

**UNIVERSITY OF NAIROBI**

**AN ANALYSIS OF THE IMPLEMENTATION OF GENDER BASED AFFIRMATIVE  
ACTION IN KENYA: THE WAY FORWARD TO ENSURE COMPLETE  
REALIZATION OF THE TWO-THIRDS GENDER MAJORITY RULE**

**A DISSERTATION SUBMITTED IN PARTIAL FULLFILMENT OF THE  
REQUIREMENTS FOR THE AWARD OF THE BACHELORS OF LAW (LL.B) FROM  
THE UNIVERSITY OF NAIROBI**

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**DECLARATION,**

**I, LORRAINE ACHOLA OOMA do hereby declare that this is my original work and has not been submitted for a degree in any other university. All sources of information have been acknowledged.**

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**This dissertation has been submitted for examination with my approval as a University Supervisor.**

**MS. J.K. ASIEMA.**

## **DEDICATION**

I dedicate this work to my parents, Daniel Ooma and Joyce Atieno Ooma, for the support and encouragement they gave me throughout this journey, my siblings for assisting me and allowing me the time and space to work.

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# CHAPTER ONE

## 1. INTRODUCTION

### 1.1 BACKGROUND TO THE STUDY

Affirmative Action can be described as positive steps taken in order to remedy past discrimination meted out against a class of individuals sharing some form of characteristic. These classes of people can be based on gender, race, ethnicity, religion or disability.

Affirmative action can be divided into two forms;

- I. Direct Affirmative Action- these are provisions that demand certain quantitative or qualitative targets be reached through admission to schools, employment or political appointments.
- II. Indirect Affirmative Action- these are programs which support certain categories of individuals so as to strengthen their performance to improve access. For example school lunches for poor children.<sup>1</sup>

A common term used in the discourse of gender based Affirmative Action is “quotas.” Quotas fall within the category of quantitative targets and they can be designed to have immediate, medium or long term effects.<sup>2</sup> They can also be said to be a form of mandate that requires women to constitute a certain percentage or number of members of a certain body, whether it is a political party list or legislative assembly.

The Universal Declaration of Human Rights states that everyone has the right to take part in the government of his/ her country.<sup>3</sup> For women, however, this right cannot easily be exercised. This

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<sup>1</sup> Tsikata, Dodzi (2009) “Affirmative Action and the prospects for gender equality in Ghana politics” (women in broadcasting, The Friedrich-Eibert Stiftung) pg.7-60

<<http://www.fesghana.org/uploads/PDF/Affirmative%20Action.pdf>> retrieved on 15<sup>th</sup> April 2013

<sup>2</sup> Tinker, I (2004) “Quotas of Women on elected Legislatures: Do they really empower women?” (Women Studies International Forum 27), pg. 531-546.

<sup>3</sup> Article 21(1) “The Universal Declaration of Human rights” <<http://www.un.org/en/documents/udhr/>> accessed on March 16 2013.

is due to power relations that prevent women from leading fulfilling lives which operate at many levels of the society. These power relations range from the most personal to the highly public.<sup>4</sup>

Unequal power relations between men and women often begin within the family; this disparity then develops to the public arena and produces discriminatory attitudes and practices. The unequal distribution of labor and responsibilities within the household based on unequal power relations also limits women's eventuality in finding the time or developing the craft for participation in decision making in the wider public forum.

Women have displayed significant leadership and management in the community, informal organizations and even in public offices. Nevertheless, culture, socialization and negative stereotyping of women and men including stereotyping through the media also fortifies the tendency of political decision making to remain the domain of men. Similarly, the underrepresentation of women in decision-making positions in the areas of art, culture, sports, the media, education, religion and the law have precluded women from having a notable impact on the many key institutions.

Affirmative action is a process that was brought about by the need to address the historical exclusion of women to leadership positions. Over the last century, many countries have adopted the process and instituted it either voluntarily or through legislation. Kenya is one of these countries that began showing interest in the process by the early 1980's. Kenya tried to champion the discourse and strategies that support women's rights during this period. The country was also at the forefront championing for gender equality and did so by hosting the 3<sup>rd</sup> World Conference of Women in Nairobi in 1985. Sadly this pioneer spirit eventually died down.

The neighboring East African countries soon took the mantle and have done well in encouraging the inclusion of women in governance systems of their countries; such is the case in Rwanda, Uganda and Tanzania who now lead global statistics on women's representation in elective politics.

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<sup>4</sup> "Draft platform for Action" Beijing Platform <<http://www.iisd.ca/4wcw/dpa-052.html>> accessed on March 4th 2013

Affirmative Action in Kenya began with the 1963 Constitution which was somewhat alive to the idea because it provided for the protection and inclusion of minority rights. Until 1997, section 82 of the Constitution dealing with discrimination excluded “sex” as an objectionable ground for discrimination further, there were other laws that were exempted from the provisions of discrimination. These laws were laws affecting non-Kenyan citizens, laws concerning adoption, burial, sharing of property on death, marriage, divorce and personal law matters. In performing its mandate, the Constitution of Kenya Review Commission was careful to be inclusive and therefore held seminars to provide discourse on the gender question.

The seminars provided the Commission with an overview of what women in Kenya were concerned about and wanted the Constitution to redress. The outcome of the discussions was the Constitution of Kenya 2010 that deals with affirmative action in a manner that no law has ever dealt with in Kenya.

There was some resistance brought forward against the document with some politicians saying that the draft bill gave too much power to women, but the arguments did not convince majority of Kenyans who voted overwhelmingly for the bill.

Article 2(5) of the Constitution of Kenya 2010 is to the effect that the general rules of international law shall form part of the laws of Kenya. It also provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)<sup>5</sup> is applicable in Kenya. Article 7 of the convention called upon state parties “to take all appropriate measures to eliminate discrimination against women in the political and public life of the country”

The UN Security Council Resolution 1325 on Women, Peace and Security<sup>6</sup> also reaffirmed the importance of equal participation and full involvement of women in all efforts for the maintenance and promotion of peace and security, and the need to increase women’s role in decision making.

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<sup>5</sup> <<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>> retrieved on March 24<sup>th</sup> 2013

<sup>6</sup> <<http://www.un.org/womenwatch/osagi/wps/>> retrieved on March 24<sup>th</sup> 2013

The Constitution of Kenya 2010 promotes the inclusion of women in decision making roles with various Articles providing for gender equality, for instance Article 81(b) states that the electoral system shall comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender. These laws are all important in the implementation of gender based Affirmative Action.

The provisions of Article 81 (b) of the Constitution were however not realized in the General elections held in Kenya on 4<sup>th</sup> March 2013. This was as a result of a lack of clarity or arguments that arose as to whether the provisions of the constitution required progressive or immediate implementation. The Attorney General petitioned the Supreme Court for an advisory opinion in order to avert a constitutional crisis.

In its majority opinion<sup>7</sup> the Court acknowledged the, “social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society and its resultant diminution of women’s participation in public affairs has had a major negative impact on the social terrain as a whole.”

However, the Court was also of the opinion that the one third gender principle as provided for by the Constitution could not be enforced immediately and was to be applied progressively (by 27 August 2015). The court stated that, “legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015”

### **1.1.1 Definition of Affirmative Action**

Affirmative Action has its roots in the Civil Rights Movement in the U.S.A and the Commission on Civil Rights (1999) describes affirmative action as any measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, sex, or disability, along with other criteria, and which is adopted to provide opportunities to a class of

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<sup>7</sup>< <http://www.kenyalaw.org/caselaw/cases/view/85286/>> retrieved on 24<sup>th</sup> June 2013

qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.

In the context of the Civil Rights Movement in the U.S.A, Affirmative Action was defined as “any institutional policy designed to open up white male dominated fields to larger number of women, blacks and other minority persons”<sup>8</sup>

Affirmative Action is also defined as a set of procedures designed to eliminate unlawful discrimination between applicants, remedy the results of such prior discrimination, and prevent such discrimination in the future for instance applicants may be seeking admission to an educational program or looking for professional employment.<sup>9</sup>

The Nolo Plain English Law dictionary describes Affirmative Action as Policies of governments and other institutions, private and public, intended to promote employment, contracting, educational, and other opportunities for members of historically disadvantaged groups. Because they may favor some groups over others, Affirmative Action policies must be narrowly tailored to meet the institution's legitimate goals, such as remedying the effects of past discrimination or promoting full diversity in a school setting.<sup>10</sup>

N Trujillo (2010)<sup>11</sup> describes Affirmative Action as the federal policy that gives help to people of different color, gender; national origin, race, and religion enter institutions of higher education, employment, public contracting, and health programs. It is a way to address discrimination and inequality in these areas.

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<sup>8</sup> Kramarae, A Paula (1985) *“Feminist Dictionary”* Pandora Press

<sup>9</sup> Susan Sturm and Lani Guinier, (2000) Boston review. *“The future of affirmative action”*: promoting diversity in education and employment requires us to rethink testing and meritocracy. Retrieved on March 24<sup>th</sup> 2013 from <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1641&context=californialawreview>>

<sup>10</sup> Affirmative action 2013. In Nolo.com retrieved March 24<sup>th</sup> 2013, from <http://www.nolo.com/dictionary/affirmative-action-term.html>.

<sup>11</sup> N. Trujillo, Smih Raymond (2010) *“Issue brief: women/ Gender Issue and Affirmative Action”* <<http://hdl.handle.net/10022/AC:P:10934>> retrieved on 25<sup>th</sup> June 2013.

Winter (2011)<sup>12</sup> opines that affirmative actions are positive steps taken to increase the representation of women and minorities in areas of employment, education, and business from which they have been historically excluded. When those steps involve *preferential* selection—selection on the basis of race, gender, or ethnicity.<sup>13</sup>

The Merriam Webster dictionary defines affirmative action as active effort taken to improve the employment or educational opportunities of members of minority groups and women; *also*: a similar effort to promote the rights or progress of other disadvantaged persons.<sup>14</sup>

The Report of the Constitution of Kenya Review Commission<sup>15</sup> stated that affirmative action and positive discrimination are often used synonymously however affirmative action suggests positive steps to achieve the improvement of the conditions of a section of the people who for various reasons have been excluded from enjoying the benefits of development. On the other hand, positive discrimination suggests treatment that assists one group of people to catch up with the rest in the society. Both concepts therefore have in common, the notion that there are certain sections of society that are disadvantaged and whose condition must be redressed.<sup>16</sup>

The Constitution of Kenya 2010 at Article 27(6) makes reference to the term Affirmative Action and it states that to give full effect to the realization of the rights guaranteed under Article 27, the State shall take legislative and other measures, including *affirmative action* programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

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<sup>12</sup> Fullinwider, Robert, "Affirmative Action", *The Stanford Encyclopedia of Philosophy* (Fall 2013 Edition), Edward N. Zalta (ed.), <<http://plato.stanford.edu/archives/fall2013/entries/affirmative-action/>> retrieved on 24<sup>th</sup> March 2013.

<sup>13</sup> Ibid

<sup>14</sup> Affirmative action 2013. In Merriam- Webster.com retrieved March 24<sup>th</sup> 2013 from <http://www.merriam-webster.com/dictionary/affirmative-action>

<sup>15</sup> "Affirmative Action" Constitution Review Report, Affirmative Action Chapter, retrieved on 24<sup>th</sup> June 2013 from <<http://www.constitutionnet.org/vl/item/affirmative-action-kenya>>

<sup>16</sup> Ibid

### 1.1.2 Definition of other terms used in AA

Terms used in the discourse of Affirmative Action include, Gender Quotas. This is the mandate that women must constitute a certain number or percentage of the members of a body, whether it is a candidate list, a parliamentary assembly, a committee, or a government. Quotas in politics involve setting up a percentage or number for the representation of a certain group, here women, most often in the form of a minimum percentage, for instance 20, 30 or 40 percent. Quotas are used as a measure to increase the representation of historically excluded or under-represented groups in politics. Quota regulations may target women or may be gender neutral, e.g. 'no more than 60% of either sex'.<sup>17</sup>

Julio and Tavares (2011)<sup>18</sup> describe quotas as mechanisms that ascribe to a specific group preferential access to a resource. The resource can vary, from entry to higher education institutions to a position in political lists or parliament.

Dahlerup (2005)<sup>19</sup> confirms this description and states that quotas for women entail that women must constitute a certain number or percentage of the members of a body, whether it is a candidate list, a parliamentary assembly, a committee or a government. She also states that candidate quotas specify the minimum percentage of candidates for election that must be women, and apply to political parties' lists of candidates for election.

Quotas can either be legal or voluntary. Legal quotas are quotas which are mandated in a country's constitution or by law, usually in the electoral law. Legal quotas regulate the proceedings of all political parties in a country and may also prescribe sanctions in case of non-compliance.<sup>20</sup>

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<sup>17</sup> Quota Project, (2013) "Global database of Quotas for women" (IDEA) <http://www.quotaproject.org/faq.cfm> accessed on 15th June 2013.

<sup>18</sup> Julio, Tavares (2011) "The good, the bad and the different, Can Gender Quotas raise the quality of politicians." (Centre for Economic Policy Research) retrieved on 13<sup>th</sup> July 2013 from, <[http://www.josetavares.eu/wp-content/uploads/2011/01/Different\\_Tavares.pdf](http://www.josetavares.eu/wp-content/uploads/2011/01/Different_Tavares.pdf)>

<sup>19</sup> Dahlerup, Drude (2005) "Increasing Women's Representation; New trends" (International IDEA, Women in Parliament) retrieved on 13<sup>th</sup> July 2013 from <[http://www.idea.int/publications/wip2/upload/4.Increasing\\_Women%27s\\_Political\\_Representation.pdf](http://www.idea.int/publications/wip2/upload/4.Increasing_Women%27s_Political_Representation.pdf)>

<sup>20</sup> Quota Project, (2013) "Global database of Quotas for women" (IDEA) <<http://www.quotaproject.org/faq.cfm>> accessed on 21st June 2013.

Ibid (2005) agrees with this description and she states that *Legal candidate quotas* are laid down in the constitution, in electoral laws or in political party laws. Such quotas as are enacted in legislation force all political parties to recruit the required percentage of women.

Voluntary party quotas are voluntarily decided by one or more political parties in a country. In such cases some political parties may have quotas, while other parties reject them.<sup>21</sup> Ibid (2005) they are adopted voluntarily by political parties, and are most common in centre-left-leaning parties, while liberal and conservative parties generally tend to be reluctant about or strongly opposed to adopting quotas.

Proportional representation is a type of electoral system which attempts to match the proportion of seats won by a political party with the proportion of the total vote for that party. It is a representation of parties in an elective body in proportion to the votes they win.<sup>22</sup>

Affirmative action policies include any policies that attempt to dismantle institutionalized or informal cultural norms and systems of group based disadvantage and the inequalities historically resulting from them or attempt to promote an ideal or inclusive community in ideals of democracy, integration and pluralism, by means that classify people according to their ascriptive identities race, gender, ethnicity, sexual orientation, disability and select people for participation in institutions using these classification criteria.<sup>23</sup>

Reserved seats are the seats in a legislature set up that are set aside in a certain number for women representatives this can be specified either in the constitution or by legislation.

