

**WOMEN IN POLITICAL POWER  
AND PUBLIC DECISION MAKING  
IN KENYA**

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## DEDICATION

*I dedicate this dissertation to my loving parents, Mr. David Njoroge and Mrs. Mary Njoroge, the source of my inspiration. You denied yourselves many things to ensure my success. You not only took me to the fountain of knowledge but also made sure that I drank from it. Thank you for believing in me and reminding me that I can make it and for the sacrifices you made for me. I can never pay you back but I will forever cherish and love you. May God Bless you.*

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## TABLE OF STATUTES

The Constitution of Kenya

The Judicature Act Cap 8 laws of Kenya.

The National Assembly and Presidential Elections Act Cap 7 Laws of Kenya

The Local Government Act Cap 265 Laws of Kenya

The Societies Act Cap 108 laws of Kenya

## TABLE OF INTERNATIONAL AND REGIONAL CONVENTIONS

Universal Declaration of Human Rights (1948)

United Nations Charter (1945)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic Social and Cultural Rights (1966)

Convention on the Political Rights of Women (1952)

Convention on the Nationality of Married Women (1957)

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1962)

Convention on Elimination of All Forms of Discrimination Against Women 1979

African Charter on Human and of Peoples Rights.

## ABBREVIATIONS

KANU	Kenya African National Union
WID	Women in Development
NCSW	National Commission on the Status of Women
CAP	Chapter
SEC	Section
UDHR	Universal Declaration on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
UN	United Nations
CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
OAU	Organisation of African Union
NARC	National Rainbow Coalition



## INTRODUCTION

Historically, women as a social group have been subordinated in most societies of the world. This has gone on despite the recognition and global acceptance that women's rights are human rights. The Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights and that everyone is entitled to all rights and freedoms set out in the Declaration without distinction of any kind including sex. Among the rights provided for in the Declaration is the right to participate in politics through the right to vote and to be voted for. Article 21 of the Universal Declaration of Human Rights states:

‘Everyone has the right to take part in the government of his country directly or through freely chosen representatives.’

The rights and freedoms set out in the above mentioned Declaration have been codified in Chapter Five of the Constitution of Kenya. Despite the lofty ideals embraced by constitution, it has failed to guarantee the enjoyment of some of these rights by women.

The political participation of women depends to a large extent on the political, cultural and social climate in the country. This defines the opportunities and limitation's governing the creation of democratic institutions and realization of democratic values. In Kenya as in many other African countries, women politicians and political leaders have to contend with myriad political obstacles as well as cultural and social traditions which continue to exclude them from participating in mainstream public life which involve power and decision making.

At present in Kenya, women's participation in politics and governance is unproportionately low given that they form 52% of Kenya's population. Despite their numerical majority, they have not been equal beneficiaries in the independence and democratization process. In fact if women's participation in the politics and decision making of their countries is a measure of democracy, many countries including Kenya have a long way to go to achieve true democracy. Women remain largely outside the realms of power and decision making in governments.

Recent statistics in Kenya relating to the participation of women in politics and decision making at various administrative levels indicate that women still lag far behind men. For instance in the last general elections (2002) only nine women were elected and seven nominated as members of parliament forming a total of 16 out of the 222 members of the House. Only seven of them managed their way into the cabinet. Apparently this year has the largest number of women in parliament since multi-partyism in Kenya. Therefore despite the widespread movement towards democratization, women are under represented in the political institutions. This is due to operative norms in the society about women's capabilities. The traditional working patterns of many political parties and government structures continue to bar women's participation in politics. Besides they may be discouraged from seeking political offices by discriminatory attitudes and practices, family and childcare responsibilities and the high cost of seeking and holding public office.

This paper is based on the recognition that women's issues are part of the national agenda and should be examined seriously by men and women alike. The

empowerment and autonomy of women, and the improvement of their social, economic and political status is essential for the achievement of both transparent and accountable government, administration and sustainable development in all areas of life. Achieving the goal of equal participation of women in decision making will provide a balance, which reflects the composition of society and is needed to strengthen democracy and promote its proper functioning. Women's participation in decision making is not only a demand for simple justice or democracy but also an avenue through which women's interests will be considered. Their participation in government and legislative bodies will contribute to redefining political parties, placing new items on the political agenda that reflect and address women's gender-specific concerns, values and experiences, and providing new perspectives on mainstream political issues. The democratization process must also necessarily include women and the population at grass root levels and rural areas. In addition to identifying problems and seeking solutions, it is necessary to muster the political will and commitment of the government and also the international community.

It is notable that women tend to be stuck at lower levels of political participation and it is important to create the conditions necessary and encourage them to extend their participation to the national and international levels. This can only be done by an overhaul of old structures and policies backed up by measures and steps to give these goals and policies a practical meaning. To change people's attitudes towards development of women, more and broader education is needed. This calls for a legal framework, which will guarantee women equal opportunities and an equal playing field in politics.

This paper therefore, will seek to examine the existing legal provisions and establish how these have frustrated the realization and enjoyment of political rights by women. Besides it will look at other political institutions that play a vital role in power and decision-making and how these provide for participation of women. These will include the Electoral Commission and political parties. The paper will also make recommendations on how women can be empowered politically. This will be through inter alia adoption of affirmative action in all aspects of politics in order to correct historical prejudices. In the paper suggestions of probable laws that will suit the social norms and which are adaptable to herald women's right to participate in politics will be given.

Besides identifying the problem, the paper will seek to establish the efforts adopted by the government of Kenya to empower women and the adequacy or inadequacy of the same. This will be through an examination of the existing legal framework, its achievements and shortcomings.

### **HYPOTHESIS**

The political space belongs to all citizens; politics is everyone's business and affects the life of each of us. The more women are associated in numbers corresponding to their percentage of the population, in the political and decision-making process, in parties, in elected bodies in government and in international bodies, the more they can be associated with this process as protagonists and the more they can change the modalities and outcomes of politics. Only then will the concept of democracy find concrete and tangible expression. Democracy and participation of women go hand in hand and promote each other mutually.

## CHAPTER ONE

### WOMEN IN POLITICAL POWER AND DECISION MAKING IN KENYA:

#### A HISTORICAL PERSPECTIVE

##### **1.1: Introduction**

A decade ago, Section 2A of the constitution of Kenya, that outlawed plural politics, was repealed paving way for the return to multiparty politics in Kenya. This marked a new political dispensation in the struggle for popular participation and the broadening of the democratic space. However women as a social group are poorly represented in politics and decision making bodies yet they constitute more than half of the country's population. This does not augur well with the democratic principles of equal representation and social justice. The disproportionate low representation of women especially in the political realm is a historical problem traceable to the traditional, social, cultural, economic and political barriers to women's participation in public leadership and decision-making positions.

In this paper we will look at theories advanced to explain why women are oppressed in most countries in the world. In this chapter, we will trace the role of women in the society from the pre-colonial times up-to the post multi-party era. Here we will examine the participation of women in political power and decision making in the struggle for independence in Kenya. Besides we will look at the social-cultural and economic factors limiting full participation of women in mainstream public life.

The purpose of tracing this history is to establish the factors that have led to subordination of women thus less participation in political power and decision-making in Kenya. Later in the paper suggestions will be made on how to address these factors and thereby empower women to take up political leadership positions.

Historically, in the world over, women have been subordinated. Several theories have been advanced to explain the causes gender imbalances in the society. None of these theories alone suffices to explain the causes of oppression of women. These theories will be discussed briefly in order to give a background of subordination of women in the world and Kenya too.

## **1.2: The concept of gender.**

To understand why women are less involved in public life compared to men, we must look at the concept of gender. The concept of gender means the state of being male or female. It refers to the economic, political and cultural attributes and opportunities associated with being male and female. The two genders are distinguished by physical, biological, sexual or reproductive differences. The term also has a social meaning. It defines how the male and female gender relates in the society. According to Melhuus, 1988, gender is not a characteristic of a person, something that women have while men remain men, as some people tend to think. It is a product of the socialization process that ensures that in many societies, men and women differ not only in the activities they undertake but also in the levels of access and control of resources and also in their level of participation in decision-making. The latter is the

concern of our study. In a nutshell social constructions of maleness and femaleness result into power relations.

Gender manifests itself in most societies in the fact that women have limited access compared to men to resources, opportunities and decision making positions. In the Kenyan context, women are considered to be disadvantaged compared to men in virtually all spheres of life.<sup>1</sup> There is also a societal preference for the male child. There will be more boys than girls in school at any given time and the rate of school drop out for girls is higher than that of boys.

Gender disparities are traceable back to the traditional philosophers. Most traditional philosophers like Aristotle, Aquinas, Kant, Hegel and Nietzsche expressed serious reservations about women's capacities, especially in their rational capacities. Except for some few philosophers like Plato, Mill, and Marx who sought to validate women as men's equals, the rest had philosophical theorizings that often discredited women and all that is discernibly female. For instance the family which is generally associated with women was never presented as deserving philosophical reflections.

Due to concern over traditional philosophy's negative attitude towards women, feminist philosophers emerged. A feminist, according to Rosalind Delmar, is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied and that the satisfaction of these needs would require a radical change or revolution in the social, economic and political order. Feminism on the other hand is a political movement which aims at

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<sup>1</sup> Kenya Human Development Report, 1992: 2.

transforming gender relations. The feminist movement is not unified. However the goals of the movement are one and the same that is to say identifying the cause of women's oppression and the possible ways to overcome them. They have adopted different strategies and methodologies to accomplish these goals. Consequently they have come up with different theories that offer critical explanation of women subordination.

Feminism as a movement came to address the thesis that society has not always been fair to women and thus worked towards women liberation. The movement seeks to identify why women are subordinated, how they are oppressed in order to establish ways of redressing the situation.

The unfairness meted on women is not a recent phenomenon. Wollstonecraft (1792) cites the example of a Reverend who warned the young women of England, to whom his sermons were addressed not to follow "those masculine women that would plead for your sharing any part of their province with us." In this case the province of men included "war, commerce, politics, exercise of strength and dexterity, abstract philosophy and all the sciences."<sup>2</sup> This unfairness is also manifest in Queen Victoria's writing to sir Theodore Martin in 1870, complaining about "this mad, wicked folly of women's rights." The formidable empress certainly did not herself need any protection that the acknowledgement of women's rights might call for." (Amarta sen)<sup>3</sup>

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<sup>2</sup> Reverend James Fordyce, 'Sermons to Young Women', 1766.

<sup>3</sup> Amarta Sen is the master of Trinity College Cambridge who has written extensively on the subject of gender since the 70's. For instance his writing on, 'The Many Faces of Gender Inequity'.



Though clear-cut beliefs on men's and women's provinces are rare today, there is presence of extensive gender asymmetry. A study on how men and women are differentiated in a social-cultural context focuses on gender relations. However when focus is shifted to transforming this negative attitude towards women, the body of knowledge is called feminist studies hence feminism is considered as a movement because it aims at transforming gender relations which are oppressive to women.<sup>4</sup>

The world society is ordered into male and female. The society proceeds to tell people what they can or cannot do depending on their sex. The male centrally features a hierarchy of control. For the female, subordination is institutionalized.<sup>5</sup>

### 1.3: Feminist theories.

Theories have been developed by feminist thinkers to explain the custom of the feminist movement and the concepts of gender globally. The major theories are liberal feminism-which focuses on equal rights and individual choices. This theory seeks to identify ways in which law could remove the barriers that prevent women's access to for example education, enjoyment of civil and political rights, employment and credit. Socialist feminists seek to address the intersection between capitalism and patriarchy and the impact of this on women. Radical feminism focus on the different ways in which men control women's sexuality and reproductive capacities to suit their own needs. It also shows how men use different forms of violence to oppress women. They draw an analogy between worker's exploitation and women's oppression. It links women's oppression to the forms of capitalist exploitation of labour and go on to

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<sup>4</sup> Feminists Theories and Study of Gender Issues.

<sup>5</sup> Mary Becker, Cynthia Grand and Morrison Torrey: Feminists Jurisprudence- cases and materials (1993, West Publishing Co.) pp70 -71.

analyze women's unpaid and paid work within the framework of capitalist economy. The psycho-analytic feminists use Freud's theory of the unconscious to understand and challenge women's oppression. They argue that the conceptual parameter of the unconscious can help explain how power relations among men and women are formed, internalized and how they can be changed. Finally there are the Black feminists whose focus is that the manner of female oppression in society must come out of women's real life experience in their society. They contend that black women must define and articulate their own views and identity instead of leaving this exercise to white women and black men. To them racism and class are relevant issues for feminism in certain contexts.

