



Participatory Constitutional Reforms vs. Realization of Equal Representation of Men and
Women in the Parliaments: A Study of Kenya, Rwanda and Tanzania

By

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Thesis Submitted for the Degree of DOCTOR OF PHILOSOPHY

in the Department of Public Law, Faculty of Law

of the UNIVERSITY OF CAPE TOWN.

August 2019

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DECLARATION

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ABSTRACT

In this thesis, the constitution-making legal frameworks in Rwanda, Kenya, and Tanzania are examined in relation to how they facilitated public participation in line with Article 25 of the International Covenant on Civil and Political Rights, 1966 and Article 13 of the African Charter on Human and People's Rights, 1986. In line with Articles 4 and 7 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979, and Article 9 of the the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, the thesis gauges the level and impact of women's participation in the constitution-making processes in furthering equal representation of men and women in parliaments. Findings contained in this thesis are informed by primary data from international, regional and national legal frameworks relating to participation in political decision-making processes and are supplemented by secondary data from credible reports, journal articles and books. Analysis of the colonial and early post-colonial constitutional formations depicts imposition of the constitutions by the colonial governments in consultation with a few African political elites. Generally, the colonial and early post-colonial constitution-making processes were founded on weak legal frameworks, denying the public, including women, the right to take part in constitution-making processes. The onset of international and regional conventions slowly influenced the opening of the constitution-making processes to the public. The 2003 Rwandan Constitution, 2010 Kenyan Constitution, 1977 Tanzanian Constitution and the subsequent stalled 2014 Tanzanian Proposed Constitution were founded on moderate strong legal frameworks allowing some level public participation. In terms of facilitating women's participation, these frameworks suffered shortcomings in several aspects particularly in composition of constitution-making organs, access of uneducated and rural women and ensuring substantive participation by women. However, the 2003 Rwandan Constitution, the 2010 Kenyan Constitution, the 1977 Tanzania Constitution and the 2014 Proposed Draft Constitution of Tanzania contain equality and non-discrimination provisions. When it comes to women's participation in parliaments, the definition of equality is equated to a percentage (mostly 30 per cent), which does not represent the meaning of equality. An increased number of women parliamentarians in the Rwandan, Kenyan, and Tanzanian Parliaments, has enabled the legislation of gender sensitive laws and policies in the areas of inheritance, gender-based violence, family law and land rights. However, there are many areas in which women parliamentarians fail to represent the real interests of women. Challenges related to the practice of first-past-the-post and proportional representation electoral systems and the practice of temporary special measures continue to hinder the realisation of equal representation of men and women in parliaments. Rwanda, Kenya, and Tanzania should adopt the equality-based proportional representation electoral system. Short-term recommendations are provided based on the contextual differences and uniqueness of each country under study namely Rwanda, Kenya and Tanzania.

ACKNOWLEDGEMENTS

First, I thank God for endless mercy and grace that endures forever, and for guiding me through my PhD journey. I thank myself for perseverance, consistence, commitment and striving for excellency. I thank the Open University of Tanzania for granting me leave time for my studies. I thank my colleagues from Faculty of Law, especially Dr Gift Kweka, Dr Damas Ndumbaro and Prof Alex Makulilo for support and encouragement. I thank the University of Cape Town for accepting me as a student and assisting with funding my studies. Special appreciation goes to my supervisor, Associate Professor Waheeda Amien for constructive comments, guidance and assistance. Without it, this thesis would have been only a dream. I want to thank my parents, my father Melkisedeck Roman Lihiru and mother Lucy Sostenes Mhigi for prayers that sustain me every day. I thank my husband Herry for his understanding, presence and volunteering with editing of every chapter. I thank my children, Ethan and Divine for bearing with me when I could not be there with them during pursuit of my doctoral degree. I thank my young sisters Lemi, Martha and Sarah for their assistance in execution of my care duties. I thank my former co-workers from the Institutions for Inclusive Development Project (I4ID), Mwanahamisi Singano, Samantha Gibson, Julie Adkins and Anna Bwana for thoughts, comments and reflections. I thank my newly met friends from Vermont State, United States of America, Ed Paquin, Bryan Dague, Ashley Goff and Toni Marsh from George Washington University for their assistance in editing chapters of this thesis. I would like to thank Advocate Fatma Karume, the former President of Tanganyika Law Society (2018-2019) for useful insights on this thesis during the one and half hour's flight from Dodoma to Dar es Salaam. Thanks to Ramada Resort, Mbezi Beach for complimenting my writing with amazing coffee and an incredible ocean view. I thank Viki Janse van Rensburg for being the final grammar editor of this thesis. The entire responsibly of this document remains with me and I am solely accountable for all errors that may occur.

DEDICATION

To all the girls and women from all walks of life, dreams are valid.

To my late step father Mohamed Nuha for the trust you had in me. If you were alive, the fattest cow would be slaughtered to celebrate the attainment of my PhD. Continue to rest in peace.

ABBREVIATIONS AND ACRONYMS

AEMO	African Elected Members Organization
AFN	Assembly of First Nations
CCM	Chama Cha Mapinduzi
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHADEMA	Chama cha Demokrasia na Maendeleo
CoE	Committee of Experts
CRA	Constitutional Review Act
CRC	Constitution Review Commission
CSW	Commission on the Status of Women
CUF	Civic United CUF)
EAC	East Africa Community
FPTP	First-Past-the-Post
GMO	Gender Monitoring Office
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDEA	International Institute for Democracy and Electoral Assistance
IEBC	Independent Electoral and Boundaries Commission
IPPG	Inter- Parties Parliamentary Group
IPU	Independent Parliamentary Unit
IPU	Inter Parliamentary Union
KADU	Kenya African Democratic Union
KANU	Kenya African National Union

KNDRC	Kenya National Dialogue and Reconciliation Committee
LCC	Legal and Constitutional Commission
LEGCO	Legislative Council
LNC	Local Native Councils
NEC	National Electoral Commission
NEC	National Executive Committee
NKP	New Kenya Party
PR	Proportional Representation
PSC	Parliamentary Select Committee
RPF	Rwanda Patriotic Front
SCA	Special Constituent Assembly
TANU	Tanganyika African National Union
TAA	Tanganyika African Association
UDHR	Universal Declaration of Human Rights
UKAWA	Umoja wa Katiba ya Wananchi
UN	United Nations
UNHRC	United Nations Human Rights Committee
URTU	United Republic of Tanzania
USA	United States of America
UTP	United Tanganyika Party
WDC	Ward Development Committees
ZEC	Zanzibar Electoral Commission

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1.CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, political and cultural development.’¹

1.1 INTRODUCTION TO THE RESEARCH STUDY

In this thesis, the relationship between participatory constitution-making processes versus the realisation of equal representation of men and women in Kenyan, Rwandan, and Tanzanian parliaments is examined. Specifically, two main aspects are discussed. The first aspect is on the contribution of the constitution-making legal frameworks for colonial and post-colonial constitutions in facilitating meaningful participation by women. While the second aspect focuses on how the participation of women in constitution-making processes enabled the attainment of progressive constitutional provisions that facilitates the realisation of equal representation of men and women in parliaments. In determining whether the constitution-making processes in Kenya, Rwanda and Tanzania facilitated the realisation of equal representation of men and women in parliament, selected provisions from the International Covenant on Civil and Political Rights (ICCPR),² the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),³ the African Charter on Human and People’s Rights (the African Charter)⁴ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

¹ Article 1 of the International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, came into force on 23 March 1976. The ICCPR, together with the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights, are considered the International Bill of Human Rights. Available at FAQ: The Covenant on Civil & Political Rights, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> accessed on 15th March 2016.

² Ibid.

³ CEDAW is often referred to as the ‘women’s bill of rights.’ It is one of the core international human rights treaties of the United Nations treaty system, which requires member states to undertake legal obligations to respect, protect, and fulfil human and women’s rights. CEDAW was adopted and opened for signature and accession by the United Nations General Assembly Resolution 34/180 on 18 December 1979. Tanzania ratified CEDAW in 1985, Kenya in 1984, and Rwanda in 1981.

⁴ Adopted in 1981 by the Organization of African Unity. The second draft of the Charter was prepared in Banjul, The Gambia, in June 1980 and in January 1981. On 27 June 1981 at its 18th General Assembly Meeting in Nairobi, Kenya. The Heads of State and Government of the OAU adopted the African Charter on Human and Peoples’ Rights. It came into force on 21 October 1986.

(Maputo Protocol)⁵ are scrutinised. Justifications for selecting Rwanda, Kenya and Tanzania as case studies for this thesis are provided in section 1.6 of this chapter entitled ‘Research justification and limitations of study.’

For the constitution to have legitimacy and to fulfil the notion that the government is ‘of the people, by the people, and for the people,’⁶ all citizens, both men and women, should be substantially involved in determining the content of the constitution.⁷ Also, in any constitution-making process, more regard is given to the sovereignty of the people.⁸ If sovereignty is vested in and flows from the people, then it is just if both men and women participate.⁹ Participation in a constitution-making process implies that the people should scrutinise, deliberate and determine how they should be ruled and that their wishes are reflected in the final content of the constitution.¹⁰ In addition, a country’s constitution provides the framework for its legal system, which shapes not only the political status of the citizens, but their economic, cultural and social status. Finally, the constitution is the higher law of the land, its major role is to specify the institutions of governance, define the rights, duties, obligations, and the relationship of the state and the citizens.¹¹ Hence, the opinions of those who will be affected by its operation, are consistently important throughout the entire constitution-making process.¹²

⁵ Article 66 of the African Charter on Human and Peoples' Rights provides for the making of special protocols or agreements where necessary to supplement the provisions of the African Charter. This gave power to the Assembly of Heads of State and Government of the Organization of African Unity in its Thirty-First Ordinary Session in Addis Ababa, Ethiopia, in June 1995 to endorse by resolution AHG/Res.240 (XXXI) the recommendation of the African Commission on Human and Peoples' Rights to elaborate a Protocol on the Rights of Women in Africa.

⁶ Words from the Gettysburg Address of Abraham Lincoln, often quoted as a definition of democracy. Available at <https://www.dictionary.com/browse/government-of-the-people--by-the-people--and-for-the-people> accessed on 16th March 2016.

⁷ Ifeoma Laura Owosuyi ‘Participatory constitution-making and why it matters: A review of the Egyptian experience’ (2016) *South African Journal of International Affairs*, 23:2, 201-223, DOI: 10.1080/10220461.2016.1210540. Ghai Y & Galli G (ed) ‘Constitution-building processes and democratization: Lessons learned’ (2006) *International Institute for Democracy and Electoral Assistance Democracy, Conflict, and Human Security: Further Readings* at 240.

⁸ Sovereignty is defined as the power of a country to control its own government: or the power or authority to rule, available at <https://dictionary.cambridge.org/dictionary/english/sovereignty> accessed on 25th May 2017. Sovereignty, in political theory, the ultimate overseer, or authority, in the decision-making process of the state and in the maintenance of order. Derived from the Latin term *superanus* through the French term *souveraineté*, sovereignty was originally meant to be the equivalent of supreme power. Available at from <https://www.britannica.com/topic/sovereignty> accessed on 25th May 2017.

⁹ Hart Vivien ‘Democratic constitution-making’ (2003)- Module 4_5.1A.pdf. (n.d.), available at http://www.constitutionnet.org/files/Module%204_5.1A.pdf accessed on March 21, 2016.

¹⁰ Ibid.

¹¹ Ibid.

¹² iKNOW Politics ‘Women's participation in the constitution-building process’

1.2 STATEMENT OF THE PROBLEM

Women constitute over half of the world's population and play an important role in both productive and reproductive work.¹³ Despite being in the majority, their presence in decision-making organs, particularly in parliaments, is minimal.¹⁴ The social construction and stereotypes of excluding women rooted in cultural practices have systematically penetrated into electoral politics.¹⁵ By December 2018, the global and African region averages for women in parliament was 24.1 and 26.6 per cent respectively.¹⁶ In Rwanda, Kenya, and Tanzania, women also form the majority of the population.¹⁷ For the case of Kenya and Tanzania, women's presence and participation in their respective parliaments is not equal to that of their male counterparts.¹⁸ While in Rwanda, women make up 61.3 per cent of parliament, Kenyan and Tanzanian women only constitute 21.8 per cent and 37.2 per cent of their parliaments respectively.¹⁹ Rwanda, Kenya, and Tanzania are signatories and have ratified various international and regional instruments that, *inter alia*, call upon the member states to facilitate the attainment of equality of men and women in decision-making positions, including in parliaments. These instruments include the United Nations Charter in which the descriptions in Articles 1, 8 and 55(c)²⁰ provide the need of universal respect for, and observance of human rights and fundamental freedoms for all without distinction based on race, sex, language, or religion.²¹

available at, <http://iknowpolitics.org/en/discuss/e-discussions/womens-participation-Constitution-building-process> accessed on 25th March 2016.

¹³ Agbalajobi D 'Women's participation and the political process in Nigeria: Problems and prospects' (2010) *African Journal of Political Science and International Relations* (4) 075-082.

¹⁴ Kadaga R 'Women's political leadership in East Africa with specific reference to Uganda' 2013 Tenth Commonwealth Women's Affairs Ministers Meeting 'Women's Leadership for Enterprise' Dhaka, Bangladesh, 17-19 June 2013.

¹⁵ Ibid.

¹⁶ Women in National Parliaments as in December 2018, available at <http://archive.ipu.org/Wmn-e/world.htm> on 5th January 2019.

¹⁷ As in 2014, the percentage of females was measured at 50.09 in Rwanda, 50.03 in Kenya, 50.05 in Tanzania, and 50.03 in Uganda according to the World Bank Group, accessed from <https://data.worldbank.org/indicator/sp.pop.totl.fe.zson> 13th March 2016.

¹⁸ Kadaga op cit note 14.

¹⁹ Women in National Parliaments op cit note 16.

²⁰ Article 8 provides that the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs. Also, Article 55c states that universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The Charter of the United Nations is the foundational treaty of the United Nations. It was signed at San Francisco, United States, on 26 June 1945 and it entered into force on 24 October 1945. Available at <http://www.un.org/en/charter-united-nations/> accessed on 15th August 2017.

²¹ Rwanda, Kenya, and Tanzania also draw inspiration from Universal Declaration of Human Rights, which, under Article 7, calls for equality and non-discrimination of all people. UDHR was passed by United Nations General Assembly Resolution 217 (111) on 10 December 1948.

Rwanda, Kenya, and Tanzania ratified the 1966 International Covenant on Civil and Political Rights (ICCPR) in 1972, 1972 and 1976²² respectively. The ICCPR is a multilateral treaty adopted by the United Nations General Assembly,²³ covering a wide range of rights for every individual to exercise political and civil rights. The ICCPR is part of the International Bill of Human Rights, along with the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁴ and the Universal Declaration of Human Rights (UDHR).²⁵ Article 3 of ICCPR specifically requires state parties to ensure equal rights of men and women in the enjoyment of all civil and political rights.²⁶ In addition, Article 25 (a) and (b) of ICCPR requires citizens to have

²² In Kenya, the ICCPR was ratified on 1 May 1972 and came into force on 23 March 1976. In Tanzania, the ICCPR was ratified on 11 June 1976 and came into force in September 1976. In Rwanda, the ICCPR was ratified on 16 April 1975 and came into force on 23 March 1976. Available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND accessed on 23rd July 2016.

²³ The ICCPR has its roots in the same process that led to the Universal Declaration of Human Rights. A "Declaration on the Essential Rights of Man" had been proposed at the 1945 San Francisco Conference which led to the founding of the United Nations, and the Economic and Social Council was given the task of drafting it. Early on in the process, the document was split into a declaration setting forth general principles of human rights, and a convention or covenant containing binding commitments. The former evolved into the UDHR and was adopted on 10 December 1948. The states parties to the present Covenant, including those who have responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations. Drafting continued on the convention, but there remained significant differences between UN members on the relative importance of negative civil and political versus positive economic, social and cultural rights. These eventually caused the convention to be split into two separate covenants: "one to contain civil and political rights and the other to contain economic, social and cultural rights." The two covenants were to contain as many similar provisions as possible, and be opened for signature simultaneously. Each would also contain an article on the right of all peoples to self-determination. The first document became the International Covenant on Civil and Political Rights and the second the International Covenant on Economic, Social and Cultural Rights. The drafts were presented to the UN General Assembly for discussion in 1954, and adopted in 1966. As a result of diplomatic negotiations, the International Covenant on Economic, Social and Cultural Rights was adopted shortly before the International Covenant on Civil and Political Rights. Sieghart P *The International Law of Human Rights*. Oxford University Press. (1983), available at https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights#cite_note-4 on 2 December 2016.

²⁴ The ISECR is not being discussed in this thesis, as it mainly provides for economic and cultural rights, available at https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf accessed on 2nd December 2016.

²⁵ "Fact Sheet No.2 (Rev.1), "The International Bill of Human Rights" (1996) UN OHCHR, Archived from the original on 13 March 2008. Unlike the UDHR, the ICCPR is a legally binding international instrument that elaborates and gives legal effect to and implementation of the principles proclaimed in the UDHR. This covenant requires under Article 2 (1) that; - Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Covenant call upon each State Party to the Covenant, to take the necessary steps, in accordance with its constitutional processes, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in Covenant if such laws or measures do not exist as per ICCPR, Article 2(2).

²⁶ Article 3 of ICCPR reads that, 'the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.'

the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote, and to be elected.²⁷ Under the ICCPR, state parties are required to domestically enforce and secure the rights and freedoms guaranteed therein.²⁸

More importantly, Rwanda, Kenya and Tanzania ratified the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW) in 1984, 1981, and 1986 respectively. Article 7 of CEDAW provides direction on what women's participation in decision-making processes should look like. State parties are required to take all the appropriate measures to eliminate discrimination against women in political and public life. In particular, the parties should ensure that women, on equal terms with men, have the right to vote in all elections and public referenda, to participate in the formulation and implementation of government policy, to hold public office and perform all public functions at all levels of government.²⁹ CEDAW requires state parties to take all the appropriate measures in the political, social, economic and cultural fields, including legislation, to ensure the full development and advancement of women, guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.³⁰

The African Union Constitutive Act³¹ is the founding legal instrument of the African Union. It sets out the codified framework under which the African Union operates. The Act

²⁷ Article 25 of ICCPR reads that, 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.'

²⁸ ICCPR, Art 2 (1) of ICCPR reads that, 'Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

²⁹ Article 7 of CEDAW reads that, 'States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.'

³⁰ Provided under Article 3 of CEDAW which reads that, 'States parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.'

³¹ Constitutive Act of The African Union, adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government 11 July, 2000 - Lome, Togo. It entered into force after two thirds of the 53 signatory states ratified the convention.

pledges to uphold human rights³² and identifies the promotion of gender equality as one of its functioning principles.³³ Also, at a regional level, there is the African Charter on Human and People's Rights (the African Charter)³⁴ which promotes and protects human rights and basic freedoms on the African continent.³⁵ The Charter enshrines the foundational principles of non-discrimination and equality before the law.³⁶ It further guarantees every citizen the right to participate freely in the government of his country, either directly or through freely chosen representatives.³⁷ Article 18(3) of the African Charter requires the state members to ensure the elimination of any discrimination against women.³⁸ Efforts towards elimination of discriminatory practises against women is a key pre-requisite to providing opportunities for women participation in decision-making process, including participation in constitution-making process. Also, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),³⁹ calls states parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. Rwanda, Kenya, and Tanzania have ratified the African Union Constitutive Act, the African Charter and the Maputo Protocol signifying their commitment to remove legislative and institutional obstacles to accelerate the realisation of equal representation of men and women in decision-making processes. The provisions of the African Union Constitutive Act, the African Charter and the Maputo Protocol

³² Articles 3 (g) and 3 (h) of the AU Constitutive Act reads that 'the objectives of the Union shall be to ... g) promote democratic principles and institutions, popular participation and good governance; h) Promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments.'

³³ 'The Union shall function in accordance with the principle of promotion of gender equality.' Article 4 of AU Constitutive Act. Murray R *Human Rights in Africa* (2004) Cambridge University Press CUP, 9780511494031.

³⁴ Adopted in 1981 by the Organization of African Unity. The second draft of the Charter was prepared in Banjul, The Gambia, in June 1980 and in January 1981. On 27 June 1981 at its 18th General Assembly Meeting in Nairobi, Kenya. The Heads of State and Government of the OAU adopted the African Charter on Human and Peoples' Rights. It came into force on 21 October 1986.

³⁵ A protocol to the Charter was subsequently adopted in 1998.

³⁶ Articles 2 of the African Charter provided that, 'the enjoyment of the rights and freedoms recognised in the Charter apply equally without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status.' Article 3 of African Charter also provides that 'Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.'

³⁷ Article 13 of the African Charter provides that 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. 2. Every citizen shall have the right of equal access to the public service of his country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

³⁸ Article 18 (3) provides that, 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.'

³⁹ Op cit note 5.

provide the legal foundation for analysis in chapter six, seven, eight and nine on how public participation in constitution-review processes have facilitated the realisation of equal representation on men and women in Rwandan, Kenyan, and Tanzanian parliaments.⁴⁰

At the sub-regional level, African states, including Kenya, Rwanda, and Tanzania, have adopted gender policies, declarations, protocols and guidelines for the promotion and protection of human rights, including women's rights. To achieve the Community's objectives, member states are required to mainstream equality between men and women in all aspects. Members also commit to enhance the role of women in cultural, social, political, economic, and technological development.⁴¹ Gender equality, as provided for in Article 6 of the Treaty, is also among the key fundamental principles in the functioning of the Community.⁴² The East African Community has currently adopted the East African Gender Policy, 2018, which, *inter alia*, requires member states to provide spaces for equal participation of women in decision-making processes, including participation in elections and political spaces.⁴³

Despite women being the majority, and the Rwandan, Kenyan and Tanzanian commitment to international, regional, sub-regional and national legal instruments, only Rwanda has reached and exceeded equal representation of men and women in Parliament. Rwanda has 61.3 per cent of women in its parliament while women constitute only 21.8 and 37.2 per cent of Kenyan and Tanzanian Parliaments respectively.⁴⁴ It is well documented that women face critical challenges that affect their social, economic, and political lives when compared to that of their male counterparts.⁴⁵ The challenges facing women are caused by their limited participation and influence in key decision-making organs, particularly in the parliaments.⁴⁶ Low numbers of women in parliaments affect progress in improving the legal and policy framework for promoting

⁴⁰ Article 2(1) of the Maputo Protocol

⁴¹ Ibid.

⁴² Ibid.

⁴³ The EAC launches the Gender Policy as accessed from <https://www.eac.int/press-releases/146-gender,-community-development-civil-society/1217-eac-launches-gender-policy> on 23rd October 2018

⁴⁴ Women in National Parliaments op cit note 33.

⁴⁵ Division for the Advancement of Women of the United Nations Department of Economic and Social Affairs and the United Nations Economic Commission for Africa in cooperation with the E-Network of National Gender Equality Mechanisms in Africa, 'Women, political participation and decision-making in Africa' available at <http://www.un.org/womenwatch/daw/TechnicalCooperation/docs/OnlineDiscussionReportAfricaFINAL.pdf>, accessed on 26 May 2016.

⁴⁶ Kasomo D 'Factors affecting women participation in electoral politics in Africa,' 2012 *International Journal of Psychology and Behavioral Sciences*.

and protecting women's rights, and among other things, the right to equal participation in the legislative process.⁴⁷

In addition to the international obligations, Rwanda, Kenya, and Tanzania embarked on constitutional reforms with the aim of bringing national constitutions on par with current international practices in the political, social, cultural and economic spheres. The constitutional reforms in Rwanda, Kenya, and Tanzania resulted in the adoption of the 2003 Rwandan Constitution, the 2010 Kenyan Constitution, 1977 Tanzanian Constitution and the 2014 Proposed Draft Constitution of Tanzania. Constitutional reform processes in Kenya, Rwanda, and Tanzania started since the struggle for independence, and other reforms took place quite recently.⁴⁸ There are insufficient studies on the level of men and women's participation in constitution-making processes, the implication on the content of the new constitutions, and how the reformed constitutions facilitate the realisation of equal representation of men and women in parliaments. This *status quo* leaves a lot to be desired, considering that genuine participation in constitution-making is, and leads to, the fulfilment of other legal rights such as the right to participation in public affairs, self-determination, personal security, freedom of speech, association and assembly.⁴⁹ Throughout the world, there is a general acknowledgment about the need to attain equal representation of men and women in political decision-making structures, including in parliaments.⁵⁰ The basic rationale for promoting women's participation in parliaments is motivated by the principles of equity, equality,⁵¹ and the need to achieve development goals.⁵²

⁴⁷ Ibid.

⁴⁸ Rwanda reviewed its Constitution in 2003 and amended same in 2010. Kenya adopted a new Constitution in 2010 and Tanzania commenced a process to change its Constitution in 2011 leading to the adoption of the Proposed Constitution which awaits Referendum.

⁴⁹ Hart Vivien op cit note 9.

⁵⁰ United Nations Sustainable Development Goals, available at <http://www.un.org/sustainabledevelopment/sustainabledevelopment-goals/>, accessed on 26th May 2016.

On September 25th, 2015, countries adopted a set of goals by the United Nations to end poverty, protect the planet, ensure gender equality and ensure prosperity for all as part of a new sustainable development agenda. Each goal has specific targets to be achieved over the next 15 years. Goal number five is specifically targeted to achieve gender equality and Goal number ten seeks to reduce inequality. Of the outgoing Millennium Development Goals that were adopted in 2000, Goal number three targeted to Promote Gender Equality and Empower Women, available at <http://www.unmillenniumproject.org/goals/> accessed on 26th May 2016.

⁵¹ Equity and equality are two strategies that are used to produce fairness. Equity is giving everyone what they need to be successful. Equality is treating everyone the same. Equality aims to promote fairness, but it can only work if everyone starts from the same place and needs the same help while it recognises the position of everyone and addresses every one's needs. Sun Amy, 'Equality is not enough: What the classroom has taught me about justice' (2014), available at <https://everydayfeminism.com/2014/09/equality-is-not-enough/> accessed on 15 March 2016.

⁵² Kasomo D op cit note 47.

Owing to the problem of absence of substantive and or equal representation of men and women in the Rwandan, Tanzanian and Kenyan Parliaments. The levels of women's participation in the constitutional review processes, and its influence on the content of final constitutional texts, the remaining challenges and recommendations for realisation of equal participation of men and women in parliaments are discussed in this thesis.

1.3 RESEARCH OBJECTIVE AND QUESTIONS

This thesis contributes to the case of equal participation of men and women in parliaments by analyzing the extent to which the adopted participatory constitution-making processes in Rwanda, Kenya, and Tanzania facilitate the attainment of equal representation of men and women in parliaments. The overriding question to this thesis is: 'To what extent do the participatory constitutional reforms in Rwanda, Kenya, and Tanzania facilitate the realisation of the right to equal representation of men and women in the Rwandan, Kenyan, and Tanzanian Parliaments?'

The following sub-questions are relevant in obtaining the answers for the above main question:

1. Were women substantively involved in the participatory constitutional reforms processes in Rwanda, Kenya, and Tanzania?
2. To what extent did the participation of women in the constitution-making processes influenced the incorporation of the right to equal representation of men and women in reformed constitutions of Kenya, Rwanda, and Tanzania?
3. What are the remaining challenges and recommendations for the attainment of meaningful and substantive equal representation of men and women in the Rwandan, Kenyan, and Tanzanian Parliaments?

1.4 SIGNIFICANCE OF THE STUDY

The findings and recommendations provided in this thesis provide the impetus for Rwanda, Kenya, and Tanzania to undergo other constitutional amendments inserting, among other things, provisions that would facilitate the attainment of equal substantive representation of men and women in their respective parliaments. As observed above, despite the enactment of the 2010 Kenyan Constitution, the 1977 Constitution of Tanzania and the unfinished 2014 Tanzanian Proposed Constitution, the problem of unequal representation of men and women in parliaments

remain.⁵³ Even with 61.3 per cent of women in the Rwandan Parliament, there are still questions as to why the Proportional Representation electoral system as practiced in Rwanda is constitutionally set to only provide for 30 per cent of women parliamentarians, while rest of the women are supposed to be obtained from the but highly criticised, women-only constituencies. The *status quo* raises the question on genuine commitments of Rwanda, Kenya, and Tanzania to the ICCPR, CEDAW and regional conventions, which require member-states to facilitate the realisation of substantive equal representation in their parliaments. Therefore, the implementation of the recommendations of this thesis could lead to a design of national level strategies for speeding up the attainment of a meaningful and equal substantive number of men and women in Rwandan, Kenyan, and Tanzanian Parliaments.

It is paramount that actors involved in policy formulation and the community, in general, get a glimpse of the available constitutional modalities that would work to fast-track the realisation of equal representation of men and women in the parliament. A lack of such an understanding coupled with the fact that women have traditionally been marginalized in the structures of state that determine political and legislative priorities⁵⁴ and negative perceptions of voters and political parties on the role of women, continue to jeopardise the realisation of the women's right to representation and taking part in decision-making processes. This thesis is expected to alert governments to the unsatisfactory situation and prompt them to take the necessary constitutional and other legal measures to ensure that men and women achieve a meaningful and substantive equal access to electoral decision-making organs. Furthermore, this study could benefit Civil Society Organisations (CSOs), Non-Governmental Organisations (NGOs), researchers and members of academia who have an interest in researching women's constitutional and political rights. Finally, the study could enable Rwanda, Kenya, and Tanzania to learn and share good practices on the modalities to avail substantive equal opportunities for men and women in political decision-making positions.

⁵³ Women in National Parliaments op cit note 19.

⁵⁴ Mutale SB & Ndlovu B *Emerging Trends in Women's Participation in Politics in Africa*, (2013) Department of Development Studies, Lupane State University, Bulawayo, Zimbabwe.

1. 5. RESEARCH METHODOLOGY

Research methods refer to tools, techniques or procedures that are used by a scientist or a researcher to collect data, justify and substantiate a question under investigation.⁵⁵ Considering that each research method has its strengths and weaknesses, this thesis employs combined research approaches in dealing with the research problem. Specifically, this thesis uses doctrinal and non-doctrinal research methods as described below.

a. The Doctrinal Research Method

The doctrinal research method is concerned with the analysis of the legal doctrine and how it has been developed and applied.⁵⁶ It consists of either simple research directed to finding a specific statement of the law or a more complex and in-depth analysis of legal reasoning. This method focuses on what the law is (*de lege lata*) as opposed to what the law ought to be (*de lege ferenda*).⁵⁷ The doctrinal method is used to analyze primary data namely the international, regional and national electoral legal frameworks and how they facilitate the realisation of equal participation of men and women in constitution-making processes and the Rwandan, Kenyan, and Tanzanian Parliaments.

b. Non-Doctrinal Methods

In this thesis, non-doctrinal methods involving desk-review research, and comparative legal research are employed.

i. Desk-Review Research

Secondary data was collected by searching the existing body of literature and library resources that are relevant to the study and has included textbooks, reports, journal articles, and monographs. Guided by the areas under study namely Rwanda, Kenya, and Tanzania, the main centres for research have been the Faculty of Law libraries of the University of Cape Town in South Africa, University of Dar es Salaam, and the East African Community Libraries in Dar es Salaam and Arusha, Tanzania respectively. Catalogues and archives from journal storage have also been used to access reputable law journals throughout the world. Journal storage, available at the University of Cape Town and University of Dar es Salaam, has been equally useful. Additionally, websites

⁵⁵ Mcgrath JE 'Methodology matters: Doing research in the behavioural and social sciences' in R. M. Baecker et al (eds) *Readings in Human-Computer Interaction: Toward the Year 2000* (1995) Morgan Kaufmann Publishers 154.

⁵⁶ Chui WH & McConville M (eds) *Research Methods for Law* (2010) Edinburgh University Press 2010.

⁵⁷ Ibid.

of local and international organizations, parliaments, political parties, and Electoral Monitoring Bodies (EMB's) were used to obtain contemporary and viable data.

ii. Comparative Legal Research

Comparative legal research is a methodology in the social sciences that aims to make comparisons across different countries or cultures. It is used to study legislative texts, jurisprudence, and legal doctrines, particularly of foreign laws. Comparative legal research is beneficial in a legal development process where modification, amendment, and changes to the law are required.⁵⁸ Through this method, international treaties, conventions, guidelines, directives, case laws, and legal frameworks on the participation of men and women in constitution-making and electoral decision-making processes are compared, contrasted and analysed. At a national level, comparison focuses on analysing and comparing constitutions, legislations, case laws, interim, draft and final constitutions, relating to how they facilitated or hindered the attainment of equal participation of men and women in decision-making processes in Rwanda, Kenya and Tanzania.

1.6 RESEARCH JUSTIFICATION AND LIMITATION OF THE STUDY

Rwanda, Kenya, and Tanzania, respectively through the 2003 Rwandan Constitution,⁵⁹ the 2010 Kenyan Constitution,⁶⁰ the 1977 Constitution of Tanzania⁶¹ and the 2014 Proposed Draft Constitution of Tanzania,⁶² have been selected as case studies for this thesis for several reasons. First, Kenya, Rwanda and Tanzania have recently engaged in constitutional reform processes. Rwanda reviewed its Constitution from the year 2000 to 2003 and amended it in 2010 while Kenya

⁵⁸ Hey E and Mak E 'Introduction: The possibilities of comparative law methods for research on the rule of law in a global context' (2009) *Erasmus Law Review* (2) 1-3

⁵⁹ Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005, 4 June 2003, available at: <https://www.refworld.org/docid/46c5b1f52.html> accessed 2 February 2016.

⁶⁰ The Constitution of Kenya 2010, available at: <https://www.refworld.org/docid/4c8508822.html> accessed 3 February 2016.

⁶¹ (CAP 2 R: E 2002).

⁶² The Proposed Draft Constitution of Tanzania of September 2014, available at; http://constitutionnet.org/sites/default/files/the_proposed_constitution_of_tanzania_sept_2014.pdf accessed 3 February 2016. The author of this thesis obtained her LLM degree from the University of Dar Es Salaam in 2013, writing on Women and Electoral Rights in East Africa: A Perspective of Tanzania Electoral Laws. The author commenced her PhD studies in 2016. The 2013 LLM thesis did not in any way consider the constitution-making processes in Rwanda and Kenya. Although Tanzania started the process for obtaining the new constitution in 2011, by the time the candidate obtained her masters degree, Tanzanian had not yet drafted the 2014 Proposed Constitution which is under discussion in this thesis. All the chapters of this doctoral thesis relate to the Rwandan, Kenyan and Tanzania constitution-making processes. A lot has changed since 2013 in terms of women participation in decision-making processes. Therefore, the author has not relied on her LLM previous research and the source materials utilized therein to complete this doctoral thesis.

revived the process of reviewing its Constitution soon after the aftermath of the 2007 electoral violence. The new Kenyan Constitution was adopted in 2010.⁶³ In Tanzania, especially after the long existence of the 1977 Tanzanian Constitution coupled with several ad hoc amendments,⁶⁴ and persistence of peoples' demand for the new Constitution, the process of reviewing the constitution occurred between 2011 to 2013.⁶⁵ However, until the end of writing this thesis, Tanzania is yet to have a new Constitution. This is because the referendum for or against the main output of the 2011-2013 participatory Constitution-making processes, namely the 2014 Proposed Draft Constitution of Tanzania, was postponed until further notice.⁶⁶ The incumbent President, Hon John Pombe Magufuli stated in 2016 that the finalisation of the new Constitution is not in his list of priorities.⁶⁷ Even though the 2014 Proposed Draft Constitution of Tanzania is not yet the governing constitution of the United Republic of Tanzania, its analysis with a view to comparing it with the key processes for the making of the 1977 Tanzanian Constitution, the 2003 Rwandan Constitution and the 2010 Kenyan Constitution is important. This is because, as noted in Chapter five, the period of 2011 to 2013 was the only historic period that Tanzania as a country endeavoured to engage in a participatory constitution-making process. During this time, women and other marginalised groups recorded important milestones in influencing the content of the Proposed Constitution, hence bringing the need for that process to be captured in this thesis.⁶⁸

The second reason for choosing Kenya, Rwanda and Tanzania as case studies for this thesis, lies on the fact that Rwanda, Kenya and Tanzania are all members of the East Africa Community (EAC), which is a sub-regional intergovernmental organisation comprising six partner states: the Republics of Burundi, Uganda, Kenya, Rwanda, South Sudan, and the United Republic

⁶³ Abrak Saati *Public Participation in Constitution Building; An Effective Strategy for Enhancing Democracy?* (PhD Dissertation, Umeå University, 2015), Dissertation Briefs Series 2015:04.

⁶⁴ Nyanduga BTM, 'Tanzania's Constitutional Amendments' Issue 20 Politics, available at <https://www.tzaffairs.org/1985/01/tanzania%E2%80%99s-constitutional-amendments/>, accessed on 10th July 2017.

⁶⁵ Mwase Ngila 'Tanzania: Reflections on rewriting Constitution,' available at <https://allafrica.com/stories/201101190239.html>, accessed on 10th July 2017.

⁶⁶ 'Tanzania postpones referendum on constitution' available at <https://www.reuters.com/article/us-tanzania-politics/tanzania-postpones-referendum-on-constitution-idUSKBN0MT21U20150402> accessed 3 February 2016.

⁶⁷ 'New Katiba not priority' says Magufuli, available at <https://www.thecitizen.co.tz/news/New-Katiba-not-priority--says-Magufuli/1840340-3441622-140sdhez/index.html>, The Citizen 5 November 2016, accessed on 10th July 2017. The President re-iterated the same in 2018, see Mwakyusa Alvar, 'Tanzania: Magufuli puts Katiba re-writing debate to rest,' available at <https://allafrica.com/stories/201811020132.html>, accessed on 15th July 2018.

⁶⁸ Maoulidi Salma 'Tanzania's Draft Constitution: Opening spaces for a gender revolution?' available at <http://constitutionnet.org/news/tanzanias-draft-constitution-opening-spaces-gender-revolution>, accessed on 10th July 2017.

of Tanzania.⁶⁹ The work of the EAC is guided by the Treaty for the Establishment of the East African Community.⁷⁰ As a means to achieve the communities' objectives, the Treaty binds the members to ensure the mainstreaming of equal representation of men and women in all aspects. Members also commit to enhance the role of women in all decision-making spaces, including in their respective parliaments.⁷¹ The third reason is that, Rwanda, Kenya, and Tanzania have similar other commitments through the international and regional instruments for achieving equal participation of men and women in decision-making structures.⁷² Despite the above similarities, one point of departure is that the three countries have a significant variation in the representation of women in their parliaments. Rwanda is leading with 61.3 per cent representation of women in its parliament, followed by Tanzania which has 37.2 per cent, while Kenya lags with 21.8 per cent.⁷³ These similarities and disparities make Kenya, Rwanda and Tanzania favourable choices for analysis in this thesis.

On the other hand, the nature and objectives of the research made it possible to obtain sufficient data to enrich the key legal premises that justified the main conclusions of this thesis without having to use empirical methods. The relevant primary data, such as the international, regional, national, and case laws, which are readily available through desk-review research, were sufficiently analysed in this thesis. To ensure data reliability, the information used in this research was drawn from studies and reports commissioned or undertaken by credible national and

⁶⁹ EAC has its headquarters in Arusha. 'Tanzania overview of EAC,' available at <http://www.eac.int/about/overview> Accessed on 27th December 2016.

⁷⁰ Ibid. The Treaty was signed on 30 November 1999 and entered into force on 7 July 2000 following its ratification by the original three partner states - Kenya, Tanzania, and Uganda. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18 June 2007 and became full members of the Community with effect from 1 July 2007. The Republic of South Sudan acceded to the Treaty on 15 April 2016 and became a full member on 15 August 2016.

⁷¹ Article 5(3)(e) of the EAC Treaty, states that 'for purposes set out in paragraph 1 of this Article and as subsequently provided in particular provisions of this Treaty, the Community shall ensure: the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic, and technological development.' Article 6 provides for fundamental principles of the Community to govern the achievement of the objectives of the Community by the partner states which include among other things: (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion, and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

⁷² Rwanda, Kenya, and Tanzania ratified the ICCPR in 1972, 1972 and 1976 respectively, United Nations Treaty Collection, available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND, accessed on 23rd July 2016. Kenya, Rwanda and Tanzania also ratified CEDAW in 1984, 1981, and 1986 respectively, United Nations Treaty Collection available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en accessed on 23rd July 2016.

⁷³ Women in National Parliaments Op cit note 54.

international agencies. Information on the constitutional reforms was taken from reports of the constitution review bodies which contains official data relating to coverage, reach and substance of the issues raised regarding the respective constitution-making processes. Information on levels and extent of women's participation in parliaments was obtained from websites of the respective websites and credible organisations such as UNWOMEN,⁷⁴ and the Inter-Parliamentary Union (IPU).⁷⁵ Other reports from international human rights bodies such as the United Nations Human Rights Committee⁷⁶ and the Committee on the Elimination of Discrimination against Women were used.⁷⁷ As the main information was obtained from government institutions and platforms, or from studies commissioned by governments, national or international organisations and agencies, the information presented in this thesis is accurate and credible. In addition, some of these studies included first-hand information and empirical data.

Another reason for the selection of the methodology for this thesis is the costs and time involved in empirical data collection methods. Although empirical methods, such as interviews, surveys, and questionnaires have advantages over documentary reviews, for instance, in obtaining in-depth information and flexibility in restructuring questions, they are time-consuming and costly.⁷⁸ Using such a method would have required the researcher to travel to Kenya, Rwanda, and Tanzania from Cape Town and to have spent long periods in the field collecting data. When time

⁷⁴UN Women is the United Nations entity dedicated to gender equality and the empowerment of women. A global champion for women and girls, UN Women was established to accelerate progress on meeting their needs worldwide. UN Women supports UN Member states as they set global standards for achieving gender equality, and works with governments and civil society to design laws, policies, programmes and services needed to ensure that the standards are effectively implemented and truly benefit women and girls worldwide. It works globally to make the vision of the Sustainable Development Goals a reality for women and girls and stands behind women's equal participation in all aspects of life, focusing on four strategic priorities. 'About UN women', available <http://www.unwomen.org/en/about-us/about-un-women> accessed on 26th August 2017.

⁷⁵ IPU is the international organisation of parliaments. It was established in 1889. The IPU is the focal point for worldwide parliamentary dialogue and works for peace and co-operation among peoples and for the firm establishment of representative democracy. It supports the efforts of and works in close co-operation with the United Nations, whose objectives it shares. The IPU also co-operates with regional inter-parliamentary organizations, as well as with international intergovernmental and non-governmental organizations which are motivated by the same ideals. Available at <https://www.oireachtas.ie/en/inter-parliamentary-work/inter-parliamentary-union/> accessed on 26 August 2017.

⁷⁶ The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant of Civil and Political Rights by its state parties. Available at <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> accessed on 26 July 2017.

⁷⁷ The Committee on the Elimination of Discrimination against Women (CEDAW) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women. Available at <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx> accessed on 26 July 2017.

⁷⁸ Burton Julius G Getman 'Contributions of empirical data to legal research' (1985) 35 *Journal of Legal Education* 489 493.

and resource factors were combined with the fact that the research objectives could still be met through documentary review, desk-review became the main research method for this thesis.

1.7 LITERATURE REVIEW

There is a lot of literature on women's participation in electoral decision-making processes in Rwanda, Kenya, and Tanzania. However, finding the literature that links public participation in constitution-making processes and how it can lead to the realisation of equal participation of men and women in parliaments is challenging and almost unavailable. Different pieces of Rwandan, Kenyan, and Tanzanian literature coupled with a review of literature sources from other parts of the world, provide inspiration and insights on the topic.

Participatory democratic scholars connect the legitimacy of a constitution to the participation of those affected by its operation.⁷⁹ Constitution-making processes are marked by original and ongoing negotiations. There is often no closure to the constitution-making process. In the constitutional dialogue, the participation of the people is central.⁸⁰ Traditionally, as typified by the Philadelphia Convention that was a draft of the United States of America Constitution, or the German Constituent Assembly called the Parliamentary Council after World War II, there has been considerable distrust on direct engagement of citizens and doubts about their ability to understand complex issues of state powers.⁸¹ The response was that the public was included through the popular 'representative democracy.'⁸² Currently, however, the sovereignty of the people is highly regarded. If sovereignty is indeed vested in and flows from the people, it is natural and paramount that the people should determine how it should be delegated and exercised.⁸³

Unlike older, classical constitutions, today's constitutions do not necessarily reflect existing national polities or power relationships that consolidate the victory and dominance of a

⁷⁹ Ghai Y & Galli G (eds) 'Constitution-building processes and democratization: Lessons learned.' (2006) International Institute for Democracy and Electoral Assistance. *Democracy, Conflict, and Human Security: Further Readings*

⁸⁰ Hart Vivien Op cit page 50.

⁸¹ Ghai Y & Galli G (Eds) op cit 80.

⁸² A representative democracy is a system where citizens of a country vote for government representatives to handle legislation and ruling the country on their behalf. It is the opposite of direct democracy, where the public gets to vote on laws to be passed and other issues; and autocracy, where a dictator has absolute power and the people have no say in how a country is governed. 'What is a Representative Democracy?' Available at <https://www.historyonthenet.com/what-is-a-representative-democracy> accessed on 23rd March 2017.

⁸³ Hart Vivien op cit note 81.

class or ethnic group.⁸⁴ Instead, they are instruments to enhance national unity and territorial integrity, they define and sharpen a national ideology, and develop a collective agenda for social, economic, and political change. Modern constitutions are negotiated rather than imposed.⁸⁵ In recent years, several constitutions were made in the aftermath of civil conflict. The pressure to resolve conflict through a constitutional conversation has often come from long-term disagreements, conflicts and wars over combination of racial, ethnic and territorial boundaries.⁸⁶ An important task of the negotiating process is to promote reconciliation among the communities who had previously been in conflict. If negotiations are the contemporary functions of constitutions, then developing a national consensus through sets of participatory modalities is crucial in the constitution-making process.⁸⁷

Constitutional discussions or deliberations by the elite and politicians generally focus on addressing the security, political, and economic concerns.⁸⁸ Such a narrow focus during a constitution-making process can cause drafters to miss out on effective and substantive governance solutions. Besides, since most of the constitutional drafters are men, women's and other marginalised groups issues can easily be overlooked.⁸⁹ Gender sensitive recommendations, proposals, and solutions can only emerge when all sorts and levels of men and women who have experienced problems and challenges are sufficiently represented.⁹⁰ Where participatory constitution-making has offered a forum for reconciling division and redressing grievances, it has often also provided an opportunity for women to gain representation in the process, outcome, implementation and thus benefit from the new constitution.⁹¹

To ensure participation, it is necessary to conduct education programmes and discussions for citizens on the basis and forms of political authority, how governments work and the need for controls and accountability.⁹² It is based on the theory of popular sovereignty that enables people to understand their constitutional history, assess and audit past governments.⁹³ The educational

⁸⁴ Angela M Banks 'Expanding Participation in Constitution-making: Challenges and Opportunities', (2008), *William and Mary Law Review* 49 at 1046

⁸⁵ *Ibid.*

⁸⁶ Hart Vivien *op cit* note 84.

⁸⁷ Ghai Y & Galli G (Eds) *op cit* 82.

⁸⁸ Hart Vivien *op cit* note 87.

⁸⁹ Angela M Banks *op cit* note 85.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

programme must enable the people to understand the nature of public power and allow them to imagine alternative forms of government while rejecting the notion of the inevitability of older systems.⁹⁴ The process must also aim to educate people in the values, institutions, and procedures of the new constitution and how they can participate equally in the affairs of the state to protect their constitutional rights.⁹⁵ However, the constitution-making process should not be more educational than a deliberative process.⁹⁶ While education is important, it is the people's free engagement in discussions, deliberations and ability to influence the thinking of decision-makers and that of others that is as paramount as the content of the constitution itself.⁹⁷ Examples of the new practices to participatory constitution-making include: prior agreement on broad principles as a first phase of constitutional making; an interim constitution to create space for democratic deliberations, civic education and media campaigns; the creation and guarantee of channels of communication; guarantee of personal security, freedom of speech, association and assembly; local discussion forums; and, elections for constitution-making assemblies.⁹⁸ Open drafting committees should aspire to transparency in decision-making and should seek approval through a variety of mechanisms such as representative legislature, courts, and referendum.⁹⁹ Furthermore, genuine accommodation of women's and other marginalised groups interests through providing equitable and deliberate representation and instigation of issues is an important aspect of modern constitution-making.

A constitution can appear to be removed from the everyday needs of people. However, a constitution is a foundation for laws and policies in a country. The challenge is to ensure that the constitution includes strong provisions that foster political accommodation and an inclusive nation in which women can participate equally in all levels of government and society.¹⁰⁰ Constitutional provisions on paper do not always translate into benefits in practice.¹⁰¹ In reviewing the constitution, people need to consider how it will work.¹⁰² That is, not only must the constitutional

⁹⁴ Ibid.

⁹⁵ Ghai & Galli op cit note 88.

⁹⁶ Angela M Banks op cit note 90.

⁹⁷ Kirsti Samuels, 'Women's Inclusion and Equity Under the Transitional Constitution of the Republic of South Sudan; (2013) available at www.cdint.org/documents/TCRSS_and_Gender.pdf.

⁹⁸ Ibid.

⁹⁹ Hart Vivien 'Democratic Constitution-making' Module 4_5.1A.pdf. (n.d.), available at http://www.constitutionnet.org/files/Module%204_5.1A.pdf accessed on 21 March 2016.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

review process be substantially inclusive of women, it should contain provisions that promote, protect, and enforce their rights, aspirations, and interests.¹⁰³ Such provisions must be capable of being translated into laws, policies, and practice that are easily implemented to make real changes in women's political lives. This means that from the beginning of a constitutional review process, women/citizens and policy-makers need to consider three factors: identification of women issues that are capable of being solved by constitutional provisions; a plan on how to secure constitutional provisions that address the identified women's issues; and, how to secure simple constitutional processes and institutions that will be sustainably inclusive and responsive to the realisation of women's interests.¹⁰⁴

Many modern constitutions, including those of Kenya, Tanzania, and Rwanda, were originally written by men at a time when women were denied the right to take part in decision-making spaces.¹⁰⁵ Women were excluded in three tiers, first in identifying constitutional issues, second in the process of defining constitutional structures and rules, and third as citizens participating in these structures and enjoying the rights at the same level as men.¹⁰⁶ While a smaller number of women were slowly starting to penetrate decision-making positions, their participation in constitution-making processes was slow as constitutions are not often subject to frequent change.¹⁰⁷ There are notable occasions where women have been instrumental in demanding that their rights were upheld through constitutional processes where governance or social conditions have previously silenced their voices.¹⁰⁸ Constitutions drafted in countries as varied as South Africa, Uganda, Cambodia, Afghanistan, Nicaragua, Burundi, India, and Canada form a useful reference.¹⁰⁹ In Nicaragua in 1986, women stunned their society when hundreds of women took turns to denounce the rhetoric of the first Constitutional draft, despite that the draft already contained significant provisions for promotion of women's rights. Ugandan women mobilised to participate in the 10-year constitution-making process leading to a Ugandan Constitution of 1996

¹⁰³ Ibid.

¹⁰⁴ Kirsti Samuels op cit note 98.

¹⁰⁵ Hari P. Bhattarai & Jhalak Subedi (ed) 'Democratic constitution making experiences from Nepal, Kenya, South Africa and Sri Lanka' (2007), *International IDEA* ISBN: 978-99933-838-4-0.

¹⁰⁶ Ibid.

¹⁰⁷ Celis K 'Guaranteeing gender equality: A new institutional assessment of constitutional reform as change' (2008) Paper for delivery at the ECPR Joint Sessions, Rennes, 'Gender, Politics, and Institutions: Towards a Feminist Institutionalism?' Available at <https://ecpr.eu/Filestore/PaperProposal/f90230c9-fdf8-442c-a86c-3bcadf963140.pdf> Accessed on 19 April 2016.

¹⁰⁸ Kirsti Samuels op cit note 105.

¹⁰⁹ Ibid.

which strongly and to a large extent is advancing the promotion and protection of women's rights.¹¹⁰ In 1992–1993, Cambodia demonstrated an example of the important role of women in the constitution-making process. Women comprised 63 per cent of the Cambodian population, and they were at the front line in demanding their right to participate at all levels of policy-making, including drafting the new constitution.¹¹¹ During the post-apartheid constitutional-drafting process in South Africa, women played an important role in participating, deliberating, writing and amending the Constitution to ensure that issues against the attainment of gender equality were addressed.¹¹²

In cognisance of the above literature, this thesis is founded on the belief that constitutional reforms pose critical moments for women to reflect, re-strategise, demand, influence and obtain substantive inclusion of equality and non-discrimination principles in the national constitutions in line with international and regional frameworks and their realities. Equality and non-discrimination principles should cut across key areas such as electoral systems and the application and practise of temporary special measures to eventually lead to equal substantive representation of men and women in parliaments. It is expected that equal participation of men and women in parliament will bring women's issues to light and avoid unconscious oversight of women's perspectives and concerns that occur when the majority of political decision-makers are men. It aligns with the mantra 'nothing about us without us'¹¹³ and would lead to progressive gender policies and laws that will eventually advance substantive participation by women in political arenas.

1.8 THESIS STRUCTURE

This thesis is organised into ten chapters. Chapter One contains the introduction and background to the study covering the background of the problem and statement of the problem. Chapter One also includes the study objectives and questions, research methodology, and a literature review. Finally, the justification and limitations of the study and the thesis structure are covered. Chapter

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Celis K op cit note 108.

¹¹³ 'Nothing About Us Without Us' is a mantra used to communicate the idea that no policy should be decided by any representative without the full and direct participation of members of the group affected by that policy. This involves national, ethnic, disability-based, or other groups that are often thought to be marginalized from political, social, and economic opportunities. Charlton James *Nothing About Us Without Us*, (1998), University of California Press, ISBN 0-520-22481-7.

Two contains key definitions and an analysis of the evolution of participatory constitution-making as a legal right. Chapter Three presents the evolution of constitution-making processes in Kenya, Rwanda, and Tanzania during the pre-colonial and colonial period. In Chapter Four, procedures for amendment and alterations of independence constitutions in Kenya, Rwanda and Tanzania and the implication in enhancing public participation in constitution-making processes are discussed. An analysis of the legal frameworks for the making of 2003 Rwandan Constitution, the 2010 Kenyan Constitution, and the 2014 Tanzania Proposed Constitution is presented in Chapter Five, in line with how they facilitated public participation, especially that of women. In Chapter Six, a critical analysis of the provisions of new constitutions and the determination of key gains advancing equal representation of men and women in the Rwandan, Kenyan, and Tanzanian respective Parliaments is provided. In Chapter Seven, the question whether an increase in the number of female members of parliament has facilitated the attainment of gender-sensitive laws and policies, is examined. Chapter Eight makes a critical analysis of the persisting legal challenges to the attainment of equal representation of men and women in the Rwandan, Kenyan, and Tanzanian Parliaments. Chapter Nine covers general and specific study recommendations, and Chapter Ten contains summary findings and the overall conclusions.

2. CHAPTER TWO

2.0 CONCEPTUAL FRAMEWORK AND EVOLUTION OF PARTICIPATORY CONSTITUTION-MAKING AS A LEGAL RIGHT

‘Participatory constitution-making is advocated as a tool for facilitating the creation of democratic governance systems with broad citizen involvement and increasing the protection of citizens' civil and political rights.’¹

2.1 INTRODUCTION

Chapter One, laid the foundation for and introduced this thesis. The discussion in Chapter Two is based on the premise that the legal framework guiding the constitution-making process is essential in limiting the dominance of politicians, elites, and state institutions in any constitution-making process.² To lay an understanding of terms, key words such as the constitution and its types, constitutional guiding principles and participatory constitution-making are defined. Also, the evolution of participatory constitution-making and challenges associated with its acceptance as a legal right are discussed. Further, guiding principles from international and regional conventions and case laws that will be used in the forthcoming chapters are highlighted in this chapter.

2.2 KEY DEFINITIONS

2.2.1 Constitution, Types of Constitution, and Guiding Principles

The constitution of a state is the *grundnorm*³ or basic norm from which all national laws and policies derive their validity.⁴ However, not every constitution can be regarded as a *grundnorm*, especially in jurisdictions where parliamentary sovereignty takes precedence.⁵ Hence, only a supreme constitution with a justiciable Bill of Rights can be regarded as a *grundnorm*.⁶ The constitution is also defined as a formal document that contains the force of law by which a society

¹ Banks AM *Expanding Participation in Constitution-making: Challenges and Opportunities*, (2008), 49 Wm. & Mary L. Rev. 1043 available at <http://scholarship.law.wm.edu/wmlr/vol49/iss4/2>, accessed on 12 July 2017.

² Owosuyi IL ‘Participatory constitution-making and why it matters: A review of the Egyptian experience’ (2016) *South African Journal of International Affairs*.

³ *Grundnorm* is a German word meaning ‘fundamental norm.’ The jurist and legal philosopher Hans Kelsen (1881–1973) coined the term to refer to the fundamental norm, order, or rule that forms an underlying basis for a legal system. See generally Kelsen H *Pure Theory of Law* (1970) Translated from the 2nd revised and enlarged German edition by Max Knight. Berkeley, CA: University of California Press.

⁴ Owosuyi IL op cit note 2.

⁵ *State v Dosso* 2 P.S.C.R. 180 [1958]; *Uganda v Commissioner of Prisons, Ex Parte Matovu* EA. 514 [1966].

⁶ *Ibid.*

defines, organises, and limits the government and its powers.⁷ Others define a constitution as the scheme of organisation of public roles and responsibilities performed in the interest of the people.⁸ The constitution breathes life into juridical existence, lays down the governance framework, enumerates and limits powers and declares certain fundamental rights and principles to be inviolable.⁹ Generally, a constitution contains the constitutional law of the state that enjoys the position of being the supreme and fundamental law of the state.¹⁰ The constitution lays down the organisation and functions of the government of the state. The government can use only those powers that the constitution has granted.¹¹

Based on origin, nature, and purpose, the constitution can be classified as federal versus unitary,¹² presidential versus parliamentary, republican versus monarchical, and written versus unwritten.¹³ Among the many typologies of constitutions, clarity is often sought in understanding the distinction between the written and unwritten constitution.¹⁴ The difference often lies in the fact that, in the case of the unwritten constitution, constitutional principles are found in different documents such as the case in the United Kingdom, where the constitutional principles are found in the Magna Carta 1215,¹⁵ the Petition of Rights 1628, the Bill of Rights 1689, and the Habeas

⁷ Nwabueze Ben *Constitutionalism in the Emergent State* (1973) C Hurst. & Co., London.

⁸ Luminița Dagne ‘Supremacy of the Constitution’ *AGORA International Journal of Juridical Sciences*, available at www.juridicaljournal.univagora.ro ISSN 1843-570X, E-ISSN 2067-7677 No. 4 (2013), pp. 38-41.

⁹ Arif Bulkan ‘The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the ‘Perfect Nation’ (2013) *Canadian Journal of Human Rights*, 2:1 Can J Hum Rts p.88.

¹⁰ Luminița Dagne op cit note 8.

¹¹ Ibid.

¹² In a federal system, apart from a central government, there is also government at state level, with legislative competence under the constitutional arrangements, as it is the case in Australia, United States of America, Canada and South Africa. On the other hand, Britain exemplified a unitary constitution which is centrally governed. However, this point may now be challenged due to devolution of powers to Scotland, Wales and Northern Ireland. Therefore, there is an incipient federal aspect to the British constitution. Parpworth N *Constitutional and Administrative Law* (2008) 5th ed., OUP3.

¹³ Ibid. The Presidential constitution places the power in the hands of the President such as the case in the Constitution of United Republic of Tanzania, CAP 2 R: E 2002 while a parliamentary constitution places the power on Parliament such as the case in the United Kingdom. This affects the way the government operates. In the case of the former, the President will be the head of state and the head of the executive branch of the government but not the head of the legislature and not accountable to it. Furthermore, the President is not a member of the House of Representatives or the Senate. By contrast, in a parliamentary constitution, the head of the executive branch of the government is the Prime Minister, who will also be the head of the executive, and also a member of the legislative branch of the government and accountable to it.

¹⁴ Ibid. The written and unwritten constitution are sometimes referred as codified versus uncoded or rigid versus flexible constitution.

¹⁵ The Magna Carta is a charter of liberties to which the English barons forced King John to give his assent in June 1215 at Runnymede. The Magna Carta was the first document constituting a fundamental guarantee of rights and privileges, available at <https://www.merriam-webster.com/dictionary/Magna%20Carta>, accessed on 15 December 2016.

Corpus Act 1679 to mention just a few.¹⁶ The written constitution is found in one or more legal documents enacted in the form of laws as a result of the conscious and deliberate efforts of the people.¹⁷ A written constitution is systematic, definite, precise, and is framed by a representative body duly elected by the people at a certain period in history.¹⁸ Generally, in a written constitution, there is a single document referred to as the constitution.¹⁹ A written constitution is rigid and poses a difficult procedure for its amendment or revision within itself or another piece of legislation. A written constitution is regarded as superior to other legislation, which must generally conform with the provisions of the constitution.²⁰ In contrast, an unwritten constitution is one in which most of the principles of the government have not been enacted in the form of laws. It consists of customs, conventions, traditions, and some written laws bearing different dates.²¹ The unwritten constitution is unsystematic, indefinite, and un-precise, has not resulted from conscious and deliberate efforts of the people but is the result of historical development.²² It is not developed by a representative constituent assembly at a specific time in history, nor is it promulgated on a particular date.²³ The constitution of the United Kingdom is a good example of an unwritten constitution as it resulted from historical growth, with the foundation laid in the 13th century by the first charter of British freedom known as the Magna Carta.²⁴ Since then, the Constitution of England has been in the process of being made through conventions and usages.²⁵

¹⁶ Benjamin Akzin 'The place of the constitution in the modern state.' (1967), *Israel Law Review Constitution and Modern State*.

¹⁷ Tushar Singh 'What is the difference between written and unwritten constitution?' (2015), available at <https://www.quora.com/What-is-the-difference-between-the-written-and-unwritten-constitution> accessed on 30 October 2018.

¹⁸ Accessed from 'The meaning, types and importance of the constitution' found in the <http://www.preservearticles.com/2014051433461/constitution-meaning-types-and-importance-of-constitution.html> on 12 November 2016.

¹⁹ Robert Blackburn 'Britain's unwritten Constitution' (2015) available at <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution> accessed on 30th October 2018.

²⁰ What is the difference between written and unwritten constitution? Accessed from <http://www.preservearticles.com/201106258609/what-is-the-difference-between-written-and-unwritten-constitution.html> on 24th September 2018.

²¹ Ibid.

²² Benjamin Akzin op cit note 16.

²³ Ibid.

²⁴ Magna Carta was started by King John (24 December 1166 – 19 October 1216) who was the son of Henry II of England and Eleanor of Aquitaine. He was King of England from 6 April 1199, until his death. He became King of England after the death of his brother Richard I ('Richard the Lionheart').

²⁵ Tushar Singh op cit note 17.

The distinction between a written and an unwritten constitution is, however, not scientific.²⁶ Every written constitution has an unwritten element and every unwritten constitution has a written element. The Constitution of the United States of America is a classic example of a written constitution, but it is overlaid with conventions and traditions.²⁷ For example, even though the Constitution gives discretion to the President and the Governor to appoint any person as Prime Minister and Chief Minister respectively, convention has grown that the leader of the majority party is appointed.²⁸ In contrast, although the major portion of the Constitution of England is based on conventions and traditions, it contains many written laws like the Magna Carta 1215, the Petition of Rights 1628, the Bill of Rights 1689, the Habeas Corpus Act 1679, the Acts of Settlement 1701, various Reforms Act of 1832, 1867, 1884, Parliamentary Act of 1911, and the Crown Proceedings Act, 1947, etc.²⁹ The above two examples confirm that there is no constitution which is completely written or unwritten.

In East Africa, the constitutions generally take the form of a written document such as the 2010 Kenyan Constitution, the 2003 Rwandan Constitution and the 1977 Constitution of Tanzania. Although written in nature, unwritten elements are observed. For example, in Tanzania, presidential tenures alternate between Islam and Christian religions.³⁰ Another example is that since Tanzanian independence in 1961, all people appointed for the position of Prime Minister are men.³¹ Thus, until there is a change evidenced either by having two consecutive Presidents hailing from the same religion and/or having a female Prime Minister, the two examples remain part of the unwritten guidelines of Tanzanian constitutional system.

Conclusively, as an unwritten constitution grows from customs and traditions, written constitutions usually undergo the process of constitution-making. Constitution-making is a broad concept entailing the process of drafting substance of a new constitution, or reforms of an existing

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Julius Nyerere (1965-1985), the Tanzanian first President was a Christian, he was replaced by a Muslim President, Ali Hassan Mwinyi, in 1985-1995. In 1995-2005 President Ali Hassan Mwinyi was succeeded by the Christian President, Benjamin Mkapa, who was later succeeded by President Jakaya Kikwete, a Muslim who ruled from 2005-2015. In October 2015 Tanzania obtained its fifth President, John Magufuli, a Christian. 'Presidents of Tanzania', available at https://en.wikipedia.org/wiki/President_of_Tanzania accessed on 1st November 2018.

³¹ Rashidi Kawawa, Edward Sokoine, Cleopa Msuya, Edward Sokoine, Salim Ahmed Salim, Joseph Warioba, John Malecela, Cleopa Msuya, Fredrick Sumaye, Edward Lowassa, Mizengo Pinda, Kassim Majaliwa. Available at https://en.wikipedia.org/wiki/List_of_Prime_Ministers_of_Tanzania accessed on 1 November 2018.

constitution.³² It entails altering, modifying, deleting, adding or entirely rewriting a new content of the constitution.³³ In any state wishing to undertake a constitution-making process, the legal framework entailing guiding principles, processes, and key stages are critical for the success of the constitution-making endeavour as discussed below.³⁴

2.2.2 Legal Framework and Guiding Principles for Constitution-Making

When a country is ready to create a new constitutional order, the legal framework and the respective guiding principles are agreed and established.³⁵ Such legal guiding principles form the legal foundation and visionary framework for the constitutional reform process and ultimately for the implementation of the new constitutional order.³⁶ Constitutional principles within the established legal framework serve three purposes. First, they legally safeguard the constitution-making process and permit the political players to declare publicly and commit themselves to a vision for the future.³⁷ Second, as the benchmark and compass through which the constitution is prepared, it provides assurance to key actors to understand that the new constitution is guided in a jointly agreed direction.³⁸ Third, and more importantly, constitutional principles are tools that seek to protect the interests of minority groups, including women, by assuring them that specific core issues will be decided beforehand so that they are not disadvantaged by the will of the majority as the process progresses.³⁹

The legal framework can encompass constitution-making guiding principles of different categories: first, principles focusing on enhancing people's participation in the constitution-making

³² United Nations 'UN Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes,' 2009 available at <https://www.un.org/ruleoflaw/blog/document/guidance-note-of-the-secretary-general-United-nations-assistance-to-constitution-making-processes/> accessed on 2nd December 2017.