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<sup>21</sup> Ibid.

<sup>22</sup> proportional representation. (n.d.). *Collins English Dictionary - Complete & Unabridged 10th Edition*. Retrieved March 16, 2013, from Dictionary.com website: <http://dictionary.reference.com/browse/proportionalrepresentation>

<sup>23</sup> "Race, Gender, and Affirmative Action" <http://www-personal.umich.edu/~eandersn/biblio.htm> (2008) retrieved March 16,2013

## **1.2 STATEMENT OF PROBLEM**

Although Kenya has made great strides in enacting provisions on Affirmative Action, this has not resulted in having a significant number of women elected directly into positions in the National Assembly and Senate. Women continue to be marginalized and discriminated against in the electoral process through various means. This has hampered greater representation of women in elective posts.

## **1.3 OBJECTIVE OF STUDY**

The objective of this study is to investigate the extent to which laws on Affirmative Action have been effective in achieving gender equality in the representation of women in the Kenyan parliament and Senate following the inauguration of the Constitution of Kenya 2010. The study examines the challenges faced and makes recommendation to deal with the challenges.

## **1.4 RESEARCH QUESTIONS.**

- I. What does the Law provide regarding Affirmative Action for women in elective posts in Kenya?
- II. To what extent has this law been implemented and with what results?
- III. What are the shortcomings of the Law?
- IV. What recommendations can be made to deal with the shortcomings and ensure the success of Affirmative Action for women in elective posts in Kenya?

## **1.5 JUSTIFICATION**

Three years have passed since the promulgation of the Constitution of Kenya in 2010. This is an appropriate time to take stock of the implementation of the provisions of the Constitution relating to Affirmative Action for Women in elective posts in order to provide information on the success or shortcomings in the implementation process so as to guide future implementation efforts.

## **1.6 ASSUMPTIONS OF THE STUDY**

The ineffective implementation of the Law on AA for elective posts for women has been a stumbling block to women's access to governing positions. This has hindered women from attaining the 30% set threshold for representation in elective posts.

There is need to put in place clear mechanisms, including legislative reform, to ensure that the law is effectively implemented and that optimal representation of women in elective posts is realized.

## **1.7 LITERATURE REVIEW**

According to Kamau, Nyokabi (2010)<sup>24</sup> Women in Kenya have been marginalized as far as political leadership is concerned and their continual exclusion in political decision making is a product of a history of patriarchal state in Kenya. This is true for both the colonial and independent state.

Kabira, Masinjila (1997)<sup>25</sup> Patriarchal simply means a social, political and economic system that ensures, preserves and perpetuates male supremacy in all aspects of life, it's possible that this patriarchal state roots in colonial systems of governance and possible implications it has for women in politics, now and in future. Ngugi wa Thiongo<sup>26</sup> states that women have always been depicted as dependent on men and as existing to serve men's needs. He also provided a theory for the forms of image women had and have in Kenya. He breaks them down to three;

### Phase 1- PRE COLONIAL HISTORICAL IMAGE

In this period women participated and played a major role in the production of wealth. Women also controlled the surplus production and men held the power over the real wealth that was livestock and land. However he says that women played a more positive role than it is assumed today because the division of labor was different.

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<sup>24</sup>Kamau, Nyokabi (2010) "*Women and political leadership in Kenya; Ten case studies*", (Heinrich Boll Stiftung) <[http://www.ke.boell.org/downloads/Women\\_in\\_Leadership\\_Study.pdf](http://www.ke.boell.org/downloads/Women_in_Leadership_Study.pdf)>

<sup>25</sup> Kabira, Masinjila, (1997) "*ABC of gender analysis*" (Forum for African Women Educationalists) accessed at the Kenya National Library Services Nairobi.

<sup>26</sup> Ibid

## Phase 2- COLONIAL IMAGE

At this stage the economic system changed rapidly, making capital and labour the most important means of wealth production. The woman like everything else became a commodity for cheap labour. She became the ayah, maid coffee and tea pickers etc. Women that could not get employment went to the cities and resorted to prostitution. Racism reinforced prostitution as it did not protect the black woman from sexual abuse. This cheap concept was particularly unfortunate as it is a fact that women participated in the fight for independence.

## Phase 3- NEO COLONIALISM

At this phase the woman is still the struggling peasant. She is exploited as a source of cheap labor. The economy deliberately invites women to join the armies of the unemployed. This view is also shared by Elleke Boehmer (1990)<sup>27</sup> when he states “where women as in Algeria or Zimbabwe fought for freedom alongside men, national consciousness was composed by male leaders. North Africa may have been free, but “mothers of Africa” remained manifestly oppressed.”

The colonialists in Kenya emphasized male dominance by transforming man’s supervisory role over land to individual legal ownership of land (Elkins, 2005)<sup>28</sup>.Subsequently women would be denied access to land.

Besides land ownership, the status of the Kenyan women was further damaged affected by the introduction of formal education. Formal education was mostly available to men, which meant that majority of women remained illiterate; this therefore meant that they could not participate in modern day economic transactions (Odinga,1967).<sup>29</sup>

Mugo(1975)<sup>30</sup> decries the unfortunate circumstance in which the Kenyan woman finds herself. She states that the story always told of women in leadership is the case of Wangu wa Makeri,

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<sup>27</sup> Boehmer, E (1990) *“Mother of Africa: Representation of Nation and Gender in Post-Colonial African Literature”* (University of Oxford).

<sup>28</sup> Elkins, (2005) *“Imperial reckoning: The Untold Story of Britain’s Gulag in Kenya”*(Owl Books)

<sup>29</sup> Odinga, O. (1967), *Not Yet Uhuru: An Autobiography*, London: Heinemann.

<sup>30</sup> Kabira, Masinjila,(1997) *“ABC of gender analysis”* (Forum for African Women Educationalists) accessed at the Kenya National Library Services Nairobi.

where a woman of great courage became a chief and became intoxicated with conceit and craze for power. She then danced naked before a crowd in a cultural ceremony. She was promptly removed from her high position of power. The lesson in this legend is that “do not give political power to women or else they will lose their heads. She also states that documented stories of men who fought for independence are painstakingly elaborated but there is no documentation of women who fought alongside men in order to attain independence. Statements are only made of what the women’s role was an afterthought.

She also gives a case example of Mary Muthoni Nyanjiru who was at the fore front advocating for the release of Harry Thuku. On a particular day she and others who were advocating for the release of Thuku had a precision whereby she was shot dead in the altercation that ensued. Mugo also suggests that men who fought for independence managed to make their way through avenues such as political parties and special appointments to positions of power; women on the other hand were forgotten and left to vegetate in the kitchen. Competent female candidates did not also come by promotion to top positions in the Kenyan system with the guise of pressing family duties.

Kamau, Nyokabi (2010)<sup>31</sup> describes the roles that women played in the struggle for independence. Most of these women led struggles against the colonial domination, protested against colonial oppression, fed and protected the veterans, led segments of the resistance armies against colonization and effectively participated in the political negotiations leading to independence.

The independent state in Kenya arose from a nationalist movement; however the colonial structure was maintained. Young people who had received education during the colonial rule occupied most of the leadership and governance positions held by the colonials. It is therefore not a surprise that women had no representation in the first parliament. The structures in the government were decentralized but were never gendered. The state was further masculinized and ethicized.

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<sup>31</sup> Kamau, Nyokabi (2010) “*Women and political leadership in Kenya; Ten case studies*”, (Heinrich Boll Stiftung) <[http://www.ke.boell.org/downloads/Women\\_in\\_Leadership\\_Study.pdf](http://www.ke.boell.org/downloads/Women_in_Leadership_Study.pdf)>

The first president of Kenya died in 1978 and as per the constitution the Vice president took over. The reign of the second President of Kenya, Moi was characterized by anti-democracy tendencies and suppression of the opposition. At this period women's issues were practically silent and those women that tried to campaign for women's rights or run for public offices were harassed and silenced (Oduol and Kabira, 2000)<sup>32</sup>

There are women who went against the grain and were able to secure seats in parliament and other leadership positions. These women leaders unlike their male counterparts had high levels of professional achievements, they were accomplished academics, having highly achieved in their professions. Another factor that aided them was the fact that their family backgrounds were able to boost their ambitions for leadership. Indeed many of them owed a lot of the support they received from their families for the educational background they possessed.

Support from male figure such as a father or husband played a critical role against which to break the patriarchal huddles imposed by their communities. There are however examples of women who struggled against numerous odds with no concrete support from their families case example Wangari Mathai .(Kamau, Nyokabi, 2010)

Kassily, B.J.N, Onkware,K (2010) provides statistics on the number of elected women MPs which moved from zero in the first post-colonial government to six in 1992 and then dropped to four in 1997; it rose again to nine in 2002. The number of women parliamentary aspirants improved from seven in 1963 to over 200 candidates in the 2002 parliamentary elections, while the number of women nominated MPs increased from zero in 1963 to eight in 2002.

The clamor for a new constitution gained momentum in the 1990s and included championing for women's rights or marginalized groups including women. This was however never realized until the years 2000 when a commission for constitutional reform for Kenya was set up by the then President Moi. Prof Yash Pal Ghai was installed as its chairman to spearhead Kenya's first major constitutional reform.

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<sup>32</sup> Oduol, Kabira(2000) "*The mother of warriors and the daughters: The women's Movement in Kenya*". (University of Nairobi) <<https://profiles.uonbi.ac.ke/wkabira/publications/ag/K?sort=author&order=asc>> accessed on 25<sup>th</sup> June 2013.

According to a report by Nzomo, Mbote (2012)<sup>33</sup> the review process was taken under the Constitution of Kenya Review Act which accommodated the diversity of the Kenyan people including gender and respects the universal principles of human rights and gender equity. The principle of gender equity was integral to the review Act. For instance, it mandated the national assembly to have regard to the principle of gender equity in nomination of persons as commissioners in the establishment of the commissioners.

In executing its mandate, the review commission was keen to be inclusive. It held a seminar to deliberate on the gender question on 5<sup>th</sup> to 8<sup>th</sup> December 2001, at which papers on diverse aspects of the gender question were discussed. Three main background papers were presented on the legal, political and economic and socio-cultural aspects of the gender question. (Ibid,2003)

In the lobbying and discussions concerning the constitution women's groups insisted on the principle of equality of men and women as a basic requirement for the enjoyment of rights. They also urged for the entrenchment of women's rights in the bill of rights. Among the rights brought out by most submissions and memoranda by women's groups, individuals and resource persons included:-

- I. Abolishment of discrimination in regard to marriage, divorce, burial, inheritance, personal law issues with a view to removing the cultural concessions made to men in gender relations that uphold the tenets of the patriarchal society.
- II. Mandatory cabinet posts reserved for women.
- III. Guarantee married women right to marriage certificate.
- IV. Outlaw retrogressive socio-cultural practices that impede on women's rights to participate, access and control resources.
- V. Women should be entitled to their children and property within and outside of marriage.
- VI. AA resonated in all submissions- the general view was whatever other constitutional provisions made to ensure or facilitate women's enjoyment of rights at par with men, such equality may not be achieved unless the provisions of such rights are reinforced with the provisions of the principle of AA which would enjoin the Kenyan society to take

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<sup>33</sup> Nzomo, M (2012) "REPRESENTATIONAL POLITICS IN KENYA: THE GENDER QUOTA AND BEYOND"; (African Research & Resource)

special and deliberate measures to correct the inequalities brought about by past gender based injustices that have placed women in a subordinate status to men.

- VII. Representational and pluralistic electoral system. A minimum of 30% and others up to 50% women's participation and representation in all decision making positions and employment in both public and private sectors.

In terms of electoral system and process, the women submitted that:

- I. There should be a mixed proportional electoral system- should be adopted with the following constitutional principles; 100 MPs selected through party list of their respective political parties contesting elections according to proportions of total votes cast for each party in general elections with at least a third of these persons being women. Such members would not contest constituency seats.
- II. 35% of women representatives would apply in the party structures and electoral list reserving 35% seats for women in parliament.

The women also proposed the creation of a commission for gender equality.

Despite the gains provided for women provided for by the Constitution, these provisions are yet to be implemented. Nzomo (2012) argued that whereas Kenya was lagging behind in regional and global averages in respect to women's political representation, which was at 20.3% and 20.2% women respectively, it had an opportunity to seize the political moment ahead of the 2013 elections, to redeem itself, by legislating the implementation mechanism for the two thirds gender rule; and in so doing, learn from and adopt the best practices from the African countries that have already attained the minimum female gender representation threshold. Accordingly this would have ensured that gender equitable representation goes beyond *formal / descriptive to substantive representation*.

She concluded by stating that , "rather than expending time debating the inevitable, the transitional period prior to the 2013 Elections was an important opportunity for working out strategies and setting out rules and standards on how to hold accountable all future political representatives (both elected and nominated), to all Kenyan citizens."

This study will look at the process that Kenya has gone through in implementation of gender based Affirmative Action most authors have looked at the need for Affirmative Action, this study seeks to go beyond the need and look at best practices to ensure the implementation of Affirmative Action.

## **1.8 METHODOLOGY**

The study was a library based study, relying on secondary sources such as books and journals as well as electronic materials.

## **1.9 CHAPTER BREAKDOWN**

The study is organized in four chapters. The opening chapter gives a general overview and essential background on affirmative action and gender quotas, it includes the origin, legality and the constitutionality of gender based affirmative action in Kenya.

Chapter two focuses on the electoral laws and provides their limitations in the encouragement or improvement of the numbers of women participating in the electoral process.

Chapter three provides a comparative study of gender quotas showing the best practices around the world. The chapter discusses Argentina, Uganda and Ghana. Chapter four contains the summary, conclusion and recommendations.

## CHAPTER TWO

### REGIONAL AND INTERNATIONAL LAWS DEALING WITH GENDER BASED AFFIRMATIVE ACTION

The Constitution of Kenya 2010 immensely changed the overview of electoral laws in Kenya and introduced into the sphere of election laws, instruments that never before formed part of the laws of Kenya. It provides that the general rules of international law shall form part of the laws of Kenya<sup>1</sup> and in addition any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the constitution.<sup>2</sup>

The effect of these provisions is that, there are non traditional sources of law affecting the electoral process and participation of the people in that process. In this regard, any discussion of the laws of Kenya on elections cannot be complete without the inclusion of international instruments that Kenya has ratified and those that form part of the general rules of international law.

