

Article 9

Right to participation in the political and decision-making process

Theodora Talumba Mkali and Annika Rudman

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

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1 Introduction

The right to participate in political and decision-making processes is significant, as it confirms the status of women as equal and important participants in society. Historically, however, men worldwide have dominated the public and political sphere, while women take care of the family and household.¹ This dichotomy is based on persistent gendered stereotypes of women's lesser capabilities in public and political life. Nevertheless, the participation of women in this regard is a requirement for the

¹ S Wittkopp 'Article 7' in M Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: a commentary* 198.

realisation of democracy.² Women's political participation is also critical to guaranteeing the right to development.³

As is the case globally, African women are seldom accorded a place of prominence in the political, governance and decision-making structures of their countries. Historically, African women have been disadvantaged in their political participation and representation flowing from a colonial past and cultural preconceptions.⁴ Most African countries are far from achieving 50 per cent female representation in politics that undergirds equal participation. Overall, women's representation in parliament on the African continent stood at 24 per cent in 2021.⁵ This arguably negatively impacts African women's ability to influence national decision-making and the design and implementation of legislation and policy.⁶ Behind the low figure of female representation is a lack of political will, restrictive electoral frameworks and deeply entrenched patriarchal stereotypes and ideals.

Article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) makes provision for the right to equal participation and representation in political and decision-making processes. Thus, this provision importantly covers both the political sphere and any other sphere where decision-making takes place – making this provision substantially broad. The right to participation in political and public affairs is primarily concerned with enhancing human agency to ensure that women have a right to influence their future and take on the corresponding responsibilities.⁷

International treaties, such as the Convention on the Elimination of Discrimination Against Women (CEDAW), similarly set the standards for the protection of women's political rights. Article 7 of CEDAW guarantees women's right to be elected to public office, their participation in public functions and service of their countries and their right to vote. Predating CEDAW, this right is also recognised in articles 1, 2 and 21 of the Universal Declaration of Human Rights (Universal Declaration) and articles 2 and 25 of the International Covenant on Civil and Political Rights (ICCPR). In addition, the Vienna Declaration and Programme of Action,⁸ the Beijing Platform,⁹ Security Council Resolution 1325 on Women, Peace and Security,¹⁰ the Commission on the Status of Women Agreed Conclusions 2006¹¹ and the General Assembly Resolution 66/130 on women and political participation¹² all emphasise the importance of combating all forms of discrimination against women in the political sphere. Through

2 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 23: Political and Public Life, 1997 (General Recommendation 23) A/52/38, para 14; United Nations General Assembly (UNGA) Resolution 'Women and Political Participation' (10 February 2004) UN Doc A/RES/58/142.

3 UNGA Res, 'Declaration in the Right to Development' (4 December 1986) UN Doc A/RES/41/128 2nd recital.

4 G Geisler 'Women and the remaking of politics in Southern Africa negotiating autonomy, incorporation and representation' (2004) *Nordiska Africa Insitutet* 18 & 36.

5 International Institute for Democracy and Electoral Assistance <https://www.idea.int/news-media/news/enhancing-womens-political-participation-africa#:~:text=Women%20have%20historically%20been%20disadvantaged,cent%20women's%20representation%20in%20parliament> (accessed 23 June 2023).

6 N Abdulmelik & T Belay 'Advancing women's political rights in Africa: the promise and potential of ACDEG' (2019) 54 *Africa Spectrum* 149.

7 C Heyns 'Study on the Right to Equal Participation in Political and Public Affairs in Africa' 5 September 2017 <https://www.ohchr.org/sites/default/files/Documents/Issues/PublicAffairs/ChristofHeyns.docx> (accessed 25 May 25, 2022).

8 Report of the World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/24 (Part I)), chap. III.

9 Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1) (Beijing Platform) chap I, resolution 1 para 13.

10 United Nations Security Council Resolution 1325 on Women, Peace and Security (2000).

11 United Nations, Commission on the Status of Women Agreed Conclusions (2006), <https://daccess-ods.un.org/TMP/5577464.10369873.html> (accessed 23 June 2023).

12 United Nations General Assembly Resolution 66/130 on Women and Political Participation (2011), http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/130&Lang=E (accessed 23 June 2023).

these resolutions and declarations, states are urged to ensure that they apply positive actions to raise the number of women in public positions and functions to achieve equal representation of women and men.

However, as argued by Abdulmelik and Belay, even with CEDAW in place, there was still a need to address issues of women's participation that are unique to African women.¹³ This resulted in a call for a treaty which could account for the African context to expand the scope of women's participatory rights.¹⁴ In essence, the right to 'participate' is shaped by the possibility of taking part in decision-making processes that directly or indirectly impact a person's interests. Thus, to participate in elections without discrimination, to be equally represented and involved in all aspects of social, political, and economic life are the major political expressions of such participation as provided in article 9. Article 9 has been framed to illustrate that the concept of participation goes beyond women's right to vote; it emphasises their ability to shape and assume responsibility for their benefit and that of others. Interestingly, while CEDAW and ICCPR refer specifically to the right to vote, neither the African Charter on Human and Peoples' Rights (African Charter) nor the Maputo Protocol reference this right, but rather the broader right to participation. The objective is to enhance the presence as well as the representation of women in public and political life, but the mere presence of women in decision-making positions is not the aim of article 9. The emphasis is rather on meaningful presence; that is, a presence where women can effectively make their voices heard.

While highlighting the slow progress of women's political participation in Africa, this chapter seeks to unpack the right to such participation and representation as provided for in the Maputo Protocol. To this end, this chapter is divided into seven sections. Section 2 presents a discussion on the drafting history of article 9. The discussion then proceeds in section 3 by setting out the linkages between article 9 and other provisions in the Maputo Protocol, as well as with other provisions in relevant international, regional, and sub-regional human rights instruments. Section 4 discusses the concepts and definitions relevant to article 9. Section 5 considers the scope of state obligations within article 9, followed by section 6, which analyses state practice through a review of domestic legislation, state reports submitted to the African Commission on Human and Peoples' Rights (African Commission) under article 26(1) of the Maputo Protocol alongside the related Concluding Observations by the African Commission. This chapter concludes, in section 7, by addressing the challenges that arise in the implementation of the rights to participation and representation in the political and decision-making processes.

2 Drafting history

In the first draft of the Maputo Protocol, the Nouakchott Draft, the right to women's political participation was provided under article 10.¹⁵ Referring specifically to article 13 of the African Charter, this provision set out the main tenets of the right to participate in political and decision-making processes. It stipulates that state parties are obligated to 'promote by means of specific positive actions the equal participation of women in the political life of their countries'. Specifically, states must ensure that women can participate in all elections without discrimination. In addition, article 10 obligates states to ensure that 'women are represented equally with men in all electoral and candidate lists'. Furthermore, this draft importantly pointed to the fact that this provision is not only about the political process, but states must also 'include women equally with men at all levels of development and execution of state policy'.

13 Abdulmelik & Belay (n 6) 149.

14 As above.

15 Expert Meeting on the Preparation of a Draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women, Nouakchott, Islamic Republic of Mauritania, 12-14 April 1997 (Nouakchott Draft).

