



Report

# Women and power

## Shaping the development of Kenya's 2010 Constitution

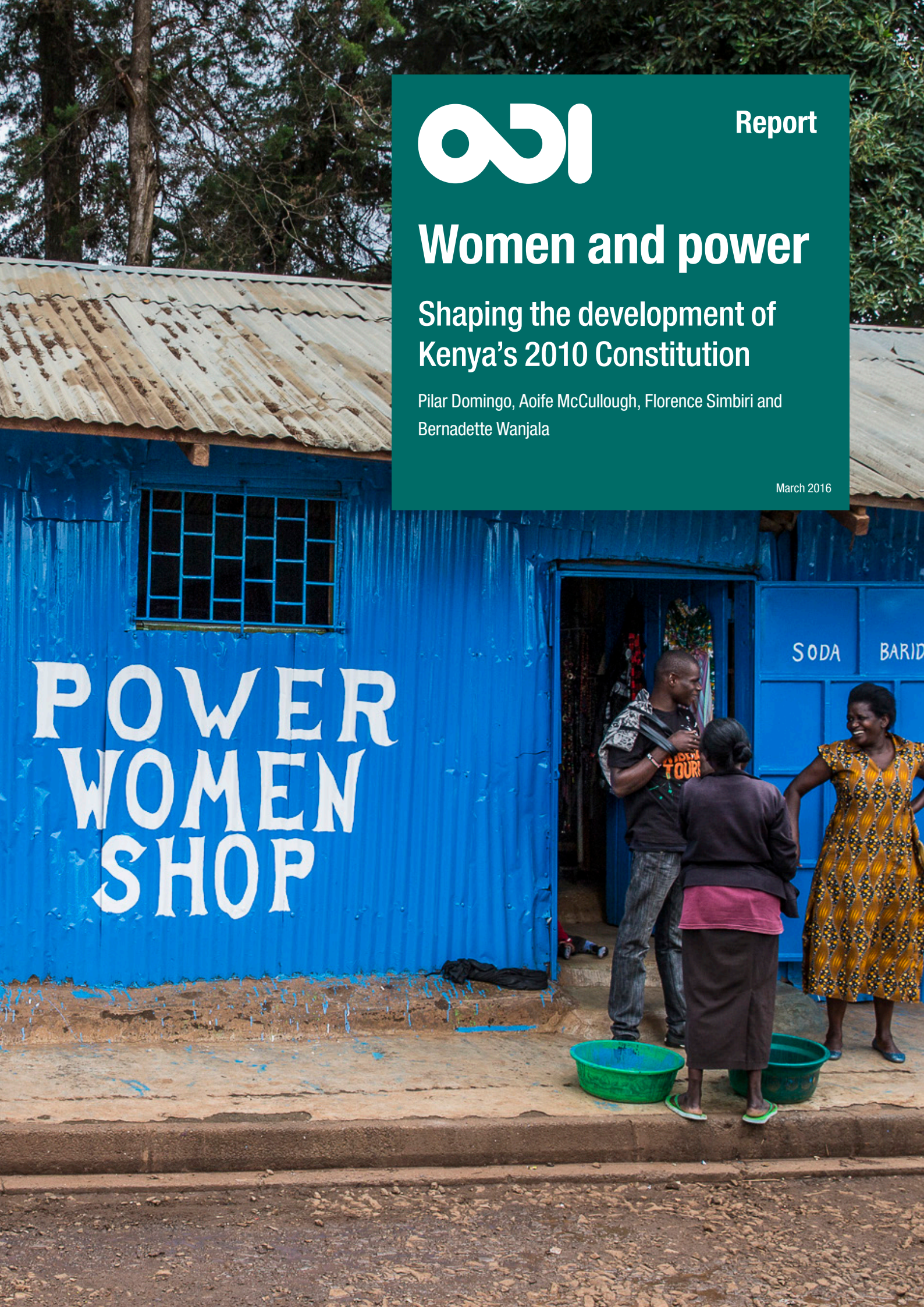
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Cover photo: Power women shop and workshop. Credit: Ninara

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## About the research

This case study is an output from the Women's Voice and Leadership in Decision-Making project. This two-year (2014-16) evidence and learning project, funded by the UK Department for International Development, asks: (i) What enables women's substantive voice and influence in decision-making processes? (ii) Does women's presence and influence in decision-making improve outcomes for other women and advance gender equality? (iii) How can international actors better support women's leadership and decision-making? In answering these questions, the research has examined the relationship between women's political, social and economic power and resources, both individual and collective.

Project activities and outputs include:

- A global review of the evidence on women's voice and leadership, with thematic chapters on women's political participation, social activism and economic empowerment,
- A rapid review on women and girls' leadership programmes,
- A rapid review on women and girls' use of digital information and communication technologies,
- Five empirical case studies on women's leadership and decision-making power, in Afghanistan, Bangladesh, Gaza, Kenya and Malawi,
- A synthesis report and policy briefings.

More information can be found at:  
[odi.org/women-and-power](http://odi.org/women-and-power)

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# Acronyms

<b>CDF</b>	Community Development Fund
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CKRC</b>	Constitution of Kenya Review Commission
<b>COE</b>	Committee of Experts
<b>COVAW</b>	Coalition on Violence Against Women
<b>DFID</b>	Department for International Development
<b>FGM</b>	Female Genital Mutilation
<b>FIDA</b>	Federation of Women Lawyers in Kenya
<b>GBV</b>	Gender-Based Violence
<b>IEBC</b>	Independent Electoral and Boundaries Commission
<b>KANU</b>	Kenya African National Union
<b>KEWOPA</b>	Kenyan Women Parliamentary Association
<b>KWPC</b>	Kenya Women's Political Caucus
<b>MCA</b>	Member of County Assembly
<b>MP</b>	Member of Parliament
<b>MYWO</b>	Maendeleo Ya Wamawake Organisation
<b>NARC</b>	National Rainbow Coalition
<b>NCGD</b>	National Commission on Gender and Development
<b>NCWK</b>	National Council for Women in Kenya
<b>NGEC</b>	National Gender and Equality Commission
<b>NGO</b>	Non-Governmental Organisation
<b>PSC</b>	Parliamentary Select Committee
<b>UK</b>	United Kingdom
<b>US</b>	United States
<b>USAID</b>	US Agency for International Development

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# Executive summary

This study focuses on the role of Kenyan women and gender activists in shaping the 2010 constitutional reform process in Kenya and the outcomes of this in relation to advancing gender equality and a women's rights agenda. Constitutional reform is an important window of opportunity with respect to renegotiating the rules of the game regarding how power is exercised and resources are distributed. For non-elite groups, it is thus a relevant site of contestation for struggles aimed at institutional and political change that address discrimination and exclusion. We aim here to use the Kenyan case to see how women can increase their access to influence and decision-making through political action and social mobilisation.

The 2010 Constitution, as the outcome of growing political and social pressure to address the failings of the post-colonial political order, represents an important milestone in Kenya's political process. Opposition forces and an increasingly mobilised social movement reflected increased demand for democratisation and a more inclusionary and rights-based model of state–society relations.

From the 1990s up until a new Constitution was approved by referendum in 2010, Kenya saw a succession of attempts at constitutional reform, mostly trumped by resistance from political parties and elite actors unable and unwilling to find sufficient common ground for compromise.

Within this process, there is wide consensus that the women's movement and feminist activists were among the interest groups that most effectively mobilised to (1) influence the wider normative content as well as advancing very concrete objectives relating to women's rights and (2) maintain the general momentum behind the constitutional reform process. This included ensuring the process was sufficiently participatory and took on board a range of demands.

Influential feminist activism was not new in Kenya by any means. Rather, the Constitution of 2010 and its gains for women need to be seen against a longer-term continuum of laws and policies that already reflected the autonomy, political capabilities and experience of women's movements and gender activists. Developments since the 1990s indicate a trend towards a thickening of women's activism that attests to growing capacity for agenda-setting and legal change. This is despite limited access to formal decision-making in formal political space and in a context of patriarchy and discriminatory gender norms.

## Key achievements: gender equality and women's rights in the 2010 Constitution

The 2010 Constitution is a progressive text that advances women's participation in political, social and economic life and establishes important gains on women's rights and gender equality.

In terms of the **normative content**, it establishes an ambitious Bill of Rights that contains specific gains in relation to women's rights – as well as on the *justiciability* of rights. The Constitution also establishes a **set of values and principles** trumping any discriminatory law, practice or action – including in relation to customary norms and tradition. Affirmative action measures compensate for historical inequality and discrimination – an especially important victory for women. It furthermore sets up an **institutional framework of checks and balances**, including through strengthened judicial review something women activists actively lobbied for. In sum, the Constitution potentially provides an enabling institutional architecture for the realisation and protection of women's rights and gender equality principles.

## Process of change: how women exercised influence to shape constitutional reform outcomes

The strategic choices, modes of engagement and institutional-political opportunities for women's influence are not single factors or moments of change that simply allowed the women's movement to mobilise and negotiate for a gender-progressive constitution. Rather, what emerged was a series of political openings that the women's movement took advantage of, which in turn created further political openings. The women's movement often met with resistance to changes in the *status quo*. This took many forms, including attempts to foster divisions in the movement, rejection of motions on affirmative action in parliament, verbal and physical abuse towards females who accessed political power and political machinations to ensure articles negotiated by both the women's movement and civil society were watered down in the draft that went to referendum in 2005.



No single strategy explains the gains women achieved through the constitutional reform process. Institutional change is an uneven process, and what follows from the iterative layering of strategic action – institutional change – is a complex and uneven sequencing of change and counter-change. However, a number of features characterised how women engaged with the democratisation process generally, and specifically with shaping the constitutional reform process and outcomes:

- *Making use of political opportunity structures:* Kenyan women's activism flourished from the early 1990s, with the formation of a multitude of distinctly political networks, coalitions, organisations and committees. Women organisations embraced the constitutional review process as a key political opportunity and focused their energies on ensuring women activists influenced the process at each stage.
- *Engaging with the state, using formal institutions:* The most effective engagement with parliamentary life has been through the work of the cross-party women's parliamentary association (KEWOPA), which has proved highly effective in generating new gender-sensitive laws and 'engendering' to some extent parliamentary life. Women's engagement with the state has also facilitated an emerging framework of gender machinery, for example the Ministry of Gender, Sports, Culture and Social Services in 2004 and the National Commission on Gender and Development. International frameworks and conventions on gender equality also contributed to informing feminist and gender agendas in Kenya; these were internalised and appropriated to become a locally driven agenda.
- *Strategic use of the law and court activism:* During the 1990s and 2000s, the movement was dominated by female lawyers who articulated their arguments in formal legalistic language, to negotiate with male politicians in a style recognised and respected by a patriarchal system, to draft motions and bills and later on to analyse drafts of the constitution for their legal impact on women. Women also emphasised the need to strengthen accountability mechanisms to maximise the chances of protecting any legal gains gained through constitutional reform.
- *Networking, lobbying and strategic engagement in different areas:* Women activists used their political acumen to build strategic alliances and coalitions, including lobbying male politicians and key power holders at different levels. They also used media skills to communicate with women not directly involved in the process. The women's movement provided civic education to key interest groups, as well as holding context-specific dialogue with key gatekeepers, such as religious and community leaders, local judges and dispute resolution arbiters to enable sensitisation on many of the issues.

- *Informal strategies:* In a context of restricted formal access to decision-making, women used the space available to them creatively, for example by subverting or contradicting norms for female behaviour, thus attracting media attention to their agenda.

## Enabling factors

The main sets of factors that shape, enable and constrain women's capacity for influencing political and public life are as follows:

- *Political and institutional factors:* The change from single- to multi-party rule created political space to negotiate Kenya's new political dispensation. Political opposition, civil society and the women's movement mobilised to push for democratisation and to negotiate a new Constitution. This was an uneven and contested process, punctuated by episodes of violence during elections and weak elite agreement regarding the underlying political settlement. In this context of political change, the constitutional reform process became a strategic channel through which the women's movement was able to negotiate new rules of the game.
- *Capabilities and resources:* These include research capacity and academic influence; high-quality technical knowledge and professional expertise; purposive investment in political skills and lobbying capabilities; and the experience itself of engaging in political activism in the different arenas, which helped women develop political acumen.
- *International factors:* Although the constitutional reform process was home-grown, the Kenyan women's movement also benefited from direct support from the international community, mainly through funding for training. Some of this funding was flexible, which allowed women's groups and civil society groups to access funding for short-term initiatives in the lead-up to the 2010 referendum on the Constitution.

## Impact of the 2010 Constitution on women's access to political and leadership positions and on gender equality gains generally

The 2010 Constitution has created new opportunity structures for women's access to decision-making roles in public and political life and advancing gender equality. The Constitution is clear that not more than two thirds of members of elective or appointed bodies can be of the same gender. In addition to the two thirds rule, the Constitution stipulates that 47 'Women's Representatives' be elected by registered voters in each county to form part of the

National Assembly. This is in addition to the 290 members elected by registered voters of single-member constituencies.

First, there are gains in women's political presence. In the 2013 elections, 47 women were elected as Women's Representatives for each of the counties. Their presence in addition to the women elected at constituency level increased the overall proportion of women in the National Assembly to 19.1%, from 7.5% in 2011. At the county level, seats were allocated to women following the elections to bring the proportion of women in the County Assemblies up to 30%. There were also significant increases in female representation in the executive and judicial sectors between 2011 and 2015.

However, while the overall picture is encouraging, the introduction of a quota system has created a new set of challenges for women in formal political life. Crucially, the introduction of 47 seats for Women's Representatives does not ensure at least one third representation of women in the National Assembly. In fact, political parties are using the allocation of seats to women to discourage women from vying in the constituency elections and voters from voting for women (using the argument that a vote for a woman is a wasted vote as she already has her seat), thus potentially curtailing the representation of women in the National Assembly to 13%. The funding system is used to further categorise Women's Representatives as different and lesser than constituency MPs. Women's limited control over the funds they can use to implement projects weakens their influence and access to power. The quota system is being used to portray women as 'second-class' politicians.

Second, more women in appointed positions also constitutes an important change in women's access to decision-making roles. It is significant, for instance, that women's presence has increased in a strengthened judicial branch, including in the higher courts. Overtime this presence can contribute to changing perceptions and beliefs about women occupying decision-making roles in public life.

Third, the new checks and balances and accountability mechanisms established by the Constitution has further broadened the range of forums for engagement by gender activists has broadened. Recourse to litigation and court action to advance women's rights and hold the state to account is being used to good effect. This combines well with the work of other oversight mechanisms, such as the new National Gender and Equality Commission tasked with monitoring the implementation of constitutional gains on gender equality and protection from discrimination.

Meanwhile, the informal rules governing power relations in Kenya remain patriarchal: the constraints that limited female involvement before the reforms remain critical factors limiting the impact of the reforms. Female politicians still cited violence, intimidation and more subtle manipulation of voters' expectations of female politicians as key factors dissuading them from entering the 2013 elections. Many forms of political canvassing used by male candidates remain socially unacceptable for

female candidates, while gendered ideas of what makes a good leader limit the impact of allocated seats. Most women in Kenya are not in a position to have access to formal justice mechanisms, in order to benefit from the new constitutional order. In a context where legal pluralism characterises much of the institutional reality of the country, formal legal and constitutional change is inevitably limited.