#### **2.1 GENERAL RULES OF INTERNATIONAL LAW**

##### **2.1.1 The Universal Declaration on Human Rights (UDHR)**

The provisions of this instrument have informed the development of numerous international legally binding conventions.<sup>3</sup> The UDHR acts as an expression of the fundamental values shared by all members of the international community. It openly recognizes the right of the people to participate in government either directly or through their democratically elected representatives.<sup>4</sup>

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<sup>1</sup> Section 2 (5) Constitution of Kenya 2010

<sup>2</sup> Section 2 (6) Constitution of Kenya 2010

<sup>3</sup> Examples include the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights

<sup>4</sup> Article 21 of the Universal Declaration of Human Rights

The Declaration provides that everyone has the right to take part in the government of his country, directly or through freely chosen representatives.<sup>5</sup>

The Declaration also requires the participation of the people to legitimize any exercise or claim to exercise state authority. It emphasizes the centrality of the people in the establishment of their government and exercise of state authority.<sup>6</sup>

### **2.1.2 The International Covenant on Civil and Political Rights**

This treaty 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;
- b) To vote and to be elected at genuine periodic elections, this 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.<sup>7</sup>

### **2.1.3 The Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**

**(1965)**

This convention was developed principally to protect racial minorities and eliminate any forms of discrimination on the basis of one's race. Article 5 of the convention provides that state parties to the convention have undertaken to prohibit and eliminate racial discrimination in all its forms and to guarantee the rights of everyone, without distinction as to race, colour, or national or

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<sup>5</sup> Article 21 (1) *ibid*

<sup>6</sup> Article 21 (3) *ibid*

<sup>7</sup> Article 25 International Covenant on Civil and Political Rights

ethnic origin, to equality before the law, notably in the enjoyment of amongst others the political rights as captured in paragraph (c) of the article

#### **2.1.4 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)<sup>8</sup>**

The convention seeks to integrate women at the center of decision making processes and eliminate any obstacle women face in the course of productive participation in the affairs of the society. Pertinent to the present discourse is article 7 of the Convention which provides that state parties shall take 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 to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.

## **2.2 REGIONAL LAWS**

### **2.2.1 The African Charter on Human and People's Rights**

At Article 2 the charter provides for non restricted rights which are rights that are applicable to all. It provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

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<sup>8</sup> Convention passed in 1979

## **2.2.2 African Union Gender Policy**

The main purpose of the Policy is to establish a clear vision and make commitments to guide the process of gender mainstreaming and women empowerment to influence policies, procedures and practices which will accelerate the achievement of gender equality, gender justice, non discrimination and fundamental human rights in Africa.<sup>9</sup>

The Gender Policy was created to provide a mandate for the operationalization of Assembly commitments and is accompanied by an Action Plan, which guides the implementation of these commitments by AU organs. It is also reviewed periodically. It compliments ongoing implementation of these commitments at the Member States level and in Regional Economic Communities (RECs).

Kenya is one of the countries in Africa that did not achieve the 30% critical mass targeted for 2005 and it can be said not to be capable of achieving 50/50 target by 2015/2020 set by the AU Gender policy.<sup>10</sup>

## **2.3 KENYAN LAWS**

### **2.3.1 The Constitution of Kenya 2010**

The Constitution of Kenya 2010 is hailed as one of the best in the world with a strong Bill of Rights. Chapter sixteen on the amendments guarantees the Bill of Rights and provides that they cannot be changed without the holding of a referendum. At Article 27(3) states that women and men have the right to equal treatment, including the right to equal opportunities in political,

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<sup>9</sup> <http://wgd.au.int/en/sites/default/files/Flier%20on%20AU%20Gender%20Policy%20-English.pdf> AU Policy Flier accessed on 15<sup>th</sup> September 2013

<sup>10</sup> African Union Gender Policy (2009)

<[http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CDEQFjAB&url=http%2F%2Fwww.africa-union.org%2Froot%2FAU%2Fauc%2Fdepartments%2Fge%2Ffrican%2520union%2520gender%2520policy.doc&ei=w2X\\_UYP8E7On0wX4jYHgBw&usq=AFQjCNHFPRWd8bZloLXnph96HgMPZ-LRcg&bvm=bv.50165853,d.d2k](http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CDEQFjAB&url=http%2F%2Fwww.africa-union.org%2Froot%2FAU%2Fauc%2Fdepartments%2Fge%2Ffrican%2520union%2520gender%2520policy.doc&ei=w2X_UYP8E7On0wX4jYHgBw&usq=AFQjCNHFPRWd8bZloLXnph96HgMPZ-LRcg&bvm=bv.50165853,d.d2k)> accessed on 20<sup>th</sup> July 2013.

economic, cultural and social spheres. Article 27(6) states that to give full effect to the realization of the rights guaranteed under article 27, the state shall take legislative and other measures, including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

Article 27(8) provides that in addition to the measures contemplated in clause (6), the state shall take legislative and other measure to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Article 56 is to the effect that the state shall put in place affirmative action programs designed to ensure that minorities and marginalized groups are provided for, participate and are represented in among other things governance and other spheres of life.

Article 81(b) that states that the electoral system shall comply with certain principles including not more than two-thirds of the members of elective public bodies shall be of the same gender.

Article 88 (1) establishes the independent electoral and boundaries commission whose duties among others is to (d) regulate the process by which parties nominate candidates for election.

Article 90 (1) Provides that the election for the seats of parliament for under Articles 97(1)(c), 98(1)(b) and (c) and for members of county assemblies under 177(1)(b) and (c), shall be on the basis of proportional representation by use of party lists.

Article 90(1)(b) states that except in the use of the seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in priority in which they are listed and (c) each party list reflects the regional and ethnic diversity of the people of Kenya.

Article 91(1)(e) provides that every political party shall (e) respect the rights of all persons to participate in the political process, including minorities and marginalized groups, (f) respect and promote human rights and fundamental freedoms and gender equality and equity.

Article 97(1) (b) states that the National Assembly consists of 47 women, each elected by registered voters of the counties, each county constituting a single member constituency and (c) 12 members nominated by parliamentary political parties according to their proportion of members in the National Assembly.

Article 98(1)(b) establishes that the Senate consists of (b) 16 women members who shall be nominated by political parties according to their proportion of members of the senate elected.

Article 100(1) Parliament shall enact legislation to promote the representation in parliament of (a) women.

The CoK 2010 has brought with it many gains however there needs to be an entrenchment of the two thirds gender rule as part of the electoral practice in Kenya. This will ensure that the provisions of Article 90 are met.

### **2.3.2 The Elections Act 2011**

The preamble states that this is an Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes.

It describes a party list as a list prepared by a political party and submitted to the commission pursuant to and in accordance with Article 90 and S.29, 34, 35, 36, and 37.<sup>11</sup> Other sections relevant to the discussion on AA are:-

**Section 27.** (1) States that a political party shall submit its nomination rules to the Commission at least three months before the nomination of its candidates.

**Section 31.** (1) provides that a person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—

(a) is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections;

Section 34 speaks of the nomination of party list members, section 35 is to the effect that the parties list it to be submitted to the commission on the same day as the day designated for submission. Section 37 is on the re-allocation of special seats if the political party member dies, withdraws from the list, changes parties, resigns or is expelled from his or her party during the term of the representation. The next member in the list will then take up the position bearing in mind gender representation. Section 36 outlines the allocation of special seats as provided in the Constitution. Party list nominations for the National Assembly shall include 12 members nominated by political parties according to their proportion of members in the National Assembly. This is to allow representation of special interest including the youth, persons with disabilities and workers in accordance to Article 97 1(c) of the Constitution.

Party list nominations in the Senate shall include 16 women who shall be nominated by political parties according to their proportion of members in the Senate as per Article 98. The article

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<sup>11</sup> Section 2 Elections Act No 24 of 2011

further provides for 2 members (male and female) to represent the youth and another 2 slots (male and female) to represent persons with disabilities

Party list nominations in the County Assembly shall include the number of special seats necessary to ensure that no more than two thirds of the membership of the assembly is of the same gender, 8 special seats at least 2 of whom shall represent persons with disability, 2 youth and 2 representing marginalized groups Article 177 (1) (b) (d) of the Constitution.

The Election Act however does not compel political parties to comply with the two third gender principal while nominating candidates for elective offices. It has also been shown to be grossly violated by some political parties who try and change the name of their members once they have been submitted to the Commission. The political parties have also been seen to push the commission into changing the dates of submission of the said lists going by what transpired before the general elections held in Kenya on 4<sup>th</sup> March 2013.

### **2.3.3 The Political Parties Act**

Political parties and Coalitions are governed by the Political Parties Act, 2011 and are bound by the Code of Conduct set out under the first schedule of the Act. This Code of Conduct obligates every political party to uphold the principles of gender equity and equality, fairness and respect the rights of all to participate in the political process.

The Political Parties Act provides the requirements necessary for the registration of political parties. What this means, is that the Registrar of Political Parties then has the authority to deny registration to political parties that do not comply with the gender rule<sup>12</sup>. Despite this being the law a survey, carried out by Women Shadow Parliament-Kenya (WSP-K) found the law being

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<sup>12</sup> Section 7(2) (c), (d) and (e) Political Parties Act 2011

violated and blamed the Registrar of Political Parties and the Independent Electoral and Boundaries Commission (IEBC) of laxity in ensuring the constitutional threshold is achieved.<sup>13</sup>

As of February 2012 Kenya had 47 registered political parties. The Political Parties Act at Section 51 requires political parties existing immediately before its commencement to comply with its provisions within 180 days from the 1<sup>st</sup> of November 2011 on which date the Act came into effect.

According to an analysis of 7 major parties in Kenya done by Njeri Kabeberi, it emerged that although the Political Parties Act is established and the parties themselves have policies that have enshrined the need for gender equality, some parties were not connected to their policy position.

*“Others are totally lost, confused or totally unaware of the role of a party viz a viz legislation at the national level or local level”<sup>14</sup>*

It also emerged that despite strong party positions on gender equality and empowerment, politicians still operate in their traditional way where culture superseded policy intention, law and even the constitution. Political parties act as gatekeepers in the process of choosing candidates; it is therefore obvious that in order to redress the problem of representation, parties must recognize the need for inclusion of equality.

The Political Parties Act should provide for a mechanism of monitoring political parties against their party instruments and develop a process of holding parties accountable. This can be through for example payment of fines.

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[http://womensshadowparliament.org/downloads/Elusive\\_Quest\\_for\\_Women%27s\\_Empowerment\\_in\\_Electral\\_Politics.pdf](http://womensshadowparliament.org/downloads/Elusive_Quest_for_Women%27s_Empowerment_in_Electral_Politics.pdf) accessed on 12<sup>th</sup> September 2013.

<sup>14</sup> <http://www.cmd-kenya.org/files/Launch-of-the-int-IDEA-gender-analysis.pdf> accessed on 12th September 2013.

## **2.4 Independent Electoral Boundaries Commission**

This is a body established under Article 88 of the Constitution of Kenya. The IEBC is responsible for conducting and supervising referenda and elections to any elective body or office established under the Constitution or other election prescribed by a statute.

IEBC among other roles conducts voter registration, regularly revises voters rolls, regulates the process by which political parties nominate candidates, registers candidates for elections, facilitates observation, monitoring and evaluation of elections, regulates money spent by or on behalf of a candidate or party in respect of an election, develops code of conduct for candidates and parties contesting elections.

As stated earlier the party lists created by political parties are submitted to the IEBC. The law requires the list to be submitted together with the party nomination, this procedure is provided for in Section 35 of the Elections Act 2011 which states that (1) A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties list of nominations of candidates for an election before the nomination of candidates under Article 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of the Constitution), however this was not the case in the culmination to the 4<sup>th</sup> March General elections. The IEBC were seen to have taken a lenient view of deadlines and allowed candidates to change parties well beyond the deadline. This shows a lack of authority for this institution in political governance in Kenya.

The persons on party lists are candidates, just as those running in geographical constituencies. The consequence of what happened above was that the IEBC allowed a situation in which the campaigns went on, and had been concluded, without the disclosure of a category of the

candidates participating in the elections. This basic failure of transparency offends the Constitution.<sup>15</sup>

Holding of regular and fair elections has not addressed diverse identities shaped by sex, age, disability, ethnicity or religion in Africa. Constitutional and law reforms have also failed to eliminate entrenched sexist practices and attitudes within the governance space. The failure to comply with provisions of the framework emanates from a complex web of factors which shall not be discussed in this study as it is another study on its own.

On 10<sup>th</sup> October 2012 the Attorney General filed a request to the Supreme court of Kenya in which he sought advice on whether the provisions of Article 81(b) as read with Article 27(4), Article 27(6), Article 27 (8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116 and Article 125 of the Constitution of the republic of Kenya required progressive realization of the enforcement of the one third gender rule or if it required the same to be implemented during the general elections scheduled for 4<sup>th</sup> March 2013.

At the mention of the case on 8<sup>th</sup> November 2012, the Commission on Administrative Justice (CAJ), the independent Elections and Boundaries Commission (IEBC), the Commission on the Implementation of the Constitution (CIC) and the National Gender and Equality Commission (NGEC) were admitted as interested parties. The Center for Rights Education and Awareness (CREAW), the Katiba Institute, the Centre for Multi Party Democracy (CMD), FIDA- Kenya, the Kenya Human Rights Commission (KHRC), the international Centre for Rights and Governance (ICRG) and Mr. Charles Kanjama were admitted as amici curiae (friends of the court).

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<sup>15</sup> <http://elections.nation.co.ke/Blogs/-/1632026/1708404/-/118c8sn/-/index.html> accessed on 15th September 2013.

In addressing the court CAJ was categorical that the dilemma faced at the time was to be blamed on the legislature. There argument was that parliament was responsible for the removal of the provisions implementing the requirements under Article 81(b). The representing counsel stated that the mechanism – proportional representation, using counties as electoral colleges- always existed in all drafts of the constitution (Bomas Draft, Wako Draft, Harmonized Draft and the Proposed Draft) the provisions “disappeared” once the parliamentary select committee on Constitutional Review met with CoE in Naivasha. He added that Parliament had shot down Constitutional amendments that would seek to implement the two-thirds gender principle.

The CIC and CMD asserted that there had been a series of consultative meetings that had taken place from May 2011 to September 2012 between civil society, parliamentary representatives and members of the executive on the issue of the implementation of the provisions of Article 81(b).

CMD argued that it did not make sense for the court to grant, a period of two elections cycles for parliament to come to conformity with the rule, though the period within which parliament is supposed to have passed legislation under Article 100 expires on 27<sup>th</sup> August 2015 and as such the parliament would find itself unconstitutional mid-term.

In its decision by a majority advised that the one third gender principle as provided for by the constitution could not be enforced immediately and was to be applied progressively: progressively being by 27 August 2015. The court stated that, “legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015.

