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## Women's Rights in Kenya since Independence: The Complexities of Kenya's Legal System and the Opportunities of Civic Engagement

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**Women's Rights in Kenya since Independence: The Complexities of Kenya's Legal System and the Opportunities of Civic Engagement**

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*Since Kenya gained independence from Britain in 1963, women's rights in the country have made slow gains and suffered some setbacks. However, the rights of women and their guaranteed participation in politics was outlined in Kenya's 2010 Constitution. This paper will survey some of those gains as well as describe the social backlash experienced by women leaders who have been trailblazers in post-colonial Kenyan politics.*

Key words: Kenya, gender equality, women, democracy, land rights, customary law

Since Kenya gained independence from Britain in 1963, women's rights in the country have made slow gains and suffered some setbacks. However, the rights of women and their guaranteed participation in politics was outlined in Kenya's 2010 Constitution. This paper will survey some of those gains as well as describe the social backlash experienced by women leaders who have been trailblazers in post-colonial Kenyan politics such as Wangari Maathai and Wambui Otieno. Both women, as well as Wanjiku Mukabi Kabera (Director of the African Women Studies Center at University of Nairobi) had been involved in the debates over whether pre-colonial traditions gave women more power than they received under British-influenced colonial, post-colonial, and patriarchal forms of governance. Activist women lawyers in the Federation of Women Lawyers (FIDA) like Judy Thongori and Jane Kiragu, and academics like Maria Nzomo have worked since the 1990s for women's political rights. Martha Karua co-founded the League of Kenyan Women voters. She served as a Magistrate and a lawyer with FIDA before becoming a Minister of Parliament in 1993. She defends Kenya's current "two thirds" gender bill that ensures no one gender holds more than 2/3 of the Parliament's seats (FEMNET, 28 August 2019). While these Kenyan women appreciate the real gains that women have made, they are frustrated by the fact that the newly set women's quotas cannot be implemented, due to lack of enough candidates for office. But Karua does not just want changes in the political realm. She thinks patriarchy has to be challenged, as it is learned in the home and as it shows up in daily language (FEMNET). Phoebe Asiyo is an example of a Kenyan woman who not only challenged narrow gender notions when she ran for and held her seat as a Minister of Parliament, but also, she challenged and changed traditions when she became the first woman elder. She was crowned elder in 2009 in a ceremony overseen by Ker Riago Ogalo, Chair of the Luo Council of Elders. She was recognized for her tireless work to promote girl's education, women's rights, and gender equity. At the time, there were no other women elders in any of Kenya's 42 ethnic communities (Okello; *Standard Media*).

Direct political gains and public leadership are not the only changes in Kenya. Family self-understanding and the role of women in the family is undergoing change. Courts have defended women's equal rights over the last few years in ways that were not legally available before. For example, several women justices—Mary Kasango, Kalpana Rawal, and Martha Koome (who is currently Chief Justice)—have made rulings upholding the right of women to inherit property that is part of their fathers' estates. Also, still-respected traditions such as women-women marriages

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help women to find alternatives to patriarchy regarding practical issues like land ownership, as well as personal issues like intimacy. This paper argues that it would be wrong to oversimplify the Kenyan context as one in which women are “behind” in some sense and trying to catch up to men (or to the standards of equality of the “developed” North). A close look at the nuances of cultural understanding can shed light on women’s progress and cultural change in Kenya (while taking care to avoid presumptions based on Western ideas of feminism) as well as the challenges that lie ahead.

In this paper, I intend to complexify what has been an over-simple dichotomy and misunderstanding of which traditions, customs or laws harm or help women, with a focus on the Kenyan context. Whether it was colonial powers, Western missionaries, or Western feminists, there has too often been the idea that African traditions should be swept away to make room for a civil society based on Western liberal democratic ideals. A closer look at the situation, and the voluminous research already written by Kenyan women scholars, and activism by Kenyan women of all backgrounds, have contributed to a nuanced perspective.

The paper’s first section studies the historical and ambivalent role of customary law as it was changed by European colonial powers in Africa. This two-tiered system of law had implications for women’s ability to inherit property. Its repercussions for Kenyan women in recent decades is reviewed. A second section explores the topic of women’s relationship to tradition in historical and comparative context. It includes study of woman-to-woman marriage traditions in several Kenyan communities. A third section then looks at the hurdles that had been placed in front of women who wanted to participate in politics, and how women activists came together to change the Constitution to ensure better women’s participation. Roadblocks to participation remain, however. A Conclusion sums up the current context and prospects for the future.

**Part One. Customary Law: Its Uses and Abuses**

In many places throughout Africa, and certainly in Kenya in the decades after independence was won in 1963, the legal system had what Kenyan feminists considered a double standard. Wanjiku Mukabi Kabira is a Kenyan scholar who has noted that despite women’s great contributions to the liberation of Kenya from colonialism, it has nevertheless been a several decades-long struggle that Kenyan women had undergone in order to have their rights recognized in the 2010 Kenyan constitution (Kabiru and Ngurukie, 1997; Kabiru 2012, pp. 115, 131-33, 167, 185, 199, 254). Although the constitution outlaws gender discrimination, there are limitations to constitutional protection, because the constitution also recognizes local customary law. Customary law may control decisions regarding marriage and divorce, inheritance, burial, and other family matters which can greatly affect women’s lives. Feminists argued that much of customary law curtails women’s legal rights, and Kenyan women lawyers like Jane Kiragu and Judy Thongori of FIDA-Kenya have been organizing in attempts to get the customary law clauses out of the constitution (Kiragu, 2002, 18; Thongori 2002).

