

**IMPLEMENTATION OF ARTICLE 100 OF THE CONSTITUTION: IS
THE TWO-THIRD GENDER PRINCIPLE A PIPE DREAM?**



UNIVERSITY OF NAIROBI

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G62/34631/2019**

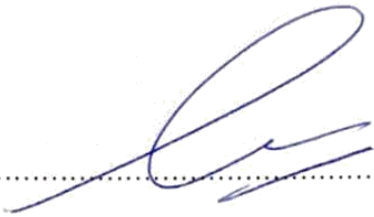
A Research Project submitted to the University of Nairobi Law School in partial fulfilment of the requirements for the award of Degree of Master of Laws (LLM)

May, 2021

DECLARATION

I, **Lodupo Loserian Tukei**, declare that this is my original work and the same has not been presented to any institution for higher learning for the award of a diploma, degree or post graduate qualification.

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Dr. Agnes Meroka- Mutua

DEDICATION

To my lovely daughter Nashilari,

Darling, I dedicate this research to you. May your generation benefit from all the efforts and clamour geared towards gender inclusivity in political process.

ACKNOWLEDGMENT

First of all, I want to thank God for the strength and grace He extended to me to undertake this research.

I recognize my supervisor Dr. Agnes Meroka-Mutua. Her excellent understanding and mastery of the subject and her strong guidance made this research possible. Dr. Meroka, your thoroughness and timely feedback will always be appreciated. You are a great teacher and mentor. I owe this research to you. Thank you.

To my father, Lodupo ole Tukei, and mother, Ann Lodupo, you both taught me to always believe and be courageous. You instilled in me that nothing is impossible and the sky is the lower limit. I pray you live long enough for me to continue sharing my successes with you. You deserve it- and more.

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Finally, I take full responsibility for all the errors, pratfalls and flubs in this research. I am human and I keep learning.

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Petition 182 of 2015, Center for Rights Education & Awareness (CREAW) V Attorney General and Another [2015] eKLR

Petition 371 of 2016 Center for Rights Education & Awareness (CREAW) & 2 Others V Speaker, National Assembly & 6 Others [2017] eKLR

CHAPTER ONE

1.0 Background

The search for political inclusion in a society that is patriarchal like ours requires both short and long-term strategies. The short-term strategies would entail putting in place a strong constitutional and legal framework that protects the participation of women in politics, governance, and other societal entitlements. On the other hand, the long-term strategies would involve reengineering our cultural and paternalistic practices that continue to have a direct bearing on inclusion and representation in democratic processes. For this to happen, however, there would be a need for a deep reflection on societal prejudices and the place of women in society, and how to advance human rights.¹

The repealed Constitution² recognized equal protection of everyone before the law. However, that particular dispensation was gender neutral as opposed to gender-sensitive. With Kenya attaining her independence, the 1963 Constitution was expected to make the society more equal. Unfortunately, this was not the case. Before 2010, the two main electoral laws³ in use-National Assembly Act and the Presidential Election Act- did not have any special features to facilitate women's involvement in the electoral and political activities. Over time, reversing the systemic marginalization proved difficult.

In 2010, Kenya took one of the most significant steps in her history by promulgating a new Constitution⁴. The new Constitutional dispensation has been lauded as providing a platform where a new era of democracy can flourish. The Constitution is particular in promoting respect for human rights, rule of law, and most importantly, equitable gender representation in our electoral system. The new dispensation was focused on breaking the gender neutrality principles that guided the repealed constitution. This was done by adopting gender-sensitive approaches and principles. Various social policies and affirmative action plans were proposed to ensure that there is equal treatment in law.

¹ Centre for Rights Education and Awareness (CREAW), *Tracing the Journey: Towards implementation of the two-third gender principle*, 2019

² COK, 1963

³ now repealed

⁴ COK, 2010

Historically, women in Kenya have been underrepresented in both political and appointive bodies. Statistics prove that men have held the majority of seats in parliament since the first general election. For instance, in 1997, only 4.1% of all the members in parliament were women. This increased to 8.1% in 2002 and 9.8% in 2007. Undoubtedly, even with the independence constitution, the number of women elected into the national assembly rose, albeit gradually. However, despite the promulgation of the new constitution that embedded the two-third gender principle, only sixteen (16) women of the 290 members were elected into parliament in 2013⁵.

The Constitution appreciates that either gender, male or female, may be subjected to underrepresentation. It is for this reason that the gender principle⁶ was formulated. Specifically, the Constitution promotes positive discrimination through nominations and women representatives to enhance women's participation in the electoral system. Such positive discrimination is what is envisaged by Article 81 (b) that ensures that there is fair political representation for all genders.

In keeping up with Article 2 (6)⁷, the Constitution has given effect to international obligations under various conventions that provide for equitable gender representation. The CEDAW⁸ Convention requires signatories to outlaw all forms of gender based discrimination. Further, it tasks member states to put in place measures to correct underrepresentation and enhance gender equality.

However, despite these progressive provisions, nine (9) years down the line and two general elections later, the National Assembly has simply failed to achieve equitable gender representation.

1.1 Problem Statement

As it has been alluded to in the background of this study, women have suffered inequality in political processes and representation since time immemorial. Their participation in politics has been impeded by both gender-specific reasons and some peculiarities that are unique to

⁵ Kaimenyi C, 'An Analysis of Affirmative Action,' International Journal of Business, Humanities and Technology Vol. 3 No. 6; June 2013, p92.

⁶ A constitutional quota formulated to ensure inclusion and participation of all genders by providing not more than two-thirds of the members of an elective or appointive body shall be of either gender.

⁷ Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

⁸ Convention on the Elimination of All Forms of Discrimination Against Women, 3 September 1981

Kenyan politics. Despite the challenges that they have faced, just like the trend worldwide, more women are now running for elective seats courtesy of more inclusive laws and policies.

Article 81(b)⁹ of the Constitution as read with Article 97 that sets out the membership of the National Assembly provides that at least one hundred and seventeen (117) members out of the possible three hundred and forty-nine (349) should be of either gender. However, the National Assembly, as currently constituted, does not adhere to these provisions. As it stands, the 12th Parliament has only seventy (70)¹⁰ elected members who are women, therefore, making the composition of the National Assembly unconstitutional.

Further, the Constitution at Article 100 of the Constitution directs parliament to enact legislation for purposes of promoting representation of women in Parliament. Sadly, nine (9) years after Kenyans adopted a new Constitution, parliament has been unable to give effect to this crucial Article by enacting the necessary legislation.

1.2 Research Questions

The four specific research questions that this paper seeks to answer are:

- I. What has been the historical place of Kenyan women in politics and how have they overcome the challenge of inclusion over the years?
- II. Why has parliament been unable to give effect to Article 100 of the Constitution?
- III. Is the current legal and electoral framework conducive for the implementation and achievement of the two-third gender rule?
- IV. What should be done to remedy the current situation to ensure the National Assembly adheres to the two-third gender rule?

1.3 Study Objectives

This paper aims to interrogate the place of Kenyan women in politics and governance.

The specific objectives of this study will be to demonstrate:

- I. The milestones achieved so far in ensuring equitable representation of women in politics.

⁹not more than two-thirds of the members of elective public bodies shall be of the same gender
¹⁰www.parliament.go.ke

- II. The inability to fully realize the two-third gender principle in the National Assembly as envisaged by Article 81(b) of the Constitution and the reasons thereto.
- III. Give proposals on legal and electoral reforms that will enable the implementation of Article 100 of the Constitution and subsequent realization of the two-third gender rule.

1.4 Hypothesis

This study is based on the assumption that the current legal and electoral framework is inadequate to ensure the actualization of the two-third gender principle.

Article 97 of the Constitution provides the composition of the National Assembly as follows:

- i. Two hundred and ninety (290) members elected by the registered voters of single member constituencies;
- ii. Forty-seven (47) women elected from each county with each county constituting a single member constituency; and
- iii. Twelve (12) members nominated from parliamentary political parties to represent special interest groups.

Further, one of the outstanding features of the electoral system as provided by Article 81(b) is *“not more than two-thirds of the members of elective public bodies shall be of the same gender”*.

With the provisions of Articles 81(b) and 97 in mind, the National Assembly should consist of at least one hundred and seventeen (117) members of either gender out of a possible three hundred and forty-nine (349). However, as it stands, the 12th Parliament has only eighty-two (82)¹¹ members who are women.

Therefore, the following hypothesis is under test:

If the two-third gender principle is to be achieved and implemented as envisaged by Article 81(b) and Article 100 of the constitution, then the country must be prepared to review its legal and electoral regulatory framework to ensure equitable gender representation.

¹¹ 23 members elected at the constituency level; 47 women county representatives and 12 nominated members

1.5 Theoretical Framework

To comprehensively answer the questions and resolve all the problems identified in this research, the researcher shall employ two theories; feminism and critical mass theory.

These theories will prove relevant as it will be shown, they speak extensively on inclusivity and gender equality in politics and governance and how it can be improved.

1.5.1 Critical Mass Theory

This is a theory that emanated from the concept of critical mass in nuclear physics. In science, the term critical mass simply means the amount of fissile material needed for a sustained nuclear reaction.¹²

In the 1980s, legal scholars adopted the concept of critical mass as found in science and incorporated it into social science¹³. The concept has subsequently been influential in gender and minority studies.

Rosabeth Moss Kanter¹⁴ researched on women and their political representation. She elaborated that, “the life of women in the corporation was influenced by the proportion they found themselves”¹⁵. In her research, Moss identified four types of groups in relation to proportional representation¹⁶. These were:

- i. the uniform group;
- ii. the skewed group: with a minority of no more than 15%;
- iii. tilted group: where the efficiency of the minority is gradually increasing to a point of influencing the culture of the whole group; and
- iv. balanced group: representation is between 60:40 to 50:50 and the gender or race of the group and other structural factors are less important.

It is from this theory that articulation for women's political representation made headway. It has since been argued by scholars that women will not necessarily represent other women and

¹² Oxford Dictionary

¹³ *Deed and Words: gendering politics after Joni Levenski*, Edited by Rosie Campbell and Sarah Childs, (2006) p.

139

¹⁴ Research on Women and blacks as minorities in organizations (1977)

¹⁵ Ibid (1977:207)

¹⁶ Moss Kanter Theory

their interests when they get elected into parliament or other political offices. This is because there are generally fewer women elected in almost all assemblies as compared to men. Therefore, the only way women would have a major impact on legislative outcomes is if they outgrew tokenism¹⁷ and became a real and considerable minority in parliament. Hence, women numbers in legislative positions must increase to effectively promote women-friendly policies and concerns.¹⁸

To guarantee actual participation and inclusion of women in politics, critical mass theory calls for the implementation of legislative gender quotas such as affirmative action.

Conversely, Moss Kanter criticises the critical mass theory and the proposed implementation of the same because according to her, it ensures entrenchment of stereotypes against women. She states that men will be apprehensive about supporting legislation that is centred around women because after all, equals should be treated equally and not receive any preferential treatment¹⁹.

Further, she argues that women who have benefitted from the legislative quota systems will have little impact because of the heavy expectations and pressure by fellow women to deliver quick results. While all along, men are not subjected to these performance pressures²⁰.

This theory, and the criticism as discussed, will aid this study in examining affirmative action and ascertaining if there is an actual need to relook at its place in our electoral system.

1.5.2 African Feminism:

Feminism as a legal theory emanated from the belief that society is patriarchal in nature and there was a need to protect women and increase their voice in decision making both for themselves and the society as a whole.

¹⁷ Tokenism is the practice of making a symbolic effort to be inclusive to members of a disadvantaged group by recruiting a small number of people from that group to give it an appearance of equality.

¹⁸ Sarah Childs Mona Lena Krook, *Critical Mass Theory and Women's Political Representation*, Political Studies: 2008 Vol 56, 725–736

¹⁹ Rosabeth Moss Kanter, *Men, and women in the corporation*, (New York: 1993)

²⁰ Mona Lena Krook, *Empowerment Versus Backlash: gender quotas and critical mass theory*. 2015 Politics, Groups and Identities, 3. (184-188).

Dr Josephine Akihire²¹, a revered African Feminist, avers that not only does African feminism agitate for equality, it also plays a part in empowering women through capacity building and eliminating any barriers that may impede full enjoyment of their rights.

African feminism is concerned with intersectional²² discrimination to understand the socio-political factors that make gender inequality flourish. This is as opposed to Western feminism that is concerned with homogeneous discrimination. Due to this, African feminism has been excluded from the mainstream feminist ideologies. It is believed that African Feminism suffers from theoretical challenges because there are many components of African feminism²³.

As argued by Akihire²⁴, legislative gender quotas ensure that there is gender equality in politics and governance. The Constitution of Kenya²⁵ is a clear triumph of women in Kenya and ensures that there is an reasonable representation of women in the National Assembly through the two-third gender principle.

1.6 Justification of study

As history has proven, inclusion of women in politics and governance is a matter that has been canvassed extensively over the years. The makers of our Constitution were aware of the need to have more women participate in politics and governance. In their wisdom, they provided gender-sensitive provisions that would help elevate women and ensure more participate in politics and governance.

However, with the difficulty that the nation has faced nine (9) years after the promulgation of the Constitution, this paper will interrogate the historical place of Kenyan women in politics and why Parliament has been incapable of giving life to Article 100 of the Constitution that seeks to cement the gains made over the years. This research will also question whether our current legal and electoral frameworks impede actualization of the two-third gender principle.

²¹ J Akihire, *African feminism in context: Reflections on the legitimation battles, victories and reversals*, (2014)

¹⁹ African Gender Studies

²² A branch of feminism that perpetuates that all aspects of social-political identities such as gender, social class, sexuality, race, etc are all connected and overlap each other

²³ Patricia McFadden, *Contemporary African Feminism: Conceptual Challenges and Transformational Prospects*

²⁴ J Akihire, *African feminism in context: Reflections on the legitimation battles, victories and reversals*, (2014)

¹⁹ African Gender Studies

²⁵ 2010

1.7 Methodology

In writing this paper, this study will largely use desk review research methodology that will be both qualitative and quantitative. These methodologies will be instrumental in collecting and dissecting the available literature on the advancement of women representation in Kenya and why the same has not been fully implemented as is provided by the constitution.

This research will also examine the various court cases over the years that have shaped the jurisprudence and discourse on the right of women to meaningful participation in democratic processes.

In addition, the researcher will analyse the specific number of female members of parliament since 1963, improvements and drawbacks over the years and propose ways on how it can be improved further in order to adhere to the Constitution.

Currently, Kenya is ranked a distant and abysmal ninetieth (90th) in terms of composition of women in the National Assembly (lower or single house)²⁶. This is in stark contrast to Rwanda who are ranked first (1st) with 61% of its parliament being women whilst South Africa is ranked an impressive tenth (10th)²⁷.

It is imperative for this study to ascertain the factors that are making these two African countries have parliaments that are representative of all genders. A comparative analysis of the social-cultural factors that have impacted gender equality in these two states shall be discussed in this research. This study shall also ascertain if the electoral systems of the states is different from that of Kenya and if that has had any impact in ensuring inclusivity.

1.8 Literature review

The literature review in this paper shall discuss the various studies and writings that have enhanced the understanding of women in politics and governance. This section shall broadly review literature that has informed how the world understands gender equity and equitable representation, identify the shortcomings in the literature and how this paper intends to cure these shortcomings.

This section shall also aid in appreciating scholarly writings on the various electoral system and how each achieves its purpose of fostering democracy.

²⁶ Women in National Parliaments Data base as at 1st Feb 2019

²⁷ Ibid

1.8.1 *Literature on feminism, critical mass theory and gender quotas*

It has been espoused that the wealthy have historically maintained social control by oppressing and exploiting the poor through the law. Over time, there have been obvious ideological struggles among social factions in which competing ideas of justice, goodness, and democracy are pitted against each other. To remedy this, scholars have advanced legal theories that would use the law to overturn the hierarchical structures of domination in the modern society.

It is accepted that majority of the world as it is, is patriarchal, and there is therefore a need to have in place policies that aid in reversing the systemic marginalization that women have faced in politics and public life. The literature in this section will not only link this study to the theoretical framework but also show how scholars over the years have grown bolder in expressing the challenges women in the modern society face and how to remedy them.

To understand society and equality in representation, Mackinnon²⁸ figures it is important to understand sex discrimination and law. She reckons that law, coupled with moral theory sees equality and gender as issues of sameness and differences. This approach ensures from the onset; law is discriminatory towards women even though it mandates equal treatment. According to this writing, the idea of sameness and differences has been challenged by women to show that they are as good as men. What a man can do, a woman can do too²⁹. It is on this basis that over time, women have felt that they too, can (and should), have a voice in the political process.

Mackinnon's study however does not take cognizance of unique societies such as African countries. In understanding the role of feminism and patriarchy in the political processes, this study shall focus on the peculiarities of African and specifically Kenyan politics and the impact feminism has had in enhancing gender inclusivity in electoral processes.

Maria Nzomo³⁰ articulates how African feminism has been critical in enhancing inclusion of women in politics. She highlights experiences of Kenyan women and how the influence of African feminism was key in expanding the democratic space for Kenyan women. In her writing, she reckons that even during the colonist era, African feminism was a major influence

²⁸ Catherine A Mackinnon, *Towards a feminist theory of the state* (Harvard University press, 1989).

²⁹ Ibid

³⁰ Maria Nzomo, Kenyan Women in Politics and public decision making in Mikell Gwendolyn, ed. *African Feminism: The political of survival in sub-Saharan Africa*. University of Pennsylvania press; 1997

in the clamour for the eradication of patriarchy in various political processes. This makes the study significant in understanding the role of African feminism and its influence in politics.

Nzomo notes that despite all the historical contributions of women in enhancing the democratic space, the social structures have remained a great impediment. This study will identify the various social structures that have proved to be an impediment to the inclusion of women in political processes. Further, an analysis will be made to determine whether the Constitution of Kenya³¹ has in any way attempted to break these barriers and the progress so far, if any.

Mona Lena Krook³² writes that as the study of liberal democracy gained prominence, there was an emergence of new scholarships that challenged the view that politics was a neutral arena where everyone plays an equal role. Rather, the new idea was that liberal political arrangements create a systematic alteration to public policies and political engagement. This distortion provides alternatives and innovations with the most common, from a global perspective, being increased representation of women.

Krook notes that quota policies, that is aimed at having more women elected and selected into political office, is the most common practice of ensuring more women participate in political activities³³. She discusses the origin of most of these policies stem from the Beijing Declaration and Platform for Action³⁴.

In her writing, Krook identifies three typologies to classify the different quotas. She highlights the *reserved seats quota system* as one which appears largely in developing countries in Africa, Asia and Middle East. The reserved seats system is established through the constitution and sometimes electoral law. The system creates separate electoral rolls for women, allocate specific constituencies to female candidates and allot women seats according to each party's proportion in a popular vote³⁵.

³¹ 2010

³² Mona Lena Krook, *Quota for women in Politics: Gender and Candidates Selection Reform worldwide*, Oxford Press (2009)

³³ Ibid

³⁴ The United Nations 4th World Conference on Women in September 1995 in Beijing. The Declaration was signed by 189 member states and it calls on governments to put in place strategies that ensure women's full access and participation in power structures and decision making.

³⁵ Krook (n 32)

The second quota system identified by Krook is the *party quotas system*- the most common type and prevalent in Western Europe³⁶. This is a system where individual parties take voluntary measures to reach a positive percentage of women in its candidates list. According to Krook, the party alters its practice by setting out new conditions for candidates' nomination that require the party's leadership to recognize the biases women face and allow alternate political enlistment.

The third quota system identified by Krook is the *legislative quota* that is the newest kind and mainly found in developing nations of Latin America and post conflict states in Africa, Middle East and South-Eastern Europe. This system is implemented through reforming election laws and sometimes the constitution. Just like the party quota, this system addresses the party selection process with the national parliament passing legislation requiring that each political party nominates a certain proportion of female candidates³⁷.

Krook's study is instrumental in understanding how various legal systems establish quotas to cure inequality in democratic processes.

This study will consequently interrogate if gender quotas are really effective in a society that is dominated by egocentric male politicians who will more often than not support policies that aid inclusion of women in the political landscape. In discussing why, the National Assembly has failed to give effect to Article 100 of the Constitution, this research will draw some of the peculiarities of Kenyan political parties and the role they have played in muzzling women participation.

In her book, honoured feminist scholar Wanjiku Mukabi Kabira³⁸ traces women's struggles to change their status and lives in an era where women empowerment and gender quotas were not embraced.

She articulates how the Constitution of Kenya 2010 provides the perfect avenue for ensuring there is tangible and passable inclusion of women in politics and governance. In this book, Kabira insists that the number of female representatives in parliament is not as important as the tangible influence that they can have to the policy process on women empowerment and

³⁶ Ibid

³⁷ Ibid

³⁸ Wanjiku Mukabi Kabira, *Time for harvest: Women and Constitution-making in Kenya* (University of Nairobi Press 2012)

representation³⁹. This is however an express contradiction of the provisions of the Constitution of Kenya⁴⁰ that has, in its determination to be gender sensitive, incorporated the gender principle. Moreover, compliance with constitutional provisions on equality in electoral processes can only be measured by the actual number of women elected in the National Assembly, something which this research will probe.

Though the law is instrumental in ensuring there is proper and actual representation of women in politics, Patricia Kameri-Mbote⁴¹ posits that gender mainstreaming does not necessarily ensure gender equity. This assertion is not farfetched. For instance, she notes the refusal of party leaders, mostly men, to change party nomination rules that will be more accommodating to women as a major factor that has hindered the actual achievement of the two-third gender principle. This just goes to show that indeed, the problem is not always the law. For that reason, this study will analyse the various socio- cultural factors that have impeded political inclusivity despite existence of a proper legal system.

Coffe and Bolzendahl⁴² attempt to contrast and explain the difference in gender gaps in political involvement in both the industrialised Western democracies and the developing Sub-Saharan Africa. The essay notes that countries that have advanced democracy facilitate the various individual resources into political action. This suggests that a state's socioeconomic characteristics will have an effect on the country's political activities. A rich state with a strong socioeconomic structure will have a more inclusive political participation than in poorer, less-democratic societies⁴³. This study is important as it gives a better understanding of the disparities in women representation in the western countries and developing countries. However, its shortcoming is that it does not provide any correlation between the choice of an electoral system and inclusive representation, something which this research aims do.

1.8.2 Literature on History of women in Kenyan Politics

This study is concerned with the advancements Kenyan women have made in progressing their right to participation in politics. It will therefore be critical to understand the role women played

³⁹ Ibid

⁴⁰ 2010

⁴¹ Patricia Kameri-Mbote 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses', (2013) International Environmental Law Research Center

⁴² Coffe, H. & Bolzendahl, C. 'Gender Gaps in Political Participation Across Sub-Saharan African Nations' Soc Indic Res (2011) 102: 245. <https://doi.org/10.1007/s11205-010-9676-6> (Accessed 27th December 2019)

⁴³ Ibid

in politics and governance in four critical eras – pre-colonial and colonial Kenya; post-colonial Kenya; second liberation Kenya and Post 2010 era and how they attempted to overcome the challenge of inclusion.

Shadrack Wanjala Nasong'o and Theodora O Ayot⁴⁴ provide an excellent sequence and understanding of the history of women and politics in Kenya. From their writing, they note that you cannot study the participation of women in politics without understanding the various political transitions that Kenya has faced.

They note that there was deep rooted systematic political marginalization of women in the pre-and post-colonial Kenya. Upon attainment of self-rule in 1963, there was formation of a political system that was based on authoritarian and over-centralized structures that engendered masculine domination⁴⁵. This, in essence, ensured that women were denied an opportunity to participate and make decisions in the political and governance sector. This exclusion of women, they assert, was systematically executed by denying women an opportunity to mainstream their own political agendas that would enhance their bargaining power in national democratic processes.

This study suggests that marginalization of women was entrenched even further during the transition period between the multi-party eras to the de jure single-party rule⁴⁶ in the early 1980s. However, the significance of incorporating women in the politics is felt during the agitation for multi-party democracy that is finally attained in 1991.

In each of these transitions, it is explained that political contestation is dominated and driven by the elite who ensure that they bar the mass of the people from involvement in politics. It is at this point that gender disparities become glaring and an examination of the engendered political periods proves this.

While discussing the political constraints that have hampered involvement of women in politics in Kenya, Shadrack and Theodora⁴⁷ identify two major constraints. They note, rightly so, that an electoral system of any country would be a great determinant of women representation. They

⁴⁴ Shadrack Wanjala Nasong'o and Theodora O Ayot, 'Women in Kenya's Politics of Transition' in Godwin R. Murunga and Shadrack W. Nasong'o (eds), *Kenya: The Struggle for Democracy*, (Zed Books Ltd, 2013).

⁴⁵ Ibid

⁴⁶ In October 1969, President Kenyatta banned the Kenya People's Union thereby making Kenya a de facto single-party as only KANU existed. In June 1982, Kenya's National Assembly declared Kenya a one-party state.

⁴⁷ Shadrack and Theodora (n 44)

illustrate proportional representation (PR) systems where the electorate vote for party lists and parliamentary seats are most conducive for fostering gender representation. On the other hand, they contend that a plurality electoral system is founded on single-member constituencies, and hence parties are less likely to nominate women in this system.

The second constraint to women's participation as distinguished in this writing is related to the structure and agendas of the various political parties. Political parties more often than not do not easily accept or promote women's participation in the party's structures and even when they do, they do not hold important positions within the party. Even so, it is party leaders, who are mostly male, that determine who gets the nomination to run for political office.

Similarly, Regina G. Mwatha⁴⁸ buttresses the position that the women movement in Kenya has evolved over the years. She elaborates how Kenyan women have endeavoured to break male domination in socio-cultural and economic sectors. She reckons that this has been achieved through ensuring that there is an emphasis on common objectives, continuity, unity, and coordination. From this study, it is clear that agitation for women inclusion in the political process has been an on-going discourse that is not likely that it will end soon.

In enhancing the studies of Shadrack, Theodora and Mwatha, this study will crunch the figures of women representation in the National Assembly since independence. An analysis of the factors that may have influenced the trends in gender representation over the years will also be made in this research.