The following is a brief discussion of the content of these theories.

### Marxist feminism

As already observed Marxist feminists locate women's oppression in the structure of capitalism. That the inter-linked forces of gender, class and race constitute one big element those subordinate women coupled with male dominance and economic inequality. For them the introduction of private ownership of property destroyed the equality the human community had previously enjoyed. Private ownership of means of production originally by males inaugurated a class system manifested in capitalism and imperialism. Women also suffer discrimination on the basis of their race, class, ethnicity, age and level of ability. They view capitalism, imperialism and sexuality as inseparable. Thus liberation of women is linked to the liberation of all social class relations.

The Marxist feminist position in the production debate can be summarised into two viewpoints. The first views women as a resource labour force for capitalism. Women's labour generally covers wages and provides extra surplus to the capitalist employer. They also serve interests of capitalism by managing family consumptions. The second viewpoint focuses on the relationship between housework and reproduction of labour. The question is whether housework is productive labour. Apparently housework is not viewed as work by the male-dominated society and no wage is paid for it.

Marxists' view of schooling in a capitalist society is considered as reinforcing social inequities and solidifying social class structure.

### Radical feminists

Radical feminists believe that women's oppression is caused by patriarchy. They contend that male rulers control the society and use women for their reproductive ability. They argue that men use the family institution to exert their power over women and children. They argue that women's oppression will not be eradicated by simply reforming the political system or economic institutions; rather, feminists must transform the entire gender system. Thus the way forward is to separate themselves and their interests from the interests of men. This has given rise to women's only organizations, institutions and businesses in some parts of the world. Radical feminists together with the socialist feminists began what has become the pre-eminent method of consciousness raising. This technique had been used originally to organize

the poor by themselves in order to help them understand the systematic social concerns of their oppression and the need to organize for political solutions.

Radical feminists view men as the oppressors and do not consider social discrimination as affecting men and women in the same way. They stress the need for structural changes in the society. They demand radical transformation of the oppressive gender relations. These feminists put sexuality, reproduction, and patriarchy at the center of the political arena and are focused on changing women's political consciousness. It challenges the conventional place for women in the society. They stress that men and women have different interests thus the need to separate themselves from the influence of men, they favor separatism other than joining coalitions with men thus stressing the need to develop a women's culture. Radical feminists therefore came to be known as feminists who are "women identified" and who analyze oppression on the basis of sex. They argue that male domination over women originates in the institution of heterosexuality, that the distinctive power of men over women in society arises from the pervasiveness of male sexual violence. Sexuality has been constructed in such a way not only <sup>6</sup>to ensure male domination and female submission but also to eroticize it. These feminists are particularly concerned with pornography, sexual harassment, rape, prostitution and woman battering which serves to ensure women's sexual and social subordination. Women are depicted as sexual objects while men are the consumers. Heterosexuality portrays women as objects of male passion and as people who are in danger needing protection.

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<sup>6</sup> Catharine Mackinnon; 'sexuality, pornography, and method: pleasure under patriarchy.'

Unlike liberal feminists who call for equal education opportunities, radical feminists challenge the quality and quantity of education being offered. Radical feminists in Africa have been demanding a system of education that is empowering. Studies carried out in Botswana and Tanzania demonstrate how educational stereotyping can be used to marginalise women. Radical feminists have not only called for equal opportunities but also changes in the curriculum. They have also challenged men's control and monopoly over production and use of knowledge. Gender biases are perpetrated due to the male dominance in the media, unlike liberal feminists who call for equal access to health services by women, radical feminists insist that health services must empower women.

#### Psychoanalytic feminists

According to these feminists, women's oppression is rooted in the human psyche. The conscious aspects of personality for example one's general self concept and gender identity is dependent upon the stability of the unconscious organization that is completed by age three. They argue that the psychosexual development of boys and girls is not without social implications. These theorists use Freud's idea of the unconscious to understand and challenge women's oppression.<sup>7</sup> They believe that the conceptual parameters of the unconscious can be used to explain how power relations between men and women are formed, internalized and how they can be changed. From this perspective patriarchy exists not only in society but also within our very

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<sup>7</sup> Psychoanalytic feminists however reject Freud's view of 'penis envy', which claims that women supposedly feel lacking because of their biology Magezis J:1996p15

selves since our identity is a product of not only what we are consciously but the unconscious as well.

### Socialist feminism

This group of theorists combine all the theories of feminism calling for an overhaul of the structures that perpetuate women's oppression. They specifically point out patriarchy and capitalism as systems which legitimize male dominance. As such these systems ensure that men control the production and reproduction of women. These feminists call all the oppressed groups to join hands and fight their oppressors rather than organizing or struggling separately to advance the rights of women. This theory is closely linked to the Marxist feminism, which focuses on capitalism, and demonstrates how women are used as a labour force for capitalism.

### Black feminism.

These theorists' focus is that the ideas on the manner of female oppression must come from women's real life experiences in their respective societies. They argue that black women have and must define and articulate their own views and identity other than leaving it to white women and black men. For them class and race must be regarded as important factors in feminism. They assert that in certain contexts for instance Britain the position and experience of black women can only be understood in the context of colonization and British imperialism. This theory incorporates the concerns of women in developing countries.

## Liberal feminism.

This is the oldest theory of feminism dating back to the 17<sup>th</sup> century. It focuses on the equality of rights and individual choices in order to eradicate discrimination of women. They were of the view that women's subordination is rooted in legal (customary and statutory) constraints that prevent women from fully participating in the public sphere. According to them equality of sexes in all spheres will liberate women. This approach aims at achieving equal rights in politics education, and employment. They want to end discrimination and build positive models for women and girls. Liberal feminists want to work within the system to reform it through equal rights laws. They see men as potential allies because they are also oppressed by the rigid sex roles that deny them individual choices. They stress the similarities other than differences between individual men and women and tend to eliminate group roles and stereotypes, which diminish individual choices.

According to them, reforms will come in a gradual process in which the government has a major role to play. They are concerned with the provision by the state of civil and political rights that will enable individuals to realise their potential in all spheres of life. They seek to increase the participation of women in political organs.

A more radical orientation within liberal feminism has been challenging the 'equal opportunity' approach, which ignores structural gender inequalities and demands a more radical transformation of gender relations through the equity approach.

These theorists are differentiating between formal and substantive equality. This theory is of particular relevance in this paper because it shall be the main point of reference. As shall be seen in later chapters, we will examine the laws governing political participation in Kenya. Here it will be noted that most of the provisions don't discriminate against women and therefore can be said to be gender neutral. The focus of reforms will be to achieve substantive equality taking into account the special circumstances of women that justify differential treatment.

#### **1.4: Feminism in Kenya**

As already discussed, feminism is a broad based political movement aimed at transforming gender relations in order to liberate women from oppression and discrimination in the public sphere. In Kenya, this movement can be traced from the organized participation of women at the first world conference in Mexico in 1975. A build up to the conference followed this on women held in Copenhagen in 1980. The movement achieved full recognition in 1985 when the third world conference was held in Nairobi Kenya. Between 1985 and 1995 women extended the boundaries of their welfare organisations by forming organised units with specific goals.. The major one was Maendeleo Ya Wanawake Organisation which was more welfare oriented. However other organisations came up and challenged the existing stereotypes that continued to subordinate women in the society.

The culmination of feminism in Kenya gained full momentum in 1995 after the Beijing Conference. This marked a major step towards making women's interests a national issue. Besides, this period also saw many literary works on women's rights and formation of more civil bodies concerned with the position of women in the



society. The effects of these organisations were felt in the 1991 struggle for multipartyism in Kenya. They also played a significant role in the debate for constitutional reforms that saw inclusion of women's rights in the draft constitution.

In the following discussion our focus will be the participation of Kenyan women in politics in a historical perspective. This will be traced back from the pre-colonial times upto date.

### 1.5: The role of women in political power and decision-making from pre-colonial times to the struggle for independence.

The political participation of women depends to a large extent on the political, cultural and social climate in the country. This defines the opportunities and limitations governing the creation of democratic institutions and the realization of democratic values. Political leadership or power, and democracy are closely related. Democracy is a system of governance, which allows popular participation in the decision-making process. It is a universal right for all citizens to fully participate in the governance of their countries. This includes taking part in popular and periodic elections, which are, free and fair.

Women have been active in the private sector, making tremendous contribution as caregivers, farmers and traders, Their level of participation in the public sphere of society and specifically in political power and leadership is not commensurate to their participation and roles in other realms of life. Ironically it has been observed that

women had more power in the pre-colonial societies and they played significant roles in the social and political reproduction of households and kin groups.

Prior to the coming of the European colonial system, Kenyan women had a much broader role in decision making than they did under colonialism. African and indeed Kenyan political systems ranged in structure from small stateless communities to vast hierarchical empires. There was an element of continuity because all of them were based on the extended family as the social-economic unit. Each extended family was embedded into a social-political structure characterized by networks of wider economic and political obligations based on kinship and tribal groupings. Women therefore played a key role in the social and political reproduction of households and kin groups in the pre-colonial period. When women were exchanged as wives, they provided their fathers and husbands with social, economic and military alliances with other lineages and clans. These alliances were important to the political prestige and military strength of households and their heads. However, it is men who became partners in these relations, while women were but means by which they were created.

With control of people as the key political and economic accumulation, control over marriage was a vigorously defended patriarchal privilege. Young unmarried men remained dependents who owed total obedience and economic service to his household head or patriarch. Marriage was the beginning of a man's social and economic emancipation. Once married, he could control the labour and output of his wife and eventually exchange his daughters in marriage for new wives or property. Marriage allowed men to gain dependents and social status. For women, marriage marked the transfer of dependency from father to husband.

Many pre-colonial societies had no permanent political structures above household level. In fact, social political linkages were formed on the basis of kinship, but positions of leadership were rarely vested in a single person or political group. The ideology of equality among all household heads permeated throughout the Kenyan tribes. Decisions on vital social or military matters required inter-household heads concerned with the matter at hand. Women were rarely household heads thus they didn't take part in the society's primary political structures. However, women formed similar, but less powerful social and ideological organisations.

Some writers have questioned the ideology that women had significant independence in the pre-colonial era. They argue that it is the colonial administration's intervention that actually weakened and reduced traditional patriarchal control over women. They lessened the chances of slavery, torture and death penalty for women rebellion. They also made divorce available to women who were attempting to escape an intolerable personal or social situation.

It is worth noting that most traditional policies in Kenya had a dual sex system in which women's affairs were handled by women, men for men's affairs and the general community. Women usually had political control over some area of activity be it farming, trading, marketing or household and family affairs. They had political institutions, usually councils, to decide how to carry on their own affairs or to control or influence the affairs of men. They were not subject to general control by men because they were autonomous in their own area of responsibility. Women's solidarity groups based on kinship, tribe, age, culture or economic production tasks

played a critical role in providing formal relationships for women in the community, as well as endowing them with a psychological sense of self-esteem. Women were bound together through complex sets of associations which sets provided a base from which they conducted their day to day affairs.

The advent of colonialism in the 19<sup>th</sup> Century and its intensification in the first half of the 20<sup>th</sup> Century had a profound effect on Kenyan women's position in politics. Generally women were ignored and deprived of their power. All colonial officials shared a basic idea that the role of women was that of household helpmate to men and that women were outside the realm of politics. The colonial powers didn't try to manipulate female leaders; they often did not even recognize their existence. European ideas about appropriate economic and domestic roles for women and capitalist exploitation destroyed the economic independence and traditional form of social authority exercised by women in the pre-colonial era.

The colonial exploitation of economic surpluses from the Kenyan population through high taxation, forced production of export crops, food levies and removal of young men to work on European plantations or as forced labour on state railways and mines, was the basic force behind women's rising labour burdens. Colonial economic policies fundamentally changed the context in which traditional household and kinship relations operated. The traditional power of patriarchs and chiefs were reconstituted by colonialists as a measure to strengthen their power on the territory. By giving in to colonial demands, these leaders lost traditional legitimacy. The greatest majority of patriots at household level were economically and politically weakened. Under the weight of colonial tax and forced labour policies.