In his dissenting opinion the Chief Justice Willy Mutunga held that parliament by its silence could not deprive the women of Kenya the right to equal representation. He also stated that in the event the parliament failed to legislate over the matter, any of the elected houses that violated the principle would be unconstitutional and the election of the house would be null and void. He also made reference to Article 3 of the Constitution;

Article 3(1) every person has an obligation to respect, uphold and defend the constitution. (2) Any attempt to establish a government otherwise than in compliance with this constitution is unlawful.

The CJ also agreed the counsel for CMD that the best option would be to legislate “here and now” and secure the rights women under the two-thirds gender principle. His opinion was therefore that the two-thirds gender principle be implemented during the general elections scheduled for March 4<sup>th</sup> 2013.

### The results of elections

The results of the 4<sup>th</sup> March General elections saw 16 female members of parliament elected and an additional 47 county women representatives elected into the lower house. A further 4 women were nominated into parliament. This saw the number of women elected into parliament amount to a total of 67 out of 350 seats that were available at the lower house.

Despite this, all hope is not lost. The Kenyan Parliament is capable of salvaging representational politics in Kenya. This can be done through making the National Assembly and the county assemblies open to minorities through a revised electoral system or other methods of choosing representatives. In terms of the electoral system, the key variables will be: (i) whether the system is proportional or majoritarian; (ii) the number of members to be elected from each district; (iii) whether there is an imposed threshold for representation; (iv) whether voters can choose between candidates as well as parties; and finally (v) whether minority voters are clustered together or geographically dispersed. Minorities could also gain representation through special mechanisms such as reserved seats, quotas or mandated multiethnic 'slates'<sup>16</sup>

Finally in discussing the laws on AA there are bound to be many arguments some for and some against affirmative action. Opponents of this process of affirmative action opine that it undermines merit, which is an important and just tool for equality. They indicate that in implementation of affirmative action merit is disposed off.

Guinier, however brings out a critical argument for affirmative action stating that with disparities merit itself is unjust. It should be noted that it is through such meritocracy arguments by opponents of affirmative action that the process is yet to yield its expected results. She also says that the idea of merit is to some extent fictitious this is because not everyone who is able to do a particular job is even allowed or given the opportunity to perform or succeed.<sup>17</sup>

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<sup>16</sup> Adams Oloo, (2011) "*Elections, representations and the new Constitution*", Society for interenational development. Accessed on 14<sup>th</sup> September 2013. <http://www.sidint.net/docs/WP7.pdf> accessed on 15th October 2013

<sup>17</sup> Susan Sturm and Lani Guinier, (2000) Boston review. "*The future of affirmative action*": promoting diversity in education and employment requires us to rethink testing and meritocracy.

## CHAPTER 3

### A COMPARATIVE ANALYSIS OF SELECTED STATES

#### 3.1 INTRODUCTION

This chapter examines AA in three countries, Ghana, Argentina and Uganda. All these countries have some form of AA in place.

#### 3.2 GHANA

Ghana and Kenya are similar in more ways than one. Some of these similarities include; both countries were colonized by the British, they both attained independence almost at the same period with Ghana attaining independence in 1957 and Kenya in 1963. According to the World Bank Kenya's GDP per capita as of 2011 was at 808.00 USD and Ghana at 1,570.13 USD. It is on this premise that I decided to do a case study on Ghana and the gender equality in politics in Ghana.

According to Claire C. Robertson "before colonialism in Ghana, age was more important indicator of status and authority than gender. British colonialism imposed European style male dominant notions upon male dominant notions upon more egalitarian local situation to the detriment of women generally and gender became a defining factor"<sup>1</sup>

Ghana gained independence in 1957 under the political leadership of Dr. Kwame Nkrumah. The struggle for independence and the ultimate attainment of independence brought together Ghanaians from different socio-cultural and economic backgrounds including women and youth. It is through this joint effort that Ghana succeeded.

In 1960 Ghana saw the first form of AA bill passed. The Bill was called; "The Representation of the people's (women members)" The bill was passed in acknowledgement of the immense role played by women in the struggle for independence<sup>2</sup>. The bill created an opportunity for 10 women to be included in the composition of the National Assembly of the First Republic.

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<sup>1</sup> Robertson, Claire C (1984) "Women and class in Accra, Ghana"

<sup>2</sup> Tsikata, Dodzi (2009) "Affirmative Action and the prospects for gender equality in Ghana politics" (women in broadcasting, The Friedrich-Ebert Stiftung)

This Act did not only increase the number of women in parliament, but it confirmed the government's commitment in encouraging women to be part of the decision making and governance system. This act is also seen as the first and successful attempt at AA policies in Ghana.<sup>3</sup>

This successful start at encouraging women's representation and role in decision making and government system was however short-lived. Between 1966 to 1991 Ghana went through a tumultuous period with devastating bouts of political, social and economic challenges wavering between coup d'états and discontinuous fragile democracy. This environment was not conducive for any development much less the nurturing of AA programs and policies.

Despite the distressing past that Ghana has had it has been able to rise for the ashes and is currently competing with other African economies such as Kenya. AA has been used in Ghana since independence to address regional imbalances in access to education, health, work and politics. It has had success in some areas like improving the male to female ratio in primary education, however it has had no or limited effect in improving representation of women in political and public life.<sup>4</sup>

Ghana is a signatory to various global declarations and protocols that advocate for women's human rights and seek to increase the role of women in governance at all levels and in all forms of development programs as well as the elimination of discrimination of all kinds of discrimination against women. These treaties include; Convention on the elimination of all forms of discrimination against women (CEDAW) Beijing Platform for Action (BPfA), the Millennium Development Goals (MDGs), The Common Wealth Plan of Action for Gender Equality, the AU Charter on Human and people's Rights and its protocol on the Rights of women. Ghana has ratified these treaties without any reservations.<sup>5</sup>

The Constitution of Ghana (1992) is also alive to the requirements required by these treaties and provides for the following;

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<sup>3</sup> Sam, Bernice (2011) *"Interrogating AA as a strategy for women's participation in politics; the Rhetoric and the Reality.*(WiLDAF)

<sup>4</sup> Tsikata, Dodzi (2009) *"Affirmative Action and the prospects for gender equality in Ghana politics"* (women in broadcasting, The Friedrich-Ebert Stiftung)

<sup>5</sup> Sam, Bernice (2011) *"Interrogating AA as a strategy for women's participation in politics; the Rhetoric and the Reality.*(WiLDAF)

At Article 12(2) it states that “Every person in Ghana whatever their race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to fundamental human Rights and freedoms of the individual in this chapter subject to respect for the rights and freedoms of others and for public interest”

Article 17(2) “a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, religion, creed and social or economic status.”

Article 35(5) provided that the “state shall actively promote the integration of the people of Ghana and prohibit discrimination and prejudice on the grounds of place, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs.”

Article 35(6) states that “Toward the achievement of the objectives stated in clause (5) of this article, the state shall take appropriate measures to achieve regional and gender balance in the recruitment and appointment of public officers”

Despite this demonstration of good will women are still underrepresented at decision making platforms.

Women’s groups in Ghana have been very active since the return of multi party constitutional rule in the 1990s. They have supported the candidature of women seeking political office and encourage political parties to select women as candidates particularly in their strongholds. They have also instituted measures to ensure equal representation of women in leadership structure. The main strategies that they have deployed include;

- I. Training and capacity building for elected and appointed members of both the parliamentary and district assemblies.
- II. Extensive public education and media campaigns

These strategies have achieved success particularly at the district assembly level.<sup>6</sup>

Women in Ghana have had a long history of engagement in politics since independence. They have contributed to the social, economic and political life in Ghana. They have also taken part in

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<sup>6</sup> Tsikata, Dodzi (2009) “Affirmative Action and the prospects for gender equality in Ghana politics” (women in broadcasting, The Friedrich-Ebert Stiftung)

policy making towards women's issues and gender equity and within international arena. In spite of these achievements by the women of Ghana the arena of politics and decision making in Ghana represents glaring gender disparities that are not only persistent but have also proven hard to tackle.<sup>7</sup>

A commitment to AA in politics in Ghana has been accused of being at best half-hearted. It has been argued that the basis for AA in Ghana is not shared or properly understood. This has created lassitude and resistance among the political bureaucratic classes and ultimately the general population towards AA programs.<sup>8</sup>

The type of parliamentary system in Ghana is unicameral with members being directly elected by the voters. The system of voting is by simple majority.

**Table 3.1** shows the trends in parliamentary elections in Ghana (1965-2012).

CONTESTANTS				ELECTED		
YEAR	FEMALE	MALE	TOTAL	FEMALE	MALE	TOTAL
<b>2012</b>	134 (10.1%)	1,198 (89.93%)	1,332 (100%)	30 (10.91%)	255 (89.09%)	275 (100%)
<b>2008</b>	103 (10.7%)	856 (89.3%)	959 (100%)	20 (8.7%)	210 (91.3%)	230 (100%)
<b>2004</b>	104 (10.9%)	849 (89.1%)	953 (100%)	25 (10.9%)	205 (89.1%)	230 (100%)

<sup>7</sup>Sam, Bernice (2011) *“Interrogating AA as a strategy for women’s participation in politics; the Rhetoric and the Reality.”*(WILDAF)

<sup>8</sup> Tsikata, Dodzi (2009) *“Affirmative Action and the prospects for gender equality in Ghana politics”* (women in broadcasting, The Friedrich-Ebert Stiftung)

<b>2000</b>	102 (9.3%)	986 (90.7%)	1,088 (100%)	18 (9%)	182 (91%)	200 (100%)
<b>1996</b>	59 (7.6%)	721 (92.4%)	780 (100%)	19 (9%)	181 (91%)	200 (100%)
<b>1992</b>	23 (5.2%)	418 (94.8%)	441 (100%)	10 (5%)	190 (95%)	200 (100%)
<b>1979</b>	23 (2.9%)	781 (94.8%)	804 (100%)	6 (4.3%)	134 (95.7%)	140 (100%)
<b>1969</b>	7 (1.5%)	472 (98.5%)	479 (100%)	1 (0.7%)	139 (99.3%)	140 (100%)
<b>1965</b>	FIGURE NOT KNOWN	N/A	N/A	19 (18.3%)	85 (81.7%)	104 (100%)

Source; Inter-parliamentary union General information

<<http://www.ipu.org/parline/reports/2123.htm>> accessed on 29<sup>th</sup> June 2013 and Tsikata, Dodzi (2009) "Affirmative Action and the prospects for gender equality in Ghana politics" (women in broadcasting, The Friedrich-Ebert Stiftung)

<<http://www.fesghana.org/uploads/PDF/Affirmative%20Action.pdf>>

President Mahama appointed 6 women in the year 2012, to be in charge of various ministries. The total numbers of Ministerial positions available were 35.

**Figure 3.1** The following chart shows the representation in the cabinet according to gender.



Source; < <http://www.guide2womenleaders.com/Ghana.htm>> accessed on 13<sup>th</sup> June 2013 and <[http://en.wikipedia.org/wiki/List\\_of\\_Mahama\\_government\\_ministers](http://en.wikipedia.org/wiki/List_of_Mahama_government_ministers)> accessed on 13th June 2013.

The situation with appointees was slightly better; this can be attributed to the existence of an AA policy at this level.

This was a decrease from the incumbent's government which constituted 8 women out of 35 ministerial positions which was 23% and 6 women out of 39 Deputy Ministerial appointments which represented 16%.

The appointments in 2008 were obtained after a group of women issued a statement and visited the President (who at the time had been newly elected) demanding for AA measures. This was after the poor show by women in the elections of that year.

It is also important to note that the Constitution of Ghana (1992) Article 78 requires that the majority of ministers be members of parliament. What this implies is that the performance of women at the election will determine their representation at the executive. It would therefore appear as if women are at a loss.

Dodzi (2009) argues that these events drew attention to a number of issues:

- I. Parliamentary representation of women in Ghana will not see steady improvement without AA.
- II. The Ghanaian society does not fully understand and comprehend the goals of equity in representation.
- III. In Ghana, the nature of AA and how it can be implemented to benefit the marginalized social groups is not well understood.<sup>9</sup>

The problems that hinder women from attaining political representation in Ghana are similar to those that Kenyan women face. They include;

- I. Women experience de facto discrimination, despite neutral laws, men have a considerable advantage when seeking political election
- II. Traditional beliefs and practices
- III. Monetization of elections
- IV. Unequal playing field created by political parties that is disadvantageous to women (women are discouraged by political parties from contesting against 'well-known and long serving' members of parliament.
- V. Ignorance of the general public on women's human rights and contribution to development;
- VI. Processes that are non-inclusive as regards to women, for example the Ghana Poverty Reduction Paper (GPRS 1, 2003 – 2006), little focus is therefore given to women empowerment and gender equality.<sup>10</sup>

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<sup>9</sup> Tsikata, Dodzi (2009) "*Affirmative Action and the prospects for gender equality in Ghana politics*" (women in broadcasting, The Friedrich-Ebert Stiftung)

Most countries in Africa that have reached or surpassed the 30% threshold have been using gender quotas as a form of redressing the situation. These countries include Tanzania, Uganda, South Africa and Rwanda. Progress towards gender parity in the legislature in Ghana like in most African countries has been too slow.

The UN Development Fund for Women (UNIFEM) in its 2008 report *progress of the world's women*, affirms that the “progress for many women, particularly the poorest and most marginal, has been far too slow”. It is on this premise that UNIFEM notes that gender parity in legislatures in developing countries can only be attained by at least 2047 at the present rates of increase.

What this shows us is that even at 2047 the goal for gender parity may still not be attained in countries like Ghana. Going by the elections held in Ghana in 2012, progress can be seen by the number of women elected however the progress has been too slow and needs a boost.

Based on such predictions the women of Ghana have been pushing for an AA policy that will ensure that they are properly represented in governance and decision making roles. In 2011 major parties in Ghana signed a commitment to promote the cause of women politicians. Ministry of Women And Children in collaboration with other stakeholders launched nationwide public consultations with the aim of developing an Affirmative Action Legislation.<sup>11</sup>

While there are provisions in the Constitution of Ghana (1992) for participation of women in governance decision-making, these provisions are spread out across the Constitution, they are therefore and not clear-cut .They lack the coercive power that would ensure that they are adhered to by all relevant stakeholders.

As stated by Dahlerup (2005) the laws are not usually enough, their success will depend on the implementation and enforcement mechanisms in place.<sup>12</sup>

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<sup>10</sup> Gender Studies and Human Rights Documentation Centre. “*Increasing women’s political participation*” <<http://www.gendercentreghana.org/increasing-womens-political-participation/>> accessed on 15<sup>th</sup> June 2013.

<sup>11</sup> <<http://www.mowacghana.net/Launch%20of%20AAB.pdf>> accessed on 17<sup>th</sup> June 2013.

