

A Gender Perspective on Electoral Processes in Malawi: The Right of Malawian Women to Participate in the Political Process under the Maputo Protocol

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Abstract

Against the background of recent political developments in Malawi, this article provides a gender perspective on Malawian women's participation in political life. It focuses on the position of women as candidates for political office and explores what determines women's positioning, the hurdles that exist in their path when entering the political domain and, correspondingly, the obligations that the state has to level the playing field to overcome such hurdles. As a point of departure, it is proposed that Malawi, which since the coming into force of the 1994 Constitution is democratically organised, cannot be deemed fully democratic and legitimate if women and men do not have an equal opportunity to serve their communities through parliamentary representation. Malawi has ratified the African Charter, the Maputo Protocol and the African Charter on Democracy, Elections and Governance. Therefore, it is bound by a multitude of international provisions which promote and protect democracy and women's rights to political participation. The objective of this article is to analyse how effective the Malawian government has been in implementing women's political rights as guaranteed under regional human rights law. Using the method of positionality to unveil discrimination and disadvantage, the authors' arguments presented in this article depart from the idea that internal change can be grounded on legal interventions which implement the legal obligations set out in the African Charter, the Maputo Protocol and the African Charter on Democracy, Elections and Governance.



Keywords: women's rights; Maputo Protocol; African Charter; democracy; representation; positionality; African Charter on Democracy, Elections and Governance; Malawi

Introduction

Since May 1994, when the new Constitution¹ came into force, Malawi has held elections every five years to elect a president, its parliamentarians and councillors. The latest election, held in May 2019, was the arena of a bitter legal battle between the three main contestants for the presidential seat. Both before and in the aftermath of the elections, political tension, violence and victimisation were felt throughout Malawi.² These tensions increased in February 2020, when the High Court of Malawi, sitting as the Constitutional Court, declared the 2019 presidential election null and void and ordered a new vote to determine the outcome of the presidential election.

In an *amicus curiae* brief, submitted to the Constitutional Court in the 2019 election matter, the Malawian Women Lawyers Association (WLA), a public interest organisation, asked the Constitutional Court to consider a 'gender perspective to the electoral process in Malawi'.³ In its submission, the WLA departed from the proposition that even though women constituted fifty-four per cent of the total registered voters in the 2019 election, their access to electoral information, their ability to cast their vote in a free and fair manner and their ability to access justice in the legal matter that ensued were hampered due to systemic male dominance.⁴ The WLA asserted that '[v]oters can only be free to make political choices where there is a good electoral system that is inclusive and easy to understand' and went on to point out that '[t]he electoral system must be comprehensible to everyone including the disadvantaged members of society such as women'.⁵ Having the freedom to make political choices arguably means that a state such as Malawi has to uphold a trustworthy and reliable electoral system which sets forth procedures that can guarantee free and fair elections. In accordance with international human rights law, as further discussed in this article, such a system must also actively promote women's participation as voters and as candidates for political office.

¹ Constitution of the Republic of Malawi 1994 (1994 Constitution).

² Press briefing notes on Malawi, Rupert Colville, spokesperson for the UN High Commissioner for Human Rights (25 January 2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24119&LangID=E>> accessed 5 February 2020.

³ *Dr Saulos Klaus Chilima and Dr Lazarus Maccarthy Chakwera v Professor Arthur Peter Mutharika and the Electoral Commission*, in the High Court of Malawi Lilongwe District Registry, Constitutional Court Reference No 1 of 2019, 2nd *Amicus Curiae* Final Submissions by the Women Lawyers Association para 3.2.

⁴ *ibid* paras 4.27 and 6.11.

⁵ *Dr Saulos Klaus Chilima*, 2nd *Amicus Curiae* (n 3) para 6.1.

Against the background of the latest political and legal developments in Malawi, this article aims to provide a gender perspective on Malawian women's participation in political life. It focuses particularly on the position of Malawian women as candidates for political office: What determines their positioning? What hurdles exist in their path towards entering the political domain? And, correspondingly, what obligations rest on the state to level the playing field in order to overcome such hurdles?

From the outset it is important to acknowledge that, in this article, we do not focus on the question of why we should strive for equal political representation of men and women – there are rich academic offerings in this regard.⁶ However, in summary, Dzimbiri presents the opinion, which we share, that a considerable increase in the number of women in parliament would 'strengthen women's unity and political advocacy, leading to changes in policy content.'⁷ He further argues that an increase in female representation could have a 'symbolic effect, encouraging more women to come forward as candidates and favouring the building of alliances between grassroots women and women in political institutions.'⁸

Over time, feminist legal theory has developed tools, such as positionality as discussed below, to detect generic outcomes of the law and to unveil discrimination and disadvantage. In this article, our analysis departs from the human rights to equal and effective representation and participation, coupled with a positionality enquiry. Through this approach we attempt to draw some conclusions, not about why we should have equal representation, but what the current position of women is and what Malawi's existing legal obligations require it to do to improve this position. The positionality review adds to this by revealing the 'pitfalls of equality' and enables us to engage with matters such as the impact of violence or a macho culture on women's representation.

⁶ See Karen Celis, Sarah Childs, Johanna Kantola and Mona Lena Krook, 'Rethinking Women's Substantive Representation' (2008) 44(2) *Representation* 99–110; Melinda Adams, John Scherpereel and Suraj Jacob, 'The Representation of Women in African Legislatures and Cabinets: An Examination with Reference to Ghana' (2016) 37(2) *Journal of Women, Politics & Policy* 145–167; Claire Devlin and Robert Elgie, 'The Effect of Increased Women's Representation in Parliament: The Case of Rwanda' (2008) 61(2) *Parliamentary Affairs* 237–254; Sylvia Tamale, 'Point of Order, Mr Speaker: African Women Claiming Their Space in Parliament' (2000) 8(3) *Gender & Development* 8–15; Gisela Geisler, 'Parliament is Another Terrain of Struggle: Women, Men and Politics in South Africa' (2000) 38(4) *Journal of Modern African Studies* 605–630; Diana Højlund Madsen 'Gender, Power and Institutional Change – The Role of Formal and Informal Institutions in Promoting Women's Political Representation in Ghana' (2018) 54(1) *Journal of Asian and African Studies* 70–87.

