

Actualising women's participation in politics and governance in Africa: the case of Kenya and Ghana

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ABSTRACT: Almost two decades into the 21st century, women are still not accorded a place of prominence in politics and governance, particularly in Africa. Using the examples of Kenya and Ghana, this article undertakes a critical analysis of the implementation of women's right to participation in political and decision-making processes in Africa with a view to highlighting progress made, challenges faced and possible solutions to these challenges. Women's right to participation in political life is enshrined in article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol). The article argues that while some progress has been made towards implementing the above right, much more still needs to be done to achieve effective and transformative participation by women. The progress revealed is mainly in the domestication by national laws of the relevant international obligations. However, the article also notes a significant disconnect between the normative framework and actual participation of women. The two case studies expose an unimpressive lack of political will and persistent societal perceptions, together contributing to the failure to move beyond codification of laws to improvements in actual practice. With lessons learnt from these two countries, this article argues for collaborative effort among African countries to promote genuine intra-Africa learning allowing African states to share experiences, consolidate gains and innovate around common challenges. By so doing, African states can consolidate efforts towards breaking the current inertia and accelerate the actual implementation of article 9 of the African Women's Rights Protocol. Overall, the article cast a spotlight on the need to refocus debates from standard-setting to actual implementation necessary to achieve transformative equality.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Actualiser la participation des femmes à la vie politique et à la gouvernance en Afrique: le cas du Kenya et du Ghana

RÉSUMÉ: Presque deux décennies après le début du XXI^e siècle, les femmes ne se voient toujours pas accorder une place prépondérante dans la vie politique et dans la gouvernance, en particulier en Afrique. En prenant les exemples du Kenya et du Ghana, le présent article entreprend une analyse critique de la mise en œuvre du droit des femmes à participer aux processus politiques et décisionnels en Afrique afin de souligner les progrès réalisés, les défis rencontrés et les solutions possibles à ces défis. Le droit des femmes à participer à la vie politique est prévu par l'article 9 du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique (Protocole relatif aux droits des femmes en Afrique). L'article fait valoir que

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si certains progrès ont été enregistrés dans la mise en œuvre de ce droit, il reste encore beaucoup à faire pour que les femmes puissent participer de manière efficace et transformatrice. Les progrès réalisés concernent principalement l'incorporation dans les législations nationales des obligations internationales pertinentes. Cependant, l'article note également un décalage important entre le cadre normatif et la participation effective des femmes. Les deux études de cas révèlent un manque de volonté politique et des perceptions sociétales persistantes qui contribuent à l'incapacité d'aller au-delà de la codification des lois pour améliorer la pratique réelle. Sur la base de leçons tirées de ces deux pays, l'article plaide en faveur d'un effort collaboratif entre les pays africains pour promouvoir un véritable apprentissage intra-africain permettant aux États de partager leurs expériences, de consolider leurs acquis et d'innover concernant les défis communs. Ce faisant, les États africains peuvent consolider leurs efforts pour mettre un terme à l'inertie actuelle et accélérer la mise en œuvre effective de l'article 9 du Protocole relatif aux droits des femmes en Afrique. En somme, l'article a mis en lumière la nécessité de recentrer les débats sur le mouvement nécessaire de la normalisation à la mise en œuvre effective pour parvenir à l'égalité transformative.

KEY WORDS: Protocol to the African Charter on the Rights of Women, Maputo Protocol, women, political participation, Africa, equality

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1 INTRODUCTION

The African continent has in recent decades made significant progress in establishing normative frameworks on human rights, particularly on the rights of women. Besides the African Charter on Human and Peoples' Rights (African Charter)¹ which is the 'parent' instrument for human rights in Africa, a number of other regional instruments have codified laudable provisions on the rights of women. The most significant of these is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol) of 2003,² which has since been reinforced by other instruments such as the African Charter on Democracy, Elections and Governance (African Democracy Charter).³ The continent is therefore quite rich in codified legal provisions on women's rights. The enthusiasm and speed with which African countries adopted and ratified the above instruments have, however, not been mirrored in the implementation of the instruments. Among the provisions whose implementation still eludes many African nations and which continues

¹ OAU Doc CAB/LEG/67/3 rev 5 (27 June 1981), entered into force 21 October 1986.

² AU Doc CAB/LEG/66.6 (11 July 2003), entered into force 25 November 2005.

³ AU Doc Assembly/AU/Decl 147 (VIII) (30 January 2007), entered into force 15 February 2012.

to elicit significant debate is the provision on participation of women in political and governance processes.

This article interrogates the continental implementation of the right of women to equally participate in political and governance processes as provided in various regional instruments. This examination inquires how the political participation provisions of these instruments have been translated into tangible and sustainable gains for African women, if at all. Specifically, the article highlights the gains made in implementation, identifies the challenges experienced and anticipated and proposes ways of plugging these gaps in order to ensure that this right is effectively guaranteed. In so doing, the article uses Kenya and Ghana as case studies in an attempt to determine broad implementation patterns across the continent. The choice of the two countries is informed by the fact that Ghana's Constitution, promulgated in 1992, evidenced one of Africa's first examples of the constitutional entrenchment of gender equality principles at the domestic level. This Constitution was largely influenced by the African Charter. Ghana has also made significant and consistent democratic strides uncommon in many African countries and is for this reason considered one of the few beacons of democratic light on the continent. Kenya's progressive and much-hailed Constitution, promulgated in 2010, was expected to open up the political space for women in a revolutionary way. The fact that Kenya and Ghana have taken some bold steps towards actualising the right of women to political participation has also exposed them to a number of challenges to effective implementation. The choice of the two countries therefore provides the opportunity to examine in one breath both bold attempts at implementation as well as teething challenges to such attempts. However, Africa is characterised by such diversity and extreme dissimilarities that to assume homogeneity in how the 55 African Union member states implement the provisions on women's participation would be simplistic and false. However, in highlighting the successes, challenges and gaps in continental implementation, this article uses the experiences of Kenya and Ghana as representative of the continent without purporting to be authoritative.

Section two highlights the provisions of the various regional instruments on political participation as read together with other provisions on related rights. Section three explores implementation in Kenya and Ghana by examining the legal and institutional frameworks and interrogating the composition of the two countries' parliaments in order to explore the practical implementation and highlight successes and challenges. Section four traces trends and practices and highlights the social realities characterising the political and governance environment for women in Kenya and Ghana specifically, and Africa, more generally. Finally, section five summarises the findings of the article and makes conclusions relevant to continental implementation of the provisions on women's participation in political and governance processes.

2 AFRICA'S NORMATIVE FRAMEWORK ON WOMEN'S PARTICIPATION

Women all over the world have historically been excluded from political participation and governance,⁴ with very low numbers in African Parliaments.⁵ Women's exclusion continues despite the fact that their inclusion and equality in the democratic process has been recognised as a precondition for democracy, rather than as a consequence of democratic governance.⁶ In an attempt to right the above wrong, article 9 of the African Women's Rights Protocol obliges African states to take specific positive action to ensure participation by women in governance and political life. The article provides as follows:

1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:
 - (a) women participate without any discrimination in all elections;
 - (b) women are represented equally at all levels with men in all electoral processes;
 - (c) women are equal partners with men at all levels of development and implementation of state policies and development programmes.
2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

A close reading of the provision reveals a deliberate use of language. The phrase 'at all levels' emphasises the fact that the measures expected of states should be all-encompassing as they are expected to address gender inequities and inequalities in the entire political and governance system. In other words, these measures should not be piecemeal approaches targeting isolated sections or aspects of the system. Further, article 1(b) lays emphasis on the broad nature of the anticipated measures by using the phrase 'in all electoral processes' thereby implying that the provision speaks more to the entire *process* leading up to political life as opposed to the specific outcomes. Also, the use of the phrase 'increased and effective representation and participation' affirms the view that, while the outcome of the anticipated measures is important, these results are very much functions of the process leading up to them. The import of this deliberate phraseology is that the provision targets the broad range of

⁴ P Paxton & S Kunovich 'Women's political representation: the importance of ideology' (2003) 82 *Social Forces* 87 87-88; SM Rai 'Gender and democratization: Ambiguity and opportunity' in R Luckman & G White (eds) *Democratization in the South: the jagged wave* (1996) 221.

⁵ T Thabane & M Buthelezi 'Bridging the gap between *de jure* and *de facto* parliamentary representation of women in Africa' (2008) 41 *Comparative and International Law Journal of Southern Africa* 175 176.