With the coming of the Constitution of Kenya in 2010, various scholars have lauded the prominent role given to women by the Constitution in matters politics and governance. In discussing gender equality in political processes, Japeth Biegon⁴⁹ notes that despite the increasing number and visibility of women, and their invaluable role recognized by society, women continue to be under-represented in political and public life. He goes further and discusses the function of parliament in realizing the implementation of the two-third gender rule. The importance of Biegon's edition is that it helps readers understand the challenges that have hampered effective participation of women in democratic processes. He also analyses

⁴⁸ Regina Mwatha, "The women's movement in Kenya" in Balghis Badri and Aili Mari Tripp (eds), *Women's Activism in Africa: Struggles for Rights and Representation* (Zed Books, 2017),

⁴⁹ Biegon, Japheth (Ed), *Gender equality and political processes in Kenya: Challenges and Prospects*, Strathmore Press, 2016.

how Kenya has reacted to the various affirmative action measures that have been put in place to guarantee gender parity in political representation.

On the other hand, Patricia Kameri-Mbote⁵⁰ discusses the role of law in ensuring gender equality in representation. She gives an extensive analysis of the legal framework in Kenya post-2010 and the role the law, and by extension, the courts play in guaranteeing constitutional requirements on gender equality are realized.

It is notable that the good Professor alludes to the fact that constitutional and statutory provisions are not enough in ensuring gender equality and achievement of the two third gender principle. She writes “*gender is only one form of marginalization among many – disability, religion, ethnicity, marginalized communities and regions – where gender is also a variable. It is not possible to address gender fully in isolation of other marginalization categories*”⁵¹.

It is however worth noting that Biegon’s edition fails to discuss the impact of an electoral system in aiding proper representation of disadvantaged groups in the political process. This study will have a critical look of the various electoral systems and what part they play in enhancing participation of women in politics.

To understand the factors that have impeded women participation in politics, Kivoi⁵² classifies these barriers as political, economic or cultural. He particularly notes, accurately so, “*financial empowerment of women, along with education and access to information, will take women from the limitations of the household to full involvement in politics and party elections*”⁵³.

It can be noted that Kivoi’s study is all gloom as it is only centred on the barriers Kenyan women have faced in political inclusion. However, it is crucial to appreciate that over the years, as this study will prove, efforts have been intensified to curb and eliminate some of the barriers identified by Kivoi’s work.

CREAW⁵⁴, who have been on the forefront in advocating for gender equality in governance, recently published a report titled, “*Tracing the Journey: Towards implementation of the two-*

⁵⁰ Patricia Kameri-Mbote, The quest for equal gender representation in Kenya’s Parliament: Past and present challenges, in Japeth Biegon, ed. Gender equality and political processes in Kenya: Challenges and Prospects, Strathmore Press, 2016.

⁵¹ Ibid page 65

⁵² Douglas Lucas Kivoi, ‘Factors Impeding Political Participation and Representation of Women in Kenya’ (2014) Humanities and Social Sciences. Vol. 2, No. 6, pp. 173-181

⁵³ Ibid

⁵⁴ Centre for Rights Education and Awareness

third gender principle, 2019". This report discusses the tremendous measures the country has undertaken since independence to safeguard inclusivity and goes further to report on the factors that have hindered actual inclusion and achievement of the two-third gender principle. However, the report, just like most post-election reports by NGOs, does not question Kenya's electoral system and any part it has played derailing actualization of the gender law.

1.8.3 Literature on electoral systems and their impact on representation

At the centre of this study is the realization that law alone is not adequate to ensure that the country fully achieves the two-third gender rule as envisaged by our constitution. It will therefore be critical to understand the various electoral systems and how they aid in advancing democracy and inclusivity.

While discussing electoral systems, Pippa Norris⁵⁵ posits that electoral rules are not neutral and thus difficulty in achieving a government that is not only effective and accountable but fair and inclusive to minorities and various social representations.

He identifies three variations of electoral systems as – majoritarian, proportional and mixed systems- and the consequence of each. This study goes further to highlight the impact of social representation through affirmative action in each of the electoral system.

Despite succinctly identifying various electoral systems and how they impact or impede adequate representation of women, Norris' work does not provide the nexus between an electoral system and other social-cultural factors that impact social representations.

This study will therefore interrogate how a choice of an electoral system, coupled with other social-cultural and economic factors including the role of political parties ensures political inclusion.

Indeed, the efficacy of electoral systems is brilliantly discussed by Teresa Sacchet⁵⁶ where she states that, "*The reason why this policy, (quotas) has been more successful in some countries than in others has to do with certain conditions that are mainly related to the electoral system.*"

⁵⁵ Pippa Norris, 'Choosing Electoral Systems: Proportional, Majoritarian and mixed Systems' in Jean Laponce and Bernard Saint-Jacques (Eds), *Contrasting Political Institutions* (International Political Science Review Vol 18(3) 1997)

⁵⁶ Teresa Sacchet, *Political Parties: When they work for women* (2005), Expert Group meeting on Equal Participation of Women and Men in decision making process.

International IDEA⁵⁷ report⁵⁸ provides a tremendous analysis of the continued advancement of women's participation in electoral processes. Chapter 4 of the report interrogates how political parties continue to evolve and in particular with the increasing need to involve more women in political processes. Chapter 5 of the report discusses electoral and party systems and their impact on the democratic inclusion of the marginalized. This report will be instrumental in studying the various electoral systems and which would be best suited to ensure the two-third gender principle is actualized.

1.9 Limitations

Over the years, there has been extensive discourse on women empowerment in Kenya and globally. In discussing political participation of women in Kenya, we must recognize that Kenya is a patriarchal system that has shunned women. While immense efforts have been put and great strides taken to ensure that women are integrated in politics and governance, the same has not achieved the desired effect. Therefore, the various proposals that have been fronted have not been realised because of lack of political goodwill that is, well, patriarchal. The proposals that this study will give towards achievement of the two-third gender principle may suffer the same fate.

Similarly, another limitation of this study is that it heavily relies on secondary data and therefore, the various recommendations that it will propose will not be appreciated as opposed to primary data.

1.10 Chapter Outline

Chapter one provides the introduction and background of the study.

Chapter two is aimed at understanding the historical place of Kenyan women in politics, their participation since independence, the various challenges they have faced over the years and the milestones that have been made in pursuit of gender inclusion in the electoral processes. An analysis and trend of women representation in the national assembly since independence has also been made in this Chapter.

⁵⁷The International Institute for Democracy and Electoral Assistance is an intergovernmental organization that works to support and strengthen democratic institutions and processes around the world, to develop sustainable, effective and legitimate democracies.

⁵⁸International Idea, *The Global State of Democracy 2017: Exploring Democracy's Resilience* (2017)

Chapter three of this study has discussed the legal and regulatory framework of the gender principle. The theoretical framework of this study has also been dissected by analysing the judicial interpretations that have guided the gender rule discourse. This Chapter has equally focused on the National Assembly's futile efforts to enact the two-thirds gender bill as envisaged by Article 100 of the Constitution.

Chapter four of the study has interrogated the various electoral systems and how they aid inclusivity. This chapter also focuses on comparative case studies of two jurisdictions, Rwanda and South Africa and what factors have aided in ensuring there is tangible inclusion of women in their political processes. The Chapter has gone further to examine the link between socio-cultural factors and the preferred electoral system and how they affect gender inclusivity.

Finally, Chapter five of this study has outlined the findings, the conclusion and given recommendations.

1.11 Conclusion

This Chapter has broadly introduced the research by discussing the problem statement and given the justification of the study. It has also provided for a theoretical framework and broadly discussed the literature that will inform the study.

CHAPTER TWO

HISTORY OF WOMEN IN KENYAN POLITICS

2.0 Introduction

Having extensively discussed the background of this study and the problem it seeks to solve, the purpose of this chapter is twofold.

First, it aims to understand the history and place of Kenyan women in politics and governance and the influence they have made over the years. In discussing the impact and challenges faced by women, four transitional periods that have shaped the law and policy on political rights and equality will be considered.

Second, this chapter problematizes the law as it was in each of these transitional periods and the role it played in impeding inclusion of women in political processes. This chapter will argue that with the colonization of Kenya, the already existing political and social structures were altered. The British implemented laws that were meant to discriminate Africans and women, who were already at a disadvantaged position, were marginalised even further.

An additional contention that this chapter will address is that negative ethnicity and animosity amongst the various tribes was perpetuated by the British administration through numerous laws and policies. The impact of this is felt post-independence as the quest to foster equality amongst all communities has proven impossible. The gap between various disadvantaged groups continued to widen with the post-colonial political elites maintaining the British ethnic divide. As this chapter will show, there is a direct relationship between negative ethnicity and political inequality amongst all genders.

With the political class passing laws that were meant to stifle the democratic space such as the enactment of Section 2A that made Kenya a one party state, the civil society led an affront in what is now referred to as the second liberation. Women gained prominence in public life and were at the forefront in the fight for democracy and equality. Ultimately, this ended with the promulgation of a new Constitution in 2010.

Later in this chapter, this study will provide a breakdown of how women have performed in elections with a specific emphasis on the National Assembly. It will be established if Kenyan

women have achieved the desired standards in their inclusion in political processes. A general inquiry of the challenges that women have faced in politics shall be made in an attempt to ascertain how and why the democratic sphere has been unfavourable for women.

2.1 Pre colonial and Colonial Period

To understand the place of women in this era, it is critical to appreciate the political structure of African societies before the invasion of the European colonizers.

In pre-colonial Kenya, the various societies and patrilineal clans lived in clan villages that provided some form of territorial organization. Each community had its own system of government, religion, education and culture⁵⁹. Even though there was male domination in each of these systems, there was flexibility and sexual division of labour⁶⁰. Women had social-political, economic and cultural areas that they dominated. They had advanced roles in care giving, food production, distribution, health and religious practices⁶¹.

The Luo community, just like the Kikuyu, did not have a centralized form of governance but a council of elders who settled disputes and steered the community.⁶² On the other hand, the Abaluhya Community- which has eighteen (18) subtribes- was governed by King Nabongo Mumia. The Wanga Kingdom was a highly organised community with a centralised hereditary monarch.⁶³

The course of a defined Kenyan territory came about in the Berlin Conference⁶⁴. In 1894, the British declared protectorate over Kenya and with this, various independent communities were integrated into one single boundary.

The setting up of the administrative and ethnic boundaries ensured that each ethnic community was jostling for the colonial resource and in the process nurturing negative ethnicity⁶⁵.

⁵⁹ Shadrack Wanjala Nasong'o and Theodora O Ayot, 'Women in Kenya's Politics of Transition' in Godwin R.

Murunga and Shadrack W. Nasong'o (eds), *Kenya: The Struggle for Democracy*, (Zed Books Ltd, 2013). ⁶⁰ Ibid

⁶¹ Ibid

⁶² Gertzel C, "Kenya Colony - Kenya: A Political History: The Colonial Phase. By George Bennett. London: Oxford University Press, 1963. Pp. 200, Maps. 6s." (1964) 5 *The Journal of African History* 330

⁶³ Ibid

⁶⁴ The Berlin Conference of 1884-1885 was held to regulate European colonization and trade in Africa. It was organised by Otto van Bismarck the first German chancellor and was responsible for the scramble for Africa.

⁶⁵ Peter Ondege, 'Colonialism and its legacies in Kenya' (Lecture during Fullbright Hay Group Project Abroad program, Moi University, 5th July- 6th August 2016).

Tribalism was further entrenched by the fact that some ethnic communities were cleaved off beyond international borders or forced to settle with other ethnic groups that they did not share any historical relations⁶⁶. In addition, the British administrators used the divide and rule tactic where they stoked animosity and hatred within the ethnic communities⁶⁷. At this point, Kenya was not only struggling with state violence and oppression but with tribalism that would prove detrimental for future generations.

The role European colonization played on marginalization of Kenyan women cannot be understated. The arrival of the British meant that there was commercialization of the agricultural activities in the country. The colonial government was keen on developing cash crops such as tea and coffee in the Kenyan highlands opposed to food crops⁶⁸. To grow cash crops needed a large labour pool in the settler farms that men readily provided. This meant that women lacked access to the labour market and were thus confined to small scale food crops to sustain their families⁶⁹. Additionally, the colonial administration recognized men as the heads of families and this marginalized women's economic position even further.⁷⁰

With Kenya officially becoming a British colony in 1920, it obviously became incredibly hard for non-Europeans to engage in any form of meaningful national politics. It is also during this period that the marginalization of women was further indoctrinated in the Kenyan social, political and economic structures.

The Europeans who dominated the executive and legislative councils made policies for the benefit of the Europeans, Indians and Arabs while excluding Africans from any decision making⁷¹. The colonial government centralised, racialized and ethicised power. The British Government was headed by a Governor, a direct appointee from London. District

⁶⁶ Daniel G. Leonard, *Five Models for Development in Kenya*, Lecture on December 14, 2018 by for the class MSID 4002 Country Analysis at University of Minnesota Twin-Cities taught by Dr. Fred O. Jonyo <https://archive.danleonard.us/scholarship/coursework/minnesota/MSID/4002/kenya.pdf> < Accessed on 25th March 2020

⁶⁷ Ibid

⁶⁸ Fredoline Anunobi, 'Women and Development in Africa: From Marginalization to Gender Inequality', *African Social Science Review*, Vol 2 (Prairie View A&M University, 2002) < <https://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1012&context=assr> > Accessed on 26th March 2020

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Odege (n 65)

Commissioners and various other administrators, appointees of the governor, followed in that order⁷².

Upon the assent of the legislative council ordinance in 1919, there was a limited election in 1920 that saw the first bunch of elected representatives. Critically, no woman was involved in the elections. However, in 1922, white women were now allowed to vote for their LegCo representatives. This, coupled with the fact that the Council was dominated by white males, set the structural basis of the place of black Kenyan women in the governance structure.

There was still no position for African women in the LegCo even in 1944 when they first allowed Africans into the legislative assembly⁷³. It was not until 1961 that Priscilla Ingasiani Abwao⁷⁴ became the first African Woman representative in the LegCo. Even with this representation by Madam Abwao, it is clear that her position in the LegCo, unlike her male counterparts, was neither prestigious nor wielded actual influence⁷⁵. Indeed, it is reported that as the only African woman in the Lancashire House Conference that deliberated on constitutional changes and self-governance, Madam Abwao did not contribute in the proceedings because she was not allowed to speak⁷⁶. Sadly, the Lancashire Conference had been turned into a negotiation between European and African men who had zero interest in women's affairs.

In the civil service sector, the 1921 order was the first step of ensuring that women had no place in the governance structure.⁷⁷ The order from Britain stipulated that the governing councils of colonies to reserve civil service jobs to men.⁷⁸ This guaranteed the white male will take all the positions in all governing institutions. Women were only allowed into civil service forty-five years later in 1946.

⁷²Bates F, 'British Rule in Kenya' Washington State University, 5-6: <https://history105.libraries.wsu.edu/spring2015/2015/01/19/british-rule-in-kenya/> < Accessed on 25th March 2020

⁷³In 1944, Eliud Mathu became the first African to sit in the LegCo.

⁷⁴Priscilla was a leading suffragette from the 1960s. She was at the forefront of agitating for the right of women to vote through organised protest. In 1962, Priscilla was involved in the organisation of Kenya African women seminar in Limuru.

⁷⁵Effie Owuor, *Women and Political Inclusion in Kenya: A historical overview, 1963-2016*, Biegona, Japheth (Ed), Gender equality and political processes in Kenya: Challenges and Prospects, Strathmore Press, 2016.

⁷⁶Ndeda M, 'Luo women voters/aspirants and the new constitutional dispensation in the March 2013 Kenya elections: The case of Siaya and Kisumu counties' in Thibon C, Fouéré M-A, Ndeda M and Mwangi S (eds), *Kenya's past as prologue: Voters, violence and the 2015 general election*, Twaweza Communications, Nairobi, 2015, 212-232.

⁷⁷Charles Hornsby, *Kenya: A history since independence* (I. B Tauris & Co. Ltd: 2012)

⁷⁸Ibid

Despite this marginalization of women, their role in the agitation of Kenya's independence cannot be overlooked. They played prominent roles in the fight against colonial occupation and British oppression.

In 1901, Wangu wa Makeri was appointed as a colonial administrator in the Fort Hall District (now Murang'a). This came at a time when patriarchal principles did not permit women to hold leadership positions⁷⁹. Wangu's duties included collecting tax, maintaining law and order, recruitment of labour, controlling drinking of beer, terracing agricultural and veterinary services⁸⁰.

With the British invasion, there was a need for every community to fight back and prevent the oppression that came with the forced occupation. In 1913, Mekatilili wa Menza became the first woman to rise against the British by leading the Giriama community in the coastal region⁸¹. Mekatilili mainly opposed forcing young men and women to work in the rubber and sisal plantations owned by the British; colonial hut tax where each household was required to pay the British government; forceful evictions from the fertile river Sabaki valley; and constrained palm wine making and consumption⁸².

The colonial rule was dominated by brutality and oppression that came about because of the use of cheap African labour. This led to the various smaller communities to fight against this oppression and forceful occupation by the Europeans. These agitations gave rise to the guerrilla independence movement that is Mau Mau war in the 1950s⁸³.

During the struggle for independence, women abandoned their traditional roles and joined the Mau in the guerrilla warfare. Some women joined the men in the forest to fight the colonizers while other women provided strategic and logistical support to the men to defeat the foreign rule⁸⁴. Women experienced the full force of the British government which used violence in its effort to obliterate the Mau Mau uprising and clamour for independence.⁸⁵ Many suffered rape,

⁷⁹ Ndun'gu Gachane, 'Inside Wangu wa Makeri colonial Office' *Daily Nation* (Nairobi, 9th July 2019)

⁸⁰ Ibid

⁸¹ Tom Mwiraria, In the footsteps of Mekatilili wa Menza, *Daily Nation* (Nairobi, 7th November 2017)

⁸² Ibid

⁸³ Oduol Wilhelmina and Wanjiku Mukabi Kabira, The Mother of Warriors and her Daughters: the women's movement in Kenya, in Amira Basu (Ed), *Challenge of local feminism: Women movement in global perspective* (Page 187-208, Boulder Co. Westview Press, 1995)

⁸⁴ Maria Nzomo, Kenyan Women in Politics and public decision making in Mikell Gwendolyn, ed. *African Feminism: The politics of survival in sub-Saharan Africa*. University of Pennsylvania Press; 1997

⁸⁵ Effie Owour (n 75)

sexual violence and forced labour. These injustices, unfortunately, did not find themselves in any pre-independence negotiations⁸⁶.

Throughout the colonial era, women were aware that they had to do a little bit more for themselves in the face of the struggle. Women from various ethnic communities organised themselves and formed self-help and merry-go round groups⁸⁷. Such groups included the Mabati Women Group and Nyakinyua Women Group⁸⁸. It is during this period that proper mobilization and organization of women begun.

Meanwhile, nationally, the white women in Kenya during the colonial period were equally attempting to have a say in public affairs. In the 1940s, the women, with the help of the colonial administrators, came together to establish sewing and knitting centres in various parts of the country⁸⁹. They did this on a voluntary basis with the hope these institutions would bring about self-reliance⁹⁰.

These institutions gained popularity amongst the women throughout the country to a point that some communities did not require help from white women to run them. The self-help women groups would soon acquire the tag 'maendeleo clubs'. The aim of these clubs was to improve the living standards of African women by providing forums for social interactions and exchange of ideas and advancements in agriculture and health.⁹¹ The clubs were also used to provide practical and informal education⁹².

With the growing popularity and ballooning membership of women in the clubs, the colonial government in 1952, through the Social Welfare Organization, decided to register these clubs under one umbrella '*Maendeleo Ya Wanawake Organization*' (MYWO)⁹³. The MYWO remained instrumental in marshalling women at the grassroots' level in order to unite, foster and improve their social, political and economic positions. It is at this level that the impact

⁸⁶ Ibid

⁸⁷ Mbugua, R. W, 'Women's organizations and collective action in Kenya: opportunities and challenges-the case of the Maendeleo ya Wanawake Organization'. , ' , 2(1),1-12

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Wipper, Audrey, '*The Maendeleo Ya Wanawake Organization: The Co-Optation of Leadership.*' African Studies Review Vol. 18, No. 3, Women in Africa (Cambridge University Press. Dec., 1975), pp. 99- 120.

⁹² Ibid

⁹³ Ibid

women can have in the expansion of the democratic space was felt. The Organization owned a monthly Swahili newspaper, operated savings accounts for its members and organized conferences at the national and district level often to discuss progress in women empowerment.⁹⁴

Other than empowerment of women in politics, the Organization used its many networks at the grassroots level to lobby for government programs for family planning, immunization of children, advocacy against FGM and tree planting⁹⁵.

Having been formed to agitate for the welfare of women, the Maendeleo ya Wanawake faced major challenges from the onset. First, the umbrella Organization was established at the height of the African revolt against the British in 1952. There were claims that some women were passing confidential information to the Colonial government through the clubs⁹⁶. This discredited the image of the organization and ultimately having an adverse effect on the number of new memberships.⁹⁷

The second major constraint that the Organization faced was the lack of proper and adequate funding. In its formative stages, the Colonial government provided all the funding for the Organization as the clubs did not have resources of their own⁹⁸. However, in 1957, UNICEF became the first nongovernmental organization to donate to MYWO⁹⁹. The lack of a steady source of funding prevented the organization from implementing most of its programs.

Lack of sufficient funds for the Organization meant political patronage by the women leaders at both the clubs and national level. Different women leaders would jostle for the attention of male political figures in an effort to secure funding to implement various programs¹⁰⁰. This would pose a greater danger years later when the MYWO was politicised and ethicized. The organization gradually metamorphosed into a KANU women's wing. While commenting on

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Mbugua (n 87)

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Ibid

the leadership of the MYWO, Tripp¹⁰¹ stated that “*patronage managed to keep them focused on personal gain rather than addressing real issues of the membership*”.

In addition, changing of its national leadership so early on made the young MYWO operations shaky. The first Chairperson, Nancy Shepard, a white woman, retired in 1958. Mrs. Phoebe Asioya replaced her in 1960 and the colonial government was confused as to how to deal with the Organization¹⁰². This may perhaps be because they distrusted the new African woman leader. Though considerable support and effort was put in ensuring the organization is strengthened, the same zeal was not seen by the Independence government.¹⁰³

2.2 Post-Independence Kenya

At independence, Hornsby¹⁰⁴ notes that Kenyans inherited highly volatile and discriminatory governance institutions. The systemic marginalization of women was further enhanced by the fact that it is African men who exclusively took over the leadership from British men.¹⁰⁵ The independence government, through the president demonstrated arrogance and disdain for constitutional rights, freedoms and liberties that were guaranteed to all by the constitution.¹⁰⁶

Upon attainment of independence, Kenya had a few far-reaching amendments to its constitution. In 1964, the position of Prime Minister was abolished while in 1966, the amendment was geared towards the president consolidating all emergency powers¹⁰⁷. This meant he could unjustly detain anyone. In 1968, the power of the National Assembly to elect a president was transferred to a popular citizen vote¹⁰⁸. All these amendments were incorporated into the 1969 Constitution.

¹⁰¹ Tripp, A., Casimiro, I., Kwesiga, J., & Mungwa, A., ‘African Women's Movements: Changing Political Landscapes’. (Cambridge University Press 2009)

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Charles Hornsby, *Kenya: A history since independence* (I. B Tauris & Co. Ltd: 2012)

¹⁰⁵ Ibid

¹⁰⁶ Ben Sihanya “Conceptualising sovereignty, constitutions, states and governments in Kenya and Africa,” in Ben Sihanya (2019) *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa (CODRALKA) Vol. 2: Presidency, Premier, Legislature, Judiciary, Commissions, Devolution, Bureaucracy and Administrative Justice in Kenya*, Sihanya Mentoring & Innovative Lawyering

¹⁰⁷ Effie Owuor, *Women and Political Inclusion in Kenya: A historical overview, 1963-2016*, Biegon, Japheth (Ed), Gender equality and political processes in Kenya: Challenges and Prospects, Strathmore Press, 2016.

¹⁰⁸ Ibid

The Constitution, despite recognizing equal protection of everyone before the law, was gender neutral. It did not provide for any opportunity to make the Kenyan society more equal. In fact, all it did was enhance the institutionalization of gender oppression and inequality.

The Bill of Rights under Section 70 provided that everyone in Kenya would enjoy all fundamental rights and freedoms regardless of race, nationality, place of origin, or place of residence, or any other social, political, racial, religious or sexual ground. This was subject to respect to the rights and freedoms of others and for the public interest¹⁰⁹.

In addition, Section 80 of the Constitution outlined the categories of person who could not be discriminated upon. Section 80(2) described discrimination to mean “*affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed.*”¹¹⁰ Curiously, there was no mention of gender. This omission had the unfortunate implication that gender discrimination was permitted in law.¹¹¹

The involvement of women in political processes faced its first test a few months before attainment of independence when Kenya held its first election¹¹². Preceding the elections, women held the second Kenya African Women’s Seminar in Limuru in which three important resolutions were passed. The Daily Nation¹¹³ reported that first, the women resolved to press and demand the government to nominate at least four women into the new legislature. Second, the conference proposed there be women representation in institutions such as East Africa Common Services Commission and United Nations. Finally, the women resolved to ask the government for at least 10% representation in the Independence celebrations planning committee.

Despite these strong and reasonable pleas, women were not heavily involved in the elections. They were not given opportunities to become party officials or cleared to run for elections¹¹⁴.

¹⁰⁹ Constitution of Kenya 1969

¹¹⁰ *Ibid*

¹¹¹ Kibwana K, ‘Constitutional development in Kenya’ in Kibwana K and Peter CM (eds), *Constitutionalism in East Africa: Progress, challenges and prospects in 1999*, (Fountain Publishers 2001)

¹¹² The first general election was held on 26th May 1963

¹¹³ ‘Women ask for seats in Legislature’ *Daily Nation* (27 April 1963, 15)

¹¹⁴ Effie Owuor (n 107)

Astonishingly, the Independence parliament had zero elected or nominated women sitting in it.

The impact of the poor policies and lack of intent by men to ensure inclusion was seen when Ruth Habwe¹¹⁵ attempted to run for a parliamentary seat and her party, KANU, refused to support her. When she opted to run as an independent candidate, KANU suspended her. The explanation given by government for her suspension was that women were not ready for political office¹¹⁶.

The first set of women representatives in the national assembly came about in 1969. Grace Aketch Onyango¹¹⁷ became the first elected woman in the National Assembly while Jemimah Gechaga was nominated into the 2nd Parliament.