Mahmood Mamdani explains that customary law was used by the British to engage in “decentralized despotism.” Colonial governments used a dual system of justice: white settlers had guarantees of civil law, while Africans were grouped by ethnicity and controlled indirectly through chiefs approved by colonial powers. However, customary law would only be allowed on issues of civil law, not criminal law. There was also always some version of a “repugnancy clause,” usually

arbitrarily enforced, through which any custom the colonial powers found contrary to the principles of “civilization” could be banned (Mamdani 1996, 109–117).

In South Africa, Nicola Barker argues that gender oppression within customary law was created with colonial influence and cooperation, since colonizers wanted to win the cooperation and loyalty of traditional leaders, and they strategized that they could do so by enshrining traditional patriarchy within colonial law. This is sometimes called the “patriarchal coalition.” (See Barker 2011, 449–52).

Undoubtedly, when customary law was appealed to in the courtroom, accounts of customs would often be changed into something more exact and permanent than such customs actually were, fossilizing the customs and presenting them as timeless and unchanging or admitting of no exceptions. Uma Narayan explains that the British in India were actively involved in shaping Indian “tradition.” The British listened to testimony of many elders, who gave conflicting evidence and interpretations, then took it upon themselves to judge of what the tradition consisted (Narayan 1997). “Traditions” were therefore distorted, reified, and then generalized. In his *African Philosophy and the Quest for Autonomy: A Philosophical Investigation*, Leonhard Praeg draws upon the works of T. Ranger, who argued that the British, drawing upon their own ideas of the importance of traditions, invented African traditions. Now Africans themselves rely upon the British idea of the importance of tradition and respond with a re-invention of their own traditions. As Ranger explains, “The invented traditions of African societies—whether invented by the Europeans or by Africans themselves in response—distorted the past but became in themselves realities through which a good deal of the colonial encounter was expressed” (Praeg 2000, 164).

Muna Ndulo explains that, while customary law is still mentioned in the recently created Kenyan Constitution, and while many Kenyans continue to follow customary law regarding their life decisions, there is more protection for women in the constitution than customary law provided, which maintains that upholding human rights trumps any customary law that contradicts that goal. In the Kenyan Constitution of 2010, article 159(3) says “[t]raditional dispute resolution mechanisms shall not be used in a way that: (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality...” (Ndulo 2011, 98). Ndulo also argues that insofar as the Kenyan Constitution says it upholds international law, any international laws that protect women from discrimination would also apply in Kenya (Ndulo 2011, 99).

Other important legislation has also recently been passed in Kenya. Women can now inherit property from their families. Kenyan women can now pass citizenship to their children, and to their husbands if they marry a foreigner (see the Kenya Citizenship and Migration Act of 2011, section 8); earlier, only men could do so. There was a Prohibition of Female Genital Mutilation Act of 2011. Also, upon the dissolution of a marriage, women can keep their property. This latter point was a key part of the Matrimonial Property Act of 2013. Its legacy is a bit mixed, however. A male-dominated Parliament struck out an aspect of the law requiring equal distribution of marital properties upon dissolution of the marriage. Instead, the law now states that the judge will divide properties based on the “contribution” of each spouse. But, how will non-monetary contributions be decided? A debate ensued in Kenyan society, as radio talk shows discussed possible ways to measure the worth of a wife’s contribution to a marriage. One journalist mused at length that due

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to “gender empowerment,” women’s contributions to their marriages have been lessened in some ways, including less cooking for their husbands and less sex with their husbands. The same author did admit that women still contribute to the household as mediators between quarreling family members and organizers of the details of daily life. He also admitted that many women give up paying careers in order to raise families, and it is hard to estimate that value monetarily. He opined that men calling into talk shows to discuss women’s “contribution” to marriage sounded like “Neanderthals” (Biko 2013).

A marriage bill that passed Kenyan Parliament and was made law by President Uhuru Kenyatta in 2014 was hailed as an advance, albeit an imperfect one, by Christine Ochieng, who was Executive Director of the Federation of Women Lawyers at the time. The good news was that all marriages are now treated equally, whether they are polygamous (as was allowed in customary marriages and Islam) or monogamous (as in Civil and Christian marriages). This is an advance because, previously customary marriages sometimes had no paperwork at all, and a woman never received a marriage license to show that she was really married. This put her at a legal disadvantage when it came to inheritance of property, for example. But Ochieng was still disappointed, because, she wanted the law to uphold the idea of informed consent as the basis of marriage. In fact, customary law’s practices were that a first wife should be informed of the husband’s intent to marry again, and she should consent. But, male members of Parliament banded together to strike this part of the law. And so in this way, the law does not really do what it says it does, that is, it doesn’t make legal the longstanding cultural practice; it only legalizes polygamy, minus the cultural practice of needing consent of the first wife (Karimi and Leposo, 2014). Dorothy Kweyu criticized the passage of the marriage bill, noting that “The Marriage Bill was passed minus the clause that required men in customary unions to inform Number One that a second wife was coming,” noting that, while up to twenty percent of elected officials nowadays are women, they are always a minority that doesn’t have the numbers to stop any legislation (Kweyu 2014).

