

**AN EXAMINATION OF THE DOMESTICATION OF NORMATIVE STANDARDS ON WOMEN'S
POLITICAL PARTICIPATION AT LOCAL GOVERNMENT LEVEL IN LESOTHO, RWANDA, SOUTH
AFRICA AND UGANDA**

by

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DECLARATION

I, Martin Semalulu Nsibirwa, hereby declare that this thesis is my original work and has not been previously submitted for the award of a degree at any other university or institution.

Signed: _____

Date: _____

Place: _____

DEDICATION

To my mother Corney Derodra and my late father Paul Munyagwa Nsibirwa
for their commitment to my education.

ACKNOWLEDGEMENTS

I have faced numerous hurdles while writing this thesis and in the process I have often been reminded of an excerpt from the 1999 inauguration speech of former South African President Thabo Mbeki. While conveying his best wishes to the runners in the Comrades Marathon he said that '[t]hose who complete the course will do so only because they do not, as fatigue sets in, convince themselves that the road ahead is still too long, the inclines too steep, the loneliness impossible to bear and the prize itself of doubtful value'.

I have been able to complete this work with the support and encouragement of numerous people who fall in the following categories: (i) my personal friends (ii) some of my former fellow doctoral candidates at the Centre for Human Rights (iii) human rights institutions that hosted me for research visits (iv) employees of government ministries, civil society and the academia (v) students who assisted with data collection. Thank you all.

To Professor Frans Viljoen, thank you for your guidance.

A special thank you to my wife Adiam Wolday Woldeyohannes and our two children Amani Wolday Nsibirwa and Awet Wolday Nsibirwa. For many years, this thesis became 'the other woman' in our lives, however, you have displayed high levels of equanimity for which I will remain eternally grateful.

SUMMARY

This study is premised on the assumption that women's right to political participation in Africa is vital, especially as women constitute half of the population in African states. Since the 1990s, much attention has been focussed on the role of women in African politics. Consequently, women's inclusion, especially in legislatures and in the executive arm of government, has increased during this period. International and national law, combined with political will, have been relied upon to ensure that women are included in key decision-making positions in national government. However, women's political participation in local government has received less attention, despite the fact that local government may be the level of government best suited to positively impact on women's daily lives. Four of the leading African states in respect of women's political participation in local government are Lesotho, Rwanda, South Africa and Uganda. The study focuses on these states with a view to establishing the extent to which they have domesticated international norms that advance women's political participation in local government.

Surveying relevant international instruments at the global and Africa regional level, the study establishes that generally, international law recognises women's right to participate in politics. Local government was, in particular, not even mentioned and participation in local government could be inferred from the wider right to political participation. However, recent developments in international law are increasingly paying attention to local government. In addition, attention is increasingly being paid to ensuring that women enjoy the right to political participation on the basis of equality with men. Consequently, parity in representation is being promoted and states are expected to domesticate the international norms to which they are parties in order to realise the goal of equality in political participation.

States have made efforts to domesticate international norms by including them in their constitutions or legislation. In addition, states have put in place temporary special measures focussing on the area of local government. These measures are to be utilised by states, to ensure that women participate more fully in local government.

With respect to the four states under investigation, it is observed that there is a limited application of temporary special measures that can be used to promote women's political participation in local government. In terms of the actual extent of women's participation, the limited available data illustrates a relatively high percentage of women in local government, especially at the level of councillors where all the four states reviewed are performing reasonably well. None of the four states has attained gender parity among directly elected councillors even though the number of women councillors is fairly high in some of the states. Among other senior local government positions, the rate of including women is inconsistent. In some cases women are included in substantial numbers but there are also cases where the inclusion of women is disconcertingly low. States are also failing to provide detailed information on women's political participation across all portfolios in local government. The implication of such shortcomings is that the actual levels of women's inclusion remain largely unknown and therefore efforts to address women's marginalisation are undermined.

In order to ensure increased political participation of women at the local government level, a number of measures must be taken. First, efforts should be made at the international level to further elaborate the right to political participation with particular reference to local government, especially in so far as indirectly elected or appointed office is concerned. These are areas of local government where the current norms do not sufficiently advance women's inclusion and as a result inclusion of women is inconsistent. Second, human rights treaty bodies should pay greater attention to questioning states on their performance in including women in local government. Questioning state performance will create greater awareness and increase the attention that states pay to women's political participation in local government. Third, concerted efforts should be made to streamline legislation on local government in the four states under review with a view to making it simpler, clearer and consistent. The current proliferation of laws can create challenges in understanding the extent to which the law promotes women's political participation in local government. Finally, the four states should display greater transparency with regard to providing data on women's political participation in local government. Providing sufficient data would enable proper scrutiny and provide a diachronic picture of developments as far as women and men's political participation in local government is concerned.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
APRM	African Peer Review Mechanism
AU	African Union
CCPR	Committee on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEN-SAD	Community of Sahel-Saharan States
COMESA	Common Market of Eastern and Southern Africa
CPRW	Convention on the Political Rights of Women
CRRs	Country review reports
CSAR	Country Self Assessment Report
CSO	Civil society organisation
CSW	United Nations Commission on the Status of Women
DRC	Democratic Republic of Congo
EA	East Africa
EAC	East African Community
EALA	East African Legislative Assembly
ECCAS	Economic Community of Central African States
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
FEMNET	African Women's Development and Communication Network
FPTP	First-past-the-post
GRB	Gender responsive budgeting
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IGAD	Inter-governmental Agency for Development
IMF	International Monetary Fund
INGO	International non-government organisation
NEPAD	New Economic Partnership for Africa's Development
NGO	Non-governmental organisation

OAS	Organisation of American States
OAU	Organisation of African Unity
RALGA	Rwanda Association of Local Government Authorities
REC	Regional economic community
RISDP	Regional Indicative Strategic Development Plan
SACU	Southern African Customs Union
SADC	Southern African Development Community
SALGA	South African Local Government Association
SREC	Sub-regional economic community
UDHR	Universal Declaration of Human Rights
ULGA	Uganda Local Government Association
UMA	Arab Maghreb Union
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNIFEM	United Nations Development Fund for Women
UPR	Universal Periodic Review

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CHAPTER 1: INTRODUCTION

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- 1.2 Research questions
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1.1 Background to the study and statement of the problem

It is estimated that the population of Africa is growing at an annual rate of about 2.2 percent.¹ Africa's current population of 1.062 billion will increase to an estimated 1.937 billion by 2050.² Women constitute 50 percent of the population in Lesotho and Rwanda while in South Africa and Uganda they account for nearly 51 percent of the population.³ Despite accounting for half of the population,⁴ in most African countries, women are not adequately — and certainly not close to the level of 50 percent — included in most political offices.

¹ United Nations Population Fund *By choice not by chance: Family planning, human rights and development* (2012) 48 & 114. See also Department of Economic and Social Affairs, Population Division, United Nations 'Population growth, structure and distribution: The concise report' (1999) 6. According to the report from the Population Division, it was estimated that Africa's population would grow at an average rate of 2.4%.

² United Nations Population Fund *By choice not by chance: Family planning, human rights and development* (2012) 112-114.

³ United Nations Population Fund *People and possibilities in a world of 7 billion* (2011) 118-120. Lesotho has 2.2 million people of whom half are women, Uganda's population is 34.5 million and women account for half of this population. Rwanda's population stands at 11 million and women account for 5.6 million. In South Africa women account for 25.5 million out of a population of 50.5 million.

⁴ African Development Bank Group *et al African statistical yearbook 2012* (2012) 31-32. According to this publication, in 2011 Africa's population stood at 1 044 304 000 and women accounted for 50% of this population.

The political and economic transformation in sub-Saharan Africa in the 1990s paved the way for an increase in the political participation of women.⁵ Inspired by a belief that their ‘performance can be no worse than those of earlier male politicians, and is likely to be considerably better’,⁶ African women have increasingly sought public office.⁷ A noticeable area that has seen an increase in women’s political participation is the legislature. These increases are reflected in some African countries emerging among the highest ranked in the world.⁸ As a region, though, the sub-Saharan African regional average of women in lower houses of parliament is only 20.8 percent, which is only marginally higher than the world average of 20.7 percent.⁹

In the area of local government, Lesotho, Rwanda, South Africa and Uganda are regarded as pacesetters in terms of including women in local government leadership.¹⁰ According to a report by the African Women’s Development and Communication Network (FEMNET), in

⁵ D Ottemoeller ‘The politics of gender in Uganda: Symbolism in the service of pragmatism’ (1999) 42 *African Studies Review* 90.

⁶ G Mikell ‘African feminism: Towards a new politics of representation’ (1995) 21 *Feminist Studies* 409.

⁷ E Johnson-Sirleaf ‘African women and political participation’ <http://www.awdf.org/browse/1416> (accessed 13 September 2012). See also AM Tripp ‘The new political activism in Africa’ (2001) 12 *Journal of Democracy* 141.

⁸ G Bauer & HE Britton ‘Women in African parliaments: A continental shift?’ in G Bauer & HE Britton (eds) *Women in African parliaments* (2006) 1 2. Bauer and Britton noted that countries such as Rwanda, South Africa and Uganda experienced ‘significant advances in women’s political representation have been realised despite pervasive gender inequality, patriarchal social relations, and historically male-dominated politics’.

⁹ ‘Women in national parliaments’ <http://www.ipu.org/wmn-e/world.htm> (accessed 1 December 2012). See also ‘Women in national parliaments: Situation as of 31 October 2012’ <http://www.ipu.org/wmn-e/classif.htm> (accessed 23 November 2012). In terms of the number of women in lower houses of parliament in the states that this study focuses upon, in Rwanda women account for 56% of parliamentarians making Rwanda the world leader in the number of women in parliament. South Africa ranks 8th in the world with 42.3% of parliamentarians being women. Uganda has 35% parliamentarians as women and ranks at number 21 in the world. Lesotho stands at number 43 in the world with 25.8% women.

¹⁰ NM Winyi (ed) ‘African women leadership conference report’ (2010) <http://femnet.co/index.php/en/meeting-reports> (accessed 20 July 2012) 23 24.

2010 apparently the representation of women at local government was better than that at the national level.¹¹ Lesotho and South Africa were cited as examples in this regard.¹² Of course, reference may have been focussed only on certain positions within local government and not local government as a whole.

In terms of its structure, local government in Lesotho, Rwanda, South Africa and Uganda has various leadership structures and tiers. To some extent, women have been included in the leadership structures even though their exact participation in key areas of local government has not received substantial attention and little comparative analysis exists to show how these states have tried to deal with the issue of women's inclusion. It appears that most of the attention in local government reform has been focussed on inclusion of women as local government councillors even though there are numerous other important levels of leadership within local government.

In Lesotho, local government consists of one municipal area (Maseru), 10 districts and 11 urban councils.¹³ The 10 districts are further sub-divided into 65 community councils.¹⁴ The 11 urban councils are centred around towns.¹⁵ The key decision-makers in local government include 1276 directly elected councillors, chairpersons, community council secretaries, town

¹¹ NM Winyi (ed) 'Our politics is now: Moving beyond the rhetoric of women's political participation' (2010a) <http://femnet.co/index.php/en/meeting-reports> (accessed 20 July 2012) 30.

¹² As above.

¹³ Genderlinks 'Getting the balance right: Gender in the 2011 Lesotho local government election' <http://www.genderlinks.org.za/article/getting-the-balance-right-2012-04-19> (accessed 28 August 2012) 7. See also MA Kapa 'Lesotho's local government system: A critical note on the structure and its implications for popular participation and delivery' http://www.trc.org.ls/LDP_website/downloads/Lesotho%20local%20government%20paper%20kapa.pdf (accessed 14 September 2012).

¹⁴ Prior to the 2011 elections the 10 districts were sub-divided into 128 community councils. Genderlinks 'Getting the balance right: Gender in the 2011 Lesotho local government election' 7.

¹⁵ Genderlinks 'Getting the balance right: Gender in the 2011 Lesotho local government election' 7. See also Kapa 3.

clerks, district administrators and district council secretaries.¹⁶ Lesotho has one mayor and this is the mayor for the Maseru municipal area.¹⁷

In Rwanda, local government consists of districts, sectors, cells and then villages, with the latter as the lowest level of local government.¹⁸ Village and cell councillors are directly elected, while sector and district councillors are indirectly elected.¹⁹ Rwanda has 30 districts and one municipality (Kigali). Each district has a mayor, two vice-mayors, a council president and an executive secretary. The executive secretary is the most senior civil servant and is appointed into the position while other members of the executive are indirectly elected. The indirectly elected members of district councils are elected from the sectors.²⁰ District councils vary in size depending on the number of sectors in a district.²¹ In accordance with the law, special seats are reserved for marginalised groups that include women.²² In terms of management of the district, the district executive committee is charged with the daily management of a district.²³

Local government in South Africa consists of 278 municipalities that are divided into 226 local municipalities, 44 district municipalities and 8 metropolitan municipalities.²⁴ The

¹⁶ Genderlinks 'Getting the balance right: Gender in the 2011 Lesotho local government election' 1 & 4. Information was confirmed in an interview with a government official working in the Lesotho Ministry of Local Government and Chieftainship.

¹⁷ Genderlinks 'Getting the balance right: Gender in the 2011 Lesotho local government election' 1.

¹⁸ 'The local government system in Rwanda' <http://www.clgf.org.uk/userfiles/1/files/Rwanda.pdf> (accessed 8 August 2012).

¹⁹ 'The local government system in Rwanda' <http://www.clgf.org.uk/userfiles/1/files/Rwanda.pdf> (accessed 8 August 2012). In 'direct elections' the legally eligible voters in the general population vote for their representatives whereas in 'indirect elections' the already elected representatives form the electorate and in turn vote for office holders.

²⁰ 'The local government system in Rwanda' <http://www.clgf.org.uk/userfiles/1/files/Rwanda.pdf> (accessed 8 August 2012).

²¹ As above.

²² As above.

²³ As above.

²⁴ Department of Cooperative Governance and Traditional Affairs 'State of local government in South Africa: Overview report national state of local governments assessments' 7 (on file with author).

metropolitan municipalities have been established for the eight 'urbanised and industrialised centres in the country'.²⁵ The senior most officials in the municipalities include the mayor, speaker, chief whips and municipal managers. The municipal managers are the administrative heads of a municipality. In terms of its management, local government consists of directly elected councillors, executive committees and the civil service (municipal managers and other staff).²⁶

Uganda is divided into 111 districts and one city (Kampala). Districts form the basis of local government. Within a district are other sub-divisions and each of these sub-divisions is considered a 'body corporate' and forms part of local government.²⁷ A number of administrative units exist at local government level across the country, for instance, a district is sub-divided into counties, sub-counties, parishes and then villages. Urbanised areas are divided into municipalities that are also divided into sub-counties, parishes or wards and then villages. The only city, Kampala, has a city council that is divided into 5 division urban councils and each division is headed by a mayor.²⁸ Towns have town councils. A distinction is also made between urban and rural areas.²⁹ In urban areas administrative units include parishes or wards and below these are villages. Rural areas have counties, then parishes and then the smallest unit is the village. Besides councillors who are directly elected, there are senior officials in Uganda's local government who are directly elected and these include mayors, district or city chairpersons, municipal chairpersons, and sub-county chairpersons.³⁰

²⁵ 'About local government' <http://www.salga.org.za/pages/Municipalities/About-Municipalities> (accessed 28 August 2012).

²⁶ Understanding local government <http://www.etu.org.za/toolbox/docs/localgov/webundrstdlocgov.html> (accessed 9 August 2012).

²⁷ J Ahikire 'Decentralisation in Uganda today: Institutions and possible outcomes in the context of human rights' http://www.ichrp.org/files/papers/41/116_-_Uganda_-_Linking_Local_Government_and_Human_Rights_Ahikire__Joesphine__2002.pdf (accessed 28 August 2012) 5.

²⁸ 'Kampala City Council Authority' <http://www.kcca.go.ug/authority.php> (accessed 28 August 2012).

²⁹ RM Kavuma 'Explainer: Local government structures in Uganda' <http://www.guardian.co.uk/katine/2009/dec/14/local-government-explainer> (accessed 13 August 2012). See also K Saxena, S Paul & PR Goel 'Decentralisation in Uganda' http://www.ruralgov-ncaer.org/images/product/doc/13_400450990_DecimalizationinUganda.pdf (accessed 13 August 2012).

³⁰ As above.

Other key personnel within local government includes speakers, chief and deputy chief administrative officers.³¹

The above brief exposition of local governments in the four states reveals that, in fact, local government in each of the states has a complicated structure with many layers of leadership. Holistically, in all four states, the exact extent to which women are included in all these levels of local government leadership seems to be unknown — at least to the public.

Harnessing women's potential through their inclusion in the various structures of local government leadership is an imperative both for purposes of betterment of women's lives and for society as a whole. A number of reasons can be advanced to support women's inclusion in local government leadership. For instance, because women constitute half of the population, it is imperative that they are included in local government as they may be better placed to advance issues affecting women.³² A representative local government is also better placed to both accurately gauge societal needs and act on addressing such needs. Furthermore, in order to achieve sustainable development, including realisation of the United Nations Millennium Development Goals (Millennium Development Goals), the inclusion of women has been identified as a key requirement in light of the fact that women form the backbone of economic development in many countries.³³ By ensuring greater

³¹ As above.

³² See generally KL Tamerius 'Sex, gender, and leadership in the representation of women' in ML Krook & S Childs (eds) *Women, gender, and politics: A reader* (2010) 243-250. Some researchers question the view that simply by including women in leadership, these women will necessarily advance women's interests in all instances. Tripp for instance is of the view that while '[w]omen's increased representation enhances equality, fairness and justice in representation', it does not automatically follow that 'women are always going to share common concerns any more than one can say this of men'. AM Tripp 'Legislative quotas for women: Implications for governance in Africa' in MAM Salih (ed) *African parliaments: Between governance and government* (2006) 48-49. For also Ford who emphasises the point that 'gender does not bind women as a group'. See LE Ford *Women and politics: The pursuit of equality* (2011) 69.