During the colonial period, although formal education was becoming an acceptable idea, girls were not beneficiaries. As boys were sent to school, young girls remained at home learning from their mothers skills such as child care, tailoring and basic reading and writing¹¹⁸. Moreover, girls continued to suffer retrogressive cultural practices that kept them out of school such as FGM and early marriages.

The open and obvious deprivation of women of an equal chance to education ensured that in post-independence Kenya, men dominated the scholarly and professional fields. Women who were offered slightly superior education, it was for employment as nurses, teachers, and secretaries¹¹⁹. Even then, women could not grow career wise because they were not given a chance to exercise actual authority over men at the work place¹²⁰.

The period between 1969-1982 laid the maker for the era of the second liberation that would follow. Between 1963 and 1969, Kenya had only two political parties – Kenya African National

¹¹⁵The first chairperson of Maendeleo Ya Wanawake Organization. In 1964, she attempted to run for political office.

¹¹⁶Nzomo (n 28)

¹¹⁷ Elected Member, Kisumu West Constituency 1969

¹¹⁸ Florida A. Karani, "The situation and roles of women in Kenya" *The Journal of Negro Education* Vol. 56, No. 3, *Knowing the Other: A Look at Education Internationally* (1987), pp. 422-434 <https://www.jstor.org/stable/2295235?seq=1> < Accessed on 25th March 2020

¹¹⁹ Fatuma Chege and Daniel N. Sifuna, 'Girls' Women's Education in Kenya Gender perspectives and trends' (2006) UNESCO <https://ir.library.ku.ac.ke/bitstream/handle/123456789/8484/Girls%20and%20womens%20education%20in%20Kenya.pdf?sequence=3&isAllowed=y>

¹²⁰ Ibid

Union and Kenya People's Union¹²¹. However, with the proscription of KPU in 1969, KANU remained as the only political party in the country although the Constitution allowed existence of other political parties¹²².

Meanwhile, the country continued to reel from post-colonial hangover. The euphoria that had welcomed the country's independence had disappeared. Kenyans continued to experience misery, poverty, diseases and illiteracy.

In 1982, the state was declared a de jure single party state by virtue of Section 2A. The impact of this on the continued marginalization of women cannot be stressed. With this constitutional change, anyone who intended to run for any elective seat must have been a member of KANU. The opportunities for women were constrained even further. Indeed, within KANU itself- the ruling and only party- there was no single woman holding any position in the executive council of the party¹²³.

During this era, the world was also coming to the realization that women were getting left behind because of years of marginalization. In 1975, there was the launch of the United Nations Decade for Women¹²⁴ that was aimed at propagating principles that would encourage equality among men and women. The next decade would shape the discourse on the role of women in society at both the national and international level.

2.3 Second Liberation Era

Perhaps the most defining era in Kenya's history, this section shall relive the major events that shaped President Moi's regime and how the role his government played in furthering the exclusion of women in the society. Further an examination of how women contributed tremendously to the political history of Kenya shall be made.

Moi's regime was known to be exclusionary, corrupt and socially unjust. The already existing inequalities were further rooted by the decision to make Kenya a single party state. The

¹²¹ On 14th April 1966, the then Vice President Mr. Oginga Odinga resigned from his position and party. Two weeks later, Mr. Odinga and 30 MPs resigned from KANU and joined the inactive Kenya People's Union.

¹²² Maria Nzomo, Kenyan Women in Politics and public decision making in Mikell Gwendolyn, ed. *African Feminism: The political of survival in sub-Saharan Africa*. University of Pennsylvania press; 1997

¹²³ Ibid

¹²⁴ On July 2nd 1975, a resolution titled "Declaration of Mexico on Equality of Women and their contribution to Development and Peace" was adopted in Mexico at the end of the International Women's Year World Conference on Women.

democratic space was stifled by the ruling party KANU, and women, having already been at a disadvantaged position, bore the harshest brunt of these innumerable human rights violations.

Maendeleo ya Wanawake Organization (MYWO) that was in fact formed to agitate for women issues, was in 1978, at the forefront, through its Chairwoman Zipporah Kittony, to support the government's decision to make Kenya a single party state¹²⁵. Despite being formed and growing as a social welfare and development organization, MYWO gained relevance as being the mouth piece for President Moi and the ruling party, KANU¹²⁶.

With the growing desecration of human rights and a struggling economy, there were increased calls for constitutional reforms. Democratization was a major issue for most Kenyans and thus there was an emergence of a more vibrant and organised civil society. At the forefront of this zeal and courage to challenge a brutal government was Professor Wangari Maathai¹²⁷. The Professor was active in the National Council of Women of Kenya and later its chairperson between 1981 to 1987.¹²⁸

It is Professor Maathai's role in personally challenging the president and agitating for democracy through her Green Belt Movement that lands her plaudits. In the better half of the 1980s, Maathai was at the forefront of opposing the plans to build the sixty-storey Kenya Times Media Trust Complex in Uhuru Park¹²⁹. In his response, President Moi commented that Maathai should act like a proper African woman and respect men¹³⁰.

Professor Maathai, having faced state harassment and arbitrary arrest with other pro-democracy activists, went on a hunger strike on 28th February 1992 at the Freedom Corner demanding the release of political prisoners. In addition, during the 1992 elections, the Professor was heavily involved with the organization of the opposition that was aiming to remove KANU from power.

¹²⁵ Marylin Muthoni Kamuru, Maendeleo ya Wanawake and the Politics of silencing Women, Elephant Room, <https://www.theelephant.info/features/2020/02/21/maendeleo-ya-wanawake-and-the-politics-of-silencing-women/> (Accessed on 21st February 2020)

¹²⁶ Ibid

¹²⁷ Born in 1940, Prof. Maathai was a celebrated scholar and activist and the first African woman to win the Nobel Prize. She got her education at the University of Pittsburgh as well as the University of Nairobi in Kenya with a specialization in Biology.

¹²⁸ www.greenbeltmovement.org/wangari-maathai/biography (Accessed on 21st February 2020)

¹²⁹ Wangari Maathai, *Unbowed: A Memoir*, (Knopf Publishing Group, 2006)

¹³⁰ Maathai (n 129 page 196)

Together with fellow opposition leaders, they formed the Movement for Free and Fair Elections¹³¹.

Globally, during this era, the concept of human development¹³² was taking centre stage. The world was coming to the realization that human progress could not be measured merely by economic progress but rather through other measures such as improvement of people's lives which was, after all, the purpose of development¹³³. Gender development and women's empowerment was starting to be seen from the lenses of health, knowledge, social economic empowerment and governance¹³⁴.

In 1975, the United Nations launched the United Nations Decade for Women¹³⁵ that was to run to 1985. During the period, governments were urged to prioritise programs and policies, including changing of legal frameworks in order to improve the lives of women. The areas of emphasis included fairness in pay, gender-based violence, property ownership and other human rights issues. Interestingly, and perhaps to show the global standing that Kenya had, the decade culminated with Kenya hosting an international conference of women in Nairobi.¹³⁶

This Conference produced a paper titled "*Nairobi: Forward-Looking Strategies for the Advancement of women*"¹³⁷. The purpose of the policy paper was to start an agenda that would enhance the efforts of ensuring gender empowerment and equality beyond 1985. A conference dubbed the Beijing Conference was later held in 1995 in China with the aim to accelerate actualization of the Nairobi document.¹³⁸ The "*Beijing Declaration and Platform for Action*" was adopted.

As the world was gearing up and implementing policies that favoured women participation in political processes, Kenya was itself in political turmoil. There was increased agitation for

¹³¹Maathai (n 129 page 230-235)

¹³² Human Development may be defined as the process of enlarging people's freedoms and opportunities and improving their general wellbeing. It comprises of real freedoms where the citizens decide what to be, what to do and how to live.

¹³³ United Nations Development Program (UNDP) Human Development reports.

¹³⁴ Ibid

¹³⁵ On 15th December 1975, the United Nations General Assembly adopted Resolution 31/136.

¹³⁶ There were three international meetings during the decade that were held in Mexico City for consciousness raising (1975), Copenhagen for creating networks (1980) and in Nairobi for the solidarity of women worldwide in 1985. More than 4,000 women came to Kenya for the meeting and 106 delegations were headed by women out of the 160 countries represented.

¹³⁷ Women Watch: Conferences: www.un.org, retrieved 22nd February 2020.

¹³⁸ O'Brien, Jodi (2009). *Encyclopedia of Gender Society*. Thousand Oaks, California: SAGE publications

expansion of the democratic space with calls for making Kenya a multi-party democracy gaining momentum. Women did not spare themselves in this fight that would soon change Kenya's democratic space. The President was continually angered by the international women conferences that Kenya was hosting. He would at one time comment that the Conferences were meant to advance the western practice of homosexuality and lesbianism.¹³⁹

Prior to 1992, women were isolated mostly because the state was intolerant to civil society organizations¹⁴⁰. The government allowed only women organizations that were supporting of the status quo hence why Maendelo ya Wanawake Organization (MYWO), National Council of Women of Kenya (NCWK) and the Nairobi Business and Professional Women's organisation were the only national women organizations that were operating then.¹⁴¹

With the calls for multiparty democracy gaining momentum in the early 1990s, so did women's activism. Women in this particular period formed political alliances, caucuses, committees and networks in order to increase their stake in the governance structure¹⁴². At this point, women were heavily involved in the constitutional review process by engaging the state through formal institutions such as FIDA¹⁴³. Tactical use of the law and court activism was also influential in ensuring that women get their rightful place in the political set-up. The highly trained and articulate women lawyers were able to argue with male politicians, draft motions, bills and negotiate with the policy makers to finally have gender sensitive laws¹⁴⁴.

By President Moi ceding to calls and repealing Section 2A of the Constitution, there was a new sense of optimism that finally, the democratic space would be opened up. The political euphoria in early 90s was not helped by the looming elections. The new and old women leaderships converged to develop a women specific democratic agenda in order to benefit in the new political dispensation.¹⁴⁵ They called for engendering of democratization; the legal policy framework protecting women be overhauled; eradication of discrimination against women in

¹³⁹ Moi Says No to un-African Sins Daily Nation (Nairobi, 30th October 1995)

¹⁴⁰ Amb. Prof. Maria Nzomo, *Women In Political Leadership In Kenya: Access, Agenda Setting & Accountability*,

Institute of Diplomacy & International Studies, University of Nairobi > https://ke.boell.org/sites/default/files/uploads/2014/01/women_in_political_leadership_in_kenya-access_influence-.pdf > Accessed on 24th February 2020

¹⁴¹ Ibid

¹⁴² Domingo. P, McCullough. A, Simbiri F and Wanjala B, 'Women and power Shaping the development of Kenya's 2010 Constitution', Report for Overseas Development Institute (March 2016)

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ In 1992, two thousand (2,000) women converged for a National Women's Convention titled "*Women's Agenda for a Democratic Kenya*"

politics, governance and employment.¹⁴⁶ The phrase “*Unity in Diversity for Women’s Empowerment*” was coined.

With women becoming aggressive in their quest for equitable representation, the former MP Phoebe Asiyo in 1997 introduced a landmark motion in parliament. She moved the ‘*Phoebe Asiyo Motion*’ that called for 12% of all seats in national assembly be allocated to women.¹⁴⁷ Though it failed, this motion was supported by notable male political figures such as James Orengo, Ooko Ombaka and Kiraitu Murungi.¹⁴⁸ This shows that the political organization by women was beginning to be felt.

Despite enhanced involvement of women in public life post 1992, there was still a feeling that the legal framework was not sufficient enough to ensure that the rule of law of is protected, there is abolition of all forms of discrimination against the vulnerable and respect for human rights. The new regime under Kibaki in 2002 came with a promise for constitutional reforms. The Justice Minister then, Hon. Martha Karua introduced in parliament the Affirmative Action Bill in 2003.¹⁴⁹ This bill called for allocation of at least 50 seats in parliament to women. Across the country, women collected thousands of signatures in the campaign dubbed “*Fifty seats and One Million signatures.*”¹⁵⁰ This too failed. All hope to fast track affirmative action now rested on constitutional review. The more he failed to deliver on the promise, the louder the calls for a new constitution became.

2.4 Post 2010 Era

After the 2007 post-election violence¹⁵¹ there was an urgent need to implement constitutional reforms. On 4th August 2010, the country finally went for a referendum which Kenyans voted ‘YES’ overwhelmingly. On the 27th Day of August 2010, the new Constitution was promulgated.

¹⁴⁶Nzomo (n 140)

¹⁴⁷United Nations Development Program, Report on the Regional Dialogue on Women’s Political Leadership, “*Championing women’s political leadership: delivering on one-third promise to Kenya.*” Pg 7, 14th-16th August 2021

¹⁴⁸Ibid

¹⁴⁹Ibid

¹⁵⁰Ibid

¹⁵¹Kenya held its general elections on 27th Dec. 2007. The results of the presidential election were disputed. This led to post elections violence that left 1,500 people dead and half a million people internally displaced.

Women were without question heavily involved in the fight of reforms and the actual drafting of the Constitution. They had a notable presence in the Committee of Experts as they accounted for a third of all the members. This enabled the momentum gained in advancing the women agenda maintained. In the run up to the referendum, Effie Owour¹⁵² reports half of all newly recorded voters in all provinces were women.

The new constitution ushered in some of the most radical changes on how gender inclusion was understood and appreciated. The Constitution has been seen as a breakthrough in entrenching democracy, rule of law, deference for human rights and most importantly, curing the inequality of gender representation in political processes.

As mentioned in this chapter, the 1969 Constitution was gender neutral. To break the neutrality of that dispensation, the 2010 Constitution adopted gender sensitive principles and affirmative action.

To ensure people of all genders are protected by law, the constitution adopts positive discrimination through the gender principle that stipulates that not more than two-thirds of the membership of an elective or appointive body shall be of either gender.

It is nevertheless strange that ten years later, women have not fully enjoyed the gains as articulated by the constitution. Both the post 2010 Parliaments have remained unconstitutionally constituted. The 12th Parliament has only seventy (70)¹⁵³ elected members who are women, out of the requirement of at least one hundred and seventeen (117) members.

An evaluation of the legal and regulatory framework that guides political inclusion of women as anchored in the 2010 Constitution shall be done in depth later in this study.

This study argues that the problems Kenyan women continue facing after fifty-seven years of self-rule are a mere prolongation of the policies established by the colonial rulers. African leaders continue justifying unfair laws and policies that are a product of political and economic exploitation by the Europeans¹⁵⁴. In addition, elite Africans have resorted to modelling their

¹⁵²Effie Owuor, *Women and Political Inclusion in Kenya: A historical overview, 1963-2016*, Biegon, Japheth (Ed), Gender equality and political processes in Kenya: Challenges and Prospects, Strathmore Press, 2016.
¹⁵³ www.parliament.go.ke

¹⁵⁴Fredoline Anunobi, 'Women and Development in Africa: From Marginalization to Gender Inequality', African Social Science Review, Vol 2 (Prairie View A&M University,2002)<

gender roles to fit into those of their European colonial masters¹⁵⁵. These roles have further been indoctrinated into the African society through education, the media and government institutions¹⁵⁶.

The next section in this chapter shall analyse the progress that has been made since independence to ascertain the trends of representation of women in the National Assembly.

2.5 Trends of women representation since independence

After dissecting the various eras that have shaped the impact of women in the pursuit of political inclusivity, this section will analyse the actual number of women representatives in the National Assembly since independence.

There will be a further analysis to determine if there has been any growth and the factors that may be impeding the full participation of women in politics.

*Table 1: Women representation in the national assembly since 1963*¹⁵⁷

Year of Parliament	No. of Women elected	No. of women nominated
2 nd Parliament (1969-1974)	1	1
3 rd Parliament (1974-1979)	4	2
4 th Parliament (1979-1983)	4	1
5 th Parliament (1983-1988)	2	1
6 th Parliament (1988-1992)	2	0
7 th Parliament (1992-1997)	6	1
8 th Parliament (1997-2002)	4	5
9 th Parliament (2002-2007)	9	8
10 th Parliament (2007-2013)	16	6
11 th Parliament (2013-2017)	63	5
12 th Parliament (2017- 2022)	70	5

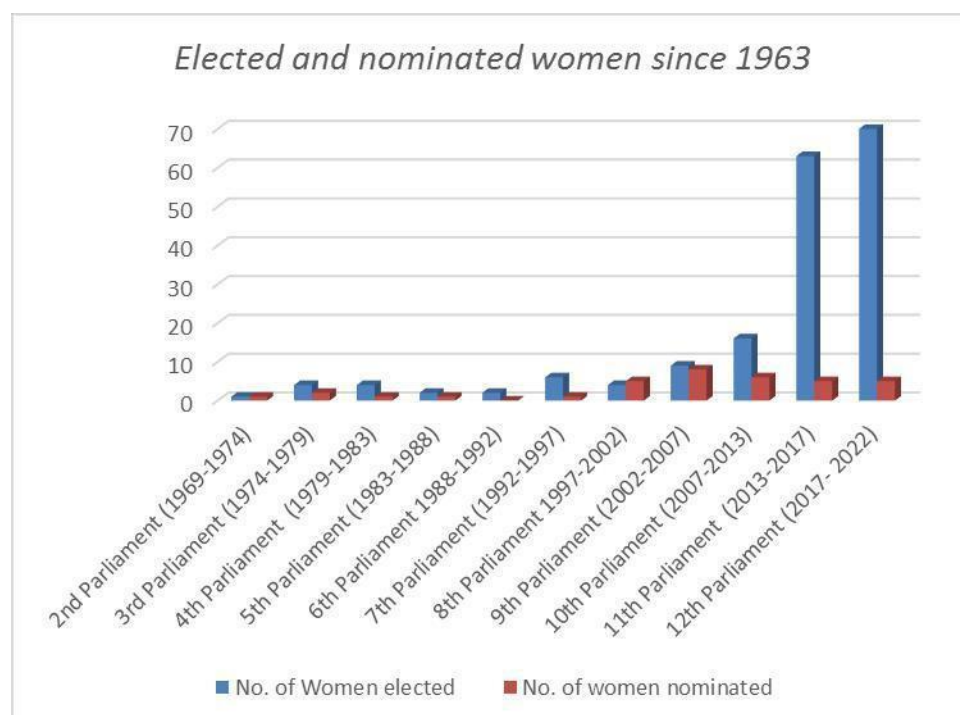
<https://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1012&context=assr> > Accessed on 26th March 2020

¹⁵⁵ Palmer, M. "Political development." Alaska, IL: Peacock Publishers (1991)

¹⁵⁶ Ibid

¹⁵⁷ www.parliament.go.ke/the-national-assembly/mps

Chart 1: Graphical representation of elected and nominated women since 1963



As it can be seen, the overall performance of women candidates has gradually improved over the years and it reached its peak in 2017. The membership of the 11th and 12th parliaments shows what valuable milestones women have gained courtesy of the 2010 Constitution.

In analysing the 2017 elections from a gender perspective, the NDI¹⁵⁸ reported that a rise in the number of women contesting elections meant more women are able to win office.

The data shows that electorate is ready to elect women if given the chance. However, very few women advance enough in the electoral process hence inability to gain office¹⁵⁹.

The 2017 General Election¹⁶⁰ shows that despite the increased number of elected women, parliament itself goes against the spirit of the Constitution of ensuring there is gender parity in the various political processes. This is evidenced by a review of the leaderships of parliamentary committees as provided for by the table below:

¹⁵⁸ National Democratic Institute (NDI) and Federation of Women Lawyers (FIDA Kenya), *A gender analysis of the 2017 General Elections*, (2018)

¹⁵⁹ Ibid

¹⁶⁰ Kenya conducted its general election on 8th August of 2017

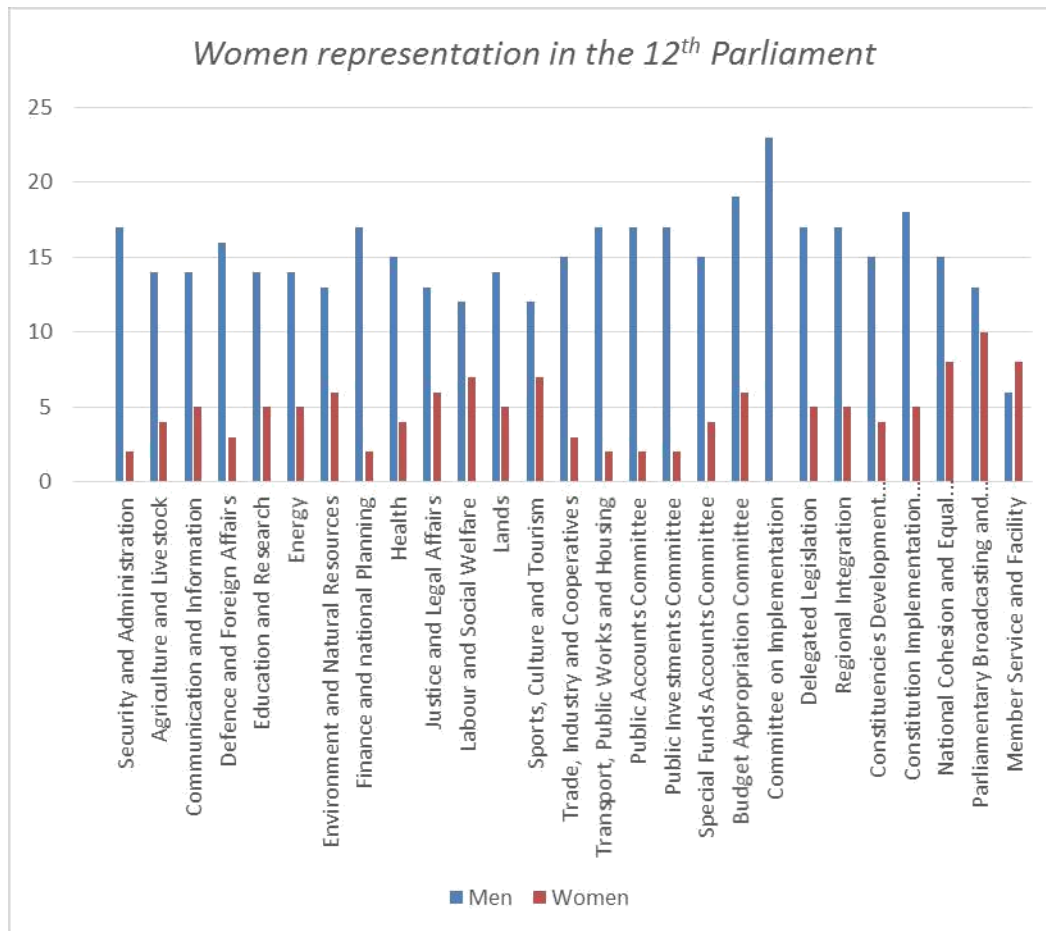
Table 2: Gender analysis of the women MPs in the various National Assembly committees of the 12th Parliament ¹⁶¹

Committee Name	Total	Men	Women	Chair M/F	Vice M/F	% women
Security and Administration	19	17	2	M	M	11%
Agriculture and Livestock	18	14	4	M	M	22%
Communication and Information	19	14	5	M	M	26%
Defence and Foreign Affairs	19	16	3	M	M	16%
Education and Research	19	14	5	M	M	26%
Energy	19	14	5	M	M	26%
Environment and Natural Resources	19	13	6	M	M	32%
Finance and national Planning	19	17	2	M	M	11%
Health	19	15	4	F	M	21%
Justice and Legal Affairs	19	13	6	M	F	32%
Labour and Social Welfare	19	12	7	M	F	37%
Lands	19	14	5	M	F	26%
Sports, Culture and Tourism	19	12	7	M	M	37%
Trade, Industry and Cooperatives	18	15	3	M	M	17%
Transport, Public Works and Housing	19	17	2	M	M	11%
Public Accounts Committee	19	17	2	M	F	11%
Public Investments Committee	19	17	2	M	M	11%
Special Funds Accounts Committee	19	15	4	M	M	21%

¹⁶¹ NDI&FIDA (n 158) and www.parliament.go.ke

Budget Appropriation Committee	25	19	6	M	M	24%
Committee on Implementation	23	23	0	M	M	0%
Delegated Legislation	22	17	5	F	F	23%
Regional Integration	22	17	5	F	M	23%
Constituencies Development Committee	19	15	4	M	M	21%
Constitution Implementation Committee	23	18	5	M	M	22%
National Cohesion and Equal Opportunities	23	15	8	M	M	35%
Parliamentary Broadcasting and Library	23	13	10	M	F	43%
Member Service and Facility	14	6	8	M	F	57%
Total	534	409	125	3	7	24%

Chart 2: Graphical representation of women representation in the 12th Parliament



From the data provided above on the membership of the various committees of the National Assembly, it may be adduced that elected women are equally limited in political participation in parliament. Of the twenty-seven (27) Parliamentary Committees, only three (3) subcommittees are chaired by women while six (6) women deputize their male counterparts. One committee’s leadership has women at both the Chair and Deputy Chair’s positions.

Having analysed the performance of women in elections since independence including the inclusion of women in the various committees of the 12th Parliament, the next section of this chapter will consider the reasons that may have contributed to the evident gender disparity in representation of women in political processes.

2.6 Barriers to women participation in political processes

This study has appreciated that more women are now running for elective seats more than they have ever done. This progress can also be noted in other non-elective governance positions¹⁶². Despite society warming up to women and giving them opportunities, women have struggled for space and opportunities in the political arena. Tremendous steps have been made to date to expand the democratic space where personal freedoms and political rights are protected by the law. This has sadly not been felt by the women. Their participation in politics has been impeded by both gender specific reasons and some peculiarities that are unique to Kenyan politics. This section shall analyse the challenges that have contributed to women being left behind in various political processes.

Kassilly and Onkware¹⁶³ opine that democracy and development are in tandem and these conditions can only be met if there is a political environment that ensures justice to citizens. Indeed, it is difficult to argue with this assertion. Currently, there are seventy one (71) fully registered political parties¹⁶⁴. From this, it would be a reasonable contention to say that the democratic space in Kenya is thriving. Or is it?

Kenya, like most African societies, is patriarchal and it is men who hold power and make all major decisions. The patriarchal system has led to some stereotypes that have proved to be a major impediment to women being accorded the necessary support and opportunities to fully participate and enjoy their political rights. Cultural practices that have been inculcated in both men and women is that the most important role for a woman in society is to make a home and raise a family while leadership and competitive politics belong to men.