³³ Ibid.

³⁴ Ibid.

³⁵ The Office of the United Nations High Commissioner for Human Rights 'Human Rights and Constitution Making' (2018), HR/PUB/17/5.

³⁶ Kibwana K 'Guiding principles on which to build Kenya's new Constitution: Some thoughts', in Mute Lawrence Murugu & Wanjala Smokin (eds) *When the Constitution Begins to Flower* Vol. 1, (2002) Claripress Nairobi.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid. These pillars or foundational principles serve the central purpose of harmonizing the entire Constitution because each section or article of the Constitution must mirror both the spirit and substance of the principles. In the final analysis, the principles are a distillation of the key values that have endeared themselves to the society, which now wishes to undertake comprehensive constitutional review. When constitution-building is finally completed, some of the principles, which were used to guide the process, will themselves have been translated into direct constitutional text.

process;⁴⁰ second, principles concerned with stakeholder relationships and conduct in the constitution-making process, and third, principles relating to the design and content of the constitution and to which the final constitution needs to conform.⁴¹ The first category of principles, namely guiding principles for ensuring people's participation, is what is popularly known as participatory constitution making. A participatory constitution-making process brings together citizens to reflect, deliberate, agree and draft a constitution that addresses critical issues facing themselves and their nation.⁴² A participatory constitution-making process uses democratic modalities to allow active participation by the people in the drafting and adoption of a state's constitution.⁴³ It emphasizes deliberate, active, free, meaningful and substantive participation of people, accommodation of the people's diversity and openness of the constitution-making process.⁴⁴ Successful participatory constitution-making will result in a constitution that is owned by the people, enhances unity among citizens, and deepens the relationship between the government and the people.⁴⁵ People's substantive participation in constitution-making, have a lasting impact of legitimacy and acceptance, and it cultivates the culture of constitutionalism by both the rulers and the ruled, which consequently promotes the rule of law.⁴⁶

Although public participation is among the most often prescribed policy tools for enhancing the legitimacy of new constitutions, there is a general lack of empirical evidence that participation does indeed enhance legitimacy at various levels of analysis. Hence, public participation in constitution-making has the potential of causing some risks. There are challenges relating to the value of citizen engagement in constitution-making that if unmanaged may hinder a country from enjoyment of the full benefits resulting from public participation in the constitutional making. Public participation does not necessarily guarantee that citizens will feel

⁴⁰ Oyaya CO *Towards Constitutional Legitimacy a Study of the Principles and Processes of Constitutional Development and Constitution-making in Kenya from Colonial Times to 2010* (unpublished PhD Thesis School of Law, University of Nairobi G/80/9216/2004).

⁴¹ Ibid.

⁴² Centre for Constitutional Dialogues *Participatory Constitution Making Process Participatory Constitution Building in Nepal* Booklet Series NO. 10, (2009), Support to Participatory Constitution Building in Nepal- UNDP/Print Point Publishing, Tripureswor, Kathmandu.

⁴³ Kirsti Samuels 'Post-Conflict Peace-Building and Constitution-Making' (2006) 6 CHI. J. INT'L L. 663, 668-69.

⁴⁴ Oyaya CO op cit note 41.

⁴⁵ Centre for Constitutional Dialogues op cit note 42.

⁴⁶ JB Ojwang 'Constitutional development in Kenya: Institutional adaptation an I S m I Change' (1990) *ACTS Press*. Nairobi. pg 213.

incentivized to meaningfully participate,⁴⁷ instead, the process can give spoilers a chance to undermine progress,⁴⁸ making bargaining and consensus building difficult,⁴⁹ time-consuming and expensive.⁵⁰ The process can create unrealistic expectations by making people expect that they will have their way on every issue. When the reality that constitution-making involves compromise sets in, and that the final text may not address their interests or concerns, people may regard the constitution with suspicion.⁵¹ A more participatory process creates challenges for effectively analysing, evaluating, and incorporating public comments into the constitutional draft, leading to incoherent documents and rendering the constitutional scheme unworkable.⁵² Further, participation leads to more specific and detailed constitutional documents, because more diverse

⁴⁷ Zachary Elkins et al ‘The citizen as founder: Public participation in constitutional approval’ 81 TEMP. L. REV. 361, 362–63, 370 (2008).

⁴⁸ Where constitution making is grounded in mass participation, it still requires compromise among political elites; open dialogue that exposes highly polarized views can make it harder for political elites to strike a bargain. In divided societies in particular, individuals or groups may use identity-based issues and politics to polarize and divide the population. Taken to the extreme, this polarization can undermine the very purpose of the constitutional undertaking and slide a nation into — or back into — open conflict. Political interest groups can also manipulate consultations. In Bolivia, both major parties mobilized huge numbers of supporters for marches, demonstrations, and even a general strike. At one point, members of the constitutional assembly were physically attacked. Public participation became an exercise in “threat-based bargaining” and almost caused the country to collapse into violence. Jon Elster ‘Forces and mechanisms of the constitution-making process’ (1995), *Duke Law Journal* 45, no. 364 388–89 and David Landau ‘Constitution-Making Gone Wrong’ *Alabama Law Review* 64, no. 923 (2013).

⁴⁹ *Ibid.* Marginalizing political elites can risk creating tension between the constitutional text and the interests of those who will be called on to implement it. Kenya’s attempt at constitutional reform (2000–05) was incredibly open and participatory, resulting in a draft that enjoyed widespread public support but threatened the interests of the political establishment. After adoption by an inclusive national conference, the Kenyan parliament removed publicly popular provisions relating to separation of powers and decentralization before submitting the draft for referendum. The public subsequently rejected the parliament’s draft at referendum, paving the way for violence following the 2008 elections. In the end, the public had its way in Kenya’s 2012 constitution-making process, which resulted in a new constitution incorporating the popular provisions. The 2012–13 Fijian process suffered from a similar disconnect between public and elite views, as the government literally burned the draft produced by the Fijian Constitutional Review Commission. Designing a process that carefully balances the contributions of politicians, experts, and the general public is crucial to creating a constitutional draft that is supported by the political elite, is coherent, provides for effective and efficient governance, and reflects the will of the people.

⁵⁰ According to government estimates, the participatory elements of Kenya’s process, including outreach efforts, the national conference, and the referendum, cost \$88 million, or roughly \$2.57 per person. Unofficial estimates are as high as \$138 million. In societies emerging from decades of totalitarian rule, there may be a natural and justified impulse to rush through the constitution-making and create a democratically elected government.

⁵¹ Blount J et al ‘Does the process of constitution-making matter?’ (2012). In T. Ginsburg (ed) *Comparative Constitutional Design* (Comparative Constitutional Law and Policy). Cambridge: Cambridge University Press. doi:10.1017/CBO9781139105712.004.

⁵² Some of the key considerations pose challenges. Should a petition signed by one thousand people enjoy greater weight and consideration than a letter sent by a single person? What about a Twitter feed with ten thousand followers or a Facebook post with thousands of likes? What if five thousand questionnaires are gathered that are exactly alike and seem to be part of a campaign? What if the one thousand people who signed a petition all belong to the same political party? How do constitution makers weigh the opinion of a civil society leader who purports to speak for thousands of others? There are no right answers to these questions.

parties are likely to want to specify their bargain in greater detail. Distrust of counterparties and concerns about strategic nondisclosure of preferences during the bargaining process may occur.⁵³

Similarly, if the public perceives opportunities for participation to be episodic, it may seek to constitutionalise various institutions that would ordinarily be left to non-constitutional politics.⁵⁴ This can lead to poor drafting, internal contradictions, or errors. Also, public consultations are susceptible to manipulation from political elites ‘authoritarians in democrats clothing’⁵⁵ and coaching of citizens to present a party line.⁵⁶ These practices infringe on citizen’s rights to be heard and constitute a form of coercion where departure from coached positions usually carry the risk of punishment, undermining the utility of eliciting public input, further polarising the public, and erodes the legitimacy of the constitution-making process.⁵⁷ In a context where the political opposition is stronger, participatory constitution-making could lead to a decrease rather than an increase in constitutional support. In Uganda, for example, popular support for the Constitution was due to the high level of support among the Ugandan elites. Thus, since most citizens rely on elites for information and opinions, participation was achieved but with existing pockets of negative attitudes about the Constitution, even in areas with high rates of participation and with relatively knowledgeable citizens.

"If only perception mattered, then citizens in all areas where participation took place would support the constitution. If only the content of the constitution mattered, then all individuals who knew about the content of the constitution would be equally supportive. My analysis shows that this did not happen. There were pockets of people with negative attitudes about the constitution,

⁵³ Thailand’s 1997 document, for example, was designed to limit political institutions by setting up a large number of watchdogs, all elaborated in excruciating detail in the constitution.

⁵⁴ For example, Brazil’s 1988 process was a model of public participation involving citizen proposals on content. The resulting document is one of the world’s longest, at over 40,000 words.

⁵⁵ In Venezuela, the 1999 constitution-making process overseen by then elected Hugo Chavez was greatly participatory. Elections for the constitutional assembly resulted in Chavez’s party controlling 95 per cent of the seats, though his party only received 60 per cent of the vote. Without a viable opposition, Chavez’s movement led a constitution-making process that received hundreds of proposals from civil society and even accepted a large number of them — all while dismantling Venezuela’s two-party system, purging the other branches of government, and facilitating Chavez’s control of the entire state. The participation helped cloak Chavez’s takeover.

⁵⁶ In Zimbabwe, civil society monitoring groups reported that people were “reading from prepared scripts/booklets... providing answers... irrelevant to questions being asked, [and only a] few people making contributions even where the meeting [was] highly attended.”

⁵⁷ In Kenya in 2010, a majority of Kenyans opposed Qadi (Islamic) courts, but the final draft of the constitution included them out of respect for the Muslim minority, to the ire of the majority.

even in areas with high rates of participation and with relatively knowledgeable citizens. Simply including participation in the constitution-making process was not sufficient to ensure support.”⁵⁸

Although the above challenges give cause for caution against the blanket rhetoric of the developmental theory of participation, there are measures to mitigate the risks. The drafters are to consider views and preferences of the people, find possible consensus and remain transparent in communicating each step. When constitution drafters do not manage to lead the process effectively, ideologues or spoilers are more likely to dominate the discourse.⁵⁹ Careful planning and management of the process and of people’s expectations; conducting effective civic education and public information campaigns; ensuring that the process has sufficient time and resources; and adhering to the principles of inclusiveness, transparency and national ownership, can help manage and mitigate many of the risks. In every situation, a constitution-making design that manages the process to maximize the benefits while avoiding the risks of increased political or identity-based polarization needs to be adopted. Legitimacy and consensus among political elites, between the people and their elected representatives, and among communities should be the goal of constitution making. Public participation can be an invaluable tool with which to achieve this consensus and the absence of participation can severely impede it. The evolution of public participation in constitution-making has undergone different stages as discussed in the next section.

2.3 EVOLUTION OF PARTICIPATORY CONSTITUTION-MAKING

The legitimacy of governments has increasingly become a concern of both national praxis and international law.⁶⁰ In international law, increasingly, democracy serves as the basis of governmental legitimacy constructed within three fundamental components, namely the right to self-determination, free political expression, and the right to democratically participate in constitution-making processes.⁶¹

Regarding the right to participate in constitution making, the process of creating and revising constitutions was historically closed to the public and controlled by politicians, lawyers,

⁵⁸ Coren Devra Moehler ‘Public participation and support for the Constitution in Uganda’ *Journal of Modern African Studies* (2006) 44(2): 275-308 56.

⁵⁹ In Libya, a delay in launching the formal process of constitutional review left greater space for proponents of extreme forms of federalism. The more loudly extreme views are voiced, the greater the danger that different segments of the public will harden their positions.

⁶⁰ Frank TM ‘The emerging right to democratic governance’ (1992) *American Journal of International Law*, 86, p. 50.

⁶¹ *Ibid.*

elites, and experts.⁶² The public could only be involved in giving consent to the final version of the pre-prepared constitution.⁶³ For example, during the making of the Philadelphia Convention, a draft of the United States Constitution, only representatives from thirteen states constituting fifty-five delegates attended the Constitutional Convention sessions and are currently considered the framers of the Constitution.⁶⁴ Recently, however, there is evidence of constitution-making processes taking a different route from the 1787 United States of America Constitution, which was made by a few experts, lawyers and politicians to the contrasting people-centred constitutions,⁶⁵ such as the 1996 Constitution of South Africa and the 2003 Rwandan Constitution.⁶⁶

It is noteworthy that at its inception, a participatory constitution-making process was conceived as a democratisation and peace infrastructure enterprise for states emerging from warfare or a dictatorship regime, as opposed to a voluntary legally safeguarded decision of and by the people to deliberate, agree, write, and pass their constitution.⁶⁷ For example, a more comprehensive public consultation during the making of the 2003 Rwandan Constitution was deemed as a strategy to allow the majority of people of Rwanda to take part in constructing their country after emerging from the 1994 genocide.⁶⁸ Also, South Africa's successful participatory constitution-making process, connected to its onward legitimacy, and broad acceptance of the substantive content, is considered as a catalyst to a successful transition from the apartheid regime to a democratic regime.⁶⁹ Currently, the general presumption that fundamental constitutional change does not take place in an environment of relative peace is still relevant. In Kenya, it took

⁶² Vivien Hart 'Constitution-making and the Transformation of Conflict' (2001) 26 *Peace & Change* 153, 169.

⁶³ Ibid.

⁶⁴ Most of the delegates were landowners with substantial holdings, and most, with the possible exception of Roger Sherman and William Few, were very comfortably wealthy. George Washington and Robert Morris were among the wealthiest men in the entire country. More than half of the delegates had trained as lawyers (several had even been judges), although only about a quarter had practiced law as their principal means of business. There were also merchants, manufacturers, shippers, land speculators, bankers or financiers, two or three physicians, a minister, and several small farmers. Of the 25 who owned slaves, 16 depended on slave labour to run the plantations or other businesses that formed the mainstay of their income. Available at 'The founding fathers: A brief overview' *The Charters of Freedom*. U.S. National Archives and Records Administration. Archived from the original on 2016-10-06. https://en.wikipedia.org/wiki/Founding_Fathers_of_the_United_States accessed on 15th November 2017.

⁶⁵ Kirsti Samuels op cit note 43.

⁶⁶ Angela M Banks op cit note 1.

⁶⁷ Ibid.

⁶⁸ Yash Ghai & Guido Galli 'Constitution building process and democratization' (2006) (International Institute for Democracy and Electoral Assistance IDEA (available at http://www.idea.int/publications/cbp_democratization/upload/cbp_democratization_eng.pdf accessed on September 1, 2016.

⁶⁹ Ifeoma Laura Owosuyi 'Participatory constitution-making and why it matters: A review of the Egyptian experience' (2016) *South African Journal of International Affairs*, 23:2, 201-223, DOI: 10.1080/10220461.2016.1210540.

post-2007 electoral violence, widespread civil unrest, destruction of property and deaths of more than one thousand people for the political elite to agree to complete the constitutional and state reconstruction processes leading to a 2010 Constitution of Kenya.⁷⁰

However, recently, constitution-making is growing as both a nation-building and development endeavour, to assist states to build widespread public support for the new constitutions and to establish a popular constitutional culture and the rule of law within society.⁷¹ For example, the constitutional reform that started in Tanzania in 2011, though unfinished, was not because of any war or civil unrest, but a government response to consistent and genuine public outcry on the need for a new constitution.⁷²

Generally, the shift from an expert-centred to a people-centred constitution-making model is linked to the shift in the underlying motive for having the constitution itself.⁷³ Currently, the intention of making a new constitution lies in enhancing national unity, territorial integrity, defining or sharpening a national ideology or developing a collective agenda for social, economic, and political change.⁷⁴ With the growth of democratic practices across the globe, more regard is paid to the sovereignty of the people.⁷⁵ If sovereignty is indeed vested in and flows from the people, it is natural that people should determine how it should be delegated and exercised.⁷⁶ Given its immense benefits, the legal history for prioritizing public participation as the key guiding principle in the constitution-making processes is worth unpacking. It is noteworthy that, in legal practice, particularly before and after the onset of the ICCPR and the African Charter, there has been a contentious debate as to whether public participation in constitution-making is indeed a legal right.⁷⁷

2.4 EVOLUTION OF PARTICIPATORY CONSTITUTION-MAKING AS LEGAL RIGHT

Before the onset of Article 25 of the ICCPR and Article 13 of the African Charter, public participation in constitution-making was interpreted within the right of the citizens to participate

⁷⁰ Oyaya CO op cit 44.

⁷¹ Vivien Hart note 63.

⁷² Prof Khoti Kamanga Dr James Jesse & Dr Edwin Babeiya, *Expert Analysis on the Constitutional Review Impasse in Tanzania*, (2018), Legal and Human Rights Centre (LHRC) publication.

⁷³ Vivien Hart note 46.

⁷⁴ Kirsti Samuels op cit note 65.

⁷⁵ Vivien Hart note 73.

⁷⁶ Ibid.

⁷⁷ Ibid.

in political processes.⁷⁸ The Magna Carta⁷⁹ guaranteed the right to petition the government for the redress of grievances⁸⁰ and over time, this right became a central part of English constitutionalism whereby the disenfranchised joined the enfranchised in participating in English political life.⁸¹ However, the Magna Carta as the first Charter of Liberties failed to state clearly whether participation in constitution-making is a definite legal right. During the onset of the United Nations Declaration on Human Rights (UNDHR),⁸² the legal foundation for participation in constitution-making was again placed within the right to self-determination and the right to take part in the conduct of public affairs by participation advocates.⁸³ The right to participation in the conduct of public affairs was first stated in Article 21 of the UNDHR. However, the UNDHR could not advance participation in constitution-making as a legal right because the UNDHR status is that of an ‘inspirational guideline,’ not a legally binding agreement among the member-states.⁸⁴

With the onset of the ICCPR, the right to self-determination and to take part in the conduct of public affairs was reiterated and given force by Articles 1 and 25. Article 1 (1) of the ICCPR recognises that all peoples have the right of self-determination, and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Article 25 of the ICCPR⁸⁵ consists of two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote or to be elected. The ICCPR guarantees not only the ‘right’ but also the ‘opportunity’ to take part in the conduct of public affairs provided that;

⁷⁸ *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

⁷⁹ A charter agreed to by King John of England in 1215 op cit note 15.

⁸⁰ Stephenson & Marcham (eds) *Sources of English Constitutional History: A Selection of Documents from A.D. 600 to the Present* (1937), Harper & Brothers Publishers, New York and London at 125.

⁸¹ Mark ‘The vestigial constitution: The history and significance of the right to petition’ (1998) 66 *Fordham Law Review* 2153 at 2169.

⁸² 1948.

⁸³ There has been a considerable amount of scholarship on the evolution of the right to self-determination, especially on what the right entails substantively. This question has led to a conceptualization of the right as both external and internal. The external conceptualization refers to the right for the peoples of the state to determine how the state will be run without external interference. The internal right is an entitlement to participate in the state's decision-making processes regarding its political status and its economic, social, and cultural development. Constitution-making is not only an aspect of public affairs, but a means by which citizens can participate in determining the State's political status and its economic, political, social, and cultural development. Angela M Banks op cit note 66.

⁸⁴ Human Rights Law, available at <http://www.un.org/en/sections/universal-declaration/human-rights-law/> accessed on 11th November 2018.

⁸⁵ *Ibid.*

‘Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives.’⁸⁶

Supplementing Articles 1 and 25 of the ICCPR, participation advocates also invoke Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination⁸⁷ which provides the right to citizens to take part in the government as well as in the conduct of public affairs at any level.⁸⁸

In the African context, Article 13 of the African Charter⁸⁹ provides for the right to take part in the conduct of public affairs directly or indirectly.⁹⁰ Article 13(1) of the African Charter provides

‘Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.’

Further, Articles 9 and 25 of the African Charter spell out the obligation of the member states to facilitate the public to take part in the conduct of their state, receive information, freely express themselves and become well informed of all the processes pertaining to their country.⁹¹

⁸⁶ Article 25 of ICCPR.

⁸⁷ Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

⁸⁸ Article 5c provides that, ‘in compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights... (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service...’ Also, the participation advocates cites Articles 15 and 17 of the European Framework Convention for the Protection of National Minorities, as a provision that call for persons who belong to national minorities to be allowed to effectively participate in cultural, social and economic life as well as in public affairs. Council of Europe ‘Framework Convention for the Protection of National Minorities’ 1 February 1995 ETS 157 available at <http://www.refworld.org/docid/3ae6b36210.html>, accessed 2 August 2017.

⁸⁹ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force 21 October 1986. Article 13 provides for right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

⁹⁰ Article 13 of the African Charter provides that ‘1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. 2. Every citizen shall have the right of equal access to the public service of the country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.’

⁹¹ Article 9,13 and 25 of the African Charter on Human and Peoples Rights.

Generally, Article 25 of the ICCPR, Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 9, 13 and 25 of the African Charter, frame the views on meaningful citizens' participation in public and political affairs but depict no clear stipulations on what exactly 'taking part in public affairs' entails and whether constitution-making is a public affair necessitating public participation by the public.⁹²

The problem around the interpretation of the rights to take part in public affairs is traced back to the onset of Article 25 of the ICCPR.⁹³ The interpretation of the right to take part in public affairs was limited to the right to vote and the right to stand for elections. Regarding constitution-making processes, the right to take part in public affairs was limited to electing a constitutional assembly or ratifying an already prepared constitutional text through a referendum.⁹⁴

Lack of legal clarity in pinning participatory constitution-making as a legal right attracts a number of case laws with key legal questions such as whether constitution-making is a public affair within the ambit of Article 25 of ICCPR.⁹⁵ In order to take part in public affairs, does it suffice to only vote for members of a constitutional assembly who then formulate the constitution; or does taking part in public affairs include the possibility to vote on a draft constitution? Does taking part in public affairs perhaps involve receiving constitutional education to then be able to actively participate in the making of the constitution in an informed manner?⁹⁶ Lack of clarity on the meaning of taking part in public affairs has resulted in constitutional petitions before courts of laws, seeking for succinct and broader interpretations of whether the phrases 'participation in public affairs' includes participation in constitution-making processes.⁹⁷ The constitutional petitions which have gradually expanded the meaning of the right to participation in public affairs and what genuine participation in constitution-making presupposes,⁹⁸ include the case of *Donald Marshall v Canada*,⁹⁹ *Native Women's Association of Canada (NWAC) v Canada*,¹⁰⁰ the reference

⁹² Vivien Hart note 76.

⁹³ Abrak Saati 'Participatory constitution-making as a transnational legal norm: Why does it "stick" in some contexts and not in others,' *UC Irvine Journal of International, Transnational, and Comparative Law* Vol. 2:113.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Vivien Hart op cit note 92.

⁹⁸ Gregory H Fox & Brad R Roth, noted in a volume edited with *Democratic Governance and International Law* (2000).

⁹⁹ UN Human Rights Comm; *Marshall v. Canada*, 5.3; U.N. Doc. CCPRC/43/D/ 205/1986 (Dec. 3, 1991) available at <http://www1.umn.edu/humanrts/undocs/html/dec205.html>.

¹⁰⁰ [1994] 3 S.C.R. 627.

re secession of Quebec,¹⁰¹ *Doctors for Life International v Speaker of the National Assembly and others*,¹⁰² and *Matatiele Municipality and Others v President of the Republic and Others*.¹⁰³ They are explained in detail below.

i. Donald Marshall v Canada and UNCHR General Comment No. 25

Donald Marshall v Canada was the first case to answer the question of whether the constitution-making process is a public affair. The *Mikmaq* tribal society in Canada submitted a communication to the United Nations Human Rights Committee (UNHRC),¹⁰⁴ under the Optional Protocol to the ICCPR claiming that its rights to self-determination and to take part in the conduct of public affairs had been violated.¹⁰⁵ The *Mikmaq* tribal society contended that Canada's refusal to allow the *Mikmaq* attendance to constitutional conferences convened pursuant to the Constitution Act, violated their right to take part in the conduct of public affairs.¹⁰⁶ The Constitution Act envisages a process which would include a constitutional conference to be convened by the Prime Minister of Canada, attended by the First Ministers of the provinces and invited 'representatives of the aboriginal peoples of Canada.' Such conferences were convened and representatives of several national associations to represent aboriginal groups were invited. The associations were the Assembly of First Nations, the Mtis National Council, and the Inuit Committee on National Issues. The *Mikmaq* maintained that their interests were not properly represented at the constitutional conferences because they could not get one of the invited associations to represent them adequately and they had not given the Assembly of First Nations (AFN) any right to represent them. The *Mikmaq* tribal society attempted to influence the AFN by submitting a package of constitutional proposals and protested 'in the strongest terms any discussion of *Mikmaq* treaties at the constitutional conferences in the absence of direct *Mikmaq* representation.' The AFN, however, neither submitted any of the *Mikmaq* position papers to the constitutional conferences nor incorporated them into its positions. Addressing the alleged violation of Article 25(a) of the ICCPR,¹⁰⁷ the UNHRC concluded that the nature and scope of activities of constitutional conferences in Canada constituted conduct of public affairs.¹⁰⁸

¹⁰¹ [1998] 2 SCR 217.

¹⁰² CCT12/05 [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

¹⁰³ CCT73/05 [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006).

¹⁰⁴ The Human Rights Committee is established by Article 28 of the ICCPR 1966.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

Twelve years after deliberating the *Marshall v Canada* case, the UNHRC issued the second textual authority expounding the meaning of taking part in public affairs through General Comment No. 25.¹⁰⁹ The UNHRC asserted that citizens participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b) of Article 25 of ICCPR.¹¹⁰ Although the aforementioned assertion by the UNHRC and the judicial precedent in *Donald Marshall v Canada* are non-binding in nature, they confirm and extend the application of Article 25 to include constitution-making as a public affair and a legal right.¹¹¹

ii. Native Women’s Association of Canada (NWAC) v Canada and Reference re Secession of Quebec

The NWAC claimed that representative organisations from aboriginal associations were male-dominated and represented only one view of constitutional reform, favouring male interests.¹¹² NWAC also claimed that the denial of equal funding for NWAC further infringed the equality guarantees of the Canadian Charter of Rights and Freedoms,¹¹³ requiring that rights, including freedom of expression, be available to women and men without discrimination. NWAC argued that the constitutional negotiations had failed to meet standards of both symbolic (the presence of women) and substantive (articulation of the interests of women) representation as well as guarantees of gender equality. The NWAC won the equality point in the federal court of appeal, which held that it would paralyse the process to hold that freedom of expression encompassed a right for everyone to sit at the decision-making table. Later, the NWAC lost the case in the Supreme Court of Canada. The Supreme Court affirmed that the preparation of constitutional amendments was not a governmental activity of a kind that was required to comply with the Canadian Charter of Rights and Freedoms since the tradition of constitution-making in Canada

¹⁰⁹ UN Human Rights Committee (HRC) ‘CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service’ 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at [RefWorldhttp://www.refworld.org/docid/453883fc22.html](http://www.refworld.org/docid/453883fc22.html) accessed 16 December 2018.

¹¹⁰ General comment is not binding but authoritative and indicative, according to the UNCHR itself, they are “intended to make the committee’s experience available for the benefit of all state parties, so as to promote more effective implementation of the covenant... and to stimulate the activities of the state parties and international organisations in the promotion and protection of human rights. Angela M Banks op cit note 83.

¹¹¹ Vivien Hart op cit 97.

¹¹² *Native Women’s Association of Canada*, op cit note 100.

¹¹³ Specifically section 2, section 15 and section 28 of the Canadian Charter of Rights and Freedoms.

was of intergovernmental negotiations.¹¹⁴ The Supreme Court got stuck on the question as to whom the federal and provincial government ought to meet with and consult during the development of constitutional amendments. There were no legal or constitutional principles to guide a court in its decision.¹¹⁵

Four years later, in the case of *reference re secession of Quebec*, the Supreme Court of Canada expounded the philosophical underpinning for Canadian constitutionalism, providing that the Constitution is made up of written and unwritten principles based on text, historical context, and previous constitutional jurisprudence. The key fundamental tenets of the Canadian Constitution include:

“Democracy – the principle that seeks to promote participation in effective representative self-government, which respects and responds to all voices in a marketplace of ideas. Constitutionalism and the Rule of Law – the principles that protect citizens from state actions by forcing governments to act under the rule of law, the constitution of Canada being the supreme law. The constitution’s entrenched protections of minorities ensure that the country does not operate simply on majority rule and enables a true democracy in which minority voices are fairly considered. Protection of Minorities – the principle that guides the other principles, but one which is also independent and fundamental because of its uniqueness to Canada relative to other federal, constitutional democracies.”¹¹⁶

The Supreme Court held that the four tenets stated in the above quotation cannot be viewed independently but all interact as part of the Constitutional framework of Canada, and across all four tenets citizen’s participation is the main drive towards a legitimate constitution.¹¹⁷

In general, the judgement from *Marshall v Canada*,¹¹⁸ *Native Women’s Association of Canada (NWAC) v Canada*,¹¹⁹ *the reference re secession of Quebec*¹²⁰ and the UNDHR general comment No. 25 expands the meaning of public affairs to encompass constitution-making, thus confirming public participation in constitution-making as a legal right. It is noted, however, that thirty years after the aforementioned precedents, Article 25 of the ICCPR has not been amended

¹¹⁴ *Native Women’s Association of Canada (NWAC)* op cit note 112.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ UN Human Rights Comm., *Marshall v Canada*, 5.3, U.N. Doc. CCPRC/43/D/ 205/1986 (December 3 1991) available at <http://wwwl.umn.edu/humanrts/undocs/html/dec205.htm> accessed on 6 April 2016.

¹¹⁹ [1994] 3 S.C.R. 627.

¹²⁰ [1998] 2 SCR 217.

to specifically incorporate participation in constitution-making within the framework of the right to take part in the conduct of public affairs, to allow citizens participation in the constitution-making process.¹²¹ In the legal arena, there are different views. The first view claims that specific mentioning of constitution-making within the wording of the right to take part in public affairs will amount to overelaboration of Article 25 of ICCPR. The commentators of this view argue that when participation in constitution-making is subject to questioning, it will suffice if Article 25 is read together with the Judicial Precedents discussed above, alongside UNHRC general comment No. 25 which, as mentioned previously, extends the application of the right to participate in the conduct of public affairs to allow citizens participation in the constitution-making activities.¹²² Thus, an international legal framework such as the ICCPR should specifically stipulate constitution-making as a key component of the right to take part in the conduct of public affairs.¹²³ Participatory constitution-making processes promote the application of other civil rights such as the right to freedom of expression and opinion, the right of assembly and association, the right to political equality, freedom of information,¹²⁴ and rights to inclusion and equality.¹²⁵ In turn, the existence and practice of these rights lead to transparency, accountability, credibility, national unity, legitimacy, acceptance, inclusiveness, and constitutional awareness of the new constitutional order.¹²⁶ The benefits of participatory constitution-making make it one of the most popular civic rights, which requires a specific mention within Article 25 of the ICCPR and other international legal instruments. Leaving participation in constitution-making to the discretion of the interpretation of unclear wording of the right to participate in the conduct of public affairs, without specific mention, exposes such a right to discretionary interpretation.¹²⁷

States parties to the ICCPR are able to influence for a specific incorporation of the right to participate in constitution-making within the ICCPR. Article 51 of the ICCPR¹²⁸ allows any state

¹²¹ Vivien Hart op cit note 111.

¹²² Ibid.

¹²³ Abrak Saati op cit note 96.

¹²⁴ It also involves a lot of seeking and receiving timely and substantive information from the key institutions such as the constitution review commissions. Article 19 of the ICCPR, allows freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

¹²⁵ Vivian Hart op cit note 111.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Article 51(1) (2) and (3) provides that, ‘any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify

party to the covenant to propose an amendment and file it with the Secretary-General of the United Nations. Such an amendment may come into existence after being approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the state's parties in accordance with their respective constitutional processes. Despite clear procedures for amendment of any provision of the ICCPR, no state has used such opportunity in respect of expansion of Article 25 of ICCPR to encompass progressive wording with regard to participation in a constitution-making process as a definite legal right.

The international conventions that came into existence after the ICCPR have achieved the required level of precision in placing participation in constitution-making as a legal right. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which is currently ratified by 185 out of 195 countries throughout the world¹²⁹ specifically provides for the right of women to participate in the formulation of government policy, its implementation, to hold public office and perform all public functions at all levels of government. Article 7 of CEDAW provides

‘States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right... (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government’

Also, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which is currently ratified by 40 out of 55 African countries,¹³⁰ requests state parties to take specific measures to ensure women are equal partners

him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.’

¹²⁹ UN General Assembly ‘Convention on the elimination of all forms of discrimination against women 1979’, *United Nations Treaty Series* 1249 13, available at: <http://www.refworld.org/docid/3ae6b3970.html> accessed on 27 September 2017.

¹³⁰ Chapter one op cit note 5.

with men at all levels of development and implementation of state policies and development programmes.¹³¹ Article 9(1)(c) of the Maputo Protocol specifically provides

‘States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that ... c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.’

The inclusion of the word participation in the formulation and implementation of public policy in both CEDAW and Maputo Protocol provides clear guidance and better inference of participation in constitution-making processes as a legal right. As the focus of this thesis is to determine how women were involved in constitution-making processes of Kenya, Rwanda, and Tanzania, Article 7(b) of CEDAW and the Article 9 (1) (c) of Maputo Protocol clearly sets out the legal foundations for participatory constitution-making as a legal right.

At a national level, constitutions and laws, especially those adopted after the entry of the ICCPR, CEDAW, the African Charter and Maputo Protocol, have clearly provided for participation in constitution-making as a legal right. The Constitution of the Republic of South Africa¹³² specifies under Sections 59(1)(a), 72(1)(a) and 118(1)(a)¹³³ that the National Assembly, which is elected by the people, ensures government by the people under the Constitution by

¹³¹ Article 9(1)(c) of the Maputo Protocol.

¹³² Constitution of the Republic of South Africa, 1996 [Assented to 16 December 1996] [Date of Commencement: 4 February 1997].

¹³³ Article 59 of South African Constitution provides for public access to and involvement in the National Assembly. It states that ‘The National Assembly must— (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken— (i) to regulate public access, including access of the media, to the Assembly and its committees; and (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person. (2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.’ Also, Article 72 provides for public access to and involvement in National Council, it specifically provides that ‘The National Council of Provinces must— (a) facilitate public involvement in the legislative and other processes of the Council and its committees; and (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken— (i) to regulate public access, including access of the media, to the Council and its committees; and (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person. The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.’ Further, Article 118 provides for public access to and involvement in provincial legislatures, the article states that ‘A provincial legislature must— (a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken— (i) to regulate public access, including access of the media, to the legislature and its committees; and (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person. (2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.’

facilitating public involvement in the legislative and other processes of the Assembly by providing a national forum for public consideration of issues including constitution-making. The South African Constitution requires the National Assembly to conduct its business in an open manner, and hold its sittings, and those of its committees, in public, and to only take reasonable measures to regulate public access, including access of the media, to the Assembly and its committees. In the interpretation of the legal framework, South African courts have also been vigilant in protecting the rights to public participation in legislative and constitution-making processes such as in the case of *Doctors for Life International v Speaker of the National Assembly and Others* and the case of *Matatiele Municipality and Others v President of the Republic and Others* in 2006. The Matatiele Municipality and other organisations and groups contested the validity of the Constitutional Amendment as it applied to the Matatiele Municipality.¹³⁴ Parliament adopted the Twelfth Amendment to the Constitution, which altered the basis for determining provincial boundaries. The provincial boundaries were no longer based on magisterial districts, but determined on the basis of municipal areas. This has resulted in the alteration of the boundary between the provinces of KwaZulu-Natal and the Eastern Cape.¹³⁵ Among other changes, the area that previously formed the local municipality of Matatiele (designated KZ5a3 by Municipal Notice 147 published in the KwaZulu-Natal Provincial Gazette 5535 on 18 July 2000) has been transferred from KwaZulu-Natal province into the Eastern Cape province and new municipal boundaries have been created as a consequence. As a result of the transfer of the area that was Matatiele Local Municipality into the Eastern Cape province,¹³⁶ the former municipality of Matatiele and a diverse group of businesses, educators, associations and non-governmental organisations challenged the constitutional validity of the Twelfth Amendment and the Repeal Act.¹³⁷ They contended that the Twelfth Amendment is unconstitutional in that it effectively re-demarcated Matatiele Municipality and removed it from KwaZulu-Natal into the Eastern Cape without complying with the provisions of the Constitution. The main thrust of the challenge was that the Twelfth Amendment re-determined municipal boundaries in a manner that usurped the authority reserved for the Municipal Demarcation Board under section 155(3)(b) of the

¹³⁴ (No 2) [2006] ZACC 12.

¹³⁵ *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

Constitution.¹³⁸ It was contended that the KwaZulu-Natal Legislature, prior to its approval of the Twelfth Amendment Bill, had not facilitated adequate public involvement in the legislative process in accordance with the African Charter and South African Constitution. It was common knowledge that the KwaZulu-Natal Legislature had not held any public hearings related to the Twelfth Amendment Act. Therefore, the Constitutional Court held that the Twelfth Amendment Act, insofar as it applied to the Matatiele Municipality, was invalid for failing to involve people.¹³⁹

Generally, despite the inexhaustive nature of Article 25 of ICCPR, Article 7(b) of CEDAW and Article 9(1)(c) of the Maputo Protocol clarify that the unresolved issue is no longer whether participation in constitution-making is a legal right but rather how to participate, modalities of taking part and their adequacy.

2.5 LEGAL GUIDANCE ON HOW TO ‘TAKE PART’

As it is the case in determining whether constitution-making is a public affair, Article 25 of ICCPR provides minimum guidance on what and how ‘taking part’ should look like. As noted in section 2.4 of this chapter, Article 25 provides that:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives”

Article 25 of ICCPR establishes the general right to participate in the conduct of public affairs to be exercised either directly or through freely chosen representatives. The precise form, nature and scope of direct or indirect participation are not stipulated.¹⁴⁰ In determining the scope of a citizen’s right to participate in the conduct of the affairs of their state, the UNHRC stated in *Donald Marshall v Canada* that the scope of the right of every citizen to participate in the conduct of public affairs should be without unreasonable restrictions.¹⁴¹ Generally, the UNHRC General Comment no. 25 gives liberty to the legal and constitutional system of the state party to provide for the modalities of participation.¹⁴² The UNHRC rejects that the right to participation allows citizens to decide

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Banks AM op cit 66.

¹⁴¹ Human Rights Committee op cit note 109.

¹⁴² In South Africa, modalities of participation in the conduct of public affairs are informed by the weight of the amendment or reform and intensity of impact to the section of people targeted by the constitutional reform. *Matatiele Municipality and Others* op cit 119.

whether they will take part in the conduct of public affairs directly or through freely chosen representatives.¹⁴³ For example, in *Donald Marshall v Canada*, the decision to design a constitutional review process that utilized conferences attended by the First Ministers of the provinces provided for citizen's participation through freely chosen representatives.¹⁴⁴ A key consideration is that the state's chosen modalities of participation do not discriminate based on race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status, or unreasonably restricts participation.¹⁴⁵ In General Comment no. 25, UNHRC refrained from specifying what participation should look like, but it discussed a variety of modalities. These included popular assemblies, consultative bodies, freely chosen representatives, referenda, elections, public debate, and dialogue.¹⁴⁶ Depending on the context, direct or indirect participation in the conduct of public affairs, including participation in constitution-making, has taken different shapes in different countries. For example, South Africa has developed a whole set of activities to accommodate participation by different sets of the population during the legislative making process. First, a public education office was established to, among other things, develop democracy road shows, aimed at taking Parliament to the people and informing them how they can influence and take part in legislative work. More than 16,000 persons have participated in the democracy road shows.¹⁴⁷ South Africa has also established sessions with the members of Parliament to dialogue directly with members of the communities and to elicit input on matters that are put before Parliament.¹⁴⁸ Broadcasting is also one of the strategies in educating and informing the public on what happens in Parliament and how laws are passed.¹⁴⁹ People have been taught how to influence the outcome of Parliament's work through broadcasts of the 12 South African Broadcasting Corporation radio service stations, in all the

¹⁴³ Human Rights Committee op cit note 141.

¹⁴⁴ In general, Article 25(a) of ICCPR does not create an unconditional right to direct participation in the conduct of public affairs; rather, it allows states to choose direct or representative modalities.

¹⁴⁵ Commonwealth Human Rights Initiative (CHRI) 'Recommendations to Commonwealth Heads of Government' at the Consultation on Participatory Constitution-making held on 16–17 August 1999 at Holiday Inn Burgers Park, Pretoria, South Africa, available at Commonwealth Human Rights Initiative, http://www.humanrightsinitiative.org/publications/const/constitutionalism_booklet_1999.pdf accessed on 28 December 2018.

¹⁴⁶ Human Rights Committee op cit note 143.

¹⁴⁷ Inter-Parliamentary Union on Parliamentary is an international organisation of Parliaments of sovereign States, which serves as a focal point for worldwide parliamentary dialogue, Inter-Parliamentary Union, *Parliamentary Involvement in International Affairs* (Report to the Second World Conference of Speakers of Parliaments, New York 7-9 September 2005) at 21.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

official languages, reaching a national audience of 35 million. There are television programmes consisting of ten episodes providing information to six million citizens on democracy, the Constitution, the three branches of Government and the functioning of Parliament.¹⁵⁰ There are also targeted information campaigns carried out on key bills that are before the Parliament. On a number of occasions, the Parliament has organised civic education workshops for rural women in several provinces. It organised a conference on enhancing the participation of women in law-making and another conference addressing the need to enhance public participation in legislative processes.¹⁵¹ The Parliament of South Africa has also used its web site to reach out to the public by allowing interactive communications. For example, public submissions could be made on any legislation electronically.¹⁵² The South African Parliament has issued several publications as well, including a book on women in law-making, a newsletter entitled ‘In Session’ a bulletin called ‘NCOP News’ and an award-winning comic book written for young readers called ‘A Day in Parliament’ which has been distributed to every school in the country.¹⁵³ The experience from South Africa depicts that not only one or two public engagement modalities in respect of constitution-making process will reach a significant number of people; a mixture of different public engagement modalities that are accessible to different sets of the population is key in ensuring meaningful public participation in the conduct of public affairs.

2.6 GUIDING PRINCIPLES FOR PARTICIPATORY CONSTITUTION-MAKING

Analysis of the international, regional, national, and case laws concerning participatory constitution-making shows that there is no ‘one size fits all’ constitutional model or process. Cognisant to that, the United Nations developed the Guidance Note which sets the policy framework that supplements the precedent of *Marshall v Canada*, and the UNHRC General Comment no. 25. The Guiding Note practically guides states undertaking constitution-making processes to open the process to the wider members of the society.¹⁵⁴ The United Nations Guidance Note sets out six key principles including, the need to seize opportunity for peace-building as an entry point for a participatory constitution-making process; encouragement of compliance with

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes, April 2009. Available at https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf accessed 6th July 2017.

participatory constitution-making international norms and standards; ensuring national ownership of constitution-making process; supporting inclusivity, participation and transparency; mobilising and coordinating a wide range of expertise; and promoting adequate follow-up after finalisation of the constitution-making process.¹⁵⁵

The principles outlined in the United Nations Guiding Note are analysed and synthesised in line with the requirement of Article 25 of ICCPR, Article 7 of CEDAW, Maputo Protocol and the UNHRC General Comment no. 25, with the aim of producing guiding principles that will be used in analysing the extent to which the constitution-making legal framework in Rwanda, Kenya, and Tanzania facilitated public participation. The synthesised guiding principles are deduced to determine how the constitution-making legal safeguards provide for: i) participation in constitution-making as a legal right; ii) clear and effective modalities for participation; iii) respect for diversity and participation of the marginalized groups; and finally, iv) how the final text of the new constitutions reflects public participation.

2.7 CONCLUSION

Chapter Two depicted the challenges in pegging public participation in constitution-making within the right to take part in the conduct of public affairs under Article 25 of ICCPR.¹⁵⁶ Chapter Two establishes that Articles 7(b) of CEDAW and 9(1)(c) of the Maputo Protocol and national constitutions such as the 1994 Constitution of South Africa confirm participation in constitution-making as a legal right. The South African experience from *Doctors for Life International v Speaker of the National Assembly and Others* and the case of *Matatiele Municipality and Others v President of the Republic and Others* depict different modalities that can be used to enhance participation in constitution-making. These modalities range from oral and written petitions and submissions, civic education through road shows, civic education workshops, broadcasting radio and television programmes, public hearing, publications, popular assemblies, dialogue, consultative bodies, and the use of websites.¹⁵⁷ The United Nations have provided a Guidance Note to enhance effective participatory constitution-making practices for countries engaging in a constitution-making process.¹⁵⁸ Key guiding principles are deduced from the United Nations

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Guidance Note of the Secretary-General op cit note 139.

Guiding Note in line with the provisions of ICCPR, African Charter, CEDAW, Maputo Protocol, the precedent under the case of *Marshal v Canada*, and UNHRC General Comment No. 25. The guiding principles will be used in the forthcoming chapters in determining if legal frameworks for constitution-making processes in Rwanda, Kenya, and Tanzania were participatory. In Chapter Three, the evolution of constitution-making processes in Kenya, Rwanda, and Tanzania during the pre-colonial and colonial period are presented.

3. CHAPTER THREE

3.0 EVOLUTION OF CONSTITUTION-MAKING IN KENYA, RWANDA AND TANZANIA

*“Functionally, the colonial constitutionality possessed the dubious character of serving a few political elite and community interests of the white population....”*¹

3.1 INTRODUCTION

In Chapter Two, the evolution of participatory constitution-making as an international norm and the challenges of its acceptance as a legal right are discussed. In Chapter Three, the foundation is laid for addressing the first research question which determines whether women were adequately involved in the Kenyan, Rwandan and Tanzanian constitutional reform processes. In this Chapter, the legal framework for making of the Rwandan, Kenyan and Tanzanian pre-colonial, colonial and independent constitutions are examined, in relation to how they facilitated participation of women and laid the foundation for participatory constitution-making practices. In doing so, how women participated in political and leadership spaces during the pre-colonial era and how that changed following the introduction of slavery and colonialism are explored.

3.2 CONSTITUTIONAL FORMATIONS DURING THE PRE-COLONIAL AND COLONIAL ERA

3.2.1 Pre-Colonial Era

During the pre-colonial era, there was no official legal framework guiding governance and administration structures in East Africa.² Most parts of Rwandan, Kenyan, and Tanzanian society were communal with everyone responsible for one another and joint ownership of property.³ The communities were originally inhabited by clans and later organised into small-scale hereditary kingdoms and chiefdoms, which took the title *ntemi*.⁴ *Ntemi* exercised both ritual and

¹ Oyaya CO ‘Towards constitutional legitimacy: A study of the principles and processes of constitutional development and constitution-making in Kenya from colonial times to 2010’ (unpublished PhD Thesis, School of Law, University of Nairobi, G/80/9216/2004).

² ‘Pre-colonial Africa’ available at <https://stiffkitten.wordpress.com/2010/08/13/pre-colonial-africa/> accessed on 30th December 2018.

³ Karari Peter ‘Modus operandi of oppressing the “savages”: The Kenyan British Colonial experience’ *Peace and Conflict Studies*: (2018) Vol. 25, available at: <https://nsuworks.nova.edu/pcs/vol25/iss1/2> accessed on 23rd August 2016.

⁴ *Ntemi* means to clear by cutting from proud first-comers to a given region, with units often breaking apart as thwarted challengers pressed out into the unsettled frontier; and second, the outsider “stranger” chief, often a hunter, whose ability to impose an impartial justice over local disputes secured his authority. *African History* available at

administrative powers⁵ but did not enjoy a monopoly over political authority. *Ntemi* exercised his ruling power alongside the elders, healers, diviners, and iron smelters.⁶ For instance, in Rwanda, the state's administration was under the Monarch (*umwami*) assisted by chiefs (*abatware*) and advisors (*abiru*).⁷

The pre-colonial East African communities were shaped and contested by popular pressures of participation.⁸ The pressure was primarily directed toward widening and strengthening social relationships and less of securing access to material resources or maintaining political power.⁹ As opposed to ownership and possession of the land or other productive resources, the level of influence determined one's power over other members of the community.¹⁰ For instance, in Rwanda during the 19th century, King Kigeli Rwabugiri of the dominant Kingdom of Rwanda initiated *uburetwa*, a system which forced Hutus to work for Tutsi chiefs, marking the start of a long-lasting rift between the two ethnic groups, which later caused the Rwandan genocide in 1994.¹¹

The pre-colonial communities were self-governing, having autonomous entities, and all members took part, directly or indirectly, in the daily running of the tribe.¹² Local issues were deliberated by elders' councils. The councils played an advisory role to the chief, checked and balanced his powers and made policy by reaching unanimous decisions.¹³ The whole community, in the form of a village assembly, were involved alongside with the council of elders to debate the issues in case there was no consensus among the elders. Under those circumstances, the majority rule would apply.¹⁴ Usually, at such meetings, there was a spokesman for the village or clan and

<http://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-33>
accessed on 23rd August 2016.

⁵ The health of the land and people depended on the chief's physical health and his observance of special rituals. Karari, P op cit note 3.

⁶ Ibid.

⁷ Brennan J 'popular politics in East Africa from precolonial to postcolonial times' (2017) *East Africa and Indian Ocean, Political History Online Publication*, Oxford Research Encyclopedia of African History' DOI: 10.1093/acrefore/9780190277734.013.33.

⁸ Ibid.

⁹ Ibid.

¹⁰ President's Office Regional Administration and Local Government, History of Local Government in Tanzania available at <https://www.jamiiforums.com/attachments/history-of-local-government-in-tanzania-pdf.487978/>. accessed on 03 December 2018.

¹¹ Available at https://www.kas.de/c/document_library/get_file?uuid=0a4ad95d-13f6-7a60-99a2-5d9f77918b44&groupId=252038, accessed on 27 August 2016.

¹² Pre-colonial Africa op cit note 2

¹³ Ibid.

¹⁴ In such a meeting the chief's role was limited to listening, summing up and leading the meeting to consensus among the diverse opinions. Brennan J op cit note 7.

decisions reached at such meetings were not questioned but upheld and carried out by every person within the jurisdiction of the relevant elders' council. The elders' councils, especially *Mabanza*¹⁵ in the *Sukuma*¹⁶ chiefdom in Tanzania and *Ubiru* in Rwanda, deliberated on matters affecting their tribe's security and welfare, such as threat from another tribe, the outbreak of serious disease, famine, environmental conservation, and depredations of wild animals just to name a few.¹⁷ The pre-colonial era was characterised by respect to customs and traditions which acted as unwritten rules governing the communities. The agreed customs were deemed to be superior and static.¹⁸ As such, during the pre-colonial era, the making or reforms of the customs and traditions that governed the communities were not evident.

Generally, women were not part of the pre-colonial governance structures of many societies. Studies of pre-colonial Kenya have painted a picture of deeply patriarchal societies run by councils of elders with no input from women whatsoever.¹⁹ However, in some parts of pre-colonial Africa, the presence of women in very high positions was witnessed in formal indigenous government structures.²⁰ Women played key roles in leadership and administration, governing kingdoms, cities, states and even ruled alongside and on equal terms as men.²¹ In Rwanda, for example, the Banyarwanda Queen Mother co-ruled with the King or chief in all state matters.²² As the counsel for the King, the Queen Mother played complementary roles to balance those of the King.²³ The Queen Mother's attributes of wisdom, knowledge, emotion, and compassion were balancing the King's qualities of bravery and inflexibility.²⁴ However, as witnessed below, the

¹⁵ Means elder's court which settled disputes in their localities among the Sukuma and Nyamwezi tribes. Sufian Hemed Bukurura 'The maintenance of order in rural Tanzania: The case of Sungusungu' available at <http://commission-on-legal-pluralism.com/volumes/34/bukurura-art.htm.html> accessed on 26th August 2016.

¹⁶ The Sukuma are a Bantu ethnic group inhabiting the South Eastern African Great Lakes region. They are the largest ethnic group in Tanzania, with an estimated 8.9 million members or 16 percent of the country's total population. Sukuma means "north" and refers to "people of the north." The Sukuma refer to themselves as *Basukuma* (plural) and *Nsukuma* (singular). They speak Sukuma, which belongs to the Bantu branch of the Niger-Congo family. Abrahams, R.G 'Neighbourhood organizations: A major sub-system among the northern Nyamwezi.' (1965) *Africa* 35: 168-86.

¹⁷ Pre-Colonial Africa op cit note 12.

¹⁸ Ibid.

¹⁹ Biegon J (ed) '*Gender Equality and Political Processes in Kenya, Challenges and Prospects.*' (2016) Strathmore University Press, International Commission of Jurists, and National Gender and Equality Commission ISBN 978 9966 054 14 2.

²⁰ Michele Z Rosaldo '*Woman, Culture, and Society: A Theoretical Overview*' (1974) ISBN: 9780804708517.

²¹ Sudarkasa N 'The status of women in indigenous African societies' (1986) *Feminist Studies Inc*, Vol. 12, No. 1

²² Ibid.

²³ Ibid.

²⁴ Ibid. Women were rarely excluded from certain councils of chiefs, but more commonly, were represented on the councils by one or more of the women who headed the hierarchy of women chiefs. Women were consulted on most

position of women in leadership deteriorated with the introduction of the slave trade and later, colonialism.²⁵

3.2.2 Constitutional Formations During Colonial Era

From the 15th century towards the 19th century, the encroachment of the slave trade and colonial exploration in East Africa by colonial explorers and missionaries occurred.²⁶ Despite illiteracy of African leaders, colonial explorers concluded a series of dubious treaties by which tribal chiefs ceded their territories to the colonialist.²⁷ For example, the German occupation of Tanzania commenced with the precarious treaties made by Carl Peters with eleven local leaders in Zanzibar in November 1884.²⁸ Though African leaders considered the treaties as a sign of their friendships with their new white friends, colonial explorers were making critical steps to secure territories for colonial dominance.²⁹

In most cases, African men and women resisted the wrongful annexation of their territories by colonialists. African opposition against colonialism manifested in different famous wars such as the *Maji-Maji*³⁰ war in German East Africa and the *Mau Mau* rebellion³¹ in Kenya.³² The wars were devastating and killed thousands of men, women, and children. Women played active roles

indigenous governmental affairs. Their participation through their spokespersons paralleled the participation of males through theirs. Women were considered physically inferior, and menstruation was seen as precluding them from warfare.

²⁵ Ibid.

²⁶ Germany and Eastern Africa 'Gymnastics in Germany in the Nineteenth Century and the diffusion of German gymnastics into German East Africa,' (2010) *The International Journal of the History of Sport*, 27:5, 820-844, DOI: 10.1080/09523361003625865.

²⁷ Iliffe John *A Modern History of Tanganyika* (1979) Cambridge University Press. Accessed on 5 November 2018 – via Google Books.

²⁸ Ibid. One such treaty between Peters and the local leader, Mungungo as explained in the Treaty of Eternal Friendship: Mungungo, Sultan of Msovera in Usagara, offers all his territory with all its civil and public appurtenances to Dr. Carl Peters as the representative of the Society for German Colonization for exclusive and universal utilization of German colonies.

²⁹ Iliffe John 'The Organization of the Maji Maji Rebellion' (1967) *Journal of African History*, Vol. 8, No.3.

³⁰ Ibid.

³¹ The four main causes of the revolt were low wages, access to land, female circumcision (also known as female genital mutilation or FGM) and Kipande which was a registration certificate recording work periods, wages, comments by employers, and other employment-related matters. From 1920 all adult males were required to carry the Kipande under penalty of heavy fines. 'Colonial Kenya - Political evolution' available at <https://www.globalsecurity.org/military/world/kenya/history-colonial-6.htm> accessed on 25 August 2017. Under Kipande identity cards African workers were required to submit them to their white employers, who sometimes refused to return them or even destroyed the cards making it difficult for workers to apply for other employment. Evans AB 'Timeline of the Mau Mau Rebellion Militant Kenyan Nationalist Movement to remove British rule' available at <https://www.thoughtco.com/timeline-mau-mau-rebellion-44230> accessed on 4th May 2017 at 11:11.

³² Ibid.

in forming resistance armies to oppose the penetration of European power in their areas. Queen Nzinga,³³ for example, led armies to oppose the Portuguese in the territory now known as Angola and parts of the Congo. She appointed women to key positions, including in the army. Edwesohemaa Nana Yaa Asantewaa of Edweso, Ghana, led the resistance army against the British between 1887 and 1900. In 1900, she led the final rebellion against the British, ending in her capture.³⁴

Poor military techniques resulted in most of the Africans losing their battle against colonial penetration, leading to Africans' colonial fate being decided by European countries during the 1884 Berlin Conference.³⁵ The Berlin Conference allocated Kenya and Tanganyika to British and German administration, respectively. Rwanda's fate, however, was not decided during the pinnacle of the 'scramble for Africa.'³⁶ Instead, it was later given to the German Empire during the 1890 Conference in Brussels.³⁷ After the Berlin Conference, the British and Germans established their authority in Kenya and German East Africa, including Rwanda-Urundi and parts of Tanganyika,³⁸ through either indirect and direct ruling systems,³⁹ while the British Government operated through indirect rule in Kenya.⁴⁰ German authority was established either directly through the

³³ In the years 1623 to 1663.

³⁴ Also, Seh-Dong-Hong-Beh in Abomey (Benin) led an army of 6,000 women in 1851 against the Egba fortress of Abeokuta. Iliffe John op cit note 29.

³⁵ 'Scramble for Africa: How the African continent became divided' available at <http://originalpeople.org/scramble-for-africa-par/> accessed on 30 August 2016.

³⁶ The Scramble for Africa, also known as the Race for Africa or Partition of Africa was a process of invasion, occupation, colonization and annexation of African territory by European powers during the New Imperialism period, between 1881 and World War I in 1914. *International IDEA* 'Constitutional history of Rwanda' accessed from <http://www.constitutionnet.org/country/constitutional-history-rwanda> on 7th July 2017.

³⁷ Ibid.

³⁸ German East Africa was a German colony in the African Great Lakes region, which included present-day Burundi, Rwanda, and the mainland part of Tanzania. Iliffe John op cit, note 27.

³⁹ Direct rule is a system of governmental rule in which the central authority has power over the country. Indirect rule is a system of government in which a central authority has power over a country or area, but the local government maintains some authority. Indirect rule and direct rule are the systems countries employ during imperialism, allowing the central government of one country to control a colony from a distance. In direct rule, the central government invokes a strong relationship between its laws and its citizenry. Direct rule provides for greater control, because a central authority makes all of the laws for another country, state or province. No decisions are left to the people under direct rule. Indirect rule is a weaker form of government, because it allows some of the local people under appointment to make decisions regarding the codification of the law. Usually, administrative and social laws not pertaining to the ruling authority's interests are left to the citizens under this system. The central authority has less control over the outcomes of these laws under indirect rule. 'What is the difference between an Indirect Rule and Direct Rule?' available at <https://www.reference.com/government-politics/difference-between-indirect-rule-direct-rule-d99ec7b97c5b15c7> accessed on 22 July 2018.

⁴⁰ The American Historical Association 'England's Indirect Rule in its African Colonies In *Through the Lens of History: Biafra, Nigeria, the West and the world.*' *AHA Teaching Guide*, historians.org, n.d. available at 2012-09-20 <http://www.historians.org/tl/lessonplans/nc/trask/indirect.htm> accessed on 15 December 2015.

Bezirksamtmann (German District Officers) or indirectly through the appointed *jumbes* (native divisional rulers) and *akidas* (native village rulers) in German East Africa.⁴¹ In Rwanda, the Germans started and maintained the pre-colonial Tutsi dominance over Hutus as part of the divide and rule strategy.⁴² The Germans favoured the Tutsi and granted them the basic ruling positions, something that intensified ethnic strife between Hutus and Tutsis, which, as will be discussed later in this thesis, resulted in the outbreak of the Rwandan genocide in 1994.⁴³

Furthermore, the introduction of the slave trade, Islam, Christianity, and later the entrenchment of colonial rule, affected the leadership positions that most women had during the pre-colonial era.⁴⁴ For example, in Uganda, the *Lubuga* (Queen Sister) and *Namasole* (Queen Mother) were the most important women in Buganda and exercised similar powers as the King. They oversaw the appointment of ministers, collection of taxes, land allocation and had their own courts, but they lost their powers with the inception of colonialism.⁴⁵ The British rule, especially the 1900 agreement between the British and the Buganda, enhanced the position of the chiefs and the Prime Ministers, which significantly side-lined the two central female positions in Buganda. The 1900 agreement did not mention the *Lubuga*, but it referred to the *Namasole*, who was to be paid an allowance until her death. No more recognition was extended to women leaders for the remaining colonial period.⁴⁶

One notable feature across colonial domination in Africa was that colonial laws were silent on African participation in the established administrative and governance structures. Thus, for many years of colonial dominance, African men and women could not participate in any decision-

⁴¹ Iliffe J op cit note 38.

⁴² The Germans believed the Tutsi ruling class was racially superior to the other native peoples of Rwanda. As such even the powerful Roman Catholic officials favoured the Tutsis because of their willingness to convert to Roman Catholicism. Anton Scholz (s1576356) *Hutu, Tutsi, and the Germans: Racial Cognition in Rwanda under German Colonial Rule* (unpublished MA African Studies, Master Thesis, Leiden University July 2015).

⁴³ Ibid. The German presence had mixed effects on the authority the Rwandan governing powers. The Germans helped the Mwami increase their control over Rwandan affairs. However, Tutsi power weakened with the introduction of capitalist forces and through increased integration with outside markets and economies. Money came to be seen by many Hutus as a replacement for cattle, in terms of both economic prosperity and for purposes of creating social standing. Also, head-tax made Hutus feel less bonded to their Tutsi patrons and more dependent on the European foreigners.

⁴⁴ Frederick Jjuuko & Sam Tindifa *A People's Dialogue: Political Settlements in Uganda and the Quest for a National Conference* (2018) Fountain Publishers available at www.fountainpublishers.co.ug, kituo cha katiba, ISBN: 978-9970-617-91-3.

⁴⁵ Ibid.

⁴⁶ Ibid.

making structures.⁴⁷ In Kenya, the first comprehensive constitutional instrument, namely the East Africa Order in Council, was introduced by the British Government in 1897 and later subjected to amendments in 1902, 1905 and in 1919.⁴⁸ The East African Order in Council stipulated government machinery in Kenya but contained no provision on representation of the Kenyans in the Legislative Council,⁴⁹ which was established as the first Parliament in 1907.⁵⁰ Until the outbreak of World War I in 1914, African men and women did not have representation in the Legislative Councils in either Rwanda, Kenya or Tanzania. In Kenya, the first elections took place in 1920 and eleven European members were elected. In 1924, an additional five seats for Indians and one for Arabs were added, but no seats were allocated for African representatives.⁵¹

Colonialist believed that Africans were not able to represent themselves in a legislative assembly. For example, in Kenya, the British Government, through the Devonshire White Paper of 1923,⁵² acknowledged interests of the African population but stipulated that Africans lacked the education to deliberate on Legislative issues.⁵³ As a result, a white missionary champion of Africans' rights⁵⁴ was nominated to represent African interests in both the Legislative and Executive Councils in 1924.⁵⁵ There was a dominant belief that Africans could only manage local level politics but not central legislative level politics.⁵⁶ Thus, in Kenya, the British Government passed the Local Authority Ordinance to confine African politics at a local level by establishing the non-elective Local Native Councils (LNCs).⁵⁷ Confirming the British Government's lack of

⁴⁷ Ibid.

⁴⁸ In 1905, the Government formulated another Order in Council to establish the position of Governor, the Executive Council and the Legislative Council. The purpose of these institutions was to oversee both the executive and legislative functions of the Protectorate. In the same year, the Government transferred the responsibility of supervising the Protectorate from the Foreign Office to the Colonial Office. In 1907, the first legislative Council (LEGCO) in Kenya was established. It was a kind of parliament. The title of the Commissioner was also changed to that of Governor. Colonel Sir James Hayes Sadler became the first Governor of Kenya. Oyaya CO op cit note 1.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Devonshire White Paper (1923) available at <https://www.britannica.com/topic/Devonshire-White-Paper>, accessed on 17 July 2017.

⁵² Oyaya CO op cit note 48

⁵³ Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission.

⁵⁴ A Scot Dr John Arthur, *a Missionary with the Presbyterian Church*.

⁵⁵ Ullrich Lohrmann, *Voices from Tanganyika: Great Britain, The United Nations and the Decolonization of a Trust Territory, (1946-1961)*, (2007), Lit Verlag publishers, Berlin.

⁵⁶ Oyaya CO op cit note 52.

⁵⁷ The Local Native Councils operated under the District Commissioners, Field Officers and nominated Africans were to sit in them. Lydia Kanini Muendo, *Local Government and Development in Kenya: The Case of Machakos District, 1925-1974*, (unpublished Masters Thesis, Egerton University, 2016).

belief in native Africans, in 1929, two other non-Africans were nominated by the Colonial Office to represent African interests in the Legislative Assembly.⁵⁸

3.2.3 Constitutional Formations After the First World War

The First World War of 1914-1918,⁵⁹ marked the end of German rule in Rwanda and Tanzania. Article 22 of the Covenant of the League of Nations of 1919 placed Tanzania and Rwanda-Urundi under British and Belgian administration as mandate territories respectively.⁶⁰ The Versailles treaties⁶¹ required the states that lost in the First World War, namely Germany and Japan, to reform their constitutions to include protection of minority rights as a symbol of independence. As noted in Chapter Two, when the constitution emerged as a concept, there was a belief that they were to be made by a few elites and the people were deemed incapable of understanding the complexities of constitution-making processes.⁶² As such, the constitutional reforms in Germany and Japan were determined by the superpowers, especially the United Kingdom and the United States of America.⁶³ Emulating what was taking place in Germany and Japan, in the African colonies, the imposition of the constitutions and or its amendments by the colonial governments became the order of the day.