³³ MA Freeman 'Women, law, and land at the local level: Claiming women's human rights in the domestic legal systems' (1994) 16 *Human Rights Quarterly* 560. See generally EE Nwokocha 'Bridging the Gender

participation of women, chances of attaining equality in society through effective combating of poverty and underdevelopment increase.³⁴ Women should therefore be seen 'as active agents of change: the dynamic promoters of social transformations that can alter the lives of both women and men'.³⁵ An additional reason identified by Imasogie is that participation in local government affords women the 'opportunity to take more control of their lives'.³⁶ Another justification for women's inclusion is that women may tend to 'pursue more selfless and caring politics than men do'.³⁷ A view is also advanced that the inclusion of women in leadership promotes good governance on the basis that women are less corrupt than men.³⁸ Women's presence in leadership positions also serves the important purpose of providing role models for other women and promoting justice.³⁹ Ahikire is of the view that the

Inequality Gap: Concretizing the Millennium Development Goals' (2007) <http://uaps2007.princeton.edu/papers/70514> (accessed 10 July 2012).

³⁴ United Nations Population Fund *The promise of equality: Gender equity, reproductive health and the millennium development goals* (2005) 16.

³⁵ A Sen *Development as freedom* (1999) 189.

³⁶ MO Imasogie *A comparative study of aspects of gender equality under Nigerian and South African law* (2001) Doctoral Thesis 293-294.

³⁷ G Geisler *Women and the remaking of politics in Southern Africa: Negotiating autonomy, incorporation and representation* (2004) 31.

³⁸ World Bank *Engendering development through gender equality in rights, resources and voice* (2001) 96. See also AE Eagly & LL Carli *Through the labyrinth: The truth about how women become leaders* (2007) 47. See also AM Goetz 'Political cleaners: Women as the new anti-corruption force?' (2007) 38 *Development and Change* 88 92 93 & 95. Goetz argues that the perception that women are less corrupt than men is a myth that 'puts women's engagement in the public arena on the wrong foot'. She is of the view that there is no causal link between the number of women in public positions and type of corruption and that the whole argument that women are less corrupt sees women as instruments and their involvement should be justified on the basis of their democratic right to participate. Goetz further opines that the myth of women being less corrupt has in fact contributed to their exclusion from politics because they are considered as incapable of rational debate that is necessary for public administration thereby relegating them to maternal related activities. Goetz argues that the way women access public office differs from that of men and may contribute to their conduct once in positions of authority. Goetz further argues that it is very difficult to research whether in fact women are less corrupt than men and that evidence on this subject is 'anecdotal'.

³⁹ A Phillips 'Democracy and representation: Or, why should it matter who our representatives are?' in A Phillips (ed) *Feminism and politics* (1998) 228-231. See also D Campbell & C Wolbrecht 'See Jane run:

‘numerical increase of women affects not just the articulation and promotion of gender issues in local politics but also the character and conduct of local politics’.⁴⁰ The absence of women in local government can have serious negative consequences for women especially as local government is the closest level of government to the people with the potential to more directly impact on their lives.⁴¹ This study deals with women’s political participation at the local government level premised on the contention that women’s political participation is vital at this level of government.

Of course, simply enabling more women to access decision-making positions is not the ‘panacea’ to ensure democracy and guarantee advancement of women’s needs.⁴² As Phillips points out, ensuring greater inclusion of women ‘is only part of a wider project of increasing and enhancing democracy’.⁴³ For example, in order for local government to succeed in delivering services a host of issues also play a role and these include ‘country context, its history, the political will, and the design of the administrative and financial systems’.⁴⁴ Therefore, within local government, the inclusion of women in leadership should be viewed as part of efforts for women to ‘make their needs better known’.⁴⁵ Increasing numbers alone is not the ultimate decider of taking women’s issues seriously but it is the making of policy and implementation of these policies which should also be gender sensitive.⁴⁶

Women politicians as role models for adolescents’ (2006) 68 *Journal of Politics* 233 247. See also Ford (2011) 143-144.

⁴⁰ J Ahikire ‘Gender equity and local democracy in contemporary Uganda: Addressing the challenge of women’s political effectiveness in local government’ in AM Goetz & S Hassim *No shortcuts to power: African women in politics and policy making* (2003) 213.

⁴¹ Phillips (1998) 235 236.

⁴² HE Britton *Women in the South African parliament: From resistance to governance* (2005) Kindle Electronic Edition, location 2065.

⁴³ Phillips (1998) 238.

⁴⁴ J Steffensen *et al* ‘Final- synthesis report: A comparative analysis of decentralisation in Kenya, Tanzania and Uganda’ <http://www.dege.biz/FINALSYNTHESISREPORTnovember.pdf> (accessed 28 August 2012).

⁴⁵ Phillips (1998) 239.

⁴⁶ AM Goetz & S Hassim ‘Introduction: Women in power in Uganda and South Africa’ in AM Goetz S & Hassim (eds) *No shortcuts to power: African women in politics and policy making* (2003) 1 5-7. See also FE Siddiqi & S Ranganathan *Handbook on women and human rights: A guide for social activists* (2001) xx. Here the authors while analysing the situation of women in India which allows for 30%

Despite recognising the importance of including women in local government in Lesotho, Rwanda, South Africa and Uganda, it appears that there is an over-concentration on including women as councillors while local governments in all these states has a myriad of key positions in which women should participate. From a legal and human rights perspective, the question that arises is whether sufficient legal mechanisms exist at both the international and domestic level to guarantee women's political participation in all leadership spheres of local government and whether these states are adhering to such standards if they exist.

1.2 Research questions

I investigate the following research questions:

1. To what extent do normative standards developed at the United Nations (UN), African regional and sub-regional levels, especially treaties to which Lesotho, Rwanda, South Africa and Uganda are parties, address women's right to political participation in local government? In other words, what are the key human rights-based principles to which states should adhere when promoting women's right to political participation at local government level?
2. Have Lesotho, Rwanda, South Africa and Uganda domesticated the relevant standards by enacting constitutional provisions and adopting legislation that focus on local government and that are in line with their commitments at the UN, African regional and sub-regional level?

representation of women in rural and urban areas in all elected offices have argued that this in itself is insufficient. They hold the view that 'one thing is clear that neither reservation nor short-term policies favouring women not any law is going to empower women because the problem is deeper as is seen at the superficial level'. Instead they advocate for change in cultural factors and these need to be changed through education so that people realise that women need respect and dignity'.

3. Are Lesotho, Rwanda, South Africa and Uganda, in their actual practices, adhering to the measures that are intended to give effect to their commitments in relation to women's political participation in local government?

1.3 Terminological clarification

'Domestication'

Once states ratify treaties, they have to ensure that they give effect to the treaty obligations at the domestic level.⁴⁷ The process of ensuring that norms in treaties take effect at the domestic level is often referred to as 'domestication', which in essence amounts to 'law-in-action.'⁴⁸ However, simply because a state accepts international standards does not guarantee that domestication will happen rapidly. Ratification rather signals that a state is intending to reconfigure its interests according to the agreed standards.⁴⁹ Simmons argues that between ratification and implementation of treaty provisions, much can happen to frustrate the process.⁵⁰

States' domestication of international law may be dictated by their 'self-interest'.⁵¹ When a state considers it to be in its best interest, it is more likely to give greater attention to domestication and implementation of treaty obligations. As Simmons notes, '[g]overnments may comply with agreements only because the treaty does not engage a national interest, or if it does, only if the treaty is consistent with that interest'.⁵² Where compliance happens and it is against state interest, such compliance may be viewed as coercion.⁵³ In the actual

⁴⁷ H Hydén 'Implementation of international conventions as a socio-legal enterprise: Examples from the Convention of the Rights of the Child' in J Grimheden & R Ring (eds) *Human rights law, from dissemination to application: Essays in honour of Göran Melander* (2006) 375.

⁴⁸ Hydén (2006) 375.

⁴⁹ M Finnemore *National interests in international law* (1996) 129.

⁵⁰ BA Simmons *Mobilizing for human rights: International law in domestic politics* (2009) 113.

⁵¹ Hydén (2006) 380.

⁵² Simmons (2009) 114.

⁵³ Simmons (2009) 114.

process of domestication three conditions must be fulfilled. First, the state must have the will. Second, it must have knowledge, the knowledge in this case would be of international standards. Third, there must be conducive external factors that enable individuals to act.⁵⁴

Notwithstanding different levels of development existing among nations, states are nevertheless expected to domesticate human rights standards and implement provisions of international treaties within their territories.⁵⁵ In the domestication of international standards states are required to ensure that resources are dedicated to realising the objectives of the treaty and that legal and administrative measures are in place, in addition to ensuring that the rights are widely publicised.⁵⁶

The domestication of international law may in all likelihood result in the limitation of some rights which may have previously existed.⁵⁷ In the case of political participation this may include for instance limiting the unfettered access to political power which men enjoy to the exclusion of women, in an effort to create a more equal society by ensuring that women also access positions of power. Should a state fail to domesticate international obligations that require equal access to positions of authority by women, negative judgment will be passed against such a state.⁵⁸ Ratification of international human rights treaties places a legal obligation on states to act so that such imbalances are obviated.

To realise human rights treaty obligations, a political obligation is placed on states which are required to have a 'comprehensive approach' to domesticating the rights.⁵⁹ Domestication requires coordination and acceptance by key players, namely, the central, federal and local governments.⁶⁰ In addition, domestication extends to cooperation with civil society and

⁵⁴ Hydén (2006) 386-387.

⁵⁵ Hydén (2006) 380.

⁵⁶ Hydén (2006) 381.

⁵⁷ AJ Simmons *Moral principles and political obligations* (1979) 7.

⁵⁸ Simmons (1979) 7.

⁵⁹ Hydén (2006) 382. See also Simmons (1979) vii.

⁶⁰ Hydén (2006) 383. See also Simmons (1979) 5. T Risse & SC Ropp 'International human rights norms and domestic change: Conclusions' in T Risse, SC Ropp & K Sikkink *The power of human rights:*

coordination among all these and the private citizen.⁶¹ In transforming international conventions to domestic law, cognisance must be had to local 'human actions and behaviour'.⁶² Without such cognition, the likelihood of successfully domesticating international laws diminishes. People must be interested in taking action and in addition they must be equipped with the correct knowledge and should be correctly guided, otherwise failure to have knowledge may result in inaction or achievement of insufficient results.⁶³ In order to ensure that people take action, socialisation of international norms must be achieved. Simmons identified three approaches that could be used in this regard. First, 'reward and punishments'; second, 'acculturation' where shaming and shunning may be part of the strategy used to ensure change in behaviour; and, third, 'persuasion', whereby through 'argumentation and deliberation' the belief system of an individual is changed.⁶⁴

Supportive structures and tools of implementation must be in place so that a linkage between policies and reality is achieved.⁶⁵ Sanctions and enforcement measures may have to be adopted in order to ensure success of the domestication process. As Hydén has noted, '[c]onventions have no sanctions and enforcement machinery of their own'.⁶⁶ States may rely on existing domestic sanctions and enforcement machinery. If a process of transformation is adopted by a state, convention standards can be backed up by existing 'sanctions and enforcement measures'.⁶⁷

International norms and domestic change (1999) 271 & 272. Risse and Ropp note that 'international norms are more likely to be implemented and complied with in the domestic context, if they resonate or fit with existing collective understandings imbedded in domestic institutions and political cultures'. Acceptance of international norms is greater where a state is liberal.

⁶¹ Hydén (2006) 383. See also Simmons (1979) 1.

⁶² Hydén (2006) 386.

⁶³ Hydén (2006) 386.

⁶⁴ BA Simmons 'International law' in W Carlsnaes, T Risse & BA Simmons (eds) *Handbook of international relations* (2013) 370-371.

⁶⁵ Hydén (2006) 385.

⁶⁶ Hydén (2006) 384.

⁶⁷ Hydén (2006) 384.

A number of factors can contribute to the process of domestication. For instance, these can include 'democratic consolidation', 'regime change' or problems related to 'serious international image'.⁶⁸ In the case of a state that has attempted to domesticate human rights following regime change and due to serious negative international image, Rwanda is an example following the 1994 genocide. Domestication may also happen as a result of 'prescriptive status' as was the case Uganda where, after taking power, Yoweri Museveni 'institutionalized' human rights.⁶⁹ However, domestication can also arise through a tactical concession in which case a state may feel vulnerable and if it was not adhering to human rights, it seeks to extend its hold on power by giving some concessions through allowing for human rights. Local NGOs may as a result be given space to operate as part of the tactical concession.⁷⁰ Another possibility for domestication of human rights can arise from 'regime vulnerability' as a result of which a state wishes to receive international acceptability.⁷¹ Another possibility for domestication of human rights standards may arise because a state displays 'rule-consistent behaviour' as was the case of South Africa during the change from Apartheid.⁷² Rule consistent behaviour may also account for the changes that have seen greater focus on women's rights in Lesotho in recent years.

The process of domestication is not always simple and straightforward. As noted by Hydén, '[h]uman rights conventions have a long way to go before reaching their final destination, namely, the human being'.⁷³ Numerous questions arise about the transition between the convention and the domestic legal system.⁷⁴ Essentially, three transition stages can be identified in the domestication process. First, the international level where the norms originate; second, the national level where support for the norms is given; and third, the sub-state level where the law is applied and where local conditions can compete with the norms that are sought to be implemented.

⁶⁸ Risse & Ropp (1999) 241.

⁶⁹ Risse & Ropp (1999) 245.

⁷⁰ Risse & Ropp (1999) 245-246.

⁷¹ Risse & Ropp (1999) 245-246.

⁷² Risse & Ropp (1999) 239-240.

⁷³ Hydén (2006) 375.

⁷⁴ Hydén (2006) 375.

Further factors that can impact on the domestication process are whether a state is monist or dualist in terms of how it deals with international law.⁷⁵ Where a state is monist, international law in theory automatically becomes part of domestic law upon ratification of a treaty. However, in practice ‘formal adherence does not necessarily guarantee ‘direct enforcement’’.⁷⁶ Additional measures may have to be taken such as enactment of laws or publication of the international laws before they can be given effect and even then there is still no guarantee that monism will guarantee that international standards are enforced.⁷⁷ What a monist state may offer is that if monism is strictly adhered to greater attention can be focussed on the relationship between societal norms and the implementation of the international norms instead of working around the subject of making international law part of national law. Monism if adhered to lessens the chances of making mistakes when converting international law to domestic law.

In dualist states, the process of implementation is more complicated as the international law has to be converted into domestic law thereby adding another opportunity for possible challenges that may not necessarily promote the ethos of the international law. Of course a possibility exists that in a dualist state, international law can be incorporated in the exact format in which it was adopted at international level.⁷⁸ Besides incorporation, a state may resort to transformation to fill in gaps that may be identified as the entire existing legal framework may not necessarily be inadequate.⁷⁹ However, a possibility exists that the international norms may be misunderstood and as a result incorrectly converted into domestic law.⁸⁰ A disjuncture may also occur between the ‘norms’ and national laws thereby impacting negatively on the implementation of treaty obligations.⁸¹ Another possibility could be that international norms are correctly translated into domestic law but at the

⁷⁵ Hydén (2006) 377.

⁷⁶ F Viljoen *International human rights law in Africa* (2012) 520.

⁷⁷ Viljoen (2012) 520 &521.

⁷⁸ Hydén (2006) 377-378.

⁷⁹ Hydén (2006) 378.

⁸⁰ Hydén (2006) 376.

⁸¹ Hydén (2006) 376.

implementation stage conflict with societal norms may result in digression from the intended objectives of the treaty obligation. Therefore, 'local context' should not be forgotten when international standards are sought to be used at a national and even local level.⁸² Regarding the issue of societal norms and their impact on domestication, Finnemore has noted that a number of factors can impact on the domestication process, including 'social norms, rules, understandings, and relationships we have with others'.⁸³ In addition, change of government, wars and other unanticipated events can also impact the domestication process.⁸⁴

Simmons in principle recognises that treaties can be domesticated through 'altering the national agenda, leveraging litigation, and empowering political mobilization'.⁸⁵

With regard to altering the national agenda, domestication of treaties can happen when the principles they promote become part of a national policy or agenda of a country.⁸⁶ If that becomes the case, the process of domestication is easier. The executive may be given a 'clear proposal to discuss an alternative to the status quo'.⁸⁷ Treaties can therefore have the effect of 'agenda-setting'.⁸⁸

In terms of litigation, domestication of treaty provisions can be strengthened through litigation.⁸⁹ In litigation the judiciary has to provide interpretation of treaties and therefore decisions emanating from treaty bodies may also be imported into the domestic arena

⁸² Finnemore (1996) 139.

⁸³ Finnemore (1996) 128. See also Simmons (2009) 113. See also Risse & Ropp (1999) 260, 261 & 274. See also Hydén (2006) 390. In addition to societal norms, a number of other factors such as those identified by Hydén, Risse and Ropp can also affect the domestication process. These could include class struggles, conflict, religious opinion, political and economic factors.

⁸⁴ Simmons (2009) 113.

⁸⁵ Simmons (2009) 148

⁸⁶ Simmons (2009) 127-128. See also Hydén (2006) 379 & 390.

⁸⁷ Simmons (2009) 128.

⁸⁸ Simmons (2009) 129.

⁸⁹ Simmons (2009) 129.

thereby strengthening the understanding of treaty provisions.⁹⁰ But of course litigation has its limits as most violations are never brought before a court of law.⁹¹

Mobilisation can help the domestication of international treaties as individuals may mobilise so as to claim the right from their leaders.⁹² Individuals must have the motive and mobilise if they are to succeed in demanding their rights.⁹³ People will mobilise if they recognise a 'grievance' and are of the view that the conditions are conducive for change to take place through those that wield authority.⁹⁴ International human rights treaties can be used to mobilise society.⁹⁵ As noted by Simmons with regard to the issue of how treaties can mobilise society, "human rights accords will contain highly attractive principles for a quite receptive mass audience segment".⁹⁶

Domestication of international norms can be affected by 'capacity constraints' whereby a state simply does not have the capacity to implement its obligations.⁹⁷ Capacity constraints can extend to a range of areas and could include 'bureaucratic capabilities, technical sophistication, and resource base needed to comply'.⁹⁸

'International'

The term refers collectively to UN, African regional and sub-regional levels.