Due to these policies, the social-political linkages tying traditional male dependents to patriarchal households and linking smaller households into larger economic units were broken. As household slaves were freed and as village headman lost ritual and traditional punitive measures, extended family households began to break into man-wife-children units. Besides, co-operative relations in farming broke down and labour was diverted from food and craft to work on colonial crops. At the same time colonial chiefs and headmen wielded so much power as tax collectors and enforcers of forced labour on colonial farms.

Upon individualization of property rights, powerful men especially chiefs and headmen acquired much of the best land whereas women's access to land for subsistence farming was highly circumscribed. This marks the start of disempowerment of women economically. Colonial policy on women's personal rights at this time was contradictory. Although missionaries and colonial administrators intervened against excessive oppressions, they recognised patriarchal power in mobilizing labour of women and youths in the colonial interests. Colonial intervention thus produced no fundamental changes in women's status as social and economic dependants of their fathers and husbands.

Towards the attainment of independence, there is additional evidence attesting to the political roles played by women. Women joined nationalist movements for liberation and democracy. They came forward to defend or struggle for national independence through resistance movements alongside with men to fight for political changes. This may be exemplified in the leadership roles of Mary Nyanjiru in demanding the release

of Harry Thuku, a freedom fighter in 1922. She challenged men to be more aggressive in the fight for independence. She lost her life in a demonstration calling for the release of Harry Thuku. Women also played a great role in ferrying food and supplies in the forest for the Mau Mau's. They also provided hide outs for the freedom fighters and stole secrets from the colonial powers. Women fought so much, even rising to the position of Field Marshall as in the case of Muthoni Ngotho. Others included Mekatilili who resisted the British powers.

This historical perspective on African women's participation in politics reveals the significant roles played by women in the National liberation. Yet this participation was ignored in the constitutional negotiations for independence at Lancaster House in 1960 where only one woman was among the African representatives. At the end of the struggle, women were expected to assume their traditional roles or were largely limited to supportive portions in political and public life. The fact that only one African woman participated in constitutional negotiations meant that women's interests were left out in the constitution of independent Kenya.

In conclusion, history reveals that the traditional society was organised into either matrilineal or patrilineal systems. However matrilineal systems were very rare therefore patrilineal ones were the most common. The former were later destroyed on introduction of private ownership of property especially land and inheritance. In most societies property ownership was the domain of males while the female were labourers on this land to improve it and to get subsistence for their family.<sup>8</sup> Sons later inherited this property thus girls and wives remained propertyless.

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<sup>8</sup> CLARION, "The Gender Question in Historical Perspective", In Constitutional Debate No. 11, An Introduction to Gender Law and Society. (Claripress Limited, Nairobi, 2001) pp. 7 –11.

Besides, patriarchy was manifested in family set-ups. The power and dominance of men is founded on their collective adult maleness for instance in initiation ceremonies and counsel of elders. Thus even in matrilineal societies women were highly oppressed because they lacked sufficient social authority.

In pre-colonial Kenya it was acceptable for women to be oppressed and subjugated by men. Wife beating was considered a disciplinary measure exercised by men. Women could not inherit or own property. The woman herself was her husband's property and in some communities like the Luo, they could be inherited upon their husband's death. These societies were characterized by gross discrimination and violation of the rights of the female gender.<sup>9</sup>

During the colonial period, although colonialist were well aware of the biases perpetrated by patriarchy, they did very little to liberate women. Though they encouraged education of girls, only the parents converted to Christianity appreciated the importance of formal education. When they got into schools, girls were only taught domestic and welfare subjects which didn't serve to empower women in the public arena.

Colonialists also introduced cash crop growing, private ownership of property, the wage economy and the land tenure system, all of which tended to discriminate against women. However they curtailed female genital mutilation, killing of witches, slavery,

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<sup>9</sup> This culture, though it reflects the prevailing practice, communication with opinion leaders prevail that it is a corrupt form of the traditional position where the widow could choose the person to inherit her from her in-laws. She also had power to terminate the relationship by simply placing his meager belonging outside her hut.

polygamy and early marriages. The feminist movement gained roots in the colonial times in the Kenyan Society and this has grown over time to the present day.

**1.6: Participation of women in decision-making in independent Kenya and the multi party era.**

Despite their active involvement in the struggle for independence, women's issues continued to be considered as peripheral. Between 1963-1969, there was not a single woman member of parliament. Since then the situation has not changed significantly because women are still under-represented in public positions. Though women are human beings with rational faculties just like their male counterparts, the denial of opportunities in education and the psycho-suppression through socialization, has jeopardized their full potential and participation in critical development including politics.

As already observed, only one African woman was a representative in Lancaster House Constitutional Negotiations. The result was that women's issues were not entrenched in the constitution. The ruling party KANU made no attempts to remedy this situation. In 1964, a woman (Ms Ruth Habwe), was denied support by KANU and consequently suspended from the party. The government justified its failure to support or nominate any woman to parliament by arguing that women were not yet qualified for political offices. The system neither addressed women's political agenda nor began to reflect seriously on the broad concern of women. The dominant political agenda was still favourable to men.



Besides lack of political agenda for women in the government, the continued existence of many and sometimes conflicting beliefs and practices among the various ethnic communities in Kenya mitigated their efforts to forge a common front and organize a cohesive women's movement. For the 29 years or so of post-colonial rule in Kenya prior to the return of multi-partyism in December 1991, women's struggle for democracy and human rights had largely been ineffective in empowering them. The major factors contributing to this ineffectiveness included a series of autocratic governments, characterized, *inter alia*, by manipulative tendencies, intolerance, harassment and muzzling of interest and lobby groups that did not support the status quo. Besides the under developed economy, built on a highly patriarchal society with high illiteracy rates especially for women, with extremely low levels of gender, civil and legal rights' awareness contributed to the ineffectiveness of the women movements.

The women's movement in the pre-colonial era saw not only its expansion but also the increased state control and influence exercised over that expansion, It sought to shape the structure and type of activities that women can engage in. Those groups that resisted this control were censured or harassed while the acquiescent ones were rewarded and accorded high official status. As a result, gender based discrimination against Kenyan women in almost every aspect of life went on almost unabated.

This was evident in law and practice on matters such as inheritance, marriage, divorce, custody and maintenance of children and in employment. Religious, customary and common laws were manipulated to deny women their basic rights on issues such as burial rights. This is exemplified in Wambui Otieno's case in 1985. She

was denied the right to bury her husband on their land in Nairobi in favor of customary law which required that he be buried in his ancestral home in Nyalgunga.

During the ten years duration of the Women Decade (1975-1985) the Kenya government adopted a Women In Development (WID) policy position and created and/or promoted national machineries to develop and co-ordinate programmes for women. This action was in compliance with the 1975 United Nations Resolutions that demanded all member states to make changes and introduce policies and programmes geared towards accelerated advancement of women, through creating national machineries to service women and strengthen existing organisations.

Long after the end of the Women's Decade, government action on the women question remained at the level of high sounding rhetoric, consisting of sweeping and vaguely worded statements of commitment and intent on WID, quite unrelated to the actual gender situation in the country. The WID approach posits that the women gender has been neglected for centuries and therefore it is high time that women were fully integrated in the development process. Proponents of this approach argue that this will not only achieve equity but efficiency in eradication of poverty.

WID was aimed at remedying the unequal gender relations in the development process thus emphasizing on the economic independence of women. The weakness of WID is that it never challenged the social structures that are largely male dominated.

The immediate outcome of the Women's Decade was the global policy document. The 1985 NAIROBI FORWARD LOOKING STRATEGIES' to which the Kenya

government is signatory. The sitting of the 1985 Women's Decade Conference in Nairobi also raised gender awareness. Furthermore, the Women's Decade contributed to the rapid proliferation of women groups and organisations, which rose both in number and membership. However, research carried out into the activities and performance of these organisations reveals that they did not succeed in empowering women. This was due to government interference in their activities, especially the co-optation of top women group leaders. Besides, the social welfare orientation of these organisations conspired to make them toothless bulldogs. The powerlessness of women in Kenya is further compounded by their gross under representation in key-decision making positions before, during and after the women's decade.

The marginalization of women in politics and decision making bodies is evident in several sectors. For instance in the judiciary though there are almost as many women as men with University Law Degrees, only a few are High Court and Court of Appeal judges. Fewer women than men are appointed to head parastatals and in the security and Armed Forces sector. In the arena of electoral politics, women's participation in the legislative and civic authorities has also remained marginal despite the female gender comprising the majority of voters. The first woman was elected into the National Assembly in November 1969 and one more was nominated to join parliament the same year to join eleven male nominated members. Within the former ruling party (KANU) hierarchy, women have had more difficulty participating at the national executive level except for one woman who held the position of Director of women and Youth Affairs at the ruling party secretariat from 1989.

Despite this marginalization of women in public decision making positions, the few women were still expected to effectively influence national policies in a manner that benefits other women in a male dominated field. By the end of 1991, there was no appeal to the government to remove the bulk of legislation discriminating against women. One reason for this might have been fear of victimization for being critical of government legislation and practice, especially when the individuals were presidential appointees in a single party political system. Besides, the small number of women in a male dominated parliament jeopardized their effort in pushing for gender related policy changes.

However, since the restoration of multiparty politics in December 1991, the political situation has changed significantly to accommodate some freedom of expression, association and assembly of not only political parties but also various interest groups concerned with the new democratization agenda. Indeed, in 1992, women became the most vocal group in lobbying for gender equity and social justice especially in matters of political empowerment of women.

In the 1992, a high premium was placed on political empowerment as a means of achieving other goals associated with the advancement of the status of women. It was then argued that if women attained key political decision making positions in large numbers, they would exert a decisive influence to ensure the repeal of laws that continued to subordinate women. Also, that this would assist women to participate in designing development policies that would mainstream gender.

From 1992, Women's lobby groups and organisations embarked on a mobilizing and strategizing campaign to ensure that women won the maximum number of political seats. This was through sensitizing women on the need to participate in elections and on the power of the vote. Also by encouraging and building confidence in candidates who wished to contest for elections. In February 1992, a National Women's Convention was held to chart out the women's agenda. In July the same year, the National Commission on the Status of Women (NCSW) organized a national training workshop for capacity building of women candidates.

In the meantime, more women's lobby groups conducted civic education programmes, gender and legal rights awareness campaigns. Though this resulted into more women participants in the political process, women were faced with many challenges ranging from harassment, discrimination within parties, financial shortages, electoral irregularities and intimidation. However, women proved their determination and tenacity to penetrate the male dominated political hierarchy. All they needed was a level playing field. Notwithstanding these challenges, women managed to scoop more political offices than previous years although they didn't attain the objective which was 30 –35 per cent women representation.

In conclusion, the gender question in contemporary Kenya greatly contributed to the empowerment of women. As already observed, during this time, integration of women in the development process became a government policy. However this approach did not address the question of gender imbalance between men and women in the development process. Besides social and economic factors such as education influenced accessibility to the political and economic systems in the country. Women

groups grew both in number and membership during this period. Their objectives were to address the inequalities existing in Kenya.

The government also played a major role by introducing affirmative action and also creating the ministry of culture and social services although this has not achieved much in liberating women. The programs of this ministry have continued to perpetuate stereotypes of the reproductive role of women. The Minimum Inter Party Parliamentary Group (IPPG) constitutional reforms of 1997 outlawed discrimination on the basis of sex. However some forms of discrimination are still evident in the application of our customary laws. The constitutional reforms process has become a milestone in the quest for gender equality in Kenya.

Today the government of Kenya has taken several initiatives to empower women. It has put in place machineries that provide gender training and awareness creation. The draft Bill of the constitution has incorporated provisions, which if implemented will achieve equality goals. These provisions include the affirmative action.

### **1.7: Factors influencing women's participation in decision-making**

As has already been noted, although women constitute a majority of the total population of Kenya, only an insignificant number of them have been elected into the top-most decision making organs in the country. The political participation of women depends to a large extent on the political, social and cultural climate in the country. In Kenya, the marginalization of women in power and decision making is evident in their proportion, which is small compared to man, in parliament and the executive.

In the last General Elections in December 2002 we had the greatest number of women contesting for political seats, since independence. However only a small number managed to be elected or appointed into the legislative. Only around twenty five women are holding positions of members of parliament (both elected and nominated) and members of cabinet (as ministers and assistant ministers). This is a negligible proportion of the total number of members of parliament and the cabinet. It is in no doubt therefore that there are factors that constrain women's participation in decision making and political power. These constrain result in gender imbalances.

