

UNIVERSITY OF NAIROBI



SCHOOL OF LAW

A DISCUSSION ON THE IMPLICATION OF ARTICLE 123 (4) OF THE KENYAN
CONSTITUTION 2010, ON EFFECTIVE PARTICIPATION OF WOMEN IN THE SENATE

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LIST OF ABBREVIATIONS

AECID- Spanish Agency for International Development Cooperation

CEDPA- Centre for Development and Population Activities

CKRC-Constitution of Kenya Review Commission

IDEA- International Institute of Democracy and Electoral Assistance

FEMNET- National Council of Women of Kenya and Africa Women's Development and
Communication Network

KEWOSA-Kenya Women Senators Association

NACOSTI-National Commission for Science Technology and Innovation

DECLARATION

I Manuela Kinyanjui, do hereby declare this thesis to be my original work and that it has not been submitted elsewhere or is not due for submission for a degree in any other University.

Signature..... Date

This thesis has been submitted with my approval as the University supervisor.

Dr Agnes Meroka

Signature... .. Date

CHAPTER ONE: AN OVERVIEW OF WOMEN IN POLITICAL LEADERSHIP IN KENYA

INTRODUCTION

The object of this essay is to explain as clearly as I am able grounds of an opinion which I have held from the very earliest period when I had formed any opinions at all on social political matters, and which, instead of being weakened or modified, has been constantly growing stronger by the progress reflection and the experience of life. That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.

-John Stuart Mills¹

Historically the position of a woman in society world over was more evident in social life.² Her position in the political sphere was unheard of. As Busia wrote, most if not all communities marginalized women in communal decision making in their patriarchal societies and the trend continues in the present day.³ Women have both a right and an obligation to active participation in political leadership.⁴ Women continue to aspire to leadership positions in all spheres of governance both in the public and private sectors with a feminism that is “political, pragmatic,

¹John Stuart Mills, *The Subjection of Women*,(1869) pp1

² K.A.Busia, *Africa in search of Democracy* (London: Routledge & Kegan Paul 1967) pp478

³ *ibid*; See also Gideon-Cyrus M. Mutiso / S.W. Rohio *Readings in African Political Thought*. (ed, London: Heinemann, 1975) pp 476

⁴ Nyokabi Kamau, ‘Women and political leadership in kenya’, (Heinrich –Boll Stiftung,2012) pp5-15

reflexive and group-oriented”.⁵ Great strides have been made in the political realm and women’s participation in the freedom struggles and democratic processes of many African countries has been notable.⁶

The Republic of Kenya promulgated a new Constitution in 2010 that provides for affirmative action under article 27(8) where the state is required to take legislative and other measures to ensure that no more than two thirds of the members of elective or appointive bodies are of same gender. This is in recognition of the historical injustices that women have experienced and which make it difficult for them to compete equally with men.⁷ Despite having a progressive Constitution in place serious and persistent obstacles still hinder the advancement of women and their participation in political decision making processes. One underlying problem for women has been the difficulty in dealing with the inherent patriarchal structures that pervade the lives of people, the processes of the state and the party.⁸ This perception has pervaded the Kenyan society to the point of the masculine view being considered the right view to the exclusion of all other perspectives. In what Anne C. Scales⁹ calls the ‘the tyranny of objectivity’, the near metaphysical perfection of the male point of view is universally accepted. To the point where its portrayal is exercised consensually and its supremacy taken as the paradigm of order; even more

⁵ G. Mikell, *African Feminism: Towards a new politics of representation* (Feminist Studies Inc Feminist Studies, Vol. 21, No. 2 (Summer, 1995), [405]. See also Josephine M. Kiamba, ‘Women and leadership positions: social and cultural barriers to success.

⁶ *Ibid*; See also G. Mikell, *African Feminism: Towards a new politics of representation* (Feminist Studies Inc, Feminist Studies, Vol. 21, No. 2 (Summer, 1995), [407]. 1995). In the text she is quoted as saying, “African women took strength from the fact that their participation was essential if their countries were to end the colonial experience and achieve independence. “

⁷ Cf n3 atp4-6, G Mikell, “However, after independence, male suppression of African women's political autonomy increased, despite the contributions women had made to nationalist politics and despite state claims to equitable approaches in education, policies, and laws”

⁸ *Supra* cf Kiamba

⁹ Anne C. Scales, *The Yale Law Journal*, Vol. 95, No. 7 (Jun., 1986), pp. 1376-1377

absurdly, the exercise of that order has come to be Constitutionally accepted as the definition of legitimate affirmative action.¹⁰

Following the general elections held on 4th march 2013 it is alarming to note that no woman was elected to the Senate; it was only due to affirmative action provisions under article 98, that 16 women were nominated by political parties to the Senate. The participation in decision making of the nominated senators who in the current Senate are all women is limited by Article 123(4) of the Constitution which states that each county shall have one vote to be cast on behalf of the county by the head of the county delegation who in this case are the is the elected senators. In his absence, the head of the delegation must assign another person to vote on his behalf. This, in effect, relegates the nominated senators to substitutes in decision making as the meaning of a represented constituency as portrayed by Article 97 (b)¹¹ does not afford the nominated (women) senators a province to pass law for. Their existence through party nomination leans more heavily towards political agency by the nominating parties than women empowerment.

This study therefore aims at examining the challenges currently facing women leaders in the Senate with regard to their role in decision making and offer tangible solutions. This Senate being the first under the new Constitution of Kenya 2010¹² currently consists of 68 representatives that is;- 47 elected members from the counties (all men), 16 women nominated by political parties, 2 youths, 2 persons with disability and the speaker.¹³

¹⁰ C. MacKinnon, *Feminism, Marxism, Method, and the State: toward Feminist Jurisprudence*, 8 *Signs* 635, 638 (1983) (footnotes omitted) [hereinafter cited as MacKinnon, *Toward Feminist Jurisprudence*]. The article's a sequel to C. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 1 *Signs* 515 (1982) [hereinafter cited as MacKinnon, *An Agenda for Theory*].

¹¹ The National Assembly consists of forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency

¹² Promulgated on 27 August 2010 and brought into effect by legal notice no 133 of 2010

¹³ Constitution of Kenya, Article 98 on membership of the Senate

Further, the study will look at the Kenyan situation as compared to other countries that have applied affirmative action successfully and borrow best practices. The study's objective is to come up with a way forward that ensures that women are not only represented in the Senate but also fully participate in decision making and ultimately in the development of our nation.

1.2 A contextual background; affirmative action and the inclusion of women in political leadership positions

This section aims to cite the position of women in Kenyan societies' leadership prior to independence, during colonialism and to show how the subjugation continued post-independence. In so doing, the brief history will serve to introduce affirmative action as a relatively new concern to leadership in society. Starting from its origins in the civil rights revolution in the United States, all in an effort to show how both backgrounds justify affirmative action.

Before the colonialists came to Kenya the society was patriarchal.¹⁴ African men made the decisions in the society and set the rules that the community was to live by.¹⁵ Few women occupied positions of power. This was mainly because few societies in Kenya were matriachial, Two instances come to the fore, one folklore and the other a fact in existence. The Agikuyu

¹⁴ Catherine Kaimenyi, *An Analysis of Affirmative Action: The Two Thirds Gender Rule in Kenya*(2013)

¹⁵ Ibid; See also John Stuart Mill, *The subjection of women* (2006 Electronics Classics Series, <http://www2.hn.psu.edu/faculty/jmanis/jsmill/js-mill-subjection-of-women6x9.pdf>) Accessed on the 12th February 2014. p7 "Laws and systems of polity always begin by recognising the relations they find already existing between individuals. They convert what was a mere physical fact into a legal right, give it the sanction of society, and principally aim at the substitution of public and organised means of asserting and protecting these rights, instead of the irregular and lawless conflict of physical strength. Those who had already been compelled to obedience (women, who were the physically weaker sex)became in this manner legally bound to it"

society was the former and the Mijikenda community the latter.¹⁶ British Policy when administrating the colonial districts further entrenched the marginalization of women leaders by reinstating collaborating patriarchs.¹⁷ A trend that was supported by the turn of events during the negotiations for independence in Kenya¹⁸ The marginality of women in political leadership and their continued exclusion in post-independence political decision making, therefore, is a product of a history of the patriarchal state in Kenya. Women's access to leadership has been hindered by discrimination and stereotyping¹⁹ and affirmative action as envisaged in the Constitution 2010 has sought to address this problem.

Affirmative action as we know today is a concept not more than fifty years old.²⁰ It gained prominence at the dawn of a new era in civil rights reform most notably in the United States of America. Then, in the face of the nation's tumultuous past of racial maltreatment the ideology of reform took a more proactive role and sought to right some historical injustices.²¹ Affirmative action generally means a deliberate move to reforming or eliminating past and present discrimination using a set of public policies and initiatives designed to help on the basis of

¹⁶ Elizabeth Migi-Ndua, Mekatilili Wa Menza: Woman Warrior, (September 6, 2000).

¹⁷ For instance we see Waruhiu Wa Kung'u's seniority during colonialism came as a direct result of collaboration with the colonial authorities. See also Evanson N. Wamagatta, 'African Collaborators and their quest for power in colonial Kenya: Senior Chief Wauhiu wa Kung'u's rise from obscurity to prominence, 1890-1920' <http://www.jstor.org/discover/10.2307/40282491?uid=3738640&uid=2&uid=4&sid=21104214467801> Accessed on 24th September 2014

¹⁸ Wendy Stokes in Chapter 12 of her book, '*Women in Contemporary Politics*' shows that this perception is due in a large part to the conservative nature of the British Political ruling party. This is deductible from the fact that it was the Tories that were power during the period of the Lancaster Conference and thus could directly influence the incoming leadership's perspective on women in high office in the incoming leadership of Kenya.

¹⁹ "A key structural barrier to women's leadership is the lack of legal equality...until every national legal system ENFORCES women's rights on par with men...violence and intimidation will continue to be the ultimate barrier to women's leadership at all levels of society" Caroline Sweetman, p4 *Women and Leadership*, ([ed] Oxfam GB 2000); See also Josephine Kiamba, 'women leadership positions: social and cultural barriers to success(2008)

²⁰ William M. Leiter, Samuel Leiter; *Affirmative Action in Antidiscrimination Law and Policy: an overview and synthesis* (2ed State University of New York, Albany 2011) ch1

²¹ *Ibid* cfp4

colour, creed, geographical location, race, origin and gender among others.²² Affirmative action was meant to bridge the glaring disparities between men and women in political representation.²³ It takes into account under-representation and insignificant occupation of positions by some minorities in the society.²⁴ The underlying motive for affirmative action is the principle of equal opportunity, which holds that all persons have the right to equal access to self-development.²⁵

We also have a quota system in the education sector. In a study by Dr Lillian Omuluka, the scholar notes that gender quotas have been set up as a management strategy in the education sector to great effect in that the teacher ratios in active service delivery have remained fairly at par notwithstanding slightly more males graduating from teacher training institutions than females. As an expert on gender mainstreaming in the education sector, she notes in her paper²⁶ that the exercise is mainly carried out at an executive national level; this is strikingly similar to the Constitutional provision in Article 98 commonly known as the one-third rule.

One of her major proposals for the positive evolution of this trend is also to localize the gender mainstreaming boards and cascade them down to the specific institutions. One may draw a parallel between this and the situation in the current Senate whereby there is identified a pressing need to give effect to the female population in Senate by allowing them to legislate fully in the Senate.

²² Catherine Kaimenyi, *An Analysis of Affirmative Action: The Two Thirds Gender Rule in Kenya*(2013)

²³ Ibid; See also John Stuart Mill, *The subjection of women* (2006 Electronics Classics Series, <http://www2.hn.psu.edu/faculty/jmanis/jsmill/js-mill-subjection-of-women6x9.pdf>) Accessed on the 12th February 2014.

²⁴ Ibid, See also William , Samuel ibid pp7

²⁵ ibid

²⁶ ‘Gender Policy as a Management Strategy in Education’, < http://ems.uonbi.ac.ke/sites/default/files/cees/disteducation/ems/Dr_Lillian_journal.pdf> Accessed on 23rd September 2014.

In Kenya, affirmative action in politics mainly takes a gender perspective.²⁷ Several women members of parliament over the years unsuccessfully tried to push for affirmative action laws.²⁸ Honourable Phoebe Asiyo tabled a motion on affirmative action to increase women's participation in leadership and decision making in parliament and local authorities to at least 33% but it was defeated.²⁹ From the first general elections held in Kenya to the most recent of 2013 men have been the majority both in parliament and Senate. There was not a single woman member of parliament in the first legislature of 1963. This has improved slightly. There was 4.1% women representation in 1997, 8.1% in 2002 and 9.8% in 2007. Even with the 2010 Constitution providing for the two-thirds gender rule, the 2013 general elections saw only 16 out of the 290 elected women in parliament.³⁰

The Constitution of Kenya stipulates strategies of bringing affirmative action to bring women to the fore.³¹ It can be termed as a milestone in the fight towards gender equality as it opened up spaces for women's participation in decision making processes. Various Constitutional articles institute the ethics of good governance such as Articles 27(8) which makes it illegal for any discrimination based on the gender and 81(b) which institutes the 'one-third rule' of the Constitution of all elective bodies. Article 10³² lists the various values and principles to include

²⁷ Catherine Kaimenyi, *An Analysis of Affirmative Action: The Two Thirds Gender Rule in Kenya*(2013)

²⁸ *ibid*

²⁹ Wanjiku Kabira, Elishaba Kimani, *The Historical Journey of Women's Leadership in Kenya*, *Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS)* 3(6) pp 843

³⁰ *ibid*

³¹ *ibid*

³² 10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) sharing..of power

(b) equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; women being considered a marginalized groups as per article 21.

democracy, participation of the people, non-discrimination and the protection of the marginalized as a precursor to the provisions in 27 and 98.

The current Constitution recognizes women's political rights in all institutions of governance including political parties and other organs of decision making.³³ On political representation, the Constitution creates three representative houses which are the National assembly, the Senate and the county assembly.³⁴ The percentage of women in the Senate is guaranteed thanks to the one-third affirmative action clause in the Constitution 98 (1) (b), with eighteen women in the current Senate.