⁹⁰ Simmons (2009) 131.

⁹¹ Simmons (2009) 132.

⁹² Simmons (2009) 135.

⁹³ Simmons (2009) 155.

⁹⁴ Simmons (2009) 136.

⁹⁵ Simmons (2009) 139.

⁹⁶ Simmons (2009) 141.

⁹⁷ Simmons (2013) 371.

⁹⁸ Simmons (2013) 371 & 372.

‘Local government’

‘Local government’ in this study refers to the lowest level of administration in a state and is subordinate to the central government.⁹⁹ It is concerned with governing a specific area and acts as the agent of the state within that area.¹⁰⁰ Local government is charged with the responsibility of addressing the needs of a local population. The powers of local government are generally derived from legislation and directives that emanate from higher levels of the government.¹⁰¹ Local government is recognised as the level of government that is best suited to deliver the most basic services to people.¹⁰²

⁹⁹ See eg Shah & Shah who define local government as ‘specific institutions or entities created by national constitutions (Brazil, Denmark, France, India, Italy, Japan, Sweden), by state constitutions (Australia, the United States), by ordinary legislations of a higher level of central government (New Zealand, the United Kingdom, most countries), by provincial or state legislation (Canada, Pakistan), or by executive order (China) to deliver a range of specified services to a relatively small geographically delineated area’. A Shah & S Shah ‘The new vision of local governance and the evolving roles of local governments’ in A Shah (ed) *Local governance in developing countries* (2006) 1. See also J Meyer *Local government law: General principles* (1978) 9-10. See also D Olowu & JS Wunsch *The challenges of democratic decentralization* (2004) 4. Hart, however, highlighted that defining local government may not always be easy especially in terms of its functions because sometimes matters are performed by local government purely by ‘accident’ or ‘convenience’. He noted that ‘[i]t might be thought that local government could be easily defined; but this is not the case’. WO Hart *Hart’s introduction to the law of local government and administration* (1968) 5.

¹⁰⁰ MB Letaief *et al* ‘Africa’ in World Bank & United Cities and Local Governments *Decentralization and local democracy in the world: First global report 2008* (2008) 31.

¹⁰¹ MB Letaief *et al* (2008) 26-27.

¹⁰² See A Todes *et al* ‘Some progress, but role of women in local government often marginal’ (2007) 5 *HSRC Review* 4; and L Mbatha ‘Democratising local government: Problems and opportunities in the advance of gender equality’ in AM Goetz & S Hassim (eds) *South Africa’ in No shortcuts to power: African women in politics and policy making* (2003) 188-212. See also P Bardhan ‘Decentralization of governance and development’ (2002) 16 *Journal of Economic Perspectives* 185 205. Bardhan argues that local government is credited with many positive aspects. Central government has lost credibility in many states while local government is considered as being ‘more responsive and efficient’ and may further help to diffuse ethnic conflict. See also SJ Burki *et al* *Beyond the centre: Decentralizing the state* World Bank (1999) 3. See also N Devas & U Grant ‘Local government decision-making – Citizen participation and local accountability: Some evidence from Kenya and Uganda (2003) 23 *Public*

‘Political participation’

The term ‘political participation’ has constantly evolved having generated much debate through the years. It is therefore important that I adopt a definition for purposes of my study.

In defining the term ‘political participation’ Verba and Nie are often cited in light of their pioneering study that defined ‘political participation’ as ‘those activities by private citizens that are more or less directly aimed at influencing the selection of governmental personnel and/or the actions they take’.¹⁰³ They argued that the concept extends beyond taking part in voting and campaigning.¹⁰⁴ Their emphasis was on how citizens influence government on the choices it makes.¹⁰⁵

Since the pioneering study of Verba and Nie a number of other scholars including Conway,¹⁰⁶ Conge,¹⁰⁷ Singerman¹⁰⁸ and Ross¹⁰⁹ have attempted to elaborate the definition of the term, paying particular attention to relationships between individuals and organs of state. Conway more or less adopted the definition conferred by Verba and Nie and suggested that the term

Administration and Development 311. While noting the arguments advanced for decentralisation, Devas and Grant also highlight the fact that local government is not perfect and that there have been mixed results with local governments and that it can be a challenge to have local government running properly due to problems related to decision-making, accountability and citizen participation. J Beall ‘Decentralizing government and centralizing gender in Southern Africa: Lesson from the South Africa experience’ Occasional paper August 2005 http://eprints.lse.ac.uk/2962/1/Decentralizing_government_and_centralizing_gender_%28UNRISD%29.pdf (accessed 28 August 2012) 2.

¹⁰³ S Verba & NH Nie *Participation in America: Political democracy and social equality* (1972) 2.

¹⁰⁴ As above.

¹⁰⁵ As above.

¹⁰⁶ MM Conway *Political participation in the United States* (1990).

¹⁰⁷ PJ Conge ‘The concept of political participation: Towards a definition’ (1998) 20 *Journal of Comparative Politics* 241-242.

¹⁰⁸ D Singerman *Avenues of participation: Family, politics and networks in urban quarters in Cairo* (1995).

¹⁰⁹ MH Ross ‘Female political participation: A cross-cultural explanation’ (1986) 88 *American Anthropologist* 843-844.

includes influencing ‘structures’ and ‘policies’ of government.¹¹⁰ Conway stated that ‘political participation’ is ‘those activities of citizens that attempt to influence the structure of government, the selection of government authorities, or the policies of government’.¹¹¹ Conge argued that there are six criteria, namely: form, behaviour, objects, aims, actions and outcomes, which have to be examined in order to determine ‘political participation’.¹¹² Furthermore, Conge questioned whether action or inaction and aggressive as opposed to passive behaviour impacted on the understanding of the term and furthermore whether the focus of ‘political participation’ must be limited to the government only.¹¹³ Singerman argued that definition of the term was too preoccupied with influencing the elite within government and failed to appreciate that sometimes people prefer not to be involved because of fear for their personal well-being.¹¹⁴ Ross’ point of view on the subject was that the term should be confined to the struggle for allocation of resources.¹¹⁵ The definitions of these scholars seemed to focus on government as a central element of ‘political participation’.

More recently, Teorell, Torcal and Montero have taken the debate further by arguing that political participation need not necessarily be directed at government.¹¹⁶ They define political participation to mean ordinary citizens or ‘non-elites’ taking action in order to influence a political outcome.¹¹⁷ According to their definition, four key elements that must be fulfilled are identified, these being, first, ‘observable behaviour’ or ‘action’; second, the ‘individuals’ involved ‘are non-elites’; third, that the individuals involved have ‘an intention to influence’ or ‘assert demands’ and; four, they argue that the person who the ordinary people seek to influence need not be a state entity.¹¹⁸ The definition by Teorell, Torcal and

¹¹⁰ Conway (1991) 3-4.

¹¹¹ As above.

¹¹² Conge (1998) 241-242.

¹¹³ Conge (1998) 241.

¹¹⁴ Singerman (2005) 4-5.

¹¹⁵ Ross (1986) 843-844.

¹¹⁶ M Teorell *et al* ‘Political participation: Mapping the terrain’ in JW van Deth *et al* *Citizenship and involvement in Europe Democracies: A comparative analysis* (2007) 334-337.

¹¹⁷ Teorell *et al* (2007) 336-337.

¹¹⁸ As above.

Montero differs markedly from earlier definitions that focussed on government by finding the explanation in the different schools of thought that may exist in defining ‘political participation’. It is therefore clear that 40 years after the pioneering definition accorded to ‘political participation’ by Verba and Nie, the last word on defining the term is yet to be written. In giving my definition for purposes of this study, I do so fully aware of the debate that has raged on over the years.

In this study I use the term ‘political participation’ in a very restrictive sense. For purposes of this study ‘political participation’ refers to active involvement by an individual in matters of governance, particularly in positions of leadership. The person holding a leadership position may ascend to office through appointment or by way of direct or indirect election. Appointment in this case refers to being assigned to non-elected office. In ‘direct elections’ the legally eligible voters in the general population vote for their representatives whereas in ‘indirect elections’ the already elected representatives form the electorate and in turn vote for office holders.

Throughout the study, the term ‘political participation’ is used interchangeably with ‘participation in politics’ and for purposes of the study the two are intended to carry the same meaning.

1.4 Methodology

My study is restricted to a desktop review of existing literature. I do not undertake an independent empirical study. In this study I supplement existing literature, which has been surveyed and to which I return later in the study in the following way:

First, international human rights instruments are used as the primary source of analysis. I undertake a textual and contextual analysis of these instruments to better understand the right to participate in politics. I examine treaty body interpretations, general comments and findings with a view to establishing the degree to which these treaty bodies further elaborate on treaty provisions. On the basis of this analysis, I then synthesise states’ obligations with respect to women’s participation in politics at the local government level.

Second, in order to provide a better understanding of the right to participate in politics, I undertake desktop research in which I limit myself to the area of local government within Lesotho, Rwanda, South Africa and Uganda. In the desktop research, I rely on existing qualitative and quantitative data in an effort to establish the extent to which the right to political participation at local government level is upheld in as far as it relates to women. I do not undertake an empirical data collection of my own, but instead rely on data that is already in the public domain such as data generated by research from state entities, non-governmental institutions and independent researchers.

The literature survey relies on both primary and secondary sources.

Primary sources referred to in this study include treaties, declarations, resolutions, constitutions, national legislation, country reports, reports from other sources, general comments, interpretations and findings of international institutions. In analysing the current state of women's political participation at local government level in Lesotho, Rwanda, South Africa and Uganda I rely primarily on a desktop review of reports submitted in terms of the reporting mechanisms under the International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Universal Periodic Review (UPR), the African Charter on Human and Peoples' Rights (ACHPR), reports on states by the African Peer Review Mechanism (APRM) and reports submitted under the Solemn Declaration on Gender Equality (Solemn Declaration). To ensure a balanced assessment of women's participation, I do not rely only on state reports but also on concluding observations from treaty bodies. For a broader understanding of women's participation in politics, reports from specialised bodies such as non-governmental organisations (NGOs) and international non-governmental organisations (INGOs) are also analysed.

In my study, secondary sources include journal articles, books, and papers. The Internet is used extensively as a source of information on this subject.

Although the study does not attempt to provide a full comparative position in the four countries, it has an inevitable comparative dimension. In relevant and appropriate instances,

data and different positions of the situation in the four countries are provided with differences and similarities pointed to.

The approach I take is both descriptive and prescriptive. Chapters 2 to 5 are both descriptive and prescriptive. In chapters 2 and 3, I examine the norms in existence and seek to establish how these norms can be relied upon to advance women's right to participate in politics at the local government level. In chapter 4, I examine constitutions, legislation and policies in place that can be relied upon to advance women's political participation at the domestic levels of Lesotho, Rwanda, South Africa and Uganda. Chapter 5 is descriptive in that it describes the performance of Lesotho, Rwanda, South Africa and Uganda with reference to their obligations, discussing the extent to which these states are upholding the standards to which they have committed themselves in relation to women's political participation at the local government level. By making recommendations, chapter 6 contains prescriptive elements as it suggests solutions to identified shortcomings.

1.5 Scope of the study

The scope of the study is delimited in three respects: (1) with respect to the states it concentrates upon; (2) with respect to the time frame of the study; and, (3) in relation to its concentration on local government as one of the spheres of government.

The study concentrates on Lesotho, Rwanda, South Africa and Uganda. In choosing these four states, the following criteria have been applied:

- 1) The states are drawn from the East and Southern African regions and as such the study provides a contrast of how states from two major sub-regions in Africa are performing in terms of women's political participation in local government. The four states have constitutional and legislative provisions that promote equality between women and men in all spheres of life and examining the extent to which the law promotes women's participation in local government is important. All four states have gone through periods of conflict and present a good opportunity for a

comparison in terms of how they have approached the subject of women's political participation in local government in post-conflict periods.¹¹⁹

- 2) All these states are member states of the UN and the AU.
- 3) The states are party to the key human rights instruments that are to be analysed, in particular, the ICCPR, CEDAW and with the exception of South Africa the other 3 states are parties to the Convention on Political Rights of Women (CPRW).¹²⁰
- 4) At the regional level, the states are all parties to key human rights instruments such as the African Charter on Human and Peoples' Rights (African Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women).¹²¹ Three of the states are parties to the African Charter on Democracy, Elections and Governance (Charter on Democracy).¹²²

In terms of timeframes, the scope (especially in relation to data) is limited to the trends covering the post-2011 local government elections period in each of the states.¹²³ By limiting the scope in such a manner, the study is more manageable especially due to challenges related to access to data. The data relating to women in local government was collected and checked between June and August 2012.

¹¹⁹ Bauer & Britton (2006) 9 11-12. They mention the conflicts experienced by Rwanda, South Africa and Uganda noting that 'women have gained substantial political representation' in these states and 'the backdrop has been a political transition following a period of prolonged conflict'.

¹²⁰ South Africa signed the CPRW on 29 January 1993 but is yet to ratify. See 'Convention on the Political Rights of Women' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-1&chapter=16&lang=en (accessed 14 September 2012).

¹²¹ Fourteen states have ratified the Protocol on Women, while Algeria, Ethiopia, Mauritius, Sierra Leone, and Swaziland have only signed http://www.au.int/en/sites/default/files/999Rights_of_Women.pdf (accessed 23 August 2011).

¹²² 'Status list – African Charter on Democracy, Elections and Governance' <http://www.au.int/en/treaties> (accessed 17 February 2012). Among the four states, Uganda is the only state that has not yet ratified the Charter on Democracy.

¹²³ Lesotho's most recent local government election was held in October 2011, Rwanda's most recent was held in February and March 2011, South Africa held its local government election in May 2011 and Uganda held its local government elections in February and March 2011.

As far as the spheres of local government on which I concentrate, the scope of the study is limited to what Moran and others term 'modern day democratic dispensation'.¹²⁴ Accordingly, I do not explore the subject of unelected traditional leaders in local government. I further limit my study to examining the most senior positions within local governments in each of the four states. Even though my study is focussing primarily on the most senior positions within local government, for purposes of drawing a contrast to illustrate the extent of women's political participation, I provide the statistical information on women councillors.

The study is undertaken with the awareness that local government in each of the four states is complex and contains numerous key players. To explain the intricate functioning of local government in each of these four states would perhaps require a separate study and that is not the intention of this study. However, for purposes of this study, I have already set out in a brief exposition the structure of local government and highlighted the key players at local government level in each of the four states.¹²⁵

The study is limited only to the four countries and to the sphere of local government. The study does not attempt to conclude that the findings in these four states are automatically applicable to the entire African continent.

1.6 Literature review

In respect of Lesotho, Rwanda, South Africa and Uganda, the literature that I have surveyed related to local government reveals limited scholarly attention to the international legal framework and how these standards are being applied in these four states. Scholarly work on women's participation in politics has in general had the shortcoming of not concentrating on providing a comprehensive examination of the legal framework that can impact on women's right to participate in politics.¹²⁶ I have also not come across any study that

¹²⁴ Moran G *et al* *Chieftainship and local governance in Lesotho* (2009) 15.

¹²⁵ See chapter 1 sec 1.1.

¹²⁶ See eg S Tamale *When hens begin to crow: Gender and parliamentary politics in Uganda* (1999). See also S Hassim 'Representation, participation and democratic effectiveness: Feminist challenges to

compares any of these states from a legal standpoint while focusing specifically on women's right to political participation in local government. In the instances where the legal framework is discussed, such discussions are cursory and do not adequately link the legal framework with the reality of women's participation. I now proceed to examine some of the literature that looks at women's political participation in local government. In view of the fact that I have not come across many studies that focus on all four states at once, I mostly look at studies focussing on the individual states and the extent to which they have tried to address women's participation while examining the legal framework.

Examining local government in Lesotho, Kapa explores the local government developments and touches on the issue of women's inclusion citing some of the instruments that bind Lesotho but without going into any detailed discussion of these instruments.¹²⁷ Kapa acknowledges the debate about women's inclusion in local government but prefers to steer clear of discussing the subject of women's participation or the legal standards that advance their participation.¹²⁸

representative democracy in South Africa' in AM Goetz & S Hassim (eds) *No shortcuts to power: African women in politics and policy making* (2003) 81-87. Hassim when discussing the participation of women in South Africa does not mention existence of international norms. Her discussion seems to suggest that the whole debate on women's participation was homegrown. No reference is made to international norms that fuelled the debates on women's inclusion and that South African male politicians may have agreed as international attention was focussed on the country during its transition to democratic rule and it was keen to portray an image of being a progressive state. See also Goetz AM 'The problem with patronage: Constraints on women's political effectiveness in Uganda' in AM Goetz & S Hassim (eds) *No shortcuts to power: African women in politics and policy making* (2003) 110-139. Geisler (2005) 1-15 broadly refers to development of international laws and not much is focussed on discussing the norms that have developed and how these have been the basis of subsequent laws and actions.

¹²⁷ MA Kapa 'Lesotho's local government system: A critical note on the structure and its implication for popular participation and service delivery' (date unknown) http://www.trc.org.ls/LDP_website/downloads/Lesotho%20local%20government%20paper%20kapa.pdf (accessed 14 September 2012).

¹²⁸ Kapa (date unknown) 14.