Finally, it is important not to overstate the 'unity' of women in Kenya. Divisions relating to political, ethnic, family, kinship and class divisions and loyalties exist country-wide, and this is no less the case for women in the National Assembly and in the women's movement. For example, although there is some evidence of women using some of the previous strategies to build support on issues, once affirmative action had been achieved divisions within the women's movement soon became apparent. In addition, following the introduction of Women's Representatives, divisions between women MPs became more accentuated. KEWOPA has now divided into three distinct caucuses: a caucus for the Women's Representatives, one for the 16 constituency MPs and one for the 16 nominated female senators. This has weakened its effectiveness.

## Conclusions

Kenyan women's influence on the content and implementation of a constitutional reform process shows how such moments for formal legal change are a unique window of opportunity for women's influence. Through negotiating access to decision-making forums in the constitutional review process, women were able to argue and lobby for the inclusion of a raft of gender-progressive articles and a series of checks and balances on executive power.

There has been a tendency to trivialise legal change, especially where politics and decision-making normally take place through informal channels. Yet legal change can activate changes in incentive structures and affect entrenched interests. What this study, and indeed a growing body of work on the politics of legal change, shows is that we need to 'repoliticise' our understanding of legal change. *The technical is political*, and in practice this is often undervalued.

Women activists (as is true of all political brokers) are effective when and because they are able to navigate formal and informal institutions, practices and relationships, through politically savvy engagement that straddles these different arenas and sites of exchange and decision-making. There is a need for more research on what this looks like, drawing on an emerging body of work in feminist institutional analysis.

However, there is also a need to temper our enthusiasm for how much formal change can translate into meaningfully transforming multiple levels of norms, belief systems and practices. In the challenges of implementation, there is a need for a much finer analysis of how constitutional change can affect norms, belief systems

and practices. The transformative impact and sustainability of constitutional reforms are inevitably hostage to wider political economy conditions – like all progressive agendas. Resistance and backlash take many forms. Typically, elite actors will aim to subvert or ignore rule changes that undermine their interests.

Finally it is important to recognise the value of the technical knowledge and expertise of women activists in a range of specialist organisations and think tanks, and the support and presence of feminist academics across a range of disciplines. This contributed to supporting the development of a Kenyan feminist agenda – notwithstanding the important cleavages and divisions among women’s voice relating to class, regional, ethnicity-based and religious identities, and political and ideological preferences and allegiances.

## Recommendations

- **Continue to invest in women’s movements.** This includes organisational support and logistical support to facilitate cross-country networking.
- **Support accountability, oversight and constitutional implementation mechanisms,** and women’s engagement with these, including the implementation of constitution oversight mechanisms and strategic litigation strategies that can activate judicial review and oversight.
- **Invest in political and technical capabilities to advance on legal change** to align with the 2010 Constitution. This includes engaging with hard issues like violence against women and support to women’s access to land rights and property. Where social norms are ‘sticky’, this involves multi-level multi-pronged strategies.
- **Invest in national capacity for knowledge production.**
- **Invest in higher education for women,** to support the development of technical skills and expertise required at different stages of policy and legal change and implementation, as well as recourse to different oversight, accountability and legal redress mechanisms.
- **Invest in flexible approaches to support that can adapt to emerging political opportunities** as these arise. This can allow for responsive support to changing conditions.
- **Women’s empowerment is a powerful agenda, particularly when owned and driven by national women.** Drawing on locally owned knowledge and strategies to identify entry points and modes of engagement to shape programming choices will contribute to more effective support and minimise the risk of doing harm (including in terms of rejection of a women’s empowerment agenda on the basis that it represents foreign or Western values).
- **Invest in brokering networks and strategic alliances,** including through creatively navigating informal norms and institutions in political and social space.

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# 1. Introduction

This paper is one of five country cases that features in the Women's Voice and Leadership project funded by the UK Department for International Development (DFID). Its focus is on Kenyan women and feminist activists' influence in shaping the constitutional reform process and the outcomes of this in terms of advancing a gender equality agenda and women's rights. The aim is to contribute to understanding how non-elite groups can influence political and institutional change, and how women in particular can increase their access to influence and decision-making through political action and social mobilisation.

Constitutional reform is a purposeful political process of normative change whereby the *formal* rules of political, social and economic engagement are the object of redefinition. It is thus an important window of opportunity to contest and renegotiate how power is exercised and resources are distributed in a given polity. From the perspective of non-elite groups, constitutional reform offers the possibility of challenging those rules that either confirm or contribute to their exclusion and discrimination from access to decision-making roles, power and control of resources. Following from this, constitutional reform is thus a relevant site of contestation for struggles aimed at changing gender norms and legal forms of gender-based discrimination and exclusion.

There is relatively little political analysis of how constitutional reform processes unfold and with what impact (with some important exceptions).<sup>1</sup> Instead, much comparative work on constitutional reform remains the domain of legal scholarship or tends to take the form of single-country monographs. There is also an important gap in the literature on how women's rights and gender equality agendas are advanced in such processes, with some recent exceptions.<sup>2</sup>

This case study examines Kenya's experience from the perspective of women's activism, influence and gains for gender equality in the political process that led to the 2010 Constitution; it also considers the opportunity structures this reform process created for enhancing women's political voice and access to decision-making and advancing women's rights more generally. It situates women's and feminist engagement with the constitutional reform process against the wider political economy of Kenya's

political development since the early 1990s and analyses the key features of this engagement to achieve the formal legal change and gender equality gains present in the new Constitution. It identifies a range of enabling factors that help explain the institutional and political opportunity structures available for feminist social and political action and the capabilities women activists drew on to make use of these. Finally, it points to the constraints, resistance and challenges encountered leading up to 2010 and in the post-2010 implementation process.

While the focus is on the achievement of gender equality gains in the new Constitution, the study also reflects on the post-2010 context, the impact of the new political dispensation and the challenges associated with implementation of new *formal* gender norms. On the one hand, the progressive text of 2010 – not least relating to women's rights – attests to the effectiveness of women's strategic engagement with the complexities of Kenya's constitutional reform history. Moreover, the Constitution has created new opportunity structures for women's access to decision-making roles in public and political life and in advancing gender equality. It has also put in place new forms of legal redress for the violation of women's rights and against gender-based discrimination. On the other hand, implementation of the Constitution has not been without challenges in relation to gender gains. These reflect both the resilience of long-standing barriers to women's voice and access to decision-making and new constraints and manifestations of resistance and backlash that women face in the post-constitutional reform context.

## 1.1 Key research questions

The key research questions that guide this study are as follows:

- **What were the main achievements of constitutional reform for women in the Kenyan Constitution of 2010?** This includes identifying formal constitutional gains in terms of gender equality, and opportunities for influence and leadership that the reform process has established.
- **What were the main features of women's engagement with the constitutional reform process?** That is, *how* did women's movements, feminist leaders and women

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1 See, e.g., essays in Galligan and Versteek (2013) on current research and key debates on the politics of constitutional design and outcomes.

2 See, among others, Waylen (2006), essays in Williams (2009) and Baines et al. (2012), concretely on Sub-Saharan Africa, Tripp (2009, 2011, 2014, 2015) and Tripp et al (2009).

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politicians gain and exercise influence to achieve gender equality gains? How did they navigate what was a highly contested process of institutional change and political negotiation that had dominated Kenyan politics for almost two decades?

- **What have been key enabling factors in and constraints to women's voice and influence in the constitutional reform process?** What socio-political, institutional and capability-based factors contribute to explaining women's capacity to influence the constitutional reform process and to secure certain outcomes? What obstacles do women face in political life in Kenya?
- **What has been the impact of the 2010 Constitution on advancing women's voice and rights in practice?** What are the constraints/limitations and opportunities for follow-up on the gains for women through the implementation of the new Constitution? Given the challenges of resistance and backlash, what is the progress on legislation intended to align law with the new Constitution and how has women's influence adapted to the implementation process?

The outcomes of the reform process here refer to the formal affirmation of women's voice and access to decision-making roles in political, social and economic life as reflected in the gains of the 2010 Constitution. They also include the degree to which there has been *actual* affirmation of women's access to decision-making roles in public and political life in practice and the advancement of women's rights and gender equality objectives more generally – not only as a result of formal change but also as the cumulative impact of the 'political apprenticeship' that emerged from the very experience of engaging with constitutional reform and other processes of institutional change.

## 1.2 Research, data collection and analysis methods used

The history of the women's movement and gender activists in Kenya, including in relation to their influence on the 2010 Constitution, has been the object of study in academic and policy research, especially among Kenyan scholars.<sup>3</sup> This case study combines a review of this body of relevant secondary sources – including academic and grey literature – and some primary research. Primary research included reference to primary documentary sources, mostly legal and constitutional texts, and a country visit to Nairobi in 2015. Interviews were carried out to understand in more detail the experience of feminist activism in social and political life leading up to 2010, and newer challenges women leaders face in public and political life in Kenya despite, or even as a result of, achieving a gender progressive constitution that includes a commitment to affirmative action.

Primary data for this research were collected from July to October 2015. Qualitative semi-structured interviews with individuals were used: in total, 20 such interviews were conducted, six with key members of the women's movement, four with parliamentarians (three women and one man), one with a member of the judiciary and five staff at non-governmental organisations (NGOs) working on women's empowerment in Kenya. Most (17) interviews were conducted by an Irish and a Kenyan researcher in Nairobi. Further interviews were carried out with the US Agency for International Development (USAID), with another member of the Kenyan judiciary and with another key member of the women's movement by a Spanish/Bolivian and an Irish researcher based in London. See Annex 1 for details of respondent categories.

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3 See Cottrell (2015); FIDA (2010, 2013); Kabira (2012); Kabira and Kimani (2012); Maingi (2011); Tripp et al. (2014).



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## 2. Setting the scene: the politics of constitutional reform in Kenya

This section situates the influence of women's movements and gender activists on the 2010 Constitution in the wider history of post-colonial political development and, more recently, the truncated and conflictive process of stop-and-start democratisation since the 1990s. The 2010 Constitution is a highly progressive charter that represents an important milestone in Kenya's political process. It was the outcome of growing – and conflictive – political and social pressure and demand to address the failings of the post-colonial political order (following independence in 1963) that was increasingly perceived as exclusionary, corrupt and socially unjust – including after formal transition from single- to multi-party rule in 1992. The 2010 Constitution was also the culmination of a spiralling process of political conflict, escalating electoral violence, human rights violations and unresolved elite competition that led to internal and external pressure for change. The call for constitutional reform by opposition forces and an increasingly mobilised civil society and social movement reflected growing demand for more democratisation and a more inclusionary and rights-based model of state–society relations.<sup>4</sup> Women's movements were an important voice in this demand.

### 2.1 Constitutional reform: a key window of opportunity for advancing gender equality and women's rights

Constitutional reform processes are strategic windows of opportunity to resettle the terms of political, social and economic engagement. In Kenya – as elsewhere – the process and outcomes unfolded against a wider history of political contestation and negotiation between competing elites over the political settlement and institutional

make-up of the polity. Constitutional reform outcomes are strongly associated with changes in the reigning elite bargain and also reflect shifts in the balance of power – including as previously excluded groups may acquire bargaining power and presence in the process. Finally, the impact of a new constitutional order, its resilience and its capacity to frame social and political conduct are in turn a measure of the degree to which it mirrors an acceptance by elite actors to be bound by the new rules of the game and a wider societal acceptance of the new normative order.

Importantly, global trends in constitution-drafting, at least since the third wave of democratisation, include first that the *process* of reform has become (and is expected to be) much more participatory and consultative, in contrast to earlier experiences of constitution-writing, with the aim that this will facilitate inclusivity and secure wider legitimacy of the political order.<sup>5</sup> Second, the normative *content* of newer constitutional texts tends to be more detailed and ambitious in terms of placing limits on the exercise of political power (variably, through different checks and balances, political accountability and judicial review mechanisms); and, typically, through the expansion of rights and entitlements – going beyond more traditional political and civil rights to include social and economic and special group rights. The latter reflects, in many cases, more effective voice and presence in reform processes of non-elite groups, and the fact of the normative ascendancy of the rights of vulnerable, excluded or minority groups (women, children, ethnic and cultural minorities, people with disability, LGBT groups).<sup>6</sup> These trends are supported by the 'thickening' or increased presence and use of international and regional normative frameworks (which are not uncontested) on different sets of (human) rights

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4 See, notably, essays in Murunga et al. (2014).

5 For instance, 18th and 19th century constitutions and early post-colonial constitutions in the 20th century were mostly the outcome of closed discussions among white, elite men. The US Constitution is a prime example of this – and typically most independence constitutions in Latin America and in post-colonial Africa (Ghai and Cottrell, 2011; Waylen, 2006).

6 See, e.g., Ghai and Cottrell (2011), IDEA International (2011) and Widner (2005, 2007) for recent discussions on contemporary trends in constitutional reform process and design – including in post-conflict settings.

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that have increasingly travelled into domestic constitutional and legal change (Risse and Ropp, 1999; Sikkink, 2001).

However, while these trends are fairly widespread, they tell us little about the sustainability and transformative impact or ‘success’ of constitutional reforms in terms of substantively reshaping the *de facto* practice of political, social and economic engagement. Mostly, new constitutions represent aspirational efforts to constrain and limit the formal exercise of power. They are also intended as foundational documents, for instance in post-conflict settings, to achieve agreement around a common project of social, political and economic development and resolve divisive social and political grievances and cleavages. In practice, the history of post-transition and post-conflict countries of the 20th and 21st century is littered with constitutional frameworks that either do not take root or are only partially and begrudgingly implemented by reluctant elites. Moreover, the capacity to resist those features of new constitutional law that challenge entrenched interests is a predictably recurrent feature of unstable transitional contexts, all the more so when elite actors remain insufficiently incentivised to feel bound by the new rules and are in a position to disrupt or undermine them. This includes resisting new constitutional rules aimed at eliminating discriminatory gender norms that can result in an important redistribution of power and resources.

Following from this, the sustainability and survival of contemporary constitutional agreements will in many respects be associated with at least four issues. First, *who* is involved in drafting the text can make a difference to its legitimacy, depending on levels of consultation and inclusiveness. Of course, what constitutes ‘inclusive enough’ constitution-writing is a political consideration and inevitably contested. Second, the *content* matters in terms of how closely it matches the expectations and aspirations of different actors, addresses divisive issues or constitutes a social and political project that garners sufficient levels of consensus across different groups and interests. Third, for a constitutional text to be ‘activated’, to limit the exercise of power and to substantively shape the rules of political, social and economic engagement there needs to be sufficient institutional, organisational and bureaucratic capacity in place to oversee and regulate *implementation and enforcement*. The governance features and capabilities of a polity thus matter. And fourth, realisation of constitutional aspirations is ultimately a political matter, closely associated with how much they mirror the actual terms and reality of the underlying political settlement and elite bargain. For the ‘limiting’ and rights-protecting aspects of a constitutional text to shape social, political and economic conduct, key actors and elite

groups need to feel sufficiently bound by (or agree to be bound by) the rules of the game that it posits.

