

**Challenges and Prospects for Women in Constitution-Building in
Sub-Saharan Africa: A Comparative Study of Rwanda, Kenya
and Nigeria**

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ABSTRACT

The trajectory of the development of Constitutions that guarantee women's rights and gender equality within sub-Saharan Africa highlights the history of gender inequality and discrimination against women. While gender gaps remain persistent some progress has been made with more countries like South Africa, Rwanda, Kenya, Uganda, Senegal, Tanzania etc. providing specific constitutional guarantees for women.

This thesis will comparatively analyse the effect of women participation in the constitution-building process and its impacts on the development of Constitutions in Rwanda, Kenya and Nigeria especially with respect to women participation in the making of the 2003, 2010 and 1999 Constitutions of Rwanda, Kenya and Nigeria respectively.

These jurisdictions share similar British colonial heritage with a constitution-building process that was *ab initio* restricted and elitist-driven with no gender-equality principle. However, the making of the 2003 Rwandan and 2010 Kenya Constitutions presents interesting case-studies with an increase in the level of women inclusion and participation. Nigeria in its constitution-review processes in recent times incorporated the principle of gender –equality yet produced a different outcome from the Kenyan and Rwandan process where the constitutions guaranteed specific rights for women.

This study will focus on the constitution-building process and will as part of its conclusions make recommendations that can suit local conditions in Nigeria and influence practices in sub-Saharan Africa as it concerns gender equality and constitution-building.

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Table 1.0 – Assessing Constitutional Provisions through Vulnerability lens

INTRODUCTION

Global trend in the constitution-building process indicates an evolution from a closed elitist process to a more participatory process that not only seeks to harness and harmonise diverse interest but to also constitutionalize gender equality and the rights of women. Gender and the constitution is constantly becoming a major discourse in the development of constitutions, with the increase in the advocacy for modern constitutions that engenders gender equality.

Sub-Saharan Africa is not left out in these debates.

As more African societies emerge as constitutional democracies; the constitution becomes the rallying point for the harmonization of diverse interests and rights of women. While gender inequality and discrimination against women remains major in maintaining the persistent gender-gaps, countries like South Africa, Rwanda, Kenya, amongst others have taken the positive lead in constitutionalizing gender-equality and the rights of women with other countries yet to take a decisive position. The discourse on women and the constitution should however advance beyond the constitutional guarantees to the process of constitution-building as a panacea for effective entrenchment of gender equality and rights of women. Inadvertently, the process begins impacting on the standards for the development of the constitutions text, language and spirit that engenders gender equality.

In recent times, “constitutional reform offers a unique opportunity to transform the fundamental structure of governance through the incorporation of women’s rights, the language of inclusion and the creation of Institutions and processes that protect and promote substantive equality of women and men.”¹ In line with Irving’s argument, if “the existence of

¹ International Institute for Democracy and Electoral Assistance, “Women and Constitutions Building in 2013” http://www.idea.int/publications/constitution-building-a-global-review/upload/cbgr_c3.pdf accessed October 28, 2015

a system of government that no longer serves the interest of the people or produces more inequalities and injustices is now a legitimate motive for constitutional change”,² the constitutionalizing gender equality from the process to the letters of the constitution should also be a course for constitution making.

This study begins on the premise that the process of constitution-making influences the outcome of the constitutional text. It goes further to analyse the level and impact of women participation in the constitution building process in Africa with Rwanda, Kenya and Nigeria as case studies. While several discourses focus on the presence or absence of constitutional guarantees for gender equality and rights and their effectiveness thereafter, there is limited focus on the process of constitutionalising or legislating gender rights and the interplay between the process and outcome.

The constitution-making process in itself is largely influenced by political events with different levels of political bargains and political compromise determining the final text of the constitution. Thus the growing demands for a people-driven constitution making process. Inclusion and participation in the constitution-building process are possible influential factors. Arguably, the participation of women can enable the constitutional development of gender equality and rights of women.

Different constitutions were developed without guarantees for gender equality or rights of women. Beyond Sub-Sahara Africa, the American constitutional experience for instance, indicates how the exclusion of women from the process enables the delay in the development of jurisprudence on gender equality since the constitution remained silent on it. Although the

² Helen Irving, *Gender and the Constitution; Equity and Agency in Comparative Constitutional Design* (New York: Cambridge University Press, 2008), 2

American Constitution remains one of the oldest constitutions, predictably, women were not part of the constitution-making process.³ Germany presents an example of the potency of women participation in the process for gendered constitution with specific highlights on the efforts and tenacity of *Dr. Elisabeth Selbert*, one of the four female members of the Parliamentary Council, in mobilizing support for gender equality which was introduced in the German Basic Law.⁴

In Sub-Saharan Africa, we see common features in the history of Constitution development in Kenya, Nigeria and Rwanda Africa from independence to include; the absence of an inclusive and gender balanced Constitution building process, absence of constitutional guarantees of gender equality and women's rights. Interestingly, the only female delegate amongst the Kenyan delegates at the negotiations of the Kenyan Independence Constitution was denied the opportunity to speak.⁵ Evidently, the early constitutions in Sub-Saharan Africa were predominantly silent on gender equality and women's rights. In Nigeria and Kenya for instance 'sex' was only introduced as a prohibited ground for discrimination in the 1979 Constitution of Nigeria and 1997 amendment to the Kenyan constitution.⁶ Considerations or legal efforts to advance gender equality and safeguard the rights of women were first assessed against standards created for men with a male dominated constitution building process.

³ Ibid, 5

⁴ Susanne Baer "The Basic law at 60- Equality and Difference: A Proposal for the Guest List to the party." *German L.J.* 11 (2010): 67-87

⁵ Wekesa Peter W. "Constitutionalising Gender Rights and the Politics of Inclusion in Kenya since 1962" in *Insights into Gender Equity, Equality and Power Relations in Sub-Saharan Africa* ed. Mansah Prah (Kampala: Fountain Publishers, 2013), 9

⁶ See Section 28 of the 1963 Constitution of Nigeria in comparison section 28 of the 1979 Constitution and subsequent constitution. Also in Kenya, the 1963 Constitution and subsequent amendments did not identify sex as a prohibited ground for discrimination until the 1997 amendment to Section 82(3) formally Section 26(3) of the 1963 Constitution.

However, increasingly more countries like Rwanda, South Africa, Kenya, amongst others have constitutions with specific guarantees of gender equality and rights of women. It is quite surprising to have the Inter-Parliamentary Union Database identify Rwanda, South Africa and Senegal ranked amongst the first 10 countries of the world with over 40% women members in the lower House of their National Parliament. According to the figures in the database as of December 2015, Rwanda for instance stands out as a model for women in Government with 63.8% of women in the lower House of the National Parliament. Although Kenya ranks 74th with 19.7% representation of women, the 2010 Constitution of Kenya provides quite an extensive guarantee for rights of women.⁷ While Nigeria, ranking 134th in the world with 5.6% representation of women in the Lower House of the National Parliament has only a general provision against discrimination on the grounds of sex.⁸

Rwanda thus presents an interesting case study in analysing the trajectory in the development of gender equality as a constitutional right and the role of women in the constitution-making process. Quite similar to Rwanda, Kenya with a relatively new constitution which came into effect in 2010 has progressive provisions guaranteeing the rights of women and gender equality. Notably, the Constitution of Rwanda (2003) and Kenya (2010) developed as part of the peace-building and reconstruction mechanism after the 1994 genocide and 2007 widespread post-election violence respectively. The 1999 Constitution of Nigeria has been amended but there has been no specific amendment to constitutionally guarantee the rights of women. While these jurisdictions may present different experiences in their constitution-

⁷ The 2010 Constitution of Kenya provides for among other rights, equal opportunity for women and men in all spheres, gender quota, equal rights of partners in marriage and at divorce and incorporates Treaty and Convention ratified by Kenya for example the Convention for Elimination of all Forms of Discrimination against women

⁸ Inter-Parliamentary Union "Women in National Parliament: Situation as December 1, 2015", <http://www.ipu.org/wmn-e/classif.htm> accessed 28 January, 2016

making processes, they have almost similar colonial and constitutional development history intertwined in ethnic and religious dynamics.

This study seeks to answer firstly; how the participation of women in the constitution-building process impact on the constitution through a comparative study of Rwanda, Kenya and Nigeria. Secondly, whether there are possible differences in the forms of constitutionalising gender equality and whether the participation of women in the process affects the language of the constitution? Lastly, whether there are other factors that affect the development of constitutional guarantees for women in the constitution-building process? These will be discussed in three broad chapters with a fourth chapter providing recommendations for Nigeria and other jurisdictions in Sub-Saharan Africa for women in the constitution-building process.

The study will deploy library based research, analysing existing literature relating to the subject matter of Study, and an analysis of the provisions with regards to gender equality in the Constitutions of Rwanda, Kenya and Nigeria.

The first chapter will begin with definitions of concepts like constitution-building, constitution-making and the constitution-reform and an overview of the constitution-building experience in Rwanda, Kenya and Nigeria. The major aim of this overview is to highlight development of a participatory constitution-building process and the development of constitutional rights for women. The history of constitution-making in different jurisdictions presents almost a similar narrative with a process that at first instance restricts popular participation and gradually progresses to a more inclusive process in modern constitution-building.

Chapter two will analyze the issues around constitutionalizing gender-equality and women's rights. This chapter will begin with a discussion on the socio-cultural and political context and how they influence the constitution-making process. The reality remains that Sub-Sahara African Society like most societies operates a predominantly patriarchal system where male dominance overrides the concerns for gender equality or demands for equal participation, representation and opportunities for women. According to the 2013 World Economic Forum Global Gender Gap Report, Sub-Saharan Africa continues to show the highest gender gaps with four countries in the region being part of the five lowest countries that had closed their educational attainment gap...while Benin, Mali, Cote d'Ivoire and Chad remain the lowest ranking Sub-Saharan Africa countries in the Index".⁹ While the overall gender gap in the region was closed by 66%, its political empowerment gender gap was closed by 18%, with the exception of Rwanda which stands out as a model for increased women's political participation.¹⁰ The existing gender gaps are an indication of the systemic patriarchy either influenced by social-cultural or religious interplay, or both, which affect gender equality considerations in decision making processes.

Accordingly, contextualizing women's participation will include an attempt to build theories around the internal inherent factors and the systematic influences over the procedural guarantee of equal participation of women. These factors highlight the different levels of societal influences in the establishment of legal norms and standards. In this sense, a women inclusive process aids in forming the attitude of the society where society inadvertently becomes the conduit for realizing of legal standards on gender equality. The internal inherent factors seek to establish the connection between the context and the reality gender equality irrespective of constitutional guarantees or established laws. The Kenyan constitutional

⁹ World Economic Forum "*The Global Gender Gap Report 2013*"

http://www3.weforum.org/docs/WEF_GenderGap_Report_2013.pdf accessed 7 December, 2015

¹⁰ Ibid

provision of Article 81(b), guaranteeing gender equality by ensuring that “not more than two-thirds members of the elective public offices shall be of the same gender” has become a subject of debates. As discussed by Peter Wagula Wekesa, article 81(b) which prima facie seeks to ensure equality and increase women’s representation raises certain issues which may render it unattainable.¹¹ One of these was “the history of women marginalization and exclusion from decision-making process in the country. As such, the sheer imagination that women could raise the minimum one-third in any institution simply because of constitutional legality is unbelievable.”¹²

Similarly in the Nigerian Context with a constitution that guarantees non-discrimination on the grounds of sex¹³ and a National Gender policy¹⁴ that provides for 30% affirmative action, women still remain under-represented in decision making processes. Irrespective of the National Gender Policy, the present National Assembly has 6.5% female members in the senate and 5.6% in the House of Representatives.¹⁵

Research for instance, has shown that there are systemic inequalities plaguing different systems as evidenced in the analysis of gender inequality from the perspectives of the prevalence in equalities in the society. The analysis examined the gender difference in political participation across selected 18 Sub-Saharan countries.¹⁶

¹¹Wekesa Peter W. “Constitutionalising Gender Rights and the Politics of Inclusion in Kenya since 1962” in *Insights into Gender Equity, Equality and Power Relations in Sub-Saharan Africa* ed. Mansah Prah (Kampala: Fountain Publishers, 2013), 3

¹² Ibid

¹³ Section 42 of the 1999 Constitution of Nigeria (amended)

¹⁴ The National Gender Policy is a policy introduced under the Federal Ministry of Women Affairs to promote gender equality in all spheres and promote the rights of women. As the name entails, it is not legislation and not enforceable in the Courts.

¹⁵ Inter-Parliamentary Union “Women in National Parliaments: Situation as at December” 2015 <http://www.ipu.org/wmn-e/classif.htm> accessed 3 February, 2016

¹⁶ Hilde Coffe and Catherine Bolzendahl, “Gender Gaps in Political Participation Across Sub-Saharan African Nations” Social Indicators Research, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3065638/> accessed February 14, 2016,

In effect, constitutionalizing gender equality or developing legal standards/policies for gender equality is not sufficient in promoting equality. The process of building these constitutional standards or legal standards provides a level of cohesion that drives the societal consciousness. And because these internal inherent factors are inbuilt norms which developed over a period of time, dislodging these ideas needs a process of building counter norms.

