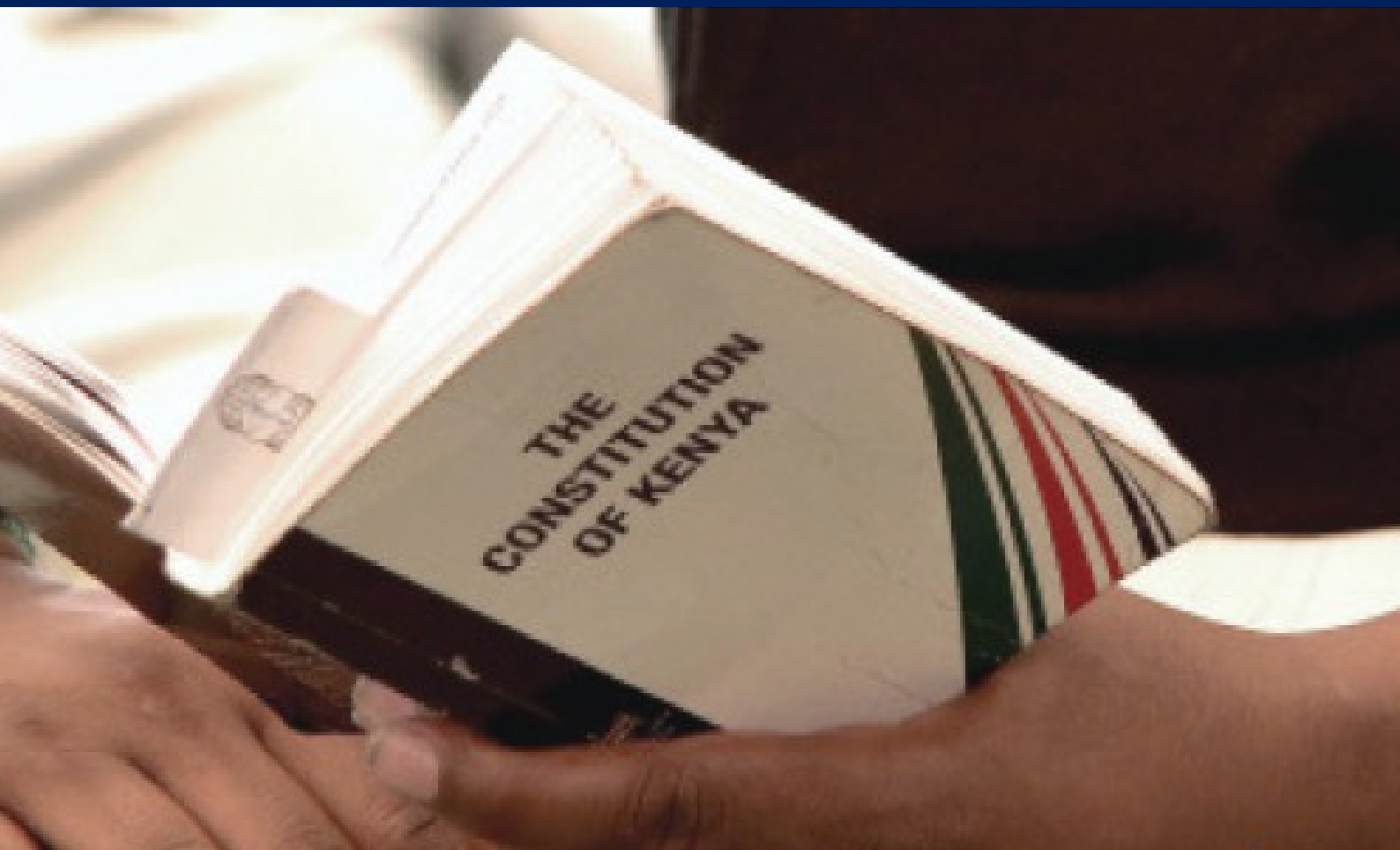




**TECHNICAL POSITION
PAPER ON THE STATUS
OF WOMEN IN THE
CONSTITUTION OF KENYA**

WOMEN HOLDING THE LINE



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FOREWORD

This Technical Position Paper was developed to contribute towards raising awareness on the immense contribution that women have made in Kenya's nation building efforts from the freedom struggle to the birthing of the "Second Republic" under the Constitution of Kenya 2010 (CoK 2010). The historical erasure of women's contributions to every significant event and epochs of our nation's history, has fueled the perception that women have been passive by-standers and only raise their voices and demand inclusion when it comes to dividing the "spoils".

Readers will see in this paper that nothing could be further from the truth. From the colonial times, to the Lancaster talks, to the agitation for a return to multi-party politics, through to the promulgation of the CoK 2010, women have been actively involved and making their contributions right there alongside the men.

The CoK 2010 ushered in a new dawn and articulated the aspirations of Kenyans who have for the longest time been yearning for a transformation in our governance, social, cultural and political structures so as to foster the inclusion and participation of all. The comprehensive Bill of Rights provides the basis for such transformation and puts the citizens at the center of that change. For citizens to be able to claim their rights and exercise their responsibilities, they need to know and understand them and that is the intent of this Technical Position Paper. This paper seeks to contribute to raising awareness among women so as to enable them know their history, understand their rights and claim them as well as know their responsibilities and exercise them.

This material is not for women only but for all citizens who value and are committed to the ideology of inclusion which is a central pillar of the CoK 2010. We all have a responsibility to safeguard the rights and freedoms that have been secured. We owe it to all those women and men who have over the years fought for the rights of all citizens to live a life of dignity and have equal opportunities in the social, economic and political spheres. Moreover, we owe a debt of gratitude particularly to those women who fought to ensure that non-discrimination and inclusivity is enshrined as a basic right in Kenya.

I wish to thank and appreciate our partners URAIA for their continued support and unwavering commitment to educating the citizens of Kenya on their rights and responsibilities.

It is our sincere hope that this Technical Position Paper will contribute to the civic education resources and will be useful in enriching the knowledge and dialogue through the historical accounts of women's contributions and support in advocacy efforts and improved public policy outcomes.

Women must become accustomed to being intimately involved in governance and decision-making processes in the scope and manner envisioned and provided for in the CoK 2010.

Above all, I wish to acknowledge the goodness of **Yahweh Elohim** to whom all glory and honour is due and for enabling us in this assignment.

Daisy Amdany
Executive Director CRAWN Trust
Coordinator National Women's Steering Committee-NWSC

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We wish to acknowledge and thank Ms. Betty Maina who was engaged as the consultant to develop this Technical Position Paper. Her passion for women's contributions to be acknowledged, documented and celebrated is communicated right through this well researched paper. We also want to acknowledge and thank Ms. Caroline Lintari who was the consultant engaged to develop the training and dissemination manual for this position paper who provided valuable insights and suggestions.

This work is an output of the Programmes Team at CRAWN Trust led by our Programmes Manager Ms. Lilian Kangethe supported by Ms. Winfred Kimeu, Mr. Edward Karihe, Mr. George Njeru and our Communications Officer Mr. Liberty Kituu working in close collaboration with members of the National Women's Steering Committee-NWSC led by Ms. Pollyne Owoko and the consultant, all who were available at every turn and at very short notice to meet and discuss the content and validate the paper. This paper would not have been possible without the collaboration of them all.

ABBREVIATION

AAWORD	African Association of Women in Research and Development
AMWIK	Association of Media Women in Kenya
AU	African Union
BBI	Building Bridges Initiative
BPFA	Beijing Platform For Action
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CKRC	Constitution of Kenya Review Commission
COMESA	Common Market to Eastern and Southern Africa
COVAW	Coalition on Violence Against Women
CRAWN Trust	Community advocacy and Awareness Trust
CSO	Civil Society Organisations
EAC	East African Community
FIDA	Federation of Women Lawyers
FGM	Female Genital Mutilation
FEMNET	African Women Development Network
HIV/Aids	Human Immuno Virus/ Acquired Immuno Deficiency Syndrome Disease
ICPD	International Conference on Population and Development
IGAD	Inter Governmental Authority on Development
ILO	International Labour Organization
KEWOPA	Kenya Women Parliamentarians Association
KWPC	Kenya Women Political Caucus
LEGCO	Legislative Council
LKWV	League of Kenya Women Voters
MPs	Members of Parliament
MYWO	Maendeleo Ya Wanawake Organisation
NCWK	National Council of Women of Kenya
NEPAD	New Partnership for Africa's Development
NFLS	Nairobi Forward Looking Strategies
NGOs	Non Governmental Organisations
NWSC	National Women Steering Committee
WPA	Women Political Alliance

1.0

INTRODUCTION

This Technical Paper has been developed as part of the “The Women Holding the Line Project.” The aim of the paper is to strengthen women’s advocacy by enabling women and girls to become informed and empowered to exercise their civic duty in order to defend constitutionalism and their entitlements for the realisation of their constitutional aspirations. The technical paper will be converted into a training manual. The idea is that through this process, women are able to fully understand how the constitution translates into their day to day life and the gains that it portends for them.

The paper also serves as a stock taking or querying of the progress that has been made in achievement of the gains for women, so that women can raise an alternative voice, from the dominant voice of political interests. The first section gives a detailed background on the constitution making process and the role of women. This involved the review of literature on the history of constitution making in Kenya since the first constitution negotiated at Lancaster, as well as looking at the history of constitutional amendments. It illuminates the history of women and political negotiations, it digs into the history of women’s civic and political engagement, women’s organising and advocacy efforts and how these have influenced policy and legislation. It highlights moments of great breakthrough and the journey that yielded these moments. Section two looks at the principle of inclusivity more broadly as incorporated in the constitution, it involves a breakdown of the provisions of the constitution that are relevant in addressing the issues of inclusivity particularly gender inclusivity. It reviews the provisions for the marginalised groups, devolution and provision of services and how these address inclusivity from a social, economic and political framework.

Section four, provides a situation analysis of Kenyan women socially, economically and politically. Section five reflects on the ongoing political discourse on the Building Bridges Initiative (BBI) and the implications especially on women’s gains enshrined in the constitution. It locates the BBI discussion within the current dispensation that women find themselves, by seeking to demystify the BBI provisions from a point of view of how these could impact women’s gains in the Constitution. It also seeks to explain the extent to which the recommendations of BBI are covered in the constitution in its current form or where there are gaps. The final section, provides recommendations for how the women of Kenya can engage in policy. It provides recommendations on a framework for women’s effective engagement in policy, legislation and any national political discourse.

2.0

HISTORY OF CONSTITUTION MAKING AND THE ROLE OF WOMEN IN KENYA

2.1 DEFINITION OF CONSTITUTION

According to the Webster Dictionary, “A constitution is the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantees certain rights to the people in it”. It is these principles that govern the relationship between the governing and the governed, and what are also referred to as the duty bearers and the right holders. Sir John Laws (1996) described a constitution as ‘that set of legal rules which governs the relationship in a state between the ruler and the ruled. All constitutional questions are about the laws which identify the ruler, define the nature and extent of their power and set the conditions for its exercise.’

Zachary Elkins et al, in their book titled “The Endurance of National Constitutions” provides one of the best explanations on the functions of a constitution. According to them, a constitution fulfills 3 core functions: First, is the limitation of government power. Constitutions generate a set of inviolable principles and more specific provisions to which future law and government activity more generally must conform. Without a commitment to higher law, the state and those who control the state can operate for the short-term benefit of those in power or the current majority. By limiting the scope of government and pre-committing politicians to respect certain limits, constitutions make government possible, and tame the possible excesses that are the result of selfish interests by the political elite or ruling class. This function, is vital to the functioning of democracy. The second function is the symbolic one of defining the nation and its goals.

In this conception, the constitution functions not so much as a set of rules, but as an ongoing set of practices that define the political unit, facilitating, under some circumstances, the emergence of a constitutional identity. The third function, is that they define patterns of authority and set up government institutions. This function differs from the constitutionalism function of limiting government. Although the mere process of defining an institution involves some constraints on its behavior, these organizational maps are conceptually distinct, albeit subtly, from the substantive and entrenched limits on government action incorporated into the notion of constitutionalism.

In the book titled, “History of Constitution Making in Kenya”¹, the authors define the Constitution as the creation of a sovereign act. It is the result of an extraordinary legislation approved directly by the people, acting in their sovereign capacity. It enables the government structure to be set up, laying down the methodology and extent of distribution of its powers. As well as defining the methods and principles of its operation, as it embraces the spirit of a nation.

¹Ndegwa, S et al (eds) 2012, “History of Constitution Making” Media Development Association & Konrad Adenauer Foundation: Kenya

The Constitution is the scheme of organisation of public responsibilities which must be performed in any community. It defines the responsibilities and vests them in particular institutions of the state. The Constitution is rigid and cannot be easily amended. It is framed for the future and is intended to be permanent. (Ndegwa, et al, 2012). From this definition, some principles of the Constitution emerge, that provide the lens with which to interrogate the history of Kenya's constitution making, as well as understand the ongoing discourse for constitutional review driven by the political class.

These include the following:

- The central role that is played by the people in shaping the substance and form of their constitution
- The sovereignty of the people in setting the rules on how they would like to be governed
- The fact that a Constitution is a solemn document and as such, the sanctity of it is imperative
- The fact that it is a negotiated document, that should serve the interests of the people as a whole and not just a few

The history of Kenya's constitution making and review process can be traced back to the colonial period. Different periodic clusters outline themselves clearly, based on the prevailing political dispensation. A critical look at this history, reveals a distinct pattern. One where the political class has consistently sought to initiate, drive and determine the outcome of any constitutional review, with a view to consolidating elite political power; stemming any dissent and competition; shifting the goal posts on their obligation as duty bearers; and clawing back on the rights of people.

This was so much so, that the colonial constitutions were referenced to the Colonial Secretary that developed them. This is evidenced repeatedly in the different time periods as will be discussed in the sections that follow. The other striking feature of all constitutional review processes prior to the Bomas process in 2003, is that women were largely absent from the mainstream conversations. Even if women participated, there is little in the way of evidence, because the records do not show their involvement. The only exception is Priscilla Abwao who was at the Lancaster Conference of 1962 as well as Hon Chelagat Mutai, who was amongst the only 2 people who voted against a constitutional amendment in Parliament in 1976.

2.2 PRE-COLONIAL, THROUGH COLONIAL TO INDEPENDENCE

Various historians have revealed that in pre-colonial Kenya, the country lacked a centralized authority and a formal judicial institution in the way we think of these institutions in the modern world. Communities, had their own system of administration and judicial systems that were specific to the different communities.

This was mostly influenced by the socio-economic lifestyle of the said communities (Pylee, 2000; Ojwang, 1990). In addition, the codification of rules and principles that governed relationships amongst the different layers of society, was mostly informal and was communicated through an oral culture. The formal administration covering Kenya as a country, was therefore instituted by the colonial administration.

Prof. Ojwang, in his Book, "Constitutional Development in Kenya" describes in detail the evolution of the codification of rules and laws in the unfolding colonial administration. The initial colonial administration was set up in 1897, when a Commissioner was appointed by the Queen. The commissioner was responsible for setting up the administrative system and institutions, developing the laws and establishing a judicial system. The Commissioner was accountable only to the queen of England. In 1902, the East African Order in Council divided the country into provinces and districts. In 1905, the title of the Commissioner was changed to Governor and Commander in Chief. In 1907, the legislative Council was established.²

The Legislative Council consisted of the colonial governor and administrator of Kenya as President, 1 Nominated unofficial Member representing the indigenous African community, 11 European Elected Members, 1 Arab Elected Member, up to 5 Indian Elected Members, up to 9 Nominated Official Members, & 11 ex-officio members.³ It was tasked with developing laws.

There was however no distinct separation of powers because the Governor developed the regulations and standing orders to guide the workings of the legislative council and was the Speaker (Ojwang, 1990). Kenya was declared a British Colony on 23rd July, 1920. The first African (Eliud Mathu) was nominated to the legislative council in 1944.

Shortly after the outbreak of the Mau Mau rebellion, the Colonial Secretary Oliver Lyttelton decided in 1954 to introduce a new constitution for Kenya. It created a new Executive Council to help the Governor run the country. The Council was multi-racial, composed of three Europeans, two Asians and one African.

The first African appointed as a minister was Benaiah Apollo Ohanga, named as Minister for Community Development and African Affairs.⁴ According to Prof. Ojwang, the Lyttelton Constitution introduced policy measures intended to give Africans a limited degree of participation in constitutional machinery. Africans were to elect eight Members to the Legislative Council. It was however not until 1955, that Africans were allowed to create political parties, but they were limited to the district level.

