirmative action provisions for women's representation in Parliament (National Assembly and Senate). These provisions were removed by the Parliamentary Select Committee (PSC) in Naivasha during the negotiations leading to 2010. They were replaced by provisions bringing in the forty-seven (47) special seats (one in each county) for women and the increase in the number of constituencies from 220 to 290.

3.0 The Constitution of Kenya 2010: Measures Addressing Gender Inequalities in Elective Politics

As noted above the Constitution of Kenya 2010 contains very robust provisions on gender equality. We will focus here on those that facilitate equality in elective politics. Suffice it to note that even before the promulgation of the

³⁶ W Kabira, above, n 2.

Constitution, Kenya had signed up to international treaties that provide for equal rights of men and women in public life³⁷ and was under pressure to ratify the Protocol to the African Charter on Human and Peoples' Rights on Women's Human Rights (the African Protocol) adopted by the African Union's General Assembly in 2003.³⁸ The inclusion of participation of the people, equity, non-discrimination and protection of the marginalised among the national values and principles of governance in Article 10 of the Constitution underscores the importance of this issue. Article 27 in the Bill of Rights further elaborated the right to equality providing for equal protection of all before the law;³⁹ the Right to equal protection for men and women and equal opportunities in political and other spheres;⁴⁰ and outlawing discrimination on sex among an expansive list of grounds⁴¹. The mechanisms for ensuring gender representation under Article 27 were outlined as *'legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination'*⁴²; and *".....legislative and other measures to implement the principle that not more than two-thirds of the members of elective bodies shall be of the same gender"*.⁴³ These provisions provide a window for the use of a variety of tools including quotas. Quotas can be fixed by statute law requiring parties to adopt a certain affirmative action measure with penalties prescribed for noncompliance.⁴⁴ Parties can also adopt quotas aimed at creating a targeted number of female candidates to be fielded by the political parties. As indicated earlier in this paper, Ethiopia has used this method to increase women's representation in parliament.

For these measures to deliver the requirement that *not more than two-thirds of the members of elective bodies shall be of the same gender*, a clear formula is required ex ante. This is the spirit behind the provision in Article 177 (1)(b) and (c) of the Constitution with respect to county assemblies which includes among the members of the County Assembly *"the number of special seats*

37 See, for example, *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.

38 Kenya only ratified the Protocol after the 2010 Constitution was promulgated.

39 Constitution of Kenya, Article 27(1).

40 Above, Article 27(3).

41 Above, Article 27(4).

42 Above, Article 27(6).

43 Above, Article 27(8).

44 Clark, n 13, 4.

members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender". This provision ensured that the principle of *not more than two-thirds of the members of elective bodies shall be of the same gender* was realised with respect to county assemblies in 2013. The removal of a similar provision that had been in earlier drafts with respect to membership in Parliament (National Assembly and Senate), which provided the mechanism for realisation of article 27, was removed during the last negotiation as the harmonised draft in 2010⁴⁵ led to the failure of meeting the Constitutional standard.

It is notable that 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 was meant to ensure that political parties did not just hand pick the nominees but would go through a process that brought in marginalised groups such as women in a fair and transparent manner. Kenyan women had hoped that pre-election nomination processes would socialise women to electoral processes and give them opportunities to learn so that after nominations they would bring their experiences to the party philosophies, management styles and help prepare them for campaigns in the subsequent elections. In other words, affirmative action was meant to be a training ground for women for competitive politics.⁴⁶

With the gains in the Constitution of Kenya 2010 discussed above, which the women's movement in Kenya had laboured hard for, the 2013 elections were a do or die moment for women. They had very high expectations. However even as they went into elections, women leaders in Kenya were aware about the problematic issues arising from the lack of implementation mechanisms for articles 97 and 98 of the Constitution. They still hoped that political parties would at the very least, utilise the provisions in the new Constitution to increase the numbers in the open seats and use party lists to bring in more women as they had proposed many times during the review process.

Kenyan women leaders knew that the 2013 Parliamentary elections would not realize the imperatives of Article 27 (8) owing to the absence of mechanisms proposed for it in relation to Article 97 and 98 on the membership of the

45 W Kabira, *Time for Harvest: Women and Constitution Making in Kenya*, University of Nairobi Press (2012).

46 (note 41 above); W Kabira & E Kimani, *The Historical Journey of Women's Leadership in Kenya* (2012) 3(6) *Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS)* 842, 849.

National Assembly and Senate respectively. They were however, hopeful that Article 177 (1) (b) and (c) on membership of the county assemblies would be implemented. They had also hoped Article 100 of the Constitution on the promotion of the representation of marginalised groups would have been translated into the legislation that would ensure enhanced representation of women. This did not happen.

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*⁴⁷ 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)⁴⁸, 98 (1) (b), (c) and (d)⁴⁹ and article 177 (1) (b) which provides for special seats for women as discussed above.

4.0 Women's Experiences with the 2013 Elections

Women expected the 2013 elections to be free and fair given their experiences of the 2007 elections and the ensuing violence. Like other Kenyans, they were concerned and that is why the women's movement and women leaders, in partnership with the United Nations Development Programme (UNDP) and UN Women, constituted a Team of Eminent Persons led by Hon. Phoebe Asiyo to promote peaceful elections through high level negotiations with political party leaders, the African Union, IEBC, the executive, the police service, the media and other parties who could ensure peaceful elections.⁵⁰ The Team of Eminent Persons and women's organisations monitored the elections through the 'Women Situation Room' where issues of concern were relayed⁵¹. This was not the first time that the women's movement in Kenya constituted a team of senior women leaders to act as bridge builders and door openers. They had done this during the review process and during the 2002 and 2007 elections when the teams were referred to as 'Women Negotiating Teams'.