Following this draft, article 11 of the Kigali Draft provided for the right to participate in the political process.¹⁶ In this draft, some changes to the provision's wording were made. It provided that states have an obligation to ensure that 'women are represented equally *at all levels* with men in all electoral and candidate lists'.¹⁷ Thus, the Kigali Draft retained the earlier draft's emphasis on women's equal representation on electoral lists but importantly added a reference to the different levels of governance, for example, to be represented locally, on a provincial and national level. In addition, it acknowledged that states must ensure that 'women are included with men at all levels of the development and implementation of state policy'. Thus, as observed by Nsibirwa, the Kigali Draft was cognisant of women's exclusion from decision-making positions, especially within government.¹⁸

The Final Draft of the Maputo Protocol was produced in 2000 and was later presented to the Meetings of Experts, Ministers, and the NGO Forum from 2001 to 2003 for commentary and revisions.¹⁹ The Final Draft, similar to other provisions, dropped the reference to the African Charter. Article 10 (as it was then numbered) was formulated within two main paragraphs where three sub-paragraphs are connected to the first, labelled 10(1)(a-c). With regard to women's political rights, the wording in article 10(1)(a) was changed from ensuring that women 'can' participate without any discrimination in all elections to ensuring that women 'do' participate without any discrimination in all elections. This is arguably an important change as it signals not merely ensuring an opportunity but ensuring actual participation. The reference to either 'do' or 'can' does not appear in the Maputo Protocol. However, it is clear that the text refers to actual participation to achieve substantive equality. Article 10(1)(c) also sets out a small but important change. The Kigali Draft required that women be 'included' with men at all levels of the development and implementation of state policy, while the Final Draft refers to women as 'partners' with men at all levels of development and implementation of state policy. This change was arguably put in place to avoid an 'add women and stir' scenario where women would be included without agency. As discussed in the following paragraph, in the final version of the Maputo Protocol, 'equal' appears before 'partners' to emphasise this point further. In addition, the Final Draft added a second main paragraph, as indicated above. Article 10(2) arguably substantially enlarged the scope of article 10, as is further discussed under section 4, by adding a reference to effective representation and participation at 'all levels of decision making', thus going beyond the scope of political and state policy processes.

In November 2001, 44 member states of the then Organisation of African Unity (OAU) met in Addis Ababa to discuss the Final Draft. The French version of article 10(1) was amended to delete the word '*plus grande*', while the English version was left without revisions.²⁰ Sub-articles (a) and (b) were adopted in totality.²¹ Sub-article 10(1)(c) was amended to add 'equal' before 'partners', while 'increased' and 'significant' was added before 'effective representation and participation' in article 10(2).²²

In December 2002, the African Union Office of the Legal Counsel (AUOLC) provided further comments on the revisions that the Meeting of Experts in 2001 had decided. As the Meeting of Experts had decided to merge articles 4 and 5, the right to 'Participate in the Political Process and

16 Draft Protocol to the African Charter on Women's Rights, Kigali, Rwanda November 1999 (Kigali Draft).

17 Our emphasis.

18 M Nsibirwa 'A brief analysis of draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 48.

19 Draft Protocol to the African Charter on Women's Rights, 26th ordinary session of the African Commission on Human and Peoples' Rights 1-15 November 1999 Kigali, Rwanda (Kigali Draft).

20 Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Expt/Prot.Women/Rpt(I), Addis Ababa, Ethiopia, November 2001 (Report of the Meeting of Experts) para 74.

21 Report of the Meeting of Experts (n 20) paras 75 & 76.

22 Report of the Meeting of Experts (n 20) paras 77 & 78.

Decision making' now appeared as article 9. The AUOLC suggested that 'do' in article 9(2) (as it was numbered in its representation) referring to article 10(1)(a) of the Final Draft be deleted. The AUOLC also suggested that the 'equal representation of women in all electoral and candidates list may not be feasible'. Therefore, the AUOLC suggested, without success, that the word 'equally' should be deleted. Alternatively, it was suggested that the provision should state that 'women have a right to stand for public office and if elected, hold office'.²³

In 2003, a meeting was convened by the Africa Regional Office and the Law Project of Equality Now. This resulted in some important suggestions, including the recommendation to include the concept of affirmative action under article 9(1) and (2). This was informed by references to CEDAW and the Beijing Platform. Article 3 of CEDAW requires state parties to take,

in all fields, in particular in the political ... all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Furthermore, under strategic objective G, the Beijing Platform stipulates that states must

[c]ommit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities... including, *inter alia*, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions.²⁴

Moreover, an additional provision, article 9(3), was suggested, which provided for a state obligation to 'undertake equal distribution of power and decision making at all levels and to undertake statistical gender analysis and mainstreaming of a gender perspective in policy development and the implementation of such programmes in national and local governments'. Neither the references to affirmative action nor the addition of paragraph 9(3) made it into the Addis Ababa Draft, adopted in March 2003.²⁵

The final framing of article 9 explicitly states that 'women are represented equally at all levels with men in all electoral processes'.²⁶ In its entirety, the right to political participation provided in article 9 ensures that women are not excluded from decision-making bodies within the public sphere. In view of the journey leading to its framing, it is a true reflection of an intentional effort towards the inclusion of women in political and decision-making processes on the African continent.

3 Linkages within the Maputo Protocol and with other instruments and treaty provisions

This section provides an overview of the many provisions on women's representation and participation relevant to article 9 existing in the Maputo Protocol itself, in other international and regional instruments from outside the continent, African regional instruments and African sub-regional instruments. Conceptualising article 9 within this broader context not only points to the development of women's rights to representation and participation, but it also shows the transformative nature of the Maputo Protocol.

23 Comments by the AUOLC, CAB/LEG/66.6/Rev.1, 2002.

24 Paragraph 190(a).

25 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, MIN/WOM. RTS/DRAFT.PROT(II)Rev.5, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia, 28 March 2003.

26 Article 9(1)(b).

3.1 Other provisions in the Maputo Protocol

The Preamble to the Maputo Protocol confirms the commitment of African states to ensure the full participation of African women as equal partners in Africa's development. Articles 10, 17, 18, 19 and 23 furthermore refer to the 'participation' of women in different forms of policy and decision-making, signalling the centrality of article 9. Moreover, 'equal representation' is referred to in article 8(e), denoting women's equal representation in the judiciary and law enforcement organs, as discussed in the previous chapter.²⁷

3.2 International and regional instruments from outside the continent

As briefly mentioned in the introduction, several international human rights treaties place great importance on the right to vote, to participate and the standards of equality that state parties must meet. Adopted in February 1948, the Inter-American Convention on the Granting of Political Rights to Women is the oldest regional instrument granting political rights to women. Consisting of only two articles, article 1 sets out that the state parties agree that 'the right to vote and to be elected to national office shall not be denied or abridged by reason of sex'. Shortly after that, in December 1948, the Universal Declaration was adopted, providing 'universal and equal suffrage' under the non-discrimination clause referencing the prohibited ground of 'sex'.²⁸

The United Nations Convention on the Political Rights of Women (Convention on the Political Rights of Women) was adopted by the United Nations (UN) General Assembly in December 1952. When it came into force in July 1954, it became the first international instrument protecting political rights. The UN Convention on the Political Rights of Women is based on the acknowledgement that every person has the right to take part in the government of their country. Thus, article 1 of the UN Convention on the Political Rights of Women stipulates that '[w]omen shall be entitled to vote in all elections on equal terms with men, without any discrimination'. Being almost as short as the Inter-American Convention on the Granting of Political Rights to Women, the UN Convention on the Political Rights of Women offers an additional two articles setting out the rights of women to be eligible for election to all publicly elected bodies on equal terms with men and to hold public office and to exercise all public functions without discrimination.²⁹

Following these developments, article 25 of the ICCPR became the second internationally binding convention to provide every citizen with political rights based on article 2.³⁰ These rights include the right to participate in the conduct of public affairs, directly or through freely chosen representatives; to vote and be elected at genuine periodic elections by universal and equal suffrage; and to have access, on general terms of equality, to public service.³¹ Many of these rights were put forward, in the context of the marginalisation of women, in the Declaration on the Elimination of Discrimination against Women (DEDAW) as adopted by the UN General Assembly in 1967.³²

Building on DEDAW, article 7 of CEDAW encapsulates the rights to representation and participation. Under article 7, member states must, at the domestic level, strive to realise 'formal, substantive, and transformative equality'.³³ In this regard, it is worth noting that CEDAW provides

27 See A Rudman 'Article 8' sec 3.2 in this volume.

28 Articles 2 & 21.

29 Articles 2 & 3.

30 See further General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (art 25): 12/07/96. CCPR/C/21/Rev.1/Add.7.

31 Article 25.

32 Article 4 of the Declaration on the Elimination of Discrimination against Women.

33 S Wittkopp 'Article 7' in Freeman et al (n 1) 198.

for temporary special measures. Article 4(1) of CEDAW provides that ‘adoption by state parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination’. Article 7 stipulates that,

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.