⁵⁸ The African groups continued to complain about political marginalisation, lack of direct representation in both the Legislative and the Executive Councils through the Hilton Young Commission which was established in 1929-1930 to consider the prospects of greater Union in Eastern Africa. Despite the Africans' complaints, the Hilton Young Commission held the view that Africans were not, and could not be in a position to protect their own interests in the central legislature. Oyaya CO op cit, note 56.

⁵⁹ World War I began in 1914, after the assassination of Archduke Franz Ferdinand, and lasted until 1918. During the conflict, Germany, Austria-Hungary, Bulgaria and the Ottoman Empire (the Central Powers) fought against Great Britain, France, Russia, Italy, Romania, Japan and the United States (the Allied Powers). Available at <https://www.history.com/topics/world-war-i/world-war-i-history> accessed on 8 January 2019.

⁶⁰ League of Nations mandate was a legal status for certain territories transferred from the control of one country to another following World War I, or the legal instruments that contained the internationally agreed-upon terms for administering the territory on behalf of the League of Nations. 'Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution' (1970) *International Court of Justice: 28-32. 21 June 1971*.

⁶¹ The Treaty of Versailles brought World War I between Germany and the Allied Powers to an end. It was signed on 28 June 1919 in Versailles. Of the many provisions in the treaty, one of the most important and controversial required Germany to accept the responsibility of Germany and her allies for causing all the loss and damage during the war. Treaty of Versailles, available at <https://www.history.com/topics/world-war-i/treaty-of-versailles-1> accessed on 24th August 2017.

⁶² Ghai Y & Galli G (ed) 'Constitution-building processes and democratization: Lessons learned' (2006) International Institute for Democracy and Electoral Assistance Democracy, Conflict, and Human Security: Further Readings'

⁶³ Osiatyński W 'Paradoxes of constitutional borrowing' (2003) *Icon-International Journal of Constitutional Law - ICON INT J CONST LAW*. 1. 244-268. 10.1093/icon/1.2.244.

In Rwanda, after the First World War, the Belgian Government, as well as the Germans, continued to rely on the Tutsi power structure for administering the introduction of cash crops, which intensified forced labour.⁶⁴ From 1935, the Belgians introduced identity cards for ‘Tutsi,’ ‘Hutu’ and ‘Twa’ that resulted in more hatred between the Tutsi and Hutu.⁶⁵ In Tanzania, the British Colonial Government imported various laws in the territory, which formed part of the overall legal sub-system.⁶⁶ The British also imposed the Tanganyika Order in Council of 1920⁶⁷ and established the Legislative Council in 1926.⁶⁸ Similar to the East African Order in Council in Kenya, the Tanganyika Order in Council did not allow native Tanganyikan men and women to be represented in the Legislative Council.⁶⁹ One notable feature of both the East Africa Order in Council and Tanganyika Order in Council is that they permitted the colonial office, through a Governor or a Secretary of State, to make any laws, amendments and guidelines as they deemed fit for smooth running of the colonies.⁷⁰ The Order in Councils allowed law-making exercises by colonialist to consider local customs and traditions if they were not repugnant to justice and morality.⁷¹ However, it was the British Government deciding what amounts to justice and morality. Hence, the imposition of colonial laws did not consider some sound pre-colonial traditions such as the use of a council of elders and a village assembly in bringing and or deciding on key governance matters.⁷² All laws were made solely by governors and or secretaries of State fuelling strong African agitation against colonialism.

Colonial education and the subsequent participation of Africans in the First World War, although as carrier corps, opened the Africans’ eyes and gave them confidence that colonialist

⁶⁴ International IDEA op cit note 36.

⁶⁵ Ibid.

⁶⁶ Iliffe J op cit note 41.

⁶⁷ The Tanganyika Order in Council provided among other things, that Tanganyika, with effect from July 22 1920, was to apply the Common Law, Doctrine of Equity and Statutes of General Application in force in England at the date of the reception. The Order in Council was qualified in the sense that English laws were to be applied as the residual law of the territory only in so far as the circumstances of Tanganyika and its inhabitants permit and subject to such qualification as local circumstances may render necessary. H. F. Morris ‘Crime in East Africa: Some perspectives of East African legal history’ (1970) *The Scandinavian Institute of African studies* Uppsala.

⁶⁸ The first legislative council was established with seven unofficial (including two Indians) and thirteen official members, whose function was to advise and consent to ordinances issued by the Governor. ‘Tanzania: British rule between the Wars (1916-1945)’ (2005), Electoral Institute for Sustainable Democracy in Africa, available at www.content.eisa.org.za/old-page/tanzania-british-rule-between-wars-1916-1945 accessed on 17 September 2016

⁶⁹ Ibid.

⁷⁰ Article 13 and 38 of the Tanganyika Order in Council.

⁷¹ Oyaya CO op cit note 58.

⁷² Article 13(a)(4) of the Tanganyika Order in Council.

could be defeated through organised political activities.⁷³ Africans began to organise themselves in associations demanding, among other things, representation in legislative councils.⁷⁴ In Tanganyika, the Tanganyika African Association (TAA) was founded in 1929 to organize Africans against the imposition of British rule.⁷⁵ In Kenya, the Young Kavirondo Association questioned the legitimacy of the Colonial Government and demanded self-determination for the people of Nyanza.⁷⁶ They presented a petition containing eight demands to the Governor but without success.⁷⁷ The second demand was the need for the establishment of a separate legislature for Nyanza as an autonomous administrative unit with an elected African president.⁷⁸ However, the response from the British Government was the arrests of African leaders as a strategy to disarm Africans associations.⁷⁹

As men and women could not be represented in the decision-making process, suffered from land alienation, forced labour, taxation such as *matiti* tax,⁸⁰ and an unjust colonial system such as the *Kipande* system, torture, and brutality,⁸¹ it motivated both men and women to participate

⁷³ Available at https://encyclopedia.1914-1918-online.net/article/carrier_corps accessed on 6th June 2016.

⁷⁴ Kikuyu Association (KA) was formed in 1919, it was later in 1921 changed to East African Association (EAA) to opposed the land alienation as well as forced labour, tax increases, and the proposed wage cuts. Harry Thuku, Secretary of the Kikuyu Association formed the Young Kikuyu Association (YKA) was formed on 10th June 1921. Other political movements formed to fight colonial rule included the, Taita Welfare Association, Akamba African Association, North Kavirondo Association and the Kikuyu Provincial Association. Oyaya C.O op cit note 71.

⁷⁵ 'Tanganyika (Tanzania): African Association,' 1929-1948, available at from <https://www.worldhistory.biz/sundries/43456-tanganyika-tanzania-african-association-1929-1948.html> accessed on 5 July 2017.

⁷⁶ Nyanza Province was one of Kenya's eight administrative provinces before the formation of the 47 counties under the 2010 constitution. Six counties were organised in the area of the former province.

⁷⁷ Atieno Odhiambo 'Siasa: Politics and Nationalism in East Africa 1919-1935' (1981) Kenya Literature Bureau ASIN: B003KV4EXK.

⁷⁸ Other demands included reversion to the Protectorate status, abolition Kipande registration system, reduction of hut tax and poll tax, increase in wages, granting of individual title deeds to land, abolition of forced labour and the dissolution of the labour camps. Oyaya CO op cit note 74.

⁷⁹ For example, in Kenya, the East African Association leader, Harry Thuku, was arrested and exiled on March 14 1922 until 1931. 'Harry Thuku: Father of Kenyan Nationalism, feminist advocate and the first man in Kenya to lead protest against White-settler dominance,' available at <https://kwekudee-tripdownmemorylane.blogspot.com/2013/12/harry-thuku-father-of-kenyan.html> accessed on 6 September 2016.

⁸⁰ For example, Market Women's Associations in Nigeria actively protested market taxes along with price controls. With the interwar depression and the collapse of key industries that women dominated, such as the production of palm oil and indigo dyed cloth (adire), they felt especially oppressed by the taxes. Food sellers felt the pinch of price controls on foodstuffs. The Abeokuta Women's Union, which represented over 100,000 women, organized demonstrations for nine months during which they sang abusive songs, engaged in tax boycotts, signed petitions, sent letters to the press, and even sent a representative to London to present their case. Aili Mari Tripp 'Women and politics in Africa subject' (2017) *Women's History Online Publication Date*: DOI: 10.1093/acrefore/9780190277734.013.192.

⁸¹ Mutunga Willy *Constitution-Making from the Middle: Civil Society and Transition Politics In Kenya 1992-1997* (1999) Highlands Harare Zimbabwe: MWENGO; Nairobi, Kenya : SAREAT.

actively in the independence movements, even as fighters in wars in Kenya and Tanganyika.⁸² Women joined the independence movement to increase opportunities for women, including literacy, girls' education, and political participation.⁸³ Women participated in anti-colonial resistance through songs, performance, dance, and rallies.⁸⁴ Intensification of colonial exploitation directed to African men and women increased African agitation for direct representation in the Legislative Council as a platform where they could air and protect their interests.

3.2.4 Constitutional Formations after the Second World War

The Second World War of 1939–1945,⁸⁵ brought two notable changes. First, the League of Nations ceased to exist in 1946, causing the League of Nations mandates to be changed to United Nations Trust Territories.⁸⁶ All of the Trust Territories were supposed to be administered through the United Nations Trusteeship Council⁸⁷ through the Proposed Trusteeship Agreement for Rwanda-Urundi and Tanganyika submitted by the Government of Belgium and the United Kingdom.⁸⁸ Therefore, as Rwanda-Urundi and Tanganyika colonies continued to be administered by the Belgian and British Governments while waiting for their independence,⁸⁹ Kenya maintained its status as a British colony. The United Nations Charter also required the administrative powers to recognise that the interests of the dependent territories were paramount.⁹⁰

⁸² Ibid. The same as in in Burundi, Cameroon, Nigeria, Mozambique, Guinea Bissau, Zimbabwe, Eritrea Sierra Leone.

⁸³ Ibid.

⁸⁴ Atieno Odhiambo op cit note 77.

⁸⁵ A conflict that involved virtually every part of the world during the years 1939–45. The principal belligerents were the Axis powers—Germany, Italy, and Japan—and the Allies—France, Great Britain, the United States, the Soviet Union, and, to a lesser extent, China. The war was in many respects a continuation, after an uneasy 20-year hiatus, of the disputes left unsettled by World War I. The 40,000,000–50,000,000 deaths incurred in World War II make it the bloodiest conflict as well as the largest war in history. Available at <https://www.britannica.com/event/World-War-II> on accessed on 7th January 2018.

⁸⁶ Trusteeship agreements were concluded between the United Nations and the administering power, they were approved by resolutions, transmitted in documents of General Assembly, Security Council and the Trusteeship Council and published in the UN Treaty Series. UN Documentation: 'Trusteeship Council' available at <https://research.un.org/en/docs/tc/territories> accessed on 7 January 2018.

⁸⁷ As per Chapters XII and XIII of the United Nations Charter, which was signed on 26 June 1945 in San Francisco, at the conclusion of the United Nations Conference on International Organization and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter. 'Charter of the United Nations' available at <http://www.un.org/en/charter-united-nations/> on 7 January 2018. There were eleven Trust Territories under the administration of the UN Trusteeship Council. Western Samoa, Tanganyika, Rwanda-Urundi, under British administration, Cameroon under French administration, Togoland under British administration, Togoland under French administration, New Guinea, Nauru, Strategic Trust Territory/ Trust territory of the Pacific Island, Italian Somaliland. UN Documentation: Trusteeship Council, Ibid.

⁸⁸ Through document A/159/ Rev.2, and A/152/Rev.2 of 13 December 1946 respectively.

⁸⁹ Ibid.

⁹⁰ The United Nations and Decolonisation as accessed from <http://www.un.org/en/decolonization/history.shtml> on 8 January 2019.

They needed to agree to promote social, economic, political and educational progress in the territories, assist in developing appropriate forms of self-government and consider the political aspirations and stages of development and advancement of each territory.⁹¹

After the Second World War, the major world powers decided to reconstruct their constitutions to guide their operations in their own countries, in the colonies and for working out relationships with other countries.⁹² The intention was to safeguard the state against the excesses that led to the outbreak of the Second World War by establishing conditions of stability and security within individual states with sound relations among them.⁹³ After the First and Second World Wars, the losing countries were also supposed to have new constitutions in place, which as noted earlier on, were mostly an imposition from the winning countries.⁹⁴ Along with England and France, the United States of America imposed a number of conditions onto the defeated states, including the principles of constitutionalism, limitations on the legislature, federalism, and the introduction of constitutional review principles for newly independent states. The Constitution of Japan of 1954, the Poland and Romanian Constitutions of 1918, and the Constitution of Germany of 1945 were highly influenced by the American or British Constitutions. These states did not have many options as they needed to comply with the conditions as the price for their independence or for losing the Second World War.⁹⁵

Constitutional reconstruction in Europe after the Second World War resulted in the adoption of the Universal Declaration of Human Rights (UNDHR) in 1948.⁹⁶ As stated in Chapter Two of this thesis, during the onset of participatory constitution-making as a concept, its legality was connected to Article 21 of UNDHR, which provides for the right to self-determination and the right to take part in the conduct of public affairs.⁹⁷ However, it was not clear whether participation in constitution-making is part of public affairs and if it was a real legal right. When this global puzzle encountered the non-binding nature of the UNDHR, Article 21 of the UNDHR did not influence how the new constitution-making processes were conducted in the colonies. As such, the

⁹¹ Ibid.

⁹² Osiatyński W op cit note 63.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

practice of imposing new constitutions by Second World War winners against the losing states also intensified in the African colonies.

Furthermore, the Second World War intensified African agitation against colonialists, demanding, among other things, representation in Legislative Assemblies. The colonial administration gave in to the popular demand and allowed the nomination of native Africans to Legislative Councils. In Kenya, the first native Kenyan, Eliud Mathu, was nominated to represent Africans in the Legislative Council in 1944, after it had been in existence since 1907.⁹⁸ The second native African was appointed in 1946.⁹⁹ In 1947 and 1948, the number of nominated Africans to the Kenyan Legislative Council increased to four and then to six in 1952.¹⁰⁰ Further, African agitation resulted in the British reconstituting the Legislative Assembly in 1955 with 44 unofficial members (10 Europeans, 10 Africans, 10 Indians, and 14 government representatives) and 17 official members. In Tanzania, despite the introduction of a Legislative Council in 1926, the first African was appointed to the council only in 1945.¹⁰¹ The Legislative Council was reconstituted in 1948 with 15 unofficial members (7 Europeans, 4 Africans, and 4 Indians) and 14 official members.¹⁰² Nominations of African representatives were done without any consultation with Africans themselves, but under the discretion of the Governor in accordance to the East African and Tanganyika Order in Councils.¹⁰³

Also, African nominations to the legislative assembly did not include women. This attracted strong opposition from women's organisations.¹⁰⁴ The Kenya African Women's League made consistent recommendations that African women should be included in the Legislative Council. As a result, the colonial Governor appointed Priscilla Ingasiani Abwao as the first African

⁹⁸ His nomination came as LJ Beecher, a European Missionary then representing African interests, resigned. Ullrich Lohrmann op cit note 55

⁹⁹ His name was FW Odede. Since it was difficult for one person to practically understand the problems experienced by all Africans, Africans demanded for their increased representation in the Legislative Council. Oyaya CO op cit note 78.

¹⁰⁰ Ibid.

¹⁰¹ The Council was formed under a law enacted by the British Parliament called the Tanganyika Legislative Council Order and Council. The law was gazetted in Tanganyika on 18 June 1926. The Council consisted of 20 members when it was formed on 7 December 1926 under the Chairmanship of the Governor of Tanganyika, Sir Donald Cameron. The history of the Parliament of Tanzania, available at <http://www.parliament.go.tz/pages/history> accessed on 23rd June 2018.

¹⁰² Julius Nyerere the founding father of the nation of Tanganyika became one of the unofficial members in 1954.

¹⁰³ Oyaya CO op cit note 100.

¹⁰⁴ Aili Mari Tripp op cit note 80.

woman to serve on the Legislative Council in 1961. In Tanganyika, the first women who were nominated to serve on Legislative Councils were European and Asian, namely Mrs. Walker and Mrs. Kika respectively. In 1955, a Tanganyikan woman, Mkamangi Elifuraha Marealle, became the first African woman member of the Legislative Council (LEGCO).¹⁰⁵

African men and women were not satisfied with the token representation received from the colonialist and thus intensified colonial oppositions.¹⁰⁶ In 1950, there was an attempt to broaden the constitution-making processes to different groups of people. In Kenya, the British Government set forth a road map for consultative constitutional development to be finalised in 1956. The plan entailed the achievement of consensus among the leaders to include all Kenya's racial groups; Africans, Arabs, Asians, and Europeans.¹⁰⁷ The propositions also entailed constituting a body where all of Kenya's people would be represented, and make constitutional recommendations to the colonial state.¹⁰⁸ However, the plan was not implemented due to the intensification of liberation movements.¹⁰⁹ After returning from the war, Kenyans became active in forming and joining political organisations, putting intense pressure on the colonialists.¹¹⁰ This led to the outbreak of the Mau Mau rebellion¹¹¹ and consequently the Declaration of a State of Emergency in October of 1952.¹¹² The Mau Mau rebellion resulted in the colonial Government imposing a total ban on African political organizations in Kenya between 1953 and 1956,¹¹³ which led the Africans to

¹⁰⁵ Another woman, Ndigwako Bertha Akim King'ori was further nominated to the Legislative Council in 1957. Oyaya CO op cit note 103.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid. Advocated by the Secretary of State for the Colonies, James Griffiths.

¹⁰⁸ Ibid. The colonial government made available the option of having an independent chairman from outside the Colony who would be appointed to lead the constitution-making process and to advise on technical questions.

¹⁰⁹ Ibid. This was attributed to the African ex-soldiers who fought alongside the British during the Second World War who realized that the White man was after all, not invincible.

¹¹⁰ Ibid. In Kenya, they formed the Kenya Central Association with its military wing known as Aanake A Forty (The Forty Group) which later came to be known as Kenya Land and Freedom Army (KLFA) or "Mau Mau."

¹¹¹ The Mau Mau Uprising, also known as the Mau Mau Rebellion, the Kenya Emergency, and the Mau Mau Revolt, was a war in the British Kenya Colony. John Newsinger 'Revolt and Repression in Kenya: The "Mau Mau" Rebellion 1952-1960' (1981) *Science & Society* Vol. 45 No. 2 Published by: Guilford Press. available at <https://www.jstor.org/stable/40402312> accessed on 2 June 2018.

¹¹² The new Secretary of State for the Colonies, Oliver Lyttelton, therefore told members of the African Legislative Council (LEGCO) in October 1952 that it would not do any good to call a multi-racial constitutional conference, which would meet to disagree. Mr. Lyttelton nevertheless stated that it remained imperative that no constitutional changes should be undertaken without the concurrence of representatives of all of Kenya's racial groups. Oyaya CO op cit, note 112.

¹¹³ On 21 October 1956, the colonial Government captured Field Marshall Dedan Kimathi and subsequently executed him on 18 February 1957. John Newsinger op cit note 117.

resort to trade unions as an alternative voice.¹¹⁴ The British colonialist also captured and executed African leaders leading to more intensification of Africans' political activism. During the Mau Mau rebellion, many women came out in large numbers to oppose colonial rule. Several women took up arms and led others to battle, including Field Marshal Muthoni Kirima, a freedom fighter from Central Kenya who actively participated in the armed struggle. She fought alongside other leaders such as Dedan Kimathi, and Mary Muthoni Wanjiru. Wanjiru led people to protest and rescued Harry Thuku from prison and lost her life in the process.¹¹⁵ Hence, women were never indifferent to the colonial regime and took to constantly feeding the armed warriors as well as hiding perceived enemies of the Colonial Government.¹¹⁶

In 1954, the British Government sent a British Parliamentary delegation to Kenya to look for ways of resolving the escalating political situation. The delegation recommended permission for Africans to participate more in the Legislative Council, politics of the country and to cultivate a multi-racial society.¹¹⁷ Despite the above recommendations, when the colonialists introduced a new constitutional order, the processes had little to do with the capturing aspirations of African groups and contexts within which they were made. African opinion and consent on the new constitutional order were not deemed critical and therefore not sought. For example, as a response to the Mau Mau outbreak, the British Government embarked on a political and constitutional reform process culminating in two key constitutional reform initiatives,¹¹⁸ namely, the Lyttelton¹¹⁹

¹¹⁴ Trade unions which were exempt from the political restrictions, provided the alternative platform for agitation for independence as African political organization and activities were totally banned. Members of these trade unions included lawyers and doctors, clerks, teachers, small merchants, urban workers, cash crop farmers and peasant farmers, among others. Oyaya CO op cit note 115.

¹¹⁵ Others included Mekatilili wa Menza, a freedom fighter from the Coast; Mang'ana Ogonje Nyar Ugu, the first African female colonial chief in Western Kenya; Moraa Moka Ngiti, a female freedom fighter from Nyanza (Kisii); and Eiokalaine O-M'barugu, an Assistant Chief in pre-independent Kenya. Accessed from Nyakairu D Women in Politics: The 50 Year Journey in Kenya, available at https://www.academia.edu/24038426/WOMEN_IN_POLITICS_THE_50_YEAR_JOURNEY_IN_KENYA?auto=download accessed on 6 May 2017 at 6:20.

¹¹⁶ Sudarkasa N 'The status of women in indigenous African societies' *Feminist Studies*, Vol. 12, No. 1 (Spring, 1986), pp. 91-103 Published by: *Feminist Studies, Inc.* Stable URL <https://www.jstor.org/stable/3177985> Accessed: 07-01-2019 02:42 UTC.

¹¹⁷ The delegation further recommended the need for an acceptable basis for the election of African representatives to the Legislative Council at the next general election. Consequently, the Government established a Commission to study the modalities of electing African representatives to the Legislative Council. Oyaya CO op cit note 114.

¹¹⁸ Ibid. These reforms were undertaken by two Secretaries of State for the Colonies, namely Sir Oliver Lyttelton in 1954 and Alan Lennox-Boyd in 1958.

¹¹⁹ Ibid. Adopted in 1954. The 1954 Lyttelton Constitution sought to, first, promote the principle of multiracialism; second, correct the anomaly in the powers and composition of the Executive Council; and third, regulate African political participation. The Lyttelton Constitution established the ministerial system by creating the Council of

and Lennox-Boyd Constitutions.¹²⁰ These constitutions were neither based on any real negotiation nor consensus among Kenya's political groups. Instead, they were designed and imposed by the Governor of the Colony.¹²¹ As a token to Africans' consistent demands for equal representation in the governance structures,¹²² the Lyttelton Constitution allowed Africans to elect eight African representatives with some level of education and who owned property to the Legislative Council. Africans were not satisfied with the eight positions; they stepped up agitation for widened representation. The African Elected Members Organization (AEMO),¹²³ was formed to reject the Lyttelton Constitution and demand for 15 more seats.¹²⁴ AEMO refused to take up the positions reserved in the Council of Ministers until their demands were met. As a result, the new 1958 Lennox-Boyd Constitution was imposed. The new Constitution increased the number of Africans to the Legislative Council from eight to fourteen, the same number as Europeans.¹²⁵ It further established an electoral college consisting of twelve elected members to represent all communities; these were four each for European, African, and Asian communities.¹²⁶ The Council of State was also established to protect minority rights, but this had no bearing with the protection of women's rights or their inclusion in either the Legislative Assembly or the cabinet.¹²⁷ Fundamentally, the form, processes, and contents of formulating both the Lyttelton and Lennox-Boyd constitutions lacked broad support from various Kenyan groups.¹²⁸ There were no pre-agreed binding principles

Ministers consisted of three European representatives; two Asian representatives, one Muslim and one Hindu; and one African was appointed for the first time to be Minister in charge of community development.

¹²⁰ Robert Maxon *Britain and Kenya's Constitutions 1950-1960* (2011), Cambria Press. New York accessed from <http://www.cambriapress.com/cambriapress.cfm?template=4&bid=477> on 4 May 2017.

¹²¹ By then Sir Evelyn Baring.

¹²² The Lyttelton Constitution established the ministerial system by creating the Council of Ministers and a cabinet office consisted of three European representatives; two Asian representatives, one Muslim and one Hindu; and one African, appointed for the first time, to be Minister in charge of community development. There were also Assistant Ministers of which one was African and one an Arab. For all the non-Europeans, it was their first time in Government. Kenya Cabinets, 'The Lyttelton Constitution' available at <http://cabinets.kenyayearbook.co.ke/the-lyttelton-constitution/> accessed on 1 December 2019.

¹²³ 'What were the demands of the African Elected Members Organisation (AEMO)?' available at <https://www.kenyaplex.com/questions/2958-what-were-the-demands-of-the-african-elected-members-organisation-aemo.aspx> accessed on 1st December 2019.

¹²⁴ Oyaya CO op cit note 117.

¹²⁵ This constitution abolished the Executive Council and increased the number of Africans in the Council of Ministers from one to two. The new Council of Ministers consisted of two Asians, four European ministers without portfolio, eight Europeans and two Africans. Konrad Adenauer Foundation 'History of Constitution-making in Kenya' (2012), available at <https://www.kas.de/web/guest/titre-unique/-/content/history-of-constitution-making-in-kenya> accessed on 17 December 2018.

¹²⁶ Tom Mboya 'Kenya's Constitutional crisis' (1958) *Africa Today* Vol. 5 No. 5 Indiana University Press.

¹²⁷ 'Lyttelton Constitution of 1954 – Features, merits and demerits' available at <http://www.schoolmattazz.com/2016/11/lyttelton-constitution/> accessed on 1 December 2019.

¹²⁸ *Ibid.*

to govern the constitution-making process.¹²⁹ Kenyan political leaders protested that they were not consulted at the conception and formulation stages of the Lyttelton and the Lennox Boyd Constitutions and called the British Government to consent to a more consultative approach.¹³⁰ Meanwhile, pressure from the United Nations for colonial governments to grant independence to their colonies mounted. The General Assembly of the United Nations adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 to speed up the progress of decolonization.¹³¹ The declaration stated that all people have a right to self-determination and proclaimed that colonialism should be brought to a speedy and unconditional end. The international pressure and intensified opposition from the Africans caused the start of the independence negotiations between the colonialist and Africans.¹³²

3.3 FORMATION OF INDEPENDENCE CONSTITUTIONS

Across Africa, the making of independence constitutions mostly depicted similar features. As the means to organize opposition against colonialism, Africans continued to form political organisations pushing for consultative constitution-making processes and independence from colonialism.¹³³ In Kenya, for example, the 1960s witnessed the formation of both the Kenya African National Union (KANU) and ¹³⁴ the Kenya African Democratic Union (KADU).¹³⁵ In Tanzania, the seminal event in the history of the independence movement occurred on 7 July 1954, when TAA members met at the TAA headquarters on New Street in Kariakoo.¹³⁶ In this meeting, the TAA was dissolved and replaced with the Tanganyika African National Union (TANU) under the leadership of Julius Nyerere.¹³⁷ The major objective of TANU was to prepare Tanganyika for self-rule and to fight relentlessly for national freedom.¹³⁸

¹²⁹ Ibid.

¹³⁰ They also demanded unrestricted universal suffrage, refused to cooperate in the implementation of the Lennox-Boyd Constitution and even boycotted the Legislative Council. Oyaya OC op cit note 124.

¹³¹ It was also known as the Declaration on Decolonization as adopted by General Assembly resolution 1514 (XV) of 14 December 1960, available at <http://www.un.org/en/decolonization/declaration.shtml> accessed on 1st December 2019.

¹³² Oyaya CO op cit note 138.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Robert Maxon op cit note 120.

¹³⁶ Geoffrey Ross Owens 'The secret history of TANU: Rumor, historiography and Muslim unrest in contemporary Dar Es Salaam' *History and Anthropology* (2005) 16:4, 441-463, DOI: 10.1080/02757200500399107.

¹³⁷ Ibid.

¹³⁸ Ibid.

Towards independence, the vision of African political leaders, especially in terms of what the post-colonial state governance structures should look like, was never shared.¹³⁹ In Kenya, the United Party and later KANU, advocated for a unitary state and a republican government where all races would come together to form one strong government.¹⁴⁰ The Progressive Local Government Party and later KADU, who were a coalition of several parties representing tribes, favoured a federal system of government to protect the interests and rights of ethnic groups.¹⁴¹ In Rwanda, the two tribes Tutsi and Hutu were the antagonists and reaching consensus on the Independence Constitution was challenging.¹⁴² Disagreements among African leaders posed strong reasons for broader consultation in designing of the independence constitutions, to broker consensus on political uncertainties caused by ethnic and ideological differences.¹⁴³ Despite this realisation, there were no negotiations nor consultations for the new independence constitutions.¹⁴⁴

In line with the East African and Tanganyika Order in Council, the powers to make any laws were still in the hands of the Governor and Secretary of State.¹⁴⁵ Thus, colonialist constitutional advisors were tasked to prepare the framework for the new constitutional order with no obligation to consult with Africans.¹⁴⁶ For example, in Kenya, at the first Lancaster Conference, the British constitution-making advisor, Professor Mackenzie, circulated papers setting out possible plans and a framework for the new constitutional arrangement. Mackenzie's plan failed to draw support from the African Elected Member Organization (AEMO) delegation and the New Kenya Party (NKP) since the African leaders were not consulted.¹⁴⁷ Changes were observed during the second Lancaster Conference as pre-conference talks were hosted to prepare the constitutional framework, and enable the different parties to reach an agreement on the principles on which Kenya's new Constitution would be framed.¹⁴⁸ Throughout the process of developing

¹³⁹ Oyaya CO op cit note 134.

¹⁴⁰ Ibid.

¹⁴¹ Ibid. They called for Kenya's division into local government units based on racial and tribal divisions.

¹⁴² Prilege Musvanhiri 'Rwanda: Factbox - Rwanda controversial Constitutional history' available at <http://allafrica.com/stories/201512181120.html> accessed on 5 December 2019

¹⁴³ Ibid.

¹⁴⁴ Oyaya CO op cit note 140.

¹⁴⁵ Ibid.

¹⁴⁶ Robert Maxon op cit note 135.

¹⁴⁷ Showing dissatisfaction for the White advisors during the Lancaster II Conference, Africans chose Dr. Edward Zellweger, who worked secretly with them to develop a constitutional plan that they presented at Lancaster Conference II. Oyaya CO op cit note 144.

¹⁴⁸ Ibid.

independence constitutions, the formula was that if no agreement was reached among key groups, the colonialists would impose a new constitutional order, which everyone would accept as final.¹⁴⁹

The nature and status of the Colony determined the process and speed of gaining independence. The fact that Tanganyika and Rwanda-Urundi were Trust Territories under British administration, helped a great deal in achieving independence for these countries.¹⁵⁰ For Tanganyika, the strategy was to send petitions and oral submissions to the United Nations (UN) to provide extra pressure for political independence.¹⁵¹ Five UN missions visited Tanganyika, where Tanganyikans including peasants, urban workers, government employees, and local chiefs and nobles met with UN representatives and called for immediate action for independence.¹⁵² The visiting mission recommended that Tanganyika receive its independence within 20 or 25 years.¹⁵³ TANU did not agree with the timelines and decided to send its leader, Julius Nyerere, to the United Nations in New York to press Tanganyikan independence to be obtained sooner.¹⁵⁴ TANU also demanded equal rights for citizens of all races and the consequent elimination of the existing racially tripartite legislature.¹⁵⁵ The colonial government responded by closing down TANU branches in various parts of the country and encouraged the formation of a rival party called the United Tanganyika Party (UTP).¹⁵⁶ Although Nyerere's endeavours did not result in the setting up of a time-table for independence, Tanganyika received its independence seven years later. As a result, the first election took place in 1958.¹⁵⁷ In the tripartite legislature in 1958 and 1959, TANU won 70 of the 71 elected seats, leading to the process of decolonisation and independence in 1961. In 1961, the Tanzanian Independence Constitution was based on the

¹⁴⁹ Ibid.

¹⁵⁰ Msekwa P 'Tanganyika's independence struggle' Available at www.firstmagazine.com/DownloadSpecialistPublicationDetail.388.ashx, accessed on 15 December 2018.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ United Tanganyika Party was a political party in Tanganyika. It was formed in 1956, with support from the colonial authorities and a wealthy plantation owner in the Tanga province. The party fared badly in the 1958 elections and was dissolved after 1962. African Democracy Encyclopaedia Project 'Tanzania: Rise of Nationalism (1945-1961)' available at <https://eisa.org.za/wep/tanoverview7.htm> accessed on 16 December 2019.

¹⁵⁷ The TANU delegates were almost unanimously opposed to the tripartite electoral rules, and actually wanted to boycott the relevant elections. Mwalimu Nyerere however convinced the delegates to the TANU annual conference of 1958 to make the difficult decision of accepting the tripartite vote, which had been imposed by the British administration. He proceeded to argue the case for accepting the new electoral rules, and to take part in the elections, instead of staging a boycott. The product of his success was the famous Tabora Resolution of 1958, which is believed to have substantially changed the history of Tanganyika's road to independence.

traditional Lancaster style, imposed by British colonialists, without a Bill of Rights and public participation.¹⁵⁸

In Rwanda, a wave of decolonization resulted in great ethnic tensions between the Hutu and Tutsi in the late 1950s.¹⁵⁹ The Hutu political movement gained momentum, while segments of the Tutsi resisted democratization and loss of their acquired privileges as a superior ethnic group over Hutus.¹⁶⁰ Between 1959 and 1961, violent incidents referred to as the Hutu Peasants or Social Revolution sparked a Hutu uprising, in which thousands of Tutsi were killed and displaced, and ended the Tutsi domination. In the urge to contain the increasing ethnic violence, Belgium organised elections in 1960,¹⁶¹ resulting in a massive Hutu win. Belgian supported a Constitutional Referendum in 1961, leading to the adoption of a Constitution that abolished the Tutsi monarchy with Dominique Mbonyumutwa as head of the transitional government. Generally, the 1961 Independent Constitution was imposed by Belgian colonialists to facilitate the transition to independence from Belgians to the Rwandan people.¹⁶²

In contrast, Kenya was still a British colony, which required a series of negotiations for an Independent Constitution to materialise. The Colonial Office called for a constitutional conference process where all African political elites would meet for a consultative and consensus building process to negotiate the Colony's constitutional future.¹⁶³ The first conference was under the chairmanship of Secretary of State for the Colonies, Iain Macleod, in January 1960.¹⁶⁴ There was

¹⁵⁸ Lancaster constitutions were negotiated at independence by the British upon handover of state powers to newly independent states. Peter Kasanda, Teresa Parkes and James Pius 'Tanzania Constitution Review – President announces date for referendum' (2014) Clyde & Co LLP.

¹⁵⁹ Ibid.

¹⁶⁰ Privilege Musvanhiri, op cit, note 142.

¹⁶¹ Ibid.

¹⁶² Ibid. By 1962, when Rwanda gained independence, 120,000 people, primarily Tutsis, had taken refuge in neighboring states to escape the violence which had accompanied the gradual coming into power of the Hutu community.

¹⁶³ Konrad Adenauer Foundation op cit note 125.

¹⁶⁴ Unlike the Lyttelton and Lennox-Boyd Constitutions where the Constitutions were just imposed by the colonial Governors without any consultations. The First Lancaster and Second Constitutional Conferences witnessed some level of representation from key groups. Four delegations including African Elected Members (AEM) or African nationalists who were all men born in Kenya, took part in the First Lancaster Conference consisted of the colonial Government representatives and. Other groups included the multiracial New Kenya Group, consisted of Africans, white British settlers and Indians. Also, the Second Lancaster House Constitutional Conference witnessed representation of six main groups. These were KANU Parliamentary Group; KADU Parliamentary Group; the Kenya Coalition; the Mwambao United Front; the Kenya Cross-Benchers; and the Government officials and their advisors. Oyaya CO op cit note 149.

no agreement and Macleod issued an Interim Constitution.¹⁶⁵ During the first Lancaster Conference, the issues of safeguards and property rights drove a wedge between African groups, especially the United Party and the Progressive Local Government Party.¹⁶⁶ With no consensus on the questions of safeguards and property rights, the Secretary of State imposed a new Constitution and brought the Conference to an early conclusion.¹⁶⁷ The colony's Legislative Assembly did not have the mandate to approve the Constitution because the mandate still remained with the British Parliament. After the Lancaster I Conference, the conference report was placed before the British Parliament on February 25, 1960. The British Parliament and Her Majesty's Government subsequently endorsed the 'Macleod Constitution' or the Kenya Constitution Order in Council for the period 1958 to 1961.¹⁶⁸ African presence in the constitutional negotiations influenced the inclusion of constitutional provisions that secured African representation in the Legislative Assembly. The Macleod Constitution provided a Legislative Council of 65 members.¹⁶⁹ Of the 65 members, 33 seats were reserved for Africans on a broader and qualified franchise, while the other seats were distributed as follows: Europeans – ten seats; Indians – eight, and Arabs two seats. There were also 12 national seats allocated; four to Europeans, four to Africans, three to Indians and one to Arabs.¹⁷⁰

The second conference commenced in February 1962 where a framework for self-governance was negotiated. The 1963 Conference finalized constitutional arrangements for Kenya's independence, marking the end of more than 70 years of colonial rule.¹⁷¹ During the Second Lancaster Conference, after three months of discussions within the established

¹⁶⁵ Ibid. During the first Lancaster Conference the African Elected Members emphasized the importance of moving towards democratic self-governance and a Bill of Rights enforced by an independent judiciary to form a safeguard for all races in Kenya.

¹⁶⁶ Konrad Adenauer Foundation op cit note 163.

¹⁶⁷ As a way forward, Macleod, however, proposed that legal provisions be made in the proposed Constitution to provide for the judicial protection of human rights. This was to be drafted along the lines of the provisions in the Nigeria (Constitution) Order in Council while taking into account the special circumstances of Kenya as well as the draft prepared by Dr. Thurgood Marshall. Oyaya CO op cit note 164.

¹⁶⁸ Konrad Adenauer Foundation op cit note 166.

¹⁶⁹ The second provision was election of constituency members based on a common roll. The third provision related to nomination of certain members to the Legislative Council. The fourth provision related to establishment of a Council of Ministers appointed by the Governor. The fifth provision was related to a Bill of Rights based on the corresponding provisions of the Federation of Nigeria. 'Lyttleton Constitution of 1954' op cit note 129.

¹⁷⁰ The Governor retained powers of nominating additional members to the Legislative Council as he deemed fit.

¹⁷¹ Robert Maxon op cit note 146.

committees¹⁷² and 20 plenary sessions, an agreement was not reached between KANU's priorities on Unitary Government and KADU's stance on federal or the *Majimbo* Constitution.¹⁷³ It was left to the Secretary of State, Reginald Maudling, to impose a settlement. The Maudling Constitution of 1962 was imposed as a framework for Kenya's Independent Constitution. Due to a great misunderstanding between KADU and KANU, it took a year from April 1962 to April 1963 to finalize the Self Government Constitution that came into effect on 1 June 1963.¹⁷⁴ Finally, the Lancaster III Conference was meant to agree on the form of Kenya's Independence Constitution. Despite the extended plenary sessions and efforts of the British Government to broker an agreement between the Kenyan Government and the main opposition party, KADU, no agreement was reached.¹⁷⁵ Instead, both the KADU and KANU delegations threatened to abandon the talks and return to Kenya which prompted the British Government representative to propose and impose a draft of 23 amendments to the 1962 Constitutional Framework.¹⁷⁶ With amendments accepted by all parties with only a few reservations, the Conference chairman confirmed a date that would be the day of Kenya's independence.¹⁷⁷ As promised during the Lancaster III Conference, Kenya gained its independence on 12 December 1963.¹⁷⁸

¹⁷² Ibid. To effectively deal with the key issues of contention among and between parties at the Conference, the second Lancaster Conference set up several committees including, the Steering Committee, Committee on the Structure of Government, Committee on the Judiciary and the Public Service, Committee on Land and Citizenship, Committee on the Bill of Rights: and sixth, a working party.

¹⁷³ However, unlike the first Lancaster House Constitutional Conference, the main political protagonists at the second Conference were not Africans and White settlers but the Kenya African National Union (KANU) and a coalition of Kenya African Democratic Union (KADU), Asian interests, European interests, and the preferences of the British Government. The primary concerns of constitutional negotiations at the second Lancaster House Conference shifted from issues of safeguards, land and the Bill of Rights to issues of regional versus national governance or unitary versus quasi-federal systems of government. During the Lancaster House II Conference, there were extensive negotiations involving the leaders of Kenya's political elite and the British Government for the first time. The Conference Chairman also allowed different parties and leaders and their legal advisers to speak as long as they wished without interruption. At the same time, the Conference staff secretly lobbied each group to bring them closer to a compromise. Oyaya CO op cit note 165.

¹⁷⁴ Ibid.

¹⁷⁵ The Kenya African Democratic Union (KADU) was a political party in Kenya. It was founded in 1960 when several leading politicians refused to join Jomo Kenyatta's Kenya African National Union (KANU). It was led by Ronald Ngala. David M Anderson 'Yours in struggle for Majimbo. Nationalism and the Party Politics of Decolonization in Kenya 1955-64' (2005), *Journal of Contemporary History* Vol. 40, No. 3 pp. 547-564: Sage Publications, Ltd.

¹⁷⁶ Ibid.

¹⁷⁷ Broadly, the final Independence Constitution was underpinned by two overriding principles, namely, parliamentary government, and protection of minority and property rights. 'Kenya's Constitution Making History: 1890-2010,' available at <http://www.katibasasa.org/2010/06/12/kenya%E2%80%99s-constitution-making-history-1890-2010> on 3 April 2017.

¹⁷⁸ Today celebrated as Jamhuri Day. Jomo Kenyatta became the first Prime Minister with a Cabinet of 13 ministers.

Another notable feature of African's Independence struggles was about women freedom fighters who played a significant role in the push for independence. Women were central to the independence movement, even if women's interests were not framed as paramount at that time.¹⁷⁹ Kenyan women fought hard for the independence of Kenya, be it *Mekatilili wa Menza* from the coast or the women Mau Mau fighters.¹⁸⁰ Women paid the price in the form of detention, loss of life, and the destruction of the family unit. As noted above, women played a formidable role in the success of the Tanganyika African National Union (TANU) and its women's wing was critical in leading Tanzania to independence.¹⁸¹ The famous Bibi Titi Mohamed, whose involvement in nationalist struggles started in 1950, became a powerful voice after the formation of TANU. In 1955, she chaired the TANU's women's wing. Within three months of her appointment, Bibi Titi mobilised, unified and enrolled more than 5,000 women as TANU members.¹⁸² Despite the significant contribution of women during the anti-colonial and nationalist struggles, women were excluded from the independence negotiations. Only representatives from government and political parties, who were all men, attended the independence negotiation talks. In Kenya, in the run-up to independence and the formulation of the Independent Constitution at the Lancaster Conferences, representation of women was skewed with the ratio of one woman for every 70 men.¹⁸³ Priscilla Abwao represented Kenyan women, but her role was limited to providing copying and typing services. A nearly qualified woman, Jael Mbogo, faced rejection and she was locked out during the independence negotiations because she did not own property.¹⁸⁴ Even during the Lancaster II Conference, which allowed representatives from special interest groups, women representatives were not included as a special group. In Tanzania, popular women like Bibi Titi, who played a key role in mobilising women to join the TANU, ended up in a women's mobilisation department and never participated in independence negotiations. Consequently, most nations received independence with no significant representation of women in government positions or in parliament.¹⁸⁵

¹⁷⁹ Ibid.

¹⁸⁰ Aili Mari Tripp op cit, note 104.

¹⁸¹ Ibid.

¹⁸² African feminism forum Bibi Titi Mohamed 'African Feminist Ancestors' available at <http://www.africanfeministforum.com/bibi-titi-mohamed-tanzania/> accessed on 14th August 2018.

¹⁸³ Nyakairu D op cit note 115.

¹⁸⁴ Ibid.

¹⁸⁵ Bibi Titi Mohamed 'Biography, political career, imprisonment, death' available at <https://informationcradle.com/africa/bibi-titi-mohamed-2/> accessed on 15 December 2017.

As women were not part of the freedom and constitutional negotiations, their will and wishes were not featured in the Independence Constitutions. The Independence Constitutions in Rwanda, Kenya and Tanganyika were extremely limited in protecting women's rights. The human rights-based provisions generally covered the first-generation rights known as civil and political rights,¹⁸⁶ namely the right to life, personal liberty, protection against slavery and forced labour, inhuman treatment, deprivation of property, freedom of conscience, expression, assembly and association, and freedom of movement¹⁸⁷ with no specific inclusion of clusters of women's rights. As a result, the Rwandan Independence Parliament had no woman, women composed only 1.5 per cent of Kenya's Independence Parliament, while the Tanzanian Parliament contained six women by 1965.¹⁸⁸ Generally, post-colonial governments witnessed only a few women participating in decision-making structures.

3.4 CONCLUSION

In this Chapter, it is noted that in some parts of pre-colonial Africa, women took high positions in decision-making processes, mainly governing kingdoms, cities, states and even ruling alongside and on equal terms with men. The colonial laws such as the East Africa and Tanganyika Order in Council presumed that native African men and women lacked the education and capacity to represent themselves fully in the Legislative Councils. However, the participation of Africans in the First and Second World Wars exposed them to new realities, that colonialists could be defeated through organised movement. These new realities triggered strong agitations from African men and women demanding, among other things, representation in the Legislative Assemblies. Intensified African opposition and external pressure, especially after the Second World War, triggered changes from colonialists on how Africans participate in the governance structures. At first, colonialists appointed their fellow Europeans to represent African interests, later nominating only one African representative, and further allowing equal numbers of African representatives in the Legislative Assembly. In line with the East Africa and Tanganyika Order in Council, such amendments were done at the discretion of either the Governor or Secretary of State with no obligation to consult the people on their desired representatives. The analysis of the independence

¹⁸⁶ Nyakairu D op cit note 184.

¹⁸⁷ Ibid.

¹⁸⁸ United Nations Economic Commission for Africa (2005-09) *Tanzania Gender Networking Programme (TGNP): Report on African Gender and Development index (AGDI)-the Tanzania Report* (2005) Addis Ababa © UN. ECA, available at <http://hdl.handle.net/10855/3777> accessed on 15 December 2017.

constitution-making processes depicts minimum reference to the people's struggle for independence, nor did it have the pre-determined legal framework to guide the making of a new constitutional order. During the independence negotiations, especially when Africans could not reach agreement, particularly on their divided aspirations on how the independent state would look like, it was left to the Governors and Secretaries of State to impose the independence constitutions. Further, in this Chapter, it was confirmed that although women participated in the struggle for independence, their role was not extended to participating in the conduct of negotiations for independence constitutions. As such, women's interests were not featured in the new independence constitutions. It can be concluded in general that the Independence Constitutions of Kenya, Rwanda, and Tanzania were merely an imposition from the colonial governments, and hence failed to lay down strong legal foundations for future compliance of participatory constitution-making processes. In the next Chapter, the legal framework for post-independence constitution-making processes in Rwanda, Kenya, and Tanzania are explored to determine whether they facilitated public participation.

4. CHAPTER FOUR

4.0 POST-INDEPENDENCE CONSTITUTION-MAKING IN RWANDA, KENYA AND TANZANIA

*'The frequency with which a Constitution is amended depends not just on the legal provisions that prescribe the procedure for its alteration but also on the extent to which the predominant political and social groups are satisfied with it. If the Constitution suits them, they will not alter it much, even if the alteration requires a simple majority in Parliament. However, if on the other hand, enough of them wish to see the Constitution altered, it will be done even if the process involves the surmounting of special legal obstacles.'*¹

4.1 INTRODUCTION

In the previous chapter, the pre-colonial and colonial constitutional formations in Rwanda, Kenya and Tanzania, were discussed. The conclusion of the discussion in Chapter Three was that the independence constitutions in Rwanda, Kenya, and Tanzania were imposed by colonial governments, with minimal consultation with only a few African political elites excluding the majority of African population including women. The discussion in Chapter Four supplements that of Chapter Three by contributing to addressing the first research question, which determines whether women were involved in the constitutional reform processes in Kenya, Rwanda, and Tanzania. In Chapter Four, constitution-making frameworks as enshrined in the Rwandan, Kenyan, and Tanzanian independence constitutions are discussed, and are linked to how they facilitated meaningful participation of both men and women in post-independence Rwanda, Kenya, and Tanzania.

Post-colonial Rwanda, Kenya, and Tanzania were governed by the Independent Constitutions of 1962, 1963 and 1961 respectively. Imposition of independence constitutions by colonial governments left grievances among the African antagonist groups who had different visions of how the post-colonial States' governance structures should look like.² For example, in Kenya, the main political party, KANU, had reservations and disagreements with 1963 Kenyan

¹ Wheare KC *Modern Constitutions* 2 ed Oxford University Press (1966), SBN 10: 0198880111 ISBN 13: 9780198880110.

² EA Atieno Odhiambo 'Politics and nationalism in East Africa 1919-1935' in A. Adu Boahen ed *General History of Africa VII: Africa under Colonial Domination 1880-1935*. International Scientific Committee for the Drafting of a General History of Africa (1985) Heinemann Educational Publishers, London.

Constitution but accepted it as a means of not delaying achievement of Kenyan independence. Generally, to Rwanda, Kenya, and Tanzania, the Independence Constitution was primarily a transitional document, never intended to be the ideal Constitution.³ Therefore, strong dissatisfaction about the content of the independence constitutions resulted in Rwanda, Kenya and Tanzania to immediately engage with constitutional-reform processes, which took the form of constitutional amendments to the independence constitutions.

4.2 EARLY POST-INDEPENDENCE CONSTITUTIONAL AMENDMENTS - 1960-1970

The Rwandan, Kenyan, and Tanzanian Independence Constitutions gave constitutional alteration powers to their respective governments and the parliaments. The colonial powers that the governor, secretary of state and colonial parliaments had during the colonial constitution formations were replicated in the provisions of the Rwandan, Kenyan, and Tanzanian Independent Constitutions.⁴ Article 71(1) and (2) of the Kenyan Independence Constitution of 1963, allowed the Constitution to be altered when three-quarters of the votes of the Parliament were received on the second and third reading. Constitutional amendments in Tanzania commenced with the introduction of the Interim Constitution of 1965. Just like Kenya, Article 51 of the Interim Constitution in Tanzania required a two-thirds majority of all members of the Assembly to support and pass any alteration of the Constitution. These legal provisions allowed the Government and the Legislative Assembly to be the main constitution-making organs, and no public consultations were required by law.⁵ As a result, a few political elites dominated and spearheaded the Constitutional Amendments. For example, in Rwanda, the Belgians consulted with a few Rwandese from the Hutu ethnic group and adopted the Independent Constitution which consolidated the Republic and established a theoretical multiparty regime in November 1962.⁶ Similarly, Kenya used the procedure provided

³ Oyaya, CO *Towards Constitutional Legitimacy a Study of the Principles and Processes of Constitutional Development and Constitution-making In Kenya From Colonial Times To 2010*, (unpublished PhD Thesis School of Law, University Of Nairobi, G/80/9216/2004).

⁴ East African Order in Council was of 1897, later repeated in the 1921 Order and applied to the Protectorate. Tanganyika Order in Council was introduced in Tanganyika in 1920.

⁵ HWO Okoth Ogendero *Constitutions without Constitutionalism: Reflections on an African Political Paradox*. New York American Council of Learned Societies

⁶ Gasamagera W 'The constitution-making process in Rwanda: Lessons to be learned' A paper presented to the 7th Global Forum for Reinventing Government (2007) Vienna, Austria.

under Article 71 of the 1963 Independence Constitution to develop and pass eleven amendments to the Independence Constitution within the first five years (1964-1969).⁷

It is noted that the new constitutional amendments were geared to serve the interest of a few politicians rather than reflecting the wishes and aspirations of the public. This was facilitated by either the practice of a single party system, or where multi-party systems existed. The majority of members of parliaments still hailed from the ruling parties. During the 1963 Kenyan elections, KANU won 120 of the 124 seats in the House of Representatives and 30 of the 38 seats in the Senate.⁸ In the 1960 Tanganyika general elections, TANU won 70 of the 71 elected seats.⁹ In Rwanda, the general elections under one-party state were held in 1965.¹⁰ Voter turnout was 87.6 and 100 percent votes were obtained for the President and the National Assembly respectively.¹¹

With control of the Parliament, the ruling parties imposed several self-serving constitutional amendments. In Kenya, for example, the early changes to the post-independence amendments

⁷ Preston Chitere, Ludeki Chweya Japhet Masya Arne Tostensen & Kamotho Wyagajo 'Kenya Constitutional Documents: A Comparative Analysis,' (2006), *Chr. Michelsen Institute for a Chronology of Constitutional Negotiations*. The first constitutional amendment converted Kenya from a Parliamentary Dominion to a Republic with a strong presidency. Consequently, the President became the Head of State, Head of Government and Commander in-Chief of the Armed Forces. The Amendment Act also gave the President power to dissolve Parliament any time at his absolute discretion. The Second Amendment altered clauses concerning the regional governments such as the financial relations between the centre and the regions, and the method of alteration of regional boundaries. The Third Constitutional Amendment, implemented retrospectively, renamed the regions, provinces and the regional assemblies, and provincial councils. The Fourth Amendment gave the President power to appoint and dismiss officers from civil service. The amendment also extended the President's power to rule by decree in North-Eastern Region to include Marsabit, Isiolo, Tana River and Lamu districts. The Fifth Constitutional Amendment introduced section 42A of the Constitution to stem defections from one political party to another. The Sixth Amendment re-introduced the draconian detention without trial law and clawed back the fundamental rights of movement, association, assembly and expression. The Seventh Constitutional Amendment introduced the merger of the House of Representatives and the Senate. The Amendment Act declared all elected members of the House of Representatives and the Senate, members of the new National Assembly. The Act also declared the 12 specially elected members of the House of Representatives, specially elected members of the new National Assembly. The Eighth Constitutional Amendment clarified that the application of section 42A of the Constitution introduced through the Fifth Amendment, was retrospective. It stated that Members of Parliament who had resigned from KANU pursuant to the new section 42A had lost their seats. The Ninth Amendment, repealed all laws made by the Provincial Councils and the former Regional Assemblies and abolished the Provincial Councils. The Tenth Amendment altered the method of presidential election and laid down the physical, electoral and party requirement of a presidential candidate. The Act provided for direct election of the President at a general election. The Eleventh Amendment consolidated all of the first ten amendments into a single constitutional document. The Amendment Act also altered the membership of the Electoral Commission and gave the President power to appoint all its members.

⁸ Nohlen D, Krennerich M & Thibaut B *Elections in Africa: A Data Handbook*, (1999) ISBN 0-19-829645-2, p878

⁹ Ibid.

¹⁰ At that time, the country was with MDR-Parmehutu as the sole legal party. Its leader, Grégoire Kayibanda, ran unopposed in the country's first election for President. Dolf Sternberger, Bernhard Vogel, Dieter Nohlen & Klaus Landfried *Die Wahl der Parlamente: Band II: Afrika* (1978), Zweiter Halbband, p 1720.

¹¹ Nohlen, Krennerich & Thibaut op cit note 8.

intended to serve KANU's stand on a unitary State structure, which was not successful during negotiations of the Independent Constitution.¹² New constitutional changes which were done without public consultations, included shifting the structure of the State from a federal, or *Majimbo*¹³ system, to a unitary system. Further changes included creating a unicameral instead of a bicameral legislature, changing from a parliamentary to a semi-presidential system with a powerful presidency, and reducing the protections of the Bill of Rights.¹⁴ In Tanzania, soon after independence, TANU nominees formed a Constituent Assembly and revised the 1961 Constitution,¹⁵ which gave birth to the 1962 Republican Constitution and established a strong presidential system.¹⁶ In 1965, the Republican Constitution was modified by a group of a few government officials to cater for the 1964 union between Tanganyika and Zanzibar.¹⁷ This led to

¹² Ibid.

¹³ *Majimbo* is a Swahili word meaning constituencies available at <https://en.wikipedia.org/wiki/Majimbo> accessed on 2 January 2018.

¹⁴ Chitere P and others op cit note 7. Some changes were done back and forth, such as a change of parliamentary language from English to Kiswahili and later on reverting to both; or the amendment that removed security of tenure for constitutional office holders only to return to status quo at a later date; or even the amendment to create a *de jure* one party state and later on return Kenya into multipartism. Most of the amendments were not intended to improve the quality of the Constitution but to entrench an authoritarian and undemocratic administration. Other amendments were intended to solve political problems facing the government from time to time. Most of the amendments were carried out by a Parliament dominated by members of one political party. The independence constitution was totally modified to suit the power-hungry elite, who equipped so much power in the presidency – a president who was never elected by anyone in the first place. That was the first type of amendments: amendments to destroy the constitutional infrastructure cited in phase two above. Kenya's ruling party amended the constitution over thirty times, for purposes that included centralizing power, strengthening executive authority, and, for a significant portion of Kenya's history, banning opposition parties.

¹⁵ 'Key Historical and Constitutional Developments' available at <http://www.kituoachakatiba.org/sites/default/files/legal-resources/Tanzania%20Key%20Historical%20and%20Constitutional%20Developments.pdf> accessed on 9 October 2017. The 71 elected members of the national assembly, all elected members of TANU passed a law that allowed them to convert the national assembly into a constituent assembly with powers to adopt the new constitution.

¹⁶ Ibid. The new President of Tanzania was granted the prerogatives of both former roles, Governor General and First Minister, serving as the head of state as well as commander in chief of the armed forces. He was granted the right to designate the vice president and Ministers, and the right to dismiss the Parliament under certain circumstances. The President also inherited security-related, repressive powers that were formerly of the Governor General, with the addition of new ones; the Preventive Detention Act, for example, gave the President the right to detain any person without trial. Under the 1962 constitution, the president inherited all the powers of the governor by the colonial legislation such as the Deportation Ordinance, the Collective Punishment Ordinance, the Emergency Powers Order in Council to which the independent government added its own repressive laws such as the notorious Preventive Detention Act, which gave the president powers to detain a person without trial. An existing national assembly which converted to a constituent assembly by an Act of parliament passed the new Republican Constitution.

¹⁷ Ibid. In 1964, Tanganyika and Zanzibar merged into the United Republic of Tanganyika and Zanzibar, renamed into "United Republic of Tanzania" that same year. The Union was constituted by signing of a treaty called the Articles of Union by the respective heads of state Mwalimu Nyerere and Abeid Amani Karume. It was ratified by the respective legislative bodies and became part of the municipal law called the Acts of Union). These agreements had been ratified under the name "Articles of Union", and became part of the new constitution as "Acts of Union."

the adoption of the Interim Constitution of the United Republic of Tanganyika and Zanzibar,¹⁸ which was again amended in 1965 to abolish the multi-party political system and formalise a one-party state system.¹⁹ The process for enacting the 1965 Tanganyika Interim Constitution was through an ordinary Act of Parliament, with no involvement of the people.²⁰ The 1965 Tanganyika Interim Constitution, under Article 51, provided the procedure for amendment of the Constitution. The procedure required any Bill intending to alter the Constitution to be supported and approved by no less than two-thirds of votes of members of Parliament. Further, after the 1964 Union of Tanganyika and Zanzibar,²¹ Articles vii (a) and (b), of the Article of the Union of Tanganyika and Zanzibar²² provided a procedure for the adoption of a permanent constitution.²³ According to the Articles of the Union, the permanent constitution was to be proposed by a constitutional commission, who would then send it to the constituent assembly for deliberation and adoption.²⁴ The permanent constitution was supposed to be adopted within a year but for reasons associated with lack of political will, twelve years passed without its existence.²⁵

4.3 RATIFICATION OF ICCPR AND ITS IMPLICATION IN INFLUENCING PARTICIPATORY CONSTITUTION-MAKING PROCESSES -1970'S-1980'S

As noted in Chapter Two, participatory constitution-making is inferred from Article 25 of the ICCPR 1966, which provides every citizen with the right to take part in the conduct of public

¹⁸ The most notable feature of the Acts of Union as incorporated in the Union Constitution was the establishment of the double government structure that is also part of Tanzania's current constitution. This structure included one government for the Union and one largely autonomous independent government for Zanzibar. Zanzibar's government included its own Parliament and President. The President of Zanzibar also served as vice president of the Union. The constitution of 1964 was adopted *ad interim*. The Acts of Union themselves included directions on steps to take to elaborate a definitive constitution, to be elaborated by a constituent assembly comprising representatives of both TANU and ASP. This procedure was initiated but was later suspended.

¹⁹ This was coherent to the double government structure defined in 1964, the 1965 Constitution identified two government parties, TANU for the Union and AfroShirazi Party for Zanzibar. The Constitution declared the party for Zanzibar and TANU for Tanganyika. The Constitution of TANU was made a schedule to the Constitution thus legally endorsing the emergence of a party state.

²⁰ 'Key Historical and Constitutional Developments' op cit note 15.

²¹ Challa M *Future Generation Learning Resources*, NGL Resources, available at <https://johnchalla.wordpress.com/2017/06/06/the-reasons-of-the-union-between-tanganyika-and-zanzibar/> accessed on 9th October 2017.

²² 'Key Historical and Constitutional Developments' op cit note 20.

²³ Ibid. First Schedule of the Union of Tanganyika and Zanzibar Act No. 22 964 on 7/01/2019.

²⁴ Ibid. The Constituent Assembly was supposed to be composed with representatives of both Tanganyika and Zanzibar.

²⁵ Ibid.

affairs, including the right to vote and stand for election.²⁶ Kenya, Rwanda, and Tanzania ratified the ICCPR in 1972, 1975, and 1976 respectively.²⁷

It was expected that the ratification of the ICCPR would change how constitution-making processes were undertaken in Rwanda, Kenya and Tanzania. However, it was apparent that the onset of Article 25 of ICCPR on the right to take part in the conduct of public affairs did not influence how the post-ICCPR constitutional amendments were undertaken. It is however appreciated that the hesitance of Rwanda, Kenya, and Tanzania to open the constitution-making process to the public soon after ratification of ICCPR was associated with a global puzzle that emerged soon after the introduction of ICCPR. As explained in detail in Chapter Two, the commencement of Article 25 of the ICCPR posed a major legal question, particularly on whether a constitution-making process is a public affair mandating opening the process to the public.²⁸ Earlier interpretation of the right to take part in public affairs was limited to the right to vote and to stand for election.²⁹ The global puzzle on the application of Article 25 of the ICCPR, which took twenty years to solve but still exists, observed Rwanda's, Kenya's, and Tanzania's legal frameworks continuing to place the post-independence constitution-making processes in the hands of a few government officials and the parliament, with limited and superficial public involvement. For example, in Rwanda towards 1970s, high levels of corruption and favoritism led to a military coup culminating a new leader, Juvenal Habyarimana, to take power in 1973.³⁰ Despite having ratified the ICCPR in 1972, Habyarimana suspended the 1962 Constitution without public consultation and ruled by decrees until 1978 when a new constitution was drawn up to replace the pluralist regime with a one-party system and concentrate all the powers in the hands of President.³¹ Similarly, in Kenya, despite the ratification of the ICCPR in 1975, the Kenyan Government in collaboration with the Parliament, without public consultation, made thirteen (13) constitutional

²⁶ Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes, April 2009 available at https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf accessed 6th July 2017.

²⁷ Cherif, Feryal M *Myths About Women's Rights: How, Where, and Why Rights Advance* (2015) Oxford: Oxford University Press p. 271.

²⁸ Banks A.M *Expanding Participation in Constitution-making: Challenges and Opportunities*, (2008), 49 Wm. & Mary L. Rev. 1043 <http://scholarship.law.wm.edu/wmlr/vol49/iss4/2>.

²⁹ Ibid.

³⁰ The coup was also known as the moral revolution. International IDEA 'Constitutional history of Rwanda' accessed from <http://www.constitutionnet.org/country/constitutional-history-rwanda> on 7th July 2017.

³¹ According to Article 40 of this constitution, only the National Revolutionary Movement for Development (MNRD) and its Chairman could run for president. Privilege Musvanhiri 'Rwanda: Factbox - Rwanda Controversial Constitutional History' available at <http://allafrica.com/stories/201512181120.html> accessed on 5th December 2019

amendment by 1980.³² Of these amendments, the nineteenth, twenty-second, twenty-third and twenty-fourth amendments entrenched constitutional dictatorship in Kenya.³³ In Tanzania, as noted in the previous section of this chapter, the permanent Constitution which was supposed to be adopted in 1966 to replace the 1965 Interim Constitution, was delayed for twelve years and later initiated by the Government. Article vii (a) and (b) of the 1964 Articles of the Union of Tanganyika and Zanzibar³⁴ stipulated that the permanent Constitution would be adopted through the appointment of a constitutional commission which would propose the new constitution and send it to the constituent assembly for deliberation and adoption.³⁵ As such, the President of the United Republic of Tanzania appointed a 20-person joint party committee to propose a new Constitution.³⁶ However, within a short time, the committee made and sent proposals to the National Executive Committee (NEC) of the ruling party which adopted them in a day and in camera.³⁷ In the 16 March 1977, the President appointed the Constituent Assembly on the same day as the Committee, to discuss and enact the new constitution.³⁸ The Bill for the new Constitution was published seven days before the Constituent Assembly met to discuss it and enacted the Constitution in three hours after it was presented.³⁹ Both a Constitutional Commission and

³² Oyaya CO op cit note 3.

³³ Ibid. The twelfth constitutional amendment, reduced the age of persons allowed to register as voters from 21 years to 18 years. The thirteenth amendment made English language a qualification for election. The fourteenth amendment sought to resolve the conflict between official languages and language qualification for election. The fifteenth amendment extended the prerogative of mercy exercised by the President. The sixteenth amendment, the last during the Kenyatta regime, established the Court of Appeal as a superior court of record with jurisdiction and powers in relation to appeals from the High Court of Kenya. The seventeen-amendment made both Kiswahili and English official languages of Parliament. The eighteenth constitutional amendment disqualified persons serving in certain offices in the public service, judicial service, constitutional office, armed forces or a local government authority from seeking nomination for election. The nineteenth amendment introduced section 2A which converted Kenya from a de facto one-party state to a de-jure one party state. The nineteenth amendment further established the office of the Chief Secretary. The twentieth amendment was basically an administrative amendment. It gave the High Court appellate jurisdiction to hear and determine questions relating to the membership of the National Assembly. The twenty-first amendment made provisions on Kenyan citizenship. The twenty-second constitutional amendment removed the security of tenure for the Attorney-General and Controller and Auditor General while abolishing the office of the Chief Secretary. The amendment further gave the President power to appoint permanent secretaries and the Secretary to the Cabinet. Twenty-second amendment, although not enshrined in the Constitution, introduced the queue voting system in 1986, which technically replaced the secret ballot system. The twenty-third amendment made all offences punishable by death, that is, treason, murder, robbery with violence and attempted robbery with violence non-bailable. The twenty-fourth amendment removed the security of tenure for members of the Public Service Commission and Judges of the High Court and Court of Appeal and introduced the office of Chief Magistrate.