⁷ Lewis Dzimbiri, 'The 50–50 Balance: Myth or Reality' in Inge Amundsen and Happy Kayuni (eds), *Women in Politics in Malawi* (Chr Michelsen Institute (CMI), Norway Department of Political and Administrative Studies (PAS) 2016) 13 <<https://www.cmi.no/publications/file/5923-women-in-politics-in-malawi.pdf>> accessed 5 February 2020.

⁸ *ibid*. This could also have the opposite effect, as is discussed below.

As a point of departure, therefore, we propose that Malawi—which, since the coming into force of the 1994 Constitution, is democratically organised—cannot be deemed democratic and legitimate if women and men do not have an equal opportunity to serve their communities through parliamentary representation.⁹ Malawi ratified the African Charter on Human and Peoples' Rights (African Charter)¹⁰ in 1989; and in line with the principles of democracy and equality in the 1994 Constitution, it ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)¹¹ in 2005 and the African Charter on Democracy, Elections and Governance (African Democracy Charter)¹² in 2012. Therefore, it is bound by a multitude of provisions—both domestic and international—which promote and protect democracy and Malawian women's rights to political participation and representation. Building on the aim to provide a gender perspective on Malawian women's participation in political life as candidates for political office, a further objective of this article is to analyse how effective the government and its institutions have been in implementing women's political rights and adhering to the comprehensive state obligations as required by the Maputo Protocol and other related regional human rights instruments.

The argument we present in this article departs from the idea that internal change can be grounded on constitutional or legal interventions and initiatives by political parties implementing the legal obligations set out in the Maputo Protocol against the backdrop of the African Charter and the African Democracy Charter. The article proceeds from the assumption that realising Malawian women's right to participate in political processes, such as parliamentary representation, is currently more symbolic than actual. This is so because of a lack of positive measures that ensure gender parity through re-socialisation in accordance with Article 9 of the Maputo Protocol.

To this end, this article is divided into five parts. After this introduction, we offer a brief overview of women's position as political actors in Malawi. The text which follows that contextualises 'positionality' as a feminist legal method which has formed the basis of the main arguments throughout this article. We then position Malawian women in the political domain and discuss a number of obstacles to women's participation. After that, we synthesise the broader African Union (AU) system and the different instruments that have been produced to protect women's participation in the political field. The final part presents our conclusions and suggests a way forward.

⁹ Jennifer Lawless, 'Politics of Presence? Congresswomen and Symbolic Representation' (2004) 57(1) Political Research Quarterly 81.

¹⁰ African Charter on Human and Peoples' Rights (27 June 1981) CAB/LEG/67/3 rev 5, 21 ILM 58.

¹¹ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (11 July 2003).

¹² African Charter on Democracy, Elections and Governance (30 January 2007).

Brief Background to Women's Position as Political Actors in Malawi

During President Kamuzu Banda's dictatorial regime stretching from 1970 to 1993, no Malawian, regardless of sex, enjoyed their civil or political rights.¹³ Compounded by custom and tradition, women's political agency was curtailed and pushed to the fringes. Publicly, women's function in the political sphere was mainly as entertainment, women often being recruited to sing and dance the president's praises.¹⁴

Women's position in the political domain post-1994 gradually changed: in 1994, female members of parliament made up only five per cent of the legislature;¹⁵ in 1999, they had increased marginally to eight per cent;¹⁶ by 2004, this figure had increased slightly again to thirteen per cent under President Bingu wa Mutharika's first term.¹⁷ At the end of the 2009 electoral cycle, when President Bingu wa Mutharika was re-elected to lead the nation, forty-three women (or twenty-two per cent of the 193-member legislature) were elected to serve as parliamentarians.¹⁸

Following the death of the sitting President, Bingu wa Mutharika, in 2012, Malawi became the second AU nation to be led by a female president, Joyce Banda. However, instead of promoting female leadership, its decline has been ascribed to President Joyce Banda's turbulent time in office. In the 2014 election, women's representation plummeted. Joyce Banda had formed her own political party but lost the election, and only thirty-two women (seventeen per cent) won a parliamentary seat.¹⁹ This number increased again in the 2019 elections, in which forty-four women (twenty-three per cent) made it into the parliamentary term, indicating that the 'Joyce Banda effect' was wearing off.²⁰

¹³ Tam O'Neil, Ngeyi Kanyongolo, Joseph Wales and Moir Walita Mkandawire, 'Women and Power: Representation and Influence in Malawi's Parliament' (2016) Report of the Overseas Development Institution <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/10289.pdf>> accessed 10 February 2016.

¹⁴ ibid 16. See also Linda Semu, 'Kamuzu's Mbumba: Malawi Women's Embeddedness to Culture in the Face of International Political Pressure and Internal Legal Change' (2002) 49(2) *Women, Language, and Law in Africa* 86–87.

¹⁵ O'Neil (n 13) 17. See also Semu (n 14) 86.

¹⁶ O'Neil (n 13) 17. See also Semu (n 14) 86.

¹⁷ O'Neil (n 13) 17.

¹⁸ Tiyesere Chikapa, 'The "Joyce Banda Effect": Explaining the Discrepancy between Public Opinion and Voting Behaviour' in Inge Amundsen and Happy Kayuni (eds), *Women in Politics in Malawi* (Chr Michelsen Institute (CMI), Norway Department of Political and Administrative Studies (PAS) 2016) 45 <<https://www.cmi.no/publications/file/5923-women-in-politics-in-malawi.pdf>> accessed 5 February 2020.

¹⁹ O'Neil (n 13) 26.

²⁰ Tione Andsen, 'Women's Political Leadership Gets a Nod' (29 May 2019) <<https://www.manaonline.gov.mw/index.php/national/politics/item/12719-women%20%99s-political-leadership-gets-a-nod>> accessed 10 February 2020.

An analysis of the sequence of women gaining seats in the Malawian parliament indicates that achieving gender parity is arguably still problematic. In the run-up to the 2009 elections, the donor community had noticed this and with a view to effecting change launched the ‘50–50 Campaign’. This campaign aimed at recruiting, financing and supporting female candidates running for office. The 50–50 Campaign continued during the 2014 and 2019 elections. Judging by the figures relating to female parliamentarians referred to above, this campaign has arguably been successful to some extent.