There has been debate as to whether all of these recent changes amount to an erosion of tradition and/or an invasion of Western values and practices. Just what the tradition held regarding women’s role and status and their participation in politics and the economy has been debated. The next section will look at the question of traditions, and later we will turn our attention to more recent developments in electoral politics and the question of women’s participation.

**Part Two. Women and Traditions in Comparative Context within East Africa**

Not all East African traditions put women at a disadvantage. Michael Kirwen explains how Christian missionaries destroyed family traditions and institutions among the formerly matrilineal Kwaya ethnic group of Tanzania. As Kirwen, himself a Maryknoll missionary, explains of the earlier time, “Western missionaries . . . have always been uncomfortable with the matrilineal tradition since it gives great freedom to women” (1979, 88). In 1945, White Fathers, a missionary group in Kwaya, began to undercut Kwaya matrilineal traditions by instituting new practices based on the patrilineal practices of other ethnic groups. Kirwen bemoans the fact that missionaries did not build upon the egalitarian aspects of matrilineal marriage to found a Christian “personalist” theology of marriage (98–99, 112).

John Mary Waliggo of Uganda noted that colonizers passed laws ostensibly to strengthen Christian marriage; however, the laws resulted in restrictions on women. For example, the 1902 law against

divorce took away African women's power by making it impossible for them to return (or threaten to return) to their natal family, as was often done when a woman was mistreated by her husband. Then, others would become involved and she could agree to return to her husband only after winning concessions from him. Under the new law, she could not return to her natal home, so she was at a new disadvantage when negotiating with her husband (Waliggo 2002, 31–33, 91).

Shadrack Nasong'o and Theodora Ayot inventoried the ways in which women in pre-colonial Africa possessed relatively more advantages than during colonial or post-colonial times. They argue that an emphasis on sexual dualism mitigated male domination in pre-colonial patrilineality. During this time women held important roles that could not be taken over by men; among other things, women were healers, teachers of indigenous knowledge, food producers and distributors. Women had usufruct rights to the land, which was held communally. Women's status and role changed significantly during colonial times, when men were socialized into political leadership roles, and a cash economy based on cash crops was established. Women's subsistence farming became relatively underpaid and marginalized. Women's status-bearing skills like medicine-making, brewing, spinning, and weaving were taken over by the British (Nasong'o & Ayot 2007, 172–75). These changes from pre-colonial to post-colonial times were noted by Wangari Maathai as well, who said that it was only when colonizers decided to give title deeds for the family land to men that women were dispossessed; prior to that, the women lived on common family land (Maathai 2009, 227). It was a focus on cash crops, Rob Nixon insists, that really hurt women and degraded the environment as well, making women's lives harder (Nixon 2006–2007, 25).

The control of cash crops was not always limited to men. Discussing the situation in Tanzania, Elinami Vareli Swai explains that women's roles and responsibilities are substantial even under patriarchy. She notes that among the Chagga (an ethnic group geographically and culturally close to the Maasai, who are similarly patriarchal), women are in charge of growing all foodstuffs. Cooking is not a simple task; it involves gathering firewood and water. Chagga women also engineered irrigation systems for their fields and practiced medicine and divination. When coffee cultivation entered the area around Kilimanjaro, women also began growing coffee as a cash crop. There have been big advances on the farms in Tanzania since the 2000s, Swai explains. Women are being paid for their farm work and negotiating for shared power on their farms. Girls are demanding part of inheritances (60–61). Despite these gains, Swai admits that women farm workers are still widely considered to be "helping" their husbands.

In contemporary Kenya, studies show that unequal division of household chores begins during childhood for girls, when many are unable to concentrate on their education due to their workload (Osongo 2011, 27). Monica Awuor Ayieko's 1995 study of households in two different ecological zones, Njoro Division and Kikuyu Division (as they were called in 1995) in Kenya showed that on smallholder farms, women spend more time in agricultural and household work than do men. Women self-consciously engage in "male" chores as a way of coping with male absence from the farm due to emigration (Ayieko, 1995). Chesaina Ciarunji noted that in contemporary Kenya, men often held onto the role of decision maker even in households where women's work supplied the family's basic needs, and women in those families capitulated to the men in order to "keep peace" in the home (2005, 211–12).