⁶ F Raday 'Gender and democratic citizenship: the impact of CEDAW' (2012) 10 *International Journal of Constitutional Law* 512 516.

actions and steps necessary to achieve the desired outcome of gender equity in the political and governance spheres. In other words, article 9 demands transformative equality which imposes upon countries the obligation to transcend mere literal comprehension of equality and adopt tangible measures to eliminate existing historical, structural and institutional hurdles that frustrate equality in reality in order to achieve equal participation of women.⁷ As such, transformative equality focuses on the results of measures taken⁸ rather than the aesthetics of the measures themselves and as such lays emphasis on interrogating the entire process leading up to the desired results.

The African Women's Rights Protocol is the authoritative instrument on women's right to political participation in Africa, and Thabane and Buthelezi have in fact called it the most progressive and defiant women's rights instrument.⁹ However, it is not the genesis of this right on the continent: two decades earlier, the African Charter had entrenched the right of all citizens of a country to freely participate in the government of their country without discrimination on any ground or status.¹⁰ To emphasise the centrality of participation to the democratic governance of a country, the African Charter reinforces this right by imposing a duty on all persons to place their physical and intellectual abilities at the service of the country.¹¹ It is therefore not only a right of all citizens to participate in the government of their country, but it is also an obligation which should not be disregarded. To ensure that all citizens are actually able to participate in government, the state is obliged to adopt measures to enable participation by all citizens on an equal footing.¹² In terms of the African Charter, participation in government by all is therefore as much a right as it is a duty, with the right and duty mutually reinforcing each other.

The political rights entrenched in the African Charter were, however, not followed by immediate enthusiastic implementation. It was not until the 1990s as Africa slowly began embracing democracy as an ideal form of governance that African leaders started appreciating popular political participation not merely as a codified right, but as a prerequisite for transforming the socio-economic fortunes of nations. This was evidenced by the Organisation of African Unity's adoption in 1990 of the Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World which recognised popular participation in governance, an enabling political environment, human rights guarantees and the rule of law as prerequisites for achieving socio-economic transformation.¹³ This

⁷ S Fredman 'Beyond the dichotomy of formal and substantive equality: towards a new definition of equal rights' in I Boerefijn *et al* (eds) *Temporary special measures: accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (2003) 111.

⁸ Raday (n 6 above) 514 - 515.

⁹ Thabane & Buthelezi (n 5 above) 184.

¹⁰ Articles 13 & 2 of the African Charter.

¹¹ Article 29(2) of the African Charter.

¹² Article 1 of the African Charter.

¹³ AHG/Decl 1 (XXVI), 9-11 July 1990 para 10.

signalled a symbolic recommitment by African leaders, at least in principle, to the provisions of the African Charter particularly on political participation by all. However, in characteristic fashion, the above declaration was also not immediately followed by any significant concrete steps towards ensuring actual participation of all citizens, particularly women, in political and governance processes. Even though participatory politics replaced authoritarian one-party systems in a number of African states towards the close of the 20th Century, the declaration's principles remained largely symbolic for women as the new 'democratic' systems largely retained the old patriarchal models of leadership and access to political power.

At the dawn of the 21st century, African leaders made a strategic decision to consolidate the gains of the last four decades of the previous century, take lessons from the failures and challenges and review their continental strategy for the new century. The Organisation of African Unity (OAU) was wound up and replaced by the African Union (AU). This move signalled a value shift from the OAU's dispassionate approach to the continent's contemporary concerns, to a more proactive approach by the AU to issues such as democratic values, the rule of law, sound governance and human rights.¹⁴ There was an emerging unequivocal recognition on the continent that the continent's socio-economic and peace and security challenges could not be sustainably addressed if African governments continued to perpetuate or tolerate bad governance practices¹⁵ such as those that exclude a significant part of society, namely women, from the political and governance processes.

Apart from establishing the AU, the Constitutive Act of the African Union of 2000 emphasised the promotion of democracy, *popular participation* and good governance and reaffirmed the commitment of African countries to promoting and protecting the rights and freedoms enshrined in the African Charter.¹⁶ Gender equality formed a specific operational principle of the new organisation.¹⁷ As testament to this renewed commitment, the African Women's Rights Protocol was adopted three years later, on 11 July 2003. Barely 18 months later, a rather unprecedented speed in African multilateral human rights treaty ratification, it had received the requisite 15 ratifications and entered into force on 25 November 2005.¹⁸

¹⁴ H Wulf 'The role of regional organisations in conflict prevention and resolution' in H Wulf (ed) *Still under construction: regional organisations' capacities for conflict prevention* (2009) 15 http://researchmap.jp/?action=cv_download_main&upload_id=8542 (accessed 16 June 2017).

¹⁵ See the Preamble & article 3 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2001.

¹⁶ Article 3(g) & 3(h) of the Constitutive Act of the African Union OAU Doc CAB/LEG/23.15 (11 July 2000), which entered into force 26 May 2001.

¹⁷ Article 4(l) of the Constitutive Act of the African Union.

¹⁸ African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: Status list' https://www.au.int/web/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_righ.pdf (accessed 1 July 2017).

Around the same time, the AU was moving fast to codify its commitments to democracy and governance which of course included equal participation for all as a key pillar. The new body adopted the Declaration on the Principles Governing Democratic Elections in Africa in July 2002, in which the member states committed themselves to establish all-inclusive electoral systems; encourage participation by women in all aspects of the electoral process; and hold all-inclusive elections.¹⁹ Such a bold statement on democracy came soon after the AU had categorically recognised the link between peace and democratic practices, good governance and the rule of law.²⁰

The above declaration set the stage for the adoption of the African Charter on Democracy, Elections and Governance (African Democracy Charter) five years later, on 30 January 2007, and its entry into force another five years later, on 15 February 2012. The African Democracy Charter's uniquely African approach to democracy has been hailed for its contribution to Africa's democratisation efforts.²¹ The African Democracy Charter sought to adapt the broad provisions of the African Women's Rights Protocol on women's participation by including among its objectives and principles the promotion of citizen's participation in public affairs, the promotion of representative government systems and the promotion of gender equality and balance in governance and development processes.²² To achieve the above objectives, the African Democracy Charter mandatorily obligates states to take concrete steps such as eliminating gender-based discrimination; adopting legislative and administrative measures to guarantee the rights of women (including the right to participation); creating conditions to ensure full and active participation of women in decision-making at all levels; and taking all possible measures to encourage women to participate fully and actively in the electoral process and to ensure gender parity in representation at all levels, particularly in Parliament.²³

The common spirit flowing through the African Women's Rights Protocol and the African Democracy Charter in relation to the participation of women in political and governance processes is the unequivocal manner in which states' obligations are framed. The instruments use the phrases 'specific positive action' and 'all possible measures to encourage full and active participation' respectively²⁴ to convey the message that what is expected of states are concrete and measurable steps capable of achieving actual and sustainable

¹⁹ AU Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl 1 (XXXVIII), 8 July 2002 paras II & III.

²⁰ Article 3(f) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 10 July 2002.

²¹ P Glen 'Institutionalizing democracy in Africa: a comment on the African Charter on Democracy, Elections and Governance' (2012) 5 *African Journal of Legal Studies* 119-120.

²² Article 2 of the African Democracy Charter.

²³ Articles 8 & 29 of the African Democracy Charter.

²⁴ Article 9(1) of the African Women's Rights Protocol; article 29(3) of the African Democracy Charter.

participation for women, as opposed to merely routine measures designed to give the illusion of compliance.

The following section examines, under thematic heads, the measures Kenya and Ghana have taken towards implementing the provisions of the African Women's Rights Protocol and the other instruments mentioned above relating to participation of women in political and governance processes. In so doing, the section identifies good practices capable of setting continental standards and also highlights some challenges encountered by the two countries which other African countries should anticipate and take into consideration when embarking on their implementation processes.