There are a multiple of factors that combine to constrain women in their participation in politics. These factors are inter-related and they all work together to subordinate women. They include social-cultural barriers, educational, legislation, institutional and policy factors, financial problems, attitudes and stereotypes, and finally general irregularities and malpractice's in the electoral process.

One of the major barriers to participation of women in public is the social-cultural beliefs and value system which form the socialization process and the gender education and training, most men and women are exposed to from childhood. Traditional Kenyan cultures place women at a disadvantage over men in political participation. Most traditional societies in Kenya are patriarchal in nature and are characterized by male dominance in decision making. Having grown up and socialized in such societies, majority of Kenyans hardly conceptualizes women as capable decision makers. Women's low esteem and lack of confidence in their ability to competently execute public roles, largely arises from this socialization and

subordination. Their nurtured psychology is that they shun all activities, which may put them in positions, which challenge men.

This attitude is hardly surprising given that socio-culturally, the most dominant gender ideology in Kenya, as in many parts of Africa, is patriarchy, on the basis of which social relations in general and gender relations in particular are structured and practiced. Due to its pervasive oppressiveness, patriarchy has been termed by one report (our voice; 1993) as a form of slavery. Culture has been constructed in such a manner as to enhance male dominance. It defines sex roles for men and women which are so deeply engrained in the minds of ordinary people that they are taken for granted and are hardly questioned. The sex stereotypes and gender segregation in employment and allocation of roles in private and public life are products of the early socialization process and the indoctrination of the societal environment. This ends up in discrimination of women when it comes to holding high positions of leadership and decision making.

At the economic level, cultural practices trample on women's economic rights and confer on men the ultimate authority over household resources as well as over his wife and children. Women are therefore not considered as heirs of family property and as a result they are economically disempowered. This bars them from contesting for political seats and for those who do, they have difficulties campaigning due to lack of adequate finances.

Another aspect of culture that bars women from participation in decision making is their multi roles in the family. They have traditional familial or domestic roles which



are so engaging and leave them with little or no time to venture into public life. The public life of women is considered as a secondary role to domestic roles. The impression portrayed by culture is that women's roles are immutable and static.

The other constraints for women's participation in public life is lack of resources. They lack resources to boost them into political leadership. This aspect is closely linked to cultural practices and beliefs under which women have less access to credit, employment and education opportunities. The pre-capitalist customs and practices serve to legitimize patriarchy and female subordination. The definition of work tends to exclude domestic work and in that way the work done by women goes without remuneration. Besides, some state institutions reinforce patriarchal dominance by restricting credit to household heads who are culturally men and thus women can't access credit facilities. Besides women hardly engage in business due to their multiple roles which consume all their time. Such economically disempowered women are unable to register their parties or interest to participate in politics.

The other barrier to women's participation is lack of education. Women form the bulk of the illiterate and semi-educated Kenyans. The content and quality of education for women is inadequate to enable them to compete effectively with men for job opportunities in top decision making bodies. Most women are kept out of school by culture, which allows early marriages, and some even don't value educating the girl-child. The content of education is permeated by male dominance and it doesn't therefore promote women in education. Women take up feminine courses like home economics, secretarial courses, tailoring among others. Women are also taught to take up the less involving jobs and roles in the society.

Besides the content of formal education which degrades apprenticeship, lack of civic education is another major barrier for women's participation in public life. Women don't know their rights and most of them rely on men for advice in decision making. The legislative framework is also not favorable to women even though it is gender-neutral. The social practices and custom within which law operates continue to perpetuate discrimination and subordinate the status for women. Such practices tend to deny women their human rights. Due to illiteracy and ignorance, most women aren't aware of their legal entitlements and will therefore agree to take secondary roles in the society in accordance to dictates of culture.

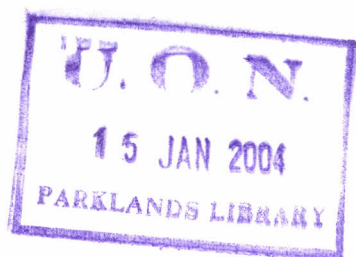
Furthermore, institutional and policy framework has an impact on women's participation. Women's national machinery is underfunded, structurally weak and ineffective in advancing gender and development policy in Kenya. This is compounded by gender blind political structures and processes which directly or indirectly discriminate against women.

However the draft bill of the constitution has addressed the question of gender discrimination and favorable provisions have been put in place to promote women. These will be addressed later in this paper.

Religious beliefs affect political orientation and thus participation of women in public life. Doctrines of religion are based on patriarchal authority, although the degree to which women are proscribed from engaging in political activity varies with religions.

Finally general irregularities and malpractice in the electoral process wrought in by inadequate and gender blind electoral laws and procedures bar women from participation in public life. Elections are usually marred with violence, bribery, rigging, intimidation and humiliation. Women suffer more in such instances, which may even go further into abuse, assault and rape. These factors make women to shy away from public life. Men are also hostile and unwilling to share power with women. They are comfortable with the status quo.

Though the draft constitution has attempted to address most of these problems through legal provisions, it is worth noting that law doesn't operate in a vacuum. Therefore unless the attitudes of people are changed, the provisions may only be as good as paper rights in the constitution. This calls for a concerted effort to address social and cultural factors that tend to subordinate women.



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## CHAPTER TWO

### THE LEGAL FRAMEWORK REGARDING PARTICIPATION OF WOMEN IN POWER AND DECISION MAKING

#### 2.1: Introduction

This chapter will focus at the various legal provisions that promote women's rights in Kenya especially in the realm of political power and public decision making. From the first chapter it has been established that women in Kenya are marginally represented in key political and decision making bodies. This point does not need to be emphasised. Barriers to women's political participation have also been identified. These include both legal and non legal constraints. The question here is identifying the most effective strategies for overcoming these obstacles and barriers. For purposes of this chapter, the major concern shall be the removal of legal barriers to women's participation through establishing laws that are gender sensitive and non-discriminatory. This objective can only be achieved by first examining the existing law and its application to women.

The question that they may arise here is why work at legal provisions yet law applies uniformly to all citizens. It has been argued that laws can be used to reinforce or give permanence to certain social injustices leading to the marginalization of certain groups of people. In the realm of women's rights, legal rules may give rise to or emphasize gender irregularity. Legal systems can also become obstacles when change is required in legal rules, procedures and institutions to remove inequality by

the oppressed. This necessitates an inquiry into what injustices are intertwined with the legal systems and the extent of their operation. One often finds that the de jure position which may provide for gender neutrality cannot be achieved in practice due to the numerous existing obstacles, which make the law powerless.<sup>10</sup>

It must be noted that the law can entrench rules and principles that are or can be interpreted to subordinate women. Besides, the implementation of laws can also be oppressive to women and also the practical reality within which law is applied may prevent the translation of abstract rights into real substantive rights. This is because law does not operate in a vacuum. There are social, cultural and economic factors, which are already established in the society. These may be so fixed and rigid that the law cannot change them without first changing these fixed ideologies.

The laws applicable in Kenya are provided for in Section 3 of the Judicature Act.<sup>11</sup>

The sources of law according to this section are as follows:-

- a) The constitution
- b) All other written laws, legislation or statutes passed by parliament.
- c) The substance of common law, doctrines of equality and statutes of general application applicable in England on 12/8/1897.
- d) The African customary law which applies,
  - (i) In civil cases
  - (ii) Only if it is not repugnant to justice and morality or inconsistent with any written law.
  - (iii) When one or both parties of the subject are effected by it.

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<sup>10</sup> Gender consideration in constitution- making; by Dr. Patricia Kameri – Mbote, Faculty of Law, University of Nairobi, 07/12/2001.

<sup>11</sup> Cap 8 of the laws of Kenya

The constitution is the supreme law of the land. It guarantees Human Rights as outlined in chapter five of the constitution. It is the basis for elections in Kenya as it grants civil and political rights. A citizen is guaranteed the right to universal suffrage and possible remedial measures where his civil and political rights are infringed upon. It is through the constitution that a society of people negotiates rules and procedures that govern them. It defines the parameters of relations between the governed and the governors. It sets up structures of government whereby the governed have willingly given up part of their rights for the general good of every citizen.

In the exercise of the right to universal suffrage, the citizenry reconstitute their government by electing leaders into the National Assembly. The Executive is then constituted from among the elected members of parliament. The president, who is himself an elected member of parliament then appoints the Chief Justice, Attorney General and Judges of both the Court of Appeal and the High Court. He therefore constitutes the Judiciary. This means that if few women are elected into parliament, there will be very few of them participating in the major decision making organs in the country.

The composition of members in government structures also affect the application of law on the people. For instance, the legislature is the main law making body and if only few or no women are part of it, it means that the interests of women are likely to be left out in the law making process. The Executive on the other hand is the body that makes and implements government policies and also implements laws made by the legislature. Lack of women in the Executive thus means that women's issues may

be left out in government policies. Likewise the Judiciary interprets and enforces the laws passed by parliament. Under-representation of women in this organ means that women's issues will be treated as peripheral or not articulated at all. Domination of men in these major government structures translates into men's ideology being entrenched in the law. The enforcement of such laws will definitely discriminate against women.

## **2.2: Local legislation.**

As already said, the constitution of Kenya is the most supreme law on the land and all other laws must be in consistence to it otherwise they will be null and void to the extent of their inconsistency.<sup>12</sup> The constitution is the basis of the right to vote in Kenya. Although this right is not specifically provided for in the Bill of Rights, there are various provisions in the constitution that allude this right.

The constitution provides for the key government organs and establishes the legislature. It provides for the elections of members of the legislature. It further provides that Kenya shall be divided into constituencies having such boundaries and names as may be prescribed by the Electoral Commission and that each constituency shall be governed by one member of parliament.<sup>13</sup> Besides, the constitution provides for qualifications of citizens to be elected into parliament.<sup>14</sup> Under Section 43, the constitution provides for qualifications and disqualification for registration as a voter. The qualifications are that one must be a citizen of Kenya who has attained the age of 18 years and has been ordinarily resident in Kenya. That person must also have been

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<sup>12</sup> Sec 3 constitution of Kenya

<sup>13</sup> Sec 32 & 42 of the constitution

<sup>14</sup> Sec 34 & 35



resident in the constituency in which he seeks to be registered. The section also provides for disqualifications.

The constitution also provides for instances in which elections will occur. Under sections 39 and 40, it provides for vacation of seats in parliament. It also provides for the formal dissolution of parliament which sets in motion the process of elections.<sup>15</sup>

In addition to the right to universal suffrage, the constitution is the basis for the rights and freedoms of citizens. This is provided for in Chapter V of the constitution of Kenya. Section 70 guarantees the protection of the Fundamental Rights and Freedoms of the individual regardless of their race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex. This protection is subject to the respect for the rights and freedoms of others and for the public interest. Section 79 and 80 guarantee the protection of the Freedom of Expression and that of Assembly and Association respectively. This is vital in this paper because political participation is generally the expression of an idea. The freedom of Association and Assembly is vital in that politics involve joining and forming political parties. Political meetings and rallies are also held during campaigns and these rights facilitates this. The Freedom of Movement<sup>16</sup> also facilitates the right to political participation by enabling political aspirants to move from place to place and to campaign for votes.

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<sup>15</sup> Sec 59

<sup>16</sup> Sec 81

Further the constitution provides for the right to Protection from Discrimination. It provides that no law shall make any provision that is discriminatory of itself or in its effects.<sup>17</sup> In Section 82 (3) the expression 'discriminatory' is defined to mean,

Affording differential treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin, residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description.

The section also provides that no person should be treated in a discriminatory manner by a person acting by virtue of a public office or public authority.<sup>18</sup>

However there are some laws exempted by section 82 (4) from the provisions against discrimination. These are laws affecting non-citizens, laws of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law, matters affecting members of a particular tribe or race of customary law with respect to any matter to the exclusion of any law with respect to that matter applicable to other persons.

It is notable that this section protects the right to non-discrimination on the basis of sex thus women are entitled to the same rights as men. However Section 82 (4) which provides exemptions to protection of this right legitimizes discrimination on the basis of sex thus women are not adequately protected. This is in the sense that the areas exempted directly affect women. These are areas especially of customary law which,

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<sup>17</sup> Sec 82 (1)

<sup>18</sup> Sub Sec 2

as already observed, relegated women as subordinate to men. The effect of this subsection is that the enjoyment of the fundamental rights and freedoms by women as guaranteed by the constitution is curtailed. Though discrimination is outlawed generally, sub section 4 denies women protection in their communities and family set ups thus the general protection does not meet the purpose.