Affirmative action has ensured that women participate in the Senate however; article 123(4) of the Constitution creates a problem since it limits some voting rights to elected senators only. This limitation essentially bars women in Senate from participating fully in the legislative process. Although this provision seeks to give counties equal voting rights, it weakens the affirmative action clause which informed nominations of women to the Senate. The provision clearly did not foresee a situation where no woman would be elected to the Senate yet this is expected in a patriarchal society such as the Kenyan society where historically women rarely get elected. Further, the Senate voting rules entrench this segregation by holding that each county forms one delegation (hence vote) on matters that affect counties, regardless of whether there are nominated (women) senators from the same county. The voting right is delegatable but the delegate may only vote in consensus with the rest of the members of the delegation, effectively stripping the nominated senator of autonomy in vote casting.

³³ Article 43 on economic and social rights and article 38 on political rights

³⁴ Article 93(1) which creates the National Assembly and the Senate and Article 176(1) which creates the county Assembly

Women bring a different perspective in decision making and also advocate for women and children issues.³⁵ This thematic concern has been canvassed at length throughout the *corpus juris* of feminism as the seemingly counter-acting ethics of rights and care.³⁶ If this opportunity is denied then women will continue to occupy a lesser position in society and this undermines the spirit of the new Constitution which promotes both equality and equity.³⁷

Standing order 174 of the Senate establishes the Rules and House Business Committee. The Committee comprises of the Speaker as the chair, the majority and minority leaders and not more than nine other senators, reflecting the relative majorities of the seats held by each of the parliamentary parties in the Senate who shall be nominated by the parliamentary parties and approved by the Senate *at the commencement of each session*.³⁸ One of the mandates of the Senate's Rules and House Business Committee is to consider and report on all matters relating to the Standing Orders and may propose amendments to the Standing Orders and any such amendments shall upon approval by the Senate, take effect at the time appointed by the Senate. That except as otherwise provided in the Constitution, in any matter in the Senate affecting counties-each county delegation shall have one vote to be cast on behalf of the county by the head of the county delegation or, in the absence of the head of the delegation, by another

³⁵ Nyokabi Kamau, 'Women and Political Leadership in Kenya, Ten Case Studies' (2010); See also Hansard records on 23rd April 2013, Sen Kainanze Daisy points out youth unemployment at 70% and recommends the continued separation of youth and women funds for effectiveness.

³⁶ Anne C. Scales explores the probable causes of the ethics of rights and care that are prevalent in males and women, p1382-1388 *The Emergence of Feminist Jurisprudence: An Essay*, (Jun., 1986), Vol. 95, No. 7, The Yale Law Journal, <http://www.jstor.org/stable/796562>. Accessed on 24/09/2013 08:48.

³⁷ C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1962)

³⁸ The current membership consists of Senators: David Ekwee Ethuro, Kithure Kindiki, Moses Wetangula, Beatrice Elachi, Johnstone Muthama, Beth Mugo, John Lonyangpuo, Charles Keter, Kiraitu Murungi, James Orengo, Janet Ong'era, Agnes Zani.

member of the delegation designated by the head of the delegation; the person who votes on behalf of a delegation shall determine whether or not to vote in support of or against the matter, after consulting the other members of the delegation; and the matter is carried only if it is supported by a majority of all the delegations.

The consequence of these provisos is that the nominated senators rarely get to freely, actively and directly exhibit and practice the ethics of care since the only time they get the chance to vote they are bogged down by party interests.³⁹

This study will therefore concentrate on the effect of article 123(4) of the Constitution and its effect of limiting participation of women in decision making in the Senate and will seek strategies that address these problem. Seeing as Kenya is a signatory to many international instruments such as the Convention on all Forms of Discrimination against Women (CEDAW)⁴⁰, the Beijing Declaration and Platform for Action, the Millennium Development Goals (MDG's)⁴¹, the UN Security Council Resolution 1325 (UNSR 1325)⁴² among many others and it is thus bound to promote gender equality and the participation of women in all decision making organs.

1.3 Statement of the Problem

³⁹ There may be the tendency to counter this argument by saying that Section 69 (c) of the standing affords every senator a vote. In the face of this the question persists, aren't matters concerning counties not in the province of nominated senators? The position leads on the assumption that nominated (women) senators are political agents made women to fulfill a criterion fulfilled as a formality and not for the true purpose of legislating and furthering the women and children's agenda.

⁴⁰ Article 10, Ratified by Kenya on 3 September 1981

⁴¹EFA Global Monitoring Report 2013/4: Teaching and Learning: Achieving equality for all
<http://unesdoc.unesco.org/images/0022/002256/225660e.pdf>

⁴² It was adopted by the U.N security on 31 October 2000.It stresses the importance of women's equal participation and full involvement in all efforts for the maintenance and promotion of peace and security.it urges all actors to increase participation of women and incorporation of gender perspectives in all U.N peace efforts.

The Constitution 2010, establishes the Senate which plays an important role of legislating matters concerning counties. With the devolved governments now in place Kenyans expect to see development right to the local level. Senators therefore play an important role as the decisions they make will affect Kenyans directly. The role of Senate is to represent the counties and participate in the law-making function of parliament by considering, debating and approving bills concerning counties. 47 men were elected to the Senate, no woman was elected but due to affirmative action 16 women were nominated by their political parties according to article 98(b).

Article 123 however limits the decision making power of nominated members by granting voting rights to elected members only. This creates a problem since no woman was elected to the Senate. The 16 nominated senators who are all women thus bring motions and contribute to them but cannot vote and fully participate in the legislative process.⁴³ This in effect means that women senators have no substantive capacity to exercise the ethics of care since they cannot vote in the Senate.

The study therefore seeks to establish what strategies could be adopted to ensure the women senators participate fully in the legislative function of the Senate. It seeks to remedy the limitation created by article 123(4) and section 68 of the Senate Standing Orders.⁴⁴

⁴³ This is in contravention with the CEDAW preamble, "discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society

and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity"

⁴⁴ All senators registered as voters form a single delegation hence one senator's vote

The study also seeks to understand the challenges facing nominated members in their participation in the Senate by identifying the means through which the pragmatic measures may be adopted in order to allow nominated senators voting rights on a permanent basis.

The research attempts to shed light on the particular challenge facing women in the Senate that is their 'substitute' status and lack of a clear juridically defined province to represent that is not reliant on political agency. This objective may be achieved through problematizing the enhancement of women senators' participation in senatorial decision-making and show how the Senate speaker's statutory position and residual power could be used to address the matter at hand.

1.4 A justification for the conduct of the study

Affirmative action is not just about the numbers but also meaningful participation in decision making. It's not in dispute that women bring a different perspective in leadership and their participation is necessary and needed to put women's issues on the political agenda. This study is important because it looks at the participation of women in the Senate and the role they play. The study thus will focus on offering strategies that promote equal participation of members in the Senate. It aims at looking at how other countries have promoted women's participation in leadership and thus learn from them.

Meaningful participation of women leaders in the Senate is likely to be undermined if article 123(4) is not implemented to include women. This study will be useful to senators in understanding their role as leaders and their duty to ensure there is participation by all members.

It will also be helpful to policy makers who must implement gender neutral policies and the public who must understand the importance of involving women in decision making processes.

A detailed look at the Senate's Hansard from April 2013 to date (7th March 2014) shows that women senators have been reduced to contributing to adjectival matters instead of the 'concrete' matters and motions that characterise legislative action in Kenya.

A clear example is the contribution Senator Beatrice Elachi made on the discussion on adjourning the Senate to allow senators to attend the official opening of the county assemblies.⁴⁵

She stated that it was important for them (the male-dominated Senate) to remember that the counties' Speakers were sworn in and yet women who were to be nominated were not in the House. She therefore stated that she would want to see a House that acts as the overseer of the counties in that respect.

On Wednesday 26th February 2014, Senator Ongare gave a notice of motion on a bill providing for the education of deceased officers' children up to university while on duty on the national government's tab. The same had to be brought on behalf of an elected senator since the nominated senator may not give notice of motion on matters concerning counties as they would be required to vote on it.⁴⁶ This shows the inability of women senators to make the ethics of care at the specific counties. These are but a few examples that go to show that women in the Senate

⁴⁵Senate Hansard, Senator Beatrice Elachi, 17th April 2013.

⁴⁶ *Ibid*, The matter was reduced to a call to the national government for a response since article 123 (4) and section 68 of the Senate rules prohibit the women senators in the first Senate from voting on county matters. A fact that is evidenced by act of the motion having to be introduced on behalf of a progressive elected senator instead of the woman senator in her own right as a parliamentarian.⁴⁶ The bill has not received support from the majority of male-dominated Senate at the time of this research and remains as a classical case of the ethics of care failing because of the inability of women senators to vote as per article 123 (4) and political will to implement the ethics of care by the male –dominated Senate

identify gender-specific issues along the ethics of care that fail more often than not due to the inability to substantively legislate on the matters.

1.5 Theoretical Framework

The theoretical framework will acquaint the reader with liberal feminism as it has inspired the women movement in agitating for substantive political space. In so doing, bring to light the distinction between the formal equalities of opportunity that has been achieved so far and the substantive equality of opportunity that is not fully realized; and which inspires this paper. I will also look at the African feminist way of thinking and how it can be applied in the current situation. In this way, the solutions to the thesis' problem will be contextualized to the Kenyan-African-setup.

1.5.1 Liberal feminist approaches in the inclusion of women in leadership in Kenya

This section identifies the liberal school of feminist thought as being central to this thesis. The school of liberal feminist thought is relevant in as far as it gives a logical edge to the women movement in the republic since independence. Liberal feminism is illustrated in the duration of women's push for representation in political representative bodies and in the end result of women senators being sworn in to achieve a formal equality of opportunity.

Susan Magerey characterized feminist ideologies into 'waves' or phases, each of which stood for a particular aspect of feminism. The first wave is generally agreed to have been a struggle for universal suffrage-the political rights for women.⁴⁷ We see Linda J. Nicholson speak of the

⁴⁷ Susan Magerey, p151, 'Passions of the First wave', University of New South Wales Press Ltd (2001)," See also Anhtje Kahle, 'First Wave of Feminism in Politics and Literature', p3, seminar paper-Grin Verlag, 2005, http://books.google.co.ke/books?id=siZaLU_BnYoC&printsec=frontcover&dq=first+wave+feminism&hl=en&sa=

second wave as being based on drive for more freedom of the women with her body⁴⁸-social issues such as reproductive rights and her rights as a unique creature from men folk. Betty Freidan was instrumental in delineating the systematic denial of women rights over their own bodies. The third wave of feminism concerns itself with creating a meritocracy in society where the sex of a person should not be a factor in granting an equality of opportunity-as theorized by Stacy Gillis et al.⁴⁹

Interplay between the first and third waves of the feminist movement is more evident as the leading liberal theory informing this research takes shape. The first wave was characterized by a clamour for suffrage, in this instance that can be construed as the clamour for women nominated senators to vote in parliament on county matters. The third wave of feminism dissociates the woman from all that makes one feminine and the other masculine and basically advocates for a meritocracy that should allow all members of a particular society equal opportunities.⁵⁰ With regards to this study, that could be construed as a theory underscoring the need to have women in the Senate voting on all matters pertaining to the Senate's mandate.

1.5.2 The theory of Liberal feminism and its effect on representation of women in Kenya

The theory of liberal feminism as originally propounded by John Stuart Mill holds that it is unjust to deny women certain roles in society based on the simple ingrained presumption that other members of the society are better suited to perform. Yo Jackson deduces any reasons exist as to why women may be arbitrarily sidelined from public office, some of them being: sex⁵¹,

X&ei=BUk5VO7UCsnsaJrrgpgM&redir_esc=y#v=onepage&q=suffrage&f=false, Accessed on 30th September 2014

⁴⁸ Linda J. Nicholson(ed), 'The Second Wave, a Reader in Feminist Theory, (vol 1), (NY Routledge-1997)

⁴⁹ Stacy Gillis, G Howie, R Munford,' Third Wave Feminism;a critical exploration.' 2007

⁵⁰ Prof Martha Rampton, <http://archive.pacificu.edu/magazine_archives/2008/fall/echoes/feminism.cfm>, Pacific University Accessed on 25th September 2014.

⁵¹ Yo Jackson, 'Encyclopedia of Multicultural Psychology', Sage Publications, (Kansas,2006)See also

proximity to the male hegemony in current positions of authority; and these are what this research shall seek to address. The chances that are available for the advancement of people in society ought to be presented to all the members of society in such a manner that everyone competes and performs based on a uniform framework of targets and benchmarks.⁵² Therefore, all the exercises of society be undertaken on an agreed balance of fairness; with the assessment of fitness to the purpose being based solely on set legal and equitable procedural basis.⁵³

The primary object of the theory of liberal feminism is to promote the equality of genders in the public sphere. In a nutshell, this can be construed to include an equality of opportunities in the public sphere both in the formal and substantive sense of the word. In refining the discussion, one must make the distinction between formal and substantive equality of opportunity. The purpose of this incursion is to further delineate the province of this paper: to show that indeed it is the theory of substantive equality of opportunity that informs this study.

1.5.3 The liberal feminist theory of formal equality of opportunity in Kenya: how liberal feminist ideals have influenced women's political participation in Kenya and their shortcomings.

According to the John Gardner in his explication of liberal theory, formal equality of opportunity requires that positions and posts that confer privileges should be open to both sexes. In such a context meritocracy prevails and the most qualified person (according to the appropriate criteria) is offered the position. The notion of formal equality has been central to the liberal feminist

⁵² John Gardner, 'Excellence: Can we be equal and excellent too?', (New York, 1995) p47

⁵³ "...when equality of opportunity prevails, the assignment of individuals to places in the social hierarchy is determined by some form of competitive process, and all members of society are eligible to compete on equal terms." The author further distinguishes formal and substantive equality of opportunity by holding that formal equality between the sexes can only guarantee the position in power while substantive equality goes further to ensure that those women in the positions of power actually exercise the power. Richard Ameson, 'Equality of Opportunity', *Stanford Encyclopedia of Philosophy* (Fall edn, 2009) < <http://plato.stanford.edu/entries/equality-of-opportunity/>> Accessed on 28th August 2014

movement since independence. It is detailed in the various pushes for representation by women at the national level. These efforts though founded on the constant theory of equality, ebb and flow with election periods hence the constant political undertones to their exercise.

In order to put in context the theory as it applies to the nominated women members of the Senate, it is important to appreciate the theoretical clout of formal equality of opportunity in Kenyan leadership. The net effect of elaborating on this theory is to show its inhibitive effect on women senators' practice of their duties as senators. More importantly, to show the inadequacy of having women seen to be providing the ethics of care on a political platform from Constitutional allowances; yet wield no substantive powers.