In this regard, ‘appropriate measures’ could include temporary measures such as quotas which are further discussed under 6.2 below.³⁴ Article 7 further refers to the right to vote; the right to participate in the formulation of government policy and the implementation thereof; to hold public office and perform all public functions at all levels of government; and to participate in non-governmental organisations and associations concerned with the public and political life of the country. This latter reference has arguably been broadened in article 9(1)(c) referring to the ‘participation of women at all levels of decision-making’. Article 8 of CEDAW further refers to representation and participation on the international level, namely the women’s rights to represent their governments at the international level and to participate in the work of international organisations.³⁵

In the European human rights system, article 3 of Protocol No 1 to the European Convention on Human Rights (European Convention) sets out the right to free elections. It stipulates that member states ‘undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. Thus, under article 3, read together with article 14 of the European Convention and Protocol 12 thereto, all European citizens are guaranteed free and democratic elections. The political rights set out within the European Convention are limited in scope to the election of the ‘legislature’ and do not afford an unlimited right. Importantly the European Court of Human rights (European Court) has distinguished between ‘active’ and ‘passive’ electoral rights. An active right is a right to participate in an election as a voter, while a passive right is a right to stand as a candidate for election. According to the European Court, passive electoral rights enjoy a lesser degree of protection than active rights.³⁶

3.3 African regional instruments

On a regional level, the right to political participation is set out in article 13(1) of the African Charter. Using the male possessive pronoun, this provision stipulates that ‘[e]very citizen shall have the right to participate freely in the government of *his* country, either directly or through freely chosen representatives in accordance with the provisions of the law’.³⁷ However, this provision must be read and implemented alongside the state obligations provided for in articles 1 and 2. Read together with articles 1 and 2, article 13(1) ensures that all individuals are able to enjoy the right to political participation without discrimination and obligates state parties to give legal effect to this right.³⁸

34 See further UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation 5: Temporary Special Measures 1988 (General Recommendation 5).

35 See further General Recommendation 8 Implementation of Article 8 of the Convention (Seventh session, 1988), UN Doc A/43/38 111 (1988), reprinted in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 234 (2003).

36 *Riza and Others v Bulgaria* - 48377/10 and 48555/10 Judgment 13 October 2015.

37 Emphasis added.

38 For a further discussion on this see Rudman & Mkali ‘A gender perspective on electoral processes in Malawi: the right of Malawian women to participate in the political process under the Maputo Protocol’ (2020) 35 *Southern African Public Law* 16.

The Treaty Establishing the African Economic Community (Abuja Treaty) includes some references to women's political rights. Article 75 of the Abuja Treaty supports the general idea in article 9 by stipulating that state parties must ensure the full participation of women in the development and activities of the African Economic Community.³⁹ Constitutive Act of the African Union (AU Constitutive Act) moreover recognises, as one of its main objectives, the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.⁴⁰ It further emphasises the importance of gender mainstreaming in its various organs.⁴¹ Notably, article 4(l) and (m) of the AU Constitutive Act stipulates that the AU must promote gender equality and ensure the 'respect for democratic principles, human rights, the rule of law and good governance'. In view of women's right to political participation, this commitment has been integrated into both the Maputo Protocol and the African Charter on Democracy, Elections and Governance (African Democracy Charter).

The African Democracy Charter was adopted in 2007. Drafted after the Maputo Protocol, the provisions of the African Democracy Charter largely mirror Article 9 of the Maputo Protocol. It promotes gender equality and gender balance in governance and development processes. One of its main objectives is to increase democracy through equal participation in elections and equal eligibility to participate in political life. Article 29 of the African Democracy Charter emphasises the critical role of women's participation for democracy to exist. Thus, state parties are obligated to 'create the necessary conditions for full and active participation of women in the decision-making processes' and to 'encourage the full and active participation of women in the electoral process and ensure gender parity in representation at all levels, including legislatures'.⁴² Article 8 of the African Democracy Charter further encapsulates the principle of non-discrimination based on gender. It establishes the legal obligation to put in place legislative and administrative measures which ensure that women's rights are protected.⁴³ In addition, article 43 importantly emphasises women's right to education as a prerequisite for equal participation.⁴⁴

3.4 African sub-regional instruments

In terms of the sub-regional domain, the East African Gender Policy,⁴⁵ relevant within the East Africa Community, confirms that one of its objectives is to 'promote women's participation in political and decision-making at all levels'.⁴⁶

With regard to the Southern African Development Community (SADC), a similar, more detailed objective is set out in the SADC Protocol on Gender and Development. Articles 12 and 13 of the SADC Protocol on Gender and Development refer to 'representation' and 'participation', respectively. Article 12(1) stipulates that member states 'shall endeavour' by 2015 to achieve at least 50 per cent representation of women in decision-making positions in the public and private sectors. To this end,

39 50 of the AU member states have ratified the Abuja Treaty. Djibouti, Eritrea, Madagascar, Somalia and South Sudan have not ratified the Abuja Treaty; of these states only Djibouti has ratified the Maputo Protocol.

40 Article 3(h).

41 K Stefiszyn 'The African Union: challenges and opportunities for women' (2005) 5 *African Human Rights Law Journal* 359.

42 Articles 29(2) & (3).

43 G Niyungeko 'The African Charter on Democracy, Elections and Governance as a human rights instrument' (2019) 63 *Journal of African Law* 71.

44 Niyungeko (n 43) 72.

45 EAC Secretariat, Arusha, Tanzania May 2018.

46 4.5(c).

states are to apply affirmative action measures, as provided for in the policy.⁴⁷ Article 13(1) confirms that member states must ensure that women have ‘equal opportunities with men to participate in all electoral processes including the administration of elections and voting’.

Within the context of the Economic Community of West African States (ECOWAS), article 63 of the ECOWAS Revised Treaty sets out the rights related to women and development. Closely related to this provision, the Supplementary Act Relating to Equality of Rights Between Women and Men for Sustainable Development in the ECOWAS Region (ECOWAS Supplementary Act) refers to ‘[g]overnance and decision-making’.⁴⁸ Article 11(1) of the ECOWAS Supplementary Act specifically refers to representation, indicating that member states must apply affirmative action to ensure effective gender equality in decision-making positions in public and private sectors, while sub-section (2) enjoins states to establish the critical link between gender-balanced representation, good governance, democracy, and sustainable development. Article 12 refers to participation in electoral processes, while sub-section (1) requires states to ensure equal participation of women and men in all electoral processes, including the administration of elections and voting and to ensure equal participation of women and men in the appointment of political representatives and decision-making.

As the above discussion shows, women’s right to political participation and representation has been developing over the past 75 years. In this regard, it is notable that the rights to vote and to be elected to public office have, over time, been developed and enlarged to include other aspects of participation and representation, such as participation in policy making and representation in the private sector. As is further discussed under the following section, article 9 captures these developments and constitutes a solid contribution to the variation of rights that already existed under international, regional, and sub-regional law.

4 Concepts and definitions

A key indicator of gender equality and women’s ability to fully enjoy their human rights is the balanced participation of women and men in political life and at all levels of decision-making. Article 9 thus covers many different aspects of women’s lives and women’s participation, from political participation and voting, through policy and development structures, to private decision-making in corporate boards, school governing mechanisms and even at household level. Article 9 deals with two different, yet equally important, contexts: the political/governance environment, which mainly refers to the public domain, and the more general decision-making environment, which refers to both the public and the private domain.

This section of the chapter sets out the different concepts involved under each of the components of article 9. Importantly, these discussions point to the fact that different thresholds apply in the political/governance environment *vis-à-vis* the decision-making environment, where the latter refers to ‘increased and effective representation and participation’ of women at all levels of decision-making, while the former refers to ‘equal participation’.

4.1 Political processes: political and electoral systems

Similar to article 7 of CEDAW, article 9 of the Maputo Protocol does not require any specific political system to be followed. As noted by Wittkopp, in relation to article 7 of CEDAW, the political system of a state is but ‘one factor amongst many which determine the degree of integration of women

⁴⁷ Article 5 stipulates that ‘States Parties shall put in place affirmative action measures with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life and create a conducive environment for such participation’.