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Margerethe Silberschmidt's study of gender antagonism in the Kisii District in Kenya situates the theme of marital relations within the larger contexts of social, political, and economic change. Colonial economic practices took men away from their rural homes, leaving women to take over management of farms. Since independence, there has been less demand for unskilled labor, but more population growth and overcrowding of land. Men who cannot secure employment come home and, feeling marginalized, sometimes fall into alcoholism, which causes more marital friction (1999, 46–52, 108). Silberschmidt notices that despite large socioeconomic changes, both men and women in Kisii had locked themselves into “an extremely ‘traditional’ and inflexible system; in a set of norms and values which put severe limits to the kinds of behavior which are acceptable” (55) regarding gender roles. Role separations were so rigid that, up to the time of her study, men would not cook their own food, and a wife's refusal to cook for them was considered an insult. A man found working side-by-side with his wife on the farm would be ostracized by other men (55–56, 104–108).

Silberschmidt noted that in the 1990s, due to changes in the economy, most male laborers could not afford to raise the traditional bride price in cattle, so actual exchange of bridewealth has become very rare. Without payment of bridewealth, a woman does not clearly belong to her husband's home, and her children do not have the right to inherit their father's land. While Western feminists have opposed bridewealth transactions since they imply that women are “bought” (even some Kenyan woman have made similar complaints), the alternative to being bought—having an informal relationship—does not free women either, since an informal relationship does not grant a woman and her children claim to her husband's land. Due to this, some women who have been able to secure paid employment have helped their husbands pay bridewealth to their own parents in order to secure rights for themselves and their children (Silberschmidt 1999, 75–79, 83–89).

Silberschmidt situates the strained relations between husband and wife in historical and economic contexts. Acknowledging the context is important, because as Jean Comaroff and John Comaroff have stated, outsiders who imagine that African women suffer primarily due to their husbands' maltreatment of them ignore the pressures that larger global economic factors bring to bear on a couple's relationship. It would therefore be erroneous to assume that the troubles are due to the “backwardness” of African culture (Comaroff & Comaroff 2012, 18).

Debunking stereotypes involves realizing that there were many ways traditions that restricted women were challenged by Africans, even African men during colonial days. D. A. Masolo evaluates the novels *Siku Ya Watenzi Wote* and *Kusadikika* by Tanganyikan author Shaaban bin Robert (1909–1962). While his country was still under the colonial yoke (Tanganyika received independence in 1961 and was renamed Tanzania when it merged with Zanzibar in 1963), the author addressed a host of problems facing his society, including discrimination and violence against women. In the novel *Siku Ya Watenzi Wote*, good counsel is embodied in a woman named Adilia, who explains that, with discussion and deliberation, society can resolve its problems, including gender oppression (Masolo 2010, 97–101).

There are also many examples of women who did not go along with discriminatory treatment. Wambui Otieno, an outspoken woman well known in Kenya, began her rebellion against colonialism in grade school when she refused to answer to her Christian name and would only answer to “Wambui.” She fought against the British with the Mau Mau, spied on the British, and

helped to secure arms for the Mau Mau. She was eventually detained by the British in a holding center in Lamu. When Kenya got its independence, she ran for and held office, and subsequently was involved in several political parties. When she married, she refused to pay “bride price,” saying to her father, “Dad that custom is outdated and I do not like it. I am not a goat to be sold. I am your child” (Otieno 1998, 97; *Guardian* 2011). Her protest against customary law was a focus of the famous S. M. Otieno burial trial, in which she tried to assert her rights to bury her husband, while his clan, which won the case, insisted that he be buried in their ancestral home. Later in life, she married a man much younger than herself, challenging marriage customs that assumed that only old men can have spouses that much younger than themselves (Lacey, 2003).

### **Women, traditions, and power**

There is rampant ignorance and misunderstanding about the times when traditions actually gave women more power than they held under colonial rule or during the early years of independence. For example, “woman-woman marriage” is a little-known tradition still practiced among some ethnic groups in Kenya, including the Akamba, Gikuyu and the Nandi. Researchers Wairimu Ngaruiya Njambi and William E. O’Brien explain that in Murang’a District, local *mbari* elders allocate land use rights according to their customs. In this system, some women can end up owning land. Women who own land can decide to take a wife (Njambi & O’Brien 2005, 151). Grace Bosibori Nyamongo explains that for the Kamba people of Machakos County, woman to woman marriage has solved a difficult problem for women who have no sons as heirs. They can marry women who already have sons, and those sons become legitimate heirs. The couple stays together, with any male partners being temporary (Nyamongo, 2020). Woman-woman marriage is a clear example of women’s ability to find alternatives to male marital domination by engaging in a practice within African tradition—an option prohibited by Christian religions (at least as practiced in Kenya), until very recently, outlawed in the United States and Europe, and considered taboo by many Western social systems. These Kenyan ethnic communities allow women to take on roles that would not be permitted in traditional Christian or civil marriage. In addition to being a property owner, woman who marries a woman becomes the head of a lineage, with children bearing her name. Researchers debate whether the woman in such a role is considered “male” (see Oboler 1980; Njambi & O’Brien 2005, 157–60). The validity of these marriages and the right of wives in woman-woman marriages to inherit from their deceased spouses was upheld by Kenyan courts in 2011 (Mwobobia 2011).