However, it is a worrying trend, as is explored further in this article, that it is foreign donors rather than the Malawian government who insist on the implementation of Malawi’s legal obligations to create a level political playing field.²¹ In this regard it is clear that, to a large extent, patriarchal structures in Malawi still dictate ‘the roles and capabilities of the different sexes and confirm women’s subordinate status to men.’²² As is further highlighted below, there is inconsistency in female representation and the active participation of women is rare.

Understanding Positionality as an Agenda for Change

Before we engage with the position of Malawian women regarding their political participation and later the regional framework that deals with the obligations of states in this respect, it is important to set out briefly the theory behind our arguments. Our objective is to show how positionality as a feminist legal method can be used to identify Malawian women’s status in current political structures as that of victims in order to give meaning to their level of disadvantage. The Maputo Protocol, which is the main legal instrument under analysis in this article, is genuinely concerned with exclusion as a form of discrimination and with stereotypes which are harmful to women’s participation and representation. As discussed further below, the Maputo Protocol embodies the feminist approach to ‘position’ and marginalisation in order to explain and confront disadvantage as a means of provoking legal reform.

Feminist legal theory provides us with an opportunity to explore the way in which the law can transform women’s political position.²³ In doing so, and as expressed by the Africa Pacific Forum on Women, Law and Development, it

²¹ O’Neil (n 13) 26.

²² O’Neil (n 13) 26.

²³ Africa Pacific Forum on Women, Law and Development, ‘Feminist Legal Theory and Practice’ 140 <<https://www.hurights.or.jp/archives/asia-pacific/section1/11%20Asia%20Pacific%20Forum%20on%20Women.pdf>> accessed 10 February 2020.

challenges the traditional notion that law is a neutral, objective, rational set of rules, unaffected by the perspective of those who possess the power.²⁴

In this article we focus on ‘positionality’ as a method applied by legal feminist scholars in order to reveal aspects that traditional legal methods generally overlook. Positionality recognises that truth is partial and provisional.²⁵ Instead of being a strategy that seeks to reconcile competing interests, positionality seeks to reconcile the existence of experience-based claims with the need to question and improve these claims.²⁶ It is, therefore, worthwhile to examine how positionality can be used to identify Malawian women’s status in the political field as those of victims in order to give meaning to their level of disadvantage.

Positionality is a standpoint from which a number of seemingly variable feminist ‘truths’ become reasonable.²⁷ The positional standpoint recognises the presence of experiential truths, principles and knowledge.²⁸ It recalls an experience-based theory of knowledge.²⁹ Therefore, from their position of exclusion, women have come to know some things about marginalisation:³⁰ the way it is masked through objective rules and constructs; its ubiquity; the pain it brings and the need to end it.³¹

In the light of our main objective, it is therefore important to question why Malawian women continue to lag behind men in the political field while establishing that new ‘truths’ can yield change for Malawian women in politics. Positionality, as a feminist legal method, is therefore more demanding than traditional legal methods because it discards the idea of one perfect, external and objective ‘truth’.³²

Contributors to the positionality method have challenged essentialist understandings of identity as ‘fixed, on-going, and rooted in dominant individual and group characteristics’.³³ For example, Acevedo and others suggest that ‘individuals occupy multiple identities, fluid and dialogical in nature, contextually situated, and continuously amended and reproduced.’³⁴ In the same vein, instead of being a strategy

²⁴ *ibid.*

²⁵ Katharine Bartlett, ‘Feminist Legal Methods’, in Kelly Weisberg, *Feminist Legal Theory: Foundations* (Temple University Press 1993) 562.

²⁶ *ibid.*

²⁷ Bartlett (n 25) 562.

²⁸ *ibid.*

²⁹ Bartlett (n 25) 562.

³⁰ Bartlett (n 25) 563.

³¹ *ibid.*

³² Bartlett (n 25) 563.

³³ Sara Acevedo, Michael Aho, Eri Cela, Juei-Chen Chao, Isabel Garcia-Gonzales, Alec MacLeod, Claudia Moutray and Christina Olaguel, ‘Positionality as Knowledge: From Pedagogy to Praxis’ (2015) 11(1) *Integral Review* 32.

³⁴ *ibid.*

that seeks to reconcile competing interests, positionality seeks to reconcile the existence of experience-based claims of truth with the need to question and improve these claims.³⁵

Therefore, as we continue to discuss Malawian women's representation in parliament, we argue that the world is informed by our identities and lived experiences, and through the positionality method an analysis of the position or situatedness of identity can be made.³⁶ Approaching the law from a 'positionality' perspective requires efforts, on the one hand, to institute 'good' law and, on the other, to maintain and renew it, to constantly deconstruct and improve the law. The advantage of raising factors that have contributed to the marginalisation of Malawian women in the political sphere is that it enables a critique of the existing (disabling) legal environment which fails to consider women's 'truths' through the ideal presented by positionality. It therefore provides us with a framework within which we can evaluate the extent to which the political institutions in Malawi enable women to participate as equals and, where appropriate, call for legal reform to ensure gender parity.

Status of Malawian Women's Participation in Political Life

As indicated above, the instances of women making it into the Malawian parliament show a limited but stable increase from 1994, barring the dip in numbers in 2014. However, the main message is that the number is still well below the fifty per cent threshold set by the AU's Africa Agenda 2063 (AU Agenda 2063).³⁷ This notwithstanding, Malawian women have made some important progress: the ascendancy of Joyce Banda to the presidency, the appointment of the first woman as a Speaker of Parliament, Catherine Gotani Hara; the appointment of the first female Mayor of Lilongwe, Councillor Mariana Kudaya; and the election of Fynes Nwagonjwa who, at 24 years of age, is currently the youngest female parliamentarian.³⁸ According to Agbalajobi, echoing the arguments of Dzimbiri, women's participation in politics can, among other things, be measured by the number of women who vote in elections; the number of public offices held by women and the number of policies related to women's issues that are implemented by the government.³⁹

It is evident from the discussion above that Malawian women have entered the political scene in very small numbers only. As is described further below, there are several

³⁵ Bartlett (n 25) 562.