⁴⁸ Chapter 3.

into political and public life and, as yet, no political system has realized full integration of women'.⁴⁹ However, the implementation of article 9, similarly to the implementation of article 7 of CEDAW, presupposes an approach to governance that accounts for the will of the people and where the will of the people plays a significant role in defining laws and policies.⁵⁰ In General Recommendation 23 the CEDAW Committee defines such an approach as one in which 'each citizen enjoys the right to vote and be elected at genuine periodic elections held on the basis of universal suffrage and by secret ballot, in such a way as to guarantee the free expression of the will of the electorate'.⁵¹

Article 9, moreover, does not stipulate any specific form of the electoral system. However, in General Recommendation 23, the CEDAW Committee notes that '[t]he system of balloting, the distribution of seats in Parliament, the choice of district, all have a significant impact on the proportion of women elected to Parliament ... [p]olitical parties must embrace the principles of equal opportunity and democracy and endeavour to balance the number of male and female candidates'.⁵² As discussed under 6.3 below, proportional representation systems with multi-member districts generally better support women's representation than plurality/majority systems.⁵³ This relates to the fact that in proportional representation systems with multi-member districts political parties tend to nominate several candidates, thus increasing the likelihood of nominating women. Majoritarian systems, by contrast, typically only allow for single-member districts, and therefore political parties are inclined to nominate the single candidate most likely to win, more often than not, a male candidate.⁵⁴ Moreover, other aspects of electoral system design that influence the participation and representation of women are electoral thresholds (the minimum percentage of the total votes cast that a party must garner in order to qualify for a seat in Parliament), district magnitude (number of seats divided by the number of districts), and open versus closed lists in proportional representation systems (the former affording voters greater influence than the latter in the selection of candidates within a party list).⁵⁵

4.1.1 *Participation*

'Participation' is generally defined as the act of taking part in something.⁵⁶ The African Commission in the *Endorois* case contextualised and defined this general right to participation. Citing article 2(3) of the UN Declaration on the Right to Development the African Commission notes that participation must be 'active, free and meaningful'.⁵⁷ This indicates that participation is an active, not a passive, position. Thus, for women to participate, active engagement must be possible.

Gender-balanced participation entails equal representation (50-50), as is further discussed in the following section. This is often referred to as the 'parity of participation' of women and men. However, parity of participation is not just about the numbers. Fraser defines the principle of 'parity of participation' as a situation where social arrangements 'permit all (adult) members of society to

49 S Wittkopp 'Article 7' in Freeman et al (n 1) 202.

50 S Wittkopp 'Article 7' in Freeman et al (n 1) 202.

51 General Recommendation 23 (n 2) para 6.

52 General Recommendation 23 (n 2) para 22.

53 Council of Europe Balanced Participation of Women and Men in Decision-Making Analytical report - 2016 data Gender Equality Commission (GEC) <https://rm.coe.int/analytical-report-data-2016-/1680751a3e> (accessed 21 June 2023) 9.

54 S Wittkopp 'Article 7' in Freeman et al (n 1) 203.

55 United Nations Division for the Advancement of Women (DAW), Department of Economic and Social Affairs (DESA), Economic Commission for Africa (ECA) Inter-Parliamentary Union (IPU), Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership Report of the Expert Group Meeting Addis-Ababa, Ethiopia 24-27 October 2005, para 42.

56 Oxford English Dictionary Online, November 2022.

57 *Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya (Endorois)* (2009) AHRLR 75 (ACHPR 2009) para 283.

interact with one another as peers'.⁵⁸ This means that everyone must have the resources to take an active and equal part in social interaction with others in society, that everyone must have equal social status among others, and that everyone must have equal access to political decision-making.⁵⁹ Parity of participation, as an important component of social justice, thus requires an enabling environment, free of negative stereotypes and gendered biases, where women can move from passive spectators to active participants. Therefore, to increase women's participation in politics, structural barriers that prevent women from participating fully must be addressed.

4.1.2 Equal participation/representation

Article 9 of the Maputo Protocol is specific in requiring not simply increased participation but 'equal participation' of women in political life. However, patriarchal political culture remains an important determinant of women's equal participation. The earlier conceptions of equality contended that 'like should be treated as alike and unlike cases differently'.⁶⁰ This is known as formal equality, based on fairness, calling for laws and policies to be applied to everyone in the same way.⁶¹ It has been argued extensively that the concept of formal equality, which values neutrality, is merely an illusion considering that it is questionable whether the law can claim to be truly neutral.⁶²

As established in the foregoing chapter, the Maputo Protocol supports substantive and transformative equality.⁶³ Equality *in fact* occurs when women are afforded equal opportunities and are empowered to seize such opportunities to transform their lives. In this context, it essentially means that men and women should be able to participate equally in public and political life as it suits them.⁶⁴ Under article 9(1)(a), this requires that women's participation in the electoral process without discrimination is not only *in law* but, in essence, women and men's equal participation as voters and candidates in the electoral processes. This may require differential treatment of men and women to respond to historically determined under-representation.⁶⁵ In view of this, meeting the 'equality' standard under article 9(1)(a) involves ensuring meaningful use of the right to political participation and states' obligations to encourage and create enabling conditions which support participation.⁶⁶

The concept of substantive equality is reflected under article 9(1)(b), referring to women being 'represented equally at all levels with men in all electoral processes'. According to Wittkopp, the threshold for achieving substantive equality is unclear.⁶⁷ Achieving substantive equality through affirmative action is arguably crucial for meaningful political participation of women.⁶⁸ This may take the form of various measures such as reserved seats for women and a certain percentage of female

58 N Fraser 'Social justice in the age of identity politics: redistribution, recognition and participation' in N Fraser & A Honneth (eds) *Redistribution or recognition? A political-philosophical exchange* (2003) 36.

59 N Fraser 'Distorted beyond all recognition: a rejoinder to Axel Honneth' in N Fraser & A Honneth (eds) *Redistribution or recognition? A political-philosophical exchange* (2003) 231.

60 YT Chekera-Radu 'The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights' (2017) 1 *African Human Rights Yearbook* 48.

61 Chekera-Radu (n 60) 48.

62 MA Fineman 'Gender and law: feminist legal theory's role in new legal realism' (2005) *Wisconsin Law Review* 407; KH Rothenberg 'Feminism, law, and bioethics' (1996) 6 *Kennedy Institute of Ethics Journal* 69.

63 A Rudman 'Article 8' sec 3.1.1. in this volume.

64 S Wittkopp 'Article 7' in Freeman et al (n 1) 210.

65 See eg the discussion on *Molefi Tse'pe v the IEC* under 6.2.

66 S Wittkopp 'Article 7' in Freeman et al (n 1) 210.

67 As above.

68 NR Kanyongolo & B Malunga 'Legal empowerment: laws promoting women participation in politics' in I Amundsen & H Kayuni (eds) *Women in politics in Malawi* <https://www.cmi.no/publications/file/5923-women-in-politics-in-malawi.pdf> (accessed 21 June 2023).

candidates on party lists.⁶⁹ The Beijing Platform⁷⁰ and General Recommendation 23⁷¹ both refer to the concept of creating a ‘critical mass’ which arguably allows for gender-sensitive and women-friendly outcomes.⁷² In this regard, the Beijing Platform recommends that states, for example, establish a target reserving 30 per cent of seats in Parliament for women as a minimum threshold.⁷³ In General Recommendation 23, the CEDAW Committee further suggests that once women’s rate of participation is at 30-35 per cent, there will be a significant impact on the political style and content of decisions.⁷⁴

The Beijing Platform moreover sets out that the ‘goals of equality, development, and peace will not be achieved without the active participation of women and the incorporation of women’s perspective at all levels of decision-making’.⁷⁵ Achieving the objective of equal participation of men and women on all levels of decision-making will provide a ‘balance that more accurately reflects the composition of society’, and such a balance is needed in order to ‘strengthen democracy and promote its proper functioning’.⁷⁶ Women’s equal participation in political life plays a decisive role in the overall process of advancing women and is thus a prerequisite for upholding other rights.