Lennox Boyd, who took over as Colonial Secretary, also introduced a new constitution in 1958, which abolished the Executive Council and created a Council of Ministers. The Council of Ministers had 16 members, half of which were appointed from elected Members of the Legislative Council. It also increased African membership in the Legislative Council to 14 members and provided for Specially Elected Members who would be elected by the Legislative Council sitting as an electoral college (Ojwang, 1990).

African leaders by now had begun to make their presence felt in the formal institutions, and this provided the opportunity to protest the fact they had not been consulted in the development of either of the 2 constitutions. This disquiet provided the basis for what is referred to as the 1st Lancaster Conference of 1960. This was under the then Colonial Secretary, Iain Macleod.

² http://www.parliament.go.ke/Parliament_Historical_Background

³ https://en.wikipedia.org/wiki/Category:Legislative_Council_of_Kenya

⁴ <https://cabinets.kenyayearbook.co.ke/the-lyttelton-constitution/>

Though this was a first attempt at making the voice of the African leaders heard, Prof. Ojwang states that it did not yield any comprehensive agreement and as such, the Colonial Secretary yet again imposed a constitution that is referred to as the Macleod Constitution of 1961. This Constitution expanded the Legislative Council to 65 elected members, 53 of whom were to be elected on a common roll while 12 were National Members. 20 of the 53 seats were to be reserved for the minority communities: 10 for Europeans, 8 for Asians and 2 for Arabs. The Governor retained the right to nominate members.

For the common roll seats, the ballots were to be given on condition that:⁵

- (a) One had the ability to read and write one's own language or be over 40 years of age;
- (b) Be an office holder in a wide range of scheduled posts at time of registration; or
- (c) Have an income of 75 pounds a year.

These conditions above set the stage for elite dominance in political leadership, a trend that has persisted to present day Kenya. This also produced a system sanctioned exclusion of women from political leadership, because by this time, many of the women were not educated, and had no income, and as such could not qualify. This Constitution provided for a justiciable Bill of Rights for the first time, which provided for right to personal liberty, private family, right to life and to property, and the freedoms of conscience, expression, and assembly.

Calls for Constitutional reform continued to intensify building up to the elections that were held in 1961. The mounting pressure resulted in the convening of the 2nd Lancaster Conference in 1962. Prof Ojwang notes that at this conference the colonial office acknowledged that the future of Kenya was as an African democratic country. As such the negotiations were cognizant that it couldn't be business as usual for the colonial government, as some major tectonic shifts had taken place not only in Kenya, but in the wider commonwealth countries. The main agenda for the Africans who attended the conference was to come up with a constitution that would enable internal self-government (Ojwang, 1990). What came out as the Lancaster Constitution was a document that attempted to balance the interests of all the parties that were present at the negotiations. Most of the major tribes were represented at Lancaster as members of either KANU or KADU which were the main parties. Priscilla Abwao, was there championing the rights of women. She however was a lone voice.

Due to her vocal stance on women's rights, a British journalist, described her as Kenya's Suffragette of the 1960s⁶ (Oduol, 1993). Both KANU and KADU were not entirely satisfied with the result. The result was the creation of a quasi federal system,⁷ with a strong central government which had the Senate (with one elected person from each district), National Assembly (with more members elected per district in consideration of population and area), Regional Assembly (with elected members from the regions) and Local Councils (deriving their power from the Regional Assemblies).⁸

⁵ Ibis

⁶ <https://www.nation.co.ke/news/politics/1064-688108-76211bz/index.html>

⁷ <https://www.businessdailyafrica.com/lifestyle/society/Constitutional-changes-in-Kenya-between-/3405664-4269542-3epia4/index.html>

⁸ <http://www.commonlii.org/ke/other/KECKRC/2001/1.html>

The Governor would appoint a Prime Minister, from the party that had majority representation in the Lower House of the National Assembly. Ministers were to be appointed by the Governor acting on advice from the Prime Minister. The Governor however on his own discretion was responsible for defence, including naval, military and air force, external affairs and internal security. The unfettered control of these areas of administration would later prove to be quite critical for galvanizing state power for political expediency, a fact that the political elite soon discovered and sought to protect at all costs. Despite this, Prof Ojwang concludes that the new Constitution was viewed as a symbol of independence of the State and the creation of a new State.

According to him, it provided a measure of legitimacy for the new rulers and was proof of national unity since it had been endorsed by a majority of the political leaders. However, the deeply rooted differences that continued to prevail post Lancaster between KANU and KADU was testament, that though this appeared to be a unifying document on the surface, the compromises made in an effort to accommodate everybody, had sowed the seeds of polarization in the country.

In keeping with the principles of permanence of the constitution, it insulated itself from amendment by requiring 75% of members from each house to endorse an amendment before it could be made. The exception was on amendments to alter rights of the individual or regions, citizenship, elections, Senate, the Judiciary and the amendment process which required 90% vote in Senate in addition to the 75% vote in the House of Representatives (Ojwang, 1990). Other significant provisions included an independent judiciary with security of tenure; the civil service was to be independent and apolitical, with its functions managed by a Public Service Commission; and it also confirmed the validity of existing land and property titles. This last provision created one of the most complex problems to land issues in Kenya that has persisted to date.

This was a period of deep betrayal of women, not only by the colonial system, but also by their fellow countrymen. In her paper titled "Kenyan Women in Politics: An Analysis of Past and Present Trends" published in the *Trans-African Journal of History* in 1993, Wilhemina Oduol, provides an exposé of actions of women, dating back to the pre-colonial period that illustrate the power of women organizing and taking political action. She writes about the law enforcement groups amongst the Pokot, the women's councils amongst the Meru and Gikuyu, which were equivalent to political institutions. Women fought side by side as Mau Mau warriors, organized logistics and even provided intelligence on plans by the colonial government.

They led insurgent groups in other parts of the country as well, the example of Mekatilili Wa Menza amongst the Giriama (Oduol,1993). Yet, despite their contribution in various ways, women were relegated to the back banner and even forgotten in most instances, when it came to sharing the fruits of independence. Many women gave their all, sacrificed not only their lives but even those of their children. Not only did the system fail them, the patriarchal machinery seemed to conspire to ensure that they were never remembered. The recording of history blatantly demonstrates this.

2.3 INDEPENDENCE TO 1982

Following independence, the political maneuvering between KANU and KADU continued. In 1964, Kenya assumed the status of a Republic. This provided the first opportunity to amend the Constitution. The amendment created the position of President of the Republic who was also the Head of State and Commander in Chief of the Armed Forces. Other amendments made alongside this amendment sought to whittle down the regionalism framework that had been created and entrench power in the central government; and particularly the office of the president.

When this successfully passed, it opened the door for a raft of future amendments which were executed at the whims of the political elite for political expediency, particularly the president and the ruling class. Amendments were executed to settle political scores; curtail the power of any opposing voice, consolidate and entrench power in the presidency; instill party discipline, create opportunities for political dominance in the future; and even in one instance an amendment was made to save the skin of a political ally of the president, who was facing the risk of losing his political seat. One scholar notes that these initial amendments were intended to harmonize and fuse the operations of a democratic constitution with an undemocratic authoritarian administrative structure with the result that democratic principles were undermined and the quality and legitimacy of the Constitution was downgraded (Kariuki, 2009).⁹

As the new political elite, worked at consolidating their powers and privileges, women were left behind. So blatant was this exclusion it even trumped down the exclusion by the colonial administration. Whereas in the colonial administration, there was at least one instance where a woman held one of the specially elected seats, when the opposition now held by KADU, tried to preserve this practice, in the independence legislative council through a motion in Parliament, in 1963, this motion was defeated (Oduol, 1993). As a result out of the 12 special seats that were to be filled by appointment in 1965, none was given to a woman. In this 10 year period. From 1969 to 1983, a total of 5 women only were elected and 2 nominated. During this era, the struggle was characterized by individual women, taking a stand, and taking on the status quo, oftentimes at great cost to themselves. There was not much in the way of a collective women's movement during this period. This could be the reason why this period witnessed some losses for women. For example in 1969 the Affiliation Act was abolished, this Act required fathers of children born outside marriage to provide some financial support.

In the same year there was the defeat of the Marriage and Divorce Bill, which resulted in married women in the public service being denied house allowance and lack of provision for paid maternity leave (Maria Nzomo, 1991). Some of the notable women in this period, and their contributions are discussed below. Grace Onyango was the first woman to be elected Mayor in 1967 and First Woman into Parliament in 1969. She was also the first woman elected Secretary General of the Luo Union Movement. During her first term, she served on the committee that was tasked with investigating the death of JM Kariuki. When the report was tabled by the chairperson Elijah Mwangale, she protested that the report had been altered. She and her colleague Martin Shikuku had secretly hidden the original report. She also lobbied for the abolition of bicycle taxes.¹⁰

⁹A full list of the amendments is provided in Annex 1

¹⁰https://en.wikipedia.org/wiki/Grace_Onyango

Chelagat Mutai contested for the Eldoret North Constituency seat at the age of 24, in 1974. She won, beating 12 other contestants to become the first Nandi and Kalenjin woman MP. She was the first female student to become the editor of the University of Nairobi magazine, 'the University Platform Magazine'. She used the university's magazine as a platform to criticize the Kenyatta government. She was credited with fighting for the rights of squatters, a matter which even landed her in jail. She was a member of the 7 bearded sisters. In 1975, she made strong remarks condemning the government over JM Kariuki's death and demanded an explanation for the sudden deaths of Tom Mboya and Gama Pinto. In January 1976, she was one of the only 2 MPs that voted against an amendment to the constitution that was designed by the government to grant more powers to President Kenyatta.

Ogeto in his paper describes her so aptly, that apart from being tribe-blind, she also led campaigns against corruption and land grabbing from the poor. It was in fact land that shot her into national prominence soon after she became Eldoret North Member of Parliament, when her supporters invaded two grabbed farms. After her arrest and in exile, Chelagat worked as a journalist where she continued to speak out about bad governance. In one of her articles in Viva Magazine she writes about corruption and says "...Sooner or later thieves will become the models to be emulated. Corruption becomes an argument against honest living, and demoralizes those who work honestly at their farms, desks and factories, creating the kind of society where the only real means of improvement is looting" (Ogeto, 2016). Her words ring so true today as they did then 40 years ago. The Rtd Hon Raila Odinga at her funeral in 2013, described her as "the greatest Kenyan hero who fought fiercely for the great democratic gains."

Dr. Julia Ojiambo was elected into politics in 1980, she is credited with campaigning for the creation of the Kenya Institute of Special Education, which was established with support from the Dutch Government. Phoebe Asiyo, was elected in 1980, she had served in the Prisons Service, having risen to become the first female Superintendent of the Kenya Prisons Service. It is during her time that women only prisons were established across the country.¹¹ Together with Priscilla Abwao, they mobilized women from the 8 provinces, who visited the first President Jomo Kenyatta, when he was still in prison in Kapenguria and pushed for 50-50 representation of men and women in parliament and local authorities.¹²

Wangari Maathai was another woman of great political significance. She started the greenbelt movement in 1977 to support environmental conservation through tree planting. She became the chairperson of the National Council of Women of Kenya. In 1988, the Green Belt Movement carried out pro-democracy activities such as registering voters for the election and pressing for constitutional reform and freedom of expression, amidst various attempts to clamp it down by the government of the day.

Through her protests and publicity of the proposed construction of a 60-storey Kenya Times Media Trust Complex in Uhuru Park, investors for the project pulled out in 1990, causing the project not to take place. She again protested the allocation of public land in Karura Forest to private investors, until the allocation was suspended. Prof. Maathai used a mix of letters and violent protests to advance her course. She faced great animosity from government with random arrests and intimidation, yet she was highly acclaimed internationally.¹³

¹¹<https://gender.go.ke/hon-phoebe-asiyo/>

¹²<https://www.nation.co.ke/lifestyle/weekend/Phoebe-Asiyo-pens-her-memoirs/1220-4772028-y5lc1e/index.html>

¹³https://en.wikipedia.org/wiki/Wangari_Maathai#1972%E2%80%931977:_Activism_and_political_life

2.4 1982 TO 1992

The decade following the attempted coup d'état of 1982, has been described by many scholars as one of the most repressive periods in the history of post-independence Kenya. The stage had been set for constitutional amendments by the first President. The 2nd President was facing great opposition that had threatened his very survival, he was not going to leave anything to chance. The amendments carried out in this period were intended to concentrate power in the Executive, undermine the functioning of other arms of the Government and independent offices, thereby weakening the systems of checks and balances. The result was an undemocratic and authoritarian system of government (Ndegwa S. et al (eds), 2012). One of the significant amendments was the inclusion of section 2A into the Constitution, which abolished the multi-party system and made Kenya a single party state in 1982.

Prof. Maria Nzomo, describes this period, as one where there as total cooptation and silencing of women's political voices by the Kenyan state that was intolerant to civil society organizing, unless such a group condoned and promoted the oppressive political status quo. The biggest women movement Maendeleo Ya Wanawake Organisation, epitomized this coopting and silencing, to the extent that it was coopted into the ruling party KANU as the women's wing of KANU in 1987 (Nzomo, undated). However, this was also the period that Maendeleo ya Wanawake grew in visibility, power and influence. Wanjiku Mbugua in her paper posits KANU made MYWO an integral tool for women's mobilization and a machine for vote hunting at the grassroots level, to boost it's waning political support. As a result, Wanjiku notes that MYWO leaders were co-opted in KANU structures across the country as well as appointed to important local positions in school boards and district based government structures. The organization now fully submerged into the government, wielded power and acquired assets courtesy of Moi's largesse and benevolence (Mbugua, 2017).

This period, however did provide some moments of awakening for the women's movement. The women's movement was further given impetus by the growing global discourse on the rights of women, and the growing women networks both formal and informal, that evolved from the various United Nations international Women's Conferences.

Kenya was host to the 2nd United Nations International Women's Conference in 1985. This provided a great impetus to the women's movement, as it gave a platform as well as strategies for building women's agency through local organizing. Some of the organisations that were started at the time included: The Federation of Kenya

Women Lawyers (1985) which focused on women's legal rights' education as well as taking up public interest litigation; The Association of Media Women of Kenya (AMWIK) which focused on giving women issues a voice and visibility for women leaders; the League of Kenya Women Voters (LKWV) (1992) focused on facilitating women for political leadership, representation and voter education; The National Council of Women of Kenya (NCWK) (1992) which worked around issues of democratization and political representation and facilitated capacity building for women candidates and monitoring of their performance and their place in their respective political parties;

The African Communication and Development Network (FEMNET) which had offices in several countries and focused on communication, training and gender mainstreaming in various organizations and sectors; The Greenbelt Movement focused on the environment, leadership, anti-corruption issues and grassroots mobilization around selected issues;

The Association of African Women in Research and Development (AAWORD)(1989) was the intellectual and academic resource for NGOs and supported the development of feminist research and analysis to guide national policy and determine the women's position on various issues;

The Education Centre for Women and Democracy (ECWD) concentrated on the training of women parliamentary candidates, as it was formed by women who had failed to be elected in the Parliamentary elections of 1992; and the Coalition on Violence against Women (COVAW) which focused on advocacy around gender based violence in all spaces, including during the electoral process (Mbugua, 2017).

This is just to mention a few of those that were very active and vocal in the policy space on the various issues. These organisations became the women's voice on policy matters, and the point of engagement with policy makers on one front, and building awareness on policy issues amongst women at the grassroot on the other hand.

Following, mounting political pressure, from politicians, civil society and also the international community, section 2A was repealed in 1991. Women like Njeri Kabebere, Wahu Kaara, Wanjiru Kihoro, were political activists during this time. Other women were harassed and intimidated in their homes, arrested, incarcerated and in some instances even tortured due to their male relatives who were considered political enemies of the state at the time. These are women like Florence Nyaguthie Murage, Mary Mwaura Kinuthia, Jane Wambui and Ruth Wanjiru, Anne Chepkoech Kitur, and many others, whose faces are known but their names unknown (FES, undated). The stories of these women have hardly been told nor well documented.

Taking advantage of the return of political pluralism in 1991, the NCWK in 1992, organized a big National Women's Convention, in collaboration with FEMNET bringing together about 2,000 women from around the country. Prof Kabira in her paper, notes that this convention, marked a significant moment in the women's journey of political participation. It served as a point for galvanizing support, building women's agency, developing strategies, and beginning a programme of work for collectively attacking the problem.

So dismal was the situation, that since independence to this point, Kenya had only 10 elected women, 3 women judges and 4 women diplomats, there was not a single woman cabinet minister, or provincial commissioner (Oduol, 1993). However, though the seeds had been born, there was not much in terms of results for women's political participation between 1992 and the next elections which were held in 1997 (Kabira & Kimani, 2012).