³⁶ Acevedo (n 33) 32.

³⁷ Aspiration goal 6 calls for full gender parity, ie 50/50 representation.

³⁸ The Commonwealth, Malawi women reflect on political advancement (29 October 2019) <<https://thecommonwealth.org/media/news/malawi-women-reflect-political-advancement>> accessed 27 November 2019.

³⁹ Damilola Agbalajobi, 'Women's Participation and the Political Process in Nigeria: Problems and Prospects' (2010) 4(2) African Journal of Political Science and International Relations 77.

factors that have contributed to the marginalisation of women in Malawian politics. These factors help us to understand what helps or hinders Malawian women entering parliament (ie identifying their positionality) and to contextualise the legal framework that is set out in the penultimate part of this article.

Patriarchy and Violence

Malawi has a strong patriarchal culture that influences family structures and social relations in all parts of the country, with some regional differences: the central and south with their matrilineal family culture, the north and south-western parts espousing a patrilineal culture.⁴⁰ However, both cultures are male dominated and this largely reflects the lack of women's participation in decision-making at all levels of society. Seemingly, patriarchy starts in the private home and manifests in the choices women make as they gravitate towards the public sphere. Those who make it into male-dominated spaces have to defend their presence amid multitudes of traditional and cultural upheavals. As Tamale puts it,

when women step over from the private sphere to claim their rightful space in the public arena, traditional values provide a ready tool for men to remind them of their proper place.⁴¹

In addition, as stated by Okoth, 'patriarchal culture is reproduced, operated and inherited through cultural, religious and state institutions.' To this we can add the inherited English law, which provides a combination of obstacles that work to exclude women.⁴² In this regard, the Gender Equality Act⁴³ has arguably not been adequately used to dismantle the different patriarchal structures that hinder gender parity, an objective emphasised in Article 9 of the Maputo Protocol.

As Malawi headed to the polls in May 2019, political spaces were rife with violence and hatred, both on- and offline.⁴⁴ When a woman was stripped of her T-shirt brand-named with United Transformation Movement and symbols, Malawian women of all political leanings united over the unparalleled levels of violence women were being subjected to

⁴⁰ Erling Berge, Daimon Kambewa, Alister Munthali and Henrik Wig, 'Lineage and Land Reforms in Malawi: Do Matrilineal and Patrilineal Landholding Systems Represent a Problem for Land Reforms in Malawi?' (2016) *Land Use Policy* 41, 62.

⁴¹ Tamale (n 6) 8.

⁴² George Odhiambo Okoth, 'Patriarchy and Democracy in Africa: Reflections on the Underlying Influence of Islamic and Indigenous African Traditions on Women Participation in Kenyan Politics' in Caroline Kioko, Rosebell Kagumire and Mbalenhle Matandela (eds), *Challenging Patriarchy: The Role of Patriarchy in the Roll-back of Democracy* (Heinrich Böll Stiftung 2020).

⁴³ Of 2013. A legislative initiative in response to gender equality.

⁴⁴ S Chisala-Tempelhoff, 'Insulting the Modesty of a Woman and the Push by the Women's Movement in Malawi' (African Feminism, 9 May 2019) <<http://africanfeminism.com/insulting-the-modesty-of-a-woman-and-the-push-by-the-womens-movement-in-malawi/>>.

during the electoral cycle.⁴⁵ This incident went viral through a video clip of the ‘humiliation’ that was recorded by the attackers—male political operatives from the ruling party.⁴⁶

Electoral System Design

Kanyogolo and Malunga demonstrate that there are several aspects of laws, procedures, policies and regulations that control an electoral process and which hinder meaningful participation by women. One important aspect is the design of the electoral system. In Malawi, the president and the 193 members of the National Assembly are elected using the First Past the Post (FPTP) system.⁴⁷ Under a FPTP system, the candidate who collects the most votes wins the election.⁴⁸ Consequently, the Parliamentary and Presidential Elections Act⁴⁹ (PPEA) stipulates that the Malawi Electoral Commission (MEC) has to declare a candidate victorious when he, she or they have secured a majority of the votes. As Malawi subscribes to a ‘winner-takes-all’ system, political parties will try to maximise their odds of winning by promoting the ‘safest’ candidate. This arguably dissuades them from picking ‘non-traditional’ aspirants such as women. Therefore, women are not nominated, or they are nominated to a lesser extent, as they are not viewed as straightforward ‘winners’.⁵⁰ As referred to by Nyamweda and Morna,

countries with a PR [proportional representation] or mixed system and quotas have double the percentage of women (36% to 48% at local and national levels) compared to 8% to 27% in the First Pass the Post (FPTP) system (with no quota).⁵¹

It is clear that, in Malawi, confirming the position of Nyamweda and Morna, the FPTP electoral system has not enabled Malawian women to make it into parliament.

Another important aspect of women’s participation is the political party registration process. During the critical decision-making processes, women are often excluded or under-represented at party meetings where key decisions are made.⁵² In Malawi, the

⁴⁵ ibid.

⁴⁶ Chisala-Tempelhoff (n 44); Wongani Chiuta, ‘UTM’s Woman Stripped by DPP Operatives Dumped by Hubby’ (23 January 2019) <<https://www.nyasatimes.com/utms-woman-stripped-by-dpp-operatives-dumped-by-hubby/>> accessed 8 July 2020.

⁴⁷ Mwiza Nkhata, ‘Presidential elections in Malawi: Towards a Majoritarian (50+1) Electoral System?’ (2016) International IDEA, <<http://constitutionnet.org/news/presidential-elections-malawi-towards-majoritarian-501-electoral-system>> accessed 10 February 2020.

⁴⁸ ibid.

⁴⁹ Of 1993.

⁵⁰ Law Commission of Canada, *Voting Counts: Electoral Reform for Canada*, 2004, 1.

⁵¹ Tarisai Nyamweda and Colleen Morna ‘State of Women in SADC’ <<https://genderlinks.org.za/wp-content/uploads/2019/08/StateOfWomenSADC2019rev2.pdf>> accessed 10 February 2020.