³⁴ First Schedule of the Union of Tanganyika and Zanzibar Act No. 22 1964 on 7/01/2019.

³⁵ Ibid.

³⁶ 'Key Historical and Constitutional Developments' op cit note 22. The committee was headed by Thabit Kombo.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

Constituent Assembly were formed albeit in a fashion that sidelined public participation.⁴⁰ In 1977, the fourth and permanent Constitution, namely the 1977 Constitution of United Republic of Tanzania⁴¹ was adopted. Having ratified the ICCPR in 1976, it was expected that the permanent Constitution would provide for a participatory approach for its alteration. However, with no departure from Article 51 of the 1965 Interim Constitution, Article 98 of the 1977 Permanent Constitution was enshrined and required support and approval of not less than two-thirds of the members of parliament for the adoption of any bill amending the constitution.⁴²

As noted in the previous chapter, the independent constitutions were silent on how marginalized groups, such as women, could participate in decision-making processes. As such, newly independent states were not legally obliged to involve women in decision-making positions, including in the constitution-making activities. This is despite the great role women played during the anti-colonial struggles.⁴³ With no constitutional provisions regarding women's participation in decision-making positions, until 1965, there were no women in the Kenyan and Rwandan Parliaments while, the Tanzanian Parliament had just six women (ten per cent).⁴⁴

The shift from multi-party to single-party regimes in Rwanda, Kenya, and Tanzania further depoliticized women and limited their participation to the ruling party mass organization and wings sections,⁴⁵ which were used to reinforce patronage systems.⁴⁶ In Tanzania and Kenya, TANU and KANU established themselves as the supreme organs of the state, co-opting and weakening the autonomous associations that participated in the nationalist struggles, including the political party's women's wings namely *Umoja wa Wanawake wa Tanzania* (The Union of Tanzanian

⁴⁰ Ibid. The public was never consulted and did not have the opportunity to debate the needs, structure and division of power of the Union and other key governance matters.

⁴¹ (Cap 2 R:E 2002).

⁴² Ibid. This Constitution essentially confirmed the main principles of the Republic and Interim Constitutions, namely, strong presidency, dual government structure, one-party state. It concentrated state power in the executive within the party state under an imperial presidency. It for the first time recognized the monopoly of politics vested in the CCM, which by then emerged as a single party in the whole union. The 1977 constitution rested on the three pillars namely imperial presidency, the two-union government and the one-party state.

⁴³ Tanganyika had the largest percentage of women in any African parliament in 1960 with 10 percent (six) of the seats held by women. All belonged to the Tanganyika African National Union (TANU), which won the election, and was the dominant party in the post-election legislature. Among African countries, it was believed that TANU had strong belief in gender equality and involvement of women in government structures. Aili Mari Tripp 'Women and Politics in Africa Subject' (2017) Women's History DOI:10.1093/acrefore/9780190277734.013.192

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

Women) and *Maendeleo ya Wanawake* (Women Development) respectively.⁴⁷ The use of parliament as a rubber stamp for new constitutional amendments pushed women away from engaging in the constitution-making processes. By 1975, Rwanda still did not have any woman in its Parliament. For Tanzania, a shift from a multiparty to a single-party political system resulted in the number of women in the Tanzanian Parliament dropping from 10 to 8.5 per cent.⁴⁸ At that time, Kenya had only reached the level of 3.5 per cent of women in the Parliament.⁴⁹ With no women in the Rwandan Parliament and only a few women in the Tanganyikan and Kenyan parliaments, together with the fact that the constitutional amendment processes were not open to the public, it caused women to be automatically excluded in the early constitution-making processes.

4.4 RATIFICATION OF CEDAW AND ITS IMPLICATION IN INFLUENCING WOMEN PARTICIPATION IN CONSTITUTION-MAKING PROCESSES

During the 1980s, a strong move towards the protection of women's rights was witnessed. Human rights treaties, such as the UNDHR and the ICCPR, laid down a comprehensive set of rights that brought entitlement to all persons, including women.⁵⁰ However, these treaties were fragmented and failed to deal with discrimination against women in a comprehensive manner.⁵¹ This led to a series of women's world conferences such as the 1975 and 1980 Mexico City and Copenhagen Conferences.⁵² The result was the Codification of Women's Rights in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979, as a comprehensive treaty.⁵³

⁴⁷ Ibid. Women political wings agendas, finances and leaders were controlled by the ruling party. It is noted that sometimes women roles in the ruling parties were reduced to providing entertainment and cooking for visiting party and government dignitaries.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ United Nations Department of Public Information 'Short History of CEDAW Convention' available at <http://www.un.org/womenwatch/daw/cedaw/history.htm> accessed on 22nd December 2016.

⁵¹ Extracted from Progress achieved in the implementation of the Convention on the Elimination of All Forms of Discrimination against Women: Report by the Committee on the Elimination of Discrimination against Women (A/CONF.177/7) available at <http://www.un.org/womenwatch/daw/cedaw/history.htm> on 22nd December 2016.

⁵² United Nations Department of Public Information, op cit note 50. Mexico conference witnesses about 133 government including the government of Kenya, Rwanda and Tanzania participating. CEDAW was adopted through resolution 34/180, by votes of 130 to none, with 10 abstentions.

⁵³ Ibid. The CEDAW is described as an international bill of rights for women and it incorporated the provisions of the Convention on the Political Rights of Women (CPRW), which was the first international legislation protecting the equal status of women to exercise political rights. The Convention codifies basic international standards for women's political rights. It was as a result of the work of the United Nations Commission on the Status of Women (CSW) that sent out a survey about women's political rights to its member states and the resulting replies became the basis for the Convention. It contains eleven articles, the first three articles articulate well on women participation in decision-making processes mainly their participation in elections, and public bodies. The preamble to CEDAW explains that,

Kenya, Rwanda and Tanzania signed and ratified the CEDAW in 1984, 1981 and 1986 respectively.⁵⁴ Article 7 of CEDAW specifically requires states to allow women's participation in the formulation and implementation of government policy and to hold public office and perform all public functions at all levels of government.⁵⁵ As noted in Chapter Two, participation advocates refer to Article 7 of CEDAW as a supplementary provision to Article 25 of ICCPR to protect women's rights to participation in constitution-making processes.⁵⁶ Further, in 1986, African countries including Rwanda, Kenya and Tanzania, adopted the African Charter on Human and Peoples' Rights (the African Charter).⁵⁷ Article 13 of the African Charter replicates Article 25 of ICCPR, stating that every citizen shall have the right to participate freely in the government of his or her country, either directly or through freely chosen representatives following the provisions of law.

Ratification of ICCPR, CEDAW, and the African Charter by Rwanda, Kenya, and Tanzania, started to influence constitution-making processes especially from the year 1980. For instance, in Tanzania, the amendment to the 1977 permanent Constitution in 1984⁵⁸ was an exception particularly on the area of public participation. Despite that Article 98 of the 1977 Constitution required support and approval from two-thirds of the members of the parliament, several debates were conducted for one year to allow for the collection of public views on the

despite the existence of other human rights instruments, women still do not enjoy equal rights with men. Article 1 of the CEDAW defines discrimination against women as any distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field

⁵⁴ Ibid.

⁵⁵ Article 7 of CEDAW.

⁵⁶ Article 3 of CEDAW requires states-parties to take all appropriate measures in the political, social, economic and cultural fields, including legislation, to ensure the full development and advancement of women, guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

⁵⁷ On 27 June 1981, at its 18th General Assembly Meeting in Nairobi, Kenya, the Heads of State and Government of the OAU adopted the African Charter on Human and Peoples' Rights. It came into force on 21 October 1986. The African Charter promotes and protects human rights and basic freedoms in the African continent. A protocol to the Charter was subsequently adopted in 1998. Articles 2 and 3 of the ACHPR provided that the enjoyment of the rights and freedoms recognised in the Charter apply equally without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status.

⁵⁸ United Nations Department of Public Information, op cit note 54. The amendments were based on the 1983 proposals which were drawn up by the Executive Committee of ruling party to correct certain anomalies, and shortcomings highlighted in the Party's 1981 guidelines. The National Executive Committee looked at the political situation in Tanzania and the need to provide for democratic safeguards within the context of a one-party democracy and also to guarantee the socialist goals to which Tanzania is committed. There were three main areas which were pointed out for analysis and possible reform, namely-the powers of the Presidency, the supremacy of Parliament, and a participatory democracy.

Constitution. Despite that the Bill of Rights was not part of the original proposals for amendment of the constitution, the opening of constitution-making process to the public led to the inclusion of the Bill of Rights under part III of the Constitution.⁵⁹ Public debates convinced the Party and Government that the constitutional exercise would be incomplete without a Bill of Rights in the Constitution. For the first time, the Government agreed to the public demand even with the silence of the 1977 Tanzania Constitution on people's participation in constitution-making process.

Due to the opening of a political space for civil society actors, freedom of press, and greater donor interventions, multiparty systems were reintroduced in Rwanda, Kenya, and Tanzania. In 1991, Kenya adopted the Twenty-sixth⁶⁰ and Twenty-Seventh Constitutional Amendments reinstating Kenya as a multiparty state.⁶¹ In Tanzania, in 1991, the Nyalali Commission⁶² was established with instructions to collect people's views on whether Tanzania should continue with a single party or adopt a multi-party system. The Nyalali Commission's recommendations included the need to amend both the Union and Zanzibar's Constitutions to reflect the will and wishes of the Tanzanian people.⁶³ Although recommendations from the Nyalali Commission were against the introduction of multiparty democracy, the Eighth Amendment to the 1977 Constitution reinstated a multiparty political system in May 1992.⁶⁴

Alongside the introduction of a multiparty system, change in women's political participation was witnessed in the 1990s, especially after women's temporary measures were

⁵⁹ Ibid. As a result of the debate, their demands for more autonomy of Zanzibar which threatened the party and led to announcing a "pollution of political atmosphere" forcing the then leadership of Zanzibar to resign.

⁶⁰ This amendment prescribed a minimum number of 188 and a maximum of number 210 of electoral constituencies. Like the 1986 twenty-second amendment that also set minimum and maximum number of electoral constituencies, it is not clear why Parliament deemed its power to determine the number of constituencies from time to time on the advice of the Electoral Commission of Kenya unnecessary.

⁶¹ Ibid. The twenty-eighth amendment reformed the presidential election process, it sought to secure broad national acceptance of a successful presidential candidate. It required that a successful presidential candidate must garner a majority of valid votes cast in a presidential election. It also required that a successful presidential candidate must receive a minimum of 25 percent of valid votes cast in at least five of the eight provinces of Kenya. The amendment further limited the President's tenure to a maximum of two terms of five years each. However, as ruled by the High Court acting as an Election Court in the *Matiba v. Moi case*, "this limitation did not apply to the incumbent presidential candidate". On electoral reforms, the twenty-eighth amendment gave the Electoral Commission of Kenya (ECK) the power, among other things, to promote voter education throughout Kenya.

⁶² United Nations Department of Public Information op cit note 52. The commission constituted of 22 Commissioners, with equal membership of ten members each from both the Mainland and the islands, and one Chairperson and a Vice Chairperson.

⁶³ Ibid. In May 1992 the Eighth Amendment was adopted reinstating multi-party-political system of governance.

⁶⁴ Ibid.

guided by Article 4 (1) of CEDAW and the African Charter,⁶⁵ and on a larger scale after the 1995 UN Fourth Conference on Women in Beijing.⁶⁶ The Beijing Conference adopted a Plan for Action encouraging member states to ensure women's equal access to and full participation in power structures and decision-making processes.⁶⁷ As a result of the Beijing Plan for Action, the Eighth Amendment to the 1977 Tanzanian Constitution introduced a quota of 15 per cent special seats for women in the Parliament.⁶⁸ Consequently, the number of women in the Tanzanian Parliament increased to 16.5 per cent after the 1995 election.⁶⁹

On the contrary, the ratification of ICCPR, CEDAW and the African Charter did not have much impact in constitution-making and women's participation in decision-making positions in Rwanda and Kenya. The number of women in the Kenyan and Rwandan parliaments remained at 3.0 and 4.3 per cent respectively by 1995.⁷⁰ Ethnic rivalry intensified in Rwanda particularly in 1990. Consequently, the Rwandan government adopted the 1991 Constitution which reintroduced

⁶⁵ Temporary special measures are provided under Article 2 of African Charter which require state-parties to "take corrective and positive action in those areas where discrimination against women in law and fact continues to exist."

⁶⁶ To accelerate women participation in decision-making article 4 (1) of CEDWA requires 'adoption by States Parties to practise positive discrimination by adopting temporary special to accelerate de facto equality between men and women. CEDAW requires states parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country, and to ensure to women, on equal terms with men, the right; vote in all elections and public referenda and to be eligible for election to all publicly elected bodies. United Nations Publication 'Women Rights are Human Rights' (2006) hr/pub/14/2, SALES NO. E.14.xiv.5 isbn 978-92-1-154206-6 e-isbn 978-92-1-056789-3.

⁶⁷ Ibid. To accelerate the implementation of action in these areas, the Commission on the Status of Women, at its forty-first session in 1997, adopted Agreed Conclusions (1997/2), which emphasized that attaining the goal of equal participation of men and women in decision-making was important for strengthening democracy and achieving the goals of sustainable development. The Commission reaffirmed the need to identify and implement measures that would redress the under-representation of women in decision-making, including through the elimination of discriminatory practices and the introduction of positive action programmes.

⁶⁸ United Nations Department of Public Information, op cit note 50. Under the eighth amendment, there were to be 5 members elected from the Zanzibari House of Representatives from among themselves. The National Electoral Commission members were to be appointed by the President. Instead of being a member of CCM as before, parliamentary and presidential candidates could be nominated by any registered party, which meant that independent candidates could not stand for elections anymore.

⁶⁹ The Sixth and Seventh Amendment took place in 1990, it related to the mandate and new composition of the Electoral Commission and consisted of the terms of one candidate for the presidency of Zanzibar respectively. The Ninth Constitutional Amendment came six months after the Eighth Amendment, it provided for the election of the president and his removal by way of impeachment. It also provided for post of prime minister and the passing of a vote of no confidence in him by the National Assembly. The Tenth Amendment enabled the Electoral Commission to facilitate the election of councillors. The Eleventh Constitutional Amendment addressed the issue of vice - presidency, the system of running mate was introduced that paired a presidential and vice-presidential candidate. The Twelfth Constitutional Amendment 1995 was passed before parliament was dissolved before the October 1995 general elections.

⁷⁰ Aili Mari Tripp op cit note 49.

multiparty politics, established the principles of separation of powers and the rule of law.⁷¹ Articles 6 and 10 of the 1991 Rwandan Constitution surrendered national sovereignty to the people of Rwanda⁷² and required the passing of a law that would determine the conditions and means of peoples' consultations on matters pertaining to them.⁷³ With regard to constitution-making however, Article 96 of the 1991 Rwandan Constitution continued to confine the role of revision of the Constitution to the President of the Republic and the National Assembly.⁷⁴ Article 55 of the 1991 Constitution provided for mandatory consultations but only to the Council of Ministers who were to be consulted on proposals for statutory bills and orders. The Constitution did not oblige the government to consult with the people who suffered from ethnic wars since the pre-colonial era and who wanted an opportunity to make a constitution that tallied with their realities, wishes and aspirations.⁷⁵ The 1991 Constitution provided for the protection of human rights and the promotion of respect for fundamental freedoms, in accordance with the Universal Declaration on Human Rights and the African Charter.⁷⁶ However, such provisions were never applied⁷⁷ because when the 1991 Rwanda Constitution was promulgated, the country had been in a state of ethnic war since October 1990. The military successes of the then rebel movement, the Rwanda Patriotic Front (RPF), and the installation of a coalition government, which included opposition parties, led to peace negotiations held in Arusha, Tanzania, between the government and the RPF. The negotiations resulted in the signing of a Peace Accord on 4 August 1993. Article 3 of the Peace Accord provided that the 1991 Constitution and the Arusha Accord inseparably were to form the Fundamental Laws of Rwanda to govern the transition period.⁷⁸ The Constitution was placed hierarchically inferior to the Arusha Peace Accord, and half of its sections were replaced by

⁷¹ Powley Elizabeth, 'Strengthening governance: The role of women in Rwanda's transition - A summary' accessed from United Nations Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI) Expert Group Meeting on "Enhancing Women's Participation in Electoral Processes in Post-Conflict Countries" (19-22 January 2004).

⁷² To be exercised through representatives or by means of referendum.

⁷³ The 1991 Rwandan Constitution.

⁷⁴ Such revisions must be presented by at least two-thirds and adopted by most of three-fourths of the members of the National Assembly.

⁷⁵ Powley Elizabeth op cite note 71.

⁷⁶ Also, Article 16 of the 1991 Rwandan Constitution, provided for citizen equality without any discrimination in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status.

⁷⁷ Reyntjens, Filip. 'Constitution-making in situations of extreme crisis: The case of Rwanda and Burundi' *Journal of African Law*, Vol. 40, No. 2, available at <https://www.jstor.org/stable/745744> Accessed on 26-12-2018 UTC.

⁷⁸ The Arusha Accord, which incorporated a number of protocols agreed in 1992 and 1993, constituted a fundamental redistribution of political powers. Heather B Hamilton, 'Rwanda's women: The key to reconstruction, *Journal of Humanitarian Assistance*,' (2000), Washington, D.C available at <https://reliefweb.int/report/rwanda/rwandas-women-key-reconstruction>, accessed on 6 December 2019.

provisions of the Accord. Despite the Arusha Peace Accord, ethnic tension intensified and caused the outbreak of the 1994 genocide,⁷⁹ causing women's roles to be more affected by political propaganda. The popular "Hutu Ten Commandments," were circulated widely and read aloud at public meetings. The commandments portrayed women, particularly Tutsi women, as deceitful 'temptresses' and urged Hutu women to protect Hutu men from treacherous influences.⁸⁰ These commandments cultivated strong hatred between Rwandan women against themselves and from men, contributing to rape, torture and killing of women during the 1994 genocide.

After the resumption of the civil war in April 1994 and the victory of the RPF, a new constitutional order was put in place. The RPF promised to adhere to the Fundamental Law as agreed by a few elites and politicians in the Arusha Peace Accord negotiations.⁸¹ However, after the RPF's resumed power, the departures from the Fundamental Law, which also included the 1991 Constitution, were evident. On 5 May 1995, the National Assembly, without any attempt to consult the public, voted for a new declaration called the 'Declaration of the RPF' or 'New Fundamental Law' which entered into force retroactively on 17 July 1994, the day on which the RPF declared its victory.⁸² The hierarchy determined by this new Fundamental Law was from bottom to top: the 1991 Constitution, the Arusha Peace Accord, the Declaration of the RPF and the protocol of agreement. Article 1 of the protocol states that the signatories adhere to the 'Declaration of the RPF' concerning the establishment of the institutions of 17 July 1994. It is, therefore, the RPF Declaration which constitutes the summit of the constitutional hierarchy and not the 1991 Constitution.⁸³ On the other hand, despite that Rwanda was in a transition period after 1994, the

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Reyntjens Filip op cit note 77.

⁸² Ibid. This brief text of only three articles contains no provision of substantive law and limits itself to the enumeration of the documents enjoying constitutional status and the determination of their hierarchy.

⁸³ Ibid. Compared with the Fundamental Law as it emanated from the Arusha Accord, the changes introduced by this new Fundamental Law are manifold and far-reaching. A few examples may be offered to illustrate what in effect constitutes a change of regime. First, at the level of the executive branch, from being purely ceremonial, the presidency becomes executive again. Article 2 of the RPF Declaration provides that the President is to be consulted on and approve the composition of the government. More important, if the government is unable to reach a decision, "the President of the Republic decides in a sovereign way" (Article 7); it is shown below that this provision is the cornerstone of the regime. Finally, a vice-presidency is created, which must be combined with a ministerial portfolio (article 2). The fact that this newly-created function is occupied by the RPF's military leader, General Paul Kagame, obviously reinforces the presidential branch of the Executive. Both the President and the Vice-President were RPF.

period of 1994-2005 witnessed an increase in the number of women in parliament to 16 per cent.⁸⁴ The reason for this increase is unclear. Verpoort suggests that the Rwandan genocide left significantly more female survivors than men. However, there is no official evidence to support Verpoort's observation.⁸⁵

When the Kenyan Government decided to respond to the escalating pressure for drafting a new Constitution, there was obvious non-compliance with ICCPR, CEDAW and the African Charter.⁸⁶ The belief was that only experts could make the constitution and the public could not have a role.⁸⁷ In January 1995, President Moi announced plans to invite foreign experts⁸⁸ to draft a constitution for consideration by the National Assembly. Through a pro-reform civil society movement, the people rejected President Moi's move,⁸⁹ demanding a comprehensive people-driven constitutional review process.⁹⁰ As the 1997 elections were close, the demand for the new Constitution increased. In August 1997, the Parliamentary political parties formed the Inter-Parties Parliamentary Group (IPPG) comprised of 36 opposition MPs and KANU Members.⁹¹ The IPPG agreed on a minimum draft of constitutional, legal and administrative reforms to guide the 1997 election, after which a more comprehensive review of the Constitution would be undertaken.⁹² The

⁸⁴ Powley Elizabeth op cit note 71. Also see Human Rights Watch, *Shattered Lives Sexual Violence During the Rwandan Genocide and its Aftermath* (1996), available at <https://www.hrw.org/reports/1996/Rwanda.htm> accessed on 3rd August 2018.

⁸⁵ Marijke Verpoort, *The Death Toll of the Rwandan Genocide: A Detailed Analysis for Gikongoro Province*, available at <https://www-jstor-org.ezproxy.uct.ac.za/stable/pdf/4148179.pdf>, accessed on 3rd August 2018.

⁸⁶ Oyaya CO op cit note 61.

⁸⁷ Ibid.

⁸⁸ Ibid. President Moi wanted to convene a forum of constitutional lawyers and experts from the USA, Germany, France, Britain and Canada to assist in collating the views from Kenyans before putting it to Parliament for debate.

⁸⁹ Kamunde AL 'Kenya's Constitutional History, (2014), *REDD+ Law Project - Briefing Paper*. The movement was the driven National Convention Assembly and its National Convention Executive Committee.

⁹⁰ Ibid. The public further called for the reform of various draconian pieces of legislation, particularly those which curtailed assembly and speech These included first, the Preservation of Public Security Act, Cap 157; second, sections of the Penal Code, Cap 63 dealing with sedition and treason; third, the Public Order Act, Cap 56; fourth, the Chiefs Authority Act, Cap 128; fifth, the Administration Police Act, Cap 85; and seventh, the Societies Act, Cap 108.

⁹¹ Ibid. Those who formed the nucleus of IPPG in secret meetings were Hon Prof Anyang Nyong'o, Hon Paul Muite, Hon. Martha Karua, Hon Musikari Kombo, Hon Kiraitu Murungi, the late Hon Ooko Ombaka, Hon Saulo Busolo, Hon Dr Mukhisa Kituyi and Hon Dr Joseph Arap Misoi

⁹² Oyaya CO op cit note 88. It introduced section 1A of the Constitution, which unequivocally stated, "The Republic of Kenya shall be a multiparty democratic state" to remove any doubt whatsoever that Kenya was indeed a multiparty democracy following the twenty-seventh amendment. The twenty-ninth amendment further increased the membership of the Electoral Commission of Kenya from four (4) to twenty-one (21) including the Chairman. It also enabled parliamentary political parties to participate in the nomination of 12 members to Parliament to represent special interests. included a provision on the responsibility of the Electoral Commission of Kenya to promote free and fair elections and voter education; and a provision on the jurisdiction of the High Court to hear and determine any question relating to membership of the National Assembly.

IPPG introduced the 29th Constitutional Amendment through the Parliament without direct involvement of people.⁹³ The Amendment provided for formulation and composition of an electoral commission and guidance for a free and fair election; it also prohibited discrimination based on sex.⁹⁴

4.5 THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE GENERAL COMMENT NUMBER 25

As noted in chapter two, following the 1986 *Donald Marshall v Canada*⁹⁵ precedent and the UNHRC General Comment no. 25 in 1996, participatory constitution-making was accepted as a legal right falling within the interpretation of the wording ‘public affairs’ referred to in Article 25 of ICCPR.⁹⁶ The UNHRC Comment no. 25 provided for a twenty-year-long awaited clarification on the applicability of Article 25 of ICCPR, requiring states to involve the public when making their constitutions. With the onset of UNHRC General Comment no 25, changes on how constitutional amendments were observed in Kenya and Tanzania. As Rwanda was in a transition period since the 1994 genocide, no constitution-making activities were observed. In Tanzania, in response to demands by members of opposition parties who wanted the Constituent Assembly to be set up and draw the new constitution, the Government issued a White Paper⁹⁷ in 1998 that contained a list of demands from stakeholders, including the need for a new constitution.⁹⁸ The White Paper also outlined the Government’s position on each demand. In response to public demands, the President appointed a 16-member committee to hear the people’s views on the future constitution and make necessary recommendations.⁹⁹ The committee sought the views of more than half a million Tanzanians from across the country. This was the first time in history where public views were sought to inform the Constitution.¹⁰⁰ One of the committee’s recommendations required the Government to open up political spaces for women in line with international

⁹³ Kamunde AL op cit note 89.

⁹⁴ Ibid.

⁹⁵ U.N. Doc. CCPRC/43/D/ 205/1986 (Dec. 3, 1991), available at <http://wwwl.umn.edu/humanrts/undocs/html/dec205.html>.

⁹⁶ [1994] 3 S.C.R. 627.

⁹⁷ U.N. Human Rights Comm., *Marshall v. Canada*, 5.3, U.N. Doc. CCPRC/43/D/ 205/1986 (Dec. 3, 1991), available at <http://wwwl.umn.edu/humanrts/undocs/html/dec205.htm>.

⁹⁸ White Paper, No. 1 of 1998.

⁹⁹ ‘Key historical and constitutional developments’ op cit, note 42.

¹⁰⁰ Ibid. The committee was led by Justice Kisanga.

¹⁰⁰ Ibid.

conventions.¹⁰¹ The Tanzanian Government responded to the committee's recommendations, and the 13th and 14th Amendments to the 1977 Constitution, among other things, increased the number of special seats for women to 20 per cent in Parliament,¹⁰² and later to 30 per cent in 2000 and 2005 respectively. The special seats arrangement increased the percentage of women in Parliament from 21.5 per cent to 30.3 per cent after the 2005 elections.¹⁰³ The number of women further increased to 36 per cent after the 2010 general election.¹⁰⁴

In Kenya, linked to the impact of UNHRC General Comment no. 25 and the intensified local and international pressure for the new constitution, the Parliament passed the 1997 Constitution of Kenya Review Act (CKRA), which was amended in 2001 to provide a comprehensive review of the Constitution. The CKRA aligned with Article 25 of the ICCPR in many ways, taking constitution-making from the hands of a few politicians and elites to the Kenyan people.¹⁰⁵ It provided for three steps of constitution-making process: (1) constituency level public consultation and initial drafting by the appointed constitution review commission; (2) revisions to the draft by a national convention; and (3) ratification of the constitution by Parliament.¹⁰⁶ To give the public broader opportunities of participation in constitution-making, Kenya's High Court issued a ruling that any new Constitution ultimately needed to be ratified by the people of Kenya through a national referendum.¹⁰⁷

The established Constitution Review Commission (CRC) went to every constituency and completed the first stage of information-gathering, public education, and initial drafting of the new constitution by mid-2002, in line with the CKRA. The CRC planned to complete the process before December 2002 so that a new Constitution could be in place before Kenya's presidential and parliamentary elections that were scheduled to take place in 2002.¹⁰⁸ Although the CKRA was intended to minimise government interference in the constitution-making processes, high

¹⁰¹ Ibid.

¹⁰² 33.3 percent on local councils. The amendment further, prohibited Sexual discrimination under Paragraph (5) of Article 13 of the 13th and 14th Amendments to the 1977 Constitution of United Republic of Tanzania

¹⁰³ Ibid.

¹⁰⁴ UNWOMEN *Women Claim their Space in Tanzania's Elections*, available at <http://www.unwomen.org/en/news/stories/2015/10/women-claim-their-space-in-tanzania-elections> accessed on 3 July 2018.

¹⁰⁵ Bannon, Alicia L. 'Designing a constitution-drafting process: Lessons from Kenya.' (2007) *The Yale Law Journal*. Yale University, School of Law High Beam Research.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid. As such the Kenyan Constitution Review Act was amended adding a provision for a referendum subsequent to Parliament's ratification of the draft constitution.

¹⁰⁸ Ibid.

government interference was dominant. As the draft constitution was about to be taken to the Parliament, President Moi dissolved the Parliament in October 2002, ending the term of Kenya's parliamentarians.¹⁰⁹ The Chairman of the CRC was forced to postpone the Parliamentary Conference until after the elections. The second stage of constitution-making started during the Constitutional Conference in April 2003 at the Boma (the location that the constitutional conference took place).¹¹⁰ Due to lack of understanding between the ruling party and opposition political parties, President Kibaki's allies walked out of Boma and withdrew altogether from the National Conference talks. The remaining members of the Conference continued their work based on the views collected from the people and without the Government representatives.¹¹¹ They subsequently passed a draft constitution coined as 'Boma Draft Constitution.' This draft provided for the transfer of most of the powers of the Office of the President (elected by the people) to the Prime Minister (elected by Parliament), among other things.¹¹²

However, before the Boma Draft Constitution was taken to Parliament for review and later for the referendum, the Government, through President Kibaki's supporters, forced the amendment of the CKRA to allow alteration of the Boma Draft.¹¹³ Attorney General, Mr. Amos Wako, published a counter-proposal to the Boma Draft known as the 'Wako Draft', which was a modified version of the Boma Draft Constitution.¹¹⁴ This draft preserved the centralization of executive powers while significantly failing to address the question of devolution that had been attended to in the Boma Draft.¹¹⁵ The opposition parties, civil society, and the public, opposed the new draft, arguing that it was contrary to the law and that it failed to reflect the will of the people regarding essential reforms that were agreed to during opinion gathering by the CRC.¹¹⁶

During the referendum, approximately 57 per cent of voters rejected the proposed constitution.¹¹⁷ The 'Yes' Camp conceded defeat and pledged to work with the 'No' camp to promote reconciliation. It is noted that the rejected 2005 Constitution was not based on the

¹⁰⁹ Oyaya CO op cit note 92.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Bosire J & Mugonyi d, 'LDP and KANU Plan to Fight New Review Bill,' (2004), *Nation* (Nairobi), available at <http://allafrica.com/stories/printable/200406100034.html> accessed on 4 January 2018.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Bannon Alicia op cit 108.

¹¹⁷ Ibid.

participatory constitutional review process that began in 2001 that was guided by the CKRA.¹¹⁸ The 2005 Constitution moved away from reflecting people's views to be a mere imposition of government wishes by the Attorney General. The 2005 Constitution placed strong executive powers in the Office of the President, whilst limiting the powers of the Prime Minister, causing people to reject it at the referendum.

Generally, the Kenyan Government half-heartedly complied with the CKRA during the Constitution review process between 1997 and 2005. The CRC succeeded in collecting public views throughout the country, ensured widespread dissemination of the Draft Constitution, mobilised broad representation of Kenyans of different backgrounds at the National Constitutional Conference and provided all Kenyans equal opportunity to present their views without any restrictions. While the 1997 and 2005 constitution-making, processes recorded the views of more than half of the population, the marginalised and those in remote areas (53 per cent) were not reached by the constitution-making process. Lack of voter cards disenfranchised most young people and women, especially in the marginalised and remote areas, from participating in the referendum. Inadequate and unsatisfactory civic education was also a challenge. The Electoral Commission admitted that civic education was not carried out satisfactorily to enable people to make an informed contribution and decision as required under the CKRA.¹¹⁹ After the failed referendum in 2005, the number of women in the Kenyan Parliament increased from 3 per cent to 7.1 per cent mainly because of strong advocacy and influence by civil societies and international actors. The unfinished Constitutional Agenda in 2005 caused the post-electoral violence that occurred in 2007 to 2008, which brought Kenya to the edge necessitating intervention of the

¹¹⁸ Olivier L *Constitutional Review and Reform: And the Adherence to Democratic Principles in Constitutions in Southern African Countries* (2007) Johannesburg: Open Society Initiative for Southern Africa.

¹¹⁹ Oyaya CO op cit note 109. Other contentious issues were cited as the major reason for failure. These issues included but were not limited to inter alia devolution of power in regions. The conference draft proposed five levels of government including regional government. The jurisdictions and financial autonomy mechanisms of the devolved structures were not clear to the majority. Another contentious issue was the powers of the executive. The majority felt the institution of the presidency was too powerful and needed more checks and balances, including sharing power with a Prime Minister. The land tenure reform was another sticking point. The proposals relating to land were not well understood, for example capping the acreage owned by an individual and inheritance of land by women in some communities; the creation and intended functions of religious courts was not well understood by the majority; single or two chamber parliaments; the abolition of provincial administration; and that referendum threshold to ratify a new constitution should be raised from simple majority to 65 per cent of total votes cast. There was no agreement on what the contentious issues were. Some of the identified issues were devolution, Kadhis courts, the land tenure question and structure of the executive. There was no clear procedure under the law for resolving the issues that proved divisive. The contentious issues continued to haunt and paralyse the reform effort since they were not comprehensively addressed in an appropriate context and framework.

African Union. Over 1000 Kenyans lost their lives in this conflict. It was clear to all Kenyans that getting a new constitutional order was necessary.¹²⁰ As a result, Kenya embarked on a participatory constitution-making journey that led to the adoption of the new Kenyan Constitution in 2010. On the other side, the ending of 1994 genocide, triggered Rwanda to start writing a new constitution in the year 2000. The new Rwandan Constitution was finalized and adopted in 2003. After undertaking about fourteen amendments to the 1977 Constitution, Tanzania began a process to obtain a new Constitution in the year 2011, but the process was stalled at referendum stage until further notice. The process of making the 2003, 2010 and 2014 Rwandan, Kenyan, and Tanzanian Constitutions respectively, forms the discussion in Chapter Five.

4.6 CONCLUSION

The Rwandan (1962), Kenyan (1963), and Tanganyikan (1961) Independent Constitutions as imposed by colonial governments provided a weak framework for its amendment and alteration. The powers to amend and alter the constitution were given to the governments, which needed only two-thirds approval from the parliament to pass any amendment. Since the states were on a one-party system or for those that practiced the multiparty system, the majority of the members of parliament were from the ruling parties, all the government engineered amendments would pass, and as such, the parliament was used merely for rubber-stamping. As the post-colonial, constitutional amendments did not reach the public, and there were only a few women in the government and in the parliament, women could not participate in the post-independence constitution-making processes. Consequently, women could not influence the content of the new constitutions or the amendments. It is also noted that the ratification of ICCPR by Kenya (1972), Rwanda (1975), and Tanzania (1976), could not change the early post-independent constitutional-making practices. This was attributed mainly to the global puzzle that resulted from the interpretation of Article 25 of ICCPR on whether constitution-making is part of public affairs. At a later stage, from the 1990s, it was observed that ICCPR, CEDAW, the African Charter and the Beijing Platform for Action began to impact the constitution-making processes in Kenya and

¹²⁰ Ibid. On the basis of the root causes of the violence as established in the numerous official reports, it was ostensibly clear that a majority of the causes could only be addressed by a new constitutional order. An authoritative report on the causes of the 2007 post-election violence was that of the Waki Commission. The commission found that the 2007 violence could be attributed to four factors. First, it established that the culture of violence had been made into an institution and had been part of the political process since the reintroduction of multi-party politics in Kenya. This deliberate use of violence to acquire political power and the lack of punishment for the perpetrators had given rise to an untamed culture of impunity.

Tanzania. Constitution commissions and constituent assemblies were formed, and the public started to be consulted. However, the government dominance in these reforms was still apparent. For example, Government interference in the 2005 constitution-making process in Kenya resulted in the 2005 Proposed Constitution to be rejected at a referendum. Further, while the Kenyan 1997 and 2005 constitution-making processes recorded the views of more than half of the population, the marginalised and those in remote areas (53 per cent) were not reached due to lack of voter cards and inadequate civic education. However, it is also noted the ICCPR, CEDAW, the African Charter and the Beijing Plan of Action led to the attainment of progressive provisions in the new constitutions and promoted women's participation in decision-making processes. As mentioned previously, in Tanzania, the 13th and 14th Amendments to the 1977 Constitution increased the number of special seats for women to 20 per cent in Parliament, and later to 30 per cent in 2000 and 2005 respectively. In Rwanda, women parliamentarians increased to 16 per cent during 1994-2005.¹²¹ In Kenya, international pressure and the role of civil society organisations contributed to an increase in the number of women in the Kenyan Parliament from 3 per cent to 7.1 per cent after the 2005 failed referendum. Therefore, steady increase in the number of women in parliament has thus been observed in all three countries in the recent past. The next chapter contains a discussion of the 2003, 2010 and 2014 frameworks for the recent constitution-making processes in Rwanda, Kenya, and Tanzania as models for participatory constitution-making.

¹²¹ Powley Elizabeth op cit note 71. Also see Human Rights Watch, *Shattered Lives Sexual Violence During the Rwandan Genocide and its Aftermath* (1996), available at <https://www.hrw.org/reports/1996/Rwanda.htm> accessed on 3rd August 2018.

5. CHAPTER FIVE

5.0 TOWARDS PARTICIPATORY CONSTITUTION-MAKING IN KENYA, RWANDA, AND TANZANIA

“One of the most significant barriers to the effective use of participatory constitution-making is exclusion...exclusion can be external or internal. External exclusion refers to the ways in which individuals are precluded from participating in the fora in which substantive decision making occurs... Internal exclusion occurs when individuals are physically present in the decision-making fora, but they lack effective opportunity to influence the thinking of others.”¹

5.1 INTRODUCTION

In Chapter Four it was indicated that the 1962 Rwandan Constitution, 1963 Kenyan Constitution, and the 1961 Tanganyikan Constitution were imposed by the colonial governments and that they provided a weak framework for future participatory constitutional amendments. As such, the post-independence constitutional amendments were dominated by a few governmental and parliamentary elites with sporadic or superficial public involvement.² The legal framework was silent about public and women’s participation in such constitution-making processes. Since only a few women were in government and parliamentary positions, women hardly took part in the post constitution-making processes. Building from the background and evidence put forth in Chapters Three and Four, the first research question of this thesis is answered in this Chapter. The question calls for analysis of the legal frameworks and processes that guided the 2003 Rwandan Constitution, the 2010 Kenyan Constitution, and the 2014 Tanzania Proposed Constitution to determine the extent to which such frameworks facilitated participation of both men and women. In doing so, the guiding principles developed in Chapter Two of this thesis are used. To recap, these guiding principles are deduced from United Nations Guiding Note³ in line with Article 25 of ICCPR, Article 7 of CEDAW, UNHRC General Comment no. 25, and the African Charter. In determining whether the constitution-making process in a particular state is participatory, the

¹Banks Angela ‘Expanding participation in constitution-making: Challenges and opportunities’ (2008) 49 Wm. & Mary L. Rev. 1043 <http://scholarship.law.wm.edu/wmlr/vol49/iss4/2>.

² Oyaya CO *Towards Constitutional Legitimacy a Study of the Principles and Processes of Constitutional Development and Constitution-making In Kenya From Colonial Times To 2010*, (unpublished PhD Thesis School of Law, University of Nairobi, G/80/9216/2004).

³ Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes, April 2009, available at https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf accessed 6th July 2017.

guiding principles call for the scrutiny of its guiding legal framework in relation to how it provided for: i) participation in constitution-making as a legal right; ii) clear and effective modalities for participation; iii) respect for diversity and participation of the marginalized groups; and finally, iv) how the final text of the new constitutions reflects public participation. Due to its extensive nature, the fourth criterion will be discussed in Chapter Six. The first three criteria are discussed below.

5.2 PUBLIC PARTICIPATION IN CONSTITUTION-MAKING AS A LEGAL RIGHT

This criterion is deduced from Article 25 of International Convention on Civil Rights,⁴ which as explained in detail in Chapter Two of this thesis, requires member-states to provide for the right and the opportunity of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs directly, or through freely chosen representatives. Recapping further from Chapter Two of this thesis, the case of *Marshall v Canada*⁵ and the United Nations Human Rights Committee General Comment no. 25⁶ confirm that constitution-making is a public affair, hence making participatory constitution-making a legal right in line with Article 25 of the ICCPR, Article 7 of CEDAW and Article 9 of the Maputo Protocol.

As a departure from the colonial and post-colonial constitution-making legal frameworks, it is observed that the legal frameworks for the 2003, 2010 and 2014 Rwandan, Kenyan, and Tanzania constitution-making processes respectively, provided for the right to public participation. As noted in Chapter Four, after the 1994 Rwandan genocide, Section 3 of Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front (RPF) stipulated that the nine-year transition period (1994-2003) would be governed by a set of texts called the Fundamental Law.⁷ The Arusha Peace Accord also contained the legal provisions

⁴ International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171.

⁵ UN Human Rights Committee, *Marshall v Canada*, 5.3 U.N. Doc. CCPRC/43/D/205/1986 (Dec. 3, 1991), available at <http://wwwl.umn.edu/humanrts/undocs/html/dec205.htm> accessed 6th July 2017.

⁶ Ibid.

⁷ Heather B Hamilton 'Rwanda's women: The key to reconstruction' *Journal of Humanitarian Assistance* (2000) Washington, DC available at <https://reliefweb.int/report/rwanda/rwandas-women-key-reconstruction>, accessed on 6 December 2019. Fundamental laws included the 1991 Constitution, the Arusha Peace Accord, the Rwandese Patriotic Front Declaration⁷ and the Political Parties Agreement The N'SELE Ceasefire Agreement of 29th March, 1991 between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, as amended in GBADOLITE on 16 September, 1991 and at Arusha on 12 July, 1992; II. The Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Rule of Law, signed at Arusha on 18 September, 1992; III. The Protocols of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Power-Sharing within the Framework of a Broad-Based Transitional Government, signed at Arusha respectively on 30 October 1992 and on 9 January, 1993; IV. The Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Repatriation of Refugees and the Resettlement of

under which the new Rwandan constitution was to be obtained.⁸ Due to the massive impact of the 1994 Rwandan genocide, the people of Rwanda wanted a constitution that would reflect their wishes and aspirations.⁹ Section 47 of the Arusha Peace Accord provided for the right of every Rwandese to participate in the constitution-making process. Article 41 required that the main constitution-making bodies, namely the Legal and Constitutional Commission (LCC), and the National Assembly, conduct extensive consultation with all the strata of the population during the writing of the new constitution.¹⁰

The Parliament of Kenya enacted two key legislations to pick up the constitutional review process from the 2005 failed referendum as explained in Chapter Four. The first was the Kenya Amendment Act¹¹ that introduced section 47 A and provided for a procedure for replacement of the constitution through a participatory approach, and the process of a referendum for the electorate to ratify or reject the proposed constitution. The second piece of legislation was the Constitution of Kenya Review Act¹² (CKRA) which made provisions to facilitate the completion of the constitutional review process within twelve months. Section 3 of CKRA provided that the object and purpose of the Act included, among other things, the need to establish mechanisms for conducting consultations with stakeholders during the constitution-making process.¹³ Section 4 of the CKRA emphasised that the constitution review process intended to secure provisions in the

Displaced Persons, signed at Arusha on 9 June 1993; V. The Protocol Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the integration of Armed Forces of the two parties, signed at Arusha on, 3 August, 1993; VI. The Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions signed at Arusha on 3 August, 1993.

⁸ Ibid. The number of women in relation to the whole population is elevated in Rwanda because of the greater number of men killed during the genocide and wars, and absence of male groups of ex-soldiers and genocidaires who have fled to Zaire. Many adult men were in the army, and 150,000 men in jail awaiting trial for genocide crimes, and are therefore not engaged in reconstruction and other economic development activities.

⁹ Privilege Musvanhiri 'Rwanda: Factbox - Rwanda Controversial Constitutional History' available at <http://allafrica.com/stories/201512181120.html> accessed on 5 December 2019.

¹⁰ Ibid. The bodies were commissioned to prepare a preliminary draft Constitution which shall be submitted to the Government for advice, before submitting it to the National Assembly which shall finalize the draft Constitution, to be submitted to a Referendum for adoption by Rwandan people.

¹¹ Act of 2008. In this regard, Parliament was authorised to enact legislation concerning the Coalition Government, and appointment and termination of the offices of the Prime Minister (PM), Deputy Prime Ministers (DPMs) and Ministers as well as to determine their functions. The new cabinet would consist of the President, the Vice-President, Prime Minister, two Deputy Prime Ministers and the other Ministers.

¹² The Constitution of Kenya Review Act Chapter 3A Revised Edition 2009 (2008) Published by the National Council for Law Reporting with the Authority of the Attorney General.

¹³ Other purposes for CKRA included a) provide a legal framework for the review of the Constitution of Kenya; (b) provide for the establishment of the organs charged with the responsibility of facilitating the review process; (c) establish mechanisms for conducting consultations with stakeholders; and (d) preserve the materials, reports and research outputs gathered under the expired Act.

new constitution that would, among other things, promote the peoples' participation in the governance of the country. Furthermore, Section 6 of CKRA required the constitution-making organs to adhere to several guiding principles including the need to provide the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the constitution. Section 6 of CKRA further required the constitution review process to be guided by the principles of accountability, stewardship and responsible management, respect for the principles of human rights, equality, affirmative action, gender equity, and democracy and to ensure that the outcome of the review process faithfully reflected the wishes of the people of Kenya.

In Tanzania, the process for rewriting the new constitution was governed by the Constitutional Review Act (CRA).¹⁴ Section 4 of the CRA called for a mechanism for allowing the public to participate widely and freely in expressing and transmitting public opinions on matters relating to the constitution. It is therefore noted that the making of the 2003 Rwandan Constitution, the 2010 Kenyan Constitution, and the 2014 Tanzanian Proposed Constitution witnessed comprehensive legal provisions for the first time, guaranteeing the right to public participation in constitution-making in compliance with Article 25 of the ICCPR.¹⁵

5.3 OPPORTUNITIES AND MODALITIES FOR PARTICIPATION IN CONSTITUTION-MAKING

Member-states to the ICCPR, including Rwanda, Kenya, and Tanzania, are required to provide for a right and modalities for public participation in public affairs.¹⁶ As noted in Chapter Two, Article 25 provided minimal guidance on how the right to public participation could be achieved. The Article provided that "Every citizen shall have the right and the opportunity, to take part in the conduct of public affairs, directly or through freely chosen representatives." However, the precise form, nature and scope of participation were not stipulated. In determining the scope and modalities of participation in constitution-making, the UNHRC General Comment no 25 in

¹⁴ CAP 83 R:E 2012.

¹⁵ Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.

¹⁶ Article 25 of ICCPR.

Marshall v Canada leaves it to the legal and constitutional system of the state party to provide for the modalities of participation in constitution-making.¹⁷ Key considerations were that the State's chosen modalities of public participation should not discriminate based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or unreasonably restrict participation.¹⁸ Regarding constitution-making in Rwanda, Kenya and Tanzania, the Rwandan Arusha Peace Accord, the CKRA, and the Tanzania CRA covered different modalities to facilitate public participation in their respective constitution-making processes, as discussed below.

First, the key constitution-making organs with roles and responsibilities to guide main steps for constitution-making processes were legally established. In Rwanda, 12-members were selected to form the Legal and Constitution Commission (LCC). Article 24 A and B of the Arusha Peace Accord¹⁹ established the LCC and tasked it with the responsibilities of preparing a preliminary draft constitution,²⁰ organising a referendum on the text of the constitution and upon approval, harmonising all laws in line with the new constitution. In Kenya, the Committee of Experts (CoE) was the main organ for the review process.²¹ The CoE was mandated through Section 23 of the CKRA to, among other things, identify the agreed contentious issues in the existing draft constitution, solicit and receive written memoranda and presentations on the contentious issues from the public, and undertake thematic consultations with caucuses, interest groups and other

¹⁷ The UNHRC rejects the idea that this right allows citizens to decide whether they will take part in the conduct of public affairs directly or through freely chosen representatives. For example, Canada's decision to design a constitutional review process that utilized conferences attended by the first ministers of the provinces provided for citizen participation through freely chosen representatives. U.N. Human Rights Committee op cit note 5.

¹⁸ Ibid.

¹⁹ Within the Framework of a Broad-Based Transitional Government between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, Privilege Musvanhiri op cit note 10.

²⁰ Ibid. The Commission was placed under the National Assembly as the highest decision-making authority and the board which composed of the president, deputy president, and the executive secretary.

²¹ The Committee of Experts was required by law section 23 of CKRA, to (a) identify the issues already agreed upon in the existing draft constitutions; (b) identify the issues which were contentious or not agreed upon in the existing draft constitutions; (c) solicit and receive from the public written memorandum and presentations on the contentious issues; (d) undertake thematic consultations with caucuses, interest groups and other experts; (e) carry out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems; (f) articulate the respective merits and demerits of proposed options for resolving the contentious issues; (g) make recommendations to the Parliamentary Select Committee on the resolution of the contentious issues in a manner that will be for the greater good of the people of Kenya; (h) prepare a harmonized draft Constitution for presentation to the National Assembly; (i) facilitate civic education in order to stimulate public discussion and awareness of constitutional issues; (j) liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution.

experts.²² In Tanzania, the CRA established the Constitutional Review Commission (CRC) as the body responsible for consulting, collecting public opinions and finally providing Tanzanians with a new constitution.²³ As such, the CRA obliged the CRC to regulate constitutional fora, prepare and submit reports on the public opinions, convene the constituent assembly, and conduct a referendum. Section 6 (7) of the CRA required the President to consult widely with the political parties, civil societies and other institutional stakeholders in appointment of the commission's members.²⁴ After wide consultation, the President appointed thirty members - fifteen from Zanzibar and fifteen from Tanzania Mainland to lead the constitutional review process.²⁵

Apart from the constitution-making commissions, other structures, such as constituency assemblies, played a key role in attaining maximum public participation in Rwanda's, Kenya's, and Tanzania's constitution-making process. Also, some deviance was observed in terms of other structures which were established to facilitate constitution-making processes. A parliamentary

²² Other responsibilities of the CoE included (a) carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems; (b) articulate the respective merits and demerits of proposed options for resolving the contentious issues; (c) make recommendations to the Parliamentary Select Committee on the resolution of the contentious issues in the context of the greater good of the people of Kenya; (d) prepare a harmonized draft Constitution for presentation to the National Assembly; (e) facilitate civic education throughout the review process in order to stimulate public discussion and awareness of constitutional issues; (f) liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution; and (g) do such other things as are incidental or conducive to the attainment of the objects and principles of the review process. Oyaya CO op cit note 2.

²³ The commission was responsible for coordinating and collection of public opinions on the Constitution; to examine and analyse public opinions; to provide for fora for constitutional review; to provide for preparation and submission of report on the public opinions; to provide for the procedure to constitute the Constituent Assembly, the conduct of referendum and to provide for related matters. Specifically, the functions of the Commission included to co-ordinate and collect public opinions; examine and analyse the consistency and compatibility of the constitutional provisions in relation to the sovereignty of the people, political systems, democracy, rule of law and good governance; make recommendations on each term of reference; and prepare and submit a report. Section 9(1)(2)(3) of the CRA. Further the commission was supposed to adhere to the national values, in respect to safeguarding and promoting:) the existence of the United Republic; the existence of the Executive, Legislature and the Judiciary the republican nature of governance; the existence of Revolutionary Government of Zanzibar; national unity, cohesion and peace; periodic democratic elections based on universal suffrage; the promotion and protection of human rights; human dignity, equality before the law and due process of law; and existence of a secular nature of the United Republic that does not inclined to any religion and that respect freedom of worship. the Commission was required by law to afford the people an opportunity to freely express their opinions.

²⁴ They were invited to nominate two candidates from their institutions, it was reported by the Government that there were a total of 550 names proposed by political parties, religious institutions, NGOs and other interested parties. Jesse James 'The constitution-making process in Tanzania,' (2013) Legal and Human Rights Centre.

²⁵ As per section 6 (7) the President paid regard to equality of the two parts of Tanzania, namely Tanzania mainland and Zanzibar, experience, gender, age and social groups representation as key factors when the President was appointing the members to the CLL. Eastern Africa Centre for Constitutional Development 'Report of East African Consultative Theme on the Tanzania Constitutional Review Process' (2013) available at http://www.constitutionnet.org/sites/default/files/report_on_the_tanzania_draft_constitution_jan_2014_0.pdf accessed on 3 January 2018.

select committee was established under Section 5 of the CKRA and was a feature observed only in Kenya,²⁶ while constitutional fora were a special feature observed only in Tanzania.²⁷ More importantly, save for Kenya which conducted a constitutional referendum in 2005,²⁸ the Rwandan and Tanzanian citizens had, for the first time, been legally availed the right to approve or disapprove the new constitutions through referendums, though as noted before, the Tanzanian referendum is not materialised to date. Generally, enshrining different structures to guide constitution-making processes was useful in opening the process to large sects of the public and to avoid domination by a few political elites.

Secondly, some disparities were noted on how the Arusha Peace Accord, the CKRA, and the CRA provided for modalities of public participation in constitution-making processes. In Rwanda, despite the direction by the UNHRC General Comment No 25 in *Marshall v Canada* that left it to the legal and constitutional system of the state party to provide the participation modalities. Article 41 of Arusha Peace Accord required the LCC to conduct extensive consultation with all the strata of the population but did not stipulate the modalities for so doing. Despite the silence of the Arusha Peace Accord on the modalities of participation, the LCC engaged in direct public consultation through training and public sensitization about the constitution-making process and the importance of their participation. The LCC also designed strategies to reach the strand of the public who couldn't participate in direct consultations with the commission by providing telephone lines, email addresses and inviting memoranda from individuals and civil society groups across the country to allow maximum contribution from the public.²⁹ The LCC administered constitution-related questionnaires to 50,000 persons, to be filled out, returned and analysed by the commission.³⁰ However, the use of questionnaires was not an effective way to reach most women. Feedback from women suggested that a lengthy questionnaire was designed for the elite and

²⁶ The PSC was established by the National Assembly to receive the draft constitution from the Committee of experts, to deliberate and build consensus on the contentious issues, and then return the draft with comments back to the CoE. The PSC was further responsible for tabling the report and draft Constitution received from the CoE before the National Assembly. The composition of the PSC had to ensure that at least six of the twenty-seven members of the PSC are women. Oyaya CO op cit note 22.

²⁷ The formation and operation of the constitutional fora was the second step for constitution-making in Tanzania. The fora were tasked to review the first draft constitution and make comments with a view to improving it before it went to the Constituent Assembly. Jesse James op cit note 24.

²⁸ Oyaya CO op cit not 26.

²⁹ Heather B Hamilton op cit note 7.

³⁰ Ibid.

women in urban areas. Most of them, being uneducated, could not make use of them.³¹ This explains why only 7 per cent of the questionnaires sent were received back and analysed by the LCC.³² Despite that however, the diverse means of the collection of public opinions allowed significant input from both men and women. Since 2001, the Commission carried out direct consultations reaching an average of 90,000 people in each of the Rwandan provinces.³³

A difference was noted in Kenya and Tanzania where both the CKRA and the CRA provided specific modalities to facilitate people's participation in their respective constitution-making processes. In Kenya, section 23 of the CKRA directed the CoE to solicit and receive written memoranda and presentations on the contentious issues from the public, conduct thematic consultations with caucuses, interest groups, other experts, and facilitate civic education throughout the review process to stimulate public discussion and awareness of constitutional issues. Section 27 of CKRA required the CoE to ensure that civic education materials were made available in a form accessible to the various groups, also for persons with disabilities.³⁴ Through Section 26 of the CKRA, the CoE used electronic and print media as part of civic education for disseminating information about constitution-making activities.³⁵ Section 30 (2) of the CKRA required the CoE to invite representations from the public, interest groups, and experts on the contentious issues. The CoE was required to prepare a harmonised draft constitution with the issues that were not contentious identified as agreed upon and closed while the issues that were contentious were identified as outstanding.³⁶ The CKRA amplified the UNCHR General Comment number 25 specifically by giving freedom to the CoE to determine the form and manner in which memoranda, information or any other data were to be gathered and how feedback could be transmitted. The CoE was supposed to ensure that such mechanisms were not discriminatory of gender, age, disability, level of education, location, socio-economic background or other reasons.³⁷

³¹ Ibid.

³² Ibid.

³³ 'Constitutional Writing and Conflict Resolution' available at <https://www.princeton.edu/~pcwcr/reports/rwanda2003.html> accessed on 4th January 2018

³⁴ Section 27 of CKRA, also gave liberty to CoE to do such other things as are incidental or conducive to the attainment of the objects and principles of the review process.

³⁵ The CKRA also commissioned the CoE with the role of undertaking research, analysis, and facts finding to identify the issues already agreed and contentious issues in the existing draft constitutions and best practices from other countries.

³⁶ Section 31 of CKRA In Tanzania, reaching out to all strands of people and collecting their views on the constitution was one of the key deliverables of the Constitution making body.

³⁷ According to section 22. (1) of the Constitution of Kenya Review (general) Regulations, 2009.

It is noted that various avenues for collection of public opinion allowed wider participation by both Kenyan men and women. In its report, the CoE confirmed to have received more submissions from women's organisations than any other sector.

In Tanzania, in order to ensure effective public participation of both men and women, the CRA stipulates several approaches that the commission could use, such as conducting awareness programmes, holding of public meetings, and assemblies.³⁸ One of the notable weaknesses of the CRA is that it doesn't mention the educational role of the CRC on specific substantive constitutional issues.³⁹ However, the Commission resolved to undertake sensitisation and awareness-raising while collecting the public views on the new constitution.⁴⁰ This was a critical decision since most Tanzanians were not aware of the constitution, let alone understand their role in the constitution-making process.⁴¹ The commission allowed those who were unable to present their views during the public meetings to do so by filling in a special form provided by the Commission.⁴² These modalities were useful in reaching a significant number of people including women. A minimum of three public meetings were held in each district and a total number of 1,365,337 people attended about 1,942 meetings.⁴³ There is a general feeling that constitution-making in Tanzania was not satisfactorily participatory because only one million people were

³⁸ According to section 17 (1) (2) (3) and Section 17 (9), the Commission could ask any person willing to appear before it for discussion, orally or by production of document, on any constitutional matter which the Commission considered relevant to the constitutional review process.

³⁹ Jesse James op cit note 27.

⁴⁰ Ibid.

⁴¹ In the first five months, the Commission went around the country to collect views from the people about the new constitution. The first round started from 2nd July 2012 and was completed on 30th July 2012.¹³⁵ It marked the beginning of the views collection. The Commission spent almost one month to collect the views from the citizen in this round.¹³⁶ The Commission visited eight regions which were marked as the zone. These were Pwani, Dodoma, Manyara, Kagera, Shinyanga, Tanga, Southern Unguja and Southern Pemba.¹³⁷ The Commission successfully collected the views in all eight (8) Regions. Speech by the Chairman of the Constitutional Review Commission on launching a Draft Constitution, on 3 June 2013.

⁴² The Forms were provided by the Commission at meetings where people were requested to write their views. The views were collected at specific centres at Ward level on the Mainland and at Shehia level in Zanzibar in every Local Government Authority. The Form required personal details such as name, age, gender, profession, residence, educational level; other information such as one's province, district, village, station at which the views were presented and space for 22 one's views on the new constitution. Eastern Africa Centre for Constitutional Development op cit note 25.

⁴³ The number of the people attended the meetings in the four rounds were 188,679, then 325,915 then 392,385 and 457,358 respectively. See Speech by the Chairman of the Constitutional Review Commission on launching a Draft Constitution, on 3 June 2013. In the four rounds, the meetings were 388; 449, 522, and 583 respectively. See Speech by the Chairman of the Constitutional Review Commission on launching a Draft Constitution, on 3 June 2013. Jesse James op cit, note 27.

reached by the commission. According to the 2012 National Census, Tanzania's population was 44.9 million in 2013.⁴⁴

5.4 RESPECT FOR DIVERSITY AND PARTICIPATION OF MARGINALIZED GROUPS

This criterion for participatory constitution-making requires looking into how the constitution-making legal framework facilitates participation of all marginalized groups such as women, youth, elders, the hard-to-reach population and persons with disabilities.⁴⁵ For the purpose of this thesis, analysis is based on how the constitution-making legal framework facilitated meaningful participation by women in each step of the constitution-making processes. In doing so, several criteria are analysed depicting how the legal framework for Rwandan, Kenyan, and Tanzanian constitution-making processes provided specifically for, a) women's right of participation in constitution-making processes; b) the composition of women in constitution-making structures; c) women's key-constitutional demands; d) participation of women's special constituency assemblies; and lastly e) how women participated in the referendums.

a. Specific Legal Provisions for Women's Participation in Constitution-Making

The Rwandan, Kenyan and Tanzanian constitution-making legal framework contained specific provisions for facilitating women's participation in the constitution-making processes. In Kenya, the CKRA emphasised participation of both men and women in the review process and required the constitutional review organs to facilitate the incorporation of gender equity and gender parity provisions in the new constitution.⁴⁶ The CKRA's objective and purpose under Section 4 stipulates the need to establish a free and democratic system of government that guarantees, among other things, good governance, human rights, gender equity, gender equality and affirmative action.⁴⁷

⁴⁴ Ibid.

⁴⁵ Guidance Note of the Secretary-General op cit note 3.

⁴⁶ Section 4 of CKRA.

⁴⁷ Article 4 of the CKRA provided for other objectives of the Constitution review process including to secure provisions therein— (a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya; (b) establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action; (c) recognizing and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya; (d) promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power; (e) respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities; (f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national

The CoE's guiding principles under Section 6 also included the need to accommodate national diversity such as socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged.⁴⁸ In Tanzania, reaching out to all strands of people and collecting their views on the new constitution was one of the key deliverables of the CRC. To ensure effective public participation of both men and women, the CRA requires the CRC to use several approaches such as conducting awareness programmes and holding of public meetings and assemblies.⁴⁹ Contrary to the CKRA in Kenya, it was noted that the CRA does not contain specific provisions for women but use a neutral language allowing all people to participate in the constitution-making process. Gender is only mentioned as a key criterion for the selection of members of the CSC under Section 6 (3) of CRA. In addition, Section 9(2) obliges the CRC to pay attention to the principle of equality before the law, and respect of human rights while drafting the constitution.

On the contrary, the Rwandan constitutional reform is renowned for being one of the most participatory and inclusive of women's rights.⁵⁰ Since the onset of the constitution-making process, the LCC was receptive of women's demands on the content of the new constitution.⁵¹ This was facilitated by the support from the ruling party, the Rwanda Patriotic Front (RPF), that included women in the political and army wings during the armed struggle of 1990 to 1994.⁵² When taking power, the RPF publicly demonstrated a strong commitment to expand the rights and representation of women in key positions in government.⁵³ To tap into the specific voices of

resources; (g) promoting and facilitating regional and international cooperation to ensure economic development, peace and stability and to support democracy and human rights; (h) strengthening national integration and unity; (i) creating conditions conducive to a free exchange of ideas; (j) ensuring the full participation of people in the management of public affairs; and (k) committing Kenyans to peaceful resolution of national issues through dialogue and consensus.

⁴⁸Section 6 (a) (b) and (c) of CKRA. Other guiding principles were good governance, responsible management, transparency, respect for human rights and reflective of the majority's wish.

⁴⁹ According to section 17 (1) (2) (3) and Section 17 (9), the Commission could ask any person willing to appear before it for discussion, orally or by production of document, on any constitutional matter which the Commission considered relevant to the constitutional review process.

⁵⁰ Banks Angela op cit note 1.

⁵¹ Powley Elizabeth, 'Strengthening governance: The role of women in Rwanda's transition: A summary' accessed from United Nations Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI) Expert Group Meeting on 'Enhancing Women's Participation in Electoral Processes in Post-Conflict Countries' (19-22 January 2004) Glen Cove.

⁵² Ibid.

⁵³Ibid. In the aftermath of the genocide, the RPF took numerous steps to increase female participation in governance. Following its victory, it appointed women to high-profile positions in the new government, as ministers, secretaries of state, Supreme Court justices, and parliamentarians. As part of the reorganization of the executive branch, they created the Ministry of Gender, Family, and Social Affairs (MIGEFASO). For the first time, Rwanda had a ministry

women, the LCC consistently engaged with women's civil societies under the umbrella organization called Pro-Femme⁵⁴ and the National Women Council.⁵⁵

Further in Kenya and Tanzania, the CKRA and the CRA respectively required the constitution review commissions to facilitate the full participation of women in the process at different levels.⁵⁶ The commissions organised women-only opinion collection sessions and encouraged women to organise their own meetings throughout the country to discuss women's key priorities for the new constitution. In Kenya, the CoE conducted specific civic education targeting women.⁵⁷ Women also participated in various public meetings and learning sessions, providing their contribution on gender aspects and general constitutional issues. In Tanzania, due to strategic positioning of the Women's Coalition,⁵⁸ the CRC invited women several times to share women's

dedicated not just to women, but also to gender. The ministry was reorganized in 1999 and renamed 'the Ministry of Gender and Women in Development' (MIGEPROF). Its central mandates have been to integrate gender analytical frameworks into all policies and legislation, to reinforce knowledge of gender analytical matrices within state structures (including local administrative structures, the ministries, legislature, and judiciary) via training and education, and to promote gender equity.

⁵⁴In 1992, women on a multi-ethnic basis came together to reconstitute the umbrella organization Collectifs Pro-Femmes/Twese Hamwe (Pro-Femmes) Pro-Femresto coordinate the activities of women's NGOs. It has been particularly effective in organizing the activities of women, advising the government on issues of women's political participation, and promoting reconciliation. Heather B Hamilton op cit note 29.

⁵⁵ Rwanda: National Women Council Empowering Women, available at <https://allafrica.com/stories/201610170024.html>, accessed on 4 June 2018.