As far as Rwanda is concerned, Powley¹²⁹ has researched the subject of women's participation in politics with local government. Powley's work looks at the evolution of women's political participation in Rwanda but in so doing fails to discuss in any depth the legal framework that governs women's participation. In relation to UN and regional standards that bind Rwanda, Powley merely mentions their existence but does not go into any discussion of these instruments, whether in terms of their content or application to Rwanda. In her article on gender balance and 'governance in post-genocide Rwanda', Burnet looks at women's involvement in politics in Rwanda and how their participation has increased especially since the end of the genocide.¹³⁰ She advances the argument that as women's inclusion in governance increased democracy had diminished and was being replaced with autocracy.¹³¹ Her work is a broad examination of women's inclusion in governance covering local government, civil society and the legislature.¹³² In light of the fact that her study examines many areas of governance, she glosses over local government and her attention mostly focuses on the development of women's councils.¹³³ Burnet's work contains very limited discussion of legal developments in Rwanda.

With respect to Uganda, a study by Johnson *et al* examines women's participation in local government and analyses both the extent and impact of using affirmative action in local government.¹³⁴ Their study focuses on women's participation at the local council level within districts and among others looks at the 'attitudes to women's role in governance'.¹³⁵ The authors acknowledge the legal provisions existing in the Ugandan Constitution that have been relied upon to advance affirmative action. However, their study does not examine other legal standards that Uganda has undertaken to uphold. Their study is largely dedicated

¹²⁹ E Powley *Strengthening governance: The role of women in Rwanda's transition* (2003).

¹³⁰ JE Burnet 'Gender balance and the meanings of women's governance in post-genocide Rwanda' (2008) 107 *African Affairs* 361-386.

¹³¹ Burnet (2008) 363.

¹³² As above.

¹³³ Burnet (2008) 366-369.

¹³⁴ D Johnson *et al* 'Women in Ugandan local government: The impact of affirmative action' (2003) 11 *Gender and Development* 8 18.

¹³⁵ Johnson *et al* (2003) 9.

to the factors that impact on women's participation in local government.¹³⁶ In contrast, my study moves beyond examining factors affecting women's participation and looks specifically at the legal framework in place. I also provide a more detailed analysis of the temporary special measures in place. In her work on decentralisation in Uganda, Ahikire very briefly explores the issue of women's participation in local government.¹³⁷ Ahikire discusses the challenges related to decentralisation and discusses the appointment of local government officials.¹³⁸ In the discussion of the appointment of local government officials only the theoretical aspects are discussed without reliance on data or legal measures in place being discussed. My study examines the actual extent to which senior officials are appointed and also looks into the legal framework that promotes women's participation.

Beall explores local government in South Africa and its impact on women's participation.¹³⁹ Beall's study approaches the subject from a political science perspective with a limited analysis of the legal perspective on women's inclusion.¹⁴⁰ Her article deals with access to services by women and how these fit into the local government agenda, while in my case I am examining women's right to participate as leaders and the extent to which this right is being realised.¹⁴¹ I extend the legal analysis by looking at the international basis from which South Africa should derive its legal principles. Beall's work, while important, is dated as far as legal developments are concerned. My study includes the examination of the most recent legal developments and their impact on states such as South Africa. The extent that the legal framework in South Africa promotes women's inclusion has been analysed by Bentley *et al.*¹⁴² However, a number of deficiencies can be detected in their work. First, their analysis is

¹³⁶ Johnson *et al* (2003) 10-14.

¹³⁷ J Ahikire 'Decentralisation in Uganda today: Institutions and possible outcomes in the context of human rights' *Working paper for International Council on Human Rights Policy* 2002.

¹³⁸ Ahikire (2002) 7.

¹³⁹ J Beall 'Decentralizing government and decentering gender: Lessons from local government reform in South Africa' (2005) 33 *Politics and Society* 253 276.

¹⁴⁰ Beall (2005) *Politics and Society* 259.

¹⁴¹ Beall (2005) *Politics and Society* 262 & 263.

¹⁴² K Bentley *et al* 'Guidelines to enhance the representation and participation of women in local government in South Africa' http://www.hsrc.ac.za/Research_Publication-8048.phtml (accessed 20 July 2012) 3.

both dated and superficial.¹⁴³ The laws that they relied upon were limited to the laws in place in 2004. They then discuss these laws very superficially. Second, the international standards that bind South Africa are merely cited without any detailed analysis being proffered. Third, both the work of treaty bodies and South Africa's domestic laws are not discussed to help establish whether South African law conforms to international standards.

In terms of studies that cover more than one state, Genderlinks in its book *At the coalface: Gender and local government in Southern Africa* covers four states, including Lesotho and South Africa. The book provides one of the most realistic examinations of women's participation in local government. A number of subjects are covered in the book including quotas, challenges women face in leadership, attitudes to women's participation and whether women make a difference.¹⁴⁴ Regarding the legal framework, superficial discussions of the domestic legal framework and international obligations are undertaken. The aim of the study was not to discuss the legal framework but rather to establish the reality of women's participation in local government. Besides not providing a detailed discussion of the Lesotho and South African legal framework on women's political participation, the Genderlinks study is now dated as it covers the period up to 2007. New developments have taken place both at the domestic and other levels and the impact of these developments on women's participation needs to be assessed. In addition, unlike the Genderlinks study that covers only states in Southern Africa, my study examines states in East and Southern Africa and, as a result, offers an opportunity of exploring how states in both these important sub-regions of Africa have gone about addressing women's political participation in local government.

A discussion paper by Kauzya is the closest study to the context of this thesis.¹⁴⁵ Kauzya's discussion paper examines the experiences of Uganda, Rwanda and South Africa with regard to decentralisation. He notes in his discussion paper that even when women participate in

¹⁴³ As above.

¹⁴⁴ CL Morna & S Tolmay (eds) *At the coalface: Gender and local government in Southern Africa* (2007) 35 & 37.

¹⁴⁵ J Kauzya 'Political decentralisation in Africa: Experiences of Uganda, Rwanda and South Africa' Discussion paper (2007).

local government, there is never a guarantee that decisions reached at local level in these states will be gender sensitive.¹⁴⁶ In Kauzya's discussion paper, where the law is mentioned, women's participation has not been discussed.

In my study, existing literature is supplemented through the following: (1) A comprehensive legal analysis of norms developed at international level is undertaken to create a better understanding of standards binding Lesotho, Rwanda, South Africa and Uganda. (2) An examination of domestic constitutional and legal principles is undertaken in order to establish whether these principles reflect commitments that these states have made at the international level. (3) An analysis of the actual extent to which women participate in local government at the senior leadership level is undertaken with a view to establishing whether such participation is in harmony with the commitments that states have made at the international and domestic levels.

1.7 Overview of chapters

The study is divided into six chapters.

Following this introductory chapter, chapter 2 and 3 focus on the development of norms related to women's participation in politics. In chapter 2, I discuss the development of norms at the UN level. Both binding and non-binding instruments are discussed in an effort to establish the extent to which the right of women to participate in politics can be best promoted by UN instruments. Decisions, general comments and general recommendations emanating from treaty bodies are analysed. In chapter 3, I analyse African regional and sub-regional normative standards with the aim of establishing how these advance women's participation in politics. Treaties, declarations, communications, decisions and other instruments emanating from African regional bodies are analysed, and so are those at the sub-regional level. The analysis is aimed at establishing the extent to which they provide for women's participation in politics.

¹⁴⁶ Kauzya (2007) 12.

Chapter 4 and 5 deal with domestication of standards developed at the international level. In chapter 4, I look at the extent to which the treaty obligations identified have been domesticated in Lesotho, Rwanda, South Africa and Uganda. Relevant constitutional provisions, laws and policies are examined. Chapter 5 is both descriptive and analytical. With reference to Lesotho, Rwanda, South Africa and Uganda, I describe and analyse the state of women's participation in local government in the process assessing whether the norms are in reality being observed.

Chapter 6 consists of a conclusion and recommendations.

CHAPTER 2: NORMATIVE STANDARDS GOVERNING POLITICAL PARTICIPATION FOR WOMEN IN LOCAL GOVERNMENT UNDER THE UNITED NATIONS SYSTEM

- 2.1 Introduction
- 2.2 The United Nations Charter sets the stage for women's equal right to political participation
- 2.3 The Economic and Social Council
- 2.4 The United Nations human rights instruments relevant to women's political participation in local government
 - 2.4.1 The Universal Declaration of Human Rights
 - 2.4.2 The Convention on the Political Rights of Women
 - 2.4.3 The International Covenant on Civil and Political Rights
 - 2.4.4 The Convention on the Elimination of All Forms of Discrimination Against Women
- 2.5 The Vienna and Beijing conferences' contribution in advancing women's right to political participation
 - 2.5.1 The Vienna Declaration and Programme of Action
 - 2.5.2 The Beijing Declaration and Platform for Action
- 2.6 Universal Periodic Review
- 2.7 Conclusion
 - 2.7.1 The meaning of the 'right to political participation'
 - 2.7.2 Using temporary special measures
 - 2.7.3 Providing data to show the extent of women's political involvement
 - 2.7.4 Domestication of standards through the adoption of constitutional and other legal measures that promote women's participation

2.1 Introduction

In this chapter I analyse the normative standards established by the United Nations (UN), seeking to determine how the UN has dealt with political participation as it relates to women. By analysing how the right to political participation has developed and how it is advanced, I seek to establish the basic standards that govern participation in local government as an aspect of particular concern within the broader issues of political participation. Both binding and 'soft law' human rights instruments will be analysed. UN

treaty bodies will be discussed to establish how they have interpreted and elaborated upon human rights norms in so far as the relevant treaties relate to the political participation for women. As far as possible, a chronological approach is adopted when analysing the instruments.

The study is limited to analysing how human rights instruments, treaty bodies and other mechanisms attempt to address the issue of political participation as it relates to women. The human rights instruments and the work of human rights bodies that are analysed have been selected on the basis that Lesotho, Rwanda, South Africa and Uganda are parties to them. These instruments and bodies have contributed to the advancement of women in political participation. In the analysis that follows the progression from an emphasis on formal protection to substantive realisation is highlighted.

In light of the numerous instruments developed over time, in conclusion a determination is made of the key guiding principles that states — including the four states on which this study focuses — should adhere to when promoting women’s political participation.

2.2 The United Nations Charter sets the stage for women’s equal right to political participation

The development of women’s rights should be contextualised within the growth of international human rights law especially in the period after the Second World War. This period was marked by efforts to develop human rights standards at the time after the end of that War.¹ The UN was established through the adoption of the United Nations

¹ P Cumper ‘Human rights: History, development and classification’ in A Hegarty & S Leonard (eds) *Human rights: An agenda for the 21st century* (1999) 1 4.

Charter (UN Charter).² Women did not participate significantly in the adoption of the UN Charter or in the formation of the UN in general.³ The UN Charter not only promoted the development of human rights in general but also laid the foundation for the development of specific rights such as those of women to participate in politics. The Preamble of the UN Charter setting out ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women’ in part seems to have been noting women’s absence from the political sphere and the UN’s aspiration, at least in part, was to redress their absence.⁴

Of the four states that are the subject of this study, only South Africa took part in drafting the UN Charter.⁵ At the time, South Africa was still, from a political perspective, not only white but also male-dominated. Lesotho, Rwanda and Uganda were still colonies at the time of drafting and adoption of the UN Charter but subsequently, upon

² Adopted on 26 June 1945 and entered into force on 24 October 1945. ‘Charter of the United Nations: Introductory note’ <http://www.un.org/en/documents/charter/intro.shtml> (accessed 22 December 2010).

³ J Connors ‘General human rights instruments and their relevance to women’ in A Byrnes, J Connors & L Bik (eds) *Advancing the human rights of women: Using international human rights standards in domestic litigation* (1997) 27-29.

⁴ ‘United Nations Charter’ <http://www.un.org/aboutun/charter/index.html> (accessed 15 January 2006).

⁵ As An-Na’im notes ‘[a]t the time of the drafting and adoption of the Universal Declaration in 1946-48, as the constituent document of the modern human rights movement, there were only four African members of the United Nations (Egypt, Ethiopia, Liberia and apartheid South Africa). The same European powers which upheld human rights for their citizens under national constitutions and proclaimed the Universal Declaration for all of humanity, were at the time denying African societies their most basic human rights under colonial rule’. See AA An-Na’im ‘Expanding legal protection of human rights in African contexts’ in AA An-Na’im (ed) *Human rights under African constitutions: Realising the promise for ourselves* (2003) 1 9. See also AA An-Na’im & J Hammond ‘Cultural transformation and human rights in African societies’ in AA An-Na’im (ed) *Cultural transformation and human rights in Africa* (2002) 13 17.

attaining independence, joined the UN.⁶ The process of colonialism curtailed the right to political participation in general, and by necessary implication, the right for women to participate in public life. It would therefore be fair to say that the concerns of African women were not represented during the drafting and adoption of the UN Charter. During the colonial period, African women faced double discrimination — as women and as ‘Africans’. The phenomenon of excluding women extended to other parts of the world as well. The general exclusion of women meant that their views and experiences were, as a general rule, not adequately represented.

The commitment to human rights in the UN Charter meant that the goal of realising human rights on the basis of equality between men and women was to be a fundamental obligation of the UN, its organs and its members. To this end, the UN Charter further states under article 1(3) that one of the purposes of the UN is

[t]o achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for the human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Under the above article, the UN Charter acknowledges that physical attributes such as ‘sex’ are possible bases for discrimination. This article therefore sets the stage for other human rights treaties to be concerned with addressing non-discrimination, among other grounds, on the basis of ‘sex’.

⁶ Lesotho was admitted through UN Security Council Resolution 225 of 14 October 1966 and UN General Assembly Resolution 2137 (XXI) of 17 October 1966. Rwanda was admitted through UN Security Council Resolution 172 of 26 July 1962 and UN General Assembly Resolution 1748 (XVII) of 18 September 1962. South Africa was a founding member of the UN and Uganda was admitted through UN Security Council Resolution 117 of 15 October 1962 and UN General Assembly Resolution 1758 (XVII) of 25 October 1962.

The principle of non-discrimination on the basis of sex is further emphasised when the UN Charter states that in order to create stability and well-being, which are both necessary pre-conditions for peaceful and friendly relations among nations, the UN should promote universal respect for and observance of human rights and fundamental freedoms without distinctions such as race, sex, language or religion.⁷

The main principles relevant to this study as laid out in the UN Charter are those of non-discrimination and equality of the sexes. These principles form the basis on which a myriad of other human rights instruments have subsequently been formulated. As the UN Charter did not focus on addressing specific human rights issues, new instruments were required which would focus primarily on state parties and on matters such as women's right to participate in politics. There was therefore a need to establish specialised institutions to deal with the issues of human rights. As a result, the Economic and Social Council (ECOSOC) was established.

2.3 The Economic and Social Council

To realise human rights in general and women's rights in particular, there was a need to institute UN specialised bodies dealing with human rights. ECOSOC was one such institution. Here, I map out its development and explore how it has contributed to the advancement of women's rights in general and their right to participate in politics in particular.⁸

According to the UN Charter, ECOSOC was to be established and was to be mandated with making recommendations aimed at promoting respect for and observance of human rights and fundamental freedoms.⁹ The mandate granted to ECOSOC included

⁷ Art 55 of the UN Charter.

⁸ Art 6 of the UN Charter.

⁹ Art 62(2) of the UN Charter.

drafting treaties and resolutions in areas such as human rights and fundamental freedoms, and submitting these to the UN General Assembly for further consideration.¹⁰ The mandate granted to ECOSOC was quite wide and required expertise.

ECOSOC in turn set up the UN Commission on Human Rights which has been subsequently succeeded by the UN Human Rights Council. The initial mandate of the UN Commission on Human Rights was to draft an international bill of human rights. This bill would set standards for the protection of human rights. The actual drafting of the bill was problematic as there were some perceptions that it would mainly promote West European and North American values.¹¹

ECOSOC mandated the UN Commission on Human Rights to submit proposals, recommendations and reports to ECOSOC regarding 'international declarations or conventions on civil liberties, *the status of women*, freedom of information and similar matters'.¹² An interpretation of this mandate can be that ECOSOC wanted to ensure that specific international declarations and conventions should be developed to deal with the status of women and address inequality between the sexes. Until this extended mandate, legal developments had largely favoured men and were not gender neutral.

To specifically address women's rights, ECOSOC additionally established the UN Commission on the Status of Women (CSW).¹³ One of its aims is to ensure 'equal participation of women in government and the possibility for women to exercise all rights and assume all duties of citizens', adding that 'little could be achieved without them'.¹⁴ It provided sufficient focus on women through the aim of ensuring 'equal

¹⁰ Art 62(3) of the UN Charter.

¹¹ This was a concern of the American Anthropological Association. See J Morsink *Universal Declaration of Human Rights: Origins, drafting and intent* (1999) ix.

¹² My emphasis.

¹³ ECOSOC Resolution 11 (II) of 21 June 1946.

¹⁴ United Nations *Convention on Political Rights of Women: History and commentary* (1955) 6.

participation of women in government’ which did not place limitations and therefore it would be appropriate to assume that it extended to all spheres including local government.

In terms of its output, the CSW prepares recommendations and reports for ECOSOC on political, economic, civic, social and educational issues.¹⁵ As such CSW attends to matters concerning women and promotes equality between the sexes. The CSW is mandated with bringing to ECOSOC’s attention those problems affecting women that require urgent attention.¹⁶ Requiring the CSW to prepare recommendations and reports fails to directly address the issue of implementation of rights set out in the various instruments. In an attempt to address this shortcoming, ECOSOC’s powers were extended in 1987,¹⁷ and now include promoting equality, development, peace and monitoring the implementation of measures that advance women’s rights.¹⁸ The CSW’s powers are broad enough to be interpreted to include the authority to monitor countries’ undertakings to substantively include women in political participation. The CSW has authority to review the progress made in terms of advancement of women at national, regional and international levels.¹⁹ After the Fourth World Conference on Women in 1995, the CSW’s was further mandated to ‘follow-up’ and ‘regularly’ review ‘the critical areas of concern’ and ‘develop its catalytic role in mainstreaming a gender perspective in United Nations activities’.²⁰

¹⁵ ‘Commission on the Status of Women’ <http://www.un.org/womenwatch/daw/csw/> (accessed 21 October 2012).