It is now quite common for elite actors to settle for progressive constitutional texts – including in relation to women’s rights and political power – as a matter of short-term political expediency during a reform process but with little intention of complying with the content. And, mostly, those actors who perceive they will lose out as a result of the redistributive intent of a progressive constitution, such as the Kenyan one, will likely resist its implementation. Thus the ‘success’ of a constitutional text depends in large measure on levels of elite consent to be bound by its rules *in practice*, on the one hand, as well as on broader societal acceptance of the fairness of these rules, on the other.

Of course, there are no straightforward answers on how to resolve these issues. However, constitutions have become more progressive and inclusionary over time. Moreover, constitutional reform in recent and contemporary Africa and Latin America has become an increasingly important channel for the voice and interests of groups traditionally excluded or underrepresented in shaping the rules of the game (e.g. Ghai, 2014). Women and gender advocates have also increasingly engaged strategically with these potentially game-changing moments of opportunity.

In the end, however, as Widner notes (2008), there is no clear recipe for what can count as a successful constitutional agreement. In practice there are many examples of constitutional texts that become irrelevant or do not mirror the *de facto* rules of social and political engagement. Moreover, experiences of constitutional reform and their impact in terms of shaping political trajectories have varied hugely over time, reflecting historical context and period, dominant ideational and normative paradigms and changing expectations about the intent of constitutional design<sup>7</sup>. They thus need to be considered in the context of longer-term processes of institutional, political, ideological and socioeconomic change.

There is wide consensus in the literature on the Kenyan constitutional reform process that women’s movements and feminist activists were among the interest groups that mobilised most effectively, first to influence the wider normative content as well as to advance very concrete objectives relating to women’s rights; and second to maintain the general momentum and drive behind the constitutional reform process. This included ensuring that the constitutional reform process was, in the end, sufficiently participatory and consultative, and that it took on board a range of demands, including from non-elite actors (Cottrell and Ghai, 2007; Ghai, 2011; Kabira, 2012). Women’s activism was important thus for their consistently progressive stance across a range of issues,

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7 Modern constitutionalism (dating back mainly to the 18th century) reflects the following trends. First, constitutional texts have become longer and more prescriptive in terms of normative content. Second they have become more detailed in terms of the institutional design of the polity. Third, in the 20th century and especially with the third wave of democratisation and since, there is an expectation of greater levels of participation and consultation in the content and acceptance of an agreed text.

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and for ensuring that efforts to water down the oversight, accountability and checks and balances mechanisms introduced in successive drafts were kept in check (Maingi, 2014; interviews).

## 2.2 Political-institutional and structural context of Kenya prior to 2010

Constitutional reform was a key feature of the political agenda in Kenya for at least two decades, from the formal move from single-party rule to multi-party electoral politics in 1992. Alternation in power remained problematic, and the ruling Kenya African National Union (KANU) was not defeated through electoral contest until 2002. At the same time, democratisation brought with it the political aperture for opposition forces (in both civil society and political party organisation) to voice demands for political and constitutional change that finally resulted in the 2010 Constitution.

A number of political-institutional and structural features of Kenya's political and development landscape are especially relevant to our story of women's influence on constitutional reform.

Following independence, the Kenyan political system rapidly became a *de facto* single-party state, formalised through a constitutional amendment in 1982. It remained that way until 1992. Political power under the presidencies of Jomo Kenyatta and his successor Daniel Moi was concentrated in the executive branch. All mechanisms of horizontal accountability and oversight were purposefully weakened, including through a succession of institutional and constitutional changes in the 1960s. This included, principally, moving away from a parliamentary to a presidential system, subordinating the judiciary, the Attorney-General's Office, the National Police Force and the Electoral Commission and strengthening the coercive capacity of the state with the purpose of protecting ruling elite interests and either co-opting or keeping all expressions of political and social opposition in check. Abolition of regional government further enhanced the concentration of political and state power.

With this centralisation of power and the absence of accountability mechanisms came state predation and use of patronage to secure political loyalty for successive governing elites (Ghai and Cottrell, 2011; Kanyinga, 2010; Sundet, 2010). Women had limited access to patrimonial politics, which in turn limited their access to political power. The colonial government had recognised the value of some form of inclusion of women in development issues and supported the formation of Maendeleo Ya Wamawake Organisation (MYWO), the largest women's organisation in Kenya to date. The independence government was quick to use this to mobilise political support and provide social projects for women. MYWO became formally

affiliated with KANU in the 1980s.<sup>8</sup> A mutually beneficial relationship emerged whereby the movement was used for political mobilisation contributing to reaffirming a patriarchal order. In turn, it was rewarded with social programmes and or projects at a remove from political decision-making spaces.

Although multi-party politics was formalised in December 1991, in response to increasing popular protest, alternation of power resulting from electoral competition did not take place until 2002. Instead, the zero-sum logic of centralised presidentialism in Kenya intensified the 'winner takes all' dynamics of electoral competition. Competing political leaders mobilised private militias and gang violence in their efforts to secure electoral gains and access to the spoils of state power – this was true of both incumbent forces and opposition parties. During the 1990s and into the 2000s, the high-stakes nature of patrimonial-based politics combined with the uncertain outcomes of electoral competition resulted in successive attempts at fragile political coalitions and an escalation of electoral violence (Zezeza, 2014). In this context, ethnicity and regional rivalries became prominent features of the fault lines underlying electoral violence. Political elites instrumentalised ethnic rivalries during elections, exacerbating conflict and violence; more fundamentally, these reflected more structural issues of regional inequality and unresolved conflict over the distribution of land and patterns of social exclusion (Akech, 2010; Kiringai, 2006).

In this context of fragile elite bargains and growing social protest, the matter of renegotiating the political rules of the game through constitutional reform became a key theme. Constitutional reform was seen as the solution to political conflict; in turn, the fragility of elite agreements successively undermined and disrupted constitutional reform efforts.

Muhula and Ndegwa (2014) note that, 'A distinctive feature of Kenyan politics is the resilience of pact-making as an immutable part of the country's political life.' This point is important, as it situates the process of constitutional reform against a longer history of elite adaptation (at times disruptive, at times conciliatory) to changing times and social demands for reform, thus recognising the 'protracted nature of political processes, such as democratisation and constitution-making' (ibid.).

Constitutional reform should be seen, then, as one of a succession of moments of institutional change and political negotiation, reflecting a longer-term process of cumulative shifts in the balance of power. On the one hand, Kenyan politics since the 1990s has been punctuated by escalating levels of political violence and elite conflict manifested especially during electoral competitions. This has featured alongside recurrent negotiations among political elites, including in response to the growing presence of oppositional voice (social movements, including

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8 <http://mywokenya.org/index.php/about-us/history>

women's movements, and civil society), to settle a course for agreed political and institutional change. This is reflected in ongoing – if truncated – efforts to negotiate a new constitutional text. We thus see the reform through the lens of cyclical patterns of 'change and counter-change' rather than as a resolved endpoint in Kenyan political development. The new constitution is an important milestone but will not in and of itself resolve the root causes of conflict in a problematic experience of democratisation.

The dynamics of 'change and counter-change' is especially relevant analytical lens to understand women's strategic engagement with the reform process to achieve women's rights and gender equality. As early as 1992, women's movements and women politicians became critical actors in shaping both the process and the content of the debate on constitutional reform (Cottrell and Ghai, 2007; Maingi, 2011). Alongside this debate, feminist activism in social and political life also translated into other more gradual efforts at legal change. Both the 2010 constitutional reform and the progressive thickening of legal gains for women before (and after) have generated different manifestations of resistance and backlash specifically against women's rights gains, and more generally against other progressive gains. But, importantly, as this case study shows, the gains themselves create new opportunity structures for voice, leadership and rights of women – and expressions of backlash need to adapt to the new political, institutional and normative conditions put in place by the 2010 Constitution.

## 2.3 Development of the women's movement

Women's movements have a long history in Kenya. Until the early 1990s, much of this engagement was focused on social development issues, and it was mostly pursued in politically neutral language.<sup>9</sup> From the early 1990s, and concretely as a consequence of the National Women's Convention held in February 1992, women's political voice became more coherent and visible. The National Council of Women of Kenya and FEMNET came together hosting more than 2,000 Kenyan women from all parts of the country. This marked a turning point in the orientation of women's collective action. The Convention inaugurated a purposeful agenda to push for women's access to elected positions and political/public decision-making and leadership roles (Kabira and Kimani, 2012).

In describing the 'women's movement' in Kenya, it is important not to lose sight of the diversity of organisations that this has included. While the movement tended to be characterised in the 1960s, 1970s and 1980s by a limited number of national organisations, the 1990s witnessed the

development of a wide range of women's organisations, which revitalised the endeavour. These included religious organisations (e.g. the Muslim Consultative Council Sisters Network), welfare organisations (e.g. the Widows and Orphans Welfare Society of Kenya) and civic education networks (e.g. the Centre for Rights Education and Awareness). Women in these organisations held diverse views and came from radically different backgrounds: the Kenyan women's movement cannot be seen as a unified or homogenous force. One important cleavage was that of the urban–rural divide. However, while recognising the diversity and divisions within the movement, it is worth highlighting several key organisations and developments for their impact on the focus and direction of the movement:

- MYWO came into being in 1952. It was initially started by a group of white women settlers but soon became a Kenyan women's organisation. Under colonial rule, it was mostly oriented towards social development and welfare issues, and it evolved into the main women's organisation until the 1990s. It was, however, in practice, the women's wing of KANU – and in 1987 was appointed officially as the representative of women's voice, under the Moi presidency.
- The National Council for Women in Kenya (NCWK) was set up in 1964 as a national umbrella organisation. Its purpose was to strengthen and unite women's organisations across Kenya.
- The UN Conference on Women took place in Nairobi in 1985. Importantly for Kenyan gender activists, this encouraged the creation of a number of women's organisations, including the Federation of Women Lawyers in Kenya (FIDA), in the same year. A number of women's rights organisations have developed since the 1980s, but it is important to underline the importance of FIDA, as it became a central actor in the constitutional reform process.
- The League of Kenya Women Voters and the National Commission on the Status of Women were formed in 1992, against the background of changing momentum in Kenyan civil society towards greater autonomy of social movements, pushing for more substantive democratisation – and constitutional reform as part of this (Zezele, 2014). As a result of opening of political space following the return to multi-party politics, there was a noticeable increase in the politicisation and autonomy of women's movements. Key issues in the emerging agenda of feminist action included gender mainstreaming, advancing women's presence in politics – increasingly through the principle of affirmative action – and addressing violence against women.

<sup>9</sup> It is important not to understate women's activism prior to the 1990s. Kabira and Kimani (2012) document its role in supporting political resistance and the struggle against colonial rule. While women's social action was politically subordinated to the independence movement, and then to single-party rule, the experience of mobilisation among women activists is a longer-standing feature of Kenya's socio-political fabric. See also Kiragu (2006) and Muteshi (2006).

### Box 1: The constitutional reform process in Kenya – key milestones

From the 1990s onwards, then, Kenya saw a succession of attempts at constitutional reform and emerging drafts, mostly trumped by political resistance among political parties and elite actors unable and unwilling to find sufficient common ground for compromise. Social movements and civil society – including women’s movements – maintained ongoing pressure and remained a driving force behind the reform effort.

The timeline for the different stages of attempted constitutional reform after the return to multi-party politics includes the following key milestones:

- In 1997, the Constitution of Kenya Review Act was passed, creating a framework for reform. The intention of opposition forces and civil society was for this to become a ‘people-driven constitution-making process’ (Maingi, 2011; Murunga, 2014; Mwathi Mati, 2012).
- In 2001, the Constitution of Kenya Review Commission (CKRC) was established. A first attempt at a draft did not go ahead and the government of the time dissolved parliament. Elections were held in 2002. The new coalition government agreed on the need for the constitutional reform process to proceed.
- The CKRC under the stewardship of Yash Pal Ghai, a leading constitutional law expert in Kenya, continued to work on a new constitution, resulting in an initial draft, which was presented at the National Constitutional Conference in Bomas in 2004. This became the ‘Bomas draft’, strongly supported by, among other social and political actors, women’s organisations. The Kibaki presidency opposed the draft.
- A modified version was produced – the ‘Wako draft’. This watered down many of the more progressive elements of the Bomas draft aimed at weakening executive power, and reduced a quota of 74 district seats for women to a 30% quota in parliament and county assemblies. It should be noted that Attorney-General Wako was supportive of the women’s movement, and removal of some of the more gender-progressive articles indicates the level of resistance among high-ranking political figures. The Wako draft was put to a referendum in 2005 and rejected by 58% of the population.
- Following the violence of the 2007 election, and as a condition in the ensuing peace process, the constitutional reform process was reinitiated, formalised through the Constitution of Kenya Review Act of 2008. Concretely, this set up a new process for drafting and approval of the text. Four organs were established or identified as relevant: the Committee of Experts (COE) – the main technical drafting body, made up of nine experts (six Kenyans and three non-Kenyans); the Parliamentary Select Committee (PSC); the National Assembly; and the referendum body – namely, the Kenyan people.
- The COE, following a schedule of consultations set by the National Accord and Reconciliation Act of 2008 with different caucuses, interest groups and experts, and drawing on research and constitutional reform experiences elsewhere, prepared a ‘harmonised’ draft, which it presented to the PSC. The PSC was tasked with considering and resolving the most contentious issues – resulting in a complex process of political negotiations, realignment of interests and strategic political compromises that resulted in a revised draft. This was returned to the COE, which produced a final draft that was tabled before the National Assembly.
- The final text was submitted to a referendum vote before the Kenyan people in August 2010. Here, according to Muhula and Ndegwa (2014), memories of the electoral violence of 2007 contributed to tempering the temptation of recourse to violence among political elites. The referendum was relatively peaceful, and over 68% of Kenyans, with a turnout of 70.44%, voted the new Constitution in.

- In 1998, the Kenya Women’s Political Caucus (KWPC), a coalition of women’s organisations brought together to mobilise collectively around gender equality and affirmative action, was set up. This became a key actor in the early stages of negotiating space for women’s participation in the constitutional reform process (Kabira, 2012). Its creation was not uncontested, and it initially represented an important division and tension among women’s organisations. It tended to be dominated by elite Nairobi-based lawyers, academics and politicians, who, at various stages of the constitutional review process, were seen as not representing all Kenyan women – or reflecting the diversity among women organisations.
- In 2002, the Kenyan Women Parliamentary Association (KEWOPA) was formed. This mobilised women parliamentarians across party lines. KEWOPA has been instrumental in leading legal change on a range of gender equality issues since its creation (Nzomo, 2011b).
- In 2004, the National Commission on Gender and Development and the Department of Gender were created to support the formulation of policies to eliminate gender-based discrimination.



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This is only a summary of key relevant milestones and organisational developments leading up to the constitutional reform. Beyond this, Kenya has a rich array of women's organisations that work at the national and subnational levels and across different sectors and thematic issues. These range from affirmative action in political and public life to improved reproductive health, access to education for women, support to policies and legal change on violence against women and increasing women's access to justice and to financial services.