Njambi and O’Brien interviewed *muhikania* (landowning women who marry a wife), who explained that their motivations involve a wide range of factors including “companionship to appease loneliness, to be remembered after death, to have children to increase the vibrancy of the household, to fulfill social obligations in accordance with indigenous spiritual beliefs, and not least to avoid direct domination by male partners in a strongly patriarchal society, including men’s control of both the women’s behavior and household finances” (Njambi & O’Brien 2005, 153). As stated by Nduta, one of their informants, “We have no interest with a man who wants to stay in our home... What for? To make me miserable? If I kept a man here who will then start asking me for money to buy alcohol, where would I find such money? No, I won’t agree to live like that” (Njambi & O’Brien 2005, 151).

Woman-woman marriage in Kenya opens a very small window on a very large topic: the different ways motherhood, marriage, and family are understood and practiced throughout the world. These



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concepts and practices are often misunderstood because Western researchers assume too much commonality between their own practices and those of Africa. They also challenge non-Africans to rethink their stereotypes of Africa. While Silberschmidt paints a Kisii community with gender roles so rigid that a man could never cook a meal for himself, at the same time in a different part of Kenya, ethnic communities allow women to take on roles that would not be permitted in traditional Christian or civil marriage: a property-owning woman is allowed to marry a woman and head a lineage whose children bear her name. It would be erroneous, therefore, for European women and women from the United States to presume on limited evidence that women in Kenya have less rights than they do in their countries. Whether the woman in such a role is considered male is debated by researchers. The question would hinge on whether sex and gender were considered something important apart from social roles, in other words, it's a debate over concepts and definitions. One woman interviewed by Njambi and O'Brien insists that everyone in her community thinks that she is a woman, even though she has the role of marriage initiator in her woman-woman marriage (Njambi & O'Brien, 157–160). On the other hand, Regina Smith Oboler quotes Taptuwei, who Oboler describes as “a Nandi female husband” as insisting that she is no longer a woman, but a man (Oboler 1980, 69). For Oboler, gender is decided by roles, and specifically property rights in this case (Oboler, 70). There are merits to both sides of the argument. It would be important, I think, to address the individuals as they see themselves and as they request to be addressed. This case is just one example of a wide variety of views being present in African contexts. African marriages include polygamous marriages and carry a great variety of responsibilities and social roles among the many ethnic groups. All of these customs change over time, and lengthy, careful study is necessary before any conclusions may be drawn.

Is the new Kenyan Constitution able to reach a balanced middle ground, respecting traditions when they are helpful in building gender equality and respect for women, but discarding traditions that are unjust? Certainly, the new constitution is closer to that goal than the former. For example, Muna Ndulo cites a case where reference to Kamba customary law was used to argue against a woman's ability to inherit land from her deceased father's estate. In this case, the court decided that the Kamba customary law was discriminatory toward women and that this particular customary law was in conflict with section 40(1) of the Succession Act, which uses gender-neutral language to describe inheritance in the case of polygamous marriages. The court therefore decided that the Kamba woman could inherit the land from her father. This is not necessarily a “defeat” for African customs; it is better understood as an example of the way African customs can grow and adapt to a changing world. As Ndulo explained, “Respect for the law can only be achieved if the law furthers the needs and conforms to the circumstances of society subject to the law. Failure to use the law to achieve just social solutions to issues confronting society and to reform society effectively thwarts development and advancement in customary law and consequently also reduces respect for it” (Ndulo 2011, 109). If I understand her correctly, Ndulo is challenging customary law to adapt itself to the changing times and values of its community members, or else become irrelevant.

It is also important to get some perspective when looking at the status of women. Some argue that focusing on the relationships between husbands and wives is too myopic a view of women's status. Elinami Swai (2010) is concerned that the tenets of Western women's liberation movement as applied in Africa entails rescuing African women from their traditions. Western women assumed that African women had not yet experienced liberation (111). Swai praised Ashiku Kanyrji, who

listened to her mother and aunt, who told her of the importance of marrying and having children while young rather than postponing these events to get an education. After initial reluctance, Kanyiriji decided to take the elder women's advice seriously, prioritized finding a suitable mate, and arranged her own marriage with haste (53). Rather than seeing her as a woman boxed in by narrow choices of what to do with her life, intergenerational internalization of women's limited roles, and ending up in a marriage she didn't want, Swai saw Kanyiriji as having a choice and exercising agency, even rejecting the now popular societal emphasis on delaying marriage for education.