The third Chapter will assess the legal framework of constitution-making by comparing the model used in Rwanda, Kenya, and Nigeria. The idea is to identify the different processes influencing the constitution-making and establish the prospects and challenges of each identified process through a cause and effect theory. Certain dynamics to note will include the system of government and process of adoption of the constitutions; where the final authority lies and what role this authority plays. The Nigerian case study for instance highlights dual-legislative adoption process where the majority from both the National and State Legislature is required for each proposed constitutional amendment.¹⁷

The cause and effect theory will be built around parity debates and feminist theory that can substantially influence the process. As proposed by Georgina Waylen, “the political opportunity structure during the constitution-making must be a favorable one.”¹⁸ Baines and Rubio-Marin advocate for the development of a feminist constitutional agenda while identifying specific position of women to include amongst other: constitutional agency, constitutional rights, constitutionally structured diversity, constitutional equality etc.¹⁹ Also,

¹⁷ Section 9 of the 1999 Constitution of Nigeria (amended)

¹⁸ Georgina Waylen, “Constitutional Engineering: what opportunities for the enhancement of gender rights?” In *The Politics of Rights, Dilemmas for Feminist Praxis*, ed. Andrea Cornwall and Maine Molyneux (New York, NY: Routledge, 2008), 43

¹⁹ Beverly Baines and Rubio-Marin Ruth, *The Gender of Constitutional Jurisprudence* (United Kingdom: Cambridge University Press, 2012), 4

Irving proposes equity and agency in constitutional design as she asserts that country's constitutions are gendered in such a way that it disparately impacts on gender.²⁰

The reality as will be presented by the vulnerability test is that constitutional concessions that are not fairly and squarely won remains good on paper without necessarily initiating positive standards. In this respect, the constitution-building process becomes this broad, multifaceted, and interconnected influencer that defines legal norms, shapes attitudes, and entrenches constitutional principles. Just as identified by Mendez and Wheatley there is a need to focus on the mode of representation of the constitution-making body and the mode of legitimation in order to investigate the outcomes of the process.²¹

²⁰ Helen Irving, *Gender and the Constitution; Equity and Agency in Comparative Constitutional Design* (New York: Cambridge University Press, (2008), 2-5

²¹ Jonathan Wheatley and Fernando Mendez, *Patterns of Constitutional Design: The role of Citizens and Elites in Constitution-Making* (England: Ashgate Publishing Limited, 2013), 2

CHAPTER ONE

General Overview of the Constitution-Building Process in Rwanda, Kenya and Nigeria

Introduction

Constitutions are revered as the supreme law of a defined society which defines State powers and relations between the organs of government, guarantees citizens' rights, regulates the relationship between the State and the people and preserves the sovereignty of the people. Constitutions are usually referred to as the *grundnorm*, which determines the exercise of governmental powers and from which every other law draws life. This central role played by the constitution in organizing the state and defining rights has increasingly advanced the discourse on constitution-building and the new waves of constitutionalizing gender equality.

This chapter provides an overview of the development of constitutions in Rwanda, Kenya, and Nigeria. The history of constitution-building in these jurisdictions like other parts of Sub-Saharan Africa can be traced to the colonial period where the colonial officials in this case the governor-general are for easy administration of the colonies introduced constitutions. Constitution-making was seen as the prerogative and exclusive right of the colonial officials and was mostly named after the governor-general in power. The exclusive process was further consolidated by the new leaders in post-colonial period which not only entrenched tyranny but became a major setback to the development of constitutional guarantees for women.

Women issues took decades to be recognized by different constitutions considering that constitution-making in many states in sub-Saharan Africa were first exclusive rights of the dominant few (who were men) in power. The exclusion of women from decision making processes largely contributed to the delay in the legal recognition of gender equality and discrimination against women. Different nations for instance always make reference to

“founding fathers”, “heroes past”, “Father of the Nation” “Nationalist father” and in all these rarely does the thought of women come to mind. Irving makes reference to a letter written by Abigail Adams in 1776 to her husband John Adams “anticipating the declaration of independence and the necessity of “Code Laws” with a reminder to “Remember the Ladies, and be more generous and favourable to them than your ancestors”... “Do not put such unlimited power into the hands of the Husbands...[r]emember all Men will be tyrants if they could”.²² The letter to Abigail Adams to her husband may signify certain things but one thing is clear; that you are better placed to make an impact when you are in the decision-making process. The trajectory in the challenging development of jurisprudence on gender equality and rights of women in the United States of America indicates the challenges for women where the constitution is silent on the rights of women and gender equality.

As such, this chapter will also discuss the constitution-making experience of Rwanda, Kenya and Nigeria in order to highlight the role and level of women inclusion in the process. As more people ask for a citizen-driven process, it is also imperative that women assume their role as equal partners in the making of modern constitutions.

1.1 Defining Constitution-Building through Historical Development

Constitution-building can be described as both a process and a system. Constitution-building as a process encompasses the making and sustainability of a constitution, the review and reform and amendment of the constitution and the institutionalisation of the legal framework set by the Constitution and its system of belief. As a system, constitution-building includes the organisation of the processes involved in developing a constitution, the structuring of a system of government that promotes constitutionalism and respects the tenets of the rule of law.

²² Helen Irving, *Gender and the Constitution; Equity and Agency in Comparative Constitutional Design* (New York: Cambridge University Press, (2008), 5

According to Ghai Yash and Guido Galli “the concept of constitution building is more complex than the process of constitution making alone...they assert that in constitutional building, a political entity commits itself to the observance and establishment of a system of government and values.” In line with this assertion, the focus thus transcends the making of a constitution itself into the realisation of a system that reflects the tenets imbedded in the constitutional text.²³ It is not a onetime attempt but a continuous process developed either as a legislative process, through judicial interpretation or governance culture. This will include the making of constitutions, review or amendment of constitutions and the continuous system that accommodates the growing diverse identities in the society and its legal realities.

A reflection of historical development of constitutions in Sub-Sahara Africa highlights the “confluence of events”²⁴ that triggered constitutional change. These events either yielded positive or negative results. The chronicle of the constitution-building process in Rwanda, Kenya and Nigeria has an almost similar trajectory with some peculiarities. Also noteworthy is the influence of the multi-ethnic and religious conflicts on the constitutional change.

The ugly genocide experience of Rwanda in 1994 was the fruit of the seeds of ethnicity sowed during colonial rule, which was further entrenched from negotiation of the Independence Constitution of 1962 and subsequent authoritarianism. The Independence constitution of 1962 was more of an instrument of the colonial officials negotiated with a few Rwandan representatives, who were from the Hutu ethnic group. The closed system of constitution-making was a similar feature across the board where the Constitution ushering in Independence was more of an imposition of the colonialists than a people constitution. The 1962 Constitution was suspended after a military coup in 1973 until a constitutional

²³Yash Ghai and Galli Guido, *Constitution-Building Processes and Democratisation* Institute for Democracy and Electoral Assistance http://www.idea.int/publications/dchs/upload/dchs_vol2_sec6_2.pdf accessed 4 February, 2016

²⁴ Ibid

amendment in 1978 which amongst other things entrenched the de facto one party system into the constitution.²⁵ Consequently, the amendment consolidated exclusive powers in the hands of president with no opportunity for opposition, human rights; protection of the interest of the Tutsi's and the division among the Hutu's and Tutsi's deepening along ethno-political lines. The abuse of power and discrimination against the Tutsi's fanned the embers of opposition and together with the pro-democracy movement across the globe; the pressure led to the adoption of a new constitution in 1991 which introduced a multi-party system, separation of powers and rule of law. However, the ethno-political tension had degenerated and thrown the Rwandan society into a state of war in the early 1990's²⁶ which finally escalated with the genocide of 1994. The peace-building process included the development of conflict resolution agreements like the "Arusha Peace Agreement, additional protocols on the Rule of Law and the 1991 Constitution, which constituted the Fundamental Law of Rwanda until the 2003 Constitution."²⁷

The Kenyan constitution-building process highlights constitutional journey that began from the pre-colonial era and only started to take a semblance of "indigeneity" with the Independence Constitution in 1963. The 1963 Lancaster Constitution was largely negotiated by the colonial officials and representatives of Kenya to entrench democracy, human rights devolution of powers, checks and balances.²⁸ The 1963 constitution was supposed to be a symbol of the independence of the people of Kenya however, it was not revered as indigenous and steps were taken to replace it. In 1964, the 1963 Constitution was replaced

²⁵ Constitutionnet "Constitutional History of Rwanda" <http://www.constitutionnet.org/country/constitutional-history-rwanda> accessed January 27, 2015

²⁶ Lindsay Scorgie "Rwanda's Arusha Accords: A Missed Opportunity" <http://dspace.africaportal.org/jspui/bitstream/123456789/23742/1/Rwandas%20Arusha%20Accords%20A%20Missed%20Opportunity.pdf?1> accessed 27 January, 2016

²⁷ Priscilla Yachat Ankut "The Role of Constitution Building Processes in Democratization: A Case Study on Rwanda" Institute for Democracy and Electoral Assistance (2005) <http://www.idea.int/conflict/cbp/> accessed 20 January, 2016

²⁸ Jill Cottrel and Yash Ghai, "Constitution Making and Democratization in Kenya (2000-2005)" <http://www.tandfonline.com/doi/pdf/10.1080/13510340601024272> accessed 15 February, 2016

with a new constitution declaring Kenya a Republic with its autonomous government, a new President and replacing the Parliamentary system with a Presidential system of government. While this constitution incorporated a bill of rights the freedom from discrimination did not include sex as one of the prohibited grounds for discrimination. By 1982, the Constitution had undergone some amendments which abrogate democratic principles, removed the devolution of powers, introduced a one-party state and concentrated more power at the centre on the President; the President became more powerful, authoritarianism was institutionalised.²⁹ By 1991, pro-democracy movement and opposition to the government became a catalyst for a constitutional amendment repealing the one party State and ushering in the 1992 elections.

In 1997, the Constitution of Kenya Review Act was published with some reforms adopted which included the addition of 'sex' as one of the prohibited grounds for discrimination³⁰ and by 1999 a Parliamentary Select Committee on Constitution Review was formed to recommend how the constitution should be reviewed. This process continued and in 2001 the Yash Pal Ghai led Constitution of Kenya Review Commission (CKRC) commenced its work. The Commission was mandated by the Constitution Review Act to incorporate gender equality as a principle in the process.

In 2002, the Constitution of Kenya Review Commission (CKRC) published a draft Constitution which was suspended with the manipulation of the then President; Daniel Moi

²⁹ Ibid

³⁰ The 1963 Constitution of Kenya in Section 26 (3) with subsequent amendment did not recognize 'sex' as a prohibited ground for discrimination. Discrimination against women was thus enabled by this silence in the constitution. It further made the Constitutional provisions subject to Laws on adoption, marriage, divorce, and burial, devolution of property on death and other matter of personal law by subsection 4 paragraph b. By implication, discriminatory practices against women continued. In 1997 one of the reforms introduced included sex as a prohibited ground of discrimination although still subject to sub-section 4. This became section 82 of the 1963 Constitution (with amendments).

for general elections to be held.³¹ The Draft Constitution was presented for consideration before the National Constitutional Conference (NCC) with representation of diverse groups and interest. The NCC adopted a new draft constitution after much controversy and conflict of political interest. The new draft raised several constitutional questions in addition; a decision of the Kenyan High Court established a process of referendum for the replacement of the constitution.³² The new draft constitution did not garner popular support at referendum and at this time, ethnic lines became fault lines manipulated by politicians while the President in reshuffling his cabinet excluded members who had campaigned against the constitution.

With an already heated polity, political campaigns along ethnic lines, the 2007 presidential elections controversy worsened with the swearing in of Mwai Kibaki as the president and it became a major trigger for the wide-spread post-election violence.³³ As part of the conflict resolution agreement, constitution reform was to be initiated as a peace-building mechanism and for political stability in Kenya.

The Nigerian experience highlights a constitution-building process fraught with military rule and the suspension of constitution with the introduction of the constitution (suspension and Modification) decrees during military rule. The several military coups were always easily justified by the military as an interventionist strategy to redeem the system. However, the counter effect was the deep entrenchment of authoritarianism, abuse of fundamental rights and the stifling of constitutional values. And because the military was male-dominated, the space for women inclusion was more restricted. The different Military Regime introduced the Constitution (Suspension and modification) Decrees but I will focus on three main constitutional change experiences.

³¹ Christiana Murray "Kenyan 2010 Constitution"

http://www.publiclaw.uct.ac.za/usr/public_law/staff/Kenyas%202010%20Constitution.pdf accessed 15 February, 2016

³² Ibid

³³ Ibid

The Independence Constitution of 1960 was easily replaced with the 1963 Republican establishing the President as the Head of State and Commander-In-Chief of the armed forces. While both constitutions provided for fundamental rights, it did not include 'sex' as a prohibited ground for discrimination. A coup in 1975 brought in a new military leadership and a subsequent setting up of a Constitution Drafting Committee (CDC) in 1975. With an already ethnically divided Nigeria, one important issue identified to be addressed by the constitution was "the creation of consensus politics and government based on a community of all interest..."³⁴ Although a failed coup resulting in the death of General Muhammad brought in a new military Head of State, the Constitution Drafting Committee continued its work and submitted a draft constitution in 1979 to a Constituent Assembly. The new constitution which was adopted with amendment by the military leadership, lifted the ban on political parties, introduced a Presidential system of Government and elections were held that same year.³⁵ It considered gender by prohibiting discrimination on the grounds of sex. The constitution-making of 1979 is regarded as the first participatory constitution-making in Nigeria; however, it had poor women representation. However, the civilian rule was interrupted after four years in 1983 by a military coup and the new administration constituted a Constitution Review Committee to review the 1979 Constitution and by 1989 a new Constitution was introduced which was to take effect in 1992.³⁶

With an inconclusive election in 1992, a failed constitution-making in 1995 and the death of the then Military Head of State, a new administration came into power under General Abdulsalami Abubakar in 1998. A Constitution Debate Co-ordinating Committee was set up in 1998 by General Abubakar as part of the transition program to civilian rule. The

³⁴ John Simpkins, "The Role of Constitution-Building Processes in Democratization; Case Study Nigeria" Institute for Democracy and Electoral Assistance" <http://www.idea.int/cbp/> accessed 7 December, 2015

³⁵ Nnamdi J Aduba and Sam Oguiche, *Key Issues in Nigerian Constitutional Law*, (Nigeria: Nigerian Institute of Advanced Legal Studies, 2014), 86-115

³⁶ Ibid

Committee produced a draft constitution that was approved as the 1999 Constitution following amendments by the Military leadership and general elections signalling the transition to a democracy. Some sections of the 1999 Constitution were amended in 2010 with a failed amendment procedure in 2015 by the National Assembly.