There was however, a birthing of a strong activism philosophy and approach by women. This was demonstrated strongly in 1992 by a group of elderly Mothers of Political Prisoners who organized a protest for several months demanding the release of their children who were political detainees. They used a combination of a hunger strike and publicly stripping naked.

This got them attention not just from the government but from the civil society and the international community. As a result of the mounting pressure, 4 political prisoners were released in 1992 and another 4 the following year (Nzomo, undated). This in essence had opened the doors for bolder activism within the women's movement.

2.5 1992 TO 2002

This period, witnessed a strengthening of the voice calling for constitutional reform. Political players had teamed up with non-state actors and development partners in pushing for this agenda. Beyond just constitutional reform, the central agenda in this period was to eventually effect regime change. As such with an increasingly strengthened opposition voice in Parliament, the amendments in this period were geared towards building the platform that would bring about regime change through legal means.

In 1992, Parliament amended the Constitution to facilitate the holding of the General Elections within the new multi-party dispensation. The amendments included the requirement that the President was required to receive majority of the total votes cast and a minimum of 25% of the valid votes cast in 5 provinces; that a President shall not hold office for more than two, five year terms and vesting the powers to conduct elections, including presidential elections, on the Electoral Commission of Kenya (Ndegwa et al (eds), 2012).

Following the election, Civil Society entered the scene as drivers of the constitutional reform agenda. Until then, constitutional processes had been dominated by political players at the exclusion of citizen groups. This was the first real instance when the civilian voice was being heard through the various civil society groups and religious organisations (Mugenyi, 2012). ICJ Kenya, Kenya Human Rights Commission and Law Society of Kenya commissioned the writing of a draft model constitution, dubbed the 'Kenya Tuitakayo'. At the Launch in 1994, at Ufungamano House, a Steering committee was formed with representation from other organisations, including some of the women organisations like FIDA. This eventually led to the convening of the National Constituency Assembly that adopted this Constitution (Ndegwa et al (eds), 2012).

At the political front, the opposition parties, in 1997, negotiated a minimum reform package through the Inter Parties Parliamentary Group (IPPG). The reforms which were negotiated by the MPs and agreed upon included amongst others, securing the independence of the Electoral Commission; nomination of MPs was to be based on party numbers in Parliament; allowing the President to appoint Ministers from members of the National Assembly who did not belong to his party amongst others

Women had begun organizing themselves to participate in the constitutional review process. Women like Atsango Chesoni and Phoebe Asiyo were working on bringing the women's agenda into the IPPG, supported by the Collaborative Centre for Gender and Development. Martha Karua, too was at the centre of the IPPG, and lobbied hard to ensure that 50 percent of nominations seats were for women (Kabira, 2012). This set the stage for women to be nominated into Parliament, and some very dynamic women made it through this window.

The Constitution of Kenya Review Bill was published in August, 1997 and passed by Parliament, with no consultation of civil society and religious groups. This approach was rejected by the civil society, and as a result the Act was later amended by the Constitution of Kenya Review (Amendment) Act, 1998, where public participation was recognized as the driving principle of the review process. During the first national meeting organized by the Attorney General in Bomas in May, 1998, women participated through the KWPC and presented their case as well as in the subsequent four consultation sessions held at Safari Park. Women negotiated for their participation in the process. Women were also credited for suggesting the district strategy and constituency level structures to ensure maximum participation of the people in the review process.

It is through these negotiations that eventually women were recognized as a stakeholder group, just like faith based organisations, political parties etc. (Kabira, 2012). Women continued to edge themselves into the process step by step. They managed to get women to be included in the drafting team of the Review Bill. They ensured that:

- The structure of consultation started from constituency to district to national
- Affirmative action for women at all levels was entrenched
- Women's organisations as nominating bodies were entrenched in the law
- 30% of the 25% representation of civil society went to women
- 30% of commissioners would be women
- 30% of district representation at the national conference would be women.

This achieved very significant gains for women, and set the tempo on how women engaged in the review process. In these consultations the women worked closely with the Attorney General, who they saw as an ally. When the Bill was tabled in Parliament, there was resistance in having women organisations included in the Bill. The women parliamentarians in the house at the time played an important role in protecting this provision. The battle was however not over. The women organisations under the auspices of the KWPC organized a nomination process that involved interviews to fill their 5 slots for commissioners. Hon. Phoebe Asiyo, Prof Wanjiku Kabira, Ms Nancy Baraza, Ms Abida Ali Aroni and Ms Salome Muigai were selected. A group of women, affiliated to the MYWO organization, contested the list of nominees citing that they were urban women and some regions had not been represented. This contestation was being sponsored in the background, by the ruling party KANU at the time.

The dichotomy between rural and urban women was introduced during this tussle. It was evident that the political elite was not interested in adopting a strong women's engagement, and was keen on neutralizing or even derailing the women's movement. This divide and rule tactic has been employed again and again, and persists even today. As at the writing of this paper, in 2020 we continue to witness the drama between those who consider themselves affiliated to the President and the 'Handshake' under the banner of 'Embrace' and the women affiliated to the Deputy President under the banner of "Inua Mama". Women have been reduced to mouthpieces for their political masters and not necessarily advocating for the common good of women.

Political parties too had challenges agreeing on how to nominate for their 13 slots. This caused the process to stall. Women again, were engaged in diplomacy to try and unlock the stalemate between the political parties. They even organized a meeting where all political parties were represented. In October 1999, a Parliamentary Select Committee on the Constitutional Review was formed with the mandate of collecting and collating views from Kenyans and making recommendations on the review process. An Independent Commission was established whose role was to consult the public and draft the Constitution.

The opposition parties boycotted this process. In protest, civil society commenced a parallel review process under the leadership of main religious groups. On April 27, 2000, the Peoples' Commission of Kenya was inaugurated by the Ufungamano Initiative, which consisted of religious organizations and civil society. This Commission had 7 women represented. Following negotiations, in March 2001 the two processes were merged by incorporating 10 members from the People's Commission, 4 of whom were women, into the Constitution of Kenya Review Commission, bringing the membership to 27. Their mandate was to draft the constitution, having collected views from the public (Ndegwa S, et al, 2012). Of the 27 members, there were 7 women. The vice chairperson role was held by a woman Mrs. Abida Ali Aroni.

We need to take a slight step backwards to understand, how women, had moved from sheer obscurity, to such a formidable force. It is important to contextualize women's role in the constitutional review process, within a broader story on the evolution of the women's movement. The emergence of political pluralism, the strengthening of political opposition and the end of the cold war, were a convergence of factors that created more opportunities for women's engagement, and alliance building. It was also the period when a lot of focus by the international community was dedicated to women's empowerment and gender equality. As such there was a lot of effort on training and capacity building and supporting programmes aimed at supporting the women's agenda. This period was however the most schizophrenic where women seemed to make 2 steps forward and 5 backwards.

These are some of the realities that characterized this phase:

- Strengthening of women's organisations' capacity as the voice of advocacy on women's issues.
- Collaboration and alliance building amongst women's organisations and other civil society organizations
- A transition for women activists from civil society into Parliament and Government, thus increasing the number of women in decision making
- A women's grassroot base that felt disconnected from the elite women's organisations
- Backlash from the men on the advances of the women's agenda
- Attempted claw-back on gains that had been achieved by women
- A stark realization that women were their own only ally when it came to advancing their agenda

Some of the key moments of women's action in this phase have been described below:

Following the UN Women's Conference in Beijing, in 1996 Charity Ngilu moved a motion in Parliament for the implementation of the Beijing Platform for Action. She was using this opportunity to provide a framework for implementation of the provisions of the BFA, which would have seen many policy benefits for women (Adawo et al, 2011). This motion was however defeated. Charity Ngilu would later run for presidency, against the incumbent President Moi in 1997, though she did not win, she had demystified the presidency for women.

In 1997, Phoebe Asiyo moved a motion on affirmative action in Parliament. The motion sought to require the government to pass legislation compelling political parties to nominate at least 30% of their candidates as women; introduce an amendment to the constitution to create 2 constituencies solely for women in each of the 8 provinces; and introduce legislation for funding of political parties which would be linked to the percentage of women in the party. (Kabira & Kimani, 2012) Though the motion was defeated, it set the stage for further discussion on women's political participation. It was after this that Kenya Women Political Caucus was established in 1997, which played a very useful role in coordinating women's participation in the constitutional review process.

In 2000, Beth Mugo, sought to introduce another Affirmative Action motion in order to improve and increase representation for marginalised groups, particularly women, in policy making institutions. Beth Mugo, was carrying a Bill that was the result of intense technical work by women in civil society that had undertaken deep research and a comparative analysis of various jurisdictions that had implemented affirmative action. Many women organisations under the banner of the Affirmative Action Committee, including women from 80 constituencies who had been consulted, were the force behind this Bill. Parliament debated this motion, they noted that this should be included as an issue in the constitutional review process which was due to commence. As a result the motion was not passed. This discussion made women rally together to ensure that they participated in the constitutional review process from a place of knowledge and influence (Kabira & Kimani, 2012).

In 2002, in the run up to the elections, women galvanized together once again. Under the Kenya Women, Political Caucus, and the women's manifesto was launched. This was a powerful tool for engaging political parties and aspirants on their commitment to the women's agenda, as well as guiding women's political participation (Nzomo, undated).

The Kenya Women Parliamentarians Association (KEWOPA) was established in 2002. Its mission was to sponsor women friendly and gender related Bills as well as producing material to support the engendering of all debates in Parliament. Working together with civil society organisations, the women in Parliament have been able to pass the following gender related legislation:

- The Children's Act of 2002;
- Establishment of the National Commission on Gender and Development by an Act of Parliament in 2003
- The Sexual Offences Act of 2006;
- The review of the Employment Act, No. 11 of 2007, which led to the increase in maternity leave to four months
- Successfully lobbied for tax waivers for sanitary towels and diapers in 2007
- Engendered the 2008 revised version of the Standing Orders of The National Assembly which were previously gender-blind;
- Pushed for the establishment of the 2008 Equal Opportunities Committee (EOC) that monitors and promotes equal opportunities for all marginalised groups, including women.
- Secured maternity leave with benefits for women MPs and female designated washrooms;
- Successfully lobbied for the appointment of women MPs as Chairs or Co- Chairs of five (5) out of the 16 standing Parliamentary Committees which were previously all chaired by men
- The Counter Trafficking in Persons Act of 2010
- The 2011 anti- FGM Act.

2.6 2002 TO 2010

In 2002, Kenya witnessed a peaceful and legal transition from KANU to a new government in power through NARC, in essence effecting the much awaited regime change. The new government was elected on a platform of reform amid great euphoria on the dream of a better future for the country. The expectation of the people was that the Government under President Mwai Kibaki would spearhead a people centred constitutional review process that would espouse the collective aspirations of the people. It was assumed that this reform trotting government would self-regulate and self-impose reform for the national good. So much faith was vested in this government that even development partners started shifting their support to government, away from civil society. The common was that this was a reform minded government and all it needed was resources to institute reforms.

These sentiments were soon to evaporate as it became clear, that this new government was intent on entrenching its hold on power just like previous regimes and the deeply rooted differences within the higher echelons of power within its party were playing out in the whole constitutional reform discourse.

The National Constitutional Conference commenced in April, 2003. This was held in Bomas, therefore earning its name as the Bomas process. The Conference comprised, all MPs, 3 delegates elected from each district, 42 representatives of political parties and 125 representatives of religious groups, women groups, and youth groups, the disabled, trade unions and NGOs. Women's organisations had a slot to nominate women delegates and 1 in every 3 of the district delegates was a woman. Women also ensured that they had a strong presence in all the critical committees namely: Committees on Representation, Legislature, Devolution, Bill of Rights and Constitutional Commissions (Kabira, 2012).

The function of the conference was to debate and if necessary to amend, and adopt the Draft Constitution presented by the Commission. Parliament also established the Parliamentary Select Committee on the Constitution that was used in advancing the political party position on matters; as well as dealing with the legislative issues within the process. The final process was a referendum which would be triggered by a negative vote by The Conference. The role of the National Assembly was to either approve or reject the Draft but had no power to modify the draft Constitution as a result of section 47 of the Constitution. The assumption was that once the draft was approved by the Conference, the enactment by the National Assembly was a formality (Ndegwa et al, 2012).

Even as the country was going through a complete overhaul of the constitution, there were some amendments still ongoing. One significant amendment during this period was to Section 45A and 45B of the Constitution establishing the Parliamentary Service and the Office of the Clerk. It also established the Parliamentary Service Commission, chaired by the Speaker of the National Assembly.

The Parliamentary Service Commission had the power to constitute and abolish offices in parliamentary service and appoint persons to serve in those offices. This was a critical milestone in enhancing the strength, capacity and independence of the legislature.

For the first time, Kenya was going through a constitutional review process that had full participation of the people and women were at the centre of it all. The voice of the people was evidenced in the expanded agenda, beyond the narrow view advanced by the political elite. This evidently made the political class very uncomfortable. Several times, a draft constitution or text was introduced through clandestine means, but each time, the commissioners would detect this and quash that agenda.

The tension in the process escalated to a crescendo so much so, that Cabinet Ministers led by the then Vice President led a boycott walkout, protesting the proposed structure of the Executive as the process was coming to an end. Despite the confusion, the Constitution of Kenya Review Commission Chairman, Yash Pal Ghai, presented the Draft Constitution as finalised at the conference to the Attorney General in 2004. This threatened to completely scuttle the process. For women, it was important that this process did not collapse, as it was their only hope at securing gender related reforms. They therefore used their networks within the political class to try and convince them to negotiate and come back into the process.

To ensure that they had a final say, Parliament amended the Review Act to provide for revision of the Bomas Draft by simple majority. Civil society challenged this Act led by the Yellow Movement. The Naivasha Accord was convened by the Parliamentary Select Committee in an effort to unlock the stalemate on sharing of executive powers. Other issues that were being challenged by Parliament included the devolution of powers and affirmative action for women's representation. In actual fact, there were two motions in Parliament to remove affirmative action from the draft entirely: one was by Hon. Bonny Khalwale and the other by Hon. Raphael Wanjala. Parliament was deeply divided, and the issue of affirmative action was high on the agenda.

Women through the Women's Consensus Group, continued to lobby friendly MPs, to try and get the two motions defeated. It was incisive to note that the NARC side of government were the ones seeking to remove affirmative action. KANU MPs led by Mutula Kilonzo were supporting affirmative action and so women had decided to work with KANU on this one.

There were however members of NARC like Prof Kivutha Kibwana, Paul Muite and Kipkalya Kones who had committed to support the agenda and the Chairperson of the Parliamentary Select Committee Simeon Nyachae, who felt that this matter had been discussed for too long and it was time that women got what they were asking for. The opening up of the women's agenda as part of the contentious issues, brought some losses for women. The principle on 30% quota in parliament was removed by the PSC in Naivasha during the negotiations, and only the 47 county seats were retained (Kabira, 2012).

There was a great deal of back and forth discussions on how the process would be concluded. Eventually, The PSC received views from stakeholders (civil society, political parties, and religious groups). These were debated in the Naivasha negotiations and included in the Naivasha Accord Draft.

The Bomas Draft, together with the compromises made in Naivasha, were put together in a new product dubbed the “Kilifi Draft”. Parliament was still deeply divided on the issues of models of the executive even at this point, and though a simple majority vote endorsed the draft, there was no consensus. The Attorney General proceeded to draft the Proposed New Constitution based on the Parliamentary approved draft and this was subjected to a referendum in 2005, where it was rejected. However the referendum result was more a vote on political differences in the NARC government more than a vote on the substance of the proposed constitution. This marked the end of the Bomas Process (Ndegwa, et al (eds), 2012). The referendum brought out some very uncomfortable conversations about women’s rights, revealing some deeply held biases against women.

In 2006, Hon. Martha Karua, the then Minister of Constitutional Affairs restarted the process of constitutional review. A multi-sectoral forum was established. Women through the KWPC and WPA, undertook a process of identifying the women to be nominated to the Forum. Five women were identified (Kabira, 2012).

In 2007 the Minister for Justice and Constitutional Affairs, Martha Karua tabled the Constitutional (Amendment) Bill 2007 on Affirmative Action that aimed at creating 50 automatic seats for women in the 10th Parliament and creating additional 40 Constituencies in Kenya. She defended the creation of 50 special seats as an affirmative action issue, which sought to put women’s representation in Parliament at par with their population size. Women organized themselves in the same way they had done during Bomas. They held a big meeting at KICC, with over 2,000 women attending from all over the country. They also held street processions and marched to Parliament, as well as collecting 1 million signatures for the support of the 50 special seats. Women presented a formal petition with 700,000 signatures and 42,000 petitions from all the 210 constituencies. This was the first time a petition had been taken to parliament by the public. This Bill never saw the light of day, as the MPs boycotted the debate session, and therefore there was no quorum (Kabira, 2012).