Prior to the adoption of systematic lobbying and aggressive positioning by women organizations in the Constitutional review process, equality of opportunity was agitated for by informal lobbying in the form of pressure and prevailing upon individuals.⁵⁴ Phoebe Asiyo is on record as holding that the women of Kenya first started agitating to be represented in Parliament one year before President Jomo Kenyatta came out of detention. She highlighted that Hon. Priscilla Abwao led the team composed of the then Maendeleo Ya Wanawake Chairperson Phoebe Asiyo as well one woman from every province, to visit Kenyatta in detention. Their main mission, she said, was to lobby Kenyatta to include the women in the first parliament as well as in the cabinet. "He did allow the women through the women's movement to make their voices heard on matters of development programs and policies. They were able to push for new ideas especially on issues touching on women and children."⁵⁵

⁵⁴ Heinrich Boll Stiftung East & Horn of Africa, 'Representation of Women in Political Leadership: Taking Stock' (Gender Forum: Nairobi 23rd September 2013) p.3

⁵⁵ *Ibid.* See also G F Gaus, Chandran Kukathas (1993, ed), 'Handbook of Political Theory'. Where Rawls gives credence to women also participating in leadership as a form of distributive justice; he holds that the social and

This approach saw the peaks of ‘agitation’ being election years thus the perceptible increases in activity around these periods since their object was to move towards a liberal equality of the sexes. No substantive gains were made after election fevers reduced and women’s effective participation in decision making remained in the backburner of successive parliaments. In 1991, Prof Amb. Maria Nzomo in an address on her paper, ‘Women in Politics and Public Decision Making’,⁵⁶ urged women to organize the push for women’s affirmative action rights into an autonomous umbrella organization to push for the semblance of equality in the opportunity in parliamentary membership. On this note a 1992 resolution from a national convention saw a network of many different organizations mobilise around key issues identified in the 1992 National Convention, chief among them being a 30% parliamentary representation for women. In the article, ‘The Historical Journey of Women’s Leadership in Kenya’, the feminist objectives were enunciated as the institutional framework for gender mainstreaming which resulted in the establishment of a national gender commission, a ministry in charge of women affairs, children and social services, a presidential directive for 30% women’s representation in public service, establishment of women’s fund and publication of the Sexual Offences Act, among many other gains. As had come to be the norm, the elections in that year yielded intangible results for the equal opportunity cause. This is because no parliamentary or Constitutional measures were taken to cement the inequality or at least bridge the gap in inequality. The political will at the time was focused on other governance issues deemed ‘more pressing’.

1997 brought with it another election year, and with it increased agitation for legally substantiated rights to equality. However, the movement had changed tact, instead of what had

economic inequalities imposed by leadership exist to satisfy and enforce two conditions- to ensure fair opportunities for advancement and to give the greatest benefit of the social contract to the least advantaged.

⁵⁶ 1991, London James Currey

come to be perceived as habitual ‘begging’ of attention at rallies, Hon. Charity Ngilu and Phoebe Asiyo-then members of parliament- successively moved the first ever motions in Kenya on Affirmative Action for women’s representation in elective positions. The latter’s motion called for parliament to increase the number of women parliamentarians by eighteen. At least two women would be nominated from each province, and an extra two would be sourced from the Rift Valley. The motion’s aims were to introduce a legislation to require all registered political parties to nominate at least one third women candidates to participate in National and Local Authorities elections; introduce an amendment to the Constitution of Kenya to provide for two parliamentary Constituencies exclusively for women candidates in each administrative province of the Republic (as there were 8 provinces) and; to introduce appropriate legislation to provide funding for all registered political parties and wherever public funding was possible, the amount of funding be linked to the percentage of women candidates fronted by each party.⁵⁷ All these efforts were geared towards instilling a culture of recognizing women as leaders capable of assuming the hitherto ‘masculine’ task of legislating.

The discussion surrounding the bill sought to allay fears that passing the bill into law would destabilize the status quo that the ‘merit based’ public service had created from independence. Honourable Asiyo in her address gave the example of Tanzania’s passing of a bill almost identical to one shot down in Kenya that enjoyed a measure of success.⁵⁸

⁵⁷ Kabira, W. M. & Nzioki, E. A. (1994). Celebrating Women’s Resistance. Nairobi, Kenya: New Earth Publications.

⁵⁸ *Ibid* “Hon. Phoebe Asiyo, in a brief historical perspective of the Women’s movement in the sixties, used the example of the Marriage Bill, which she said was first tabled in the parliament in 1968. After two years of going around the country through the commission that had been set up by the late H.E Jomo Kenyatta. She observed that despite the Bill having good provisions it was defeated. She intimated that two years after that, Tanzania took the same Bill and enacted it into law. For this, she said that Kenya need to only come up with great ideas but also implement them. She added that that is the only way to societal transformation.”

The Hansard shows members of parliament weighing in on the specifics of actualizing the concept of affirmative action. For instance, Kiraitu Murungi weighed in thus, “Introduction of a quota system to be established at political party level so that one third of all the candidates for civic and parliamentary elections put forward by political parties were women. He went further to explain about the two seats for women in each province and funding for political parties. He argued that he supported the motion within the framework of Constitutional and administrative reforms that were seeking for better governance in this country”.⁵⁹

Opposition to the motion was staunch with the then Minister of State, Office of the President went on record on the Hansard as explaining that, “there was no need for this motion because male MPs represented everybody women and men and that there was already one assistant minister for culture at the time who was a woman. He noted that women were doing a wonderful job bringing up children which was a very important role and, therefore, those who had time and energy to struggle could do so. The Constitution did not prevent women from coming to parliament. In other words, women needed to leave some of these things to nature; leave the natural force of political evolution to come slowly; and that because of our cultural setups, time was not ripe for Affirmative Action.”⁶⁰ In other words, there was no inequality occasioned by denying women the opportunity to participate in political leadership. Theorizing about the political exclusion of women in the Kenyan society also requires clarity in thought between understanding and differentiating the sex-based division of labour and the antagonism that arose as a result of that transfusion of the principles of division of labour into post-colonial Kenya.

⁵⁹ Parliamentary Hansard, April 23rd 1998, p 342.

⁶⁰ *Supra* at note 1 p843

The division of labour in our African society was firstly created on the simple basis of sex. That is, the heavy labour was done by men and women were left the role of care-givers. The antagonism referred to in this case arose the economic classes that emerged after independence. In Engel's view, sex divides labour (read authoritative political positions) not relations between the sexes. Classes' disparities and sexual antagonism only "coincided" in that they developed at the same time, but they did not coincide in the sense of falling along the same lines.⁶¹

The back and forth liberal feminism therefore caused in parliament was a clear indication of the discomfiture the women's push for affirmative action was creating in the highest levels of the chauvinistic male hegemony. More so when the Hansard account shows female members of parliament taking the bull by its horns: Hon Martha Karua⁶², in a characteristically liberal fashion held that, "In the last Session (concerning Mr. Koech's response), the Government told this House that it was committed to implementing the Beijing Platform for Action. One of the areas of critical concern is increasing women's participation in decision-making. Today's response by the Government seems to suggest that it does not exactly know its stand on women's issues. It does appear that the Government is busy giving mere lip service to women's issues and making statements that are suitable in international for it to gain respectability, whereas back at home, it is doing exactly the opposite. What this motion is calling for is political good will and leadership from the Government; it is difficult to hope that society will evolve differently."⁶³

⁶¹ C.Mackinnon, p23 *Toward a feminist theory of the state* (Harvard University Press, 1989)

⁶² Parliamentary Hansard, April 23, 1998, P342.

⁶³ In 2007, the Minister for Justice and Constitutional Affairs, Honourable Martha Karua tabled the Constitutional (Amendment) Bill 2007 on affirmative action. The crux of the motion was to create fifty seats for women as a matter of affirmative action in addition to forty constituencies solely for women in the subsequent parliament in line with the critical mass theory that would see the ninety seats represent women percentage in the population. For the third time, the bill was shot down in parliament; with the detractors arguing that the minister had 'personalized the Bill'

Needless to say, the motion passed by Hon Phoebe Asiyo⁶⁴ was defeated. The defeat in itself proved a rallying call for protagonists of affirmative action. In characteristic feminist reaction, the three percent of women then in Parliament consolidated with other like-minded individuals and formed the Women's Political Caucus. This caucus was to shape future interactions with the establishment whenever affirmative action matters came to the fore.

In 1998 Parliament appointed a twenty-five member inter-party committee for Constitutional review. The Women's Political Caucus organized nationwide women participation as the commission went round all districts in the country collecting the public's views on the Constitutional review. That aside, the Women's Political Caucus pushed for the centralization of affirmative action rights by lobbying and getting increased number of positions at the CKRC by virtue of the fact that the Women's Political Caucus was an umbrella body. Liberal feminism demanded no less than agitation for equality, which at that point was assumed to be substantial once acquired.

It is against this background that Hon. Beth Mugo-with a strong backing of the Affirmative Action Committee (a sub-committee of the Women's Political Caucus)-introduced the 'Affirmative Action Bill' whose purpose was to both recognize women as a marginalized segment of society and to statutorily include them in policy making at an institutional level.⁶⁵ During the tabling of the motion, the MP stressed that the bill was indeed a test of parliament's sincerity on the implementation of the Beijing Platform to which Kenya is a signatory. Notably, that Kenya was no exception to the surrounding countries that implemented the Beijing Platform. The Affirmative Action Bill's preamble is the soul of Article 27 (6). In the preamble, it was

⁶⁴ Chairperson of the Caucus for Women Leadership since 1998.

(http://www.kwpcaucus.org/index.php?option=com_content&view=article&id=55) accessed on 28th May 2014

⁶⁵ Parliamentary Hansard, April 12th 2000. See also Article 56, a direct result of these efforts

stated that the purpose of the Bill was to give full realization to the legislative and state measures (affirmative action) and policies designed to not only provide a level playing field in the future; but also to redress any disadvantage suffered by women due to past discrimination. The one-third concept in itself is a brainchild of the Affirmative Action Bill Again, during the second reading, the bill fell through since parliament argued that since the process of Constitutional review had almost began, the inclusion of affirmative action would be more effective if intimated to the clerk of the CKRC.⁶⁶

This third deflection again served to reinvigorate the push for affirmative action, this time more refined. As Kabira and Kimani put it, the critical mass theory that motivated the feminist movement in Kenya would see a parliament with around thirty percent women make the feminist agenda and policies a reality. Therefore, the feminist movement strived to ensure that all drafts of the Constitution from the initial Wako draft have had the enforced equality of political opportunity entrenched in them.

A case in point is the first round of Constitutional review in 1998 in the creation of the Wako Draft. At the National Conference, one out of every four delegates was a woman in addition to the already increased number of commissioners that arose out of the lobbying of the then Attorney General Amos Wako. The significant numbers in the Constitutional process at that point served to propel the affirmative action agenda even from its primordial stages. Kabira⁶⁷ illustrates that the women representatives ensured that women supported a structure that ensured consultations with all women folk starting from the national to district levels. The affirmative action for women's representation at all levels was entrenched with women's organizations as

⁶⁶ *Supra* at note 1 p844-845

⁶⁷ L Kabira, 'A Time for Harvest', (University of Nairobi, 2012).

nominating bodies being entrenched in the law. Furthermore, that thirty per cent of the twenty five per cent of representation allocated to civil society for the purposes of Constitutional review be allocated to women; that thirty percent of the body of commissioners directing the process would be women. Lastly, that thirty percent district representations at the National Conference were women, that is, at least one out of three district representatives were women. This diligence on the part of the organizations agitating for affirmative action set a precedence that was a part of all subsequent efforts to review the Constitution included women.

The strength that was shown by women in positioning affirmative action in Kenya is well reflected in the affirmative action provision that is Article 98 of the Constitution 2010. Affirmative action in the Senate was entrenched in the Constitution promulgated in August 2010 in the Senate by nominating all sixteen of the current women senators. Art. Article 27 (8)⁶⁸ being a locus of the same.

However, Article 123 (4) has under the current circumstance come to defeat the purpose of gender parity-to mainstream women's agenda-thus the subject of this thesis. The article creates a sense of equality in opportunity but does not explicitly include a substantive aspect to the prescribed equality.⁶⁹

The mischief in Article 123 (4) of the Constitution is therefore a clear manifestation of a hegemony determined to keep women-and in extension the ethics of care- in the periphery of governance and development on the nation's socio-political structure. The article being

⁶⁸ The state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

⁶⁹ Substantive equality requires that women not only be given an equal chance to participate in the political process but also be granted the tools available to the male hegemony to exercise that political authority. Supra n37; See also Supra n37 at p225.

conceived in the full knowledge of the fact that the electorate was not in a position to elect women to the Senate, and in so doing continue to sideline them from active leadership. The provision in 123 (4) was made and accepted in full knowledge of the fact that the Kenyan electorate was not ready to vote in a third of its Senate as one gender. Also, no clear constituency was demarcated for the women senators, an act in itself would violate the very freedoms of voting and democracy that the country's citizens; citizens who are still patriarchal in their thinking and traditional political structures.

Including women in the political process without addressing the cultural and structural constraints that enforced their exclusion in the first place defeats the purpose of the brand of feminism this thesis propounds as its theoretical framework. Gender quotas in themselves are created to form a bridge between women and the society's leadership. What is the case however is that no heed is paid to the women who really need the representation-by virtue of the fact that the theory that seemingly informed feminists in advocating for equalities in opportunity was stated by a mere formality in law. In the end being denied the substance of the positions they agitated for decades on end.

Women as a 'category' of persons are divided along the lines of ethnicity, financial class and rural/urban background among many other variables. Instituting gender quotas with the sole objective of meeting Constitutional thresholds and rewarding women politicians will not necessarily improve women's effective participation in the Senate. Even though this falls well within the ambit of provision of equality in opportunity, it does not necessarily imply an equality in the substance of those positions allocated to women. Thus the shortcoming formal equality of opportunity *vis a vis* substantive equality is typified by participation of women in the formerly segregated process. This is exactly what is needed in the Kenyan Senate. Furthermore,

substantive equality in the opportunity to act as senators will bring out the differences that the equality imposed upon the Senate will bring about. By this, it is meant that women's ethics of care will come to the fore and temper the dominant male perspective.

The strength of women does indeed reside in a sharp acumen in strategy. That strength is reflected in the strong affirmative action provisions in the Constitution, specifically the one-third gender rule which we are looking at in the Senate. In my view, the provision in Article 123(4) is plain old chauvinist mischief, a successful attempt to eschew the very spirit of affirmative action founded on Article 27(6), 98 and on the principles of good governance as per Article 10 2 (b). What the foregoing train of thought leads to is an understanding that this research paper will be premised on the theory of substantive equality of opportunity for women in the Senate.