From the foregoing, constitution-making in the three jurisdictions were not participatory and did not make consideration for women representation. It is important to note the Kenyan as well as the Rwandan constitution-building experience began to show a semblance of a participatory process in the 1990's constitution-building efforts. However, system of participatory, people-driven constitution-building in Kenya was entrenched first in 2004 decision in *Njoya and Others* where the Court held that:

Parliament has no jurisdiction or power under section 47 of the Constitution to abrogate the existing Constitution and enact a new one in its place...The Power to make a new constitution (the constituent power) belongs to the people of Kenya as a whole...in the exercise of that power, the applicants together with other Kenyans, [in this case] entitled to a referendum on any proposed new Constitution...The Constitution gives every person in Kenya an equal right to review the constitution which right embodies the right to ratify the constitution through a national referendum.³⁷

The Court's decision establishing the role of citizens and right to referendum was further consolidated in the Constitution Review Act of 2008, which identifies Referendum as one of the organs of constitution making. In Rwanda, the 2003 Constitution was subject to Referendum. In Nigeria, the military interregnum influenced the Constitution-building process. The military system is inherently dictatorial rather than democratic. Considering that the 1979 process is often regarded as the first participatory constitution-making process and also the 1999 process were both under military regimes, the question however lies on the

³⁷*Njoya and Others v Attorney-General and Others* (2004) AHRLR 157 (KeHC 2004)
<http://www1.chr.up.ac.za/index.php/browse-by-country/kenya/1126.html> accessed 27 January, 2016

final ratifying authority and in both instances, it was the Military leadership with the power to introduce amendments at the point of adoption.

1.3 Constitution-Making; A Reflection on the 1999 Constitution of Nigeria, 2003

Constitution of Rwanda and 2010 Constitution of Kenya

Mendez and Wheatley describe constitution-making according to its different functions from two different perspectives. On the one hand, “constitution-making has a peculiar relationship to the existing legal framework as: extra-legal; where its outcome breaks preceding legality, as supra-legal; where it sets rules for future lawmaking and infra-legal; needing a legal basis to function”.³⁸ On the other-hand, “constitution-making is a unique moment in high politics as it aims to conclude a new social contract, shape new institutions and legitimate new rulers”.³⁹ However, as highlighted in the brief constitution-building experience of Rwanda, Kenya and Nigeria, constitution-making is not always infra-legal as different regimes in the military era or authoritarian rule in Kenya and Rwanda wielded the constitution as an instrument of oppression with no regards for legitimacy.

Constitution-making can therefore be said to vary in its functions and in most situations is best described according to the existing legal context of a particular political entity. It aims at defining or re-shaping a legal framework according to defined benchmarks. The development of constitutions within different jurisdictions shows that the constitution-making process evolves with societal realities and is subject to influences by the political situation. In this sense, gendered constitutions should be a result of an affirmation of the increasing role of women in nation-building as a viable base of human capital and civic energies.

³⁸ Jonathan Wheatley and Fernando Mendez, *Patterns of Constitutional Design: The role of Citizens and Elites in Constitution-Making* (England: Ashgate Publishing Limited, 2013), 1

³⁹ Ibid

Vivien Hart discusses constitution making as “a contest over the distribution, redistribution and limitation of power”. She identifies the “making and remaking of a constitution as part of peace-making and nation-building endeavour especially in divided and conflicted society”.⁴⁰

The 1994 genocide in Rwanda and 2007 Post-Election violence of Kenya remain turning points for their constitutional development as the constitution-making was part of the peace-building process. Within different jurisdictions, the absence of constitutional order becomes an impetus for the making of a constitution.

The idea of constitution-making itself is borne from the recognition of a need and the identification of a means to address that need. It therefore becomes a component or determinate means to an end. In this sense, constitution-making has overtime functioned as an integral part of a peace-building process, a representation of a transition of government which can be from authoritarian rule to civilian rule/democracy or it can also signify the attainment of the status of an independent State.

The making of the 1999, 2003 and 2010 Constitutions of Nigeria, Kenya and Rwanda respectively signified the beginning of a new era. The constitution-making process will be discussed adopting Wheatley and Mendez’s three operational dimensions:

- a) The mode of representation which can be through elite appointment, direct election and in some cases indirect selection;
- b) The style of the constitution-making process: is it open or closed?
- c) The mode of legitimation: this can be through ratification by political elites, citizens through a referendum or institutional ratification.⁴¹

⁴⁰ Vivien Hart, “Constitution Making and the Right to Take Part in a Public Affair,” in *Framing the State in Time of Transition Case Studies of Constitution Making*, ed. Laurel E. Miller (Washington, DC: United States Institute of Peace, 2010), 20.

⁴¹ Wheatley and Mendez, “Patterns of Constitutional Design”, 16-17.

Constitution-making is usually enabled by a law to guide the processes and help in addressing both procedural and substantive issues. The Arusha Peace Agreement in Rwanda provided for the setting up of a Constitutional Commission with the mandates of this Commission.⁴² The 2010 constitution-making in Kenya was governed by the Constitution of Kenya Review Act (2008) while the making 1999 Constitution of Nigeria was guided by the Provisional Ruling Council as part of the transition program to civilian rule.

1.3.1 Mode of Representation

The trend of constitution-making in Nigeria from the post-colonial Independence (Lancaster) Constitution shows that the elite mode of appointment where the executive appoints members of the Constitution Drafting/Review Committee (commission) or the Constituent Assembly was the practice. This mode of representation was further enabled with the long period of Military rule. The making of the 1999 constitution of Nigeria was not quite different from this as the then Military Head of State was responsible for appointing the members of the Constitution Debate Co-ordinating Committee (CDCC).

The Constitution Debate Co-ordinating Committee was made of 25 members who were all men and led by Niki Tobi who was then the Chief Justice of the Court of Appeal.⁴³ It is important to note that the constitution of 1999 was a symbol of the transition to democracy in Nigeria and having the military in power implied that civilian rule will be a product of the commitment of the military to a transition agenda. The Committee had the mandate to “pilot the debate, co-ordinate and collate view and recommendations canvassed by the individuals and groups and submit the report...”⁴⁴ There was however no reference to gender equality.

⁴² Chapter IV, Article 24 (b) of the Arusha Peace Agreement between the Rwanda and Rwandese Patriot Front

⁴³ Otiye Igbuzor “Constitution Making and the Struggle for Resource Control in Nigeria”

<http://www.dawodu.com/igbuzor1.htm> accessed March 12, 2016

⁴⁴ Association of Nigerian Scholars for Dialogue “Presentation of the Report of the Nigerian Constitution Debate Co-ordinating Committee by Justice Niki Tobi

http://www.waado.org/nigerian_scholars/archive/debates/constitution/cdcc.html accessed 10 February, 2016

The Constitutional Commission of Rwanda was set up in accordance with the Arusha Peace Agreement. These laws enabled the engendering of the process and “introduced a strong gender policy based on principles of equality and human rights, requiring a least 30 percent representation in all decision making process.”⁴⁵ The Members of the Commission were elected by the National Assembly as the highest decision-making body with the President, Vice-President and Executive Secretary as members of the Board.⁴⁶ The Commission was made up of 12 members 3 of whom were women; the 12 members were referred to as the Council of Commissioners and represented different sectors of the political landscape in Rwanda.⁴⁷ This mode of representation, according to Wheatley and Mendez’s typology, can be classified as the ‘direct election’ with commissioners elected by the National Assembly.

The Kenyan constitution-making process was governed by the Constitution of Kenya Review Act (Review Act) 2008. According to Section 5 of the Review Act, the organs for the making of the constitution were the; Committee of Experts, Parliamentary Select Committee, National Assembly and Referendum. Each organ had its mandate and acted as a check on the other.⁴⁸ The “Committee of Expert was the organ of review with the mandate to identify and resolve outstanding issues before preparing a draft Constitution for the adoption by Parliament and the ratification in a national referendum”⁴⁹

The mode of representation in the Committee of Expert was specified in the Review Act to be by nomination by the National Assembly and appointment by the President with gender

⁴⁵Constitutionnet “Constitutional History of Rwanda” <http://www.constitutionnet.org/country/constitutional-history-rwanda> accessed March 11, 2016

⁴⁶ Priscilla Yachat Ankut “The Role of Constitution Building Processes in Democratization: A Case Study on Rwanda” Institute for Democracy and Electoral Assistance (2005) <http://www.idea.int/conflict/cbp/> accessed 15 February, 2016

⁴⁷Rirhandu Mageza-Barthel, *Mobilizing Transnational Gender Politics in Post-Genocide Rwanda*, (England: Ashgate, 2015), 108

⁴⁸ Christiana Murray “Kenyan 2010 Constitution” http://www.publiclaw.uct.ac.za/usr/public_law/staff/Kenyas%202010%20Constitution.pdf accessed 15 February, 2016

⁴⁹ Committee of Experts on Constitution Review, “Final Report of the Committee of Experts on Constitution Review”, 11 October, 2010.

equity as one of the guiding principles.⁵⁰ The Committee was made up of nine members, three of whom were women and two ex-officio members. Section 8(4) of the Review Act provides for the composition of this Committee of Experts to include:

- a) Three (3) non-citizens of Kenya nominated by the National Assembly from a list of five names submitted to the Parliament Select Committee by the Panel of eminent African Personalities, in consultation with the National Dialogue and reconciliation committee ;
- b) Six (6) members shall be citizens of Kenya nominated by the National Assembly
- c) The Attorney-General and the Director shall be ex-officio members of the committee without the right to vote.

This mode of representation as specified in the Review Act can be classified more as an indirect selection with separation of power between the Executive and Parliament. The members were nominated and then appointed with the Attorney General as an ex-officio member. Notably, the constitution-making process provided by the Review Act is quite decentralised. It takes into cognizance the peculiarity of the Kenyan constitution-making history with several failed attempt to successfully review or produce a new constitution.

The Constitutional Commission in Rwanda was set with the mandate to prepare a new constitution and revise the laws of Rwanda as provided in the enabling fundamental laws. The members of the Commission were elected by the National Assembly and a board for the Commission had the president, Vice President and Executive Secretary as members.

1.3.2 Style of Constitution-Making

The style of constitution-making will be viewed according to the mandate of the constitution making body, the mode of representation and the enabling law. The commission acts

⁵⁰ Sections 6 and 8(6)(b) of the Constitution Review Act of Kenya, 2008

according to its mandates which determine if it will deploy an open or closed process of constitution making. This and the level of citizen participation in the process will be considered here. It is important to highlight here some processes are quasi-open with certain restrictions.

a) Mandate

The Constitution Debate Co-ordinating Committee in Nigeria was mandated to “organise nationwide consultations”,⁵¹ “pilot the debate in the constitution, co-ordinate and collate views and recommendations canvassed by individuals and groups”.⁵² The Rwandan Constitutional Commission was to among other things; “prepare a draft bill of the constitution, search for, receive and collect thoughts given by the population and make use of examples from other countries, explain to the population what the constitution is and the main idea which it is to comprised of.”⁵³

Similarly, the Kenya Review Act 2008 required the Committee of Experts to amongst other things; identify both the consensus and contentious issue in the existing draft constitution; solicit and receive public written memorandum and presentations on the contentious issues; carry out thematic consultations with diverse interest (including women); prepare harmonised draft constitution to be presented to the National Assembly, liaise the electoral commission to hold a referendum on the Draft Constitution.

b) Citizen Participation

⁵¹ Ignatius Akaayar Ayua and Dakas C.J Dakas “The Federal Republic of Nigeria” http://www.forumfed.org/libdocs/Global_Dialogue/Book_1/BK1-C08-ng-AyuaDakas-en.htm accessed 10 February, 2016

⁵² Association of Nigerian Scholars for Dialogue “Presentation of the Report of the Nigerian Constitution Debate Co-ordinating Committee by Justice Niki Tobi” http://www.waado.org/nigerian_scholars/archive/debates/constitution/cdcc.html accessed 10 February, 2016

⁵³ Ankut, The Role of Constitution Building Processes in Democratization: A Case Study on Rwanda, 13

The CDCC of Nigeria through an advertisement for the submission of memoranda received 405 memoranda from Nigerians, both within and outside Nigeria. The 1995 draft constitution and the 1979 constitution were also debated on for possible consolidation; the 1979 was the preferred option with some sections taken from the 1996 draft constitution.

As recorded by Priscilla Yachat Ankut, in Rwanda the Constitution Commission organised a constitutional building seminar where “the strategic action plan of action was [shared]” with the public. In addition, questionnaires were developed with question on contentions issues, while members of the commission and their trained assistant visited the Province to promote constitutional education and discussions on the constitution in the communities. She also explained that a database was created to collate the feedback and memoranda from the public, telephone lines, and email were provided for the public. Accordingly, responses from the public was compiled in a booklet and taken to the people for deliberation as a form of validation on the draft provided by the Commission.⁵⁴

In the Kenyan process, the Report of the Committee of Expert highlights that a call was sent out a call to Kenyans for submissions on contentious issues and the Committee collects a total of 26, 451 memorandum and presentations from the public. According to the report, the committee conducted public hearing in 18 locations of the 8 provinces of Kenya with consultations that were based on thematic issues including on contentious issues, affirmative action and inclusiveness with diverse interest groups representing different sectors. Also they had consultations with a thirty member reference group and while also participating in meetings arranged by various other institutions. The drafting period was followed with a three day seminar with the participation of the public and diverse interest.

⁵⁴ Ibid

1.3.3 Mode of legitimation

The mode of legitimation basically focuses on the final body that adopts and ratifies the constitution. The Nigerian case presents an elite adoption model while the Rwandan and Kenyan process were based on popular vote. The ratification and promulgation of 1999 Constitution of Nigeria was done by an all-male military officers under the Armed Forces Ruling Council⁵⁵ headed by the then Military head of State; General Abdulsalami at the recommendation of the CDCC.⁵⁶ However, before the promulgation of the Constitution, some amendments were introduced to the Constitution by the Provincial Ruling Council which was not subject to public debate or scrutiny.⁵⁷

In Rwanda, the Constitution was subjected to a referendum with citizens voting on the Constitution; it was ratified at referendum with a 93% support and subsequently promulgated into law.⁵⁸

The Constitution Review Act of Kenya (2008) clearly provides for the Referendum as an organ of the constitution-making. According to Section 43 and 43A of the Review Act; the Interim Independent Electoral Commission was responsible for conducting the referendum via secret ballot voting in line with the guidelines on the voting procedure; the result of the referendum is published in the Gazette and the result becomes final if there is no objection within the time limit; the President promulgates the new Constitution within 14 days after the final result is published.