The AU Strategy for Gender Equality and Women’s Empowerment for 2018-2028 (AU Strategy) presents a plan to realise Aspiration 6 of the Agenda 2063: The Africa We Want (Agenda 2063) and the principle enshrined in article 4(l) of the AU’s Constitutive Act to promote gender equality. The AU Strategy sets as a target ‘equal participation and demonstrated influence of women and girls in all leadership and decision-making positions’. In contrast to ‘equal’ participation, the members of the Council of Europe (CoE) have committed themselves to achieving a ‘balanced participation of women and men in political and public life’. A ‘balanced participation’ has been defined by the CoE to mean that ‘representation of either women or men in any decision-making body in political or public life should not fall below 40 per cent’.⁷⁷

According to Heyns, even if, at a formal level, the opportunity to participate is provided to all citizens, those who are marginalised may find themselves in such an imbalance of power that positive measures may be necessary before they have a meaningful hold over their fate.⁷⁸ Thus, with reference to the definition provided in article 1(f) of the Maputo Protocol, achieving equality in the political sphere must consider the eradication of stereotypes and harmful social and cultural practices, a wide scope of state obligations and the need to make provision for gender budgeting for the effective implementation of women’s rights.⁷⁹ Thus, it is justified to consider exclusion from political participation as a form of discrimination which evokes the use of the remedies provided in article 2 on the elimination of discrimination against women. In particular, article 2(2) recognises the negative impact arising from harmful stereotypes and thus calls on states to meet their obligations by modifying social and cultural

69 As above.

70 Beijing Platform (n 9) Strategic objective G.1 para 194(a).

71 Para 16.

72 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 210.

73 Beijing Platform (n 9) Strategic objective G.1 para 194(a).

74 General Recommendation 23 (n 2) para 16.

75 Beijing Platform (n 9) para 181.

76 As above.

77 Recommendation Rec(2003)3 of the Committee of Ministers to member states on balanced participation of women and men in political and public decision making (Adopted by the Committee of Ministers on 12 March 2003 at the 831st meeting of the Ministers’ Deputies). Appendix.

78 C Heyns ‘Study on the Right to Equal Participation in Political and Public Affairs in Africa’ 5 September 2017 <https://www.ohchr.org/sites/default/files/Documents/Issues/PublicAffairs/ChristofHeyns.docx> (accessed 23 June 2023). See also CH Heyns ‘The right to political participation in Sub-Saharan Africa’ (2019) 8 *Global Journal of Comparative Law*.

79 Rudman & Mkali (n 38) 20.

patterns of conduct and harmful cultural and traditional practices based on the idea of stereotyped patriarchal roles for women and men.

4.2 Decision-making processes

The persistence of masculine politics pinpoints the otherness of women to the extent that women are significantly excluded from decision-making in all public spheres.⁸⁰ The Preamble of CEDAW reiterates the importance of women's participation in decision-making, indicating that 'the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields'.⁸¹

The under-representation of women in political decision-making reflects a basic democratic deficit.⁸² However, article 9(2) refers to 'all levels of decision-making', which substantially broadens the scope of decision-making well beyond the political sphere. The concept referred to in article 9(2) resembles the concept of 'political and public life of the country' referred to in the main provision of article 7 of CEDAW and the concept of 'public affairs' referred to in article 25 of the ICCPR. This covers all aspects of public administration and the formulation and implementation of policy at the local, national, regional and international levels.⁸³ Accordingly, this extends women's representation to civil society and includes 'public boards and local councils and the activities of organisations such as political parties, trade unions, professional or industry associations, women's organisations, community-based organisations or other organisations concerned with public and political life'.⁸⁴ Importantly, article 12 of the SADC Protocol refers to 'public and private sectors' bringing the lens of equality into the domain of, for example, private corporations, governing bodies of private schools and trusts. The same, broader scope would arguably follow from the reference in article 9(2) to 'all levels of decision-making'.

4.2.1 'Increased' and 'effective'

Article 9(2) has a different character than the provisions under article 9(1). While the latter refers to 'equal' participation and representation, the former refers to 'increased' and 'effective' participation and representation. The reference to 'increased' under article 9(2) was, as mentioned in section 2 above, added by the Expert Meeting in 2001 to the reference to 'effective participation and representation' as stipulated in the Final Draft. There is a similar reference in article 10(2) of the Maputo Protocol referring to the right to peace.

When something increases, it becomes greater in size, amount, degree or importance.⁸⁵ However, the reference to 'increased' arguably imposes a lesser obligation on states as compared to 'equal' as adding a few women to a low number of women would arguably fulfil the requisite of 'increasing' while not coming close to equal representation. In the same vein increasing numbers of women in an institution of low impact, for example, in an advisory function, would suffice to fulfil the requirements of "increased" participation while not reaching 'equal' participation. Importantly, however, the reference to 'increased' refers to a progressive realisation placing an obligation on the state not to regress its commitments.

80 O Eni 'The right to participate in political and decision-making process under the Maputo Protocol: normative masculinity and Nigerian Women' (2022) 18 *The Age of Human Rights Journal* 398.

81 General Recommendation 23 (n 2) para 2.

82 Resolution 489 (2006) on mechanisms to ensure women's participation in decision-making.

83 S Wittkopp 'Article 7' in Freeman et al (n 1) 201.

84 S Wittkopp 'Article 7' in Freeman et al (n 1) 201 as provided in General Recommendation 23 (n 2) para 5.

85 Oxford English Dictionary Online, November 2022.

Under article 9(2), each member state must moreover ensure ‘effective’ representation and participation. This is an interesting reference as it arguably cures the deficiency of only ‘increasing’ participation and representation. When something is effective, it is successful in producing a desired or intended result. The desired or intended result of the Maputo Protocol is arguably substantive, transformative equality. Thus, for representation and participation in all decision-making to be ‘effective’ under the Maputo Protocol, it arguably needs to be equal. This indicates that such representation and participation must be made available and possible through positive measures.⁸⁶

5 Nature and scope of state obligations

Article 9 includes two main state obligations: (i) to *take specific positive action* to promote participative governance and the equal participation of women in political life through affirmative action, enabling national legislation and other measures; and (ii) to *ensure* increased and effective representation and participation of women at all levels of decision-making. The following sections present the nature of the different state obligations involved thereunder.

5.1 Obligation to respect, protect and fulfil the right of equal participation and representation

As a point of departure and with the understanding that all human rights contain the four-fold obligation to *respect, protect, promote, and fulfil*, the African Commission has provided context to each layer of obligations. First, in view of the right to *respect*, this entails that state parties should refrain from interfering in the enjoyment of all fundamental rights by respecting rights holders, their freedoms, autonomy, resources, and liberty of their action.⁸⁷ Thus, with regard to the right to political participation, the state must, as a basic requirement, ensure that all political systems are free from state interference and that basic civil rights such as freedom of expression and assembly and the right to information are upheld.

Second, according to the African Commission, states have an obligation to ‘*protect* rights-holders against other subjects by legislation and provisions of effective remedies’.⁸⁸ In essence, this obligation requires that the state should take measures to protect beneficiaries against, for instance, political, social and economic interferences or the impact of stereotypes and biases.⁸⁹ The obligation to protect commonly involves developing and enforcing legal frameworks where laws and regulations interact to allow individuals to realise their rights freely.⁹⁰ Thus, in terms of the representation and participation of women in political affairs and in decision-making processes, relevant laws and regulations must be in place.

Third, the obligation to *promote* is intimately linked with the obligation to protect. In this regard, states must ensure that individuals can exercise their rights and freedoms. In the context of article 9, this includes, for example, awareness-raising and public education campaigns to address deep-rooted stereotypes and patriarchal attitudes regarding the role of men and women in public life.⁹¹

Finally, state parties are to *fulfil* the rights and freedoms under article 9 of the Maputo Protocol. According to the African Commission, there is a positive expectation placed on the state to move its

86 M Lasseko-Phooko ‘The challenges to gender equality in the legal profession in South Africa: a case for substantive equality as a means for achieving gender transformation’ (2021) 21 *African Human Rights Law Journal* 500.

87 *Social and Economic Rights Action Centre (SERAC) v Nigeria (SERAC)* (2001) AHRLR 60 (ACHPR 2001) para 45.

88 *SERAC* (n 87) para 46. Our emphasis.

89 *SERAC* (n 87) para 46.