As the women's movement grew through the 1990s and early 2000s, it became less dominated by one or two organisations and more diverse and amorphous. In relation to the constitutional reform process, instead of one organisation leading or characterising the movement, women (and women's organisations) took part in specific coalitions, committees or networks, which then worked together to present the 'women's position' to government and the general public. For example, the Women Lobby Team (1999/00) the Women's Political Alliance of Kenya

(2000), the Women's Consensus Group (2005) and the Women's Organisations Coordinating Committee for Protecting Women's Gains (2009/10) all formed to address particular sticking points in the constitutional review process. Perhaps a key feature of the success of Kenyan women's movements was their responsive and adaptive approach to navigating the constitutional review process. Rather than one organisation dominating the approach and methods used, the formation of groups that worked on specific political challenges allowed for more flexibility in the approach but also more inclusivity. Of course, in many cases, the same women were involved in each new manifestation of a women's group set up to represent the 'women's movement'. FIDA, the League of Kenya Women Voters and KEWOPA remained focused on increasing women's access to politics through affirmative action and the constitutional review and, in many cases, it was members of these organisations who formed the more temporary committees and coalitions to address specific political problems.

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# 3. Women mobilising for change through constitutional reform

In this section, we first identify the main achievements for women's rights and gender equality through the constitutional reform of 2010 and earlier legal change. Second, we describe how women's movements and gender activists in social and political life engaged with the reform process to secure these gains. Third, we analyse the key enabling factors and constraints that explain the success and limitations of the constitutional reform process in terms of women's voice and influence, and its impact in terms of broader gender equality objectives.

## 3.1 Key achievements: gender equality and women's rights in the 2010 Constitution and other legal change

### Gender equality and women's rights in the Constitution of 2010

The new Constitution is a progressive text that advances women's participation in the political, social and economic life of Kenya and establishes important gains with regard to women's rights and gender equality. In large measure, it reflects the effectiveness of women's collective action. Such was the extent of its reform in favour of gender equality that it was referred to informally as 'the women's constitution' (Tripp et al, 2014). Not only did the new Constitution commit to legislative and affirmative action to redress disadvantage caused by past discrimination, but also it specified that laws stemming from it superseded any customary or other laws regarding discrimination against women (and other groups suffering from marginalisation or discrimination).

The Constitution is progressive in terms of the *normative content* it establishes. Notably, this includes an ambitious Bill of Rights (Chapter 4) with a broad array of political, social and economic rights generally, and specific gains on women's rights (summarised below). The Bill of

Rights, following the South African model, establishes guidelines on the *justiciability* of rights. This means all persons have legal standing to hold the state to account for the non-realisation of rights (Art. 24), making litigation a relevant channel of redress for the violation of women's (and other) rights.<sup>10</sup>

The Constitution also establishes a *set of values and principles* in which inclusiveness, equality and non-discrimination are underlined as core values and trump any discriminatory law, practice or action – including in relation to customary norms and tradition (Arts 10 and 27) (while embracing ethnic, cultural and religious diversity). Importantly, the principle of equality is recognised as insufficient to secure the protection of marginalised and minority groups. Measures of affirmative action are included to compensate for historical injustices of inequality and discrimination. This represented an especially important victory for women, and also included recognition of other minorities and marginalised groups.

The Constitution stipulates an *institutional framework of checks and balances* that limits the power of the executive branch. In addition to a strengthened legislative branch, this includes a number of accountability, oversight and review mechanisms that in the medium and long term are intended to 'oversee' implementation and ensure the protection and advancement of the normative content of the text. In direct response to an overly powerful and centralised executive, the Constitution introduces a stronger devolved executive and legislature, the main objectives of this being to bring government and services closer to citizens in terms of delivery and accountability. The judicial branch has been restructured with a view to enhancing its independence, incorporating better checks on ensuring merit in appointment processes and strengthening its powers of judicial oversight and constitutional review. This has included creating a new Supreme Court at the top of the judicial hierarchy. As rights are intended to be justiciable, using the courts to protect and advance

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10 This is notwithstanding the fact that the Constitution allows for the principle of 'progressive realisation' in recognition of the need for realism and practical challenges of implementation.

women's rights has become an important institutional mechanism for women's movements and gender activists, as described further below. Women activists, notably FIDA, were actively involved in lobbying for this protective architecture of checks and balances.

Additional oversight mechanisms created have the objective of acting as watchdog bodies, including in relation to overseeing implementation of the Constitution. Some of those more relevant for the realisation of women's rights and follow-up on measures of affirmative action (with greater or lesser degrees of effectiveness in the implementation process) include the Commission for the Implementation of the Constitution (a temporary commission whose term ended in 2015); the Kenya National Human Rights and Equality Commission, which was restructured pursuant to Art. 59 (4) of the Constitution into three separate commissions (the Kenya National Commission on Human Rights, the National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice);<sup>11</sup> the Judicial Service Commission, involved in the appointment and discipline of judges and magistrates; and a number of bodies tasked with overseeing implementation of the Constitution. Finally, to limit 'winner takes all' incentives in politics, devolution to the county level was introduced, including establishment of 47 local government and County Assemblies.

In sum, the Constitution has – as an aspirational political and social project – put in place a progressive Bill of Rights, including for women and other disadvantaged groups, the decentralisation of political power from the executive and a fundamentally restructured framework of checks and balances and accountability mechanisms to limit the exercise of power and advance the realisation of rights. These features, in and of themselves, potentially provide an enabling institutional architecture for the realisation and protection of the women's rights and gender equality principles delineated in the Constitution. In addition, the Constitution establishes some important concrete gains for women.

- Art. 27 underlines **freedom from discrimination and the principle of equality**, recognising the right of 'women and men to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres'.<sup>12</sup> Thus, the new Constitution commits the Kenyan political system to redressing disadvantage caused by past discrimination. It also specifies that laws stemming from it supersede any customary or other laws. This – in the context of a strengthened framework – offers women new legal pathways to fight decisions

based on customary practice. Critical to the rights of women is Art. 19 establishing human rights as the core values against which state action is to be measured.

- **On access to women's presence and representation in political and public office**, the Constitution commits the state to taking legislative and other measures to ensure not more than two-thirds of members of elective or appointed bodies can be of the same gender. With this, the goal of **affirmative action**, central to the women's movement since 1992, has effectively been realised – on paper at least.
- There is concrete wording to ensure **increased representation for women in parliament and County Assemblies**. While the Constitution only stipulates a quota of 47 seats for women representatives – 13% of the National Assembly – a quota of 16 seats – or 33% – is stipulated for the Senate and a quota of 30% for the County Assemblies.
- The Constitution recognises the equal rights of women and men to inherit land in a country that has for the most part excluded women from land ownership. It upholds **equal rights** to matrimonial property where previously men gained most of the property in situations where a marriage was terminated. Art. 60 (1) (f) commits to the elimination of gender discrimination in law, customs and practices related to land and property. Article 68 moreover **recognises matrimonial property**, both during and on the termination of marriage. Women's rights to matrimonial property had been largely compromised by the patriarchal order of society, which viewed men as the sole owners of matrimonial property, as well as a lack of clarity on the value that unemployed or semi-employed female spouses contributed to the overall family wealth.
- Women's right to **reproductive health care** is recognised, paving the way for the development of a health system that reflects the Constitution (Art. 43). Importantly, abortion is permitted when 'in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law' Art. 26 (4).
- **Women are now able to pass on citizenship to their children**, independently of their marital status. Previously, women could pass on citizenship only if they were married to a Kenyan man. Moreover, dissolution of a marriage between a foreign woman and a Kenyan man cannot result in loss of citizenship for the woman, an issue that was unclear in the old Constitution.

A number of issues proved especially conflictive and controversial. First, on abortion, there was widespread resistance to the inclusion of the right to choice. This came

<sup>11</sup> The founding statutes mandate the three commissions to work collaboratively towards the enhancement and realisation of human rights, including women's rights, even though NGEC has the primary role and mandate regarding the same.

<sup>12</sup> <http://www.kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=Const2010>, accessed 11 September 2015.

from different Christian religious groups, in particular the Catholic Church, but many Christian women also did not support inclusion of the right to abortion (Kabira, 2012). Acknowledging this resistance, the women's movement supported the easing of language from an outright ban to the acceptance of safe abortion when, in the opinion of a health professional, the life or health of the woman is in danger, or in the case of an emergency. Considering that the Catholic Church actively opposed even this version, achieving a yes vote for abortion in limited situations was an important victory.

Second, affirmative action was especially important, and had consistently been resisted by the political *status quo* over the previous two decades. Even though a provision for a one-third quota in parliament was removed in the final draft that went to referendum, the Constitution commits the state to taking legislative and other measures to implement the two-thirds rule for all elected and appointed bodies. This allows the women's movement space to negotiate legislation that will further increase women's representation in parliament.

And third, recognition by the Constitution of *kadhi* courts – albeit subordinated to constitutional principles – was a controversial issue. *Kadhi* courts are a dispute resolution mechanism for the Muslim community and decide on family law issues relating to personal status such as marriage, divorce and inheritance (Tripp et al. 2014). While this issue took on a religious lens, there was lack of clarity on the efficacy or effectiveness of these courts in terms of upholding the rights of Muslim women. The Christian lobby and the women's movement were both against including the courts in the Constitution but the women's movement conceded to allow the process to continue.

Finally, changing rules on women's access to and ownership of land challenged 'traditional' and 'customary' inheritance. Most communities in Kenya view land ownership as a question of identity with the tribe, clan and family, and the vast majority of these structures are patrilineal. As such, male members of the family continue to be seen as custodians of the land. Giving women the possibility to own land will potentially increase their access to economic resources and the power that comes with this, thus threatening male patriarchy and male dominated patronage systems.

### Other legal change advancing gender equality and women's rights

It is important to situate any gains against a longer-term history of women mobilising to effectuate legal and policy change both before and after the 2010 Constitution. There is no doubt the Constitution has opened up and formalised new space for women's access to representative and decision-making in public and private life – but

the influence of women in politics and through social mobilisation had already had important legislative and policy impacts. Influential feminist activism and gender equality agendas were not new by any means. Rather, constitutional gains for women need to be seen against a longer-term continuum of laws and policies that already reflected the autonomy, political capabilities and experience of women's movements and gender activists.

Notwithstanding ongoing legal and normative barriers to women's rights and gender equality, important examples of legislation and policy predated the 2010 Constitution. Nzomo (2011b) draws attention to legislative changes in the 2000s reflecting the incipient presence of women in Parliament, and, concretely, the capacity of KEWOPA to push through gender-progressive legislative change. This combined with the growing political effectiveness of women's movements from the 1990s onwards. The importance of cross-party organising in feminist action is a recurrent feature in effective feminist action to advance legal change (Waylen, 2015). The Kenyan example confirms this.

Examples of feminist policy and legal gains include some of the following<sup>13</sup>:

- Policy by which tax waivers for sanitary towels and nappies adopted in 2007. This was an outcome of an awareness-raising campaign on the impact on women and girl's school performance of missing school because of menstruation.
- The review of labour laws was seized as an opportunity to address gender issues, leading to an increase in maternity leave under the Employment Act of 2007.
- In 2006, the Sexual Offences Act was passed, representing a legal milestone in setting up increased protection against sexual violence. It included all forms of violence against women.
- In 2011, the Prohibition of Female Genital Mutilation (FGM) Act constituted an important milestone in protecting women and girls from the practice, and was itself the outcome of long-term activism and advocacy.
- In 2008, the Standing Orders of the National Assembly were revised, to be more inclusive of the needs and participation of female MPs. KEWOPA also was successful in lobbying for women MPs to be appointed as chairs or co-chairs in five of the 16 standing Parliamentary Committees. More practically, KEWOPA lobbied effectively for maternity leave, with benefits for women parliamentarians, and women's washrooms were made available (Nzomo, 2011a, 2011b).

This increased capacity for agenda-setting in parliamentary business, combined with increased women's movement activism, was in place in advance of the 2010 Constitution, notwithstanding the limitations of patriarchy,

<sup>13</sup> See Nzomo (2011a and 2011b); Kamau (2008).

obstacles and hostility to women's political and social voice. Feminist and women's movements' engagement with the constitutional reform process was thus part of a broader continuum of increased effectiveness in achieving institutional change – formal and informal – and advancing a women's rights agenda. Of course, during this time, progress on affirmative action remained ineffective despite the energy women's movements devoted to this.

The formidable resistance by men in parliament in particular and more widely to affirmative action is a notable feature and underlines the deeply political nature of efforts to advance women's access to political voice and decision-making roles. In the end, securing the principle of affirmative action required the opportunity offered by the constitutional reform process.

### 3.2 Process of change: *how* women exercised influence to shape the reform outcomes

The level of institutional change the women's movement in Kenya lobbied for potentially involved a radical reallocation of resources and power to those who had been previously excluded.

The strategic choices, modes of engagement and institutional-political opportunities for women's influence this section describes are not single factors or moments of change that simply allowed women's movements to mobilise and negotiate for a gender-progressive constitution. What emerges from the analysis is a series of political openings, which women's movements responded to, often through the formation of specific committees or coalitions. Their strategic and multilevel participation in turn created further political openings. However, rather than seeing the process as a sequence of cumulative political openings into which the Kenyan women's movement stepped, it is more accurate to represent it as one of change and counter-change. As women's movements reacted creatively and strategically to political opportunities, the *status quo*, in turn, also reacted, attempting to subvert the demands of the movements (as well as other progressive agendas).

This push for, and resistance to, political change is part of the process of negotiating a political settlement. As noted, the new Constitution represents one key milestone in a longer-term process of gradual and iterative political change. Just as the process of political change leading up to the constitutional reform involved opportunistic behaviour by both the women's movement and its resistance, the aftermath of the Constitution is also characterised by adaptation on both sides. In this section, we examine how the women's movement engaged with the constitutional reform and the new forms that negotiation of political change takes following that milestone achievement.

A number of features characterised how women, individually and collectively, both through social mobilisation and through legislative struggles – notwithstanding slow progress in achieving presence in formal politics for women – engaged with the democratisation process generally, and specifically with shaping the constitutional reform process and outcomes.

#### Making use of political opportunity structures

A central feature of women's engagement in democratisation in Kenya was increased capacity from the 1990s onwards by women activists, individually and collectively, to identify key opportunity structures and engage with these creatively and opportunistically as they unfolded. Democratisation in Kenya – with all its limitations – created space and opportunities for women's organisations to both develop autonomous voice and use different political mechanisms to advance gender issues.

Up until the 1990s, as we have seen, women's movements in Kenya were mostly captured by the ruling party, notably through MYWO. At that point, female activists began to position themselves to take advantage of the opening of political space for more plural politics, such as through the National Women's Convention which brought together over 2000 women. This was a key event which galvanised feminist groups and other women's movements into a new cycle of activism (Tripp et al., 2014; Kabira, 2012). From this point on, women's political activism flourished, and radical feminist agendas emerged as 'new and old women's leaderships and perspectives converged to strategically utilise this political moment and to develop a women specific democratic agenda with specific action plans and targets' (Nzomo, 2011b). The literature underlines the 'cathartic' impact of the Convention, with women mobilised under the banner of 'Unity in Diversity for Women's Empowerment'. Demands included legal change to eliminate discrimination against women in access to decision-making and, increasingly, the goal of affirmative action. The strategy was to use collective action around a common purpose both through social mobilisation and through activism targeted at and within the state. From this time, strategic action involved using multi-level multi-dimensional approaches to take advantage of the different opportunity structures the democratisation process generated – with all the challenges that this would entail.