3 ACHIEVING TRANSFORMATIVE EQUALITY: LESSONS FROM KENYA AND GHANA

As mentioned above, measures aimed at achieving transformative equality in governance and politics as called for by the above instruments should be focussed on opening up political space to women and changing societal perceptions of women's participation in politics.²⁵ In other words, these measures should address the broad spectrum of issues that create bottlenecks for women in governance and political life. In order to determine their effectiveness, the measures should be examined through a double lens that interrogates the legal framework designed to achieve women's participation as well as the relevant institutional structure. This section therefore starts by highlighting Kenya's and Ghana's relevant legal framework in light of these countries' human rights obligations as highlighted above. It then proceeds to examine the representative structure of the legislatures of Kenya and Ghana with a view to highlighting women's position in these institutions and the attendant challenges, again in light of the human rights obligations above. Being the apex of political power in most jurisdictions, the composition of Parliaments often attracts a much-needed and healthy scrutiny. Being the institution where the people's political power is represented, Parliament's composition is usually indicative of the society's general attitude towards women's right to political participation.

3.1 Women's right to political participation under municipal law

The appropriate starting point when examining a country's implementation of international human rights obligations is the treatment accorded to such rights under that country's supreme law. For countries like Kenya and Ghana whose supreme law is a written constitution, that examination is relatively straight-forward. Entrenching a principle in the constitution of a country arguably gives

²⁵ Paxton & Kunovich (n 4 above) 88.

it greater legitimacy as an expression of the people's values; it imposes a mandatory obligation on the state to implement the principle; and also ensures supreme protection for the principle since constitutional provisions are often accompanied by procedures that make constitutional amendment more onerous.

The Constitution of Kenya 2010 (Kenyan Constitution) is celebrated as perhaps the most transformative and progressive on the continent, second only to the South African Constitution.²⁶ This transformative and progressive attribute is largely due to the fact that it includes, as one of its chapters, a very robust Bill of Rights which contains an array of progressive human rights and fundamental freedoms provisions.²⁷ It is noteworthy that the text of Kenya's Bill of Rights borrows quite significantly from international human rights treaties ratified by Kenya, including the African Women's Rights Protocol and the African Charter. Such treaties are further expressly recognised under article 2(6) of the Kenyan Constitution as forming part of the laws of Kenya.

Key among the rights in the Bill of Rights is the right to make political choices which includes participating in political activities and seeking political office.²⁸ Specific to participation of women, the Bill of Rights provides that women and men have the right to equal opportunities in political, socio-economic and cultural spheres and in this regard the state is obligated to take legislative and other measures to ensure that 'not more than two-thirds of the members of *elective* or *appointive* bodies shall be of the same gender'.²⁹ While article 9(1)(b) of the African Women's Rights Protocol calls for women to be represented *equally* with men, thereby implying a 50 per cent:50 per cent representation, the above provision of the Kenyan Constitution appears to lower this threshold to 33.3 per cent: one-third as the bare minimum. The effect of this is that the state would be tempted not to pursue aggressive measures aimed at achieving transformative equality as required by the African Women's Rights Protocol, but to only pursue those measures that ensure the bare constitutional minimum. The Supreme Court of Kenya has further arguably enabled this 'bare-minimum' approach. With specific reference to the implementation of this principle in Parliament, the Supreme Court rendered its advisory opinion in *In the matter of the principle of gender representation in the National Assembly and the Senate*,³⁰ in which it interpreted this principle as being *progressively realisable*, as opposed to being immediately realisable, and affirmed the constitutional deadline for enacting the enabling legislative framework as 27 August 2015, five years after the Constitution's promulgation.

²⁶ G Musila 'Realizing the transformative promise of the 2010 Constitution and new electoral laws' in G Musila (ed) *Handbook on election disputes in Kenya: context, legal framework, institutions and jurisprudence* (2013) 2.

²⁷ Constitution of Kenya 2010 cap 4.

²⁸ Article 38 of the Constitution of Kenya 2010.

²⁹ Articles 27 & 81(b) of the Constitution of Kenya 2010.

³⁰ Supreme Court of Kenya Advisory Opinion 2 of 2012 [2012] eKLR para 79.

In addition to constitutionally entrenching the so-called two-thirds gender principle for elective and appointive bodies, the Kenyan Constitution provides further safeguards to this principle. To guard against political tinkering, the Constitution secures this principle from whimsical amendment or repeal by providing two rigid procedures for its amendment. The first is through a parliamentary initiative, which must be approved separately by each of the two Houses of Parliament, each House approving by at least a two-thirds majority of all its members.³¹ At least 90 days must lapse between the first and second readings in either House.³² Thereafter, the proposal must be subjected to a referendum where at least 20 per cent of registered voters in at least half of Kenya's 47 counties must vote and it must be approved by an overall countrywide simple majority.³³ The second procedure involves a popular initiative by not less than one million registered voters, subsequently approved by a majority of Kenya's 47 county assemblies and ultimately by the people in a referendum as mentioned above.³⁴

Ghana, on the other hand, has had a series of Constitutions since gaining its independence in 1957, but none significantly provided for the rights of women in the manner that the Constitution of Ghana 1992 (Ghanaian Constitution) has done. Drawing inspiration from the African Charter, the 1992 Constitution represents significant advances for human rights.³⁵ The Ghanaian Constitution expresses an instrumental supremacy over any other laws in the land³⁶ and bestows upon the Supreme Court, the highest court of the land, the utmost power of interpretation and striking down inconsistencies between the Constitution and legislation.³⁷

Chapter 5 of the Ghanaian Constitution is entirely dedicated to 'fundamental human rights and freedoms' to be enjoyed by every person in Ghana regardless of 'race, place of origin, political opinion, colour, religion, creed or gender'.³⁸ These are political, civil, social and economic rights including protection from forced labour and slavery,³⁹ equality and the prevention of discrimination on the grounds of gender or race.⁴⁰ Further, it provides for 'freedom of expression and association'⁴¹ and fairness among administrative bodies and their subordinates'.⁴² Article 21(3) explicitly stipulates the right to 'form or join political parties and to participate in political activities subject to

³¹ Articles 255 & 256 of the Constitution of Kenya 2010.

³² Articles 256(1)(c) of the Constitution of Kenya 2010

³³ Articles 255 & 256 of the Constitution of Kenya 2010.

³⁴ Articles 255 & 257 of the Constitution of Kenya 2010

³⁵ The drawing and promulgation of the 1992 Constitution followed the ratification of the African Charter in 1989. In its bid to measure up to the standards set by the African Charter, Ghana modelled its Constitution after the African Charter.

³⁶ Article 1(2) of the Constitution of Ghana 1992

³⁷ Article 2 of the Constitution of Ghana 1992.

³⁸ Article 12 of the Constitution of Ghana 1992.

³⁹ Article 16 of the Constitution of Ghana 1992.

⁴⁰ Article 17(2) of the Constitution of Ghana 1992.

⁴¹ Article 21(1)(a) & (e) of the Constitution of Ghana 1992.

⁴² Article 23 of the Constitution of Ghana 1992.

such qualifications and laws as are necessary in a free and democratic society'.⁴³ The Constitution also calls for equal economic opportunities for citizens with full integration of women into economic development of the country⁴⁴ as well as equality in working under satisfactory, safe and healthy conditions and equal work without discrimination.⁴⁵ These general constitutional protections are further broadened by the Labour Act, 2003, which calls for equity in employment for men and women. Part five of the Act is entirely dedicated to the rights of women necessary to promote the participation of women in public offices. It considers specificities in relation to women such as frowning upon overtime work by pregnant women after normal working hours;⁴⁶ proscription of allocating above-weight duties to pregnant women especially after their fourth pregnancy month;⁴⁷ and maternity, annual and sick leave, together with a number of days' entitlement for nursing mothers.⁴⁸

The Ghanaian Constitution in addition demands unique care for mothers during reasonable periods before and after child-birth with paid leave and special care for the children so that women can realise their full potential.⁴⁹ Further, there is also the guarantee of equal rights during trainings and promotions void of impediments from any person.⁵⁰ Chapter 6 of the Constitution covers the Direct Principles of State Policy for guidance of cabinet, government organs and political parties towards human rights and again obliges the executive to report to parliament annually on the essential measures undertaken for 'full realisation of basic human rights'.⁵¹ It then calls on the state to promote integration and eliminate discriminative preconceptions based on gender among others, and to see to measures for realising 'regional and gender balance in recruitment and appointments to public offices'.⁵² In this regard, a 'quota system' has been created in a number of statutes designed towards achieving women's political empowerment. The Legal Aid Scheme Act, 1997, for example, establishes the Legal Aid Board whose membership must include at least one female member.⁵³ The Persons with Disability Act, 2006, also creates the National Council on Persons with Disability whose membership includes a representative from the ministry responsible for women and children's affairs (now Ministry of Gender, Children and Social Protection) and two other female representatives.⁵⁴ When nominating persons to occupy the two positions available to be filled by the president in the

⁴³ Article 21(3) of the Constitution of Ghana 1992.