<sup>12</sup> Dahlerup, Drude. (2007): “*Electoral gender quotas: Between equality of opportunity and equality of result.*” *Representation* 43.2 73-92.  
<[http://www.idea.int/publications/wip2/upload/4.Increasing\\_Women%27s\\_Political\\_Representation.pdf](http://www.idea.int/publications/wip2/upload/4.Increasing_Women%27s_Political_Representation.pdf)> accessed on 30<sup>th</sup> June 2013.

As of July 2013 the Ministry of Gender, Children and Social Protection of Ghana stated that it would lay an Affirmative Action draft bill before Parliament to help address the gender imbalances in the society by September of the same year.<sup>13</sup>

It is important to remember that studies have shown that quotas by law are generally less solid than constitutional quota systems. At the implementation stage the difference between the two different kinds of legal basis is however insignificant. It is therefore going to be interesting to see if Ghana will indeed be able to pass this AA bill and implement it.

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<sup>13</sup> <<http://www.ghanabusinessnews.com/2013/07/23/ministry-to-lay-affirmative-action-bill-before-parliament-by-september/#sthash.O1ia8l5K.dpuf>> accessed in July 2013.

### 3.3 ARGENTINA

Argentina is a federal republic with a presidential system and a bicameral legislature. The Argentine chamber has 257 directly elected members from 24 multi-member constituencies using party list system, with proportional distribution of seats.<sup>14</sup> The current democratic period in Argentina began in 1983 following nearly eight years of military rule.

“In 1983, almost 51 per cent of Argentine voters elected Raul Alfonsin (Union Civica Radical,UCR) as president and when Alfonsin yielded presidential power to Carlos Menem in 1989, it was the first time in Argentina's history that the president from one party transferred power to a fairly elected president of another party. Thus, Argentina, despite recent upheavals, has developed stable democratic processes, although social systems, economic systems, and party systems still tend to be quite volatile.”<sup>15</sup>

Gender equality in Argentina can be said to have began from the enactment of Law 13,010 in September 1947. This law gave the women of Argentina the right to vote. The woman responsible for championing for the enactment of the law was the first lady (second wife to President Juan Peron) Eva “Evita” Peron. She served as first lady from 1946 to 1952 when she died.

Evita understood that the law alone could not increase the participation of women in the public sphere; she therefore founded the (PPF) Female Peronist Party in 1949 with the help of other politically active women. The party’s main purpose was to support and encourage women’s participation in politics.<sup>16</sup>

Women’s rights in Argentina had been developed early in the life of the republic. For example Joint custody, it was established in 1947, through the Constitution of that year. This provision was however amended by the military rule that had taken over Argentina in 1956. This restored the inequality between men and women that had earlier been experienced in this nation.

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<sup>14</sup> Kılınçarslan, Pelin (2009) “*Legislation of Candidate Gender Quotas: Argentina’s Success, Turkey’s Failure*” <[http://www.ecpg-barcelona.com/sites/default/files/ECPG\\_PKilincarslan.pdf](http://www.ecpg-barcelona.com/sites/default/files/ECPG_PKilincarslan.pdf)> accessed on 17<sup>th</sup> June 2013.

<sup>15</sup> Tricia, Gray (2003) “*Electoral Gender Quotas: Lessons from Argentina and Chile*” Bulletin of Latin American Research, Vol. 22, No. 1, pp. 52-78

<sup>16</sup> Soledad Vega (2013) “*A century of struggles; gender equality in Argentina*” <<http://www.argentinaindependent.com/socialissues/a-century-of-struggles-gender-equality-in-argentina/>> accessed on 9<sup>th</sup> July 2013.

In 1974, Congress attempted to re-establish the joint custody rule; ironically the bill was vetoed by the first female president of Argentina María Estela Martínez Cartas de Perón (Isabel Martínez de Perón or Isabel Perón). Joint custody was later to be restored in 185 during the rule of President Raul Alfonsín.

The next major milestone for gender equality was in 1977 when the government of María Estela Martínez Cartas de Perón officially acknowledged the International Women's Day proclaimed by the United Nations.

It is important to note that even though Argentina had a female president (Isabel Peron took over from her husband after his sudden death in power in 1974. She was president from 1974 to 1976) women were still systematically excluded from real spheres of public power. This posed a great challenge to women who wanted to join politics and brought about the criticism of Argentina's democracy.

What we can establish from this history is that though most political parties in Argentina had some degree of women participation since their early days, it was not until the 1980's that the intensity of women participation in party politics properly emerged. It has been suggested that this led to "changes in attitudes in the search for points of agreement and common objectives."<sup>17</sup>

Through the democratic transition of the 1980's, there were organized groups of activists who understood the significance of engaging in the struggle against gender discrimination, particularly in the context of rebuilding democracy. Women therefore began their struggle for "parity democracy." They developed practices and strategies that would reach out to women as a whole and promote greater gender awareness.<sup>18</sup>

The next milestone for gender equality in Argentina was on 3<sup>rd</sup> June 1987 when congress voted for the "divorce law" this law renewed the equal rights of women and also brought in a new concept where women were capable of choosing whether or not to take on their husband's surname upon marriage. It also provided for prohibitions against various forms of discrimination against women.

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<sup>17</sup> EM, Carrio (2009) "*Argentina: A New Look at the Challenges of Women's Participation in the Legislature*"(IDEA) <<http://www.idea.int/publications/wip2/upload/Argentina.pdf>> accessed on 10t July 2013

<sup>18</sup> Ibid (2009)

The *Ley de Cupos* (Quota law) was passed on 6<sup>th</sup> November 1991 and initially it applied only to the Chamber of Deputies. The law established a minimum 30% female participation in the list of candidates for legislative elections. Argentina therefore became the first country in Latin America to adopt and implement the quota system.

Constitutional reforms in Argentina (1994) saw the embodiment of the laws regarding women into the Constitution. This move fortified these laws and made them obtain constitutional authority.

Laws regarding women and politics in Argentina are the:

- I. The Convention on the Elimination of all form of Discrimination against Women which was ratified by Argentina.
- II. The Beijing Platform.
- III. The Constitution of Argentina (1994)

Article 37 of the Constitution of Argentina (1994) states that “this Constitution guarantees the full exercise of political rights, in accordance with the principle of popular sovereignty and with the laws derived wherefrom. Suffrage shall be universal, equal, secret and compulsory. Actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of **positive actions** in the regulation of political parties and in the electoral system.”<sup>19</sup>

Article 75 (23) gives power to Congress to “legislate and promote **positive measures** guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled persons.”<sup>20</sup>

The Argentine National Congress is composed of the Upper house (Senate) and the Lower house (Chamber of Deputies). The Senate comprises of 72 members who serve a term of 6 years, a third of the term is renewed every 2 years. They are elected from 25 three-seat electoral districts. Two seats are later awarded to the most voted party and one to the second most voted party.

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<sup>19</sup> <<http://www.senado.gov.ar/web/interes/constitucion/english.php>> accessed on 10<sup>th</sup> July 2013

<sup>20</sup> Ibid.

The Chamber of Deputies consists of 257 members elected for 4 year terms by closed-list PR system, with half of the seats renewed every 2 years.

The Deputies are elected from closed party lists which are formulated by the provincial branch of the party with some oversight by the national party these seats are allocated using a PR formula. Parties must receive support from at least 3% of registered voters to be eligible for a seat in the chamber.<sup>21</sup>

The first elections under the new rules were held in it saw, women's seat share increase from 5% to 14%. The quota's full effects were however not realized until 1995, when women's seat share rose to 27%. Women's presence in the lower house has continued to grow, reaching 36% in the 2005 elections.

The quota law has had a positive impact on the number of women elected in the Argentine Chamber of Deputies. From 1983-1991 the percentage of women averaged at 4.2 per cent in the Chamber.

In 1993, the first elections following the implementation of the Quota Law were held and women accounted for 21.3 per cent of the deputies elected. In the 1995 elections the percentage of women rose to 27.7 per cent. The first Argentine Chamber elected, entirely under the Quota Law consisted of 66 (25.7per cent) female deputies this was in December 1995.

This feat caused Argentina to achieve the highest percentage of female members of any democratically elected national legislative body in the Western hemisphere and the sixth highest in the world Since the 1999 elections there are currently 76 women out of a total of 257 deputies the Chamber, which constitutes 29.6 per cent. The main source of this success has been the placement of women on the party lists and increasing the number of women in mandate positions.<sup>22</sup>

The Ley de Cupos was applied to the Senate in 2001, following a reform of Senate electoral rules. In the 2001 elections, women's presence in the Senate ascended by a percentage from 5.7% to 37.1%.

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<sup>21</sup> Tricia, Gray (2003) "Electoral Gender Quotas: Lessons from Argentina and Chile" Bulletin of Latin American Research, Vol. 22, No. 1, pp. 52-78

<sup>22</sup> Ibid (2003)

Some of the factors that have enabled the success of gender quotas in Argentina are:

*Proportional representation (PR) system with closed and blocked lists.* This has enabled the determination of the particular number or proportion of women to be included in the list.

*Women's activism-* The women of Argentina have been aggressive in demanding for their rights. Those that are able to surmount existing barriers and become included in the lists are more often activists with varying backgrounds they are women who can hold their own and for whom experience in Congress is marked by both adversity and success. "They are key legislators and ardent defenders of the constitution and of strict compliance with its terms; they are the authors of most of the bills aimed at addressing women's concerns, and are responsible for significant gains in women's human rights."<sup>23</sup>

*Requirement by the law to comply-* Sanctions are provided by the law in cases of non-compliance with the quota. Women have also been zealous guardians of the law, and of compliance with the sanctions provided for by law.

*Sanctions-*In the National Electoral Code, Law No. 24,012 provides that a party list that does not meet the 30 per cent requirement will not be registered.

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<sup>23</sup> EM, Carrio (2009) "Argentina: A New Look at the Challenges of Women's Participation in the Legislature" (IDEA) <<http://www.idea.int/publications/wip2/upload/Argentina.pdf>> accessed on 10th July 2013

**Table 3.2: Shows the Argentine Congress, Senate, 1983–2001, Number of Women Members and Women as a Percentage of Total Senators.**

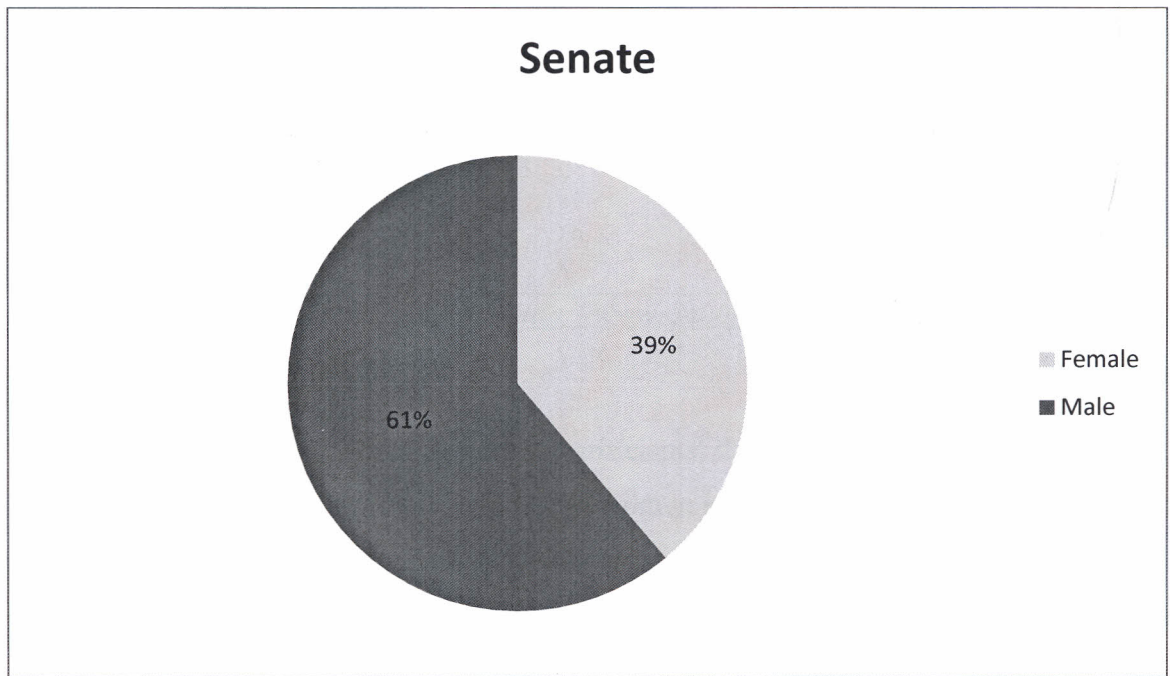
<b>Year</b>	<b>Total Number</b>	<b>No. of Women Members</b>	<b>% of Total</b>
1983	46	3	6.5
1984	46	3	6.5
1985	46	3	6.5
1986	46	3	6.5
1987	46	3	6.5
1989	46	4	8.7
1990	46	4	8.7
1991	46	4	8.7
1992	48	4	8.7
1993	48	2	4.2
1994	48	2	4.2
1995	65	4	6.1
1996	65	4	6.1
1997	65	4	6.1
1999	66	2	3.0
2001	71	25	35.2
2005	72	24	33.3

Source; EM, Carrio (2009) "Argentina: A New Look at the Challenges of Women's Participation in the Legislature" (IDEA) <<http://www.idea.int/publications/wip2/upload/Argentina.pdf>> accessed on 10th July 2013

Following the elections held in Argentina on 23<sup>rd</sup> October 2011 the number of women in the senate amounted to 28, representing 38.9% The Chamber of Deputies has 96 women representing about 37.4%

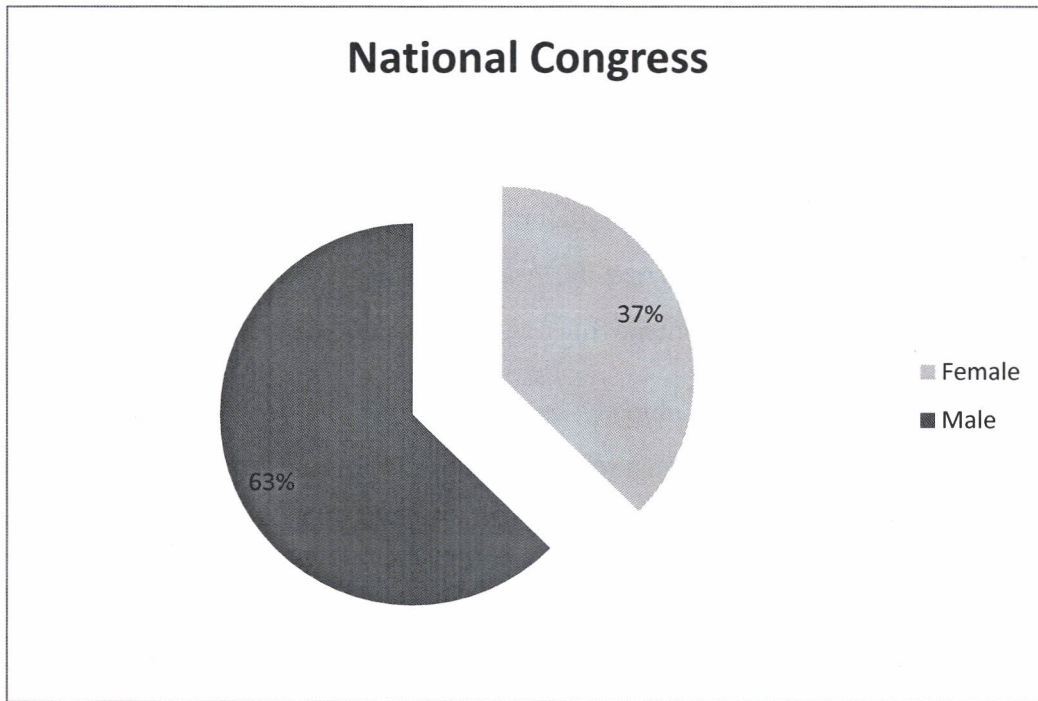
The following chart shows the distribution of women in the Argentine Senate.