⁵⁵Otiye Igbuzor "Constitution Making and the Struggle for Resource Control in Nigeria"
<http://www.dawodu.com/igbuzor1.htm> accessed March 12, 2016

⁵⁶ Ignatius Akaayar Ayua and Dakas C.J Dakas "The Federal Republic of Nigeria"
http://www.forumfed.org/libdocs/Global_Dialogue/Book_1/BK1-C08-ng-AyuaDakas-en.htm accessed 10 February, 2016

⁵⁷ John Simpkins, "The Role of Constitution-Building Processes in Democratization; Case Study Nigeria" Institute for Democracy and Electoral Assistance" <http://www.idea.int/cbp/> accessed 7 December 2015

⁵⁸Mageza-Barthel, "Mobilizing Transnational Gender Politics in Post-Genocide Rwanda", 108

The level of citizen's participation and women inclusion is largely influenced by the; composition of the constitution-making body, mandate of the Commission and the timeline for the making of the Constitution. Firstly, a restricted (all male) constitution-making body limits the effect of the process in considering diverse interest. Secondly, a broadly framed mandate does not take into consideration the diverse parts of participation and special group categorisation. And a citizen-driven process includes a process that ensures participation is not only active but well informed through effective education on the process.

The 2008 Constitution Review Act of Kenya for instance clearly identifies gender as an issue of concern, provides for not only widespread consultation but also for civic education and in-depth research on the process. The Constitutional Commission of Rwanda also deployed as its strategy, the use of questionnaires framing contentious issues for citizen's views while also conducting constitutional education in the provinces. In this way participation is achieved with a communication system that ensures feedback while guaranteeing an all-inclusive process. Although there was no gender equality in the composition of both bodies in Kenya and Rwanda, it had some form of women representation. These were however absent in the 1999 Constitution-making process of Nigeria.

Conclusion

The overview of the constitution-building experience in Rwanda, Kenya and Nigeria highlights the delay in the introduction of a participatory process while also identifying the prospects of a participatory process in enabling women participation. While modern constitution-making has evolved to make considerations for gender equality and women representation, the question still bothers on the level of influence of such representation of women in the process.

CHAPTER TWO

Constitutionalizing Gender-Equality and Women Rights through the Process of Constitution-Building

Introduction

Constitutionalizing gender-equality and women's rights through the process of constitution-building recognizes the importance of defining the constitution-making process to positively influence the outcome of the constitution. Jon Elster views "the creating of a constitution to involve making choices under constraint," where these choices which may be collective choices are determined by the goals of the individual constitution-makers and the mechanism for their aggregation.⁵⁹ Accordingly, having a constitutional guarantee for gender equality and women's rights begins by ensuring that gender equality is one of the goals of the constitution-makers and that the system will promote gender as a collective choice.

Murray and Kirkby identify the setting of an agenda as the first stage in constitution-making. Here they highlight issues like a legal framework through an entrenched Act of Parliament or process specified in the constitution. This will guide issues like the constitution-making organ(s), the process, timelines, and requirements for public engagements. According to them, entrenching a legislation for constitution-making "will [commit] the government to a clear agenda, reflect the need of government [to garner citizens support], secure the process, open up the process, set out the role of citizens."⁶⁰ The agenda setting stage is crucial as it determines, on the one hand, the course of the constitution-making process and its credibility and, on the other hand, the level of inclusion and participation of diverse interest groups. In this sense, the agenda setting stage is crucial in engendering the process to favour progressive guarantees for women in the constitution.

⁵⁹ Jon Elster, "Forces and Mechanisms in the Constitution-making Process" *Duke Law Journal*, 45 (1995): 365

⁶⁰Coel Kirkby and Christina Murray, "Constitution-Making in Anglophone Africa: We the People?" https://www.academia.edu/6026889/Constitution-Making_in_Anglophone_Africa_We_the_People_From_Imposition_to_Participation_in_Constitution-Making accessed March 15, 2016 pg 5 accessed 27 January, 2016

This chapter will discuss influential factors in constitutionalizing gender equality and women's rights through the process of constitution-making by providing an overview of the socio-cultural and political context in Rwanda, Kenya, and Nigeria. It will identify internal inherent factors that influence the process and realization of gender equality. In this sense is there an existing framework that engenders equality and promotes the rights of women? What is gender equality and what are the rights of women? Additionally, how does the socio-cultural context influence gender gaps and the process of developing gendered principles to support the rights of women?

2.1 The Socio-Cultural and Political Context of Constitution-Building: Rwanda, Kenya, and Nigeria in Perspective

The historical development of constitutions in sub-Saharan Africa highlights the long period of gender inequality with most constitutions neither providing guarantees for women's rights nor gender equality. Constitutions were more or less focused on defining the extent and limit of state powers before the subsequent introduction of the bill of rights and the provision prohibiting discrimination on the grounds of sex in some jurisdictions. As observed in the previous chapter, issues around women's rights and gender equality were not considered priority issues as the process itself closed out the voices of women.

The political marginalization of women and discrimination against women were products of the socio-cultural norms/attitudes supported by patriarchal societies across the region. Peter Wekesa highlights the fact the African societies were not inherently patriarchal, as both patrilineal and matrilineal systems of governance were widespread in pre-colonial Africa, with women and men having defined roles in the society...issues like "control of food production and land were under the authority of women." According to him, the supposed matrilineal system within some societies did not, however, mean "sufficient social authorities" for women because they "could neither own nor inherit properties and were

considered as properties of men.”⁶¹ However, he notes that the colonial conquest and the introduction of Christianity and Islam brought a major shift in power relations by dividing the society into social classes...as such the “colonial state perfected the pre-colonial institutions and structures in as far as gender inequities were concerned.”⁶²

The social-cultural and political background of the development of gender equality and women’s rights in Kenya did not differ from the above narrative as male dominance became an entrenched practice during colonialism. As recorded, women relentlessly joined in the nationalist movement for independence only to be cast aside after independence by patriarchal values.⁶³ The Independence Lancaster Constitution of Kenya, for instance, did not guarantee women equal rights with men and sex was excluded from the prohibited grounds of discrimination.⁶⁴ This therefore, meant that the social-cultural discrimination against women was now supported by the constitution thus denying women equal protection of the constitutional right to freedom from discrimination.

The Nigerian socio-cultural and political context is not so different from that of Kenya except for the fact that Nigeria has more ethnic groups with their traditional dynamics and also has a higher influence of Islamic religion than Kenya. Pre-colonial Nigeria did have different communities existing as autonomous groups with their individual cultural norms. While gender inequality existed, some communities had women in leadership positions. For instance, “women in the traditional Yoruba states held political offices like the *iyalode*, *iyaloja*, *iyalaje*⁶⁵ and even the office of the *oba*.”⁶⁶ However, gender-inequality was

⁶¹Wekesa Peter W. “Constitutionalizing Gender Rights and the Politics of Inclusion in Kenya since 1962” in *Insights into Gender Equity, Equality and Power Relations in Sub-Saharan Africa* ed. Mansah Prah (Kampala: Fountain Publishers, 2013), 4-6

⁶² Ibid

⁶³ Ibid

⁶⁴ See section 26(3) of the 1963 Constitution of Kenya

⁶⁵ The *Iyalode* was a chieftaincy title for women, *iyaloja* was seen as a woman leader in the market and *Iyalaje* was a woman who was believed to see the future.

institutionalized during the colonial rule in Nigeria. Practices like the indirect rule established men as leaders and superior to women, and then there was also the 1922 Clifford Constitution which further restricted political participation to an adult male.⁶⁷ Private property ownership, inheritance emphasized male dominance and issues of political leadership were assessed according to cultural or religious dictates of the role of the woman.

The Rwandan experience is quite similar to the general experience within the region highlighted above. However, Rwanda presents a peculiar case of where gender roles were more complementary. Women “were both empowered and disempowered by an aspect of the culture,” and “gender roles in the home were [determined] by social status and material wealth of the family.”⁶⁸ According to Uwineza and Pearson, women had substantial autonomy in their traditional roles as child bearers and food producers while men had the final authority over family decisions and property issues. They also noted that women could neither own nor inherit property at the death of their husbands or divorce they had no right to the property and to retain their status in the family were required to marry the brother of the deceased. They affirmed that traditionally, men were required to consult the women before major decisions like the sale of property, the objection of a woman to such decision did not, however, restrict the man from disposing of the property as deemed fit.⁶⁹ In Rwanda, gender practices affected women differently due to the existing social differences based on their economic status and ethnicity. For instance, factors like Tutsi or Hutu women and family wealth determined the levels of gender equality with respect to access to property.⁷⁰ Notably, this dynamic was absent in Kenya and Nigeria where ethnicity though a divisive factor in the

⁶⁶Damilola Taiye Agbalajobi “Women Participation and Political Process in Nigeria: Problems and Prospects” *African Journal of Political Science and International relations* 4, No. 2 (2010): 076

⁶⁷ Ibid, and Otiye Igbuzor “Constitution Making and the Struggle for Resource Control in Nigeria” <http://www.dawodu.com/igbuzor1.htm> accessed March 12, 2016

⁶⁸ Peace Uwineza and Elizabeth Pearson, *Sustaining Women’s Gains in Rwanda: The Influence of Indigenous Culture and Post-Genocide Politics* (Rwanda: Institute for Inclusive Security, 2009), 8

⁶⁹ Ibid, 9

⁷⁰ Ibid

society, did not determine gender relations with respect to the rights of some women over others. However, while some women in Rwanda had access to and influence over property, women generally did not have access to public decisions.

Rwandan women were traditionally expected not to speak in front of men; they were to defer to men or to wield influence indirectly through their husbands⁷¹ or in making decisions. Notably, women were not allowed to participate in public deliberations but indirectly influenced the *Gacaca* which was the traditional system of justice.⁷² There was the notion that women who wielded power were to be feared based on the belief that those women in the past who wielded power as traditional rulers were monstrous. These beliefs affected the level of women's political participation in the pre-genocide Rwandan society. However, there was a shift in power relations in the 1990's with more women exercising authority in the public sphere. The shift in power resulted from the number of Tutsi men dying in the violence or in exile due to the conflict leaving women behind, who had to assume roles as the authority positions in the families and communities.⁷³ These roles became revered as more women got involved in building peace and their communities when they could no longer look to the men to take charge.

With the already existing cultural practices, political marginalization, Christianity and Islam further consolidated on emphasizing the subordinate role of women in the society. These factors determined the socio-cultural and political context of post-independence constitution making within the three jurisdictions. The exclusion of women from the constitution-making process can largely be attributed to the existing practices and in most cases was reasoned as justified. Assessment for women inclusion was checked against a male-dominated system

⁷¹ Ibid, 12

⁷² Ibid

⁷³ Peace Uwineza and Elizabeth Pearson, "Sustaining Women's Gains in Rwanda: The Influence of Indigenous Culture and Post-Genocide Politics" (Rwanda: Institute for Inclusive Security, 2009), 14

which did not consider women as equal partners. It is no surprise that within the three jurisdictions women were either absent or poorly represented in the constitution-building process.

2.2 Contextualizing Women Participation in Constitution-Building; Rwanda, Kenya, and Nigeria

The narrative provided in the previous sub-topic highlights the influence of the socio-cultural and political context on the constitution-building process. It may be argued that the absence of women in the process did not inherently represent a discrimination against women as representation in the different constitution-making processes was supposedly a representation of all members of the society. The same argument may be presented to justify a general prohibition on the ground of sex as sufficient to guarantee gender equality. However, it is important to note that discrimination of women and the persisting gender gaps in the society presents the need for special constitutional provision for women. Thus beyond the constitution recognizing gender equality and women's rights, the inclusion of women in the constitution-making process fosters the re-engineering of the society in entrenching gender equality. This is because there are certain internal inherent factors which persistently influence the process and the effective realization of the constitutional guarantees for women.

The internal inherent factors are existing structures, attitudes or practices that influence the development and/or implementations of a gendered constitution either negatively or positively. The idea here is identifying those subject(s) of controversy, practices, norms, and systems in the society which to a large extent influence the constitutionalization of gender equality and rights. Inadvertently, the society becomes an embodiment of both constraints and prospects of achieving gender equality through constitution-making. These internal inherent factors will be discussed in terms of defining gender equality and women's rights,

socio-cultural practices, the role of conflict and violence, legal pluralism, women and Politics.

a) Definition: Gender Equality and Women's Rights

When it comes to constitutionalizing women's rights and gender equality the initial question usually revolves around the definition and scope of gender equality or the rights to be recognized. Conceptualizing gender-equality and women's rights in constitution-making is usually a subject of debate when defining the standard for incorporating such provisions and the scope of the definition. Gender-equality provisions in constitutions vary according to jurisdictions. The two common views of gender-equality are the formal and substantive equality. "Formal Equality treats women and men alike, as deserving of equal and similar treatment [while] substantive equality recognizes that formal equality can produce unequal results [and incorporates] positive programs to ameliorate disadvantages."⁷⁴ The major distinction with these definitions of equality is that the former distinctly treats both sexes as equals in general terms while the latter distinguishes between the peculiarities of both sexes to ensure that equality is equitably achieved.

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) therefore adopts both the formal and substantive definition of gender equality. Article 1 of CEDAW in prohibiting all forms of discrimination either by distinction, exclusion or otherwise, guarantees the equality of men and women. Article 15 also provides for State parties to accord women equality before the law. To ensure substantive equality, articles 2, 3, 4, and 7 provide for State parties to adopt a positive measure to ensure equal opportunities and equal participation of women in decision-making processes.

⁷⁴ Helen Irving, *Gender and the Constitution; Equity and Agency in Comparative Constitutional Design* (New York: Cambridge University Press, (2008), 3-4

In the same vein, defining the rights of women is often a subject of controversy because universal standards may conflict with socio-cultural or religious context. In the broader spectrum of rights, women's rights are human rights in the sense that all universally recognized rights are universally applicable to both sexes. The concept of women's rights developed to address the systemic discrimination, violence against women and the political marginalization of women. These rights could be viewed as Civil and Political Rights and as socio-economic and cultural rights.⁷⁵ These rights together with the general human rights specifically define the status of women as citizens, women's social status, standard of living and quality of life, and their personal autonomy. They include but are not limited to: freedom from all forms of discrimination, right to equal protection of law, right to vote, right to political participation and representation, right to health care, equal opportunity, equal rights in marriage and divorce, right to own and inherit property and family rights, freedom from violence (both sexual and domestic violence). These rights are specifically protected under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

The trajectory of the development of constitutional guarantees highlights the influence of definition in contextualizing women's participation. Firstly, the idea of equitable gender equality as a principle in the constitution-building process was absent in earlier efforts of constitution-making. Secondly, constitutionalizing gender equality garnered momentum from a more participatory process that had some form of women representation. For instance, substantive gender equality only became a principle in the later efforts of constitution-making in Kenya and Rwanda. This was not the case in the making of the 1999 Constitution of Nigeria which still retains a formal definition of gender equality.

