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# THE QUEST FOR EQUAL GENDER REPRESENTATION IN KENYA'S PARLIAMENT PAST AND PRESENT CHALLENGES

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Published in: in Japhet Biegon ed., *Gender Equality and Political Process in Kenya - Challenges and Prospects* (Nairobi: Strathmore University Press, 2016), p. 39-66.

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# GENDER EQUALITY AND POLITICAL PROCESSES IN KENYA

*Challenges and Prospects*



Editor:  
Japhet Biegon

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

*Patricia Kameri-Mbote*

## 1 Introduction

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

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

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

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

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

A major theme that is evident in the definitions adopted on affirmative action is the fact that what is sought is the levelling of the playing field so as to ensure that equal opportunities are provided for all. This recognizes the fact that every person has the right to equal access to self-development<sup>3</sup> and as such this right must be respected. It has also been propounded that affirmative action programmes are important in ensuring the promotion of the welfare of members of the public because the available human resources are put into maximum use and thus waste is avoided.<sup>4</sup>

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

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

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

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

<sup>4</sup> Nickel JW, 'Preferential Policies in Hiring and Admission', [http://www.jstor.org/stable/1121772?\\_redirected](http://www.jstor.org/stable/1121772?_redirected) on 10 June 2014.

<sup>5</sup> Rawls J, *A Theory of Justice*, 1972, 53-54.

<sup>6</sup> Rawls J, *A Theory of Justice*, 1972, 53-54.

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

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

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

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

<sup>7</sup> Young M, *Justice and the Politics of Difference*, 1990, 116.

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

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

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

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

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

## 2 Gender representation: Some conceptual issues

### 2.1 Gender

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

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

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

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

<sup>14</sup> Clarion 'An Introduction to Gender, Law and Society: Constitutional Debate No. 11', 2001, 2.

<sup>15</sup> Smart C, *Feminism and the Power of Law*, 1989, 1991.

<sup>16</sup> Mackinon C, *Women's Lives, Men's Laws*, 2005, 70.

<sup>17</sup> Mackinon C, *Women's Lives, Men's Laws*, 2005, 70.

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

## 2.2 Feminism

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

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

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

<sup>19</sup> Mackinon C, *Women's Lives, Men's Laws*, 2005, 67.

<sup>20</sup> Mackinon C, *Women's Lives, Men's Laws*, 2005, 67.

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

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

<sup>23</sup> Firestone S, *the Dialectic of Sex*, 1970, 144-145.

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

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

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

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

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

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

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

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

<sup>29</sup> Wollstonecraft A, *Vindication of the Rights of Woman*, 1792, 30.

### 2.3 Law and the quest for gender equality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>48</sup> Article 27 (8) *Constitution of Kenya* (2010).

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

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

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

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

The number of women in top appointive positions in Africa has also risen as is evidenced by the rising number of women in cabinet and judicial positions.<sup>54</sup> Cape Verde has the highest number of women occupying ministerial positions in Africa<sup>55</sup> with nine out of its 17 ministers being female. This is second only to Finland which has 10 of its 16 ministerial positions occupied by women. South Africa, the second highest ranked in Africa has 15 women out of its 36 ministers.<sup>56</sup> Burundi, Guinea-Bissau, Rwanda, Tanzania are also among the top 20 countries globally.<sup>57</sup>

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

<sup>52</sup> 1249 UNTS 13; 19 ILM 33 (1980).

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

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

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

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

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

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

The quest for equality in the sphere of politics in Kenya has been long and winding. Phoebe Asiyo tabled a motion for affirmative action to increase women's participation in Parliament and local authorities to at least one third (33.3%) in 1997.<sup>58</sup> In the same motion, she also sought to have the level of public funding for political parties linked to the percentage of women candidates fronted by the party.<sup>59</sup> The motion was soundly defeated.<sup>60</sup>

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

<sup>58</sup> 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>)

<sup>59</sup> 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>)

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

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

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

<sup>63</sup> *The Constitution of Kenya (Amendment) Bill No. 32 2007*.