**Figure 3.2; Representation of Argentine Senate**



Source; Inter- Parliamentary Union <<http://www.ipu.org/wmn-e/classif.htm>> accessed on 10<sup>th</sup> June 2013.

**Figure 3.3,** Shows the representation of women in Argentine National Congress as of 23<sup>rd</sup> October 2011.



Source; Inter- Parliamentary Union <<http://www.ipu.org/wmn-e/classif.htm>> accessed on 10<sup>th</sup> June 2013.

What this statistics show is that despite the criticisms, the implementation of the new system has led to an effective increase in the presence of women in the Congress, which otherwise may well not have been attained. Therefore, beyond the controversy stirred by the measure, it has been effective in attaining the proposed objective of gender balance at all level of governance in Argentina.

Argentina has been successful with the gender with the gender quotas since their introduction in 1991. From what has been discussed it is obvious that the success is not instantaneous and as earlier stated requires some mode and mechanisms for implementation and enforcement. Argentina is one of the countries that Kenya can learn from and develop an AA legislation compatible with its electoral system.

### 3.4 UGANDA

Uganda attained its independence on 9<sup>th</sup> October 1962; it had been under the colonial administration of the British just like Kenya. It derived its unicameral system as well as the majoritarian electoral system from the British.

According to the World Bank (2012) the population of Uganda stands at 34.51 million with women making up 50.01% of the population.<sup>24</sup> Uganda suffered bouts of unrest and volatile political periods oscillating between multi-party democracy, one party rule, and military dictatorship to the current no party or the “movement system”.

As is the case with most African countries, Uganda is a mostly patriarchal society meaning that the public “space” or public life is mostly dominated by men with women being relegated to the “private space” or domestic roles.

Women’s participation in formal politics in Uganda post independence had been almost negligible for about 30 years post independence. The National Resistance Movement (NRM) administration took over power in 1986 and has been operating under a political system which is supposed to accommodate all citizens regardless of political inclination, tribe, ethnicity, religion, sex, social class, etc.

The concept of AA was introduced in Uganda through quotas. In 1986 the government with the assistance of the legislature put in place laws that allowed AA especially to the advantage of women. These quotas entailed reserved seats for women. The posts at the time were known as “secretary for women”. The quota law created one mandatory seat for women in all executive local councils. The creation of these posts was met with resistance from different quarters and they ultimately did not meet the objective for which they were created.

Most of the executive councils throughout the country unknowingly or knowingly reduced the role of such women among them to traditional functions of nurturing and caring. These women were expected to serve tea to the other councils, and to take care of the social aspects of the council work. They were also expected to stay away from the politicking.

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<sup>24</sup>< <http://data.worldbank.org/country/uganda>> accessed on 15<sup>th</sup> June 2013.

The Ugandan Women's Movement grew dissatisfied with the mediocre decision making positions in both the local and national level that they had been given.

The Nairobi Conference also known as the UN Women's Conference was held in 1985 in Nairobi, Kenya. The conference could not come at a better time. It came as an inspiration for the Ugandan women and motivated them to demand for their rights.

The women aggressively campaigned and asserted their rights using whatever avenue was open to them and in 1989; NRM came up with a legislation that enlarged parliament by creating 39 reserved seats for women.

These women would be elected from each district in the country. Each district would vote for a woman representative from an all female line up. This is similar to the position of Women's County representative in Kenya.

This provision was created partly due to the pressure the women exerted on the executive but also as a result of political expediency and calculation by NRM. The procedure for the election for this post was different from that typically associated with the County Members of Parliament. It entailed appointment by a limited male dominated electoral college as opposed to the universal adult suffrage.

This quota system was later institutionalized by the Constitution of Uganda (1995). The Constitution provides for a number of seats in parliament equal to the number of districts and they are reserved for women. It also guaranteed a third of all local council seats to be occupied by women. Women are also able to benefit from the limited quota seats reserved for persons with disabilities, the youth and workers.

The particular provisions are;

Article 32(1) states that, "Notwithstanding anything in this Constitution, the State shall take affirmative action in favor of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom."

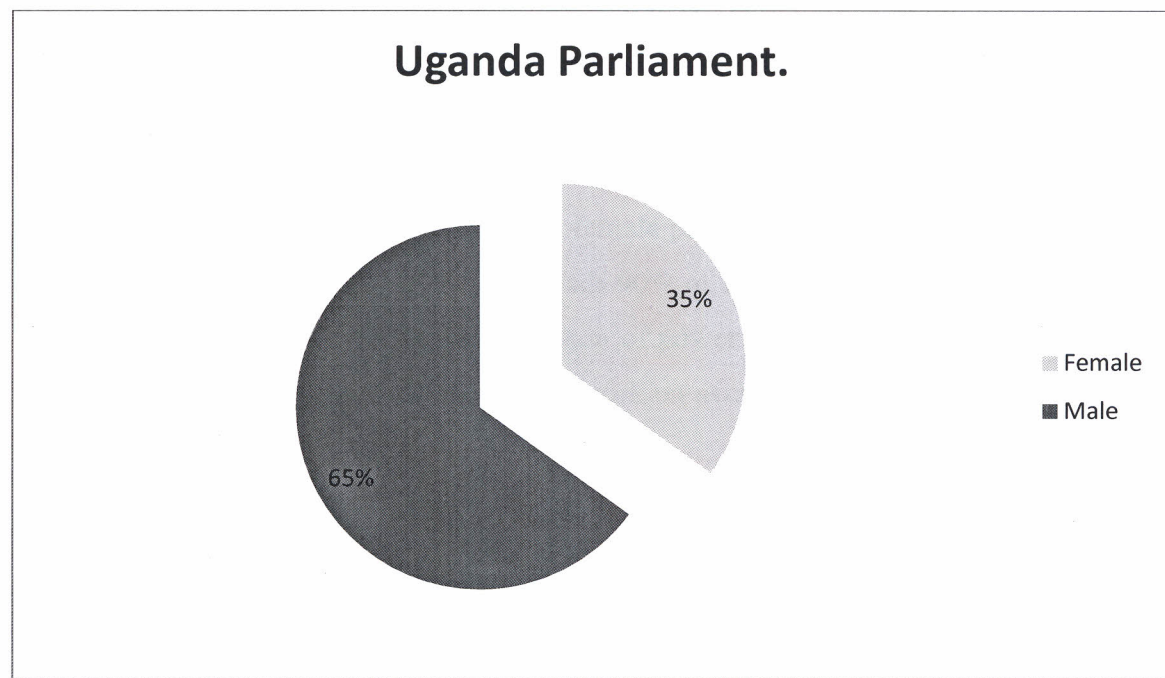
Article 78(1) provides for the composition of parliament.

- a. Members directly elected to represent constituencies.

- b. One woman representative for every district.
- c. Such numbers of representatives of the army, the youth, workers, persons with disabilities and other groups as parliament may determine.
- d. The vice-president and ministers, who, if not already elected members of parliament, shall be ex-officio members of parliament without the right to vote on any issue requiring a vote in parliament,

Article 180(2) (b) provides that: ‘one third of the membership of each local government council shall be reserved for women.’

**Figure 3.4, Shows the representation of women in the Ugandan parliament as of February 2011.**



Source: INTER-PARLIAMENTARY UNION <<http://www.ipu.org/parline/reports/2329.htm>> accessed on 20<sup>th</sup> June 2013.

Despite the constitutional guarantees of equality, women in Uganda have varying levels of experience in the social, economic and political spheres their status is therefore defined by their limited control over this experience.<sup>25</sup>

In the late 1990s at least one-third of all the women in Uganda lived in absolute poverty, which is “defined as being unable to meet their basic needs”<sup>26</sup> McLeod(2009) brings out various reasons why the women of Uganda lived in abject poverty during the 1990s. These reasons are not unique to Uganda; most African countries face these problems;

- I. Women have no control over the production and produce of resources. This is especially relevant to Uganda being a country that relies heavily on agricultural products. Just to emphasize the importance of this sector, according to a World Bank report published in 2010, 65.60% of Ugandans are employed in the agricultural sector.<sup>27</sup>
- II. The patriarchal society that comes up with the “domestic virtue” notions that women are not decision makers. In Uganda, approximately 87% of the population lives in rural areas with 81% of the population working in the agricultural sector being women. This is despite the fact that only 7% of the female population has ownership of land.<sup>28</sup> According to a study conducted by IFAD, In Uganda 90% of all rural women work in agriculture. Only 53% of rural men do so. This division of power translates to all spheres of life meaning that in the division of labor, women work on average twice the number of hours that men do.<sup>29</sup>

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<sup>25</sup> McLeod, Jennifer (2009) “An Examination of Gender Quotas in Politics: The Case of Uganda” <[http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&cad=rja&ved=0CJIBEBYwBzGK&url=http%3A%2F%2Finternationaldevelopmentstudies.artsandsocialsciences.dal.ca%2FFiles%2FJennifer\\_McLeod\\_2009.doc&ei=fDz2UcCQH-y20QXtp4CQDQ&usg=AFQjCNGrl-gnCulUxDhwlsrvP2EPA-S8wA&sig2=OllgSmyrNlelNK54yVcO9g&bvm=bv.49784469,d.d2k](http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&cad=rja&ved=0CJIBEBYwBzGK&url=http%3A%2F%2Finternationaldevelopmentstudies.artsandsocialsciences.dal.ca%2FFiles%2FJennifer_McLeod_2009.doc&ei=fDz2UcCQH-y20QXtp4CQDQ&usg=AFQjCNGrl-gnCulUxDhwlsrvP2EPA-S8wA&sig2=OllgSmyrNlelNK54yVcO9g&bvm=bv.49784469,d.d2k)> accessed on 10<sup>th</sup> June 2013.

<sup>26</sup> Kyomunendo, G. V. & McIntosh, M. K. (2006). Women, work and domestic virtue in Uganda 1900-2003. James Curry: Oxford, Ohio University Press: Athens, Fountain Publishing: Kampala

<sup>27</sup> Trading Economics “Employment in Agriculture (% Total employment) in Uganda.” <<http://www.tradingeconomics.com/uganda/employment-in-agriculture-percent-of-total-employment-wb-data.html>> accessed on 20<sup>th</sup> June 2013

<sup>28</sup> UNDP, Uganda Human Development Report (2007) <<http://www.undp.or.ug/phocadownload/Uganda-HDR-Report-2007.pdf>> accessed on 20<sup>th</sup> June

<sup>29</sup> IFAD, (2000) Uganda: Division of labour in agriculture “There are identifiable but dynamic patterns in gender division of labour in agriculture.” <<http://www.ifad.org/gender/learning/role/labour/54.htm>> accessed on 20th June 2013

- III. “Society considers women to be second-class citizens, lacking the skills for leadership and decision making”<sup>30</sup> The lack of leadership skills by women is both a practical consideration and a perceived one. Practical in that women have rarely been given the opportunity to develop such skills, and a perceived one in that there are a number of educated women in Uganda who even though are not capable to develop leadership skills in governance, they have been able to lead other institutions such as schools, hospitals and even public or private owned companies.
- IV. Women in Uganda have restricted access to credit, limited ownership of assets and gender inequalities in education. All these issues have developed a barrier and other social biases against women that hinder them from participating in the governance and decision making of the country.

The main causes of women’s unequal status in Uganda and the root cause of the structural constraints imposed on women are the cultural, traditional and patriarchal norms which determine the perspectives and actions of both men and women in society. Traditional practices and notions that place women in a subordinate position remain pervasive and greatly impact how women are able or willing to act in both public and private arenas.<sup>31</sup>

Despite the doom and gloom that has been seen in the discourse of AA in Uganda, all is not lost.

In the case of Uganda, affirmative action in the form of quota laws has the potential to improve the status and lives of women, but not unless the social dynamics that result in these trends are challenged, and ultimately, changed.<sup>32</sup>

<sup>30</sup> Musoke, H. D. (2005). Shattering the glass ceiling: What women in Uganda need to make it to the top. In J. Bond (Ed.). *Voices of african women: Women's rights in Ghana, Uganda and Tanzania*, p.366-378. North Carolina: Carolina Academic Press

<sup>31</sup> Rani, M., Bonu, S., & Diop-Sidibe, N. (2004). An empirical investigation of attitudes towards wife-beating among men and women in seven sub-saharan African countries. *African Journal of Reproductive Health / La Revue Africaine De La Santé Reproductive*, 8(3), 116-136

<sup>32</sup> McLeod, Jennifer (2009) “An Examination of Gender Quotas in Politics: The Case of Uganda”

<[http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&cad=rja&ved=0CJIBEBYwBzgK&url=ht tp%3A%2F%2Finternationaldevelopmentstudies.artsandsocialsciences.dal.ca%2FFiles%2FJennifer\\_McLeod\\_2009.d oc&ei=fDz2UcCQH-y20QXtp4CQDQ&usg=AFQjCNGrI-gnCulUxDhwlsrvP2EPA-S8wA&sig2=OllgSmYrNlelNK54yVcO9g&bvm=bv.49784469,d.d2k](http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&cad=rja&ved=0CJIBEBYwBzgK&url=ht tp%3A%2F%2Finternationaldevelopmentstudies.artsandsocialsciences.dal.ca%2FFiles%2FJennifer_McLeod_2009.d oc&ei=fDz2UcCQH-y20QXtp4CQDQ&usg=AFQjCNGrI-gnCulUxDhwlsrvP2EPA-S8wA&sig2=OllgSmYrNlelNK54yVcO9g&bvm=bv.49784469,d.d2k) > accessed on 10<sup>th</sup> June 2013.