¹⁶ As above.

¹⁷ ‘Measures to strengthen the role and functions of the Commission on the Status of Women’ ECOSOC Resolution 1987/22 <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/673/80/IMG/NR067380.pdf?OpenElement> (accessed 21 October 2012).

¹⁸ ‘Economic and Social Council’ <http://www.un.org/documents/ecosoc/docs/1996/e1996-97.htm> (accessed 21 October 2012).

¹⁹ As above.

²⁰ As above.

In 1996 the CSW's terms of reference were again modified and among others it was to identify 'emerging issues, trends and new approaches to issues affecting the situation of women or equality between women and men that require urgent attention'.²¹ In the 1990s, one of the emerging issues was that of political participation as it related to women.²²

As illustrated by the above analysis, there has been progression in the CSW's mandate from that of merely looking at formal legal protection of women towards the ability to assess the substantive realisation of their rights. The mandate now includes assessment of whether their right to political participation is being realised on the basis of the various human rights instruments in existence.

²¹ 'ECOSOC Resolution 1996/6 of 22 July 1996' <http://www.un.org/documents/ecosoc/res/1996/eres1996-6.htm> (accessed 21 October 2004). The terms of reference of CSW also included:

- (a) Assist the Economic and Social Council in monitoring, reviewing and appraising progress achieved and problems encountered in the implementation of the Beijing Declaration and Platform for Action at all levels, and shall advise the Council thereon;
- (b) Continue to ensure support for mainstreaming a gender perspective in United Nations activities and develop further its catalytic role in this regard in other areas;
- (c) Identify issues where United Nations system-wide coordination needs to be improved in order to assist the Council in its coordination function;
- (e) Maintain and enhance public awareness and support for the implementation of the Platform for Action'.

²² See eg Report of the CSW on its thirty-sixth session 'Resolution 36/3 Women in decision-making bodies' (21 May 1992) E/CN.6/1992/13. See also Report of the CSW on its thirty-eighth session E/CN.6/1994/14 paras 91-96. See also CSW 'Monitoring the implementation of the Nairobi forward-looking strategies for the advancement of women' (1 February 1995) E/CN.6/1995/1. See also Expert group meeting on political decision-making and conflict resolution: The impact of gender difference (7 November 1996) EGM/PRDC/1996/REP.1. E Kofman & L Peake 'Into the 1990s: A gendered agenda for political geography' (1990) 9 *Political Geography Quarterly* 313 315 326-327.

The establishment of ECOSOC resulted in the establishment of human rights bodies that dealt not only with formal realisation of human rights but also their substantive realisation. The establishment of the CSW has resulted in greater attention to women's rights. The need for women to be involved in political participation is now recognised by the key human rights bodies within the UN system. In order to realise rights such as women's right to political participation, there was a need to develop human rights instruments which set the standards. A further requirement was to establish specialised human rights bodies that would test states' adherence to the human rights standards as stipulated in the new instruments.

2.4 The United Nations human rights instruments relevant to women's political participation in local government

Since 1945, the UN has developed a plethora of human rights instruments. Some of these instruments are general in nature, while others deal directly with specific issues such as women's political participation. Even some key instruments that do not specifically deal with the subject of political participation sometimes contribute to the protection of these rights.

What follows is a discussion of some of the key human rights instruments developed through the UN system which have contributed to the realisation of women's right to political participation. An interpretation of the instruments is made in an attempt to establish how each instrument actually and potentially protects women's rights to participate in politics.²³

²³ The right to be candidates in elections including legislatures elections, election for heads of state or government and other elected bodies. The extent to which women can be involved in the judiciary, in the executive such as ministers, as senior civil servants including in diplomacy, in local government, peacekeeping, development programmes, traditional authority and political parties will be examined.

2.4.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (Universal Declaration)²⁴ set the standard for development of subsequent human rights norms. The Universal Declaration is, however, not binding international law but its provisions can become binding if accepted through international customary law. Regarding the question of customary international law, with respect to political participation, the question is not all that important as the essence of the right as contained in the Universal Declaration has been concretised in treaties such as the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by most states in the world including the four states under review. The examination of the Universal Declaration is meant to serve the purpose of tracing how the right to political participation developed under the UN system.

The Universal Declaration laid the ground for the formalisation of the main human rights norms. During the process of its drafting both women's rights and the principle of equality were considered.²⁵ It provides for equality of the sexes, the promotion of non-discrimination and furthers the UN Charter's commitment to promoting women's equal involvement on the basis of equality.²⁶

To a limited extent, the Universal Declaration deals with the issue of political participation. However, the relevant provision is general in nature and does not refer to women specifically. The provision reads as follows:²⁷

²⁴ 'UN General Assembly Resolution 56(l) of 11 December 1946' <http://www.un.org/documents/ga/res/1/ares.htm> (accessed 18 February 2008).

²⁵ For instance the representative of the Dominican Republic argued that the phrase 'everyone' as stated in the declaration might not necessarily be interpreted to include women and the Dominican Republic representative wanted more specific attention to be paid to the women. Morsink (1999) 118.

²⁶ See Preamble and art 8 of the UN Charter.

²⁷ Art 21 of the Universal Declaration.

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

An analysis of the provision reveals contradictions and uncertainties. The contradiction between the use of the words ‘everyone’ and ‘his’ to promote the rights for all people suggests a bias towards men especially when considering that the system in place already favoured men. Of course, it can be argued that the provision implicitly caters for women’s involvement in areas such as local government. In the Universal Declaration, the right to take part in local government is anchored on the principle of equality.²⁸ Guaranteeing universal suffrage was necessary because at the time of drafting the Universal Declaration, it was not yet a universally accepted norm.²⁹ What this provision promotes is that women have an equal right to men to be involved in matters of governance as representatives; and if not as representatives, they have a right to elect individuals who can represent them. It follows that women, too, have the right to be elected as officials at local government level.

In terms of the provision on participation in government, the Universal Declaration provides for a wider interpretation of ‘the right of equal access to public service’ that can mean not only the right to benefit from services provided by the public service but includes the ability to work in government in different capacities — also at the local government level. While the right is guaranteed in male-centred language, it equally applies to women when considering that the right is granted to ‘everyone’.

²⁸ A Rosas ‘Articles 21’ in G Alfredsson & A Eide (eds) *The Universal Declaration of Human Rights* (1999) 431.

²⁹ See Inter Parliamentary Union ‘Women’s suffrage: A world chronology of the recognition of women’s right to vote and stand for election’ <http://www.ipu.org/wmn-e/suffrage.htm> (accessed 24 October 2012).

The view that the right of equal access to public service has a wider interpretation is supported by Rosas who postulated that the requirement that everyone should have a 'right to take part in the government of his country' can have a wider interpretation 'so as to include not only regional and local government but also various semi-public and semi-private institutions'.³⁰

The Universal Declaration does not define the key words that it uses and that have become central pillars in the democratic process. For example, despite providing that there should be 'periodic and genuine elections', the provision fails to elaborate on what the terms 'periodic' or 'genuine' entail. The provision also mentions the need for 'free voting procedures' but without indicating the requirements that fulfil such procedures. These omissions emphasise the fact that the period was an era of standard setting with little or no attention paid to implementation of the rights that were guaranteed.

The requirement that government authority is based on the 'will of the people', in no way distinguishes between women and men. To further emphasise the need for equality there is need for universal elections based on equality. Elections should be held from time to time with clear set periods.

Although the Universal Declaration by its very nature as a declaration is not binding as such, parts of it have acquired the status of customary international law. In any event, the essence of its relevant provisions, such as those dealing with political participation, has been adopted in treaties such as the Convention on the Political Rights of Women (CPRW), the (ICCPR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

³⁰ Rosas (1999) 450.

2.4.2 The Convention on the Political Rights of Women

In this section, I look at the historical development of the CPRW³¹ and the rationale for its development and adoption. The CPRW is one of the UN human rights instruments that can be relied upon to promote the participation of women in local government. I therefore analyse its key provisions that focus on the substantive aspects of women's right to participate in politics which in essence includes the right to take part in local government.

The need for the adoption of the CPRW in the 1950s can be observed from the fact that women's right to political participation was achieved incrementally in most states. For example, the United States of America was the first country to grant women political rights and allowed them to stand for office as early as 1788, but it was only in 1920 that women were allowed to vote.³² The granting of partial political rights to women was not exclusive to the United States of America but extended to New Zealand, Norway, Canada, Netherlands and Belgium.³³ African states such as Lesotho, Rwanda and Uganda did not follow a similar trajectory. Instead, in the vast majority of cases African states granted women full political rights at independence (and in the case of South Africa, after the political changes of the 1990s).³⁴ The granting of full political rights to women

³¹ UN General Assembly Resolution 640 (VII) adopted on 20 December 1952 and entered into force on 7 July 1954. See also 'Convention on Political Rights of Women: Status' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-1&chapter=16&lang=en (accessed 29 November 2012). Lesotho acceded to the CPRW on 4 November 1974, Rwanda acceded on 26 September 2003, South Africa signed on 29 January 1993 and Uganda acceded on 21 June 1995.

³² Inter Parliamentary Union 'Women's suffrage: A world chronology of the recognition of women's right to vote and stand for election'. African-American women were in principle also granted the right to vote but women in the southern States of the United States of America continued to face obstacles until at least the 1960s.

³³ Inter Parliamentary Union 'Women's suffrage: A world chronology of the recognition of women's right to vote and stand for election'.

³⁴ As above.

by Lesotho, Rwanda and Uganda can be explained by the fact that at independence (or in case of South Africa, after introduction of political equality and an electoral democracy) a number of UN human rights instruments had already been in existence. These instruments which guaranteed women the right to participate in politics, in all likelihood, influenced both the departing colonial powers and the leadership in fledgling independent states.

The adoption of the CPRW formalised in a legally binding document the recognition that women should play a significant role in their countries political processes.³⁵ Lesotho, Rwanda and Uganda acceded to the CPRW but the little significance accorded to this treaty by these states can be deduced from the fact that these states acceded to the CPRW many years after gaining independence.³⁶ The instrument therefore has full binding effect on these states, with the exception of Lesotho, which entered a reservation in respect of article 3 which deals with women's right to 'hold all public office and exercise all public functions'.³⁷ According to this reservation, issues that were governed by 'Basotho law and custom' were to be exempted from the application of

³⁵ United Nations (1955) 13.

³⁶ Lesotho acceded to the CPRW on 4 November 1974, Rwanda only acceded on 26 September 2003 and Uganda on 21 June 1995. All these states had attained independence in the early 1960s and hence the delay in acceding to this treaty shows that political rights of women were not a priority in most cases. See 'Convention on the Political Rights of Women' http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-1&chapter=16&lang=en (accessed 10 January 2012).

³⁷ See Convention on the Political Rights of Women http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-1&chapter=16&lang=en (accessed 10 January 2012). Lesotho's reservation was to the effect that the provision should not apply to 'matters regulated by Basotho law and customs'. The main purpose of the reservation was to ensure that positions such as succession to Lesotho's kingship and chieftainship positions would not be filled by women as these positions were traditionally accessible to only men.

article 3.³⁸ South Africa has only signed the CPRW which in essence is an expression that the country intends to become a party to the instrument but the document is not legally binding.³⁹ South Africa's signing of the CPRW in 1993 may have been motivated by efforts for the country to receive wider international acceptability after years of international isolation as a pariah state on matters related to equality. However, failure of the new democratic South African government to follow up signature with ratification testifies to the diminishing importance of the CPRW during the last two decades.

The CPRW was one of the earliest UN treaties focussing on a specific right thereby suggesting that the international community accorded priority to the issue of women's participation in politics. The CSW was pivotal in the drafting and adoption of this treaty and was of the view that merely encouraging states to uphold women's political rights was insufficient.⁴⁰ The CPRW was the first global treaty on any aspect of women's rights and drew inspiration from a regional treaty that had been adopted by the Organisation of American States.⁴¹ The influence by a regional treaty on an international treaty illustrates the importance of regional systems which can be innovative and contribute to the advancement of human rights at the global level.

The CPRW was inspired by both the League of Nations that had established the Committee for the Study of the Legal Status of Women and the Organisation of American States (OAS) through its Inter-American Commission on Women.⁴² This

³⁸ See Convention on the Political Rights of Women http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-1&chapter=16&lang=en (accessed 10 January 2012).

³⁹ South Africa signed the CPRW on 29 January 1993. See Convention on the Political Rights of Women http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-1&chapter=16&lang=en (accessed 10 January 2012).

⁴⁰ United Nations (1955) 7.

⁴¹ The Convention on the Granting of Political Rights to Women to Women, adopted on 29 April 1948. See United Nations (1955) 4 7 & 8.

⁴² United Nations (1955) 3.

Commission had been tasked with considering the civil and political rights of women.⁴³ Both the League of Nations and OAS attempted to remove distinctions between women and men. By the time the UN came into existence, work had already been undertaken in the area of civil and political rights of women. The effect was that it was easier for the UN to adopt a women's rights convention as one of its first treaties.

A few states objected to the development of a treaty that would focus solely on women's political rights.⁴⁴ The basis of these objections was that the ICCPR was being developed at the same time and would contain provisions on political rights and equality, and therefore efforts to develop the CPRW were considered as duplication. These objections failed due to a general sentiment that a distinct treaty aimed at promotion of women's political rights was necessary in light of the fact that women as a group had been historically disadvantaged in respect of political participation.⁴⁵ The rationale for such a treaty was that it would help states to prioritise the realisation of women's political rights.

Adopted in 1952, the CPRW expanded on the right to political participation as set out in the 1948 Universal Declaration and had some distinct advantages. These advantages included the fact that unlike the Universal Declaration, the CPRW was a treaty and would bind member states. Furthermore, the CPRW elaborated on the normative standards with respect to political participation as these rights specifically related to women. It therefore formalised the principle of equality between the sexes as it related to women's right to participate in politics. Another important advantage of the CPRW

⁴³ As above.

⁴⁴ United Nations (1955) 9.

⁴⁵ As above.

was that it served to restate the advances that women had made in some states and called on states in other parts of the world to ensure that women realised this right.⁴⁶

Debates for women's participation in politics increased during the drafting of the CPRW. One of the more prominent voices was that of American First Lady, Eleanor Roosevelt, who participated in drafting both the Universal Declaration and the CPRW.⁴⁷ She called on states not to treat women as tokens in politics but to genuinely grant them real political power.⁴⁸ While calling for increased women's participation, Roosevelt, at the same time, was doubtful about the extent to which women would stay in politics due to their obligations to care for their families.⁴⁹ In a statement that is still pertinent today, Roosevelt summed up the challenges faced by women when she noted that⁵⁰

too often the great decisions are originated and given form in bodies made up wholly of men, or so completely dominated by them that whatever of special value women have to offer is shunted aside without expression. Even in countries where for many years women have voted and been eligible for public office, there are still too few women serving in positions of real leadership.

The argument of Roosevelt reveals the bias women faced in public. However, she also acknowledged that the pressure of political office should not be borne by men alone but

⁴⁶ Inter Parliamentary Union 'Women's suffrage: A world chronology of the recognition of women's right to vote and stand for election'. By the time of its adoption most African states were not independent and therefore both women and men had limited political rights. Among developed countries in some cases women had only recently been granted political rights.

⁴⁷ E Roosevelt 'UN deliberations on draft Convention on the Political Rights of Women' (1953) *Department of State Bulletin* <http://www.udhr.org/history/124.htm> (accessed 4 October 2007).

⁴⁸ As above.

⁴⁹ As above.

⁵⁰ As above.

that it was only fair that women should be involved in the 'difficult tasks which confronted the world'.⁵¹

The CPRW itself is a brief document and lacks details on the right to political participation. Roosevelt put across two arguments for a short convention and these were: It would be ideal in terms of its effectiveness due to its brevity; and, it would be more easily understood by the public.⁵² Her reasoning prevailed as the final document contained 11 articles out of which only three deal with substantive rights. The other articles deal with matters related to states signing, ratifying, acceding and depositing their instruments of ratification or accession.

The CPRW can be criticised for its lack of a monitoring mechanism as it has neither a provision for a treaty monitoring body nor a complaint mechanism that would have allowed for states to be challenged on the implementation of the rights it sought to advance. The absence of monitoring mechanisms meant that it was easy for states to abrogate on their undertakings. The weakness of the instrument is further exacerbated by the absence of any state reporting requirements and therefore right from the onset the CPRW was bound to be easily 'forgotten'. At the time of its adoption attention was on standard-setting and therefore the drafters of the CPRW seem to have been preoccupied by formalising rights rather than paying attention to mechanisms to support the realisation of the rights that the instrument purported to advance. It was entirely up to state parties to implement their obligations as there was no treaty body to monitor state performance. Absence of reporting mechanisms meant that implementation of obligations was bound to be weak.

Another criticism of the CPRW is that on the one hand it sets out in vague terms at the end of each substantive article that women should enjoy their political rights 'without

⁵¹ United Nations (1955) 12.

⁵² Roosevelt (1953).

any discrimination’ but on the other hand it gives details about one ground of non-discrimination, that being *sex*.⁵³ The manner in which provisions on non-discrimination were drafted suggests that the instrument was hurriedly drafted. The extremes from being vague when reference is made to ‘without any discrimination’ and then proceeding to identify only one ground for non discrimination, namely, sex suggests that its preoccupation was non-discrimination on the basis of sex and therefore the phrase ‘without any discrimination’ seems superfluous. The instrument is therefore narrow in how it perceives discrimination against women.

The CPRW emphasises the need for state parties to implement the principle of equality between men and women. Through its Preamble it notes that⁵⁴

everyone has the right to take part in the government of his country directly or indirectly through freely chosen representatives, and has the right to equal access to public service in his country, and desiring to equalize the status of men and women in the enjoyment and exercise of political rights, in accordance with the provisions of the Charter of the United Nations and of the Universal Declaration of Human Rights.