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

One would, therefore, have expected that with the promulgation of the 2010 Constitution, which includes a robust equality and non-discrimination provision in Article 27, these issues would be addressed once and for all. The ‘two-thirds gender rule’<sup>65</sup> and the call for measures of affirmative action<sup>66</sup> to deal with past discrimination were aimed at precisely the kind of situation that Asiyo, Mugo and Karua sought to address earlier without success. It is disheartening to note that increasing women’s representation in Parliament continues to be elusive six years after the promulgation of the 2010 Constitution.

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

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

<sup>65</sup> Article 27 (8) *Constitution of Kenya* (2010).

<sup>66</sup> Article 27 (6) *Constitution of Kenya* (2010).

<sup>67</sup> Articles 33 and 36 *Constitution of Kenya* (2010).

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

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

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

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

Kabira<sup>72</sup> has extensively documented women's struggles through the constitution review process underscoring the high as well as the low moments in the process. Significantly, the lowest moment was when the Proposed New Constitution of Kenya (2005 Draft Constitution)<sup>73</sup> was rejected during the 2005 referendum.<sup>74</sup> The deferral of the Kenyan dream for a new Constitution was also a deferral of women's dream for a gender equal society. As a participant in that process, the greatest fear was that a lot of ground that had been gained in the fight for gender equality in the constitution review process would be lost. It did not escape our attention that gender continued to be a most divisive issue.<sup>75</sup> The Committee of Eminent Persons appointed by the President in 2006 to advice on the way forward following the defeat of the 2005 Draft Constitution in referendum found that gender was one of the nine most contentious issues in the review discourse.<sup>76</sup> It is important to point that the gender provisions remained largely the same up to the 2010 draft that was accepted in a referendum in that year. Experience with the implementation of the provision on equal gender representation suggests that gender is still a most divisive issue and it is not sufficient that it is addressed unequivocally in the 2010 Constitution.<sup>77</sup>

#### 4 Gender and the Constitution of Kenya, 2010

The 2010 Constitution was hailed as a major landmark in the quest for gender equality. It has a very expansive equality and non-discrimination provision in the bill of rights<sup>78</sup> and is awash with provisions that deal with women's rights to land, inheritance, equal rights in marriage, to name a few. In

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

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

<sup>73</sup> Kenya Gazette Supplement No 63, 22 August 2005.

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

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

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

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

<sup>78</sup> Article 27 (4) *Constitution of Kenya* (2010).

the realm of women's representation in elective and appointive positions, the 2010 Constitution provides that '*not more than two-thirds of the members of elective bodies shall be of the same gender*'.<sup>79</sup> Kenya is also a signatory to international treaties that provide for equal rights of men and women in public life<sup>80</sup> and ratified CEDAW in 1985 in the run up to the Third Women's Conference that was held in Nairobi in the same year. Kenya also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)<sup>81</sup> after the promulgation of the 2010 Constitution. The Maputo Protocol is very progressive and includes socio-economic rights such as water, housing, sustainable development, and food security.

The 2010 Constitution also includes the right to public participation, equity, non-discrimination, and protection of the marginalised among the national values and principles of governance.<sup>82</sup> The 2010 Constitution also unequivocally and unambiguously provides for equality of subjects of law in the following terms: 'Every person is equal before the law and has the right to equal protection and equal benefit of the law'.<sup>83</sup> It goes on to elaborate that 'equality includes the full and equal enjoyment of all rights and fundamental freedoms'<sup>84</sup> and that 'women and men have the right to equal treatment'<sup>85</sup> and opportunities 'in political, economic, cultural and social spheres'.<sup>86</sup> This call to equality is further buttressed by the exhortation of the State<sup>87</sup> and other persons<sup>88</sup> not to directly or indirectly discriminate against any person on any ground. The listing of objectionable grounds on which discrimination may not be based is wide and includes: 'race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth'.<sup>89</sup> It also provides that to give full effect to the

<sup>79</sup> Article 27 (8) *Constitution of Kenya* (2010).

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

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

<sup>82</sup> Article 10, *Constitution of Kenya* (2010).