This section highlights experiences of women with the 2013 elections and

47 Constitution of Kenya, Article 81 (b)

48 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

49 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;

50 UNDP, Kenya's Team of Eminent Persons-Final Report (2013).

51 As above.

discusses the institutional frameworks as well as the expectations of the women at various stages.

4.1 Nominations and Institutional Framework for the 2013 Elections

The IEBC in the electoral law, the Elections Act 2012⁵², simply restated the constitutional provisions and provided no guidance as to how the party list which was critical should have been arrived at.⁵³ This guidance should have included further provisions, such as regulating the development of the lists and affirmative action measures requiring the party list to start with a woman's name in order to ensure increased representation of women.⁵⁴ This is important for the gender question because the women's movement had during the review process presented this methodology of presenting party lists and required that it be made public. Unfortunately, this did not happen. IEBC which is supposed to supervise the process by which party lists are formulated and ensure compliance with the law failed to do so. They failed to publish the party lists submitted before the elections. In addition, the lists submitted did not comply with the law, given that there were no guidelines and therefore it was easy for political parties to manipulate the process.

This led to disputes around the party lists, a situation which could have been avoided if the law had been clearer, guidelines provided, and supervision by IEBC been done.⁵⁵ Closed lists should have been published before elections to ensure transparency and accountability as required in the constitution.⁵⁶

It is worth re-noting that women had proposed the method of using the party lists of political parties as a strategy for increasing women's representation in political institutions and had introduced the concept of MMPR during the review process and in the CKRC 2002 draft constitution. Women therefore expected that party lists would be used particularly in the implementation of article 177 (1) (b) and 98 (b) for transparency and accountability. This did not happen and as a result, the women nominated to the county assemblies joined the assemblies long after elections of speakers, chairs of the various committees and other positions in the assemblies had been determined. The

52 Chapter 7 Revised Edition 2012.

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

54 As above, 19.

55 As above, n 53 above.

56 As above, n 53, 34.

nominated women only joined the assemblies after National Gender and Equality Commission took IEBC to court to gazette the nominees⁵⁷, and hence to protect the women's right to representation on the lists. The nominees were not gazetted by IEBC until July 2013⁵⁸ four months after the elections.

In its defence, IEBC, in their 2013 report, noted that although the Act provided for the order and categorization of nominated members, Political Parties ignored the rules and procedures as provided. This, according to IEBC, is what led to the confusion and the late publication of the list. IEBC pointed out that political parties started reviewing their lists without proper procedures and insisted on retaining their lists as they were. There were cases where women went to court because of the flawed nomination processes. These included the *Lydia Mathia v Naisula Lesuuda*.⁵⁹ In this case, Lydia Mathia who was a candidate of TNA party was listed number three on the party list while Naisula Lesuuda was ranked number five in the TNA party list⁶⁰. When the list was gazetted, Naisula Lesuuda was listed as number three and Lydia was left out. Lydia argued that Naisula Lesuuda was not validly nominated and/or elected pursuant to Article 90 and Article 98 (1) (b), of the Constitution. That under Article 90 of the Constitution, for any person to become a Senator under Article 98 (1) (b) one must fulfill two conditions namely: - (a) Must be validly nominated and included in the party list; and (b) The list must be subjected in a general election through submission of the party list to IEBC in accordance with section 35 of the Elections Act.⁶¹

After the long arguments presented which included detailed discussions of the various constitutional provisions, issues of regional and ethnic balance, shortcomings of the Elections Act, 2012 as well as the role and powers of political parties, the court decided that Naisula Lesuuda was validly elected and nominated as a member of Senate in compliance with Article 88 (4) (d), 90 and 98 (1) (b) of the Constitution. This case makes very interesting reading on the kind of problems women continue to face even in cases where the quota for women is presented and where political parties have the power to make choices.⁶² It also points to the fact that contestations on gender representation

.....
57 The National Gender and Equality Commission (NGEC) versus Independent Electoral and Boundaries Commission (IEBC) Petition 147 of 2013 reported in [2013] eKLR.

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

59 *Lydia Mathia V Naisula Lesuuda & Another* [2013] eKLR Election Petition No.13 of 2013.

60 published gazette notice No. 3508 dated 20 March 2013.

61 Above, note 59.

are not necessarily between men and women but can be and tended to be between women.

Another case related to the nomination process is that of *Mary Wangari Mwangi V John Omondi Ogotu & 2 Others*. The petitioner complained to the IEBC that she had been sidelined in the party list. However, she was issued a nomination certificate and her name was included in The National Alliance (TNA) list.⁶³ Mary Wambui, a contestant for the National Assembly for Othaya constituency, also complained to the IEBC that her name was not on the list of nominated candidates for the TNA parliamentary seat in Othaya, despite her success in the party primaries. An agreement to include her name was reached internally in the party. In general, out of the total number of 207 complaints related to candidates' nomination process, 26 complaints concerned women, contesting both the special seats and the open seats.⁶⁴

In seeking to secure the nomination of representatives of special interest groups through proper application of the law, in March 2013, the National Gender and Equality Commission (NGEC) commenced proceedings against the IEBC.⁶⁵ The High Court found that the IEBC failed to meet its obligation to conduct and supervise the conduct of the election for special seats under Article 90 of the Constitution. The court ordered IEBC to publish party lists submitted with regard to County Assembly seats within five days and put in place a dispute resolution mechanism to deal with all the disputes. The High Court judgment resulted in the nomination of women to the County Assemblies.⁶⁶

However, literature available suggests that the nomination exercise preceding the 2013 General Elections was hostile for women aspirants.⁶⁷ There was violence against women candidates, marginalization and exclusion of women from the nomination process; and lack of dispute resolution mechanisms at both party and nominations levels.⁶⁸ IEBC in its report also notes that the implementation of the Act at various levels was met with challenges especially due to the fact that the parties had no standardized rules.

62 (note 55 above).