⁵⁶The CKRA included names of the women organizations such *Maendeleo ya Wanawake* Organization (MYWO); National Council of Women of Kenya (NCWK); and Federation of Women Lawyers (FIDA) to be among the Organizations to Choose Representatives to form the Reference Group in providing technical support, researched and factual information on gender and women issues to be covered by the new constitution.

⁵⁷ The KWPC, formed in 1998 for women to mobilise collectively around gender equality and affirmative action, brought together 43 women's organisations. This was in response to defeat of the motion by MP Hon Phoebe Asiyo to advance affirmative action. It would become a key player in the constitutional reform process. Meanwhile, in the early 2000s, 54 human rights organisations, faith/religious groups, women's rights organisations, youth groups and opposition political parties united behind Ugungamano, a social movement that pressurized KANU to conduct a people-led constitutional reform process. Ugungamano was led by male religious leaders but it was a core group of women activists who agitated for the formation of the movement. Accessed from Ghai, Yash and Cottrell J *Kenya's Constitution: An Instrument for Change* (2011) Nairobi Kenya: Katiba Institute ISBN 9789966712349

⁵⁸ This Coalition has 65-women member organizations who are defenders of Human Rights, especially women's and Children's rights, with multiple and variable experiences equitably distributed country-wide. These organisations forming Women and Katiba Coalition are, Tanzania Media Women Association(TAMWA) Women Fund Tanzania (WFT), Tanzania Women Cross Party (TWCP)-ULINGO, , Tanzania Gender Networking Programme (TGNP), Tanzania Women Lawyers(TAWLA), Equality for Growth (EfG), Haki za Wanawake (HAWA), Kilimanjaro Women Information Exchange and Consultancy Organization (KWIECO), Shirikisho la Vyama vya Walemavu Tanzania (SHIVYAWATA), Tanzania Union Congress Tanzania (TUCTA), Tumaini Women Development Association (TUWODEA), Women Legal Aid Centre (WLAC), Zanzibar Gender Coalition(ZGC), individual feminists and activists, among others. Ruth Meena 'Gender analysis of the proposed constitution of the United Republic of Tanzania: Gains and Challenges' (2014) available at <http://womenfundtanzania.nl/wp-content/uploads/2014/12/28Oct14-ENGL.GENDER-ANALYSIS-GAPSCHALLENGES.pdf> accessed on 2nd January 2018.

views, priorities, and issues on the new constitution. Members of the CoE were impressed by the clear articulation of the women's issues and further requested the women's coalition to engage in issues beyond those affecting women only.⁵⁹

b. Women's Participation in the Constitutional Review Bodies

The presence of women in constitution-making bodies is important in influencing inclusion of gender specific provisions in the new constitution.⁶⁰ The constitution-making legal framework must contain specific provisions that facilitate the presence of women in constitution-making bodies.⁶¹ In Kenya, Section 6 of CKRA required members of the committee to have substantial knowledge and experience in structures of democratic governments, human rights, women and gender issues.⁶² Also, in appointing the members of the committee, the President and the National Assembly were to ensure composition of both men and women.⁶³ Out of the nine members that comprised the CoE, three were women.⁶⁴ The law also mandated the chairperson and the deputy chairperson to be persons of opposite gender.⁶⁵ Any replacement of either members of the CoE or the Parliamentary Select Committee was not to result in gender imbalance in the committee.⁶⁶ The chair and the director of the CoE were elected by consensus and it turned out that both were men, while the deputy chair for the CoE was a woman.⁶⁷ Further, Section 7(2) of CKRA required the Parliamentary Select Committee to ensure gender balance in its composition.⁶⁸

Unlike Kenya, in Rwanda, the Arusha Peace Accord was silent on the number of women to form the constitution-review commission. However, the LCC was required by law to observe

⁵⁹ Ibid.

⁶⁰ Guidance Note of the Secretary-General op cit note 45.

⁶¹ Ibid.

⁶² According to section 8 (4) and (5) of CKRA, three of the CoE members, shall be non-citizens of Kenya nominated by the National Assembly from a list of five names submitted to the Parliamentary Select Committee by the Panel of Eminent African Personalities, in consultation with the National Dialogue and Reconciliation Committee; and (b) six shall be citizens of Kenya nominated by the National Assembly in accordance with the procedure prescribed in the First Schedule. (5) The Attorney-General and the Director shall be ex officio members of the Committee of Experts without the right to vote.

⁶³ Section 8 (6 & 7) and First Schedule of the CKRA.

⁶⁴ The women member of the CoE were, Ms Atango Chesoni, Ms Chesoni, and Ms Njoki Ndung'u. in the team of the CoE, there were three foreigners who were proposed by the Panel of Eminent African Personalities, led by Chief Mediator Kofi Annan are Prof Murray (South Africa), Dr Chaloka Beyani (Zambia) and Frederick Ssempebwa (Uganda). During the 2005 review, six of the 25 commissioners selected for the CKRC were women.

⁶⁵ Section 11 of the CKRA.

⁶⁶ Section 15 1 (b) of the CKRA. As for the Secretariat, particularly in employing the deputy directors and staff, the Committee was required by law to pay regard to Kenya's national character, diversity and gender equity.

⁶⁷ Mr Nzamba Kitonga as the chair, Dr Ekuru Aukot as a director and Ms Atsango Chesoni as his deputy.

⁶⁸ Established under section 7(1) of CKRA as one of the constitutional review structures, consisting of twenty-seven members, to assist the National Assembly in the discharge of its functions.

the universality principle, the implications of the fundamental principles of democracy⁶⁹ and equality before the law.⁷⁰ As such, three women were appointed as part of the 12 members of the LCC.⁷¹ Women's advocates found an ally in the LCC as one of the three women forming the 12 members of the LCC. Judith Kanakuze, hailed from the civil society and, therefore, supported gender equity advocates' goals within the commission.⁷² As an LCC commissioner, she facilitated the LCC engagement and deliberation on the submitted gender equality proposals.⁷³ In Tanzania, Section 6(c) of the CRA requires adherence to the principle of gender equality in the appointment of the CRC members.⁷⁴ Among 30 members, only ten were women, while the positions of the CRC chair, vice chair, secretary and vice-secretary were all occupied by men.⁷⁵ It was noted that

⁶⁹ Such as sovereignty of the people; government based on the consent of the people expressed through regular, free, transparent and fair elections; guarantee for the fundamental rights of the individual as provided for in the Universal Declaration of Human Rights as well as in the African Charter on Human and Peoples' Rights, among others, freedom of speech, enterprise and of political, social and economic association; laws and regulations based on the respect of fundamental human rights.

⁷⁰ Article 80 of the agreement protocol called the political forces participating in the Transitional Institutions to: 1. Support the Peace Agreement and work towards its successful implementation; 2. Promote national unity and national reconciliation of the Rwandese people; 3. Abstain from all sorts of violence and inciting violence, by written or verbal communication, or by any other means; 4. Reject and undertake to fight any political ideology or any act aimed at fostering discrimination based mainly on ethnic, regional, sexual or religious differences; 5. Promote and respect the rights and freedoms of the human person; 6. Promote political education among their members, in accordance with the fundamental principles of the Rule of Law; 7. Work towards a system whereby the political power serves the interests of all the Rwandese people without any discrimination; 8. Respect the secularism of the Rwandese State; 9. Respect national sovereignty and the territorial integrity of the country.

⁷¹ The peace agreements called for national unity that entails the rejection of all exclusions and any form of discrimination based notably, on ethnicity, region, sex and religion. It also entails that all citizens have equal opportunity of access to all the political, economic and other advantages, which access must be guaranteed by the State. This was provided under Article 3 Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Rule of Law, Powley Elizabeth, 'Rwanda: Women hold up half the Parliament. Women in Parliament: Beyond Numbers' (2005). On the other hand, among the three women in the LCC, Judith Kanakuze was the only representative from civil society, she played an important role both as a 'gender expert' within the commission ranks and as a liaison to women's movement in Rwanda.

⁷² Banks Angela op cit not 50.

⁷³ Ibid.

⁷⁴ Section 6(c) of the CRA.

⁷⁵ Among the 15 commissioners nominated from Tanzania mainland 6 were women and 9 men, in Zanzibar among the 15 nominated members 4 were women and 11 men. Former Prime Minister of Tanzania and Attorney General, Hon. Judge Joseph Sindi Warioba as the Chairperson. The retired Chief Justice of Tanzania, Hon. Augustino Ramadhan was appointed the Vice Chairperson. The President appointed Mr. Assaa Ahmad Rashid (from Zanzibar) as the Commission's Secretary and Mr. Casmir Sumba Kyuki (from Mainland) as Commission's Vice-Secretary. The former previously served as Permanent Secretary in the Legal and Constitutional Affairs Ministry, while the latter is the Chief Parliamentary Draftsman in the Attorney General's Chambers. The President appointed Mr. Assaa Ahmad Rashid (from Zanzibar) as the Commission's Secretary and Mr. Casmir Sumba Kyuki (from Mainland) as Commission's Vice-Secretary. The 15 members of the Commission from Tanzania Mainland includes, Prof. Mwesiga Baregu (a Political Science Professor at St. Augustine University and a representative of CHADEMA political party); Riziki Shahali Mngwali (a Lecturer at the Centre for Foreign Relations); Dr. Sengondo Edmund Mvungi (a Constitutional Lawyer, Vice Chancellor of Bagamoyo University and a representative of NCCR-Mageuzi political party); Mr. John Nkolo (a Teacher of Secondary School, and Secretary General of UDP political party); Mr. Alhaj

despite the Arusha Peace Accord, the CKRA and the CRA containing strong provisions connoting equal participation of men and women in constitution-making, they limited the participation of women in key constitution-making bodies. In Rwanda, Kenya and Tanzania, women's participation in constitution-making commissions did not exceed thirty per cent.

c. Women's Demands in the New Constitution

As the legal frameworks, namely the Arusha Peace Accord, the CKRA, and the CRA, recognized and promoted women's participation in constitution-making, women organized and identified their priorities and vision to be included in the new constitutions. For demands that related to participation in decision-making, Kenyan women in academia, parliamentary delegates, the women's organisations led by the Kenya Women's Political Caucus (KWPC), and the Federation of Women Lawyers in Kenya (FIDA), joined together to strengthen voices towards attainment of strong provisions for protection and promotion of women's rights.⁷⁶ Kenyan women demanded a constitution that outlaws religious, social and cultural practices that discriminate against women indirectly or directly. They also demanded mandatory cabinet posts reserved for women, and the need for political parties to be registered when it provides for at least one third of candidates allocated to geographical constituencies to be women.⁷⁷

Rwandese women also identified key priorities for the new constitution. Those relating to increasing of women's participation in the decision-making process included the need for a constitutional guarantee on gender equality and prohibition of gender-based discrimination.

Said Hamad El-Maamry (Lawyer), and Ms. Jesca Mkuchu (Tanzania Gender Networking Programme).¹¹² Others were Professor Palamagamba Kabudi (a former Dean of the University of Dar es Salaam School of Law); Mr. Humphrey Polepole (Youth Advocacy); Mr. Yahya Msulwa (Teachers' Union); Ms. Esther Mkwizu (Private Sector); Ms. Maria Malingumu Kashonda (Chairperson of the Tanzania Women Lawyers Association); Ms. Al-Shaymaa Kwegyir (CCM MP Special Seat); Ms. Mwantumu Malale (former Principal Secretary in the Government and the Vice Chancellor of the Islamic University of Morogoro); Mr. Joseph Butiku (Mwalimu Nyerere Foundation Executive Director); and Mr. Richard Lyimo. ¹¹³ Members from Zanzibar include, Dr. Salim Ahmed Salim (former Secretary General of OAU and Board member of the Nyerere Foundation); Ms. Fatma Said Ali; Mr. Omar Sheha Mussa (former CCM MP Chumbuni); Ms. Raya Salim Hamad (CCM House of Representatives Special Seat); Mr. Awadh Ali Said (President of Zanzibar Law Society); Mr. Ussi Khamis Haji (Lawyer and former Vice-Chair Zanzibar Electoral Commission); Ms. Salma Maoulidi (Women's Rights); Mr. Simai Mohamed Said (Chairman of the Zanzibar Association of Tourism Investors); Mr. Abubakar Mohamed Ali (Director General, Zanzibar Clove Producers Organization); and Mr. Ally Abdullah Ally Saleh (BBC Swahili Correspondent). Jesse James op cit note 42.

⁷⁶ Women came together, shared their experience, and skills in the interest of ensuring women's agenda was entrenched in the new Kenya's constitution. The women's diversity, such as age and experience, multi-ethnic or ethnicity, multi-parties and social relations became an added advantage enabling women to access and lobby support from all sectors of the society and stakeholders. Maingi G 'The Kenyan Constitutional reform process: A case study on the work of FIDA Kenya in securing women's rights' (2011), *Feminist Africa*.

⁷⁷ Ibid.

Elimination of all discriminatory laws, and adoption of affirmative action was called for to improve the status of the disadvantaged groups, be it women, men, people with disabilities, girls or boys.⁷⁸ In addition, the women demanded that participation by men and women at all decision-making levels of society be ensured, and the constitution had to be written in simple, clear and gender-sensitive language to combat sexist stereotypes conveyed by language.⁷⁹ In addition, the constitution had to include specific provisions on effective implementation of and compliance with gender principles and make provision for several mechanisms that ensure gender promotion.⁸⁰

In Tanzania, soon after President Kikwete announced the launch of the new constitution-making process, women organised themselves and formed the *Wanawake na Katiba*⁸¹ Coalition (Women's Coalition on the Constitution) to streamline priorities, lobby and ensure that the new constitution would be inclusive of women's political, social, and economic rights.⁸² After several consultative processes among themselves, the female members of the parliament, and the general public, the Women's Coalition identified twelve key issues to be included in the new constitution.⁸³ The demands encompassed among other things, the need for equal representation between men and women to engage in all levels of decision-making processes.⁸⁴ For Rwanda, Kenya, and Tanzania, the making of the 2003, 2010 and the 2014 Constitutions provided an opportunity for women to organise, agree on their priorities and influence the constitution-making processes for the first time. In Chapter Six of this thesis, women's gains in the new constitutions in response to their demands are discussed extensively.

⁷⁸ Ibid.

⁷⁹ Powley Elizabeth op cit note 53.

⁸⁰ Ibid.

⁸¹ Translated as Women and the Constitution Coalition.

⁸² Ruth Meena op cit note 58.

⁸³ Ibid. These priorities were: women's rights to be spelt out in the constitution; prohibiting all laws, regulations and practices which discriminate against women; women's rights to dignity to be protected by the constitution; the international instruments and standards to be respected and translated into laws ; constitution to guarantee equal rights for women in decision making organs; spelling out the age of the child (to protect girl children against early marriages); women's rights to access, control and benefit from national resources should be spelt out in the constitution; women's rights to maternal health services to be spelt out; women's rights to access and benefit from basic services to be spelt out; the rights of women with disabilities to be spelt out; a commission to monitor and oversee implementation of these rights to be provided as one of the accountability instruments for gender equality; a family court to be provided for in the constitution.

⁸⁴Article 66 (1)(b) of the 1977 Constitution of the United Republic of Tanzania established the Special Seat system which provides for a 30% quota for women which is subject to critics.

d. Women's Participation in Constitutional National Assemblies

After collection of public views and issuance of the draft constitutions, the next step was for deliberations of the draft constitutions by the national assemblies before the referendum. In Rwanda, the LCC created a booklet of the collected opinions, and sent them back to the public for validation and the shaping of their opinions.⁸⁵ The LCC also sponsored a national conference of 700 people to review the draft constitution.⁸⁶ During this time, the women's organisations, particularly the Pro-Femmes, separately and as part of the other Civil Society Organisation's networks, carried on a lobbying campaign and worked to disseminate information about the draft constitution to women. They held consultations, meetings, and training on the proposed provisions and their implications for women.⁸⁷ Also, the Arusha Peace Accord required the Transitional National Assembly to approve the constitutional draft before subjecting it to the referendum. After the 1994 genocide, the 74-member body was appointed to the Transitional National Assembly in 1994 for a 5-year term, later extended to 9 years, with the role of passing a new constitution for Rwanda.⁸⁸ The draft constitution bearing strong provisions on women's political, social and economic rights was approved unanimously by the 68 Assembly members present, who put it up for referendum.⁸⁹

In Kenya, after analysing the public views, including those of women, the CoE produced the Harmonised Draft Constitution.⁹⁰ The CoE was required by law to present the draft constitution to the Parliamentary Select Committee (PSC) to deliberate and build consensus on the contentious issues, and then return the draft with comments to the CoE.⁹¹ The PSC was further responsible for tabling the report and draft constitution received from the CoE before the National Assembly.⁹² The composition of the PSC had to ensure that at least six of the 27 members were women.⁹³ The PSC worked on the Harmonised Draft Constitution received from CoE and later released it under

⁸⁵ Gasamagera W 'The Constitution making process in Rwanda: Lessons to be learned' (2007) presented to the 7th Global Forum for Reinventing Government, Vienna, Austria, 26-29 June 2007, available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan026620.pdf> accessed on 16th October 2018

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Oyaya CO op cit note 28.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

the name, the PSC Draft.⁹⁴ The PSC Draft revealed that a lot of gains that had been made in the Harmonised Draft Constitution, had been taken away. In the PSC Draft, minority and marginalised groups were now subsumed within the category of vulnerable groups. The PSC Draft removed the section in the CoE Draft (Section 44) which specifically outlined measures the government should take to ensure minority and marginalised groups are accorded special opportunities in the educational and economic fields, get special opportunities for access to gainful employment, and are assisted to have reasonable access to water, health services and transport infrastructure.⁹⁵ Further, the PSC Draft replaced the Human Rights and Gender Commission contained in the CoE Draft with an Equality Commission.⁹⁶ In doing so, the specific designation of a minority rights commissioner, who was to have responsibility for promotion and protection of the rights of ethnic, religious minorities and marginalized communities, was eliminated.⁹⁷ The PSC Draft represented a significant setback in the government's commitment to protecting and fulfilling economic and social rights, specifically the rights to social security, health, education, housing, food and water.⁹⁸ The PSC Draft undermined transparency and civil society participation by removing key language protecting the right to information and freedom of association. The Draft eliminated language outlining the activities which the government must take to meet its human rights obligations and eliminated the Constitutional Court and its accompanying powers.⁹⁹

In response, women's organisations undertook various initiatives to counter the negative effect of the PSC Draft on both specific and general issues. Awareness-raising and public influence through meetings, campaigns and media engagement¹⁰⁰ were used to let the public know about the shortcomings of the PSC Draft.¹⁰¹ Submission of well-researched and factual analysis in the form of memoranda, petitions and press releases on the affected provisions in the PSC draft and how they can be redressed were made public.¹⁰² As a result, the CoE rejected most of the PSC amendments and produced a Revised Harmonised Constitution, which was taken to the National

⁹⁴ Ibid.

⁹⁵ Maingi G op cit note 78.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid. At each national consultation, women's organisation such as FIDA produced a weekly bulletin updating the status of the constitutional reform process with regard to the attainment of women's rights priorities.

¹⁰¹ Ibid. Civil society organizations joined together to caucus with Members of Parliament as organized interest groups and to provide technical expertise to Members of Parliament on protection of women rights provisions.

¹⁰² Ibid.

Assembly for further deliberations.¹⁰³ While the constitutional National Assembly was ongoing, women lobbying and influencing strategies took different forms. Kenyan women's groups sought the indulgence of the committees to influence retention of women's rights provisions.¹⁰⁴ While some women's organisations set up tents within and around the parliament buildings and distributed materials in the form of pamphlets and magazines to the delegates, with prior clearance from the Commission, others engaged the delegates in face-to-face advocacy. For example, women held almost daily consultations to address and review women's issues and to ensure that women's gains were retained and safeguarded to the very end of the Parliamentary Conference.¹⁰⁵ The Kenyan women understood that to gain wider support for their goal, they needed to frame affirmative action in a way that would be easy for the general public to accept.¹⁰⁶ They thus worked to frame it in development terms – they highlighted how the government had used affirmative action to help other categories of people, such as those living in poverty. This moved the understanding of affirmative action from being a threat to the status quo to a positive construct that is intended to help the marginalised groups, including women.¹⁰⁷

In Tanzania, in February 2013, after collection and analysis of the public opinion, the CRC produced the First Draft Constitution.¹⁰⁸ The draft contained among other things, key gains of the twelve areas of priority identified by women.¹⁰⁹ Relating to matters pertaining to women electoral and political rights, the First Draft Constitution suggested significant change in the electoral system by abolishing parliamentary special seats for women and provided that for every electoral district, each political party should put forward a man and a woman as candidates, as such voters will vote for a man and a woman of their choice from any political party as their representatives in that particular constituency. This provision implied that women would be elected democratically, and will be accountable to their voters and their own electoral constituencies, thus addressing challenges associated with the women's special seats arrangement as further explained

¹⁰³Ibid. Women presented a petition to Parliament to halt any amendments to the RHD. Women used media and organized formal and informal meetings with female MPs, established committees and the Minister of Gender to garner support for maintaining women gains in the constitution.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ The Draft Constitution (“titled in Kiswahili— *Rasimu ya Katiba ya Jamhuri ya Muungano wa Tanzania*, 2013”) contains 240 Articles. It is long compared to the current Constitution of 1977 which has only 152 Articles.

¹⁰⁹ Ruth Meena op cit note 83.

in detail under Chapter Seven.¹¹⁰ It should be noted that the fact that the First Draft Constitution was only available in English posed a serious challenge, as less than 20 per cent of Tanzanians speak English and it made it difficult for the majority of the population, particularly women, to understand the content of the draft constitution without assistance.¹¹¹ The Women's Coalition took immediate efforts to translate the draft constitution in Swahili, but financial constraints hindered the dissemination of the translated version to majority of Tanzanians especially those in remote areas. Therefore, it affected how they provided feedback to the commission on the content of the draft constitution.

The formation and operation of constitutional fora was the second step for constitution-making in Tanzania.¹¹² After issuing the first draft constitution, the Commission, in line with section 18 of CRA, allowed reaction from the public through district constitutional fora, direct meetings, letters, petitions, and memoranda.¹¹³ The fora were tasked to review the first draft constitution and make comments with a view to improve it before it went to the Constituent Assembly.¹¹⁴ There were two types of fora. The first type was managed by the Commission¹¹⁵ while the second was managed by organisations or institutions.¹¹⁶ The Women's Coalition made a great effort to influence the first draft by translating, reading, analysing and commenting on how it responded to the women's twelve priorities. The Women's Coalition also identified gaps, provided alternatives on how they could be addressed, and compiled its report and submitted the

¹¹⁰ 'Draft Constitution in Tanzania proposes gender equality in electoral system' available at <https://demofinland.org/draft-constitution-in-tanzania-proposes-gender-equality-in-electoral-system/?lang=en> accessed on 2 January 2018.

¹¹¹ 'New Constitution: Civil society has taken an active role,' Available at <http://www.kepa.fi/jasensivut/jasenblogi/12992> as accessed on 3 January 2018.

¹¹² Section 18 of the CRA.

¹¹³ As per section 18 (6), it says for the purpose of this section, the Commission may allow organizations, associations or groups of persons to convene meetings in order to afford opportunity to its members to air their views on the Draft Constitution and forward such views to the Commission.

¹¹⁴ This phase started officially in June 2013 and was completed on 31st August 2013. Jesse James Op cit note 74.

¹¹⁵ Ibid. These were constituted under the level of District. The Commission was directly responsible to supervise them. Elections of members to these fora started from village (in rural area) or mitaa (in urban areas) and then at ward level and finally at district level. People were invited to apply within their village or mitaa to be elected by residents of those areas. Those who were elected in each village or mitaa went to the ward level to compete with others elected from other villages or mitaa. Elections were also done at the ward level and those elected went to the district to constitute the District forum.

¹¹⁶ Ibid. These were formed by organisations or institutions which wanted to do so. So, political parties, various institutions, religious organizations, professional clubs, civil society organizations and any groups of persons with the same interest formed their own independent fora. These types of fora were not supervised by the Commission. They were self-supervising. They were required to present their views to the Commission after their meetings on or before 31st August 2013.

proposed recommendations to the Commission for further consideration in the Second Draft.¹¹⁷ The women's coalition and other civil society organisations, such as the Legal and Human Rights Centre, launched a countrywide campaign through constitutional fora to educate remote populations including women, on the content of the draft constitution and the extent to which women's rights had been catered for and what they could do further to attain progressive gender provisions.¹¹⁸ There were issues pertaining to how the constitutional fora were operated, which posed doubts on key areas such as inclusivity, viability and acceptability of the fora's deliberations. At first, the formation of the constitution was to be democratic and transparent. People who wanted to be forum members in the villages, streets and ward levels were requested to apply and be elected.¹¹⁹ However, the elections were marred by violence, and the voting of the members were influenced by political, tribal and religious forces.¹²⁰ Members were screened by Ward Development Committees (WDCs) of which the majority of its members were dominated by councillors from ruling party, Chama Cha Mapinduzi (CCM). This led to a perception that the views and deliberations from the constitutional fora were unduly influenced by the dominant party, causing challenges in acceptability of the constitutional fora as platforms for gathering views for genuine enrichment of the First Draft Constitution.¹²¹

After compilation and analysis of the public opinion on the first draft constitution from the constitution fora, the commission prepared and released the Second Draft Constitution.¹²² The

¹¹⁷ Ruth Meena op cit note 109.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ A total of 19,378 constitutional fora members were elected all over the country. In Tanzania Mainland, a total of 18,180 members were elected to form the constitutional fora. Zanzibar had 1,198 members of the fora of whom 1,005 were elected from all Shehia. Each shehia was represented by three members. 205 And, all 193 councillors joined the fora as members. Jesse James op cit note 115.

¹²¹ Ibid. Another challenge was on the closer look of section 17 and 21 (3) of the CRA which states that: "Any person or organization wishing to conduct awareness programmes on constitutional review must register under the relevant laws and must disclose sources of his/their funds. Failure to do so constitutes an offence punishable by a fine of not less than Tzs.5, 000,000/= and not exceeding Tzs .15, 000,000/= or imprisonment for a term of not less than three years." Depicts that the objective of the above provisions appears to be avoidance of foreign interference or influence in what should appropriately be a home-grown process. However, it was doubtful whether the objective can be achieved by placing strict letters on the freedom of individuals and civil society to fully participate in and influence the review process. Since the parameters for the debate were defined by law, it was therefore possible to detect and prevent the pushing of anti-people agenda. The process would have been more facilitative if the legal requirement had stopped at notifying authorities of the planned events and refrained from criminalizing activities which creates fear, and a hindrance to free participation. It is hoped that the Commission would have designed the tools to be used during the awareness creation campaign to avoid distortion of the intended message/information.

¹²² Ibid.

Women's Coalition found the Second Draft Constitution to have systematically incorporated women's key priorities except for a few identified gaps.¹²³ Just like the First Draft, the Second Draft Constitution endorsed the women's demand for the provision of equal representation between men and women in the decision-making processes by providing that each electoral constituency should have one male and one female candidate from each political party.¹²⁴ The second draft allowed independent candidates and provided for non-registration of political parties that had not taken gender equality principles into consideration.¹²⁵ Allowing independent candidates was a great gain for women in the Second Draft Constitution. It would allow women who were not interested to be members of political parties, but have political ambitions to still stand as candidates.¹²⁶

After the issuance of the Second Draft Constitution, the CRA provided for a Constituent Assembly as the third step of the constitution-making process in Tanzania.¹²⁷ The President, in agreement with the President of Zanzibar, appointed members and convened the Constituent Assembly. As per the CRA, the President appointed 201 different governmental and non-

¹²³ Ruth Meena op cit note 116. Further, in its preamble, the proposed draft constitution commits among other things to build a society which is free from all forms of discrimination including gender. In defining discrimination, the draft constitution affirmed that purposeful acts to rectify the historical imbalances in the society shall not be deemed to be discrimination. The draft considered gender equality has been considered as one of governance issues, and its overall goal included the principle of equality generally, while specific social, economic and political objectives included gender equality goals. The draft constitution directs that goals and specific objectives spelt out in this draft constitution will guide the interpretation and implementation of the constitutional principles. The draft constitution established the principle of supremacy of the constitution, hence declares all practices, traditions and cultural beliefs which contradict the constitutional principles null and void. The second draft constitution also affirmed respect for all international and regional standards which the country is a party to such standards include CEDAW, CRC, and Maputo Protocol.

¹²⁴ Ibid. This is likely going to reduce the financial burden which individual women have to incur when contesting for electoral position. It is also more likely that such modality will reduce electoral corruption and build a more gender responsive electoral culture. In the final analysis, electoral resources will be used in a more equitable manner, reduce corruption and finally the nation will benefit by getting legislatures who are more accountable, who will adhere to ethical standards. By Ruth Meena, how gender/women issues have been incorporated in the Proposed Draft Constitution, Wanawake na Katiba Coalition.

¹²⁵ Ibid. This is a first time in the history of this country that demands are made on political parties to address gender equality and non-discriminative practices in decision-making organs. For women movement, this is a great gain, as political parties are gate keepers in defining and determining who gets in or who is out in political participation in electoral processes.

¹²⁶ Ibid.

¹²⁷ Ibid. After releasing the second draft constitution the CRC submitted the report and the Second Draft Constitution to the President who published it in the Gazette and other local newspapers with a statement that the Second Draft Constitution was to be presented to the Constituent Assembly for enactment as the proposed Constitution. After twenty-one days following the publication of the Second Draft Constitution. The original version of the CRA did not provide mechanisms for election/selection of the members of the Assembly of the categories and the numbers to represent each group. A subsequent amendment clarified the additional members of the CA will be appointed by the President. According to the amendment, each of the interest groups will forward not more than nine names of persons from which the President will select three delegates.

governmental organisations to join the existing members of parliament and together they formed the Special Constituent Assembly (SCA).¹²⁸ The President considered the qualifications and experience of the nominees as well as the gender factor.¹²⁹ Before he appointed members of the SCA, the Women's Coalition took the initiative to consult and influence the then President (Hon, Dr Jakaya Mrisho Kikwete) to observe equal representation between men and women when appointing the SCA's members.¹³⁰ This was the greatest move by the Women's Coalition and a major success for women, as the President appointed 101 men and 100 women, almost in parity. Further, due to the great role of the Women's Coalition in the constitution review process, six of its members were appointed to be part of the SCA. In total, there were 620-members in the SCA¹³¹ of whom 256 were women, comprising 41.3 per cent of the entire Assembly.¹³² Before the CSA began its work, there were leadership positions that needed to be filled. In the election for the Interim Chair of the SCA, only one out of four candidates was a female, and a male candidate won. During the elections for the deputy SCA Chair, only two candidates were women, and a woman won.¹³³ The pattern is also reflected at the SCA Committees level, where women chaired four out of fourteen committees, and ten out of fourteen vice chairs were female. This suggested that it was easy to accept women as deputies but not at the helm of the parliament or respective committees.¹³⁴

As the CSA begun its work, the Women's Coalition also started to empower all members of SCA on the twelve women's priorities for the new constitution.¹³⁵ Through the coalition's experts and consultants, the Women's Coalition produced a deeper analysis of the second draft constitution from a gender perspective by comparing it with best practices from other jurisdictions

¹²⁸ As per section 22.-(1) A Constituent Assembly consisting of the following members: (a) all members of the National Assembly of the United Republic; (b) all members of the House of Representatives of Zanzibar; (c) one hundred and sixty six members drawn from the following: (i) Non-Governmental Organisations; (ii) Faith Based Organisations; (iii) all fully registered political parties; (iv) institutions of higher learning; (v) groups of people with special needs; (vi) Workers Association; (vii) an association representing farmers; (viii) an association representing pastoralists; and (ix) any other group of persons under whatever name having common interest.

¹²⁹ The President consulted the interest groups and selected names from their lists of nominees to be members of the SCA. Ruth Meena op cit note 127.

¹³⁰ Nancy Mrikalia a member to women coalition, was one of the Political Parties' delegation visiting the President, and she successful convinced the President on the importance of having a gender balanced SCA.

¹³¹ Comprising 365 ordinary members of parliament, 54 members from the Zanzibar House of Representatives and 201 presidential appointees from civil society and other non-governmental organisations' members charged with the task of reviewing the second draft constitution. Jesse James op cit note 121.

¹³² Ruth Meena op cit note 129.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ruth Meena op cite note 83.

with progressive constitutions such as Rwanda, Kenya, and South Africa.¹³⁶ The Women's Coalition provided the female members of the CSA with well-researched, factual and evidence-based recommendations on what should be discarded, retained or added to the second draft constitution. This was in addition to enhancing the coalition's capacity to identify male champions who were willing to support the women's agenda during the whole process.¹³⁷ The Women's Coalition also intervened through the media in various TV and radio programmes and through the issuance of press releases whenever anything occurred that was likely to be detrimental to obtaining a gender-sensitive constitution.¹³⁸ Further, the Women's Coalition conducted a national convention in the capital city, Dodoma, as a parallel or shadow SCA with rural women to enhance their understanding of the constitution-making processes. They were reminded of women's priorities versus the content of the Second Draft Constitution, and jointly, strategies to influence the remainder of the constitution-making process were devised.¹³⁹

In general, the women in Rwanda, Kenya, and Tanzania were able to utilize the constitution-making processes to unify the voices on women's constitutional rights, enhance their advocacy and influencing strategies to ensure that the new constitutions were substantially inclusive of progressive women's rights. The way women participated in key constitution-making steps during the making of 2003, 2010 and 2014 Rwandan, Kenyan, and Tanzanian Constitutions is a proof that when the benchmarks for participation are set by the law, it forces the key players to open the constitution-making process for wider participation. Under these circumstances, women also are cultivated to organise and influence constitution-making processes in a more progressive way. As observed in Chapters Three and Four, the legal framework for colonial and post-colonial constitution-making processes were silent about public participation and specifically about women's participation. Coupled with the fact that women were the minority in the decision-making positions, such as the cabinet and the parliament, they rarely participated in the making of the Rwandan, Kenyan, and Tanzanian independence and early post-independence constitution-making processes.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid. The women coalition lobbied for about 10 different TV spaces to utilise whenever a need arise, they issues various new papers articles and social media press releases.

¹³⁹ Ibid.

e. Women's Participation in a Referendums

After the draft constitutions were approved by the national assemblies, they were then supposed to be submitted to the public for referendums. In Rwanda, women advocates perceived the draft constitution to be catering for women's interests and priorities.¹⁴⁰ To show their support on the proposed constitution, through Pro-Femmes, women engaged in a mobilisation campaign encouraging women to support the adoption of the new constitution in the countrywide referendum.¹⁴¹ Consequently, the 2003 Rwandan Constitution received 93.42 per cent approval by 89.86 per cent of the people of Rwanda who voted.¹⁴² In Kenya, when the 2010 Constitution was put to referendum, the women's movement provided civic education through print, radio and electronic media to key interest groups teaching them about the referendum and reasons they should support the new constitution.¹⁴³ Approaching the referendum, a distinct lack of genuine voter civic education was witnessed as most of the campaigns began later than the stipulated campaign period and lagged the period set aside for civic education.¹⁴⁴ Despite intense campaigning, there was a large percentage of the population who did not benefit from quality civic education. The Interim Independent Electoral Commission (IIEC) attempted to encourage an increase in female voter registration ahead of the referendum. However, it was hampered by patriarchal practices.¹⁴⁵ In order to assist the IIEC to sensitise more women to register as voters and participate in voting on the day of the referendum, women's organisations marked the 3 May 2010 as Female Voter Registration Day and held press conferences calling on women to come out and register to vote.¹⁴⁶ To create a peaceful environment for the referendum, women's organisations, such as FIDA Kenya, held five National Women's Strategy Meetings ahead of the

¹⁴⁰ Privilege Musvanhiri op cit note 19.

¹⁴¹ Ibid.

¹⁴² In 2015, there was another referendum to approve the constitutional amendments that allowed the incumbent President Paul Kagame to run for a third term of office in 2017 as well as shortening presidential terms from seven to five years. However, the latter change would not come into effect until 2024. Rwanda: Presidential Elections 2017, available at <http://makeeverywomancount.org/index.php/tools/political-participation-a-election-monitoring/2017-elections-monitoring/10658-rwanda-presidential-elections-2017> as accessed on 3rd January 2018.

¹⁴³ FIDA set up a Rapid Response Unit to ensure a quick response to controversies or misinformation in relation to the Constitution, as well as dialogue and engagement at the subnational level with key gatekeepers, such as religious and community leaders, local judges and dispute resolution arbiters, to enable exchange and engage in advocacy and sensitisation on many of the issues. Dialogue was adapted to different contexts, noting the normative pluralism that characterises Kenyan society. Maingi G op cit note 107.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid. Husbands who kept the national identification cards of their wives who seemed to be on the side contrary to theirs. Also, most men did not want their families to be in urban areas such as Nairobi during the day of the referendum due to fears associated with voting and the post-election violence.

¹⁴⁶ Ibid.

referendum to enable women from both the ‘Yes’ and ‘No’ campaign sides to discuss holding a peaceful referendum in an open space. Many Kenyan men and women voted and by a margin of 67 per cent chose to adopt the new constitution. The Constitution of Kenya was promulgated on the 27 August 2010.¹⁴⁷

In Tanzania, after the Special Constituency Assembly finished its work and produced the Tanzanian 2014 Proposed Constitution, the new constitution was supposed to be put to a referendum.¹⁴⁸ The CRA provided for a referendum to be conducted by the sitting of the Electoral Commission of the Union, and that of Zanzibar. The Constitution should have been approved by a ‘Yes’ or ‘No’ vote.¹⁴⁹ The Women’s Coalition started preparation for the referendum by strengthening the Coalition and analysing other existing related laws with the new constitution. The Coalition informed women of the gains obtained from the Proposed Constitution, and on why they should vote ‘Yes’ during the referendum. The referendum was initially announced to take place on 30 April 2015 but was later postponed until further notice.¹⁵⁰ Until the time of the completion of this thesis, the National Election Commission has yet to provide a new date.¹⁵¹ In 2016 and in number of occasions, the current President of the United Republic of Tanzania, John Pombe Magufuli, made it clear that completion of a new constitution is the least of his priorities, literally meaning that it will not happen anytime soon.¹⁵² While the Proposed Constitution enjoyed much acceptance from the Women’s Coalition as will be explained in detail in Chapter Six, some constitutional analysts claimed that it altered fundamental and substantive provisions put forth in the popularly accepted Second Draft Constitution.¹⁵³ They claim that the CSA was dominated by the ruling party - CCM, which hijacked the constitution-making process and altered the provisions obtained from wide people’s consultation and covered in the Second Draft Constitution by replacing them with the provisions that favours CCM.¹⁵⁴ At the moment, the majority of

¹⁴⁷ Ibid.

¹⁴⁸ Jesse James op cit note 131.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² ‘Tanzania postpones referendum on constitution’ available at <https://www.reuters.com/article/us-tanzania-politics/tanzania-postpones-referendum-on-constitution-idUSKBN0MT21U20150402> accessed 3 February 2016.

¹⁵³ Jesse James op cit note 148.

¹⁵⁴ Ibid.

Tanzanians men and women are still longing for a new constitution,¹⁵⁵ others desire a fresh start of the entire constitution-making process while others call for resumption of the constitution-making process from where the Second Draft Constitution was released.¹⁵⁶

5.5 CONCLUSION

In this Chapter, the legal framework for the 2003, 2010 and 2014 Rwandan, Kenyan, and Tanzanian constitution-making processes were analysed in relation to how they facilitated public participation, particularly women's participation. While the Kenyan legal framework was found to be more advanced in covering specific provisions for ensuring women's engagement during the constitution-making process, Rwandan and Tanzanian legal frameworks were not detailed. They covered the general principles of participatory constitution-making without specific emphasis on women's participation. Also, all the constitutional review commissions failed to have equal compositions of men and women. Women's representation in constitution-making commissions did not exceed 30 per cent in any of the three countries. Despite these challenges, the actual constitution-making processes in Rwanda and Tanzania depicted satisfactory levels of women's involvement in all constitution-making stages. Therefore, the legal frameworks for constitution-making, namely, the Arusha Peace Accord, the CKRA, and the CRA, tallied with public participation guiding principles as deduced from the ICCPR, and the United Nations Guiding Note on constitution-making processes. It was confirmed in this Chapter that women participate in constitution-making processes when the legal framework provides for it. The constitution-making actors become consciously proactive about the inclusion of women when they are obliged by law. This is contrary to when the legal framework is silent, as evidenced from colonial and early post-independence constitution-making processes described in Chapters Three and Four. In Chapter Six, the detailed key constitutional gains for women, in relation to promotion of women's participation in parliaments, are analysed. The analysis is done through public participation guiding principle number four, explained at the introduction section of this Chapter. Principle number four calls for an investigation into the final draft constitution in relation to how it reflects public participation.

¹⁵⁵ Buguzi Syriacus 'Two in three Tanzanians want new constitution: Twaweza' available at <https://www.thecitizen.co.tz/news/Demand-for-new-constitution-rekindled/1840340-4146730-p8w225z/index.html> accessed 17th January 2018.

¹⁵⁶ Ibid.

6. CHAPTER SIX

6.0 A CRITICAL ANALYSIS OF THE KEY GAINS OF THE NEW RWANDAN, KENYAN AND TANZANIA'S CONSTITUTIONS IN ADVANCING WOMEN'S PARTICIPATION IN POLITICAL DECISION-MAKING PROCESSES

“Participation and Inclusion ensures not only that individuals are physically present in the Constitutional-making forums, but that they have an effective opportunity to influence the thinking of others.”¹

6.1 INTRODUCTION

An examination of how the Rwandan Arusha Peace Accord, the Constitution of Kenya Review Act (CKRA), and the Constitution Review Act (CRA) facilitated public participation during the making of the 2003 Rwanda Constitution, the 2010 Kenyan Constitution, and the 2014 Proposed Draft Constitution of Tanzania was presented in Chapter Five. It was confirmed that the Arusha Peace Accord, the CKRA, and the CRA provided for the right of public participation in line with Article 25 of the ICCPR. Active participation by Rwandan, Kenyan, and Tanzanian women was observed in every step of the constitution-making processes. Building up from this realization, chapter Six determines whether the participation of women in such constitution-making processes enabled the attainment of the progressive provisions that facilitates among other things, the realisation of equal representation of men and women in parliaments. Specifically, this chapter determines whether the content of the new constitutions reflected the wishes and priorities of the Rwandan, Kenyan, and Tanzanian women. In doing so, the guiding principle number four, which was carried forward from Chapter Five, is discussed. In order to determine if a constitution-making process was real participatory, guiding principle number four requires an in-depth examination of the content of the respective final draft constitutions in relation to how they reflect people's participation, views and recommendations.² To recap, the guiding principles are deduced from

¹ Angela M Banks 'Expanding participation in constitution-making: Challenges and opportunities' 49 *Wm. & Mary L. Rev.* 1043 (2008), available at <http://scholarship.law.wm.edu/wmlr/vol49/iss4/2>.

² The UNWOMEN and International IDEA Guidance Note on Women's Human Rights and National Constitutions, Leadership and Political Participation, (2012), available at <http://www.onu.cl/es/wp-content/uploads/2016/06/Womens-Human-Rights-and-National-Constitutions-Guidance-Note.pdf> accessed on 6 November 2017.

United Nations Guiding Notes in line with Article 25 of ICCPR, Article 7 of CEDAW, and UNHRC General Comment no. 25 as explained in detail in Chapters Two and Five.

6.2 CONTENT OF THE NEW CONSTITUTIONS

In determining the extent that the final content of the new Rwandan, Kenyan, and Tanzanian constitutions provides, promotes and protects women's participation in decision-making processes, this section obtains guidance from criteria deduced from Article 7 (a) and (b) of CEDAW which provides that:

'States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and...'

The UNWOMEN and International IDEA Guidance Note on Women's Human Rights and National Constitutions, Leadership and Political Participation³ expound Article 7 of CEDAW and requires scrutiny of the content of constitutional provisions in relation to how they provide for i) the general guarantees of equality and non-discrimination; ii) a favourable electoral system and modalities for women's participation in decision-making processes; iii) regulation of political parties; iv) the role of the electoral management body in protection and promoting women participation in elections; v) institutions to safeguards women's rights; vi) procedure for amending the new constitutions, and vii) the new constitutions as a basis for progressive electoral reforms.⁴ These criteria are discussed below in understanding the level of women's influence and gains they obtained as a result of their participation in the making of the 2003 Rwanda Constitution, 2010 Kenyan Constitution, and the 2014 Proposed Draft Constitution of Tanzania.

6.3 CONSTITUTIONAL GENERAL GUARANTEES OF EQUALITY AND NON-DISCRIMINATION IN POLITICAL LIFE

For women to have meaningful participation in decision-making processes, principles of equality and non-discrimination against discriminatory traditions among other things, must be established in the nation's constitution. This is because in countries such as Kenya, Rwanda, and Tanzania,

³ Ibid.

⁴ Ibid.

customs, traditions, and public attitudes not only determine how many women are considered and nominated for office, but they have a direct and indirect influence on how many female candidates win a general election.⁵ During the 2003, 2010, and 2014 constitution-making processes in Rwanda, Kenya, and Tanzania respectively, women consistently demanded for prohibitions of discriminatory customs and traditions, which for a long time, have placed them on unequal footing with men, particularly in the decision-making arena. To determine if the 2003 Rwandan Constitution, 2010 Kenyan Constitution, and the 2014 Proposed Draft Constitution of Tanzania have incorporated guarantees of equality and non-discrimination in political life successfully, an assessment has to be made in respect to how such constitutions have incorporated the use of gender-neutral language, clear non-discrimination principles, women's rights-only provisions, prohibitions of harmful customs and traditions, and the role of international law in the nation's legal hierarchy.⁶

a. Equality Guarantees

The use of gender-neutral language has been widely recognized as being hugely important in the struggle for gender equality and normalisation of women being equal in social, economic, and political spheres.⁷ The use of gender-neutral language, such as 'each person', 'both men and women', 'every person' or 'every citizen' features across the wording of the 2003 Rwandan, 2010 Kenyan, and 2014 Tanzanian Proposed Constitutions. The new constitutions also cover the general principles of equality before the law. The preamble to the 2003 Rwandan Constitution sets the country's commitment to gender equality and provides a commitment to ensure equal rights of Rwandan women and men in all aspects. Further, Article 15 establishes general principles of equality before the law, while Article 16 declares that all Rwandans are born and remain equal in rights and freedoms. In Tanzania, Paragraph 1 of the Preamble of the 2014 Proposed Draft Constitution of Tanzania commits the Government of the United Republic of Tanzania (URT) to strive to build a nation guided by principles of human dignity, freedom, human rights, equality of persons and gender equality. In Kenya, Article 27 of the 2010 Kenyan Constitution regards every

⁵ International Institute for Democracy and Electoral Assistance, *Constitution Assessment for Women's Equality*, ISBN: 978-91-7671-049-4, (2016), available at <https://www.idea.int/sites/default/files/publications/constitution-assessment-for-womens-equality.pdf> accessed on 5th February 2018.

⁶ Ibid.

⁷ Suzannah Weiss '7 Gender-neutral terms we should all be using', available at <https://www.bustle.com/p/7-gender-neutral-terms-we-should-all-be-using-9565996> accessed on 15 July 2018.

person as equal before the law with the right to equal protection and equal benefit. Article 27 emphasises that equality includes the full and equal enjoyment of all rights and fundamental freedoms. Beyond the preamble, Article 10 of the 2010 Kenyan Constitution includes equity, social justice, equality, non-discrimination and protection of the marginalised among the national governance values and principles. Similarly, the Tanzanian Proposed Constitution specifically includes gender equality as a governance principle under Article 6 (g)⁸ and it runs through the political, economic, and social development sections. Further, Article 23 (3) of the Kenyan Constitution recognises women and men as having the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Article 59 of the 2010 Kenyan Constitution obliges the Kenya National Human Rights and Equality Commission to, among other things, promote gender equality. In Rwanda, Article 16 provides for protection from discrimination, insisting that all Rwandans are born and remain equal in rights and freedoms.

Furthermore, under equality guarantees criteria, the national constitutions are required to include equality as one of the key principles in applying and interpreting the constitution and other laws, and in making or implementing any policy decisions.⁹ Article 20 (4)(a) of the 2010 Kenyan Constitution lists equality and equity as values to be promoted in interpreting the Bill of Rights and in implementation of rights and fundamental freedoms. Article 21 (3) creates a duty of state actors to address the needs of vulnerable groups in society, including those of women. The right to equality and non-discrimination as expressed in Article 27 of the Kenyan Constitution represents a substantial improvement on the right as previously provided under Article 82 of the 1969 Kenyan Constitution. The Article begins with a guarantee of equality before the law, which guides development and guarantees equality beyond political affiliations. These guarantees were not present in the 1969 Kenyan Constitution.¹⁰

In Rwanda, Article 48 of the 2003 Rwandan Constitution requires equality of people in participation in national development, while Article 55 guarantees equality regardless of political party affiliation. In Rwanda, it is noted that the 2003 Rwandan Constitution provides for more substantive equality provisions compared to Article 16 of the 1991 Rwandan Constitution, which

⁸ Also, the development of the economy is supposed to be guided by principles of equity & equal opportunities to all citizen as provided for under Article 8 (e & g) of the Tanzanian Proposed Constitution.

⁹ International Institute for Democracy and Electoral Assistance op cit note 6.

¹⁰ Further, equality is defined under Article 27 of the Kenyan Constitution including full and equal enjoyment of all rights and freedoms.

provided mainly for a general equality before the law provision, without proper mainstreaming in other provisions. Similar to Rwanda, the 2014 Proposed Constitution of Tanzania stipulates development of the economy to be guided by principles of equity and equal opportunities to all citizen as provided for under Article 8.

The use of gender neutral language and recognition of equality principles in the 2003 Rwandan, 2010 Kenyan, and 2014 Tanzanian Constitutions are the major constitutional gains for Rwandan, Kenyan and Tanzanian women. Gender equality principles in the constitutions help in shifting the mind set about the role of women in the society and provide a strong foundation and for women to take a first step to their greater participation in all sectors of life, including in decision-making processes.

b. Non-discrimination Guarantees

Equality guarantees are often followed by a non-discrimination provision and contain a list of grounds on which discrimination is prohibited, including gender. The Committee on the Elimination of Discrimination against Women¹¹ has consistently recommended that state parties incorporate the definition of ‘discrimination against women’ into their constitutions from Article 1 of CEDAW, which provides:

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The Rwandan, Kenyan, and Tanzanian Constitutions include critical elements of Article 1 of CEDAW in defining discrimination against women as seen in Articles 27 (4) and 16 of the Kenyan and Rwandan Constitutions respectively, and Article 33 (5) of the 2014 Tanzanian Proposed Constitution. Article 16 of 2003 Rwandan constitution provides for protection from discrimination by prohibiting and punishing discrimination of any kind or its propaganda,

¹¹ The Committee on the Elimination of Discrimination against Women (CEDAW) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women. CEDAW Committee consists of 23 experts on women’s rights from around the world. ‘The Committee on the Elimination of Discrimination against Women (CEDAW)’ available at <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>, accessed on 10 February 2018.

including those based on sex.¹² Article 46 calls for all Rwandans to maintain good relations, respect and consideration for their fellow beings without discrimination. Article 55 of the Rwandan Constitution guarantees no discrimination on grounds of membership of a given political organisation, or non-membership of a political organisation. The non-discrimination provisions in the 2003 Rwandan Constitution are more progressive compared to the general blanket provision on equality and non-discrimination provisions provided under Article 16 of the 1991 Rwandan Constitution.¹³ The 2010 Kenyan Constitution also prohibits all forms of discrimination under Article 27 (3, 4 and 5) requiring the state and individuals to forbid direct or indirect discrimination against any person on any grounds, including sex. Articles 12 (a) and 33 of the 2014 Proposed Draft Constitution of Tanzania prohibit all forms of discrimination including sex. Also, Articles 8 and 14 (b) of the Tanzanian Proposed Constitution require national authorities to provide equal opportunities to both women and men, without discrimination. In terms of non-discrimination provisions, the 2010 Kenyan Constitution includes non-discrimination as one of the national values under Article 10, which must be applied in all aspects of life. Further, Article 27 (6) of the 2010 Kenyan Constitution commits the state to take legislative and other measures, such as affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Hence, the Rwandan Constitution, Kenyan Constitution, and the 2014 Tanzanian Proposed Constitution successfully provide and protect the women's right to political participation, by including non-discrimination provisions that are important to safeguard women against discriminatory traditions, customs and beliefs that for a long time have kept women away from electoral decision-making spaces. Changing discriminatory practices takes a long time, but the constitutional provisions to that effect are important to kick start the transition within the Rwandan, Kenyan, and Tanzanian societies towards the countries that are free from discriminatory practises against women.¹⁴

¹² Article 10 of the 2003 Rwanda Constitution, provides for fundamental principles committing Rwanda as a nation to eradicate discrimination and divisionism, promote for equitable power sharing; build a State committed to promoting social welfare and establishing appropriate mechanisms for equal opportunity to social justice; build a State governed by the rule of law.

¹³ Also, Article 16 of the 1991 Rwandan Constitution provided for citizen equality without any discrimination in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status.

¹⁴ As in 2014 percentage of females was measured at 50.09 in Rwanda, 50.03 in Kenya, 50.05 in Tanzania, 50.03 in Uganda according to the World Bank Group, available at <https://data.worldbank.org/indicator/sp.pop.totl.fe.zs> accessed on 13 March 2016.

c. Prohibitions of Harmful Customs and Traditions

As noted in the preceding paragraph, part of the strategy for the attainment of meaningful participation of women in political leadership lies in the explicit prohibition of customary law practices or harmful customs that have been discriminating negatively against women's ability to participate in electoral politics.¹⁵ Under Article 176 of the Rwandan Constitution, unwritten customary law remains applicable provided that it has not been replaced by written law, is not inconsistent with the constitution, laws, and orders, and does not violate human rights or prejudices public security or good morals. Further, Article 47 of the Rwandan Constitution gives the state the obligation to safeguard and promote national culture based on cultural traditions and practices if they do not conflict with human rights, public order and good morals. Article 2 of the Kenyan Constitution established the Constitution as the supreme law of the Republic and binds all persons and all state organs at both levels of government. Further, the Kenyan Constitution declares void any law, including customary law, that is inconsistent with the Constitution, and any act or omission in contravention of Constitution is invalid to the extent of the inconsistency. Article 8 (1) of the 2014 Tanzanian Proposed Constitution obliges the state and its organs to direct their policies and duties to ensure dignity and respect, and all other human rights are preserved and maintained considering regional and international agreements consented to by the United Republic of Tanzania. Customary law has limited women's spaces to participate in decision-making for centuries.¹⁶

d. Specific Provision for Women's Rights

The women's rights clauses are important tools for advancing gender equality. In equality and non-discrimination guarantees, constitutions should contain provisions dedicated to setting out women's rights only in addition to every right elsewhere in the constitution that also applies to women.¹⁷ It is only the 2014 Tanzanian Proposed Constitution that contains specific provision for women's rights. Article 54 of the Tanzanian Proposed Constitution guarantees every woman the right to: i) be respected, valued and their dignity recognised; ii) protection against discrimination, harassment, abuse, violence, sexual violence and harmful traditional practices; and iii) participate

¹⁵ Kadaga R 'Women's political leadership in East Africa with specific reference to Uganda' Tenth Commonwealth Women's Affairs Ministers Meeting 'Women's Leadership for Enterprise' Dhaka, Bangladesh, 17-19 June 2013.

¹⁶ Ibid.

¹⁷ The UNWOMEN and International IDEA Guidance Note op cit note 4.

in elections and all stages of decision-making without discrimination.¹⁸ Specific provisions for women's rights provide for active measures to improve the position of women, which is usually lower in the society, to enable them to achieve gender equality through women's social, economic and political empowerment. The 2003 Rwandan and 2010 Kenyan Constitutions do not cover specific provision on women rights.

e. Gender Equality and Constitutional Status of International Law

The advancement of gender equality is more likely to occur if constitutions incorporate international law, including aspects of international human rights standards.¹⁹ The kinds of constitutional provisions that are most favourable to the full enforcement of international human rights law are those which give international law direct effect and make them take precedence over domestic law in case of conflict or where the international law instruments are more rights-protective.²⁰ Articles 2 (5 and 6) of the 2010 Kenyan Constitution accept the general rules of international laws as part of the law of Kenya.²¹ So any treaty or convention ratified by Kenya forms part of the law of Kenya without needing domestication process. Also, any law, including customary law, and any act or omission in contravention of 2010 Kenyan Constitution is invalid.

Article 95 of the 2003 Rwandan Constitution provides a legal system hierarchy starting with the Constitution followed by organic laws, then international treaties and agreements ratified by Rwanda, international law and ordinary law, and orders. The Rwandan Constitution places the international conventions higher than ordinary laws and orders with the exception that international law is not supreme over the Constitution and other organic laws.²² International treaties and agreements which have been duly ratified or approved have the force of law as national legislation in accordance with the hierarchy of laws provided for under the first paragraph of Article 95 of the 2003 Rwandan Constitution.²³ In Rwanda, a law cannot contradict another law

¹⁸ In women only clause, the 2014 Tanzania Proposed Constitution, continued providing under Article 54: (d) get employment opportunity and be paid the same salary as a man; (e) protection for her employment while she is pregnant and after delivery; (f) get quality medical services including safe reproductive health; and (g) own property.

¹⁹ The UNWOMEN and International IDEA Guidance Note op cit note 17.

²⁰ Ibid.

²¹ Article 18 (5) of the 2010 Kenyan Constitution provides that the general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

²² Organic laws are those designated as such and empowered by the 2003 Rwandan Constitution to regulate other key matters in the place of the Constitution.

²³ Article 168 of the 2003 Rwanda Constitution.

that is higher in hierarchy, hence local laws and orders cannot contradict the international laws, nor can international laws contradict organic laws or the Constitution. In terms of the legal status of treaties, where an international treaty or agreement contains provisions which are conflicting with the Constitution or an organic law, Article 170 of the 2003 Rwandan Constitution directs that the power to ratify or approve the respective international treaty not to be exercised until the Constitution or the organic law is amended. Further, the Rwandan President, under Article 98 of the 2003 Rwandan Constitution, is obliged to ensure continuity of the State's independence and sovereignty of the country and the respect of international treaties.

In Tanzania, signing or ratification of any international convention does not automatically place it at the same level as the Constitution or any other national laws. However, Article 14 (1) of the 2014 Tanzanian Proposed Constitution ensures that human dignity is preserved and maintained in accordance with the customs, traditions and regulations of the Universal Declaration of Human Rights and other international conventions adopted by Tanzania. Further, Article 8 (1) of the 2014 Tanzania's Proposed Constitution obliges the state and its organs to direct their policies and duties to ensure that dignity, respect and all other human rights are preserved and maintained considering different agreements to which the United Republic of Tanzania has consented. The Foreign Policy of the United Republic of Tanzania aims to safeguard national interests and full state sovereignty and requires that the policy shall be implemented with transparency in order to respect international laws, observe international and regional treaties which are beneficial to the United Republic, and to resolve international conflicts through dialogue.²⁴ Article 62 (1) also requires the judiciary or any other agency to observe international laws and human rights in interpreting the provisions of the Constitution regarding human rights. While in Kenya, international laws are literally on equal footing with its Constitution, in Rwanda, the Constitution and organic laws are superior to international law. On the other hand, the Tanzanian Proposed Constitution just commits to observe international law in promoting human rights, rendering justice, and implementing public policy, but the international laws do not have equal weight or take precedence over national laws. For Kenya, the automatic application of international laws at equal footing with national laws, imply that international conventions, such as the ICCPR, CEDAW, African Charter, and Maputo Protocol automatically apply, promote and protect the

²⁴ Article 21 (1) of the 2014 Tanzanian Proposed Constitution.

Kenyan women. As such, women have liberty and can easily access local courts in case provisions of any international laws regarding women are infringed, something which effectively enhances recognition, protection, and promotion of women's rights, including the right to take part in decision-making processes.²⁵ For Rwanda and Tanzania, the recognition and consideration of the international conventions in the national jurisdiction depict the great influence these conventions can have on the conduct of state, civil, and political affairs. However, proper respect and implementation of international conventions or covenants call for their automatic application in national jurisdiction. Generally, the recognition and application of international law and standards in the 2003 Rwandan, the 2010 Kenyan and the 2014 Tanzanian Proposed Constitutions are paramount to counter laws, policies, customs and traditions that have side-lined women's participation in decision-making processes for ages.

6.4 ELECTORAL SYSTEM AND MODALITIES FOR WOMEN'S PARTICIPATION IN DECISION-MAKING PROCESSES

The electoral system calculates the number of elected positions into government that individuals and parties are awarded after elections.²⁶ Electoral systems translate votes into government and parliamentary seats. The type of electoral system has a profound impact on women's political representation.²⁷ Generally, electoral systems around the world can either be a system of plurality, proportional representation or mixed systems.²⁸ Plurality electoral systems are also known as first-past-the-post, the majority or the winner-takes-all system. Under the first-past-the-post system, an individual candidate with the most votes wins the election. The candidate does not have to get a majority (50%+) of the votes to win; if he or she has a larger number of votes than all other candidates, he or she is declared the winner.²⁹ On the contrary, in proportional representation, the

²⁵ The UNWOMEN and International IDEA Guidance Note op cit note 19.

²⁶ King C 'Electoral Systems' (2000), available at http://faculty.georgetown.edu/kingch/Electoral_Systems.htm accessed on 13 November 2018.

²⁷ International Institute for Democracy and Electoral Assistance op cit note 9.

²⁸ Ibid. Different aspects that characterize these electoral systems can substantially influence women's electoral chances: the electoral formula used to translate votes into seats; the district magnitude, or number of seats available for election in a district; and the ballot structure — that is how voters are allowed to express their preferences among candidates or political parties.

²⁹ Majority electoral systems are also referred to as "second ballot" systems, requiring that candidates achieve a majority of votes in order to win. "Majority" is normally defined as 50% -plus-one-vote. If no candidate gets a majority of votes, then a second round of voting is held. In the second round of voting, only a select number of candidates from the first round are allowed to participate. The top two vote-getters in the first round move on to the second round. King C op cit note 26.

percentage of offices awarded to candidates should reflect the percentage of votes as closely as possible.³⁰ Proportional representation operates on party lists and voters normally vote for parties rather than for individual candidates.³¹ Countries that use mixed systems apply both the first-past-the-post and the proportional representation electoral system in different ways. It is noted that a majoritarian electoral system is not suitable for facilitating women's representation in parliaments.³² This is because the underlying customs and beliefs that inform political parties and voters assume that women cannot make strong and acceptable candidates. This notion affects the chances of women to be elected as candidates as their political parties have mostly male-dominated party structures.³³ Under the first-past-the-post system, voter selection is candidate-centred, as opposed to party-orientated. As such, political parties and voters are more likely to support candidates viewed as safe and mainstream, which exclude women who may be perceived as a riskier choice.³⁴ However, there is a broad consensus in the literature that the proportional representation system creates less obstacles to women's representation.³⁵ This is because parties are able to use the lists to promote the advancement of women politicians, and allow voters to elect women candidates without being influenced by other concerns such as the gender of the candidate.³⁶

The Rwandan, Kenyan, and Tanzanian women's priorities for the new constitutions includes, among other things, the need for specific constitutional stipulations that would facilitate the realisation of equal representation of men and women in all decision-making processes. In Tanzania for example, it was named as the fifty-fifty agenda calling for a constitutionally stipulated process that will lead to equal numbers of men and women in all decision-making processes. In line with women recommendations, the 2003 Rwandan constitution, 2010 Kenyan constitution,

³⁰ Ibid. Proportional representation is the most widely used set of electoral systems in the world, and its variants can be found at some level of government in almost every country (including the United States, where some city councils are elected using forms of PR).

³¹ Ibid. Party list can be either closed, where voters vote only for a particular party, and parties determine who will fill the seats that they have been allocated. Party list can also be open where voters have some degree of choice among individual candidates, in addition to voting for entire parties.

³² Ibid.

³³ The Inter-Parliamentary Union's annual study on 'Women in Parliament' in 1995 found that on average women made up 11 per cent of the parliamentarians in established democracies using FPTP, but the figure almost doubled to 20 per cent in those countries using some form of Proportional Representation.

³⁴ International Institute for Democracy and Electoral Assistance op cit note 27.

³⁵ King C op cit note 30.

³⁶ ACE Project 'Advantages of Proportional Representation,' available at <http://aceproject.org/main/english/es/esf02a.htm> accessed on 18 January 2018.

and the 2014 Tanzanian Proposed Constitution included political rights and civil liberties, specifically providing for voting rights and the right to stand for election. Also, through equality and non-discrimination provisions, the constitutions have set a broader context for political gender equality and participation in parliaments.

For the matter of electoral systems, it is noted that the systems in Rwanda, Kenya, and Tanzania take the form of either first-past-the-post, proportional representation or a mixed system. For the purpose of promoting women's participation in electoral politics, countries are encouraged to compliment the general electoral system, with temporary special measures, such as quotas for women.³⁷ In Rwanda, Article 75 of the 2003 Constitution provides for proportional representation as the main electoral system governing Rwanda's election.³⁸ It requires the composition of the Chamber of Deputies and election of its members to include twenty-four women elected by specific electoral colleges through the party's list, and further requires that at least 30 per cent of deputies should be women.³⁹ The 2003 Rwandan Constitution brought dramatic gains in the numbers of women in the Parliament because until the end of the 1994 genocide, women in Rwanda did not hold more than 18 per cent of the Parliamentary seats.⁴⁰ After the adoption of the 2003 Constitution, the first post-genocide parliamentary elections⁴¹ ushered women into the legislature in great numbers by the appointment of women to 30 per cent of the legislative posts.⁴² In addition to the 24 set-aside seats in the Chamber of Deputies, there was an additional 15 per cent of women elected in openly competed seats, making a total of 39 out of 80, or 48.8 per cent

³⁷ Chauve C 'Promoting women's political representation and effective participation in Parliament' (2014), available at <file:///C:/Users/User/Downloads/Promoting%20Womens%20Political%20Representation.pdf> accessed on 15 December 2018.

³⁸ As per the 2003 Rwandan Constitution, 53 deputies elected from a fixed list of names of candidates proposed by political organisations or independent candidates elected by direct universal suffrage based on proportional representation.