Paradoxically, in the preamble the contracting parties did not use a gender-sensitive term and instead used ‘his’ even though the treaty deals specifically with women’s rights. There is perhaps no better indication in the CPRW of the gender insensitivity of the time than the failure to use a gender representative term. Political participation was still, in principle, regarded as men’s domain.

⁵³ On the hand, there was an alternative point of view which stated that the grounds of discrimination was not exhaustive and that rather the word ‘women’ as used was sufficient to be understood to mean ‘all women’ and hence there was no need for further elaboration. See United Nations (1955) 9 20 & 21.

⁵⁴ Preamble of the CPRW.

I focus on two aspects of the CPRW that have implications for local government: (i) women's eligibility for elections,⁵⁵ and (ii) women's entitlement to hold public office.⁵⁶ Even though the treaty focuses on the political rights of women, the principles of equality and non-discrimination are present in both issues. Besides prohibiting discrimination against women, the CPRW promotes the principle that the rights it contains should be promoted and protected in a manner that ensures equality between women and men. The general theme in the two provisions is that the rights should be granted on the basis of equality and non-discrimination as far as sex is concerned.

The emphasis in the two articles of the CPRW is that women should be included in every aspect of public life. The emphasis is in the use of the term 'all', for instance by stating that women should 'be eligible for election to *all* publicly elected bodies', and that they should 'exercise *all* public functions'.⁵⁷ The emphasis that women should participate in 'all' activities underlines the fact that they had previously been excluded and that the CPRW is attempting to correct this exclusion.

The rights in the CPRW are couched in a manner that uses men as the yardstick for determining equality between women and men. For example, the CPRW requires that women should be involved in politics on the basis of equality with men. This approach of using men as a yardstick reveals a bias towards men who are used as the standard to measure women's participation.

The rights in the CPRW are in the form of entitlements; a case in point is that women are 'entitled to hold public office'. The understanding of the word 'entitle' is 'to give

⁵⁵ Art 2 of the CPRW states that '[w]omen shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination'.

⁵⁶ Art 3 of the CPRW states that '[w]omen shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination'.

⁵⁷ Arts 1-3 of the CPRW (emphasis added).

someone a right to do or receive’,⁵⁸ while ‘rights’ means ‘a moral or legal entitlement to have or do something’.⁵⁹ In comparison to the Universal Declaration which was not binding, the CPRW was therefore compelling states to ensure that women’s right to hold public office was realised and in principle this right could be claimed by women.

The CPRW provides that ‘[w]omen shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination’.⁶⁰ As such, women should be represented in various bodies that ‘fulfill other functions of government’.⁶¹ The provision is emphatic and states that women are entitled ‘for election to all publicly elected bodies’, here the use of the term ‘all’ indicates the need to include women in every matter of governance — local government included.

The provision allows for women to serve on ‘publicly elected bodies’. However, the CPRW does not define the term ‘publicly elected bodies’ but the additional condition that these should be ‘established by national laws’ can be understood to include bodies such as local government in light of the fact that they are established by national law.

In its third substantive article, the CPRW states that ‘[w]omen shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination’.⁶² This provision confirms that besides elected office, women have a right to be employed or appointed as public officials. When related to local government, it means that besides those offices that women occupy through election, they have an equal right to men to fill other posts within local government. Accordingly, ‘public office’ has to be given a wide meaning as these offices

⁵⁸ M Waite (ed) *Oxford dictionary and thesaurus* (2007) 341.

⁵⁹ Waite (2007) 893.

⁶⁰ Art 2 of the CPRW.

⁶¹ United Nations (1955) 22.

⁶² Art 3 of the CPRW.

may be more numerous than elective office.⁶³ The provision that women should have access to public office on equal terms not only relates to the functions that they perform but extends to terms of service such as ‘recruitment, exemptions, pay, old age and retirement benefits, opportunities for promotion, and employment of married women’.⁶⁴

Despite the absence of a treaty monitoring body, the CPRW was the first real effort directed at addressing existing imbalances in women’s representation in public office such as local government, even if local government is not mentioned specifically. The CPRW acknowledged the disadvantaged position of women and tries to put minimum standards to ensure that men and women are treated as equals in the political sphere.

2.4.3 The International Covenant on Civil and Political Rights

In discussing the ICCPR,⁶⁵ focus is primarily on an analysis of the relevant provisions of the ICCPR in light of the Human Rights Committee’s (HRC’s) interpretations. I start by looking at the treaty body and introducing its role and work, and then analyse its work in relation to its interpretation of the right to political participation.

The ICCPR provides for a treaty body tasked with monitoring states’ performance in terms of adherence to rights contained in the ICCPR. The treaty body consists of an eighteen member committee, the HRC,⁶⁶ to monitor state parties in terms of how they

⁶³ Roosevelt (1953).

⁶⁴ As above.

⁶⁵ UN General Assembly Resolution 2200A (XXI) adopted on 16 December 1966 and entered into force on 23 May 1976. See also ‘Covenant on Civil and Political Rights: Status’ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed 29 November 2012). Lesotho acceded on 9 November 1992, Rwanda acceded on 16 April 1975, South Africa ratified on 10 December 1998 and Uganda acceded on 21 June 1995.

⁶⁶ Art 28 of the ICCPR.

implement the rights stipulated in the ICCPR. The monitoring of state performance can help with the domestication process as states are examined in terms of whether they have put in place legislation and measures to ensure that the rights in the ICCPR are recognised and realised at the domestic level of states.

In terms of its composition, the HRC has a dismal representation of African women among its members with only one woman out of its four African representatives.⁶⁷ The HRC's main function is to examine reports from state parties⁶⁸ and to consider complaints brought by individuals against state parties.⁶⁹ The requirement for states to

⁶⁷ As at 11 November 2012, Ms Zonke Majodina (South Africa) was the only woman from Africa among the five members of the HRC. The other members are: Mr Lazhari Bouzid (Algeria), Mr Ahmad Amin Fathalla (Egypt), Mr Kheshoe Parsad Matadeen (Mauritius) and Mr Ben Achour Yadh (Tunisia). 'Human Rights Committee members' <http://www2.ohchr.org/english/bodies/hrc/members.htm> (accessed 11 November 2012).

⁶⁸ According to Art 40(1) of the ICCPR, state parties are to submit reports on measures which they have taken to ensure that the rights in the ICCPR are implemented. Therefore matters such as efforts to ensure equality of the sexes should be set out in the report. Furthermore the first report has to be within a year of the ICCPR coming into effect in respect of a state party and thereafter reporting is supposed to be whenever the HRC so requests. The HRC has a practice of stating when the next report is due whenever it makes its concluding observations on a country report. The HRC has adopted a number of guidelines for states to follow when submitting their country reports. In terms of art 40(2) of the ICCPR, state parties indicate difficulties or factors that affect implementation of the rights under the ICCPR. The HRC has noted that only a small number of states submitted their reports on time and delays ranged from a few months to several years. See CCPR General Comment 2(13) of 1981, CCPR/C/19/Rev.1, CCPR/C/5/Rev.2 (28 April 1995), Annex VIII of HRC report to UN General Assembly (a/53/40). 'Consolidated guidelines for state reports under the International Covenant on Civil and Political Rights' CCPR/C/66/GUI/Rev.2 (26 February 2001) [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.66.GUI.Rev.2.E...](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.66.GUI.Rev.2.E...) (accessed 22 September 2012) para B.2. See 'General Comment 1: Reporting obligation' (27 July 1981) <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/dbb4924618246cf3c12563ed0045c05b?Opendocument> (accessed 28 August 2012).

⁶⁹ T Opsahl 'The Human Rights Committee' in P Alston (ed) *The United Nations and human rights - A critical appraisal* (1992) 369 370.

report on their activities and for individuals to bring cases before a treaty body had been absent in earlier human rights instruments. An innovation by the ICCPR is that through its Optional Protocol of the International Covenant on Civil and Political Rights (First Optional Protocol)⁷⁰ it allows individuals to bring communications against state parties. With the exception of Rwanda all the other states have acceded to the First Optional Protocol.⁷¹ Therefore, women or advocates of women's rights in Lesotho, South Africa or Uganda can bring communications against these states if, for example, women's right to participate at local government level is not appropriately addressed at the domestic level.⁷²

The introduction of a treaty body and the First Optional Protocol are innovations that enable women or advocates of women's rights to have opportunities that can ensure better state compliance. States compliance can be pursued in three ways: first, through rigorous examination of state reports; second, by asking the HRC to visit a state and monitor state compliance; and third, by filing a communication before the HRC to ensure that a right is observed. The existence of these methods can be used to examine whether the rights have been domesticated and whether compliance to rights such as participation in politics is taking place in Lesotho, Rwanda, South Africa and Uganda.⁷³

⁷⁰ UN General Assembly Resolution 2200A(XXI) adopted on 16 December 1966 and entered into force on 23 March 1976.

⁷¹ Adopted on 16 December 1966 and entered into force on 23 March 1976. Lesotho acceded on 6 December 2000, South Africa acceded on 28 August 2002 and 14 November 1995. See 'International Covenant on Civil and Political Rights' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (accessed 10 January 2012).

⁷² 'Status — Optional Protocol to the International Covenant on Civil and Political Rights' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (accessed 10 October 2012).

⁷³ Adopted on 16 December 1966 and entered into force on 23 March 1976. Lesotho acceded on 9 September 1992, Rwanda acceded on 16 April 1975, South Africa ratified the ICCPR on 10 December 1998 and Uganda acceded on 21 June 1995. See 'International Covenant on Civil and

In terms of its provisions, the ICCPR addresses the need for the prohibition of discrimination. For example, discrimination on the basis of sex is not permissible.⁷⁴ Focus on non-discrimination is on 'everyone' in which case everyone is entitled to the equal protection of the law and that the law should prohibit discrimination that is based on distinctions such as race, colour, sex, religion, national or social origin.⁷⁵ On the basis of non-discrimination on grounds of sex, women should be accorded equal treatment in terms of enjoying the rights set out in the ICCPR.

In advancing the right to political participation, the ICCPR does not have any provision specific to women. Its provision is intended for general applications but is limited to citizens who should be able to participate in the public life of their country directly or through freely chosen representatives.⁷⁶ The relevant article provides the following:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Through this provision, the right to political participation is limited to 'citizens', in contrast to the UDHR, where the language used is that the right is guaranteed to 'everyone'.⁷⁷ The right is further guaranteed but with reasonable limitations.⁷⁸

Political Rights' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en (accessed 10 January 2012).

⁷⁴ Art 2(1) of the ICCPR.

⁷⁵ Art 26 of the ICCPR.

⁷⁶ Art 25 of the ICCPR.

⁷⁷ Compare art 21 of Universal Declaration and art 25 of the ICCPR.

Concerning the restrictions, two possibilities exist. The first type of restriction or limitation may be with regard to the individual's own participation which could be restricted due to reasonable criteria such as mental health. A second possible interpretation of the restrictions could be of a general nature such as implementation of measures that restrict participation of some parts of society. In the latter case it could be measures aimed at for instance ensuring that women participate in areas such as local government.

The manner in which the right is granted includes requiring that citizens should have an 'opportunity'.⁷⁹ Therefore, opportunities must be created by the state to enable people to realise their right and participate in the various spheres of public life such as local government. With reference to women's participation in local government, it means that the state's responsibility does not end when it makes policies or institutes legislation that favours women's participation but extends to giving effect to such undertakings.⁸⁰

The HRC as a treaty body can be helpful in clarifying aspects in the ICCPR as was the case in clarifying what the 'right to take part in the conduct of public affairs' means. In this regard the HRC in the communication of *Karakurt v Austria* stated that 'the rights protected by that article are to participation in the public political life of the nation, and do not cover private employment matters such as the election of an employee to a

⁷⁸ Some feminists contend that reference to 'individual' or citizen is in essence reference to 'white men' and therefore women are excluded. See P Paxton & MM Hughes *Women, politics and power: A global perspective* (2007) 3-4.

⁷⁹ Art 25 of the ICCPR.

⁸⁰ M Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (2005) 569. For example Nowak notes that giving political participation rights to people is insufficient unless measures are taken to ensure their actual realisation.

private company's work-council'.⁸¹ 'Public political life' includes local government and elections related to local government.

Participation in politics should not only be guaranteed but it should be 'on general terms of equality', however, the need for equality does not exclude the use of measures aimed at promoting inclusion of previously excluded groups.⁸² The implementation of special measures must be temporary and reasonable in nature.⁸³ Therefore, in areas such as local government where women have been historically excluded, special measures should be relied upon to ensure women's access to this level of government. An example of how the HRC approved the use of special measures to advance women's participation, while rejecting that such measures amounted to unfair discrimination, can be seen in the case of *Guido Jacobs v Belgium*.⁸⁴ In this case, the applicant (a man) applied for a position at the High Council of Justice in Belgium.⁸⁵ The total number of positions at the High Council of Justice was 44.⁸⁶ The High Council of Justice was further divided into two colleges, one for French speakers comprising 22 members and another for Dutch speakers with a similar number.⁸⁷ A further sub-division in each college set aside 11 seats for non-justices and required that of the 11 non-justices in each college at least four must be exclusively reserved for women.⁸⁸ Such a measure was implemented to address past exclusion and discrimination against women. The applicant applied for a non-justice seat and when he was not appointed he lodged a case that eventually ended

⁸¹ *Karakurt v Austria* Communication No 965/2000, CCPR/C/74/D/965/2000 http://www.bayefsky.com/.html/austria_t5_iccpr_965_2000.php (accessed 25 December 2007).

⁸² Nowak (2005) 586.

⁸³ As above.

⁸⁴ 943/2000, ICCPR A/59/40 vol.II (7 July 2004) 138 paras 2.1- 2.10, 9.2-9.11 and Individual Opinion of Ruth Wedgwood (concurring) 158.

⁸⁵ *Guido Jacobs* case paras 2.8-2.10.

⁸⁶ *Guido Jacobs* case 138 paras 2.2.

⁸⁷ As above.

⁸⁸ *Guido Jacobs* case paras 2.3.

up at the HRC. He alleged that setting aside some non-justice seats in the High Council of Justice exclusively for women was discriminatory.⁸⁹ The applicant argued that such quotas were contrary to the ICCPR provision requiring access to public service on ‘general terms of equality’.⁹⁰ In this case the HRC held that ‘states parties may take measures in order to ensure that the law guarantees to women the rights contained in article 25 on equal terms with men’.⁹¹ Furthermore, the HRC held that the aim of the exclusion was to ‘increase the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there’.⁹² The HRC held that the requirement that at least a third of the vacancies should be for women did not amount to a restriction which disproportionately affected Mr Jacobs’ ‘right of access on general terms of equality’.⁹³ In a concurring individual opinion, Ruth Wedgwood indicated that states were free to decide on methods to use to ensure that women participated in the ‘processes of government’.⁹⁴ This case and the decision of the HRC in the matter show that special measures can be used in various instances — including in local government — and these would not amount to undermining access to public service on ‘general terms of equality’.

The phraseology within the ICCPR shows a bias towards men that still existed, for example, through use of language such as citizens to ‘have access, on general terms of equality, to public service in *his* country’.

To advance women’s rights, there may be instances where distinctions are permissible which may favour women. However, such distinctions must be supported by reasonable

⁸⁹ *Guido Jacobs* case paras 3.3, 3.4, 3.5 & 3.8.

⁹⁰ *Guido Jacobs* case para 9.3.

⁹¹ As above.

⁹² *Guido Jacobs* case para 9.4.

⁹³ *Guido Jacobs* case para 9.5

⁹⁴ *Guido Jacobs* case, individual opinion of Committee member, Mrs Ruth Wedgwood (concurring).

and objective criteria.⁹⁵ Reasonable restrictions may be placed on potential candidates for appointed or elected office. Such restrictions must be of universal application and take into account the environment or experiences of women in a particular region or sub-region.

Measures may be put in place to determine minimum conditions for office holders. However, as Nowak has noted, ‘public office may not be denied to members of a certain ethnic group, religion or gender’,⁹⁶ but has also emphasised that it is permissible to place what he terms ‘qualificational requirements’ when appointments are made.⁹⁷ In my opinion such measures should not be overly stringent, for example, resulting in exclusion of marginalised groups such as women. In fact, the HRC addressed the question of whether emphasis on gender equality renders qualification irrelevant. In this regard, within the context of the *Guido Jacobs v Belgium* case where all candidates had to have at least 10 years of relevant experience, the HRC emphasised that measures should be fair such that ‘a reasonable proportionality is maintained between the purpose of the gender requirement, namely to promote equality between men and women in consultative bodies; the means applied and its modalities’.⁹⁸ This reasonable proportionality must therefore be applied at local government level as well.

In terms of assessing state party performance, the HRC requires state parties to provide data and statistics so that it can ‘assess’ the progress made in achieving the rights under the ICCPR.⁹⁹ Providing data about local government would help for purposes of proper

⁹⁵ Nowak (1993) 44.

⁹⁶ Nowak (2005) 585.

⁹⁷ As above.

⁹⁸ *Guido Jacobs* case para 9.5.

⁹⁹ General Comment 2 (13) of 1981, CCPR/C/19/Rev.1 (26 August 1982), CCPR/C/5/Rev.2 (28 April 1995), Annex VIII of HRC report to UN General Assembly (a/53/40). ‘Consolidated guidelines for state reports under the International Covenant on Civil and Political Rights’ CCPR/C/66/GUI/Rev.2

assessment of women's political participation in local government. To this end, the HRC has noted that besides reporting on laws, states needed to provide information on 'practices and decisions of courts and other organs of the state party' furthermore states need to provide factual information showing 'progress achieved, factors and difficulties' experienced in trying to implement provisions of the ICCPR.¹⁰⁰ The provision of data can help the HRC to assess whether human rights norms have been domesticated and whether their domestication is making an impact.