63 Kenya Law Reporting, *Mary Wangari Mwangi V John Omondi Ogotu & 2 Others* [2013] eKLR, Election Petition 9 of 2013.

64 B Namunane, "Uhuru party hands Wambui poll ticket" in the *Daily Nation* Online, Wednesday, January 23, 2013.

65 Kenya Law Reporting, *The National Gender and Equality Commission (NGEC) v Independent Electoral and Boundaries Commission* (IEBC) Petition 147 of 2013 reported in [2013] eKLR.

66 FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process* (2013) 33.

67 As above.

68 As above.

Political parties did not perform their role as expected.⁶⁹ While article 81 (b) of the constitution required that not more than two thirds of the elective body shall be of the same gender, the political parties, which should have taken the opportunity to increase women's representation through nomination of women in their strongholds, did not do so. In addition, political parties, according to the Political Parties Act, 2011, were meant to take into consideration gender balance and ensure that it was respected in the composition of the Political Party Boards, while making sure that the not more than two thirds gender rule was observed. The parties were also meant to put aside 30 per cent of the Political Parties Fund for promoting the representation of women, persons with disabilities, youth and other minorities. This did not happen despite the fact that the parties had opportunities and supportive provisions in the Constitution to develop guidelines to help realize or at least move closer to the implementation of the two thirds principle through political parties. Having failed to nominate women and therefore flouting Articles 27 (8) and 81 (b) of the Constitution, women's representation was below expectations. If no changes are made to the rules of the game, the same, or worse could happen in the next general election.

Women thought that they could trust the citadel of justice-the judiciary-for a favorable interpretation of the Constitutional provisions on the not more than two thirds members of the same gender in an elective body. The 2012 Supreme Court Advisory Opinion⁷⁰ just before the 2013 elections discussed in part four is a case in point. The Supreme Court, through its ruling, dashed women's hopes by advising that Article 27 (8) in relation to women's representation in the National Assembly and Senate is intended to be progressive not immediate. Responding to the Attorney General's request for an advisory opinion on the implementation of article 27 (8) of the Constitution and related provisions on the two thirds gender rule in elective positions specifically with regard to the National Assembly and the Senate, the Supreme Court on 11 December 2012 advised that the provision was not applicable to the 2013 elections and that it should be implemented progressively by 27 August 2015. The timing of this Opinion was excellent as it would have forced political parties and other actors to find ways of abiding by the principle. The advice given, however,

69 As above.

70 In the Matter of the Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate and in the Matter of the Attorney General (on behalf of the Government) as the Applicant.

removed the pressure from political parties to nominate female candidates and ensure their success.⁷¹

According to IEBC, the new parliament has 290 elected members, out of which only 16 which are held by women although 160 women vied. Of the 12 nominated seats, five are held by women and there are the 47 special women seats. If it were not for the special seats, the representation would have been as it has always been in the past Kenyan elections (see table 1). Senate has 47 elective seats and no woman won any of these seats although some vied. Senate however has the 16 seats reserved for women. Out of 1,450 county assembly seats, 85 were won by women.⁷² That women encountered obstacles raised by candidates at the hands of their political parties is not a surprise. Indeed the law envisaged an arbiter: IEBC. The Constitution, the Elections Act, and the IEBC Act give the IEBC the authority to regulate political party nominations. This power included: (i) the ability to specify days during which nominations could be conducted, which must be at least 45 days before elections; and (ii) the role of monitoring compliance with the legislation relating to nomination of candidates by parties. IEBC had a responsibility to ensure that a transparent and safe nomination exercise was conducted, giving women aspirants a better chance to compete fairly. IEBC's failures in providing oversight left the nominations open to the malpractices and abuse that were witnessed.⁷³

4.2 The 2013 Campaign Period

Despite the failure to implement constitutional provisions and the legislative framework that led to flawed nominations particularly in relation to affirmative action provisions, many international observers reported that the campaigns were generally peaceful.⁷⁴ However, various observers pointed out problems that women have historically experienced.

According to election monitoring reports of EU Election Observation Mission (EU EOM), the Women's Representative seats were used to push women out of the competition for open seats. Male politicians were telling the electorate that women have their own seats "guaranteed" by the nomination procedures (for the Senate and county assemblies). In addition, men pointed

71 FIDA, As above, n 66); EU EOM, European Union Election Observation Mission to Kenya, General Election 2013 Final Report (2013).

72 UNDP, Kenya's Team of Eminent Persons-Final Report. (2013).

73 FIDA, as above, n 66.

74 EU EOM, 2013; UNDP, Kenya's Team of Eminent Persons-Final Report. (2013).

out that in every county, the women had their own seats which men could not contest for. Those contesting the open seats were therefore seen as intruders in the male electoral world. Unsuccessful constituency candidate Rebecca Otachi stated that *'some of my opponents kept reminding the electorate that Kitutu constituents since independence [have] never been led by a woman, so let Rebecca contest for the Women Representative's seat and leave the National Assembly seat to male candidates'*.⁷⁵

Rhoda Rotino, who ran for election in West Pokot County pointed out that *"Some male rivals confused the electorate [by arguing] that women could not vie for any other positions apart from that of women's representative,"* She continued that, *"Men are highly rated in society and the propaganda was taken as gospel truth"*.⁷⁶

In addition to propaganda aimed at tarnishing the character of the candidates, rivals used the affirmative action seats as arguments to deter voters from voting for women candidates. Reports from women from various parts of the country indicate that there was widespread misinformation circulating to the effect that women could not vie for any position other than those reserved for them. FIDA, 2013 report⁷⁷ notes that this type of propaganda was meant to discourage voters from voting for women in seats that were open to both men and women. As Institute for War and Peace Reporting (IWPR) notes, beyond the implementation of constitutional provisions, women who were running for the 47 women special seats experienced similar problems as those in open seats. Some of them complained that their parties gave them fewer resources for the campaigns than they gave to their male counterparts running for other positions.⁷⁸

According to IWPR Some political parties (ODM, URP, UDF, and TNA) charged women lower nominations fees and provided some financial and organisational support to the more promising candidates during the campaign.⁷⁹ According to EU EOM field findings, many female candidates from larger parties such as TNA, ODM, URP, and UDF paid for their own security while campaigning, by employing party activists.⁸⁰

75 African Woman and Child, Kenyan Woman (2013) 4.

76 As above.

77 Above, n 66.

78 IWPR, Female Candidates Claim Discrimination in Kenyan Elections: They say underhand tactics were used to discredit their campaigns (2013), <https://iwpr.net/global-voices/kenyan-women-face-obstacles-public-life>.