For instance, it is believed that power belongs to men while women only exercise power at home¹⁶⁵. More often than not, women are relegated to hold the power behind the throne with the grave assumption that the place of women is away from the public view¹⁶⁶. It is for this

¹⁶² There are currently seven (7) women in the Kenyan Cabinet out of the possible twenty-one (21) excluding the president, deputy president and Attorney General who all sit in the cabinet. There also eight (8) chief administrative secretaries out of a possible fifteen (15)

¹⁶³ Kassilly, B. J. N & Onkware, K (2010). Struggles and Success in Engendering the African Public Sphere: Kenyan Women in Politics. Kenya Studies Review: 3, 3, 71-83.

¹⁶⁴ www.orpp.or.ke/index.php/en/

¹⁶⁶ Ibid

very reason that wives to prominent elected officials are usually seen to support their husbands by doing traditional roles such as volunteering at charitable organizations¹⁶⁷.

The stereotype problem, which has been perpetuated even further by the shackles of patriarchy, can be seen from the subtle sexist reporting of female political leaders by mainstream media. On 6th April 2009- at the height of political tensions following the 2007 bitterly disputed elections and formation of the coalition government- the Daily Nation reporting on Martha Karua¹⁶⁸, refer to the Honourable Minister of Justice as, “*only man standing in PNU’s side of the Grand Coalition*”. You are therefore left to wonder if the abilities and competencies of a woman politician can only be measured against a man’s.

As we have ascertained, the Kenyan social structure has granted power to men. This ensures that it is men who control the law making process and the various institutions that implement the law.¹⁶⁹ With this in mind, it is not farfetched to avow that the economy is controlled by men.¹⁷⁰ Due to this control, women suffer economic hardships whilst still trying to keep their families strong. With poverty and home keeping responsibilities, participating in politics, let alone running for electoral office is the least priority for most women.¹⁷¹

According to Katindi¹⁷², competitive politics requires use of huge finances for three main reasons. First, candidates are required to budget for some legitimate statutory expenditure such as nomination fees to be paid to both the party and the electoral commission¹⁷³. If there was enough goodwill, then there would be waiver of these unnecessary fees for disadvantaged women. Another legitimate reason why money is needed and must be budget for is for campaign expenses. During campaigns, candidates must budget for the peculiar political culture of spending money on donations and harambees. Candidates are not required or obligated to spend money this way but it will be detrimental if they do not¹⁷⁴. The third expected

¹⁶⁷ Ibid

¹⁶⁸ The Iron Lady of Kenyan politics, Monday, 6th April 2009 > <https://www.nation.co.ke/news/1056-557878-k5xmb5z/index.html> (Accessed on 10th February 2020)

¹⁶⁹ Kassilly and Onkware (n 163)

¹⁷⁰ The Marxist philosophy perpetuates that economic prosperity is influenced by social processes. Men, being the controllers of the economy therefore benefit and amass more wealth for themselves as compared to women.

¹⁷¹ Kassilly and Onkware (n 163)

¹⁷² Katindi Sivi Njonjo, *The path towards inclusive democracy in Kenya*, Biegon, Japheth (Ed), *Gender equality and political processes in Kenya: Challenges and Prospects*, Strathmore Press, 2016.

¹⁷³ Ibid

¹⁷⁴ Ibid

but illegitimate expenditure in Kenya's political process is the use of resources to bribe voters, hire goons for violence and sabotaging opponents¹⁷⁵.

A woman candidate in any election must therefore have access to the requisite resources to satisfy the huge finances needed to win an election in Kenya.

Constraints in resources have also had an effect on the media coverage of various candidates during the electoral period. Anyango, Alupo, and Opoku¹⁷⁶ reported that, women candidates find expenses of political campaigns and media coverage unaffordable. Lack of funds ensures that various media outlets do not pay attention to the women candidates. In the long run, the visibility of the woman candidate to the electorate is poor compared to a male candidate.

This goes to show that only the candidates with enough resources can compete and participate in politics. The truth of the matter is, more often than not, those candidates are not women.

Gender based violence has been used as a tool of oppression and intimidation. It is no surprise that during every electioneering period, women suffer the brunt of violence, abuse and intimidation. One hypothesis is that violence against women is as a result of systemic and long-standing history of state violence, institutional breakdown, ethnic marginalisation, and land injustices.¹⁷⁷ It is no wonder that this violence that is meted during the electioneering period is either perpetrated or condoned by state organs.

Some male candidates have been known to use violence hired goons or state agencies to bully women opponents and make them drop out of the political race altogether.¹⁷⁸ Indeed, the Elections Observation Group (ELOG) reported that in the 2017 General Election, 31% of observers reported to have seen or heard of violence against women during the campaigns.¹⁷⁹

¹⁷⁵ Ibid

¹⁷⁶ Anyango, B. O., Alupo, B. A. & Opoku, M. P. (2018). Women in Politics in Kenya: an Analysis of Participation and Barriers. *Multidisciplinary Journal of Gender Studies*, 7(1) 1505-1530. doi: 10.17583/generos.2018.3179

¹⁷⁷ J Osogo Ambani, *The roots and effects of electoral sexual and gender based violence on women's political participation in Kenya*, Japheth Biegon (Ed), *Gender equality and political processes in Kenya: Challenges and Prospects*, Strathmore Press, 2016.

¹⁷⁸ Anyango, B. O., Alupo, B. A. & Opoku, M. P. (2018). Women in Politics in Kenya: an Analysis of Participation and Barriers. *Multidisciplinary Journal of Gender Studies*, 7(1) 1505-1530. doi: 10.17583/generos.2018.3179

¹⁷⁹ National Democratic Institute (NDI) and Federation of Women Lawyers (FIDA Kenya), *A gender analysis of the 2017 General Elections*, (2018)

The importance of political parties in the electoral process cannot be overstated. These entities play the role of advancing the principle of representative democracy¹⁸⁰. It is however at political parties, the very institutions that should be encouraging and supporting women that female politicians are frustrated the most.

It is no secret that political parties in Kenya are characterised by weak internal structures that exposes the party to abuse and control by the elite in the party. These weaknesses ensure that there is systemic exclusion of women, youth and persons living with disabilities from party affairs¹⁸¹. This ultimately leads to the inequality in participation of women in various political processes.

Male patronage is another way that political parties ensure that women are relegated to second fiddle in party affairs. Political parties will be beholden to the biggest financial contributors to the party¹⁸² and often, it is male politicians with such financial resources.

In 2018, NDI¹⁸³ reported that female candidates rely so much on party backing that a lack of it or hostility by the party as often witnessed, can ruin a woman's campaign and chances. Failure of parties to adhere to constitutional requirements on inclusion; and the deliberate misinformation to potential women candidates on various electoral timelines are some of the ways that parties ensure that women participation in the party affairs is threatened¹⁸⁴.

It goes without saying, for actual contribution and equitable representation of women in politics, parties must undertake deliberate voluntary actions to promote women affairs within their parties. Certainly, the position and influence political parties hold in the electoral process is far more influential than legislative measures in engineering social change¹⁸⁵.

2.7 Nexus between political inclusivity and gender equality

Politics and political processes play a key part in all aspects of life. Indeed, it has often been commented that failure to participate in politics is the reason we are governed by our inferiors. This goes to show that there is a constant need for each person to zealously participate and

¹⁸⁰ A type of democracy that is founded on the principles of an elected officials representing a group of people.

¹⁸¹ Dickson Omondi, *The role of political parties in promoting women's political participation*, Japheth Biegona (Ed), *Gender equality and political processes in Kenya: Challenges and Prospects*, Strathmore Press, 2016.

¹⁸² Ibid

¹⁸³ NDI & FIDA Kenya (n 72)

¹⁸⁴ Ibid

¹⁸⁵ Omondi (n 74)

protect their political rights. Similarly; every state ought to put structural safeguards and policies in place to support inclusivity in political process. This study therefore begs the question, why is it most important to have equity in political processes and how does this affect gender equality in all aspects of life?

It is proven that societies whose political processes and institutions are inclusive and participatory tend to more peaceful and resilient. Having gender inclusivity in political processes will more often than not indicate that all the vulnerable social groups in that given society are well represented and not just the women. This ultimately leads to remedying structural inequalities that are a major contributor to conflict. It is no wonder that the United Nations has inclusion in political processes as one of the key tenets of the 2030 Sustainable Development Goals.¹⁸⁶

Having gender equality in political processes likewise ensures that there is sustainable democracy. After all, democracy requires participation and representation of all citizens in democratic institutions, such as parliament and processes such as elections and referenda. Democracy thrives only when all citizens (including women) are willing to participate in public debates, elect representatives and join political parties.¹⁸⁷ How then can we claim to have democracy when there continues to be a systemic marginalization of women in these institutions and processes? Can democracy truly deliver if 50% of the world population is continuously neglected as voters, political leaders and elected officials? The answer to these questions is simple. There can be no gender equality in absence of democracy.

Investing in women and having them in position of authority and decision making has proven to have a direct effect on how social issues and challenges are handled.¹⁸⁸ For instance there is evidence that in societies that have women in position of authority, more resources are allocated to boost social programs such as education and health care.¹⁸⁹ This ultimately shows that having more women in political positions is beneficial for all.

¹⁸⁶ <https://www.undp.org/content/undp/en/home/2030agendaforsustainabledevelopment/peace/governance/inclusive-political-processes.html> <Accessed on 17th February 2021>

¹⁸⁷ Economist Intelligence Unit, "Democracy Index 2017: Free speech under attack" Retrieved from <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34079> <Accessed on 17th February 2021>

¹⁸⁸ Tatiana DiLanzo, Strengthen Women's Political Participation and Decision-Making Power, https://womendeliver.org/wp-content/uploads/2016/09/Good_Campaign_Brief_8_092016.pdf 2016 <Accessed on 18th February 2021>

¹⁸⁹ Ibid

Similarly, gender balance and equal participation in political sphere has also been determined to influence and promote gender equality in the job market and workplaces.¹⁹⁰ Needless to say, the potential this has on economic growth is stupendous. Where there is political inclusivity, there is better pay for women workers, equal pay for same job done and fairness culture in the labour market.¹⁹¹ There is further proof that countries that have a high number of women in public life tend to have lower levels of inequality.¹⁹²

Kofi Annan famously noted, “Study after study has taught us, there is no tool for development more effective than the empowerment of women. No other policy is as likely to raise economic productivity or to reduce child and maternal mortality. No other policy is as sure to improve nutrition and promote health, including the prevention of HIV/AIDS. No other policy is as powerful in increasing the chances of education for the next generation.” Therefore, equal involvement of women in political affairs is essential in ensuring all round gender equality.

2.8 Conclusion

History has tended to portray women as mere spectators in the struggle of democratization in Kenya. Nevertheless, as this chapter has seen, they have been at the forefront in all the key transitions that the country has faced.

As it has been explained, the African societal set up is patriarchal. With the coming of the British to Kenya, it is not only men that fought this invasion. Some strong and courageous women such as those in the Mau Mau not only provided logistical support to the fighting rebels but were also forest fighters.

Further, this chapter has elaborated the role women played in the fight for the second liberation. Despite living through a brutish regime, womenfolk endured it all together with the men in the quest for expanding the democratic. Their efforts were rewarded with repealing of section 2A that paved way for multiparty democracy and later, a new constitutional dispensation in 2010.

The next chapter of this research will discuss the legal and regulatory framework that provides for equitable participation of women in politics with a particular focus on the gender principle.

¹⁹⁰ Ibid

¹⁹¹ Ibid

¹⁹² “The Global Gender Gap report, 2014”, World Economic Forum
www3.weforum.org/docs/GGGR14/GGGR_CompleteReport_2014.pdf

There will also be an examination of various judicial interpretations that have shaped the discourse on the two-thirds gender principle. Finally, the chapter shall discuss the attempts by the National Assembly to give effect to Article 100 of the Constitution.

CHAPTER 3

LEGAL FRAMEWORK UNDERPINNING THE TWO THIRD GENDER RULE

3.1 Introduction

August 27th, 2010 was a significant day in Kenya's history. After years of agitation, the country promulgated a new constitution. The constitution of Kenya 2010 has been praised as being one of the most advanced instruments that would alter the political landscape and usher the country into a new democratic era.

This study has so far examined the various transitional periods that the country has experienced in its quest for democratic inclusion. There has also been an analysis of the trend of gender representation in the national assembly and the factors that impede women's participation in political processes.

This chapter shall aim at answering the research question of whether the current legal and electoral framework is conducive for the operation and achievement of the two-third gender rule. The legal framework under reflection shall be at both the national and international levels. An analysis of the jurisprudential framework of the gender rule shall also be made by analysing the various judicial interpretations.

Finally, this Chapter shall relook at the National Assembly's futile efforts to enact legislation that would give effect to Article 00 of the Constitution and the implication of such failure.

The Chapter shall argue that in its effort to ensure political inclusion, the country has managed to put in place some strong short term strategies by having a robust legal framework. However, due to cultural and paternalistic practices, the country's choice of electoral system has ensured that there is no inclusivity and meaningful representation of women in the electoral and political processes.

3.1 International framework

To understand the place of international law in Kenya, it is critical for this study to ascertain whether Kenya is a monist or dualist state.

Monism, a system that has been advanced by legal scholars such as Kelsen, presupposes that both international law and domestic laws are part of one singular and unified legal system. Once a treaty in a monist state is ratified and published, it becomes part of domestic law. In any case, either the domestic law or international law has complete supremacy over the other.¹⁹³ Therefore, in monist states, international law may be supreme over all other domestic laws (including the constitution) or domestic laws are superior to any conflicting rights or obligations arising under international laws.¹⁹⁴

On the other hand, a dualist system reckons that, for a ratified treaty to be applicable domestically, there has to be an enactment of domestic law that incorporates the treaty into domestic law. This interpretation was elaborated in the matter of *Okunda v R*¹⁹⁵ where it was stipulated that “*a treaty had no domestic effect unless it was made part of municipal law through legislation, and that even if it was, its provisions could not supersede those of the Constitution in the event of a conflict.*” This essentially meant that Kenya was, in fact, a dualist state under the independence constitution.

With the promulgation of the new constitution, there has been a debate on whether Kenya is a monist or a dualist state. The Court clarified in the matter of *Beatrice Wanjiku & Another v Attorney General & another*¹⁹⁶ that Kenya had moved on from a dualistic state.

On whether Kenya is monist or dualist is perhaps answered by the provision of Article 21(4) that asserts that, “*the State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.*”

This study, taking into account of both Articles 2 (5) & (6) and Article 21(4) of the Constitution assumes that Kenya subscribes to both the monism and dualism theories.

This segment of the study shall discuss the various treaties and conventions on gender and political inclusion that have been ratified by Kenya.

¹⁹³ Kelsen Hart, *Principles of International Law*, (2nd edn, Hart Publishing) 150

¹⁹⁴ *Ibid*

¹⁹⁵ [1970] EA 512

¹⁹⁶ [2012] eKLR

3.1.1 International Covenant on Civil and Political Rights (ICCPR)

The treaty was adopted and ratified by the signing, ratification and accession of resolution of General Assembly 2200A (XXI) dated 16 December 1966. It came into effect on 23 March 1976.

The framework of the treaty recognizes the natural dignity and equal and inalienable rights of all members of the human family as the basis for freedom, justice, and peace in the world. Article 2 (1) of the Convention provides that every state party promises and guarantees that all persons have the right to be free from any form of discrimination.

Civil and political rights - which are essential to strengthening democratic processes - are enshrined in Article 3 of the Convention. The task is placed on government agencies to ensure that both men and women have equal opportunities to participate in political processes. Political rights are intended to be extended to the citizens and the convention requires periodic elections based on universal and equal suffrage, held by secret ballot and guaranteeing the free will of the electorate¹⁹⁷.

Article 26 which deals with equality before the law and protection from all forms of discrimination provides that member states must enact laws that will “*prevent all forms of discrimination and ensure universal equality and effective protection against discrimination on any ground such as race, colour, sex, language, religion, politics or any other opinion, national or social origin, property, birth or other status.*”

3.1.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW¹⁹⁸ was adopted on 3rd September 1979 as the international convention that would promote gender equality and ensure the elimination of all forms of discrimination. The Convention came into effect on 3rd September 1981¹⁹⁹. Kenya ratified it on 9th March 1984.

¹⁹⁷ Article 25 (2)

¹⁹⁸ The Convention on the Elimination of All Forms of Discrimination Against Women was passed vide General Assembly resolution 34/180

¹⁹⁹ Article 27 (1) provides that the “Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.”

The agreement notes that while there are strong and comprehensive tools aimed at promoting equality between men and women, discrimination against women persists. This inequality, according to the preamble of the convention, is an obstacle to women's participation, on an equal footing with men, politically, socially, economically and culturally in their countries; impedes social and family prosperity; and makes it increasingly difficult to fully develop the power of women working for their countries and humanity.²⁰⁰

Article 1 of the convention describes discrimination against women as “*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*”

The convention provides that individual member states will take special interim measures aimed at accelerating equality. These special measures, such as gender quotas in political systems, should not be considered discriminatory²⁰¹. However, to ensure that positive discrimination is not misused, the Convention provides that any special measures will be discontinued once the objectives of gender equality and treatment are achieved²⁰².

The place of women in political and social life is guaranteed in the Convention by requiring parties to take all appropriate steps to end discrimination against women²⁰³. In particular, states are required to ensure that women, just like men, vote in elections and referendum and be eligible to contest for political seats; participate in the formation of government policy and implementation at all levels of government and; participate in non-governmental organizations and associations concerned with the public and political life of the country.²⁰⁴

The Committee on the Elimination of All Forms of Discrimination against Women provides various recommendations to member states in their areas of focus. General Recommendation No. 25²⁰⁵ provides that state parties must put in place policies and programs aimed at ensuring

²⁰⁰ Preamble of the Convention on the Elimination of All Forms of Discrimination Against Women

²⁰¹ Article 4(1) Convention on the Elimination of All Forms of Discrimination Against Women

²⁰² Ibid

²⁰³ Article 7 Convention on the Elimination of All Forms of Discrimination Against Women

²⁰⁴ Ibid

²⁰⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), “*General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004”> <https://www.refworld.org/docid/453882a7e0.html> [accessed on 1 May 2020]

that men and women compete equally. These special interim measures need to be developed, implemented, and evaluated within the context of each country. In keeping up with this recommendation, Kenya has constitutionalized human rights and provided the prominent two-third gender rule in the Constitution to ensure that there is equality of both men and women in the public and political life.

3.2 Regional Framework

Kenya is equally signatory to various regional treaties such as the African Charter on Human and People's Rights that are aimed at enhancing the governance of African countries.

3.2.1 Protocol to The African Charter On Human and Peoples' Rights on the Rights of Women in Africa

In its 31st Ordinary Session ²⁰⁶, the Organization of African Unity (OAU) authorized the African Commission on Human Rights to establish a code of conduct for the African Charter on Human and Peoples' Rights. The purpose of this protocol, as identified at the 1995 Women in Law and Development in Africa (WiLDAF) conference, was to address women's rights.

The law was adopted by the AU on 11th July 2003 in Maputo, Mozambique. It came into effect on 25th November 2005 after the approval of the required 15 nations. Kenya ratified the protocol on 13th October 2010 with two reservations ²⁰⁷.

The first reservation was about Article 10 (3) of the protocol. This article requires member states to reduce their military spending significantly rather than to spend more on improving the welfare of the people and in promoting women in particular. The study notes that indeed, Kenya continues to face many security problems due to the terrorist threat posed by Al-Shabaab.

The second reservation that Kenya placed relates to Article 14 (2) (c) on medical termination of pregnancy. The protocol calls for termination of pregnancies in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. Abortion is only permitted if, in the opinion of a

²⁰⁶ June 1995

²⁰⁷ Reservations limit a state's obligations in respect of a specific right outlined in a treaty article.

trained health professional, there is need for emergency treatment or the life or health of the mother is in danger.

The Maputo Protocol requires States Parties to fight all forms of discrimination against women. This may be done through proper legislative, institutional, and other measures²⁰⁸. In applying any of these measures, the protocol requires that the principle of equality between women and men is protected and states ensure its effective application²⁰⁹. Besides, the protocol requires member states to incorporate a gender perspective in their policy decisions, legislation, development plans, programs, and activities in all other spheres of life²¹⁰. Member states are also required to take curative and positive action in those areas where discrimination against women in law and in fact continues to exist²¹¹.

The right to participate in political processes is provided by Article 9 of the protocol. Member states are obligated to take specific positive action aimed at ensuring more women participate in democratic governance of their countries. This may be done through affirmative action, enabling national legislation and other measures.²¹² The areas of focus for political inclusion for women include participation in elections, equal representation in political processes, and equality in the application of state policies and development programs.²¹³ Further, states are required to ensure increased and effective representation and participation of women at all decision-making levels.²¹⁴

3.3 National Legislation

3.3.1 Constitution of Kenya, 2010

The Constitution of Kenya 2010 is considered to be the most progressive in recognizing and protecting basic human rights. The Constitution recognizes the aspirations of all Kenyans for a government based on the fundamental values of human rights, equality, freedom, democracy, social justice, and the rule of law²¹⁵.

²⁰⁸ Article 2(1), Protocol to The African Charter On Human and Peoples' Rights on the Rights of Women in Africa

²⁰⁹ Ibid

²¹⁰ Ibid

²¹¹ Ibid

²¹² Article 9(1) Protocol to The African Charter On Human and Peoples' Rights on the Rights of Women in Africa

²¹³ Ibid

²¹⁴ Article 9(2) Protocol to The African Charter On Human and Peoples' Rights on the Rights of Women in Africa

²¹⁵ Preamble of the Constitution, 2010

The Constitution enshrines human dignity, equality, social justice, inclusiveness, equality, human rights, non-discrimination, and the protection of those who are marginalized as part of national values and principles of governance²¹⁶.

Perhaps to show the positive steps the country has taken in ensuring that vulnerable groups are included in all aspects of their lives, Chapter 4 of the Constitution provides for the Bill of Rights. In interpreting the Bill of Rights, Article 20 (4)²¹⁷ requires the courts, tribunals or other authority to promote the fundamental values of an open society and democracy based on human dignity, equality, equality and freedom.

The Constitution mandates the state and its organs to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms of every citizen.²¹⁸ Further, Article 21 (3)²¹⁹ states that “*all organs of state and all public officers*²²⁰ *have a duty to address the needs of vulnerable groups in society, including women, older members of society, people with disabilities, children, youth, minority or marginalized members of society, and members of certain ethnic communities , religion or culture.*”

Article 27 of the Constitution deals with equality and freedom from discrimination where all citizens are protected and treated including the right to equal opportunities in the political, economic, cultural and social spheres²²¹.

Additionally, Article 27 (4)²²² specifically instructs the State to ensure that there is no direct or indirect discrimination of any person based on their race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 27(6) of the Constitution is central to this study. This Article directs the State to take legislative and other measures, including affirmative action programs and policies designed to

²¹⁶ Article 10 (b) Constitution of Kenya

²¹⁷ Constitution of Kenya

²¹⁸ Article 21 (1) Constitution of Kenya

²¹⁹ Constitution of Kenya

²²⁰ A public Officer means “any person in the national government, county government, or in the public service and draws remuneration and benefits directly from the consolidated fund or directly out of money provided by parliament.”

²²¹ Article 27(3) Constitution of Kenya

²²² Constitution of Kenya

redress any disadvantage suffered by individuals or groups because of past discrimination. In this case, it is the role of the State to spearhead the inclusion of women in political processes.

Political rights for everyone are an integral aspect of any democracy. The Constitution of Kenya grants the freedom of every citizen to make political choices, which include formation and involvement in political parties²²³. This political right is extended to every citizen who wishes to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office²²⁴.

As the background of this study postulated, the choice of electoral system is critical in ensuring there is electoral integrity and equitable representation of disadvantaged and vulnerable groups in the society. Other than providing for the liberty of citizens to exercise their political rights, the Constitution also makes provision that ensures that not more than two-thirds of the members of elective public bodies are of the same gender²²⁵.

Perhaps recognizing the role political parties play in the democratization process, Article 91 of the Constitution asks of parties to ensure that they respect the right of all persons to partake in all internal political processes, including minorities and marginalized groups and promote human rights and fundamental freedoms, and gender equality and equity. The importance of electoral and political party systems and the role they play in fostering inclusivity in political parties shall be delved into much deeper in the next chapter.

The provision of Article 97 on the composition of the National Assembly is at the core of this study. The Constitution provides that the Assembly shall comprise of forty-seven women, each elected by the registered voters of the counties, each county constituting a single-member constituency,²²⁶ and twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly per Article 90²²⁷, to represent special interests including the youth, persons with disabilities, and workers²²⁸.

²²³ Article 38(1)(a) Constitution of Kenya

²²⁴ Article 38(3)(c) Constitution of Kenya

²²⁵ Article 81(b) Constitution of Kenya

²²⁶ Article 97(1)(b) Constitution of Kenya

²²⁷ Article 90 of the Constitution discusses the criteria for allocation of party-list seats.

²²⁸ Article 97(1)(c) Constitution of Kenya

Thus, to comply with the constitutional requirement of Article 81(b) of the Constitution, the membership of parliament at any given time should be at least one hundred and seventeen (117) members out of the possible three hundred and forty-nine (349) should be of either gender.

Specific mandate is placed upon the national assembly to promote representation of women amongst others in Parliament. Parliament is required to give effect to Article 87(b) by enacting enabling legislation²²⁹. Later in this chapter, the research shall examine the efforts by the national assembly to actualize Article 100 of the Constitution and the difficulty the same has faced.

In giving the various interpretations that touch on political participation and inclusivity, the Constitution defines affirmative action to include any measure intended to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom²³⁰. Further, the constitution defines a marginalized group to mean a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4).²³¹

This review of the Constitution shows that there is a comprehensive legal framework to ensure the actualization of the two-third gender rule. The constitution has put in place the necessary short term strategies needed to incorporate women in political processes.

3.3.2 Elections Act, 2011

The Elections Act²³² may be touted as the foremost legal framework that Kenya has put in place to regulate the conduct of elections to the offices of the president, National Assembly, the Senate and the county assemblies. The Act elaborates on the various constitutional provisions touching on elections at all levels.