States are expected to give an accurate overall account of their activities including measures in place and challenges that they faced.¹⁰¹ The initial country reports map out the measures in place that are aimed at guaranteeing the rights in the ICCPR, while subsequent reports give an indication of how the rights are being implemented and as such they contain the relevant data on issues such as women's participation in politics.¹⁰² With the exception of Rwanda, all the other three states are behind with their reporting under the ICCPR; Lesotho and Uganda have only submitted their initial country reports, while South Africa is yet to submit its initial country report.¹⁰³

The initial country reports deal directly with the issue of domestication as they are supposed to explain both the 'constitutional and legal framework' which is in place for purposes of achieving the rights in the ICCPR.¹⁰⁴ Besides setting out the legal framework, the reports are also aimed at setting out the 'practical measures' which have been put in

(26 February 2001) [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.66.GUI.Rev.2.E...](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.66.GUI.Rev.2.E...) (accessed 22 September 2007) para C.6.

¹⁰⁰ As above.

¹⁰¹ Consolidated guidelines for state reports under ICCPR para C.6.

¹⁰² Consolidated guidelines for state reports under ICCPR para E.1.

¹⁰³ 'Reporting status of human rights treaty bodies' <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 10 January 2012). See chapter 5 sec 5.2.4(i) for a discussion of the contents of the reports on the extent of women's inclusion in local government.

¹⁰⁴ Para D.1 of the Consolidated guidelines for state reports under ICCPR.

place to achieve these rights.¹⁰⁵ In the case of participation in local government, practical measures can show that citizens have access and that the access is on the basis of equality or that special measures are in place to ensure access for marginalised groups. The failure to submit up to date reports means that the HRC is unable to be informed of recent legal changes that may be aimed at ensuring equal participation of marginalised groups such as women.

The HRC's concluding observations on Lesotho do not fully reflect the present day reality as they were adopted more than 10 years ago.¹⁰⁶ At the time, the HRC noted that women faced discrimination as legally they were considered perpetual minors.¹⁰⁷ Women's participation in political life was still deficient and Lesotho was required to ensure that efforts were made including taking affirmative action to further improve participation of women in the political life and public life of the country.¹⁰⁸ The ICCPR had not been sufficiently domesticated as some of the constitutional and legal provisions were contrary to the promotion of equality and as a result undermined the ability of women to achieve their rights to the same extent as men.¹⁰⁹ In Uganda's case, the report, considered in 2004, failed to address the issue of women's participation in politics altogether.¹¹⁰ The HRC was critical of Uganda for failing to clarify the status of the ICCPR in domestic law, in essence meaning that the level of the domestication of principles set out in ICCPR could be questioned.¹¹¹ Regarding Rwanda, the HRC observations have been made more recently, in 2009, and are therefore more reflective of the situation in the country.¹¹² Rwanda was commended for the increased

¹⁰⁵ Para D.1 of the Consolidated guidelines for state reports under ICCPR.

¹⁰⁶ 'Concluding observations of the HRC: Lesotho' UN Doc CCPR/C/79/Add.106 (8 April 1999) para 9.

¹⁰⁷ Concluding observations of the HRC: Lesotho para 10.

¹⁰⁸ Concluding observations of the HRC: Lesotho para 25.

¹⁰⁹ Concluding observations of the HRC: Lesotho paras 6 & 10.

¹¹⁰ 'Concluding observations of the HRC: Uganda' UN Doc CCPR/CO/80/UGA (4 May 2004).

¹¹¹ Concluding observations of the HRC: Uganda para 6.

¹¹² 'Concluding observations of the HRC: Rwanda' UN Doc CCPR/C/RWA/CO/3 (7 May 2009).

participation of women in Parliament but at the same time a recommendation was made that efforts needed to be increased to ensure women's participation in other spheres of public life.¹¹³ The concluding observation on Rwanda focussed on the legislature only and local government was not specifically mentioned thereby highlighting the lack of attention on local government even by a treaty body such as the HRC. The apparent consistent failure by the HRC to raise the subject of women's political participation in local government can lead to a conclusion that perhaps the subject of local government is not yet viewed as being of vital importance.

Besides filing communications and examination of state reports, another means through which rights such as political participation can be advanced is through 'General Comments' that the HRC issues. General Comments serve a number of key functions. While they have a persuasive and authoritative effect, they are not binding in a strict legal sense.¹¹⁴ However, General Comments guide state parties in realising the substantive rights in the ICCPR. They provide clarity for purposes of implementation. Furthermore, they elaborate on how provisions of the ICCPR should be understood. General Comments are not binding and as such, states can oppose the interpretation that the HRC attaches to a provision of the ICCPR. As Tomuschat has noted, the HRC can 'explain to state parties how certain problems arising in the implementation of the CCPR should be dealt with'.¹¹⁵ General Comments can therefore serve another useful purpose of clarifying norms when states are domesticating provisions of the ICCPR, for example, when legislation is being developed.

In relation to political participation, the HRC issued General Comment 25 which reinforces and clarifies the right of individuals to participate in the political life of their

¹¹³ Concluding observations of the HRC: Rwanda para 6.

¹¹⁴ C Tomuschat *Human Rights between idealism and realism* (2003) 156.

¹¹⁵ As above.

communities.¹¹⁶ It mentions local government specifically and explains that ‘conduct of public affairs’ referred to in the ICCPR is a ‘broad concept’ which includes participating at a local level.¹¹⁷ ‘Conduct of public affairs’ includes ‘public administration, and the formulation and implementation of policy at international, national, regional and local levels’ and citizens may equally and directly participate in these activities.¹¹⁸ General Comment 25 is not limited to women’s participation but is of general application and besides clarifying the right, is intended to guide state parties in terms of the information they should provide when making state reports to the HRC. The guidance to states in turn assists the HRC to adequately assess whether the right to political participation is being fulfilled. General Comment 25 is detailed and for purposes of this study only those sections with a direct bearing on women’s participation in politics are discussed.

A further clarification is that of the meaning of ‘access to the public service’ which in terms of General Comment 25 should mean access to public service positions.¹¹⁹ Access to public service can be interpreted to include positions such as those at local government and therefore measures that ensure inclusion of marginalised groups in local government are acceptable. According to the HRC’s interpretation, state parties can implement affirmative action measures to ensure that the public service is accessible to every citizen, including marginalised groups.¹²⁰ Women would fall within the very broad category of ‘marginalised groups’.

¹¹⁶ CCPR ‘General Comment 25: The right to participate in public affairs, voting rights and the right of equal access to public service (art 25)’ CCPR/C/21/Rev.1/Add.7 (12 July 1996) [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument) (accessed 20 September 2012) para 1.

¹¹⁷ CCPR General Comment 25 paras 5-6.

¹¹⁸ As above.

¹¹⁹ CCPR General Comment 25 para 23-24.

¹²⁰ CCPR General Comment 25 para 23.

In terms of actual candidacy for office, General Comment 25 makes it clear that there should not be unreasonable requirements for candidacy in elections.¹²¹ As such, women should not be excluded on unreasonable criteria based on ‘education’ or ‘political affiliation’,¹²² especially when considering their historically disadvantaged position. Candidates may also not be required to prove support of an unfairly large number of people which could result in automatic disqualification for women as they may not be as politically well-connected as their male competitors.¹²³ Where candidates are appointed, fulfilling the requirement of ‘access on general terms of equality’ means that all processes including ‘appointment, promotion, suspension and dismissal must be objective and reasonable’ but at the same time affirmative action if needed in order to ensure equal access.¹²⁴

In addition to General Comment 25 the right to equal participation in politics is raised in General Comment 28 which touches on the subject fleetingly.¹²⁵ The matter is addressed within the context of article 3 of the ICCPR that focuses on promotion of equality. In General Comment 28, states must provide statistical information on the participation of women in ‘publicly elected office’.¹²⁶ States may use ‘positive measures’ or ‘affirmative action’ and should provide statistics and other information on women’s participation in all elected offices.¹²⁷ By indicating that statistics should be provided in areas ‘including’ the legislature, senior civil service and judiciary,¹²⁸ General Comment

¹²¹ CCPR General Comment 25 para 15-18.

¹²² CCPR General Comment 25 para 10.

¹²³ CCPR General Comment 25 para 17.

¹²⁴ CCPR General Comment 25 para 23.

¹²⁵ ‘CCPR General Comment 28: Equality of rights between men and women (article 3)’ CCPR/C/21/Rev.1/Add.10 (29 March 2000) <http://www2.ohchr.org/english/bodies/hrc/commitments.htm> (accessed 10 January 2012) paras 3 & 29.

¹²⁶ As above.

¹²⁷ As above.

¹²⁸ CCPR General Comment 28 para 29.

28 is clearly indicating that these should not be the only areas that a state should concentrate upon.

Overall, the ICCPR further extends the right to political participation and the interpretation of this right by the HRC has further made it clear that local government is included. Other instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women and the treaty body under this instrument further help to elaborate the right of women to participate in politics.

2.4.4 The Convention on the Elimination of All Forms of Discrimination Against Women

In this section of the chapter, an analysis of how the CEDAW¹²⁹ addresses women's right to political participation is undertaken. In analysing the substantive provisions, the contribution of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee)¹³⁰ is considered in terms of how women's right to political

¹²⁹ Adopted by Resolution 34/180 (1979) by the UN General Assembly. Entered into force on 3 September 1981. See also 'Convention on the Elimination of All Forms of Discrimination Against Women: Status' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 29 November 2012). Lesotho ratified on 22 August 1995, Rwanda ratified on 2 March 1981, South Africa ratified on 15 December 1995 and Uganda ratified on 22 July 1985. Initial efforts to address discrimination against women were addressed through the Declaration on the Elimination of All Forms of Discrimination Against Women (DEDAW). LA Rehof *Guide to the travaux preparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1993) 6. See also UN General Assembly Resolution 1921 (XVIII) of 5 December 1963. There was a request that the CSW should prepare a draft declaration that would address the plight of women and set standards that would ensure equality between men and women.

¹³⁰ CEDAW provides for the CEDAW Committee which consists of 23 members who serve for four years in their individual capacities. It meets for two weeks to consider reports submitted by state parties. One criticism against this committee is the duration and frequency of its meetings. The

participation is advanced and how this participation can be related to local government. I start with introducing the CEDAW Committee and briefly look at how it has handled the issue of women's participation in politics at the local government level in Lesotho, Rwanda, South Africa and Uganda. I then analyse the provisions within CEDAW that deal with the right to participate in politics and how some of these have been interpreted by the CEDAW Committee especially through its General Comments. Women's right to participate at the local government level is not in all cases addressed directly but can be implied from the pronouncements of the CEDAW Committee or the provisions of CEDAW, especially when it deals with the right to participate in politics in a broad manner.

In terms of its composition, the CEDAW Committee is supposed to consider geographical representation of its members.¹³¹ In comparison to the HRC, which has few women members, the CEDAW Committee has no African men among its four African members.¹³² Of course the absence of men from the CEDAW Committee may be largely as a result of lack of expertise among men but at the same time the absence of men from this important committee can be erroneously interpreted in some quarters as indicating that women's rights are only a concern of women.

CEDAW Committee cannot adequately evaluate state reports in such a short time. Another criticism is that in view of the fact that the CSW already exists, there is a need to reduce duplication. This can be best done by ensuring better information sharing between the CSW and the CEDAW Committee. See arts 17(1) & (5) and art 20(1) of CEDAW. See also R Jacobson 'The Committee on the Elimination of Discrimination Against Women' in Alston P (ed) (1992) *The United Nations and human rights: A critical appraisal* 463. The author states that the CEDAW Committee and the CSW have had very little formal or institutional contact.

¹³¹ Art 17(1) of CEDAW.

¹³² 'Members of the CEDAW Committee' (2012) <http://www.ohchr.org/english/bodies/cedaw/membership.htm> (accessed 5 October 2012). The five Africans on the CEDAW Committee are: Ms Meriem Belmihoub-Zerdani (Algeria), Ms Naela Mohamed Gabr (Egypt), Ms Violet Tsisiga Awori (Kenya) and Ms Pramila Patten (Mauritius).

In protecting and promoting women's rights under CEDAW, state parties are required to submit reports to the CEDAW Committee which then assesses each state's performance.¹³³ The timeframes for reporting are that the first report is submitted within a year of becoming a state party to CEDAW and thereafter after every four years. As part of the proof of domestication, in their state reports, the states set out the legislative, judicial, administrative and other measures that are in place and the progress that has been made with respect to achieving the objectives of the Convention which include women's participation in political life. In addition to the measures, the reports must show an analysis 'of women's situation in all spheres of life'.¹³⁴ For example, the sphere of women's participation at local government level must be analysed. Such an analysis helps to bring about a better understanding of women's situation taking into consideration their historical treatment, and then also current and future plans of the state. In making the analysis states should indicate the difficulties they experience while implementing CEDAW's provisions.¹³⁵

A key aspect to which the CEDAW Committee has paid attention and which affects political participation is the role of 'temporary special measures'. The CEDAW Committee recommends that state reports should contain information on the 'temporary special measures' that state parties have adopted or failed to adopt in an effort to realise *de facto* equality.¹³⁶ The position adopted by the CEDAW Committee is similar to that of the HRC but has greater detail and focuses specifically on women. The CEDAW Committee has also made it clear that when states report, they must in their reports distinguish between 'temporary special measures' and 'general social policies' aimed at improving situations of women and girl children.¹³⁷ The importance of such distinction is that temporary special measures would be more specific and tailored to

¹³³ Art 18(1)(a) of CEDAW.

¹³⁴ CEDAW General Recommendation 25 para 27.

¹³⁵ Art 18(2) of CEDAW.

¹³⁶ CEDAW General Recommendation 25 para 25.

¹³⁷ As above.

the needs of a sector. States would be more easily assessed on their performance unlike the case with 'general social policies'.

Rwanda, South Africa and Uganda all ratified CEDAW without entering any reservations.¹³⁸ Lesotho, on the other hand, entered a reservation stating that it was not bound by article 2 of CEDAW as far as it conflicted with the country's Constitution, 'affairs of religious denomination', succession to the kingship or chieftaincy and that it would not take any legal measures that would conflict with the constitution.¹³⁹ The reservation has since been modified and now only relates to succession to kingship and chieftaincy.¹⁴⁰ Lesotho's position is that equality between the sexes cannot apply in these two areas of leadership. The reservation excluding women from succession to kingship and chieftaincy is incompatible with the objects and purpose of CEDAW and as such it remains the subject of numerous objections by other state parties to CEDAW.¹⁴¹ Chieftaincy for instance forms part of local government structures and excluding women from succession to this positions means that they are excluded from playing a vital leadership role.

¹³⁸ 'Convention on the Elimination of All Forms of Discrimination Against Women' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#32 (accessed 12 January 2012). Rwanda ratified CEDAW on 2 March 1981, South Africa ratified on 15 December 1995 and Uganda on 22 July 1985.

¹³⁹ 'Convention on the Elimination of All Forms of Discrimination Against Women' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#32 (accessed 12 January 2012). Lesotho ratified CEDAW on 22 August 1995.

¹⁴⁰ 'Declarations, reservations and objections to CEDAW' <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N35> (accessed 12 January 2012).

¹⁴¹ 'Report of the Committee on the Elimination of Discrimination Against Women' A/53/38/Rev.1 (14 May 1998). See also eg objections entered against Lesotho's reservation by Finland and Norway 'Declarations, reservations and objections to CEDAW' <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N35> (accessed 12 January 2012).

In the last five years Lesotho, Rwanda, South Africa and Uganda have submitted reports to the CEDAW Committee. In all cases these states submitted reports covering a period of at least 12 years in which they have discussed the issue of women's involvement in local government. In response to these reports, the CEDAW Committee has generally concluded that all four states need to take further measures in order to safeguard women's political participation in local government. In its concluding observations, the CEDAW Committee has not adequately explored the subject of women's political participation in local government but has nevertheless created awareness about the importance of women's political participation in local government.

Among the four states under review, Lesotho is the only state that was commended for taking steps to ensure high levels of women's inclusion in local government leadership.¹⁴² The CEDAW Committee commended Lesotho for effectively using the quota as a temporary special measure and as a result, for achieving 58 percent inclusion of women in local government.¹⁴³ The CEDAW Committee, however, failed to investigate further to establish the type of positions that women were occupying within local government to establish whether they could adequately impact on developments at local government level. The CEDAW Committee was dissatisfied with the low usage of temporary special measures and recommended that Lesotho should 'systematically' apply the temporary special measures so that 'substantive equality between women and men' could be achieved.¹⁴⁴

With regard to Rwanda, South Africa and Uganda, their performance in respect of women's political participation in local government was found to be deficient and as a

¹⁴² 'Concluding observations of the CEDAW Committee: Lesotho' CEDAW/C/LSO/CO/1-4 (21 October 2011) para 18.

¹⁴³ Concluding observations of the CEDAW Committee: Lesotho para 18.

¹⁴⁴ As above.

result they were encouraged to take measures to ensure better inclusion of women.¹⁴⁵ In Rwanda's case, for example, the CEDAW Committee found that women were 'underrepresented in local public administration' and called on the government to make efforts, particularly using temporary special measures so that women's inclusion in local government can improve.¹⁴⁶ In the case of South Africa, the country was commended for its adoption of gender parity with respect to political participation but the statistics of women's participation that were provided were limited to parliament, cabinet and the civil service.¹⁴⁷ Inclusion of women in local government was not mentioned. According to the Committee, South Africa was failing to vigorously apply temporary special measures and as a result a recommendation was made that efforts must be made in this regard and that these measures should be monitored to ensure women's participation in public life including within local government.¹⁴⁸ Uganda was also commended for ensuring better inclusion of women in the legislature but criticised for failing to use temporary special measures adequately to ensure 'advancement' of women in areas such as local government.¹⁴⁹

The issue of domestication was raised in respect of all four states. Rwanda was commended for taking steps to ensure substantive gender equality.¹⁵⁰ With respect to

¹⁴⁵ 'Concluding observations of the CEDAW Committee: Rwanda' CEDAW/C/RWA/CO/6 (8 September 2009) paras 29-30. See also 'Concluding observations of the CEDAW Committee: South Africa' CEDAW/C/ZAF/CO/4 (4 February 2011) paras 29-30. See also 'Concluding observations of the CEDAW Committee: Uganda' CEDAW/C/UGA/CO/7 (22 October 2010) paras 29-30.