⁴⁴ Article 36(6) of the Constitution of Ghana 1992.

⁴⁵ Constitution of Ghana 1992 art 24(1).

⁴⁶ Section 55 of the Labour Act 651 of 2003.

⁴⁷ Section 56 of the Labour Act 651 of 2003.

⁴⁸ Section 57 of the Labour Act 651 of 2003.

⁴⁹ Article 27(1) & (2) of the Constitution of Ghana 1992.

⁵⁰ Article 27(3) of the Constitution of Ghana 1992.

⁵¹ Article 34(1) & (2) of the Constitution of Ghana 1992.

⁵² Article 35(5) & (6)(b) of the Constitution of Ghana 1992.

⁵³ Sections 3 & 4(1)(h) of the Legal Aid Scheme Act 542 of 1997.

⁵⁴ Sections 41 & 43 of the Persons with Disability Act 715 of 2006.

governing body of the National Peace Council, the president is also obligated to nominate one woman.⁵⁵ The same requirement applies to the membership of the governing bodies of the Regional Peace Councils and the District Peace Councils.⁵⁶

Other relevant constitutional protections under the Ghanaian Constitution include an equal right to vote,⁵⁷ the right to join any political party by any eligible voter⁵⁸ and the right to political participation for influencing structures and policies of government.⁵⁹ Article 35(6)(b), read in conjunction with article 36(6) of the Ghanaian Constitution, asserts an affirmative responsibility on the state to put in place 'appropriate measures to achieve regional and gender balance in recruitment and appointment to public offices' as well as 'all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana'.

The discussion above reveals the recognition Kenya and Ghana's constitutional frameworks have made of the intersectionality between various rights. The essence is that participation of women in political and governance processes is not an isolated right. Rather, it is an indivisible right related to and dependent upon a host of other rights. Therefore, in order to effectively ensure women's participation, countries ought to take a multi-dimensional approach through several measures aimed at simultaneously tackling all barriers manifested in all aspects of life. This process starts by constitutionally recognising the indivisibility, interrelation and interdependence of the right to participation and the host of other rights mentioned above. This indeed is what article 9 of the African Women's Rights Protocol envisions when it calls for a wide range of measures targeting the entire process necessary to reform the political and governance system. The legal framework of a state forms a fundamental part of this process hence the discussion of the normative frameworks of Kenya and Ghana above.

While the discussion above has revealed robust constitutional guarantees in Kenya and Ghana regarding *formal* protection and promotion of women's rights particularly the right to participation, these guarantees are not exhaustive. As the constitutions of Kenya and Ghana recognise, the constitutional guarantees should take account of 'others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man [and woman]'⁶⁰ and 'other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law'.⁶¹ Therefore, guaranteed rights in 'treaties, conventions, international or regional

⁵⁵ Section 4(1)(b) of the National Peace Council Act 818 of 2011.

⁵⁶ Article 9(b) & 12(b) of the National Peace Council Act 818 of 2011.

⁵⁷ Article 42 of the Constitution of Ghana 1992.

⁵⁸ Article 55(2) of the Constitution of Ghana 1992.

⁵⁹ Articles 55(2) & (10) of the Constitution of Ghana 1992, respectively.

⁶⁰ Article 33(5) of the Constitution of Ghana 1992. See also articles 17(2), 22, 26(2) & 39(2) of the Constitution of Ghana 1992

⁶¹ Article 19(2)(b) of the Constitution of Kenya 2010.

accords, and norms'⁶² and 'provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states'⁶³ could be applied here. The following discussion will therefore examine the interplay between Kenya's and Ghana's domestic provisions on women's rights and the countries' obligations under international instruments.

3.2 Constitutional recognition of international obligations

The general notion of international human rights law which can hardly be disputed is its embodiment and commitment towards women's rights.⁶⁴ In the case of Kenya, the constitution is express on the question of international law by providing that international instruments ratified by Kenya are part of Kenya's laws.⁶⁵ Arguably therefore, Kenya is a monist state and as such the international instruments it has ratified particularly those pertaining to human rights are binding. Further, general rules of international law [whether expressed in ratified instruments or not] form part of Kenyan law.⁶⁶ Specifically on equality of rights, the High Court of Kenya has emphasised that, 'Equality or rights under the law for all persons, male or female, is so basic to democracy and commitment to human rights.'⁶⁷ Arguably therefore, regardless of whether a right is expressly codified or not and regardless of the instrument in which a particular right is codified, that right is recognised under Kenyan law in as far as it reinforces the right to equality of persons.

The situation is slightly less straight-forward in Ghana. International law in the Ghanaian context is subject to interpretations. The Ghanaian Constitution is silent on international law and how it relates to national law. Conversely, provisions of rights in the constitution are not exhaustive and may include others that are not specified and may also be considered with the aim of securing man's

⁶² *Adjei-Ampofo v Attorney General* [2003-2004] SCGLR 418.

⁶³ *Ghana Lotto Operators Association & Others v National Lottery Authority* [2007-2008] SCGLR 1088.

⁶⁴ These instruments put direct obligations on states to put in place necessary measures to do away with barriers that undermine women's capacity to handle opportunities and also provide equal protection and empowerment to women. Notable among these are the Universal Declaration of Human Rights, the Charter of the United Nations, the Convention on the Elimination of All forms of Discrimination Against Women, the International Covenant on Economic Social and Cultural Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Constitutive Act of the African Union and the African Charter on Democracy, Elections and Governance.

⁶⁵ Article 2(6) of the Constitution of Kenya 2010.

⁶⁶ Article 2(5) of the Constitution of Kenya 2010

⁶⁷ *Centre for Rights Education and Awareness & 2 others v Speaker of the National Assembly & 6 others* High Court Petition 371 of 2016 [2017] eKLR.

[and woman's] freedom and dignity'⁶⁸ including laws of international instruments that pursue the promotion of human rights.⁶⁹ Moreover, duties to be discharged by the state in reference to article 37 on securing and protecting a social order based on the ideals and principles of freedom, equality, justice, probity and accountability 'shall be guided by international human rights instruments which recognise and apply particular categories of basic human rights to development processes'.⁷⁰ In the face of the constitution's silence on international law, the country remains party to a significant number of international instruments which include soft law norms. Prominent among these are: The international Convention on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the International Covenant on Economic Social and Cultural Rights, the African Charter, the African Women's Rights Protocol and the Beijing Declaration and Platform for Action.

There appears to be no better statement of a country's intent on promoting and protecting human rights than the signing and ratification of international instruments. However, signing or ratifying treaties does not equate to implementation and a real influence on people's lived realities. Many countries' failure to implement provisions of ratified instruments buttresses this argument. According to the United Nations Population Fund, for example, considering the harsh working conditions which result in impoverishing a higher number of women in many countries regardless of the countries' level of development, the ratio of illiteracy between women and men is two to one respectively. The report further indicates existence of 'discriminatory laws on inheritance, land, marriage and property' in several nations though they have ratified the CEDAW.⁷¹ This is an indication of the fact that ratification of international instruments, and even domestication, do not in themselves provide assurance of these transformative provisions actually impacting on women's lived experiences. Without concerted effort to implement them, these provisions remain little more than utopian aspirations. While ratification and eventual domestication provide a firm foundation for implementation, a genuine follow-through in the form of targeted implementation efforts is required if these noble ideals are to deliver on their transformative promise.

3.3 Shaking up Kenya's Parliament: a mirage?

The Kenyan Constitution has adopted a unique mix of strategies to enhance women's representation in both houses of its bicameral

⁶⁸ MG Nyarko 'The impact of the African Charter and the Maputo Protocol in Ghana' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected states* (2016) 99-100.

⁶⁹ As above.

⁷⁰ Article 37(3) of the Constitution of Ghana 1992.

⁷¹ United Nations Population Fund 'The human rights of women' 2006 <http://www.unfpa.org/resources/human-rights-women> (accessed 24 June 2017).

parliament, the Senate and the National Assembly (NA), and in its devolved government system. One of these strategies is the adoption of a multi-member electoral constituency system where more than one member is elected to the legislature from one electoral constituency/district.⁷² The use of a multi-member electoral constituency system is considered very likely to achieve a quick rise in women's membership in the legislature.⁷³ Kenya's Constitution provides for the election by universal adult suffrage of two members from each of the country's 47 counties with each county constituting a single-member constituency.⁷⁴ While one of these elected members represents the county as a member of the Senate, the other member represents the county in the NA. The unique feature of this system is that while the Senate seat can be contested by any eligible person regardless of gender, the NA seat is exclusively for female contestants.