The next constitutional moment came as a result of the post-election violence crisis of 2007-08. The parties of the Kenya National Dialogue and Reconciliation Committee that was established to agree on the terms of reconciliation, chaired by Koffi Annan agreed on 4 agendas. The 4th agenda noted that “Poverty, the inequitable distribution of resources and perception of historical injustices and exclusion on the part of segments of the Kenyan society constituted the underlying causes of the prevailing social tensions, instability and cycle of violence. Amongst the recommendations for addressing this was the need to undertake a constitutional, legal and institutional reform. To this end Parliament enacted the Constitution of Kenya Review Act (2008) and Constitution of Kenya (Amendment) Act (2008). The latter sought to provide for the political agreements that had been made in the reconciliation process. It created a coalition government by establishing the office of the Prime Minister and the Deputy Prime Minister.

The former established the process agreed upon for review of the constitution. It also introduced a new section 47A in the existing Constitution, which set out the procedure for the replacement of the Constitution with a new one through the process of a referendum where the people were empowered to accept or reject the proposed constitution. It established the institutions of review as the Committee of Experts (COE), the Parliamentary Select Committee and the National Assembly. The COE was to study the reference materials which included previous drafts, compile the contentious issues, invite views from the public on these issues and then develop a harmonized draft constitution. This was debated by the Parliamentary Select Committee, and the revised draft submitted to the National Assembly for approval or amendment.

Though women were feeling betrayed and wounded following the Naivasha mutiny, they still engaged, and they facilitated 1,000 women to attend a meeting at Bomas, so that they could take a position on the referendum. Women agreed to vote YES for the constitution (Kabira, 2012). Upon approval of the draft by Parliament, the Attorney General published the Draft Constitution in accordance to the provisions, and the Electoral Commission facilitated a referendum. The referendum took place on the 4th August 2010, where Kenyans adopted the new Constitution (Ndegwa, et al (eds), 2012).

Because of the strong and coordinated presence by women throughout the process, the various drafts all had very gender aware language and provisions (CKRC Draft 2002, Bomas Draft 2004, Wako Draft 2005, Harmonised Draft 2009 and Constitution of Kenya 2010). Women had kept their eyes on the ball despite the various challenges and efforts to derail them. This can also be attributed to the fact that there were strong technical minds, and strategic lobbyists amongst the women. In addition, there were some very strong and knowledgeable allies amongst the men including people like the late Prof Okoth Ogendo and the late Oki Ombaka, both of whom were extremely brilliant and respected legal experts.

There were several sections of the political class who were not happy with the constitution for various reasons, in actual sense, during debates gearing up to the referendum, there was a consistent voice that kept reiterating that “we should adopt the constitution even if it is not perfect, because we could change the provisions that were not agreeable in the future.” That voice has risen in crescendo in recent times, though coming from different mouths. Barely 10 years into the Constitution implementation, there is talk to undertake ground breaking constitutional amendments. History, has demonstrated to us, the motive behind these calls for amendment. Never has it been about the good of the people, it has again and again been about political expediency.

The process of constitutional engagement for women was not a linear, progressive process. It has been described aptly as a process of change and counter change. As women’s movements reacted creatively and strategically to political opportunities, the status quo, in turn, also reacted, attempting to subvert the demands of the movements. This then called for continuous strategic and multi-level action on the part of women (Domingo et al, 2016). The result was the 2010 Constitution, which was a major win for the women, having engendered in it all the demands that women had made over the years. These organisations then undertook to provide civic education in the run up to the referendum, to educate the public on the import and provisions of the proposed Constitution.

2.7 2010 TO PRESENT

The ink had hardly dried on the Constitution, before it became clear for women that the struggle was not yet over. Women have been isolated on two thirds agenda where the institutions obligated to give effect to the provisions have absconded their duty, and the matter remains in abeyance, in blatant contravention of the constitution and outright impunity by the duty bearers.

This issue of the two thirds gender principle mutilation started with the court's ruling in 2012, in response to an opinion sought by the Attorney General, indicating that the implementation of the two thirds principle was progressive and was not expected to fully take effect in the 2013 elections. Nothing in the constitution had indicated that the implementation of this provision was progressive, so the courts in essence introduced a new condition to the implementation of this provision. The courts therefore, gave Parliament until 27th August 2015, to prepare the necessary legislation to give this provision effect. This date and the one year extension Parliament gave itself all lapsed.

In 2016 realizing that both Parliament and Cabinet were in contravention of the constitution, Marilyne Muthoni and Community Advocacy and Awareness (CRAWN) Trust took a case to the high court seeking the dissolution of Cabinet for the violation of the two thirds rule. The court delivered a decision that confirmed the violation but suspended the dissolution order because the country was going into an election soon, and thus ordered that the next cabinet should be constituted in compliance to this constitutional provision.¹⁴

Still in 2016, the Centre for Rights Education and Awareness (CREAW) and CRAWN Trust, sought an order for the dissolution of Parliament for failing to pass the necessary law within the time stipulated under the Constitution and the Supreme Court. The court found Parliament to be in violation of its obligation and directed Parliament to pass the required legislation within sixty days. If this did not happen, any person could petition the Chief Justice to advise the President to dissolve Parliament. This time lapsed in May 2017 with no legislation passed. Despite the gravity of this matter, as at the time of writing this paper, it has not come up for a full hearing, only mentions have been given.

The Executive through the Attorney General appealed both these cases. The political class continue to exercise veto power over the constitutional rights of women. As at the writing of this paper, Parliament remains non-compliant and so does the Executive. Women continue to grapple with this matter until today, with no real solution on the table.

¹⁴ <https://www.the-star.co.ke/siasa/2019-05-12-a-snapshot-quest-for-implementation-of-the-two-thirds-gender-rule-in-courts/>

3.0

INCLUSIVITY AS PROVIDED FOR IN THE CONSTITUTION OF KENYA

According to the Oxford Dictionary, inclusivity is the practice or policy of including people who might otherwise be excluded or marginalized, such as those who have physical or mental disabilities and members of minority groups.

For purposes of this section, this definition is used. However, there is also the realisation that inclusivity can be further achieved where there is transparency, accountability and public participation. As such, these themes have been adopted in the expanded view of inclusivity, to create an understanding that transparent, accountable participatory government is a recipe for inclusive and effective service delivery and engagement of its people. The 2004 World Development Report (WDR) highlighted this by demonstrating that there was a case for increasing the engagement of constituents, particularly vulnerable groups, with public institutions and service providers in such ways to increase the effectiveness, appropriateness, and quality of service delivery. This paper uses this analytical framework in this section.

The Constitution of Kenya has been lauded as one of the most progressive Constitutions in the world with regard to gender equality. It advances women's participation in the social, economic and political life, and through bold and progressive provisions. It not only makes provision to end any form of discrimination on the basis of gender, but goes a step further and nullifies all previous legislation and customary laws that had promoted discrimination against women in the past. In the sections that follow, the inclusivity provisions of the constitution are discussed and the expected impact on women from a political, social and economic point of view.

3.1 POLITICAL AND GOVERNANCE PROVISIONS

Aspirations of Kenyans

In the Preamble, the Constitution recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The government is expected to promote these essential values in all its operations, decisions, policies, programmes and laws. The government should in no way violate these values in the name of promoting others. These remain the overriding values that characterise the relationship between the state and its citizens in Kenya.

National Values

Article 10 (2) lists the national values as:

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development

Art 10 (1) provides that these national values and principles bind all state organs, state officers, public officers and all persons whenever any of them: applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. As such, state officers and public officers should have as their overriding guide the application of these principles in any decision taken.

Participation of the people is a key principle. The government should not undertake any policy, programme or legislation without involving the public. Participation of the public by its very definition implies that the public should be capacitated to participate. It is different from public information.

Participation includes provision of timely, relevant and accessible information; time lag to allow reflection on information provided; then engagement and feedback. Government should ensure that all legislation, policy and programmes promote human dignity, equity, equality inclusiveness and non-discrimination. A programme that for example displaces families from their homes, without compensating them to their original position, can be challenged based on this provision.

Equality and Freedom from Discrimination

Art 27 provides a very elaborate framework for promoting and protecting citizens against discrimination. It provides the following specific clauses:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

The state is obligated to ensure that there is no discrimination on any basis and further, should ensure that women and men benefit equally from opportunities, programmes, plans and policies. Where equal benefit or opportunity cannot be realised due to the disadvantaged position of one group of persons over another, then the state should take affirmative action measures to create an equal playing field for all citizens. These affirmative action measures could include allocating special quotas for women to access opportunities where men have an evident dominance. The government has enacted some affirmative action provisions, for example the National Government Affirmative Action Fund, the Women's Enterprise Fund, The UWEZO Fund. Women should remain vigilant to ensure that the implementation of these programmes, rights the wrong for which they were instituted. One monitoring basis, is the affirmative action principle.

Access to Information

Art 35 (1) provides that every citizen has the right of access to information held by the State

Women have a right to access information about laws, policies, plans and programmes being implemented by government for their benefit. They have the right to also access budgets and reports of the same. They have a right to gain access to this information in a manner that is accessible and understandable to them as well as in a timely fashion.

Freedom of Association

Art 36 (1) states that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

This provides women the freedom to join an association of whichever kind and participate in its activities.

Assembly, demonstration, picketing and petition.

Art 37 provides the right for every person to peaceably and unarmed, assemble, demonstrate, picket, and present petitions to public authorities.

Art 118 (a and b) states that Parliament shall conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

Art 119 (1) provides that every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.

Where women have an issue that they want to bring to the attention of authorities or Parliament or the world more generally, they have been provided with the right to demonstrate and even present a petition to the authorities and to Parliament. This they should be able to do without being intimidated by the said authorities. Women are free to participate as observers in parliamentary business and sessions which are open to the public as well as through the framework for public participation provided in the constitution.

Political Rights

Art 38 (1) provides that every citizen has a right to make political choices, which include:

- (a) To form, or participate in forming, a political party;
- (b) To participate in the activities of, or recruit members for, a political party; or
- (c) To campaign for a political party or cause

Women therefore have the freedom to join political parties and participate in the activities of these parties as equal partners alongside the men.

Art 38 (2) provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for:

- (a) any elective public body or office established under this Constitution; or
- (b) any office of any political party of which the citizen is a member.

Women have a right to demand that elections are held for all elective political seats or offices that have been created by this constitution, including elections within the political parties where they are members.

Art 38 (3) provides that every adult citizen has the right, without unreasonable restrictions—

- (a) to be registered as a voter;
- (b) to vote by secret ballot in any election or referendum; and
- (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

Women have a right to be registered as voters and vote for the candidate of their choice in any office, with no restriction. Women also have the right to vie for elective positions in the elective offices established by this constitution and in the political parties where they are members. This provision however needs to be protected for women and girls with disability, in cases where one is diagnosed as having psycho-social disability including conditions such as bipolar, they may be limited from enjoying this right. Women and girls with disability therefore face certain discrimination even within existing gender rights.

Leadership

Art 73 (1) states that authority assigned to a state officer is

- (a) a public trust to be exercised in a manner that—
 - (i) is consistent with the purposes and objects of this Constitution;
 - (ii) demonstrates respect for the people;
 - (iii) brings honour to the nation and dignity to the office; and
 - (iv) promotes public confidence in the integrity of the office;

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

Women should view those holding state offices not as lords to be worshipped (Wakubwa) but as state servants (Wafanyikazi), who should serve them and deliver results that are for the good of the public. They should recognise that they are the employer of state officers through the taxes that they pay. They should be able to demand the quality of service that they receive from them and their offices.

Art 73 (2) defines the principles that should guide the selection of a leader. It states that the guiding principles of leadership and integrity include:

- (a) Selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
- (b) Objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism other improper motives or corrupt practices;
- (c) Selfless service based solely on the public interest, demonstrated by—
 - (i) Honesty in the execution of public duties; and
 - (ii) The declaration of any personal interest that may conflict with public duties;
- (d) Accountability to the public for decisions and actions;
- (e) Discipline and commitment in service to the people.

These should be the measures that women use in selecting leaders through elective processes. They should subject them to these tests based on their past record for those who have been in public life, or based on the conduct of their private affairs. The same measure should be subjected to women candidates, ensuring that women are not supported just because they are women. Women should also demand that those who are appointed into public offices, are subjected to similar scrutiny and disqualified if they are found to fall short. Those in office should be subjected to continuous scrutiny to ensure that they do not violate these principles while in office. Women have the right to call for the resignation of a state officer who violates these principles, as their rightful employer.

Representation in Appointive and Elective Positions

Art 27 (8) provides that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Art 81 (b) also provides that the electoral system shall comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender. The government is obligated to ensure that there is a legislative framework that ensures that the not more than two thirds principle is applied in all elective and appointive positions. This should guide the appointments made to all public offices.

Women should demand the enactment of this legislation as a matter of right and urgency. Parliament as is currently constituted is unconstitutional, and women should demand for this compliance.

Art 54 (2) provides that the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities. Art 81 (b) also provides that the electoral system shall comply with the principle that there is fair representation of persons with disabilities. The government is obligated to create the legislative framework for the achievement of this principle, and should be guided by this in making appointments to all public offices. In doing so, the government should ensure that both women and men with disability are represented. Women should demand the enactment of this legislation as a matter of right and urgency. Parliament as is currently constituted is unconstitutional, and women should demand for this compliance.

Art 55 (1) (b) obligates the state to take measures including affirmative action to ensure the youth have opportunities to associate, be represented and participate in political, social, economic and other spheres of life. The government is obligated to ensure that the youth are represented and have channels for participation in political, economic and social life including young women.

Art 56 (a) obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life. The government is obligated to develop a framework for ensuring that minority and marginalised groups are represented. This consideration should be made in appointments into public offices and committees of government. This consideration should ensure that women are not left behind, gender differences exist even within marginalised and minority considerations, therefore the not more than two thirds principle should apply here as well.

Legislation on elections

Art 82(1) (d) provides that Parliament shall enact legislation to provide for the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections.

Art 82 (2) states that this legislation shall ensure that voting at every election is:

- (a) simple;
- (b) transparent; and
- (c) takes into account the special needs of:
 - (i) Persons with disabilities; and
 - (ii) Other persons or groups with special needs.

Parliament should enact legislation that ensures voting does not discriminate against certain groups of people like those with disabilities, the elderly, those with nursing babies. No person by their unique circumstance should be denied the opportunity to exercise their right to vote. The Persons with Disability Amendments Bill 2019, has some positive provisions regarding ease of voting for persons with disability. Similar provisions should be made for the elderly as well as pregnant and nursing mothers.

Basic Requirements of Political Parties

Art 91 (1) (e and f) state that every political party shall:

- (e) respect the right of all persons to participate in the political process, including minorities and marginalised groups;
- (f) respect and promote human rights and fundamental freedoms, and gender equality and equity

Women should be vigilant in calling out political parties that do not abide by these provisions in the undertaking of their internal party affairs. Women should blacklist parties that out rightly violate these principles, because it is a demonstration that the leaders in the party do not respect these principles and it would therefore follow, that if that party was in power it would not respect the same principles in the national development process.

Art 91 (2) (a) states that a political party shall not be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis.

As such, women cannot start a women's only political party due to this provision. Women will have to take the bull by the horns and demand inclusivity as their right in the existing multi-gender parties.

Allocation of Party List Seats

Art 90 (2) (b) states that except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed.

Women should engage in political parties, as this is the main vehicle through which they can participate by being elected or nominated in elective politics.

Eligibility to stand as an independent candidate Art 85 (a) provides that any person is eligible to stand as an independent candidate for election if the person is not a member of a registered political party and has not been a member for at least three months immediately before the date of the election.

Where women find that they are being edged out of political parties or being relegated to the back burner, they have an option of running as independent candidates. This provision however has its advantages and equal measure of disadvantage, because political parties wield substantial political strength within their strongholds. If a woman is not in the popular political party for her constituency, it reduces her chances of winning.

Registration of Voters

Art 83 (1) provides that a person qualifies for registration as a voter at elections or referenda if the person:

- (a) is an adult citizen;
- (b) is not declared to be of unsound mind; and
- (c) has not been convicted of an election offence during the preceding five years.

As such no one should deny any woman a chance to register as a voter, unless they violate any one of these qualities.