90 As above.

91 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 216.

machinery towards the actual realisation of the rights in article 9.⁹² For example, states should ensure that the requirements for entering public service and functions are designed to work with the realities of female and male lifestyles.⁹³ This is an example of how to ensure the *de facto* realisation of the right to political participation and decision-making process. States should moreover support the ‘equal sharing of family responsibilities by adopting measures to enhance the work-life balance for both women and men in the public sector’.⁹⁴

5.2 Specific positive action, affirmative action and other measures

Article 9 requires states to take measures to ensure women’s right to political participation and participation in all decision-making processes. In order to ensure this right, the measures to be implemented range from administrative and other policy measures, including special temporary measures as discussed below.⁹⁵ The CEDAW Committee recommends that such measures should include ‘recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions’.⁹⁶ As is further discussed in 6.2 below, quotas are one form of temporary special measures that state parties have employed.

Article 9 stipulates that member states must take ‘specific positive action to promote participative governance and the equal participation of women in the political life ... through affirmative action’. In this context, positive action can broadly be referred to as ‘temporary special measures’.⁹⁷ States are urged to set up temporary measures to increase the representation of women where they have traditionally been underrepresented, as reflected in article 9(1). In view of the CEDAW Committee, the terms ‘affirmative action’, ‘positive action’, ‘positive measures’, ‘reverse discrimination’ and ‘positive discrimination’ all equate to temporary special measures.⁹⁸ Specifically, the term ‘positive action’ is used to describe positive state action, which refers to the obligation of a state to initiate action as opposed to a state’s obligation to abstain from action.⁹⁹

In addition, the CEDAW Committee has specified that in view of article 7 of CEDAW, state parties are to make use of temporary special measures such as positive action, preferential treatment or quota systems to advance women’s integration into, for example, electoral politics.¹⁰⁰ The CEDAW Committee has also defined the term ‘measures’ as encompassing a ‘wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes, allocation and/or reallocation of resources, preferential treatment, targeted recruitment, hiring and promotion; numerical goals connected with time frames, and quota systems’.¹⁰¹

As stated by Durojaye, affirmative action favours the adoption of temporary positive measures, in this case, opportunities for the advancement of women’s political participation.¹⁰² Increasing women’s

92 *SERAC* (n 99) para 47.

93 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 216.

94 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 217.

95 S Wittkopp ‘Article 7’ in Freeman et al (n 1) 214. See 4.3.

96 CEDAW General Recommendation 23 (n 2) para 15.

97 General Recommendation 25, on Article 4(1) of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (General Recommendation 25) para B 17.

98 As above.

99 General Recommendation 25 para B 17 footnote 4.

100 General Recommendation 5 (n 34).

101 General Recommendation 5 (n 34).

102 E Durojaye ‘Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa’ (2006) *African Human Rights Law Journal* 192.

representation through electoral systems can take different forms. In a bid to make equal participation of women and men in political life and in decision-making in all spheres a reality, the Parliamentary Assembly of the CoE has, for example, made a number of important suggestions as to measures that, in its view, are included under the obligation of ‘equal representation’ and ‘equal participation’. For instance, in countries with proportional representation, this entails list systems establishing compulsory quotas, which provide for a high proportion of female candidates, preferably at least 40 per cent, to ensure equal representation.¹⁰³ Other measures include invoking a strict rank-order rule, for example, a ‘zipper’ system (or a ‘zebra’ system as it is often referred to in the African context) of alternating male/female candidates on the party list.¹⁰⁴ In addition, effective sanctions for non-compliance, for instance, the non-acceptance of candidatures/candidate lists, are important, preferably combined with closed lists in larger constituencies and/or a nationwide district, to mitigate prejudice.¹⁰⁵

For countries with majority or plurality systems, reaching equal representation could, for example, entail introducing a method where each party chooses a candidate between at least one female and one male nominee in every party district. It could also involve ‘applying innovative mandatory gender quotas within political parties, or “all-women shortlists”, ... accompanied by effective sanctions for non-compliance’.¹⁰⁶

Article 9 recognises that while removing legal obstacles is a necessity, there is a need to have positive measures in place. Failure to prioritise women’s equal participation in political life results in continued gender imbalance in all spheres. As confirmed by the Inter-American Commission on Human Rights, positive measures of affirmative action with the obligation of state parties to ensure non-discrimination and equality involve ‘recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions’.¹⁰⁷ In principle, such positive measures essentially ensure parity in view of the opportunities available to women seeking to participate in political life. For instance, article 9(1)(b) provides that women must be ‘equally’ represented with men, which arguably calls for parity. Similarly, Agenda 2063 provides that gender equality in political participation involves ensuring that women occupy at least 50 per cent of elected public offices.¹⁰⁸

Notably, article 9(2) specifically refers to the ‘increased and effective representation and participation of women at all levels of decision-making’. This closely resembles article 7(a)-(b) of CEDAW, which is broad in its formulation and covers the exercise of legislative, judicial, executive and administrative powers.

6 State practice

6.1 Constitutional measures

Although constitutional guarantees of equality and non-discrimination do not assure that the rights to representation and participation in the political and decision-making process are available in practice, constitutional measures constitute the foundation upon which the rights set out in article 9 can be implemented. For example, article 9 of the 2019 Guinean Constitution stipulates that male/female

103 Parliamentary Assembly of the Council of Europe Recommendation 1899 (2010) on increasing women’s representation in politics through the electoral system (Council of Europe Recommendation) para 2.1.1. See also 4.1.

104 Council of Europe Recommendation (n 103) para 2.1.1.

105 As above.

106 Council of Europe Recommendation (n 103) para 2.1.2.

107 General Recommendation 23 (n 2) para 15.

108 Agenda 2063, para 52.

parity is a political and social objective and that the government and the assemblies of the deliberative bodies cannot be composed of members of more than two-thirds of the same gender. Under article 55 of the 1980 Constitution of Cape Verde, the state is obligated to ‘encourage balanced participation of citizens of both sexes in political life’.

In the same vein, the 2010 Constitution of Kenya provides that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. According to Owiso and Sefah, the Kenyan Constitution secures the two-thirds gender principle from political tinkering by providing rigid procedures for its amendment.¹⁰⁹ According to Chiweza et al, although equality and non-discrimination is the basic principle for ensuring female participation, the principle has not been consistently applied through state practice in Kenya.¹¹⁰ As is evident from these examples, the constitutional requirements highlight the importance of gender equality and non-discrimination. However, they do not stipulate gender parity.

Many state parties have reported on the implementation of article 13 of the African Charter and article 9 of the Maputo Protocol through constitutional provisions. Burkina Faso, as one example, reported that it had initiated a number of quotas and initiatives to further the participation of women in public and political life.¹¹¹ However, as much as it has made efforts to put constitutional provisions to this effect in place, it confirmed that there is still a need to eradicate socio-cultural bottlenecks to enforce its laws relevant to quotas effectively.¹¹²

In reporting on article 9, Eswatini furthermore referred to section 84(2) of its 2005 Constitution, protecting the right to representation which stipulates that ‘the women of [Eswatini] ... have a right to equitable representation in Parliament and other public structures’.¹¹³ Section 86 correspondingly refers to a quota indicating that ‘[w]here at the first meeting of the House after any general election it appears that female members of Parliament will not constitute at least thirty per cent of the total membership of Parliament ... the House shall form itself into an electoral college and elect not more than four women on a regional basis to the House’. Eswatini also referred to legislative measures such as the Election of Women Members to the House of Assembly Act¹¹⁴ that give effect to these constitutional provisions.¹¹⁵ This Act provides for a process and mode of nomination of women members in the House of Assembly. It furthermore referred to the Elections Act,¹¹⁶ which prohibits discrimination in terms of political participation for voters.¹¹⁷ In addition, the Senate Elections Act¹¹⁸ incorporates section 94(2) of the Constitution, which provides that out of the 10 Senators, half should be women.¹¹⁹

109 O Owiso & B Sefah ‘Actualising women’s participation in politics and governance in Africa: the case of Kenya and Ghana’ (2017) 1 *African Human Rights Yearbook* 272. The first is through parliamentary initiative. The second procedure is through a popular initiative by not less than one million registered voters, which must be approved by a majority of Kenya’s 47 country assemblies and then by the people in a referendum.

110 AL Chiweza et al ‘The women’s parliamentary caucus: promoting cross-party substantive representation’ in Amundsen & Kayuni (n 68) 34.

111 Periodic Report of Burkina Faso within the framework of the implementation of article 62 of the African Charter on Human and Peoples’ Rights, January 2015, para 334.