³⁹ Article 80 of the 2003 Rwanda Constitution requires organs responsible for the nomination of Senators to take into account national unity and the principle of gender equality, and further provides for the composition of senate and requires that at least 30 per cent of elected and appointed Senators must be women.

⁴⁰ During the nine-year period of the post-genocide transitional Government from 1994-2003, women's representation reached 25.7 per cent in the unicameral Parliament (by appointment). UNWOMEN, Revisiting Rwanda five years after record-breaking parliamentary elections, (2018) accessed from <http://www.unwomen.org/en/news/stories/2018/8/feature-rwanda-women-in-parliament> accessed on 18 January 2018.

⁴¹ It was conducted in October 2003.

⁴² Ibid. There were 80 members serving five-year terms, 53 of whom are directly elected to represent political parties in a proportional representation system. The 24 seats that were reserved for women are contested in women-only elections; that is, only women can stand for election and only women can vote. Two were elected by the National Youth Council, and one is elected by the Federation of the Associations of the Disabled.

of seats for women.⁴³ The number of women in parliament increased to 56.3 per cent following the 2008 election, making Rwanda the world's leading country on representation by women in parliament. Rwanda broke its own record in the 2013 election when the number of women in parliament further increased to 63.8 per cent (+59.5 points higher than in 1995).⁴⁴ The percentage of women in the Rwandan parliament fell slightly from 63.8 per cent to 61.2 per cent following the 2017 legislative elections⁴⁵ but Rwanda will remain the leading country with most women in Parliament followed by Cuba and Bolivia.⁴⁶ The high percentage of women in the Rwandan Parliament reflects years of campaigning during the post-genocide transitional period by women's organizations and lobbies, who successfully influenced the way in which the new constitution was framed.

In Kenya, the main electoral system is first-past-the-post, however proportional representation is also used. The National Assembly has 350 members of whom 290 are elected in single-member constituencies and 47 are reserved for women, based on the 47 defined counties.⁴⁷ Proportional representation is used to decide on the remaining 13 seats including the 12 proportionally nominated by political parties based on their number of seats and a speaker. The

⁴³ Ibid. The Rwandan government, specifically the ruling Rwandan Patriotic Front, has made women's inclusion a hallmark of its programme for post-genocide recovery and reconstruction. The Government's decision to include women in the governance of the nation is based on a number of factors. The policy of inclusion owes much to the RPF's exposure to gender equality issues in Uganda, where many members spent years in exile. Uganda uses a quota system to guarantee women's participation; in its Parliament, one seat from each district is reserved for a woman. Men and women in the RPF were familiar with this system, as they were with the contributions and successes of women in South Africa's African National Congress (ANC), and drew on these models. Within the RPF's own ranks, too, women played a significant role in the movement's success from the RPF's early days as an exile movement through the years of armed struggle. Such involvement provided them a platform from which to advocate for women's inclusion during the transitional phase and to consolidate those gains in the new constitution. For example, the first Minister of Women's Affairs after the genocide, Aloisea Inyumba, had been the Commissioner of Finance for the RPF. She is considered by many Rwandans to be the "founding mother" of gender issues in post-genocide Rwanda. Lieutenant Colonel Rose Kabuye, the highest-ranking woman in the Rwandan army and a veteran of the RPF movement, explained the involvement of women this way: "It started in Uganda, with the beginning of the [RPF's] struggle ... men did not start alone. Because women were part of what was going on, the men started cooperating ... It spread like that ... women took [on] very big responsibilities".

⁴⁴ Inter-Parliamentary Union (IPU) 'Rwanda: Presidential elections 2017, women in parliament: 20 years in review' (2015) - ISSN 1993-5196, available at <http://archive.ipu.org/pdf/publications/WIP20Y-en.pdf> accessed on 30 January 2018.

⁴⁵ The UNWOMEN and International IDEA Guidance Note op cit note 25.

⁴⁶ Cuba has 53.2 per cent women in Parliament and Bolivia has 53.1 women parliamentarians. Edmund Kagire 'Number of women MPs in Rwanda drops slightly', available at <https://www.theeastafrican.co.ke/news/ea/Number-of-women-MPs-in-Rwanda-drops-slightly/4552908-4750160-ogix9p/index.html> accessed on 30 January 2018.

⁴⁷ NDI 'Record number of women elected in Kenya's 2017 general elections, but women's representation remains low' (2018) available at <https://www.ndi.org/our-stories/record-number-women-elected-kenya-s-2017-general-elections-women-s-representation> accessed on 30 January 2018.

Senate has 68 seats, of which 47 are elected from single-member constituencies based on the counties using first-past-the-post, and the remaining 21 are appointed.⁴⁸ Sixteen women are proportionally appointed based on the party's seat votes. Article 81 (b) refers specifically to the general principles of Kenya's electoral system. It states that "the electoral system shall comply with the following principle... (b) not more than two-thirds of the members of elective public bodies shall be of the same gender." The government is obliged by Article 27 to develop and pass policies and laws, including affirmative action programmes and policies to address the past discrimination that women faced.⁴⁹ The Kenyan Constitution under Article 27 extends the quota system beyond legislative bodies. The state is obliged to 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.⁵⁰ Although the application of the two-thirds rule has posed strong implementation challenges as will be explained in Chapter Seven, it has been key in increasing the number of women in Kenyan electoral politics from 7.5 per cent in 2011 to 19 per cent in 2013. After the 2017 elections, women accounted for 21.8 per cent of the National Assembly and Senate.⁵¹ This is progress for Kenya, given that Kenya had limited participation of women in Parliament since its independence in 1963. For instance, women held only 1.2 per cent of the Kenyan Parliament until 1970. This increased to 4.1 per cent after the 1974 election but dropped again to 2.4 per cent in 1979. It later dropped to 1.8 per cent after the 1983 election and

⁴⁸ Ibid.

⁴⁹ This represents a substantial improvement on the previous 1963 independence constitution which made no reference to positive or affirmative action measures.

⁵⁰ The 2010 Kenyan Constitution provided for membership of the National Assembly as follows: Article 97. (1) 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; (2) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a). Membership of the Senate is also provided under article 98. (1) The Senate consists of — (a) forty-seven members each elected by the registered voters of 60 Constitution of Kenya, 2010 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; and (e) the Speaker, who shall be an ex officio member. (2) The members referred to in clause (1) (c) and (d) shall be elected in accordance with Article 90. (3) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a). Membership of the National Assembly. Despite Article 177 ensuring that Articles 81(b) and 27 (8) of the Kenyan Constitution are complied with at the county level through the nomination of special seat members, the same is not guaranteed at the National Assembly and the Senate, making the two-thirds rule the most suffering provision in terms of implementation since the adoption of the 2010 Kenyan Constitutions.

⁵¹ 'Women in national parliaments as in December 2018' available at <http://archive.ipu.org/Wmn-e/world.htm> accessed on 5 January 2019.

further to 1.5 per cent in the 1988 election. Women held 3.5 per cent of the parliamentary seats after the 1992 election and the 1997 election reflected 3.6 per cent women in parliament. The 2002 general election results released by the Electoral Commission of Kenya (ECK) showed more women had participated in electoral politics than at any other time since the 1963 independence, resulting in an increase of 8.1 per cent.⁵² Hence, the current 21.8 per cent of women in the Kenyan Parliament depict a great contribution by the 2010 Kenyan Constitution. The 2010 Kenyan Constitution further mandates all appointed and elected bodies to contain at least one-third of women. Despite this achievement, women's representation in electoral decision-making positions in Kenya still falls short of the constitutional threshold as will be explained in detail in Chapter Eight of this thesis.⁵³

In Tanzania, during the making of the 2014 Proposed Constitution, Tanzanian women demanded, among other things, for provisions that would accelerate the realisation of equal participation of men and women in all decision-making processes. The 2014 Tanzanian Proposed Constitution provides for the first-past-the post electoral system to govern presidential and parliamentary elections. The Proposed Constitution also did away with the parliamentary quota system popularly referred as women special seats, which was introduced in Tanzania in 1985 by the 1977 Constitution of United Republic of Tanzania. As an alternative to a parliamentary quota, the 2014 Proposed Constitution called for equal representation of men and women in Parliament through Article 124 (4). However, this Article is silent on the modalities for attainment of equal representation of men and women, but obliges the Parliament under Article 124 (6) to enact legislation to classify the procedure of implementation of Article 124.⁵⁴ As noted in Chapter One, the 2014 Tanzanian Proposed Constitution is not yet a governing Constitution of the United Republic of Tanzania given that the referendum for its ratification is postponed endlessly.

⁵² Kasomo D 'Factors affecting women participation in electoral politics in Africa' (2012) *International Journal of Psychology and Behavioral Sciences*.

⁵³ NDI op cit note 48.

⁵⁴ The explanation from the Constitutional Review Commission entails that each party will have to have both male and female candidates in a constituency, hence once that party wins, both male and female candidate have won. On the other hand, the 1977 Constitution of Tanzania uses the mixture of both first-past-the-post electoral system in the presidential and parliamentary elections and Proportional representation which is used to allocate women seats, the seats for women are distributed among the political parties in proportion to the total number of votes they received as a party. To qualify to offer a special seat candidate, the political party must have at least five per cent of the total parliamentary votes. Meena R 'Women participation in positions of power and influence in Tanzania' available at http://www.redet.udsm.ac.tz/documents_storage/2009-8-19-11-34-23_womenparticipationinpositionsofpower.pdf accessed on 14 March 2016.

However, its analysis is still useful in understanding the progress that Tanzania has made in terms of opening constitution-making processes to the public, its contribution towards the attainment of equal representation of men and women in Tanzania is minimal. At the same time, Chapter Four notes that before the unsuccessful attempt to rewrite the 2014 Tanzanian Proposed Constitution, the 1977 Constitution had undergone several amendments, which contributed to an increase in the number of women in the Tanzanian Parliament. The first post-independence Tanzanian Parliament (1962-1965) contained only 7.5 per cent of women, the number was maintained below 10 per cent until 1985.⁵⁵ In 1985, constitutional reform introduced a parliamentary quota system comprising 15 per cent and 25 per cent of seats in Parliament and local councils respectively.⁵⁶ This constitutional amendment increased the percentage of women in parliament to 16.5 after the 1995 election. The Beijing Declaration⁵⁷ and the Southern African Development Community (SADC) Declaration⁵⁸ required a benchmark of 30 per cent female representation in parliaments. To comply with the SADC Declaration, Tanzania amended its constitution to increase the parliamentary percentages of special seats to 20 per cent in 2000 and later to 30 per cent of women in 2005.⁵⁹ The 2005 elections increased the percentage of women in Parliament from 21.5 per cent to 30.3 per cent, which increased to 35 per cent after the 2010 election.⁶⁰ The number further increased to 37.18 per cent after the 2015 election, where 30 per cent of women are appointed through special seats while 7.1 per cent are from constituencies after winning competitive elections.⁶¹ Despite facing a milliard of challenges as explained in detail in Chapter Eight, special seats arrangement has helped Tanzania become a keen promoter of female political participation with more than 37.2 per cent in the current parliament.⁶²

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ 'Fourth World Conference on Women in Beijing China' available at <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm> accessed on 27 May 2016.

⁵⁸ SADC signed the Declaration on Gender and Development on 8th September 1997 at Blantyre, Malawi to promote closer regional cooperation and collective action as a means of fostering gender equality. Available at https://www.sadc.int/documents-publications/show/Declaration_on_Gender_Development_1997.pdf accessed on 15 February 2018.

⁵⁹ Article 66-1(b) of the 1977 Constitution of United Republic of Tanzania.

⁶⁰ Ibid.

⁶¹ 30 per cent comes from special seats arrangement and only 7.18 per cent are directly elected. United Republic of Tanzania Bunge (National Assembly), available at <http://archive.ipu.org/parline/reports/2337.htm> accessed on 1 May 2018.

⁶² 'Women in national parliaments as in December 2018', available at <http://archive.ipu.org/Wmn-e/world.htm> accessed on 5th January 2019.

Finally, another way an electoral system can promote women's political participation is by allowing independent candidates. Article 75 of the Rwandan Constitution, and Article 99 of the Kenyan Constitution allow independent candidates. In Tanzania, the Women's Coalition pressed strongly for independent candidates given the male dominated nature of Tanzanian political parties.⁶³ As a departure from the 1977 Constitution, Article 135 of the 2014 Tanzania's Proposed Constitution also allows private candidates. This is an important gain for women as it opens more doors for candidacy in electoral positions and it diversifies political parties as the only option and gate keepers in determining electoral candidates.

6.5 THE RESPONSIBILITY OF POLITICAL PARTIES TO ADVANCE GENDER EQUALITY

Political parties are the 'gatekeepers' for anyone to be elected to office. Therefore, how they function internally and whether women can gain leadership positions within parties is crucial.⁶⁴ Although women play important roles in campaigning and mobilising support for their parties, they rarely occupy decision-making positions in political party structures.⁶⁵ The constitutions may regulate political parties through a prohibition on sex discrimination in parties' membership, a requirement to include women in party decision-making structures, and nomination and candidates lists.⁶⁶ For parties to fulfil their critical functions of aggregating and expressing the political interests of different public spectrums, women must be able to take part in setting the priorities and agendas of parties.⁶⁷ Article 55 of the Rwandan Constitution provides for freedom to join a political party granting every Rwandan a right to join a party of his or her choice, or not to join any. The Constitution guarantees no discrimination against any Rwandan on grounds of membership or non-membership of a political party. Having recognised that the two are not mutually exclusive but mutually reinforced, Article 56 of the 2003 Rwandan Constitution obliges

⁶³ Meena R op cit note 56.

⁶⁴ United Nations Division for the Advancement of Women (DAW), Department of Economic and Social Affairs (DESA), Economic Commission for Africa (ECA), Inter-Parliamentary Union (IPU) 'Equal participation of women and men in decision-making processes, with particular emphasis on political participation and leadership' (2005) Report of the Expert Group Meeting Addis-Ababa Ethiopia 24 – 27 October 2005. Available at <http://www.un.org/womenwatch/daw/egm/eql-men/FinalReport.pdf> accessed on 17 November 2018.

⁶⁵ Many parties have women's units (women's wings), and although they can play a role in the party, their influence on party decisions can be limited. Women should also be integrated into party structures, including key decision-making bodies. International Institute for Democracy and Electoral Assistance op cit note 34.

⁶⁶ United Nations Division for the Advancement of Women (DAW), Department of Economic and Social Affairs (DESA), Economic Commission for Africa (ECA), Inter-Parliamentary Union (IPU) op cit note 64.

⁶⁷ Ibid.

political organizations to reflect the unity of Rwandans as well as equality and complementarity of men and women in the recruitment of members, in establishing their leadership organs, and in their functioning and activities.⁶⁸ In Rwanda, political parties are required to ensure that at least 30 per cent of the party candidates are female.⁶⁹ Regulating political parties is one of the contributing factors for the highest female representation in Rwandan decision-making positions, which is currently at 61 per cent of the entire Parliament.⁷⁰ It is noted that with regard to mainstreaming equality across the party, political parties are reluctant to change and as such, constitutional provisions regulating political parties need to include sanctions in case of breach. Article 58 of Rwandan Constitution holds any political organization that violates obligations that are stipulated under Articles 10, 56 and 57 accountable. Depending on the gravity of the violation identified, the political organisation may face a formal warning, suspension of its activities for a period not exceeding two years, suspension of its activities for the entire parliamentary term, or cancellation of the certificate of registration of a political organisation.⁷¹

In Kenya, Articles 51 (e), (f) and 91 of the 2010 Kenyan Constitution require every political party to respect the right of all persons to participate in the political process, including minorities and marginalised groups; and to respect and promote human rights and fundamental freedoms, gender equality and equity. Further, Article 92 calls for specific legislation regulating political parties. In 2011, the Kenyan Political Parties Act came into existence to regulate formation and operation of political parties in Kenya.⁷² In Tanzania, for the first time, the 2014 Proposed Constitution requires political parties to adhere to the gender equality principle in leadership positions as a condition for registration.⁷³ Although the 2014 Tanzanian Proposed Constitution is not in force, its influence is noticeable. Though tainted with many shortcomings and facing an

⁶⁸ In Rwanda, Political organisations are called to abide by the Constitution and other laws. Article 57 of the 2003 Rwandan Constitution further prohibits political organisations from basing themselves on race, ethnic group, tribe, lineage, region, sex, religion or any other division which may lead to discrimination.

⁶⁹ Article 56 of the 2003 Rwandan Constitution.

⁷⁰ UNWOMEN ‘Revisiting Rwanda five years after record-breaking parliamentary election’ (2018) available at <http://www.unwomen.org/en/news/stories/2018/8/feature-rwanda-women-in-parliament> accessed on 23 December 2018.

⁷¹ Article 58 of Rwandan Constitution.

⁷² In Kenya, Article 84 of the 2010 Kenyan Constitution obliges candidates and political parties to comply with a code of conduct prescribed by the Independent Electoral and Boundaries Commission. The code of conduct amplifies key do’s and dont’s from the Political Parties Act.

⁷³ (see Article (224) (2)(e).

outright objection,⁷⁴ the 2019 amendments to the Political Parties Act⁷⁵ requires political parties to comply with the principles of gender equality in the a) formulation and implementation of its policies, b) nomination of candidates for elections and c) election of its leaders. This provision, if implemented, is expected to change the parties' internal leadership structures as currently all major political parties such as the Revolutionary Party (CCM), the Party for Democracy and Development (CHADEMA), the Civic United Front (CUF) and Alliance for Change and Transparency (ACT-Wazalendo) have male politicians in their key leadership positions.⁷⁶ Generally, the constitutional regulations of political parties are important in influencing the behaviour of political parties, which in many ways are the gatekeepers of who gets the constituency candidacy. Having women in the top leadership positions of the political parties will have a multiplier effect on how nomination rules facilitate more women as electoral aspirants and candidates.

6.6 THE ROLE OF INDEPENDENT AND SUPPORTIVE ELECTORAL COMMISSION

A nation electoral commission should be mandated to oversee compliance regarding guarantees of women's participation in electoral politics.⁷⁷ For the electoral commission to facilitate women's participation in electoral politics, it must adopt gender sensitive guidelines and rules to govern the conduct of elections. The composition of the members of a commission and staff must also reflect equality.⁷⁸ Article 211 of the 2014 Tanzanian Constitution establishes the Independent Electoral Commission. However, Article 211 is silent on the promotion of women's participation in terms of composition of the members of the commission and in elections. In Tanzania, the 2015 elections observed the National Election Commission (NEC) and the Zanzibar Election Commission (ZEC)

⁷⁴ Available at <https://www.africanews.com/2018/12/17/inside-tanzania-s-repressive-amendments-to-political-partiesact/>. <https://www.thecitizen.co.tz/News/Movement-seeks-to-thwart-amendment-of-Political-PartiesAct/1840340-4884988-30mptgz/index.html> accessed on 4 March 2019.

⁷⁵ The Political Parties Amendment Act was passed by the government on 29 January 2019, assented to by the President on 13 February 2019, advertised in Government Gazette on 22 February 2019. The new PPA Amendment supplements the Political Parties Act [CAP 258 R.E. 2002], and the two should be read together as one.

⁷⁶ In Chama cha Mapinduzi, Chairman, vice chairman, party secretary, and party's spokesperson are all men (Hon. President John Magufuli, Philip Mangula, Bashiru Ally, and Humphrey Polepole respectively). The main opposition party leadership chairman, vice chair, party secretary, party spokesperson are all men (Freeman Mbowe, Abdallah Safari, Vicent Mashinji, and Tumaini Makene respectively). Both Party leader (Zitto Kabwe) and deputy party leader (Haji Duni) for ACT-Wazalendo are men.

⁷⁷ For example, Article 91(g) of the Constitution of the Republic of Burundi 2005 requires the independent national electoral Commission to "assure the respect for the provisions of this Constitution relative to multi-ethnicity and to gender and to take cognizance of the claims in this respect." In addition, constitutions may provide for gender balance in the staffing of such commissions.

⁷⁸ The UNWOMEN and International IDEA Guidance Note op cit note 45.

incorporating gender policies in the election observer guidelines, voter education guidelines, and the code of ethics for political parties.⁷⁹ Additionally, it is worth noting that ZEC adopted and committed to implement an elections gender inclusion strategy that was developed in coordination with other promoters of women's participation in electoral politics stakeholders.⁸⁰ Despite a great level of resistance, the political parties guidelines and code of ethics were useful documents for NEC and ZEC to think more systematically about the inclusion of women by political parties in elections.

Through the 2010 Kenyan Constitution, the Independent Electoral and Boundaries Commission (IEBC) was established with the responsibility of conducting or supervising referenda and elections of any elective body or office and any other elections as prescribed by an Act of Parliament. The IEBC adopted the regulation that significantly subsidized nomination fees — half of the full nomination fee — for female candidates. This was a relief for women who could not afford to pay for electoral expenses. Furthermore, the constitutional requirement that the chair and vice-chair of all constitutional commissions and independent bodies cannot be of the same gender ensures the presence of women in IEBC. The National Electoral Commission of Rwanda was established under Article 139 of the 2003 Rwandan Constitution. The Commission supports women's participation in elections by ensuring that the political parties comply with the constitutional gender principles in their party lists. The Rwandan electoral commission has implemented the gender related provisions as enshrined in the 2003 Constitution, and other electoral laws without failing, making it one of the key reason why Rwanda has the most women in decision-making positions worldwide.

6.7 INSTITUTIONS TO SAFEGUARDS WOMEN'S RIGHTS

The new constitutions should incorporate additional enforcement mechanisms or bodies tasked to mainstream, promote and enforce women's rights, including political rights.⁸¹ Through Article 59 (g) (1) of the 2010 Kenyan Constitution, the Kenya National Human Rights and Equality Commission was established. Its function included to act as the principal organ of the state in

⁷⁹ With support from the Democratic Empowerment Project, NEC managed to entrench gender provisions in the key election guidelines, 'International Republic Institute, Tanzania National Elections Gender Assessment'(2016) available at https://www.iri.org/sites/default/files/wysiwyg/tanzania_gender_report.pdf accessed on 16 February 2018.

⁸⁰ Ibid.

⁸¹ The UNWOMEN and International IDEA Guidance Note op cit note 78.

ensuring compliance with obligations under treaties and conventions relating to human rights. The commission also functions to promote respect for human rights and the promotion of gender equality and equity generally, and to coordinate and facilitate gender mainstreaming in national development.⁸² The Rwandan Constitution established the National Council of Women and Gender Monitoring Office (GMO)⁸³ to monitor, advise and advocate for gender equality in all institutions in the country.⁸⁴ The office undertook the role to monitor progress towards gender equality effectively. Moreover, the office is responsible to: i) develop understandable performance indicators and a monitoring and evaluation system in line with priority areas; ii) conduct periodic gender impact studies and propose strategies to relevant institutions to enhance the promotion of gender equality; and iii) advise different institutions to respect the principles of gender equality at all levels and be accountable. One important instrument for promoting women's issues is the Women's Councils that stretched from the bottom up in Rwandan society as a way of putting forward gender issues. The councils are also responsible for selecting female candidates for election.⁸⁵ On the side of Tanzania, the Proposed Constitution provides for the duties and functions of the Commission for Human Rights and Good Governance to include the sensitisation of the public about the preservation of human rights. The Constitution further provides for duties to the public to promote, protect, and monitor implementation of gender equality.⁸⁶ Generally, in Rwanda, there is an independent body to oversee women's rights while in Tanzania and Kenya, women's rights are promoted through the human rights and good governance commissions. These commissions help to promote gender equality through promotion of public policy that effectively responds to women's demands and interests.⁸⁷ It is noted, however, that while women's rights are human rights, there is a danger for women's rights to be monitored by the body that generally

⁸² Article 59 (g) (1) of the 2010 Kenyan Constitution.

⁸³ UNWOMEN, Gender Monitoring Office, available at <http://evaw-global-database.unwomen.org/en/countries/africa/rwanda/2008/gender-monitoring-office-2008>, accessed on 5th August 2018.

⁸⁴ Report on the implementation of the Beijing Declaration and Platform for Action (1995) and the outcomes of the Twenty-Third Special Session of the General Assembly (2000), available at https://www.uneca.org/sites/default/files/uploaded-documents/Beijing20/NationalReviews/natl_review_rwanda_-_eng.pdf accessed on 22nd March 2017.

⁸⁵ Ibid.

⁸⁶ Article 232 (1) of the 2014 Proposed Constitution.

⁸⁷ Chauve C op cit note 37.

oversees human rights. When this happens, women's rights get its share in planning but always suffers implementational oversight.⁸⁸

6.8 PROCEDURES FOR AMENDING THE NEW CONSTITUTIONS

The new constitution must provide the procedure for its amendment which helps to determine safeguards around unscrupulous amendments and alterations.⁸⁹ It is noted that there is a great shift from the independence constitutions in terms of giving power to the people to determine the type of amendments they want. Articles 175, 129, and 256 of the 2003 Rwandan, 2010 Kenyan Constitutions and of the 2014 Tanzanian Proposed Constitution respectively provide for amendment procedures. In Rwanda, the power to initiate an amendment or revision of the Constitution is vested in the President of the Republic after approval by Cabinet, or in each Chamber of Parliament through a two-thirds majority vote of members. Also, the amendment or revision of the Rwandan Constitution requires a three-quarters majority vote of the members of each Chamber of Parliament. However, if the amendment concerns the term of office of the President of the Republic or the system of democratic government based on political pluralism, or the constitutional regime established by the Constitution, especially the republican form of the government and national sovereignty, then the amendment must be passed by referendum after adoption by each Chamber of Parliament. With respect to Rwanda, it is noted that people's involvement in the constitution-making process can also be used contrary to the principles of undertaking constitutional reforms. The most recent referendum was witnessed in 2015. A two-year process to secure a constitutional amendment to the 2003 Constitution to reduce years of Presidential terms, and allow Rwandan President Kagame to run for a third term and grant him a possibility to stay in power until 2034 obtained 98.3 per cent voter approval during referendum.⁹⁰ In Tanzania, Article 129 (1) of the 2014 Tanzanian Proposed Constitution allows the Parliament to enact laws to facilitate constitutional changes, when the Bill to amend the constitution is supported by two thirds of all Members of Parliament. Any amendment has to be approved by more than half of the valid votes casted by the citizens of the Tanzania Mainland, and more than

⁸⁸ The UNWOMEN and International IDEA Guidance Note op cit note 81.

⁸⁹ Brian K Landsberg 'Safeguarding constitutional rights: The uses and limits of prophylactic rules (1999) 66 *Tenn. L.Rev.* 925, 926.

⁹⁰ Filip Reyntjens 'The changes made to Rwanda's constitution are peculiar – here's why' (2016) available at <http://theconversation.com/the-changes-made-to-rwandas-constitution-are-peculiar-heres-why-53771> accessed on 17 March 2018.

half of the valid votes casted by the citizens of Tanzania Zanzibar in a referendum.⁹¹ In Kenya, an amendment to the Constitution is enacted either by Parliament, in accordance with Article 256 or by the people and Parliament. However, any amendment of the Constitution has to be approved by a referendum. Also, at least 20 per cent of the registered voters in each of at least half of the counties vote in the referendum and the amendment is supported by a simple majority of the citizens voting in the referendum. Article 257 of the 2010 Kenyan Constitution allows an amendment of the Constitution by a popular initiative when it is signed by at least one million registered voters. A popular initiative for an amendment to the Kenyan Constitution may be in the form of a general suggestion or a formulated draft Bill.⁹²

The new provisions on amendments of the Constitution depict a great shift from the Independence Constitutions namely, the 1962 Rwandan Constitution, 1993 Kenyan Independence Constitution of 1963, and the Interim Constitution of Tanzania, 1965. The independence constitutions vested the constitutional amendment power in a few government elites and the parliament, mirroring the powers that the governor, secretary of state and colonial parliament had during the colonial constitution formations processes as provided under the East African and Tanganyika Order in Council.⁹³ According to the 2010 Kenyan Constitution and 2014 Tanzanian Proposed Constitution, any amendment has to be ratified by the people through a referendum. Also, in Kenya, the people themselves can initiate constitutional amendment, a feature that is missing in the Rwandan Constitution, the 1977 Tanzanian Constitution and the 2014 Proposed Constitution. It is important for the constitutional alterations powers to shift from a few political elites to the members of the public. This gives confidence that the rights enshrined in the constitution including the right to women political participation have some level of protection. On the other hand, it depicts difficulties in amending the constitution even when the intention is to obtain further and better provisions to promote and protect marginalised groups, including women.

⁹¹ The referendum shall be conducted and managed by the Independent Electoral Commission in accordance with the law. Jesse James 'The constitution-making process in Tanzani,' (2013) *Legal and Human Rights Centre*

⁹² Ibid. If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill. The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.

⁹³ East African Order in Council was of 1897, later repeated in the 1921 Order and applied to the Protectorate. Tanganyika Order in Council was introduced in Tanganyika in 1920.

6.9 NEW CONSTITUTION AS A BASIS FOR LEGAL REFORMS

After the new constitution is in place, new laws and policies must be realigned with the principles enshrined in the new constitutional order.⁹⁴ Regulation of elections and political parties and the coming into being of the 2003 Rwandan Constitution, 2010 Kenyan Constitution and 2014 Tanzanian Proposed Constitution, caused or contributed to the enactment of new electoral and political parties' laws in accordance to the new constitutions. The 2003 Rwandan Constitution calls for legislation of specific organic laws to govern elections matters.⁹⁵ In line with the Constitution, Rwanda has passed the Law Relating to Elections,⁹⁶ which contains the provisions relating to women's participation in elections in detail and provides for election matters in general. In Kenya, the 2010 Constitution paves the way for the reformed electoral framework. Article 27 (8) of the Kenyan Constitution calls the state to take legislative and other measures to implement the two-thirds gender rule. Also, Article 100 calls for the Parliament of Kenya to enact legislations to promote the representation of i) women; ii) persons with disabilities; iii) youth; iv) ethnic and other minorities; and, v) marginalized communities.⁹⁷ In response to the Constitution, Kenya's Parliament passed three basic electoral policy frameworks: the 2011 Elections Act, the 2011 Political Parties Act and the 2011 Gender Policy. In Tanzania, since the constitution-making process had been called-off,⁹⁸ no changes were made to the Election Act and other elections related laws save for the 1992 Political Parties Act.⁹⁹ It is noteworthy that the initiated 2014 review of the Political Parties Act was postponed for, among other reasons, the need to leave room for the completion of the constitution review process.¹⁰⁰ The constitution review process was not

⁹⁴ Ibid.

⁹⁵ Also, Article 55 of the 2003 Rwandan Constitution provides for an organic law to determine the modalities for the establishment and functioning of political organisations, the conduct of their leaders, and the process of receiving State grants.

⁹⁶ N° 27/2010 of 19/06/2010.

⁹⁷ Article 82 and 92 of 2010 Kenyan Constitution calls for the Parliament to enact the legislation to provide matters pertaining to the election monitoring body, nomination of candidates, voting, elections, and political parties.

⁹⁸ When the Tanzanian 2014 Proposed Constitution stalled, there were moves to amend the 1977 Constitution to provide for an independent candidate, a free and fair election commission, and the equal participation of men and women. However, these amendments could not materialise.

⁹⁹ Political Parties Act (herein after referred as the PPA) No. 5 was enacted in 1992 following the implementation of recommendations from the Nyalali Commission, which depicted only 20 per cent of Tanzanians in support of the move from a one party to a multiparty system. But the then First President of United Republic of Tanzania Julius Nyerere perceived it as the right time for Tanzania to move to multiparty politics. This led to the enrichments of the Eighth Amendment to Constitution of the United Republic of Tanzania of 1977 to provide for a multiparty democracy. In May 1992, Parliament enacted a law to allow other political parties to start political activities from 1st July 1992. Since its enactment, the Political Parties Act has undergone seven amendments with the objective of strengthening multiparty democracy in the country.

¹⁰⁰ In 2015, the review of Political Parties Act was further adjourned to allow the 2015 general elections to take place.

completed, but produced the 2014 Tanzanian Proposed Constitution, which, for the first time, requires political parties to adhere to the gender equality principle in leadership positions as a condition for registration.¹⁰¹ Although the 2014 Tanzanian Proposed Constitution is not in force, its influence is noticeable. In November 2018, the Political Parties Amendment Bill was read for the first time in the Parliament of United Republic of Tanzania. Despite strong disapproval from opposition parties and other stakeholders, including women's organisations, the Bill was passed, assented and became operational in February 2019.¹⁰² How women participated in the formulation of the laws relating to the regulation of elections and political parties after the constitution-making processes and the obtained achievement, is discussed in Chapter Seven.

6.10 CONCLUSION

The new 2003 Rwandan Constitution, 2010 Kenyan Constitution and 2014 Tanzanian Proposed Constitution have similarities and differences regarding the provision and protection of women's political participation. They all guarantee participation of men and women in decision-making processes including participation in parliament, in line with Article 7 of CEDAW. The new constitutions contain key provisions on the general guarantees of equality and non-discrimination. The use of proportional representation and regulation of political parties have been a breakthrough in attaining the highest number of women, particularly in the Rwandan Parliament. It was also seen that the use of the first-past-the-post electoral system in Kenya and Tanzania coupled with parliamentary quotas for women have increased the number of women in Kenyan and Tanzanian Parliaments up to 21.8 and 37 per cent respectively. It is noted that the role of electoral management bodies and human rights or gender institutions cannot be underestimated in promoting women's participation in elections. The new constitutions have also been a source of progressive electoral reforms, exemplified by the passing of the Kenyan Elections Act and the Political Parties Act in 2011. Generally, the analysis in Chapter Six established that when women are involved in constitution-making processes, they are likely to obtain progressive provisions that further strengthen and increase their participation in political decision-making processes. However, analysis in this Chapter has revealed that even with the new constitutions, only Rwandan

¹⁰¹ (Article (224) (2)(e).

¹⁰² Tanzania: New Bill seeks to criminalise politics – Parties, available at <https://allafrica.com/stories/201812100200.html> accessed on 17 January 2019.

women have reached and crossed the 50 per cent mark for women in parliament (Rwanda has 61 per cent of women in Parliament), while women's representation in Tanzania and Kenya are still at 21.8 and 37 per cent respectively. It was also noted in this Chapter that key gains obtained by women after taking part in constitution-making processes are facing serious challenges. In Chapter Eight, the critical analysis of the contribution of women parliamentarians in advancing gender sensitive policies and laws in Rwanda, Kenya, and Tanzania is discussed

7. CHAPTER SEVEN

7.0 IMPACT OF WOMEN PARLIAMENTARIANS IN POLICY FORMULATION

‘When the Constitution contains provisions for equal participation, the same must be able to foster women’s descriptive, substantive and symbolic representation as the key impact measurements for female participation in politics’¹

7.1 INTRODUCTION

In Chapter Six the achievements and shortcomings on women’s key gains in the 2003, 2010 and 2014 Rwandan, Kenyan and Tanzania constitution-making processes were depicted. Owing to the past and recent constitutional reforms, the number of women in parliaments has increased to 61 per cent, 21.8 per cent, and 37.2 per cent² in the Rwandan, Kenyan, and Tanzanian Parliaments respectively. In this Chapter, the question whether the increase in the number of female members of parliament has facilitated the attainment of gender-sensitive laws and policies, is examined.³ It is noted that in order to avoid the risk of obtaining a hollow victory for the emancipation of women, effective female participation in decision-making should not only focus on the overall numbers of women elected to office (descriptive representation).⁴ Participation of women in decision-making processes should also be scrutinised in terms of how and why the elected/nominated women pursue or fail to pursue political objectives that put the women agenda at the centre of decision-making processes⁵ and lead to gender sensitive policies and laws (substantive representation).⁶ Descriptive

¹ Gretchen Bauer ‘Gender quotas and women’s representation in African parliaments 2013’ available at <http://democracyinafrica.org/gender-quotas-womens-representation-african-parliaments/> on 9 May 2018.

² ‘Women in national parliaments as in December 2018’ available at <http://archive.ipu.org/Wmn-e/world.htm> accessed on 5 January 2019.

³Female participation also impacts on parliamentary debates and atmospheres, and attitudes toward female parliamentarians.

⁴ Gretchen Bauer op cit note 1.

⁵ A woman-centred agenda acknowledges that gender makes a difference in human demands. It unpacks needs dynamics attached to gender roles and focuses on women’s needs, expectations and aspirations as defined by women themselves. A woman-centred approach creates safe spaces for women to engage constructively in setting the agenda addressing gender dynamics. It involves deliberate efforts for women to be present and to meaningfully influence the thinking and decision making processes. A woman-centred approach develops and implements policies, practices and programmes that are relational to- and promotes the wellbeing of women. It provides women with opportunities to improve their socio-economic, political and technological conditions. The Centre for Social Justice ‘A WOMAN-CENTRED APPROACH Freeing vulnerable women from the revolving door of crime’ (2018), *the Centre for Social Justice, 34a Queen Anne’s Gate, London, SW1H 9AB* www.centreforsocialjustice.org.uk.

⁶ Gretchen Bauer op cit note 4. Others have argued that the interest of women cannot necessarily be signified if women are not present in decision-making bodies. Likewise, the needs and demands of women differ from those of men, thus

representation considers the composition of the legislative body, mainly whether the legislative body represents the electorate demographically, such as whether the legislature entails representation from diverse groups of the society. The number of male and female parliamentarians elected reflects among other things, descriptive representation.⁷ Substantive representation however refers to the representation of group interests in the policymaking process. It pertains to the contribution that elected or nominated women have made on policies and legislative priorities, for example, the nature and quality of the legislation that individual women parliamentarians and women's parliamentary and party caucuses support.⁸ Hence, Chapter Seven focuses on the role of women parliamentarians in Rwanda, Kenya and Tanzania in relation to how they pursue or fail to pursue political objectives that assist in putting the women agenda at the centre for realisation of gender sensitive policies and laws.

7.2 RWANDA

In Rwanda, gender issues seem to have been accepted prior to an increase in numbers of women in parliament, right from the beginning of parliamentary politics in 1994.⁹ This is because the Rwandan government, through the ruling Rwandan Patriotic Front (RPF), made the inclusion of women a hallmark of its post-genocide recovery and reconstruction agenda. The policy on the inclusion of women owes much to the RPF's exposure to gender equality issues in Uganda, where many members spent years in exile.¹⁰ Although there is no official statistics, many literature suggest that more men than women were killed during Rwandan genocide, leaving women as key players in social and legal reconstruction even before the onset of the 2003 Constitution.¹¹ Soon after the genocide, many gender-sensitive laws were passed. Such laws were the Rape or Sexual

the presence of women in decision-making bodies could result in more equitable policy outcome because the policy makers will give more attention to issues affecting women.

⁷ Gretchen Bauer op cit note 6.

⁸Ibid. Descriptive and substantive representation always goes hand in hand with symbolic representation which denotes the impact that women's presence in elected bodies may have on voter perceptions and attitudes towards women in politics. Symbolic representation considers if women and men voters are encouraged to vote for more women because of the acts, changes and contribution brought by the women who were or are in decision-making positions. Since this thesis employs a desk review as the main research methodology, issues of voters' attitudes and perceptions on women candidates are not explored.

⁹ Powley Elizabeth 'Rwanda: The impact of women legislators on policy outcomes affecting children and families' (2007) *The State of The World's Children Background Paper* available at <https://www.unicef.org/sowc07/docs/powley.pdf> accessed on 2 February 2018.

¹⁰ Ibid.

¹¹ Rwanda – real equality or gender-washing? Available at <https://www.dw.com/en/rwanda-real-equality-or-gender-washing/a-47804771>, accessed on 18th August 2019.

Torture law in the Post-Genocide Prosecution Guidelines,¹² a law extending the rights of pregnant and breast-feeding mothers in the workplace,¹³ a law on the protection of children from violence,¹⁴ the Inheritance Act¹⁵ and the 2003 Rwandan Constitution.¹⁶ These laws were legislated before the 2003 post genocide general elections.¹⁷ Although these laws were initiated by the executive, approved by the parliament and passed at a time when the number of women in the Rwandan parliament were much smaller, the contribution of the few women parliamentarians in terms of supporting, shaping, and corroborating the proposed provisions with their lived in experiences cannot be underestimated.¹⁸ After the passing of the 2003 Rwandan Constitution, the notable achievement from the large number of women in Rwandan parliament was witnessed through the introduction and passing of the Law on Prevention, Protection and Punishment of Gender-Based Violence (GBV) Act.¹⁹ This is one of only a few pieces of legislation that have originated in Parliament and particularly from the women parliamentarians rather than from the executive. The women deputies and the FWRP were instrumental in formulating the law and getting it passed.²⁰ More women in the parliament has led to strengthened collaborations and solidarity between men and women parliamentarians, evidenced by increased alliance between women and men parliamentarians right from the outset of the legislative process of the GBV law. In terms of a workable strategy, women used an issue-personalization technique to win more male supporters. For example, provisions that criminalised wife beating was perceived as a personal threat to male legislators, so FFRP members spoke with individual men, framing the Bill not as targeting their marriages but as protecting their mothers, sisters, and daughters, thereby obtaining a strong buy-in.²¹ Furthermore, the 2003 Rwandan Constitution calls for legislation of specific organic laws to

¹² 1996.

¹³ 1997.

¹⁴ 2001.

¹⁵ 2003.

¹⁶ 2003.

¹⁷ Claire Devlin & Robert Elgie 'The effect of increased women's representation in parliament: The case of Rwanda' (2008) *Parliamentary Affairs Volume 61, Issue 2* Pages 237–254 available at <https://doi.org/10.1093/pa/gsn007> accessed on 2 February 2018.

¹⁸ Powley E op cit note 10.

¹⁹ Law No. 59/2008 of 2008 on Prevention and Punishment of Gender-Based Violence in Rwanda (10 September 2008) available at: <https://www.refworld.org/docid/4a3f88812.html> accessed on 23 July 2019. This law is important for Rwandan women, because among other things, the law makes polygamy illegal and provides a legal definition of rape of an adult woman. It also sets out punishments for offenders.

²⁰ Claire Devlin & Robert Elgie op cit note 17.

²¹ Powley Elizabeth op cit note 18.

govern elections matters.²² In line with the Constitution, the Rwandan Parliament with a 56.3 percentage of its members being women, passed the Law Relating to Elections,²³ which provides for election matters in general, and contains specific provisions for promoting women participation in elections. Article 102 of the Election Act provides for the composition of the Chamber of Deputies to include twenty-four women elected according to the administrative entities of the country. It allows candidates to either belong to a political party, a coalition of political organisations or stand as an independent candidate.²⁴ Further, Article 116²⁵ of the 2003 Rwandan Constitution provides for the composition of the Senate to include twenty-six people of whom at least thirty percent should be women. The Election Act also provides for election administrative organs to include the Council, the Bureau of the Council, and the Executive Committee, which must have at least thirty per cent female representation.²⁶ It is noted that when women are in elections bodies, they tend to champion better procedures and guidelines to allow more women to

²² Also, Article 55 of the 2003 Rwandan Constitution provides for an organic law to determine the modalities for the establishment and functioning of political organisations, the conduct of their leaders, and the process of receiving State grants.

²³ N° 27/2010 of 19/06/2010.

²⁴ Article 109 of the 2003 Rwanda Constitution provides for election of female deputies by specific organs (this article is modified and complemented by the article 24 of the Law no 37/2013 ryo of 16/06/2013). The article provides that, the 24 female Deputies shall be elected by specific organs in accordance with national administrative entities. A Presidential Order shall determine the electoral constituency and the number of Deputies in every constituency in accordance with administrative entities of the country. Those 24 female Deputies shall be elected in secret ballot by the electoral college composed by: 1° Members of Executive Committee of the National Women Council at the national level elected from the entity within electoral constituency; 2° Members of the Executive Committee of the National Women Council at the Provincial and City of Kigali level; 3° Members of the Councils of Districts of Provinces or City of Kigali; 4° Members of the Executive Committee of the National Women Council at district level within electoral constituency; 5° Members of the Councils of Sectors within the electoral constituency; 6° Members of the Executive Committee of the National Women Council of all Sectors within the electoral constituency; 7° Members of the Executive Committee of the National Women Council of all cells within the electoral constituency; 8° Members of the Executive Committee of the National Women Council of all villages within the electoral constituency; At each entity through which election has been conducted, candidates who obtain more votes shall be considered as elected according to the number of Deputies set for that electoral constituency. However, where there are at least two candidates with equal number of votes while competition for the last slot to get the required number of seats, there shall be conducted another round of elections between those with an equal number of votes within a period of three days; where there is a tie vote, the elections are repeated only once and if they obtain the same number of votes again, the winner shall be decided by drawing lots. Instructions of the National Electoral Commission shall specify modalities through which such elections shall be conducted.”

²⁵ Modified and complemented by the Article 8 of the Law no 34/2011 ryo of 28/07/2011.

²⁶ Article 156: Election of female members of council constituting at least thirty per cent of all District Council members shall be elected through indirect and secret ballot as well as by the members of the Council Bureau of Sectors constituting the District, members of the Executive Committee of the National Council of Women at the district and sector levels and Coordinators of the National Council of Women at cell level. The election of the executive committee members of the District and the City of Kigali is held through indirect and secret ballot. There shall be at least thirty per cent of women among the members of the executive committee.

participate in elections.²⁷ This is witnessed by the fact that women parliamentarians have reached the highest percentage in the world, currently at 61.2 per cent. However, although women form the majority of the Rwandan parliament, most of the Rwandan citizens view them as a majority without authority.²⁸ Women can only influence the agendas that are not contradictory to the ruling party stand. Even though women are the majority in Rwandan parliament, are not able to influence for the promotion of media, civic and democratic spaces which are also key for women to thrive in decision-making processes.²⁹ Women parliamentarians are not condemning the acts of imprisonment, rape and other forms of violence against women perpetuated by Rwandan government against the opposition leaders and the media critics of the government.³⁰ Rwandan women parliamentarians, have failed to weigh in on legislative changes on topics like parental leave, the official maternity leave in Rwanda is still 12 weeks which is not much.³¹

To complement the high number of women in the Rwandan Parliament: reasonably regulated civic, media and political spaces; respect of human rights and democratic governance principles; political will; and a woman-centred policy making approach are important for women to thrive and influence gender progressive laws and policies.³²

7.3 KENYA

In Kenya, since the adoption of the 2010 Constitution, women members of parliament have been making valuable contributions to parliamentary business and matters pertaining to women's affairs. In the lead-up to the Female Genital Mutilation (FGM) Bill, women MPs collaborated with women advocates from civil society organisations and made a strategic decision to frame the FGM as a human rights issue and not a gender issue. The Kenyan Women Parliamentary Caucus

²⁷ 'Women in national parliaments as in December 2018' available at <http://archive.ipu.org/Wmn-e/world.htm> accessed on 5 January 2019.

²⁸ Straight Talk Africa, 'The 25th Anniversary of the Rwandan Genocide - Straight Talk Africa,' available at https://www.youtube.com/watch?v=PHbU_fO1tEU accessed on 15th June 2019.

²⁹ Ibid.

³⁰ Ibid. When businesswoman and politician Diane Rwigara wanted to challenge Kagame in the 2017 presidential election the electoral commission did not accept her candidacy. She was accused of forging the required signatures for her candidacy, tax evasion and calling for an overthrow of the government. Additionally, alleged nude photos of Rwigara were leaked during her campaign. In September 2017, she was arrested, and only acquitted of the charges over a year later.

³¹ Rwanda – real equality or gender-washing? Available at <https://www.dw.com/en/rwanda-real-equality-or-gender-washing/a-47804771>, accessed on 18th August 2019.

³² Straight Talk Africa, 'The 25th Anniversary of the Rwandan Genocide - Straight Talk Africa,' available at https://www.youtube.com/watch?v=PHbU_fO1tEU accessed on 15th June 2019.

(KWPC) strategically took a back seat and facilitated the Human Rights Caucus to build support for the Bill. As a result, the FGM Act was passed in May 2011.

Also, as noted in Chapter Six, the 2010 Kenyan Constitution paved a way for reforming the electoral legal framework. Article 27 (8) of the Kenyan Constitution calls the State to take legislative and other measures to implement the two-thirds gender rule. Also, Article 100 calls for the Parliament of Kenya to enact legislation to promote the representation of i) women; ii) persons with disabilities; iii) youth; iv) ethnic and other minorities; and, v) marginalized communities.³³ In response to the women's agenda set in the 2010 Kenyan Constitution, Kenya's Parliament with only 7.5 per cent of women parliamentarians, passed three basic electoral policy frameworks: the 2011 Elections Act, the 2011 Political Parties Act and the 2011 Gender Policy.³⁴ The 2011 Kenyan Elections Act, which is the playbook governing elections in Kenya, requires, under section 16, that every registered political party and referendum committee should: ensure security and full participation of women and persons with disabilities as candidates and voters; ensure respect for the right of women to communicate freely with political parties, committees and candidates; facilitate the full and equal participation of women in political activities; ensure free access of women and persons with disabilities to all public political meetings, marches, demonstrations, rallies and other public political events; and take reasonable steps to ensure that women are free to engage in any political activity. Section 6 of the Elections Act stipulates modalities in which special seats for women are appointed in line with Article 177(1)(b) of the 2010 Constitution, which requires no more than two-thirds of the membership of the Assembly to be of the same gender. Also, the Kenyan Election Act under Section 7 allows voters to transfer their registration to an electoral area other than where they registered. This provision ensures that even women who had been internally displaced by civil strife could transfer registration and participate in elections.³⁵ Further, it is an offence to be in possession of someone else's voting card without authorization, which gives women a remedy when their cards are withheld by either their parents or husbands against their will.³⁶ This is a progressive provision because in some cases, women whose voter

³³ Articles 82 and 92 of 2010 Kenyan Constitution call for the Parliament to enact the legislation to provide matters pertaining election monitoring body, nomination of candidates, voting, elections, and political parties.

³⁴ Federation of Women Lawyers (FIDA), *Key Gains and Challenges, A Gender Audit of Kenya's 2013 Election* (2013).

³⁵ *Ibid.*

³⁶ *Ibid.*

cards are withheld or in the custody of their spouses or male relatives, could not vote. With this provision, women can still vote without physically having a voter's card and whoever is found in possession of voters' cards of others face criminal charge.

In allocation of special seats for women, section 36 (9) of the Kenyan Elections Act provides for a proportional representation electoral system through mixed-member party lists to be used according to the Constitution at Senate and county levels. Section 37 (1) of the Elections Act further requires that when a special seat representative from a political party dies, the replacement from the party list should be of the same gender. In addition, section 6 of the Elections Act highlights key offences including prohibitions of using language that is threatening, abusive, or insulting or engaging in any kind of action that may advocate hatred, incite violence, or influence the voters on grounds of ethnicity, race, religion, gender, or any other grounds of discrimination. Engagement in bribery, violence and nominating a candidate who does not meet constitutional requirements during the nomination process are also prohibited.³⁷ Depending on the graveness of the violation committed, a presidential candidate of that party is not eligible to contest. The prohibitions under the Kenyan Elections Act responds to past situations in which violence, abusive language, bribery, and favouritism affected willingness of women to participate in elections.³⁸ The most notable gain from the Kenyan Elections Act was also seen in the establishment of the election regulations that subsidised half of the nomination fees of all women candidates, thereby addressing financial barriers that have prevented women's participation in the political arena for a long time.³⁹ However, some provisions in the Elections Act hinder its compliance by key actors. For example, the Act requires the candidates who wish to dispute the results of party primaries or the elections to pay several fees.⁴⁰ The cost can be substantial and makes disputing results prohibitively expensive for most female candidates. Consequently, many women choose not to challenge poorly conducted primaries or elections.⁴¹ The Elections Act fails to include a provision for the principal voter's register to be gender disaggregated, which would have facilitated monitoring both by the commission and other stakeholders, especially bearing in

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ For example, election petitions require fees of 100,000 kshs for MCAs, 500,000 kshs for MPs, Governors and Senators, and 1,000,000 kshs for President.

⁴¹ Federation of Women Lawyers (FIDA) op cit 34.

mind the historical under-registration of women voters.⁴² The Act also does not provide for specific guidance on timelines within which voter education should be conducted and there are no efforts targeting traditionally marginalized groups such as women.⁴³ Since the Acts specifically cover matters relating to the election, it was expected that they would contain a detailed procedure for realization of the two-thirds rule. Also, while the Acts make provision for a mixed-member party list, it simply restated the constitutional provision while offering no clear guidance on how to implement the two-thirds rule. The Act should have included a provision regulating affirmative action measures requiring the party list to start with a woman's name to facilitate an increased chance for women.

Alongside the Kenyan Elections Act, the Political Parties Act 2011 was also passed, again with only 7.5 per cent of women in the Kenyan Parliament. The Act provides for the registration, regulation, and overall management of political parties. Significantly, the Constitution requires the political parties to respect the rights of all persons, including women, to participate in the political process. The Political Parties Act contains provisions for protecting women and promoting their participation by providing clear opportunities to enhance their participation in the electoral process.⁴⁴ In Section 5 of the Political Parties Act, women are recognised as an interest group and every political party is required to respect the right of all persons to participate in the political process, including special interest groups such as women. Political parties are required to respect and promote gender equity and equality, human rights, and fundamental freedoms to all citizens' groups. Sections 6 and 7 of Political Parties Act require political parties to prove that not more than two-thirds of its members and governing body are of the same gender before receiving provisional and full registration. Political parties' guiding documents, namely the Constitution and other rules stipulate and ensure that not more than two-thirds of the membership of all-party organs, bodies and committees, in aggregate, are of the same gender. This means that both genders can take part in the membership and management of political parties. A Political Parties Fund is established under Section 23 of the Act,⁴⁵ and for political parties to receive the funds, its

⁴² Ibid.

⁴³ Ibid. There are several other gaps including lack of guidelines that would increase chances of selection of the underrepresented gender on party lists for other special seats. An example is a requirement that the first name on all lists must be of the underrepresented gender.

⁴⁴ Ibid.

⁴⁵ The Fund shall be administered by the Registrar. The sources of the Fund according to section 24 of the Kenyan Political Parties Act are: such funds not being less than zero point three per cent of the revenue collected by the

membership and governing body have to satisfy the two-thirds principle of representation. Section 26 of the Political Parties Act requires the moneys allocated to a registered political party to be used for, among other things, promotion of the representation in Parliament and in the county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities; and, promotion of active participation by individual citizens in political life. As incentive to political parties to facilitate meaningful participation by women in the decision-making, the 2016 amendment to the Political Parties Act ⁴⁶ provides under section 25 1(aa) that 15 per cent of the Political Parties Funds should be distributed proportionately among qualifying political parties based on the number of its elected candidates from special interest groups, including women.⁴⁷ A political party is not entitled to receive funding if it has more than two-thirds of its registered office bearers from the same gender; and does not have representation of special interest groups including women in its governing body.⁴⁸ Further, the Amendment provides for deregistration of political parties that do not include representation of special interest groups in their governing and functional organs.⁴⁹ The Political Parties Act, under Section 30, establishes the Political Parties' Disputes Tribunal, which provides an impartial platform to address grievances that women encounter as they pursue engagement in political parties, among others. While all these provisions address the challenges that women had previously faced while pursuing electoral seats, key challenges are noticed. The provisions related to the Political Parties' Disputes Tribunal requires one to exhaust internal political party dispute resolution mechanisms

national government as may be provided by Parliament; and (b) contributions and donations to the Fund from any other lawful source.

⁴⁶ The Act also establishes of the Political Parties' Liaison Committee (PPLC) to facilitate coordination between the political parties, the election commission (IEBC), and the Registrar of Political Parties for smooth flow of mandates.

⁴⁷ Section 25 further provides that, 80 per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election while five per cent to cover administration expenses of the Fund. Prior to amendment, the PPA required parties to develop policies and plans for affirmative action; now the Political Parties Code of Conduct requires implementation of those programmes and policies. The Code of Conduct guides relations and, among other things, prohibits abuse of women members. The most recent Gender Policy was developed in July 2011 by the then Ministry of Gender, Children and Social Development. It was noted that despite women's essential productive and reproductive roles, they still have significantly less access than men to resources, assets, knowledge, community management, and decision-making — hence, the need for a gender policy. The Policy focuses on the practical needs, opportunities, constraints, and strategic interests of both women and men from the local, national, regional, and international contexts in which they live. In this regard, the policy forms a suitable overarching framework toward supporting the enhancement of women's participation, including in the arena of elections and politics.

⁴⁸ Also, if the party does not secure at least three per cent of the total number of votes at the preceding general elections. Section 25 (2)

⁴⁹ The Office of the Registrar of Political Parties can deregister parties that fail to meet gender requirements, do not promote free and fair nominations, and do not respect national values, which include equality and inclusiveness.

before bringing a case to the Tribunal. The Political Party Act fails to provide for any regulations for internal political parties' dispute resolution mechanisms, and in the circumstance where the party leadership is on the offending side, the solution becomes self-defeating. While the Political Parties Act requires records of political parties to include copies of the policies and plans of the political party, the Act does not require parties to prepare and provide an affirmative action policy or guidelines.⁵⁰ It is also observed that, although the Political Parties Act was amended in 2016 to include provisions that facilitate gender equity in political parties, it has failed significantly in expanding the space for women's participation in politics. During both the 2013 and 2017 Kenyan elections, the implementation of the Act was very half-hearted with political parties implementing only those mandatory provisions, and even then, instances of circumvention were many.⁵¹ For instance, it was widely reported and documented that the membership lists of political parties were fraught with fraud with parties failing to conduct genuine registration of members but instead, lifting names of the people from various public records. Furthermore, even in the political parties governing bodies, parties took on a very minimalistic approach by ensuring that women did not benefit from the influential positions of party leadership but were relegated to peripheral and low roles in the governing bodies. Since membership and governance represent the very basic units of a political party, the compromise on these two aspects completely undermines a party's ability to be gender-responsive.

It is also noted that the Kenyan women face challenges in pursuing progressive gender policy and legislation. Even after making it to the parliament, women need to put up with ridicule, name calling and second-class treatment.⁵² Female MPs who are allocated seats through the top-up mechanism are referred to as 'Bonga points' (the points that can be won with one of the mobile network providers when one uses a certain amount of phone credit).⁵³ There are incidences of nominated women being shouted down when they stand to speak, as they were not considered legitimate representatives of constituencies. Therefore, the mechanisms under which women access parliamentary seats and a woman-centred policy making approach is important to enable women to influence gender sensitive policies and laws without being questioned about the manner

⁵⁰ Federation of Women Lawyers (FIDA) Kenya op cit note 41.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

that they accessed parliamentary seats and whether or not they really represent the interests of the people. Further, for women to influence the legislative arm of government, they need to be fully involved and participate effectively in committees as well as in other influential house positions, including as speaker, leader of the majority or minority and chairs of various parliamentary committees.⁵⁴ These positions are key to guiding, swaying and even manipulating the agenda of the legislature. Between 2013 and 2017, of the ten leadership positions in the National Assembly, women held only two. Women chaired seven out of the 27 National Assembly committees and served as vice-chairs in another eight.⁵⁵ This does represent a significant increase since the last parliament, where women chaired only 5% of committees.

7.4 TANZANIA

Tanzanian women parliamentarians have, to a large extent, facilitated the passing of gender progressive policies and laws. For instance, the increase in women's participation led to recommendations to review 12 pieces of legislation which discriminated against women in Tanzania. These are: the Law of Marriage Act;⁵⁶ the Probation of Offenders Ordinance;⁵⁷ the Affiliation Ordinance;⁵⁸ the Adoption Ordinance;⁵⁹ the Disabled Persons (Care and Maintenance) Act;⁶⁰ the Employment Ordinance;⁶¹ the Education Act;⁶² the Penal Code;⁶³ the Age of Majority (Citizenship) Act;⁶⁴ the Customary Law Declaration Order;⁶⁵ and the Probate and Administration (Deceased Estates) Ordinance.⁶⁶ Further, due to strong recommendations and initiation from women parliamentarians and civil society organisations, the Parliament of the United Republic of Tanzania has enacted laws such as the Sexual Offences (Special Provision) Act, (SOSPA).⁶⁷

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ 1971.

⁵⁷ 1962.

⁵⁸ 1964.

⁵⁹ 1964.

⁶⁰ 1982.

⁶¹ Cap. 366.

⁶² No. 25 of 1978.

⁶³ Cap. 16.

⁶⁴ No. 24 of 1970.

⁶⁵ of 1963.

⁶⁶ Cap. 445 'The United Republic of Tanzania country report on the implementation of the Beijing platform for Action and the outcome document of the twenty-third special session of The General Assembly' (2005) - Beijing +10 available at <http://www.un.org/womenwatch/daw/Review/responses/UNITEDREPUBLICOFTANZANIA-English.pdf> accessed on 2 May 2018.

⁶⁷ 1998.

SOSPA protects women and girls from rape, sexual abuse and female genital mutilation by subjecting perpetrators to a thirty-year sentence in jail.⁶⁸ In addition, women parliamentarians have played a big role in the passing of the Land Act and Village Land Act 1999, which has succeeded in solving the problem of women and land ownership.⁶⁹ The Land Act was amended in 1999 requiring spousal consent in mortgaging matrimonial homes.⁷⁰ Also, women parliamentarians, in collaboration with women's NGOs, were instrumental in passing the Labour Act of 1997, which protects female employees from sex discrimination and provides paid maternity leave of three months every three years.⁷¹ Further, Tanzanian women parliamentarians tabled and defended a bill providing maternity leave for married and unmarried women.⁷² They also pushed a bill that allowed female students to enter university directly after high school, rather than waiting for two years to lapse. Women parliamentarians pressed for these laws through political party caucuses, women's wings and the parliamentary standing committees.⁷³ It is noted that most gender-sensitive laws have been initiated by the government but mainly because of the pressure from women.⁷⁴ In relation to the laws governing elections and political parties, since the constitution-

⁶⁸ 'Achievements and Challenges of women special seats arrangement in Tanzania.' Available at https://www.researchgate.net/publication/259150061_Achievements_and_Challenges_of_women_special_seats_arrangement_in_Tanzania accessed on 3 February 2018.

⁶⁹ Ibid. Several women's rights groups formed the Gender Land Task Force (GLTF), which effectively, with strong support from women legislators, targeted policy makers and consequently ensured the inclusion of gender-sensitive provisions in the Land Act and Village Land Act in 1999.

⁷⁰ Ibid. Specifically, any document used to apply for a mortgage and any document used to grant the mortgage should be signed by the mortgagor and the spouses or should have evidence of consent by them.

⁷¹ Gretchen Bauer 'Fifty/Fifty by 2020' (2008) *International Feminist Journal of Politics* 10:3 348-368, DOI: 10.1080/14616740802185668.

⁷² Ibid.

⁷³ Women in the parliament and NGOs have influenced the review of the Women in Development Policy of 1992, with a view to bring about gender equality. This resulted in the preparation of the Women and Gender Development Policy that was approved by the Parliament in 2000. The policy also provides for women's empowerment by giving more opportunity to women in all spheres including politics, leadership positions, management and economic development. In 1997, women parliamentarians formed Tanzania Women Parliamentarians' Group (TWPG) to share skills and experiences and unite them regardless of their political differences, to address policy and gender issues in a more focused way. Another aim is to help new female MPs understand the system and build confidence. Whenever a new parliament begins, the caucus trains them for a few days about the rules and procedures of conducting House affairs and parliamentary codes of conduct (for example, how to ask questions, how to participate in debates, etc). The caucus sometimes offers a mock parliament to train new female MPs. However, a TWPG's self-evaluation states that the caucus lacks the culture conducive to mentoring and sharing useful information. TWPG played a significant role during the 2011-2014 constitution-making process, working closely with women in movement to advocate for a gender-sensitive Constitution. 'Achievements and challenges of women special seats arrangement in Tanzania' op cit note 151.

⁷⁴ Ibid. Again, even when implemented as top-down policies put in place by an authoritarian regime, gender quotas and equality policies can lead to significant cultural changes in attitudes towards and perceptions of women and their competence. Generally, the increased number of women MPs has brought positive and numerous change in the Parliament. It has increased the proportion of women's contribution to parliamentary debates and has broadened

making process had been called-off,⁷⁵ no reforms have been made to the Elections Act or Elections Expenses Act but were made to the Political Parties Act, 1992.⁷⁶ The initiated 2013 review of the Political Parties Act was postponed for, among other reasons, the need to leave room for the completion of the constitution review process.⁷⁷ Although, the constitution-review process was not completed, it produced the 2014 Tanzanian Proposed Constitution which, for the first time, requires political parties to adhere to the gender equality principle in leadership positions as a condition for registration.⁷⁸ In November 2018, the Political Parties Amendment Bill was read for the first time in the Parliament of the United Republic of Tanzania.⁷⁹ It is noted that the women started engaging in influencing progressive provisions in the Political Parties Act since the recalled 2013 process. During that time, the women conducted a series of engagements to collect the views on how the Bill could facilitate more women as political parties' members, leaders and electoral candidates. The women conducted a series of lobbying sessions to build consensus on key women's concerns emerging from the 1992 Political Parties Act. In this regard, the Women Coalition lobbied key institutions and organs such as the Office of Registrar of Political Parties, Political Parties councils, individual Political Parties, Women Political Parties Wings, and the CCM National Executive Committee. Despite these engagements, the Political Parties Act review stalled in 2014 and resurfaced in 2018 through the Political Parties Amendment Bill. Having formerly participated in the review process, the women expected the Bill to contain progressive provisions for meaningful women's participation of in electoral politics. However, the scrutiny of

parliamentary discourse. Issues affecting women, children, and families are better articulated and more frequently discussed. The increased number of women MPs has created a parliamentary environment where female MPs are more comfortable to pursue a pro-women agenda.

⁷⁵ When the 2014 Tanzanian Proposed Constitution stalled, there were moves to amend the 1977 Constitution to provide for independent candidates, free and fair election commission, and the equal participation of men and women. However, these amendments could not materialise.

⁷⁶ Political Parties Act (PPA) No.5 was enacted in 1992 following the implementation of recommendations from Nyalali Commission, which although depicted only 20 percent of Tanzanians in support of the move from one party to multiparty system. But the then First President of United Republic of Tanzania, Julius Nyerere, perceived it as a right time for Tanzania to move to multiparty politics. This led to the enrichments of the Eighth Amendment to the Constitution of the United Republic of Tanzania of 1977 to provide for a multiparty democracy. In May 1992, Parliament enacted a law to allow other political parties to start political activities from 1 July 1992. Since its enactment, the Political Parties Act has undergone seven amendments with the objective of strengthening multiparty democracy in the country.

⁷⁷ In 2015, the review of Political Parties Act was further adjourned to allow the 2015 general elections to take place.

⁷⁸ (Article (224) (2)(e).