Section 82 (4) basically legitimizes the traditional position in which women were regarded as inferior beings compared to men. The sub section has posed problems in the application of other laws that seek to give equal rights to men and women for instance the law of succession Act.<sup>19</sup> The constitution has therefore become a barrier to enacting of statutes that provide for equality of sexes. It therefore follows that true legal reforms will include amending the constitution to repeal some provisions, which in their effect subordinate women.

The constitution also provides for citizenship,<sup>20</sup> which is the basis for taking part in elections in Kenya. Here the constitution provides for persons who are entitled to be registered as citizens. These provisions are gender neutral but a technicality arises with regard to a woman's right to pass citizenship to her children and husband especially where he is a foreigner. If she loses her Kenyan citizenship upon marriage to a foreigner, it is not clear what is her status should the husband abandon her. The legal position is that she can retain her Kenyan citizenship but she cannot pass the same to her children. It has been held that laws barring a woman from passing citizenship to both her husband and children are discriminatory and contravenes the Convention on the Elimination of Discrimination Against Women. In this case, a

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<sup>19</sup> Cap 160 laws of Kenya

<sup>20</sup> Chapter VI

Tswana woman was married to an American man and they had three daughters. They lived in Botswana. Unity Dow, the woman couldn't get citizenship plus her children, in Botswana, because her husband was a foreigner. She challenged the constitutionality of this provision and it was held to be discriminatory.<sup>21</sup>

Finally the constitution in Section 41 establishes the Electoral Commission which is the main body that is responsible for the conduct of the election process in Kenya. Under Section 42A, the commission is responsible for the registration of voters; directing and supervising the Presidential, National Assembly and the local Government elections; promoting free and fair elections; promoting voter education throughout the country and such other functions as may be prescribed by law.

The commission plays a vital role in participation of the populace in elections especially in its functions to promote free and fair elections and to promote political awareness. This body can therefore be used as a vehicle to empower women in political participation both as voters and candidates in elections. This body is absolutely necessary especially now that we have identified illiteracy and ignorance as one of the barriers to women's participation in political power and decision making in the country.

Beside the constitution, there are other written laws and statutes enacted by parliament which also affect women's rights. Only those relevant to this paper will be highlighted. The National Assembly and Presidential Elections Act <sup>22</sup>is the law dealing with elections in Kenya. It covers registration of voters; the election of the

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<sup>21</sup> The Attorney General of the Republic of Botswana V. Unity Dow C. A No. 4/9/1995

<sup>22</sup> Cap 7 Laws of Kenya

president and the national assembly; the procedures to be followed; qualifications of voters and candidates and election offences and election petitions. The Local Government Act <sup>23</sup> regulates the election of the councilors. It has provisions for qualifications and disqualification of persons to be elected as such. The Societies Act<sup>24</sup> also plays a vital role in the election process as it provides for registration of political parties. Political parties are the arenas in which political leadership is exercised. It is through them that individuals work to attain the control, distribution and use of power.

The other body of laws applicable to Kenya is common law, doctrines of equity and statutes of general application in England as at 12/08/1897. It is worth noting that some of the English common law principles discriminate against women for instance the principles of “agency of necessity” and “presumed agency” which have been received in Kenya and are applicable to women. These principles are based on the notion that married women are chattels and have no proprietary capacity. This is illustrated in the case of *Best V. Samuel Fax company Limited* <sup>25</sup> in which it was held that the husband had a proprietary right in his wife.

Finally, customary law is the other body of laws applicable in Kenya but this is subject to some limitations. Customary law is governed by the practices and experiences of small communities. In Kenya, there is no consensus on what is customary law since the country has many and different tribal communities with differing customary practices, However in all these society there seems to be a general

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<sup>23</sup> Cap 265 Laws of Kenya

<sup>24</sup> Cap 108 Laws of Kenya

<sup>25</sup> (1954) 2 All ER. 394

consensus on the status of women in the society that is to say they are inferior to men and their role is domestic work.

The effect of customary law on gender is that women are subordinated in almost all communities and enforcing some customary law practices means discriminating against women. Most traditional societies discriminated against women. Most of them patriarchal in nature and it can therefore be said that women had no rights under customary law. However they were accorded better protection as mothers and had a right and access to resources even where they held no political leadership positions in the society. Recognition and application of this law especially in matters of personal law acts to discriminate women and in some instances, it creates conflicts with statutes. Under this law women are preoccupied in their reproduction and production roles that they are left with little or no time to participate in public decision making.

### **2.3: International instruments.**

International laws also provide for women's rights. Kenya has ratified and is signatory to many international legal instruments that have a bearing on the status of women. It is noteworthy however, that in the Judicature Act, International law is not categorized as one of the laws applicable to Kenya. For it to apply there must be clauses domesticating and entrenching the same into specific pieces of legislation. Therefore for international law to benefit women in Kenya, it must be domesticated through legislation. As at now Kenya does not have an automatic domestication clause. However Kenya is signatory to and has ratified several international instruments that have influenced law reform in Kenya.

Article 1 of the Universal Declaration of Human Rights (1948) states that:

“All human beings are born free and equal in dignity and right. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

This Declaration is the basic international instrument and statement of the inalienable and inviolable rights of all members of the human family. It is intended to be the standard of achievement for all nations and peoples seeking to secure universal and effective recognition and observance of Human Rights and Freedoms. The Declaration also outlaws discrimination on inter alia, the ground of sex. On this basis, we can say that it recognizes women's rights as Human Rights. Although it does not require any rights to be constitutionalised, the UDHR sets standards for all its member states. Constitutionalizing these rights gives them a supreme status and immunity from ordinary political processes. Kenya has entrenched this Declaration in the Bill of Rights, chapter V of the constitution of Kenya. It is the adequacy of these rights that is questionable.

Kenya is also a member of the United Nations and would therefore have an international obligation to provide for equal rights to men and women as provided for not only in the UDHR but also in the United Nations Charter (1945). The UN Charter in its preamble states :-

‘We the peoples of the UN are determined to reaffirm faith in fundamental human rights, in the dignity and worth of the women and all nations large and small’.

The inclusion of a clause on women has indicated a commitment to enforce women's rights as human rights.

Kenya is also signatory to the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). The adoption of these covenants in 1976 was a milestone in the prohibition of discrimination as an important human rights principle. The ICCPR provides for equal rights of men and women to the enjoyment of civil and political rights. This encompasses the right to take part in the conduct of public affairs directly or through freely chosen representatives and the right to have access on general terms of equality to public service.<sup>26</sup> The ICESCR on the other hand provides for equal enjoyment of all economic, social and cultural rights and these include the right to work, education, favorable working conditions, right to social security and special protection during a reasonable time before and after birth. These two covenants increased the obligations in the area of equality of sexes under international law.

The UN, to which Kenya is a member, has expressed great concern on women's rights since its inception in 1945. In 1946, it established the International Commission on the Status of Women. This commission was meant to promote women's rights. Besides, the General Assembly and other specialized agencies of the UN have adopted various covenants in the area of women rights.

Firstly, in 1952, the Convention on the Political Rights of Women was adopted. Its aim was to ensure the equality of men and women in the participation of public life.

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<sup>26</sup> Article 26



State parties are obliged to grant women political rights which include right to vote, right to be eligible for elections to all public elected offices and bodies and right to exercise all public functions on equal terms with men without discrimination of any kind.

Secondly, the UN adopted the convention on the Nationality of Married Women in 1957. This aimed at ensuring the right of all persons to a nationality as recognized in the UDHR. It acknowledged that laws which imposed on women the nationality of their husbands does affect women's right to a nationality. It expressly provides that men and women have equal rights to acquire, retain or change their nationality.

Thirdly, the UN adopted the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage in 1962. The aim of this convention was to guarantee equal rights for both spouses in connection to marriage. It provides that marriage should be entered into with free and full consent of the spouses and this is to be expressed to responsible authorities. It required that a minimum age for marriage be established by all the member states and that all marriages be registered.

Fourthly, the convention on the Elimination of All Forms of Discrimination Against Women was adopted in 1979. This is the most comprehensive and exhaustive legal instrument on the Rights of Women.

The Convention on the Elimination of All Forms of Discrimination Against Women to which Kenya is a signatory deals with discrimination in both the public and private spheres. It suggests that women can face discrimination not only on the basis of race,

sex or religion, but also because they are married and likely to bear children, or because they belongs to a community in which by tradition, men who determine that she belongs to the domestic domain, govern her.

#### **2.4: Legal provisions of CEDAW**

Here we will examine in brief the provision of CEDAW that relate to women's political rights.

Article 1 defines the term Discrimination in very exhaustive terms and it forms the springboard of definition of the term. It is defined as follows :-

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of imploring 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.

Article 2 condemns discrimination against women in all its forms and the state parties agree to persue by all appropriate means and without delay a policy of eliminating discrimination against women. State parties undertake to embody the principle of equality of men and women in their constitutions and to make other measures to prohibit discrimination. Also to provide legal protection of women's rights on equal basis with men, to establish tribunals and other public institutions to effectively protect women, to repeal all laws discriminating against women and to take measures to modify or abolish existing laws, regulations, customs and practices that constitute

discrimination against women. This Article is also concerned with acts of private entities, which should be in conformity with the obligations of CEDAW.

Article 3 requires states to take all appropriate measures including legislation, in all fields in order to guarantee women their basic human rights and fundamental freedoms on the same basis as men.

Article 4 provides that states should take temporary measures aimed at accelerating women's equality and all measures taken for maternity protection should not be considered as discriminatory. This Article adverts to the need for Affirmative Action aimed at de facto equality between men and women.

Article 5 deals with the need to take measures to modify the social and cultural patterns of conduct for men and women in order to remove prejudices and cultural stereotypes. The Article deals with sex roles and advocates for the proper understanding in family education and recognition of maternity as a social function. That men and women share a common responsibility in the upbringing of children.

Article 6 provides that states should take all appropriate measures to suppress all forms of traffic and exploitation of women through prostitution. Article 7 provides for the political and public life of women. That discrimination should be eliminated in these spheres. Women and men should share equal terms in the political and public life of the country. The Article provides for the right to vote and be eligible for election to all public elected bodies; to participate in formulation of government policy and to hold office at all levels of government and to participate in Non-

Governmental Organisations and associations concerned with public and political life of the country.

Article 8 provides that women shall be given the opportunity to represent their Government at international levels and to participate in the work of international organisations. Article 9 provides for equal rights of men and women to acquire change or retain their nationality and that of their children. That marriage to a foreigner does not automatically change the nationality of the wife. Article 10 grants women equal rights with men in the field of education. This includes access to information.

Article 11 requires measures to be taken to eliminate discrimination against women in the field of employment. States should ensure equal rights of women and men to work, remuneration, employment opportunities, social security, health protection and safety in working conditions and free choice of profession and employment. The Article also safeguards the issue of reproduction and women should not be discriminated against on the ground of marriage or maternity.

Article 12 takes measures to ensure access and equal opportunity to health care services including family planning. Appropriate services should be provided to women in connection to pregnancy, confinement, post-natal care, free services and provision of adequate nutrition during pregnancy and lactation. Article 13 grants women on an equal basis with men the rights to economic and social benefits.

Article 14 takes care of the particular problems of women in rural areas and of the roles they play in the economic survival of the family including unpaid work and grants them certain rights to benefit them. Article 15 provides that women shall have equality with men before the law with respect to legal capacity and freedom to choose their residence and domicile.

Article 16 enjoins all state parties to take measures to eliminate discrimination against women in all matters relating to marriage and family. Women shall have equal rights and responsibilities with men in this area. Article 17-30 establishes the procedure for implementation of the convention.

Besides international instruments, there are regional instruments that touch on women's rights. One of these is the African Charter on Human and Peoples Rights. This articulates the rights of women and makes them applicable to the Organisation of African Union State members, of which Kenya is one. Article 18 of this charter provides that states shall take all appropriate measures to ensure elimination of discrimination against women and also ensure the protection of the rights of the woman and child as articulated in international conventions and declarations.

There are also other specialized bodies like the International Labour Organisation that have made provisions touching on women. This particular one refers to rights of women in employment. It provides for the standard working conditions for women.

It is worth noting that the international scene is not lacking in terms of women's rights and all that needs to be done is enshrine them in our domestic laws so as to have the force of law.