It is important not to understate the value of the breadth of women's organisations that – even if variably so – coalesced behind achieving affirmative action. Despite rural-urban and ethnic cleavages between different women's organisations, resistance to affirmative action within the political elite worked to unite Kenyan women, at least in the short term.

Despite the *de jure* return to multi-party politics under combined national and international pressure, Moi's KANU party remained in control through the 1992 and 1997



elections. However, the legitimacy of Moi's position and the reigning political settlement continued to weaken during the decade. Both elections were highly controversial and corruption escalated (Chege, 2008). Meanwhile, the end of the Cold War dampened Western governments' enthusiasm for supporting dictators solely on the basis of their opposition to communism. Annual economic growth declined significantly between 1990 and 2000 and poverty soared. Moreover, the neoliberal fiscal austerity measures introduced in the 1990s as part of donor conditionality limited Moi's ability to continue a patronage system and resulted in further political elite fragmentation (Mwathi Mati, 2012).

Weakening legitimacy of the ruling party and fragmentation of the elite resulted in more active opposition in both civil society and parliament. Opposition parties began to engage with women's concerns and gender issues (Kabira, 2012). As early as 1997, the women's movement audited the Democratic Party of Kenya on women's representation at different levels within the party (*ibid.*). But, mostly, women remained marginal to party politics, and indeed to parliamentary politics.

As the constitutional reform process gathered pace, women's activism through social mobilisation and in civil society was especially important in shaping the women's agenda. The KWPC, formed in 1998 for women to mobilise collectively around gender equality and affirmative action, brought together 43 women's organisations. This was in response to defeat of the motion by MP Hon Phoebe Asiyo to advance affirmative action. It would become a key player in the constitutional reform process. Meanwhile, in the early 2000s, 54 human rights organisations, faith/religious groups, women's rights organisations, youth groups and opposition political parties united behind Ugungamano, a social movement that pressurized KANU to conduct a people-led constitutional reform process. Ugungamano was led by male religious leaders but it was a core group of women activists who agitated for the formation of the movement (Cottrell and Ghai, 2007; Kabira, 2012).

By conducting consultation with the population, the movement embarrassed KANU into setting up the CKRC (Cottrell and Ghai, 2007; Kabira, 2012). The role of the CKRC was to provide civic education on the process of a referendum and to consult with Kenyans across the country before producing a draft to be considered at a National Constitutional Conference. Six of the 25 commissioners selected for the CKRC were women. This in turn offered the women's movement, which had largely been confined to a small group of lawyers and politicians in Nairobi, an opportunity to engage with a great range of women from around Kenya, to build awareness of the importance of a constitution that addressed gender issues and to ground their arguments in the economic and social reality of Kenya.

The constitutional review process itself represented a political opportunity. Initially, the focus of the women's

movement had been on gaining affirmative action through legislative lobbying. But as the parliamentary route failed, women's activism began to focus on emerging opportunities within the process of constitutional reform. In 2000, a second attempt at gaining increased female representation in politics through legislative lobbying was again resisted by the majority in parliament. The Affirmative Action Bill was defeated but the defeated bill was handed to the CKRC with the recommendation that it be included as part of the constitutional review process. Through the KWPC, women's organisations embraced the constitutional review process as a key political opportunity and, from this point on, focused their energies on ensuring women activists influenced the process at each stage.

Women's organisations – notably through FIDA and specific committees and coalitions set up during the review – actively supported the progressive Bomas Draft in 2005, (which was supplanted by the Wako Draft that eliminated many of the progressive elements and was rejected by popular referendum). As the constitutional reform process resumed following the 2007/08 electoral violence, women's groups mobilised effectively at the different stages and in the range of forums of the review process (Maingi, 2011).

This activism involved developing and invoking a range of political skills and modes of engagement with a very diverse set of actors. Women's organisations and female politicians were effective in using a broad range of forums and institutional sites.

### Engaging with the state, using formal institutions

Under KANU, using formal institutions and conventions seemed more like political manoeuvres than real opportunities for women to gain more access to power. However, since the 1990s, Kenyan women activists have been informed by a series of national, international discussions and normative developments that have influenced and nurtured an environment that is more enabling of gender work.

At the international level, Kenyan women's movements were attuned early on to developments on emerging women's rights norms and agendas. In 1985, on the government's initiative, the World Conference on Women was held in Nairobi, with the key theme of 'Women in Leadership'. Kenyan women were not oblivious to the irony here: at the time, Kenya had only two elected MPs of 158 and one nominated MP of a possible 12. Importantly, FIDA came into being during the Nairobi conference. The Fourth World Conference on Women in Beijing in 1995 outlined concrete steps and processes to which Kenya, as a signatory government, committed. Regardless of the government's actual intention in terms of implementing the institutional mechanisms specified in the Beijing Platform for Action, Kenyan female lawyers started to base their challenges on this commitment and other human rights frameworks.

While international norms contributed to informing feminist and gender agendas in Kenya it is important to

stress they were also internalised and appropriated to become a locally driven agenda. Women activists in social and political life – albeit varying – have used to good effect the international normative framework to advance a Kenyan agenda of gender equality. FIDA has presented shadow reports to the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Commission on Human and People's Rights, in particular to bring international and regional attention to the situation of women in Kenya and lukewarm support by the state towards Kenya's obligations.

As democratisation advanced, and despite very limited access to formal political life, women activists sought to effectuate legal change. The most effective engagement with parliamentary life was through the work of KEWOPA (Tripp et al, 2014). This would prove highly effective both in generating new gender-sensitive laws across a range of issues and in 'engendering' to some extent parliamentary life (Nzomo, 2011b). Over time, and through its effective engagement also with women's organisations, KEWOPA became a credible legislative actor and driver of progressive gender law. It also contributed to facilitating capacity development for women politicians and supporting women's political development (Tripp et al, 2014).

While the national gender machinery has been under threat since passage of the new Constitution, its presence in the past has helped frame gender agendas, and was the outcome of women's activism. In 2004, the Ministry of Gender, Sports, Culture and Social Services was formed, building on an earlier Department of Women's Affairs formed in 1976. This changed in 2008 into the Ministry of Gender, Children's Affairs and Social Development, including a Department of Gender and Social Development (Tripp et al, 2014). The National Commission on Gender and Development (NCGD) was also set up in 2004, to formulate policies and work to eliminate gender discrimination (Heinrich Böll Foundation, 2006). This developed a national gender policy and worked to promote gender-responsive legal reform and sensitisation of sectoral line ministries. The NCGD (in 2011 becoming the NGEC) has been important in coordinating mainstreaming in national development and providing advice on gender to a range of government stakeholders (Nzomo, 2011b). This includes advising political parties, statutory commissions, engaging with sub-national government bodies. NGEC also works with women's movements and supports policy-relevant research (e.g. Mwathi et al., 2013) and takes part in policy formulation, supporting advocacy, research, education, investigation of gender-based violations and building partnership and alliances.

The NGEC has been 'the main watchdog body to coordinate, monitor and ensure compliance to and implementation of women and gender related provision

in the 2010 Constitution' (Nzomo, 2011b). It currently constitutes one of the multiple oversight mechanisms that feminist activists in formal political space can use. One study found it to be an important mechanism not just for oversight of implementation of the Constitution but also in supporting enabling conditions for ongoing legal change to adapt Kenya's laws to the constitutional framework (FIDA, 2013).

The KWPC worked hard to negotiate space for women representatives in the early stages of the constitutional process. The women's movement then used advanced negotiation skills to influence decision-making around each draft. The KWPC's initial ability to bring together a range of women's organisations meant women had a wide network to ensure their representation across a range of committees involved in the constitutional review process and to expand their lobbying power. In Bomas, the Women's Political Alliance, the KWPC, FIDA and the Collaborative Centre for Gender and Development represented the women's movements. The women coordinated themselves on a daily basis, prepared their positions and agreed on who would lobby whom (Kabira, 2012).<sup>14</sup> They set up a communication system to agree time out for consultation during committee negotiations if an issue came up for which they had no agreed position (ibid.). They worked to ensure good relations with those on committees dealing with different parts of the Constitution; women from all 12 committees at the national constitutional conferences met twice a week at lunch, shared their views and asked each other for support.

The women's movement had a vested interest in ensuring the review process was successful and thus, when the overall process stalled, engaged in shuttle diplomacy to reinvigorate it. In 1999, when political parties failed to agree the allocation of their 13 nominated seats for commissioners in the process, the KWPC formed a negotiating team that engaged with both KANU and the opposition. When the process stalled again in 2000 and 2008, women (and other interest groups) took the initiative to break the stalemate, once again employing negotiation and diplomatic skills.

### Strategic use of the law and court activism

A key feature of Kenyan women's engagement with the state has been their strategic use of the law and their recourse to judicial review and the courts to seek redress for injustices or to challenge the legality and, more recently, unconstitutional practices that result in discrimination against women and girls. It is of great importance for women's influence on the constitutional reform process that, during the 1990s and 2000s, the movement was dominated by female lawyers who used their training in law to articulate their arguments in formal legalistic language, to negotiate with male politicians in a style

14 Interview, WM #4.

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recognised and respected by a patriarchal system, to draft motions and bills and later on to analyse the draft versions of the Constitution for their legal impact on women.

Feminist lawyers worked across a number of spheres. First, through engagement of specialist civil society organisations like FIDA and the Coalition on Violence Against Women (COVAW), in collaboration with other human rights bodies such as the Kenya Human Rights Commission and the International Commission of Jurists, feminist lawyers contributed critical technical legal support to the constitutional reform process. They engaged with the reform process at key stages of text formulation, supported concrete text on women's rights and gender issues and contributed to advancing more general propositions on strengthening checks and balances, accountability and judicial review mechanisms. Their efforts, combined with those of women lawyers in academia, were a fundamental piece of feminist strategy in engaging with the constitutional reform process.

Second, they engaged with other technical experts to defend certain gains for women, for instance with the Reproductive Health Rights Alliance and the international Centre for Reproductive Rights to contain anti-abortion messaging from the right to life lobby. This included drawing on the health-related evidence base to make a case for enabling some room for legal abortion, drafting the corresponding text and engaging in advocacy and civic education at national and subnational levels.

Third, FIDA's use of its legal knowledge on process to protect advances on gender issues in the drafts was important, for instance related to non-compliance with rules of procedure by the PSC and by petitions that sought to cut back on some of the more progressive elements of the harmonised draft before the text was put to the referendum (Maingi, 2014).

The key point here is women activists in Kenya were keenly aware of the strategic and political value of legal reform and that legal change is a deeply political exercise. Law – including constitutional law – is a site of normative contestation, with potentially transformative impact. Legal change creates new opportunities to change access to power and redistribute resources – in this case for women. But, importantly, women activists in the reform process were sufficiently aware of the risks and resistance – including through experience – that they were likely to encounter, not least in relation to the implementation of any gains achieved. They thus emphasised the need to strengthen accountability mechanisms to maximise the chances of

protecting whatever legal gains could be achieved through constitutional reform.<sup>15</sup> This insight, of the political value of legal change, remains underappreciated in development discourse. Legal change is often seen as a technical rather than a political measure. But among feminist activists in countries that have undergone constitutional reform or other critical law reform processes (e.g. in relation to marriage laws, land laws, violence against women) there is an accumulating wealth of experience on combining technical expertise with the political and strategic action required to enlist support and negotiate legal gains.<sup>16</sup> For this, the importance of opportunistic and organised collective action, networking and engagement with a wide range of actors and stakeholders was critical to achieving constitutional reform gains for women.

### Networking, lobbying and strategic engagement in different areas

Women activists used their political acumen to build strategic alliances and coalitions. This included lobbying male politicians and key power holders – and working at different levels and across parties. Networking aimed to achieve support and to shift mind-sets and discourse on gender norms and discriminatory practice. This required ongoing internal discussions to strategise in relation to the priority forums, committees and audiences at the different stages of the reform process – and the issues that required argumentation and evidence. An acute understanding of their own resources, technical knowledge and political negotiating skills resulted in a targeted deployment of individual activists and collective action strategists to different forums and audiences (Kabira, 2012).

At the national constitutional reform consultation conferences, the women's movement held private meetings with delegates to build awareness on why to include gender-progressive articles. Female politicians used their connections to lobby the most powerful male MPs (Ibid). There was a clear understanding of the importance of working with political parties. The movement worked to form and reform alliances with the opposition and parts of the ruling party; indeed, as the ruling party changed from KANU in the 1990s and early 2000s to the National Rainbow Coalition (NARC) (2002-2005), the movement's allies changed. While KANU had worked to prevent women from participating in an influential way at the first National Constitutional Convention, the movement supported the Bomas draft in 2004/05.

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15 Interviews and FIDA (2010, 2013).

16 As noted, in feminist action globally, appreciation of the importance of legal change has acquired prominence, not least through the experience of women's activism in social movements, formal politics and use of the law and court action to advance gender equality and women's empowerment objectives (Baines and Rubio-Marín, 2015; Rubio Marín and Chang, 2015; Tripp, 2015; Waylen, 2011).

Women's organisations also drew on their media skills to communicate with women not directly involved in the negotiation process on the constitutional drafting. At each national consultation, FIDA produced a weekly bulletin updating on the constitutional reform and the role women were playing in the developments.<sup>17</sup> The movement understood that, in order to gain wider support for their goal, they needed to frame affirmative action in a way that would be easy for the general public to accept. They thus worked to frame it in development terms – they highlighted how the government had used affirmative action to help other categories of people, such as those living in poorer states. This moved the understanding of affirmative action from being a threat to the *status quo* to something that was positive and about helping oppressed and marginalised groups.

When the Constitution was put to referendum in 2005 (the unpopular Wako draft) and again in 2010 (the current Constitution), the women's movement used communication and advocacy skills to engage with the public on the issues at stake. In the lead-up to both referendums, it provided civic education to key interest groups that had connections to the local level across Kenya. In 2010, these groups included the National Nurses Association of Kenya, the Reproductive Health Rights Alliance, Daughters of Mumbi and Waremba Ni Yes (Maingi, 2011). In relation to the divisive issue of including the right to abortion, FIDA worked to encourage women leaders and supportive medical practitioners to use the same message and to focus on keeping it simple (*ibid.*). They used a combination of print, radio and electronic media to propagate their message. FIDA set up a Rapid Response Unit to ensure a quick response to controversies or misinformation in relation to the Constitution, as well as dialogue and engagement at the subnational level with key gatekeepers, such as religious and community leaders, local judges and dispute resolution arbiters, to enable exchange and engage in advocacy and sensitisation on many of the issues. Dialogue was adapted to different contexts, noting the normative pluralism that characterises Kenyan society.

### Informal strategies

Nzomo (2011b) notes – not directly in relation to constitutional reform but on broader agenda-setting strategies in the period we are addressing – that women activists navigated informal and social norm-setting in creative ways. This is a way of engaging in a political economy context where in effect formal access to decision-making spaces and roles is restricted. Women have creatively used the space that is in practice available

for women's engagement with public debate, to influence policy and legal change and to put issues onto the political map. This includes 'over-riding the formal structural and procedural road blocks to access, agenda setting and influence', by using, for example, to their advantage women's 'stereotype profiles of motherhood; as sex symbols and as tools of oppression and subordination (...) and used them to shape and influence the agenda of democratic governance'.