The inclusion of women in political processes – both as voters and candidates is enshrined in this crucial act. The Act is particular on criminalizing some already identified hindrances to political inclusivity such as interference with the right to vote through bribery, intimidation or violence. More importantly, the Act provides for the procedures and processes of how various

²²⁹ Article 100(a) Constitution of Kenya

²³⁰ Article 260 Constitution of Kenya

²³¹ Ibid

²³² Act No. 24 of 2011

social and minority groups would be represented in parliament and county assemblies.²³³

The Commission is required to scrutinize and ascertain that the party list submitted by political parties conforms, not only the two-third gender rule, but that also the political party that prepared the list did so in a democratic and inclusive manner. For instance, political parties are obligated to submit to the Commission their elections and nominations rules at least forty fives from the day of the nominations²³⁴. This gives the Commission ample time to review and be satisfied that political parties have set in place sufficient measures that would ensure the nominations are done in an inclusive and participatory manner.

The Commission is further mandated to make regulations that are meant to enhance the implementation of the Act. Such regulation that has since been gazetted is the Elections (General) Regulations²³⁵. The regulations reduced the required nomination fees for all female candidates. The regulations require women candidates to pay half of what is required of men. Women candidates for the position of national assembly paid Ksh. 10,000 as compared to men's Ksh. 20,000 in the last general election.²³⁶

The impact of this regulation on nomination fee payable to the Commission cannot be overstated. As suggested in Chapter Two of this study, financial constraints continue to be a key hindrance to the meaningful participation of women in political processes. It is a clear indication that having women pay meagre nomination fees would encourage more to participate in competitive politics.

Similarly, the Act establishes an electoral code of conduct²³⁷ that regulates the actions of political parties, officials, candidates, agents and their followers. In addition to promoting free, fair and violence free campaigns, the code also requires political parties to commit to promoting gender equality and prohibit discrimination within their ranks. The safeguarding of women's political rights both as candidates and as voters is contained in Section 16 of the Code.

²³³ Elections Act Section 36

²³⁴ Elections Act Section 13 (3)

²³⁵ 2012.

²³⁷ Elections Act, Second Schedule

3.3.3 *Political Parties Act, 2011*

The Political Parties Act, 2011 was established to give effect to Article 92 of the Constitution²³⁸ and ensure that political parties are managed and regulated democratically. With the realization the integral part political parties play and how they aid in the inclusion of women in democratic processes, the Political Parties Act²³⁹ defines women as part of special interest groups.²⁴⁰

As vehicles for political democracy, this study is equally concerned with the role political parties can play in ensuring that the two-third gender rule is achieved. The importance of this can be seen by the fact that the Act requires that other than regional and ethnic diversity, the composition of the party's governing structure must cater for gender balance with the representation of special interest groups; and not more than two-thirds of the members of its governing body are of the same gender.²⁴¹

On the funding of political parties, Section 25(1)(aa) of the Act provides that 15% of the Political Parties Fund is to be dispersed proportionately to political parties based on the number of candidates of the party from special interest groups elected in the preceding general election.²⁴² Further, a qualifying party cannot receive funding if more than two-thirds

of its officials are of the same gender²⁴³ and the party does not have, in its governing body, representation of special interest groups.²⁴⁴ Moreover, the funds received by the party should amongst others be used to promote representation in parliament and the county assemblies of women and other special interest groups.²⁴⁵

3.4 Policy Framework

Despite the National Assembly failing in its role of enacting the necessary legislation that will see the two-third gender rule is actualized in parliament, the Executive branch of government continues to enhance efforts geared towards gender equality.

²³⁸ Article 92 mandates parliament to enact legislation on the regulation of political parties.

²³⁹ 2011

²⁴⁰ PPA, 2011 Section 2 on interpretations.

²⁴¹ PPA, 2011 Section 7

²⁴² PPA, Section 25(1) (aa)

²⁴³ PPA, Section 25(2)(b)

²⁴⁴ PPA, Section 25(2) (ba)

²⁴⁵ PPA, Section 26

Ministry of Public Service, Youth and Gender recently published the National Policy on Gender and Development²⁴⁶ whose main objective is to “*create a just, fair and transformed society free from gender based discrimination in all spheres of life practices.*” This policy lays the threshold in which all government efforts to address gender inequalities would be measured against.

More specifically, the Policy at Chapter Four outlines the various priority areas of focus and details the policy actions that ought to be undertaken to actualize gender equality. One of these priority areas, that is central to this study is on governance, authority and decision-making.²⁴⁷ The Policy aims at fostering inclusive and meaningful involvement and representation of both women and men in governance, power and decision-making positions in public and private sectors.²⁴⁸

In order to gain equal representation in governance, the policy proposes the introduction of legislation to give effect to the constitutional principle that not more than two thirds of members of appointive and elective positions shall be of the same gender.²⁴⁹ So far, this has not bore any fruits. In addition, the policy proposes to support and promote active and meaningful participation of women in political and decision-making processes at the grassroots level.

The policy also recognizes the role political parties play in gender equality. It is for this reason that it aims to govern political parties by requiring them to support women’s participation in political processes within the parties. Additionally, the policy seeks to have effective interaction between government and non-government actors in empowering women to participate and engage in competitive politics, leadership and governance.²⁵⁰

3.5 Jurisprudential framework of the two-third gender rule

The Courts have played a major role in ensuring that there is equitable participation of all genders in political processes. Since the promulgation of the new constitution in 2010, there has been a litany of court matters that have been presented to the courts to interpret the two-thirds gender rule and how the same can be actualized.

²⁴⁶ Sessional Paper No. 02 of 2019

²⁴⁷ Ibid

²⁴⁸ Ibid

²⁴⁹ Ibid

²⁵⁰ Ibid

As it shall be seen in this section, the courts are sentient to the fact that the makers of our constitution were very particular in enhancing the participation of women in all aspects of social, economic, and political life. However, and in particular, to political participation, the challenge has always been how to actualize the provisions of Article 81(b) of the Constitution.²⁵¹

This section shall discuss the key landmark decisions that continue to shape the discourse on representative politics and how the Courts propose the same can be achieved as provided by our laws.

3.5.1 Supreme Court Advisory Opinion No. 2 of 2012

With the first general election under the new constitution fast approaching, the Hon. Attorney General sought an advisory opinion from the Supreme Court concerning Article 81(b) of the Constitution. The advice sought was *"whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116 and Article 125 of the Constitution of the Republic of Kenya require the progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March 2013"*

The Attorney General directed the Court's attention to the safeguards afforded to both men and women in the Bill of Rights that provides for equality and freedom from discrimination.²⁵² He stated that the Constitution placed a positive obligation on the government to put in place measures that would ensure equality.

Noting the potential discrepancies between the principles of equality contained in Article 27 and the specific provisions regarding membership of the National Assembly and the Senate, as provided in Articles 97 and 98, the Hon. Attorney General grounded his advisory opinion on these.

The matter attracted a lot of public interest and organizations applied to be enjoined in the case and the Supreme Court allowed several. These were: Commission on the Administration of

²⁵¹ One of the Principles of Kenya's electoral system is that not more than two-thirds of the members of elective public bodies shall be of the same gender

²⁵² Article 27(3) declares that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."

Justice (CAJ); the Independent Electoral and Boundaries Commission (IEBC); the Commission on the Implementation of the Constitution (CIC); and the National Gender and Equality Commission (NGEC).

On the other hand, the following were admitted as *amicus curiae*: The Centre for Rights Education and Awareness (CREAW); the Katiba Institute; the Centre for Multi-Party Democracy (CMD); FIDA Kenya; the Kenya Human Rights Commission (KHRC); the International Centre for Rights and Governance (ICRG); and Mr. Charles Kanjama, Advocate.

One of the Attorney-General's submission was despite the ambiguity of the language in the Constitution's gender-equity clauses, the certainty was that by virtue of Article 97(1)(b), the required number of those of the female gender to form part of the National Assembly's membership is **33.4 percent**. He noted that if the voters, uninhibited, failed to elect the requisite number of women to satisfy the two-third gender rule, the only way to comply would be through the political parties by way of nominations.

The rejoinder, however, was that these nominations would result in automatically raising the membership numbers in parliament beyond what the constitution prescribes. This would, in turn, lead to a conflict between the provisions of the Constitution on gender equality, and its provisions on the numerical strength of parliament. The cost implication for this, according to the Attorney-General, would be unbearable to the taxpayers.

The Attorney General was of the view that the Constitution intended progressive realization of the gender-equity principle in elective representation. The various parties in the matter were torn between progressive realization while the majority advocated for immediate implementation.

Perhaps resounding the beliefs of feminist theory, and taking into account Kenya's peculiar cultural and social practices; the court noted that Articles 27(8) and 81(b) of Constitution were included in our Constitution because for decades, there has been unequal participation and representation of women in elective or other public bodies. This may have been attributed to discriminatory practices or gender-indifferent laws, policies, and regulations.

The Court noted that the Constitution set out to rectify these gender inequalities by providing for affirmative action through Articles 27 and 81 and a detailed Bill of Rights. Further, the

Court acknowledged that the major stumbling block to gender equality was political will. It thus would need more than just enacting laws with gender quotas to accomplish real inclusion of women in the elective and appointive public offices. The state must therefore introduce a wide variety of measures other than affirmative action programs.²⁵³

The majority opinions ruled in favor of progressive implementation save for the Chief justice who dissented. In his dissent, the Chief Justice determined that the 2/3 gender rule should be implemented immediately. He stated *“I am in agreement with Counsel for the Katiba Institute that the Constitution's view to equality, as one of the values provided under the constitution, in this case, is not the traditional view of providing equality before the law. Equality here is **substantive** and involves undertaking certain measures, including affirmative action, to reverse negative positions that have been taken by society. Where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive.”*

The court advised that the progressive realization should be achieved by 27th August 2015.

3.5.2 Constitutional Petition 182 of 2015²⁵⁴

Upon determination by the Apex Court in Advisory Opinion No. 2 of 2012 that the two third gender principle could only be implemented progressively and did not apply to the March 2013 general elections, the Centre for Rights Education & Awareness (CREAW) went to court to seek a declaration that the Attorney General and the Constitution Implementation Commission (CIC) had failed to develop and present affirmative action legislation in line with the August 27th 2015 deadline issued by the Supreme Court in the advisory opinion.

One of the foremost issues for determination was whether the advisory opinion, which had placed an August 27th 2015 deadline to have put in place the legal framework that would give effect to Article 100 of the Constitution, was binding. It was equally important to ascertain whether the national assembly was culpable for any failure to put in place this all important legislation.

²⁵³ Levit N. & Verchik R.M (2016), ‘Feminist Legal Theory, Primer’ New York University Press, 2nd Ed

²⁵⁴ Centre For Rights Education & Awareness (CREAW) Vs The Hon Attorney General & The Commission On The Implementation of the Constitution (CIC)

In answering these questions, the court pronounced that the AG and CIC had, “dropped the ball and demonstrated laxity and reluctance in preparing legislation for tabling in Parliament that would ensure realization of the two-third gender rule in elective and appointive bodies.”

On parliament’s role, the Learned Hon. Justice Mumbi Ngugi was categorical that there was failure by the National Assembly in the stalemate. She stated that “the Constitution Implementation Oversight Committee had abandoned its oversight role by failing to ensure the legislation envisioned by Article 100 of the Constitution was in place within five years of the promulgation of the Constitution as set out in the fifth schedule of the Constitution.”

The court gave the Attorney General and the Commission 40 Days to submit the legislation to parliament for the necessary action.

3.5.3 *Constitutional Petition No. 371 of 2016*²⁵⁵

The main issue in this petition was whether the national assembly had failed to fulfil its constitutional obligation; in particular, the failure to pass the necessary legislation that gives effect to the two-thirds gender rule.

The petition revolved around the reading of Article 261 of the Constitution which discusses extensively the role of Parliament in enacting the necessary legislation. Article 261(1) as read with the fifth schedule provides the specific timelines for the enactment of the various legislations. In this case, the National Assembly is required to put in place a law on advancement of representation of marginalized groups as provided by Article 100 within five years.

Should the National Assembly fail to enact the legislation, the Constitution gives leeway to parliament to extend the period prescribed for enacting legislation for a period not exceeding one year.²⁵⁶ These powers can however only be exercised only once and in exceptional circumstances to be certified by the Speaker of the National Assembly.²⁵⁷

Should Parliament fail to enact any legislation within the prescribed time, anyone may petition the High Court which can make a declaratory order and direct Parliament and the Attorney-

²⁵⁵ *Centre for Rights Education and Awareness and 2 others Vs The Speaker of the National Assembly and 3 others*

²⁵⁶ Article 261(2) Constitution of Kenya

²⁵⁷ Article 261(3) Constitution of Kenya

General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.²⁵⁸

To curb any malice or inaction, the makers of our constitution provided that should Parliament fail to enact legislation in line with an order issued by the High Court, the Chief Justice is obligated to advise the President to dissolve Parliament and the President shall do so.²⁵⁹

The Court noted that the National Assembly had exercised its right to extend the timeline for the enactment of the two-third gender law that was due by 27th August 2015 to 27th August 2016.

The court did not hesitate to point out that the constitution is very clear on the issue of gender equality. The Constitution, the court noted, clarifies the steps that have to be taken to be fully effective in enforcing the two-third gender law. It requires the state to take legislative and other measures, including affirmative action programs and policies to redress those victims or groups of past discrimination.

The court said that it was obliged to adopt the interpretation that favours most the enforcement of equal rights and non-discrimination of men and women in Parliament. Indeed, the Learned Justice Mativo stated that *"Parliament's failure to enact the required legislation amounts to failure to recognize the important task conferred on the legislature by the Constitution to respect, protect, promote and fulfill the rights in the Bill of Rights."* To this end, the court asserted that Parliament had failed to enact the required legislation to implement the measures contemplated under Article 27(6). This meant that there was a gross violation of Articles 21(3) and 100 of the Constitution.

In agreeing with the petitioners, the Learned Justice ordered Parliament and the Hon. Attorney General to take steps to ensure that the required legislation is enacted within a period of sixty (60) days and to report the progress to the Chief Justice.

²⁵⁸ Article 261(6) Constitution of Kenya

²⁵⁹ Article 261(7) Constitution of Kenya

3.5.4 Civil Appeal 148 of 2017 ²⁶⁰

Being dissatisfied with the decision in *Constitutional Petition No. 371 of 2016*²⁶¹ where a determination was made that parliament had failed in their legislative role; in particular, the failure to pass the required legislation that gives effect to the two-thirds gender rule, the Speaker of the National Assembly appealed this decision. The two key issues for consideration by the Court of Appeal were that the High Court failed to hold that there is no constitutional requirement to enact legislation under Article 81 of the Constitution and that the High Court had apportioned blame to the national assembly by pronouncing that the National Assembly and the Senate had failed to enact legislation on the gender principle.

The Court highlighted that in its view, the two-third gender rule in elective and appointive bodies can be achieved in three ways. First way is through a democratic election where voters exercising their will vote into offices members with the gender mix required by the Constitution. This has however proven difficult since independence. The second way, according to the Court, is set by the Constitution itself, but unfortunately only for the county assemblies.²⁶² There are no specific provisions on how to achieve gender parity in the National Assembly or the Senate. Thirdly, the Court relied on the contemplation of Article 27(8) where it is expected legislative and other measures will be employed to guarantee that the constitutional ratio in elective bodies is attained.

The Speaker of the National Assembly was of the view that parliament had taken legislative measures to ensure achievement of the two-third gender rule in the National Assembly. By amending Section 25 of the Political Parties Act that 15% of the Political Parties Fund is to be distributed to political parties based on the number of a party's candidates from "*special interest groups*" in the preceding general election, the Speaker argued that this had given political parties incentive to nominate more women candidates.

However, the Court rightly pointed out that "*special Interest groups*" as described by the Political Parties Act include women, persons with disabilities, youth, ethnic minorities and

²⁶⁰ Speaker of The National Assembly Vs Centre For Rights Education & Awareness And 7 Others

²⁶¹ *Centre for Rights Education and Awareness and 2 others Vs The Speaker of the National Assembly and 3 others*

²⁶² Article 177(1) (b): "the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly is of the same gender".

marginalized communities.²⁶³ The term is therefore not specifically intended to incentivize political parties to nominate and elect women candidates. After all, political parties could still get the 15% funding if they nominated candidates from any of the categories of special interest groups to the exclusion of women. Similarly, the courts buttressed the point that the incentive for getting the 15% by political parties was merely based on nomination of candidates and not the actual election of these candidates. This would in no way solve the two-third gender conundrum.

The appeal failed.

3.5.5 *Constitutional Petition No. 19 of 2017*²⁶⁴

As this study has seen, political parties play a critical part in the democratization process and ensuring that women achieve their desired place in political processes.

In 2017, Katiba Institute approached court seeking a declaration that Political Parties have a constitutional responsibility in ensuring that there is gender equality in all its activities and in particular in the nomination process of candidates for members of parliament. Unlike previous petitions, this one was nit about the shortcomings by the National Assembly to enact the relevant legislation but rather, whether there were any failings by Political Parties and the Independent Electoral and Boundaries Commission (IEBC).

The petition scrutinized powers granted to the Commission as stipulated in Article 88 (4) (d) and the Commission's constitutional duty of ensuring that the nomination process by political outfits complies with the two-third gender rule. The petition further contended that the Constitution compels the Commission to reject any nomination list of a political party for its candidates for the 290 Constituency based elective positions for members of the National Assembly and 47 County-based positions for the member of the Senate that do not comply with two-third gender rule.

On the other hand, the Commission was adamant that it did not have the specific powers of enforcing the two-third gender rule as provided for by the Constitution. The Commission was

²⁶³Section 2, PPA 2011

²⁶⁴*Katiba Institute Vs Independent Electoral and Boundaries Commission*

also of the opinion that there was no law that provides for the manner in which the two-third gender rule would be realized.

The Court noted that Political Parties are required by Article 91(1)²⁶⁵ to ensure that, amongst others, they respect and promote human rights and essential freedoms and gender equality and equity. The Hon. Justice Mwita opined that Political Parties are financed by the people of Kenya to encourage women and marginalized groups' representation in Parliament and County Assemblies. That, therefore, means that political parties should mainstream gender equality and equity in order to eradicate gender discrimination. This, according to the Learned Judge, cannot be achieved unless there is gender balance in elective positions and implementation of gender-sensitive policies that are geared towards women's socio-economic and political development.

In agreeing with the Petition, Hon. Mwita pronounced that indeed, political parties had the obligation of ensuring that the two-third gender principle in their nomination processes is adhered to. However, the court was quick to note that it was not in a position to decide how the two-third gender principle should be realized within Political Parties. The duty was on political parties to choose how they should incorporate the two-third gender principle. Further, the onus was on the Commission to put in place administrative measures that would ensure political parties comply with the two-third gender rule.

3.5.6 Chief Justice Maraga Advisory Opinion²⁶⁶

On 21st September 2021, something momentous happened. The Chief Justice and President of the Supreme Court, Hon. Maraga had been bombarded with six petitions all calling him to advise the president to dissolve parliament for being unconstitutionally constituted. These were:

- i. Petition No.1 of 2019 by Margaret Toili dated 12th April 2019;
- ii. Petition No. 2 of 2019 by Fredrick Gichanga Mbugua' dated 7th May 2019;
- iii. Petition No. 3 of 2019 by Stephen Owoko and John Wangai dated 20th November 2018;
- iv. Petition No. 4 of 2019 by Aoko Bernard dated 18th June 2019;

²⁶⁵This Article of the Constitution provides the basic requirements for every political Party

²⁶⁶₂₀₂₀

- v. Petition No. 5 of 2019 by Hon. David Sudi dated 10th July 2019; and
- vi. Petition No. 1 of 2020 by the Law Society of Kenya dated 20th July 2020

The Petitions were all based on the grounds that despite four court orders requiring Parliament to enact the legislation that would enable implementation of the two thirds gender rule as provided by Article 27(3) read together with Articles 81(b) and 100 of the Constitution, Parliament has blatantly failed, refused and/or neglected to do so.

The Chief Justice noted that the Speakers of both Houses and Attorney General made three assertions to persuade the CJ not to act on the petitions. First, by virtue of Articles 97 and 98, the Constitution had set a limit on the composition of the two houses of Parliament. This, according to the respondents made it impossible to enact any legislation to give effect to the two-thirds gender rule as doing so would disenfranchise the citizens' political rights under Article 38(3).²⁶⁷ Secondly, the respondents claimed that there is no budget to stage a by-election that would ensue due to dissolution of Parliament. Third, with the world reeling from the Covid-19 pandemic, it was the opinion of the respondents that advising the president to dissolve parliament would go against public interest. Lastly, the respondent submitted that any advice to the president to dissolve parliament would trigger a constitutional crisis as Parliament's law-making and oversight roles would stall.

Despite these submissions, the Chief Justice relying on powers granted by Article 261(7)²⁶⁸, advised the President of the Republic of Kenya to dissolve parliament. He noted that such dissolution would cause great inconvenience and even economic hardship especially during this era of the pandemic. However, the now retired Chief Justice was convinced that Kenyans understood the possible cultural resistance that the idea on gender equality would face. This, he observed, could clearly be seen by parliament's lackadaisical attitude in handling the issue.

3.5.7 Reactions to the CJ's Advisory Opinion

Needless to say, the decision by the Chief Justice to stand up for the rule of law and constitutionalism was met with jubilation and utter disdain in equal measure. The Speaker of

²⁶⁷ "Every adult citizen has the right, without unreasonable restrictions: (a). to be registered as a voter; (b). to vote by secret ballot in any election or referendum; and (c). to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office."

²⁶⁸ "If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament."

the National Assembly was the first to vehemently reject the CJ's Advisory opinion. He maintained that the Kenyan Parliament is wrongly shouldering the blame for the failure to implement the two-thirds gender rule. In his speech, *"Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?"*²⁶⁹ Mr. Muturi outlines a raft of reasons indicating why parliament should not be blamed. Most important is the contention that there is no direct decree by the Constitution requiring Parliament to pass law to ensure compliance with the two-thirds gender principle with respect to members of parliament.

On the other hand, Constitutional Lawyer Kibe Mungai wrote that, *"the CJ's Advisory is a recommendation rather than a court order and so President Uhuru, in his capacity as head of state and government, must determine whether abiding by it will protect the Kenya's constitutional order, public interest and the best interests of the Kenyan State and nation."*²⁷⁰

Mr. Mungai went ahead and gave several grounds why the advice by the Chief Justice to the president should be ignored. One key point that he raised was that the Constitution's two-third gender rule applied to the electoral system and not the composition parliament hence the rule was not an enforceable right capable of immediate enforcement.²⁷¹ With the Advisory Opinion No. 2 of 2012 advising that the rule can only be realized progressively, Mr. Mungai erroneously interpreted this to mean that, *"even if the State were to take all legislative and other measures and they failed to result into a one-third representation of women in Parliament that fact would not render the composition of Parliament unlawful."*²⁷² He concluded his opinion by saying that the proponents of the gender rule have 'narrow constitutional fetishism' which has caused the elevation of the two-thirds gender rule above fundamental principles of constitutional democracy.

The coordinated attacks of Justice Maraga's advisory opinion were not only done in the media. The court was also used as an avenue to litigate the decision. Ten court matters were filed in court to either challenge or support the advisory opinion. These are:

²⁶⁹ <http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> <Accessed on 12th February 2021>

²⁷⁰ Kibe Muigai, **"Why Uhuru Should Ignore Maraga's Advise On Dissolution Of Parliament,"** <https://www.capitalfm.co.ke/news/2020/09/why-uhuru-should-ignore-maragas-advise-on-dissolution-of-parliament/>, 24th September 2020 <Accessed on 12th February 2021>

²⁷¹ Ibid

²⁷² Ibid

- i. HCCHRPET/E291/2020: Leina Konchellah And Mohsen Abdul Munasar Vs. Hon. Justice David Kenani Maraga, Office Of Attorney General and 2 Others
- ii. HCCHRPET/E300/2020: The National Assembly and The Senate Vs. The Chief Justice of the Republic of Kenya and The Honourable Attorney General
- iii. HCCHRPET/E302/2020: Thirdway Alliance Kenya Vs Office Of Attorney General And Speaker of The National Assembly and Another
- iv. HCCHRPET/E305/2020: Office Of Attorney General Vs. Speaker Of The National Assembly And Speaker Of The Senate
- v. HCCHRPET/E314/2020: Prof. Tom Odienda Vs. Hon. Attorney General And Hon. Justice David Kenani Maraga And 2 Others
- vi. HCCHRPET/E317/2020: Edwin Kimatu Saluny Vs. (Office Of Attorney General) And Speaker Of The National Assembly And 2 Others
- vii. HCCHRPET/E337/2020: Centre for Rights Education & Awareness Vs. Office Of Attorney General & Others
- viii. PET. 228/2020: Nthaatu Ntoogo Vs. The Chief Justice Of The Republic Of Kenya And Another
- ix. PET. 229/2020 Claire Amdany And another Vs. The Chief Justice And President Of The Supreme Court Of Kenya And Another
- x. JR E1108/2020 Adrian Kamotho Njenga Vs. The Hon. Chief Justice & 4 Others

The matters have since been consolidated and a bench of five (5) justices constituted to listen and determine them.

How the bench will decide these consolidated matters will have huge ramifications on the future of gender equality in the national assembly. Should the court uphold the decision and reasoning of the Chief Justice, it will be left to the President to dissolve the national assembly. The head of state will either adhere to the advice or disregard it. The big question is, will he be willing to be seen as the greatest impediment to inclusivity or the one who stood with women in their quest for justice?

3.6 Is the law sufficient?

Kenya possesses a robust legal framework at both the national and international levels to enable gender equality in political processes. Indeed, as this chapter has seen, the drafters of our Constitution recognized that women have lagged in representative politics and hence provided

for the two-thirds gender rule for both elected and appointive positions. The courts have continued to provide better insight, clarification and probable solutions to solve the problem of gender inequality in political processes.

All the while, ten years later, parliament has been unable to enact the enabling legislation that will ensure the membership of parliament is constitutional. Underrepresentation of women continues in the national assembly, executive, judiciary, state agencies and all the various spheres of life.

Oliver Wendell Holmes Jr. opined that "The life of the law has not been logic: it has been experience."²⁷³ It is therefore a reasonable expectation that with such a robust legal framework and a conglomeration of various organs including Executive, Parliament, Judiciary as well as Independent Constitutional Commissions, the two- gender rule should be easily implemented in all of public life. But this has not been the case so far.