1.5.4 The theory of African feminism

The theory of African feminism has been employed in this thesis to give direction to the achievement of a discussion that successfully applies the drive for substantive equality-that is embodied by the liberal school of feminism.

Looking at contemporary Kenya one sees a male dominated *status quo* that makes it necessary for the African woman politician to use feminism as an intellectual means of analyzing and critiquing discriminatory legal and political structures. Ideologues of African feminism share the same view on male dominance; that it is the source of oppression of women that causes inequalities, gender power imbalances in political structures and the abuse of affirmative action. The womanist ideologue is displeased with the societal imbalance around them and voices the

critiques using the law.⁷⁰ Therefore, the theory of an African feminism adapts the theory of feminism to the African context by proposing pragmatic courses of action that are a direct contrast to the ‘militant opposition’ to the male hegemony—a hallmark of western feminists such as Prof. Catharine Mackinnon and Carol Gilligan.⁷¹

African feminism does recognize that the society is indeed plagued by inequitable and unjust institutions that marginalize women. Furthermore, that improving the lot of the African woman may not be necessarily by a simplistic reversal of roles⁷² or an all out offensive on masculine hegemony; rather through a process that incorporates the specific strengths of the African women involved.⁷³ These strengths are what are then universally acclaimed as the ethics of care.

With particular regard to this study, the theory of African feminism is crucial to making substantive equality of opportunity in the Senate a reality. How this is possible is on the theoretical leaning of Gwendolyn Mikell⁷⁴ that African feminism adopts the feminist solutions of western ideologies with the important relationships between local cultural dynamics and gender ideology, as well as African models of state politics and gender interests. As a result, African feminism will form an interplay with the main theory of substantive equality to interchangeably but singly stress the fact that nominated women senators need a substantive equality with their male counterparts who also have the formally equal opportunity of being senators.

⁷⁰Pascal Newbourne Mwale, *Where is the foundation of African gender? The case of Malawi*, 11 (Nordic Journal of African Studies 2002) 1 <http://www.njas.helsinki.fi/pdf-files/vol11num1/mwale.pdf> Accessed on 14th February 2014

⁷¹“African feminism owes its origins to different dynamics than those that generated western feminism. It has largely been shaped by African women’s resistance to western hegemony and its legacy within African culture.”p4 Gwendolyn Mikell (ed) *African feminism: the politics of survival in sub-saharan Africa*, (University of Pennsylvania Press, 1997)

⁷²Dzama 2001: p1

⁷³Pascal Newbourne Mwale, p4 *Where is the foundation of African gender? The case of Malawi* (2002)

⁷⁴(ed), ch 3 and 4, ‘African Feminism: the politics of survival in sub-saharan Africa’, University of Pennsylvania Press (1997)

Therefore, we see the theory of African feminism as a whole separating the conception of the woman in her physical capacity and the woman in her capacity as productive human being in society, willing and capable of participating in the political process and applying the ethics of care. In this respect, feminism conceives the African woman as a misunderstood and untapped resource.⁷⁵

1.6 Literature review

Truly independent women and national politics are a rare and heady mix in our country. A common tendency has existed to attribute women's political mileage to their femininity.⁷⁶ For the breadth of this paper, it will be shown that the women that have reached higher echelons of national leadership have done so in no small part due to their perceived masculinity; McGuire in his book says that it is a mistake to confuse Margaret Thatcher's femininity with feminism. Despite the fact that she often drew attention to her sex by equating many of her national duties to household chores, she made decisions in a masculine way;⁷⁷ so much so that her premiership did not coincide with a significant rise in women's participation in office.⁷⁸ Conversely, that informs the logic that women were nominated previously to parliament, and now the Senate so benefit due to a perceived femininity closely associated with political weakness.

⁷⁵Chidam' modzi, H.F.,p 118 "Addressing African Feminism," in Journal of Humanities, No. 8/9, 1994/5

⁷⁶ Supra n. 16

⁷⁷ My experience is that a number of the men I have dealt with in politics demonstrate precisely those characteristics which they attribute to women-... an inability to make tough decisions' p129 *Margaret Thatcher: The Authorized Biography, Volume One: Not For Turning* (1995)

⁷⁸ Fawcett Society website; IPU website shows the percentage of women in the UK parliament rising from 3 percent in 1979 to 9.2 percent in 1992, that is, during the time of Margaret Thatcher's premiership.

As a matter of introduction, I note that pre-colonial Kenya women used to form social and welfare groups and they would use them to advance their interests. Post-independence Kenya posed many challenges to women's movements in gaining equality in political, social and economic aspects of society due to the patriarchal nature of the Kenyan society.⁷⁹ The essay on 'History of Feminism in Kenya' notes that the struggle for affirmative action in Kenya can be traced back to 1996 when Honourable Charity Ngilu moved a motion in parliament on the implementation of the Beijing platform for action however it didn't pass. Subsequently other affirmative action's bills failed however the new Constitution 2010 finally guarantees affirmative action. They recommend that the feminist ideology can clarify for women their power and show them the way this power can be used to resist oppression and exploitation. The relevance of this article is that it helps the study look at the ideology of feminism and apply it to affirmative action.

1.6.1 Women's exclusion from leadership

Amb. Prof. Maria Nzomo (1987)⁸⁰ in her book traces the subordination of women to the evolution of the class society into an institutional one where the men were in control of the means of production.⁸¹ She further contends that those who control the economic domain invariably exercise similar control over the political arena, therefore political leadership and important decision making is dominated by men. Prof. Nzomo proves male domination over women in society by detailing their general financial and stereotypical superiorities. Moreover,

⁷⁹ Lillian Adowo, Lucy W.Gikonyo, Regina M.Kudu, Olga Mutoro, 'History of Feminism in Kenya'(2011) <http://www.nawey.net/wp-content/uploads/downloads/2012/05/History-of-Feminism-in-Kenya.pdf> Accessed on 14th Feb 2014

⁸⁰ Nzomo Maria, women, democracy and development in Africa(published 1987)

⁸¹ A view identical to John Stuart Mill in his book 'The Subjection of Women', Mill was one of the rare examples of the exception to Western philosophy's androcentric character that marginalized women by devaluing

Prof Nzomo explores the issue of women being sidelined from public representation through a male hegemony that is institutionally amorphous in that it is practised across society. She notes that women are now articulating more openly their expectations to be treated as equal citizens endowed with absolute rights.

The professor's-Maria Nzomo's work-however, does not articulate the discrimination of women through the interpretation of the Constitution. Thus the import of this thesis, which seeks to address specifically how Constitutional provision 123 (4) has been applied to the disadvantage of women senators in the Senate.

Women constitute over 50% of Kenya's population but majority of them are among the illiterate and poor in the country.⁸² A number are still affected by customary laws and practices which have long perpetuated their oppression.

The essay, *law and the status of women in Kenya*⁸³ critically looks at the legal position of women in Kenya and highlights some of the barriers they face when seeking positions in public leadership. It is crucial in understanding the historical perspective of the role of women in politics. A lot of proposed changes have been made through legislation and the Constitution. Women used to get the short end of the stick in the political process and state that despite the fact that women are the majority of the voter population. Their participation in the political and elective office is at most prevalent at the grassroots level.⁸⁴ An emphasis is placed on that participation of women in political and public decision making perceived as critical to the

⁸² Kenya Bureau of Statistics 2009.

⁸³ Janet M. Kabeberi ed, *law and the status of women in Kenya* (Women & Law in East Africa, 1995, Ch 4, p3-4) <http://www.ielrc.org/content/a9501.pdf> Accessed on the 14th Feb 2014.

⁸⁴ Ibid, p3. See also Wendy Stokes. 'Women in Contemporary Politics', Part V (<http://books.google.co.ke/books?id=n7gA-4wpJRwC&pg=PA181&dq=women+in+local+government+in+uk&hl=en&sa=X&ei=06n9Uq78KI-UhQeEnIG4Dw&ved=0CCsQ6AEwAA#v=onepage&q=women%20in%20local%20government%20in%20uk&f=false>) Accessed on the 14th Feb 2014

actualization of sex equality. Progressive feminist literature shows that women must command real political power if their concerns are to be prioritised and meaningfully included in the national agenda.

Furthermore, deliberate moves should be undertaken to ensure women are well represented in government positions. They suggest that seats should be reserved in parliament or political parties for women⁸⁵ seeing as the ignoring of women in politics, policy making and implementation of policies will not result in suitable laws for them. Societal stereotypes on gender-defined roles which place barriers to the advancement of women, they recommend further research on women and law in order to expose the constraints and practices that obviate women empowerment and advancement.⁸⁶

The essay does not show the means for the application of feminist ethics of care in the Senate as a decision making organ through allowing nominated senators (women) substantial voting rights, which is the direct import of this research. This research therefore seeks to detail the mechanisms that may be employed to overcome the legal hurdles facing women senators as shown in Article 123 and the Senate rules on voting.

That aside, it is the sentiment in some quarters that women based affirmative action has remained the facilitating tool for perpetuating of discrimination against women notwithstanding the spirit of the Constitution of Kenya 2010.⁸⁷ Seeing as the global trend has for some time now leaned towards correcting gender equalities and equities, the paper critically analyses the

⁸⁵ V. Kattambo, J. Macharia, P.Mbote, *Law and the status of women in Kenya* (<http://www.ielrc.org/content/a9501.pdf>) Accessed on 14th Feb 2014

⁸⁶ Janet Kabeberi-Macharia, 'Women, Laws, Customs and Practices' (1995)26

⁸⁷ Catherine Kaimenyi, Emelda Kinya, Chege Samwel, *An Analysis of Affirmative Action: The Two Thirds Gender Rule in Kenya* (Chuka University, 2013) http://www.ijbhtnet.com/journals/Vol_3_No_6_June_2013/11.pdf Accessed on 14th Feb 2014

implementation of the two thirds rule with a specific look at parliament.⁸⁸ Catherine Kaimenyi notes that although the Constitution of Kenya 2010 provides for affirmative action it does not provide for the substantive equality mechanism to be employed. She states Kenya is unlikely to achieve 33% women representation without the help of affirmative action; that the public needs to be educated on affirmative action so as to unravel the myths and promote gender equity in political representation and ultimately improve development outcomes if there is full commitment to its objectives and measures.

1.6.2 Attempts to equalize the opportunity of public leadership

The use of quotas to ensure representation where a fixed number for nomination or representation is left for women is advisable and to this effect are the provisions on nominated senators (the subject of this paper).⁸⁹ This paper is crucial to this study as it seeks to find strategies that will employ affirmative action. In her article Kaimenyi notes that various writers hold different views on affirmative action. Without its' full realization, the capabilities of nominated senators remain untapped. According to her affirmative action promotes diversity and encourages public welfare for common good by increasing opportunities for previously disadvantaged groups, which in turn decreases the potential for conflict as the members of the society find themselves at the same level politically, economically and socially. Within the context of the study this means enabling nominated senators-women-full voting rights in senatorial decisions.

Kaimenyi's work only gets the reader to the 'river Jordan'-the acknowledgement of affirmative action. It does not fully address the means through which subsequent violations of the spirit of

⁸⁸ *Ibid*

affirmative action such as Article 123 (4) are to be addressed and resolved. Thus the relevance of this paper, it seeks to point out specific means through which the injury in Article 123 (4) can be remedied.

This paper will draw parallels between the substantive rights of elected senators *vis a vis* the senatorial nominees in the first Senate in Kenya in the twenty first century. In which case show how it was tolerable to create the post of sitting-duck women nominees to the Senate of Kenya and identify the means by which the situation may be remedied. This research paper will therefore investigate the injustice of Article 123 (4) to women senators and prescribe the means by which the substantive position of women in the Senate be improved; in light of their inability to legislate on matters concerning counties.

1.7 Objectives of the Study

The overall objective is to examine the participation of women in the Kenyan Senate and agitate for a situation where a minimum third of women in the Senate will always have the capacity to vote on county matters; regardless of whether they are elected or not.

Specific objectives included:

1. To determine whether article 123(4) of the Constitution limits participation of women senators in voting on matters concerning counties and make recommendations to the Senate Rules and House Business Committee
2. To examine the challenges facing women nominated to the Senate, find tangible solutions and inform parliament and the general public on ways of achieving real affirmative action.

1.8 Broad Argument Layout

The broad argument layout section is basically one which details the discussion at hand. In other words, this section paints an abstract sort of picture to the whole study in its brevity.

Women in Kenya have long been underrepresented in political and governance structures; the new Constitution has remedied this by entrenching affirmative action under article 27(8). Women now have a right to equally participate in leadership. Article 123(4) however limits the participation of nominated senators who currently are all women in decision making. The research will therefore look at the practical solutions to ensure women meaningfully participate in decision making in the Senate.

1.9 Hypothesis

This study was premised on the hypothesis that the Constitutional provision in article 123(4) allowing only elected senators the right to vote on matters affecting the counties essentially limits the right to equal effective participation in decision making for women since none was elected to the Senate.

1.10 Research questions

The study seeks to answer the following research questions:

1. How does article 123(4) of the 2010 Constitution affect women senators' role of representing the interests of women and children in the Senate?

2. How can the women senators ensure their effective participation in the face of the challenges posed by the limitation in Article 123 (4) to ensure substantive contribution in legislating?

1.11 Research Methodology

The research paper's feminist methodology will be inspired by the interests of the women senators whose problem (lack of full voting rights) is the real reason for the carrying out of this research. The methodologies are: participatory, social impact and evaluative. Chapter two will detail the feminist methodologies that will be employed by this research.

Research methods

The sources of information for this study are relevant published books, reports and articles on women leadership, discrimination, affirmative action and feminism.

1.12 Limitations of the study

The study will investigate the role women play in decision making in the Senate though it notes that parliament also has women leaders and so do other public institutions and they may look at the issue differently.

This study focused specifically at the sixteen women senators nominated as per the mandatory one third rule in Constitution Article 98 (1) (b) and not the two women senators currently serving as Senate representatives in the dockets of youth and disabled population of the country.

The Senate Hansard shows little to no activity by the women senators in the Senate on voting even on those matters not concerning county governments. Therefore, this constricts the scope of the study to addressing the theoretical reasons as to why this has not been achieved.