One example Nzomo cites refers to women's efforts in the early democratisation years to put pressure on the repressive state apparatus to release their sons held as political prisoners, mobilising in their roles as mothers and using this to galvanise public support and protest against the government.<sup>18</sup> This resulted in the release of eight prisoners in 1992. But, more importantly, the effect was to set an example of strategic use and subversion of gender norms by women activists to shape public debate and put issues in the political agenda, and with the aim of changing norms.

### Summary reflections on how women engaged with the constitutional reform process

Women activists used a very broad range of strategies for engagement at the formal political level, through social mobilisation, networking and advocacy and through use of law and the courts to advance a relatively coordinated agenda on women's empowerment and gender equality. This was a distinctly multifaceted, multidimensional approach through which political influence was exercised with considerable success in a context of unfolding opportunity structures. The constitutional reform process was an especially important opportunity for this agenda, as democratisation progressed in fits and starts. As it became evident that initial efforts to advance women's political voice through legislative change on affirmative action was unlikely to proceed, and as the momentum behind constitutional reform grew, this was very quickly seen as a key opportunity for the women's movement to use to advance their agenda on empowerment and gender equality.

Access to formal decision-making in political life for women during this process of constitutional reform was limited, in the context of patriarchy and discriminatory gender norms. But those women who were in elected office and activists in women's movements working together were able to exercise influence to good effect in the end. This was achieved through relatively coordinated efforts using multiple strategies, working in different arenas and speaking to a range of audiences and stakeholders.

<sup>17</sup> Interview, WM #4.

<sup>18</sup> This is not dissimilar to the mobilisation by mothers and grandmothers of the disappeared in Argentina in the late 1970s and 1980s, which to draw attention to the scale of atrocities committed under authoritarian rule. This mobilisation for transitional justice resulted in a sequence of transitional justice mechanisms that brought an end to impunity. This use of traditional gender roles to contest political process or advance a progressive agenda is a recurrent feature of strategic and politically savvy engagement by women activists.



Importantly, women activists, through the experience of democratisation and using the different strategies described above, cumulatively underwent a learning process of political engagement, akin to the notion of ‘political apprenticeship’ unpacked by Cornwall and Goetz (2005). This resulted from different pathways of political struggle on women’s rights. Political learning was also enmeshed in wider struggles of political change, and women drew on a range of capabilities and resources. We discuss these in the next section but the point to underline here is that no single strategy on its own explains the gains women achieved through the constitutional reform process. Rather, institutional change is an uneven process, and what follows from this iterative layering of strategic action–institutional change–reaction is a complex and uneven sequencing of change and counter-change that Muhula and Ndegwa (2014) note, and the capacity for elite resistance and backlash underlined by Murunga (2014) among others.

It is also important not to overstate the ‘unity’ of purpose of the women’s movement. The history of women’s mobilisation in Kenya – as elsewhere – inevitably intersects with other inequalities and cleavages *within* the movement that mirror Kenya-wide divisions relating to distinct political, ethnic, family and kinship and class divisions and loyalties. This is in addition to socio-cultural, structural and political constraints and obstacles to women’s efforts to exercise influence in public and political life.

Finally, it is important to underline that, while international factors were relevant, engagement by women’s movements and political activists in the constitutional reform process was first and foremost a Kenyan matter. This was a nationally driven process, and the gender agenda was the product of Kenyan feminist and gender struggles. It was also deeply contested within women’s movements. Affirmative action unified the movement but, once this was achieved, divisions within the movement soon became apparent.

### 3.3 Enabling factors and constraints to the women’s movement in the lead-up to constitutional reform

In this section, we identify the main sets of factors that shaped, enabled and constrained women’s capacity for influencing political and public life in the lead-up to constitutional reform.

#### Political and institutional factors

*Social movements and civil society activism:* The centrality of women’s movements and their effective engagement with and participation in the force of oppositional voice that

gathered pace as Kenya stuttered its way from single- to multi-party rule cannot be underestimated. Drawing on a longer (if less politicised) tradition of women’s movements, this provided the basis on which new modes of activism and women’s demands around recognition of political voice and access to decision-making became a rallying force. Notwithstanding their many divisions, the constitutional reform process provided sufficient incentives for many of the key women’s organisations to work together.

*Constitutional reform process:* The fact of democratisation itself was key in creating space for oppositional voice to surface. The state’s repressive apparatus remained active in many respects but the opening of reform spaces and legislative debate that allowed for oppositional voice to emerge was a clear window of opportunity for women to advance a gender equality and women’s empowerment agenda. In the 1990s and 2000s, the Kenyan government embarked on a number of legal reforms that to some extent informed the constitutional reforms; these included various task forces and commissions (Mbote and Akech, 2011).<sup>19</sup> Agitation for these reforms and the inclusion of various civil society actors such as FIDA evidenced their credibility as reform actors among the notable taskforces including on judicial reform (Republic of Kenya, 2010).<sup>20</sup> As key litigators, they were critical in informing the report of the taskforce, which largely informed not only the constitutional provisions relating to the judiciary but also subsequent judicial reforms. As the debate over the Constitution gathered pace, the process became a visible site of political action and a strategic channel to advance new rules of the game.

#### Capabilities and resources

*Research capacity and academic influence:* Kenya benefits from a fairly developed academic research community able to produce robust evidence geared to supporting (or making the case for) evidence based policy. Furthermore, Kenya has a rich tradition in gender-related academic and policy-oriented research, which contributes to raising awareness and building up evidence-based activism in political and social life to advance women’s rights and gender equality. Organisations and think-tanks like the Heinrich Böll Foundation and the Katiba Institute, as well as Kenyan universities – not least the University of Nairobi – are an source of important scholarship on gender norms and women’s rights on a number of issues relating to political, social and economic empowerment. It is significant that Kenya’s feminist activism and women’s movements in different areas of life (legal empowerment, support to women’s sexual and reproductive health rights, access to land, etc.) draw very effectively on networks of scholars and activists across different disciplines (law,

19 <https://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-20110315.pdf>

20 <http://www.kenyalaw.org/Downloads/Final%20Report%20of%20the%20Task%20Force%20on%20Judicial%20Reforms.pdf>



politics, economics, medicine) and areas of technical expertise. Indeed, the activism on affirmative action can be traced back to the presentation of a paper on women in politics by an academic, Maria Nzomo, at the Women's Convention in 1992.

Moreover, there is recognition in the literature that political activism in the academic community has been a rich source of ideational input into political life – including in terms of shaping political agendas on gender issues (e.g. Kabira, 2012; Nzomo, 2011b).

*Technical knowledge and professional expertise:* The fact that women's movements counted on high-quality legal expertise among women activists was instrumental in shaping concrete outcomes. This also very strongly signals the awareness among women activists of the political value – and the political nature – of technical knowledge. This remains an underdeveloped structure of opportunity in much development support, not least as the technical is delegated to 'technical' experts. For women activists in Kenya (and increasingly in other countries), the technical proved a powerful site of political contestation.

*Purposive investment in political skills and lobbying capabilities:* Nzomo (2011b) and others signal that targeted measures to enhance the political capabilities of women activists have contributed to shaping their skills, improving their self-confidence and shaping an identifiable narrative on women's empowerment and gender justice that is relevant to Kenyan women. This includes such measures as support to the 'development of feminist research and analysis' aimed at guiding policy and action<sup>21</sup>; voter education programmes as a way of increasing women's chances to access political power (e.g. through the League of Women voters of Kenya created in 1992); capacity development activities for women candidates, including in election monitoring; logistical support for lobbying and advocacy and civic education activities that contribute to awareness-raising; and the investment in organisational capacity to engage in public interest litigation and use of courts, through such organisations as COVAW and FIDA, has contributed to awareness raising around rights. We need to know more about the specific added value of these. The role of the international community was important in supporting these activities but not without problems.

*'Political apprenticeship' in the making:* The very experience of engaging in political activism in the different arenas described above has been important in contributing to opportunities for women to develop political skills. Both working together (which enables feelings of common purpose, collective self-confidence and motivation, as in the 1992 National Women's Convention), and engaging in the more confrontational processes of contestation,

negotiation, dialogue, networking and alliance-building create a cumulative process of political apprenticeship that is at the root of political careers. It is clear that women activists developed strategies to overcome and manage divisions within the movement through focusing on their common agenda of affirmative action.

An important area for future research lies in examining individual pathways and experiences of political activism. Kenyan-based research already provides documentation on this that captures personal stories and experiences (e.g. FIDA, 2013; Kabira, 2012; Kamau, 2010).

## International factors

The women's movement also benefited from direct support from the international community in relation to the constitutional reform process. The willingness of donors to fund civil society groups during this time was critical for women's groups in Kenya. USAID and UN Women in particular funded women groups working on constitutional reform. The Gender Sector Coordination Group has coordinated donor and government work in international support to women's empowerment and access to leadership. Support, including from Canada, Denmark, Finland, the Netherlands, Norway, Spain, Sweden and the UK, has been channelled through a UN Women Basket Fund (previously through UNIFEM).

International funding has not been without problems, including a strong perception that support to women was less strategically political – including by engaging principally through government (Tripp et al. 2014). Interviews noted the need for donors to engage in more agile and flexible ways. However, there is recognition that international support to legal change, the constitutional reform process and women's engagement at national and subnational levels was important. Interviews signalled the merits of the adaptive and flexible support that characterised USAID funding.

In addition, such organisations as the Netherlands Institute for Multiparty Democracy, the National Democratic Institute and International IDEA have engaged very directly with providing support to women politicians, mostly in the form of capacity development and training and working at national and subnational levels. This has included working with women but also supporting engagement with the Independent Electoral and Boundaries Commission (IEBC), party election boards and women's bodies like KEWOPA. Support to strategic litigation efforts and capabilities in the context of increased mechanisms of accountability and judicial review are also proving politically strategic. Victories in court and through the new horizontal accountability mechanisms are important

21 This is an important point. In Kenya, as Nzomo (2011b) underlines, the value of research by Kenyan organisations to support policy recommendations cannot be underestimated, noting as an example the work of the Kenyan Chapter (formed in 1989) of the Association of African Women for Research and Development, formed in 1989.

post-2010, building on previous capabilities in this respect (FIDA, 2013; Tripp et al., 2014).<sup>22</sup>

Interviews noted two effective forms of international support. One was facilitating peer learning from other countries: the success stories of constitutional reform in South Africa and Uganda in the early 1990s each included participatory elements (Cottrell and Ghai, 2007). This also provided opportunities for women activists to build international networks important both as learning and exchange forums and to give visibility to Kenyan efforts. Although the women's movement and Ugungamano pushed for participation through its own consultation, the idea of the importance of a participatory constitution review process was widely shared, particularly among donors.

The second form of effective international support was funding for training that both female candidates and parliamentarians used as a form of patronage to increase their legitimacy and lobby other parliamentarians. Thus, female parliamentarians organised awareness-raising programmes in attractive hotels in Nairobi or Mombasa, which helped them build support for their position.<sup>23</sup> The corollary to this is that the frequency of training female politicians are able to access means they are absent from parliament and county assemblies more often than their male counterparts:

*'For five years they made money attending these workshops but they lost their seats in the following elections.'*<sup>24</sup>

## Constraints to the women's movement

It is important to underline that women's experience of political life – whether in formal politics or through women's social activism – confronts many obstacles, and is also fraught with its own internal contradictions and tensions. While the achievements have been significant, the limitations and constraints of the context within which women engage are many.

It is worth distinguishing between constraints relating more generally to women's access to influence and power and those specifically relevant to their lobbying for affirmative action and constitutional reform. The general constraints women experience in relation to participation in politics and public life relate to wider structural constraints, including deep patriarchal socio-cultural structures and norms/beliefs (Nzomo, 2011b), lack of awareness of gender injustice, especially in rural areas, and inequality in access to education, training and employment (Kamua, 2010). More specifically, women's low levels of economic

autonomy undermine their influence in politics and public life. In Kenya, influence comes with access to resources. While women comprise up to 80% of the workforce in agriculture and livestock production, only 1% of registered land titles are in women's names and around 5-6 % of registered titles are held in joint names (FIDA, 2010).

Given the context, it is hardly surprising that, when the women's movement became overtly political in the 1990s, there was strong resistance from the political elite – particularly the ruling party – and the wider public. When the movement coordinated to support motions proposing affirmative action, parliament rejected these outright. This happened in 1998 and 2000 and again in 2007.

When the movement started to focus its attention on the constitutional review process, the KWPC stepped forward first to represent women's interests in negotiating the contents of the Constitution. KANU quickly realised that a united group of women could represent a threat to its influence, and its members accused the KWPC of not being representative of all women in Kenya (Kabira, 2012). The women's movement was indeed dominated and driven by urban educated women, so the ruling party had identified a weak point in the movement. KANU members worked with MYWO to foster divisions within the women's movement, and MYWO eventually took the KWPC to court over its procedures to nominate commissioners to the Constitutional Review Committee (ibid.). MYWO lost the case but the divisions between urban and rural women in the women's movement continued to constrain it in different ways. For example, in the debate over whether women should support proportional representation or a quota system, urban women tended to support the former and rural women the latter.<sup>25</sup> Rural women were more familiar with the concept of a quota system and could easily understand how this would contribute to increased representation of women in politics, whereas they did not trust that a proportional representation system would provide the same. The women driving the movement (i.e. feminist lawyers and academics based in Nairobi) had to eventually concede on proportional representation, and the form of affirmative action negotiated is based mostly on a quota system.

The pushback the movement experienced from KANU in the initial years morphed into more dispersed pushback across the political establishment. The women's movement lobbied for more progressive gains generally, including reducing the power of the executive. While they enjoyed support from a range of parliamentarians, political agendas were constantly shifting throughout the process. The women's movement was effective at gaining access to the negotiation process at national conventions but failed to

22 Interview, FMJ.

23 Interview, NGO #1; FP #2.

24 Interview, NGO #1.

25 Interview, WM #3; #4.

gain access to the small group of actors who weakened their achievements in the constitutional drafts both in 2005 and again in 2010.

Moreover, in a broadly socially conservative society, there was not always widespread support for the movement's position. Aside from the rural/urban cleavage, the movement struggled to build support for provisions to allow abortion and equal access to matrimonial property. While the movement did succeed in convincing the public to support equal access to matrimonial property, the clergy, which had originally worked with the movement to lobby for a participatory constitutional review process, did not support the draft of the Constitution that was put to referendum in 2010.

### 3.4 Impact of the 2010 Constitution on women's access to power and influence, and on gender equality

Five years on from the referendum, the implementation process has not been smooth generally, and specifically for gains relating to women's access to decision-making roles and influence. This section looks first at the impact of the new Constitution on women's access to positions of power, then at the structural and normative constraints to women's access to real power and influence. Finally, we examine the impact of the constitutional reform on the women's movement.