⁵² Ngeyi Kanyongolo and Bernadette Malunga, ‘Legal Empowerment: Laws Promoting Women Participation in Politics’ in Inge Amundsen and Happy Kayuni (eds), *Women in Politics in Malawi*

Political Parties Act⁵³ importantly prohibits discrimination based on ‘sex’ in the enjoyment of rights and privileges accruing from membership of a political party.⁵⁴ The Act also recognises the principle of gender equality and asserts that, as part and parcel of the right to participate in elections, parties must strive to achieve fair gender representation when ‘appointing membership of party organs and committees ... in so far as it is practicable.’⁵⁵

Notwithstanding the fact that the Political Parties Act pushes political parties to attain a fair ground for women, they still remain major culprits in enforcing patriarchy, as indicated below. It is notable that the Act, through the reference to ‘practicable’ and without any further specifications as to women’s representation, continues to enable patriarchy to persist. It is therefore argued that this Act is among the legislation which could, alongside the introduction of a proportional representation or mixed system, enable women to participate in a more meaningful way, by providing for gender parity as a condition.⁵⁶ This extends to the principles of gender equality and non-discrimination that should be used as a precondition of registering political parties in line with the regional norms presented below.⁵⁷ These principles can be used to confirm that women are featured in the leadership composition of the parties, which is a necessary part of ensuring symbolic representation. In this instance, the argument is not that women should be entitled to whatever is more favourable to them but that, under these circumstances, special measures—in line with the obligations that are set out below—are needed in order to counteract men’s advantages.

Socio-economic Status

In Malawi, as elsewhere, socio-economic factors tend to shape the conditions that ultimately lead women to refrain from envisaging careers in public spheres such as politics. Manon argues that

(Chr Michelsen Institute (CMI), Norway Department of Political and Administrative Studies (PAS) 2016) 26 <<https://www.cmi.no/publications/file/5923-women-in-politics-in-malawi.pdf>> accessed 5 February 2020. It is possible to point to an array of different factors influencing the low numbers of women in politics in general and more specifically at all-important party meetings. Kanyongolo and Malunga suggest that this is an outcome of both socio-economic and legal factors, including inadequate electoral laws, level of education and the influence of culture, tradition and the impact of colonial rule.

⁵³ Act 1 of 2018.

⁵⁴ Section 3(1)(c) of Political Parties Act 1 of 2018.

⁵⁵ Section 3(1)(d).

⁵⁶ Kanyongolo and Malunga (n 52) 26.

⁵⁷ Kanyongolo and Malunga (n 52) 26.

if there are few women in politics, it is because women are under-represented in the milieus where parties identify and recruit their potential candidates.⁵⁸

Therefore, developing women's socio-economic conditions could arguably lead to a rise in female representatives in parliament.⁵⁹ This is because Malawian women display lower levels of literacy and education than men, alongside lesser access to employment and resources,⁶⁰ which contribute to the low socio-economic status of women as they hinder women from rising in social status, effectively preventing them from participating fully in the political domain.

In order to become a political candidate, part of the vetting processes require finances. For example, political candidates are required to pay nomination fees and this tends to be a financial burden because their lack of economic power makes it difficult for Malawian women to contend with their male counterparts in this respect.⁶¹ In 2018, the MEC had ruled out reducing the hiked nomination fees for the 2019 tripartite elections because of the high cost of goods and services. Therefore, the MEC augmented the nomination fees for presidential candidates from one to two million Malawi Kwacha (K). And whereas male parliamentary candidates had to pay K500 000, their female counterparts were given the option of a reduced fee of K250 000.⁶² This was done to encourage female candidates to stand for parliamentary positions.⁶³ However, this was only partial relief because, compared to previous elections, the amount had in fact been increased from K200 000 to K250 000. It can therefore be argued that even though the fees payable by female candidates were less compared to those of male candidates, this in fact worsened the position of women candidates. Consequently, where finances cannot be adequately secured, women tend rather to participate in activities that support male politicians than to offer themselves for office.⁶⁴

'Politics is a Dirty Game'

In Malawi, and in Africa at large, politics is dominated by men and influence over public institutions is often achieved through the use of intimidation. In Malawi, intimidation often takes the form of the use of patriarchal language, that is, reference to 'father' or (male) 'heroic' figures or 'macho men'. It also includes the use of dirty strategies and

⁵⁸ Manon Tremblay, 'Democracy, Representation, and Women: A Comparative Analysis' (2007) 14(4) *Democratization* 536.

⁵⁹ *ibid.*

⁶⁰ Kanyongolo and Malunga (n 52) 27.

⁶¹ Kanyongolo and Malunga (n 52) 27.

⁶² Suzgo Khunga, 'Mixed Reactions on New Nomination Fees' (18 July 2018) <<https://mwnation.com/mixed-reactions-on-new-nomination-fees/>> accessed 10 February 2020.

⁶³ Kanyongolo and Malunga (n 52) 27.

⁶⁴ Happy Kayuni and Kondwani Chikadza, 'The Gatekeepers: Political Participation of Women in Malawi' (CMI Brief 2016) 15(2) 3 <<https://www.cmi.no/publications/5929-gatekeepers-political-participation-women-malawi>> accessed 10 February 2020.

the ‘incumbency advantage’ that men enjoy in all political parties. To be accepted, women in Malawian politics have to find creative ways that ‘complement’ those of their male counterparts, and these often shift away from issue-based campaigns. For instance, during the 2019 campaign, women’s groups and human rights organisations condemned the use of inflammatory language by Ben Phiri, the director of elections of the governing party, the Democratic Progressive Party. During his campaign rallies, he expressed inappropriate sentiments towards the former First Lady, Shani Muluzi, who, at the time, was competing for a parliamentary seat.⁶⁵ After the publicity around the incident, Mr Phiri apologised, as his remarks had been interpreted as attacking the ‘modesty of a woman’, an offence under the Malawi Penal Code.⁶⁶

In addition to this, the dynamics between women’s capabilities and ambitions, on the one hand, and the political will and power of ‘male gatekeepers’ of the political parties, on the other, determine the extent to which women participate in political parties.⁶⁷ As suggested by Kayuni and Chikadza, gatekeepers tend to support and promote individuals who resemble themselves and, consequently, because there are very few female gatekeepers, women tend to end up being sidelined.⁶⁸ Accordingly, women continue to be marginalised because of the male gatekeepers who agitate for appointments that reflect loyalty from party members as opposed to those that are born out of performance.