⁷⁹ 'Tanzania: New Bill seeks to criminalise politics – Parties' available at <https://allafrica.com/stories/201812100200.html> accessed on 17 January 2019.

the Bill depicted only one general provision that instructed political parties to uphold, among other things, issues of gender and social inclusion during the political parties' formation stage.⁸⁰

Having followed up the public discussions on the Bill, the women, through the Women's Coalition, learnt that the public comments and analyses by other CSOs on the Bill were mainly on its implication on multiparty democracy, particularly how the Bill would hinder the functions and operations of political parties and the sanctions. The Women's Coalition thought that even when the CSOs included gender and social inclusion in their analysis, it was inconsistent and superficial. An in-depth discussion on how the new Bill could facilitate or hinder participation of women in electoral politics could not be picked easily. As such, the Women's Coalition agreed to analyse the Political Parties Bill in line with gender equality, democracy, human rights principles and good governance principles in line with the Constitution of the United Republic of Tanzania, 1977 and other obligations from international conventions and agreements that Tanzania is a part of.⁸¹ A provision-by-provision analysis was conducted and case studies from the Kenyan and Rwandan Political Parties Acts were employed to establish gaps in the Proposed Political Parties Amendment Bill.⁸² The Women Coalition responded to the invitation by the Legal and Constitutional Parliamentary Committee, by sending a team of 10 members (9 women and 1 man)

⁸⁰ Even though, around Christmas holidays, the Women Coalition through members of the technical committee met to strategize ways to analyse the proposed Bill, engage and influence provisions that would facilitate more women to take leadership positions both in the political parties and during elections.

⁸¹ The coalition ensured that the voices of the youth, women, and women with disabilities are captured into the analysis. Representatives from the Federation of the Disabled People Association and other young women were in attendance to also provide their views and inputs. After the analysis of the Bill, the recommendations from the technical committee included: the new law to provide for political parties to put in place internal procedures, processes and mechanisms to ensure substantive gender equality in internal party democracy, especially in parties' membership, party leadership structures and candidates; offloading powers and responsibilities of the office of the registrar of political parties so the office can effectively monitor compliance to existing political and human rights standards, including women's political rights within the political parties; to make it mandatory for political parties to adhere to regional human rights instruments that the country has ratified with regard to gender equality principles as per AU Solemn Act, SADC Declaration and Maputo protocol on 50/50 representation in leadership positions; the rights and privileges of political parties should be provided to function as autonomous entities; accountability of political party leaders to members to be spelt out more clearly; the law to oblige each political party to establish internal mechanisms to address gender related issues including gender based violence; to have transparent internal systems and processes on equitable distribution of party resources during elections; to establish a mechanism for political parties or provide incentives to political parties to institute affirmative action in promoting women's participation in electoral politics.

⁸² After the report was finalised, the comprehensive report was translated into simple advocacy tools, namely matrix of key gender gaps in the proposed Bill, and addendum of key recommendations. Both the matrix and the addendum were translated into a popular Swahili version to improve its accessibility by all people. The coalition distributed the matrix and the addendum to other key CSOs to allow them to add into their analysis an in-depth gender analysis of the Bill. These organisations were Twaweza, Tanganyika Law Society, Legal and Human Rights Centre and Jukwaa la Katiba.

to attend the public hearing on the Political Parties Amendment Bill in Dodoma on 17 and 18 January 2017.⁸³ The addendum and the matrix were also handed to other members of parliament such as those from the opposition parties, members of the women parliamentary caucus, and leaders of political parties. The Women Coalition also conducted consultative meetings with key strategic and influential people to influence the incorporation of gender sensitive provisions in the Political Parties Amendment Bill.⁸⁴ A series of social media campaigns and engagements on the implication of the Bill in promoting women's participation in electoral politics were also explored.⁸⁵ After the engagement in public hearings, the Women Coalition brought together its members (those who did and did not attend the public hearing in Dodoma) to review and reflect on their involvement in the review processes.

During the parliamentary discussion on the Bill, the submission by both the Government and opposition camp did not touch anything on the implication of the Bill on women's political participation. It was further noted that the Legal and Constitutional Parliamentary Committee included some of the provisions recommended by the Women Coalition. Such provisions included, prohibitions of people with a track record of conducting acts of gender-based violence from forming political parties, lifting of a provision on prohibition of political parties to be a pressure or activist group. Also, the provisions included, inserting the requirement for Registrar of Political Parties to provide guidelines and monitor income and expenditure of political parties and accountability of resources, and the reasons to refuse civic education or a capacity building training by and to political parties. After serious antagonist deliberations between the government and the members of parliament, especially the opposition members, the Bill was passed on 29 January

⁸³ In addition to handing key documents to the parliamentary committee team, the coalition submitted the addendum and the matrix to the Parliamentary Secretary to ensure that their recommendations are incorporated in the committee's records.

⁸⁴ These key strategic people who met included Hon. Andrew Chenge (CCM MP, Bariadi), Hon. Jenister Mhagama (CCM MP Songea), the Minister in the Prime Minister's Office; Policy, Parliament, Labour, Youth, Employment and People with Disabled, Hon. Sophia Mwakagenda from the opposition wing and Hon. Amina Molleli from PwD's special seat. These leaders agreed with the coalition views and promised to sensitize others on them. They were also provided with the coalition's handouts for more awareness.

⁸⁵ This was the only social media content on the implication of the Bill to women's political participation. (Twitter-Change Tanzania <https://twitter.com/changeTanzania/status/>, WhatsApp, YouTube: <https://t.co./j13Tu5pord> and Facebook pages). These enabled more public awareness on the need for gender issues to be included in the Bill and on the process.

2019.⁸⁶ Later, the Bill was assented to by the President on 13 February 2019 and advertised for commencement of its use in a government gazette on 22 February 2019.⁸⁷ As a departure from the Political Parties (Amendment) Bill, which was put to the public for opinion in December 2018, the gazetted PPA contained strong provisions for mainstreaming of gender and social inclusion principles in the political party constitutions and manifestos, recruitment of members, election of its leaders, and nomination of election candidates.

With the new Political Parties Amendment Act (PPA Amendment), no political party shall qualify for provisional registration unless ‘its membership is voluntary and open to all the citizens of the United Republic without discrimination on account of... gender and disability.’ After getting provisional registration the Political parties are required ‘to be managed by adhering to the Constitution of the United Republic of Tanzania, Constitution of Zanzibar, this Act, the political party’s constitution, principles of democracy, good governance, non-discrimination, gender and social inclusion.’⁸⁸ This is a progressive provision and was not in the 1992 Political Parties Act. It depicts a good intention to address discriminatory practices against women and other marginalised groups within political parties. Although the Registrar of Political Parties (RPP) supervises the administration and implementation of the Act,⁸⁹ the new law provides little guidance on how the registrar will measure compliance of gender and social inclusion provisions in deciding whether to grant provisional registration. This further prohibits a person to form a political party if, within five years before making an application, the person has been sentenced or convicted on, among other things, offences relating to gender-based violence.⁹⁰ Since violence against women in elections and politics is one of the main reasons for less women in electoral politics, this provision is a good step towards making politics a safe space for women. In course of its operation, political

⁸⁶ It should be noted that when the Bill landed in the public platforms, it quickly attracted a number of criticisms on its implication on multiparty democracy, especially its great interference on political parties’ internal functions. <https://www.africanews.com/2018/12/17/inside-tanzania-s-repressive-amendments-to-political-partiesact//>. <https://www.thecitizen.co.tz/News/Movement-seeks-to-thwart-amendment-of-Political-PartiesAct/1840340-4884988-30mptgz/index.html> accessed on 5 March 2019. During a reflection meeting, the members of the coalition felt that due to the political climate, a number of things could happen to the Bill. First, it would be passed with considerable changes advanced by political parties and other stakeholders. Second, the Bill could be withdrawn, and taken back to stakeholders for further deliberations. There was a general feeling that CCM as a party did not have enough time to digest the implications of the proposed Bill even in itself.

⁸⁷ The new PPA Amendment supplements the Political Parties Act [CAP 258 R.E. 2002], and they two should be read together as one.

⁸⁸ Section 6A (1) of PPA Amendment.

⁸⁹ Section 3 (5) (a) of PPA Amendment.

⁹⁰ section 6 (B) (f) of PPA Amendment.

parties are required to ‘promote the union of the United Republic, Zanzibar Revolution, democracy, good governance, anti-corruption, national ethics, core values, patriotism, secularism, uhuru torch, national peace and tranquility, peace, gender, youth, and social inclusion in the a) formulation and implementation of its policies, b) nomination of candidates for elections, and c) election of its leaders.’⁹¹ This is a very progressive provision in promoting intra-party compliance to gender and social inclusion principles as it directs the RPP on the key aspects of scrutiny when determining compliance to gender and social inclusion provisions by the political parties. The new PPA Amendment also requires political parties to be ‘formed to further the objectives and purposes that are not contradictory to the Constitution of United Republic of Tanzania, Constitution of Zanzibar and any other written law of the united republic.’⁹² The RPP also has other roles, which although highly and genuinely contested for its potential to cause greater interference to the political parties internal affairs, such roles may be used to enforce provisions on gender and social inclusion. In the course of overseeing the implementation of the Political Parties Act, the RPP may at any time call for any information from the political party.⁹³ The information that may be demanded by the RPP may include documents such as the party’s constitution, guidelines, strategies and party registers on its members, party leaders, and leaders of the governing organs.⁹⁴ The RPP also monitors the intra-party election and nomination process.⁹⁵ As noted above, these roles can be administered with a view to, among other things, check political parties compliance to gender and social inclusion provisions in its policies, leaders and candidates. Since the beginning of multiparty politics in Tanzania after the commencement of the Political Parties’ Act 1992, the political parties’ constitutions, manifestos, rules and regulations have been consistently silent with no meaningful provisions that advances effective participation of women in electoral politics. The silence of the PPA Amendment on quota or the number of women to be included in the party’s leadership and candidates’ nominations gives room for parties to decide how and to what extent they can comply with the provisions on gender and social inclusion. It is predictable that political parties will just accept and keep a majority of women as their members in their register, but put only a few of them in the lower levels of party leadership positions and even less

⁹¹ Section 6A (2) of PPA Amendment.

⁹² Section 6 A (1) of PPA Amendment.

⁹³ Section 5 B (1) of PPA Amendment.

⁹⁴ Section 8 C of PPA Amendment requires political parties to maintain a register of their members, leaders of all administrative levels, and members of each of the party organs.

⁹⁵ Section 3 (5) (b) of PPA Amendment.

of them as candidates, with no meaningful integration of gender mainstreaming principles.⁹⁶ Schedule I of the PPA Amendment already gives an indication that political parties will just do a superficial and cosmetic inclusion of women. It is noted under Schedule I of the PPA Amendment that the proposed checklist for key provisions to be included in the political parties' constitutions, does not include a provision where political parties will have to state how they will embrace gender and social inclusion principle as provided in the main content of the PPA Amendment, posing a potential for technical oversight.

Financial support for women candidates is also reported as a great challenge for women to access electoral politics in Tanzania. As the registrar disburses and monitors accountability of government subventions and issue guidelines on the political parties' income, expenditure and accountability of resources,⁹⁷ the envisaged Political Parties Regulations should stipulate clearly how such funds should be used to advance women's participation in electoral politics. However, since the new PPA Amendment includes gender and social inclusion provisions, individuals and institutions will be excited to provide technical training and support to the parties to mainstream gender and social inclusion provisions in the party's policies, leadership and candidates' nominations. In line with that, the PPA Amendment calls for early planning to ensure that the registrar is notified and has agreed to the training within 30 days after receiving the notification.⁹⁸ Further, as the registrar provides and regulates civic education on multiparty democracy, research on political parties, party financing and multiparty democracy,⁹⁹ intentional effort to ensure the designed civic education and research substantially includes issues for the advancement of women's inclusion as party's members, leaders and candidates is necessary. Finally, the role of police force to protect, defend, and ensure safety of the political meetings needs to be strengthened and guaranteed to all parties, given the fact that political parties are prohibited to hire or deploy militia of security groups.¹⁰⁰

Mainstreaming a gender and social inclusion agenda in the PPA Amendment faced a number of challenges including the fact that the number of women in parliament is not in itself sufficient and need to be complemented by a woman-centered policy making process. There was

⁹⁶Op cit note 86.

⁹⁷ Section 3 (5) (c & d) of PPA Amendment.

⁹⁸ Section 4 (5) (A) (1) of PPA Amendment.

⁹⁹ Section 3 (5) (f) and (i) of PPA Amendment.

¹⁰⁰ Section 8 E (i) of PPA Amendment.

an apparent partisanship as the Bill polarised political parties along the lines of those that supported it, especially the ruling party (CCM), and those that were against it, especially the opposition parties. This posed a challenge in the inclusion of neutral public agenda such as gender and social inclusion. The ruling party supported the Bill and was not ready to engage effectively with other stakeholders and consider alternatives or improvements.¹⁰¹ The opposition parties thought the Bill a thorn to multiparty democracy and targeting to undermine the opposition parties hence for them the gender agenda was not important given the dire consequences the Bill was expected to have on multiparty democracy. Consequently, women parliamentarians followed the party stand on the Bill, rather than the women's agenda which was centred around influencing progressive provisions for facilitating effective women's participation in political parties. For example, during public hearing sessions, even after being taken through the key women's concerns on the Bill, a representative from the ruling party who was a female parliamentarian did not mention anything on the implication of the Bill on women's political participation.¹⁰² It was also noted that, the provisions that the Women Coalition advanced as lessons that Tanzania could learn from the Kenyan Political Parties Act of 2011, were not welcomed by the members of the Constitutional and Legal Parliamentary Committee. The members of the committee noted that Tanzania is doing far better in terms of women's participation in decision-making processes and cannot learn from a country that struggles to achieve its own constitutional two-third gender rule. Even with this remark, and considering the ongoing challenges in its implementation, the Kenyan Political Parties Act is more advanced in providing, promoting and protecting women's political participation. It has not yet achieved its full potential, but since its inception, the Act has enabled Kenya to move from having 7 per cent of women in 2011, to 16 per cent after the 2013 general elections and

¹⁰¹ The ruling party Chama Cha Mapinduzi (CCM) called for a public meeting to allow its members and other members from the public to give their views on the Bill. Although several concerns were noted in this meeting, CCM General Secretary Dr Bashiru Ally, when giving his remarks on the Political Parties Bill, argued for a Bill to be passed without any changes, not even a full stop.

¹⁰² It was also observed that high level engagement was necessary but did not seem to be fruitful. Although Dr. Bashiru Ally, the ruling party's general secretary acknowledged the articulation of women's issues, he never came forward to advance them in public. Likewise, for Humprey Polepole, Freeman Aikael Mbowe, and Augustine Mrema. It was noted that out of 19 political parties, three parties discussed women's and other marginalized groups' issues in their submissions while the others remained silent. Even after the parliamentary session, the coalition followed up and monitored parliamentary discussions on the new Bill through mainstream, social media and physical observations by members who attended the parliamentary sessions. Members of the Women Coalition were given a role to collect proceedings of all sessions that would be discussing the Political Parties Bill in Parliament and pass them to the coalition for processing, analysis and further advocacy. It was agreed that key consideration should be paid when the government, legal and constitutional parliamentary committee, and opposition camp read their report on the Bill and their stance.

currently 21 per cent after the 2017 elections. The increase in the number of women has had a positive impact in pushing for progressive laws in the country. For instance, the Matrimonial Property Act was passed in 2013 reinforcing the equal rights enshrined in the constitution for both spouses when they own property together and granting new rights to women landowners.¹⁰³ In the Kenyan Political Parties Act, the provisions on political parties fund, political parties dispute tribunal, and incentive for political parties to accommodate more women as party leaders and candidates, are progressive provisions which Tanzania could have considered in the making of the 2019 PPA Amendment. However, the new Tanzanian PPA Amendment just makes an impression on gender and social inclusion provisions, but misses an opportunity to include enforcement mechanisms for compliance by political parties. Tanzania still has a chance to include enforcement mechanisms for political parties' compliance to gender and social inclusion provisions, as the making of the Political Parties Regulations are under way.

On the challenges emanating from other laws regulating elections, the 1977 Constitution and other electoral laws are largely silent on women's rights.¹⁰⁴ Article 41(7) of the Constitution bars any proceeding to challenge the presidential election once the Commission has declared the results, making it difficult for women to enter into a battle with no recourse in case of injustice.¹⁰⁵ The Constitution does not allow challenging of the acts and omissions of the electoral commission in the course of managing the elections. It excludes the possibility of judicial review or any proceeding to hold the electoral commission responsible for its act and omission. Also, there is no fixed timeframe for the announcement of results by the national electoral commission, causing uncertainty, suspicion and tension.¹⁰⁶ Further, the elections deposits are huge and mostly not affordable for women. It requires a deposit of up to five million Tanzanian shilling for a presidential candidate and one million Tanzanian shilling for a member of parliament.¹⁰⁷ The

¹⁰³ Sophia Mbugua, *Despite the New Law, Women in Kenya Still Fights for Land Rights*, available at <https://www.newsdeeply.com/womensadvancement/articles/2018/02/23/despite-new-laws-women-in-kenya-still-fight-for-land-rights>, accessed on 18th August 2019.

¹⁰⁴ International Republican Institute (IRI) *Tanzania National Elections Gender Assessment October 25 2015* (2016) available at https://www.iri.org/sites/default/files/wysiwyg/tanzania_gender_report.pdf accessed on 24 May 2018.

¹⁰⁵ For parliamentary elections, section 108 of the National Election Act makes provision for election petition to the High Court.

¹⁰⁶ For instance, the result for the Union presidency in 2010 General Election was only announced on 5 November, five days after polling.

¹⁰⁷ Section 11 of the Elections Expenses Acts provides for prohibition for receiving funds within or from outside the United Republic of Tanzania within 90 days before the General Election. This provision is contested by women who claim to largely depend on volunteers and good will donors to raise money for elections. Women don't have a lot of resources like some other political parties and candidates, thus they largely depend on friends to run for party elections.

Elections Act of Tanzania provides for penalties on electoral offences. However, the penalties are small compared to the gravity of the offences, which include discouraging people from seeking nomination, or procuring any person who has been nominated to withdraw his candidate, engage in bribery or corrupt practices, personating, undue influence, and interference with public meetings. These offences occur mostly with women but the penalty of Tanzanian shilling two to five thousand is too small and thus encouraging the commission of such offences.¹⁰⁸

On another note, women in the Parliament of Tanzania are lagging in utilising their positions to bring about gender sensitive laws confirming that the number of women in the Parliament is not enough for pushing gender progressive laws. Issues such as legislating on ending child marriage,¹⁰⁹ and gender based violence¹¹⁰ are within their legislating capabilities but the two issues still keep on affecting the majority of girls and women.¹¹¹ Women parliamentarians failed to influence the annulment of the unequivocal statement by President Magufuli banning pregnant girls and young mothers from returning to government schools which is a setback for the ‘re-entry’ policy.¹¹² Also, women parliamentarians played significant role the realisation of the removal of Value Added Tax (VAT) on menstrual towels in the financial year 2018-2019, but they failed to influence its retention beyond one year.¹¹³ This is happening while Tanzania has a female vice

It is difficult to know when someone will be able to give a supporting hand. Restricting candidates from fundraising 90 days before the General Elections is a clear ploy to keep women out of the elections.

¹⁰⁸ Other offences include issuing of a false statement to facilitate registration, registering in other polling station, double registration, failure to return a voter’s card after being deleted from the register, making any statement or doing any act with intent to discourage any other person from seeking nomination under the Act or to procure any person who has been nominated to withdraw his candidate, forging voters’ register, or certificate of registration, counterfeiting or destroying ballot papers, engaging in bribery or corrupt practises, offence of treating, personating, undue influence, interference with the public meeting as provided under sections 88-97 of National Elections Act.

¹⁰⁹ In 2016, the High Court of Tanzania declared sections 13 and 17 of the Law of Marriage, 1971 as discriminatory against women and was in violation of articles 12(1) and 13(1) & (2) of the Constitution of the United Republic of Tanzania, but the government appealed against the decision. Msichana Initiative ‘The fight to end child marriages in Tanzania’ the Rebeca Gyumi’s Case’ available at <http://msichana.or.tz/wp-content/uploads/2015/12/MSICHANA-CASE-STUDY-CORECTED-ENGLISH.pdf> accessed on 24 July 2019.

¹¹⁰ Sexual and other forms of violence are rampant, refer to ‘*Teleza*’ incidence in Kigoma, Samira Sawlani ‘Tanzania: The strange and worrying rise of oil-covered rapists in Kigoma’ available at <https://africanarguments.org/2019/06/10/tanzania-strange-worrying-rise-oil-covered-rapists-kigoma-teleza/> accessed on 24 July 2019

¹¹¹ With regard to Gender Based Violence there is no specific and comprehensive law. GBV incidents are addressed by several laws mentioned in the Constitution of the United Republic of Tanzania of 1977; Law of Marriage Act, Cap. 29; and Penal Code, Cap. 16.

¹¹² ‘After getting pregnant, you are done’: no more school for Tanzania's mums-to-be,’ available at <https://www.theguardian.com/global-development/2017/jun/30/tanzania-president-ban-pregnant-girls-from-school-john-magufuli> accessed on 24 July 2018.

¹¹³ Tanzania reinstates taxes on sanitary wear, available at <https://www.theeastafrican.co.ke/business/Tanzania-reinstates-taxes-on-sanitary-wear/2560-5176202-td1gua/index.html>, accessed on 29th June 2019.

president,¹¹⁴ a female minister of education,¹¹⁵ a female minister of health and gender,¹¹⁶ a female deputy speaker¹¹⁷ and 37.2 percentage of women in Parliament. In respect to Tanzanian parliament, besides the number of women in parliament, other considerations such as the electoral system, the manner that women access parliamentary seats, political will and a woman-centred policy making approach both at political party and Parliamentary level, are the key building blocks to the realisation of gender sensitive policies and laws.

7.5 CONCLUSION

This Chapter depicts the contribution of women parliamentarians in advancing women's rights and gender progressive policies and laws. It also shows areas in which women parliamentarians have lagged and missed opportunities for legislating gender progressive laws and influencing gender progressive practices. It is argued in the chapter that complementary efforts are needed for a better promotion of gender progressive policies and laws, especially the need for Rwandan, Kenyan and Tanzanian parliaments to adopt a woman-centered policy making approach. In incidences where women parliamentarians facilitated progressive gender legislations, strategies such as having a common women cross-party agenda, mobilizing for men champions, taking a human rights-centered approach and collaborations with other women's rights organizations proved to work. Challenges such as paying allegiance to party lines, unclear women's common agenda, lack of genuine women cross-party unity, harassment from fellow parliamentarians, poor influencing strategies, less women in the top leadership positions of the strategic parliamentary committees, failure to create or spot windows of opportunities for advancing gender sensitive laws are among the challenges facing women parliamentarians. It is noteworthy that although legislation alone is not a sufficient marker of women's substantive representation, it serves as an early indicator of the potential accomplishments of large numbers of women in parliament,¹¹⁸ in line with key parliamentarian's roles, which are representation, legislating and government supervision. Women parliamentarians are expected to take up women's critical policy issues from constituency engagement, champion for their legislations in the parliament, and further demand for effective implementation by the government. In Chapter Eight, the persisting challenges for

¹¹⁴ Samia Suluhu Hassan.

¹¹⁵ Professor Joyce Ndalichako.

¹¹⁶ Ummu Mwalimu.

¹¹⁷ Dr Tulia Ackson.

¹¹⁸ Gretchen Bauer op cit note 71.

achieving substantive equal representation of men and women in Rwandan, Kenyan, and Tanzanian parliaments are explored.

8. CHAPTER EIGHT

8.0 PERSISTING CHALLENGES TO ATTAINMENT OF EQUAL REPRESENTATION OF WOMEN AND MEN IN PARLIAMENTS

‘Adoption by States Parties of temporary special measures shall aim at accelerating de facto equality between men and women, shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.’¹

8.1 INTRODUCTION

In Chapter Seven, the key gains from the 2003 Rwandan, 2010 Kenyan, and 2014 Tanzanian Proposed Constitutions were discussed in relation to how they provide and facilitate the attainment of equal representation of men and women in parliaments. It was noted that since the onset of the new constitutions in Rwanda, Kenya and Tanzania, only Rwandan women have reached and crossed the half-way mark of the number of members of the parliament of Rwanda. Currently, women occupy 61 per cent of the Rwandan Parliament while women in Tanzania and Kenya represent 21.8 and 37.2 per cent of their respective parliaments. In understanding the discrepancies between Rwanda, Kenya and Tanzania in terms of women’s participation in their parliaments, this Chapter answers the third research question, which calls for analysis of the remaining challenges to the attainment of equal representation of men and women in parliaments. In this Chapter, challenges emanating from the legal framework under which the 2003, 2010 and 2014 Rwandan, Kenyan, and Tanzanian Constitutions are made and challenges emanating from the content of the such constitutions are discussed.

8. 2 SHORTCOMINGS OF THE CONSTITUTION-MAKING LEGAL FRAMEWORK

The legal framework for making the 2003 Rwandan Constitution, the 2010 Kenyan Constitution, and the 2014 Proposed Draft Constitution of Tanzania, namely the Rwandan Arusha Peace Accord, the Kenyan Constitution of Kenya Review Act (CKRA),² and the Tanzania Constitution Review

¹Article 4 of CEDAW.

² The Constitution of Kenya Review Act 2009 published by the National Council for Law Reporting with the Authority of the Attorney General.

Act (CRA) presented a comprehensive legal framework that guaranteed the right to public participation for the first time. However, several shortcomings were witnessed that revealed minimal compliance to Article 25 of the ICCPR, Article 13 of African Charter and the United Nations Human Rights Committee General Comment number 25, which as explained in Chapter Two, confirmed participatory constitution-making as a legal right. The noted shortcomings are described below.

For a legal framework to create a conducive environment for participatory constitution-making, there must be a people-centered prior agreement on the enforced guiding principles.³ For Rwanda and Kenya, the constitution-making process was triggered by the 1994 genocide and the post-2007 electoral violence respectively.⁴ As such, the state of unrest experienced by Rwanda and Kenya resulted in early deliberations among key groups on how the constitutional reforms would be undertaken. For example, in Kenya, the post-electoral violence witnessed between the late 2007 and February 2008, necessitated an intervention by the African Union.⁵ Koffi Anan was chosen by the international community to lead the negotiations and conciliation on the Kenyan political impasse, establishing the Kenya National Dialogue and Reconciliation Committee (KNDRC) to resolve the prevailing political crisis.⁶ In its agreement of March 2008, the principal signatories to the National Accord, His Excellency President Mwai Kibaki and the Right Honourable Prime Minister Raila Odinga, committed themselves to instituting measures to effectively address all the Agenda Four concerns. Under Agenda Four, the KNDRC outlined five key stages that the constitution-review process was to undergo: i) initiation of an inclusive process to be completed

³ Hart Vivien 'Democratic constitution-making' (2003) Module 4_5.1A.pdf. (n.d.) available at http://www.constitutionnet.org/files/Module%204_5.1A.pdf accessed on March 21, 2016.

⁴ Ibid.

⁵ As over 1000 Kenyans lost their lives in this conflict, it was clear to all Kenyans that getting a new constitutional order was necessary. On the basis of the root causes of the violence as established in the numerous official reports, it was ostensibly clear that a majority of the causes could only be addressed by a new constitutional order. An authoritative report on the causes of the 2007 post-election violence was that of the Waki Commission. The commission found that the 2007 violence could be attributed to four factors. First, it established that the culture of violence had been made into an institution and had been part of the political process since the reintroduction of multi-party politics in Kenya. This deliberate use of violence to acquire political power and the lack of punishment for the perpetrators had given rise to an untamed culture of impunity.

⁶ In the course of doing its work, the KNDRC agreed on four agenda items to address the crisis. The fourth agenda item was entitled "long-term issues and solutions" and discussions under this item included the examination and the proposition of the solutions for longstanding issues such as, *inter alia*, undertaking of constitutional, legal and institutional reform and addressing transparency, accountability and impunity. The post-election violence and the crisis accompanying it provided the thrust of political goodwill that facilitated the laying of the foundation upon which parliament was to furnish a legal framework for the acquisition of a new Constitution. Available at http://www.dialoguekenya.org/docs/kenyanationaldialogue_constitutional_review.pdf accessed on 4 March 2017.

within eight weeks through which a statutory constitutional review timetable would be developed; ii) enactment of a referendum law by parliament; iii) the provision for the preparation of a comprehensive draft by stakeholders with the assistance of experts; iv) the consideration and approval by parliament of the proposed new constitution; and v) a referendum for people to consider the constitution.⁷ Key guiding principles reflecting the KDNRC recommendations for a people-centered constitution-making process were enshrined in the CKRA as the main law to facilitate the completion of the constitutional review process.⁸ Similar to Kenya, the nine-year transition period in post-genocide Rwanda (1994-2003) was governed by a set of texts called the Fundamental Law.⁹ It included the 1991 Constitution, the Arusha Peace Accord, the Rwandese Patriotic Front Declaration of July 1994, and the Political Parties Agreement of November 1994, which abided by the former declaration and provided power-sharing mechanisms in the new Government.¹⁰ The legal framework established fundamental principles for participatory constitution-making and put forth steps that would be followed to allow maximum participation of Rwandans as explained in Chapter Five of this thesis. On the contrary, in Tanzania, the constitution-making process started as a surprise.¹¹ The public was not given time to reflect on key

⁷ Oyaya CO 'Towards constitutional legitimacy a study of the principles and processes of constitutional development and constitution-making in Kenya from colonial times to 2010' (unpublished PhD Thesis, School of Law, University Of Nairobi, G/80/9216/2004).

⁸ The object and purpose of this Act was to (a) provide a legal framework for the review of the Constitution of Kenya; (b) provide for the establishment of the organs charged with the responsibility of facilitating the review process; (c) establish mechanisms for conducting consultations with stakeholders; (d) provide a mechanism for consensus-building on contentious issues in the review process; and (e) preserve the materials, reports and research outputs gathered under the expired Act.

⁹ I. The N'SELE Ceasefire Agreement of 29th March 1991 between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, as amended in Gbadolite on 16 September 1991 and at Arusha on 12 July 1992; II. The Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Rule of Law, signed at Arusha on 18 September 1992; III. The Protocols of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Power-Sharing within the Framework of a Broad-Based Transitional Government, signed at Arusha respectively on 30 October 1992 and on 9 January 1993; IV. The Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Repatriation of Refugees and the Resettlement of Displaced Persons, signed at Arusha on 9 June 1993; V. The Protocol Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the integration of Armed Forces of the two parties, signed at Arusha on 3 August 1993; VI. The Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions signed at Arusha on 3 August 1993.

¹⁰ Article 3 of the Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front provided that the two parties also agree that the Constitution of 10 June 1991 and the Arusha Peace Agreement shall constitute indissolubly the Fundamental Law that shall govern the country during the transition period, taking into account the provisions from Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front.

¹¹ In his speech to welcome the New Year on 31 December 2010, President Kikwete promised Tanzanians that he will deliver his promise to start the constitution-review process.

guiding principles to govern the process. The legal framework which controlled the entire constitution-making process, namely the CRA,¹² was not enacted in a conducive environment.¹³ The CRA was tabled under a certificate of urgency, enacted and continued to be amended under stiff opposition, struggles, and through personal interventions by the President.¹⁴ In addition, the CRA Bill was in English, limiting many people, including women, from engaging effectively in understanding the constitution-making due process.¹⁵

Although public participation was put at the centre of the Rwandan and Kenyan constitution-making review process from the beginning, in Tanzania, the CRA captured the significant parts of public participation as an afterthought. This was noted where the first version of the CRA was silent on participation of different key groups, attracting strong agitation from opposition parties and other interest groups. As a response to the public agitation, sections 3, 22, 23, 24, 27 and 28 of the Act were amended to allow the appointment of members of the Constituent Assembly from groups such as the political parties, civil societies, and other institutional stakeholders as specified under section 22(i)(c) of the CRA.¹⁶

In addition, the representation of women in constitution-making bodies was minimal. All constitutional review commissions, namely, the Rwandan Legal and Constitutional Commission (LCC), the Kenyan Committee of Experts (CoE), and the Tanzanian Constitution Review Commission, failed to have equal representation of men and women. Representation by women in the constitution-making bodies did not exceed 30 per cent in all countries. Kenya had three women out of nine members of the CoE, Tanzania had ten out of thirty, and Rwanda had three out of twelve.¹⁷ However, although the inclusion of women in the constitution-making bodies occurred for the first time in the history of Rwanda, Kenya and Tanzania, it is worth noting that the Arusha Peace Accord¹⁸ was silent on women's participation in constitution-making bodies while the

¹² [Cap. 83 R.E 2012].

¹³ After the President's declaration on the intention to review the constitution, the Government through the Ministry for Constitutional and Legal Affairs drafted a Constitutional Review Bill of 2011.

¹⁴ Ibid.

¹⁵ Jesse James 'Bottlenecks to New Constitution Making Process in Tanzania' available at https://www.tanlap.or.tz/sites/default/files/Adv.James%20Jesse%20article_0.pdf accessed on 15th December 2018

¹⁶ See recommendations of the *Jukwaa la Katiba, Asasi za Kiraia na Taasisi za Dini* together with Tanganyika Law Society Recommendations regarding the Constitutional Review Bill 2011.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁸ Article 24 A and B of the Arusha Peace Accord.

CKRA¹⁹ and the Tanzanian CRA²⁰ provided for only ten per cent of women to be included in the constitution-making bodies. As such, there was no equality of men and women in the constitution-making bodies, and as a result, women did not have a strong force to influence the content of the constitution.

Further, despite the law obliging the constitution-making bodies to conduct extensive consultations and civic education,²¹ they were few and less successful programmes targeting women.²² In Rwanda, the few women who were included in constitutional deliberations were not given equal opportunity to engage, deliberate, and influence decision makers on the content of the constitution.²³ In Kenya, various challenges were faced during civic education processes, including popular ideas rooted within Kenyan culture about the legitimacy of women as full citizens when it came to questions of inheriting property and reproductive control.²⁴ In Tanzania, the Constitution Review Commission (CRC) conducted awareness programmes²⁵ to ensure effective public participation of both men and women through public meetings and assemblies.²⁶ However, the CRA did not specifically mention the educational role of the CRC on substantive constitutional issues. This was a serious oversight given that the majority of Tanzanians were not aware of the

¹⁹ The CoE was mandated through section 23 of CKRA to among other things, identify the agreed and contentious issues in the existing draft constitutions; solicit and receive from the public written memoranda and presentations on the contentious issues; and undertake thematic consultations with caucuses, interest groups and other experts.

²⁰ In Tanzania, the CRA established the Constitutional Review Commission (CRC) as the body responsible for consulting, collecting public opinions and finally providing Tanzanians with a new a constitution as such the CRA obliged CRC to regulate constitutional fora, preparation and submission of report on the public opinions, procedure to constitute the Constituent Assembly, and the conduct of referendum. Jesse James op cit note 14.

²¹ Section 23 of the CKRA directed the committee of experts to solicit and receive from the public written memoranda and presentations on the contentious issues; conduct thematic consultations with caucuses, interest groups and other experts; and facilitate civic education throughout the review process to stimulate public discussion and awareness of constitutional issues.

²² Ibid. Most women from groups who were marginalized based on class, religion, ethnicity or those living in rural areas were not able to participate sufficiently in the process.

²³ Angela M Banks, 'Expanding participation in constitution-making: Challenges and opportunities' (2008) *William and Mary Law Review* 49 at 1046.

²⁴ Maingi G 'The Kenyan Constitutional reform process: A case study on the work of FIDA Kenya in securing women's rights' (2011) *Feminist Africa*.

²⁵ The work of the Commission was expected to run for a period of 18 months. Thus, by October 2013 the Commission was expected to complete its works by presenting the final Draft Constitution to the Constituent Assembly. The Commission's budget for funding its activities was estimated to be TZS 40 billion during the 2012/2013 fiscal year. The President has repeatedly stressed that a new constitution is expected to be launched on 24 April 2014. This is when the nation will be marking its 50 years' anniversary of the Union between Tanganyika and Zanzibar. Jesse James op cit note 20.

²⁶ According to section 17(1)(2)(3) and Section 17(9) of the CRA, the Commission could ask any person willing to appear before it for discussion, orally or by production of a document, on any constitutional matter which the Commission considered relevant to the constitutional review process.

constitution under review, let alone understand their role in the constitution-making process.²⁷ In addition, irregularities were reported in Tanzania, especially during voting for the adoption of the Proposed Constitution.²⁸ During the special Constituency Assembly, some members claimed to have voted against the Second Draft Constitution but had their names listed as having voted in favour of the Draft.²⁹ In some incidences, a representative from mainland Tanzania was wrongfully listed as representative from Zanzibar. Also, Special Constituency Assembly members were authorized to vote electronically from abroad despite there being no provision allowing for such a procedure in the CRA nor in the Constitution Assembly standing orders.³⁰ Although the CRA called for extensive public consultation in Tanzania, only one million people out of the 44.9 million were reached by 2013.³¹ According to the report issued by the Commission Chairperson on 3 June 2013, a minimum of three public meetings were held in each district and a total number of 1,365,337 people attended in about 1942 meetings.³² As such, there is a general feeling that constitution-making in Tanzania was not satisfactorily participatory as required by the CRA.

Furthermore, key constitution-making steps were politically hijacked.³³ It was noted that women in Kenya did not freely pursue their rights during the 2010 constitution-making process. Many women followed their political parties' stand instead of women's issues.³⁴ When the draft was released to the public, it was the politicians who campaigned for or against the constitution. The women again campaigned more for what their political party wanted and not what women

²⁷ In the first five months, the Commission went around the country to collect views from the people about the new constitution. The first round started from 2 July 2012 and was completed on 30 July 2012. 135. It marked the beginning of the views collection. The Commission spent almost one month to collect the views from the citizen in this round. 136. The Commission visited eight regions which were marked as the zone. These were Pwani, Dodoma, Manyara, Kagera, Shinyanga, Tanga, Southern Unguja and Southern Pemba. 137. The Commission successfully collected the views in all eight regions. See Speech by the Chairman of the Constitutional Review Commission on launching a Draft Constitution on 3 June 2013. Jesse James op cit note 25.

²⁸ Ibid.

²⁹ Ibid.

³⁰ On October 2, 2014, the draft Constitution was finally adopted by 331 Assembly members from the mainland Tanzania and 147 Zanzibari representatives – one vote more than the required two-thirds quorum on Zanzibar's side. Martinaud C 'Katiba mpya? Dynamics and pitfalls of the constitutional reform process in Tanzania (2015)', available at <https://mambo.hypotheses.org/252>, accessed on 25 January 2018.

³¹ James Jesse op cit note 29.

³² Ibid. The number of the people attended the meetings in the four rounds were 188,679, then 325,915 then 392,385 and 457,358 respectively. See Speech by the Chairman of the Constitutional Review Commission on launching a Draft Constitution, on 3 June 2013. In the four rounds, the meetings were 388; 449, 522, and 583 respectively. See Speech by the Chairman of the Constitutional Review Commission on launching a Draft Constitution on 3 June 2013.

³³ Ibid.

³⁴ Maingi G op cit note 24.

needed out of new constitution.³⁵ In Rwanda it was noted that although the constitution-making process allowed for significant input by women and women's organizations, it was largely dominated and driven by a few political elites.³⁶ Also, in Tanzania, there were issues pertaining the constitutional fora as far as inclusivity and acceptability of the process were concerned.³⁷ The formation of constitutional fora was supposed to be democratic and transparent. Tanzanians who wanted to be forum members in the villages, streets, and at ward-levels were supposed to apply to be elected.³⁸ However, the elections were marred by violence and the voting of the members were influenced by political and religious forces.³⁹ Members were screened by Ward Development Committees which were dominated by one political party, the Chama Cha Mapinduzi. This led to a perception that the views from the constitutional fora were unduly influenced by the dominant party, resulting in challenges regarding the acceptability of constitutional fora as platforms for enriching the first draft constitution.⁴⁰ Under this circumstance, a few non-politically allied women could not find space to influence the thinking of other politically polarised participants, particularly on the content of the new constitution. There is general agreement that political

³⁵ Ibid.

³⁶ Powley Elizabeth 'Strengthening governance: The role of women in Rwanda's transition: A summary' accessed from United Nations Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI) Expert Group Meeting on "Enhancing Women's Participation in Electoral Processes in Post-Conflict Countries" (19-22 January 2004) Glen Cove.

³⁷ The formation and operation of the constitutional fora was a second step for constitution-making in Tanzania. After issuing the first draft constitution the commission in line with section 18 of CRA allowed reaction from the public through district constitutional fora, direct meetings, letters, petitions, and memoranda. The fora were tasked to review the first draft constitution and make comments with a view to improving it before it went to the Constituent Assembly. There were two types of fora, the first type was managed by the Commission while the second was managed by organisations or institutions. Jesse James op cit note 31.

³⁸ Ibid.

³⁹ Ibid. A total of 19,378 constitutional fora members were elected all over the country. In Tanzania Mainland, a total of 18,180 members were elected to form the constitutional fora. Zanzibar had 1,198 members of the fora of whom 1,005 were elected from all shehia. Each shehia was represented by three members and all 193 councillors joined as members.

⁴⁰ Ibid. Another challenge was on the closer look of section 17 and 21(3) of the CRA which states that "Any person or organization wishing to conduct awareness programmes on constitutional review must register under the relevant laws and must disclose sources of his/their funds. Failure to do so constitutes an offence punishable by a fine of not less than Tzs.5, 000,000/= and not exceeding Tzs .15, 000,000/= or imprisonment for a term of not less than three years." Depicts that the objective of the above provisions appears to be avoidance of foreign interference or influence in what should appropriately be a home-grown process. However, it was doubtful whether the objective can be achieved by placing strict letters on the freedom of individuals and civil society to fully participate in and influence the review process. Since the parameters for the debate were defined by law, it was therefore possible to detect and prevent the pushing of anti-people agenda. The process would have been more facilitative if the legal requirement had stopped at notifying authorities of the planned events and refrained from criminalizing activities which creates fear, and a hindrance to free participation. It is hoped that the Commission would have designed the tools to be used during the awareness creation campaign to avoid distortion of the intended message or information.

interests rather than people's interest had confused people during the collection of opinions and through-out the constitution-making processes in Rwanda, Kenya, and Tanzania.

Finally, Rwanda's, Kenya's and Tanzania's constitutional commissions were criticised for not reaching the women in rural areas, and that illiterate women could not give their views, particularly with the questionnaires being in English, lengthy and lacking anonymity.⁴¹ The time set for the commissions to finalize the constitution-making process was too short for the members of the commission to pay special attention to marginalized groups including women.⁴² For example, in Tanzania, citizens in each district were given three days to provide their views and the commission spent only three hours a day per district.⁴³ Most of the indigenous communities did not obtain subsequent information about the draft constitutions, and there were concerns that the language used in draft constitutions was difficult to comprehend.⁴⁴ In a nutshell, there were challenges in obtaining sufficient public participation in the Rwandan, Kenyan and Tanzanian constitution-making processes. Mostly, challenges were related to political pressure, technicalities, logistics or time factors which affected how the public, and specifically women, participated and influenced the content of the new constitutions.

8.3 CONSTITUTIONAL CHALLENGES TO THE ATTAINMENT OF EQUAL REPRESENTATION OF MEN AND WOMEN IN PARLIAMENTS

Factors affecting women participation in electoral politics are well documented. They include, lack of confidence, fear of the unknown, inadequate knowledge on political tactics, financial constraints, challenges within political parties, and traditional patriarchal beliefs leading to cultural attitudes toward the role of women in society and in politics.⁴⁵ In-depth analysis of the factors affecting meaningful and effective women's participation in electoral politics depicts electoral systems and nature and practise of affirmative action⁴⁶ or temporary special measures as main

⁴¹ 'Constitutional writing and conflict resolution' available at <https://www.princeton.edu/~pcwcr/reports/rwanda2003.html> accessed on 4 January 2018.

⁴² Ibid.

⁴³ Jesse James op cit note 38.

⁴⁴ Kasomo D 'Factors affecting women participation in electoral politics in Africa' 2012 *International Journal of Psychology and Behavioral Sciences*.

⁴⁵ Ibid.

⁴⁶ Affirmative action generally refers to any temporary special measure that a public or private entity takes to increase participation of women or another underrepresented group. Although affirmative action strategies have been in place for as long as thirty years in some countries, it continues to be one of the most controversial topics in contemporary public discourse. 'About affirmative action, diversity and social inclusion', available at https://www.aaed.org/aaed/About_Affirmative_Action__Diversity_and_Inclusion.asp, accessed on 2 June 2018.

hindrances.⁴⁷ The challenges relating to public participation in the Rwandan, Kenyan, and Tanzanian constitution-making processes as explained in section 8.2 of this Chapter, hindered the ability of women to influence and acquire more progressive provisions, particularly on the electoral system and nature of voluntary special measures provisions, as discussed below.

8.3.1 Electoral Systems

In Kenya and Tanzania,⁴⁸ the first-past-the-post (FPTP) system has been used since independence. In the FPTP, a winner-takes-all stance is encouraged in which one candidate is elected in each constituency, with the winner being the candidate with the most votes.⁴⁹ In Rwanda, the FPTP is used to elect the President, while members of the senate and the chamber of deputies are elected via a party's closed-list proportional representation.⁵⁰ There is normalization of the FPTP system in Kenya and Tanzania, but this approach to elections is increasingly at odds with the rest of Africa and the world.⁵¹ The FPTP system has not led to success for many women as candidates because of a number of setbacks.⁵² The FPTP system of selection of a member of parliament is candidate-centred, denying most women the right to stand for election as provided under Article 25(b) of ICCPR and Article 13(1) of African Charter, which allows everyone to participate in public affairs regarding his country, directly or through representative. Under the FPTP, political parties and voters are more likely to support candidates viewed as safe and mainstream, which exclude women, who may be perceived as a riskier choice due to strong negative perceptions, traditions and taboos regarding the role of women in the society.⁵³ The challenges of the FPTP are further aggravated in societies such as Kenya and Tanzania that remain disinterested regarding the promotion of women's engagement in active and competitive politics. The FPTP electoral system

⁴⁷ International Republican Institute (IRI) 'Tanzania national elections gender assessment' October 25 2015 (2016) available at https://www.iri.org/sites/default/files/wysiwyg/tanzania_gender_report.pdf accessed on 24 May 2018.

⁴⁸ Section 81 of the National Elections Act Cap 343 (RE 2010).

⁴⁹ Consequently, reform of the electoral system has been a part of Kenya's and Tanzania's constitutional reform debate. Jesse James op cit note 43.

⁵⁰ 'Gender quotas database' available at <https://www.idea.int/data-tools/data/gender-quotas/country-view/255/35> accessed on 11 December 2018.

⁵¹ Amy D 'What is "proportional representation" and why do we need this reform?' https://www.fairvote.org/what_is_proportional_representation_and_why_do_we_need_this_reform on 22 December 2018.

⁵² Ibid. In the United States—a country that uses FPTP—women hold 98, or 18.3 per cent, of the 535 seats. A similar outcome is also evident in the United Kingdom, which also follows an FPTP system. Out of 650 MPs, only 143 women (22 per cent) were elected in the 2010 elections. Conversely, in Denmark, where a proportional representation system is used, 37.7 per cent of MPs are women.

⁵³ Ibid.

has produced an overly adversarial, antagonistic and violence-prone political contest. In Tanzania, this is well explained by the Tanzanian 2015 general election, where women aspirants faced additional challenges during the creation of the opposition parties' coalition, known as Umoja ya Katiba ya Wananchi (UKAWA).⁵⁴ When the opposition parties came together to field joint candidates, women electoral aspirants lost out as less of them had the political experience, support and resources to be the strongest candidate.⁵⁵ Also, the FPTP tends to support the incumbent and popular candidates to the disadvantage of women who have limited experience or exposure to political processes.⁵⁶ For example, the UKAWA coalition decided which party's candidate would be fielded in each constituency by considering several factors. These factors included whether or not the party already had an incumbent member of parliament in that constituency, in which case they would usually be selected to run for re-election under the UKAWA. Another consideration was which party had the strongest network and stronghold in the area.⁵⁷ In the Segerea Constituency, for example, it was agreed that the candidate from the Civic United Front, a man, Mr. Julius Mtairo, should be the flag bearer instead of a woman, Ms. Anatropia Theornest from CHADEMA.⁵⁸ With the intention to win over the ruling party candidate, UKAWA felt extra pressure to field a competitive candidate who had the highest chance of victory. Consequently, most male candidates were chosen over female candidates.⁵⁹ During the 2013 and 2017 Kenyan

⁵⁴ The *Umoja wa Katiba ya Wananchi (UKAWA)* opposition coalition formed when many opposition members walked out of the Constituency Assembly during the constitutional reform process. This coalition is led by CHADEMA, the strongest opposition party on the Mainland during the 2010 elections and CUF, previously the strongest opposition party and still an influential major party that enjoys support on the Mainland but especially in Zanzibar. International Republican Institute (IRI) op cit note 49.

⁵⁵ Ibid.

⁵⁶ Kemi Ogunsanya, 'Women and elections in African politics' available at http://www.iag-agi.org/bdf/docs/women_and_elections_in_african_politics.pdf accessed on 6 August 2018.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Chama cha Demokrasia na Maendeleo (CHADEMA)'s constitution states that the party will ensure that the rights of women are protected and promoted but it does not explain how this will be implemented (p. 60). The party's 2010 manifesto outlined a number of measures to improve women's welfare, and called for the establishment of a Women's Council of Tanzania to promote women's rights throughout the country. However, women's representation in key decision making bodies within the party is less than that of men (p. 60). Chama Cha Mapinduzi (CCM)'s constitution broadly refers to equality but makes no specific mention of gender-based representation in political leadership and processes. However, CCM's 2010 manifesto included promoting women's political participation as one of its objectives. It also stated that it aims to achieve 50 per cent women's representation in all elective bodies by 2015 but still CCM sets a lower target for women's representation in the party's internal leadership and decision-making positions. Women in Tanzania tend to support the ruling CCM because of the CCM's electoral success, which means that it has the largest proportion of special seats for women. This in turn means that supporting the CCM can be a good option for educated women who are keen to pursue a career in politics. The Civic United Front (CUF)'s constitution states that it aims to promote and protect the rights of women. The party's 2010 manifesto stated that if elected it would adopt affirmative action measures for women to enable them to participate in decision-making bodies

elections and the 2015 Tanzanian elections, the narrative of the most safe and mainstream candidate played out.⁶⁰ It was common to hear voters sympathise with women candidates, and at the same time express unwillingness to vote for them as chances for winning were slim.⁶¹

The 2010 Kenyan Constitution and the 2014 Tanzanian Proposed Constitution did not bring about the electoral system that would lead to parliaments that reflected the will and wishes of the people. Article 3 of ICCPR and Article 2 of African Charter calls for state parties to ensure equal rights for men and women in enjoyment of all civil and political rights, including the right to take part in the conduct of public affairs either directly or indirectly. This right is expounded under Article 25 (a) of ICCPR and 13(1) African Charter. The FPTP routinely denies representation to large numbers of voters, and produced legislature that failed to accurately reflect the wishes of the public. This is because only one candidate wins, the rest, even if they were close to winning, get no representation at all.⁶² For example, in the FPTP, it is only the average of 50-60 per cent of voters that elects a winner, more than 40 per cent of the votes and wishes of the voters are disregarded.⁶³ The 2010 Kenyan Constitution and the 2014 Tanzania Proposed Constitution kept the electoral system that discouraged the public to exercise their franchise right and their right to representation. Article 25(b) of ICCPR allows every citizen to have the right and the opportunity to vote and to be elected at genuine periodic elections. Under the FPTP it is easy to gauge and decide who was going to win, depending on the nature of the constituency. Thus discouraging voters with opposite views than the majority, who, as a result, chose not to vote at all.⁶⁴ Generally, under the FPTP rules, the public have the right to vote, but they do not have the equally important right to be represented.⁶⁵ In Tanzania, mainly attributed to the disappointments of the FPTP system, the turnout for general elections fell from 72 per cent in 2005 to 43 per cent

in political, managerial, administrative and other leadership positions. It also stated that it would enact laws to severely punish anyone found guilty of using their office to harass or discriminate against anyone because of their gender. The National Convention for Construction and Reform Mageuzi's constitution includes a specific provision on gender equality. It also provides for the right of all party members to elect and be elected to all leadership positions. The party's 2010 election manifesto called for women's representation in all elective bodies and administrative posts to stand at 50 per cent. The manifesto also stated that if elected, a woman would hold one of the top government positions. International Republican Institute (IRI) op cit note 57.

⁶⁰ Ibid.

⁶¹ Federation of Women Lawyers (FIDA) *Kenya, Key Gains and Challenges, A Gender Audit of Kenya's 2013 Election* 2013.

⁶² Amy D op cit note 53.

⁶³ Federation of Women Lawyers (FIDA) op cit note 61.

⁶⁴ Amy D op cit note 62.

⁶⁵ Ibid.

in 2010 and then to 65.3 per cent in 2015, implying that more than 30 per cent of voters chose not to vote.⁶⁶

Largely, the main problem of the FPTP system is the 'most broadly acceptable candidate' syndrome which affects the ability of women to be elected to parliamentary office, because they are often less likely to be selected as candidates in male-dominated party structures. In the FPTP system, both men and women are viewed as enjoying the same political parties' and voters' privileges and acceptance. The system takes no efforts to address historical injustices and other disadvantages that naturally accrue to special interest groups, including women.⁶⁷

In Rwanda, proportional representation is used as an electoral system for the National Assembly. Of the 80 members of the Chamber of Deputies,⁶⁸ 53 members are elected by direct universal suffrage through a secret ballot using a closed list proportional representation. At least 30 per cent has to be seats reserved for women. The Senate has 26 members, 14 are indirectly elected from a party closed list under proportional representation. Proportional representation is renowned for being a favourable electoral system that can facilitate the attainment of equal participation of men and women in parliament. However, for Rwanda, the fact that the system is limited to bringing only about 30 per cent of women into parliament, it hinders the attainment of equal and substantive representation of women in the Parliament. For this case, the proportional representation arrangement as used in Rwanda, if not accompanied by other strategies such as women-only constituencies, (explained below), could hardly lead to the realisation of equality of men and women in parliament.

8.3.2 Challenges Associated with Temporary Special Measures

To address the challenges of proportional representation and a FPTP electoral systems on women's participation, affirmative action⁶⁹ or temporary special measures in the form of special seats for women and women-only constituencies and counties arrangements are used in Rwanda, Kenya, and Tanzania. The use of temporary special measures is in line with Article 4(1) of CEDAW and Article 9 of the Maputo Protocol. Article 4 of CEDAW provides that:

⁶⁶ African Research Institute 'Party rules: 'Consolidating Power Through Constitutional Reform in Tanzania' (2015) available at <https://www.africaresearchinstitute.org/newsite/publications/constitutional-reform-tanzania-2/> accessed on 21 January 2019.

⁶⁷ Ibid.

⁶⁸ Article 4 of the 2003 Rwandan Constitution guarantees at least 30 per cent of posts in decision-making organs to be occupied by women.

⁶⁹ About Affirmative Action, Diversity and Social Inclusion op cit note 48.

‘States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.’

Article 9 of Maputo Protocol provides that:

‘States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that: a) women participate without any discrimination in all elections; 11 b) women are represented equally at all levels with men in all electoral processes; c) women are equal partners with men at all levels of development and implementation of State policies and development programmes . 2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.’

The purpose of Article 4(1) of CEDAW and Article 9 of the Maputo Protocol is to accelerate the improvement of the position of women to achieve *de facto* and substantive equality, and to affect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women.⁷⁰ Also, special temporary measures aim to accelerate equal participation of women and men in the political, economic, social, cultural, civil or any other field. To determine how Articles 4 of CEDAW and Article 9 of the Maputo Protocol should be applied and practised, three guiding criteria are deduced particular from Article of 4 of CEDAW:

- a) The state should adapt special temporary measures to accelerate *de facto* equality between men and women;
- b) Special measures shall in no way entail the maintenance of unequal or separate standards;
- c) Special measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Criteria a, b and c above, are used to examine temporary special measures as adapted by the 2003 Rwandan Constitution, the 2010 Kenyan Constitution, and the 2014 Tanzania Proposed Constitution. In relation to the challenges in the attainment of equality of men and women in parliament, the application of temporary special measures is described below. The analysis is based on the applicability of such temporally special measures in line with the requirements of Article 4

⁷⁰ General recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, available at *pdf*. accessed on 25 December 2018.

of CEDAW, and challenges they pose in attaining equal representation of men and women in parliament.

a. The State should adapt special temporary measures to accelerate de facto equality between men and women

To provide opportunities for women to participate in electoral politics, the 2010 Kenyan Constitution under Articles 81(b) and 27 (8)⁷¹ requires the electoral system to comply and ensure that no more than two-thirds of the members of elective public bodies are of the same gender. Also, the Constitution reserves 47 seats in the National Assembly for women deputies elected from 47 counties with each county constituting a single-mandate constituency.⁷² These seats are to be contested by only women candidates nominated by political parties in these counties using the first-past-the-post system.⁷³ For Rwanda, taking in account that the country had just emerged from genocide which left the country with more women than men, the 2003 Rwandan Constitution included a quota policy assuring women ‘at least 30 per cent of posts in decision-making organs’ under Article 9 (4) in addition to the requirement that 30 per cent of the 53 members of the senate elected using the closed-list proportional representation should be women. The Constitution also provided for an additional 24 seats to be reserved for women who will be elected through a women-only election in which only women can stand for election and only women can vote.⁷⁴ In Tanzania, considering that the 2014 Proposed Constitution is not yet an officially used document, the existing 1977 Constitution of United Republic of Tanzania will guide this analysis. As per the 1977 Constitution, women members must not make up less than 30 per cent of the members of the National Assembly through special seats arrangement. Women special seats are distributed among the political parties in proportion to the number of seats obtained by them after the general elections. In Tanzania, the quota system of 30 per cent has been used since 1985 as set out under

⁷¹ Articles 81(b) and 27(8) of the 2010 Kenyan Constitution further 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’.

⁷² Ibid.

⁷³ In addition, the National Assembly will have 290 elected members, each elected by voters of single-mandate constituencies, and 12 members nominated by political parties to represent special interests including the youth, persons with disabilities and workers, with the relevant list to be composed of alternating male and female candidates (Article 97 of the 2010 Kenyan Constitution 2).

⁷⁴ Virgint E, ‘Electoral Systems and Women’s Representation’ (2016). Publication No. 2016-30-E 5 Available at https://www.ndi.org/sites/default/files/Gender%20Analysis%20of%202017%20GeneralElections%20FINAL%20High%20Res%20for%20Printer%20-%20NEW%20COVER_small.pdf accessed on 6 September 2018.

Articles 66 1(b) and 78 (1)) of the 1977 Constitution of United Republic of Tanzania.⁷⁵ It is noted that Article 124 of the 2014 Proposed Constitution removes special seats for women replacing it with the provision that require men and women to equally constitute the total number of parliamentarians in the Parliament. As noted before, the Proposed Constitution is not yet in application, hence the 30 per cent of special seats for women as established by the existing 1977 Constitution continue to apply in Tanzania. Affirmation action measures have enabled Rwanda, Kenya, and Tanzania to increase the number of women in their respective parliaments to 61.3, 37.2 and 21.8 per cent respectively. The increase in the number of women in Parliament because of the two-thirds rule, women only constituencies and special seats for women in Kenya, Rwanda, and Tanzania respectively confirms that some form of temporary special measures is necessary to compliment the inadequacy of the electoral systems with the view to address past inequality and discrimination against women in accordance with Article 4 of CEDAW and Article 9 of the Maputo Protocol. Despite that, the goal of accelerating the attainment of *de facto* equality is farfetched. The Rwandan, Kenyan and Tanzanian Constitutional temporary special measures to enhance women political representation are set at 30 per cent. This is against the objective of Article 4 (1) of CEDAW and Article 9 of the Maputo Protocol which requires temporary special measures to accelerate equality between men and women. Equality is defined as the state of being equal, especially in status, rights or opportunities, or the same status, rights, and responsibilities for all the members of a society, group, or family.⁷⁶ The instigators of the 30 per cent rule believed that 30 per cent is necessary to form the so-called ‘critical mass’ for women to make a visible impact on the style and content of political decision-making processes.⁷⁷ There is also a belief that 30 per cent was adopted in order to take people through phases of consciousness, understanding and acceptance of women in leadership positions. However, when a 30 per cent ceiling is set, political parties will only allow women to hold decision-making positions to the extent of a constitutional ceiling. Also, a 30 per cent ceiling inhibits the ability of women to have a meaningful

⁷⁵ In Tanzania, special seats have been the popular means for Tanzanian women to access the parliament. Special seats are assigned based on the number of votes a party wins in the parliamentary elections. The political parties that gain 5 per cent of the votes in the general election nominate the names of candidates for nomination under the special seats system. As per NEC regulation, every political party which contests parliamentary election may propose and submit to the commission the names of eligible women candidates for nomination of women special seats. International Republican Institute (IRI) op cit note 63.

⁷⁶ Available at <https://www.collinsdictionary.com/dictionary/english/equality> accessed on 3 November 2019.

⁷⁷ United Nations Department of Economic and Social Affairs (DESA) Division for the Advancement of Women (DAW) ‘Equal participation of women and men in decision-making processes, with particular emphasis on political participation and leadership’ Expert Group Meeting Addis Ababa, Ethiopia, 24 to 27 October 2005.

or equal voice in decision-making processes.⁷⁸ When it comes to voting on issues that have a positive or negative impact on women, women cannot form a critical mass to outnumber male parliamentarians, who, due to a strong patriarchal system, tend to be blind to women's agendas.⁷⁹ For example, in Kenya, the constitutional two-thirds principle is facing implementation challenges and is up for review. The Bill for amending the Constitution was tabled before the Parliament in November 2018, but strong opposition was experienced from male parliamentarians. The Bill would have reserved one in three seats for women if passed. However, most male members of parliament did not attend the parliamentary session and most of those who attended voted against the Bill. This signifies a high level of lack of constitutionalism, political will and reluctance toward the implementation of the two-thirds principle. With only 21.8 per cent of women in parliament, women could not form a critical mass to provide enough support to pass the proposed Constitutional Amendment.⁸⁰ Consequently, the two-thirds rule remains one of the key gains that suffered the greatest setback since its onset on the 2010 Kenyan Constitution.⁸¹ Also, the 2017 elections witnessed the two-thirds rule being implemented only at the county level but not in the National Assembly or Senate.⁸² Although Kenyan women obtained more seats in the 2017 elections compared to 2013, the number still falls short of the constitutional two-thirds gender requirement.⁸³ Currently, the National Assembly has 75 women parliamentarians — 22 elected from the 290 constituencies in the 2017 election, six nominated in the 12 nomination slots while 47 were elected as woman representatives from women only constituencies. About 42 new seats are required in the National Assembly in addition to the current seats to meet the two-third gender

⁷⁸ Wilson Centre 'Democracy promotion, beyond gender quotas in African politics: How to deliver on women's issues in Africa', available at <https://www.wilsoncenter.org/event/beyond-gender-quotas-african-politics-how-to-deliver-womens-issues-africa> accessed on 21 November 2018.

⁷⁹ Maingi G op cit note 34.

⁸⁰ 'Women in national parliaments as in December 2018', accessed from <http://archive.ipu.org/Wmn-e/world.htm> on 5 January 2019.

⁸¹ Ibid.

⁸² As a result, two Kenyan groups, the Center for Rights and Education and Awareness (CREAW) and the Community and Advocacy and Awareness Trust (CRAWN), filed a court case seeking an injunction to stop the newly elected Parliament from convening because it failed to meet the gender quota. ⁸² The petition asked the court to force the Parliament to pass legislation to implement the gender quota during their first week. The High Court denied the request for an injunction, leaving the constitutional requirement to meet the gender quota unmet. The Carter Centre 'Kenya General and Presidential Elections (2018)', available at https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf accessed on 1 May 2018.

⁸³ Overall, women candidates numbered 1,300 out of a total of 14,523 candidates (9 per cent) and only 172 (13 per cent) were elected. Oluoch F 'More women elected in Kenya, but the numbers still fall short' available at <http://www.theeastafrican.co.ke/news/Women-elected-in-Kenya-/2558-4054988-d8a9guz/index.html> on 1 May 2018.

rule.⁸⁴ The Senate has 18 nominated women Senators and three elected members and requires five more slots for women to meet the requirements of the two-thirds rule gender principle. Lack of political will to implement the special-seats arrangement is also seen in Tanzania. In 2010, the ruling party National Executive Committee increased the number of special seats from 30 per cent to 40 per cent but it was not implemented in the 2015 general elections for unknown reason.⁸⁵ Generally, framing the number of women in decision-making positions around 30 per cent, even when complimented with some form of women only counties or constituencies, jeopardises the realisation of substantive *de facto* equality of men and women contrary Article 4(1) of CEDAW and Article 9 of the Maputo Protocol. Lack of genuine political will to open political spaces for women makes the realisation of the such objective even harder.⁸⁶

b. Special measures shall not maintain unequal or separate standards or further marginalization

The second criterion under Article 4(1) of CEDAW requires no unequal or separate standards to be maintained by the adapted special measure. However, the implementation of temporary special measures in Rwanda, Kenya and Tanzania depicts several challenges. The temporary special measures arrangement as applied in Rwanda, Kenya, and Tanzania erodes the principle of equal opportunity for men and women in enjoyment of civil and political rights.⁸⁷ The term ‘special’ conforms to human rights discourse and should be interpreted to refer to measures that are designed to serve a specific goal. In Rwanda, Kenya and Tanzania, temporary special measures are used to cast women and other groups who are subject to discrimination as weak, vulnerable and in need

⁸⁴ Africacheck ‘Factsheet: Kenya’s new parliament by numbers’ available at <https://africacheck.org/factsheets/factsheet-kenyas-new-parliament-numbers/> on 1 May 2018. According to the Independent, Electoral and Boundaries Commission (IEBC) in 2013, out of a total of 1908 aspirants for the National Assembly seats, only 197 were women. And out of the 197 women, only 16 made it to parliament. In addition to the 16, there are 47 women county representatives who were elected to the National Assembly. At the county representative level, 623 women vied and only 85 were elected. However, 1365 of their male counterparts were elected out of a total of 9,287 male contestants. Despite their numbers, no woman made it to be elected to the seat of Senator or Governor. Only one woman contested for presidency out of seven men and she performed poorly.