#### Impact on women's access to elected and appointed positions

In the 2013 general elections, the first since the constitutional reform, more women gained seats in the National Assembly than ever before. As stipulated in the Constitution, 47 seats were allocated in the National Assembly for 'Women's Representatives', who were elected at the county level in addition to MPs elected from single-member constituencies. Their presence in addition to 16 female MPs elected at constituency level, and 5 nominated female MPs<sup>26</sup> increased the overall proportion of women in the National Assembly from 7.5% in 2011 to 19.1% in 2013 (Lott, forthcoming). In the Senate, political parties were required to nominate 16 women in addition to the women senators elected at county level through an open contest: women now comprise 27% of senators. Elections were also held for the first time for the County Assemblies. Out of 1,450 wards, 82 women were directly elected (5%). As the two-thirds gender rule was implemented at the county level, political party lists were used to nominate

additional women to bring the proportion of women in each assembly up to 33%.

For women to influence the legislative arm of government, they need to be fully involved and participate effectively in committees, as well as in other influential house positions, including as speaker, leader of the majority/minority and chairs of various parliamentary committees. These positions are key to guiding, swaying and even manipulating the agenda of the legislature (FIDA, 2013). Of the 10 leadership positions in the National Assembly, women hold only two. Women chair seven out of the 27 National Assembly committees and serve as vice-chairs in another eight (ibid.). This does represent a significant increase on the last parliament, where women chaired only 5% of committees (Lott, forthcoming). But this positive sign is eclipsed by the fact that female representation in a majority of the committees fails to satisfy the two-thirds gender representation rule.

Lott (forthcoming), used the Diamond Leadership Model to examine the extent to which women gained access to political and leadership positions in Kenya between 2011 and 2015. The model spans three levels of leadership (high, mid, low) and four government sectors (legislative, executive, judicial, security) using a weighted design (see Hughes et al., 2014). Her analysis shows significant increases in female representation not only in the legislative but also in the executive and judicial sectors between 2011 and 2015 (Figures 1 and 2). The proportion of female technocrats increased from 12% to 27%. Although the two-thirds rule has not yet been legislated for appointed positions, there is an understanding by citizens that, at a minimum, one-third of all new appointments should be women (Tripp et al. 2014). Furthermore, women have tended to find it easier to assert their authority in appointed positions where their hard technical skills are required.<sup>27</sup>

Awareness that women should be represented in appointed positions has had a clear impact in the judiciary, where women are well represented at the middle and lower levels; the proportion of women in the Appeals and High Court is 31% and 44%, respectively (Lott, forthcoming).<sup>28</sup> At the higher levels, men still tend to dominate; of the seven judges in the Supreme Court, five are men. The overall score for women's leadership in security sector has not improved significantly, although there has been a 6.5% increase in the number of commanders in the police. While the overall picture is encouraging, the introduction of a quota system has created a new set of challenges for women. Crucially, the introduction of a quota of 47 Women's Representatives in the National Assembly and 16 seats for female senators does not guarantee at least

26 There are 12 seats allocated for nominated MPs in the Kenyan National Assembly. The nominated MPs should represent marginalised or minority populations

27 Interview, WM #1.

28 Interview, WM #1.

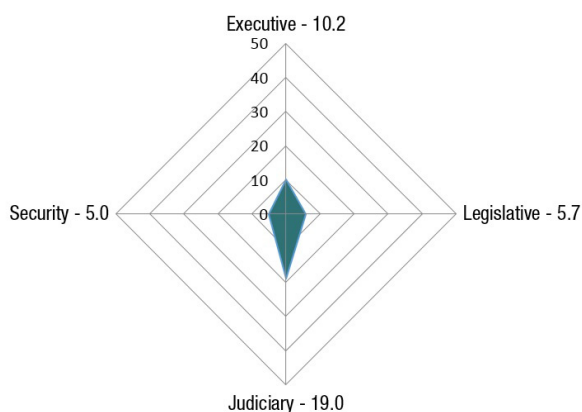
30% representation of women in Parliament. Moreover, political parties are using the allocation of seats for women to discourage women from vying for single constituency seats and County Assembly seats or to discourage voters from voting for women. In the 2013 elections, political parties reportedly asked female candidates to step down from the election race at the constituency level, with the promise that they would be nominated for a Women's Representative position.<sup>29</sup> In situations where a male candidate was running against a female candidate, the former used the allocation of seats for women to convince voters that the latter had already got her place. For example, in the single constituency contest, male candidates argued female candidates already had seats allocated at the county level (i.e. as Women's Representatives) and that voting for them at the constituency level was a wasted vote (Tripp et al. 2014).<sup>30</sup> Mirroring the narrative at the national level, male candidates at the county level argued female candidates would get their seats through the top-up mechanism.<sup>31</sup> There is some evidence that these strategies reduced the overall number of women elected through open contest in 2013. The number of women elected directly at the constituency level did not increase in 2013 compared with 2007, representing stagnation on the upward trend of the preceding three elections. If the quota system continues to be used either to convince

female candidates to step aside from the open contest or to dissuade voters from voting for female candidates, the allocation of 47 seats for Women's Representatives and 16 seats for the Senate could potentially cap female representation at 14% and 24%, respectively.

The proportional representation system introduced through the Constitution works at the level of the allocation of nominated seats, which is based on the number of elective seats won by a party and not the number of votes a candidate gains. This system favours larger parties; smaller parties, which tend to be friendlier to women, do not get as much opportunity to nominate as many members (FIDA, 2013).

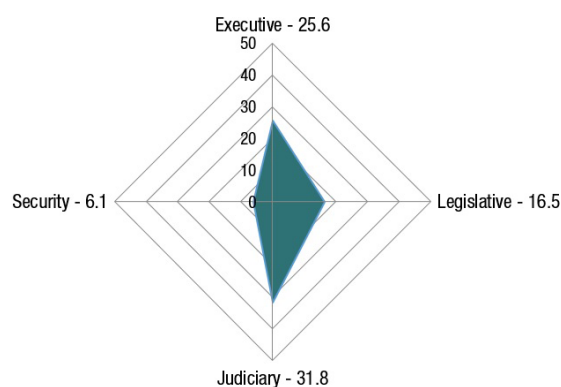
Many of the patriarchal ways of conducting politics in Kenya that limited female involvement before the reform remain critical factors limiting the impact of the reform. Female politicians still cite violence and intimidation as key to dissuading them from entering the 2013 elections.<sup>32</sup> Much of the violence directed towards women continues to be sexual in nature (see Tripp et al, 2014 for more details) and used to debase female candidates' socially approved female roles – that is, as mothers and wives. Some female politicians produce aggressive responses, which are then used to further undermine their position as 'decent women'.<sup>33</sup> However, in its audit of the gender gain in the 2013 elections, FIDA (2013) found few incidents of reported direct violence in the

**Figure 1: Women in leadership positions in Kenya in 2011**



Source: Lott (forthcoming)

**Figure 2: Women in leadership positions in Kenya in 2015**



Source: Lott (forthcoming)

29 Interview, NGO #1; WM #3.

30 Interview, WM #1.

31 Interview, FP #2.

32 Interview, WM #1; #3.

33 Abuse and bullying take many forms. One woman MP reported having her skirt lifted over her head during a parliamentary session – but was wearing trousers underneath pre-emptively (Tripp et al., 2014). Another, after being slapped by a male MP in parliament in May 2015, sarcastically offered to undress (Chweya, 2015).

campaign. FIDA had set up a hotline for reporting incidents; perhaps the increased levels of accountability the new political dispensation afforded dissuaded attackers from following through with their threats.

In addition to verbal and physical abuse, more subtle gendered norms continue to limit women's participation in political life. Many forms of political canvassing remain socially unacceptable for females. For example, men can sit in villages and drink local brew with opinion formers and vote mobilisers; women would be castigated for this type of behaviour.<sup>34</sup> Female candidates also continue to face criticism over the constituency they choose to run in. A male candidate always campaigns in his home constituency but, if a female candidate is married, her home constituency may reject her, as she should now be living in her husband's constituency. If a female candidate's husband is of a different ethnicity, campaigning in her husband's constituency could be problematic.

Access to resources remains a problem for females hoping to enter politics. Many women who are elected hail from wealthy backgrounds or have made money through successful careers. Family wealth and connections to party leaders and machinery are also important forms of access to resources to support women's access to politics. But limited control of and ownership of assets and resources limits access to a large proportion of Kenyan women to positions of influence, or opportunities for political careers. Although the Constitution supports the bequeathing of land to daughters, informal norms make this difficult to implement over the short term. Even with the new rights the Constitution affords women, some women interviewed admitted that they did not challenge the allocation of family land to their brothers. Land and property continues to be a key source of financing for male candidates

Data collected by FIDA on the 2013 elections show female candidates were almost as successful as men at getting elected once they had been nominated. This indicates that a critical constraint is the limited number of women who are nominated. FIDA (2013) concludes that political parties remain dominated by men, with low representation of women in key decision-making roles.

## Constraints on women's access to political power and influence in elected office

'There is hardly anything we can do as women reps.'  
Women's Representative

It was hoped the increase in women's political representation would bring about a different type of politics. The formal rules of the game have changed, allowing women a level of representation that would have been difficult to achieve before. In line with the literature on the limits of quotas, it is clear that presence and numbers of women MPs in and of itself tell us little about the quality of legislative action, normative or ideological preferences or the political allegiances they respond to. The new quota system has produced a new set of formal rules that is navigated and contested by female and male politicians alike. New structural and normative constraints have emerged within the new quota system that limit the influence and power women in elected and appointed positions, particularly those coming through the quota system, can access.

The first constraint the quota system has created for women is the system of nomination by political parties of women for allocated seats. In the National Assembly, constituency MPs are nominated by political party members through primaries held in the constituency. Women's Representatives, on the other hand, are nominated by political parties through a highly opaque process susceptible to nepotism and corruption.<sup>35</sup> In the Senate, political parties nominate women to fill their allocated 16 seats. Female Members of County Assemblies (MCAs) who access seats through the top-up process are also nominated by political parties through a similar process, which those inside and outside politics describe as corrupt.<sup>36</sup> This means female politicians who are in position through the allocation system are reliant on their party for legitimacy and thus are under more pressure to toe the party line.<sup>37</sup> This system also incentivises political parties to select such women.

The system of allocating funding to MPs represents another structural constraint for women who access seats through the quota system. In Kenya, politicians build their support base through demonstrating their ability to access and distribute funding in their constituency. Constituency MPs have access to Community Development Funds (CDFs) to distribute as they decide.<sup>38</sup> Initially, Women's

39 Interview, FP #3.

35 The IEBC was taken to court following the 2013 elections for not publishing the nomination lists and for not providing guidelines to ensure compliance with the alternating gender positions on the party lists.

36 Interview, NGO #3; FP #2.

37 Interview, FP #3; WM #2.

38 The practice of allocating funds to elected officials has not been without controversy. These funds were declared unconstitutional as legislators were allowed to manage funds they had the constitutional duty to oversee. Unfortunately, the highly monetised nature of Kenyan politics means political actors have been socialised into requiring public funds for patronage and sustenance of power and networks.



Representatives had no access to CDF funding. This meant some Women's Representatives aligned themselves with constituency MPs to access funds but ultimately reneged on their policy goals.<sup>39</sup> Other Women's Representatives lobbied for separate funding; Parliament approved this but constituency MPs voted in favour of maintaining control over funding for Women's Representatives. Furthermore, there is currently no structure to link Women's Representatives with the counties they were elected to,<sup>40</sup> thus divorcing them from a geographic area in which they can have an impact. Lastly, the area Women's Representatives should demonstrate impact in is far larger than the single constituency constituency MPs work in (there are on average six constituencies in every county). Even if a Women Representative accesses resources to distribute in her county, these resources need to be spread across a much larger population, thus making it more difficult for her to demonstrate impact.

'The political space is rough, so most women have ended up playing the man's game to survive.' Gender and Human Rights Consultant

Despite increased female representation in elected and appointed positions, the informal rules governing how power is accessed and exercised remain patriarchal. To protect the patriarchal power base, female politicians who have accessed their position through the quota system are ridiculed and treated as 'second-class' politicians. Male and female MPs elected at the constituency level accuse Women's Representatives of not representing any particular constituency,<sup>41</sup> while a Women's Representative described how male MPs called her 'Mama' instead of her right title 'Honourable'. On several occasions, the speaker has had to clarify to Parliament that Women's Representatives are MPs with the same duties as any other MP.<sup>42</sup> Female MCAs who were allocated seats through the top-up mechanism are referred to as 'Bonga points' (the points that can be won with one of the mobile network providers

when one uses a certain amount of phone credit).<sup>43</sup> In Kisii county, only one female MCA was elected; a further 26 were nominated to bring representation of women in the County Assembly up to 30%. The nominated women were shouted down when they stood to speak, as they were not considered legitimate representatives of constituencies within the country.<sup>44</sup> To gain access to power, some women are using the same patriarchal strategies that work to exclude other women.<sup>45</sup>

Representing women's issues through allocated positions has, for some, become a poisoned chalice. Many of the Women's Representatives now want to change their title to County Representative because they believe their current title belittles their position.<sup>46</sup> At the county level, some women are proposing to change their title from 'nominated' to 'special elect' because they feel the title of 'nominated' detracts from their legitimacy.<sup>47</sup>

### Using the Constitution to open legal and policy space for advances on gender equality

Despite these challenges, constitutional reform has contributed to opening up space for further advances in legal change. Moreover, there is in place an architecture mandated not only to oversee implementation but also to bring up to date Kenyan laws to be aligned with new constitutional norms and principles. FIDA has been active in using the new Constitution to lobby for including gender-progressive provisions in the Political Parties Act, the Elections Act and the Elections Regulations (FIDA, 2013). It has achieved some success: for example, the Elections Regulations incorporate Affirmative Action by subsidising half the nomination fees of all women candidates (ibid.).

Feminist lawyers have also been using the Constitution to take government agencies to court, and to scale up litigation strategies to advance the realisation and protection of women's rights and gender equality gains in the constitutions. Litigation strategies and recourse to judicial review to date has been a mixed bag (FIDA 2013).

39 Interview, FP #3.

40 Interview, NGO #1; #3.

41 Interview, NGO #1

42 Email, WM #2.

43 Interview, MP #1; NGO #2.

44 Interview, NGO #1.

45 Interview, WM #2; NGO #1.

46 Interview, WM #1; #3; NGO #1.

47 Interview, FP #2.

For instance, the Supreme Court decision in 2012 that the two thirds gender limitation on elected and appointed positions was to be implemented not through direct enforcement but achieved through progressive realisation was experience at the time as a major set-back. At the same time, the constitutional principle was confirmed and a timeline set for its realisation to be completed in 2015. In another case the NGEK filed a petition at the High Court on the invalid composition of party nomination lists provided by political parties to the IEBC. Importantly, recourse to court action has been strengthened as an additional and important site for contesting practices of gender-based inequality or that contravene constitutional gains on gender equality and women's rights

Furthermore, the constitutional requirement that the chair and vice-chair of all constitutional commissions and independent bodies cannot be of the same gender has ensured the presence of women in the growing body of checks and balances and accountability measure and bodies tasked with guarding the normative content of the Constitution. Women's presence in courts at all levels, for instance, may result in improved prospects for jurisprudence that protects newly expanded women's rights (although this is a matter to be tested through empirical analysis). But while it may not be easy to quantify the qualitative gains here, this presence can contribute to changing perceptions and beliefs about women occupying such decision-making roles.

Parliament must approve the executive's appointments to various positions, such as chief justice, ambassador and other high-level posts. The President must address Parliament and thus the nation once a year to report on progress in various areas, including human rights. It is too early to measure the impact for women's rights, but this clearly creates greater opportunity for public scrutiny.