1.13 Chapter Breakdown

Chapter one laid out the background to the study. It looked at the historical position of women in leadership in Kenya, and noted the inequity in Article 123 (4) that bars effective participation of women in the Senate. It saw that affirmative action provisions in the Constitution 2010 are a culmination of the long fight for the recognition of women in the current Constitution, and as such, the proposal detailed the scope of the thesis in addressing why women need to substantively participate in the Senate.

Following the inequity in Article 123(4) as pointed out in chapter one, chapter two uses feminist methodology to carve out a discussion that will attempt to portray the ethics of care and subsequently make a case for their substantive equality in the Senate. The interviews are used to bring to light the specific challenges women senators face in order to contribute to the discussion of women participation in the Senate. The chapter will identify the indicators that will inform the research questions of subsequent chapter, piercing the veil behind which the powers that deny women substantive participation lie. In so doing, women senators will be interviewed in order to tap into their collective experience in office. Furthermore, comparative studies on international best practices in other jurisdictions and form a foundation for their application in the discussion in the ensuing chapter.

By taking off from the interviews, chapter three analyses the various approaches to interpreting the two otherwise conflicting provisions (27 and 123[4]) with a view to creating

harmony and giving meaning to the Constitution as a whole. This chapter will take cues from other jurisdictions that have employed affirmative action in their Senates and political parties' through their standing orders and see how the same success can be applied in Kenya; also whether the failures in those jurisdictions may provide lessons to Kenya.

Chapter four makes recommendations on charting the best way forward on the strength of the discussion in chapter three and the inadequacies in the Constitutional provision 123 (4).

The conclusion of the study will be based on a concise summary of the previous chapters of the study. This being chapter five; it brings out the key messages in the work and highlights the conflict between Articles 123(4) and 27 with a view of emphasizing the importance of ethics of care in society's legislation.

CHAPTER TWO: METHODOLOGY

2.1 Introduction

Chapter one of the thesis-the proposal- introduced the Senate and the role women play in political decision making. It made a case for women in leadership using the feminist theories highlighted in the interviews of this chapter, so that we may now see how the Constitutional provisions around Article 123 (4) create inequity.

The rationales based on feminist jurisprudence bring out the role women have to play in the current Constitution both in the theoretical framework and through the review of all the feminist literature. It moves the reader from a position of first of all acknowledging the problem in Article 123 (4) to setting the stage for the discussion of the substantive equality to be addressed in the course of this thesis.

This study is feminist; as such the parameters and indicators of success are different since the epistemology of feminism chooses a distinct set of eyes to analyse the information that is acquired from the research; hence the need for a chapter illustrating the need for the looking at the information through feminist eyes. Similarly, being the first Senate under the 2010 Constitution it was necessary to conduct interviews so as to get information for this thesis due to the fact that there is little jurisprudence available.

2.2 The research process: interviews

Loosely structured interviews that touched intimately on the thematic concerns⁹⁰ of this paper were the main tool used to acquire descriptive information from the interviewees. Using a conversational approach during research led to a discussion with the candidness usually seen in informal conversations⁹¹ The dialogue became a sharing platform, a participatory venture, in line with the participatory methodology of which this research is partly based on. The senators shared on how they understood the power structures around them. In the interviews the senators aided this paper in making an inquiry into the women senators' collective political experiences when faced with the handicap in Article 123 (4).

This chapter detailed the research process: starting from the methodology used in its methods to the rationale that guided its conducting on women senators as selected interviewees. In giving the details of the interviews this chapter used the methodologies mentioned in the previous chapter to capture the 'ethic of care' in the responses elicited from the interviewees. These methodologies include: social impact methodology, participatory and evaluative methodologies.

2.3 The specific methodologies employed in the research

⁹⁰ Blackmore, J., *'Troubling Women: Feminism, Leadership and Educational Change'*. Buckingham: Open University Press. (1999)3-8

⁹¹ *Ibid* at ch3. Furthermore, the interviews were conducted in a context that was neutral, the rationale being as held by Wragg, that the propensity to give false information when interviews are carried out in very familiar settings is higher. Wragg, T., *Interviewing: Research Methods in Educational Leadership and Management*, London: Paul Chapman. (2002) See also Hartas D, *Educational Research and Enquiry: Qualitative and Quantitative Approaches'* (London 2010).

Lorraine Code, a Canadian feminist philosopher once posed a question, “is the sex of the knower epistemologically significant?” As she grappled with the lopsidedness of the masculine ethics of duty in science that was detailed by Carol Gilligan to include: reason, rationality, autonomy; disconnection. Lorraine concluded that indeed the sex of the researcher is significant, feminist research uses different parameters from what male dominated disciplines use. . In what Anne C. Scales⁹² calls the ‘the tyranny of objectivity’, the near metaphysical perfection of the male point of view is universally accepted. To the point where its portrayal is exercised consensually and its supremacy taken as the paradigm of order Thus, feminist methodology as employed in this study will focus on the principles of analysis/methodologies unique to feminist scholarship.

The methodology to be employed in discussing the interviews conducted in this thesis was distinctly feminist.⁹³ In other words, the methodology employed in this thesis sought to question gender roles in the Senate as construed by male hegemony. Interviews were carried out with women senators that aimed at revealing the women senators’ understanding of the power structures in the Senate and the extent to which those male dominated spheres of influence have been involved in their subjugation.

2.3.1 Participatory research methodology

Using the participatory research methodology, the research emphasized the importance of collective inquiry arising out of the discussions with the women senators. These discussions were grounded on their participation in the political experience as women politicians; similarly, their

⁹² Anne C. Scales, *The Yale Law Journal*, Vol. 95, No. 7 (Jun., 1986), pp. 1376-1377

⁹³ N.Kamau, ‘*Women in Political Leadership*’, Heinrich Boll Stiftung, Nairobi,2009 p4

http://ke.boell.org/sites/default/files/women_in_leadership_study.pdf Accessed on 25th August 2014

experience-their social reality-as women politicians in decision-making processes in a way that unites the action of women senators in this research.⁹⁴

2.3.2 Social impact methodology

The study was inclined towards social impact research methodology⁹⁵ by examining Article 123 (4) of the Constitution of Kenya 2010 and focusing on its suitability, practicability and effectiveness in conveying the intended meaning of the article in as far as achieving effective participation is concerned. This methodology, however, acquired the subjectivity relevant to feminist research by acknowledging the subjects of the interviews' unique experience: these experiences being those challenging the Constitutional 'objectivity' and 'neutrality' of creating posts for affirmative action with the purpose defeating the clause set out in Article 123 (4) of the Constitution. Simply put, the research brought to light the effect woman senatorship is having on the fabric of the societies in their sphere of influence.

2.3.3 Evaluative methodology

The study also adopted an evaluative methodology⁹⁶ in that the operation of Article 123 (4) was critically examined with a focus on the implementation of the article since the promulgation of

⁹⁴ Chevalier and Buckles, 2013, ch1

⁹⁵ Social impact research is a form of conducting research and analyzing the results in a way that predicts and addresses the effect on particular parameters on the society. John V. Willigen, 'Applied Anthropology: an introduction', 3 edn, Greenwood Publishing Group (GreenwoodUS,2002)

⁹⁶ Evaluation is the empirical analysis of information gathered from field study. Its relation to educational studies such as this is discussed in Judith Bennett's 'Evaluation in Research' (MPG books Ltd, Cornwall, 2003) p12-14.

the Constitution. From the pragmatic viewpoint adopted in the literature review, the feminism of this research sought to specifically evaluate the epistemologies⁹⁷ of the research's subject.

The end result was, of course, to describe the injustice in Article 123 (4), to analyse it through the spectrum of the interviews' discussions and liberal feminism. Finally it prescribed meaningful and pragmatic ways of ensuring substantive participation in the Senate using the African feminism lens.

2.4 Rationale for using feminist methodologies in the research

This study is unique because it used the feminist lens to look at the issues presented by the handicap in Article 123 (4). Feminist epistemology required a distinctly different method of approaching the research, one that names its parameters in a way that captures the essence of liberal feminism in the research.⁹⁸ This concept of naming is what guided the collection of the data and also inform the ensuing methodology. In the words of Nyokabi Kamau, "By using feminist methodology, this research focuses on other areas of women's work, especially their role in their constituencies (even nominated MPs had what they referred to as their constituencies), which are not always made public."⁹⁹ In other words, this feminist research used the social impact methodology to both describe and evaluate how women leaders participate in the political process. This ensured that the research makes it ever more clear the potential for

⁹⁷ Epistemology is defined by various leading researchers as the philosophical inquiry into the nature of knowledge that justifies a belief, and what is meant when one says that a claim is true.

⁹⁸ 'Naming', in research is what determines the quality and value of what is named, while at the same time denying reality and value to that which is never named, that which has no name- Du Bois, B. *'Passionate Scholarship: Notes on Values Knowing and Methods in Feminist Social Science'*, in G. Bowles and K. R. Duelli, *Theories of Women's Studies*, London: Routledge and Kegan Paul, (1983),.

⁹⁹ *Supra* n68, at p 12

women nominated senators when granted the ability to vote on county matters to incorporate the female view that the one third rule sought to enforce.

The interviews presented the nominated women senators a chance to reflect on their experiences as nominated members of the Senate and the handicapping effect of Article 123 (4).¹⁰⁰ This participatory methodology was frequently in danger of turning into therapeutic sessions for the participants that would derogate the crux of the conversation to matters that were not the direct import of the study¹⁰¹, a pitfall that was identified and deftly manoeuvred around. With the intention of getting more information out of the short interview encounters, the research focused on those senators who were both reachable for a discussion and who were documented as making a continuous social impact on the society around them. This was done by focusing on the information already in the public domain on their social impact.¹⁰² This was an actualization of the uniquely feminist social impact methodology¹⁰³ which led the researcher to identifying and making contact with Senators: Catherine Mukite Nabwola, Judith Sijeny, Fatuma Dullo. These particular senators fulfilled the foregoing criteria and as such were a choice of interviewees.

The subjectivity of liberal feminism guided the researcher in delineating the substantive contributions of the women senators from the formal roles that they were allocated by virtue of their political party affiliations. The choice for this research to employ the evaluative methodology is reflected in choosing this option because the interviewer then had the clarity

¹⁰⁰ Burgess, R. G., 1: 139-156 'Conversations with a Purpose: The Ethnographic Interview in Educational Research', *Studies in Qualitative Methodology*, London: Jai Press, (1988).

¹⁰¹ Mason speaks of how interviews may be kept on track as a means of effective qualitative research. See Mason, J, *Qualitative Researching*, London: Sage Publishers (2002)

¹⁰² Other sources of information for this study are relevant published books, reports and articles on women leadership, discrimination, affirmative action and feminism, real time media.

¹⁰³ Kurt Finsterbusch, C.Charles Parker, ch 2, '*Methodology of Social Impact Assessment*', (Dowden, Hutchinson & Ross,1977)

of thought to guide the conversation towards the substantive inequalities posed by the offending Constitutional provision, hence discussing on possible remedies to the situation. The interviews therefore served the double purpose of identifying the challenges faced by the nominated women senators as well as providing a rare opportunity to talk about senatorship in a forum that was receptive to substantive voting equality. In that way the interviews ascended from being a mere opportunity to extract information into empowering conversations¹⁰⁴ that shed new light on the nominated senators' unique position in Kenya's history-being the first with a third composition being women.

A limitation in adopting feminist methodology however; was that the indicators were difficult to delimit and explain to the interviewees. This was largely due to the fact that the interviewer had to first explain to the interviewees the parameters by which this research would be guided by in the first place. Finding the senators for the interviews themselves presented challenge. Even though the interviews were conducted after acquiring the necessary permissions from the county ministry office for Science, technology and innovation; securing the interviews proved difficult. Furthermore, even when the interview was eventually secured, time for an exhaustive discussion was limited-the main reason being given as busy schedules.

Comparative examples of other jurisdictions also play a crucial role in this research in that they provide a guiding light for the best practices that may be followed when tackling the issues of effective women participation in parliament. All over the globe, affirmative action has been conjugated to fit the particular circumstances of that society.¹⁰⁵ It is with this

¹⁰⁴ Opie A, *Feminist Review* (40): p 55-65, 'Qualitative Research, Appropriation of the 'Other' and Empowerment.'. (1992).

¹⁰⁵ Karen Bird, 'The Political Representation of Women and Ethnic Minorities in Established Democracies: A Framework for Comparative Research', (Dept of Political Science, McMaster University, Canada, 2003)

rationale that the principles of those same ethos be used by this research in order to foster a rich pragmatic discussion and make recommendations that are suitable to the Kenyan context.

The purpose of the licence is to provide a benchmark for interview standards by adhering to a code of ethics prescribed by the ministry and also by further directives made by the county office which the researcher was referred to by the ministerial directive. Therefore, the licence itself provided for full disclosure of the necessary research materials as per Article 35 of the Constitution and compliance with all other Constitutional thresholds.

2.5 Approvals for the research

Directives from the NACOSTI show that one must apply for a licence before conducting any research within the various counties across the country. They are issued by the Department of Research Management and Development at the National NACOSTI on a monthly basis. In this research the license was issued in July 2014; and is attached as appendix 1 after the application was made in June 2014.

2.6 Challenges encountered in the research in accessing the respondents

At the time of the research permit being issued the Senate was two weeks from going on recess. Thus, it was not possible for the researcher to sit in Senate sessions noting that the license was issued in July and the Senate went on recess shortly before.

The researcher was unable to neither reach the speaker nor sit in the committee meetings for the same reason. This posed a challenge in itself since the application was made in June. The effect of the delay denied in issuing the licence the researcher made it difficult to achieve the opportunity to reach all the preset targets and it was left for the researcher to employ some

finesse to get to even interview the senators themselves as they were so close to Senate recess hence were not easily located.

2.7 Research ethics

It goes without saying that feminist research must be held responsible for its conduct since feminism itself is all about accountability of one gender to another. This research was guided mainly by the ethics instilling: confidentiality, balancing power relations and disclosure.

2.7.1 Confidentiality of the interviewees, data protection

The question of maintaining the privacy of the interviewees arises. Normally, privacy is maintained when the interviews are deemed to give rise to prejudicial backlashes. This consideration was taken into account when talking about the sensitive matters of political agency. However, the interview also traversed matters attestable by the nominated senators in the public personas. This meant that they could-in those instances-be quoted. Keeping the identities of the interviewees' public was also supported by the fact that the questionnaire were first passed through the executive and county governments and screened before issuance of a licence allowing the interviews.