The Legislature

Art 94 (1) states that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. As such the people ought to have a say in the legislation that is passed by Parliament. Women should exercise this legislative authority by demanding that all legislation passed by Parliament should take into account the impact on women and ensure there is no adverse impact. Women should demand that all legislation is subjected to effective public participation, and monitor the extent to which their views have been taken into consideration.

National Assembly

Art 95 (1) states that the National Assembly represents the people of the constituencies and special interests in the National Assembly. Membership to the National Assembly is provided in Art 97 (1) which states that the National Assembly consists of:

- (a) two hundred and ninety members, each elected by the registered voters of single member constituencies;
- (b) forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;
- (c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers.

Women should note that they are free to vie for positions as members of single member constituencies, and are not just limited to the forty-seven county women seats. Nomination to the special interest seats should also apply the principles of gender balance.

Senate

Art 96 (1) states that the Senate represents the counties, and serves to protect the interests of the counties and their governments.

Art 98 (1) states that the Senate shall consist of:

- (a) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;
- (b) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90;
- (c) two members, being one man and one woman, representing the youth;
- (d) two members, being one man and one woman, representing persons with disabilities;

Women are free to vie for a senate seat, and should not limit their chances to waiting for nominations. However, where women do not make it through elections, there is the provision for nomination into the 16 slots assigned for women, 1 slot for female youth and 1 slot for a woman with disability. These nominations will be allocated based on party strength in Senate. As such it is critical for women to strengthen their participation in political parties and ensure that those slots are allocated based on merit within the respective parties and not patronage.

Qualifications and disqualifications for election as Member of Parliament or Senate.

Art 99 (2) gives the qualifications for a member of Parliament and states that a person is eligible for election as a member of Parliament if the person:

- (a) is registered as a voter;
- (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament; and
- (c) is nominated by a political party, or is an independent candidate who is supported:
 - (i) in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or
 - (ii) in the case of election to the Senate, by at least two thousand registered voters in the county.

For women to succeed in elective politics they need to understand the rules and start early. Women should cultivate their political base way before the election season begins so that they stand a better chance at becoming eligible and getting elected.

Promotion of representation of marginalised groups.

Art 100 provides that Parliament shall enact legislation to promote the representation in Parliament of:

- (a) women;
- (b) persons with disabilities;
- (c) youth;
- (d) ethnic and other minorities; and
- (e) marginalised communities

This has not been enacted, and women need to put more pressure on Parliament to ensure that it is passed. While regional groups like the minority and marginalised are represented through their constituency Members of Parliament and Senators, demographic groups have a very limited framework for equitable and proportional representation.

There is also need to ensure that in these categories, gender equality is applied even within the special groups. For example ensure women and girls with disability are included within disability categories; marginalised and minority women and girls are provided for within marginalised and minority groups; and young women are provided for within the youth category.

Right of Recall

Art 104 (1) provides that the electorate under Articles 97 and 98 have the right to recall the Member of Parliament representing their constituency before the end of the term of the relevant House of Parliament.

This provision was aimed at ensuring that power remains with the people, for whom the Members of Parliament act on behalf of. Parliament is expected to pass the legislation detailing the circumstances and process for this provision, but this has not yet been done. Women should put pressure on parliament to pass this legislation, as it provides a tool for maintaining checks and balances on the legislature and keeping them true to their calling for the service of the people.

Parliamentary Service Commission

Art 127 established the Parliamentary Service Commission, The role of the Commission is ensuring the effective and efficient functioning of Parliament. The Commission shall consist of the Speaker, 4 members nominated equally from both houses by the political party(s) forming government and at least 2 shall be women; 3 nominated from the political parties not forming government and one should be a woman; one woman and one man nominated by Parliament from persons who are experienced in public affairs but are not Members of Parliament.

This is an example where clear provisions have been laid out for a public institution to ensure that the not more than two thirds gender principle is applied. It demonstrates that indeed it can be done. Where such elaborate provisions were not made, these need to be provided through legislation.

The Executive

Art 129 (1) states that executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution. As such, women should understand that the constitution gives them the power to direct executive authority, through their participation and demand for their rights.

According to Art 130 (1) the national executive of the Republic comprises the President, the Deputy President and the rest of the Cabinet. Art 131(2) (d and e) provide that the President shall promote respect for the diversity of the people and communities of Kenya; and ensure the protection of human rights and fundamental freedoms and the rule of law.

The President should demonstrate the highest image of promoting respect for human rights and fundamental freedoms of the people. This is demonstrated in the decisions he/she makes with regard to appointments of public offices, legislation assented to, allocation of budget as a reflection of plans and programmes approved for government execution. As such, women have a right to demand this of the president at all times. In addition, just like the provisions for qualifying to run for a Member of Parliament position, there is nothing in the qualifications for President that preclude a woman from being eligible.

Women should identify suitable women candidates who they can rally support towards presidency. In addition, women should demand before electing a President that where the Presidential candidate is a man, the running mate would be a woman, and vice versa.

Art 152 (1) (d) provides that Cabinet Secretaries shall be not fewer than fourteen and not more than twenty-two Cabinet Secretaries.

Art 155 establishes the office of Principal Secretary.

The not more than two thirds principle should apply in the appointing of cabinet secretaries and principal secretaries. The first Cabinet under this new constitution in 2013, was in violation of this principle. Currently this provision has still not been fulfilled in the appointment of Cabinet Secretaries and Principal Secretaries. Women should be vigilant to ensure that the not more than two thirds principle is not violated in future cabinet secretary and principal secretary appointments.

Judiciary

Art 159 (2) provides that judicial authority will be exercised by the courts and tribunals based on the following principles:

- (a) Justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3) which states that traditional dispute resolution mechanisms shall not be used in a way that:
 - (a) contravenes the Bill of Rights;
 - (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
 - (c) is inconsistent with this Constitution or any written law

Women have a right to seek legal redress through the judicial system and expect that their justice will not be delayed or denied. The Judiciary should put in place measures to expeditiously process cases brought before it. In some instances alternative dispute resolution mechanisms may be cheaper and take less time to resolve. However in the case of use of traditional dispute resolution mechanisms, these may not favour women, due to the deeply patriarchal culture in most Kenyan traditions. However the Constitution provides that these mechanisms shall not be used in a way that contravenes the constitution and violates the rights of women. So where women feel like their rights will be violated, they can refuse to be subjected to a traditional dispute resolution mechanism.

Devolved Government

Art 174 introduces the objectives of devolution as: The objects of the devolution of government are:

- (a) to promote democratic and accountable exercise of power;
- (b) to foster national unity by recognising diversity;
- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

- (d) to recognise the right of communities to manage their own affairs and to further their development;
- (e) to protect and promote the interests and rights of minorities and marginalised communities;
- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) to ensure equitable sharing of national and local resources throughout Kenya;
- (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
- (i) to enhance checks and balances and the separation of powers.

The spirit of Devolution is about taking government closer to the people and in so doing achieve effectiveness and efficiency in service delivery and local development. Devolution has been provided as a remedy for the winner takes it all that has characterised political contestation in Kenya since independence. It was aimed at moving resources from the centre and distributing them to the peripheries and by so doing, creating new centres of economic and social development right across the country.

Women have a real opportunity to participate in governance at this level, and ensuring that development programmes of counties contribute to the economic and social development that is relevant in the context of their day to day lives.

Art 175 (c) provides that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

Art 197 (1) provides that not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender.

Art 197 (2) provides that Parliament shall enact legislation to:

- (a) ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and
- (b) prescribe mechanisms to protect minorities within counties.

The framework for implementing the not more than two thirds principle in the county assembly has been provided. Women should take advantage of this opportunity to position themselves in parties to ensure that the nominated women are nominated based on merit and capacity to engage meaningfully in the governance process of the county. There have been instances where the county even after applying the top up seats was not compliant to the not more than two thirds principle, because of the limitation of party lists. As such women should ensure that they are formally and actively engaged in political parties as registered members of these parties.

Community and cultural diversity continues to remain a sticky issue in most counties, a reflection of the deeply fractured society that Kenya is when it comes to political inclusion across ethnic lines. Women should be the force that pushes for this, they themselves being beneficiaries of affirmative action. They should distinguish themselves as the voice of reason and inclusion, which speaks out for the inclusion of minorities and other marginalised groups in counties.

County Assembly

Art 177 (1) provides that a county assembly consists of:

- (a) members elected by the registered voters of the wards, each ward constituting a single member constituency,
- (b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
- (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;

This level of governance provides space for women to participate in elective politics by vying for election seats as Members of County Assembly or being nominated as part of the affirmative action framework that has been provided for in this constitution.

Election of a Governor

Art 180 (2), provides that to be eligible for election as county governor, a person must be eligible for election as a member of the county assembly.

As such, there is no criteria that precludes women from vying for positions of governor, if they qualify to vie for the position of Member of County Assembly.

Election of Member of County Assembly

Art 193. (1), states that a person is eligible for election as a member of a county assembly if the person:

- (a) is registered as a voter;
- (b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and
- (c) is either:
 - (i) nominated by a political party; or
 - (ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

Just like the election to the office of Member of Parliament, women need to ensure that they are participating in political parties as registered members to increase their chances of becoming eligible candidates for these positions. Many women are capable of meeting the criteria provided for MCAs and as such they should take advantage of this platform to hone their political skills.

Legislative Authority of County Assemblies

Art 185 (2) states that a county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

Art 185 (4) states that a county assembly may receive and approve plans and policies for the management and exploitation of the county's resources and the development and management of its infrastructure and institutions.

Art 196 (1) (a and b) provides that a county assembly shall conduct its business in an open manner, and hold its sittings and those of its committees, in public; and shall facilitate public participation and involvement in the legislative and other business of the assembly and its committees.

These articles demonstrate that county assemblies play a very critical role in determining the development programme that will be pursued by a county government and the resource allocation towards the same. As such, it is important that whoever ends up as an MCA recognises this role that they play and has the capacity for effective engagement. Women should position their advocacy in engaging county assemblies to ensure that they prioritise programmes and investments that promote women's development and gender equality. Women should participate in every public participation opportunity with a view to not just ticking the boxes but getting their voice heard and necessary action taken.

Public Finance

Art 201 states that the principles that shall guide all aspects of Public Finance shall be:

- (a) there shall be openness and accountability, including public participation in financial matters;
- (b) the public finance system shall promote an equitable society, and in particular:
 - (i) the burden of taxation shall be shared fairly;
 - (ii) revenue raised nationally shall be shared equitably among national and county governments; and
 - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;

The principle of openness and accountability would suggest that public finance is not a secret, but shall be available for scrutiny by the public. Women should participate in public financial management effectively. The current practise of budget hearings does not comply with the principle of openness. Government is obligated to ensure openness and accountability by providing access to information on public finance and providing adequate time for the public to interrogate the information and thereafter provide ample time for engagement and feedback. Women should position their advocacy to demand for EFFECTIVE public participation, not just public participation.

Public financial management should promote an equitable society by investing in programmes that benefit all, while taking specific measures to boost those who are weak, vulnerable and marginalised.

Women should demand accountability from the government to demonstrate how the budget is promoting equity in the society. This should include an analysis of the proposed plans and programmes and the extent to which they will promote equity and equality; the procurement framework and how this promotes equality and equity; the public debt framework and its inter-generational equity and equality potential; and lastly revenue raising framework and how this promotes equity and equality.

Budget Estimates and Annual Appropriations Bills

Art 221 (5) provides for public participation in the budget process. In discussing and reviewing the estimates, a committee of the Assembly shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly.

Women should take advantage of these opportunities to understand the budget and the rationale made for the allocations and seek to engage from a point of knowledge by submitting their views preferably in writing, to ensure that there is recorded evidence of their contribution. This makes it possible to follow up on action taken in the future.

Equitable Share

Art 203 (h) provides that the need for affirmative action in respect of disadvantaged areas and groups will be one of the criteria used in determining the equitable share between the national and county governments.

Equalization Fund

Art 204 Establishes the Equalization Fund. In 204 (2) it is stated that the national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

Article 203 would suggest that counties that are home to marginalised groups, would receive an enhanced allocation to enable them implement programmes that would uplift their communities to a comparable standard to the rest of the country. Article 204, seems to respond to the principle set out in Art 203, but falls short because it doesn't include education, which is a basic right, and a big affirmative action tool for raising communities out of poverty in the long run.

Women should be vigilant in monitoring the programmes which are being funded by the Equalization Fund and analysing their impact. This Fund should be about generating transformation and change, and should not be business as usual.

Public Service

232 (1) (i) provides the Public Service shall afford adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of: men and women; the members of all ethnic groups; and persons with disabilities.

This suggest that the Public Service is an equal opportunity employer that will give fair opportunity for all to be appointed and advance in their career through training and promotion. Women should hold the public service to account on these matters. The reality is that women still remain in the lower cadres of the service and as you go up the ranks there are fewer and fewer women.

National Security Organs

Art 238 (2) (b) states that national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.

Women should not condone or tolerate intimidation, and violation of human rights by national security personnel. Security personnel should exercise their role in compliance with the rule of law and demonstrating respect for human rights and fundamental freedoms

Art 238 (d) recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions.

Women represent that diversity and as such, women should be recruited into the national security organs according to their merit

3.2 SOCIAL PROVISIONS

Supremacy of the Constitution

The Constitution is the supreme law of the land, Art 2 (4) states that any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. This provision protects women, from discrimination that is culturally sanctioned. Laws and cultural practices that are in contravention of the constitution can therefore not be enforced. Some of the practises include: FGM, early marriages, gender based violence, limiting women's ownership of land amongst others.

Application of International Law

Art 2 (5) provides that the general rules of international law shall form part of the law of Kenya. There are many international and regional treaties on gender equality and advancement of women, that Kenya is signatory to.

Through this provision, women, can strengthen the claim of their rights on the basis of the provisions of these international instruments, where the national legislation may fall short. Some of these include: Convention on the Elimination on all Forms of Discrimination Against Women, African Charter on Human and People's rights (ACHPR), The Protocol to the African Charter on Human Rights on the Rights of Women in Africa (Maputo Protocol).

Access to information

Art 7 (3)(b) provides that the State shall promote the development and use of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities. This provision ensures that those who are differently abled including the deaf and blind can access information, particularly public information. It also promotes the use of indigenous languages, meaning that people who have not had formal education, where women are in the majority, have a right to information in a language that they understand.

Citizenship

Art 14 (1) states that a person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.

This means that a woman, is able to pass on citizenship to her child, as a citizen of Kenya.

Bill of Rights

Art 19 (1, 2) recognises that the Bill of rights is the fundamental framework for economic, social, cultural policies. Their aim is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. This provision requires that policy should promote the achievement of these fundamental rights and freedoms.

Art 19 (5) requires the state to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals. With this provision, the government is required to give priority to the achievement of a right of freedom to a group that is considered vulnerable. With this provision, the government is limited from perpetually claiming that it does not have the resources to fulfil the obligation of providing a right or freedom. Women can challenge the state to ensure the fulfilment of this obligation.

Art 21 (1) states that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

These provisions place the obligation on government to ensure that all persons enjoy these rights and fundamental freedoms, particularly those who are considered marginalised and disadvantaged. It should be ensured that even within the groupings stated above, the gender considerations are made. Women and girls with disability have unique needs from men with disability. The same applies for women and girls in the other categories. Government is expected to do this by developing relevant legislation, policy and measures. Anyone can go to court if they feel that their rights and fundamental freedoms in the Bill of Rights have been denied. This will be done at no fee to the person filing the case.

Right to Life

Art 26 states that every person has a right to life and life begins at conception. Abortion is prohibited. However where there is emergency treatment or the life of the mother is at risk, a pregnancy could be terminated by a qualified health professional. This protects the unborn child, particularly in cultures that do not favour the birth of girls.

Human Dignity

Art 28 states that every person has inherent dignity and the right to have that dignity respected and protected. This provides that women have a right to be respected just like every other human being, because they are human beings. Women should not be treated like second class citizens.

Freedom and security of the person

Art 29 states that every person has the right to freedom and security of the person, which includes the right not to be:

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner

This provides a basis for women to have redress when they experience any form of violence. Gender based violence is covered within these provisions. Women should not be subjected to violence in the private space including the context of the home and this should also not happen in the public sphere including violence by law enforcement authorities. This also enables issues of violence by employers to be addressed, an issue that faces some domestic workers and in some instances factory workers, who are mostly women.

Freedom from servitude and slavery

Art 30 (1 and 2) states that, a person shall not be held in slavery or servitude. And a person shall not be required to perform forced labour.

Women have been victims of servitude and forced labour in various contexts. Some religious sects have been known to hold women as hostages. There are instances where young girls have been taken forcefully by relatives to work as domestic workers, with meagre or no pay, with a promise to support them with school fees in the future. Through this provision, the victims can seek redress following such occurrences.