⁷⁵ Charlotte Bunch "Women's Rights as Human Rights: Towards a Revision of Human Rights" *Human rights Quarterly* 12, No. 4 (1990): 493-494

The Kenyan experience began with a total of one woman in the negotiation of the Independence Constitution. Subsequent amendments were a closed process that did not make considerations for women inclusion until the 2000 Constitution Review Act⁷⁶ and subsequently the 2008 Constitution Review Act which stipulated the respect of gender equality as a principle in the process.⁷⁷ The Rwanda experience also highlights this with only 3 women from the 12 members of the Constitutional Commission in the making of the 2003 constitution.

The principle of gender equality was absent in the constitution-building process in Nigeria. The Constitution Drafting Committee for the 1979 Constitution and the Constitution Debate Coordinating Committee and Armed Ruling Council for the writing and promulgation of the 1999 Constitution (Nigeria) did not have a female representative. Arguably, the level of exclusion reflected on the constitutional guarantees for women with respect to how the constitution defined rights of women and gender equality.

In Kenya for instance, the idea of sex as a prohibited ground for discrimination only became a constitutional principle in the 1997 constitutional reform.⁷⁸ Furthermore, the principle of discrimination was subjective, as it excluded issues relating to marriage divorce, inheritance, and personal law from the constitutional protection from discrimination afforded women. By implication, when it came to gender equality, neither the state nor the society was bound by law to take positive measures to prevent abuse. This was, however, reversed in the 2010 Constitution which not only guarantees gender equality but specifically places constitutional

⁷⁶Yash Pal Ghai "Seeking Guarantees of Equality" in *Perspectives of Gender Discourse: Gender and Constitution-Making in Kenya* ed. Asegede Ghirmazion, Anne Nyabera, Esther Wanjugu Kamweru (Kenya: Heinrich Boll Foundation, 2002), 7

⁷⁷ See Section 6(d)(iv) of the 2008 Constitution of Kenya Review Act

⁷⁸ See Section 82(3) of the 1963 Constitution of Kenya (as amended to 2008) in comparison with section 26 (3) of the 1963 Constitution of Kenya

provisions and obligations in International Treaties above any other law that affects the status of women. It further prescribed the use of positive measures to ensure gender equality.

This shift in definition can also be observed in the development of a gendered Constitution in Rwanda. Unlike Kenya, Rwanda incorporated sex as a prohibited ground for discrimination in the 1978 Constitution and guarantees equality. However, the 2003 Constitution extended the definition on gender to include: equal protection of the Law,⁷⁹ equal rights of parties in a marriage and at divorce,⁸⁰ equal access to elective offices,⁸¹ obligations for gender equality in political organization⁸² and 30% quota for women in the senate.⁸³

In Nigeria, gender equality was only defined by the 1979 Constitution⁸⁴ as the previous constitutions⁸⁵ did not include sex a prohibited ground for discrimination. Gender equality and women's rights, however retained a formal definition without distinguishing women as a social category with special needs for constitutional protection in Nigeria. The 1999 Constitution of Nigeria currently adopts the formal definition of equality. Section 42 of the 1999 Constitution (with amendments) provides for sex as a prohibited ground for discrimination and further specifies in paragraph (b) of sub-section (1) further prohibits any law, executive or administration action to accord any privilege or advantage to any sex.

⁷⁹ Article 16 of the 2003 Constitution of Rwanda (with amendments)

⁸⁰ Article 26

⁸¹ Article 52

⁸² Article 54

⁸³ Article 82

⁸⁴ Section 39 of the 1979 Constitution provided for sex as a prohibited grounds for discrimination

⁸⁵ See Section 27 and 28 of the 1960 and 1963 Constitution of Nigeria respectively

b) Influence of Social-cultural Practice

The overview of the socio-cultural and political context in Kenya, Rwanda, and Nigeria reflects a society where patriarchy became an entrenched norm and accorded women a subordinate role in all spheres. This context quite often influenced the political process with respect to the participation and representation of women. The role ascribed to women became fetters on their status as citizens and equal partners in the democratic process.

In Nigeria for instance, women across the federation only gained the right to vote in 1979.⁸⁶ Customary practices that restrict women's rights to inheritance, to equality in marriage and at divorce are still quite prevalent in the society. Arguably, the exclusion of women in the constitution-building process and absence of constitutional guarantees for women were influenced by the socio-cultural context within the three jurisdictions. The consideration for gender equity only became a principle in the later constitution-making process in Rwanda and Kenya. Notwithstanding, the Constitution-making bodies did not reflect equality as women still constituted only 30% of the members of the Constitution-making bodies.

As already noted, there was only one woman in the negotiation of the Kenyan Independence Constitution. Subsequent constitutional amendments, although they were more or less closed processes, had no female representation until the 2000 amendment process which had a total of seven women out of the twenty-seven members of the Commission for Constitutional Reform of Kenya.⁸⁷ The composition of the National Constitution Conference also adopted a gender equity principle as the Constitution of Kenya Review Act of 2000 specified for a "minimum of at least one of the three representatives from each county to be a woman and

⁸⁶Otiye Igbuzor "Constitution Making and the Struggle for Resource Control in Nigeria"
<http://www.dawodu.com/igbuzor1.htm> accessed March 12, 2016

⁸⁷Yash Pal Ghai "Seeking Guarantees of Equality" in *Perspectives of Gender Discourse: Gender and Constitution-Making in Kenya* ed. Asegede Ghirmazion, Anne Nyabera, Esther Wanjugu Kamweru (Kenya: Heinrich Boll Foundation, 2002), 7

representation of women's organization as part of civil society.”⁸⁸ The 2008 constitution review process further built on this with the Constitution review Act of 2008 requiring gender equity in the constitution making process. Out of the ten members of the Committee of Experts, three were women.

In Rwanda, the negotiation of the Independence Constitution was a process controlled by the colonial officials with little inputs from the Rwandans. Rwanda embarked on constitution-making in 2000 with a twelve-member Constitutional Commission leading the process, three of whom were women. As noted in the previous chapter, the constitution making process was guided by the principle of gender equity. Women participation in the process was also a major improvement compared to the previous constitution-making process of 1978.

The Independence Constitution of Nigeria was negotiated by the colonial officials, all male representatives of Nigeria. Subsequent constitution-making did not, however, guarantee equal representation of women in the process. The Constitution Drafting Committee for the 1979 constitution was an all-male 50 member committee and only 5 women of the 230 of the Constituent Assembly.⁸⁹ In 1999, the Constitution Debate Coordinating Committee (CDCC) set up to lead the debate on the constitution and collate recommendations for the new Constitution; this committee was a 25 member committee who were all male.⁹⁰ The Draft Constitution was further promulgated by 26 military officers under the Armed Forces Ruling Council who were all men.⁹¹

The socio-cultural idea of the role of women was not only reflected in the delayed process in including women in the constitution-making process as Constitutions within these regions

⁸⁸ Ibid

⁸⁹ Ignatius Akaaya Ayua and Dakas C.J Dakas “The Federal Republic of Nigeria” http://www.forumfed.org/libdocs/Global_Dialogue/Book_1/BK1-C08-ng-AyuaDakas-en.htm accessed March 12, 2016

⁹⁰ Otiye Igbozor “Constitution Making and the Struggle for Resource Control in Nigeria” <http://www.dawodu.com/igbozor1.htm> accessed March 12, 2016

⁹¹ Ibid

also remained silent on guarantees for women. The discrimination of women in marriages, inheritance, and electoral competition only became recognized as constitutional issues in the 2003 Constitution of Rwanda and the 2010 Constitution of Kenya. While the constitution of Nigeria still remains silent on this, it is important to note that the jurisprudence on women's rights has progressed to define the rights of women as a constitutional principle of equity.⁹²

c) Conflict and Violence

The constitution-making process is increasingly becoming part of a conflict resolution and peace-building efforts in societies recovering from conflicts. The Kenya and Rwanda and experience highlight the importance of the constitution-making process in building citizens cohesion in peace-building efforts and determining the future of the State. Conflict as an internal inherent factor as supported by Uwineza and Pearson positively influenced the inclusion of women in the constitution-making process. According to them, "research shows that particularly in new democracies, dramatic increases in women's representation in parliament often follow periods of conflicts that disrupt prevailing gender norms and thrust women into new roles."⁹³ This is particularly reflected in the level of women inclusion and participation in the constitution-making process in post-genocide Rwanda and the post-electoral violence in Kenya.

The violence and genocide in Rwanda, for instance, left a vacuum in the leadership structure of the society and women had to take up the responsibilities as leaders to rebuild the communities from ruins. These had two major implications. Firstly, the younger generation who grew to see women and mothers lead the peace-building efforts in the community or

⁹² See *Mojekwu v Mojekwu* (1999) 7 NWLR pg. 288 para 9, where the Court ruled that an "Oli-Ekpe" custom which excluded female children to inherit properties was discriminatory and inconsistent with the doctrine of equity. The Court also took similar position in *Mrs. Lois Chituru Ukeje & Anor v Mrs. Gladys Ada Ukeje* (2014) LPELR-22724 (SC)

⁹³ Peace Uwineza and Elizabeth Pearson, *Sustaining Women's Gains in Rwanda: The Influence of Indigenous Culture and Post-Genocide Politics* (Rwanda: Institute for Inclusive Security, 2009), 14

provide for the family built a different image of women, contrary to the socio-cultural idea of the role of women. Secondly, the importance of women as equal partners and political leaders was revered rather than feared and appreciated without socio-cultural prejudice.

The constitution-making process in post-genocide Rwanda and post-electoral violence Kenya were not only reflective of the gender equity principle but also produced more substantive guarantees for women in the new constitutions.

d) Plural Legal system

The existence of a plural legal system recognizing traditional legal system alongside the common law system influences the legal attitude to the role of women in the constitution-making and development of constitutional guarantees for women. “The Constitution of [Nigeria] recognizes three distinct traditions of law: the English Common law, the Islamic sharia law (religious law), and the customary law (based on communal traditions).”⁹⁴ The constitution thus provides for customary courts and sharia courts. The effect of this is the challenge of constitutional rights regarded as issues of personal law regulated by either customary or Islamic law. The 1963 Constitution of Kenya (with amendments to 2008) for instance prohibited discrimination on the grounds of sex; however it excluded the provision of the Constitution in issues of adoption, marriage, and inheritance. Additionally, section 66(5) of the said Constitution presently in section 170(5) of the 2010 Constitution, grants jurisdictions to the Kadhis court to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings where the parties are Muslims.

The existence of such a pluralistic legal system becomes a factor when standards of customary or Islamic law determine the status of women in certain regions. Such standards

⁹⁴Nkoyo Toyo, “Revisiting Equality as a Right: the minimum Age of Marriage clause in the Nigerian Child Rights Act, 2003” in *The Politics of Rights: Dilemmas for Feminist Praxis* ed. Andrea Cornwall and Maine Molyneux (New York, NY: Routledge, 2008), 131

indirectly influence societal attitudes towards the reception of gender equality as a principle. This poses a challenge because in constitution-making building consensus on constitutional issues requires majority support. Where such majority is influenced by customary or Islamic law norms which support male supremacy, the possibility of constitutionalizing gender equality or women's rights becomes minimal.

e) Women and Politics

Constitution-making as a legal process involves defining the legal ambits for the exercise of governmental powers and the protection of the rights of the people. As a political process, it is a confluence of diverse interest and the concessions that are borne from popular negotiations. The question then focuses on who defines popular negotiations, who defines the majority? Is it male or female popularity and majority? Just as elections will always be determined by the number of persons who come out to vote, so also is the constitution-making process determined by those who actually have the power to vote on the issues.

The existing gender gaps in political participation has relegated women to 'mere background supporters' and has further built a "politically passive" image for women. A contributory factor also is the delay in the right to vote for women as seen in Nigeria where voting rights for all women only became operative in 1979. Research has shown that "the longer women have had formal voting rights the more equal women's and men's participation in collective action and political contact...and that gender equality is not limited to the number of women elected but women obtaining power in the government..."⁹⁵ This becomes an internal inherent factor because on the one hand, women are not associated with political power, therefore, it becomes easy to neglect the needs in the constitution-building process. On the other hand, a

⁹⁵ Hilde Coffe and Catherine Bolzendahl, "Gender Gaps in Political Participation Across Sub-Saharan African Nations" Social Indicators Research, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3065638/> accessed 15 March, 2016

compelling case for gender equality in the constitution-building process will be best advanced if women have the requisite number in government (Parliament) to influence such processes.

Nigeria represents a case study in assessing the difficulty in constitutionalizing women's rights in connection with a poor number of women obtaining political power. In the 2015 general elections in Nigeria for instance, out of the 746 Senatorial candidates only 124 were women and out of the 1,506 candidates for the House of Representatives, only 268 were women.⁹⁶ As at December 1, 2015, from the 124 female senatorial candidates and 268 female candidates for the House of Representatives, 7(6.5% of total senators) and 20(5.6% of total representatives) emerged as successful candidates.⁹⁷ With a poor history of women representation in the National Assembly the constitution review process since 1999 has consistently not favored women. The vote of the National Assembly in 2014 on 'proposed amendment to the Constitution to include gender issues, including but not limited to reserving a certain percentage of elective offices for women' was voted against by 251 members out of 360 members of the House of Representatives⁹⁸(with 6.7% female representatives⁹⁹).