The purpose of the licence is to provide a benchmark for interview standards by adhering to a code of ethics prescribed by the ministry and also by further directives made by the county office which the researcher was referred to by the ministerial directive. Therefore, the licence itself provided for full disclosure of the necessary research materials as per Article 35 of the Constitution and compliance with all other Constitutional thresholds.

This research therefore discloses the full identities of the interviewees, with their full consent and the knowledge of the relevant authorities in publishing the senators' views.

2.7.2 Disclosure of interview materials

It is also ethical to publish only those facets of the interviews that the interviewees fully consent to. This ethic is applicable by firstly explaining the purpose and estimated scope of the interviews so that the interviewees were fully cognizant of the effect of their responses. Secondly, this was also achieved by discussing a summary of the interview after in order to confirm the collected information.

2.7.3 Handling of power relations in the interviews

The ethics of power relations between the researcher and the interviewees¹⁰⁶ also comes into focus. The interviewees were in a societally 'higher' position hence could dictate when and where to meet. This dynamic was tackled by maintaining a slight detachment from the interview questions and 'shepherding' the research discussion towards the research parameters. This served to avoid the situation where the position of the interviewee may make them comfortable to exaggerate or give false information.¹⁰⁷

¹⁰⁶ Referred to as binary interview power play in 'Women and Political Leadership'.

¹⁰⁷ Kamau, N. (2002), 'The Status of Women in Higher Education Management: A Study of One Private University in Kenya', *Eastern Africa Journal of Humanities and Sciences* 2(1)..

CHAPTER THREE: A DISCUSSION ON EFFECTIVE PARTICIPATION OF NOMINATED WOMEN SENATORS IN KENYA

3.1 Introduction: Research and Analysis

Following the discussion in chapter two that detailed the process of conducting the interviews¹⁰⁸ we take note of the fact that women in Kenya have long been under-represented in political and governance structures; the current Constitution has remedied this by entrenching affirmative action under article 27(8). Women senators now have a right to effectively participate in leadership by dint of Article 98 (1) (b).¹⁰⁹ Article 123(4) however limits the effective participation of nominated senators-who currently are all women-in decision making. The research will therefore look at the practical solutions to ensure women meaningfully participate in decision making in the Senate. In the course of this chapter, interviews are carried out with women Senators¹¹⁰ who are currently in office for the term of 2013-2017. The single purpose of those interviews is to bring out the realities that the paper seeks to address concerning the effective participation of women senators in the Senate and foster a discussion on the ineffectiveness of their current position; with a view to making comparisons with best practices in other jurisdictions and make recommendations on how to transfer the same success to the Kenyan context.

¹⁰⁸ Social impact, evaluative, participatory research methodologies.

¹⁰⁹ The Senate consists of— sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90Article 90 stipulating the proportions by which the nominative seats for the Senate are to be allocated.

¹¹⁰ Senators MP: Judith Achieng' Sijeny; Catherine Mukite Nabwalo; Fatuma Dullo Adam.

It may be engaging to hold that women senators do not have a clearly set mandate for which their performance in the Senate is to be judged. This emerges from the general practice from women's participation in previous parliaments where women made substantive contributions in parliaments from their ethics of care perspective without the bounds of a defined mandate. However, one must appreciate that the woman senator is nothing like the nominated members of parliaments both past and present, if for no other reason; that she is denied the fundamental ability to vote on matters affecting counties by virtue of Article 123 (4). The senator is a new breed of public official in Kenya, as such, the women senators are expected to offer their ethic of care on the issues mandated to the Senate by Article 96 (1) and (2).¹¹¹ The women senators are denied this by virtue of the effect of Article 123(4). The parameters by which the performance of their mandate as senators is Constitutionally delineated from Articles 109 to 113, which is not in question. It is the curtailing of their effective contribution and participation as women senators-borne of an almost four decades' old struggle for representation-that is in issue.

This chapter brings to the readers' attention the views of the elected women senators as they attempt to participate in the political process. Following an incursion of the history of women's fight for affirmative action in the previous chapter; this chapter questions women senators on what they do in order to ensure that the Senate exercises the ethics of care now that they have achieved representation in the Senate. In so doing, this chapter will show the reader the extent of the crippling effect that Article 123 (4) has on the women senators' capacity to substantively and effectively push their agendas on the floor of the Senate.

¹¹¹ The Senate participates in the law-making function of parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113

The questions were presented in the form of a questionnaire that was filled in an interview-like session in order to optimise the time spent in each discussion and shed more light on the hypotheses. Another rationale for the bias towards the interview mode of collecting information is that the establishment of a rapport between the senator interviewee and I led to a greater understanding of the thematic concerns that the answers they give brought out.

3.2 Thematic concerns of this chapter

The interviews traversed three thematic areas concerning their effective participation in the Senate. The first one revolved around having the senators identify the challenges that they as women senators face in effectively pushing the collective ethic of care agendas in the Senate. The question sought to animate a discussion on the practical problems faced by the women senators in their attempt to participate in the legislative process, it questions the evolving gender roles in the Senate as construed by the male hegemony in the Senate's in house committees and external bodies (such as the CIC-Constitutional Implementation Committee) in creating atmospheres for affirmative action to thrive. The objective of the interview question is to move the interviewee to elaborate on the day-to-day challenges that they face in the Senate in the said capacity.

The thematic concern that was discussed in the second question sought to understand the effect of Article 123 (4) that is apparent in voting as far as women voting on county matters is concerned. In addition to the challenges uniquely faced by the women senators as the first in the Senate, Article 123 (4) explicitly bars them from voting on county matters-their Constitutionally delineated space. The question therefore sought to bring to light the effect of the article on the women senators in real terms; that is, how are they crippled by the effect of the provision?

The aforementioned article's mischief is the Constitution being given meaning *in toto* as per the implementation of the article: seeing as there seems to be a general consensus that women participation in public affairs is important. The second question therefore sought to create a discussion of whether the spirit of the Constitution was being followed or whether the strict and literal adherence on the Constitutional provision is having an adverse effect on effective participation of the women senators.

It is worth noting that the Senate House Rules Committee's could play a role in addressing the travesty in Article 123(4). It holds that each house of parliament may establish committees and make standing orders for the orderly conduct of its proceedings. As a matter of introduction, this body plays an oversight role over all the activities of the Senate. It is the body mandated to steer the affairs of the Senate hence its relevance to this discussion. The House Rules Committee is the only organ in the country with the capacity to fashion adjectival instruments with which the Senate can make substantive laws in its operations.

Therefore the primary objective of this chapter is to provide for a rich realistic discussion on the Constitutionality of Article 123 (4). During the course of which we see how the male hegemony has cushioned itself from implementing substantive affirmative action and ensuring the effective participation of women in the Senate. The political will-or lack of it- in adapting the Senate's operations to the principles of equality, equity and substantive affirmative action is made clear. Appendix one provides a sample of the questionnaire with the actual questionnaires forming a part of this chapter in presenting the information that was acquired from the interviews; with the actual interviews buttressing the discussions contained in the chapter.

The questions put across in the interview shall inform the direction of the conversation as they are used to problematize the thematic concerns of the chapter.

3.2.1 Question 1: concerning the challenges faced by women senators in their exercise of the ethics of care .How does Article 123 (4) of the 2010 Constitution affect women senators role of providing the ethics of care in the Senate?

Yes the crippling effect of the article is apparent, if not glaring, at the woman senator. The Senate is evolving its own rules of practice. One of them is the requirement of a written authority by the elected senator allowing the nominated senator to vote on his behalf, almost always in his absence. This pegs the performance of the woman senators to brief moments when they may exercise the full powers of their positions. The rest of the time they are latent. It also boils down to interpersonal relationships; some elected senators do not allow their nominated counterparts the chance to vote even in their absence. This cripples motions on the floor of the house. For example, yesterday (on the 25th July 2014) two motions failed to sail through for the simple reason that women senators did not have the collective capacity to vote on the issue.

-Verbatim-Senator Fatuma Dullo¹¹²

From the senator's response its clear there is a general consensus that the quota designed to remedy the structured, systematic gender disparities in the Senate exists in order to create a balance in representation of the public. The rationale of this holding is one of general notoriety; to limit the capability of having one county casting more than one vote in the Senate on a county Bill.

¹¹² Appendix on interview by Hon. MP Fatuma Dullo

Even in the face of the nominated senators' inability to vote, an interesting trend among the research interviewees emerged during the course of the interviews. There seemed to be virtually no resistance to the clause in Article 123(4); as a matter of fact the restriction was not mentioned as a restraint to their performance as senators in all the interviews conducted. In the Senate, bills concerning the counties are not generally dwelt on by the women senators. This raised more questions than answers and necessitated further inquiry in to what the nominated woman senator considered effective participation other than the ability to vote for county Bills. The result was rather unexpected; the women senators did not pre-occupy themselves with legislating, as has come to be the province of legislators. Rather, the women used their position in society as women senators to 'effect' the changes they wanted in their respective counties.¹¹³ The women senators attended fundraising events, became actively involved in setting up hospitals and schools, gave alms from their own pockets as they not been allocated their own stipend by the Senate. For instance, Senator Catherine has personally donated lab equipment to a girl's school; buying solar lamps for poor families in her constituency.¹¹⁴

On further research, it came out clearly that the impact women senators have on the legislations of the Senate may take longer to manifest because what constitutes effective participation for the women senators is not what the 'masculine world view' perceives as effective participation in decision making. In interviews with the women senators; it comes out that the ethics of care as construed by the male hegemony exercised in the Senate is still rudimentary in contrast with its exercise in the grassroots- as pointed out in the interview with Senator MP Judith Sijeny.¹¹⁵

¹¹³ Senator Catherine Mukite Nobwola

¹¹⁴ This has come to be a common practice in Kenyan politics, in a situation where the members of parliament make regular contributions to constituents' private requests.

¹¹⁵ United Nations Division of Policy and Planning, 'Rwanda: The Impact of Women Legislators on Policy Outcomes Affecting Children and Families' [December 2006] "Women parliamentarians see a clear advocacy role

Women senators are therefore seen to be making great strides in practising the ethics of care out in the public more than in making ethic of care contributions on the floor of the Senate; most likely due to the fact that they cannot vote. Instead, the women's movement in the Senate is still primarily concerned with making the male-initiated laws gender-sensitive despite a glaring out-performance of input in the drafting, debating of bills and spearheading the implementation of existing laws within and without the ambit of the Constitution's article 123(4). In a manner strikingly reminiscent of Rwandan Senator Wellars'¹¹⁶ account of the situation, Kenyan Nominated Senator Catherine spoke along the lines of, "The diversity [of having both men and women in parliament] adds value to the quality of the process. I wish you could attend our Plenary Sessions, you would find women are out-performing men. We are there just speaking about our ideas, but women are fighting and sticking to their points ... women are very determined and it is really an added value."

3.2.2 Question 2. How can the women senators ensure their effective participation in the face of the challenges posed by the limitation put forward in Article 123 (4) be addressed in order to ensure substantive contribution in voting?

As Senator Fatuma Dullo Adam put it, the elected senator and his vote embody the party's position on most issues. Coming from Fatuma's dialogue, it was her position that the fact that they represent a party is a challenge on its own since they must follow the agreed party position. The fact that they have no specific mandate therefore exposes them to be perceived as competition both by fellow nominated women senators and by their respective county senators

for themselves within their own government and feel a responsibility to hold the executive accountable on issues of importance to women and children."

¹¹⁶ *ibid* at p.30

who they may be outperforming. In the absence of a written authority from the elected senators, the nominated woman senator cannot vote on any matter concerning the county.

Senator Mukite spoke of the provision in 123 (4) as serving to ensure that each county does not get more than one vote. It helps control the parties' strength in numbers in the Senate by reducing them; secondly it is used to give the male elected senators a form of authority over the female nominated in that only the written authorities of the male senators can see a nominated woman senator vote.¹¹⁷ The response voices the limitation that is codified not only in the Constitution but also in Section 68 of the Senate Standing Orders which states that all senators who are registered as voters in a single county form a single delegation. That except as otherwise provided in the Constitution, in any matter in the Senate affecting counties-each county delegation shall have one vote to be cast on behalf of the county by the head of the county delegation or, in the absence of the head of the delegation, by another member of the delegation designated by the head of the delegation¹¹⁸; the person who votes on behalf of a delegation shall determine whether or not to vote in support of or against the matter, after consulting the other members of the delegation; and the matter is carried only if it is supported by a majority of all the delegates.

These structural inhibitors to effective women participation in the Senate show that political agency is a great impediment to the freedom that nominated women senators need in order to push their agenda. The challenge that faces the women senators as the embodiments of affirmative action in the Senate is the wide gap between the values reflected in Kenya's national (Constitutional, as per Article 27) and international policies (the African Charter for Human and

¹¹⁷ The standing orders and Constitution hold that the elected senator stands as the head of the delegation from that county to the Senate.

¹¹⁸ This member being the nominated senator.

Political Rights as domesticated by Sub-article 6 of the first Article of the Constitution) and practices in the Senate.

Prior to the famous Section 2A repealing, the political structures in Kenya were heavily gendered;¹¹⁹ hence the question of having women involvement in parliament was not even in the picture of the normative political theory. The effect that had on political agency in the country was that the party structures for nominative capacities to the representative positions served as soft landings for the male party loyalists who missed out on elective posts. When construed in this light, it makes sense to hold that nominative posts were never intended to hold currency as far as actual political decisions were being made. The same scenario could be construed to inform the drafters of Article 123 (4) of the Constitution and Section 68 of the Senate Standing Orders. When women entered the Senate through the nominative posts created as per the one third gender rule enshrined in the Constitution, they filled this same vacuum; a fact evidenced by the political parties retaining the power to nominate the women senators.

A number of countries have taken up measures that are geared towards improving the representation of women in elective bodies. The International Institute of Democracy and Electoral Assistance (IDEA) shows a global database on quotas for women which are mandated either by Constitutional means or legislation.¹²⁰ Historically, women's exclusion from substantive participation in public office has been the result of multi-layered structural, societal and personal factors that are unique to the each facet of the vast heterogeneity of Kenya's forty odd

¹¹⁹ Democracy has historically served men better than women. As a political system from the ancient Greece to the modern times of the 21st century, it has built on the public-private dichotomy and excluded women from citizenship. Women have been kept outside the public domain of politics as most of the political thinkers and philosophers such as Plato, Aristotle, Rousseau, John Lock, Thomas Hobbes and Hegel considered women fit only for domestic roles in the private sphere and maintained that there was no place for women in politics because of their suitability in caring roles as mothers and wives. The public private divide remains as the foundation of the various forms of world democracies. Rai M. Shirin 'International Perspective on Gender and Governance, Macmillan Press', Great Britain., (2000)

¹²⁰ See www.idea.int/quota.

communities but which always served to disadvantage the women in politics. However, a new cross-cutting issue emerges and survives in the face of circumstances in Kenya that has led to the existence of women senators in the first place—a liberal democracy of sorts and economic development.