Swai walks an interesting tightrope of sorts because she wants to insist that African women are not victims. And yet she also readily admits they are oppressed (149). But she sees them as always actively engaged in response to this oppression. Regarding African traditions, she admits that in rural areas, "role models remain the old patriarchal dictators who rule their households like little Emperors, where they wield absolute power, with veto power over everything." (143) Even under the seemingly progressive *ujamaa* ("family hood") movement promoted by Tanzanian leader Julius Nyerere, households were grouped by tens and then ruled by "mainly older males" referred to as *wazees*. ("elders") (55). Swai describes women in contexts such as this as "resilient" (143). Domestic violence is on the rise, she says, because men feel their masculinity threatened by unemployment. If families get involved in domestic disputes, it is usually to try to patch up the situation so that the status quo can be restored (143–44). She also asserts that men's domination of their wives, while real, is seen in a larger context, dwarfed by the harm done to women's livelihood by neoliberal globalization,

Clearly, it is difficult to radically change a social as well as a political system. Swai suggests that women who go against social norms in East Africa and deprive themselves of family life have regrets and unhappiness. Faith Wambura Ngunjiri suggests in her book on African women leaders that many are "tempered" radicals, who pick some fights and conform in other ways. Her chapter devoted to Judy Thongori, who was Executive Director of FIDA for five years and the lawyer who led the fight for several gains for women's rights in Kenya over the decades, Thongori nevertheless had this to say about her life: "I am not a rebel, I cannot be a rebel. Even though patriarchy is very high in this country, I need the sense of belonging and respectability that comes with certain social structures, such as marriage, in order to be credible in fighting for women's rights as human rights. I respect such structures and remain in them even as I challenge them and seek to change them" (quoted by Ngunjiri, 79). Thongori could have been alluding to Wangari Maathai, who had been painted by Kenyan president Daniel Arap Moi and the media as "too radical," perhaps because she was a divorcee—however, Moi's argument clearly reflected a double standard, since he himself divorced his wife Lena (who bore him eight children) in 1974 (*Africa Confidential* 1998). Maathai described her own attempts to reconcile with her husband, who ultimately insisted on divorcing her; perhaps she would have preferred to retain the respectability that Thongori describes (Maathai 2007, 139–47). The double bind, in-betweenness, double standards, as lived experiences of women (expressed by Wangari Maathai and others) needs redress.

### **Part Three. Electoral politics**

At this point, I would like to focus more specifically upon the participation of women in electoral politics. I will suggest that the slowness of robust incorporation of women in politics has a lot to do with this long history and the context of colonial and postcolonial developments. Nasong'o and

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Ayot (2007) give an overview of just how limited the participation of women in Kenyan politics had been since independence in 1963. At the beginning of Kenyan independence, only one woman was present among the seventy delegates chosen by Britain to come to the Lancaster House conference in London to discuss the drafting of Kenya's Constitution (176). During the rule of Kenya's first president, Jomo Kenyatta (1964–1978), not a single woman was appointed a cabinet member. There had been much violence and intimidation of political candidates throughout the 1960s and 70s, which was not conducive to women's participation. The authors cite Jael Mbogo, who described political violence against herself and other women candidates for Parliament, including kidnapping and the use of hired thugs to vandalize vehicles and prevent women from speaking (Nasong'o & Ayot 2007, 178–81).

The administration of Kenya's second president, Daniel Arap Moi (1978–2002), was not much better for women in politics. Moi harangued the few women who were able to get into Parliament, accusing them of having "little minds" (see *East African Standard* and *Daily Nation*, March 7, 2001, cited in Nasong'o & Ayot 2007, 182). During this time President Moi attacked Wangari Maathai, who criticized his crooked deals and his sale of public lands (or gift of them as favors) to his loyal backers. Maria Nzomo explains the way Moi used his influence over Maendeleo Ya Wanawake (the largest women's development organization) during his presidency to discredit Maathai and divide the women's movement in order to weaken it, a topic also covered by Maathai herself in her autobiography (Nzomo 1997; Maathai 2007, 137–38, 155–56; Nasong'o & Ayot 2007, 183). Despite Moi's misogyny, women still gathered in the country's capital of Nairobi in order to chart future directions for their advancement.

Delegates gathered in Nairobi in 1985 under the auspices of the United Nations for the Third World Conference for Women in celebration of the UN Decade for Women. Those gathered drafted "Forward Looking Strategies for the Advancement of Women." These strategies prioritized women's equality, development, and peace. Concerns for equality focused on equal treatment under the law, equal chances to develop potential, and the need to uphold rights that had been denied to women. Women needed to be integrated into any development efforts, and women needed peace and security to flourish. The conference statement emphasized its special concern for "vulnerable and underprivileged groups of women" such as refugees, those who are trafficked and in war torn areas, and those in poverty, whether in rural or urban areas (Muteshi-Strachan, 13). A follow-up delegation of Kenyan women was sent to Beijing for the Fourth World Conference on Women in 1995.

The backlash aimed at these progressive women has resulted in sexist jokes and comments ever since. President Moi opposed a Kenyan Equality Bill drafted in 1999 that would have given women equal inheritance rights as well as the freedom to choose a spouse. As Minister of Parliament for Dagoretti Hon. Beth Wambui Mugo pointed out on November 27, 2001, Moi publicly spoke out against affirmative action for women, even though Moi had appointed the first female minister, Nyiva Mwenda, who signed the "Beijing Platform for Action," a document that promotes affirmative action for women, on behalf of Kenya. It's also important to note that some Muslim women joined Muslim men in protesting the bill, saying it was anti-Muslim and inspired by foreigners. The Equality bill had said that every person is entitled to equality of treatment in marriage and divorce, and property inheritance. Kenyan Muslims insisted that sharia law, or Islamic legal code was their guide on such issues. As Ndzovu notes, Islam allowed polygyny, and

considered the power of divorce as belonging only to men. Islam also counseled different levels of wealth inheritance between men and women. Many Kenyan Muslims said they were against this equality bill because men and women aren't the same. Ndozvu thinks that Islam itself can provide a basis for gender equality, for example, by focusing on certain verses of the Quran like 33:35 which asserts that both men and women must do good deeds and will receive the same reward after death. It would also help to interpret Islamic texts in a dynamic way (Ndzovu, 107-110). Nevertheless, in 1999 this Kenyan community voiced its opposition to the bill, which was then defeated.