*“One cannot deal with the problem of female representation by a quota system alone. Political parties, the education system, NGO’s, Trade unions, Churches –all must take responsibility within their own organizations to systematically promote women’s participation, from the bottom up. This will take time. It will not happen overnight, or in one year or five years; it will take one or two generation s to realize significant change. This is what we working on in Sweden. We did not start with a quota system. First we laid the groundwork to facilitate women’s entry into politics. We prepared the women to ensure they were competent to enter the field; and we prepared the system, which made it a little less shameful for men to step aside. Then we used quotas as an instrument in segments and institutions where we needed a breakthrough”*

Brigitta Dahl, Former Speaker of Parliament, Sweden<sup>33</sup>

I partly agree with the statement made by Brigitta Dahl, in that the problem of female representation cannot be dealt with by quotas alone as is the case with Uganda. There should be an overhaul of the system, from bottom up. All sectors of the governance structure should be engendered and perhaps Gender education should be part of the curriculum in schools just as Sex education is.

I do not necessarily feel that gender quotas should come before the overhaul of the system, the quotas have been successful in Argentina albeit with some challenges like any other endeavor, it is therefore possible to begin with gender quotas, keeping in mind problems that the quotas seek to address and dealing with them. Otherwise the parliaments of the world especially in Africa would never have adequate female representation, perhaps until 2047 and beyond.

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<sup>33</sup>Dahlerup, Drude (2002) *“Using Quota’s to Increase Women’s Political Representation”* (International IDEA, Women in Parliament,) <[http://www.idea.int/publications/wip/upload/3\\_Dahlerup.pdf](http://www.idea.int/publications/wip/upload/3_Dahlerup.pdf).> p.2 accessed on 15<sup>th</sup> June 2013

## CHAPTER FOUR

### SUMMARY, CONCLUSIONS, AND RECOMMENDATION

#### 4.1 INTRODUCTION

This chapter presents the summary of the study, conclusions, recommendations and suggestions for further research. The purpose of the study was to investigate the history of AA and eventually come up with the rationale for AA in the Kenya political context.

#### 4.2 Summary of the study

##### **4.2.1 Lessons learnt from Argentina**

The discussion will start by looking at the achievements of Argentina and the challenges it has faced in regard to the implementation of the quota law. As discussed in the previous chapter, quota law was introduced in Argentina in the year 1991. The quota type in Argentina is based on both the legislation and the Constitution. The provision for the quota system in Argentina requires that no more than two thirds of the either gender shall be represented in parliament. What this means is that women in parliament must at least meet the 30% threshold.

This requirement has enabled the representation of women to increase in Argentina and currently it stands at 37.5% for women in the chamber of deputies and 38.9% for the Senate.

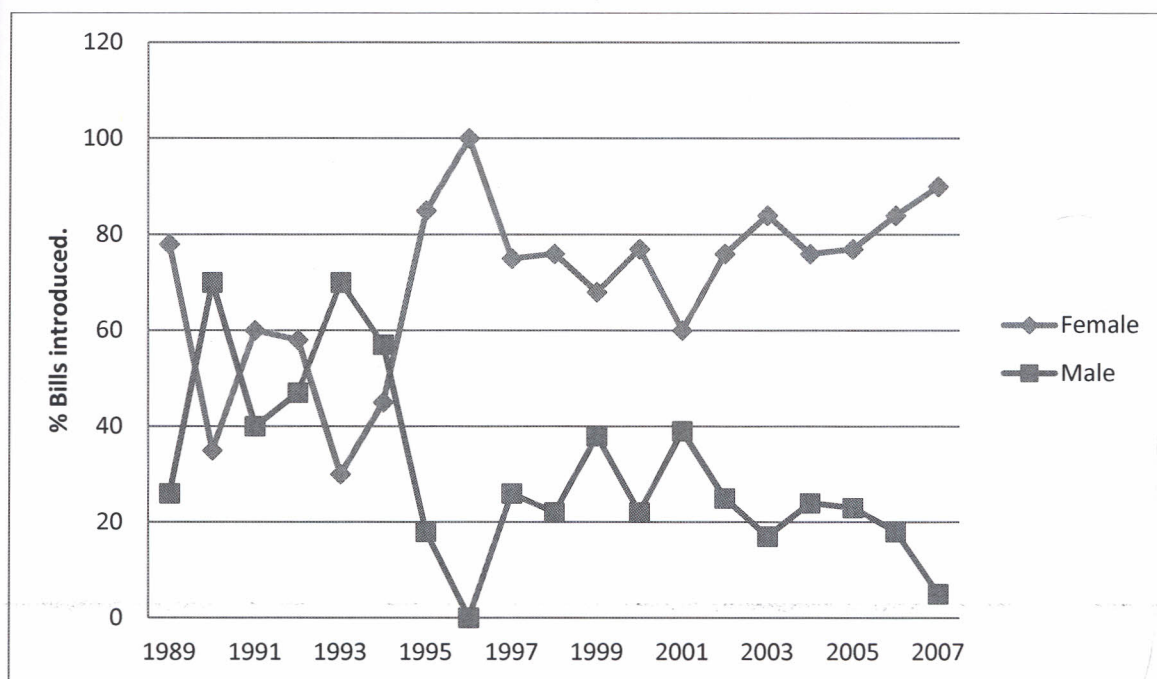
The argument of women's descriptive representation (presence of women in politics) and women's substantive representation (promotion of women's interest) takes effect at this stage. Does the presence of women in parliament have an effect in the substantive representation of women in parliament?

A study conducted by Franceschet, S and Piscopo (2008) found that quotas in Argentina improved women's substantive representation as process. They also found that there was a significant increase in the number of women's rights bills introduced into the Argentine Congress with the vast majority introduced by women.<sup>1</sup>

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<sup>1</sup> S, Franceschet and J Piscopo (2008) "Gender Quotas and Women's Substantive Representation: Lessons from Argentina" (Cambridge University Press)

**Figure 4.1; Shows patterns of bills introduced by gender and year**



Argentina, Costa Rica, South Africa and Rwanda represent a new “fast track model” for engendering the political system of their countries. This is in contrast to the Scandinavian countries which represent a model of gradual increase in women’s representation.<sup>2</sup>

With this “fast track model” comes some challenges that a country such as Argentina has faced. These challenges include;

#### 4.2.2 Manipulation of mechanisms for choosing candidates

Since the adoption of the quota laws in Argentina, political parties have come up with various devious mechanisms for selecting candidates; the men in Argentina’s political circles have their so called “old boys’ network” “much like in Kenya. The “old boys’ network” continue to function even after they are not in parliament. Based on the traditional concept that women are part of the men’s properties and are therefore owned by their husbands, wives are placed in the positions their husbands cannot occupy by law.

<http://www.hhh.umn.edu/centers/wpp/events/pdf/GenderQuotasandSubstantiveRepresentation.pdf> accessed on 15th June 2013

<sup>2</sup> Gender Studies and Human Rights Documentation Centre. “Increasing women’s political participation” <http://www.gendercentreghana.org/increasing-womens-political-participation/> accessed on 15<sup>th</sup> June 2013.

In some cases legislative seats that are likely to be occupied by women elected under the quota system are even considered family property and daughters, relatives or friends are nominated for a seat that the male politicians feel they deserve. Docile and obedient women are therefore given first priority in nomination.<sup>3</sup>

*“Quotas are a double-edged sword. On the one hand, they oblige men to think about including women in decision-making, since men must create spaces for women. On the other hand, since it is men who are opening up these spaces, they will seek out women who they will be able to manage—women who will more easily accept the hegemony of men.”*

Anna Balletbo, former MP, Spain

#### **4.2.3 Promotion of legislations**

Now that there are more women in congress the work begins to promote laws and regulations that correct the social-cultural and economic inequalities that hold back women as a whole.

#### **4.2.4 Implementation of laws passed**

In the legislative area, several provinces in Argentina have come up with laws that are aimed at bringing gender equality. These laws include domestic violence legislations. The effectiveness and sufficiency procedures that are capable of guaranteeing the exercise and enjoyment of those rights have yet to be devised. The implementation and respect for the law is still lacking.

As Franceschet and Piscopo (2008) found in their study, quotas do not change the institutional features and gender bias in the legislative environment and therefore they do not enhance women's ability to transform policy outcomes.<sup>4</sup>

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<sup>3</sup> EM, Carrio (2009) *“Argentina: A New Look at the Challenges of Women's Participation in the Legislature”* (IDEA) <<http://www.idea.int/publications/wip2/upload/Argentina.pdf>> accessed on 10<sup>th</sup> July 2013

<sup>4</sup> S, Franceschet and J Piscopo (2008) *“Gender Quotas and Women's Substantive Representation: Lessons from Argentina”* (Cambridge University Press) <<http://www.hhh.umn.edu/centers/wpp/events/pdf/GenderQuotasandSubstantiveRepresentation.pdf>> accessed on 15th June 2013

#### **4.2.5 Allocation of funds.**

Sufficient funds should be allocated to programs that promote genuine equality of opportunity.<sup>5</sup>

The Argentine experience also shows that quota law is a means to an end in itself; it sets a minimum not a ceiling. The thirty per cent threshold is merely a basis, it is therefore necessary to deal with the core issues that affect women especially in political parties. In many cases these issues have not been fully dealt with and addressed.

Despite the criticism, implementation of quota law has increased the number of women representation in congress. Solidarity by women has enabled the implementation of the requirements to meet the 30% threshold.

The Argentine experience also shows that not all women will be willing to push the gender agenda. Some women forget their own gender grievances as soon as they come to power; the solidarity in women may or may not be achieved.

Finally, “the Argentine model suggests that a national electoral gender quota provides a relatively easy and effective mechanism to increase dramatically the number of women in the legislature, especially in those countries that use proportional representation closed-list system to elect members of the legislature.”<sup>6</sup>

#### **4.2.6 Lessons from Uganda.**

A more critical look at the quota system in Uganda reveals some major problems. The system prima facie appears thorough but that is not the case. From the history we looked at in the previous chapter NRM introduced quota for women in the National Assembly in calculated political move. These posts were therefore created and intended for purely “descriptive representation”.

The Patriarchal system in Uganda at the time was not prepared for female politicians that politically acted for women in the sense of morphing the unequal gender relations prevailing in

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<sup>5</sup> EM, Carrio (2009) “*Argentina: A New Look at the Challenges of Women’s Participation in the Legislature*”(IDEA) <<http://www.idea.int/publications/wip2/upload/Argentina.pdf>> accessed on 10<sup>th</sup> July 2013

<sup>6</sup> Tricia, Gray (2003) “*Electoral Gender Quotas: Lessons from Argentina and Chile*” Bulletin of Latin American Research, Vol. 22, No. 1, pp. 52-78

Uganda. A clear manifestation of this is through Article 78 of the Constitution of Uganda which describes an AA female parliamentarian as “woman representative for every district”. This is in contrast with other categories of AA parliamentarians who are said to be “representatives of the army, youth, workers, persons with disabilities...”

In the use of this language, the Constitution creates and maintains “status quo” representatives instead of the “emancipationists”. The NRM has been accused by some authors of allowing women to participate in the decision making process but not to represent women as an interest group nor to presume to have special responsibility for them. President Yoweri Museveni has even been quoted severally saying that quotas are nothing more than a “symbolic gesture” to please women.<sup>7</sup>

During the introduction of the policy in Uganda there wasn't any strong grassroots effort by women to mobilize politically, and so when it was first implemented men immediately became the self appointed identifiers of “suitable women” to fill the newly created seats.<sup>8</sup>

A study revealed that 90 per cent of women who joined parliament in 1989 had been approached by male elders from their districts and requested to stand for their mandatory seats. The AA policy introduced by the NRM has also been criticized to have proved to be nothing more than sites of accommodation and subject to the control of the state. Basically AA in Uganda is said to produce women in power without power.

The difference between AA in Uganda and Kenya is that unlike Kenya where it took serious mobilization and lobbying by women interest groups, Ugandan women were simply caught by surprise with the new developments that at the time seemed genuine.

Even though Ugandan women advocated for representation in parliament, they were in some way short changed with the introduction of quotas in the 90's. For their Kenyan counterparts however, they had avenues to express their demands and ensure that the gender agenda was taken into account in the drafting of the Constitution.

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<sup>7</sup> See for example Museveni K Yoweri (1997) *“Sowing the mustard seed: The struggle for freedom and democracy in Uganda.”*(London: Macmillan) P.191

<sup>8</sup> Tamale, Sylvia( 2003)“Introducing Quotas in Africa: Discourse and Legal Reform in Uganda”  
<[http://www.quotaproject.org/CS/CS\\_Uganda\\_Tamale-6-6-2004.pdf](http://www.quotaproject.org/CS/CS_Uganda_Tamale-6-6-2004.pdf)>

The rules governing participation of women in politics in Uganda were not devised by the women themselves and therefore the women as the beneficiaries see it as a favour. The women of Uganda have therefore been held ransom psychologically; this has caused the complacency and self-satisfaction that is sometimes exhibited by some female parliamentarians and councilors.<sup>9</sup>

It is also important to note that the women are elected by a predominantly male electoral college; this significantly impacts on the effectiveness of the quota system. This is in contrast to Rwanda where an all female election is conducted to decide the female candidate that shall hold the seat. Perhaps Kenya should be forewarned by the situation in Uganda and provide that the County women representative should be elected by female voters only or else the position will be “masculinized”.

All these problems have developed a myriad of concerns as regards to allegiance, accountability and representation of AA Mp’s. Like their male counterparts most female politicians in Uganda run for office on account of opportunities that come with the status such as personal wealth and access to state power.

The debate on AA in Uganda is premised on two major issues, firstly AA is misconstrued to mean reverse discrimination, and the tendency then is to rebuff quotas. Secondly the over bloated parliament and councils due to the “add on” which are criticized for straining the economy of a developing nation. Gender quota seats are usually the first casualties when calls for reduction of the numbers are made. Gender quotas in Uganda are therefore under threat of being scrapped.

The AA system in Uganda has also been criticized as being “flawed in two interdependent ways. In the first place, it provides women representatives in Parliament a larger area of jurisdiction without proportional support or funding for development initiatives. Secondly, its confusing “add-on” system has been implemented without proper explanation of its mandate.”<sup>10</sup>

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<sup>9</sup> Ibid (2003)

<sup>10</sup> Joyce Mpanga, MP, quoted in Tamale, Sylvia 199 p.179

*“As soon as you become the district MP you realize that you have an MP in every county of your district; yours is a kind of water lily, an umbrella of sorts above everybody else. If you don't pick what to do carefully, you may be treading on other MPs' toes. You have to liaise with them sometimes for activities otherwise you may collide.”*

Although most representatives say that affirmative action has made large gains for Ugandan women, they are also of the opinion that the “add-on” quota system has certainly institutionalized disadvantages for female representatives at the Parliamentary level.<sup>11</sup>

Quotas cannot produce a democratic, non-sexist political system if the hierarchical institutions that exist in the patriarchal society are not efficiently disassembled. Providing women positions of leadership and authority without at the same time attempting to solve the practical and structural problems that hinder their efficacious involvement in this arena is not beneficial. Simply adding women to existing social and political structures doesn't do much to eradicate the perpetual discrimination and inequities from which they suffer.<sup>12</sup>

The single-member majoritarian electoral system operating in Uganda promotes division between female politicians and male politicians. Indeed, it has been noted that all but one (Cuba) of the 14 countries in the world with female representation that exceeds 30 percent has the PR-based electoral system. It is much more effective when supported by gender quotas.