79 As above.

80 EU, above, n 74.

4.3 Situation Room to Deal with Electoral Violence in Nairobi, Kenya

In a report from UNDP (2013), it was noted that some information was given through the “Women’s Situation Room”, (a concept initiated by the Angie Brooks International Centre to ensure peace and security during elections and ensure women are actively involved in peace advocacy, intervention, coordination, political analysis, monitoring and documentation)⁸¹ which was established in Nairobi to monitor women’s participation in the 2013 elections. The initiative worked closely with IEBC, the police, political parties and African women ambassadors to monitor the elections. The Team of Eminent Persons working in the Women’s Situation Room also engaged in high level negotiations with political parties, the African Union (AU) and other stakeholders and shared information. The Women’s Situation Room employed expertise and experience of women to prevent conflict during elections. With 500 trained observers in the field, over 1,200 reports were made to the Situation Room in just three weeks, ranging from electoral complaints, threats, damage to property, and a small number of violent incidents. This information was relayed to IEBC and the police service regularly before the election, during elections on the Election Day, and after the elections. The process of conflict resolution and peace mediation took place immediately.⁸²



Kenya’s Women’s Situation Room is launched by Assistant Police Commissioner Beatrice Nduta (centre) with UN Women Country Director and members of the Team of Eminent Persons. (Photo credit: UN Women/Zipporah Musau)⁸³

81 UNDP Kenya, Kenya’s Team of Eminent Persons-Final Report. (2013).

82 As above.

83 UN Women, Women Elected to One-Fifth of Seats During Kenyan Elections (March 28, 2013).

The Women's Situation Room report further indicates that women candidates faced challenges related to the enforcement of the Elections Act as well as other laws particularly in relation to electoral offences. They were subject to threats and intimidation, underhand actions by opponents, and smear campaigns.⁸⁴

On Election Day, The Elections Observation Group (ELOG) report (2013)⁸⁵ indicates that 99.9 percent of the polling stations sampled had security personnel present, which contributed to peace on Election Day.⁸⁶ The participation of women on Election Day processes acting as polling officials, security officers, observers, and party agents was noted. The Election Observation Group report also indicated that the elderly, expectant mothers and disabled were exempted from queuing in most polling stations.⁸⁷ However, there were cases where expectant mothers and old women were neglected with some fainting while waiting to vote.⁸⁸

The Women's Situation Room reported six gender-based violence cases on Election Day. Of the six, two were wife battering by husbands for not voting for the "correct" candidates (p59).⁸⁹ In Kitui County, Mlango location, the Kenya Human Rights Commission report indicated that a husband threatened to disown his wife (Nzambi Mwendwa) for not voting for his brother-in-law, who was contesting for the County Assembly seat as a Wiper candidate.⁹⁰

4.4 Election Results

According to SIDA, 2014 report, women constitute 21 per cent in the bicameral parliament, a major gain in women's political leadership.⁹¹ There are a total of 86 elected and nominated women leaders out of the 416 parliamentarians (349 National Assembly members and 67 Senators). 12 of the 16 elected women members of parliament have served in the previous parliament, which represents re-election of 75 per cent of the previous women leaders compared to the previous 20 per cent re-election in 2007. An important factor for the

84 UNDP, above, n 81.

85 ELOG, Final Report on 2013 Elections in Kenya (July 2013), http://www.gndem.org/ELOG_Report_2013, at January 18, 2016.

86 As above.

87 ELOG, Final Report on 2013 Elections in Kenya (July 2013) 57, http://www.gndem.org/ELOG_Report_2013, at January 18, 2016.

88 FIDA, above, n 66.

89 UNDP, above, n 81, 57

90 UNDP, above, n 81.

91 SIDA, Women's political participation, (May 21, 2014), <http://www.sida.se/English/where-we-work/Africa/Kenya/examples-of-results/Cecily-Mbarire/Facts-Womens-political-participation-/>, at January 18, 2016.

re-election was the collaborative support to Kenya Women Parliamentarians Association (KEWOPA). In addition, the county assemblies constitute 33 per cent of women representatives.⁹²

The table below shows the number of women that vied for various electoral positions versus men and how they fared in the 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)

The Table above shows that in the case of county open seats namely, the positions for governors and senators, no woman was elected. If it were not for affirmative action provision for women's representation in the Senate, there would be no women in the Senate. We argued above that women representatives in the 1992 National Conference and in other organs of the review process argued for affirmative action knowing very well that history has shown that when there is one seat being vied for, the chances of women capturing the seat in Kenya is slim. It is therefore gratifying to note that without affirmative action, representation of women would not have moved from 10 percent to 20 percent and would have definitely not moved to 33 percent at the county level.⁹³

Indeed the facilitative provisions in the constitution explain how the numbers moved from 10 percent in 2007 to almost 20 percent in 2013.⁹⁴ The adoption of the quota system in the Constitution was a success for the women's movement that had sustained the struggle for over 20 years. The struggle by

⁹² Kenya Law Reporting (<http://www.kewopa.org/>).