Kenya has also adopted a proportional representation system based on party lists. Proportional representation is a system whereby political parties allocate parliamentary seats based on the proportion of the votes each party receives in an election and usually on the basis of a list of candidates prepared before elections.⁷⁵ While the majority of Senate seats, 47 seats, are filled through universal adult suffrage where male and female candidates can contest, 16 seats are reserved for women nominated by political parties based on the proportion of the parties' elected members in the Senate and from an exclusively female party-list prepared and presented to the Electoral Commission at least 45 days before the date of the general election.⁷⁶ A further two female members of the Senate are nominated by political parties based on party list proportional representation to represent the youth and persons with disabilities.⁷⁷

Further, 12 special interest seats are created in the NA and filled by political parties based on the proportion of the parties' elected members in the NA but drawn from party-lists that alternate between male and female candidates.⁷⁸ Additionally, apart from elected members of county assemblies, each of Kenya's 47 county assemblies comprises a number of special seats necessary to ensure that the two-thirds gender principle is achieved and which are filled based on a proportional gender-exclusive party list, and six special interest seats based on party-lists that alternate between male and female candidates.⁷⁹

⁷² JF Banzhaf 'Multi-member electoral districts – do they violate the “one man, one vote” principle?' (1966) 75 *Yale Law Journal* 1309 1309.

⁷³ L Kenworthy & M Malami 'Gender equality in political representation: a worldwide comparative analysis' (1999) 78 *Social Forces* 235 261.

⁷⁴ Articles 97(1)(a) & 98(1)(a) of the Constitution of Kenya 2010.

⁷⁵ Paxton & Kunovich (n 4 above) 104.

⁷⁶ Article 98(1)(b) of the Constitution of Kenya 2010; section 35 of the Election Act 24 of 2011.

⁷⁷ Articles 98(1)(c) & (d) of the Constitution of Kenya 2010.

⁷⁸ Article 97(1)(c) of the Constitution of Kenya 2010

⁷⁹ Articles 177(b) & (c) of the Constitution of Kenya 2010; section 7(1)(b) of the Governments Act 17 of 2012.

Three safeguards stand out about the above party lists. First, the lists once submitted to the electoral commission before the elections remain valid for the duration of parliament's term.⁸⁰ Second, nominative seats in parliament and the county assemblies are allocated from the list based on the priority in which they are listed, that is, first to last on the party list.⁸¹ The above safeguards serve to prevent political parties or any other person from tampering with the list thereby giving the list a degree of certainty. Third, party lists that are not required to be gender-exclusive must alternate between male and female candidates.⁸² By mandatorily requiring parties to alternate men and women in party lists, chances of women landing seats in parliament are increased. Left to their own devices, political parties would most likely position women at the bottom of the party lists thereby reducing their chances of making it to parliament and beating the purpose of the system altogether.⁸³ This particular measure, it is argued, increases political competition and attracts experience and diversity to parliament.⁸⁴

The above measures taken by Kenya are considered by the African Women's Rights Protocol as reasonably necessary to ensure or facilitate participation by women in the electoral and governance processes of the state.⁸⁵ Further, Kenya seems to have heeded the call in article 9 of the African Women's Rights Protocol for a multiplicity of measures. Indeed, following Kenya's first general election in 2013 under its new constitutional dispensation, the number of women members of parliament rose to 86 and then to 97 after the 2017 general elections,⁸⁶ the highest ever in the country. This increased representation promotes gender sensitivity in legislation, which angle is most likely to be ignored in a male-dominated legislature.⁸⁷ Gender-sensitive legislation can go a long way in addressing structurally and historically entrenched challenges to women's advancement. However, while the above measures adopted by Kenya have increased the number of women in representative politics, Kenya's parliament is still grossly imbalanced. According to the World Classification of Women in National Parliaments Kenya is still very unequal, ranking at position 86 with 30.9 per cent and 21.8 per cent women representation in the Senate and NA respectively.⁸⁸ Further, of the 97 women in the combined

⁸⁰ Section 34(10) of the Elections Act 24 of 2011.

⁸¹ Article 90(2)(b) of the Constitution of Kenya 2010.

⁸² Article 90(2)(b) of the Constitution of Kenya 2010.

⁸³ Thabane & Buthelezi (n 5 above) 189.

⁸⁴ R Darcy *et al* *Women, elections and representation* (1994) 15-18.

⁸⁵ J Finnis 'Equality and differences' (2011) 56 *American Journal of Jurisprudence* 17-33.

⁸⁶ Kenya Women Parliamentary Association 'Members' http://www.kewopa.org/?page_id=72 (accessed 09 March 2016); T Onyinge *et al* (eds) *86 and counting: Women leaders in the 11th parliament* (2014); Inter-Parliamentary Union 'Women in national parliaments: World classification' 1 September 2017 <http://www.ipu.org/wmn-e/classif.htm> (accessed 4 October 2017).

⁸⁷ Thabane & Buthelezi (n 5 above) 201.

⁸⁸ Inter-Parliamentary Union 'Women in national parliaments: World classification' 1 September 2017 <http://www.ipu.org/wmn-e/classif.htm> (accessed 4 October 2017).

parliament, only 73 of them are directly elected (three directly elected to the Senate in all-inclusive elections, 23 directly elected to the NA in all-inclusive elections and 47 directly elected to the NA for positions reserved for women contestants) while the rest are nominated.⁸⁹ Considering that Kenya's constitution provides as a mandatory principle of governance that, 'Not more than two-thirds of the members of elective public bodies shall be of the same gender,'⁹⁰ the current scenario falls short of the minimum 33 per cent female membership required. Consequently, effective gender representation is hampered resulting in largely gender-insensitive legislation.⁹¹

In fact, achieving the above threshold has proven quite problematic for Kenya's parliament. Despite the constitutional provision that the legislation to ensure this threshold is met ought to have been enacted within five years of the constitution's promulgation,⁹² parliament failed to enact the requisite legislation by 27 August 2015.⁹³ Consequently, parliament extended this period by the maximum constitutionally permissible period of one year,⁹⁴ but this extension also lapsed without any concrete action. As a result, concerned civil society organisations petitioned the High Court in *Centre for Rights Education & Awareness & 2 others v Speaker of the National Assembly & 6 others*.⁹⁵ The High Court agreed with the petitioners that parliament had indeed failed to enact the requisite legislation to ensure that not more than two-thirds of its membership is of one gender within the timeline provided in the constitution. Exercising its powers under article 261 of the Kenyan Constitution, the High Court directed that Parliament should enact the legislation within 60 days (by 28 May 2017) failure to which any person could petition the Chief Justice to advise the president to dissolve parliament. By this date, however, parliament had neither enacted the requisite legislation⁹⁶ neither had the Chief Justice advised the President to dissolve parliament. This could probably be attributed to the fact that by May 2017, political activities for the 8 August 2017 general elections were already in high gear.

⁸⁹ A Shiundu 'Factsheet: Kenya's new parliament by numbers' *AfricaCheck* 31 August 2017 <https://africacheck.org/factsheets/factsheet-kenyas-new-parliament-numbers/> (accessed 4 October 2017).

⁹⁰ Article 81(b) of the Constitution of Kenya 2010.

⁹¹ Thabane & Buthelezi (n 5 above) 201.

⁹² Articles 27, 81, 100 & 261 of the Constitution of Kenya 2010.

⁹³ The Constitution of Kenya 2010 was promulgated on 27 August 2010 after being overwhelmingly approved in a referendum.

⁹⁴ Article 261(2) of the Constitution of Kenya 2010; Kenya National Assembly Official Hansard Report of Tuesday 25 August 2015 <http://www.parliament.go.ke/the-national-assembly/house-business/hansard?start=255> (accessed 28 June 2017).

⁹⁵ High Court of Kenya Petition 371 of 2016 [2017] eKLR.

⁹⁶ Parliament had earlier in 2016 shot down a bill intended to provide a framework for achieving the two-thirds gender principle. Some politicians argued that the bill's provision for more nominative seats would bloat an already-bloated parliament.