<sup>83</sup> Article 27 (1), *Constitution of Kenya* (2010).

<sup>84</sup> Article 27 (2), *Constitution of Kenya* (2010).

<sup>85</sup> Article 27 (3), *Constitution of Kenya* (2010).

<sup>86</sup> Article 27 (3), *Constitution of Kenya* (2010).

<sup>87</sup> Article 27 (4), *Constitution of Kenya* (2010).

<sup>88</sup> Article 27 (5), *Constitution of Kenya* (2010).

<sup>89</sup> Article 27 (4), *Constitution of Kenya* (2010).

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

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

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

<sup>90</sup> Article 27 (6), *Constitution of Kenya* (2010).

<sup>91</sup> Article 27 (8), *Constitution of Kenya* (2010).

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

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

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

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

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

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

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*<sup>98</sup> 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),<sup>99</sup> 98(1)(b), (c) and (d)<sup>100</sup> and Article 177(1)(b), which provides for

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

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

<sup>98</sup> Article 81 (b), *Constitution of Kenya* (2010).

<sup>99</sup> 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

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

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

**Table 3:** Female candidates and 2013 elections

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

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

## 5 Claiming the 'two-thirds gender rule'

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

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

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

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

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

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

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

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

<sup>105</sup> Article 97 (1), *Constitution of Kenya* (2010).

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

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

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

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

### 5.1 Case law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 5.2 Constitution amendments

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

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

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

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

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

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

There was a lot of lobbying against the Chepkong'a Bill, which was seen as a claw-back to constitutionally guaranteed rights. The result was the adoption of the TWG proposed Bill (the Duale Bill) by the Leader of Majority in the National Assembly who moved it for publication as a Government Bill. Some changes made to the Bill included: a sunset clause of 20 years; and the requirement that beneficiaries of the affirmative action seats had a maximum of two (2) terms.<sup>117</sup> In the meantime, the timeline for finding mechanisms to achieve the two-thirds gender rule was extended by one more year from the date set by the Supreme Court to 27 August 2016.<sup>118</sup>

The Duale Bill<sup>119</sup> was published on 24 July 2014. Its 1<sup>st</sup> reading was on 30 July 2015. It was introduced for 2<sup>nd</sup> reading on 22 March 2016, and debate thereon finalised on 19 April 2016.<sup>120</sup> From discussions in the National Assembly, the passage of the Bill seemed to be a done deal. Women were, however, aware that they could not take anything for granted. A lot of lobbying was done to marshal the requisite numbers on the day of the vote. The Bill needed the support of 233 MPs. Unfortunately, when it was put to the vote on 28 April 2016, only 195 votes were cast in its favour, 38 votes short of the constitutional threshold. The Speaker of National Assembly directed a second vote within five (5) days, on 5 May 2016. Although the requisite quorum was not attained on this day, the Speaker still directed that a vote be taken; and the Duale Bill garnered 179 votes whereupon it was stated to have lapsed. We are now back to the drawing board to search for the path towards a gender equal political field. Clearly, this is not going to be attained easily if the happenings in the National Assembly are anything to go by. Female MPs reportedly kept

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

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

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

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

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

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

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

## 6 Conclusion: The struggle continues

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

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

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

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

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

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

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

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

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

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

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

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

This book focuses on Kenya's experience in its determination to ensure gender equality in political processes and specifically in Parliament. Kenya's 2010 Constitution requires the State to 'take legislative measures and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender'. Kenya has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). Under these frameworks, Kenya has undertaken to take specific positive action to promote the equal participation of women in politics and to ensure increased and effective representation and participation of women at all levels of decision-making.

Against this background, this edited volume examines the status of implementation of affirmative action measures, including the 'two-thirds gender rule', and the factors hindering increased and effective representation of women in Kenya's political processes. The book is a product of the 2015 Annual Jurists Conference organized by the Kenyan Section of the International Commission of Jurists from 24 to 27 November 2015, in Ukunda, Kenya.



ISBN 978 9966 054 14 2



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