African Women’s Right to Political Participation

The Broader AU System

Borrowing from Tamale’s description of women standing for political office as ‘hens that crow’, this part analyses the legal obligations that have been presented under human rights law to mitigate African women’s alienation from the political scene.⁶⁹ As Tamale points out:

[I]t is popularly believed that women are not supposed to speak up or express their opinions in public, a view that is deeply embedded in African patriarchal values, which relegate women to the domestic arena of home and family.⁷⁰

⁶⁵ Malawi24, ‘Ben Phiri’s Uncensored Attack on Shani irks First Lady, Gender Activist’ (18 April 2019) <<https://malawi24.com/2019/04/18/ben-phiris-uncensored-attack-on-shani-irks-first-lady-gender-activist/>> accessed 10 February 2020.

⁶⁶ Chapter 7, s 137(3).

⁶⁷ Kayuni and Chikadza (n 64) 2.

⁶⁸ *ibid*.

⁶⁹ Sylvia Tamale, *When Hens begin to Crow; Gender and Parliamentary Politics in Uganda* (Routledge 2018).

⁷⁰ *ibid* 1.

This statement was made in 1999 at a time when African states, as asserted by Owiso and Sefah, slowly started to embrace democracy, and some leaders began realising popular political participation not only as a codified right, but as a condition for altering the socio-economic future of these states.⁷¹

Against the backdrop of the rights to equality and political participation set out in the African Charter, the then OAU, later the AU, began to develop and codify women's rights to political participation; to present states with a legal framework within which African women could transcend different political landscapes.

In the regional domain, the origin of the right to political participation can be traced back to articles 13(2) and 29(2), read and implemented in the light of the state obligations set out in articles 1 and 2, of the African Charter. Article 13(2) entrenches the right that all citizens have the right to participate freely in the government of their country, either directly or through representatives freely chosen in accordance with the provisions of the law. This right must be viewed through the lens of article 2, which stipulates that all individuals are entitled to the enjoyment of the rights acknowledged and guaranteed in the African Charter without distinction of any kind; and article 1, which obligates the states to give legal effect to the enshrined rights.

It is of interest to note that the African Charter under which the Maputo Protocol was created further stipulates that every individual has a duty to serve their national community by placing their physical and intellectual abilities at its service.⁷² This is indicative of the responsibility that rests on every citizen to participate in the political life of their nation.

Notwithstanding the fact that the African Charter deals with popular political participation, neither the popular angle nor women's participation garnered any major support from African states in the 1980s and the early 1990s. As indicated above, slow change was taking place in the mid-to-late 1990s, but as highlighted in Tamale's conclusion above, African women's participation in political life had, and still has, a long way to go towards substantial and equal representation.

At the regional level, three major legal developments would help to emphasise women's lack of and need for political participation. In 2000, the Constitutive Act of the African Union (AU Constitutive Act) was adopted, transforming the OAU and constituting the AU. The AU Constitutive Act amalgamated the promotion of democracy, popular participation and good governance and reiterated the commitment of African states to

⁷¹ Roger Owiso and Bright Sefah, 'Actualising Women's Participation in Politics and Governance in Africa: The Case of Ghana and Kenya' (2017) 1 African Human Rights Yearbook 267.

⁷² Article 29(2).

promoting and protecting the rights and freedoms enshrined in the African Charter.⁷³ Importantly, it furthermore stipulated, in article 4, that the AU should ‘function in accordance with the principles of gender equality, respect for democratic principles, human rights, the rule of law and good governance.’ This renewed, and obvious, commitment to women’s rights in the AU Constitutive Act, and for the purposes of this article, women’s political rights, have since been well anchored in the Maputo Protocol (discussed below) as well as in the African Democracy Charter.

The latter was developed from the Declaration on the Principles Governing Democratic Elections in Africa,⁷⁴ presented by the AU in July 2002. In the declaration, AU member states made general commitments to establishing all-inclusive electoral systems and to holding free and fair, all-inclusive elections.⁷⁵ More importantly for the purposes of this article, paragraph III(j) of the declaration committed all AU member states to encouraging the participation of African women in all aspects of the electoral process in accordance with relevant national laws.

The declaration paved the way for the introduction and adoption of the African Democracy Charter in 2007, an instrument that Glen refers to as a ‘distinct contribution to regional attempts at democratic institutionalization.’⁷⁶ With the entry into force of the African Democracy Charter, women’s rights to political participation were again emphasised. In this regard, there are important synergies between article 9 of the Maputo Protocol and the provisions of the African Democracy Charter. The latter sets out a number of gender-related provisions that must be viewed as a distinct framework within which the rights set out in the Maputo Protocol should be understood. For this reason, these provisions are presented here as part of a broader regional commitment to equal participation and representation of women in the political sphere. As suggested by Owiso and Sefah, the African Democracy Charter sought to enhance the comprehensive provisions in the Maputo Protocol referring to women’s participation by incorporating the advancement of citizens’ involvement in public life, the promotion of systems of representative government and the promotion of gender equality in its objectives and principles.⁷⁷

Article 2(11) of the African Democracy Charter stipulates that one of its objectives is to promote gender balance and equality in the governance and development processes. Furthermore, article 3(6) indicates that the promotion of gender equality in public and private institutions is a leading principle. Based on this, the African Democracy Charter

⁷³ AU Constitutive Act arts 3(g) and (h).

⁷⁴ African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002.

⁷⁵ African Democracy Charter, paras II and III.

⁷⁶ Patrick Glen, ‘Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance’ (2012) 5 African Journal of Legal Studies 150.

⁷⁷ Owiso and Sefah (n 71) 269.

elaborates—in general, specific and practical terms—on ways to enable and empower women’s political participation. Article 8 speaks about the general idea of non-discrimination based on gender and member states’ obligation to adopt legislative and administrative measures to guarantee the rights of women; article 43 encapsulates women’s right to literacy and basic education as a prerequisite for participation.