3.4 Debunking the illusion of equality in Ghana's Parliament

In contrast to the Kenyan system, Ghana's parliamentary representation system affords very little, if any, assurances of women's participation. Ghana's unicameral parliament comprises 275 members from single-member constituencies elected through universal adult suffrage.⁹⁷ Through a constitutional provision requiring a majority of cabinet ministers to be appointed from among sitting members of parliament,⁹⁸ quite a number of women have nonetheless been appointed to the cabinet from parliament. However, this has not been with the intention of encouraging women representation in parliament.

Ghana's parliament has significant powers it can channel towards improving women's rights particularly by exercising its legislative authority. Additionally, parliament has a 25-member Parliamentary Select Committee on Gender whose role is to scrutinise issues related to gender and children in order to ensure total recognition of the rights of women in appropriate legislation.⁹⁹ Proposals geared towards improving affirmative action are fronted to parliament by the committee which also reports progress to the house.¹⁰⁰ Further, parliament oversees the African Peer Review Mechanism in Ghana, a mechanism that assesses countries' performance in attaining the New Partnership for African Development's goals in order to ensure greater gender equity.¹⁰¹

Despite these extensive powers, parliament has failed to pass specific affirmative action laws and initiatives to improve political participation by women. Particularly worrying is parliament's failure to pass a progressive Affirmative Action Bill presented by the Gender, Children and Social Protection ministry that targets addressing gender and sex-based discrimination and also guaranteeing equality in public services and political discourse for women by pushing for a '40 per cent women representation in decision-making bodies and power positions and other public institutions.'¹⁰² This Bill is inspired by the Affirmative Action Policy Guidelines of 1998 that direct the government to guarantee 40 per cent representation of women at all levels of governance, including public sector boards, commissions, councils, and

⁹⁷ Parliament of Ghana 'Overview' <https://www.parliament.gh/mps> (accessed 26 June 2017).

⁹⁸ Article 78 of the Constitution of Ghana.

⁹⁹ Parliament of Ghana 'Gender and children committee' <https://www.parliament.gh/committees?com=17> (accessed 27 June 2017).

¹⁰⁰ As above.

¹⁰¹ UN Economic Commission for Africa 'The role of parliament in African Peer Review Mechanism: Information on how parliamentarians can participate in APRM' (2011) 10 https://www.uneca.org/sites/default/files/PublicationFiles/5-pamphlet_the_role-of-parliament-in-aprm.pdf (accessed 26 June 2017).

¹⁰² Nyarko (n 68 above) 103; Government of Ghana 'Gender ministry, stakeholders speak on Affirmative Action Bill' <http://www.ghana.gov.gh/index.php/media-center/news/1802-gender-ministry-stakeholders-speak-on-affirmative-action-bill> (accessed 26 June 2017).

the executive although this is yet to be implemented. Nonetheless, the Constitutional Review Committee of Parliament has acknowledged receipt of proposed amendments to the Ghanaian Constitution expected to see to a 30 per cent representation of women in all government institutions so as to increase visibility in the male-dominated public institutions.¹⁰³

Largely because Ghana's legal framework does not provide affirmative action provisions and partly due to lack of political goodwill, Ghana's parliament is more gender-imbalanced than Kenya's. Presently, Ghana is ranked 141st out of 193 countries in the Inter-Parliamentary Union's ranking of women's representation in parliaments around the world.¹⁰⁴ Only 35 of the parliamentary seats out of the 275-seat parliament are occupied by women, representing a marginal 12.7 per cent.¹⁰⁵ Further, Ghana has only had one female speaker of parliament since independence in 1957.¹⁰⁶ The lack of a specific enabling legal framework should not, however, be an excuse for not taking proactive measures. There exist constitutional institutions in Ghana whose mandate can be exploited to advance women's participation in political affairs. One such institution is the Electoral Commission of Ghana (electoral commission) which is the only institution in Ghana with a nationwide electoral mandate. It also has the power to formulate policies and electoral laws that directly influence electoral processes. Nonetheless, no electoral laws or policies have been formulated by the commission to advance affirmative action and to close the gender gap. In as much as it is promisingly welcoming that five of the seven commissioners of the electoral commission are women,¹⁰⁷ there is no evidence of any clear and unequivocal work that the electoral commission has undertaken to promote women's political participation. The commission should take advantage of its strategic position to advance women into sought-after public positions through gender-sensitive and friendly electoral reforms that will seek to create equal playing field for men and women. The electoral commission can liaise with the political platforms including the Inter-Party Advisory

¹⁰³ Government of Ghana 'White Paper on the Report of the Constitutional Review Commission' (2012) 14 <http://ghana.gov.gh/index.php/media-center/reoprts/653-white-paper-on-the-report-of-the-constitution-review-commission-presented-to-the-president> (accessed 26 June 2017).

¹⁰⁴ Inter-Parliamentary Union (n 88 above).

¹⁰⁵ As above.

¹⁰⁶ The late President, Professor John Evans Fifi Atta Mills, in his first term which he did not fully serve due to his demise, appointed Mrs Joyce Bamford Addo remains the only woman to have graced Ghana's parliament as the speaker.

¹⁰⁷ It must be noted that of the five out of seven commissioners are all presidential appointees. In this regard, although it serves as a shining example to other women, it would have been better served if the appointments had come from the commission itself. By them being appointed by the president, it cannot be attributed to the prowess of the commission.

Committee¹⁰⁸ and exploit these platforms to advance gender sensitive agendas within political parties. Moreover, the electoral commission can capitalise on its close working relationship with the National Commission for Civic Education and embark on sensitising citizens on the necessity of eradicating prejudices and stereotypes to close the gender gap.

4 TRENDS, PRACTICES AND SOCIAL REALITIES FOR WOMEN IN DECISION-MAKING PROCESSES AND ORGANS

In tracking and analysing the participation of women in political discourse and governmental organs, women's representation at the highest levels of decision-making bodies have always been the benchmark. The last two decades have seen a relative increase of women in such spaces in both Kenya and Ghana.¹⁰⁹ As evidenced by table 1 below, numerical increase of women in such areas although gradual, has not been stable. The 1992 elections in Ghana saw 16 women elected to parliament,¹¹⁰ while elections held the same year in Kenya resulted in only six women as against 196 men in parliament.¹¹¹

¹⁰⁸ Formed after the loss and subsequent accusations by the opposition party of electoral malpractices and rejection of the results of the 1992 elections, the Inter-Party Advisory Committee has served as a platform for registered political parties, the Electoral Commission of Ghana and relevant stakeholders to meet and discuss electoral issues. Here, views of political parties, expectations and challenges are forwarded and addressed. The electoral commission also uses the opportunity it presents for educating the political parties on significant changes in the electoral processes including the channels to address electoral disputes. In as much as decisions from IPAC meetings are not binding on parties and stakeholders, they go a long way in influencing parties' decisions as well as bringing parties and stakeholders to speed on relevant issues.

¹⁰⁹ To highlight the point, women in Ghana have progressively been assuming higher political and decision-making positions since the 1980s and 1990s. 1989 saw Mrs Mary Chinery-Hesse become the first ever woman to be appointed Deputy Director-General of the International Labour Organisation; Dr Mrs Matilda Fiadzibey was also appointed as Ghana's first administrator of Stool Lands (1996); Ms Esther Ofori was selected as the first woman to be the Chief Executive Officer of the Ghana Trade Fair Authority (2001); Ms Eva Lokko was appointed the first woman Director-General of the Ghana Broadcasting Corporation and Ms Elizabeth Adjei the first female to be appointed as Director of the Ghana Immigration Service (2002); Dr. Regina Adutwum the first Woman to be appointed the Director-General of the National Development Planning Commission (2005); Her Ladyship Justice Mrs Georgina Wood, first Woman to be appointed Chief Justice (2007); Hon Justice Joyce Adeline Bamford-Addo made history as the first woman to hold the position of Speaker of the Fifth Parliament of the Fourth Republic of Ghana (2009); Ms Christina Samia Yaba Nkrumah was elected as the first woman chairperson of the Convention People's Party and the first woman to ever head a political party in Ghana (2011); Mrs Charlotte Kesson-Smith Osei became the first woman since the country's independence in 1957 to hold the position of Chairperson of the Electoral Commission of Ghana (2015).