While Nigeria reflects an example of a persisting gender gap in politics, Rwanda currently stands out as a model for women political participation with a 63.8% female members in the Lower House of Parliament and 38.5% female Senators.¹⁰⁰ The image of women as political leaders after the genocide enabled a constitution-making process that was likely to favor women. The more women occupy political offices the more positive attitudes towards engendering the constitution. The Forum of Women Parliamentarians in Rwanda, for

⁹⁶ Report on Youth Candidacy in the 2015 General Elections in Nigeria (YIAGA: 2015)

⁹⁷ Data on Women in National Parliaments compiled by Inter-Parliamentary Union in 2015, <http://www.ipu.org/wmn-e/classif.htm> accessed 16 March, 2016

⁹⁸ PPS Vote Collation Result of the House of Representatives, Nigeria People's Public Session <http://www.hrcr.org.ng/media-updates/peoples-public-session-result.html> accessed 18 March, 2016

⁹⁹ Nigerian Women Trust Fund <http://nigerianwomentrustfund.org/publications/percentage-of-women-in-parliament-worldwide/> accessed 16 March, 2016

¹⁰⁰ Data on Women in National Parliaments compiled by Inter-Parliamentary Union in 2015, <http://www.ipu.org/wmn-e/classif.htm> accessed 16 March, 2016

instance, remains a strong force in “sustaining women’s gains...facilitating women’s leadership and translating women’s presence in Parliament into action in Legislation.”¹⁰¹

Kenya presents an interesting case with respect to the realization of gender equality guarantee in elective offices under the 2010 Constitution. As noted by Wekesa Peter, the provision of Article 81(b) of the Constitution stipulating that not more than two-thirds members of the elective offices shall be of the same gender may, in reality, be unattainable due to the history of women exclusion and marginalization.¹⁰² The two-third¹⁰³ and one-third¹⁰⁴ gender quota rule together with other articles guaranteeing gender equity were brought before the Supreme Court of Kenya in 2012 by the Attorney General for an advisory opinion on whether the gender quote rule required immediate realization for the 2013 General Elections or required a progressive realization. The attorney-general was apprehensive that the gender quota will be realized during 2013 Election and its impact on the legitimacy of the legislature if not realized. The Supreme Court in its advisory opinion held that the provision of Article 81(b) could not be enforced immediately with respect to the 2013 General Elections to the National Parliament but rather was “amenable to progressive realization.”¹⁰⁵ The said election subsequently produced 69 women of the 350 members of the lower house (19.6%) and 18 female senators of the 68 members of the upper house (26.5%).¹⁰⁶

The absence or poor representation of women in politics, therefore, enabled a male-dominated political system which can only be dislodged by a process of concerted efforts. As noted by the Kenyan Supreme Court,

¹⁰¹ Peace Uwineza and Elizabeth Pearson, “Sustaining Women’s Gains in Rwanda: The Influence of Indigenous Culture and Post-Genocide Politics” (Rwanda: Institute for Inclusive Security, 2009), 19

¹⁰² Wekesa Peter W. “Constitutionalizing Gender Rights and the Politics of Inclusion in Kenya since 1962”, 3

¹⁰³ Article 81(b) of the 2010 Constitution of Kenya

¹⁰⁴ Articles 97 and 98 of the 2010 Constitution of Kenya

¹⁰⁵ Advisory Opinion No. 2 of 2012, In the Matter of the Attorney General (on behalf of the Government) and in the Matter of Gender representation in the National Assembly and the Senate

¹⁰⁶ Data on Women in National Parliaments compiled by Inter-Parliamentary Union in 2015
<http://www.ipu.org/wmn-e/classif.htm> accessed 15 March, 2016

...women's current disadvantages as regard membership of elective and appointive bodies are accounted for by much more than the lack of political will. It arises from deep-rooted historical, social, cultural, and economic power-relations in the society. It thus must take more than the prescription of gender quotas in law, to achieve inclusion of women in the elective and appointive public offices.¹⁰⁷

As such, the level of women political participation is an important determining factor in both the process of constitution-making and the realization of constitutional guarantees for women.

Conclusion

The internal inherent factors remain influential in the level of implementation and realization of gender equality rules and women's rights safeguarded in the constitution. This is because, "for laws to persist, they must be rooted in social value systems since they derive their effectiveness from the will of the people."¹⁰⁸

Accordingly, it goes beyond the constitution-making provisions for women, to the realities of women with regards to access to these rights and their realization. The question then centres on whether gender equality in the constitution translates to gender equality in the social, political and economic lives of women.

Setting and working with a gender framework for constitution-making therefore involves, on the one hand, reaching a consensus on the definition of gender equality and how best to build equality as a constitutional principle. On the other hand, there is the issue of what constitutes women's rights considering the differences in legal systems, socio-political and cultural contexts? The idea of adopting universally recognized rights of women remains compelling but yet is subject to local reservations. This has resulted in poor adoption as constitutional

¹⁰⁷ Advisory Opinion No. 2 of 2012, in the Matter of the Attorney General (on behalf of the Government) and in the Matter of Gender representation in the National Assembly and the Senate, Pg 36-37

¹⁰⁸ Uwineza and Pearson, "Sustaining Women's Gains in Rwanda: The Influence of Indigenous Culture and Post-Genocide Politics" 18

rights in some countries, or produced constitutional guarantees that are only good on paper in some other countries. However, being good on paper is a positive step in achieving substantial recognition. But first, it begins with the process because if the process closes out women's voices, the Constitution will most likely remain silent on women rights and gender equality.

CHAPTER THREE

Women Participation in Constitution-building: Issues and Prospects

Introduction

The constitution within different jurisdictions represents the supreme law of the land which lies at the centre of government, regulating the use of governmental power and the interaction between the state and the people. The central role played by the constitution affirms the need for a process of constitution-making to reflect the ideas, principles and needs sought to be addressed by the constitution. The identification of these needs provides the guidelines for the setting of an agenda for constitution review. These are incorporated to influence the principles of the legal framework for constitution-making, especially where the process is to produce a new constitution.

The need for a constitution that is gendered to favour women and guarantee substantive equality is borne from the systemic marginalisation and discrimination of women in society. As discussed in the previous chapter, women live in a differently unfavourable reality such that the continued silence of the constitution on women issues remains an injustice. Highlighting the challenges and prospects of women participation in the constitution-building process requires a “gender auditing”¹⁰⁹ of the process. This includes analysing the legal framework to assess its possibility to achieve equity and agency for women in the constitution. “Equity [in this case,] involving justice and fairness, recognition and respect while agency entails inclusion, access to, and effective participation in decision-making.”¹¹⁰ As such, to carry out a gender audit on the process will include identifying factors that promote women inclusion and participation.

¹⁰⁹ Irving, “Gender and the Constitution; Equity and Agency in Comparative Design” 2

¹¹⁰ Ibid at 3

As noted by Ghai and Galli, the design of the process includes the institutions and method of making decisions in the process.¹¹¹ In this sense, we need to identify which institutions/organs are responsible for constitution-making, from the drafting to the adoption. What is the role of each of the identified constitution-making bodies? With respect to method, what are the stages in the constitution-making, the level of citizen-participation and communication and the style of adoption? What is the effect of these on women participation and constitutional guarantees for women? To what extent does it promote a feminist constitutional agenda as part of a constitution-making agenda?

Baines and Rubio-Mario identify the need for a feminist constitutional agenda in the constitution-building process.¹¹² This will include analysing different ideas of feminist theories and building arguments that best promote equality of rights and opportunities through the constitution. While Rwanda and Kenya both stand out as countries with a constitution that engenders women's rights, it will be important to identify the factors that supported the development of such constitutional guarantees. This will be juxtaposed with the Nigerian experience which will focus on the recent constitution-review effort that began in 2012 (although its adoption is indeterminate as at March 2016) as a recent perspective on women and constitution-building in Nigeria.

3.1 The Legal-Framework for Constitution-Making; Rwanda, Kenya and Nigeria in Perspective

The Legal framework for constitution-making provides a foundation for the making of the constitution. The legal framework can be designed as a separate legislation that regulates the constitution-making process as we have in Kenya with the Constitution of Kenya Review Act 2008. It can be prescribed by a body of laws regulating the system in place of a constitution

¹¹¹Yash Ghai and Guido Galli, *Constitution-Building and the Process of Democratization: Lessons Learned* (Sweden: International IDEA, 2006), 9

¹¹² Baines and Rubio-Marin "The Gender of Constitutional Jurisprudence", 4

like the Rwandan case as provided in the Fundamental Laws. It can also be incorporated in the constitution of the Nigerian Constitution which provides for a legislative process for the amendment of the Constitution.

The legal framework for constitution-making will be discussed under broad topics of the institutions provided by law and the method of decision-making adopted.

a) Institutions for Constitution-Making

Rwanda in Perspective

The Arusha Accord provides for a Legal and Constitutional Commission with the responsibilities, which amongst other things includes preparing a preliminary draft of the Constitution which shall govern the country after the Transitional Period. The Commission had the mission to:

- i. Prepare the draft-bill of the Constitution
- ii. Search for, receive and collect thoughts given by the population and to make use of examples from other countries
- iii. Explain to the population what the constitution is and the main idea which it is comprised of
- iv. Prepare the draft-bills of laws that govern the last transition period
- v. Put together all the laws which must be modified in order to adopt them to the constitution¹¹³

¹¹³ Republic of Rwanda Legal and Constitutional Commission, "Towards a Constitution for Rwanda: Action Plan 2002-2003" <http://www.constitutionnet.org/files/Rwanda.pdf> accessed 20 March, 2016

Kenya in Perspective

The Constitution Review Act of 2008 in Section 5 established four organs to complete the review of the Constitution to include the Committee of Experts, Parliamentary Select Committee, National Assembly and the Referendum.

The Committee of Experts (COE): This committee was made up of 9 members including 3 were women nominated by the National Assembly and appointed by the President with gender equality as one of the principles guiding the nomination. The COE amongst other responsibilities was to: “identify consensus and contentious issues in the existing draft constitution, receive memorandum from the public, undertake thematic consultation with caucuses, interest groups and other experts, and prepare a harmonised draft constitution...”¹¹⁴ Gender and women issues were also identified as one of the fields members of the committee must have expert knowledge on.¹¹⁵ The committee had the duty of conducting civic education on the draft constitution before the referendum.

The Parliamentary Select Committee (PSC): The PSC consisting of 27 members was drawn from the National assembly¹¹⁶ as one of the organs for the review of the constitution to ensure regional and gender balance in the persons recommended for appointment.¹¹⁷ The draft constitution and report is submitted by the COE to the PSC who has the duty of deliberating on contentious issues, building consensus and returning the draft to the COE with the result of its consensus for their incorporation into the draft constitution.

The National Assembly: the draft constitution with the incorporation of the results of consensus of the PSC is resubmitted to the PSC by the COE. This draft constitution is then

¹¹⁴ Section 23 Constitution of Kenya Review Act 2008

¹¹⁵ Ibid

¹¹⁶ Abrak Saati, *The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy* (Sweden: Umea University, 2015), 159

¹¹⁷ Section 8(7) Constitution of Kenya Review Act 2008

submitted to the National Assembly. The duty of the National Assembly is to debate the draft of the constitution either approves the draft constitution or proposes amendments.

The Referendum: the voting at the referendum is conducted through secret ballot with each voter either voting for or against the proposed new constitution. This determines the adoption of the proposed new constitution.¹¹⁸

Nigeria in Perspective

The making of the 1999 Constitution was a process initiated by the then Military government through a Constitution Debate Co-ordinating Committee. The 1999 Constitution has since then undergone a number of reviews resulting into the first, second and third Alteration Acts to the 1999 Constitution. In 2012, the 7th National Assembly embarked on a constitution review process which will be the focus of this discussion as the most recent Constitution review process. The constitution review process as provided in Sections 8 and 9 of the 1999 Constitution (with amendments) is a tailored legislative process with the National Assembly as the constitution-making body. The National Assembly is made up of two houses with 109 Senators in the Senate and 360 Representatives in the House of Representatives.

Both Houses of the National Assembly have a Constitution review Committee tasked with the responsibility to review and alter the constitution. The Senate Committee for the Review of the 1999 Constitution (Senate Committee) had 49 members out of which 7 were women.¹¹⁹ The House of Representatives Committee (House Committee) for the Review of the Constitution had 53 members out of which 7 were women.¹²⁰ Although this is a poor

¹¹⁸ Section 37 of the Constitution of Kenya Review Act 2008

¹¹⁹ The 7th Senate Federal Republic of Nigeria Committee of the Review of the 1999 Constitution: Report of the Senate Committee on the Review of the 1999 Constitution of Nigeria and Other Matters Related Therewith, 2013

¹²⁰ The 7th House of Representatives of the Federal Republic of Nigeria Committee of the Review of the 1999 Constitution: Report on a Bill for an Act to Further Alter the Provisions of the 1999 Constitution of Nigeria and Other Matters Related Therewith, July 2013

representation, but when compared to previous constitution-making process for the 1979 and 1999 Constitutions, this is a progress.

b) The Process/Method of Constitution-Making

The argument for a more participatory process of constitution-making has its foundation in the democratic principle of participation. A participatory process is more likely to build citizens civic consciousness, form a culture of constitutionalism and mould societal attitudes towards ensuring respect for constitutional values and principles. Constitution-making within different jurisdictions takes different forms with different levels of participation. The constitution-making process is broad and will be analysed according to 2 stages in the process: the making and the adoption of the Constitution.

i. The Making

The making of the 2003 Constitution of Rwanda, 2010 Constitution of Kenya and the 2012 review of the 1999 Constitution of Nigeria all incorporated a participatory process. This is highlighted in the mandate of the respective constitution-making bodies.

The Constitutional Commission in Rwanda had a mandate to “search for, receive and collect thoughts given by the population and to make use of examples from other countries.”¹²¹ The Commission also highlighted in its Strategic Action Plan, a “training and sensitisation of the public, the consultation of the population on the content of the constitution etc.”¹²² This included the conduct of civic education activities, engaging diverse interest group and

¹²¹ Republic of Rwanda Legal and Constitutional Commission, “Towards a Constitution for Rwanda: Action Plan 2002-2003 <http://www.constitutionnet.org/files/Rwanda.pdf> accessed 20 March, 2016

¹²² Ibid

carrying out community consultation in the drafting process. As observed by Ankut, the participatory approach “allowed significant input by women and women groups.”¹²³

The Constitution of Kenya Review Act in Section 23 provides that the COE solicit and receive from the public the written memorandum and presentations and undertake thematic consultations and caucuses, with interest groups and other experts. According to the COE, it received a total of 26, 450 written memoranda from the public within 8 months, out of which 107 were from women organisations.¹²⁴ The COE also conducted civic education and technical consultation on thematic areas with affirmative action and inclusiveness on the thematic areas. This enabled the interest of women for constitutional guarantees to be brought to bear.