⁸⁵ ‘Official Report from National Executive Committee of Chama Cha Mapinduzi’ which sat on 16-17 August 2009 under the chairmanship of Jakaya Mrisho Kikwete, available at <http://ccmtexas.blogspot.com/2009/09/taarifa-rasmi-kuhusu-kikao-cha.html> accessed on 18 May 2016.

⁸⁶ D Otto ‘Gender comment’: Why does the UN Committee on economic, social and cultural rights need a general comment on women?’ 14 (2002) *Canadian Journal of Women’s Law* 1 available at the court held that the use of positive action contravened the Equal Treatment Directive. U O Hare ‘Positive action before the European court of justice - Case C450/93 *Kalannke v. Freie Hansestadt Bremen*’ 1996 *Web J of Current Legal Issues* available at <http://webjcli.ncl.ac.uk/1996/issue21/ohare2.html>. *Marschall v. Land Nordrhein-Westfalen*, Case 409/95, 1997 ECR I-6363. See also *EFTA Surveillance Authority v. The Kingdom of Norway*, Case E-1/02, 24 January 2003.

⁸⁷ Article 3 of the ICCPR and Article 2 of the African Charter.

of extra or ‘special’ measures to participate in political decision-making processes. This kind of arrangement affects the conduct and treatment of women special seats parliamentarians. In Kenya and Tanzania, special seats for women or women-only constituencies and counties are referred to as ‘Bonga points’ (the points that can be won with one of the mobile network providers when one uses a certain amount of phone credit).⁸⁸ There have been incidences of nominated women being shouted down when they stand to speak, just because they are not representatives of constituencies. To quieten the women in special seats, especially during the heated debates, men parliamentarians claim that women special seats exist because they (men) won constituencies in competitive elections, without which women special seats could not make it to the Parliament.

Also, the practice of special seats for women arrangement hinders women of their right to stand for election against Article 7 of CEDAW and Article 9 of the Maputo Protocol. This is exacerbated by the fact that political parties use the special-seats arrangement as a tool to discourage women from vying for electoral seats or to discourage voters from voting for women.⁸⁹ In the Rwandan, Kenyan and Tanzanian elections, it is a common practice for political parties to ask female candidates to step down from the election race at the constituency level, with the promise that they would be nominated for a women’s representative positions.⁹⁰ In situations where a male candidate runs against a female candidate, the former will use the allocation of seats for women to convince voters that the latter had already gained her place in a special seat.⁹¹ This further affects the women’s right to stand for election and affects how they get elected in parliament. Mistreatment of women in special-seats arrangement by political parties regarding how they should or should not enter the parliaments is known to the government of Kenya, Rwanda, and Tanzania. Yet, no measures have been taken by States against the political parties in line with Article 2 of CEDAW. Article 2 requires state parties to impose accountability to different national actors in case they hinder implementation of CEDAW.⁹²

⁸⁸ Maingi G op cit note 79.

⁸⁹ Wilson Centre op cit note 78.

⁹⁰ Ibid.

⁹¹ Pilar Domingo and et al ‘Women and power: Shaping the development of Kenya's 2010 constitution’ *Research Reports and Studies* (2016).

⁹² Special seats discriminate against sex and gender because politicians are elected because of their gender, not because of their qualifications or capability to lead. Discrimination among other things based on gender and or sex is prohibited under article 1 of CEDAW.

Further, temporary special measures exposed women to second-class treatment and further discrimination against Article 1 and 4 of CEDAW and Article 1 of the Maputo Protocol. In Kenya, when it came to constituency financial support, each elected member of parliament received Ksh60 million (\$600,000) annually for development projects in their constituency. However, women in reserved seats received only seven million shillings.⁹³ Until August 2017, only 16 women out of Kenya's 290 elected members of the National Assembly received the full lawmakers' budget.⁹⁴ In Tanzania, elected members of parliament receive about 40,000,000 Tsh (about \$20,000) as constituency funds, but women in the special seats receive nothing based on the presumption that they don't have constituencies. In Tanzania, the 1977 Constitution and other electoral laws and guidelines from National Electoral Commission (NEC) are silent on how women in special seats are elected and who they should represent. As such, each political party has its own procedure for appointing women to occupy special seats. Absence of the guided uniform procedure for nomination of women special seats by the political parties has cause parties to adopt criteria and procedure that attract nepotism, favouritism and corruptions. This, in turn, undermines the quality and integrity of women in special seats and affects their acceptance by the constituents, and how they get elected in future. When this is coupled by lack of awareness by citizens about the goal of having special seats for women, it leads to high opposition to the special-seats arrangement by common citizens. However, special seats for women in Tanzania are generally appointed without a defined boundaries or confined constituencies. While the ruling party, CCM, appoints women in special seats to represent regions, other political parties regard women special seats as national women representatives. This is because most of opposition political parties had not obtained sufficient votes to attract sufficient number of special seats to represent all the regions.⁹⁵ There is a common presumption that since women special seats are not attached to constituencies, they are also not entitled to receive constituency development funds. Under this circumstance, the definition of a constituency is mistakenly limited to physical boundaries of constituencies, and does not extend to the women's interests that women special seats represent. Women special seats deserve to receive constituency development funds to assist them in building political capital

⁹³ Maingi G op cit note 88.

⁹⁴ 'Women candidates face curses and worse in Kenyan elections' – Reuters available at <https://www.reuters.com/article/us-kenya-election-women/women-candidates-face-curses-and-worse-in-kenyan-elections-idUSKBNIAK1EI> accessed on 1 February 2018.

⁹⁵ But unofficially even women in opposition parties tend to confine themselves to regions. Example Upendo Peneza confined herself to Geita region.

through different initiatives and projects to engage with women and other community members. Also, women special seats are working in wider geographical locations and serve many people at regional and national levels.⁹⁶ Given that the major aim of temporary measures is to empower women and prepare them to run for competitive seats, a constituency development fund is a necessary catalyst for realisation of this objective. Providing a constituency development fund to constituency members of parliament and denying the same to women parliamentarians sitting in special seats is contrary to the objective of establishing temporary special measures under Article 4 of CEDAW which recognizes special seats as temporary measures that are not supposed to further discrimination against women.

There are other practises that marginalise and discriminate against women in special seats. For example, in Tanzania, women in special seats do not qualify to be appointed as prime minister, as only elected members of parliament are eligible.⁹⁷ In Kenya, female parliamentarians in special seats are not supposed to vote in any motion. At senate level, only elected senators can vote. Despite having 18 women in the senate in 2013, these women did not have the right to vote in a motion because they had been nominated and not elected. Thus, only the men could vote on motions, irrespective of whether the motions dealt with women and children's rights. In the 2017 election, three women won seats in the 68-member Senate, making them the first women to be elected and have the right to vote in the lower house of parliament.⁹⁸ Having women in the Senate and not allowing them to vote defeats the purpose of their presence. It is just symbolising women's faces in decision-making bodies while they have no authority and influence in the actual decision-making business, contrary to the requirement of Article 4 of CEDAW.

Despite the high levels of marginalisation, dysfunctions and the damage that temporary special measures pose to the women's political participation agenda, its implementation is also

⁹⁶ The Constituencies Development Catalyst Fund Act, Act No 16 of 2009.

⁹⁷ Article 51 (2) of the 1977 Constitution of United Republic of Tanzania provides that as soon as possible, and in any case within fourteen days after assuming office, the President shall appoint a Member of Parliament elected from a constituency of a political party that has a majority of members in the National Assembly or, if no political party has a majority, who appears to have the support of the majority of the Members of Parliament, to be Prime Minister of the United Republic, and he shall not assume office until his appointment is first confirmed by a resolution of the National Assembly supported by a majority vote of the Members.

⁹⁸ The Senate consists of 68 seats with 47 elected and 21 appointed including the 16 women, 2 from disabled groups, 2 representing male and female youth and a speaker. Six women have made history in Kenya for being the first women to win seats as governors and senators since the promulgation of the 2010 constitution, available at <http://www.africanews.com/2017/08/11/kenya-s-history-making-women-elected-governors-senators/> accessed on 16 November 2018.

facing strong political unwillingness.⁹⁹ In Kenya, a two-thirds gender rule is provided under Article 27(8) and Article 81 of the 2010 Kenyan Constitution.¹⁰⁰ Although the two-thirds gender rule is one of the most fundamental gains for women that was secured under the 2010 Kenyan Constitution, its realisation has been controversial as the Constitution has not provided a clear mechanism for its implementation in the Senate and the National Assembly.¹⁰¹ The two-thirds requirement was expected to radically change political representation for women in Kenya, but since its introduction in 2010, there has been no consensus on the proposals put forward to assist the realisation of the two-thirds rule. Women's organisations have proposed several mechanisms, including requiring political parties to nominate enough female members to meet the gender threshold, reserve seats for women in party strongholds, and have rotational seats for affirmative action. These suggestions were not taken into consideration. On 11 December 2012, the Supreme Court of Kenya held that the gender equity principle is progressive in nature and does not need immediate realisation. The Court gave Parliament until August 27 2015 to present a legislation on how the one-thirds gender rule would be met in the 2017 General Election.¹⁰² The five-year provision expired on August 27, 2015, witnessing the Constitution of Kenya Amendment Bill rejected three times by the National Assembly. The Amendment sought to amend Articles 97 and 98 of the Constitution to provide for the creation of special seats to top up the number of elected female legislators.¹⁰³ The main rejection argument is that the new provisions would result in a bloated parliament which would add a heavy burden to the taxpayer. This criticism is also

⁹⁹ 'The gender Bill just makes political and economic sense,' available at <http://www.theeastafrican.co.ke/oped/comment/Kenya-Gender-Bill/434750-3911440-j0klraz/index.html> accessed on 29 January 2018.

¹⁰⁰ Article 81 states: The electoral system shall comply with the following principles—(b) not more than two-thirds of the members of elective public bodies shall be of the same gender.

¹⁰¹ Article 177 ensures that Articles 81(b) and 27 (8) of the Kenyan Constitution are complied with at the County level through the nomination of special seat members, the same is not guaranteed at the National Assembly and the Senate.

¹⁰² In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] EKLK, *advisory opinion no. 2 of 2012*, in the matter of an application for advisory opinion under article 163 (6) of the constitution of kenya-and-in the matter of article 81, article 27 (4), article 27 (6), article 27(8), article 96, article 97, article 98, article 177(1)(b), article 116, article 125 and article 140 of the constitution of kenya -and- in the matter of the principle of gender representation in the national assembly and the senate -and- in the matter of the attorney-general (on behalf of the government) as the applicant. Available at <http://kenyalaw.org/caselaw/cases/view/85286> accessed on 29 December 2019.

¹⁰³ Ndonga S 'Petition on two thirds gender principal due in court Monday' available at <https://www.capitalfm.co.ke/news/2016/09/petition-two-thirds-gender-principal-due-court-monday/> accessed on 14 May 2018.

experienced in Tanzania as the public argue that a large amount of taxpayers' money is spent to pay MPs of whom it is unknown to voters who they represent and with what interest.¹⁰⁴

c. Special measures are supposed to be temporary

Article 4 of CEDAW requires special measures to be temporary and to be discontinued when the objectives of reaching equality of opportunity and treatment have been achieved.¹⁰⁵ Depending on the context, level of past discrimination and inequality against women in a particular area, temporary special measures may apply for a long period of time, however, they should not be deemed to continue indefinitely.¹⁰⁶ The duration of temporary special measure in a country should be determined by its functional result in response to a concrete problem and not by a predetermined passage of time.¹⁰⁷ Given that special seats for women has been set at 30 per cent and the tendency of political parties to discourage women to stand for mainstream seats, makes it impossible for temporary special measures to facilitate the attainment of substantive equal representation of men and women in parliament. As such, temporary special measures may need to remain for a long period of time, or permanently without results or be changed to a more workable option.¹⁰⁸ The laws of Rwanda, Kenya, and Tanzania provide no indicators for determination of when temporary special measures should come to an end. Also, the constitutions, electoral laws, and guidelines from electoral commissions in Rwanda, Kenya, and Tanzania do not include timeframes under which individual women could serve under temporary special measure. As such, temporary special measures have been benefiting a few women, despite their objective of building political capacities and experiences for many women, who afterwards transit to competitive politics. For Tanzania, for example, since its establishment approximately 34 years ago (1985), special seats have

¹⁰⁴ Given the fact that there are 102 special seats MPs in the parliament, a quick calculation shows that each day when the parliament convenes about 15,300,000 Tanzanian shillings are spent on paying allowances as each MP pockets in 150,000 Tanzanian shillings *per diem* and sitting allowances per day. Furthermore, *per diem* and allowance is also paid to Members of Parliament including the special seats parliamentarians whenever the parliamentary standing committees meet in Dar es Salaam before the parliamentary sessions in Dodoma. The committees normally meet for over 40 days while the parliamentary session meet for over 80 days per year. Much focus of the public is on salaries and other allowances to special seats Members of Parliament and overlooks the contributions of the parliamentarians to the decisions of the Parliament. These allegations indicate that the quota system in the Tanzanian Parliament and local councils faces a serious challenge.

¹⁰⁵ Careful considerations must be taken for the system of special seats not be dismantled prematurely, to avoid regression of results. General Recommendation No. 25 on Article 4 paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures.

¹⁰⁶ *Ibid.*

¹⁰⁷ General Recommendation No. 25 op cit note 105.

¹⁰⁸ Swai Idda & Anasel Mackfallen & Masue Orest, 'Achievements and challenges of women special seats arrangement in Tanzania. (2013). *Journal of Policy and Leadership*. 2. 121-135.

maximally facilitated only 7 per cent of women to win constituencies in one election. This trend suggests that it will take another 102 years to reach 50 per cent of women in the Tanzanian Parliament with the understanding that 30 per cent will be from special seats and 20 per cent from constituencies. The root causes for low progression from special seats to competitive politics is the absence of a term limit for women who serve in special seats. One woman can serve in a special seat endlessly, and it is notable that some women have been in special seats for more than twenty years. There is an ill-founded argument that if a member of parliament or a councilor elected from a constituency or ward has no term limit, then why should women special seats be subjected to a term limit. At this juncture, it is worth noting that women in special seats, even though they have roles as ordinary parliamentarians or councilors, they serve an additional purpose. They are supposed to hold such seats ‘temporarily’ to gain political experience, financial muscles, and expand their networks to eventually transit to competitive politics, as per the requirement of Article 4 of CEDAW. Absence of a term limit gives women already in special seats additional advantage to continue holding such seats, since they have a big network and influence within the political parties and women political parties’ wings - a benefit that aspiring women do not have. In 2010, the Tanzanian ruling party, Chama Cha Mapinduzi’s National Executive Committee was keen to bring a new policy that would limit special seat MPs to two terms (10 years) to give room for more women to gain political requirements and transition to competitive elections. However, unfounded fear about the readiness of the women to face political competition at the constituency level made the proposal highly contested, even by the women themselves.¹⁰⁹

8.4 CONCLUSION

Although Rwandan, Kenyan, and Tanzania women managed to obtain significant provisions for protecting and promoting women’s participation in decision-making processes, they failed to influence the legislation of electoral systems and temporary special measures that would successfully facilitate the attainment of equal representation of men and women in parliaments. The FPTP electoral system as used in Kenya and Tanzania, has been found to be unsuitable for women due to its antagonistic nature and the winner-takes-all approach. On the contrary, the proportional representation electoral system that is used in Rwanda, although credited for facilitating women’s participation in parliament, is limited to produce not less than 30 per cent of

¹⁰⁹ Strachan AL ‘Women in politics and the public sector in Tanzania’ (2015) (GSDRC Helpdesk Research Report, Birmingham, UK: GSDRC, University of Birmingham).

women in parliament. When a 30 per cent ceiling is set, political parties will only allow women to hold decision-making positions to the extent of a constitutional ceiling. Despite the intended aim of redressing past inequalities and discrimination and its contribution to increasing the number of women in Rwandan, Kenyan, and Tanzanian Parliaments. It is noted that temporary special measures as applied in Rwanda, Kenya and Tanzania that do not have a time limit, further inequality, discrimination and mistreatment of women, hence contravening the requirement of Article 4 of CEDAW and Article 9 of Maputo Protocol. In Chapter Nine, recommendations to address the challenges depicted in Chapter Seven are set forth.

9. CHAPTER NINE

9.0 STUDY RECOMMENDATIONS

‘...electoral systems will inevitably need to adapt over time if they are to adequately respond to new political, demographic and legislative trends and needs.’¹

9.1 INTRODUCTION

In Chapter Eight, the provisions of the 2003 Rwandan Constitution, the 2010 Kenyan Constitution, the 1977 Tanzanian Constitution and 2014 Proposed Constitution were examined in relation to how they hinder the realisation of equal representation of men and women in their respective parliaments. The electoral or voting system and the practise of temporary special measures were identified as major stumbling blocks. In Chapter Nine, the general and specific recommendations on how the electoral system, regulation of political parties and the practice of special temporary measures can be improved to facilitate the attainment of equal representation of men and women in parliament are presented. Areas for further research are also provided.

9.2 GENERAL RECOMMENDATIONS

As noted in Chapter Seven, there is general agreement that a country’s electoral systems have a direct impact on women’s participation in electoral decision-making bodies. The First-Past-The-Post (FPTP) electoral system as used in Kenya and Tanzania remains the main challenge for the realisation of equal participation of men and women in parliament.² While there is no legal stipulation on the preferable electoral system, there is an increasing recognition of the issues affected by electoral systems, including issues around fair representation of all citizens and equality of women and men.³

¹ Ellis A ‘Principles of electoral system choice’ (2005) *Presented at Workshop VI: Representative Democracy, Participatory Methods and Capacity Development for Responsible Politics Sixth Global Forum on Reinventing Government Seoul Republic of Korea.*

² FPTP allows election of only one candidate per constituency, and parties in this situation overwhelmingly choose a male candidate due to reasons that are widely documented. Political parties are the major ‘gatekeepers’ in determining who will be candidates in elected office. They play a critical role in advancing or impeding women’s participation in decision-making bodies. Through the process of candidate selection (where candidates are taken on by the party for election), women face a number of obstacles. Men are often viewed as more viable and better candidates and are given preference to female candidates. Additionally, the pool from which political parties search for candidates tends to be dominated by men, such as trade union officials and local councillors. Kemi Ogunsanya ‘Women and elections in African politics’ available at http://www.iag-agi.org/bdf/docs/women_and_elections_in_african_politics.pdf accessed on 23 December 2018.

³ Ellis A op cit note 1.

According to the IPU and International IDEA, women are generally three to four times more successful to be elected in proportional representation (PR) electoral systems than in FPTP.⁴ Also, the country's choice and design of electoral systems must take place in the context of several international covenants and treaties, especially those governing voting rights, which for this thesis are the ICCPR, the African Charter, CEDAW and the Maputo Protocol. The provision of Article 25 of the ICCPR, Article 13 of the African Charter, Article 7 of CEDAW and Article 9 of the Maputo Protocol, among other things, call for equal participation of men and women in voting, standing for elections, and in policy formulation and implementation. As such, it is generally recommended that Rwanda, Kenya and Tanzania should adopt an equality-based list PR electoral system to facilitate equal representation of men and women in their respective parliaments. In the list PR electoral system, each party presents a list of candidates to the electorate in each multi-member electoral district.⁵ Voters vote for a party, and parties receive seats in proportion to their overall share of the vote in the electoral district.⁶ Winning candidates are taken from the lists in order of their position on the lists. The list PR electoral system must be accompanied by a condition of balanced party lists with 50 per cent of men and women representation.⁷ The essence of the PR system is that every vote counts, and everyone has the right to fair representation in proportion to their strength in the electorate.⁸ Since voting behaviours are highly influenced by a society's cultural or social divisions, list PR electoral systems help ensure that the legislature includes members of both majority and minority groups.⁹ This is because the list PR system encourages parties to craft balanced candidate lists, which appeal to a whole spectrum of voters'

⁴ The more seats elected from each constituency, the more women are likely to be elected. Single-member electorates with the full preferential voting system reduces the number of parties vying for election and makes it more likely that a single party can choose their local candidates without having to consider the gender balance of the party at a national level. The proportional representation electoral system is also considered to have been the key factor in the adoption of quota systems in Africa, where several countries have now met or exceeded a 30 per cent quota for women parliamentarians. There are, however, examples where a majoritarian electoral system has produced a successful quota system. In 2005, for example, Tanzania amended its constitution to increase the proportion of reserved seats to 30 per cent, and also required that five out of ten seats be set aside for presidential appointees. As a result, the proportion of women increased after the 2015 national elections to comprise 37.1 per cent of the National Assembly. International Republican Institute (IRI) 'Tanzania national elections gender assessment' October 25, 2015 (2016) available at https://www.iri.org/sites/default/files/wysiwyg/tanzania_gender_report.pdf accessed on 24 May 2018.

⁵ Ibid.

⁶ Ellis A op cit note 3.

⁷ Ibid.

⁸ Ibid.

⁹ Ogindo M 'Proportional representation more democratic, less costly' (2018) available at https://www.the-star.co.ke/news/2018/09/15/proportional-representation-more-democratic-less-costly_c1818558 accessed on 30 January 2018.

interests.¹⁰ Also, voters vote for the party and its ideologies without going deeper into who they are voting for.¹¹ This helps voters to avoid becoming entangled in concerns about culture, tradition, gender and abilities or inabilities of the listed candidates.¹² Other benefits of proportional representation in electoral systems are that it reduces violence and fatal competition caused by the ‘winner-takes-all FPTP syndrome’ that has been pushing women out of political spheres.¹³ The PR electoral system also increases voter turnout, is less expensive, and enhances the country’s diversity and national unity.¹⁴ The list PR electoral system promotes political parties’ internal democracy, forces parties to have a national outlook and ensures that political parties are guided by ideologies, not individuals. Generally, the benefits of an equality based list PR electoral system have a multiplier effect on how women participate and get elected in line with Article 25 of the ICCPR, Article 13 of the African Charter, Article 7 of CEDAW and Article 9 of the Maputo Protocol.

9.3 SPECIFIC RECOMMENDATIONS

In line with the realisation of contextual differences in Rwanda, Kenya and Tanzania, the different levels women have attained in terms of their participation in electoral politics, the duration under which the temporary special measures have applied in such countries, and the readiness of individual countries to overhaul the entire constitutional electoral system, calls for the need to provide more country-specific recommendations.

a. Rwanda

In Rwanda, PR is used as an electoral system for the National Assembly. Of the 80 members of the Chamber of Deputies, 53 members are elected by direct universal suffrage through a secret ballot using closed list proportional representation, and at least 30 per cent must be seats reserved for women.⁹ The Senate has 26 members of whom 14 are elected from a party closed list under PR. As noted in the preceding section, list PR is a favorable electoral system to facilitate

¹⁰ Ibid.

¹¹ Virgint E ‘Electoral systems and women’s representation’ (2016). Publication No. 2016-30-E 5 Available at https://www.ndi.org/sites/default/files/Gender%20Analysis%20of%202017%20GeneralElections%20FINAL%20High%20Res%20for%20Printer%20-%20NEW%20COVER_small.pdf accessed on 6 September 2018.

¹² Ibid.

¹³ Ellis A op cit note 8.

¹⁴ The folly of FPTP can easily be seen in some constituencies in Nairobi where a candidate was declared winner despite 65.4 per cent of the electorates voting against him or her. In other words, some representatives are elected to the legislative assemblies with as low as 34.6 per cent of the votes. This anomaly can only be cured by proportional representation. Ogindo M op cit note 9.

the realization of equal participation of men and women in parliament.¹⁵ However, the list PR electoral system as implemented in Rwanda is limited to bring a minimum of 30 per cent of women into parliament. Apart from the list PR, Article 9 (4) of the 2003 Rwandan Constitution extends the 30 per cent rule to all decision-making organs. As such, the additional 24 seats are reserved for women to be elected through women-only elections, where only women can stand for the election and only women can vote.¹⁶ The combination of the list PR electoral system and women only constituencies enabled Rwanda to have the largest number of women in Parliament, currently at 61.3 per cent.¹⁷ This implies that without the 30 per cent constitutional party list being complimented by women-only constituencies, the Rwandan Parliament would not have reached the number of women it has. Women-only constituencies attract a lot of criticism from members of the community, resulting in ridicule, name-calling and discrimination against women occupying those constituencies. This is contrary to the requirements of Article 4 of CEDAW, which prohibits temporary special measures from maintaining inequality and furthering discrimination as explained in detail in Chapter Eight.

It is thus recommended that the 2003 Rwandan Constitution should be altered to allow women to occupy a minimum of 50 per cent of the party lists under the existing PR electoral system. This change will automatically eradicate women-only constituencies and lead to substantive and meaningful equal representation of men and women as per Article 7 of CEDAW and Article 9 of the Maputo Protocol.¹⁸ This recommendation takes into consideration that Rwanda already applies the list PR electoral system, that women enjoy wider acceptance and are the majority in the parliament. Furthermore, twenty-five years have passed since the 30 per cent gender rule and women-only constituencies have applied in Rwanda. As such, women have gained enough political experience to be able to compete to be an equal number on party lists and attain non-controversial equality. Switching to a balanced or fifty-fifty men and women party list will mean that the number of women in the Rwandan Parliament will drop from the current 61.3 per cent to 50 per cent women and 50 per cent men. Similar to how advocacy for more women in decision-making pushes men away from decision-making seats, for Rwanda, the adoption of an equality-based party list will push about ten per cent of women away from their seats. This loss is

¹⁵ Ibid.

¹⁶ Virgint E op cit note 11.

¹⁷ Ibid.

¹⁸ Ibid. In Italy, women must make up 50 per cent of the Proportional Representation (PR) ballot.

however crucial for realisation of substantive representation of women and men, which is as important as descriptive representation. This change will eradicate the highly-contested women only constituencies, and allow women to still have power and influence to pass gender sensitive policies and laws. In Rwanda, it is worrying to encounter views that women leaders make no difference, are corrupt and that they can be a majority without authority that does not disrupt the authoritarian regimes.¹⁹ To complement equal numbers of men and women in the Rwandan Parliament, a democratic government and political will are therefore needed to place and execute a woman-centred agenda. The role of electoral systems and laws is to contain provisions that facilitate equal numbers of men and women in decision-making processes by considering realities of both men and women. Through fair and just elections, the voters must be left with the role to replace their leaders depending on performance towards addressing citizens' priorities in line with the requirement of the laws. The world, Rwanda inclusive, has had male leaders since its inception, and if for any reasons the world is lagging from being a better place, then women should not be excluded from decision-making processes as a payback for issues that have mostly been caused and failed to be addressed by men. It is important for both men and women on equal basis and based on their different lived-in experiences to be partners in decision-making processes and to co-create solutions to the Rwanda's imminent challenges.

b. Kenya

Articles 81 (b) and 27 (8)²⁰ of the 2010 Kenyan Constitution require that the FPTP electoral system should comply with the principle of 'not more than two-thirds of the members of elective public bodies to be of the same gender.' The two-thirds gender rule should lead to not less than 33.3 or not more than 63.7 per cent of women in the Kenyan Parliament. Further, the 2010 Kenyan Constitution designed 47 women-only seats as a supplement to the two-third gender rule. These seats are to be contested only by women candidates nominated by political parties using the FPTP system.²¹ The two-third gender rule and women only counties are the modalities of temporary

¹⁹ Straight Talk Africa, 'The 25th Anniversary of the Rwandan Genocide - Straight Talk Africa,' available at https://www.youtube.com/watch?v=PHbU_fOItEU accessed on 15th June 2019.

²⁰ It 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.'

²¹ In addition, the National Assembly will have 290 elected members, each elected by voters of single-mandate constituencies, and 12 members nominated by political parties to represent special interests including the youth, persons with disabilities and workers, with the relevant list to be composed of alternating male and female candidates. Article 97 of the Constitution of Kenya.

special measures that Kenya has adopted to promote the realisation of the women's right to political participation in line with Article 4 of CEDAW and Article 9 of the Maputo Protocol. As noted in Chapter Eight, since its adoption, the two-thirds gender rule suffers slow implementation in the both in the Kenyan National Assembly and in Senate.²² Women are struggling to table a Bill to amend the 2010 Kenyan Constitution to provide for a procedure to realise the two-thirds gender principle. However, the Parliament is hesitant to pass such a Bill citing bloating of Parliament leading up to high cost of Parliamentary operation.²³

The two-thirds gender rule will not lead to the immediate attainment of equal representation of men and women given the underlying reluctance and lack of political will among political actors for its implementation. Therefore, as a long-term plan, a recommendation from this thesis is an alteration of the 2010 Kenyan Constitution to adopt an equality based list PR electoral system as stated under section 9.2 of this Chapter. In recognition that Article 4 of CEDAW requires temporary special measures to be removed when it has achieved its purposes, careful consideration is needed for such measures not to be dismantled prematurely to avoid regression of results.²⁴ As a short-term measure, it is suggested that before Kenya adopts the list PR electoral system, immediate and full implementation of the two-thirds gender rule is crucially applied. It is noted that a constitution amendment is needed for the two-thirds gender rule to be realized. Articles 27 and 100 of the 2010 Kenyan Constitution calls for the Parliament of Kenya to enact legislation to promote the representation of i) women; ii) persons with disabilities; iii) youth; iv) ethnic and other minorities; and, v) marginalized communities.²⁵ In response to the Constitution, Kenya's Parliament passed three basic electoral policy frameworks: the 2011 Elections Act, the 2011 Political Parties Act and the 2011 Gender Policy. Since the Acts specifically cover matters relating to the election, it was expected that they would contain a detailed procedure for realisation of the

²² Article 177 ensures that Articles 81(b) and 27 (8) of the Kenyan Constitution are complied with at the county level through the nomination of special seat members. The same is not guaranteed at the National Assembly and the Senate.

²³ Ndonga S 'Petition on two thirds gender principal due in court Monday' available at <https://www.capitalfm.co.ke/news/2016/09/petition-two-thirds-gender-principal-due-court-monday/> accessed on 14 May 2018.

²⁴ Article 4 (1) of CEDAW, CEDAW General Comments 4 and 25. Article 1 (4) of CERD, CERD General Comment 14 on the Definition of Discrimination, HRI/GEN/1/Rev. 3 para. 2. Human Rights Committee General Comment 18, para. Human Rights Committee General Comment 28, para. 3. CESCR General Comment 16 paras. 15, 35 and 36. Disability Convention art 5 (4).

²⁵ Article 82 and 92 of 2010 Kenyan Constitution calls for the Parliament to enact the legislation to provide matters pertaining election monitoring body, nomination of candidates, voting, elections, and political parties.

two-thirds gender rule. While the Acts make provision for a mixed-member party list, it simply restated the constitutional provision while offering no clear guidance on implementation of the two-thirds gender rule. Therefore, it is the Political Parties Act, or Elections Act or the Elections Code of Conduct that need to be amended to provide for a procure for realisation of the two-thirds rule in line with Articles 27 and 100 of the Constitution, and not the Constitution itself. The amendment will result in realisation of tangible measures to increase the representation of marginalized groups freed from the shackles of the interpretation of the gender rule.²⁶ Also, the amendments should also provide measures for realization of increased participation of all marginalized groups to avoid the whispered questions about the other marginalized groups.²⁷ The amendments should include additional incentives for political parties to comply with the gender rule as gatekeepers in recruiting and nominating of candidates, and should contain strong sanctions for noncompliance.²⁸ This recommendation is backed by the fact that temporary special measures have just been provided for the very first time in the 2010 Kenyan Constitution to accelerate women's *de facto* equality. It has been nine years since its institutionalisation, therefore it is prudent to comply with Article 4 of CEDAW, which calls for temporary special measures not to be removed pre-maturely. It is important to give Kenya time to find ways to cultivate a strong political will to fully implement the two-thirds rule before taking any departure. However, this recommendation does not preclude proportional representation activists and women from creating opportunities or seizing a window of opportunities to strive for and obtain an equality-based list proportional representation electoral system.

c. Tanzania

In Tanzania, alongside with the FPTP electoral system, the special seats for women were established under Article 66 1(b) and 78 (1)²⁹ of the 1977 Constitution. Though intended to address

²⁶ Collins Odote 'Time for reality check on two-thirds gender law' available at <https://www.businessdailyafrica.com/analysis/editorials/Time-for-reality-check-on-two-thirds-gender-law/4259378-4878268-jx2qd6/index.html> accessed on 28 July 2019.

²⁷ Ibid.

²⁸ During the 2017 elections the IEBC passed the rules that state that political parties must ensure that one-third of the women on their nomination list are chosen, however the electoral body did not have means to enforce the rule in elective posts, nor impose sanctions on political parties for being non-compliant. It took a court order in July to force the major parties, Jubilee, ODM, KANU and Ford-Kenya, to readjust their lists to consider the gender and special interest groups.

²⁹ In Tanzania, special seats have been the popular means for Tanzanian women to access the parliament. Special seats are assigned based on the number of votes a party wins in the parliamentary elections. The political parties that gain 5% of the votes in the general election nominate the names of candidates for nomination under the special seats system.

past inequalities and discrimination,³⁰ special seats for women as practised in Tanzania appease, discriminate, ridicule, marginalize and ultimately side-line women from meaningful participation in parliament, as explained in detail in Chapter Eight.³¹ The Tanzanian Government has an intention to remove parliamentary special seats for women. In the attempt to write a new constitution, Tanzania still kept the FPTP electoral system, but Article 124 (4) of the Tanzanian Proposed Constitution eradicated parliamentary special seats for women. Article 124 (4) of the Tanzanian Proposed Constitution provides that, ‘the basis of composition of the Parliament shall be equal representation of female and male parliamentarians.’ Article 124 (4) is silent on the modalities for attainment of equal representation but obliges the Parliament, under Article 124 (6), to enact legislation to classify the procedure of implementation of Article 124.³² Failure of Article 124 of the Proposed Constitution to provide for the mechanism for its realisation poses serious concerns. Learning from the slow implementation of the two-thirds gender rule in Kenya caused by absence of clear modalities for its implementation in the 2010 Kenyan Constitution, Tanzania may find itself facing the same dilemma if the Proposed Constitution is passed without providing clear modalities for implementation of Article 124. It is noted that a blanket provision such as ‘the parliament will enact law to guide the realisation of equal representation of men and women’ is dangerous, subject to abuse and can lead to Tanzania losing the progress it has achieved on the number of women in Parliament. In cognisance of the fact that a constitution must only contain the key principles to be expounded in other pieces of legislations, it is crucial that before the 2014 Proposed Constitution is presented for a referendum, amendments must be made to provide a clear and explicit procedure on the implementation of Article 124 (4). In such an amendment, the Parliament should consider reinstating a more specific provision contained in the Second Draft

As per NEC regulation, every political party which contests parliamentary elections may propose and submit to the commission the names of eligible women candidates for nomination of women special seats.

³⁰ D Otto “‘Gender comment’: Why does the UN committee on economic, social and cultural rights need a general comment on women?” (2003) *Canadian Journal of Women’s Law* 1.1/02.

³¹ ‘Electoral systems’ available at <http://aceproject.org/main/english/es/esc07c.htm> accessed on 30 December 2018.

³² The explanation from the Constitutional Review Commission entails that each party will have to have both male and female candidates in a constituency, hence, once that party wins, both male and female candidate have won. On the other hand, the 1977 Constitution of Tanzania uses the mixture of both FPTP electoral system in the presidential and parliamentary elections. Proportional representation is used to allocate seats for women that are distributed among the political parties in proportion to the total number of votes they received as a party. To qualify to offer a special seat candidate, the political party must have at least five per cent of the total parliamentary votes. Meena R ‘Women participation in positions of power and influence in Tanzania’ available at http://www.redet.udsm.ac.tz/documents_storage/2009-8-19-11-34-23_womenparticipationinpositionsofpower.pdf accessed on 14 March 2012 p 10.

Constitution produced by the Constitution Review Commission. The Second Draft Constitution provided for a one-man-one-woman system to stand and upon winning, represent each constituency. This change will guarantee fifty-fifty per cent representation of men and women in parliament and eliminate the need for reserved special seats for women.³³ There are views that a one-man-one-woman representation in one constituency will lead to a bloated and costly parliament. Currently, there are 265 constituencies, and if there is a one-man-one-woman representative in each constituency, the number of parliamentarians will double to 530, adding to costs for running the parliament. It is therefore recommended that the available constituencies be divided by two ($265/2=132.5$) and to allow each political party to field a man and a woman candidate in that constituency (men will be competing against men and women against women in one constituency). Voters will also vote for a man and a woman representative of their choice in a constituency. This modality will keep the same number of members of parliament, hence addressing the cost issue. It will also allow the government to save trillions of shillings currently used to pay salaries, allowances and gratuities for the additional number of women on top of the actual number of elected parliamentarians. This modality fits the requirement of Articles 4 and 7 of CEDAW and Article 9 of the Maputo Protocol equally, for it leads to equal representation of men and women in the constituencies and in parliament. The modality does not further discriminate against or ridicule women, as women get to stand for elections in the constituencies and are voted for by all people. With this modality, women will have a specific constituency, receive constituency development funds, and could be considered as candidates for a prime minister position by the President. It is noted that this modality can remain indefinitely, as it mirrors the composition of the nation, contrary to a special seats arrangement.³⁴

However, it is noted that despite the clear demands of citizens for the new Constitution, the 5th President of Tanzania, the Hon. John Pombe Magufuli, had clearly stated that finalising the constitution-making process is not on his list of priorities.³⁵ Although the President's statement is arbitrary and remains subject to criticism, it is apparent that the new Constitution may take time to come into existence. While the recommendations stipulated in the preceding paragraph takes

³³ Ibid.

³⁴ *International Idea Handbook of Electoral System Design Draft* November 2004, available at the <https://sites.hks.harvard.edu/fs/pnorris/Acrobat/stm103%20articles/IDEAs%20Handbook%20of%20Electoral%20System%20Design.pdf> accessed on 23 December 2018.

³⁵ Ibid.

precedent, there is a need to provide short term recommendations addressing the apparent and disturbing challenges associated with the current system of parliamentary reserved special seats for women. It is recommended that the Elections Act or the Electoral Guidelines be amended to provide for criteria, terms of reference, and uniform procedures for the nomination of women for parliamentary special seats by political parties. Also, special seats for women should be attached to manageable geographical locations for easy assessment of their services, and they should get constituency development funds.³⁶ In line with Article 4 of CEDAW, which requires temporary special measures to be transitional in nature, one woman should not be allowed to hold a special seat for more than two terms or ten years. The women in special seats should consistently be groomed and facilitated to be able to contest in constituencies upon the expiration of the special seat tenure. If women would serve in special seats for only two terms and then transit to constituencies, it would enable many other women to obtain such seats, gain political experience, head to the constituencies and leave the seats for other women, given that there is an intention to increase the number of women in special seats from 30 to 40 per cent. In 2010, the National Executive Committee of the ruling party increased special seats for women from 30 to 40 per cent but it was not implemented during the 2015 general elections. The intention was to achieve a fifty per cent representation of women in the parliament, especially when 40 per cent special seats is added to the number of women from constituencies, five women from the ten presidential appointees and two representatives from Zanzibar. Alongside the above recommendations on improving women special seats, the government should implement its intention to increase the number of women in special seats to 40 per cent.³⁷ The recommendations in this paragraph were supposed to be thought of and taken care of when the women special-seats arrangement had just operated in Tanzania for one or two terms after its introduction in 1985. The fact that the basic challenges of women in special seats persisted for thirty-four years after its introduction, sends a signal that no evaluations are done on key lessons from the implementation of the special-seats arrangement by the National Electoral Commission, which is the main overseer of the implementation of special seats. Alternatively, evaluations are conducted but the willingness to

³⁶ Gender-sensitive parliaments are necessary to ‘remove the barriers to women’s full participation and offer a positive example or model to society at large’.

³⁷ ‘Official Report from National Executive Committee of Chama Cha Mapinduzi’ which sat on *16-17 August, 2009 under the chairmanship of Jakaya Mrisho Kikwete Available at <http://ccmtexas.blogspot.com/2009/09/taarifa-rasmi-kuhusu-kikao-cha.html> accessed on 18 May 2016.*

change the status quo is not present. It is predicted that if the government adopts the changes proposed in this paragraph, it will take many years for the women to realise a more practical solution to the challenges relating to the special-seats arrangement proposed in the preceding paragraph. Therefore, an overhaul of the special-seats arrangement and its replacement with the changes recommended in the preceding paragraph is highly recommended.

9.4 CONCLUSION

The fundamental recommendation of this research study is the adoption of a proportional representation electoral system with a fifty-fifty per cent balance of women and men on the party lists. The equality-based list PR electoral system is a workable way of achieving substantive equality for men and women in parliaments, and is in line with Article 25 of the ICCPR, Article 13 of the African Charter, Articles 4 and 7 of CEDAW, and Article 9 of the Maputo Protocol. It is recommended that Rwanda should do away with women-only constituencies and adopt a fifty-fifty per cent men and women list PR electoral system due its great acceptance and advancement on the number of women participating in its Parliament. For Kenya, although most Kenyan women prefer adoption of an equality-based list PR electoral system, it is acknowledged that a major constitutional change overhauling the entire electoral system to adopt a PR electoral system is unlikely to happen soon. It is also noted that no constitutional amendment is needed to operationalise the two-thirds gender rule but rather, amendments are required of the 2011 Political Parties Act and the 2011 Elections Act. The two Acts should be amended to provide a clear procedure to implement the two-thirds gender rule, before embarking on the goal to influence adoption of the equality-based list PR electoral system. In Tanzania, the 1977 Constitution is still the governing Constitution, however, the stalled 2014 Proposed Constitution maintains the FPTP electoral system but contains progressive provision for equal representation of men and women in Parliament. However, the Proposed Constitution fails to provide a clear procedure on how the equality of men and women in the parliament will be attained. Therefore, the 2014 Proposed Constitution must be altered before it is presented for referendum to provide, among other things, a clear procedure on the implementation of Article 124 (4), especially adopting the procedure provided under the 2013 Second-Draft Constitution.

Finally, it is observed that electoral systems will inevitably need to be adapted over time if they are to respond adequately to new political trends and address previous inequality,

demographic, and legislative trends and needs.³⁸ As such, the specific recommendations stipulated above are more towards the improvements within existing systems. The ultimate recommendation is for Rwanda, Kenya and Tanzania to adopt the equality-based PR electoral system with a fifty-fifty per cent balance of men and women in the party list PR system.

For areas for further research, there is a need to analyse how the legal framework for local elections supports women's participation in local level politics as a means of preparing them to participate in parliamentary elections. Also, an empirical study needs to be done to examine the impact of women who enter into the parliament through temporary special measures vis-à-vis the women elected from the constituencies in Rwanda, Kenya and Tanzania. There is need for an in-depth look on how women take part in the leadership of parliamentary committees, party caucuses, women's cross-party platforms and other decision-making bodies, and how their participation can be leveraged to influence and advocate for more progressive gender policies, laws and practises. Finally, further research is important to determine how equal numbers of men and women in decision-making positions can reflect diversity of other key groups, such as people with disabilities, youth, the elderly, and ethnic and other marginalised groups.

³⁸ Ellis A op cit note 13.

10. CHAPTER TEN

10.0 SUMMARY FINDINGS AND CONCLUSIONS

‘Women represent half of the world’s population, unless it is in the decision-making positions’

10.1 INTRODUCTION

The key recommendations on addressing the persisting challenges to the attainment of equal representation of men and women in the Rwandan, Kenyan, and Tanzanian Parliaments were presented in Chapter Nine. Recommendations are directed at how the provisions of the 2003 Rwandan Constitution, the 2010 Kenyan Constitution, the 1977 Tanzanian Constitution, and the 2014 Tanzanian Proposed Constitution and other electoral laws could be altered to facilitate the attainment of equal representation of men and women in their respective parliaments. The recognition that Rwanda, Kenya, and Tanzania have reached different stages in realising the right for women to participate in political processes are described in Chapter Nine, as well as the overriding question on willingness to overhaul the electoral system. Hence, tailored recommendations to fit the circumstances of each country were presented. In this Chapter, a summary of the findings and general conclusions are presented.

10.2 SUMMARY OF FINDINGS

In this thesis, the constitution-making legal frameworks for Rwanda, Kenya, and Tanzania are examined, particularly on how the legal frameworks facilitated public participation in line with Articles 25 of ICCPR, 13 of the African Charter, 7 of CEDAW and 9 of the Maputo Protocol. The levels and the impact of women’s participation in the constitution-making processes in obtaining provisions that furthers the attainment of equal representation of men and women in parliaments are assessed. Further, the impact and shortcomings of an increased number of women parliamentarians in legislating gender progressive policies and laws is also scrutinised. Finally, the remaining challenges and possible recommendations to facilitate the attainment of equal representation of men and women in Rwandan, Kenyan and Tanzanian parliaments are presented.

This thesis starts with the introduction of the study including the problem statement, the study objectives and questions, literature review, methodology, justification, and thesis structure. Uncertainties in grounding public participation in constitution-making processes as a legal right within the realm of Article 25 of ICCPR are explained in Chapter Two. Thirty years after the

precedent from the judgement of *Donald Marshall v Canada* and the UNHRC General Comment No. 25, placing constitution-making as a public affair within the interpretation of Article 25 of ICCPR,¹ the exact wording, namely, public participation in constitution-making, is yet to be incorporated within the narrative of Article 25 of the ICCPR. In current political trends, participation in constitution-making processes has at an equal weight with other rights such as the right to vote and stand for elections. It is thus crucial for the word ‘constitution-making’ to appear within the wording of Article 25 of the ICCPR and subsequently in other regional legal framework such as Article 13 of the African Charter. Although states such as Rwanda, Kenya, and Tanzania have been influenced by the ICCPR, the judgement from *Donald Marshall v Canada*, the UNHRC General Comment No. 25 to open constitution-making processes to the public. The amendment to Article 25 of the ICCPR remains necessary to promote consistent application of the right to public participation in constitution-making across all the ICCPR members states. Specific mention of constitution-making in Article 25 of the ICCPR will also avoid the application of the right based on countries’ discretion, and circumvent challenges relating to application of precedents and the non-binding nature of General Comment No 25. It is apparent that any state party can pioneer the amendment of Article 25 of the ICCPR through the procedure provided under Article 51 of the ICCPR. The procedure allows state parties to propose and realise any amendment to the ICCPR. Despite the challenges associated with the application of precedents and the non-binding nature of the UNHRC General Comments, the judgment in the case of *Donald Marshall v Canada* and the UNHRC General Comment No. 25 makes an important contribution to the legal jurisprudence and confirms public participation in constitution-making processes as a legal right. Also, Article 7(b) of CEDAW and Article 9(1)(c) of the Maputo Protocol have successfully grounded participation in constitution-making as a legal right. The inclusion of the word participation in the formulation and implementation of public policy in both CEDAW and Maputo Protocol provides clear guidance and better inference of participation in constitution-making processes as a legal right. Further, the incorporation of public participation in constitution-making by countries’ constitutions and laws such the Constitution of South Africa, 1994, the Constitution of Rwanda, 2003, the Constitution of Kenya Review Act, 2008, the Constitution of Kenya, 2011 and the

¹ Other cases with similar judgements were *Native Women’s Association of Canada (NWAC) vs. Canada*, the *Reference re Secession of Quebec*, *Doctors for Life International vs. Speaker of the National Assembly and others*, *Matatiele Municipality and Others vs. President of the Republic and Others in 2006*.

Constitution Review Act of Tanzania, 2011 depict great acceptance of public participation as a crucial part of constitution-making and as a legal right.

In terms of the history of women's participation in decision-making processes, in some parts of pre-colonial Africa, women occupied high positions in decision-making processes. Women governed kingdoms, cities, states and ruled alongside and on equal terms with men.² However, upon the onset of colonialism, colonialists and colonial laws such as the East Africa and Tanganyika Order in Council³ presumed that native African men and women could not fully represent themselves in the governance structures, such as the Legislative Councils. All colonial laws were made or imposed by governors and secretaries of states, with none or superficial consultation with a few African political elites.⁴ Consequently, the 1962, 1963, and 1961 Rwandan, Kenyan, and Tanganyika Independent Constitutions were a mere imposition by colonial governments. There was only minimal reference to the people's struggle for independence and no reflection of their wishes and aspirations in the independence constitutions. Also, despite the evidence that women took leadership roles during the struggle for independence,⁵ women's roles were not included or recognised in the new constitutions.⁶ In Kenya, it was found that in all the independence conferences, women were represented by Priscilla Abwao but her role was limited to providing copying and typing services. A woman, Jael Mbogo, who almost qualified, was locked out during the conferences because she did not own property.⁷ As such, women's interests were not reflected in the new constitutions. The true picture of exclusion of women during the pre-colonial and colonial era manifested after independence.⁸ When Kenya became independent, women constituted only 1.5 per cent of the entire parliament, Tanzania had only six seats (7.5 per

² Sudarkasa Niara 'The status of women in indigenous African societies' (1986), *Feminist Studies Vol. 12 No. 1 Feminist Studies Inc.* Available at <https://www.jstor.org/stable/3177985> Accessed on 07-01-2019.

³ East African Order in Council was of 1897, later repeated in the 1921 Order and applied to the Protectorate. Tanganyika Order in Council was introduced in Tanganyika in 1920.

⁴ Sudarkasa Niara op cit note 2.

⁵ 'Women in Africa's independence and development movement in historical perspectives' Available at <https://daogewe.org/index.php/blogs-k2/item/156-women-in-africa-s-independence-and-development-movement-in-historical-perspectives> accessed on 13 October 2017.

⁶ 'Bibi Titi Mohamed and the historical context of the time in Tanzania' Available at <http://awaazmagazine.com/previous/index.php/latest-issue/special-features/item/551-bibi-titi-mohamed-and-the-historical-context-of-the-time-in-tanzania> accessed on 13 October 2017.

⁷ Nyakairu D *Women in politics; The 50year journey in Kenya*, available at https://www.academia.edu/24038426/Women_in_politics_the_50_year_journey_in_Kenya?auto=download accessed on 6 May 2017.

⁸ Iliffe John 'The organization of the Maji Maji rebellion' (1967) *Journal of African History* Vol. 8 No.3.

cent) of women out of the overall of 80 seats,⁹ while Rwanda had no women at all in its early post-colonial parliament.

It was also found that the 1962, 1963, and 1961 Rwandan, Kenyan, and Tanganyikan Independent Constitutions gave powers to amend and alter the constitutions to the executive, which needed only two-thirds support and approval from the parliaments. Since most of the members of the parliament were from the ruling party, all the executive's engineered amendments passed.¹⁰ It is noted that with the unavailable initiatives to include the public, and the few women in government positions and in the parliaments, women could not participate in the early post-independence constitution-making processes. Later it was observed that the ratification of the ICCPR, CEDAW, the African Charter, the Beijing Platform for Action, and subsequently the Maputo Protocol, began to impact the constitution-making processes in Kenya and Tanzania, especially after the 1990s.¹¹ Constitution commissions and constituency assemblies were formed, and the public consultations started.¹² However, as covered in detail in Chapter Four of this thesis, the government dominance in these reforms were still apparent. The impact of ICCPR, CEDAW, the African Charter, the Beijing Platform for Action, and the Maputo Protocol, also changed how women started to participate in decision-making processes.¹³ In Tanzania, the eighth, thirteenth and fourteenth constitutional amendments provided for 15, 20, and 30 per cent of parliamentary quotas for women respectively.¹⁴ The arrangement of a quota for women increased the percentage of women in parliament from 21.5 per cent to 30.3 per cent after the 2005 elections.¹⁵ The Rwanda's post genocide transition period 1994-2005 witnessed an increase in the number of women in parliament to 16 per cent.¹⁶ While in Kenya, a series of unending constitutional reforms

⁹ TGNP *Report on Africa Gender and Development Index (AGDI) the Tanzania report* Dar Es Salaam 2003.

¹⁰ Oyaya CO *Towards constitutional legitimacy: A study of the principles and processes of constitutional development and constitution-making in Kenya from colonial times to 2010*, (unpublished PhD Thesis School of Law, University of Nairobi, G/80/9216/2004).

¹¹ Ibid.

¹² 'Key historical and constitutional developments' as accessed from <http://www.kituoachakatiba.org/sites/default/files/legal-resources/Tanzania%20Key%20Historical%20and%20Constitutional%20Developments.pdf> on 9 October 2017.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Human Rights Watch, *Shattered Lives, Sexual Violence During the Rwandan Genocide and its Aftermath* (1996), available at <https://www.hrw.org/reports/1996/Rwanda.htm> accessed on 3rd August 2018.

and the failure of the 2005 referendum witnessed women occupying only 7.1 per cent of seats in the Parliament by 2005.¹⁷

In response to the intensified demands for new and people-centred constitution-making processes, Rwanda, Kenya, and Tanzania engaged in participatory constitution-making processes in 2003, 2010, and 2014 respectively.¹⁸ The Rwandan constitution-making process was triggered by the 1994 genocide which was later ended by Peace Agreements that highlighted the need for the new constitution as a unifying tool.¹⁹ In Kenya, the long-awaited desire for the new constitution was prompted by the 2007 post-election violence.²⁰ In Tanzania, the decision to engage in the 2011-2013 constitution-making process was announced by President Jakaya Mrisho Kikwete in response to the intensified needs for a new constitution. The constitution-making process in Rwanda, Kenya, and Tanzania were governed by the Arusha Peace Accord, the Constitution of Kenya Review Act²¹ and the Constitutional Review Act.²² Although, there is general acceptance that the Arusha Peace Accord, the Constitution of Kenya Review Act and the Constitutional Review Act (CKRA) facilitated public participation in line with Article 25 of ICCPR and Article 13 of the African Charter, the representation by women in constitution-making bodies did not exceed 30 per cent. Although there were less women, it was an indication of strong progress towards the inclusion of women in the constitution-review processes, compared to the previous processes where women were excluded altogether. Other constitution-making bodies also reflected the presence of women. For instance, about 43 per cent of the Tanzania Special Constitution Assembly were women. There were also strong efforts by the Constitutional Review Commissions to provide women with the opportunity to influence the constitution-making processes. This was done through conducting specific awareness-raising programmes for women on constitution-making processes, and direct meetings with women representatives to collect their views.

¹⁷ Privilege Musvanhiri 'Rwanda: Factbox - Rwanda controversial constitutional history' available at <http://allafrica.com/stories/201512181120.html> accessed on 5 December 2019.

¹⁸ Oyaya CO op cit note 11.

¹⁹ The nine-year transition period in post-genocide Rwanda (1994-2003) was governed by a set of texts called the Fundamental Law including the 1991 Constitution, the Arusha Peace Accord, the Rwandese Patriotic Front Declaration (of July 1994) and the Political Parties Agreement (of November 1994) abiding with the former declaration and providing for power sharing mechanisms in the new Government. This legal framework also established fundamental principles for crafting a people-led constitution.

²⁰ Oyaya CO op cit note 18.

²¹ *The Constitution of Kenya Review Act Chapter 3A Revised Edition 2009* (2008) Published by the National Council for Law Reporting with the Authority of the Attorney General.

²² CAP 83 R:E 2012.

However, there were several criticisms about the government's control of constitution-making processes in Rwanda, Kenya, and Tanzania. Also, the constitution review commissions did not reach the women in rural areas due to limited time allocated for people to give their views. Further, illiterate women could not give their views as the questionnaires were in English, lacked anonymity and were lengthy.²³ It was also observed that women participate in constitution-making processes when the legal framework provides for it. The constitution-making actors become consciously proactive about the inclusion of women when they are obliged by law, this is contrary to when the legal framework is silent, as evidenced from colonial and early post-independence constitution-making processes.

The involvement of women in constitution-making processes enabled the new Constitutions in Rwanda, Kenya, and Tanzania to guarantee participation of both men and women in parliament in line with Article 7 of CEDAW and Article 9 of the Maputo Protocol. The new constitutions contained key provisions on the general guarantees of equality and non-discrimination. The use of the proportional representation electoral system and regulation of political parties was a breakthrough in attaining the highest number of women, particularly in the Rwandan Parliament. It was also seen that the use of the first-past-the post electoral system coupled with women only counties and parliamentary quotas for women, had also increased the number of women in Kenyan and Tanzanian Parliaments up to 21.8 and 37.2 per cent respectively.²⁴ As noted before, the achievement related to an increased number of women in Rwandan and Kenyan Parliaments is a direct contribution to the process and the final content of the 2003 Rwandan Constitution and 2010 Constitution. For Tanzania, the 37.2 per cent of women in its Parliament is mainly contributed by the 1977 Tanzanian Constitution, which provides for 30 per cent of women in parliament to be realised through the arrangement of special seats for women.

It is noted that the new constitutions have been a source of progressive electoral reforms, exemplified by the passing of the Kenyan Elections Act, Political Parties Act in 2011 and the Tanzanian newly passed but highly criticised Political Parties (Amendment) Act. Although there are a number of missed opportunities, women's presence in the Rwandan, Kenyan and Tanzanian

²³ Accessed from Constitutional Writing and Conflict Resolution website. <https://www.princeton.edu/~pcwcr/reports/rwanda2003.html> on 4th January 2018.

²⁴ 'Women in national parliaments as in December 2018', accessed from <http://archive.ipu.org/Wmn-e/world.htm> on 5 January 2019.

Parliaments have promoted the legislation of gender sensitive policies and laws,²⁵ especially in the areas of inheritance, gender-based violence, family law and land rights.²⁶ Notwithstanding such achievements, it is only Rwandan women who constitute more than 50 per cent of the parliament, while women in Kenya and Tanzania constitute 21.8 and 37.2 per cent respectively. Also, even with the fact that women managed to obtain significant provisions for promoting women's participation in decision-making processes in the 2003 Rwandan Constitution, the 2010 Kenyan Constitution, the 1977 Tanzanian Constitution, and the 2014 Tanzanian Proposed Constitution, the adopted electoral system and temporary special measures fall short of facilitating the attainment of equal representation of men and women. The electoral system, namely first-past-the-post as used in Kenya and Tanzania, is unsuitable for women due to its antagonistic nature and the winner-takes-all approach.²⁷ On the contrary, although proportional representation is credited for being a type of electoral system that can facilitate many women to occupy seats in the parliament, in Rwanda, it is only limited to bring a minimum of 30 per cent of women to parliament. Other women are elected through women-only constituencies, which is a form of a temporary special measure similar to the special seats arrangement in Tanzania and women-only counties in Kenya. The intention of temporary special measures modalities is to accelerate *de facto* equality of men and women, and address past marginalisation and discrimination against women. However, the nature of the adopted forms of temporary special measures in Rwanda, Kenya and Tanzania furthered inequality, discrimination and mistreatment of women contrary to Article 4 of CEDAW and Article 9 of the Maputo Protocol. In cognizance of the different contexts and circumstances that Rwanda, Kenya, and Tanzania operate in, and the journeys that each of the countries had reached towards the attainment of equal representation of men and women in parliament, customised recommendations for each country were provided in Chapter Nine.

²⁵ Burnet J 'Women have found respect: Gender quotas, symbolic representation and female empowerment in Rwanda' (2011). *Politics & Gender* 7 (3), pp.303-334. There is also a strong introduction of a gendered perspective to the legislative process and use of a gendered lens to analyse and monitor national budgets.

²⁶ Mi Yung Yoon 'More women in the Tanzanian legislature: Do numbers matter?' (2011) *Journal of Contemporary African Studies* 29:1 83-98 DOI: 10.1080/02589001.2011.539011.

²⁷ Amy D 'What is "proportional representation" and why do we need this reform?' available at https://www.fairvote.org/what_is_proportional_representation_and_why_do_we_need_this_reform accessed on 22 December 2018.

10.3 GENERAL CONCLUSION

The legal framework for making of the 2003 Rwandan Constitution, 2010 Kenyan Constitution, and 2014 Tanzanian Proposed Constitution allowed some level of public participation in line with Article 25 of the ICCPR and Article 13 of the African Charter. Women gained an opportunity to influence the content of the constitution, leading to the attainment of progressive provisions for advancing women's participation in decision-making processes in line with article 7 of CEDAW and Article 9 of the Maputo Protocol. However, it is noted that the Rwandan, Kenyan and Tanzanian communities are deeply rooted in cultural and customary practices. As a result, when it comes to women's participation in either constitution-making processes or in decision-making bodies, political actors tend to comply with the minimum provisions of the law. Women in Rwanda, Kenya and Tanzania started taking part in constitution-making processes and in electoral politics when the legal framework provided for opportunities to do so. In Kenya, this was exemplified by the adoption of the progressive 2010 Kenyan Constitution, which provided for a two-thirds gender rule and women-only counties. Although not fully implemented, the Kenyan Constitution has led to a significant rise in the number of women in the parliament; from 7.5 per cent in 2011 to 19.1 per cent in 2013, to 21.8 per cent after the 2017 general election. This awareness calls for the future constitution-making legal frameworks in Rwanda, Kenya and Tanzania to be detailed to capture all possible avenues to enhance women's participation.

Constitutionalism and the political will to identify and execute a woman-centred agenda are equally important. A strong political will has enabled Rwanda to have the largest number of women in the parliament, currently at 61.3 per cent. While challenges persist, strong political will has also helped Tanzania to stick to the implementation of the constitutional 30 per cent quota for women since its adoption in 1985, leading to 37.2 per cent of women in the current parliament. Political reluctance in implementation of the 2010 Kenyan Constitution on the two-thirds gender rule has led to the rule being implemented only half-heartedly in the Senate, the Assembly, and in political parties.

Although much is still expected, the presence of women in parliaments has led to the initiation and legislation of gender sensitive laws, policies, and practices.²⁸ Progressive provisions

²⁸ Tripp A 'Uganda: Agents of change for women's advancement?' (2006) in Bauer G and Britton H (eds) *Women in African Parliaments* pp. 111–32 Boulder CO: Lynne Rienner Publishers.

in the 2003 Rwandan Constitution, 2010 Constitution of Kenya, 1977 Tanzanian Constitution and the 2014 Tanzanian Proposed Constitution and the subsequent increase of women in the respective parliaments, reflect acceptance of women as leaders. For example, the increase of women in political decision-making positions in Rwanda after each election depicts a strong acceptance of women as leaders. It changed the attitude of Rwandese on the role of women in politics. The fact that there are a considerable number of women who have stopped to confine themselves to special seats by running and winning the competitive seats, depicts changes in perception in both women themselves and the society about women's capacity to lead. Despite these strides, Rwanda, Kenya, and Tanzania are still far from attaining substantive equal representation of men and women in parliament. Although Rwanda has attained 61.3 per cent of women in parliament, the fundamental challenge lies in the percentage of women that the Rwandan electoral system is limited to produce and the nature of temporary special measure adopted. Despite the clear objectives of temporary special measures, such as special seats for women in Tanzania, or women-only constituencies Rwanda and Kenya, its implementation and practice promotes inequality, inequity, ridicule, discrimination and furthers marginalisation of women. This, in turn, affects performance, integrity, perceptions and it further influences how women will be elected in future.²⁹ Misapplication of temporary special measures calls for its immediate replacement with a more practical modality, either by overhauling or undertaking adjustments within the Rwandan, Kenyan, and Tanzanian electoral system framework.

It is observed that the international legal instruments, especially Article 7 of CEDAW and Article 9 of the Maputo Protocol, call for equal participation and representation of men and women in all aspects of life. However, in the implementation by member states, especially when it comes to participation in parliaments, the definition of equality is equated to some form of percentage for women (mostly 30 percent), which clearly does not represent equality. As women represent half of the population in Rwanda, Kenya, and Tanzania, it is only fair, logical, common sense and in compliance with Article 7 of CEDAW and Article 9 of the Maputo Protocol, for the decision-making structures to mirror the true characteristics and composition of the society. It is argued in chapter seven of this thesis that, a mere increase in the number of women in political processes

²⁹ Mansbridge J 'Quota problems: Combating the dangers of essentialism' (2005) *Politics and Gender* 1 (4): 622–44. Halima Mdee and Ester Bulaya were once special seat MPs but now they are full member of parliament in Kawe and Bunda constituencies.

and in parliament is not sufficient and run the risk of amounting to no more than a hollow victory for the emancipation of women.³⁰ The challenges relating to electoral systems, and the application of temporally special measures, and allegiance to political parties affiliation among other things, hinders how women in Rwanda, Kenya, and Tanzania influence legislation of gender progressive policies and laws. As such, women parliamentarians have become the reliable instruments in executing political party policies. The inability of Rwandan, Kenyan, and Tanzanian female parliamentarians to influence for among other things, progressive maternity laws, re-entry policies in education sector, better policies for menstrual hygiene management, opening up of democratic governance and condemn against human rights abuses especially those happening to fellow women and other citizens make the community members to consider them as the majority without authority. To complement the number of women in the decision-making processes and in facilitating substantive change, a woman-centred agenda is crucial in all spheres, including the political domain.³¹ The number of women and a woman-centred agenda at a decision-making table are mutually reinforcing. This is because the patriarchy system has deeply penetrated the thinking and conduct of African communities, leading to automatic, conscious and unconscious oversight of women's issues. With the rate of marginalisation and discrimination faced by women since time immemorial, the world, and for this case Rwanda, Kenya, and Tanzania, needs both the equal numbers of women and men and a women-centred agenda in all decision-making processes. In conclusion, it is fair and just to argue that the world has had male leaders since its inception, and if for any reasons the world is lagging from being a better place, then women should not be excluded from decision-making processes as a payback for issues that have mostly been caused and failed to be addressed by men. The legal frameworks should be drafted to facilitate both men and women to take substantive part in decision-making processes. When women lead equally as men in the political arena, it makes for stronger decision-making and more representative governance. It provides an opportunity for both men and women to jointly co-create solutions to the world's imminent challenges, which due to the deep-rooted patriarchy system, are affecting more women than men. The need to represent the diversity of society in all spheres of life is an important aspect of representative democracy. The situation where representation in decision-

³⁰ Gretchen Bauer 'Gender quotas and women's representation in African parliaments 2013' available at <http://democracyinafrica.org/gender-quotas-womens-representation-african-parliaments/> on 9 May 2018.

³¹ Straight Talk Africa, 'The 25th Anniversary of the Rwandan Genocide - Straight Talk Africa,' available at https://www.youtube.com/watch?v=PHbU_fO1tEU accessed on 15th June 2019.

making positions continues to be male dominated is an issue that raises moral, legal and constitutional issues. The Rwandan, Kenyan, and Tanzanian Constitutions and other electoral legal frameworks and practices must strive to promote an equal representation of male and female youth, the elderly, persons with disabilities, ethnic minorities and other marginalised groups in parliament.

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