At the 1985 World Conference on women held in Nairobi, the domestication of CEDAW was identified as an important step in the implementation of the strategies formulated at the conference at the national level. The same issues were amplified later.<sup>27</sup> Subsequent international meetings concerning women's rights have expressed the necessity of domestication. There is a well established principle of international law that all states parties must organize and regulate their domestic jurisdiction to abide by international legal obligations. The Permanent Court of International Justice said that France could not rely on her own legislation to limit the scope of her international obligations.<sup>28</sup>

The only difficulty under international law is its enforcement. Although it provides for women's right and imposes an obligation on state parties to domesticate these rights, its enforcement mechanism is weak and countries will default it. Therefore unless a state has the political will to and enacts municipal law to incorporate international obligations, its subjects will not benefit from such obligations. In our national scene, steps have been made in the Draft Bill of the Constitution to include the provisions of CEDAW. However these remain unfruitful until the Draft constitution becomes the constitution of this country. Later in this chapter, we will briefly examine the extent to which the Draft Bill of the constitution has complied with CEDAW in relation to civil and political rights of women.

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<sup>27</sup> In the 1990 'Abuja Declaration on Participating Development: The Role of Women in Africa in the 1990s.'

<sup>28</sup> Free zones of upper Savoy and District of Gex case (1932) PCIJ, series A/B No. 46 Pp. 167.

In this chapter, we have alluded to the concept of equality and discrimination. We will briefly look at the meaning of these terms and their interplay and how they amount to gender imbalances.

## 2.5: Discrimination and equality.

Discrimination means affording differential treatment to persons attributable mainly to their race, tribe, sex, place of origin, residence or any other local connection creed or political opinion.<sup>29</sup> Under CEDAW, it is defined as any distinction, exclusion made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights.<sup>30</sup> Gender discrimination thus means according differential treatment to men and women on the basis of sex.

Discrimination in itself is neutral. Two phenomena with different properties can be treated differently so long as they are different and there exists good or acceptable justification for different treatment. This is not discrimination. The term has a negative connotation if discrimination is based on sex, race, tribe, origin or other social traits. Sex is also neutral in itself but the concept of sex discrimination means discrimination directed to individual women or women as group. When women are discriminated against themselves this is not discrimination. A distinction is made between positive and negative discrimination on the basis of aims and consequences of discrimination. Positive discrimination to one sex means negative discrimination to the other and vice versa. Positive discrimination is adopted to benefit of favor one group. Positive discrimination in favor of women relates to their reproductive

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<sup>29</sup> Sec 82 of the constitution

<sup>30</sup> Article 1

function or rules that cannot naturally apply to men for instance the right to abortion or right to breast-feed. This type of discrimination is acceptable for instance in Affirmative Action and it is aimed at removing historical prejudices and injustices meted on women. This is usually a temporary measure.

Discrimination can also be direct or indirect, it is direct where rules are made intentionally to treat men and women differently from their inception whereas indirect discrimination is where rules in their operation result in favoring one sex though this was not the intention of the law. Our concern is indirect discrimination since virtually all laws are gender neutral.

Equality on the other hand means similar treatment. The equality we are talking about here has already been achieved since our laws are gender neutral. However there are special circumstances that only affect one category of persons thus de jure equality can amount to discrimination. This is largely because law does not operate in a vacuum but in a gendered social context. Equality of opportunity is a good starting point in addressing discrimination but this must be accompanied by looking at the social context. This justifies the move by liberal feminists from formal equality to substantive equality. The later involves addressing the social paradigms inherent in the society and it brings about equity.

Formal equality can be elusive because all subjects of law cannot be treated equally.

Aristotle asserts that,



‘If they are not equal, they will not have what is equal. This is the origin of quarrels and complains when either equals have and are awarded unequal shares or unequals equal shares.’

The concern of this paper is substantive equality. It is important that legal reforms look at the question of gender in a socio-cultural perspective.

Over the last four years, when the process of reviewing the constitution in Kenya has taken center stage in the national discourse there has been a consensus that democratic values, social justice and fundamental human rights are critical to the constitution. Thus, the constitution as the supreme law of the land should define the parameters within which human dignity, justice, rights and freedoms of all women and men should operate. It should be a basis for guaranteeing every Kenyan protection and security from any injustice or discrimination- deliberate or accidental, subtle or blatant, direct or indirect.

**2.6: The extent to which the draft bill of the constitution has incorporated women’s rights with regard to political power and public decision making**

In the preamble the draft constitution is mindful of women’s concerns in protecting and nurturing the well being of the individual, family, and community and broadly recognising the primacy of the family as a basic social unit. The wording of the preamble also includes both men and women. Being the supreme law, the constitution provides a good basis for the protection of women’s rights.

Under section 5, the draft constitution includes international law as one of the classes of law applicable in Kenya. This forms a basis for the application of CEDAW and other International Declarations on women's rights which Kenya has signed and ratified.

Chapter three provides for national goals, values and principles and recognizes diversity and has provision for participation of power. More significantly, full participation of women is listed as a national goal.<sup>31</sup> Further it provides that one third of all elective and appointive bodies should be women.<sup>32</sup> The provision for social justice, basic needs of food, shelter, education, clean water, sanitation, health and a clean environment also enhance women's rights.<sup>33</sup> Under section 15(1) d and (i) provides for duties of a citizen. Home-making and promotion of the family is recognized as one of them. This is an acknowledgement of the reproductive roles of women.

Section 16 provides for citizenship and accords equal rights to men and women and this is not lost through marriage or dissolution of marriage. The foreign husband of a Kenyan woman and widower can also reside in Kenya.

Chapter 5 provides for the Bill of Rights. It provides for equality and all persons have full and equal enjoyment of all rights and freedoms. (Section 33). Section 40 provides for the inherent dignity of all men and women and this should be protected. The draft also protects persons from discrimination on grounds of sex, marital status or

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<sup>31</sup> Sec 14 (11)

<sup>32</sup> Sec 14 (12)

<sup>33</sup> Sec 14 (14)

pregnancy.<sup>34</sup> This is a milestone for women empowerment because they will not be discriminated against by virtue of being female .

Section 34 (3) provides for Affirmative Action permitting the state to take appropriate measures to benefit individuals or groups who are disadvantaged whether or not as a result of past discrimination. Section 35 (4) expressly outlaws any culture, custom or tradition that undermines the dignity, welfare, interest or status of women. This provision will help in eliminating discriminatory customary law and sex stereotypes.

Section 35 (5) is an undertaking by the state parties to protect women and their rights bearing in mind their unique status and natural maternal role in society. The state undertakes to provide reasonable facilities to enhance the welfare of women to enable them realize their full potential.

Under Section 38, the family is recognized as the natural fundamental unit of society and as a necessary basis for social order. It accords equal rights in, during at the dissolution of marriage. Quite importantly in the realm of politics, the rights to make political choices such as forming or participating in forming a political party, to participate in the activities of the parties and to campaign for a political party are provided for. Besides there is a right for free, fair and regular elections and all adults have the right to be registered as voters and to vote in any election and to stand on conditions of equality for public office or offices within a political party of which they are a member and if elected, to hold office. This explicit provision on an equality basis is a milestone for women because they can challenge elections if they are denied such rights. Political rights are provided for in section 50 of the Draft constitution and

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<sup>34</sup> Sec 34 (1)

are recognized as human rights. Section 54 provides equal rights for all persons to own and acquire property either as individuals or in association with other persons. Section 56 provides for the right to social security for all whereas section 57 provides for the right to healthcare including reproductive health care.

Besides the Draft constitution also provides for access to justice for all persons<sup>35</sup> and therefore women can enforce the rights guaranteed in this Draft. Section 73 grants the right to ask the commission on Human Rights and Administrative Justice or the court to uphold the Bill of Rights. This provides an adequate enforcement mechanism for the realization of women's rights.

The draft also provides for fair representation of women. Section 76 grants the right of all citizens to vote and to stand for elections in legislative and executive bodies. Section 76 (6) specifically provides that elections shall ensure fair representation of women. The right to vote is specifically provided for under section 78 of the Draft Bill.

Under section 77 (2), political parties must ensure that one third of its candidates for direct elections are women and that fifty per cent of its candidates for proportional representation at public elections are women. The Draft also provides that one third of the members of the National Assembly shall be women.

Besides there are other provisions whose application would result in empowerment of women to participate in politics and decision making. In a nutshell, the draft bill of

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<sup>35</sup> Sec 67

the constitution is a milestone for women's rights in Kenya. However there are some gaps and inadequacies in the Draft Bill that need to be examined. This will be done later in this paper. Nonetheless if the Draft Bill becomes law, it will mark a new political dispensation for women.

In conclusion, Kenya is making deliberate progress to empower women. There should be more lobbying to pass the Draft Bill of the constitution to become law if these rights are to become a reality.

### **2.7: The principle of 1/3 women and mixed proportional representation and their effect in empowerment of women**

The draft constitution provides for affirmative action at all levels of governance. Chapter seven, which provides for the legislature, sets out the representation of women in the National Council and the National Assembly. Articles 105, 106, 107 and 108 provide for the Mixed Member Proportional Representation (MMPR) electoral system. This requires that at least one third of all members of each House of parliament should be women. In this connection, the MMPR electoral system provides for a formula for implementing affirmative action. It provides for a bicameral parliament totaling 310 members with at least 75 women seats guaranteed through the now proposed MMPR electoral system and additional seats can be won through the normal competitive elections. This will be done as follows:-

- a) Lower House – National Assembly will have 210 members elected on basis of single member constituencies. 90 members on a basis of party lists shall be a woman.

- b) Upper House – National Council will have 70 members on basis of single member constituencies (coinciding with District boundaries) and 30 seats for women candidates on multi-member constituencies representing each of seven provinces and two representing Nairobi province.

Besides the MMPR formula the draft constitution in section 109 (I) provides explicitly for affirmative action. It states;

..... at least one third of the members of each house shall be women.

Various sections in the draft allude to affirmative action. Chapter 10 in some sections provides for a third representation of women in local decisions - making structures. The question is how these will improve the lot of women in decision making processes.

By definition, affirmative action is a deliberate temporary measure or strategy aimed at redressing historical, cultural, political or economic barriers that have marginalised specific groups from active participation in the development process and in decision making. For purpose of this study, our focus is women as a marginalized group. Affirmative action will therefore redress the imbalance in policy-making institutions in this country by bringing them into a higher degree of access and participation in governance and development. Once parity is achieved, affirmative action automatically loses its validity and is either revised or abolished altogether. Affirmative action offers an opportunity not only for inclusion but also for self actualization to the marginalised members of the society.

The effect of legislating affirmative action is that the law will warrant its enforcement by the judiciary and the executive. It will also reflect the commitment of Kenyans to implement the same.

The effect of affirmative action is that it will increase the number of women participating in politics, this will, as a result, bring new perspectives and priorities in political leadership. Women will influence priorities and decisions in parliament and local authorities where the leadership in women's interests can be expected to permeate to other sectors and to sustain an explicit message to the rest of the country. If parliament becomes gender sensitive, the vision and policies of the country will be favorable to women.

Affirmative action will therefore make politics more accessible to women. It will ensure participatory democracy and re-distributive justice. Once included in organs of government, women will advocate for their rights. They will bring in new perspectives, interest, needs and diversity of views and in effect enlarges the democratic space in the country.

Affirmative action is a form of compensatory justice, which calls for governance. Such women will be in a position to put the concerns of women on the government agenda and influence its policies.

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## CHAPTER THREE

### THE ROLE OF POLITICAL PARTIES AND THE ELECTORAL COMMISSION IN EMPOWERMENT OF WOMEN.

#### **3.1: Introduction.**

This chapter seeks to establish that besides the law, there are other institutions which when regulated by legal measures would empower women. These include political parties and the electoral commission both of which play a vital role in electoral politics. These institutions should embrace affirmative action in them in order to empower women politically.

Why look at political parties and the electoral commission? This is because they play a significant role in political participation in any democracy. Political parties are not mere appendages of modern government; they are at the center of it and play a determinative role in it. Parties are the best evidence of the nature of any regime. There are no alternatives to political parties in the establishment of democracy. We are therefore faced with a world of democracies based on parties.

Political parties play a significant role in democratic consideration. This includes expression of distinct interests in the electoral process resulting from competition of parties. They also provide the electorate with a choice of leadership. These two institutions are the primary actors in politics in that they

govern the electoral process. They legitimize and sustain laws and norms that govern political participation. They also provide voter and civic education programs that seek to facilitate participation.