In Nigeria, both the Senate Committee and the House Committee adopted a participatory process in reviewing the Constitution. The Senate Committee for instance identified as its core principles public participation, inclusiveness and gender equity, representations, national ownership and transparency. The public engagement included the submissions of memoranda, geo-political zones (Senate) and Constituency (House of Representatives) public hearing for presentations and feedback from the public with gender and special groups as one of its thematic areas. The House of Representatives, for instance, in a summary of memoranda received indicates that out of the 98 memoranda received, 10 were from women and women groups on gender equality and women’s rights.¹²⁵

¹²³ Priscilla Yachat Ankut “The Role of Constitution Building Processes in Democratization: A Case Study on Rwanda” 23

¹²⁴ Committee of Experts on Constitution Review, “Final Report of the Committee of Experts on Constitution Review”, 11 October, 2010 page 41

¹²⁵ House of Representatives Committee on the Review of 1999 Constitution Summary of Memorandum Received (Policy and Legal Advocacy Centre, 2012)

b) Adoption/Final Authority

Adoption and ratification of the constitution takes different forms depending on the legal framework for the constitution-making process. As identified by Murray and Kirkby, the constitution can either be adopted by the legislature or constituent assembly or through a referendum.¹²⁶ In chapter one, I highlighted that adoption can also be through a military promulgation like the adoption of the 1999 Constitution of Nigeria, which signified the transition from a military regime to a democracy in 1999. With more countries favouring constitutionally democratic systems, this is now an uncommon practice.

The 2003 Constitution of Rwanda was adopted by the people through a referendum after the final constitution text was approved by Parliament. As identified by the Constitutional Commission of Rwanda, one of its objectives was to “consult the people of Rwanda by referendum on the constitution of the country.”¹²⁷ The Constitution was approved by 93% positive vote.

Similarly, the Constitution Review Act of Kenya 2008 provides in section 5 for a referendum elaborately as a constitution-making organ. Part V of the Review Act further provides for the procedure for the referendum. The 2010 Constitution of Kenya was adopted by 69% positive vote for the constitution by the people.¹²⁸ Women constituted 49% of the total number of registered voters.¹²⁹

Nigeria presents a different adoption process done by the Parliament which also requires presidential assent as provided in Sections 9 and 58 of the 1999 Constitution (amended). The

¹²⁶Coel Kirkby and Christina Murray, “Constitution-Making in Anglophone Africa: We the People?” 15

¹²⁷ Republic of Rwanda Legal and Constitutional Commission, “Towards a Constitution for Rwanda: Action Plan 2002-2003 <http://www.constitutionnet.org/files/Rwanda.pdf> accessed 20 March, 2016

¹²⁸ African Democracy Encyclopaedia Project <https://www.eisa.org.za/wep/ken2010referendum.htm> accessed 21 March, 2016

¹²⁹ Daily Nation <http://www.nation.co.ke/Kenya-Referendum/-/926046/970148/-/n99j9kz/-/index.html> accessed 21 March, 2016

Constitution is to be adopted through a multi-level legislative process which includes both the National Assembly and State Houses of Assembly. These include the requirement for votes of not less than a two-thirds majority passed in both Houses of National Assembly and supported by the Houses of Assembly of not less than two-thirds of all the States. By implication, each proposed amendment requires a two-third majority vote from either House of the National Assembly to form part of the harmonised bill to be sent to the State Houses of Assembly. The State Houses of Assembly will then vote on the proposed amendments and only the amendments with two-third vote will be adopted for presidential assent.

3.2 Gender Auditing of the Legal Framework

In gender auditing, I will assess the legal framework according to the terms of Equity and agency defined above. Equity in this sense will include fairness and recognition while agency includes access, inclusion and effective participation.

Progressively, more constitution-making processes recognizes the principle of gender equality as one of the principles guiding the process as was seen in Rwanda, Kenya and Nigeria. While the legal framework establishing the Constitutional Commission in Rwanda was silent on the principle of gender equality, the composition of the commission did consider gender with three women serving as members of the commission. This was also the case in Nigeria as the composition of the constitution review committees in both Houses of the National Assembly identified the need for gender equity in constituting the committees. Although both committees had poor representation of women, between 10%-20%, it was a progress from previous constitution-making bodies. The Kenyan case was more elaborate with the Constitution Review Act of Kenya specifically stating that gender equity be respected in the process. Kenya also adopted a more decentralised system with each organ acting as a check on the other and each organ was to ensure that the review process

accommodates diversity including gender¹³⁰ and respects the principles of equality, affirmative action, gender equity and democracy.¹³¹

Interestingly, membership of women in each body did not exceed 30% irrespective of the defined law specifically requiring gender equity or a general procedural principle. Although this represents a progress in the history of women and constitution building within the three jurisdictions, it is important to determine the impact of this representation on the process. The question then remains whether fairness and recognition in the composition of constitution-making body are sufficient to influence the process.

Public engagement has proven to be a veritable tool for constitution-making especially as a cohesive force for citizen's support of the process as seen in Kenya and Rwanda. The Constitution Review Act of Kenya 2008 specifically provides that the COE identifies both consensus and contentious issues, receive memoranda from the public and presentations and also conducts civic education through the constitution review process. This level of engagement opened up the space for participation and enabled a two-way communication and feedback system between the people and the COE.

Similarly, the Constitutional Commission in Rwanda adopted a two-way communication and feedback system while conducting civic education and distribution questionnaires for an opinion poll. The Constitution Commission in its set up had a mandate to search for, receive and collect thoughts given by the population and to make use of examples given from other countries.¹³² This enabled more women participation with memoranda submitted on women issues and examples of affirmative action drawn from other jurisdictions. Evidently as identified by Uwineza and Pearson, the gender quota system in Uganda, the 1994 South

¹³⁰ Section 6(c) Constitution Review Act of Kenya 2008

¹³¹ Ibid Section 6(d)(iv)

¹³² Republic of Rwanda Legal and Constitutional Commission, "Towards a Constitution for Rwanda: Action Plan 2002-2003" <http://www.constitutionnet.org/files/Rwanda.pdf> accessed 20 March, 2016

African election where 26% of the seats in National Parliament were won by women and the Mozambique elections in 1994 resulted in a substantial number of women in Parliament influenced the move for gender quota in Rwanda.¹³³

Although civic education was not identified in the review process in Nigeria; the public was engaged through public hearings conducted in the geopolitical zones and constituencies. The communication strategy did not however include a feedback system as the public were only allowed to make presentation during the public hearings. The review process was centralised with the National Assembly leading the process and determining its outcome.

Equity is incomplete without agency, as women require access to influence the process. The representation of women in the constitution-making process appears to be insufficient in producing a constitution that guarantees women's rights and gender equality. The Rwandan and Kenyan process enabled agency through a decentralised constitution-making process that granted the people the power as the final authority in the adoption of the constitution. By implication, the principle of 'one person one vote' as applied during the referendum provides women with equal opportunity to influence the constitution. The determining factor was whether women mobilised enough support to increase their number in the voting process. Notably, the Kenyan process allowed for some form of gender auditing as provided in the Review Act, in this case the issue of gender equality and equity were influential factors through the process. This was, however, different in the case of Nigeria where the absence of equal representation of women in the parliament remains a major disadvantage in achieving gender-equality.

¹³³ Peace Uwineza and Elizabeth Pearson, "Sustaining Women's Gains in Rwanda: The Influence of Indigenous Culture and Post-Genocide Politics", 14

The Nigerian System for the adoption of constitutional amendments as provided in the constitution limits gender equity and agency. The requirement of two-third majority for each proposed amendment removes from women substantial influence in the process considering that they constitute less than 10% of the members.¹³⁴ This was evidenced in the vote of the members of the House of Representatives where the proposal on gender equality and gender quota for elective offices was voted against by 251 members of the 360 members of the House of Representatives.¹³⁵

3.3 Parity Debate and Feminist Theory: Cause and Effect in the Constitution-Building Process

The efforts to legislate or constitutionalize women's rights is a response to the disadvantages of women in a "male authored" world still grappling with accepting the concept of gender equality. Issues of gender and difference remain topical in the constitutional discourse as more women look to the constitution to redeem their status in the society. The constitution-building process provides the opportunity for political influence that can only be effective if the structure is favorable to women.¹³⁶ As discussed earlier, the legal framework for constitution-making can either support or restrict the possibility of a gendered process that favors women.

Rubio-Marín and Baines identify the need to develop a flexible feminist constitutional agenda to address the position of women along feminist lines. They propose that the feminist constitutional agenda should address the position of women with respect to constitutional agency, constitutional rights, constitutionally structured diversity, and constitutional equality;

¹³⁴ Nigerian Women Trust Fund <http://nigerianwomentrustfund.org/publications/percentage-of-women-in-parliament-worldwide/> accessed 16 March, 2016

¹³⁵ PPS Vote Collation Result of the House of Representatives, Nigeria People's Public Session <http://www.hrcr.org.ng/media-updates/peoples-public-session-result.html> accessed 18 March, 2016

¹³⁶ Georgina Waylen, "Constitutional Engineering: what opportunities for the enhancement of gender rights?" In *The Politics of Rights, Dilemmas for Feminist Praxis*, ed. Andrea Cornwall and Maine Molyneux (New York, NY: Routledge, 2008), 43

and with special attention to women's reproductive rights, sexual autonomy, and women's rights within the family, women's socio-economic development, and democratic rights.¹³⁷ These feminist lines exist to illuminate the various challenges for women in the society as a foundation for developing guarantees that addresses these challenges. However, in constitutional-making, these feminist lines are challenged with the parity debates that favor the understanding of gender equality in the process as formal equality.

Parity debates often thrive on the notion that the general guarantee of gender equity is sufficient to guarantee equal participation and representation of women issues in the constitution-making process. This is arguably a misconception when assessed against the outcome of the constitution-making process and the realities of women in the society. Notably, the recognition of gender equality as a guiding principle in constitution-making neither grants women automatic constitutional guarantees, nor produces uniform guarantees of women rights. As observed above, Rwanda, Kenya, and Nigeria incorporated gender equity and equality as a guiding principle in the making of the constitution which accounts for the efforts to have a sense of women representation on the constitution-making body. Yet each process produced different outcomes. On the one hand was the development of constitutional guarantees for women in Rwanda and Kenya with the exception of Nigeria. On the other hand, was also the variation in the constitutional guarantees for women in the 2003 Constitution of Rwanda and the 2010 Constitution of Kenya.

The danger of the parity debates is the tendency to classify women as an equal social group without recourse to their peculiarity as a social category. Thus the same indicators used to assess the effect of general constitutional guarantees on men are used for women. The discussion in the previous chapter on the internal inherent factor highlights among other

¹³⁷ Baines and Rubio-Marin "The Gender of Constitutional Jurisprudence", 4

things the deceit of the principle of equality when applied in isolation of the challenges of women. The gender audit on the process within the three jurisdictions highlights that mere recognition and fairness in the process is only effective where there is access, inclusion, and effective participation of women. As such, the realization of gender equality cannot be built on parity debates which do not take into account the differences in the sexes. These differences form the basis for a feminine constitutional agenda in the constitution-building process.

A feminist constitutional agenda identifies both structural and substantive issues that influence the effectiveness of women participation on the process. This will involve assessing some feminist theories in order to develop the best suited constitution-making process for gender equity and agency. The feminist social theory for instance focuses on understanding fundamental inequalities between men and women and with analysis of male power over women.¹³⁸ This theory develops from the premise that male-dominance derives from social, economic and political arrangements specific to peculiar societies.¹³⁹ The socio-cultural and political context of constitution-building in Rwanda, Kenya, and Nigeria shows the persistent gender gaps that were enabled by a male-dominated society.

3.4 Cause and Effect: How does Gender Inequality Intersect with the Constitution-Making?

In identifying the cause and effect factor, it is important to consider how representation influences the process. Defining gender equity in the modern constitution-making process is usually symbolized by the nomination of a number of women as members of the constitution-making body. Previously, gender equality was not a subject for consideration within the political process that will rather decide for women than have women involved. Thus, the

¹³⁸Stevi Jackson, "Feminist Social Theory" in *Contemporary Feminist Theories* ed. Stevi Jackson and Jackie Jones (Edinburgh: Edinburgh University Press, 1998), 12

¹³⁹ Ibid

early constitution remained silent on women issues. Firstly, gender equality was believed to be protected by the general prohibition of discrimination on the grounds of sex. This was seen in the 1978 Constitution of Rwanda, the 1979 and 1999 Constitution of Nigeria, and the 1997 amendment to the 1963 Constitution of Kenya. Secondly, the constitution in the three jurisdictions did not provide for constitutional guarantees for women with respect to political representations, rights in marriage and family, and socio-economic rights. Thirdly, the State was not bound to take positive measures to promote women participation and international and regional instruments on women were not given constitutional power.

With demand for a more inclusive process by international and regional instruments and women movements, the practice of women representation progressed. In Kenya and Rwanda we see about 30% representations of women in the Committee of Experts and the Constitutional Commission respectively. While Nigeria although poor in women representation, had between 10%-20% representation in the Committees for the Review of the Constitution in both the Senate and House of Representatives.

In addition, the process allowed broad based consultation and participation. Accordingly, in Kenya and Rwanda, there was a more robust engagement of public and the final authority vested in the people. This resulted in an increase in the constitutionalization of gender equality and women's rights.

The Nigerian case reflects the pitfall of the absence of a feminist constitutional agenda that takes into cognizance the socio-cultural and political context of women during constitution-making. While gender equity was recognized as a principle in the process, there was a lack of actual realization of such principle from the mode of representation of the constitution-making body through to the legitimization of the draft constitution.

It is not surprising that the processes in the three jurisdictions produced different outcomes.