Thus, the Constitution offers a valuable architecture by means of which women can influence and change the formal rules and practices of official bodies. However, impacts will take some time to be felt. FIDA (2013: 17) concludes that, 'Although the Constitution undoubtedly offers a wide range of protective clauses aimed at promoting equality and curbing discrimination of women, FIDA Kenya contends that most of these gains were not fully realized during the 2013 elections.'

There is a view that female MPs in the current Parliament are less effective and active in lobbying male

MPs and building coalitions support as the KWPC/ Women's Leadership Alliance did before 2010.<sup>48</sup> For instance, female MPs were against the Marriage Bill (which legalises polygamy) and walked out of Parliament in protest. However, this more dramatic gesture was not combined with more strategic work building support from male MPs<sup>49</sup> or the behind-the-scenes work and active advocacy that featured strongly in the previous Parliament. The Bill was approved.

But is important to note that the knowledge base is still patchy – not least as the implementation process has been slow. So, in contrast with this view of less effective women parliamentarians, there is evidence of women using some of the strategies used by the women's movement to build support on some issues. For example, in the lead-up to the presentation of the Chepkonga Bill<sup>50</sup> in Parliament on 4 August 2015, KEWOPA mobilised female MPs to invite up to three male MPs to a dinner at the Intercontinental Hotel to build support for an alternative. In the lead-up to the FGM Bill, women made a strategic decision to frame the argument in human rights and not gender terms. Thus the Human Rights Caucus and not the KWPC lobbied to build support for the Bill, which passed.

### Impact on women's movements in Kenya

'We thought we had arrived. We thought we can go in [to the government] and work.' Women's movement activist. Following the success of achieving a Constitution that recognised and committed to promoting gender quality, women's movements in Kenya lost some of its vigour.<sup>51</sup> Many of its powerful figures were lawyers by training and went to work for the government in appointed positions on commissions and in the judiciary, where they have been progressing a gender equality agenda from within. Some joined political parties and were given influential positions. Some were pressurised to join political parties to be silenced.<sup>52</sup> Considering the political skills many women had learnt through participating in the women's movement, relatively few contested in the 2013 elections. Some activists felt tired; after over a decade of lobbying for affirmative action, they felt the time had come to hand over the reins to the next generation of women.<sup>53</sup> Others understood the informal rules of politics remained unchanged in Kenya and did not want to '*wrestle with men*'.<sup>54</sup>

48 Interview, WM #1; #2.

49 Interview, NGO #3.

50 The Chepkonga Bill proposed progressive introduction of affirmative action as committed to in the Constitution. The women's movement was in general against this Bill as they perceived it as a way to put off affirmative action.

51 Interview, NGO #3; WM #2; #3.

52 Interview, NGO #3.

53 Interview, WM #2.

54 Interview, FP #3.

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The mode of engagement on women's issues has changed as a result of the women's movement's success. The movement used to be very combative, with regular street demonstrations; there are now more entry points for engagement on gender issues.<sup>55</sup> There is more direct dialogue with government rather than protest. For example, when women's movements started to lobby for the Gender-Based Violence (GBV) Bill, they engaged with MPs directly. There are some indications that female MPs are working to distance themselves from antagonistic

politics; when NGOs arranged a street protest on the GBV bill, some females MPs were reluctant to engage,<sup>56</sup> although it was asserted by KEWOPA that many female MPs were out of the country at the time.<sup>57</sup>

That said, key women's activists of the 1990s and 2000s provide strong role models for younger women. Many of the leading figures in the movement were notorious for subverting gender norms and as a result were often the focus of media attention. As one activist noted, '*When I opened my mouth, the country listened.*'<sup>58</sup>

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<sup>55</sup> Interview, WM #3.

<sup>56</sup> Interview, NGO #4.

<sup>57</sup> Interview, FP #1.

<sup>58</sup> Interview, WM #2.

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# 4. Conclusions

The Kenyan experience of women's influence on the content and implementation of a constitutional reform process shows how such moments of formal legal change are a unique window of opportunity in this regard. Of course, what how that influence takes place varies in terms of women's access to such processes (formal or informal), and the specific trajectories and experiences of advocacy, networking and lobbying and social mobilisation. Whether women have a formal seat at the table, in terms of direct access to constituent assemblies, or whether they engage through other forums and arenas or networks where decisions are being made and agreements negotiated, there is no doubt that constitutional reform processes constitute an important site for shaping institutional change and contesting gender norms.

Law is a political instrument, and a powerful site for political contestation that can contribute to transformative change. It is notable, therefore, that it has not been a prominent feature of the development agenda. Moreover, to the extent that legal and constitutional change has been supported, there is often an assumption that it is a technical process. What this study shows, as does a growing body of work on the politics of legal change, is that we need to 'repoliticise' our understanding of legal change. *The technical is political*, and in practice this is often undervalued. Normative content matters. This is made evident precisely because it inspires so much political resistance. This is true of constitutional reform which after all, it defines the formal rules of political, social and economic engagement.

In addition to supporting struggles over normative content for the women's rights and gender equality agenda, it is important to invest in the institutional and organisational capabilities of the relevant mechanisms of oversight and implementation. The watchdog functions of these bodies can under certain political, organisational and capabilities-based conditions contribute to activating the accountability functions that can help protect or advance normative gains.

Thus, there has been a tendency to trivialise legal change, especially where politics and decision-making normally takes place through informal channels, institutions and relationships. Yet legal and constitutional change processes are politically charged precisely because they can activate changes in incentive structures and affect entrenched interests. At the same time, we must not idealise

the transformative potential of legal and constitutional change for at least two important reasons.

First, formal written norms co-exist *everywhere* with informal norms, relationships and practices. Exchanges of power and resources happen at the intersection between the formal and the informal. Women activists (as with all political brokers) are effective precisely when and because they are able to navigate formal and informal institutions, practices and relationships, through politically savvy engagement that straddles these different sites of exchange and decision-making. There is a need for more research on what this looks like, drawing on an emerging body of work in feminist institutional analysis.<sup>59</sup> The challenges with such research, as demonstrated in this study, are that, by their very nature, informal processes are not documented and some incidents are so nuanced that the actors may not have total clarity on what finally worked best.

Second, in contexts such as Kenya, where legal pluralism is an important feature of the political and social landscape, there is all the more need to temper our enthusiasm for how much formal change can translate into meaningfully transforming the multiple levels of norms, belief systems and practices.

At the same time, it is crucial that constitutional reform – as a window of opportunity – be seen as one milestone in a longer process of political and institutional change. At one level, it helps sediment longer-standing efforts (such as the earlier legal and legislative gains by Kenyan gender activists) and thus is the outcome of a longer-term process of political mobilisation and institutional change efforts by women's movements. At the same time, to the extent that it advances, it can galvanise new momentum in contesting and challenging the terms of the political settlement in the degree to which it leads to a new set of rules on politics and development.

In this regard, the transformative impact and sustainability of constitutional reforms are - like all progressive agendas – inevitably hostage to wider political economy conditions. Resistance and backlash take many forms. Typically, elite actors will aim to subvert or ignore rule changes that undermine their interests. Progressive gender gains will also be hostage to the *real* nature of the ruling elite bargain. Of interest in the Kenyan context is that the political settlement is relatively 'unsettled'. This in itself creates opportunities for change and contestation that women's groups and political activists have used effectively

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<sup>59</sup> Waylen (2014) and Mackay and Waylen (2009) are examples of important new scholarship generating analytical and theoretical insights on how institutional and political change happens, drawing on feminist theory and a gendered analysis of institutional development.

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to create new space and political openings for women's rights and access to political and economic power.

This is still an unfolding story with uncertain outcomes. However, concrete gains include the following. First, substantive gains have been made in terms of presence in political representation in elected posts. Despite important hiccups and resistance, the fact of women's presence in national and county level politics constitutes an important gain. Second, the new Constitution has brought in new presence in appointed and public positions. This is an important gain in terms of women's presence in the state bureaucracy and the judicial branch. Third, the constitutional requirement that the chair and vice-chair of all constitutional commissions and independent bodies cannot be of the same gender has ensured the presence of women in the growing body of checks and balances and accountability measure and bodies tasked with guarding the normative content of the Constitution. In the courts, for instance, this is important as it could enhance the prospects for jurisprudence that protects newly expanded

women's rights. Fourth, important normative gains on women's rights also constitute an important achievement.

Institutional change of the scale advanced by the Kenyan constitutional reform process in support of gender equality and women's rights would not have been possible without the presence of a mature, if diverse, women's social movement and feminist political activists, who effectively navigated formal politics, social mobilisation and the range of national and subnational informal forums of political bargaining, advocacy and awareness-raising.

Finally, it is important to recognise the value of the technical knowledge and expertise of women activists in a range of specialist organisations and think tanks, and the support and presence of feminist academics across a range of disciplines. This contributed to the development of a Kenyan feminist agenda – notwithstanding the fact of important cleavages and divisions among women relating to class, regional, ethnicity-based and religious identities and political and ideological preferences and allegiances.



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# 5. Recommendations

- Continue to **invest in women's movements**. This includes organisational and logistical support to facilitate cross-country networking, consolidation of experience, knowledge and lessons learned, and providing opportunities for the development of political apprenticeship acquired in different spaces of social mobilisation and political activism. Areas of support involve working across diverse issue and sectoral domains, at the national and sub-national levels to facilitate space for women's participation, voice and the development of different associative capabilities and political skills in order to consolidate gains achieved and remain active in pushing the boundaries for change across different women's rights and gender equality issues (on reproductive health, access to land, legal expertise on law reform and rights protection). Support can also aim to facilitate creative exchange between older women's movements and younger generations of feminist activism in to allow for knowledge transfer and exposure to historical trajectories of political contestation, experiences of backlash and lessons on political strategy – including in support of activism in formal political life and political party engagement.
- Support **accountability, oversight and constitutional implementation mechanisms**, and women's engagement with these. This includes support to implementation of constitutional oversight mechanisms and to strategic litigation strategies that can activate judicial review and oversight. This means first working with public and state bodies, and engaging with reform champions inside these accountability mechanisms (such as High Court judges as well as magistrates and *kadhis* who work on frontline issues of access to justice). Second, it includes supporting social movements and organisations with legal standing, such as FIDA and COVAW, that can advance strategies to protect newly constituted rights for women. Third is investing in oversight mechanisms relating to application of the quota, but also to implementation of subsequent legislation, such as the 2011 Political Parties Act. This can contribute to strengthening practices on 'following the money' and ensuring the IEBC fulfils its oversight mandate on political party and electoral practice in relation to women's access to political participation.
- Invest in political and technical capabilities to advance on legal change to align with the 2010 Constitution. This includes engaging with hard issues like violence against women and women's access to land rights and property. Change in these areas can be transformational – and thus also susceptible to resistance and backlash. Women activists in Kenya are aware of the merits of ongoing iterative and progressive gains in formal legal change *and* of the need to pursue and oversee implementation.
- Where social norms are 'sticky', this involves multi-level, multi-pronged support strategies to connect the national and the local/county levels, across a wide range of stakeholders. Social norms are a formidable barrier to progress on legal change. Addressing these includes engaging with national level political actors and local power brokers, custodians of customary norms and gatekeepers of power structures. It also includes working to broker engagement with community elders, religious leaders. Deep knowledge of and sensitivity to legal pluralism and how it is manifested in different parts of the country should underpin engagement on support to awareness-raising and sensitisation.
- Invest in **national capacity for knowledge production**. The most valuable sources of evidence to inform policy and practice are national-level research. Support can be directed to local think tanks or knowledge-producing organisations working on gender equality and women's rights, or on concrete thematic and sectoral issues that this research has found to be relevant to supporting women's voice and leadership. This includes research on reproductive health needs (thus medical and other sciences), on women and girls' access to education, on violence against women and access to justice and on women's access to economic assets. Investing in women's research capabilities is an underdeveloped and underappreciated form of international support, but the dividends can be far-reaching in terms of providing context-specific evidence to inform policy and programming to contribute to women's technical knowledge, and thus to enhance the prospects for locally owned, locally relevant and locally driven agendas. This includes investing also in deeper comparative analysis of subregional experiences of how to support implementation of the Constitution (Ohman and Lintari, 2015).
- Invest in **higher education for women**, to support the development of technical skills and expertise required at different stages of policy and legal change and implementation, as well as recourse to different oversight, accountability and legal redress mechanisms.

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Technical knowledge is also a hugely valuable asset in parliamentary debate and issue-specific policy formulation. It is clear that, without the high levels of education members of the women's movement enjoyed, women would not have been able to achieve as much influence. However, it is also clear that urban women dominated the women's movement. To build capacity across all women in Kenya to participate in and inform the women's movement, it is necessary to provide incentives and support to rural women to access higher education across a range of disciplines, include law, public administration, economics and medicine. Women are increasingly reaching parity levels in primary and secondary education, but higher education remains elusive for women and girls (Mulongo, 2013).

- Invest in **flexible support and programming structures that can adapt to emerging political opportunities** as these arise. This can allow for responsive support to changing conditions. Some opportunities structures

in institutional and political reform can be planned for, such as the process of devolution. But even here there are many unknowns with regard to what this will involve in practice and the nature of the obstacles and problems that will be encountered. Moreover, subnational variation in Kenya is important. The experience of gender norms in Garissa, for instance, is quite different to that in Nairobi.

- Maximise the fact that **women's empowerment is a powerful agenda driven and owned by Kenyan women and gender activists**. Drawing on locally owned knowledge and strategy to identify entry points and modes of engagement to shape programming choices will contribute to more effective support and to minimising the risk of doing harm (including in terms of contributing to patrimonialism).
- **Invest in brokering networks and strategic alliances**, including through creatively navigating informal norms and institutions in political and social space.

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# Annex 1: Research, data collection and analysis methods used

The history of the women's movement and gender activists in Kenya, including in relation to their influence on the 2010 Constitution, has been the object of study in academic and policy research, and especially among Kenyan scholars. This case study combines a review of this body of relevant secondary sources – including academic and grey literature – and some primary research. Primary research included reference to primary documentary sources, mostly legal and constitutional texts and a country visit to Nairobi in 2015. Interviews were carried out to understand in more detail the experience of feminist activism in social and political life leading up to 2010, and newer challenges women leaders face in public and political life in Kenya despite, or even as a result of, achieving a gender-progressive constitution that includes a commitment to affirmative action.

Primary data for this research were collected from July to October 2015. In total, 20 semi-structured qualitative interviews were conducted – six with key members of the women's movement, four with parliamentarians (three women and one man), one with a member of the judiciary and five staff at NGOs working on women's empowerment in Kenya. Most (17) interviews were conducted by an Irish and a Kenyan researcher in Nairobi. Further interviews were carried out with USAID, with another member of the Kenyan judiciary and with another key member of the women's movement by a Spanish and an Irish researcher based in London.



# Annex 2: Interview respondent categories

Category of respondent	Code	No. of interviews conducted
Female politicians	FP	3
Male politicians	MP	2
Female member of the judiciary	FMJ	2
Key activists in the women's movement	WM	7
NGOs working on women's empowerment	NGO	5
Donors	DO	1
Total		20



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