112 Periodic Report of Burkina Faso (n 111) para 335.

113 Combined Periodic Report 2010-2021 of Eswatini on the African Charter on Human and Peoples’ Rights and Initial Report to the Protocol to the African Charter on the Rights of Women in Africa, paras 451-453.

114 Act 9 of 2018.

115 Combined Periodic Report of Eswatini (n 113) para 454.

116 Elections Act 10 of 2013.

117 Combined Periodic Report of Eswatini (n 113) para 455.

118 Act 7 of 2013.

119 Combined Periodic Report of Eswatini (n 113) para 455.

6.2 Quotas

Similar to the approach by Eswatini, discussed with reference to the constitutional protection of women's representation and participation in the previous section, other states have implemented quotas and gender-sensitive laws in order to advance women's political representation and participation. As a point of departure, it is important to note that although quota systems have been used to ensure the representation of women at all levels of political decision-making, such measures alone do not necessarily result in women's effective political participation.¹²⁰ This is so because, without a transformation of socio-cultural, political and institutional systems, which remain male-dominated, the promotion of gender equality is severely hampered.¹²¹

In Uganda, a system of quotas was adopted in 1986.¹²² This led to a significant increase in women's public presence through the creation and reservation of seats at national and local government levels.¹²³ Tamale suggests that the positive action to increase the proportion of women in the National Assembly intended to form descriptive representatives who 'stood for' women in society.¹²⁴ She states that a descriptive nature of women representatives creates '*status quo*' representatives as opposed to 'emancipationists,' as women are neither positioned as representing a particular interest group nor do they carry a special responsibility for their peers.¹²⁵ Thus, attaining equality through quotas depends on the type of electoral system, the dedication of party leaders and governments to encourage women in politics, and the overall influence wielded by women's movements and women's groups.¹²⁶ As an example, in the state report presented by Burkina Faso, it is evident that since the adoption of the Law on Quotas for Legislative and Municipal Elections,¹²⁷ the state has taken positive steps towards increasing women's participation, such as engaging with political leaders to better the positioning of women on the electoral lists and organising workshops for women candidates.¹²⁸

In Cameroon, a law relating to the Electoral Code¹²⁹ introduced a gender approach to managing elections.¹³⁰ Specifically, sections 151 and 171 provide that 'each list shall take into consideration ... gender aspects'.¹³¹ In response, some political parties adopted good practices of demanding female representation of at least 30 per cent on their lists.¹³² Nonetheless, it is evident that there are still

120 R Kandawasvika-Nhundu 'The role of political parties on women's participation and representation' International IDEA Technical Paper (2001) <https://www.idea.int/sites/default/files/publications/the-role-of-political-parties-on-womens-participation-and-representaion-en.pdf> (accessed 21 June 2023).

121 As above.

122 Article 32(1) stipulates that, '[n]otwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition. Article 180 (2)(b) provides that 'one third of the membership of each local government council shall be reserved for women'.

123 A Goetz 'No shortcuts to power: constraints on women's political effectiveness in Uganda' (2002) 40 *Journal of Modern African Studies* 40 550.

124 S Tamale *When hens begin to crow: gender parliamentary politics in Uganda* (2000) 74.

125 Tamale (n 124) 74.

126 IKnow politics 'Consolidated Response, Gender Quotas in African Countries' <https://iknowpolitics.org/sites/default/files/cr20gender20quotas20in20african20countries20en.pdf> (accessed 21 June 2023).

127 Law 010-2009/AN of 16 April 2009.

128 Periodic Report of Burkina Faso (n 111) para 334.

129 Law 2012/1 of 19 April 2012.

130 Periodic Reports of Cameroon relating to the African Charter on Human and Peoples' Rights and Initial Reports relating to the Maputo Protocol and the Kampala Convention 2020.

131 Periodic Reports of Cameroon (n 130) para 745.

132 Periodic Reports of Cameroon (n 130) para 751.

challenges with regard to the full participation of women in politics in Cameroon, as, according to the state report, many women continue to lack interest in politics.¹³³

Essentially, quotas have provided an important stepping stone for women to access positions of power in politics, which, in Africa, is still largely a male-dominated space. As observed by Boshha, if women continue to be deprived of the necessary support to enter politics successfully, this will result in reinforcing the socialised perspectives of women as not being suited for public life but belonging in the private sphere.¹³⁴

In its Initial Report under the Maputo Protocol, The Gambia reports that *de facto* equality is yet to be achieved, especially in politics. This is due to 'deep seated social and cultural beliefs'.¹³⁵ For example, in the 2017 National Assembly and Local Government elections, political parties were encouraged to present more women candidates but only 22 women contested in the National Assembly elections out of a total of 239 candidates, which is less than 10 per cent. In the 2018 local government elections, 49 women contested out of a total of 409 candidates, which amounts to 12 per cent of the candidates.¹³⁶ This notwithstanding that Gambian women constitute 58 per cent of the electorate.¹³⁷ Only 10 per cent of the representation in the National Assembly was female. As of 2016, there were four female National Assembly members, out of which two were elected, and the President nominated two.¹³⁸ Following the elections in 2018, there were five female National Assembly members; two were elected, and the President nominated three.¹³⁹ Accordingly, the proportion of female parliamentarians is well below the objective of achieving 30 per cent female representation.¹⁴⁰ To quell this, The Gambia's Women's Act provides temporary special measures to accelerate *de facto* equality between men and women to be implemented at all public institutions and private enterprises.¹⁴¹ The implementation of such measures, as is evident in the figures presented above, becomes highly relevant in the 'political arena and decision-making at all levels, where women are not legally barred from participating effectively on an equal footing with men, but may not be able to do so due to cultural bias in favour of men, and stereotypical perception of the role of women'.¹⁴² Thus, there is a need to continuously encourage women to assume decision-making positions and to change the mindset of people through sensitisation and awareness of the importance of women's effective participation.

Similarly, Lesotho reported that the National Assembly Elections Act was amended to require that for proportional representation seats, all political parties must submit a list of candidates which reflects an order mixed by gender, also referred to as a 'zebra list'.¹⁴³

Lesotho introduced a gender-based quota system at the local level in 2004, where a third of the seats in electoral councils are reserved for women. The Local Government Election (Amendment)

133 Periodic Reports of Cameroon (n 130) para 754.

134 S L Boshha 'Quota systems and women political leadership development in Africa' (2014) 3 *Journal of African Union Studies* 103 & 112.

135 The Gambia Combined Report on the African Charter on Human and Peoples' Rights for the Period 1994 and 2018 and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa p 156.

136 The Gambia Combined Report (n 135) p 156.

137 As above.

138 As above.

139 As above.

140 As above.

141 The Woman's Act 12 of 2010 sec 15.

142 The Gambia Combined Report (n 135) p 59.

143 The Kingdom of Lesotho Combined Periodic Report Under the African Charter on Human and Peoples' Rights and Initial Report under the Protocol to the African Charter on the Rights of Women in Africa 2018 para 386.

Act¹⁴⁴ (Lesotho Electoral Act) reserves one-third of seats in every council for women candidates.¹⁴⁵ This means that men are not allowed to stand as candidates in such designated electoral divisions. The remainder of the seats in every council are open to both male and female *candidates*. The Lesotho Electoral Act makes provision for this system to rotate to different constituencies for at least three elections, at which time it will be evaluated and assessed.¹⁴⁶

The amendment introduced in 2004 was challenged in *Molefi Tse'pe v the IEC*,¹⁴⁷ where the applicant claimed that the amendments infringed his constitutional rights. Molefi Tse'pe wanted to stand as an independent candidate in the elections but was informed by the returning officer of the division in question that he could not do so because the division was reserved exclusively for women candidates.¹⁴⁸ In light of this, Mr Tse'pe filed a constitutional suit arguing that he was being discriminated against on the basis of his sex with reference to Section 18 of the Constitution of Lesotho.¹⁴⁹ However, section 18(4)(e) contains a limitation clause stipulating that such a right can be limited if it is 'reasonably justifiable in a democratic society'.