In addition to the general and universal norms expressed in articles 8 and 43, articles 29 and 21(2) reiterate the intentions shared between the African Democracy Charter and the Maputo Protocol. Article 29 confirms the crucial role of women’s participation in attempts to strengthen democracy on the African continent. Essential to the discussion in this article is that article 29 obligates state parties 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.

As an important tool with which to monitor the implementation of these provisions, article 21(2) stipulates that electoral observer missions must take cognisance of the principle of gender equality.

Women’s Right to Participation in the Political Process under the Maputo Protocol

As indicated in the title, this article is focused on an analysis of article 9(1)(a) and (b) of the Maputo Protocol. It is important, however, that the synergies with other regional instruments such as the African Charter and the African Democracy Charter are recognised in this discussion, as was highlighted above. The implementation of the Maputo Protocol has been substantially prolonged as a result of a lack of political will across the continent, coupled with ‘challenges in changing prevailing behaviours and attitudes that embrace patriarchy.’⁷⁸ It is therefore important to reiterate the multifaceted ways in which AU member states have approached women’s right to political participation. In this regard, which is highlighted below, it is key to acknowledge that the Maputo Protocol and the African Democracy Charter have unequivocally used strong and similar language in presenting the obligations of the state parties. These instruments therefore complement each other in the strongest terms.

As is evident from the general provisions of the AU Constitutive Act, as discussed above, the promotion of gender equality is a fundamental principle on which the AU rests. It was therefore essential that this principle was operationalised not only in the treaties generated by the AU on different themes, such as the African Democracy

⁷⁸ Romi Sigsworth and Liezelle Kumalo, ‘Women, Peace and Security – Implementing the Maputo Protocol in Africa’ (2016) 295 Institute for Security Studies Papers 20.

Charter, but also that women's rights were strengthened by their recognition in a separate instrument. Conceived under article 66 of the African Charter, the Maputo Protocol was adopted in July 2003 and entered into force just 18 months later, in November 2005.⁷⁹

Article 9(1)(a) and (b) obligates state parties to take *specific positive action* to promote the equal participation of women in national political life through *affirmative action*. In this regard, states must ensure, through legislation and other means, that women can participate in all elections without any discrimination; and that women are represented equally at all levels with men in all electoral processes. Key to the discussion in this article is the remedy of 'specific positive action' and 'affirmative action'. Here it is worth acknowledging that, as mentioned above, the Maputo Protocol and the African Democracy Charter complement each other: where the latter refers to the creation of the 'necessary conditions for full and active participation of women', the Maputo Protocol defines what those conditions are.

As a point of departure, states are obligated to act and to affirm women through such positive acts to achieve equality. It is helpful, therefore, to view the obligation in article 9 as two-fold: first, to introduce a process to achieve equality in participation and, second, to achieve the outcome of actual equality in participation.

It is not the objective of this article to define and discuss equality comprehensively as an end result in the domain of political participation. In this context, political participation, equal seats around a political table—in parliament, for example—has often been debated as an aspired end-result. The AU Agenda 2063 essentially envisages gender equality in terms of political participation as 'women occupying at least 50 percent of elected public offices'.⁸⁰ However, equality of participation has been understood differently in different contexts. For example, in the Rwandan Constitution,⁸¹ 'equality of participation' specifies that women be granted at least thirty per cent of posts in decision-making bodies.⁸² In a similar manner, the Kenyan Constitution⁸³ limits the representation of the majority gender to no more than two-thirds in elective and appointed bodies.⁸⁴

However, these quota systems are not implemented without difficulties. For example, the Supreme Court of Kenya, in its 2012 Advisory Opinion,⁸⁵ had to consider the implementation and realisation of the two-thirds gender rule. The Supreme Court

⁷⁹ Article 29(1).

⁸⁰ AU Agenda 2063, 9 para 52.

⁸¹ Constitution of the Republic of Rwanda of 2003.

⁸² Article 9 of the 2003 Constitution of Rwanda.

⁸³ The Constitution of Kenya, 2010 (2010 Constitution).

⁸⁴ Articles 27(8) and 81(b).

⁸⁵ 2 of 2012.

concluded that the gender rule had to be implemented progressively and that its implementation was dependent on further actions of the state.⁸⁶ The minority judgment fundamentally pointed out that ‘political and civil rights demand … a thorough treatment of the historical, social, economic and political basis of the two-thirds gender principle.’⁸⁷ But implementing a quota system regardless of its design cannot focus only on the end-result; instead, it requires the building up, innovatively, of a political culture that recognises the need to have women in the political sphere.

Returning to the Maputo Protocol and the process of achieving equality in participation, its strength lies in its comprehensive definitions contained in article 1, its insistence on the eradication of stereotypes and harmful social and cultural practices, a combination of well-defined and far-reaching state obligations and a direct instruction to state parties to allocate the necessary budgetary means to the implementation of the prescribed rights. Together, these instructions serve to operationalise the right to participation, presenting it as a process, as is detailed below.

Article 1(f) of the Maputo Protocol defines ‘discrimination’ as

any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

For the purposes of contextualising article 9, it is important to acknowledge that ‘exclusion’ is a form of discrimination that activates the remedies in article 2 set out to eliminate discrimination against women.

Article 2 emphasises the role of negative and harmful stereotypes and obligates states to modify the social and cultural patterns of conduct and harmful cultural and traditional practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

In returning to the Ugandan example presented in Tamale’s research in the 1990s, a male observer at a campaign rally reminds a female candidate of an old African saying: ‘*Wali owulide ensera ekokolima?*’ (‘Have you ever heard a hen crow?’). As described by Tamale, ‘the message was clear: Women have no business standing for political office’ and ‘[t]he rowdy applause from the other men at the gathering signalled their broad sympathy and support for their colleague’s observation.’⁸⁸ The stereotype ‘that women are poor decision-makers’ and therefore will be ‘bad politicians’ is grounded in a patriarchal structure which the Maputo Protocol importantly recognises and takes

⁸⁶ Paragraphs 71 and 77.

⁸⁷ Paragraph 9.3.

⁸⁸ Tamale (n 69) 1.

issue with. It does so by obligating states to take action against such negative and harmful stereotypes by implementing different measures of re-socialisation.