¹¹⁰ Ghana Statistical Service 'Women and men in Ghana: A statistical compendium 2014' (2014) 172 http://www.statsghana.gov.gh/docfiles/publications/W&M_per cent202014.pdf (accessed 25 June 2017).

¹¹¹ Inter-Parliamentary Union 'Kenya National Assembly: Historical archive of parliamentary election results' http://www.ipu.org/parline-e/reports/2167_arc.htm (accessed 28 June 2017).

An increase to 19 women was recorded in Ghana in the 1999 and 2000 elections, far below the 181 male representations.¹¹² The 1997 elections in Kenya resulted in an unimpressive increase to eight women, from the previous election's six.¹¹³ However, in the 2002 elections, the number of women increased to 16,¹¹⁴ which probably is attributable to the euphoric political wave that ended almost four decades of hegemonic and dictatorial rule by the Kenya African Union Party. This number increased slightly to 21, following the chaotic 2007 elections.¹¹⁵ In Ghana, the 2004 elections recorded a minimal increase to 25 women parliamentarians, which again dropped to 19 in the 2008 elections.¹¹⁶

Just as the sun set on the first decade of the millennium, women's representation increased steadily, although not to levels that can be considered acceptable by contemporary standards. The last two elections in Ghana, in 2012 and 2016, recorded a steady rise from 30 to 35 women; a representation that has, however, not met the internationally-agreed 30 per cent threshold of women parliamentarians.¹¹⁷ The 2013 elections in Kenya saw the number of women parliamentarians rise to 65, as against 285 men, in the National Assembly; and 18 as against 50 men in the newly-created Senate.¹¹⁸ This number rose to 76 in the NA and 21 in the Senate in the 2017 general elections (of 8 August 2017).¹¹⁹ This increase is attributable in part to the affirmative action provisions in the 2010 Kenyan Constitution, discussed earlier in the article. Even though the above figures and the slow-paced rise over the past two decades, as evidenced in Table 2 below, do not inspire confidence, they shed light on how far Africa has come and still has to go to achieve transformative equality for women in the political and governance spheres.

¹¹² Ghana Statistical Service (n 110 above) 172.

¹¹³ Inter-Parliamentary Union 'Kenya National Assembly: Historical archive of parliamentary election results' http://www.ipu.org/parline-e/reports/2167_arc.htm (accessed 28 June 2017).

¹¹⁴ As above.

¹¹⁵ n 113 above.

¹¹⁶ Ghana Statistical Service (n 110 above) 172.

¹¹⁷ As above; The Inter-Parliamentary Union's world classification of women ranks Ghana 141 out of 193 countries for women's representation in government. See generally Inter-Parliamentary Union (n 88 above).

¹¹⁸ Inter-Parliamentary Union 'Kenya National Assembly: Last elections' http://www.ipu.org/parline-e/reports/2167_E.htm (accessed 28 June 2017); Inter-Parliamentary Union 'Kenya Senate: Last elections' http://www.ipu.org/parline-e/reports/2168_E.htm (accessed 28 June 2017).

¹¹⁹ Inter-Parliamentary Union 'Women in national parliaments: World classification' 1 September 2017 <http://www.ipu.org/wmn-e/classif.htm> (accessed 4 October 2017).

Table 1: Gender representation in Ghana's Parliament (1992 - 2016)

Allocation of seats in Ghana's parliament per election based on gender							
Year	1992	1996	2000	2004	2008	2012	2016
Female	16	19	19	25	19	30	37
Male	184	181	181	205	211	245	238
Total seats	200	200	200	200	230	275	275

Sources: Ghana Statistical Services (2014); Inter-Parliamentary Union¹²⁰

Table 2: Progress in women's parliamentary representation in Kenya and Ghana (1995 - 2017)

Global ranking (as 1 September 2017)	Country	per cent of women (1995)	per cent of women (1 September 2017)	per cent point change
86	Kenya	3.0 per cent	23.3 per cent (combined per cent for both Houses)	20.3 per cent
141	Ghana	8.0 per cent	12.7 per cent	4.7 per cent

Source: Inter-Parliamentary Union Report (2017)¹²¹

The above discussion depicts the relatively lower number of women representatives in Kenya and Ghana's Parliaments as opposed to the expected threshold, resulting in the dominance of men. Inroads by women into political spaces are still met with scepticism and prejudices on the place of women in the national governance and political spheres. This has negatively affected the presence and contribution of women in impactful political and socio-economic developments in Kenya and Ghana. A particular criticism levelled against Kenya specifically is that the system has almost exclusively trained its focus on reserved seats for women (quota system), as opposed to the promotion of women's engagement in competitive electoral politics. There is in fact a growing

¹²⁰ Ghana Statistical Service '(n 110 above) 172; Inter-Parliamentary Union (n 88 above).

¹²¹ Inter-Parliamentary Union 'Women in parliament: 20 years in review' 2015 <http://www.ipu.org/pdf/publications/WIP20Y-en.pdf> (accessed 28 June 2017); Inter-Parliamentary Union (n 88 above).

perception that considering the number of 'special seats' reserved for women and the women-only elective positions women should not contest other elective positions.¹²² The result is the relegation of women to 'hand-out' seats and the entrenchment of the very social inequalities democracy seeks to eliminate.¹²³ Therefore, this focus skirts around the real issues hindering women's participation in competitive elective politics such as economic barriers¹²⁴ and entrenched cultural and social biases. As a result, Kenya is seen as being more concerned with increasing the numbers for statistical purposes rather than working towards ensuring *genuine and effective* representation as envisioned under article 9 of the African Women's Rights Protocol.

The above criticism does not negate the impressive fact that most women who were nominated to Kenya's Parliament after the 2013 elections actually contributed positively to parliamentary business¹²⁵ and even used these positions as a launching pad to elective politics and contested for elective positions during the 2017 general elections.¹²⁶ As such, despite the criticism levelled against the so-called affirmative action seats, it is undeniable that they serve as powerful platforms through which women can launch forays into elective politics. To consolidate this gain, Kenya and any other country considering the above option should seriously consider operationalising a law to regularise and regulate campaign spending¹²⁷ and hopefully ensure that women who are historically economically disadvantaged¹²⁸ do not get locked out of elective political competition by virtue of lack of financial ability to counter that of their male counterparts. Also, potentially effective and worth exploring is the introduction of incentives for political parties that promote and facilitate participation of women in party primaries. Taken together, these initiatives can help move the effort beyond mere numerical representation to representation by women who are actually capable of representing not

¹²² F Blyth 'New constitution helps Kenyan women gain traction in politics' 29 March 2013 <https://theglobalobservatory.org/2013/03/new-constitution-helps-kenyan-women-gain-traction-in-politics/> (accessed 26 June 2017).

¹²³ D Rueschemeyer 'Addressing inequality' in L Diamond & L Morlino (eds) *Assessing the quality of democracy* (2005) 7.

¹²⁴ P Paxton 'Gender and democratisation' in CW Haerpfer *et al* (eds) *Democratization* (2009) 149.

¹²⁵ The Kenya Women Parliamentarians' Association meticulously tracks contribution by women members of parliament to parliamentary business [See Kenya Women Parliamentarians' Association 'Publications' http://www.kewopa.org/?page_id=97 (accessed 29 June 2017)]

¹²⁶ While many of the previously nominated members contested for elective positions, only a few of them won.

¹²⁷ Kenya enacted the Election Campaign Financing Act 42 of 2013 in 2013 but its operation was suspended till after the 2017 general elections [See Election Laws (Amendment) Act 1 of 2017 sec 32].

¹²⁸ HH Sheikh 'Human rights in the transition to multi-party democracy: The gender dimension' in J Oloka-Onyango *et al* (eds) *Law and the struggle for democracy in East Africa* (1996) 290.

only women's interests, but the interests of broad segments of society.¹²⁹

The situation is in fact not different in other spheres of civil service. This failure on the political arena manifests itself in other governance institutions. A 2010 report by Ghana's Gender, Children and Social Protection ministry indicates that 3 out of 28 institutional boards surveyed nationwide have 40 per cent of the board as women. The report further affirms that 18 per cent of directorate positions in the civil service are occupied by women.¹³⁰ A look at the judiciary also indicates that, of the current 12 Justices of the Supreme Court, only 3 are women (one being the Chief Justice).¹³¹ The Chief Justice position has been occupied by women since 2007. Of the 27 judges on the Court of Appeal bench, 6 are women.¹³² Of Kenya's seven Supreme Court judges, only two are women while of the 22 Court of Appeal judges, only seven are women.¹³³

While the legal frameworks of both Kenya and Ghana call for measures to enhance the participation of women in all spheres of governance, the governments of both countries have largely failed in their obligation to extend these and other measures beyond parliamentary representation to appointive bodies¹³⁴ in order to create a society where equality of the sexes is a defining feature.¹³⁵ The lack of strong role models in the political and other governance spheres discourages active participation by women, particularly young women, in institutions which are historically dominated by men thereby perpetuating imbalanced governance policies and practices.