As Kenya transitioned from President Moi to President Mwai Kibaki (2002–2013), there were still only small gains for women. The number of women elected to positions was still quite small in the 1992, 1997, and 2002 elections. While women had only held around four percent of elected seats in the 1990s, by 2002 they had won 7.6 percent of the seats, still far too few (Nasong'o and Ayot, 186). Nasong'o and Ayot claim that it is clear that the ethnicity of candidates was considered more important by the electorate than gender, as leading women Parliamentarians like Zipporah Kittony campaigned for President Moi's re-election rather than supporting the leading woman candidate, Charity Ngilu. The authors argue that women strategically align themselves with men in order to survive in Kenyan politics. Among the longstanding hurdles women face in attempting to enter politics, include socio-cultural constraints such as women prioritizing marriage and motherhood and avoiding politics because it is seen as a "dirty game"; economic constraints that deny women the funds needed to campaign; and political constraints, including political party agendas shaped by men and a lack of proportional representation that would be most advantageous to women (Nasong'o & Ayot 2007, 184-91).

Nasong'o and Ayot's list is very helpful but it may be incomplete in some ways. They themselves note that there is a problem of violence, even "thuggery," in politics that drives women away. There are concerns that as the 2022 elections come closer, politicians are hiring armed gangs, as they have done in previous years. The Nov. 15, 2021 report on the formation of the gangs noted that "The use of gangs as an entourage or intimidatory force... reinforces a culture which deters women from running for or winning political office." (*The Standard*, Nov. 19, 2020). But in addition to the armed gang violence at election time (members of ethnic groups and/or political parties attack each other, sometimes employing paid attackers), there is the fact that the government controls the police force. The police have sometimes been the main source of death and injury of people expressing their support of opposition candidates. Human Rights Watch found this to be the case in the period surrounding the 2017 elections (*Human Rights Watch*, 2018).

I contend that it is not only a question of women finding politics unattractive or dangerous, as described above and by Nasong'o and Ayot, but also the question of an electorate that may be influenced by gender conceptions to believe that a man is more suitable in a role that seems to require violence. In fact, the 2013 election of President Uhuru Kenyatta and Deputy President William Ruto, both of whom had been investigated and charged in 2011 by the International Criminal Court for backing 2007–2008 election violence, seems to show that voters are not deterred by a candidate's reputation as a violent person. While there was not as widespread violence as in 2007-2008, during the 2013 elections there were still 477 killed and 118,000 persons displaced, according to Human Rights Watch (2013).

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Despite these daunting statistics of violence in electoral politics, there are also signs of improvement for women. The Kenyan Constitution of 2010 is committed to gender inclusiveness in elected and appointed political offices. The constitution sets protective guidelines that allow neither men nor women to hold more than two thirds of the seats in Parliament (81b). Although National Assembly and ministerial positions have been dominated by men up to the present, the gender-neutral wording of this aspect of the constitution indicates that, at least for the foreseeable future, it is meant to ensure that at least one third of officeholders will be women.

The Kenyan law is not very different from ones in nearby Tanzania and Uganda. Those two countries have more women participating in politics than the United States, which ranks forty-second in the gender equality index of the 2013 UNDP Human Development report, quite low for a Northern nation. The United States ranks seventy-eighth regarding women's participation in national parliaments, below Tanzania (twentieth), Uganda (twenty-first) and Kenya (seventy-sixth) (Inter-Parliamentary Union, 2013). Kenyan women have been frustrated by the stubborn persistence of the gender gap in political participation. Unfortunately, it was not possible to uphold the constitutional requirement that at least one third of offices be held by women because not enough women ran for office. As a result, this aspect of the constitution was suspended. Parliament has continued to postpone the implementation of this aspect of the constitution and so far has not agreed upon a way to implement it (Karanja 2016). Marilyn Muthori Kamaru argues that the Kenyan government is still in non-compliance with its own constitution, since the National Cabinet, Parliament, and Supreme Court all violate provisions of the Constitution that guarantee women at least one-third gender representation (Kamaru, 2017).