Implementation of the two-third gender rule in the national assembly goes beyond just numbers. It goes beyond granting women numbers in elective or appointive positions as a token. For gender balance to be actually achieved not just in legislative assemblies but in all spheres of life, there must be accompanying structural safeguards and policies put in place to support this quest. The Kenyan situation is sufficient proof that systemic and cultural marginalization of women cannot be undone overnight by a mere piece of legislation.

3.7 Parliamentary efforts to implement Article 100 of the Constitution

One of the tangible measures of checking the progress being made in terms of gender equality in political participation is by ascertaining the membership of the national assembly. Moreover, upon recognition of women as a marginalized group, the Constitution of Kenya mandates parliament to pass laws that will facilitate achievement of the two-third gender rule.²⁷⁴

This constitutional duty that is placed upon Parliament has however not been fulfilled 10 years after the proclamation of the constitution. In fact, parliament has attempted to enact the two-third gender law four times to no avail. In all these instances, parliament has failed to raise the requisite numbers in favour of the bill. Members, including women, have calculatingly stayed

²⁷³ Holmes, Oliver Wendell Jr. (1881), *The Common Law*, I. Boston: Little, Brown and Company

²⁷⁴ Constitution of Kenya, Article 100

away from chambers or simply voted against the bills. This begs the question of whether it is by design that parliament continues to abdicate its constitutional duty and hence continues to be constituted unconstitutionally?²⁷⁵

Following the Supreme Court Advisory Opinion, the Technical Working Group grappled with three issues on how to implement the two-thirds gender principle.²⁷⁶ First, the group contemplated if it was possible to achieve the constitutional requirement by just providing legislation and without amending the Constitution. The second issue identified was whether a referendum would be required should the need to amend the Constitution arise. Finally, the options that option resonates best with the tenets of the principle of affirmative action were discussed.

Despite these key issues being raised, the Departmental Committee on Justice and Legal Affairs went ahead to formulate what was later to be known as the Chepkonga Bill.

3.7.1 Two-Thirds Gender Rule Laws (Amendment) Bill of 2015 (Chepkonga Bill)

On 28th April 2015, the Departmental Committee on Justice and Legal Affairs formulated the Two-Third Gender Rule Law (Amendment) Bill of 2015 commonly known as the Chepkonga Bill.

From the onset, the Bill was flawed. The bill directly challenged Article 81 (b) of the Constitution.²⁷⁷ It proposed inserting the phrase “progressive implementation” of the legislation to ensure no more than two-thirds gender principle is realised. The Bill, however, did not provide for any actual timeframe that this should be achieved. The proposal was that to incrementally achieve the two-third gender rule, the focus should be civic education, capacity building of women, and facilitating them to participate in party affairs. This amendment was said to be retrogressive and whose effect was to postpone the actualization of the two-thirds gender rule indefinitely.

More so, the bill contravened the principle of equality and freedom from discrimination as provided for by Article 27 of the Constitution and Article 10 on the national values and

²⁷⁵ Daily Nation 26th June 2015 Why Chepkonga Bills won't enact gender principle, “It is now obvious that those charged with the responsibility of implementing the constitutional principle of not more than two-thirds of either gender representation in Parliament are hell-bent on delaying it.”

²⁷⁶ Daily Nation (n 275)

²⁷⁷ not more than two-thirds of the members of elective public bodies shall be of the same gender

principles of governance. Clearly, it was not only bad in law, but it was also meant to dilute all the gains women have made in their quest for political inclusion. Interestingly, the KEWOPA members of the Justice and Legal Affairs disowned the bill and asserted that it was a creation of Hon. Chepkonga and a few other male MPs.²⁷⁸

While introducing the bill in Parliament for the second reading, Hon. Chepkonga insinuated that gender inequality was part of Kenyan political culture by stating “*we cannot force people to do things which they think are not cultural to them.*”²⁷⁹

Nonetheless, the bill did not sail through.

One of the reasons that the Hon. Chepkonga provided that informed the formulation of the bill was that the executive arm of government deemed implementation of the two-third gender principle too costly.²⁸⁰ It has been projected that it will require Ksh. 2.5 billion in salaries and emolument to fully implement the two-third gender principle in the national assembly.²⁸¹

3.7.2 The Constitution of Kenya (Amendment) (No. 4) of 2015 (Duale Bill I)

The Constitution of Kenya (Amendment) (No. 4) of 2015²⁸² sought to alter the provisions of Article 97²⁸³ and 98²⁸⁴ of the Constitution to ensure they conform to Article 81(b) of the Constitution that provides for the two-third gender rule representation.

To ensure the realization of the gender principle, the bill sought to create special seats beginning with the 12th Parliament for a period of twenty years. The rationale behind this was that these special seats over twenty years would aid in creating a level playing field and thereafter, both genders would compete on equal grounds.

The proposed bill was lauded as progressive as it would ensure that at every given time, the composition of the national assembly would be constitutional.²⁸⁵ The simplicity of the formula

²⁷⁸ Daily Nation (n 275)

²⁷⁹ Hansard Page 16 of Tuesday 25th October 2016 at 2:30

²⁸⁰ Daily Nation (n 275)

²⁸¹ [Institute of Economic Affairs \(IEA\), *Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation*](#)

²⁸² The bill was published on 24th July 2015

²⁸³ of the Constitution provides the membership of the Assembly

²⁸⁴ Article 98 of the Constitution provides the membership of the Senate

²⁸⁵ National Gender Equality Commission, *Journey to Gender Parity in Political Representation: Search of a framework for the realization of the not more than two-thirds gender principle in Kenya* (2012-2018)

provided was also thought to protect the electoral gains women already made in the Constitution such as the forty-seven (47) county women representatives and six (6) nomination slots.²⁸⁶ Moreover, the proposal was to act as a topping up mechanism that would only be considered if once elections are conducted, the two-third gender rule is not met.²⁸⁷

Despite the female Members of Parliament lobbying the majority male members, the bill garnered one hundred and ninety five votes (195) out of the required two hundred and thirty three (233)²⁸⁸ in the first division. During the second round of voting, the Bill garnered a paltry one hundred and seventy-eight (178) votes. The speaker ruled the bill as defeated.

3.7.3 Constitution of Kenya Amendment Bill (2014) (Mutambo Bill)

Mwingi Central MP Joe Mutambo, proposed the Constitution of Kenya Amendment Bill (2014) in which he sought to relieve the national assembly of any responsibility of legislating the two-third gender law. The bill further sought to withdraw the constitutional gains women have had by scrapping the position of the County Women Representatives. The objective of this amendment was cited as *“to amend the constitution to provide for the reduction on the membership of the National Assembly and the Senate. There is proposed deletion on the 47 women representatives and 16 women members nominated to the senate.”*

The Member also proposed to delete Article 81(b) that provides for the two-third gender rule and cut the number of constituencies from 290 to 141 and set the number of counties to 10.

However, after a public outcry, the bill was never prioritized in debate.²⁸⁹

3.7.4 The Constitutional Amendment Bill No.6 of 2015 (Duale Bill II)

The Constitutional Amendment Bill No.6 of 2015 was introduced in parliament in February 2018. The similarity with this bill and Duale I was they both meant to alter Articles 97 and 98 of the Constitution. The Bill sought to eliminate all pre-existing nominated seats and provide for special seats in both the National Assembly and the senate. The number of special seats, according to the proposal, would be determined upon conclusion of the general election. This

²⁸⁶ Political Parties are required to submit a nomination list that adheres to the zebra rule i.e. both genders should alternate each other in the list. This is pegged on section 36 of the Elections Act.

²⁸⁷ National Gender Equality Commission, *Journey to Gender Parity in Political Representation: Search of a framework for the realization of the not more than two-thirds gender principle in Kenya* (2012-2018)

²⁸⁸ Article 256(1)(d) of the Constitution provides for the minimum requirement to pass a Constitutional Amendment Bill

²⁸⁹ Centre for Rights Education and Awareness (CREAW), *Tracing the Journey: Towards implementation of the two-third gender principle*, 2019

was an attempt to mirror the gender top-up criteria for county assemblies as provided by Article 177(1)(b) of the Constitution.

The bill also provided for two-term limits for any beneficiaries. Needless to say, it faced opposition as both male MPs and elected female MPs felt that women should vie for political seats as nothing is for free.

As is required, the Speaker called the motion for voting but unfortunately, there was a quorum hitch. Indeed, the Daily Nation²⁹⁰ reported that there were only one hundred and seventy-four members in chambers during the call. Curiously, of the seventy-five women lawmakers, only twenty showed up to vote.

This meant that legislation to ensure enforcement of the two-third gender rule remains elusive 10 years after the promulgation of the Constitution.

3.8 Conclusion

Kenya possesses a robust legal framework both at the national and international levels to enable gender equality in political processes. Indeed, as this chapter has seen, the drafters of our Constitution recognized that women have lagged in representative politics and hence provided for the two-thirds gender rule for both elected and appointive positions.

All the while, ten years later, parliament has been unable to enact the enabling legislation that will ensure the membership of parliament is constitutional.

As this study has so far ascertained, Kenya's inequality in political and electoral processes is not merely a legal issue. Other factors that are socio-economic in nature have ensured that the spirit of the constitution on the elimination of discrimination in political processes has not fully materialized.

This research begs the question, even with the current legal dispensation, will Kenyans enjoy full democratization that ensures there is equal participation of all genders in political processes and more importantly, the two-third gender rule is achieved?

²⁹⁰ Gender equity bill shelved over quorum hitch, David Mwere Daily Nation 27th February 2019 <https://www.nation.co.ke/news/Two-thirds-gender-bill-flops/1056-5002100-13d3pym/index.html>

The next chapter of this study will tackle the issue of electoral and party systems and how they influence the representation of the marginalized in society.

CHAPTER 4

ELECTORAL AND PARTY SYSTEMS AND THEIR IMPACT ON THE TWO-THIRD GENDER RULE

4.0 Introduction

Despite the failure to implement the two-third gender principle, this study has ascertained that there exists a robust legal and regulatory framework to guarantee fair inclusion of women in representative institutions. However, this has not been the case as women continue to be marginalized in political processes.

Elections play a critical role in any democratic society. The preferences of individual citizens translate into the distribution of power. It is argued that by conducting elections, the will of the larger group is better achieved and the sense of democracy as a decisional device is fully felt.²⁹¹

Equally, elections go a long way in influencing how various social groups in any society benefit economically and politically. To achieve any desired outcome as a consequence of democratic elections, various societies tailor-make their electoral democracy into a unique system.

As this Chapter forms the gist of this study, it will be critical for several reasons. First, there shall be an examination of the various electoral systems and how each of these systems impact representation of marginalized groups in any democracy. Thus, this chapter will explore whether some democratic designs do better in ensuring women and the marginalized are adequately represented. Secondly, this Chapter shall examine the importance of political parties- with specific emphasis on party systems and gender quotas- and the key part they play in representative politics.

Further, this chapter shall conduct a comparative analysis of Kenya's electoral system with that of South Africa and Rwanda, which exhibit exemplary inclusion of women in their political processes and legislative institutions. Finally, this Chapter shall be concerned with what ails Kenya's electoral systems and the impact political parties' operations have on gender inclusion.

Ultimately, this chapter will answer two important questions; why, despite the existence of a credible legal system, Kenya has continuously been unable to attain equality of women in

²⁹¹ Andrew Reeve & Alan Ware, *Electoral Systems: A Comparative and Theoretical Introduction*, Routledge, Taylor & Francis (2006)

representative politics and whether, even if the National Assembly successfully implemented Article 100 of the Constitution by enacting the necessary two-third gender law, would this necessarily equate to the accomplishment of the two-third gender rule?

4.1 Electoral Systems of the world

Periodic and regular elections have proven to be one of the most important and stable forms of democracy worldwide²⁹². Over time, different democracies have tinkered with the guidelines and regulations on the administration of elections to suit their societal and political needs.

Simply put, an electoral system refers to how votes cast in an election are converted into seats²⁹³. These seats, for purposes of the Kenyan context, include the single presidential seat, a member of parliament's seat, a member of the county assembly's seat, or the single governor's seat.

There is a fundamental difference between electoral laws and electoral systems. Electoral laws allude to a family of rules that govern the process of elections²⁹⁴. The rules are broad and range from registration of voters, nominations, and campaigning. On the other hand, electoral systems are concerned with the determination of who is the winner or loser in the election. This entails details of matters such as the actual voting method, tabulation of votes, and determination of the winner.

As alluded to by Sisk,²⁹⁵ any given electoral system determines the political culture of that particular democracy. This may include how the politics is played, mobilization, campaigning, and most importantly who wins or loses in the election and ultimately forms the government²⁹⁶. Therefore, the electoral system and the subsequently adopted party systems profoundly affect the political discourse of any democracy²⁹⁷. Indeed, electoral institutions have the power to determine how concerns of the marginalized are debated and handled²⁹⁸.

²⁹² Timothy D. Sisk, 'Elections, Electoral systems and Party Systems' in *The Global State of Democracy 2017: Exploring Democracy Resilience*, (International IDEA 2017)

²⁹³ Pippa Norris, 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' in Jean Laponce and Bernard Saint-Jacques (Eds), *Contrasting Political Institutions* (International Political Science Review Vol 18(3) 1997)

²⁹⁴ David M Farrel, *Electoral Systems: A comparative Introduction*, 2nd Edition (Macmillan Int'l, Red globe, 2011)

²⁹⁵ Sisk (n 292)

²⁹⁶ *Ibid*

²⁹⁷ Salomon Orellana, 'Electoral Systems and Governance: How Diversity Can Improve Policy-Making,' Routledge (2014)

²⁹⁸ *Ibid*

Additionally, the choice of electoral system affects operations of political parties and how they interact in the democratic space. This may be seen in terms of propagating ideologies and policy formulation at both the local and national levels²⁹⁹. Studies have shown that there is a unique relationship between electoral institutions (electoral systems and party systems) and policy outcome³⁰⁰. These electoral institutions ensure there is a diversity of perspectives and an avenue for expressing dissent which is a key point in the policymaking process³⁰¹.

Elections are important for any democracy because of two main reasons. First, elections determine the leadership of any given state. It ensures that a government that is legitimate and accepted runs the affairs of its citizens³⁰². Secondly, elections help in the institutionalization of democracy. It helps with inculcating electoral integrity and democratization of political parties that provide candidates to run for office³⁰³.

Having seen the important role elections play in our democracy, this section will discuss the various electoral systems and how they affect representation.

With the understanding that an electoral system entails the rules that regulate elections and how citizen's votes decide an overall winner, it is impossible to have a system that has all the desired outcomes such as integrity, legitimacy, inclusivity, and cohesiveness³⁰⁴.

There are predominantly three classes of electoral systems practiced around the world. Each of these classes has distinct features such as a simple majority for the winner, or the winner garnering at least half of all the votes cast, or based on the principle of proportionality.

4.1.1 Plurality / Majoritarian System

This is the oldest and simplest electoral system that has been popular since the 12th Century³⁰⁵. The outstanding feature of this system is it requires a candidate to win a plurality or total majority of all ballots cast to be elected. The Majoritarian model may itself take different forms.

²⁹⁹Sisk (n 292)

³⁰⁰s. Salomon Orellana, 'Electoral Systems and Governance: How Diversity Can Improve Policy-Making,' Routledge (2014)

³⁰¹Ibid

³⁰²ibid

³⁰³Ibid

³⁰⁴M. Gallagher and P. Mitchell (eds), *The politics of electoral systems* (Oxford: Oxford University Press, 2009)

³⁰⁵Pippa Norris, 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' in Jean Lapointe and Bernard Saint-Jacques (Eds), *Contrasting Political Institutions* (International Political Science Review Vol 18(3) 1997)

First-Past-the-Post (FPTP)

This is the most common model of the majoritarian system. The FPTP system aims at manufacturing a majority in the legislative assembly where the leading party produces an absolute parliamentary majority for the government whereas the smaller parties get meagre rewards. It is a winner-take-all model that is practiced in countries such as United Kingdom, United States, India, and Kenya.

The FPTP system concerns itself with the effective governance and fulfilment of the government's agenda and not a representation of the minority groups and their views. The countries that ascribe to this system have territorial single-member constituencies where voters choose one representative. The candidate with the majority of the votes gets into office. The political party with the most representatives- that is the majority of seats- forms the government.

Another unique aspect of this electoral system is that the single-member constituencies that produce representatives are based on the size of the electorate in that particular constituency.

Article 89³⁰⁶ of the Constitution of Kenya on the demarcation of electoral units provides that the Commission shall review constituency boundaries and ensure its inhabitants are nearly equal to the population quota. Further, the Constitution provides that the number of inhabitants in cities or sparsely populated areas shall have a margin of not more than 40% against the population quota while a 30% threshold is allocated against other areas.

For this electoral model, the winning candidate need not obtain a minimum threshold of votes or an absolute majority to be the winner. The candidate needs to have a simple majority to be declared a winner. However, as noted, different democracies tweak their systems to suit their most important needs. For instance, in Kenya, having realized that the Presidential election is

³⁰⁶ “The Constitution provides that there shall be two hundred and ninety (290) constituencies for the election of the members of the National Assembly. The Commission is mandated to review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament. Other than population quota, the Commission must consider geographical features and urban centers; a community of interest, historical, economic and cultural ties; and means of communication while conducting the review.”

bitterly contested -a do or die affair- and having it still fall under the winner take- it- all model, the Constitution provides a minimum threshold for the presidential election³⁰⁷.

Other jurisdictions who ascribe to the FPTP system, such as Britain, require that political party with the most parliamentary seats forms the government. In this case, the share of the popular vote does not determine who forms government but rather, the parliamentary majority³⁰⁸. However, in Kenya, the executive branch of government is formed simply by the declared winner of the Presidential election. The parliamentary majority does not affect the legitimacy of the elected president.

Some democracies, though being majoritarian, still want to increase the 'legitimacy' threshold by ensuring their elected leaders obtain the majority of votes.

Two-Round System (TRS)

The Two-Round System or Second ballot majority run-off system features the first round of voting where the two best contenders compete in the second round of elections to determine the winner. However, in case a candidate gets complete majority in the first round of voting (50 %+), then there would not be a second round of voting. This is a system that is most prevalent in elections of presidents in countries such as France, Russia, and Kenya.

The majority run-off is used in parliamentary elections in countries such as Mali and Ukraine³⁰⁹.

Alternative vote

Alternative vote is also another form of the majoritarian electoral system. In this model, the voters do not simply mark their preferred candidates on the ballot but rather, they rank all their preferred candidates from highest to lowest. To be declared the winner, the most ranked candidate must attain an absolute majority of more than half of the votes cast. If none of the

³⁰⁷ Article 138(4) of the Constitution provides that "a president is validly elected if he or she receives more than half of all the votes cast in the election; and at least twenty-five percent of the votes cast in each of more than half of the counties."

³⁰⁸ In 1951, the British Conservative Party formed government after winning sixteen more seats in parliament against their Labour opponents who won the popular vote with 48.8% against Conservatives 48.0%.

³⁰⁹ Pippa Norris, 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' in Jean Laponce and Bernard Saint-Jacques (Eds), *Contrasting Political Institutions* (International Political Science Review Vol 18(3) 1997)

candidates has achieved the threshold, the least preferred candidate is removed and the votes are redistributed. The process is repeated until the candidate with an absolute majority emerges.

4.1.2 Proportional Representation

More than anything else, the majoritarian electoral system, in whatever model, concerns itself with governability and who is the most popular amongst the electorate. However, democracy has proven to be dynamic, and thus, the need to continuously include minority voices in the electoral systems. Most importantly, there is a need to incorporate minority groups in the legislature where they can effect real change.

Proportional representation (PR) systems require the percentage of votes cast for a party or candidates to match the number of seats obtained in the house. The seats in a constituency are distributed in accordance to the number of ballots cast for party lists. This is given effect in two main ways.

Party List System

The Party Lists System is the most popular model of proportional representation. In this system, voters choose the lists of candidates provided by the political party. The voters do not elect an individual candidate but rather, they elect the whole list of candidates provided by the political party.

Yet still, the party-list model may either be open or closed³¹⁰. If open, the voters have the choice of expressing their preferred candidate within the provided list. This is popular in countries such as Norway. If closed, voters have no say on the candidates and ultimately the party decides the candidates to be included in the list and at what rank. The parties will go down its lists until all the seats won by their percentage share have been filled. The closed model is popular in countries such as Israel, Germany, Portugal, and Spain³¹¹.

Another key distinction of the Party Lists System model can be whereby the list provided is national, that is to say, the whole country is one big constituency divided into a specific number of seats. For instance, Israel that uses this model is divided into 120 different seats spread across

³¹⁰ Ibid

³¹¹ Ibid

the country. Alternatively, and as is preferred by most democracies, the party-list may be regional where each region is subdivided further into seats.

Single Transferable Vote (SVT)

Single Transferable Vote (SVT) is another model that falls within the Proportional Representation family. In this model, the country is divided into multi-member constituencies. The party provides a list of as many runners as they think could win in each constituency. The voters are required to rank the candidates by order of preference. The total number of votes is tallied and divided against the total number of seats to generate a quota that must be reached. If no candidate in the first preference candidates has achieved this quota, the least preferred candidate is disregarded and their votes redistributed according to second preferences.

4.1.3 Mixed System

To balance the advantages and shortcomings of the various system, some democracies use both the majoritarian and proportional systems hand in hand.

The distinct models that have since been developed to suit this particular system are the Mixed Member Majoritarian (MMM) and Mixed Member Proportional (MMP) systems.

Mixed Member Proportional System (MMP)

In the MMP model, the electorate elect their leaders at the district or regional levels while voting for a specific political party on the national list. Both of these elections (national and regional levels) are linked and dependant on each other. The seat allocation for proportional representation is dependent on the outcome of the majoritarian seats garnered at the district level. This model is used in Germany where electors have two votes. One vote is for half of the members of the Bundestag (328) who are elected in single-member constituencies using a simple majority. The other half are elected from closed lists in each region. This ensures that smaller parties have a chance of representation through the second votes of party lists even if they fail to win any single-member constituencies³¹².

Mixed Member Majoritarian System (MMM)

³¹²Ibid

Unlike MMP, Mixed Member Majoritarian or parallel system is designed in a way that the voting of single-member constituencies and that of the party-lists are not dependent on each other³¹³. The results of the parallel system give a proportionality that falls between majoritarian and proportional representation.

Having understood the various electoral systems, it is vital to examine the nexus between an electoral system and a representation of special interest groups.

4.2 Effect of the Electoral system on representation

There has been much debate on the actual impact of electing more female legislators. At the centre of this is whether elected female legislators can influence policymaking³¹⁴. When discussing women's representation, scholars have contended with two issues. One, if women make up half of the world's population, should they be entitled to half of the seats in parliament? Secondly, does voting in more women mean the interests of women are better catered for as compared to electing more male legislators? To sufficiently answer these two questions on representation, it is critical to understand what constitutes 'women's interest'.

Women's interests – which will need representation in various levels – can be categorized into three classes³¹⁵. The first category of interests is interests that affect women by virtue of them being women such as reproductive health. The second class of women's interests is the ones that are connected to the traditional role of women in society such as interests related to children and family. Finally, some women's interests are tied to social spheres generally such as education, health care, etc. For all these interests to be catered for, it is critical for the representatives in policy-making positions to understand the interests³¹⁶.

There are varying explanations attached to democratic representation and what its perfect form is. The two main classes are microcosm representation and principal-agent representation³¹⁷. Proponents of microcosm³¹⁸ representation propose that the democratic representative body

³¹³ Timothy D. Sisk, 'Elections, Electoral systems and Party Systems' in *The Global State of Democracy 2017: Exploring Democracy Resilience*, (International IDEA 2017)

³¹⁴ Diana Z. O'Brien and Jeniffer M. Pispoco, 'The impact of women in parliament,' in Susan Franceschet, Mona Lena Krook, Netina Tan (eds), *The Palgrave Handbook of Women's Political Rights*, (Macmillan 2019)

³¹⁵ Ibid

³¹⁶ Ibid

³¹⁷ David M Farrel, *Electoral Systems: A comparative Introduction*, 2nd Edition (Macmillan Int'l, Red globe, 2011)

³¹⁸ President John Adams, a major proponent of microcosm representation said that parliament should be an exact portrait in miniature of its people and it should think, feel, and reason like them.

should reflect the actual composition of the society as it is³¹⁹. For instance, the ratio of men vis-a-vis the women in parliament should be as the population census shows. Similarly, the representation of youth in the parliament should reflect the proportion of youth in society. Simply, parliament should be a representative sample of the country³²⁰.

On the other hand, principal-agent representation stipulates that parliament is perfect as constituted provided the representatives (agents) were validly elected by the electorate (principals)³²¹. According to the proponents of this view, it does not matter if parliament only has male members provided they make decisions on behalf of those who elected them. Therefore, it is inconsequential if the parliament is irregularly constituted provided it acts in the best interest of its citizens as decisions trump composition³²².

The choice of the electoral system plays a role in shaping the socio-economic and political structure of any country. The legislature, where laws and policies are created, needs to exhibit the face of diversity with the inclusion of special interest groups. Decades of research have proven that electoral systems have a major bearing on the conduct of political parties by influencing their nature and character³²³. Most importantly, an electoral system impacts every other aspect of democracy in a given state including the representation of the minorities.³²⁴ Consequently, as democracy develops, countries continue to be more conscious of the social composition of legislative assemblies and the need to have the representation of the historically marginalized.

Different countries face different representation problems and therefore, electoral systems need to be tailor-made to fit the specific needs of each country. However, the lack of gender inclusivity in political processes has continued to be the most prevalent problem worldwide. This has prompted formulating designs that will aid the inclusion of women and other social groups in legislative institutions.

Political parties, as the vehicles for electoral democracy, play a major role in determining who wins an election and forms government. It is in these political parties that suitable candidates

³¹⁹ Farrel (n 287)

³²⁰ Ibid

³²¹ Ibid

³²² Ibid

³²³ Salomon Orellana, 'Electoral Systems and Governance: How Diversity Can Improve Policy-Making,' Routledge (2014)

³²⁴ Ibid

are selected to represent the party in the election. It, therefore, goes without saying that the choice of the electoral system has a huge bearing on the party systems within any democracy.