Family

Art 45 (2) states that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

This provision addresses the issues of forced marriages, pre-arranged marriages and child marriages, which are prevalent in some cultures. Its states clearly that marriage is between two consenting adults of the opposite sex, as such young girls should not be engaged in marriage and neither should women be forced to marry someone who is not their choice.

(3) provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

Women should not be made to feel like they are lesser partners in a marriage than their husbands. Women are entitled to the same rights to acquire, access and share in matrimonial property during a marriage and at the dissolution of a marriage.

Access to Justice

Art 48 states that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Women should be able to seek justice through the formal justice systems. The state is obligated to ensure that fees are kept reasonable so people are not impeded from accessing justice

Children

Art 53 states a child is entitled to:

(a) right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

The state is obligated to enforce the protection of children from abuse and violence, neglect and harmful cultural practises like Female Genital Mutilation and Cut, child marriages, involuntary betrothing of young girls amongst others.

(b) right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;

Single mothers have a right to demand that the father(s) of the children provide equally for the children. Women can take up legal action against husbands or fathers who have absconded their responsibility of providing for their children.

Persons with disabilities

Art 54 (1) states that a person with any disability is entitled:

(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;

Women and girls with disability deserve to be respected and referred to in a manner that preserves their dignity. It is the right of a woman with disability not to be referred to according to her disability.

(b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;

Girls and women with disability have a right to access available educational institutions and facilities for persons with disability. They should be able to pursue their interests to the greatest extent possible and granted opportunity to gain employment or utilise their skills in the market place and in society without being prejudiced against.

(c) to reasonable access to all places, public transport and information;

Buildings, transport services, information services including media, public notices etc, should take consideration of access for persons with disability. These include ramps and lifts in buildings, railing and lowered platforms for buses and trains, sign language, braille and audio notices and signage.

(d) to use sign language, braille or other appropriate means of communication;

(e) to access materials and devices to overcome constraints arising from the person's disability.

The state is obligated to ensure that technology is made available that eases the constraints of access faced by persons with disability, these include wheel chairs, braille, hearing aids etc

Older Members of Society

Art 57 provides that the State shall take measures to ensure the rights of older persons:

(a) to fully participate in the affairs of society;

(b) to pursue their personal development;

(c) to live in dignity and respect and be free from abuse; and

(d) to receive reasonable care and assistance from their family and the State.

The state is obligated to ensure that older persons are not left out of society and that they are treated with dignity and respect. The state should provide social security to older persons to assist them. Women and men should benefit equally from these programmes.

The Kenya National Human Rights and Equality Commission

Art 59 establishes the Kenya National Human Rights and Equality Commission to amongst other things promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development.

The commission is an institutional mechanism to promote the protection of human rights. It has the powers to investigate complaints of human rights abuse whether by the State or private actors; ensure compliance with international commitments by the State amongst others.

Art 59 (3) states that every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Women should use this mechanism to channel any complaints they may have regarding human rights abuses or where their rights and fundamental freedoms have been denied.

In line with Art 59 (5) the National Gender and Equality Commission was established to address gender equity and equality issues. This is the commission that monitors gender equality issues especially with regard to access to opportunities, compliance with the constitution and appointments to public positions.

3.3 ECONOMIC PROVISIONS

Culture and Heritage

Art 11 (3) (a) provides that Parliament will enact legislation that will ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage. This provision provides economic opportunities for many indigenous women in Kenya. There is rich cultural heritage in the form of jewellery and artefacts that have been traditionally made by women. Women have faced the risk of losing the claim to this knowledge, as they are exploited by commercial middlemen. Women can use this provision to push for their fair compensation for this knowledge and goods produced thereof. Protection of Right to Property and Land.

Art 40 states that every person has the right, either individually or in association with others, to acquire and own property. Through this provision, women can own land by buying, inheriting or being given as a gift. They can have this land registered in their names and as a result are able to utilise it for collateral in obtaining a loan, they can sell it or transfer it to a child or other person as they please.

Art 60 (1) states that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable. One of the principles by which land shall be managed is that (f) there will be elimination of gender discrimination in law, customs and practices related to land and property in land. This further strengthens the provision that women can own land by whatever means and be able to use it as a productive resource and should not be discriminated against in any way, not even through customary laws and practices.

Art 68 (c) provides that Parliament shall enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.

The spirit of this provision is aimed at protecting the matrimonial home, for the sake of the women and children, who are usually the ones who are left disenfranchised in the event of a dissolution of marriage or separation.

Labour Relations

Art 41(1) states that every person has the right to fair labour practice. (2) provides that every worker has the right:

- (a) to fair remuneration
- (b) to reasonable working conditions

This article provides the basis upon which women should demand equal pay for equal work. The world over women have been found to earn less than their male counterparts for similar work. Women should also be guaranteed safe, and reasonable working conditions. They should be provided with appropriate protective gear where this is required and protected from operational hazards in the workplace. In addition, women are entitled to breaks during a working day, and periodic days of rest, including exemption from work when they are sick, and re-designation from heavy manual work when they are pregnant or immediately after a pregnancy. It is on this basis that women can claim maternity leave.

Economic and Social Rights

Art 43 provides a list of economic and social rights that every person is entitled to:

- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

Women have a right to access high quality health care, provided by the state. This includes access to reproductive health care, including contraceptives, pre-natal care and delivery in a medical facility. In addition 43 (2) provides that a person shall not be denied emergency medical treatment. In the event of an accident, hazard or acute symptoms necessitating immediate and quick action. A person, is entitled to treatment first even if they do not have money. As such women should not be shy of taking their children or loved ones to hospital in the case of an emergency just because they don't have money. The health needs of girls and women with disability should also be taken into account, when addressing health as a basic right.

(b) to accessible and adequate housing, and to reasonable standards of sanitation;
Women, are the home makers and adequate housing and sanitation is a big need for them.

Women have a right to enjoy decent housing that promotes dignity of the individual by separating where parents sleep from where children sleep, as well as separating boys from girls. In addition, they should have safe and decent ablution facilities that ensure proper and safe disposal of human waste.

(a) to be free from hunger, and to have adequate food of acceptable quality;

Women are the main providers of food in homes. Access to food, is therefore of critical importance to them. The government is obligated to put in place measures that ensure that there is food security in the country, and food can move from surplus areas to where it is consumed. Every person should be able to afford this food. In addition, the government is obligated to oversee the quality of food to ensure that food being sold for consumption is of an acceptable quality and standard and not harmful to health. The constant revelations that grains have aflatoxins or milk, meat and sugar in the market are laced with harmful chemicals, are a violation of this right by the government.

(b) to clean and safe water in adequate quantities;

Water scarcity is one of the issues that continues to plague women in both urban and rural Kenya. The government is obligated to ensure that women can access clean and safe water in adequate quantities, without having to travel long distances to do so.

(c) to social security;

The government is obligated to provide social security to persons who are unable to support themselves. This could be because of having no income due to illness, old age, crop failure, lack of employment or any other factors that impact one from earning an income. No household should fall into destitution due to lack of income

(d) to education.

Everyone has a right to an education. Girls should not be denied an education because of their gender. Boys and girls should have a right to pursue specialization in any subject. There are no subjects suited for girls and others for boys. When a girl gets pregnant, she has a right to go back to school after delivering the baby to complete her education. Also education should be accessible to all irrespective of their social status and income level. Factors that pose challenges for girls in their pursuit of education such as access to sanitary towels, clean and safe ablution facilities, demand to support with household chores in the home, should be addressed as a matter of right, as part of the package that will promote access to education for girls.

Youth

Art 55 (1) (b), obligates the state to take measures including affirmative action to ensure the youth:

(a) access relevant education and training;

The state should ensure that there are sufficient educational opportunities that provide training and skills to the youth to enable them gain relevant skills for the current demands in the market. These should be made available for both young men and women equally.

(c) access employment;

The state should ensure that the youth can access employment, by creating an enabling environment for the economy to grow, and generate jobs. They should also ensure that the youth gain employable skills so that they are able to participate in the economy.

Minority and Marginalised Groups

Art 56 obligates the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups:

(b) are provided special opportunities in educational and economic fields;

(c) are provided special opportunities for access to employment;

The government is obligated to undertake affirmative action programmes that provide person from these groups to access education and employment. This is because due to their historic marginalisation they experience great disadvantage. Special attention should be taken to ensure women and girls benefit equally from such opportunities.

Procurement of Public goods and services

Art 227 (2) (a and b) provides that an Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for categories of preference in the allocation of contracts; and the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination.

This is another affirmative action framework that seeks to provide specific advantages to previously disadvantaged groups with the aim of enabling them catch up with the rest. The 30% Public Procurement Preferential Regulations for Women, Youth and Persons with Disability, provide an avenue for women to participate in public procurement as suppliers. However the situation has not benefitted the vast majority of women due to the flawed nature of the public procurement system. Women should demand their right in gaining access to these opportunities through fair competition, devoid of cronyism that has resulted in the benefit only being accessed by a small category of women.

4.0

CURRENT STATUS OF WOMEN IN KENYA

4.1 POLITICAL STATUS OF WOMEN

Women's political participation is an important measure in determining the level of gender equality in a country. Women's political participation is not just about the self-actualization of women, who make it there, but it goes further. It is about numbers, but also about substance. It emanates from the simple slogan "Nothing about us without us", which characterized much of Central European political history in the 16th Century. It is also closely related to the slogan for the American revolution "No taxation without representation".

So why are the numbers important? The law of democracy, places a great premium on numbers. It is about the will of the majority. Issues gain prominence based on how many people supported them or raised them. As such, the question of whether women in politics is important is settled by just this simple rule. Secondly, Women, bring a different flavor to the decision making table, they are able to analyse issues from an angle that men are likely to leave out (Kamau, 2010). They know women's issues because they are women, and can therefore present them more coherently and ensure that they are not ignored or forgotten. Despite this fact, the struggle for increasing women's political participation has been like the game of musical chairs. Just when the women thought they had sealed the deal, the music started again, and the goal posts had shifted.

As has been discussed in the section above, the Constitution of Kenya provides a bold and unapologetic framework to increase women's political participation. Through the various provisions, more women have indeed made it to Parliament, County Assemblies and other public offices. However, there has been a breach of the Constitution because the provision of having no more than two thirds of any gender in any elective or appointive position has actually not been realised 10 years on.

The table below highlights the status of women in various positions of decision making in Kenya as at January, 2020.

POSITION	WOMEN	MEN	% OF WOMEN
CABINET	7	17	29.1
CHIEF ADMINISTRATIVE SECRETARY	9	20	31.0
PRINCIPAL SECRETARIES	8	36	18.2
DIPLOMATIC CORPS	13	43	23.2
GOVERNORS	2	45	4.3
DEPUTY GOVERNORS	8	38	17.4
COUNTY COMMISSIONERS	14	33	29.8
DEPUTY COUNTY COMMISSIONERS	34	261	11.5
NATIONAL ASSEMBLY (47 WR, 23 CONSTITUENCY MEMBER, 6 NOMINATED)	76	273	21.8
SENATORS (3 ELECTED, 18 NOMINATED)	21	46	31.3
CHAIRPERSONS OF COMMITTEES IN NATIONAL ASSEMBLY	4	30	11.8
VICE- CHAIRPERSONS OF COMMITTEES IN NATIONAL ASSEMBLY	8	24	25.0
CHAIRPERSONS OF COMMITTEES IN NATIONAL SENATE	1	19	5.0
VICE- CHAIRPERSONS OF COMMITTEES IN NATIONAL SENATE	5	12	12
MCA'S (96 ELECTED, 650 NOMINATED)	746	1431	34.3
COUNTY ASSEMBLY SPEAKER	5	42	10.6
SUPREME COURT JUDGES	2	5	28.6
COURT OF APPEAL JUDGES	7	12	36.8
HIGH COURT JUDGES	55	74	42.6
WOMEN ON SOE BOARD			¹⁵ 26/32

Source: Various (KNBS, KNA, Senate, CAF, Executive Order, NGEC 2017/18)

[15] <https://www.capitalfm.co.ke/business/2017/03/kenya-highest-number-women-boardrooms-africa-study/>

The table above reveals very interesting results. The apathy towards gender equality, manifests glaringly in elective processes. The elective process of 2017, yielded way below the constitutional threshold of 33.3 percent of women in Parliament. Parliament has lacked a legal mechanisms for addressing this situation, despite carrying the mandate for ensuring that the not more than two thirds gender provision can be actualised in Parliament.

This has been a violation of omission. However, despite this major illegality, Parliament has continued to operate and transact legislative business despite its evidently unconstitutional character in both the National Assembly and Senate. At the County Assembly, there were 12 counties that did not elect a single woman into the county assembly.

These counties included: Kwale, Garissa, Wajir, Mandera, Isiolo, Embu, Kirinyaga, West Pokot, Samburu, Elgeyo Marakwet, Narok and Kajiado. The mechanism that was provided for ensuring the achievement of the 33.3 percent women in county assemblies, involved topping up the extra numbers of women through nomination using party lists. Even with this mechanism, some counties failed to reach the constitutional threshold namely: Taita-Taveta, Trans Nzoia and Narok Counties.

In addition to the challenges of reaching the correct numbers, women who made it into the decision making offices through affirmative action mechanisms, have continued to struggle with gaining their due respect and legitimacy as equal members of these positions. The Women Members of National Assembly for example also known as Women Representatives are often referred to as 'Mama wa County' (mother of the county), whereas their colleagues are referred to as 'Mheshimiwa' (honourable). A nuance that suggests that they are not quite at the same level with those who are Constituency Members of Parliament.

At the County Assemblies, there have been efforts to downplay and in some instances totally alienate the nominated women MCAs. Counties like Nyamira for example in the first elections in 2013, failed to swear in their nominated MCAs considering them as not fully fledged members. In 2019, Kisii County Assembly moved a motion barring nominated MCAs from voting in the house. Though these actions were eventually overruled, they are a demonstration that the struggle for women's equal say in decision making does not end with numbers at the table, there continues to be an underlying social-cultural perspective of patriarchal dominance that continues to characterise how men relate to women (Maina and Muiru, 2019)

The table below further illustrates what was witnessed in the 2017 elections. Apart from the governor position where a third of women who vied actually won, the rate of success was below 20% for all the others. It would suggest that for women to achieve the 33.3 percent rate in elective politics, with the same average success rate of 14.8 percent, it means that a total of 4,295 women would need to vie for the various positions..

POSITION	NO. OF WOMEN WHO VIED	NO. OF WOMEN WHO WON	PERCENTAGE
President	0	0	0
Governor	9	3	33.3
Senator	21	3	14.3
Member of Parliament	134	23	17.2
Woman Member of National Assembly	299	47	15.7
Member of County Assembly	796	96	12.1

source: IEBC

In the appointive processes, the results is equally not encouraging. At the Cabinet level, the first Cabinet in this constitutional dispensation was constituted in contravention of the not more than two thirds principle and subsequent cabinets have not corrected this situation. Having 18.2 percent women as principal secretaries is a big violation of the gender equality provisions in the constitution by the appointing authorities. At the County level some counties like Mombasa, Kilifi, Nyeri and Migori actually achieved 50:50 with regard appointments of CECMs; while others like Nairobi, Kisumu, Nyamira, Nakuru and Tana River range between 20-25%. The most shocking county however is Kericho at 16.7%.

This data would suggest that there is a systematic apathy towards gender equality that pervades every level of society, and particularly with the duty bearers and the political leadership in the general sense of the term. Drilling down into some of this data revealed some additional disturbing results, for example, despite the low numbers of women holding chairperson or vice chairperson positions in Senate, it was observed that there are instances where a male chairperson in one committee, is a vice chairperson in another committee. Meaning a male senator is in some instances holding 2 leadership positions, yet women are grossly underrepresented. The question begs as to why one person would be within the committee leadership more than once. It would serve diversity and inclusion better if these were divided amongst a broader pool of members.

When we look at political parties which are the pipeline for political leadership, we find some better results. From a Survey done by CMD-Kenya in 2014, out of the 30 party surveyed, only 17% of the parties had women as party leader, while at least 33% of the parties had women as deputy party leader, another 33% had women as treasurer and national women leader. When we look at total number of members in the NEC, most parties had achieved the not more than two thirds principle, with even some having above 50% women. Two parties however failed to achieve this principle and that is NARC-K at 25 percent and CCU at 29 percent. These numbers of women however are not translating to women making it into political leadership positions.

With this backdrop, the only straw women have been left holding onto is the Constitutional provision in Art 27 and Art 81. Any process that would threaten to open up these clauses for debate or amendment should be strongly rejected by the women of Kenya.