### **3.2: Political Parties**

At the foundation of all public institutions is the political element. It is this which, according to Heckscher, relates every major problem to the party system.<sup>36</sup> The political party is so vital at the general level that a constitutional analysis which fails to acknowledge it is unlikely to bear a full relation to reality.

In this paper we are seeking to establish ways of empowering women to participate in politics and decision making in this country. Political parties are another avenue of women empowerment. In the following discussion we will see how parties can meet this goal.

Political parties are institutions through which individuals work to attain the control, distribution and use of state power. Members of a political party share similar ideas values and vision about the society and its future development. This is represented in the party manifesto. Political parties are the arenas in which political leadership and control is exercised.

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<sup>36</sup> Ojwang, 1981, pp. 511-521; Arder 1974, Pp. 17-39; Hecksher says 'Practically every study of an important (political problem) leads back to the party system; 1957 Pp. 119

There are two party systems in a constitutional order, one-party or multi-party system. These systems reflect the legal order of a country. In the words of S.A. de Smith; he wrote:

I am willing to concede that constitutionalism is practical in a country ..... where political groups are free to organise and to campaign in as well as immediately before elections with a view representing themselves as an alternative government .... ;and I am not easily persuaded to identify constitutionalism in a country where any of these bodies is lacking.<sup>37</sup>

In the same vein the 1<sup>st</sup> Amendment to the constitution of the United States provides a safeguard for the plurality of parties. Referring to this guarantee, the Supreme Court has remarked;

There is .... no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and the 1<sup>st</sup> Amendment freedoms. New parties struggling for their place must have the time and opportunity to organise in order to meet responsible requirements for ballot position, just as the old parties have had it in the past.<sup>38</sup>

Therefore political parties provide alternatives upon which the life of the state can be molded and shaped. It is a fundamental premise to development of

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<sup>37</sup> De Smith, S.A. (1961) Westminster's Export Models: 'The legal Framework of Responsible Government' 1 Journal of common wealth political studies 2.

<sup>38</sup> Glen A. Williams V James A. Rhodes and Socialist Labour Party V James Rhodes 393 U.S. 23, 21 L Ed. 2d 2 (1968) Pp. 32

governmental institutions. Upon this, structures have been evolved that take the form of legal phenomena hence party systems are part of the fundamental assumptions that are attached to constitutionalism and legal set-up. The reason of a political party is to mobilize people and resources to gain access to regular executive and legislative machinery of the state with a purpose to take charge of the state's constitution and all its institutions. This means that political parties are indispensable vehicles in propelling people to political power because for one to contest for political leadership, they must be nominated by a legally registered political party.

Since the repeal of Section 2A of the constitution of Kenya in 1992 which paved way for multi-party politics, there are about 50 political parties in Kenya registered under the Societies Act. The advent of multi-partyism was expected to play a major role in democratising Kenyan politics and make them more gender responsive by removing all forms of gender discrimination. However many of the emerging political parties have failed to challenge the patriarchal culture, which excludes women from decision-making and from accessing positions of power and influence. Instead they have continued to evolve policies that discriminate against women.

Kenyan women have suffered immense discrimination in seeking to ascend to political power through the male-dominated and led political parties. This is due to the patriarchal ideologies permeating such parties. For instance the belief that politics is not the domain of women ensured that women were not nominated for elections. Various measures have been proposed to remedy this

sad situation. These include having women led, women's only and gender responsive parties in which men and women are equally represented in leadership on a 50-50 proportion. Each of these proposals has its pros and cons. The point here is that we need democratic parties whose philosophy mission and vision are gender responsive. These should in addition, have structures and management principles that encourage the participation of both men and women.

It is important that political parties be guided by fundamental values of political interpretations or ideologies. This could either be capitalism, communism, marxism, Protestant, ethics and Islamic fundamentalism. An ideology of a political party reveals how it perceives reality, the assumptions it makes about political power, its views on what power is legitimate, and what it thinks about who should wield the power. In Kenya parties have been ethnic or personality based.

The major political parties in Kenya today are KANU and NARC both of which have an ideological kinship in that they all believe in liberal values like the rule of law, freedom of expression, property rights, constitutionalism, a free market economy and privatization. However the operationalization of political ideologies have an impact on women's participation in political power and decision making. This is reflected in the way party positions are filled and their distribution to men and women. More often than not women don't get positions in the male led parties and where they do, they get non-participatory roles. The other question about political parties and their effect

on gender is to examine what strategies parties have adopted to address the question of gender.

Engendering political parties entails changing political structures at five important levels. That is to say ideology, vision, structures, programs and policies and finally party symbolism, images and language. Firstly, ideology identifies manifestations of patriarchy, in terms of assumptions it makes about power relations, negations of political conflicts and relationship between governors and citizens. Secondly, vision tells us to what use a party will put power if it acquires it. Citizens should vote for parties that de-institutionalize patriarchy. Thirdly, the structures of a political party should incorporate women's issues and have positions for women. Fourthly, the programs and policies of the party for instance recruitment, mobilization of party activities should not be dominated by men. Women personnel should equally be assigned tasks in the party. Finally, party symbolism, images and languages are central to the constitution of powerlessness in a society. Some of these may be consistent to patriarchal culture, dominance and violence and should therefore be avoided.

Women should be sensitized and informed that the right to vote is a human right. Also that every Kenyan citizen is free to join a political party of their choice. The freedom of association grants all citizens the right to a political party which promotes their interests and aspirations. Before joining a party, its important that citizens be conversant with the party constitution, code of

conduct and manifesto in order to fully understand and participate in realization of it's mission and vision.

Since the introduction of multi party democracy in Kenya, most people have become conscious of their active choices through taking part in politics. Given that these parties maintain a list of the registered and elected officials of its structures with the registrar of societies, it is important for its supporters to maintain participation in the respective party organs in order to influence party decisions.

Political parties are therefore a key player in participation of women in politics and decision making. They must therefore consider examining party structures and procedures to remove all barriers that directly or indirectly discriminate against women's participation. Besides they should develop initiatives that allow women to participate fully in all internal policy-making structures and; appointive and electoral nominating processes. Finally they should incorporate gender issues in their political agenda, taking measures to ensure that women can participate in the leadership of political parties on an equal basis with men.

### **3.3: Gender audit of political parties with reference to the constitution.**

The current constitution does not provide for women's rights in political parties specifically. There are only general provisions applying to men and women equally. These include the freedom of association which allows formation of political parties. The constitution requires that candidates for

elections in the Presidential and National Assembly elections should be members of a political party registered under the law.

However, the Draft Bill provides extensively for political parties. Firstly in section 50 (I) the Bill provides that every citizen is free to make political choices, which include the right to; form, or participate in forming a political party, to participate in the activities of, or recruit members for a political party, and to campaign for a political party or cause.

Section 50 (2) guarantees every citizen the right to free, fair and regular elections for any elective public body or office established in terms of the constitution, or office bearers of any political party of which they are a member. Section 50 (3) provides that every adult citizen has the right, in accordance to the relevant legislation, to be registered as a voter and to vote by secret ballot in any elections and to stand on conditions of equality, for public office, or office within a political party of which they are a member, and if elected, to hold office. These rights are guaranteed to all citizens and these include women. The entrenchment of political rights in the Bill of rights is an achievement in the campaign for women's rights because they can challenge any move that infringes on these rights.

Part III of the Draft Bill provides for political parties. Section 87 provides for the right to form a political party to every citizen. This includes women. Section 88 provides the roles and functions of political parties aimed at ensuring democracy and the participation of people. Section 89 provides for



registration of political parties a responsibility placed on the Electoral Commission which is required to keep and maintain a register of political parties.

Section 90 provides for qualifications for registration of political parties. Among these is that the party must, by its constitution or Articles of association, seek to promote and respect human rights and gender equality and equity. A party that is founded on religious, linguistic, racial, ethnic, sex, corporatist or religious basis or seeks to engage in propaganda based on any of these matters does not qualify for registration. This provision protects discrimination of women on the basis of sex in formation of political parties. Besides section 90 (3) provides that a political party shall not engage in, or encourage, violence or intimidation of its members, supporters or opponents or any other persons. This provision is a milestone for women who have suffered a lot in political participation due to violence meted on them. A party can be cancelled for non compliance with these provisions.

Section 93 provides for the establishment of a political parties fund administered by the electoral commission. This fund will go along way to encourage women to participate in political leadership especially those who have been barred by lack of adequate resources to campaign. Further the Electoral commission is empowered to prescribe the maximum amounts of money that a party may spend on its candidates and the amounts an independent candidate may spend on an election. This provision will empower women politically because they will not have to compete with men in terms of

money in which case women have always lost because in the traditional set up they did not own property.

#### **3.4: The role of the electoral commission on the participation of women in politics**

The Electoral commission is established under section 41 of the constitution of Kenya. It is the body responsible for elections in Kenya. It is empowered to handle all electoral matters in respect to parliamentary, presidential and civic elections in Kenya. Its functions include voter registration, handling of electoral offences, recruitment and deployment of election officers, designation and naming of electoral boundaries, creation and administration of polling stations, oversight of electoral process, announcement of electoral results, enabling party nominations, Gazetting winners and forwarding of names to the speaker of the National Assembly and most importantly they conduct voter and civic education.

Among its functions, the most important ones to the question of women's participation is voter education and handling of electoral offences. For a long time, women have been ignorant of their rights. This is due to the high levels of illiteracy among women coupled by the sex stereotypes which dictate that political life is not the domain of women. The commission therefore has a major role in administering civic education which refers to a process of acquiring information and skills that citizens need to play their citizenship roles responsibly and effectively. This education is largely informal and is a

good base for creating gender awareness. The quality of a government depends on the quality of citizens. Passive and uninformed citizens get weak undemocratic governments. The converse is also true. Civically active and informed citizens monitor performance of leaders and implementation of policies. They also choose their representatives with care and promote practical policies, which improve their lives.

The electoral commission should conduct voter education from a gender perspective aimed at addressing the current gender imbalance and increase women's participation in politics. As a social value gender sensitivity requires that citizens recognize the difference between men and women, and how this represents itself in the society. It should aim removing all gender based myths /stereotypes around these differences. It should respect and protect the rights of each other as male and female. Besides, it should place emphasis on the need for both men and women to work together in society without discrimination.. It should take affirmative action to redress past discrimination in the political arena. Finally it should recognize the unique contribution of both men and women to politics and general development in the country.

The other area in which the electoral commission can empower women politically is in the administration of electoral offences. One of the major obstacles to participation of women in politics is electoral violence. Women candidates and their supporters are usually harassed, intimidated, subjected to humiliating forms of abuse and in some cases, even raped. Electoral violence should not only be avoided but also condemned by all means because it

ensures that the playground is not level. In a bid to address this, the electoral commission has developed a code of conduct requiring all actors in the electoral process to desist from perpetuating any acts of violence during elections.

The commission therefore has a role in enforcing the code of conduct. Besides it should ensure that the mode of monitoring and observing elections is gender sensitive. Monitoring and observance of elections is a process of ensuring that elections take place in a free and fair atmosphere and in accordance with electoral laws. Monitoring is not confined to the polling day but encompasses the entire pre-election environment, campaign period, actual voting, counting and announcement of results and any election petitions that are heard.

Elections generally precipitate violence at all levels of the electoral process. Security must therefore be beefed up during elections. Notwithstanding the provisions of the Police Act, a police officer assigned duties during the conduct of elections is deemed to be an election official and is subject to the direction and supervision of the commission. The duties of the police officers is to maintain peace, law and order. It is important that such officers and observers to be gender sensitive. They must insist on fair treatment and non-harassment of all women, election observers, voters, agents and candidates. They should also be committed to the principles of democracy, human rights and the rule of law. Finally they should not engage in any conduct that may bring the cause of women's political empowerment to any form of public disgrace on any grounds.

The commission should make the electorate aware of mechanisms for reporting or responding to violence. Election offences should be prosecuted with undue delay. The commission should also seek to protect women. This will open up avenues for women who have been put aback by the prevailing violence in the conduct of elections. The timing of elections, campaign hours, voter registration, polling stations and their location should be accessible to women without predisposing them to any dangers peculiar to them as women.