As pointed out by Viljoen and Nsibirwa, this case was fundamentally about 'two notions of equality – formal and substantive equality'.¹⁵⁰ As noted by the Lesotho Court of Appeal, the formal test of equality, as suggested by the complainant in this case, 'evokes an approach to equality ... which subordinates substantive to formal equality'. This, in the court's opinion, would be detrimental to 'any form of handicap (positive or negative) and to quotas'. Thus, the Lesotho Court of Appeal found that the affirmative action, introduced by the 2004 amendment, both upheld Lesotho's international obligations and constituted a justifiable limitation to Mr Tse'pe's constitutional rights.¹⁵¹ In terms of Lesotho's obligations under international law, it was a member to the Maputo Protocol before this case was heard, but the Maputo Protocol only entered into force on 25 November 2005 after the ratification by 15 African states. Therefore the Protocol was mentioned in the case but not applied.¹⁵² However, as suggested by Viljoen and Nsibirwa, the Maputo Protocol not only supports the decision in *Molefi Tse'pe v the IEC* but 'strengthens arguments for the extension of "specific positive action" designed to promote women's representation in politics at the national level'.¹⁵³

It is worth noting that the idea of enforcing legal measures to further women's political participation is still controversial in public and legal spheres. Quotas have been criticised for providing the incorrect idea that 'only women can represent women, while men can represent both men and women'.¹⁵⁴ Such critiques have referenced country examples where women have failed to represent women's issues, as seen in Rwanda. It has been argued that female members of the Rwandan Parliament had failed to advocate for women's rights when a new land policy was debated. As a result, rural women were disappointed and felt that the women MPs had not represented their issues adequately.¹⁵⁵

144 Act 6 of 2004.

145 Sec 26(1A)(a) and (b) of the Local Government Election Act as amended.

146 Lesotho Combined Periodic Report (n 143) para 399.

147 *Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LeCA 2005) (*Molefi Tse'pe v the IEC*).

148 *Molefi Tse'pe v the IEC* (n 147) para 2.

149 Section 18 provides that 'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'.

150 F Viljoen & M Nsibirwa 'Political participation of women in Lesotho: the case of *Molefi Ts'epe v The Independent Electoral Commission and Others*, judgment of 30 June 2005' (2006) 39 *Comparative and International Law Journal of Southern Africa* 358.

151 *Molefi Tse'pe v the IEC* (n 147) para 40.

152 Viljoen & Nsibirwa (n 150) 359.

153 Viljoen & Nsibirwa (n 150) 360.

154 Boshia (n 134) 103 & 109.

155 Boshia (n 134) 109.

6.3 Electoral systems

Electoral systems are commonly divided into proportional representation, majority/plurality, and mixed representation systems. Furthermore, there are different forms of arrangements within the majority system, such as the First Past the Post (FPTP), also referred to as the ‘winner-takes-all’ system.¹⁵⁶ The FPTP electoral system is applied in a limited form in nearly half of African countries: Botswana, Cameroon, Chad, Congo (Brazzaville), Côte d’Ivoire, Gabon, Gambia, Ghana, Ethiopia, Kenya, Liberia, Malawi, Mali, Mauritius, Mozambique, Nigeria, Sudan, Swaziland, Tanzania, Uganda and Zimbabwe.¹⁵⁷ As seen in Malawi, the ‘winner-takes-all’ system means that political parties will try to maximise their odds of winning by promoting the ‘safest’ candidate.¹⁵⁸ Thus, this arguably dissuades political parties from choosing ‘non-traditional’ aspirants such as women as they are often not considered to be the winning ticket.¹⁵⁹

In a proportional electoral system, every electoral district has more than one member, each party presents a list of candidates for multi-member districts, and there is proportional representation. As an example, in Namibia, the ruling South-West Africa People’s Organisation has a 50 per cent one woman, one man or ‘zebra’ quota.¹⁶⁰ This played an important role in electing 46 per cent of women to the House of Assembly in the 2019 elections. The 2019 elections also paved the way for young women to take up leadership positions in Namibia.¹⁶¹

It is worth noting that although the proportional representation system is considered to be women-friendly, it has been criticised for containing discriminatory elements unless women are intentionally placed at the top of the list in order to maximise their chances. In view of the same, Lesotho reported, in 2018, that of the 80 constituencies around the country, only nine of them elected women against the 71 constituencies (89 per cent) that elected men.¹⁶² The other 18 women went to Parliament through the zebra-listing of the proportional representation policy, and they made up 40 per cent of the 40 proportional representation seats.¹⁶³ In its Concluding Observations, the African Commission expressed its concern over the overall low representation of women in decision-making positions in Lesotho.¹⁶⁴

In view of state practice, there are several concluding observations that pinpoint an ongoing struggle regarding accounting for women’s political participation and involvement in decision-making processes. As explained by the Commission in its Concluding Observation on Algeria, ‘the [r]eport does not highlight specific cases of women in Algeria and notably, the provisions put in place to guarantee the active participation of women at all decision-making levels, including cases where women have been subjected to violence’.¹⁶⁵ In addition, with regard to Nigeria, the Commission raised

156 See 4.1.

157 IKnow politics (n 126) 4.

158 Rudman & Mkali (n 38) 12.

159 As above.

160 Gender Links for Equality and Justice, 50/50 Policy Brief Namibia May 2020 <https://genderlinks.org.za/wp-content/uploads/2020/10/50-50-PB-NAMIB-MAY20rev.pdf> (accessed 21 June 2023).

161 Gender Links for Equality and Justice (n 160) 1.

162 Lesotho Combined Periodic Report (n 143) para 390.

163 As above.

164 Concluding Observations and Recommendations on the Kingdom of Lesotho’s Combined Second to Eighth Periodic Report under the African Charter on Human and Peoples’ Rights and its Initial Report under the Protocol to the African Charter on the Rights of Women in Africa, para 50.

165 Concluding observations on the 3rd and 4th combined Periodic Reports of the Peoples’ Democratic Republic of Algeria, presented at the 42nd ordinary session of the African Commission para 15.

concern over the low representation of women in positions of power and authority.¹⁶⁶ The Commission recommended that Nigeria '[e]nact a legislative framework that provides for affirmative action for women including the stipulation of specific female representation quotas in decision-making positions, to increase women's representation'.¹⁶⁷ These concluding observations point to a lack of compliance in view of article 9 of the Maputo Protocol.

7 Conclusion

Gender-balanced political representation and participation and power-sharing between women and men in decision-making is an internationally agreed target dating back to the Beijing Platform. However, the reality for most African women is that they have limited or no access to the corridors of power. The effective realisation of the rights to representation and participation in political and decision-making processes is essential for women's emancipation and for the overall legitimacy of democracy in Africa. Achieving parity on the rights set out in article 9 requires the removal of the practical and structural obstacles that hinder women's effective involvement in all decision-making. Simply adding women to existing social and political structures, using, for example, quotas, will, as discussed in this chapter, have limited effect on eradicating the discrimination and inequities which women continually suffer from.

Article 9 sets out rights and obligations that enable women to assume responsibility for the benefit of themselves, their families, their communities, and their countries. As the analysis in this chapter has shown, article 9 moves well beyond a narrow focus on the sphere of formal politics to decision-making more broadly. It is thus a vanguard of the transformation that must take place for women to achieve overall substantive equality.

The stereotypes that women are less interested in politics or less suited to participate in politics and decision-making is deeply rooted in the patriarchal and hierarchical design of the political systems. This also includes various forms of gender-based violence that women often experience in the political sphere. Thus, to achieve parity of participation and representation, women must be afforded actual opportunities to actively join in community life and be allowed to be creative in an environment marked by dignity and freedom. However, although state practice, as discussed in the previous section, shows some innovative ways of fulfilling the obligations in article 9, the fact remains that without effecting substantial change in the social, political, economic, cultural, and religious contexts in which women are expected to claim their rights to equal representation and participation such rights will remain unfulfilled. Thus, the conceptual richness of article 9 has not been fully matched by the state parties' efforts towards implementation.

The rights to political representation and participation, along with active participation on all levels of decision-making within the Maputo Protocol, is part of a broader quest to achieve substantive female leadership in Africa to transform the way women are viewed in society at large. In this regard, all stakeholders must join hands to enable women to make their voices heard as politicians and as leaders.

166 Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011-2014) 57th ordinary session 4-18 November 2015, Banjul, The Gambia para 75.

167 Concluding Observations Nigeria (n 166) para 115.