As noted by Gunther and Diamond,³²⁵ electoral rules will determine the functioning of political parties and how they interact with each other. Duverger's Law³²⁶, which has been developed upon analysis of electoral systems and their impact on political parties, asserts that majoritarian democracies tend to have a two-party political system³²⁷. On the other hand, it is noted that Proportional Representation encourages the existence of multiple strong parties³²⁸.

The electoral system also plays a major role in the institutionalization of political parties. Consolidated democracies tend to have political parties that are strong and principled. On the contrary, democratizing countries tend to have weak party systems with no specific ideology.

In his attempt to find the nexus between electoral systems and party politics, Grofman³²⁹ identifies three major effects. First, he notes that the electoral system will silhouette the behaviour of the candidates and how the party relates to its members. The candidates and the party officials are already aware of how the rules that govern their internal activities are structured. The understanding of these rules will determine how the candidates campaign and mobilize. Therefore, with the winner take it all model; each candidate will do all it takes to win the party primaries to represent the party in the election. Electoral systems that encourage centripetalism suggest to achieve political stability, each candidate needs to appeal and get support from a cross-cutting demographic³³⁰. This can be seen in the Kenyan context where the Constitution requires the winning President to garner 25% of votes in at least half the counties. This increases the legitimacy of the president and prevents the candidate from identifying with only one single demographic representation.

³²⁵ Gunther R & Diamond L, 'Species of Political Parties: A new typology,' *Party Politics*, 9/2 (2003), pp. 167-199

³²⁶ In 1954, French political scientist Maurice Duverger hypothesized that there is a relationship between the number of political parties in a country and its electoral system. He asserted that an electoral system designed for plurality voting - where a voter chooses only one candidate and the candidate with the most votes wins an election-favors a two-party system.

³²⁷ Duverger M, *Political Parties: Their Organization and Activity in Modern State* (New York: Wiley, 1954)

³²⁸ Ibid

³²⁹ Grofman B, 'The Impact of Electoral laws on Political Parties', in D. Wittman and B. Weingast (eds), *Oxford Handbook of Political Economy* (Oxford: Oxford University Press, 2008)

³³⁰ Reilly, B., 'Political Engineering and Party Politics in conflict-prone societies,' *Democratization*, 13/4 (2006) pp 811-827

Secondly, electoral systems affect how parties enter into political coalitions³³¹. For instance, the aim of the run-off election in the Two-Round System is to encourage cross-party coalition building and affiliations in a way that the smaller parties support one of the two leading parties³³². The smaller parties entering into the coalition may end up benefitting with a stake in leadership positions in the legislature or the executive.

Thirdly, and most critically, electoral systems tend to sway and condition voters to vote in a strategic manner³³³. Voters, desirous of representation by a specific type of candidates may vote for candidates or party lists that suit their needs. This tactic would ideally lead to a pool of representatives that are diverse and inclusive.

Advocates of Proportional Representation systems claim the model produces a parliament that reflects the composition of the electorate³³⁴. This may perhaps be credited to the fact that parties produce a list that is balanced and inclusive of the various marginalized groups to gain the support of all categories of voters. In majoritarian systems, however, the candidates battle it out first at the party level and the winner meets other candidates from other parties in the elections. The most popular candidate wins with little regard to their attributes and whether they are best suited to represent their electorate. This tends to prevent the marginalized from winning any seats.

The culture and the recruitment process within political parties are equally influenced by the electoral system of a country. With a favourable electoral system that facilitates the representation of special interest groups, political parties can implement measures within the party such as affirmative action to increase the amount of women involved in elections³³⁵.

In a working democracy, it is voters that decide who wins an election. Their turnout during the election plays a significant role in determining who sits in parliament and who forms the government. While analyzing the elections in Canada, Black³³⁶ notes that in proportional

³³¹ Grofman B, 'The Impact of Electoral laws on Political Parties', in D. Wittman and B. Weingast (eds), Oxford Handbook of Political Economy (Oxford: Oxford University Press, 2008)

³³² Pippa Norris, 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' in Jean Lapointe and Bernard Saint-Jacques (Eds), *Contrasting Political Institutions* (International Political Science Review Vol 18(3) 1997)

³³³ Grofman (n 331)

³³⁴ Pippa Norris. (ed) 'The Politics of Electoral Reforms'. Special Issue of the International Political Science Review (January 1995)

³³⁵ Norris (n 332)

³³⁶ Black j., 'Reforming the context of voting process in Canada: Lessons from other Democracies', in H. Bakvis (ed) *Voter Turnout in Canada*, (Toronto: Dundurn press 1991)

representation, the voter turnout is slightly higher. This is because unlike in majoritarian systems, there is no threat of wasted votes and hence more people participate. The competitive nature of elections prompts parties to present the best of candidates to afford the voters a wider and better choice. With a wider choice, more voters prove to participate in the elections³³⁷.

4.3 Party Systems and Quota systems

As postulated in Chapter two of this research, political parties, by their very nature, ought to be at the forefront in the promotion of gender inclusivity in politics. It is through political parties that the peoples' democratic and political interests are exercised both in society and in parliament. Political parties act as the vehicles that accommodate and front elected representatives in the electoral process. Moreover, political parties provide the necessary checks and balances in governance, foster the rule of law, enhance political participation, and social inclusion³³⁸.

Suffice to say, political parties are a key ingredient to a vibrant democracy.

Thus, in discussing the ideals of a democratic society and the need to achieve equitable representation in political leadership, it is critical to examine how political parties may make or break this quest for equality. This section of the study suggests that other than the choice of the electoral system, the management, and systems of political parties are fundamental in ensuring the elevation of women in political processes.

For a range of reasons, political parties worldwide have failed in their role as avenues through which the political interests of citizens coalesce. Key amongst them is the lack of intra-party democracy. Intraparty democracy may be described as explicit ways in which a political party involve its membership in making decisions affecting the party³³⁹. The idea of intra-party democracy is to ensure that the members of political parties across all ranks are the actual decision-makers in the party. All the decisions made by the party must be credible and this can only happen if the party stakeholders have been involved in arriving at the decisions.

Political parties, especially in emerging democracies have failed in achieving their role because of the lack of a proper political organization. Without proper organization, the decisions made

³³⁷ Norris (n 332)

³³⁸ Dickson Omondi, *The role of political parties in promoting women's political participation*, Japheth Biegon (Ed), *Gender Equality, and political processes in Kenya: Challenges and Prospects*, Strathmore Press, 2016

³³⁹ Ibid

in parties do not meet the criteria outlined by Omondi³⁴⁰. These are; inclusiveness, centralization, and institutionalization. If any single decision of the party does not meet the criteria suggested, it lacks transparency and legitimacy.

Political parties tend to have personality failures where the decision making organs and processes are utterly centralized and personalized. A system of political patronage is noted within the parties where, as it is often pronounced, 'party owners' make all the key decisions³⁴¹. The party leaders, who are mostly male, have huge control over critical decisions of the party such as which candidates will represent the party in elections.

Besides, the institutionalization of political parties is another key consideration in the organization of the party. A party needs to have in place, systems in which it formalizes its internal-decision making organs and procedures and provide proper structures across all its organs. The membership of the party should have a legitimate expectation of how the party runs its affairs and reaches its decisions. The prescribed rules of the party, internal party documents, policy documents, and the formal organs of the party provide great incentives to the institutionalization of parties. Political parties must, therefore, devise a robust party organization and internal democracy systems to guarantee equitable contribution of women in the electoral process.

The concern in political circles worldwide is how to have more women participate in democratic processes not just as voters but as candidates who win and sit in parliament. However, this has proven to be impossible.

Regrettably, this is partly caused by the decision of political institutions to ignore women in their structures. Omondi³⁴² suggests that political entities that purposely implement strategies to proliferate the role of women in internal party structures and procedures end up attracting and fielding formidable female candidates in an election.

Indeed, this study poses the question, is it possible to have a strong party system without having meaningful involvement of women in its decision-making structures?

³⁴⁰ Ibid

³⁴¹ Ibid

³⁴² Ibid

With the realization that it is not enough to have just a few token women in political life, particular attention has been turned on parties and what they can do to achieve the elusive goal of having women make up at least a critical minority of 30-40% in the national assemblies. Being key players in the electoral process, there is an obvious need for political parties to devise ways in which more women candidates find their way to the ballot with a greater chance to be elected. This realization has led to the progression of the voluntary party quota system.

In discussing the impact gender quotas have on representation, Mona Lena Krook³⁴³ identifies three typologies to classify gender quotas. The first class, *reserved seats quota system* appears largely in Africa, Asia, and the Middle East. The reserved seats system is established through the constitution - and occasionally, electoral law – that creates distinct electoral rolls for women, designate specific constituencies for female candidates and distribute women seats based on each party's proportion to a popular vote³⁴⁴.

The second quota system identified by Krook is the *legislative quota* that is the newest kind and mainly present in emerging economies in Latin America and post-conflict societies in Africa, the Middle East, and South-Eastern Europe. This system is enacted through reforms to the electoral laws and sometimes the constitution. This system addresses the party selection process with the national parliament passing legislation requiring that each political party nominates a certain proportion of female candidates³⁴⁵.

The third type of quota, which shall be interrogated in this section of the study, is the *party quotas systems*. This is a system where individual parties take voluntary measures to reach a certain percentage of women amongst their candidates. The party alters its practice by outlining new conditions for candidates' selection that require the elites in the party to recognize the biases women face and allow alternative political enlistment. Curiously, in Western Europe where gender quotas are not legislated, there is better inclusion of women in parliament than countries that prefer to legislative quotas³⁴⁶.

Voluntary party quotas are implemented in two ways. First, the quota is used in the selection process where the party invites prospective aspirants for an election. In this pool of potential

³⁴³ Mona Lena Krook, *Quota for women in Politics: Gender and Candidates Selection Reform worldwide*, Oxford Press (2009)

³⁴⁴ Ibid

³⁴⁵ Ibid

³⁴⁶ Ibid

candidates that are up for consideration, a certain percentage is reserved for women³⁴⁷. The second way of implementing voluntary party quotas is through nomination of candidates to be included in the party's list during the election. The party places a threshold of the number of women to be on the candidate's list. Eventually, more women get an opportunity at being elected into parliament³⁴⁸.

Voluntary party quotas have proven to be beneficial in many ways. From the onset, quotas for women by parties are designed not to favour women but rather to compensate for the barriers that have prevented equal and meaningful participation of all genders in political life³⁴⁹.

Political parties being the vehicles of democracy need to be run most democratically and legitimately. This can only happen if there are effective formal internal party structures that provide the necessary checks, balances, and transparency. A party voluntarily taking up the option of implementing party quotas can only do so through formalizing its internal structures. The effect of this is parties that voluntarily take up gender quotas end up being stronger.

As noted by Kanter³⁵⁰, women cannot have a meaningful impact in democratic institutions such as parliaments unless they outgrow the few tokens they are offered in leadership positions. On the other hand, political parties implement gender quotas to grow the number of women in elected office. Essentially, this means that if successful, quotas by parties tend to have a positive effect on the voice of women in elected office and therefore ensuring that more women participate in decision-making processes.

Be as it may, the most critical concern in the implementation of voluntary party quotas is if the women who are nominated as candidates in the party lists are well placed to win an election. This goes to show the mere intention by parties to implement quotas does not eliminate all the barriers to full participation by women.

4.4 Comparative Analysis

An examination of the composition of parliaments worldwide shows that currently, Kenya is ranked a distant and abysmal ninetieth (90th) in terms of number of women representations in

³⁴⁷ Drude Dahlerup: *"Increasing Women's Political Representation: New Trends in Gender Quotas"*, in Ballington and Karam, eds. International IDEA. 2005: Women in Parliament. Beyond Numbers (revised edition)

³⁴⁸ Ibid

³⁴⁹ Ibid

³⁵⁰ Rosabeth Moss Kanter, *Research on Women and blacks as minorities in organizations* (1977)

the National Assembly (lower or single house)³⁵¹. On the other hand, Rwanda is ranked first (1st) with 61% of its parliamentarians being women whilst South Africa is ranked an impressive tenth (10th)³⁵².

It is therefore imperative for this study to ascertain the factors that are making these two African countries have parliaments that are representative of all genders. The role of electoral systems, social-cultural factors, and management of political parties shall be examined and the impact they can have on representation.

4.4.1 Rwanda

When it comes to female representation, Rwanda is an outlier. Rwanda, a country that has been ravaged by some of the most horrific violent conflicts in modern history, is ranked first (1st) with 61% of its parliament being made up of women. Proportionally, Rwanda has more women in power than any other country³⁵³. How did they get here?

This exclusion was heightened by the fact that the country was a one-party state and a dictatorship. Indeed, in 1992, there were only three (3) women ministers and only twelve (12) women Ministers of parliament out of a possible seventy (70)³⁵⁴.

By the time the genocide was ending, reports indicate that at least 250,000 women had been raped with 100,000 children orphaned.³⁵⁵ Rwanda's surviving population of approximately six million was mainly female.³⁵⁶

In discussing how Rwanda's descriptive representation has risen so high in such a short time, the impact of the genocide cannot be understated. It is not in doubt that the genocide redefined gender politics in Rwanda as we know it today³⁵⁷. Women bore the brunt of the violent forces

³⁵¹ Women in National Parliaments Database as at 1st Feb 2019

³⁵² Ibid

³⁵³ Kennedy Elliott Rwanda's legislature is majority female. Here's how it happened <https://www.nationalgeographic.com/culture/2019/10/graphic-shows-women-representation-in-government-around-the-world-feature/> <Accessed July 14th, 2020>

³⁵⁴ Ibid

³⁵⁵ Rania Abouzeid, How women are stepping up to remake Rwanda www.nationalgeographic.com/culture/2019/10/how-women-are-remaking-rwanda-feature/, October 15, 2019, <Accessed July 14th, 2020>

³⁵⁶ Ibid

³⁵⁷ Dr. Rirhandu Mageza-Barthel, *Mobilizing Transnational Gender Politics in Post-Genocide Rwanda*, (Ashgate 2015)

unleashed on the political system and this was integral in the renegotiation of their stake in post-genocide politics³⁵⁸.

Uwineza and Pearson³⁵⁹ contend that it is normal to experience a sharp rise in women's representation in post-conflict states. The key to this is the fact that during the conflict, there is an upset of gender roles. Conflict divides families and women end up taking leadership roles in the family and become breadwinners. Rwanda was no different.

To help in the recovery of post-genocide Rwanda, a new constitutional dispensation was promulgated. This is the point where the women's gains were reduced into actionable targets. The first step for Rwanda was outlawing discrimination. The constitution forbids political organizations from being founded on the basis of race, ethnic group, tribe, lineage, region, sex, religion, or any other division which may lead to discrimination³⁶⁰. Further, and more specifically, it provides that “*political organizations must constantly reflect the unity of the people of Rwanda, gender equality, and complementarity, whether in the recruitment of members, putting in place organs of leadership, and their operations and activities*”³⁶¹.

Just like in Kenya, the Rwandan Constitution provides that legislative power shall be vested in a two-tier National Assembly (*Assemblée Nationale*) consisting of the Senate (*Sénat*) and the Chamber of Deputies (*Chambre des Députés*).³⁶²

The Constitution provides that the Senate shall be composed of twenty-six (26) senators who shall serve a term of eight years.³⁶³ The supreme law specifically provides that at least thirty-percent (30%) of the members in this house shall be women³⁶⁴. Of the twenty-six members, the Constitution provides that twelve (12) members are indirectly elected by regional governing councils with eight (8) members selected by the President. On the other hand, four (4) members are appointed by the National Consultative Forum of Political Organizations and two (2) members are selected by Institutions of higher learning.

³⁵⁸ Ibid

³⁵⁹ Peace Uwineza, and Elizabeth Pearson, *Sustaining Women's Gains in Rwanda: The Influence of Indigenous Culture and Post-Genocide Politics*. (The Institute for Inclusive Security, 2009).

³⁶⁰ Article 54, Constitution of Rwanda

³⁶¹ Ibid

³⁶² International Foundation for Electoral Systems (IFES) <http://www.electionguide.org/elections/id/2696/> <Accessed on July 17th, 2020>

³⁶³ Article 82, Constitution of Rwanda,

³⁶⁴ Ibid

On the other hand, the Constitution provides that the composition of the Chamber of Deputies (*Chambre des Députés*) shall be eighty (80) Deputies³⁶⁵. Of these eighty Deputies, fifty-three (53) are elected through a closed-list proportional representation system to serve 5-year terms while twenty-four (24) women Deputies are indirectly elected by regional governing councils. Two (2) Deputies are elected by the National Youth Council while one (1) Deputy is elected by the National Council of Persons with Disability.

Perhaps to show the impact an electoral system can have on representation; the Constitution provides that the election of the fifty-three (53) deputies shall be through universal suffrage from a final list of names using the system of proportional representation³⁶⁶. The list compiled for any election must adhere to the principles of national unity and of gender equality³⁶⁷.

Indeed, in the transitional period before the 2003 Constitutional change that adopted gender quotas, women had considerable membership in the national assembly. In 1999, 46% of women held all the seats won by the Rwanda Patriotic Front (RPF). It is also around this time that Rwanda, in its efforts to heal and be more inclusive, proposed 'Rwanda's Vision 2020' which would ensure women access to decision-making power³⁶⁸. With this vision having been achieved, it is a clear indication that societies that are serious about ensuring the actualization of involvement of women in electoral and governance processes can do so with a cultural reboot.

The post-genocide RPF government was instrumental in ensuring that the place of women in the governance structure is cemented. In showing public confidence in women, the government-appointed women in various influential positions within the executive, judiciary, and the party structure itself. This single decision to recognize and incorporate women in all government-led activities was the first step in laying the foundation of how the country in general views women and leadership.

In an interview conducted by Neleli Morojele,³⁶⁹ a respondent stated that *"In Rwanda, I can say that there is not one thinking that women cannot perform. You cannot perform on individual*

³⁶⁵ Article 76, Constitution of Rwanda

³⁶⁶ Article 77, Constitution of Rwanda

³⁶⁷ Ibid

³⁶⁸ Neleli Morojele, *Women Political leaders in Rwanda and South Africa: Narrative of triumph and loss*, (Barbara Budrich, 2016)

³⁶⁹ Ibid

*basis, but not generalising that women cannot perform...*³⁷⁰ Rwanda is a prime example that attitudinal and social change can be key factors in the elimination of marginalization.

Other than the law, the influence of women's resilience and mobilization in post-genocide Rwanda can also be said to have impacted the participation of women in politics. After independence, and before the genocide, the social determinant was division of identities along ethnic lines.[82] Women and women organizations countrywide were beginning to be involved and gain a voice in democratic movements as nascent publics³⁷¹. This growth and involvement were interrupted by the genocide. However, after the genocide, the women embarked on rebuilding the country. Their ability to collectively organize to cope with the post-conflict trauma was more visible during this period. This led to the women-centered organizations to develop into emerging publics³⁷².

Though some cynics claim that the post-genocide political changes were because men were absent, human rights scholars have attributed some of the changes to political vision.³⁷³ Women were at the forefront of the healing process and were rewarded for refusing to shelter known perpetrators.³⁷⁴ The efforts of the women were concentrated on changing the mindset of men in society.

From the foregoing, this study opines that Rwanda has two key factors to thank for its strong showing of gender equality at the international level. First, the electoral system of Rwanda ensures that more women get the opportunity to be elected into the national assembly. Secondly, the cultural reboot post the genocide has enabled the larger society to embrace women and treat them as equals. More women, therefore, get the chance to be considered for office independent of patriarchal biases.

4.4.2 South Africa

Just like Rwanda, South African women have suffered the harshest brunt of violence and political turmoil. South Africa, a country with a population of 58,065,097,³⁷⁵ was for the

³⁷⁰ Ibid

³⁷¹ Ibid

³⁷² Ibid

³⁷³ Rania Abouzeid National Geographic <https://www.nationalgeographic.com/culture/2019/10/how-women-are-remaking-rwanda-feature/> October 15, 2019 <Accessed July 14th 2020>

³⁷⁴ Ibid

³⁷⁵ Department of Statistics South Africa as at 2019, <http://www.statssa.gov.za/?p=12362> <Accessed July 20th 2020>

longest time subjected to apartheid rule and racial segregation. It was only in 1994 that South Africa achieved its true independence when a black-led democratic government was formed.

Britton³⁷⁶ notes that the period of transition into new democratic governments provides the perfect opportunity for women to influence constitutional change, play a role in party politics, and win elections. These, she elaborates, can only be achieved in the pre-transition mobilization of women. During any liberation struggle, space, and influence that women gain is critical as it provides the perfect platform for women to transcend into positions where they can actualize change once liberation is achieved³⁷⁷.

The South African elections in 1994 saw a major boost in the number of women elected into parliament. Preceding the 1994 elections, parliament had merely 2.4% of its membership consisting of women. However, in 1994, 26% of the elected members were women. Further proof that the impressive improvement was not a fluke was in 1999 when a third of the membership of parliament consisted of women³⁷⁸. Currently, South Africa is ranked an impressive tenth (10th) in terms of women membership in parliaments worldwide.

The tremendous improvement that has seen South Africa transit into one of the most gender-sensitive states can be attributed to three³⁷⁹ main factors. First, there was an intense multi-party coalition-building between various democratic movements that recognized the input and impact women can have in leadership positions. At the end of the apartheid, women were seen as the backbone of the struggle. This was because they were at the forefront of pushing for mass action and national mobilization across the political divide³⁸⁰.

Secondly, the relentless pursuit of equality across the country was pursued even further by women into political parties. More women demanded their political parties' leaders- who were mostly men- to recognize and advance the status of women in political parties. The effect of this was that through affirmative action and gender quotas, more women were able to hold influential positions in the parties. Women, therefore, had the chance and confidence not just

³⁷⁶Hannah E. Britton, *Women in the South African Parliament: From resistance to governance*. (University of Illinois Press, 2010)

³⁷⁷Ibid

³⁷⁸Ibid

³⁷⁹Ibid

³⁸⁰Ibid

to seek leadership positions within their parties but more of them were ambitious enough to seek positions nationally.

Thirdly, and most critically, South Africa took a massive step in curing the systemic marginalization of women by reviewing its electoral system and framework. This created an enabling environment that would prove to be the most appropriate catalyst for the election of more women.

The South African Constitution provides the National Assembly shall consist of four hundred (400) members who are to be elected through a closed-list proportional representation system for a four (4) year term. Importantly, this list for the national assembly is divided into two-national and regional lists- where each elect two hundred (200) members. There are nine (9) member districts in the regional tier with seats assigned in proportion to the population.

Other than the change of the electoral framework that has enhanced the election of more women into parliament, it is important to delve into the management of party politics and the impact political parties in South Africa have had in elevating the place of women in the governance system.

As the research has already ascertained, South Africa ascribes to the proportional representation electoral system. This is critical as voters do not vote for individual candidates but rather, they vote for political parties³⁸¹. The management of politics at the party level hence becomes instrumental in determining who gets into parliament.

The journey for the political inclusion of South African women started in 1943. African National Congress³⁸², one of Africa's most vibrant political organizations, in its efforts to modernize nationalism allowed women to hold full membership in the party.³⁸³ In implementing its nationalism ideology, the party intended to have more African members amongst its ranks and women were a significant target.³⁸⁴

³⁸¹ Neleli Morojele, *Women Political leaders in Rwanda and South Africa: Narrative of triumph and loss*, (Barbara Budrich, 2016)

³⁸² Founded on 8th January 1912, ANC was legalized on 3rd February 1990. ANC is the ruling party in South Africa and has won every election post-apartheid.

³⁸³ Shireen Hassim, *Women Organizations and Democracy in South Africa: Contesting Authority*, (University of Wisconsin Press 2006)

³⁸⁴ Ibid

The decision of ANC to recognize women as full members of the party was possibly the spur that was needed to enhance the organized association of women not just within the party but around the country. Hassim³⁸⁵ writes that women were confident enough to come together and act against social fragmentation, poor government services, and economic inequality. In a show of defiance, the women often formed women-groups in the various townships and workplaces to agitate for social-political and economic issues that were closest to them. By the mid-80s, these organizations would transform into political forces.³⁸⁶

All the while, and despite getting much opposition from the dominant male figures, the ANC continued to strengthen its women's sections within the party- the National Women's League and the National's Women's Executive Committee. The tasks of these women sections were to mobilize more women into active party membership and mobilize resources and financial support at the international level.³⁸⁷

The 1985 ANC National Consultative Conference undertook to eliminate '*traditional, conservative and primitive constraints imposed on women by man-dominated structures*'.³⁸⁸ A resolution was passed to prepare men and women for equality, to fight male chauvinism, and eliminate male domination in the homes, villages, towns, factories, politics, economics, religion, and within the ANC movement itself³⁸⁹. This was an explicit affirmation by the party's leadership that they were ready to incorporate women in all party affairs.

However, as it was expected, the South African women were always going to face opposition even within the ANC where they thought they would get shelter. There was a greater need for the women to mobilize and organize so as not to lose the momentum. The ANC league women who were empowered partnered with other like-minded women across the political divide to establish the Women's National Coalition³⁹⁰. This coalition was meant to be the organizational vehicle to agitate for equality in one voice independent of the various political parties. This strong and independent voice gave the women leverage at the party level while negotiating with their male counterparts.³⁹¹

385 Ibid
386 Ibid
387 Ibid
388 Ibid
389 Ibid
390 Ibid
391 Ibid

Equally, this coalition movement and organization created a discernible political constituency of women. Suddenly, women were being taken seriously and the country was warming up to women involvement in the transitional era into the post-apartheid rule in South Africa.

Despite South Africa ascribing to the proportional representation system, this study asserts that the management of political parties, and in particular the leading party, ANC, has played a key role in ensuring that women are represented in democratic processes. The inclusion of women at the party level can make or break any efforts to have equitable representation.

4.5 What ails Kenya?

As this Chapter has seen, both Rwanda and South Africa- who rank exceptionally in women representation- both belong to the Proportional Representation electoral system class. This particular electoral system has proven to be the best system for increasing women's representation.

However, worth noting is that the role of an electoral system in any democracy is not to increase the number of women elected but rather, to allow minority representation.³⁹² And as enunciated by Dahlerup³⁹³, party quotas, voluntary or otherwise, are easily and best implemented in a proportional representation system. This is because the voters elect political parties rather than individual candidates³⁹⁴. The onus is on individual political parties to place women on their party lists with no regard to their electorate. Consequently, in this system, the fate of women in political processes is not left to the whims of patriarchal biases³⁹⁵.