### **3.5: Role of pressure groups in empowerment of women.**

Interest and pressure groups exist for purposes of influencing specific lines of decisions that affect their respective constituency. Most of the lobby groups are registered as Non Governmental Organisation. These should seek to mobilize support of a common course and protest against bad policies. In Kenya there are many pressure groups working for the advancement of Kenyan women socially, politically and economically. These include Kenya Women Political Caucus, League of Kenyan Women Voters, Coalition on Violence Against Women, Maendeleo ya Wanawake organisation, the National Commission on the Status of Women among others. There is need for these lobby groups to come together with a common point that is to say women empowerment and lobby for changes in the legal system to engender it.

Among the activities undertaken by these organisations are voter and civic education, gender sensitization programs, socio-economic support of women especially at the grass root levels and capacity building of women electoral aspirants.

The Kenya women political caucus for instance is a non-partisan broad-based national organisation incorporating women politicians and women organisations that have demonstrated a commitment to promote gender responsive and democratic political system in Kenya. The caucus evolved out of the shared vision, mission, aspirations, interests and commitment of Kenyan women to nurture an instrument to facilitate the political advancement of women for sustainable development and democratic governance of this country. The fundamental belief was that the principles of gender equity and Affirmative Action are essential for promoting national development and that key institutions of governance such as parliament are critical to developing a gender responsive policy and legal framework that will facilitate the achievement of an equitable process.

The caucus has made significant achievements in respect to the foregoing including adoption of Affirmative Action and Gender Equity principles in the inter Parties Parliamentary Group Reforms whereby it was legislated that  $\frac{1}{2}$  of the nominated positions shall be reserved for women. Discrimination on the basis of sex was also outlawed. The caucus also mobilized women to participate in the constitutional review negotiations whereupon it was recognized as one of the stakeholders representing the interests of Kenyan

women. It also saw the adoption of gender equity and Affirmative Action principles in the Constitutional Review Acts of 1998, 2000, 2001 and 2002. The caucus also saw the engendering of the poverty reduction strategy paper. Now the caucus is lobbying for the adoption of Affirmative Action and Equity motions, both of which were adopted by parliament in 2000. It is now lobbying for the adoption of the respective Bills.

In conclusion, the role of lobby groups for women's rights, cannot be underscored. They have played a significant role in empowerment of women especially by engendering the political structures and processes and also through gender sensitization.

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## CHAPTER FOUR

### RECOMMENDATIONS AND CONCLUSION.

From the foregoing discussion, it is apparent that women have been discriminated against in the realm of political power and decision making. Strategies adopted by the government to remedy this past discrimination have also been identified. Indeed, Kenyan women have a lot to celebrate as we move towards a new constitutional dispensation. The Draft Bill of the constitution represents major gains towards gender equality and equity. It delivers on many points that have been the concern of the women's movement in Kenya.

The clamor for a new constitution gained momentum in the 1990's and this included championing the rights of marginalized groups, women being one of them. The Draft Bill accommodates the diversity of the Kenyan people including gender and it respects the principles of human rights and gender equity as observed in the previous chapter.

In the realm of politics and public participation, where rules have been gender neutral, a provision on a minimum of a third representation by women in different levels of government will take care of historical limitations to women's participation. However there are inadequacies in the draft and recommendations will be made to ensure that these are redressed.

Firstly the principle of affirmative action has not been included in the preamble of the draft bill despite the numerous submissions made by women to that effect. There is need to lobby for inclusion of this in the preamble. Reference may be had to the Ugandan Constitution<sup>39</sup> which provides for advancement of women generally and equality of men and women. Article 21(1) of that constitution explicitly provides for equality between sexes. It states;

All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

Clause 2 of Article 21 outlaws discrimination on the basis of sex. Article 32 (I) and (2) thereof provides for Affirmative Action in the following terms;

The state shall take Affirmative Action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for purposes of redressing imbalances which exist against them.

Clause 2 also empowers parliament to make relevant laws including laws for the establishment of an equal opportunities commissions. The Ugandan basic law also provide for Affirmative Action at the local government level of representation by stating that the highest political authority in a district, shall have at least  $\frac{1}{3}$  of it's membership reserved for women.

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<sup>39</sup> Constitution of Uganda, 8<sup>th</sup> October 1995

The South African constitution also provides for equality of men and women before the law. Further it provides for the establishment of a commission on gender equality to promote equality of gender and to advise and make recommendations to parliament or any other legislature with regard to any laws or proposed legislation which affects the status of women.<sup>40</sup>

The Draft Bill should make provision for Affirmative Action in direct terms and also make provision for a fully fledged gender commission independent of the Human Rights and Administrative Justice Commission. While recognizing that other sections of the constitution make provisions for women's and gender rights, the statement of commitment to this principle should be put in the preamble to give it more weight and value.

Besides the qualification made in section 31(4) of the Draft should be removed on grounds that it contradicts section 10 which provides that the state shall treat all religions equally. Besides this ground, this provision might increase the possibility of abuse of women's rights as applied to personal law, where traditionally women have been vulnerable to some of the worst abuses of their human rights.

The provisions on women's rights are satisfactory save for the lack of clarity, preciseness and forthrightness in some aspects. For instance section 35 (5) (a) and (b) outlines the responsibility of the state to the advancement of women's rights. The section states that the state shall provide 'reasonable' facilities and opportunities to enhance the welfare of women. The constitution does not define what is reasonable.

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<sup>40</sup> Article 119

This leaves room for compromise on women's rights. The same vagueness is reflected in section 34 (I) and (2) in the use of the word 'unfairly' in reference to the freedom from discrimination. The question is how to distinguish between fair and unfair discrimination. The constitution must therefore explicitly state the rights of women.

In Chapter Six, Section 76 (6) provides that elections shall ensure 'fair' representation of 'women.' This is vague because it is not clear what percentage is fair. With respect to the executive, a provision should be made to the effect that where the president is male, the vice president should be female. This should apply to all elective and appointive decision making positions.

In addition to removal of sex based discrimination and installation of Affirmative Action measures in the constitution as recommended the following legal changes should be made to enhance women's political participation. Firstly the Independent Candidates Act<sup>41</sup> should be reinstated. This will enable women to, in absence of gender responsive political parties, contest political offices without joining the existing political parties that may be discriminatory.

Training is the other mechanism for improving women's participation in public decision making. Whilst training can be directed at improving women's skills in specific areas, particularly in management, gender sensitivity can be directed to both men and women to build awareness of the concrete and attitudinal barriers to women's participation and advancement. A concentrated effort to train all citizens and women especially to create awareness of their rights is vital. This is because legal

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<sup>41</sup> Repealed in 1969

provisions may remain paper rights in an ignorant and illiterate society. The success of laws depends on the society's willingness and ability to observe and enforce them. Such awareness programs will include aggressive campaigns to ensure that past and current injustices that constrained women's participation are addressed in practice because laws don't operate in a vacuum.

Introduction of women's political parties is the other strategy to empower women. The difficulties of working within male-dominated political parties have led to formation of women's parties in some countries to mobilize and involve women in politics. An account of the launching of the women's political party in Kaiba (Women for the motherland) in the Philippines in October 1986 reported;

Delegates stressed the need for an avenue for women to develop skills in political participation and felt that a women's political party would be a forum for women to organize and train themselves to be in political participation and felt that a women's political party would be a forum for women to organize and train themselves to be in politics<sup>42</sup>.

Women's parties have been formed in Nigeria, Germany, Canada, Spain and Iceland. Although most of them have been short-lived and without much impact on electoral politics, their significance generally lies in giving women space to discuss political issues. In Russia, a newly established women's party did remarkably well in the parliamentary elections of December 1993 gaining over eight per cent of the vote. Only three other parties received a higher percentage.

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<sup>42</sup> 'Women's Political Party formed in the Philippines', Women in Action, No. 6 1986 Pp 12

Such parties may be introduced in Kenya since they will be more gender responsive. The assumption here is that political parties controlled by women would lobby for women's rights. Experience from Scandinavian countries, that have experimented with parties led by women, show that such parties normally emerge as a form representation in male dominated political parties. Women led and controlled parties thus emerge to challenge the patriarchal system and the established male dominated structures.<sup>43</sup> They are also a manifestation of the difficulty faced by women who are committed to social change in countries where male politics has become a kind of tribalism with a high degree of insensitivity towards the disadvantaged groups especially women. Such parties' distinction would be that they would have women at the helm of their leadership. Otherwise membership and recruitment to them should be from both genders, such parties would form a basis of recruiting and supporting future women candidates who find it difficult to compete in male dominated parties. These parties have already been suggested in Kenya (Nzomo: 1993) and are gaining currency in other African countries for instance Uganda (Tamale, 1993 : 17), Nigeria and South Africa, where there are parties initiated by women.

As already observed in the foregoing discussion, increasing the number of women in policy-making positions is not enough. The quality of representation must be looked at, in particular whether women are prepared to advance issues of gender equality and women's interests. Women in power should reach out to the grassroots to encourage more women to be involved in political life at all levels. The state should have a responsibility to take steps to decentralize its operations in order to make resources and know-how more accessible to people at the grassroots level and to allow women

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<sup>43</sup> E.H. Mannila et al fedal 1985: 43-48

to participate in decision making at all local government levels. It is necessary that the women's movement should link urban struggles with rural struggles where the majority of women live. Otherwise, the urban based women movement will be accused of being an elitist middle class movement trying to divide the people's unity under the influence of western feminism. This will create a division among women and as such they may not support a common course.

I would also recommended that various organisations in the civil society should be allowed to act as channels for political participation. These include women's organisations and Non-Governmental Organisations. This type of participation should not remain the exclusive monopoly of political parties, nor should political life be seen as confined solely to a national legislative body.

Finally the state should develop gender, legal awareness and civil education. It cannot be over emphasized that many women in urban and rural areas in Kenya fail to exercise their democratic rights and to participate effectively in electoral politics due to illiteracy, lack of civil education and gender awareness. Deliberate measures must therefore be taken to institutionalize civil education, gender and legal awareness programs as well as to eliminate negative attitudes and social cultural practices. Gender sensitization should be set up at the grassroots level and be included in the school curricula. The education curriculum should be revised to remove gender stereotypes. Human rights groups and organisations, the media and religious organisations should team up with women to disseminate the relevant gender civic education.

Lastly penal laws should be revised to criminals gender violence so that women can have recourse under the law. This will give women more confidence to participate in politics without the fear of violence.

### CONCLUSION.

It is no longer enough for women to say we have achieved. It's not time to celebrate yet. They must be seen to act in accordance with their paper decisions. They must also translate their numerical power to political power and decisively move towards shaping democratic change in this country. In this regard, women and gender sensitive men must actively participate in lobbying for and shaping the constitutional reform process in a manner that will result in a democratic and gender sensitive constitution.

The importance of women's participation and the impact in the development process is not questionable it has been said that a society attempting to develop without the full participation of women is like a bird trying to fly with only one wing. It is bound to go off course.<sup>44</sup>

Women must continue to lobby for the provisions in the Draft Bill of the constitution so that they are not thrown out of the document. They should also seek to have the inadequacies remedied by including the relevant recommendations in the constitution.

In this paper, focus has been placed mainly on the participation of women in political power and decision making in Kenya. We have discovered that although the progress

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<sup>44</sup> Women in Nigeria, 'Women in Nigeria', Women in Action, No. 4 1989, Pp 22-3



has been slow in the empowerment of women, some gains have been made and some lessons learnt in the process, The major lesson is the realization that women, regardless of their religious, class, ethnic, professional or political party affiliations, share a common gender-based oppression. Their tribulations as well as aspirations and visions for the future are similar. Violence against women for instance cuts across class, race, ethnic and other boundaries.

With increased communication and sharing of experiences, Kenyan women have changed perceptions about themselves as victims and have begun to appreciate themselves as active agents of social change with formidable power that can be mobilized through unity in diversity. Women are therefore more conscious of the importance of gender solidarity as a strategy for empowerment. This is demonstrated in their concerted efforts in the constitutional reform process in Kenya.

Women have also learned to use the political spaces afforded by the democratization struggles and multi-party environment to lobby and demand the upholding of human rights, removal of gender disparities and restoration of their autonomy. Gender sensitization, legal awareness and civic education programs are, as a result, on the agendas of virtually all women's organisations.

Besides, women have increased awareness of the fact that incursions at the formal level of politics does not necessarily guarantee that women's rights will suddenly acquire priority on a predominantly man-made agenda. They are therefore exploring and initiating alternative political spaces for their issues, within their organisations.

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