Defining women's exclusion from participation in the political sphere as a form of discrimination caused by stereotypes about women's roles and abilities activates a host of obligations under article 2. Furthermore, the remedies enumerated in article 2 are useful in defining 'specific positive action' and 'affirmative action', as referred to in article 9 and which, by analogy, are relevant to the African Democracy Charter. Besides honouring their obligation to enact legislation at different levels, states must ensure that the Charter is effectively applied and implemented through proper regulations and they must take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist. In fact, the law must go further than merely legislating formal equality or be amended with the same effect: it must ensure substantial equality. Substantial equality is firmly grounded in the idea of re-socialisation, as mentioned above.

Importantly, re-socialisation is part of the legal obligations contained in the Maputo Protocol. This approach to the obligation to eradicate practices stemming from inherent patriarchal structures, under the Maputo Protocol, was confirmed by the African Court on Human and Peoples' Rights ('African Court') in *APDF and IHRD v Republic of Mali ('ADPF')*.⁸⁹ In its reasoning, the African Court explained that re-socialisation, as the most powerful tool in combating inequality between men and women, translates into various practical obligations that rest on the state. These include informing, teaching, educating and sensitising its populations about issues such as gender inequality, harmful practices and gender stereotypes.⁹⁰ In this regard, the African Court specifically referred to unequal inheritance laws, early marriages (depriving girls of the right to education) and the lack of consent in some customary and religious traditions for entering marriage as hurdles to women's substantial equality and where re-socialisation through education and other means must take place.⁹¹

Stepping into the corridors of power is a long process that intertwines the different social expectations of men and women, access to education and recourses, access to time (for many women there is little time to contemplate political ambitions at the end of a day of housework and child-rearing) and various stereotypes about women's and men's strengths and weaknesses. Gender equality, especially in political terms, also embodies a struggle for limited resources and power and is forcefully resisted by those in power. As elaborated on by Kameri-Mbote

⁸⁹ *Association Pour Le Progrès et la Défense des droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*, Application No 046/2016, para xii.

⁹⁰ *ibid.*

⁹¹ *APDF* paras, 124–125.

[E]ven where law clearly provides for gender equality, law's capacity to the promise is mediated by other factors such as resistance to women's entry into the political space, for instance, by men who perceive such entry as threatening.⁹²

It is clear that the process of participation through the mechanism of the law can be useful, but that substantial progress can be made only once societies have been re-socialised to view men and women as equal participants in the political field. The Maputo Protocol importantly obligates states to take a holistic approach, focusing both on achieving a process that includes re-socialisation as a mechanism for change and on equal participation by the genders.

Conclusions

Positionality, as the theory guiding the enquiry in this article, sought to unearth some of the diverse experiences of disadvantage facing Malawian women as they enter politics. From this perspective we attempted to analyse potential disadvantages through the lens of the Maputo Protocol to make possible some suggestions of systemic reform. Our analysis revealed the political scene in Malawi to be mainly a 'boys' club', judging by the cluster of structural impediments as well as the situational and contingent factors. In the current circumstances, men are arguably still in a much better position to join politics and are even more advantaged in successfully claiming parliamentary seats. Women are limited to choosing from mainly male candidates whose names appear on the ballot paper.

As set out above, Malawi, having ratified both the Maputo Protocol and the African Democracy Charter, has hard targets to achieve in the area of equal gender participation. The obligations set out under article 9(1)(a) and (b), read in conjunction with articles 1(f) and 2, help to strengthen its obligations to attain gender parity by labelling 'exclusion' a form of discrimination. To combat exclusion, the Maputo Protocol, supported by the African Democracy Charter, offers two important avenues for achieving the objectives in article 9: first, processes defined as special, positive and affirmative measures which often translate into legislated quotas or, as described above, differential nomination fees; and, secondly, processes of re-socialisation, sensitisation and education about stereotypes and harmful cultures or practices. Regarding the latter, to make practical sense of quotas and to empower women in their positions, stereotypes, practices and cultures related to patriarchal structures, such as those that exist in Malawi, have to be dismantled.

The discussion highlighted the reality that Malawians still exist in a strong patriarchal culture in which there is a dire need for re-socialisation in order to achieve the goal of

⁹² Patricia Kameri-Mbote, 'The Quest for Equal Gender Representation in Kenya's Parliament: Past and Present Challenges' in J Biegan (ed), *Gender Equality and Political Processes in Kenya: Challenges and Prospects* (Strathmore University Press 2016) 47.

substantial equality. Based on gender stereotypes, women do not have a presence at all levels of decision-making, especially that affecting all levels of their lives. What starts at home is transferred into the political domain, where political violence is perpetrated against women by their male opponents to shame them for taking a strong political stance. The influence of patriarchy was highlighted through the use of gendered stereotypes, where successful political figures are described as ‘father figures’ or as ‘macho men’. This points to the acute need for the obligations in the Maputo Protocol to tackle such stereotypes to be actioned in Malawi. Therefore, we suggest that legislated quotas to ensure women’s equal representation should be introduced in Malawi hand in hand with extensive efforts at re-socialisation through sensitisation and educational programmes.

In our discussion we also suggested that the FPTP electoral system used and the way political parties are registered have a negative effect on women’s representation in Malawi. The FPTP system reduces female candidates’ chances of representing a party, as a female candidature is often viewed as ‘risky’ compared to the candidature of a male. Moreover, the Political Parties Act skews the registration process in favour of men because there is no pre-condition of gender equality in registering a political party in Malawi. Both issues are principally linked to the issue of who gets to represent a constituency on a political party ticket. Therefore, to increase female representation, the electoral system should be reviewed and replaced with a proportional representation system; and a gender criterion must be integrated into the registration process under the Political Parties Act.

Finally, our research highlighted the extent to which the low socio-economic status of women is linked to their low levels of participation in the political field. Women, unlike their male counterparts, end up missing out on elected positions due to a lack of education and the finances needed to support their campaigns. Education and financial support clearly remain areas of disadvantage for Malawian women. This, again, points to the obligations of Malawi, under the Maputo Protocol, to resolve the question of the equal participation of women in the political sphere by creating a gender-equal society.

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