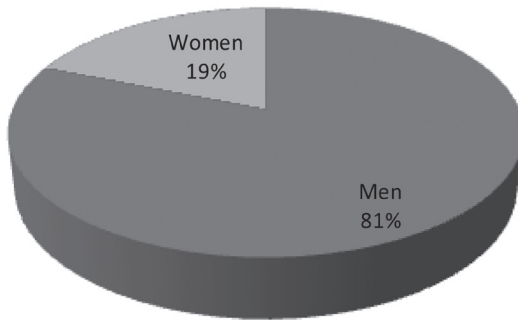
⁹³ SIDA, above, n 91.

⁹⁴ As above.

the Kenyan women also resulted to 33 percent representation of women as members of the county assemblies. This is despite the nomination problems discussed earlier in this section.

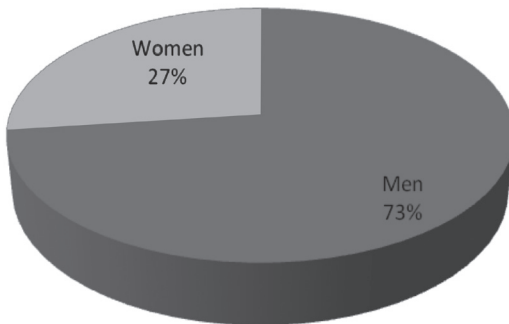
The pie charts below show the progress made mainly due to affirmative action provision.

National Assembly Composition



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

Senate Composition



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

In the 2013 general elections, out of 416 elected Members of Parliament (both houses) 86 are women (21 percent). Though these figures indicate increase in

numbers of women in elected positions in Kenya which have come through implementation of constitutional numbers remain low when compared to international standards on [women's] representation.⁹⁵ Other international observers including the Carter Center noted the low number of women nominated by political parties to run for seats in the 2013 elections.⁹⁶

The Table below also shows that, beyond the elections, leadership positions continue to be held by men. Neither the national assembly nor the senate has implemented two thirds gender rule as shown below in selecting members of parliament to leadership positions in parliament.

Leadership position in Senate	Women Representation
Speaker	None
Deputy speaker	None
Majority Leader	None
Deputy Majority Leader	None
Majority Chief Whip	1 – Hon. Beatrice Elachi
Majority Deputy Chief Whip	None
Minority Leader	None
Deputy Minority Leader	None
Minority Chief Whip	None
Minority Deputy Chief Whip	1 – Hon. Janet Ongera

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

Leadership position in National Assembly	Women Representation
Speaker	None
Deputy speaker	1 – Hon. Dr. Joyce Laboso
Majority Leader	None
Deputy Majority Leader	1 – Hon. Naomi Shabaan
Majority Chief Whip	None
Majority Deputy Chief Whip	None
Minority Leader	None
Deputy Minority Leader	None

95 IIDEA (2014).

96 The Carter Center, Observing Kenya's 2013 March 2013 Elections(2013), https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf , at 14 February, 2016.

Leadership position in National Assembly	Women Representation
Minority Chief Whip	None
Minority Deputy Chief Whip	None

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

Kenya made some progress towards the envisaged 33 percent women's representation. Strategies must be put in place to ensure that, women's representation moves beyond 33 percent. In addition, sealing the loop holes that have resulted in the marginalization of women county assembly members and better implementation of the provisions on party lists would help in ensuring women's quality participation as well as their being treated as equal to the male counterparts in the assemblies.

5.0 Handling of Gender Electoral Disputes by the Courts

With all the difficulties encountered by women during the 2013 elections highlighted above, one would have expected a flurry of litigation to right the wrongs. As noted above however, there is very little jurisprudence coming out of the Kenyan courts to guide the discussion on gender in electoral processes. The very progressive provisions of the Constitution on gender equality and non-discrimination have not been the subject of many court cases. The most instructive cases remain two that were brought before the 2013 elections. The first one which is directly relevant to the 2013 elections is *In the Matter of the Advisory Opinion on the Principle of Gender Representation in the National Assembly and the Senate and in the Matter of the Attorney General (on behalf of the Government) as the Applicant*.⁹⁷ The Attorney General sought an advisory opinion from the Supreme Court on whether Articles 27 (8) and 81(b) on gender equity ought to be achieved immediately or progressively upon the first elections under the Constitution of Kenya 2010. This was in recognition of the fact that in case the two thirds gender rule enshrined in the Constitution was not achieved in the impending 2013 General Elections, then the elected Parliament would be unconstitutional and this could lead to a major constitutional crisis.

The Attorney General argued that the implication of the provisions of Articles 27(3) (6), 27(8), 97 and 98 was that there were inconsistencies and this

97 Advisory Opinion No. 2 of 2012.

particularly arose in determining whether the two-thirds gender-equity rule in the national legislative entities (National Assembly and Senate) was to be implemented immediately or progressively. He argued that for the provisions of the Constitution to be complied with, there was need to adopt other criteria and that this might necessitate an increase in the tax burden borne by the citizens. He further argued that the Constitutional provisions were not clear on whether the two-thirds gender-equity rule was to be applied progressively or whether the Constitution required immediate implementation. In his view, a corrective measure was needed if the Constitutional requirements were to be realized. He further opined that using nominations by parties to bridge the gap would result in unduly-large legislative bodies.

In its majority opinion, the Supreme Court stated that in light of the provisions of Article 81 (b) of the Constitution, and in the event that the electorate did not meet the two thirds gender rule threshold, nominations would have to be done to bridge the gap. However, the Court noted that this would again be problematic and present a constitutional crisis since the members of the National Assembly would then exceed the constitutionally stipulated numbers.⁹⁸ The Court reiterated that it was aware of the social imperfections that had led to the inclusion of the gender equity provisions in the Constitution. The Supreme Court further had regard to various international human rights instruments that Kenya is signatory to and that bind Kenya by dint of Article 2 (6) of the Constitution such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Universal Declaration of Human Rights, and Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). These international instruments also call for the realization of gender equity in elective political offices.