The existence of a strong and conducive electoral system and appropriate quotas does not guarantee the equitable inclusion of women in political office. Top of the list is political will. Political parties – which are mostly male-dominated - ultimately decide who gets included in the party list and at what position. To actualize gender parity in political processes, parties should be willing to include women in their lists and place them in favourable positions that increase their chances. Is this a possibility in the Kenyan context?

³⁹² Neleli Morojele, *Women Political leaders in Rwanda and South Africa: Narrative of triumph and loss*, (Barbara Budrich, 2016)

³⁹³ Drude Dahlerup: "Increasing Women's Political Representation: New Trends in Gender Quotas", in Ballington and Karam (eds.) *International IDEA. 2005: Women in Parliament. Beyond Numbers*

³⁹⁴ Morojele (n 392)

³⁹⁵ Ibid

An analysis of the figures at the Office of the Registrar of Political Parties³⁹⁶ provides a grim picture. First, the notion that women do not actively engage in party politics should be dispensed with. Data at the ORPP shows that 13,883,849³⁹⁷ adults are members of political parties. Of these, women constitute 6,537,327, or 47.1%.

The other point of analysis of this data and how it impacts this study touches on the proportion of registered office bearers of the various fully registered political parties. This Chapter has so far seen that the management of political parties goes a long way in promoting the position of women in party politics.

At the formative stage of a political party, it is a requirement that the proposed party submits a governing body that not more than two-thirds of its members are of the same gender³⁹⁸. Therefore, from the onset, it is clear that any fully registered political party are compliant with the two-third gender rule in their governing bodies.

Be as it may, it is worth noting that there are four core positions in any political parties. These include the positions of the Party leader, Party Chairperson; Secretary General; and Treasurer. The holders of these positions can influence the policy direction of the Political party as key decision makers.

An analysis of the sixty-nine (69) fully registered political in the country shows that collectively, there are one thousand and fifty-four elected party officials.³⁹⁹ Of these, only three hundred and fifty-six (356) women occupy some sort of position in the governing body.⁴⁰⁰ However, that is not the whole story.

Of the 356 women, only three (3) women are trusted to steer their respective Parties as Party Leaders. On the other hand, only nine (9) hold the position of the Party Chairperson. The position of the Secretary General, which is usually the accounting Office for any political party has been entrusted to only eleven (11) women holders. The other influential position within political parties, that of the Party Treasurer, is held by twenty-nine (29) women leaders.

396 Office of the Registrar of Political Parties, <https://www.orpp.or.ke/> <Accessed 25th July 2020>

397 Ibid

398 Section 7 (2) (c), Political Parties Act

399 Office of the Registrar of Political Parties, <https://www.orpp.or.ke/> <Accessed 25th July 2020>

400 Ibid

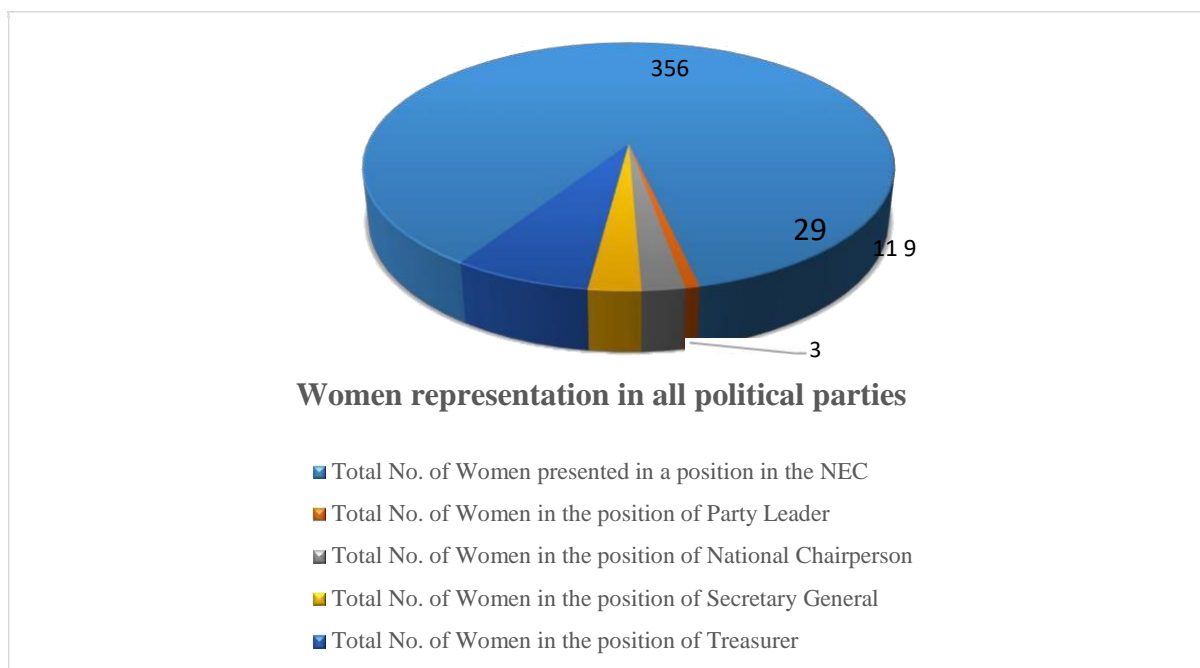


Chart 1: Women representation in governing bodies of fully registered political parties

The tragedy of this data is further proof that women are only included in the governing bodies of political parties to merely fulfil the two-third gender requirement in governing bodies. It would be foolhardy to expect any meaningful impact by women in the political circles. They simply do not wield actual influence at the party level!

The Political Parties Liaison Committee⁴⁰¹ recently reported⁴⁰² that the inability to obtain equitable representation of women in political processes and particular elected office stems from the inability of parties to conduct credible party nominations and primaries. The report is explicit that, for political parties in Kenya, nominations and primaries can only be seen from the context of internal party democracy.

Party primaries may be defined as the process in which parties internally choose their preferred candidates in an election. The process is internal to each party. On the other hand, party nomination implies to the process in which the party submits the candidates who have been chosen through the primaries to be cleared by the Election Management Body⁴⁰³.

⁴⁰¹ Section 38 of the Political Parties Act, 2011 “establishes the Political Parties Liaison Committee as a platform for dialogue between the Registrar of Political Parties, Electoral Commission and Political Parties.”

⁴⁰² Collins Odote, *Report on Reforming the Political Party Primaries Process in Kenya*, (PPLC 2019)

⁴⁰³ Ibid

It is no secret that political parties in Kenya are not managed in a participatory, inclusive, and acceptable way to all its members. Political parties are autonomous with vast powers to manage their affairs how they deem fit. It is for this reason that upon formation of a political party, the party is required to provide party elections and nomination rules⁴⁰⁴. The party may decide to use a range of methods in deciding who represents the party in an election including but not limited to direct nominations and selection.

With leeway to do as they wish, it is no surprise the criticism that political parties in Kenya get regarding the nomination process. This is compounded by the fact that the courts have been clear on various occasions⁴⁰⁵ where it has been clarified that the IEBC has no role in the party primaries. Indeed, its mandate is to ensure that the list submitted for clearance is compliant with the constitution regarding the two-third gender rule and inclusion of other special interest groups. The danger of this autonomy in the nomination process is twofold.

First, political parties in Kenya are not institutionalized. Key decisions of the party, including proposing or supporting a candidate in an election are done exclusively by 'party owners' who are men. This only leaves women with little chance through tokens to barely make it to the ballot.

Secondly, and with a lack of proper nomination guidelines, political parties may submit a list that is compliant to the IEBC, but just on paper. Section 34(6) of the Elections Act⁴⁰⁶ provides that the party list to be presented to the Commission shall be in line with the party's Constitution or Nomination rules. The Commission's role is simply to verify the list provided to ascertain it adheres to the two-third gender rule. How the list is prepared and the strengths of the candidates in the elections is not a concern of the Commission.

Thus, in preparing the nomination list, what would stop a political party from nominating women in electoral areas that it knows it does not enjoy strong support? In any case, all a political party is expected to do is submit to the IEBC a list that is compliant with the two-thirds gender rule. Therefore, women are merely on the list to make it gender compliant and not to make any meaningful impact in the elections.

⁴⁰⁴ Section 9 and 2nd Schedule of Political Parties Act, 2011.

⁴⁰⁵ See *Moses Mwigigi & 14 Others Vs Independent Electoral and Boundaries Commission & 5 Others* [2016, eKLR] and *Party of National Unity Vs Dennis Mugendi & 3 Others* [2017, eKLR]

⁴⁰⁶ 2011

The IEBC Post-Election Evaluation⁴⁰⁷ shows that in the 2017 general elections, there were fourteen thousand, five hundred and one candidates (14,501) candidates who participated in elections. Of these, only one thousand three hundred and fifty-eight (1,358) or 9.4% were women. This simply shows that not enough women find their way to the ballot and even when they do, regrettably, most are not elected.

The breakdown of women representation on the ballot is as follows for all elective seats.

S/No	Elective Position	Number of Female Candidates	Number of elected Candidates
1	Presidential	0	0
2	Senatorial	20	3
3	Member of National Assembly	131	23
4	Woman Member to National Assembly	298	47
5	Gubernatorial	9	3
6	Member of County Assembly	900	98

*Table 1: Gender analysis of women candidates in the 2017 general elections.*⁴⁰⁸

Seeing as Kenya is a majoritarian electoral system, the nomination process plays a key role in ensuring the two-third gender rule is realized in the national assembly. This can only happen if Political Parties submit a list that includes strong and competitive women candidates who have a chance at winning the election. However, without a proper framework to regulate the nomination process, this will only remain a pipe dream.

4.6 Conclusion

This Chapter has been instrumental to this study in various ways. First, the Chapter has been critical in understanding the various electoral systems in the world and how they impact on representation. Secondly, the Chapter has discussed the nexus between management of political parties, party quotas and representation of women in political processes. There has been a concise finding that party systems have a significant role in ensuring that there is equitable participation of everyone in democratic processes.

⁴⁰⁷ www.iebc.or.ke/uploads/resources/siEABKREDq.pdf < Accessed July 27th 2020 >

⁴⁰⁸ Ibid

This Chapter has also conducted a comparative study of South Africa and Rwanda which both ascribe to the proportional representation system. It has been established that indeed, proportional representation systems provide the best avenue for the election of more women. However, other than the choice of the electoral system for these two countries, it has been seen that other conditions must be present to actualize the elusive dream of political inclusivity. Key among these, as is the case of South Africa, is the management of political parties. Political parties must be willing to accept that women play a key role in elevating the place of women in democratic processes. Thus, token slots within the party leadership's positions and candidates' lists are no sufficient to overturn the systemic and longstanding exclusion of women in democratic processes. Equally, as the analysis of Rwanda has demonstrated, there is need for societies especially in developing countries to have a cultural shift in how they view women. Women play a major role in all spheres of life and societies should be the mere will to accommodate them.

Having explored the major problems that ail Kenya's electoral and party systems in this chapter, the next chapter will provide the recommendations and propose solutions that if implemented, would help in achieving the two-third gender rule.

CHAPTER 5

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.0 Introduction

This research could not have come at a better time. The country has recently encountered two major developments in its quest to safeguard equitable representation of women in the national assembly. First, on 8th March 2018, the President of the Republic of Kenya teamed up with the Chief Opposition Leader in what would later come to be referred to as the “handshake”⁴⁰⁹. The product of this handshake is what we are contending with now, the Building Bridges Initiative (BBI)⁴¹⁰.

Secondly, on 21st September 2020, Chief Justice Maraga issued a landmark advisory opinion on the dissolution of parliament for failure to pass the gender rule⁴¹¹. The Chief Justice notes that for 9 years, and in spite of several court orders, parliament has had lackadaisical attitude and has refused to enact the legislation vital for implementation of the two-thirds gender rule. He therefore relied on the powers granted by Article 261(7)⁴¹² of the Constitution and advised the President to dissolve parliament.

This Chapter shall serve two purposes. First, the chapter will speak on the findings made in relation to the research questions. The Chapter will ascertain what prevailing conditions have made it impossible to enact legislation that would ensure the two-third gender rule is achieved in the National Assembly. Secondly, this Chapter shall problematize the findings of the study

409 “The two leaders, representing the ruling party and the opposition, shook hands as an agreement that was intended to not just end months of typical post-election ethnic violence and confrontations that have been witnessed over the years, but seek a long-term solution for curing ethnic animosity and divisions into the foreseeable future. The handshake is meant to create an opportunity to unite the country and set in motion a process to identify the comprehensive changes that will strengthen the Rule of Law, unite Kenyans, deepen our constitutionalism, and launch a comprehensive reform process” <https://www.bbi.go.ke/> <Accessed on 1st December 2020>

410 In order to cure the recurring problems the country faces after every electoral cycle, the Building Bridges Initiative Task force was mandated to engage the public and report on the problems that citizens face and how to cure the same. The Task Force highlighted the following key issues of concern: “Lack of National ethos, Rights and Responsibilities of Citizens, Ethnic antagonism and Competition, Divisive elections, Inclusivity, Shared prosperity, Corruption, Devolution and State security.”

411 “Chief Justice’s advice to the President on dissolution of parliament for failure to enact the gender rule was issued as a result of a Consolidated Petition by Margaret Toili and 7 others Vs Speaker of the National Assembly, Speaker of the Senate and the Attorney General.”

412 “If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.”

and provide concrete recommendations that if implemented, would go a long way in guaranteeing achievement of the gender rule in the national assembly.

5.1 Finding

This research aimed at answering four critical questions that have dogged Kenya's quest for equality in representation. First, the research sort to know what has been the historical place of Kenyan women in politics and if at all they have managed to overcome the challenge of representation over the years. A historical analysis in this study found that society has always portrayed women as mere spectators in the struggle of democratization in Kenya. This has been perpetuated by the patriarchal nature of our society and politics in general. The role of women in political and democratic spaces, more often than not, has always been relegated to the background. Nevertheless, this study has seen that women have been at the forefront in all the key democratic transitions that the country has faced since the fight of independence a century ago to the promulgation of a new constitution in 2010.

In relation to the specific barriers that have prevented equitable representation of women in political processes, this study found that Kenya, like most African societies, is patriarchal. By its very nature, it is men who control all key decisions touching on politics, social and economic aspects. This patriarchal system continues to ensure that women are not accorded the necessary support and opportunities to fully participate and enjoy their political rights. Recently, the Building Bridges Initiative taskforce reinforced the assertion of this study that Kenya has a continuing legacy of marginalization of some specific social groups and areas⁴¹³. The consequence of this is that there continues to be inequality in the economic front which in turns affects the ability of meaningful involvement of women in the electoral process.

Additionally, this study has found that violence against women, which is a direct consequence of patriarchy, has often been used as a tool of oppression and intimidation which hampers the attainment of equitable representation of women in the National Assembly.

Nonetheless, despite the massive challenges and barriers women have faced in their quest for political inclusion, history continues to prove that they have made tremendous strides. This study has found that the number of women elected into the national assembly continues to rise.

⁴¹³ "Notable Issues In The BBI Report 2020," <https://www.bbi.go.ke/post/bbi-report-october-2020>, Updated 21st October 2020, <Accessed on 2nd December 2020>

This obviously culminated with the promulgation of the constitution in 2010. However, despite this strong constitutional framework meant to provide an avenue for inclusion of women and attainment of parity in the national assembly, it still seems a tall order.

The second question that this study sort to answer was whether the current legal and electoral framework is conducive for the implementation and achievement of the two-third gender rule. As has been discussed in this research, Kenya possesses a robust legal framework both at the national and international level to enable gender equality and meaningful participation of women in political life. Indeed, the courts have also played a prominent role in interpreting the law and how the two-third gender rule should be achieved. Since the promulgation of the Constitution 2010, this study has alluded to a flurry of court matters that have been adjudicated in respect to interpretation and implementation of the two-third gender rule.

Importantly, as this research has found, Kenya's inequality in political and electoral processes is not merely a legal issue. Other factors that are socio-economic in nature have ensured that the spirit of the constitution on elimination of discrimination in political processes has not fully materialized.

In problematizing the study, this research sought to find the nexus between the various electoral systems and how each of these systems impact representation of marginalized groups in any democracy. This research explored the question of whether some democratic designs do better in ensuring women and the marginalized are adequately represented.

In answering the question of whether an electoral system can influence the equality –or inequality- in representation, this research conducted a comparative analysis of Kenya's electoral system with that of South Africa and Rwanda, who exhibit exemplary inclusion of women in their legislative institutions.

This research shows that unlike Kenya -which ascribes to a majoritarian electoral system – both South Africa and Rwanda are doing much better globally in terms of representation of women in their legislative institutions because they ascribe to the proportional representation system. This study has established that proportional representation systems provide the best avenue for the election of more women into the legislative assembly.

Finally, this study was equally concerned with the role of political parties in actualizing political inclusivity and parity in the national assembly. Lack of proper political organization within political parties appears to be a key deterrent to meaningful inclusion of women in political processes. This study suggests that other than the choice of the electoral system, the management, and systems of political parties are key in ensuring equality in representation. Political parties must willingly and intentionally accept that women have a vital role in political processes and should therefore include them in the internal management and affairs of the party.

5.2 Recommendation

In his advisory opinion to the President of Kenya, The Chief Justice admits that Kenya is a patriarchal society and there will always be “cultural resistance to transformational ideas on gender equality”. The Honorable Chief Justice noted that the makers of the Constitution formulated Article 261⁴¹⁴ with a view that there would be resistance in enforcement. It was always expected that the political class would want to maintain the status quo by failing to put in place measures that would ensure the achievement of the Constitution’s transformational agenda.

In order to cure the inequality witnessed in political processes that has made it impossible to achieve the two third gender rule, Kenya must embrace some short term and long-term strategies that will change the legal and political systems.

5.2.1 Short Term

i. Implementation of voluntary gender quotas by political parties

As postulated in Chapter 4 of this study, this research found that in order to attain the critical minority of 30-40% of women in the national assembly, political parties will play key role in making this a reality. One of the ways in which political parties can aid in this quest is implementing gender quotas voluntarily.

For years, political parties in Kenya have been allowed to run their internal nomination processes for elections how they deem fit. As the gatekeepers of elections and the electoral

⁴¹⁴Transitional and Consequential Provisions

system, political parties need to streamline their nomination process by making it more inclusive and gender sensitive. Indeed, the implication of the Katiba Institute ruling⁴¹⁵ is that to achieve gender parity in legislative assemblies, interventions at the political party level are likely to yield results as opposed to seeking to achieve it after political parties have selected their candidates. All political parties should strive to voluntarily alter their candidates' selection criteria and guarantee at least 40% of their candidates in all national elections are women. For instance, the party may opt to designate a given number of seats up for nomination to strong women candidates.

However, it does not end there. The party should ensure that the women are nominated in electoral areas that they can actually win. It would be imprudent for a political party to nominate women in areas that are not the party's stronghold. The idea is to have more women elected into office and not just nominated for elections.

This study accepts that in the meantime, Kenya is a patriarchal society and elections will always be determined by the biases that have been ingrained in us. It would be naïve to expect that the electorate will most certainly choose a competent woman candidate as opposed to an inept male one. Political parties should therefore invest in their women candidates to the very end. They should set aside enough funding for women who naturally are constrained of funds. Most importantly, it should not be the end of the road for strong female candidates who lose elections. Strategic partnerships between the political party and the female candidate will ensure the continued working solidifies their base in preparation for the next electoral cycle. This guarantees that more women get the same grassroots support that most men have enjoyed and built on for years.

ii. Regulation of political party primaries

Additionally, to attain gender parity in the electoral process, there should be enactment of a law that regulates the conduct of party primaries and the role of IEBC giving effect to Article 88(4) (d)⁴¹⁶. Party Primaries may be internal affairs of the party but perhaps therein lays the problem. Currently, the role of the IEBC is limited to ensuring that the list of candidates

⁴¹⁵Constitutional Petition No. 19 of 2017

⁴¹⁶“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for— the regulation of the process by which parties nominate candidates for elections;”

submitted for clearance is compliant with the constitution regarding the two-third gender rule and inclusion of other special interest groups.

Political parties therefore have leeway to decide who gets on the list and for which area. However, it is time to wade into this ‘secret garden’, re-model and re-engineer how nominations are conducted. A new dispensation regulating the conduct of political parties’ primaries and an amendment to the Elections Act would empower the IEBC to designate specific electoral areas for women candidates to ensure meeting the prescribed threshold. The danger of this proposal is that it would be considered tantamount to limiting democracy. However, if there was equality in the democratic representation, then there would be no need for affirmative action. It is a bold decision that needs to be considered and taken.

iii. Review of political parties funding laws

It is practically impossible to win an election, especially in our political context, without proper funding. The current law is so punitive in terms of state funding for political parties that currently, only two political parties –Jubilee and ODM- benefit from the Political Parties Fund⁴¹⁷. This means that most political parties do not have the financial muscle to compete and win seats let alone support their women candidates. It is thus critical to overhaul the funding criterion for political parties. More parties should have access to the political parties fund as this will give them to opportunity to support more female candidates in elections..

5.2.2 Long Term

This study cannot stress enough the role an electoral system plays in shaping the socio-economic and political structure of any country. This study has found that Kenya ascribes to the majoritarian system specifically the First Past the Post system whose sole purpose is to manufacture an effective majority in the national assembly for the leading party. This system is only concerned with effective governance and fulfilment of the government's agenda. Representation of the minority groups is the least of its worries.

i. Constitution of Kenya (Amendment) Bill, 2020: Is it a solution?

⁴¹⁷Section 25(1)(a) of the Political Parties Act provides that “80% of the Political Parties Fund is to be distributed proportionately to political parties based on the number of votes secured by each political party in the preceding elections. Additionally, the party must have at least twenty elected members of the national assembly, three elected senators, three elected governors and forty elected Members of County Assembly.”

There have been concerted and unending efforts to implement Article 100 of the constitution that will provide a proper framework for the implementation of the two-thirds gender rule. The latest effort to provide a solution for this longstanding dilemma is the Building Bridges Initiative. The Constitution of Kenya (Amendment) Bill, 2020, a by-product of the BBI process, proposes to alter the composition of the national assembly by amending Article 97 of the Constitution.

Clause 13(a) (i)⁴¹⁸ proposes to increase the number constituencies from two hundred and ninety (290) to three hundred and sixty (360). Additionally, to cater for special interest groups, the amendment proposes to have four nominated members –two of each gender- to represent persons living with disability⁴¹⁹ and two nominated members, a man and a woman, representing the youth⁴²⁰. Significantly, this amendment proposes to introduce the number of special seats members necessary to ensure that no more than two-thirds of the membership of parliament is of the same gender⁴²¹. The members to fill the special seats are to comprise of the candidates who stood for elections at the constituency level and precedence shall be given to those who received the greatest votes. However, no matter how rosy it may sound, this proposal is bound to fail for several reasons.

First, this proposal is a drawback on the gains women have made on the political front over the years. The Constitution currently makes provision for forty-seven women elected to represent the counties⁴²². Taking away this major win for the women in the 2010 Constitution is inconsiderate and ironical. Secondly, this proposal on open special seats means that nothing stops the electorate from electing three hundred and sixty male members of parliament. After all, one hundred and eighty women can be nominated into the National Assembly to adhere to the two-third gender rule. This means that by the very nature of our politics, the proposal will relegate women to dependence on nomination tokens into parliament. Indeed, male politicians will use this opportunity to discriminate women some more by making them aim for the special seats. And be as it may, it is more appealing to win a contested election into parliament than relying on nomination.

⁴¹⁸The Constitution of Kenya (Amendment) Bill, 2020

⁴¹⁹ Clause 13(a) (ii) The Constitution of Kenya (Amendment) Bill, 2020

⁴²⁰ Clause 13(a) (iii) (c) The Constitution of Kenya (Amendment) Bill, 2020

⁴²¹ Clause 13(a) (ii) (ca) The Constitution of Kenya (Amendment) Bill, 2020

⁴²² Article 97(1)(b), Constitution of Kenya

Third, the proposal is that the provision of the special seats will lapse after the next three general elections, which is roughly fifteen years. This research poses the question, is it possible to undo a lifetime of discrimination in fifteen years? In fact, should this proposal be adopted, it will mean that marginalization and dislike of women politicians is entrenched even further among the electorate for one major reason; the economic repercussions. It is likely that the country will have to deal with a bloated national assembly and the biggest number of the nominated members will be women. The electorate in a struggling economy will blame the over representation on the women nominated hence the disapproval of women politicians by the electorate.

ii. Review of Kenya's electoral system

With the aforementioned reasons, it is clear that this constitutional amendment is not the solution for implementing the two thirds gender rule. It will be yet another cycle of an unfulfilled promise. It is for this reason that this study proposes that as a long term measure; the country should consider changing its electoral system and adopt the Mixed Member Proportionate system.

In the MMP system, the voters will elect their leaders in two levels – at the national and at the political party level- with both of these elections linked and dependant on each other. The seats that will be allocated for proportional representation will be dependent on the outcome of the majoritarian seats garnered at the national level. This study proposes that there be an allocation of 150 single-member constituencies spread across the country for election of members using a simple majority. Upon completion of the elections, there shall be a determination of how each political party has performed in the elections in terms of seats won and total number of votes received in that election. This will help to ascertain how many seats each party will be entitled to for the elections of the closed party lists. This will be pegged on a minimum nationwide party vote.

Parties will therefore submit a closed list of its candidates for elections of the other 150 members of the national assembly spread across the country. For this level, the electorate will elect party lists and not individual candidates.

The MMP is a brilliant system that would not only cure the two-thirds rule conundrum, but also be beneficial to Kenya's political culture for two reasons. First, in this system, the sole

purpose of the nationwide allocation of seats to political parties will be to provide compensation to parties and provide an avenue for proportionate results and representation of the entire population. This will therefore give latitude to political parties to front candidates of each category of special interest groups' for elections. With this system, quality in representation for all social groups and the historically marginalised would be improved.

Secondly, the MMP system will ensure emergence of strong political parties. In order to win the closed seats, parties will provide a list of candidates that is diverse and inclusive. More candidates, especially those that are strong but cannot ordinarily win elections because of one reason or another would be enlisted with a chance to win. Further, smaller parties will have a chance of representation through the second votes of party lists even if they perform abysmally at the single-member constituencies.

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