Women are a political minority in that they are not proportionately represented¹²¹ in the Senate—if parliament is truly a mirror of society, as such the bulk of scholarly literature that tackles the question of their persistent exclusion usually studies minorities as a whole. There are few studies that specifically address the under-representation of women in decision-making votes in contrast to their numbers in decision-making bodies. Many democracies provide quotas for their political minorities; they include Croatia (where seats are reserved for Hungarian, Italian, Czech, Slovak, Ruthenian, Ukrainian, German and Austrian minorities); Singapore (for Malay, Indian and other ethnic communities); Slovenia (for Hungarians and Italians); Jordan (for Christians and Circassians); Pakistan (for non-Muslim minorities); Western Samoa (for non-indigenous minorities); Colombia (for Black communities and indigenous peoples); and the Palestinian Authority (for Christians and Samaritans).¹²² These examples show that the concept of minorities being allocated political space being an accepted emerging practice. Furthermore, the scholars presenting this information argue that there is a need to develop mechanisms that ensure the continued participation of these political minorities in key decision-making organs.¹²³ The special measure in the Kenyan context is the nomination of senators. As Karen Bird puts it, special measures and preferential treatment (including separate candidate selection procedures, for example) assist groups such as ethnic minorities and women to obtain their fair share of

¹²¹ Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ, Princeton University Press, 1990), and *Inclusion and Democracy* (Oxford, Oxford University Press, 2000)

¹²² *Supra* cf n101

¹²³ *Supra* n120

representation, may undermine the idea of equal treatment for all individuals. She holds that such mechanisms inadvertently reify and essentialize groups, and fail to acknowledge or invite diversities within them. These diversities are a dime a dozen, each variant factor depending on the specific society that the women comes from.

The social construction of Kenya's society as a whole sees women spread the economic and socio-cultural divide even within one community. Taking a homogeneous approach to the matter of women's representation by allowing political parties to nominate women from similar strata will not in effect achieve the objective for setting apart the nominative positions in the first place. Even though this is in line with the international instruments Kenya has ratified such as Article 2 of the Maputo Protocol, that aims to integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; These mechanisms for group representation tend to overemphasize the differences between groups of Kenyans and to underemphasize their commonalities. They may undermine the cohesiveness of the nation and promote its balkanization. In the same vein, linking representation to group-based characteristics may weaken political accountability, especially where descriptive representatives (and their constituents) accept the idea that a representative's (nominated senator's) identity or gender matters more than the policy ideas and party platform that they presumably stood for when they were nominated. With those concerns in mind, it becomes clearer that the women senators are manifest political agents, regardless of their envisioned mandate-that is-to bring the ethics of care to the decision-making table. The weakened political accountability that is a direct result of the political agency is therefore the sustained subject of this discussion.

In the context of a modern democracy, the women senators are denied the capability to intrinsically alter the politics of being nominated members of the Senate, an unfortunate situation

further compounded by the perception that the very existence of women as nominated senators proves a 'lack of merit' in the eyes of the electorate.¹²⁴ Therefore, women senators largely play political roles on the established male hegemony's terms. Male dominated political parties pose a great challenge to the mandates of women senators. Across political divides, each party moves its own national agenda through all its senators-nominated ones included. Therefore, it makes it even harder for the nominated women senators to take unified positions on any issue as there is no political room for cross-party unity by nominated women senators. However, a young organisation, KEWOSA has been formed by the nominated women senators in an effort to streamline their efforts on their collective duty to highlight overlooked issues in line with the ethics of care.¹²⁵

A second instance that shows the inconsistency between Constitutional practice and letter of the text was revealed in an interview with Honourable Senator Fatuma Dullo Adam. In terms of infrastructure, the nominated women senators are not given as much attention as their male senator counterparts. This is seen in the instance where the nominated senators are only allocated offices in the capital city and not their home counties too; disconnecting the public from the women senators.

Studies of the situation of women or ethnic minorities in elected assemblies of various countries, with a view to understanding how particular institutional structures (including electoral systems and party recruitment and selection practices) contribute to low levels of female and minority representation, and what effects enhanced representation for these groups can have upon policy directions and outcomes are largely empirical. This body of research is particularly diverse,

¹²⁴ This is a paradox in itself since the family nominated senators are on record as carrying out the societal expected functions of elected senators without the financial muscle to do so-Senator Catherine Mukite Nobwola

¹²⁵ Information acquired during the interview with Senator Dullo

because it looks at the place of different groups in various countries, and also because it examines a very broad range of institutional and cultural variables and their effects upon those groups. The problem of women's representation is brought to the fore *vide* multi-case studies comparing the contextual factors that limit women's political representation across countries¹²⁶ - as Senator Senator, MP Judith sijeny explained. The fact that there are very few studies that compare ethnic minority representation across countries, or that address the under-representation of different groups within countries points to a vacuum in knowledge of how that particular segment of the population can be actively involved with the organs of decision making.¹²⁷

The disconnection is what may give credence to the allegation-supported by research-that women representation in elective bodies does not necessarily result in more effective women agendas being pushed. It is this disconnect that gives the Kenyan women senators a rationale to rely on in demanding for equal and continued access to the electorate after ascending to public office like their male colleagues. In what Adrian Favell refers to as a disconnect between the theory of women representation and the empirical realities on the ground.

“There is a notorious disconnect between the ideal world of contemporary political philosophy – its happy discourse of rights and justice, or the idealizations of cultural difference and radical democracy – and the actual institutional and technocratic practice of liberal politics.... An

¹²⁶ Wilma Rule, “Electoral Systems, Contextual Factors and Women's Opportunity for Election to Parliament in 23 Democracies,” *Western Political Quarterly* vol. 40 (1987), pp 477-498; Richard E. Matland and Donley T. Studlar, “The Contagion of Women Candidates in Single-Member District and Proportional Representation Electoral Systems: Canada and Norway,” *The Journal of Politics* vol. 58:3 (1996), 707-733; Genvieve Pascaud-Becane, “Participation of Women in Political Life: An Assessment of Developments in National Parliaments, Political Parties, Governments and the Inter- Parliamentary Union, Five Years after the Fourth World Conference on Women.” (Geneva, Inter-Parliamentary Union, 1999); Miki Caul, “Political Parties and the Adoption of Candidate Gender Quotas: A Cross-National Analysis.” *The Journal of Politics* vol. 63:4 (2000), pp 1214-1229.

¹²⁷ Senator Judith Sijeny, See also Wilma Rule and Joseph F. Zimmerman (eds.), *Electoral Systems in Comparative Perspective: Their Impact on Women and Minorities* (Westport CT, Greenwood Press, 1994); Susan A. Banducci, Todd Donovan and Jeffrey A. Karp, “Minority representation, empowerment and participation in New Zealand and the United States.” Paper presented at the Annual Conference of the Western Political Science Association, Seattle, WA (March 1999)

explicit connection between liberal reflection and liberal practice is generally missing, a fact which distorts the reality philosophers see through their theory.”¹²⁸

The women senators are beholden to an agency with their parties as there is no pragmatic connection between the women senators and the women in the electorate of county. We must pay attention to the fact that even the Constitution sees Kenya comply with all international instruments such as Article 9 of the Maputo Protocol and the CEDAW, what the article creates in effect-is that women are equal partners with men at all levels of development and implementation of State policies and development programmes .However, effective participation of women in those same positions of legislature is absent. What this implies is that it has been institutionalized that women should take part in formulating implementing policies but not in crafting the pieces of legislation that really are what effect change in the Kenyan context.

In a nutshell, the empirical function of the women senator in the Kenyan context at this point of the nation’s political development is to make contributions, party pronouncements on matters but then have not the power even to vote for the same of their own accord. Women senators have been reduced to full time lobbyists rather than actual legislators. They need to lobby their male counterparts to make motions go through as the vast majority of them have no power to vote on the motions themselves even in the absence of elected members of the Senate

¹²⁸ Adrian Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (New York, St. Martin’s Press, 1998), p. 12.

CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSIONS

CEMENTING EFFECTIVE PARTICIPATION OF NOMINATED WOMEN SENATORS AS LEGISLATORS, A WAY FORWARD

4.1 Reflections on the study

This thesis is a revelation, that the exercise of the ethics of care is not a theoretical endeavour. That its postulation is seen most clearly at the grassroots levels, a fact that is further buttressed by the interviews' evidence of women senators getting involved in service delivery.

Following the delineation of the topic, women in Senate; an unravelling of the history women's movement in Kenya; and a discussion on the matter, this thesis comes to a conclusion by making recommendations that would serve to bring to rest the questions raised. In its conclusion, the chapter addresses the discussions raised in each phase of the paper and gives a view on the best practices that are reasonably adaptable to remedying the situation- in full cognizance of the disadvantaged but improved position women hold in the Kenyan society.

Using interviews in the research brought out the experiences of the women senators as they participate in the legislative process with their current incapacity. As a means of actualizing participatory research methods, the face-to-face interviews brought to light the crippling effect that Article 123 (4) and how the women senators work around it.

The research laid bare the social impact that women senators are making in their counties from their disadvantaged position. Furthermore, it evaluated if there is an urgent need to allow women to vote in spite the article. The rationales put forward by the interviewed senators barring them

from voting indicated that political agency prevents nominated women from voting as it would result in some county delegations voting twice.

On reflecting on the matter, it is difficult to accept that rationale since posts of nominated senators are allocated in terms of the party proportions in the Senate.¹²⁹ Allowing women to vote will not affect the dynamics of party dynamics when voting on issues since the party proportions would remain identical whenever there is a vote. On evaluating the research findings

In my opinion, the sixteen nominative seats granted to women senators have worked against the meriting of the women senators as legislators since the point of having them legislate is replaced by that of obliging them to be grateful to be senators and not actually participate. Effecting the crux of this paper therefore would alter the fundamental inequity in Kenyan politics. It would create a genuine medium within which women senators may operate in prior to the sustained satisfaction of the one-third gender rule in regular elections. Furthermore, the Constitutionally enshrined meritocracy of liberal feminism will be in effect. Since Section 3 of the Judicature Act provides the hierarchy of laws the alteration of Section 68 of the Senate Standing Orders will be a mere formality. Another benefit of this action would be that a contextualized solution would be acquired and also that the act would provide the Supreme Court with an independent precedent on best practices by another arm of government. The ripple effect in the judiciary can only be positive as Supreme Courts world over are wont to rely on minimally altered precedents when dealing with hot-button issues, the sort of which this matter is. The answers arrived at by this paper can therefore be applied to any other field so long as the underlying principle of liberal

¹²⁹ Article 98 1 (b) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90;

feminism are applied to achieve substantive equality of opportunity for the disadvantaged gender.

4.2 Recommendations

In aligning the prescribed courses of action with the research analysis, the recommendations espoused within this chapter will be channelled along the themes that were dwelt on in the thesis. This means that the ensuing recommendations tackle the issue of having women senators participate substantively in the political process in the Senate.

4.2.1 House Rules' Committee considering voting petition that will allow women senators to vote on county matters

The Senate's 'House Rules Committee' could make to improvements on women senator's substantive participation in voting by giving due consideration to petitions; the women senators have forwarded a complaint on the mischief in Article 123 (4) to the Constitutional Implementation Committee. It has the capacity to remedy the wrong by allowing women senators to vote; denying the offending article the effect of its letter but implementing the full spirit of equality of the Constitution. The Constitution Implementation Commission is taking its time though, electing to stay mum on the matter and recommending waiting for at least five years before amending any part of the Constitution.

The male-dominated Senate House Rules Committee should speed up making adjectival laws that would make female senator participation more effective. The problem facing substantive affirmative action in the Senate therefore is the implementation by the bodies capable of creating

substantial and adjectival measures to ensure women senator participation. The Senate House Rules Committee should follow the spirit of the Constitution, even in the absence of specific Constitutional and legislative provision for nominated senator voting rights. It must see that allowing nominated senators to vote not only transcends the normal political reward system of nominative posts, but also a means of giving women leadership a voice in the Senate¹³⁰. It is a gender issue by virtue of the fact that no woman was elected to the Senate in the General Elections that were conducted in March 2013. Parliament faces various obstacles in achieving effective participation for all the women senators that comprise the ‘third’ of the elective posts in the Senate– a lack of funding and of trained staff, and an overly strong executive controlled by one political party – hampers its ability to generate the legislative momentum to overrule the inequity in Article 213 (4) of the Constitution. In a chapter titled “Achieving Equality or Serving an Authoritarian State,” scholar Timothy Longman highlights this contradiction. Though he states that the participation of women is “not entirely without meaning,” and that “the larger number of women in parliament today may make it even easier to adopt legislation to benefit women,”¹³¹ As such, the question of voting rights is one that must be looked at in a manner that sees the women’s ethics of care show in the whole Senate’s performance come the end of the five year term that the Senate will have served come the next election season in 2017.

¹³⁰“ Research demonstrates that, when empowered, women make decisions that positively effect children and families. Scholars in the field of women and development, for instance, have been able to demonstrate for many years that economic investments in women are far more likely to positively impact the lives of children than the same investments in men.” United Nations Division of Policy and Planning, ‘Rwanda: The Impact of Women Legislators on Policy Outcomes Affecting Children and Families’ [December 2006] citing Drude Dahlerup, “Using Quotas to Increase Women’s Political Representation,” *Women in Parliament: Beyond Numbers*, ed. Azza Karam. (Stockholm, Sweden: International Institute for Democracy and Electoral Assistance, 1998) 96

¹³¹ Longman, Timothy. “Rwanda: Achieving Equality or Serving an Authoritarian State?” in Bauer and Britton, *Women in African Parliaments*, 2006. Page 149.

4.2.2 Use political agency to drive a unified, cross-political party agenda promoting effective participation in the Senate.