The laws establishing quotas must be carefully worded so that they are not interpreted to mean ‘the maximum number’. This involuntarily creates a glass ceiling, making it impossible for women's representation to rise above the stated quota.

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<sup>11</sup> Cristina Constantini.

<http://broadrecognition.com/politics/misrepresentation-flawed-affirmative-action-in-uganda%E2%80%99s-national-parliament/> accessed on 15<sup>th</sup> June 2013.

<sup>12</sup> Tamale, Sylvia (2003) “Introducing Quotas in Africa: Discourse and Legal Reform in Uganda”

[http://www.quotaproject.org/CS/CS\\_Uganda\\_Tamale-6-6-2004.pdf](http://www.quotaproject.org/CS/CS_Uganda_Tamale-6-6-2004.pdf) accessed on 15 June 2013

#### 4.2.7 Lessons from Ghana.

The persistence of gender inequalities in the political arena and the prediction that gender parity in legislature can only be attained by 2047 requires that special measures be taken to achieve this gender parity. Discrimination of any fashion cannot self correct. Instead it perpetuates itself. This requires some measures to eliminate the institutional effects of discrimination.<sup>13</sup>

Ghana requires an AA plan in its parliamentary system, this need is born out of the fact that in the list of representation of women in parliament around the world, among the top ten only 3 countries have been able to achieve representation without quotas (Sweden, Finland and Iceland).

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<sup>13</sup> Tsikata, Dodzi (2009) *"Affirmative Action and the prospects for gender equality in Ghana politics"* (women in broadcasting, The Friedrich-Ebert Stiftung)

### 4.3 Conclusion

#### The Case for AA: Necessity, Obligation and Benefits

In making a case for affirmative action in Kenya, I adopted a three tier approach which Dodzi (2009) used in the discussion regarding Ghana.

#### Necessity

Since the Constitution of Kenya 2010 was passed, there has been change in the “face” or representation of parliament. The number of women representation in parliament increased, though not dramatically as expected due to deliberately created legal encumbrances.

**Table 4.1; Shows the trend of representation of members of parliament from 1963- 2012.**

Parliament.	Period.	Total Number of Constituencies.	Number of Women elected.	Available slots for Nomination.	Number of Women Nominated.
1 <sup>st</sup> Parliament	1963- 1969	158	0	12	0
2 <sup>nd</sup> Parliament	1969- 1974	158	1	12	1
3 <sup>rd</sup> Parliament	1974-1979	158	4	12	2
4 <sup>th</sup> Parliament	1979-1983	158	5	12	1
5 <sup>th</sup> Parliament	1983-1988	158	2	12	1
6 <sup>th</sup> Parliament	1988-1992	188	2	12	0
7 <sup>th</sup> Parliament	1992-1997	188	6	12	1
8 <sup>th</sup> Parliament	1997-2002	210	4	12	5
9 <sup>th</sup> Parliament	2002-2007	210	10	12	8
10 <sup>th</sup> Parliament	2008-2012	210	16	12	6

11 <sup>th</sup> Parliament	2013-	350	16*	11	4
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Source; Kamau, Nyokabi (2010) as amended by the author using data from Parliament of Kenya <<http://www.parliament.go.ke/plone/national-assembly/news/majority-of-national-assembly-members-are-new>> 16\* women were elected as members of parliament with an additional 47 elected as county women representatives.

What this trend shows is that, although the number of women has been increasing gradually, it has done so at a very slow rate.

Some feminist scholars Nzomo (2012) have analyzed women’s representation and participation in governance, and they largely concur that women’s status and capacity for meaningful political representation largely depend on

- I. The kind of access women have to formal political structures-parliaments, political parties, etc.
- II. The specific socio-cultural contexts that mitigate women leader’s capacity to influence policy and in turn fulfill a transformative gender agenda and remain accountable to the constituent group(s) they represent ;
- III. The size of the numerical presence/physical numbers of women in political office and
- IV. The nature of the institutional norms and practices pertaining in governance<sup>14</sup>

Globally, women's poor showing in political and public life show the extent of gender inequalities and barriers that exist in the society and the lack of sufficient effort to tackle the problem. There are various reasons that have been suggested by numerous authors to offer explanation on the low levels of women's participation in public life, politics and decision making. These reasons are both systemic and structural. There are three that are commonly mentioned;

- I. Impact of women's position in other spheres of life as a result of the inequalities in the sexual division of labor, women's disadvantages in the control of resources<sup>14</sup> and gender ideologies which naturalize and reinforce inequalities

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<sup>14</sup> Nzomo,M (2012) “REPRESENTATIONAL POLITICS IN KENYA: THE GENDER QUOTA AND BEYOND”; (African Research & Resource)

- II. Problems of the political system
- III. Failure of public policy.<sup>15</sup>

The prognosis was that, Kenya and other developing countries could only attain gender parity by the year 2047 or beyond. The intervention of AA was therefore to hasten the process is that the women of Kenya could enjoy their right as soon as possible. The barriers facing women in leadership are many as discussed above and It is on that premise that most authors agree that women ought to be assisted in ensuring that they are fully represented in the governance system.

In implementation of quotas, women should be vigilant to ensure that they are involved in the process of formulation of the gender quotas and placement of mechanisms to assist in implementation. As it was state earlier, quotas themselves are not effective on their own. Why then are so many governments implementing AA or thinking of doing so?

Tinker (2004) states that the answer to that question depends on the justification offered for the quotas. What then are some of the justifications? There have been at least four arguments distinguished by scholars for women's equal participation in formal politics, they are;

- I. Women represent half the population and have the right to half the seats (the justice argument).
- II. Women have different experiences (biological or socially constructed) that ought to be represented (the experience argument). In line with this argument women should enter into positions of power because they will engage in politics differently, thereby improving the nature of the public sphere.
- III. Women and men have partly conflicting interests and thus men cannot represent women (the interest group argument), and
- IV. Women politicians represent important role models, encouraging other women to follow suit (Dahlerup 1978, Phillips 1995). The core idea behind electoral gender quotas is to recruit women into institutional politics and to ensure that women are not isolated in political life.

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<sup>15</sup> Tsikata, Dodzi (2009) "*Affirmative Action and the prospects for gender equality in Ghana politics*" (women in broadcasting, The Friedrich-Ebert Stiftung)

Kenyan women have come a long way in demanding for AA despite all the challenges that arose during the activism period. The work however has just begun. Kenya now needs to work on structural reforms, Nzomo( 2012) says that “even with the utmost commitment from gender and democracy champions, effective political representation through gender quotas and the advancement of a gender and democratic agenda may be limited without structural reforms and support of some key political institutions, including political parties and the State organs at all levels of the now devolved government.”

Lessons from other countries discussed in chapter one and three (South Africa, Rwanda, Argentina and Uganda) have shown that gender quotas are known to work effectively when under the PR list system. Also; a study conducted by Tricia Gray (2003) found that the relationship between gender quotas and electoral outcomes in Argentina and Chile supported the hypothesis that national electoral quotas are most effective for securing women's representation in political institutions when applied within a closed-list, PR system. The Argentine electoral system and diligent implementation of the national quota law have achieved some of the highest levels of female representation in the world.<sup>16</sup>

The study also found that the lack of strong quota policies and the binomial majoritarian electoral system are obstacles to women's success in electoral politics in Chile. Institutional and ideological barriers in Chile limited quotas to the internal structures of a few political parties.

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<sup>16</sup> Tricia,Gray (2003) “*Electoral Gender Quotas: Lessons from Argentina and Chile*” Bulletin of Latin American Research, Vol. 22, No. 1, pp. 52-78

## Obligation

The legal basis for AA in Kenya is found in international and regional commitments and the Constitution as quoted in the previous Chapters. The most comprehensive of these is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which Kenya signed in 1980 and is ratified without reservations. Article 4 paragraph 1 of the Convention provides that, “adoption by state 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”.

The General Recommendations 23 and 25 of the CEDAW Committee reinforces and gives clarity to this Article. Recommendation 23, paragraph 15, the CEDAW Committee provides the justification for temporary special measures or affirmative action, it states that, “While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men.” At Article 4, the Convention promotes the use of temporary special measures in to give full effect to Articles 7 and 8. Countries can use various effective temporary strategies to try and achieve equality in representation. Such efforts include; developing campaigns aimed at equal participation, recruiting, financially assisting and training women candidates, amending electoral procedures, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies.<sup>17</sup>

Other legal bases for AA in Kenya are based on the Constitution and other conventions such as the CEDAW. What this shows is that eventually Kenya will have to implement Affirmative Action, regardless of the lack of political support that is now being witnessed or else risk being unconstitutional. Kenya at the moment is still working on laws that will enable the proper functioning of Affirmative Action.

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<sup>17</sup> Tsikata, Dodzi (2009) “Affirmative Action and the prospects for gender equality in Ghana politics” (women in broadcasting, The Friedrich-Ebert Stiftung)

True equality in political life can only be witnessed when the formal removal of barriers and introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies takes place. Overcoming centuries of male domination of the public sphere, requires that women should be encouraged and supported by all sectors of society to achieve the full and effective participation. This encouragement must be led by States parties to the Convention, as well as by political parties and public officials. States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens.

### **Benefits**

Affirmative action has been justified on the ground that improved representation of social groups such as women has a beneficial impact on policies. Therefore affirmative action is an opportunity to be proactive about women's gender interests. The growing numbers of women candidates suggests that there are women interested in political office that could make valuable contributions through their participation in governance.

Affirmative Action provides more female role models and improves awareness of the issues. It is also a guarantee for gender balanced policy making at all levels of government. It can also allow considerable skills to be brought into decision making structures. Because of their experiences in life, women are good managers, experienced at multi-tasking and getting things done.<sup>18</sup>

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<sup>18</sup> Ibid (2009)

## **4.4 Recommendations.**

### **4.4.1 Political Parties.**

Political parties should adopt specific action plans for recruitment of women and other underrepresented groups based on analysis of the cause of this underrepresentation. They should also develop methods for gender monitoring of nominations and elections.

Party selectors should take into account ethnicity and likewise gender in the pursuit of a more balanced representation.

Political parties should provide recommendations and targets with specific goals in order to redress the problem of women's under-representation.

The Political Parties Act should provide a mechanism of monitoring political parties and gauging them against their manifestos and party policy's a punitive system can then be adopted to take care of parties that do not connect with their own party manifestos and policies such as payment of fines, and perhaps even risk deregistration.

### **4.4.2 Women groups**

As well as other stake holders, should develop mechanisms for gender monitoring of nominations and elections.

Multiple measures should be applied such as capacity building programs, a system of mentoring for inexperienced new members; family oriented working hours, support of mentoring for inexperienced new members and support for women organizations.

Gender quotas must be compatible with the electoral system in use in order to be effective. There should be clear criteria for quota implementation, such as placement mandates or rank-ordering rules should be stipulated. There should also be strong financial penalties or rejection of lists must be allowed for. Rejection of lists is to be preferred, since large parties might neglect financial penalties.

Money should be made available for research on the implementation and effect of gender quotas.

### **4.4.3 Adoption of complimentary electoral laws**

Kenya should adopt measures and policies that enable the implementation of gender quotas. The Elections Act No 24 of 2011, Political Parties Act and the IEBC alone cannot ensure the implementation of AA. Parliament should enact laws that facilitate the development of AA in Kenya by keeping in mind the following issues: (i) whether the system is proportional or

majoritarian; (ii) the number of members to be elected from each constituency; (iii) whether there is an imposed threshold for representation; (iv) whether voters can choose between candidates as well as parties; and finally (v) whether minority voters are clustered together or geographically dispersed. Minorities could also gain representation through special mechanisms such as reserved seats, quotas or mandated multiethnic ‘slates’,<sup>19</sup>

#### **4.4.4 Election Procedure.**

In Countries that practice plurality or majority electoral process, the first step in the electoral selection process is usually to find aspirants to be considered for nomination, either through primary elections or by nomination committees and other parts of the party organization. In this step, gender quotas are designed as a requirement that a certain number or percentage of women or of either sex be represented among the pool of candidates under discussion. These kinds of quotas are often dubbed aspirant or primary quotas.

Such quota provisions may be legally mandated, as with the primaries in Panama, or voluntary, as in the case of the British Labour Party.

The second step in the selection process requires political parties to nominate and place candidates on their party lists for public election. A common form of quota rule is that a certain minimum percentage of female candidates must be placed on the parties’ lists, for example, 20, 30, 40 or even 50 percent; but it can also be formulated in a gender-neutral way. This is primarily used in countries with PR electoral systems. Again, candidate quotas may be legally mandated, as in France, Slovenia, Spain and Belgium, or voluntary, as in Sweden, Poland and Germany.

The third step, usually targets those elected, and at this stage quotas take the form of reserved seats. This is regulated by the constitution or electoral law, it entails a certain number or percentage of seats reserved for women members in the country’s legislature. Increasingly today, reserved seats are subject to election, usually elected by a special electorate or by an additional vote, as in the cases of Rwanda and Uganda.

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<sup>19</sup> Adams Oloo, (2011) “*Elections, representations and the new Constitution*”, Society for interenational development. Accessed on 14<sup>th</sup> September 2013. <http://www.sidint.net/docs/WP7.pdf> accessed on 15th October 2013

was a success at the local level, where it applies to municipalities with more than 3,500 inhabitants elected in PR systems.<sup>23</sup>

Kenya can therefore revise the electoral system or method of choosing representatives to accommodate or facilitate the election of women into Parliament and Senate. Arguments put forward in this discourse support a proportional system rather than a Majoritarian. Kenya can also encourage mechanisms such as reserved or mandated seats. The general consensus therefore is that an amendment is needed to secure the two thirds gender majority rule. Article 27(8) requires that the state shall take legislative and other measures to implement the principle that not more than two-thirds of elective and appointive bodies shall be of the same gender. Article 81(b) also expressly states that not more than two-thirds of the members of elective public bodies shall be of the same gender. These instruments will enable Kenya achieve equality in representational politics at the same time ensuring that it does not find itself falling into the trap that some countries that practice Gender based Affirmative Action have found themselves in. Finally Affirmative Action is a double edged sword, if used correctly and properly can provide equality for all, when used wrongly can destroy that which it is intended to build.

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<sup>23</sup> Ibid p42-p110

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