The reasons for the aforementioned low representation of women in public spaces and influential political positions are multifaceted as they emanate from diverse legal, political and socioeconomic factors, some of which have been alluded to in the discussion above. Similar to happenings in most parts of the continent and beyond, patriarchy has heavily dominated and penetrated the social lives of many Kenyan and Ghanaian communities and is 'characterised by entrenched cultural norms, beliefs and practices that propagate gender inequalities'.¹³⁶ The penetration and permeation of patriarchy is not only felt around

¹²⁹ Paxton (n 124 above) 150.

¹³⁰ Ghana Statistical Service (n 110 above) 171.

¹³¹ Judiciary of the Republic of Ghana 'The Supreme Court' <https://judicial.gov.gh/index.php/the-supreme-court> (accessed 28 June 2017).

¹³² Judiciary of the Republic of Ghana 'The Court of Appeal' <https://judicial.gov.gh/index.php/the-court-of-appeal> (accessed 28 June 2017).

¹³³ The Judiciary of the Republic of Kenya 'Supreme Court judges' <http://www.judiciary.go.ke/portal/page/supreme-court-judges> (accessed 1 July 2017); The Judiciary of the Republic of Kenya 'Court of Appeal judges' <http://www.judiciary.go.ke/portal/page/court-of-appeal-judges> (accessed 1 July 2017).

¹³⁴ Article 27(8) of the Constitution of Kenya 2010.

¹³⁵ Thabane & Buthelezi (n 5 above) 197.

¹³⁶ TP Uteng 'Gendered bargains of daily mobility: Citing cases from both urban and rural settings' (2011) 18 <https://openknowledge.worldbank.org/bitstream/handle/10986/9111/WDR2012-0010.pdf?sequence=1&isAllowed=y> (accessed 28 June 2017); See also M Mies *Patriarchy and accumulation on a world scale: Women in the international division of labour* (2014).

households but has practically been evidenced in processes and structures of government.¹³⁷ The result of these unfortunate social realities and cultural norms is the underrepresentation of women because the socialisation process in most African societies, and indeed many other societies around the world, has had a history of pushing women to the periphery and regarding women as subordinate to men in the quest for political office. More to this social reality is the embedded and rooted religious connotations which have rendered most societies quite destructively conservative.

General household duties and activities which were traditionally and historically expected of Kenyan and Ghanaian women have invariably limited these women in terms of attaining decision-making roles and political positions unlike their male counterparts without such burdens. While there has been considerable positive change in attitudes over the years, historically-entrenched attitudes can be quite stubborn. To some extent, some of these attitudes have survived to this day and as such secondary burdens are significantly contributing on a daily basis to many women being hindered from the possibility of advancing from the household duties to circles of decision-making and political institutions.

In spite of the relatively remarkable records in development in both Kenya and Ghana, there still exists a persistent income gap between men and women.¹³⁸ This persistent occurrence adversely affects or disadvantages women from amassing economic power and as a result restricts their prospects of competitively participating in political discourse due to their lack of financial strength. This in extension perpetuates women's inability to financially engage with men on an equal footing in competing for the already male-dominated political processes since these processes often involve significant financial implications and costs.

In addition to the above-mentioned, one major limitation which has also contributed to the perpetuation of women's peripheral treatment in political and governance processes is 'restrictive exposure' of women in parliament and other spheres. Most women who have been selected for cabinet positions since Kenya's and Ghana's return to multi-party democracy in 1992 have mostly been placed in positions with less prominence as compared to their male counterparts.¹³⁹ These continuous developments reinforce the already deep-rooted perceptions and false impressions pertaining to women's political and overall leadership competencies. These occurrences further restrict the space for women to strengthen their political and leadership abilities thereby stifling women's political and leadership growth and maturity.

¹³⁷ S Bawa 'Women's rights and culture in Africa: a dialogue with global patriarchal traditions' (2012) 33 *Canadian Journal of Development Studies* 90 102-103.

¹³⁸ United Nations Development Programme 'Inequalities in Ghana: A fundamental national challenge' (2014) 5 <http://www.undp.org/content/dam/ghana/docs/Doc/Inclgro/Ghana-unicef%20Inequality%20Briefing%20Paperpercent20FINAL%20DRAFT%20Apr%202014.pdf> (accessed 28 June 2017).

¹³⁹ Notable of these positions include the ministry of education, health etc.

The end result is a relatively low number of women who are skilled and experienced in the tactical manoeuvres necessary to navigate the male-dominated rigour of politics and emerge as formidable candidates for high political offices and appointments to strategic positions. Quite tragically, no woman has yet to ascend to the positions of president or even vice or deputy president in Kenya or Ghana,¹⁴⁰ and this also entrenches the false idea of women's inability to perform in some capacities. In as much as the current and immediate past governments tried in this regard by appointing women as Chief Justices and Attorneys General in Ghana and as cabinet secretary for defence in Kenya, other high-ranking positions that elevate their holders to the political and governance limelight such as the government finance and economy dockets have never been occupied by women. It should be noted that these positions are not elective positions in both Kenya and Ghana, and indeed in many African states, and as such appointments only require the political will of the appointing authority. The retrogressive patriarchal attitude that has seen successive governments fail to elevate women to such positions only serves to cement structural inequalities that continue to subjugate the African woman.

5 CONCLUSION

The discussion above has revealed some laudable progress on the part of Kenya and Ghana particularly in constitutionalising the right of women to participation in political and decision-making organs. While these advances are laudable, numerous challenges have been identified in the implementation process. These challenges can be summarised as arising out of a failure to move beyond mere codification of equality in law towards measurable empowerment programmes that eliminate the systemic barriers to effective participation of women in the politics and governance.¹⁴¹ Normative provisions without any genuine action to back them up only serve to gloss over underlying gender inequality and the invisibility of women in seemingly democratic systems,¹⁴² thereby resulting in cosmetic equality.

The article argues that these challenges are not insurmountable. They can be overcome through concerted political and societal goodwill and effort. African countries that are genuinely dedicated to achieving transformative equality for women in the political and governance spheres ought to take lessons from Kenya and Ghana to the extent that these countries have made progress and learn valuable lessons from the two countries' failures, challenges and shortcomings. The process of implementing their obligations under article 9 of the African Women's Rights Protocol as analysed in section two above must commence with

¹⁴⁰ In fact, the continent's list of female heads of state is very brief and uninspiring: Catherine Samba-Panza (Central African Republic 2014); Ellen Johnson-Sirleaf (Liberia 2006 -); Joyce Banda (Malawi 2012-2014); Ameenah Gurib-Fakim (2015 -).

¹⁴¹ SJ Kpundeh (ed) *Democratization in Africa: African views, African voices* (1992) 21.

¹⁴² Paxton (n 124 above) 146.

an honest audit of a country's obligations and processes through a multi-stakeholder process. This way, countries will be able to gauge progress, if they have already commenced the process; identify and consolidate gains; identify, isolate and dedicate targeted effort towards plugging gaps in implementation; and identify channels for collaboration and learning.

It is worth noting that while advocating for intra-Africa learning, African states should take into account specific country realities and avoid misguided attempts at one-size-fits-all attempts.¹⁴³ As such, the above analysis is not representative of all African countries, neither are the proposed solutions desirable for all countries. However, this should not be mistaken for an apologist free pass for countries that have made no effort at realising women's right to political participation or those that have made half-hearted aesthetic attempts. Rather, it should be understood as being an appreciation of the unique and diverse circumstances of African countries while at the same time recognising the common features and ideals of democracies.

¹⁴³ See Relaunching Africa's Economic and Social Development: The Cairo Agenda for Action, AHG/Res 236 (XXXI), 26-28 June 1995; Algiers Declaration, AHG/Decl 1 (XXXV) 12-14 July 1999; Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl 5 (XXXVI), 10-12 July 2000; UN General Assembly, Resolution 60/1 (24 October 2005) para 35.