While agreeing that gender equity in elected political office is a constitutional imperative, the Supreme Court held that this right as enshrined under Article 27 of the Constitution could only be achieved or realized progressively over a particular period of time. It further held that this progressive realization will require the political will and exercise of governance discretion in good faith through policy measures in addition to legislative measures. In arriving at this conclusion, the Court interpreted Articles 27(8) and 81(b) as

⁹⁸ Article 89 of the Constitution fixes the members of the National Assembly at 290 representing the electoral constituencies.

giving a broad statement of principle or aspiration of Kenyans rather than an immediate right. On this ground, the Supreme Court held that the two thirds gender rule could not be achieved immediately in the 2013 General Elections. Instead, the Supreme Court gave the government up to 27 August 2015 to come up with legislation to effect the rule. While the decision of the majority seemed convenient and reasonable at the time to avert what many expected would be a major constitutional crisis, it failed to move the country towards gender equality in the remaining citadel of male political privilege. The framing of the question by the Attorney General was erroneous in our view because cost alone cannot be a justified ground for excluding groups from representation. Democracy is expensive and it is not acceptable that cost is only a factor when gender representation is the issue. Indeed the implementation of the Constitution of Kenya on representation of the people and specifically the introduction of a Second House of Parliament (Senate) and 47 county assemblies was an expensive engagement. The fact that law set the ceiling for the number of members for the National Assembly, as pointed out by the judges, was and continues to be problematic. It is our view that the Court could have put pressure on the parties to ensure that more women were nominated to run for competitive posts and give more support to such candidates. Postponing the date of adhering to the constitutional provisions on equality validated the status quo and provided space for the hardening of anti-gender equality stances.

The August 2015 date given by the court has now passed and there is no mechanism in sight for facilitating the movement towards gender equality. Discussions on this question have noted the need for a provision similar to Article 177 (b) for Parliament, but there is no consensus on this matter with three bills before Parliament by the end of 2015 seeking to untangle the knot.⁹⁹ What has become increasingly clear is that nothing short of a Constitutional amendment will deliver the requisite result. To continue with a Parliament that is constituted in violation of the Constitution begs the question of our commitment to implement the hard earned constitutional provisions. The Supreme Constitutional Court in Egypt declared the Egyptian parliament unconstitutional in *Anwar Subh Darwish Mustafa v The Chairman*

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99 The Constitution of Kenya (Amendment) Bill, 2015 SPECIAL ISSUE Kenya Gazette Supplement No.50 (National Assembly Bills No. 18 30th April 2015; The Constitution of Kenya (Amendment) Bill, 2015 SPECIAL ISSUE Kenya Gazette Supplement No.112 (National Assembly Bills No. 38 24th July 2015; The Constitution of Kenya (Amendment) Bill, 2015 SPECIAL ISSUE Kenya Gazette Supplement No. 143 (Senate Bills No. 16) 21st August 2015.

of the Supreme Council of the Armed Forces¹⁰⁰ for failure to abide by the one third gender rule relating to independent candidates. Such boldness has not been forthcoming on the part of Kenyan courts on the issue of gender equality. The dissenting opinion of Chief Justice Mutunga in the advisory opinion is encouraging even though a minority opinion. He 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. He was cognizant of the resistance that changes aimed to bring gender equality would elicit. The picture painted in Part four of this chapter detailing the experiences of women vindicates the Chief Justice's dissenting opinion.

In *Centre for Education Rights Awareness & Others-v-The Attorney General*¹⁰¹, the petitioners challenged the appointment of 47 County Commissioners by the President on grounds that they did not meet the gender-equity rule enshrined under Article 27 of the Constitution. 37 of the Commissioners were male while 10 of them were female. To this extent they argued the appointment was void for not adhering to the provisions of the Constitution. The High Court agreed with the petitioners and declared the appointment unconstitutional thus giving effect to the gender equity provision under Article 27 of the Constitution. Of particular interest is what the Court stated:

In my view, the primary obligation imposed by Article 27(8) on the state is to do its utmost to meet the constitutional requirement. An effort must be made, bearing in mind the historical disadvantage to which women have been subject, to ensure gender equity. From the facts before me, there does not appear to have been any effort made to meet the requirements of the Constitution (...) The Constitution is thus very clear on what rights are subject to the progressive realisation test-the social and economic rights to health care, education, water, housing, and sanitation. Such rights require the allocation of resources, and as is the case with similar provisions in the International Covenant on Economic, Social and Cultural Rights, the state's obligation is made subject to the availability of resources. Had it been the intention to make the principle that not more than two thirds of elective and appointive positions should be of the same gender subject to progressive realisation, nothing would have been easier than for the Constitution to make this specific provision." (Underlined for emphasis).

100 Supreme Constitutional Court Case No. 20/24.

101 High Court Petition No. 208 of 2012.

Although the matter in issue was with respect to appointive positions, the principle would apply to elective positions as evidenced in the quoted extract of the judgment. This differs markedly from the High Court decision in *Federation of Women Lawyers-Kenya (FIDA-K) & 5 Others v Attorney General & Another*¹⁰² where the Court rejected a similar petition challenging the composition of the Supreme Court for failing to comply with the two third gender rule. In this case, the learned judges were of the view that Article 27 of the Constitution that provides for gender equality did not place any duty or obligation on the part of the Judicial Service Commission (JSC) in the performance of its functions. In the judges' view, Article 27 could only be claimed or sustained against the government with particular complaints and even then, only if the government fails to take legislative and other policy measures to achieve gender equity. Such a finding is strange when one considers that Article 27 is contained in the Bill of Rights and secures the concept of equality and freedom from discrimination and affords the right to equal treatment of both men and women. The Court in this case refused to compel the JSC or the State to enforce Article 27 on grounds that this would be an encroachment on the Executive's policymaking turf. The Court's sentiments with regard to the enforcement of gender equity provisions were arguably in bad taste. The judges said this of the petitioners:

Keep your feminine missiles to their launch pads until the State acts on policies and programmes as are envisaged in Article 27(6) and (8) and the Legislature has legislated accordingly to set the formulae, mechanisms and standards to implement the spirit and import of the whole Constitution within the time frame set by the Constitution or in default of their complying within that time frame.