In the first general election under the new guidelines provided in the Kenyan constitution, there were only sixteen women among the 290 Ministers of Parliament (MPs) elected. The fact that women representatives from the counties can also sit in Parliament brought the number of women up to sixty-eight out of 349, but that was still far below the amount needed to fulfill the constitutional mandate. Dorothy Kweyu explains the low representation of women as follows:

“All the 18 women senators are there by virtue of the Constitution's affirmative action provisions that had them nominated. If it were not for the 2010 Constitution, which added 47 affirmative action seats to the National Assembly, there would be only 16 elected women in Kenya's 11th Parliament. That overlooks the fact that of the 47 governors, all elected, none is a woman. The same applies to the Senate where no woman was elected” (Kweyu 2014).

Similarly, veteran woman politician Phoebe Asiyo who was first elected in 1979 and continued to hold government positions until 1997 laments the exclusion of women from politics and holding top government positions. For example, Asiyo regrets that Monica Juma, a good and very knowledgeable candidate, had her presidential nomination to head the Cabinet blocked by male politicians. (Oketch 2015) Moreover, women not only face barriers to access political opportunities but also experience threats of physical violence and verbal abuse by men. Sophia Abdi Noor, a Somali woman leader equates running for office and trying to recruit other women to run in the Somali community in Northeast Kenya to a dangerous activity (Oketch 2016). Nonetheless, women are not silent in Kenya.

### **Women's Gains**

At the Women's Day event on March 8, 2016, women leaders emphasized that, even though more needs to be done, people should take note and acknowledge that there have been significant gains for women in Kenya in the last few years. Some examples given were that "The national FGM [female genital mutilation] prevalence rate had also dropped from 27 per cent in 2009 to 21 per cent in 2014 while the application of the affirmative action principle in the Constitution had seen the number of women in Parliament rise by 21.5 per cent up from 9.9 per cent in 2007" (Karanja 2016). While the increase from 9 to 21.5 percent is a good gain, it falls short of what the Supreme Court had insisted, that is, that the one-third gender rule had to be implemented by August 27, 2015, the fifth anniversary of the constitution (Wanga 2015). In 2017, finally, three women were elected governors and three were elected senators (Akwei, 2017).

There is another group that may not be happy with the two thirds clause, that promises women one third of the seats in Parliament and other leadership roles. In an interesting related development, Audrey Mbugua, a transgender person, and Solomon Gichira have brought a suit saying that the constitution, when it mentions two-thirds of one gender and one-third of the other gender, assumes that there are only two genders competing for elected positions (Agoya 2015). The legal question is whether seats should be reserved for transgender persons.

In the meantime, being openly gay or lesbian is still controversial. An openly gay Kenyan, Binyavanga Wainaina, was interviewed in the *Daily Nation* newspaper. Unapologetic about his sexual orientation, he said, "The Africa I envision is not a continent ruled by policemen of dogma." He referred to woman-woman marriages as proof that Africa had a diverse tradition of family; their example shows how gay or lesbian couples could also have families. Within a few days, there was another article in the newspaper that expressed an opinion opposite to Wainaina's. (However, the article was not motivated solely by the Wainaina interview; Ugandan president Yoweri Museveni had been pushing a harsh anti-gay law in neighboring Uganda, and President Obama had asked Museveni to repeal it.) In the article, Kenyan MPs asked foreigners to stay out of Kenya's business; they also expressed anger that anyone in Kenya could openly profess to be gay, since there were current Kenyan laws against homosexuality—such persons should be arrested. MP Kangata insisted that those who equate woman-woman marriages with gay marriages were wrong, since woman-woman marriage was rather an arrangement meant to help barren women (Wafula 2014).

It is plain that the rights of women (as well as the rights of transgender persons, sexual orientation, and the legality of same-sex relationships) will continue to be debated in Kenya.

### **Conclusion**

Kenya is poised to make great strides in increasing women's role in government. Kenyans have paid serious attention to the model of African countries that have greater representation of women in their legislatures and changed the Kenyan Constitution to guarantee at least one-third representation of women. While Kenya has not yet lived up to its constitution's guidelines, Judy Thongori successfully sued the government about its violation of the one-third rule, and the Kenyan government has to respond by adapting as quickly as possible to their own rules (Williams 2015). The Inter-Parliamentary Union keeps a website that tracks the percentage of women in parliaments, and as of this writing, the following African countries have more than 33.3 percent

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women in their legislatures: Rwanda, Senegal, South Africa, Namibia, Mozambique, Ethiopia, Tanzania, Burundi, and Uganda (Inter-Parliamentary Union 2022). Kenya is ranked as country #106 with 21.4 percent of the lower house as 30.9 percent of the upper house being women. So, Kenya is clearly coming closer to its goal and poised for change as it quickly attempts to join the other African countries with one-third or more representation by women. There is much to learn from Kenya's example and much to look forward to in an improving situation for women in Kenya.

At the same time, we continue to realize how much work needs to be done on a family and cultural level, as Martha Karua stated. She thought that ninety percent of patriarchal norms were still intact, once one looked at family and language practices (FEMNET, 28 August 2019). My hope is that this paper celebrated the gains up to now, while cautioning us all to be careful in how we conceive gains. Eschewing simple dichotomies of outdated traditions against equality in the contemporary constitutional context, women should acknowledge the diversity of views among women in Kenya, and work together to uphold the rights of women, even though the solutions would look quite different to different groups of women.

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