3.5 Vulnerability Theory: Equity, Equality, and Participation

The vulnerability lens theory for women inclusion in constitution-building is based on the idea that Equality can best be achieved through equity and participation in the process. Nina Kohn discusses vulnerability as inherent to the human condition, and the government therefore has a responsibility to respond affirmatively to that vulnerability by ensuring that all people have equal access to societal institutions that distribute resources.¹⁴⁰ Applying this to constitution-building processes entails identifying the process as the ‘societal institutions that distribute resources’ where the resources are the constitutional gains. It does not necessarily mean that women be ascribed weaker status because of vulnerability, rather that due to the history of exclusion and marginalization of women, they are faced with certain disadvantages which threatens their equal participation. These disadvantages continually subject women to inequalities and discrimination and also undermine the legitimacy of the constitution where almost half of the population is excluded from the decision-making process.

Assessing the constitution through the vulnerability lens will include identifying issues like the participation and representation of women in the process, whether the language of the constitution disparately impacts on women, what constitutional guarantees are provided to promote gender equality, whether the constitution provides for an oversight mechanism for effective implementation. These will be assessed in Table 1.0 to identify how vulnerability theory influences constitution-making to ensure gender equality.

¹⁴⁰ Nina A. Kohn, “Vulnerability Theory and the Role of Government” *Yale Journal of Law and Feminism*, 26, no.1 (2014): 3.

Table 1.0 Assessing Constitutional Provisions through vulnerability lens

| Jurisdictions | Representation and Participation of women in the process | Language of the Constitution | Constitutional Guarantees for women | Oversight Mechanism for Implementation |
|---|--|---|---|---|
| Nigeria (Proposed Constitutional Amendment Bill) | <p>-7 women out of the 49 members of the Senate Constitution Review Committee</p> <p>-7 women out of the 53 members of the House of Representative Constitution Review Committee</p> <p>-One way communication and engagement</p> <p>-Final Authority vested in the Parliament and President</p> | <p>-Uses masculine pronouns: “he/his” in specifying qualifications or standards for appointive and elective position or exercise for constitutional powers</p> <p>-Uses gender-neutral pronoun like “persons” for general rights.</p> | <p>-Right of a woman married into another State to choose State of indigene¹⁴¹</p> <p>-Non-citizens husbands to Nigerian women can now acquire Nigerian citizenship by registration¹⁴²</p> | None provided in the Constitution. |
| Kenya (2010 Constitution n) | <p>-3 women of the 9 members of the Committee of Experts</p> <p>-Parliament Select Committee and National Assembly bound by gender equity and equality principles</p> <p>-Final Authority vested with the people at the Referendum</p> | <p>- Uses both masculine and feminine pronouns: he/she, her/his</p> <p>Also uses gender-neutral pronoun: persons, citizens, etc.</p> | <p>-Incorporates Treaty or Convention ratified by Kenya¹⁴³</p> <p>-Duty on State organs to address the need of vulnerable groups including women¹⁴⁴</p> <p>-equal treatment and equal opportunity for women and men in all spheres and legislative measure for gender quota¹⁴⁵</p> | -Kenya National Human Rights and Equality Commission ¹⁴⁹ |

¹⁴¹ Proposed amendment to section 25 of the 1999 Constitution

¹⁴² Ibid

¹⁴³ Article 2(6) of the 2010 Constitution of Kenya

¹⁴⁴ Article 21(3)

¹⁴⁵ Article 27(3) and (8)

| | | | | |
|-----------------------------------|--|---|--|---|
| | | | -Right to reproductive health care ¹⁴⁶ -Equal Rights of partners during marriage or at divorce, legislation to recognize marriages under traditional, religious systems, personal or family law ¹⁴⁷ -Gender quota for elective offices ¹⁴⁸ | |
| Rwanda (2003 Constitution) | -3 women out of the 12 members of the Constitutional Commission -Final authority vested on the people in the referendum | Uses both masculine and feminine pronouns: he/she, her/his Also uses gender-neutral pronoun: persons, people, Rwandan etc. | -State commits to ensuring equality between men and women and women granted at least 30% of posts in decision-making ¹⁵⁰ -Discrimination prohibited on the ground of sex ¹⁵¹ -Recognizes monogamous marriage and equal rights during marriage and divorce ¹⁵² -Equal access of women and men to elective position and political parties 52&53 Gender quota ¹⁵³ | -Senate to lodge complaint where there is breach of article 52, 53 and 54 in the High Court ¹⁵⁴ -Gender Monitoring Office ¹⁵⁵ -National Council of Women ¹⁵⁶ |

The table shows the differences within the three jurisdictions with respect to the representation of women in the constitution making process, the language of the constitution, and the constitutional guarantees for women through the vulnerability lens. The process with better opportunities for women representation and participation like Kenya and Rwanda

¹⁴⁹ Article 59 of the 2010 Constitution of Kenya

¹⁴⁶ Article 43(1) (a)

¹⁴⁷ Article 45

¹⁴⁸ Articles 81(b), 90, 91, 177(1)(b), 197

¹⁵⁰ Article 9(4) of the 2003 Constitution of Rwanda

¹⁵¹ Ibid Article 11 of the 2003 Constitution of Rwanda

¹⁵² Ibid Article 26

¹⁵³ Article 76 and 82

¹⁵⁴ Article 55

¹⁵⁵ Article 176

¹⁵⁶ Article 176

produced a constitution that provided for specific rights to protect women considering the history of disadvantages faced by women both in the public and private sphere. The language of the constitution which is usually ignored was also used in such a way to guarantee equality either by the use of sex-neutral words or both female and male pronouns. In addition, the process in both Rwanda and Kenya both produced constitutional bodies for oversight to ensure the constitutional guarantees for women are realized. These were however absent in the Nigerian case.

Conclusion

The efforts to legislate for women's rights through the constitution must take into cognizance the realities of women assessed through the vulnerability lens that has been influenced by the "male authored" society. Developing gender equality standards for participation and representation of women in constitution-building must begin to reflect the true realities of women in the society and their diversity as a social category. While there is no conclusive evidence to prove that the recognition of gender-equity translates to process that fairly includes women or produces constitutional guarantees for women or otherwise, the Kenyan and Rwandan process are ready examples in building such evidence.

CONCLUSION AND RECOMMENDATIONS

The discussion on the challenges and prospects of women in the constitution-building process in sub-Saharan Africa focused on analysing the participation of women in the constitution-building process in Rwanda, Kenya and Nigeria and its impact on the constitution. This study began on the premise that the constitution-making process influences the final text of the constitution with an assertion that the inclusion and participation of women in the process will influence the development of constitutional guarantees for women. However, while the three case-studies highlight the importance of women participation in the process, they also present other dynamics that influence the process irrespective of participation.

One such dynamic was that the membership of the constitution-making body and the final authority play a fundamental role in determining the outcome of the process. Irrespective of the level of women participation in the drafting and public engagement stage, the final authority has to be favourably constituted to empower women with some measure of influence. The pitfall of an unfavourable process of adoption was evident in both the 1999 and 2012 constitution-making processes in Nigeria. In 1999, the constitution-making body was an all-male Constitution Debate Coordinating Committee and the Constitution was adopted by an all-male Armed Forces Ruling Council. The 2012 process which had poor women representation in the Constitution Review Committees was a progress from previous processes because it recognized gender equality as one of the guiding principles. It was therefore more inclusive with women representation in the Constitution Review Committees in both Houses of the national Assembly, more women groups participated in public hearings compared to the 1999 process. However, the power of adoption is vested on the National Assembly with presidential assent. At the point of adoption in the House of Representatives, the recommendation on gender equality and gender quota for elective offices was voted out by the majority members. Considering that female members in the House were less than 10%,

it was not a surprise to have the proposed amendment voted out. The Rwandan and Kenyan process provided a more positive narrative with an inclusive process that vests the final authority in the people through a referendum. This provided women with the opportunity to have some measure of influence in the adoption of the constitution.

In addition, the decentralisation of the organs of constitution-making reduced the overconcentration of power in one constitution-making organ and also enabled the influence of women. In Kenya for instance, the Constitution of Kenya Review Act 2008 (Review Act) in Section 6(c) provided for each organ to ensure that the process accommodates gender, respects the principles of equality and affirmative action and gender equity as guiding principles. This guided both the constitution of the Parliamentary Select Committee and the Committee of Experts as both the National Assembly and Parliamentary Select Committee were to ensure gender balance as provided in Sections 7(2) and 8(7) of the Review Act respectively. By implication at the point of harmonisation of the constitution by the Committee of Expert and the National Assembly, gender-equality remained a guiding principle. This to an extent influenced the final constitution presented at the referendum.

From the foregoing, the incorporation of a decentralised process gave women a fair chance to influence the process. Both the 2003 Constitution of Rwanda and the 2010 Constitution of Kenya reflect this by providing for gender quota for elective and appointive offices, gender-equality in marriage and divorce, equal opportunity for both men and women, and also incorporated standards from international instruments.

Other influential dynamics include factors like the socio-cultural context, the legal system, the level of women in politics. These factors largely were identified in this study as influencing the representation of women in the constitution-making process, the amenability

of the system to gender equality proposals and level of constitutionalizing gender equality and women's rights.

The observations above highlight certain structural and substantive issues that affect the level and impact of women's participation in the process. As such, in proposing recommendations with respect to structural issues, it is important that the constitution-making process is regulated by legislation that clearly provides for separate constitution-making institutions and guarantees a participatory process. Such clearly defined process increases the level of participation and the opportunities for women to make impact. On participation, two things are apparent. First, increased participation enables increased women participation. Second, decentralization opens up the space for participation and creates more opportunities for women to influence the process especially where the final authority is the people. Rwanda and Kenya highlight the prospects of a decentralised process with the people adopting the constitution through a referendum. While there were some difficulties in ascertaining the exact number of women that voted at the referendum, the reports on the referendum indicates that voting rights were guaranteed and that both constitutions garnered popular support. As noted, in Kenya for instance, women constituted 49% of the newly registered voters voting at the referendum. Subjecting the constitution to a referendum reduces the challenges of adopting the Constitution through a legislative process where women are poorly represented.

Nigeria and other countries in the Sub-Saharan region for instance can adopt the practice of having legislation to regulate constitution-making or review that incorporates gender equality as a guiding principle. This is important because in a society like Nigeria where patriarchal ideas still exist, it becomes easier to promote gender equality if the constitution-making institution is independently constituted in line with the guiding principles of the said legislation. This will also include the need for the decentralisation of the process and the provision of separate institutions from the Parliament for the making or review of the

constitution and its adoption. In this sense, irrespective of the number of women in the Parliament, membership of such an institution will ensure gender balance according to the guiding principles. Also, the conflict of the vested interest of male-dominated parliament and the interest of the minority women lawmakers will be avoided. This conflict becomes less relevant when the people have the final say in the adoption of the constitution. In such a case, women have more freedom to mobilise support from the generality of the people.

On substantive issues, setting a guideline and an agenda for gender equality and equity is essential in promoting a process that favours women in developing constitutional guarantees for gender equality and women's rights. This is reflected in the Kenyan process, where the Constitution Review Act consistently identified gender equality and equity as guiding principles. As such, the assessment of the proposed constitution was also checked through the lens of gender-equality and equity.

Consequently, the constitution-building process should be gendered in such a way that gender equality practice becomes a norm and not a separate demand that is easily rejected. The more women and gender equality is mentioned in the regulating legislation and the more visible women are in the process, the better the result in constitutionalizing women's rights and dislodging ideas that support male-dominance. In addition increasing women representation in decision-making position and peace-building process also builds the image of women as equal partners requiring support. As noted in Rwanda, the role of women as 'authority figures' during the conflict and the peace-building process contributed to the support for incorporating gender quota and women's rights in the 2003 Constitution.

It is important to note that while fairness and recognition on the constitution-making body may seem satisfied with a 30% representation of women in respective organs, the identified internal inherent factors cannot be dislodged when women representation is treated as favours

granted to women and not rights. This is because the ingrained notion of a preferred male-dominated process requires a legal process that produces actual representation of men and women as equal partners. This will require going beyond 30% and making equality a norm that influences behaviour.

In addition, using sex-neutral language in constitutions and legislations regulating the process inadvertently removes the subconscious attribution of political authority to the image of a man. The use of sex-neutral language or recognition of pronouns that represent both sexes initiates the process of recognizing both men and women as equal partners in the key decision making processes.

While this thesis focused on identifying how the constitution-building process affects the outcome with respect to the development of constitutional guarantees for women, there is still the need for more research on the extent of such impact. However, Rwanda represents the prospects of a process that develops constitutional guarantees for women with a National Parliament that currently has 63% and 38.5% women representation in the lower and upper house respectively.¹⁵⁷ Kenya with its ‘progressive realization’ principle as interpreted by the Supreme Court of Kenya,¹⁵⁸ currently has 19.7% and 26.5% women representation in the lower and upper houses of the National Parliament respectively.¹⁵⁹ Nigeria grapples with a 5.6% and 6.5% representation in the lower and upper houses of the National Parliament.¹⁶⁰ Notably, efforts to legislate on gender equality and women’s rights have not recorded much success. In March 2016, the Nigerian Senate rejected a Gender and Equal Opportunity Bill that sought to eliminate discrimination against women and promote equality rights of men

¹⁵⁷ Inter-Parliamentary Union “Women in National Parliament: Situation as at February 1, 2016” <http://www.ipu.org/wmn-e/classif.htm> accessed March 31, 2016

¹⁵⁸ See Advisory Opinion No. 2 of 2012, In the Matter of the Attorney General (on behalf of the Government) and in the Matter of Gender representation in the National Assembly and the Senate

¹⁵⁹ Inter-Parliamentary Union “Women in National Parliament: Situation as at February 1, 2016” <http://www.ipu.org/wmn-e/classif.htm> accessed March 31, 2016

¹⁶⁰ Ibid

and women.¹⁶¹ These challenges further support the demand for a constitutional-building process that guarantees gender equality. Dislodging patriarchal practices in society requires redefining the status of women through the constitution and building a culture of equality through the constitution-building process.

¹⁶¹ See reported on allAfrica.com <http://allafrica.com/view/group/main/main/id/00041814.html> accessed March 31, 2016

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