Article 27 and 81 of the Constitution on gender equity cannot simply be said to be an empty grant. Neither should gender equity as a principle be couched as an aspiration that should be left to the State to implement if it feels like doing so.

The bulk of the electoral matters that have come before courts after the 2013 elections that would have a gender flavor relate to nominations by parties. The issue of party nominations and the unstructured way in which it was done has been canvassed above. We pointed out above that Article 90 of the Constitution bestows upon the IEBC the responsibility for the conduct and

102 2011 eKLR.

supervision of elections for seats provided for, *inter-alia*, the members of the county assembly under Article 177 (1) (b) and (c), which shall be on the basis of proportional representation by use of party lists. Pursuant to Article 177 (1) (a), it is the duty of a political party that nominates a candidate for election to submit to the commission a party list and a political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Article 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of the Constitution. This seems to give political parties unfettered discretion in drawing up party lists with nominated candidates of their choice for submission to the IEBC. The latter's only responsibility being allocating such special and gender top up seats as are available to the presented candidates. So then what happens when the same parties present more than one party list with conflicting information?

Interestingly, in *Nestehe Bare Elmi v Sarah Mohamed Ali & another* [2014] eKLR¹⁰³ a list was received by IEBC on 18 January, 2013, by the National Vision Party. The party had submitted the name of the 1st Respondent herein as a nominee for the Mandera County assembly. The said list however did not indicate the position for which the respondent was nominated. The party submitted another list to the IEBC on 12th March 2013, with the name of the 1st Respondent under the category of the marginalized group. By another list received by IEBC on 22nd April 2013, the same party submitted the appellant's name under the gender top up category. When the IEBC moved to declare the appellant as the gender top up nominee, the party petitioned in court to have her nomination nullified citing *Imelda Nafula Wanjala vs. IEBC High Court Petition No. 239 of 2013* and were successful, prompting a successful appeal by the applicant in this case.

It is noteworthy that the trial magistrate had sought to disqualify Nestehe on the basis of her academic qualifications which were below those required in the Elections (General) Regulations, 2012 (hereinafter referred to as the Regulations). This was however overturned on appeal with the judge holding that that the legal requirement under which the qualification for a person to be elected as a member of the county assembly of post secondary education was amended and was no longer a requirement and any rule purporting to require such qualification was contrary to the Act even if supported by the

103 Election Petition No. 1 of 2014 (HC, Nairobi).

party nomination rules. In the Court's opinion, soon any party rule contrary to the legal provision in the amendment was null and void to the extent of its inconsistency. The court further noted that party nomination rules cannot be superior to national legislation as this would defeat the very purpose for which the electoral legislation and the Constitution were promulgated. Party constitutions including their rules must be in conformity with the national legislation. Accordingly, it was his view that the appellant was academically qualified to be nominated as a Member of the County Assembly of Mandera and the learned trial Magistrate had erred in holding otherwise.

Other cases¹⁰⁴ were challenges over the election of women representatives. Some were resolved on the fluid parameters of ethnic and regional balance¹⁰⁵. Such parameters rendered the order in the party list useless. In many jurisdictions as we have noted above the lists are presented in a way that guides the selection and need to have been presented before the elections to avoid manipulation. Clearly, the parties had a free hand to offer support to candidates at the bottom of the list without having to explain the rationale. Indeed if ethnic and regional balance was a crucial consideration, it should have informed the party list right from the start.

In *Peninah Nandako Kiliswa v Independent Elections & Boundaries Commission & 2 others* [2014] eKLR¹⁰⁶, the appellant sought to overturn the judgment of the High Court of Kenya that upheld a decision of the IEBC Nomination Dispute Resolution Committee recognizing the third respondent, Edith Were Shitandi as the duly nominated Ford Kenya party member of the Bungoma County Assembly for purposes of Article 177(1) (b) of the Constitution. The appellant contended that the respondent was not in the original list submitted by the party to IEBC and that she was not a member of the party whatsoever. Similar allegations were brought up in *NARC Kenya Party & Another v IEBC & Another*¹⁰⁷ where the party alleged that IEBC had nominated a candidate who was not of their choice, that the candidate had forged documents to the 1st respondent and that despite the party's outcries that the nominations were faulted, the IEBC proceeded to nominate the 2nd respondent to the county

104 HC Election Petition No.13 of 2013 - Lydia Mathia vs. Naisula Lesuuda & another [2013] eKLR; HC Election Petition No. 7 of 2013; Bwana Mohamed Bwana vs. Silvano Buko Bonaya & 2 others [2013] eKLR; Bungoma HC Pet. No. 8 of 2013 - Major Rtd. Godfrey Masaba vs. Reginalda Nakhumicha Wanyonyi ; Embu HC Pet. No. 3 of 2013 - Mercy Kirito Mutegi vs. Beatrice Nkatha Nyaga; HC Pet. No. 6 of 2013 - Fatuma Zainab Mohammed vs. Ghati Dennitah;

105 HC Election Petition No.13 of 2013 - Lydia Mathia vs. Naisula Lesuuda & another [2013] eKLR.

106 Civil Appeal No. 201 of 2013 (CA, Nairobi).

107 Civil (Election) Petition 2 of 2014 (2014 eKLR).

assembly of Garissa. In both instances, the candidates were women and the quarrel was on which one of them was the more suitable one. In *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others*¹⁰⁸ relating to election of Lamu County women's representative, the issue revolved around electoral irregularities but the contenders were both women and so the issue was more procedural than substantive.