4.2 SOCIO-CULTURAL STATUS OF WOMEN

As has been discussed in Section 4, the Constitution has various provisions aimed at promoting the socio-cultural development of all persons including women. Looking at various indicators however evidence reveals mixed results, with regard to women's achievement of their socio-cultural development.

A. Education

Education is a critical right that enhances the development of society. Women who have secondary and post-secondary education, have been found to also enjoy better human development outcomes in health, nutrition and their children also reported better human development outcomes. As such, access to education is a fundamental right for women that benefits the broader society (UNWomen, 2009).

In Kenya, women's literacy level is 80.2 percent and for men it is at 89 percent. The most recent policy framework in education recognises the need for reforming the education sector to ensure that the results of education are in line with the obligations created by the Constitution. We look at the general data on enrolment to try and explain women's participation in education, and factors that may be impacting the same.

The tables below presents enrolment data in the various levels of education (2018)

Level of Education	Enrollment Girls	Enrollment Boys	% of Girls	NER	GER
Pre-Primary	1,660,308	1,730,237	49.0	77.2	78.4
Primary	5,178,300	5,364,300	49.1	92.4	104
Secondary	1,437,400	1,505,300	48.8	53.2	70.3
TVET	158,742	205,142	43.6	53.2	
University	210,543	302,639	41.0		
Adult Education	146,799	65,642	69.1		

Source: Economic Survey 2019

Other indicators, 2018

Indicator	Female	Male	Total
Pupil primary completion rate	DATA NOT ACCESSED	DATA NOT ACCESSED	84.2
primary to secondary transition	82.9	83.3	83.1
Scored above c+	37,323	53,627	83.1
% who scored above c+	11.7	16.0	13.9
Secondary completion rate	80.9	82.2	81.6
Literacy rate	78.2	85	81.5

Source : KNBS

From the data presented above, girls are performing almost at par with boys in most of the indicators. Kenya seems to have achieved close to gender parity in enrolment especially in primary school. This could be attributed to the implementation of free primary education, which reduced the cost of accessing education, therefore sparing girls the discrimination they faced when families had to make a decision on whether to educate boys or girls with their meagre resources.

There are however some indicators that pose some concern. If we look at the net enrolment ratio (NER) for pre-primary, it is at 77.2 percent. This means that 22.8 percent of children who are of pre-primary age are not enrolled in school. This has several implications. First, when children miss the critical milestones taught in early childhood development, it impacts their learning even in the latter years. The second implication is that children are staying longer at home, which would mean that mothers are not able to engage in economic activity outside the home effectively, and thus impacting on their income earning potential.

The most alarming indicator however is the NER for secondary school, which is at 53.2 percent. It implies that 46.8 percent of children of secondary school age are not in secondary school. This would suggest that many children are falling through the cracks. Evidence from cross sectional studies has shown that girls are more vulnerable as they progress through the various education levels. Many factors are responsible for hindering their progress including the onset of their menstruation, teenage pregnancy, competition with their brothers for school fees, needing to supplement family income through work, household chores, early marriage amongst many other factors (Kiriti & Tisdell, 2003).

We can therefore conclude that the distribution of this 46.8 percent would constitute more girls than boys (KNBS, 2018). If indeed, these children are not in secondary school at this age, there could be two assumptions. First, that they are captured in a lower level of education, or secondly, that they are at home. If the former is the case then we can assume that they will eventually attain formal education, though delayed completion of school, also impacts completion rate as well as school drop-out rates due to factors such as pregnancy and early marriage.

However if the latter is the case, the country is facing a big risk of having such a large population getting into adulthood with no post primary education, and unable to participate in the formal economy and make meaningful contribution to the same. Because the bulk of these would be women, it will have adverse implications on many other human development indicators including health, gender equality, gender based violence and others.

Beyond just attendance numbers, it is useful to note that the value of education is beyond just going through school. It is important that the students attain educational outcomes that enable them progress to the next stage and attain higher level knowledge, which will enable them eventually participate meaningfully in the economy. Looking at the outcomes, we find that 11.7 percent of the girls who sat for their KCSE in 2018, scored the cut-off grade of C+ and above to enable them join the university (KNBS, 2018). Though this figure was generally lower than in the past, there has been confidence that the integrity of the examination system has been restored. Further, the affirmative action policy that was previously in place allowing girls to qualify for entry into the university at two points below boys, was abolished, so now girls compete at the same level as boys. However more fundamentally is the implication that this has on women's contribution and participation in the knowledge economy. It is evident that this ratio will be transmitted into the formal economy as women seek to engage in the labour market as potential employees and as innovators of products and services in the future.

Down the pipeline, the result will be, fewer women will be able to participate in higher income opportunities in the economy due to the lack of sophistication in the economy and as such will have to settle for low income opportunities. This creates a vicious cycle for women.

B. Health

A healthy nation is critical for its development and sustainability. Women's health is critical, for their contribution as mothers, workers, producers, traders etc. In addition the health of children below the age of 15 is closely interrelated with the health of their mothers.

Women have a higher life expectancy than men in most countries. This is usually attributed to the fact that women are less likely to engage in risky behaviour during their lifetime. In Kenya, the life expectancy rate for women is 69 years. This is however below the global average of 72 years. Despite this, the prevalence of illness for women is much higher than that of men at 23.8 percent and 19.1 percent respectively (KNBS, 2014).

There has been a general improvement in the various health indicators relevant to women. This can be attributed to the advent of devolution, where health became a devolved function. Devolution was coupled with the deliberate policy decision by government to invest in maternal health care, by ensuring that the cost for accessing maternal healthcare was reduced to a minimum.

The same positive story can however not be told of the more general health care system in Kenya. The quality and cost of healthcare still requires a great deal of improvement to meet the constitutional provision provided in Art 43. Maternal health care is critical because it accounts for 14 percent of deaths amongst women, which happen during pregnancy, childbirth or within two months after child birth (KNBS, 2015).

The three leading causes of maternal deaths are obstetric haemorrhage (40 per cent), hypertensive disorders (15 per cent) and anaemia (14 per cent). Women in childbearing years (15 to 49) are prone to anaemia (iron deficiency); 27 per cent of women of childbearing age in Kenya have iron deficiency and 38 per cent of pregnant women suffer from anaemia. Another high percentage of deaths is associated with complications related to abortion. The data for this is however is inconclusive as most abortion cases are undertaken illegally (KNBS, 2015).

Looking at other diseases indicators, women have a HIV prevalence level of 6.3 percent, which is above the national prevalence level of 5.9 percent. 33 percent of new HIV infections were amongst girls within the age group of 15-24. The reason for the high prevalence has been explained by various studies as being the fact that women have a low negotiating power in sexual relations, as such, they are more likely to engage in unsafe sex. In addition sexual violence has also been identified as a key contributor to the spread of HIV.

Cancer has emerged as another significant cause of death amongst women. Breast cancer and cervical cancer are the most common cancers amongst women. Breast cancer is a leading cancer in incidence among women in Kenya and a substantial contributor to early mortality. Globocan 2018 statistics show that breast cancer incidence rate in Kenya is estimated at 40.3 per 100 000 with a mortality rate of 17.8 per 100 000.

The annual incidence of breast cancer in Kenya is about 5985 (12.5% of all new cancer cases) and the annual mortality is about 2553 (7.7% of all cancer deaths). This speaks to a high mortality to incidence ratio, which is an indicator that speaks to various issues including when the cancer was detected, and the treatment provided. Due to the inadequate technology related to cancer screening, many cancers are detected at an advanced stage, when treatment is likely to be ineffective. This can explain the high mortality rate.

The other worrying statistic related to this is the median age of incidence. This is on average above 60 years globally, however in Kenya it is much lower at an age of 40-49 years (Gakunga et al, 2019). In the case of cervical cancer, 25 out of 100,000 population are affected by cervical cancer. The health practitioners have been advising on the need for annual screening for both breast and cervical cancer, to ensure that they can be detected early. However the screening rate is very low at 13.8 percent nationally and only 11 percent in rural areas.

With regard to the capacity of the health care system and ability to provide quality healthcare, an analysis of medical personnel, provides a very vivid story. Medical personnel is at 3.68 per 1,000 population in Kenya, this is way below the global average of 9.3 per 1,000 population (KNBS, 2014). With such a ratio, the system does not have the capacity to effectively and efficiently deal with the high disease incidence.

Medical workers have raised these concerns numerous, where they have cited various issues including the medical personnel to patient ratio; the conditions of health centres; the provision of adequate basic medical tools, including equipment and consumables which are necessary for them to effectively carry out their work amongst others.

Medical Personnel (2018)

- Total Medical personnel 368 per 100,000 persons
- Medical Officers – 24 per 100,000
- Pharmacists – 7 per 100,000 persons
- Registered nurses – 110 per 100,000 persons
- Clinical Officers – 47 per 100,000 persons
- Public Health Officers – 31 per 100,000 persons
- Female graduates as percent of total graduates = 49.9 percent
- Female medicine and surgery students as percent of total = 39.2 percent
- Female nursing graduates as percent of total = 62 percent.

Life Expectancy (2016)

- Life expectancy at birth = 64 years for males; 69 years for females
- Probability of dying between 15 and 64 years = 256 per 1,000 population for male; 184 per 1,000 population for women

Maternal health (2018; 2014)

- Fertility Rate = 3.9 births per woman (2014)
- Deliveries in health facilities = 71.7 percent of expected births were delivered in health facilities (2018)
- Maternal mortality ratio = 362 deaths per 100,000 live births
- 58 percent of married women use contraceptives (2014)
- 60 percent of contraceptive users access them from a government health facility (2014)
- 96 percent of women with live births received antenatal care in a health facility (2014)
- 33 percent of women are overweight or obese
- 56 percent of women have comprehensive knowledge of HIV/AIDs
- 10 percent of women have had a breast exam
- 14 percent have had cervical cancer screening
- 1 percent of women, use tobacco products
- 82 percent of women are not covered by any health insurance
- Maternal deaths account for 14 percent of all deaths of women
- 9 percent of women have been told that they have hypertension

There has been a steadily increasing trend in the incidence of non-communicable diseases, what is referred to as lifestyle diseases. There is need to improve on the capacity of the health system to cope with this emerging trend.

The health system will therefore need to be better equipped to deal with these, based on the reality that they are more complex to manage and usually have a longer life cycle. However there is stronger need to make a fundamental shift towards preventive medicine rather than the current focus on curative medicine.

This is especially critical and more affordable in managing lifestyle disease incidence over the long-term. Since health provision is a devolved function, counties will need to undertake long-term planning based on their disease profile, and channelling investment in view of this.

Child Health

- Pentavalent third dose immunization coverage – 81.6 percent (2018)
- Infant mortality rate = 39 deaths per 1,000 live births (2014) Under five
- mortality rate = 41 deaths per 1,000 live births (2016)
- 36 percent of infants born had their first postnatal check-up within the first 2 days after birth (2014)
- Stunted children under the age of five = 26 percent
- Children under the age of 5 that are wasted = 4 percent
- Children under the age of 5 that are underweight = 11 percent
- 99 percent of children have at least been breastfed, but 61 percent of those below 6 months were being exclusively breast fed.

The health of children positively correlates with the mother's health, education and economic empowerment. Most of the children health indicators are an indicator of the economic empowerment of women. Stunted growth, and underweight amongst children indicates that the children have insufficient nutrition, which is an indicator of overall household income status. This would suggest that 26% of families with children below the age of 5 are not able to afford nutritious food. Children's health also affects the mother's health both physical and mental health. Sufficient attention and investment has not been given to mental health services in Kenya. These remain weak and unevenly distributed. Women in rural areas are less likely able to access mental health services. The result has been increasing cases of violence against children by mothers, including, suicide and homicide rates (KNBS, 2014).

Gender Based Violence (reported amongst 15 - 59 year olds, 2014)

Gender based violence has continued to persist at an alarming rate. Gender based violence, takes various forms including physical abuse, emotional abuse, sexual abuse and promotion of negative cultural practises such as FGM and child marriage. In most instances abuse is perpetrated by someone who the victim knows and even in some instances trusts. Gender based violence is not only happening in the private space, but is also prevalent in the public space.

Reports have suggested that one reason that makes women shy away from elective politics, is the violence targeted at them during the process (Kamau, 2010). GBV greatly hinders the social, political and economic progress of women, it is a tool that has been used to hold women back from advancing through intimidation and fear. Another area of violence that has been highlighted by media severally, is femicide. Though this report was not able to access this data, media reports indicate that this is an issue of great concern, especially affecting young women.

- 45 percent of women have experienced physical violence since the age of 15. The main perpetrators of violence are husbands.
- 14 percent of women, have experienced sexual violence at least once
- 39 percent of married women have experienced spousal physical and sexual violence
- 44 percent of women have sought assistance for the violence they experienced.
- 21 percent of women have undergone Female Genital Mutilation or Cut

The Kenya Demographic and Health Survey (2014), from which most of this health data has been obtained points out that women's economic empowerment is positively correlated with most of the health indicators. Women are better able to make decisions concerning their health when they are empowered, particularly economic empowerment. However, it is in reality a chicken and egg situation.

Whereas economic empowerment accords women the opportunity to invest in their own health and that of their children thus realising better health outcomes; it is also a fact that when women are suffering poor health, they are not able to fully exploit their economic potential and thus are less likely able to achieve economic empowerment.

Women and Girls with Disability

The unique needs of women and girls with disability in health deserve mention. According to the NGO submission to the CEDAW, in 2017, the report notes that there is a general lack of disability mainstreaming within public healthcare institutions as there are inaccessible beds, toilets and washrooms, lack of Sign language interpretation, inaccessible gender based violence recovery centers, a lack of privacy and confidentiality and a general lack of awareness on the needs of women with disabilities. The lack of accessible infrastructure brings about poor sanitation especially for women and girls with physical disabilities because most toilets in public institutions are pit latrines and inaccessible therefore posing a health risk for girls with physical/multiple disabilities getting in contact with the dirty floor of the latrine as they are forced to crawl.

There are cases of women and girls with disabilities especially intellectual and psycho-social disability not getting proper medical attention in government facilities after sexual violence. This results to cases failing in court as medical personnel provide insufficient reports, do not handle the matter urgently to get good evidence to ensure successful prosecution; evidence is lost in hospitals or police stations.

4.3 ECONOMIC STATUS OF WOMEN

There is growing recognition globally that gender equality is good for economic growth and essential for poverty reduction. Where gender inequalities constitute barriers to women entering or participating fully in markets, economic growth and private sector development will be constrained with less investment, less competition, and lower productivity (Ellis 2004). Gender inequalities can also adversely affect the outcome of trade and macroeconomic policy reforms and their ability to translate incentives into economic development.

According to a report published by the IFC in 2007, eliminating gender-based inequalities in education and access to agricultural inputs in Kenya, could result in a one-off increase in as much as 4.3 percentage points of GDP growth, followed by a sustained year-on-year increase of 2.0 to 3.5 percentage points in GDP growth.

Some of the findings of this report hold true more than 10 years later. Little has changed with regard to the place of women in the economy. The situation is also dire for women with disabilities. Though the data was not readily available for purposes of this paper, anecdotal evidence reveals that women with disability bear an even bigger brunt of poverty and income inequality. Participation in the formal labour market. It has been observed that women make great contribution to the economy, but in most cases, their contribution is invisible. It is invisible to the extent that it is not captured in the national accounting system and is also not captured in the balance sheets of the enterprises they run.

This is because, women tend to remain mostly in the informal sector. Looking at Kenya's economic structure, we find that agriculture accounts for 32 percent of the economy. This makes it the single largest sector of the economy. Understanding women's role in agriculture therefore is critical in understanding their overall role in the economy. In agriculture over 80 percent of labour in agriculture is provided by women in rural areas.

Most of this farm labour is provided in owner managed small scale, subsistence farming enterprises, and is usually not formally remunerated. The same situation replicates itself in the micro and small enterprises, which is the category where over 85 percent of female enterprises fall.

It is interesting to note that when analysing data on formal wage employment in the agricultural sector for example, it is found that there is a higher participation of men than women, where women account for only 33 percent of the wage employment in the sector. Overall women constitute 34 percent of the total wage employment (KNBS, 2018). This would suggest that women are getting stuck in the informal sector, and are limited when it comes to participation in the formal sector. Because of this situation, coupled with what is referred to as the care roles played by women, women are considered time poor. On average, women work longer hours per day (12.9 hours) compared with those of men (8.2 hours), yet they earn less because more of these hours are not remunerated (Kiringai, 2006).