“Although it is often said that there can be no democracy without political parties, it equally true that that there can be no parties without the democratic participation of women. This not only means being open to women’s specific demands and interests, but also providing them with equal opportunities...”¹³²

The ensuing recommendation is that political agency is a tool that can also be used to further the feminist agenda through both intra-party and cross-party pressure on the male hegemony to give effect to Article 27¹³³ of the Constitution by using cross-party caucuses such as KEWOSA (Kenya Women Senators) to push for the overruling of the effect of Article 123 (4) and ensure effective participation of women senators in the Senate. As the Kenyan Senate is relatively young, its rules of practice can be altered with minimum disregard with the rule of the letter of the Constitution to allow for effective participation of women senators irrespective of whether they are nominated or not.

Previous pushes for the involvement of women in the decision making positions of public government have shown that movements that embody the various heterogenies of the women in that particular point in time. In the current circumstance, this heterogeny includes political, economic and cultural divides.

Looking at international best practices, a good example is presented by the action taken by the Citizens’ Action Party of Spain. According to that party, equal opportunities for men and women

¹³² Vidar Helgesen, Secretary General, International Institute for Democracy and Electoral Assistance.

¹³³ The Constitutional provision that makes it unethical to keep the female voice in the Senate silent by both commission and omission when they are discriminated against and denied substantive/effective on the strength of procedural provisions of law. Article 27 (3), Constitution of Kenya 2010 “ Women and men have the right to equal treatment, including the right to equal opportunities in political..... spheres.”

in all spheres of human resource development involve a concrete commitment to guaranteeing equal participation in all internal bodies and decision-making structures, as well as in election lists. Article 11 of its statute establishes that in order to fulfil the goal of gender equality, an even number of candidate of each sex must be nominated for all list or position in each body and committee. It also requires compliance with the laws and interpretations passed on these issues by the Consultation Court and the Supreme Electoral Tribunal .In the case of rosters or lists presented by the party for elected positions, equity must not only be established in percentage term, but also by the alternative placement of both genders in the sequencing of the list.¹³⁴ This step would not only ensure that acceptable percentages of women make it to representative houses, but also that the ethics of care that are propounded by the feminists are taken into account during decision making times.

4.2.3 Interlinking to form a transnational platform for women senators for ideological and structural refinement

In their book *Activists Beyond Borders*, Margaret Keck and Kathryn Sikkink make a case for the increasing importance in international affairs of transnational advocacy networks¹³⁵ The term transnational advocacy networks refers to the set of non-state actors working together on an international issue that are bound together by shared values, common discourse, and dense exchanges of information and services, who coalesce and operate across national frontiers and whose targets may be international organizations or the policies of particular states. Historical examples of such trans-border alliances include antislavery and woman suffrage campaigns.

¹³⁴ IDEA, ' From Words to Action-Best Practices for Women's Participation in Latin American Political Parties,' 2008

¹³⁵ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY, Cornell University Press, 1998).

Women have tended to be more successful than ethnic minorities in cross-border mobilization for improved political representation. Women's organizations have been able to mobilize and to achieve a high degree of cross-national cooperation to help them promote their case at home for more representatives in parliament. While there are numerous ethnic and anti-racist organizations working at a local and national level in most countries, they do not appear to be organized across ethnic, national or religious lines.¹³⁶

Women legislators have a crucial role to play in making legislations reflect the ethics of care in male dominated parliaments. As Nyokabi Kamau put it in her study on women in political leadership¹³⁷, "The women already in parliament or local government need to ensure that their voices are heard, and that issues that are of concern to women are kept at the forefront. One way they can do this is to network among themselves by holding regular consultations to discuss issues that affect women differentially, and to strategize on how they can make this part of the legislative agenda. This is in keeping with the fact that, as noted in the study, society at large expects women politicians to represent not just their constituents but women as a whole. Not only will such networking help increase the visibility of women issues, it will also help keep the women leaders accountable to each other and, therefore, offset or at least diminish the likelihood of their becoming masculinized, where they get so engrossed in keeping their positions in a male-dominated parliament that they lose sight of issues that are of concern to their fellow women."

¹³⁶ Bashy Quraishy, 'Ethnic Minority Experiences of Participation in Democratic Decision Making Processes,' lecture at Pesaro, Italy (24 February 2002). Also see Quraishy at http://www.bashy.dk/ethnic_minorities.htm (accessed on 5th July 2014).

¹³⁷ Supra n68 at p 81

However, this study has shown that they do not have a clear mandate as the novelty of senatorship suggests; the source of which could be international platforms erected by cross-border women leaders that crystallizes their various aspirations into practices that can then create a culture and the resultant expectations on future women senators.¹³⁸

4.3 Key Percepts and Conclusions

From the study, we understand the historical position of the woman in society as being intrinsically connected to her status in social life. That her initial and continued subjugation obscures her right to actively participate in the political leadership of her community; bringing this concept to Kenya the study highlights the pre independence traditional patriarchy. It goes on to show how this patriarchy subsisted even after independence in the face of women's equal role in the independence struggle. As a matter of fact, it is brought to light that it is indeed the patriarchy in Kenya's colonizer at Kenya's independence that instilled the marginalization of women that persists to date. It is alarming that no woman was elected into the Senate which buttresses the notion of Kenya as a patriarchal society.

Women have struggled to occupy their rightful places as productive public officials in the political sphere. Thanks to the efforts of liberal feminists in the infancy of the nation's politics women are now guaranteed a third of the representation in all elective bodies in the republic. The Senate-which is the subject of this discussion- itself comprises of sixteen women

What this study is chiefly concerned with is the limitation in Article 123(4) which limits the voting rights of nominated senators on all matters concerning the counties. This in effect denies

¹³⁸ For instance, the declarations of the Beijing Platform for action (1995) p16, forms a good basis for creating these discussions and proposing good practices that can then be made the mandate of women senators

all women in the Senate from freely legislating along the ethics of care due to their subdued positions in their county delegations.

A gender inequity arises, the third of the female gender in the Senate has no capacity to effectively participate in decision making as envisaged in the Constitution. Using the feminist methodologies, the study ascertains the impact women senators have on society. The ensuing analysis goes so far as to evaluate their participation in the political process even in their presently handicapped state. The research involved conducting of interviews whereby the women senators highlighted challenges they face in their exercise of the ethics of care; these ranged from the reduced kitty as compared to elected senators to a lack of will to .unwarranted competition from their male counterparts.

In addition to learning best practices in other jurisdictions, the study arrived at recommendations that are principally aimed at actualizing effective participation in the Senate. It then follows that the equitable way of dealing with the crisis created by the article is to create an environment conducive to effective participation of the female gender in Senate. The recommendations involve changes both to the institutions around the women senators and the attitudes of the men who are in a position to alter the adjectival laws¹³⁹ in order to allow women to participate effectively in the Senate.

In conclusion, I note that indeed there is a conflict in the spirit of the Constitution under Article 27 and 123 (4). Formal equality has been demonstrated to fall short of the demands of substantive equality of opportunity in the Senate.

¹³⁹ Such as the Senate Standing Orders

For the ethics of care to be felt in society women need a voice in the Senate, they require the ability to vote on county matters. Thus, Article 123 (4) and its effect must be addressed in order to ensure an inclusive Senate and a progressive society.

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APPENDIX

Appendix 1

Name: Hon. Fatuma Dullo Adam

Occupation: Nominated Senator in the Republic of Kenya

Date: 26th July 2014

QUESTIONS

- 1.** What challenges do nominated women senators face in pushing the collective gender-based agendas in the senate?

 - a) The provision in 123 (4) serves to ensure that each county does not get more than one vote. For me this has two uses, it helps control the parties strength in numbers in the senate by reducing them; secondly it is used to give the male elected a form of authority over the female nominated in that only the written authorities of the male senators can see a nominated woman senator vote.
 - b) In terms of infrastructure, the nominated women senators are not given as much attention as their male senator counterparts. This is seen in the instance where the nominated senators are only allocated offices in the capital city and not their home counties too. This sees them disconnected from the electorate and any arising issue on women and children in their county.
 - c) Male dominated political parties pose a great challenge to the mandates of women senators. Across political divides, each party moves its own national agenda through all its senators-nominated ones included. Therefore, it makes it even harder for the nominated women senators to take unified positions on any issue as there is no political

room for cross-party unity by nominated women senators. However, a young organisation called (**KEWOSA-Kenya Women Senators Association**) has been formed by the nominated women senators in an effort to streamline their efforts on their collective duty to highlight overlooked issues in line with the ethics of care.

- 2.** Is the effect of Article 123 (4) of the 2010 constitution apparent in voting in as much as women voting in senate motions concerned?

Yes, the effect is apparent to the working woman senator.

- a) The senate is evolving its own rules of practice. One of them is the requirement of a written authority by the elected senator allowing the nominated senator to vote on his behalf, almost always in his absence. This pegs the performance of the woman senators to brief moments when they may exercise the full powers of their positions. The rest of the time they are latent. It also boils down to interpersonal relationships; some elected senators do not allow their nominated counterparts the chance to vote even in their absence. This cripples motions on the floor of the house. For example, yesterday (on the 25th July 2014) two motions failed to sail through for the simple reason that women senators did not have the collective capacity to vote on the issue.
- b) Women senators have been reduced to full time lobbyists rather than actual legislators. They need to lobby their male counterparts to make motions go through as the vast majority of them have no power to vote on the motions themselves.

- 3.** Do you see any improvement the Senate’s ‘House Rules Committee’ could make to improve women senator’s substantive participation in voting?
- a) Through the Senate House Rules Committee, the women senators have forwarded a complaint on the mischief in Article 123 (4) to the Constitutional Implementation Committee. The CIC is taking its time though, electing to stay mum on the matter and recommending waiting for at least five years before amending any part of the constitution.
 - b) The male-dominated Senate House Rules Committee itself is slow making adjectival laws that would make female senator participation more effective. The problem facing substantive affirmative action in the senate therefore is the implementation by the bodies capable of creating substantial and adjectival measures to ensure women senator participation.
 - c) The Senate House Rules Committee should follow the spirit of the constitution, even in the absence of specific constitutional and legislative provision for nominated senator voting rights. It must see that allowing nominated senators to vote transcends the normal political reward system of nominative posts. It is a gender issue by virtue of the fact that no woman was elected to the senate in the General Elections that were conducted in March 2013. As such, the question of voting rights is one that must be looked at in a manner that sees the women’s ethics of care show in the whole senate’s performance come the end of the five year term that the senate will have served come the next election season in 2017.

APPENDIX 2

Name: Hon. Judith Sijeny

Occupation: Nominated Senator in the Republic of Kenya

Date: 26th July 2014

QUESTIONS

- 4.** What challenges do nominated women senators face in pushing the collective gender-based agendas in the senate?
- d) The women nominated senators cannot vote on many matters that concern counties. Therefore, their contribution to the motions and bills on the floor of the senate is restricted to lobbying and debating on the draft articles. A position that makes a nominated member of parliament of the national assembly more effective, ironically.
- e) Some national matters are categorized as ‘female’ matters and as such are given a wide berth by the male members of the senate. Here the votes are delegated well. However, the downside is that some matters are then considered a male preserve and the women’s voice is effectively ignored since we do not have the capacity to vote and actually influence the outcome of votes in the senate.
- 5.** Is the effect of Article 123 (4) of the 2010 constitution apparent in voting in as much as women voting in senate motions concerned?

Yes, because the inability to vote makes it hard to substantively take part in being a senator.

- c) However, seeing as we are not as effective as our male counterparts in the senate when it comes to voting, we move towards implementation of the existing laws and making a change at the county instead of the house even though it is more expensive for us. Nominated women senators do not have offices at the county level so we have to bear the costs ourselves unlike the elected senators.
- d) The constitution is not fair when it gives women a third of the seats in the senate and then goes on to deny them a voice and tell them that they cannot vote. Yet the senate exists

So that it can make laws and perform an oversight role in the first place..

6. Do you see any improvement the Senate's 'House Rules Committee' could make to improve women senator's substantive participation in voting?

- d) Not really, because the matter has already been forwarded to the Constitutional Implementation Committee and there is a lack of will to alter the constitution in order to facilitate our voting. The general reason is that we should wait at least for five years so that any alterations can be made to the constitution. The question is, do we just sit and do nothing just because the bodies in the country and senate will not allow women to vote? No, because the people at the grassroots need services which we can

help facilitate with our position as nominated senators, the public makes no distinction between nominated and elected senators.

APPENDIX 3

Name: Hon. Catherine Mukite

Occupation: Nominated Senator in the Republic of Kenya

Date: 26th July 2014

QUESTIONS

7. What challenges do nominated women senators face in pushing the collective gender-based agendas in the senate?
- f) The nominated women senators are divided along the lines of parties. This is significant because they are obliged to follow the party position whenever they are given the opportunity to vote. The constitution itself is clear that every county has a delegation whose vote on county matters in the senate is only valid if there is a general agreement to it (in the absence of the elected senator) or if the elected senator expressly decides to vote in another manner.
- g) It is easier for our counterparts in the ruling coalition to push for development in their counties than for those in the opposition. This greatly hampers the ability of the nominated (woman) senator to push for their gender-based issues as a unified front across all parties. Thus denying women and children issues a sure progression as the developments are mostly concentrated on the ruling party's counties.

8. Is the effect of Article 123 (4) of the 2010 constitution apparent in voting in as much as women voting in senate motions concerned?

Yes, the effect is apparent to the working woman senator.

- e) The senate is evolving its own rules of practice. However, these rules of practice are not new and do not reflect the principles of the current constitution as traditional treatment of nominated members persists. It is a common culture that the positions of nominated members parliament were used as 'soft landings' for those party loyalists who failed to make it to the August House through the ballot. So that when they got into parliament they did not contribute much to the political process and were more effective as party stalwarts in parliament. Now the nominated women senators is still expected by some quarters that the nominated senator is nothing more than party loyalist, ignoring the fact that women were nominated to the senate not only to fill the numbers but also to push the various issues that can only be best captured by women legislators.
- f) The clause exists to ensure that each county does not vote more than once, so trying to fight it could be considered a political act of aggression towards the parties in the opposition as the ruling party has the majority seats in the senate hence the highest number of nominated senators. The effect is there to be seen and it is also sacrifices nominated senator issues in the senate for political reasons.

9. Do you see any improvement the Senate's 'House Rules Committee' could make to improve women senator's substantive participation in voting?

- e) The women senators through the Kenya Women Senators (KEWOSA) have forwarded a complaint on their exclusion from voting to the senate but there is yet to be a response from the CIC directing the Senate House Rules Committee on the issue.
- f) The Senate House Rules Committee is in itself facing difficulty in some operations because of the intense inter-political rivalry that is a national issue. This state of affairs has made it difficult for this our agenda to be successful because it is perceived as a minor issue when considered in light of various political sagas going on at any point in time.