6.0 Conclusion

The Constitution of Kenya 2010 is a robust document and has opened important pathways for women and other marginalized groups to participate in all sphere of life including politics. While women's agency in Kenya may not have articulated the philosophy guiding it, the focus on the electoral process is clear. A number of conclusions can be made from the discussions in this chapter. *One*, the failure to provide for implementation mechanisms for critical provisions relating to Parliament that would have enhanced women's representation in electoral politics is a major shortcoming in the Constitution. There is need to address that shortcoming if the principles of non-discrimination and equality in electoral politics are to be effectively implemented in future elections. It is noteworthy that where provisions are clear as in the case of Article 177 (1) (b) and (c), relating to county assemblies, women's representation has adhered to the not more than two thirds constitutional principle.

Two, the Supreme Court's 2012 Advisory Opinion was a missed opportunity for the judiciary to force a country that has historically discriminated against women in electoral matters to change. The postponement of the date by which this provision is required to have been implemented has placed the country at the pre-constitution status. *Three*, while law has utility in bringing about change in social relations such as gender, its effectiveness is limited when the norms it seeks to replace are stronger and greatly entrenched. This is the case with gender relations in Kenya. Indeed in no country has gender equality been realized through changes in law alone. Beyond law, there is need for commitment to the principles of law. *Four*, electoral rules and party structures can be an obstacle to the realization of constitutionally provided for rights. We have noted above that nomination processes by parties can facilitate the enhancement of women's representation in politics. It has however been a

108 (2013) eKLR.

major obstacle. This is one area where the electoral process needs to change if the not more than two thirds principle is to be realized. We appreciate that this is not a simple matter because nomination processes represent a struggle over scarce resources (elective or nominated posts) that pit men against women. Women are late entrants into the scene where the rules of the game have been set and without support by the parties for gender responsive rules of the game, women continue to play at a disadvantage. Party lists provide an avenue through which women's representation can be enhanced. It is disheartening that party lists pit women against women for gender top up and other nomination positions. This ensures that women remain in the periphery of the game squabbling over affirmative action posts but not challenging the citadel of mainstream politics where they are shut out despite favourable laws. We need more successful challenges by women of party nomination processes for competitive elective positions.¹⁰⁹

Five, affirmative action measures and mandatory political party quotas remain the most effective way to get women onto the political stage and ensuring gender equality in politics through them is too important to be left to political parties alone. There is need to use incentive measures and penalties for parties to adhere to gender equality provisions. Incentives could be in the form of increased funding for parties while penalties could be in the form of some disadvantage for parties that do not conform to the set rules.

Six, women continue to challenge the non-implementation of constitutional provisions such as the two-thirds gender principle. Through this challenge and in line with the feminist ideology that has guided this chapter, we hope that a new jurisprudence will emerge that fundamentally questions the absence of women in electoral politics and indeed the discrimination against women in this sphere through shifting positions in parties rather than just dealing with technical electoral rules that pit women against other women. Courts must be more vigilant in safeguarding the gains of the constitution if new path-breaking and transformative jurisprudence is to be developed in handling elections and electoral processes bringing in new measurements, new theories and new procedures that take on board new experiences and new challenges. The judiciary has great potential to transform gender relations, shifting social

109 See e.g. Mary Wambui, the National Assembly representative for Othaya constituency in 2013, supra note 26; HC Pet. No. 2 of 2013 - *Rozaah Akinyi Buyu vs. IEBC & John Olago Aluoch* (Petition challenging election of Member of the National Assembly for Kisumu West Constituency).

power by challenging ideologies that justify social inequalities and therefore lock out women and other groups from moving to the center.

Finally, not having mechanisms to implement the two-thirds gender rule is not a good justification for non-conformance with the rule. These mechanisms can be found as others have been for different aspects of the constitution. It is encouraging that women are questioning long held theories and perceptions of politics. It is now generally agreed that participatory democracy must take into consideration the voices of those who will be affected by the decisions being made. Conscious and deliberate steps must be taken to ensure that even the minorities or any other disadvantaged group are included in decision-making and mainstream development processes.

Related to this is the misplaced focus on the financial cost of bringing in more women. In our view, focus should shift to the loss that the country suffers by excluding women. One of the arguments for increasing women's representation in the elective positions is that they bring a different perspective to issues related to legislation, and management of resources among others.¹¹⁰The list of the KEWOPA Members of Parliament bills and motions in Parliament since 2013 is a testimony to the fact that this could happen.¹¹¹ It is notable from this list that the women in Parliament have focused on social economic rights provided for under Article 43 of the Constitution, which include rights to food, health, education and natural resources among others. Out of 17 bills/motions tabled by women, 6 are on health; 1 on food; 3 on education and information; 1 on persons with disabilities; 1 on youth; and 1 on county governments. Clearly, the focus is on bills that will benefit the whole family and community as well as those that are marginalised. The unrealised constitutional promise of the constitution will continue to hinder the effective and equal participation of the women's agency to ensure a transformative agenda for the country. The struggle continues.

110 W Kabira, *So Near Yet So Far*, a publication of American Scholarly Research Association (2016).

111 These bills and motions include: The Persons with Disabilities (Amendment) Bill, 2013; The Diabetes Management Bill, 2014; The Traditional Health Practitioners Bill, 2014; The In-Vitro Fertilization Bill, 2014; The Pharmacy Practitioners Bill, 2014; The Engineering Technologists and Technicians Bill, 2015; The Access to Information Bill, 2015; Reproductive Health Care Bill, 2014 (Sen. Bill No. 17); The Food Security Bill, 2014; The Universities (Amendment) Bill, 2014; The Employment (Amendment) Bill (Senate Bill No. 1 of 2015); The County Governments (Amendment) (No. 2) Bill, 2014; The National Youth Service Bill (Amendment) Bill, 2014; The Self Help Associations Bill, 2015; The National Hospital Insurance Fund (Amendment) Bill, 2015; The Natural Resources (Benefit sharing) Bill, 2014; and The County Library Services Bill, 2015, (KEWOPA).