Formal wage employment by sector, 2018

SECTOR	Female '000'	Male '000'	% of Female)
Modern sector employment	880	1685	34
Agriculture	112	225	33
Manufacturing	49	252	16
Wholesale trade	54	186	23
Public administration	83	148	36
Education	249	276	47
Service activities	66	61	52

Source: KNBS

Low participation in the formal sector, contributes to the gross under reporting of women's contribution to the economy. However, beyond just participation in formal wage labour market, women even within the wage labour market are still being left behind with regard to income inequalities. The table below demonstrates that women are more in the lower cadres of the wage brackets, from Ksh30,000 and below (KNBS, 2018).

Distribution of Wage Employment by Sex and Monthly Income (KSh) Groups 1, 2018

Monthly Income Groups	Men	Female	% of Female
0- 9,999	13,439	9,749	42.0
10,000 - 14,999	14,304	9,161	39.0
15,000 - 19,999	61,376	30,297	33.0
20,000 - 24,999	100,761	82,572	45.0
25,000 - 29,999	184,524	145,222	44.0
30,000 - 49,999	731,832	361,241	33.0
50,000 - 99,999	550,264	337,898	38.0
100,000 +	87,400	45,119	34.0
Total	550,264	1,021,259	36.9

Source: KNBS

Ownership of productive assets

Looking at the asset base still in the agricultural sector, women own about 1 percent of agricultural land, even the agricultural machinery is owned by men. As a result of this low asset ownership, women are unable to engage in the formal financial market as they do not have the requisite collateral to secure any loan that they would borrow. The options available to them then remain the micro-finance institutions and other informal credit arrangements which tend to be very expensive and not sufficient for making transformational changes. Women then get stuck in a rut, never being able to break away from the micro and small, and thus perpetually suffering the impacts of dis-economies of scale and the high cost of being small.

Access to Water and Sanitation

72.6 percent of Kenyans have access to safe drinking water 86.7 percent in urban areas and 61.8 percent in rural areas (KNBS, 2015). 24 percent have water in their household, while 63.4 percent spend less than 30 minutes fetching water. The remaining 12.6 percent spend even an hour or more finding water (KNBS, 2016). We know that women bear the greatest burden of finding water, where water is not easily accessible. The situation in urban areas is slightly more complex as there is water scarcity, even where there is accessibility. In informal settlements access to water is not guaranteed, women are faced with the option of buying very expensive water from water vendors.

They have no way of confirming whether the water that is sold by the water vendors is fit for human consumption as they do not know the source. Another urban challenge is what is referred to as water rationing. Even where households have been connected to the main water supply system, there is rampant artificial water shortages. This results in the same situation above, where households have to buy expensive water from water vendors, and they have no control of where the water comes from. This is posing a huge health risk for urban dwellers.

With regard to sanitation, 65.2 percent of households have access to improved methods of human waste disposal, while 8.4 percent of households have no access to a toilet. This would suggest that where households have no access to a toilet, women bear the burden of seeking ways of disposing human waste of their own and that of their children. This poses a big risk to the health of these families, further increasing the burden of care that women have to bear (KNBS, 2016).

On solid waste disposal, 63.7 percent of households dispose off their waste by either dumping it in their compounds or burning it. Solid waste disposal is a big environmental challenge particularly in urban areas. Women have a big responsibility in the management of waste at the household level. Sensitizing them on effective and sustainable solid waste management is vital for themselves and the community at large (KNBS, 2016).

Access to Energy

41.4 percent of households use electricity from the main grid for lighting, 73 percent in urban areas and 17.1 percent in rural areas. 14.1 percent of households used solar lighting. The source of lighting is very critical in influencing educational outcomes. This is particularly significant for girls in rural areas, who have to undertake household chores like fetching water and fuel-wood after school before dark, and then settling down to do their homework and study thereafter. The lighting conditions impacts their performance in their studies and thus their educational outcomes, and also poses long-term risks to their eye sight. 17.1 percent is a very low level of access for rural households (KNBS,2016).

With regard to cooking, 54.6 percent of households use wood fuel, 84.3 percent in rural areas and 16.1 percent in urban areas. 13.4 percent use liquefied gas, 14 percent kerosene and 14.6 percent use charcoal. Cooking is predominantly the domain of women and girls. The use of firewood, has been associated with acute respiratory diseases amongst women. Women in rural areas face greater risk to contracting respiratory issues due to the continued use of fuel-wood for cooking, thus affecting their long term productivity in the economy (KNBS, 2016).

Use of digital technology

According to the GSMA report of 2019, 82% percent of adult women and 86 percent of men own a mobile phone. 26 percent of adult women are mobile internet users against 43 percent of men. It has been reported that women in Kenya are 39 percent less likely to use mobile internet and 23 percent less likely to own a smart phone (GSMA, 2020).

This inequality has many implications for how women engage, and take advantage of the information age. Mobile internet use is particularly low amongst women. This is of great concern for a country that is moving towards digital service delivery, and an economy that is becoming more and more integrated with the outside world. For women, to fully take advantage of the digital age opportunities and information, this will have to be addressed.

5.0

IMPLICATIONS OF THE BUILDING BRIDGES INITIATIVE TO WOMEN

The Building Bridges Initiative was started following the much publicized reconciliatory handshake between President Uhuru Kenyatta and Rt. Hon. Raila Odinga. A task-force was gazetted vide Gazette Notice No. 5154 and established on 31st May 2018. The task-force comprised of 14 members and 2 joint secretaries appointed by the President, and they were tasked with identifying how to address the issues raised in the Joint Communique on building bipartisanship and unity in Kenya. Following various public hearings around the country in all the 47 counties, the task-force produced a draft report on proposals of how to build a united Kenya. This report was jointly launched by President Uhuru Kenyatta and Rt. Hon Raila Odinga at Bomas in Nairobi on 27th November, 2019. The BBI report is organised along ten thematic areas, which provide a synthesis on the problem, and make recommendations to provide the identified solution. The lens with which this analysis has been done, is to ask, what is new in BBI, that has not been provided in the Constitution and what is at stake for women. These 10 thematic areas include:

- **Lack of a National Ethos** – the report notes that there is need for developing a collective vision that would lead to a united Kenya equal to all its major challenges. The Constitution of Kenya, is that collective vision. In the Preamble, the Constitution recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 10, further elaborates on the national values. This is the basis of our national ethos as a country.
- **Responsibilities and Rights** – The report highlights the need for citizens to not only focus on what government should do for them, but also what responsibilities they bare. It also calls for civil servants to have skin in the game, by using the same services they are responsible for providing. The confusion on the role of the state and the role of citizens, has emerged as a result of the misconception of the spirit of the constitution. The spirit of the constitution is very clear, Art 1 declares that sovereign authority belongs to the people, the institutions of government and governance, exercise delegated authority from the people. As such the demand for accountability of the state by citizens and responsibility to the nation by citizens, is not a question of either or. Everyone needs to play their part, and the constitution is clear on this.

- **Ethnic Antagonism and Competition** – the report calls for doing away with a winner-take-all model for the Presidency and opt for a more consociational model that works best for ethnically divided societies. It states that political parties should also be compelled to reflect the face of Kenya in ethnic, religious, regional, and gender terms. The same should also apply in the public service. Art 91 of the Constitution, provides that every political party shall have a national character, as will be prescribed by an Act of Parliament. Art 232, provides that the public service shall have representation of Kenya's diverse communities. The only issue that has not been covered in the constitution that is being canvassed by the BBI, is the change in the structure of the Executive, particularly the Presidency.
- **Divisive Elections** – The report notes that the winner takes it all model has resulted in negative contestation based on “we” versus “them” along tribal lines. It makes recommendations for an executive structure where there is a President who is the head of state elected by the people, and a Prime Minister appointed by the President from among Members of Parliament, from the party that has the majority members, who will be the head of government. It also recommends that Cabinet is made up of both Members of Parliament and technocrats. These recommendations are new proposals, they have not been provided for in the constitution. The recommendations in iii, and iv have dominated political discourse on the BBI report, at the expense of the socio-economic issues that are contained in it. It could be sufficient to conclude that these are the most important provisions of this report, in the eyes of the political class, and the other provisions have been suggested to try and legitimize this one agenda.
- **Inclusivity** – the report notes that Kenyans, at core, interpret inclusivity in very political terms as ‘who gets what, when and how’, and focus on the authoritative allocation of resources and values. They therefore yearn for more inclusion in executive power, at the National and County levels. Inclusivity as a theme, runs through almost every chapter of the constitution. We need to ask ourselves, why it has not been realized. The solution does not lie in framing and reframing it. The solution lies in understanding the politics of exclusion and the reasons why exclusion persists despite being explicitly provided for in the supreme law of the land.
- **Shared Prosperity** – The report noted, that Kenyans were concerned about poverty and unemployment. It notes that it is not enough to merely improve our economic output and present rates of investment, we must entirely transform the way our economy operates if we are to deal with the present lack of jobs. It is therefore crucial for us to build an economy that is founded on the principles and practices of value creation, and that rejects the extractive model as the primary mode of economic activity. The constitution identified the need for shared prosperity and has made provisions for promoting equitable development. The gap has however remained in policy appropriateness, policy consistency and policy implementation. An economy that is driven through deals and middlemen, does not have the capacity of creating value, and absorbing the wider population.

- **Corruption** – The report notes that there is a growing public perception of Kenya having a rigged system that rewards cronyism and corruption, as opposed to productivity and hard work. It notes that this the greatest risk to Kenya’s cohesion and security. The report makes various recommendation. The constitution, has clear guidelines and principles of leadership as enshrined in Chapter six. What has lacked until now is a system of effective implementation of the same.

- **Devolution** – The report notes that Kenyans support devolution, but it has some challenges. The spirit of devolution was about taking governance closer to the people, so that they have a bigger say in their development process and by so doing can obtain better service delivery. There has been a systematic undermining of devolution not only by the national government, but also by the county governments. Accountability is still a far cry, service delivery has not improved to the extent it was expected, and county governments are more interested in consolidating their power than in serving the people. Whereas devolution was supposed to shift development attention to the counties, citizens have continued to focus on national government because the bulk of resources have remained at national government. The political attention being laid on the structure of the executive and the winner takes it all model at national government level, is a demonstration that the political elite have no intention on actualising full devolution, where the national government is left as an organ of policy formulation and coordination, and the county governments become the arena of development implementation and service delivery.

- **Safety and Security** – The report notes that Kenyans do not feel secure. The principles of human and state security have been provided in the constitution in chapter fourteen. The framing of the national discourse on BBI led by politicians, has emphasised the structure of the executive, at the expense of all the other socio-economic issues that have been raised in the BBI report. The call for a constitutional referendum should be cognizant of the fact that the Constitution is very clear on which sections of the Constitution should be subjected to a referendum. These protected clauses guard against any possible excesses of the state. Art 255, clearly stipulates these as including:
 - (a) the supremacy of this Constitution;
 - (b) the territory of Kenya;
 - (c) the sovereignty of the people;
 - (d) the national values and principles of governance referred to in Article 10(2)(a)- (d);
 - (e) the Bill of Rights;
 - (f) the term of office of the President;
 - (g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;
 - (h) the functions of Parliament;
 - (i) the objects, principles and structure of devolved government; or
 - (j) the provisions of this Chapter.

The structure of the Executive is not one of the issues that should be subjected to a referendum. This can be included through an amendment by Parliamentary Initiative as provided for in Art 256, or amendment by Popular Initiative as provided for in Art 257.

In the current dispensation, where women have continued to struggle for the implementation of their constitutionally guaranteed rights, and conscious of the nuances that have surrounded discussions on implementation of the not more than two thirds principle, where it has been intimated that the expanded space for women's leadership, has had little value. Women should be very wary of a process that leads to a referendum and the possibility of opening up discussions on provisions in the Bill of Rights.

If the current administration has had a lacklustre approach to implementation of a constitutional provision that is binding, and has further been in outright defiance of court orders, it is highly unlikely that another less binding document would produce better results.

6.0

RECOMMENDATIONS ON HOW WOMEN SHOULD ENGAGE MOVING FORWARD

This paper, has demonstrated that indeed, despite the monumental achievement that women made in securing very progressive provisions in the Constitution. They have continued to experience the shorter end of the stick with regard to converting those provisions into tangible benefits. Whereas there has been progress, there has not be transformation.

Transformation is what women were seeking. This however, is not meant to dampen the spirits of individual women and as a collective, but is meant to be a wake up call. It is a call that says to women, the things that kept them awake in former years, should continue to occupy their hearts, minds and voices even in these latter years. That many of the champions crossed over, is not an indication that they have made it when the vast majority continue to suffer marginalisation and in some instances destitution. It is a call that declares that the struggle has to continue. Women have a responsibility to protect the gains in the constitution, that those who were before them fought very hard to attain. We owe it to them and to ourselves. Looking at the journey of women, it is evident that the political class has never been open to accommodating women. They use various tactics to derail women and even remove their agenda entirely from the table.

Women should not allow themselves to be divided along tribal or political lines, these are never groupings that support the women's agenda. The tribe has always had provisions for exclusion of women. This has been carried forward into the political alliance. With this in mind therefore, the question however begs, how will this latter years' engagement look like, for it to be effective. Conscious that in this season, it is not about awareness by the duty bearers it is about lack of political will.

Women need to arise and defend the constitution. They should refuse to engage in side shows when the main show has not yet been staged. It would be absolutely tragic if the gains women earned through very hard work would be clawed back under our watch due to a lack of discernment or negligence on our part. Below are some recommendations on how women can engage, to amplify their voice and strengthen their relevance:

a. The reality of democracy, is that numbers matter; as well as organizing for interests. Women need to continue investing in building a cohesive, unified women's movement. This will involving building awareness and consciousness right across the country; building a new type of political consciousness and alertness, where women refuse to be used as the stepping stones for men, yet they are left empty thereafter; social and economic mobilisation, conscious that women cannot carry out advocacy when their children are hungry. The new women's movement should move away from hotels and workshops, to the village and town centres, it is about women mobilizing around the things they do every day. For women to mobilize, they need civic education for them to understand what is at stake.

b. Strengthen women's voice as the voice of governance and accountability. Women should emerge as the remaining voice that will speak out against bad governance, irresponsible legislation, unfinished projects, exorbitant projects etc. Women should use every space available to get their voices heard. These they will be able to do if there is focus on understanding government and governance, and consistently monitoring government policies, budgets and projects. This they should do at the sub-national level and national level concurrently. The system keeps women busy fighting over peripheral issues, so that they are never able to engage on the structural issues. For example, women should be able to demand that government allocates the health budget in line with commitments made at the Abuja Declaration, this is for national government and also county governments. They should then demand to know how the budget will promote curative health in line with the health policy. They should monitor implementation and shout out loud when they see discrepancies. These they can do by using the mechanisms of engagement provided through public participation, petitions and use of media.

c. With dwindling donor resources, there needs to emerge a new variety of community advocacy, one that grows organically from the ground up. This cannot be a single agenda movement, it will have to carry multiple agendas. Women need to come together to build their economic empowerment and financial strength. These groups will then also serve as the platforms for social support and beyond that also political advocacy. There is need to move away from activism hinged on donor funding. This has been the model that has greatly weakened the women's movement, because when funding dried up, the women went back to their market stalls and small shambas and the advocacy died out. Women's advocacy should be around the things they do, advocacy cells should be established within existing clusters of women's daily lives. In this way, the women do not dissociate their daily lives from their advocacy agenda, because they experience it every day.

d. Women should continue to build their version of truth, in a society where the truth is often muzzled to an extent you cannot recognise it. Women will need to take control of their knowledge generation processes so that they develop truth based on their experiences and realities.

e. The women's movement should evolve a specific accountability framework for keeping women in particular accountable. The women in today's parliament and executive at both national and county government levels, are beneficiaries of the intense advocacy and lobbying that has gone on for decades by women. They owe the women's movement an explanation on how their ascending to that level, is opening up the space for more women and delivering better outcomes for women. They owe women the answers. Women should create an accountability forum, held every 6 months where women in these positions account for their position. It then also serves as an opportunity to share with them specific recommendations on how things can be improved in the various sectors, and they are mandated to carry that agenda and bring it to fruition. The results of which are submitted at the next bi-annual accountability forum.

f. Use of legal mechanisms still provides a useful channel for engagement. Even if decisions are not made expeditiously, a legal case builds public awareness on a matter. The lone ranger approach that women's organisations have taken lately should be abandoned for the herd approach, where women rally around as many organisations and even individual women and present a case in court. Women should continue to build alliances across gender borders. There are men who can be champions, if they were asked to. Women will need to identify these men and recruit them to support the women's cause.

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The background features a dark blue gradient. In the lower half, there are stylized yellow silhouettes of people of various heights and widths, interspersed with yellow circles of different sizes, creating a crowd-like effect.

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