¹⁴⁶ Concluding observations of the CEDAW Committee: Rwanda paras 29-30.

¹⁴⁷ Concluding observations of the CEDAW Committee: South Africa paras 7-8.

¹⁴⁸ Concluding observations of the CEDAW Committee: Rwanda paras 29-30.

¹⁴⁹ Concluding observations of the CEDAW Committee: Uganda paras 29-30.

¹⁵⁰ Concluding observations of the CEDAW Committee: Rwanda para 6.

Lesotho, South Africa and Uganda, the states were not taking adequate steps aimed at domestication of principles related to substantive equality between women and men.¹⁵¹

Besides state reporting, two other approaches can be utilised to promote and protect women's rights. The first is through lodging individual complaints and the second is through confidential on-site enquiry. In the first instance, individual complaints are brought against member states to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Optional Protocol) of which Lesotho, Rwanda and South Africa are parties.¹⁵² Accordingly, a case involving a violation of women's right to participate in politics at the local government level could be brought before the CEDAW Committee against any of the three states. In the second instance, an inquiry can be launched against a state party if information is received that the state party is committing a grave or systematic violation of the rights under CEDAW.¹⁵³ Any right under CEDAW can be the subject of such an inquiry.

In terms of the theoretical framework, the right for women to participate in politics is considered important as can be seen from the fact that it is set out within the treaty. The issue is addressed generally within the preamble of CEDAW where it is

¹⁵¹ Concluding observations of the CEDAW Committee: Lesotho para 10. See also Concluding observations of the CEDAW Committee: South Africa para 14. See also Concluding observations of the CEDAW Committee: Uganda para 13.

¹⁵² 'Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women' UN General Assembly Resolution A/RES/54/4 of 15 October 1999 entered into force on 22 December 2000 <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>(accessed 28 October 2007). See also 'Briefing paper on Optional Protocol to CEDAW' <http://www.fwld.org.np/pub8.html> (accessed 20 December 2006). See also 'Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en (accessed 28 September 2012), Lesotho became a party on 24 September 2004, Rwanda became a party on 15 December 2008 and South Africa on 18 October 2005.

¹⁵³ Art 8 of the CEDAW OP.

acknowledged that addressing the issue of women's participation in politics is important for realising development and achieving peace.¹⁵⁴ The right can also be read into a number of general provisions within CEDAW especially those dealing with non-discrimination.¹⁵⁵ One provision where it arises is within the definition of the term 'discrimination against women' in which case CEDAW states that the term means any¹⁵⁶

distinction, exclusion or restriction' which is based on sex and whose effect or purpose results in 'impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and *fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

By including political participation within the definition of the term 'discrimination against women' CEDAW shows the importance that is accorded this right and therefore the attention that state parties should pay to it. Accordingly, states parties have undertaken to 'embody the principle of the equality of men and women in their national

¹⁵⁴ Preamble of CEDAW states that

'[D]iscrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the *political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity*' (emphasis added).

¹⁵⁵ The preamble of CEDAW addresses the need for women to enjoy their political rights. Art 1 defines the term 'discrimination against women' and in so doing it indicates that it is distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the enjoyment or exercise by women of their rights and freedoms of which their political rights is one of them. Art 2 of CEDAW also deals with the need for state parties to take measures that would ensure that equality between men and women is embodied in their constitutions and other areas of life. This would have an effect on their political rights as well. Art 3 has addressed the political rights of women by requiring state parties to ensure full development and advancement of women.

¹⁵⁶ Art 1 of CEDAW (emphasis added).

constitutions or other appropriate legislation’ and to ensure its realisation.¹⁵⁷ Emphasis on realisation shows that CEDAW’s pre-occupation was not with *de jure* equality but with *de facto* equality as well. In realising the right, states are given leeway to implement appropriate measures that would result in increased women’s participation in, for example, political office.

CEDAW addresses the right to participate in politics in general terms by requiring states to ‘refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation’.¹⁵⁸ Requiring ‘public authorities and institutions’ to refrain from discrimination extends to the constitution of such ‘authorities and institution’. They too must pay attention to the inclusion of women.

In yet another general approach to the subject of participation in politics, CEDAW provides that the state must ‘take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise’.¹⁵⁹ States are required to implement legislation that prohibits discrimination and to repeal those laws that have promoted discrimination against women.¹⁶⁰ Primary responsibility rests on states to ensure that measures are in place for purposes of modification of negative social conduct including ‘all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles of men and women’.¹⁶¹ Accordingly, it is the duty of the state party to monitor and ensure that no discrimination occurs at the domestic level, for instance, in entities such as local government structures.

¹⁵⁷ Art 2(a) of CEDAW.

¹⁵⁸ Art 2(d) of CEDAW.

¹⁵⁹ Art 2(e) of CEDAW.

¹⁶⁰ Art 2(b) and (f) of CEDAW.

¹⁶¹ Art 5(a) of CEDAW.

With specific regard to women's right to participate in politics in places such as local government, three provisions within CEDAW can be identified as potentially impacting on women in local government. In the first instance, states are compelled to 'take all appropriate measures to eliminate discrimination against women in the political and public life of the country'.¹⁶² Reference to 'public life' undoubtedly extends to local government. Second, states must ensure that, on equal terms with men, women are 'eligible for election to all publicly elected bodies'.¹⁶³ Therefore, even at local government level, women should be eligible for election. Third, states must ensure that, on equal terms with men, women 'hold public office and perform all public functions at all levels of government'.¹⁶⁴ Besides elected office, women therefore have a right to be appointed in those instances where office holders are appointed.

The above three provisions are specifically elaborated upon by General Recommendation 23 of the CEDAW Committee which was adopted during a period of political and social change taking place in Lesotho, Rwanda, South Africa and Uganda.¹⁶⁵ In addition to General Recommendation 23, General Recommendation 25 that addresses the need for the use temporary special measures is relevant for the realisation of women's participation in politics in areas such as local government.

¹⁶² Art 7 of CEDAW.

¹⁶³ Art 7(a) of CEDAW.

¹⁶⁴ Art 7(b) of CEDAW.

¹⁶⁵ General Recommendation 23 (16th Session of 1997). General Recommendation 5 (7th Session of 1988) which deals with temporary special measures and which can also contribute to the realisation of women to participate in politics as states are encouraged to use temporary special measures. Other general recommendations that can be used include General Recommendation 9 (8th Session of 1989) that deals with statistical data and encourages states to provide statistics on women's inclusions when they report before the CEDAW Committee. In terms of political and social changes, Lesotho was going through political changes influenced by changes in South Africa, Rwanda had experienced a genocide in 1994 which resulted in major social and political changes in the country and Uganda was emerging from a period of prolonged political instability.

In terms of General Recommendation 23, the term ‘political and public life’ is acknowledged as having a wide meaning and accordingly the CEDAW Committee states that it ‘refers to the exercise of political power’ and extends to ‘formulation and implementation of policy’ at among others the local level of government.¹⁶⁶

General Recommendation 23 makes it clear that ‘political and public life’ extends beyond the areas that are explicitly mentioned in CEDAW.¹⁶⁷ As such, reference to ‘political and public life’ included local government as well. If local government is included, then taking all necessary measures to ensure that women are able to participate in politics also entails creating a conducive environment at the local government level so that women participate equally as men.¹⁶⁸

General Recommendation 23 recognises the need to use temporary special measures to redress the historical exclusion of women.¹⁶⁹ Temporary special measures cover a wide array of activities having ‘corrective, compensatory and promotional’ dimensions.¹⁷⁰ These measures should be targeted to all areas of ‘public life’ and therefore local government is included. The temporal nature of temporary special measures has been explained further in General Recommendation 25 where it is explained that time is not the factor of concern but rather the achievement of a result and the ability to sustain such result without needing to apply any measure.¹⁷¹ For example, if a time comes and at local government level women are ordinarily included to the same extent as men,

¹⁶⁶ CEDAW General Recommendation 23 para 5 (emphasis added).

¹⁶⁷ CEDAW General Recommendation 23 para 5 .

¹⁶⁸ CEDAW General Recommendation 23 para 14.

¹⁶⁹ CEDAW General Recommendation 23 para 15.

¹⁷⁰ Schöpp-Schilling, HB ‘Reflections on a general recommendation on Article 4(1) of the Convention on the Elimination of All Forms of Discrimination Against Women’ in Boerefijn, I *et al* (eds) (2003) *Temporary special measures: Accelerating de facto equality of women under Article 4 (1) UN Convention on the Elimination of All Forms of Discrimination Against Women* 15 22.

¹⁷¹ CEDAW General Recommendation 25 para 20.

then the measures become unnecessary and unjustifiable. The ‘special’ status of the measures lies in the ‘specific purpose’ that they seek to achieve rather than because women are ‘weak or vulnerable’.¹⁷² They are ‘measures’ because they cover varied options that may be resorted to in order to ensure inclusion of women, these could include but are not limited to¹⁷³

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.

With specific reference to political participation a wide variety of measures can qualify as temporary special measures and any of these could be used to promote women’s participation in local government. As noted in General Recommendation 23, some states have already put in place measures ‘including 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’.¹⁷⁴ In applying any of these measures or strategies, the state would be seeking to achieve substantive equality between the sexes and temporary special measures are necessary in areas such as political participation so that equality in ‘political influence’ can be realised.¹⁷⁵ In assessing the extent to which temporary special measures are effective, statistical data becomes necessary when states report on the inclusion of women.¹⁷⁶

¹⁷² CEDAW General Recommendation 25 para 21.

¹⁷³ CEDAW General Recommendation 25 para 22.

¹⁷⁴ CEDAW General Recommendation 23 para 15.

¹⁷⁵ CEDAW General Recommendation 25 paras 8-9.

¹⁷⁶ CEDAW General Recommendation 23 para 47(d). See also General Recommendation 9 and General Recommendation 25 para 35.

CEDAW's contribution to the advancement of women's participation in politics lies in the fact that it exceeded the standards that any of the earlier instruments had set. It provided greater detail. In addition, the work emanating from the CEDAW Committee has further advanced the understanding of what political participation entails and the measures that are considered as necessary to achieve greater equality for women.

In addition to binding instruments such as CEDAW, non-binding instruments have also further helped to further clarify the right to political participation as is evident from the Vienna and Beijing Conferences.

2.5 The Vienna and Beijing conferences' contribution in advancing women's right to political participation

World conferences have contributed to the advancement of women's rights in particular by highlighting the importance of women's political participation and how it should be addressed. It is in light of such contribution that I analyse their role towards furthering women's participation in politics. All the world conferences were held under the auspices of the UN and contributed to identifying areas of concern to women. The two conferences to be analysed here, namely the World Conference on Human Rights of 1993 (Vienna Conference) and the Fourth World Conference on Women of 1995 (Beijing Conference), guided states through their programme/platform for action on how to achieve the rights and as such provided more specifics on implementation than what previous human rights instruments had done.

The Vienna and Beijing Conferences broaden the right to political participation as it affects women. Despite the fact that the programme/platform for action from each conference is not binding, it nevertheless serves a persuasive role and guides states as they develop standards at their domestic level.

While I focus on only two conferences, other conferences had preceded these. In the case of women's rights three world conferences had been held since 1975 in Mexico City, Copenhagen and Nairobi.¹⁷⁷ However, it is the Beijing Conference that has left a lasting impression in the area of women's participation in politics especially in light of the fact that it took place in the 1990s when the issue of women's participation was current in discourse on women's rights.

2.5.1 The Vienna Declaration and Programme of Action

The contribution of the Vienna Declaration and Programme of Action¹⁷⁸ (Vienna Declaration) is that it provides an up-to-date interpretation of the Universal Declaration. The analysis of the Vienna Declaration's contribution in this study is with the aim of establishing the extent to which it expands on implementation of various rights but in particular focus is on women's right to participate in politics.

In promoting women's participation the Vienna Declaration states that absence of development should not be used as a justification for failure to abide by recognised rights.¹⁷⁹ In fact, an obligation is placed on states to make women's political participation a priority.¹⁸⁰ Therefore, no state should rely on under-development as an excuse for the non-inclusion of women in political participation. Regardless of a state's level of development all citizens should be afforded an opportunity to participate in politics.

¹⁷⁷ 'United Nations Conference on Women' <http://library.thinkquest.org/12336/Beijing.html> (accessed 27 October 2007). These conferences have been held in Mexico City (1975), Copenhagen (1980), Nairobi (1985) and Beijing (1995).

¹⁷⁸ 'Vienna Declaration and Platform of Action 1993' UN Doc A/CONF.157/23 [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En) (accessed on 27 October 2007).

¹⁷⁹ Part I, art 10 of the Vienna Declaration.

¹⁸⁰ Part I, art 18 of the Vienna Declaration.

In an effort to redress past exclusion of women and sidelining of their views and experiences, no better indicator exists than requiring that women should be included in positions of authority so that they too are agents of development.¹⁸¹ There is therefore no doubt that women should have an opportunity to be included at all levels of authority such as in local government.

Attention is focussed on provision of data to help determine the extent of realising women's rights. For example, an obligation is placed on treaty bodies that they should consider matters related to women. Treaty bodies are obliged to 'include the status of women and the human rights of women in their deliberations and findings, making use of gender-specific data'.¹⁸² The achievement of gender equality is not purely about adopting policies and laws. Use of data illustrates whether in reality equality indeed exists. Portrayal of women's representation through data encourages states to take action to ensure that in areas such as women's participation in politics at local government, formal protection is translated to substantive realisation.¹⁸³

2.5.2 The Beijing Declaration and Platform for Action

Even though it is not a treaty, the Beijing Declaration and Platform for Action (Beijing Declaration)¹⁸⁴ is one of the most comprehensive human rights instruments that details practical ways in which women can be included in political participation and identifies women's participation in politics as a 'critical area of concern'.¹⁸⁵ The contribution of the Beijing Declaration is unique because it takes into consideration different factors and

¹⁸¹ Part II, art 36 of the Vienna Declaration.

¹⁸² Part II, art 42 of the Vienna Declaration.

¹⁸³ Part II, art 42 of the Vienna Declaration.

¹⁸⁴ 'Beijing Declaration and Platform for Action, 4th World Conference on Women' A/CONF.177/20(1995) and A/CONF.177/20/Add.1(1995) <http://www.un.org/womenwatch/daw/beijing/platform/> (accessed 27 October 2010).

¹⁸⁵ Beijing Declaration para 44.

sets out quite clearly what states must do in order to realise the rights of women. For instance, it considers factors such as socio-political issues and pays attention to activism which was not the case in previous human rights instruments. Women's participation in local government is not specifically addressed but instead the right to participate in politics is addressed in a more general manner which sufficiently covers the local government sphere.

Objectives identified by the Beijing Declaration and that can have an impact on women's participation in local government include 'equal access and full participation in power structures',¹⁸⁶ integration of gender in laws, policies, programmes and projects,¹⁸⁷ and generation and dissemination of gender related data.¹⁸⁸ Besides these objectives, detailed measures that stakeholders such as government need to undertake to correct discrimination against women are suggested. Previous instruments had not given this type of detail to ensure that women participate in politics.

In terms of specific measures that can also impact the local government level, states are required to institute a number of measures such as set targets so as to realise women's participation¹⁸⁹ and adopt electoral systems that enable greater participation of women.¹⁹⁰ National bodies are also supposed to ensure that women form a critical mass in all national bodies.¹⁹¹ In support of such measures, collation of data would illustrate the extent of women's participation at all levels of government.¹⁹² In addition to data, states are to monitor progress and provide an analysis of women's situation.¹⁹³

¹⁸⁶ Strategic objective G.1 of the Beijing Declaration.

¹⁸⁷ Strategic objective H.2 of the Beijing Declaration.

¹⁸⁸ Strategic objective H.3 of the Beijing Declaration.

¹⁸⁹ Beijing Declaration para 190(a).

¹⁹⁰ Beijing Declaration paras 190(b), (c) & (e).

¹⁹¹ Beijing Declaration para 192.

¹⁹² Beijing Declaration paras 190(b), (c) & (e).

¹⁹³ Beijing Declaration para 190(e).

Governments are also supposed to support organisations that carry out research on women's participation.¹⁹⁴ Additional measures can include career development to assist women in being more effective in political participation. For example, programmes focussed on increasing women's self-esteem, mentorship, public-speaking and training in management.¹⁹⁵ All these measures can be useful in areas such as enabling women to access leadership positions at local government level and once in the positions to perform optimally.

The Beijing Declaration prioritised substantive realisation of women's rights. It provides clear guidance on what state must do in order to realise women's right to participate in politics. Its setback is that as a declaration it does not bind states.

2.6 Universal Periodic Review

In addition to the state reporting procedures of the existing treaty body mechanisms, states adherence to human rights norms can be examined through the Universal Periodic Review (UPR). Rights such as the right of women to participate in politics and whether they are involved in areas such as local government can be examined using the UPR. The UPR was adopted in 2006 by the UN General Assembly and is undertaken under the auspices of the Human Rights Council (HRC).¹⁹⁶ Lesotho, Rwanda, South Africa and Uganda have — like all other UN member states — been reviewed under the UPR. In terms of the UPR, states are reviewed to establish whether they are implementing their human rights obligations. Recommendations are then made and conclusions drawn with the intention of improving states' implementation of human rights. The advantage of the UPR when compared to state reporting under the treaty bodies is that the process of reviewing state performance is much broader and covers all treaties to

¹⁹⁴ Beijing Declaration para 190(f).

¹⁹⁵ Beijing Declaration paras 192(g) & 195.

¹⁹⁶ See art 1 & 5(e) of the UN General Assembly Resolution 60/251 adopted 15 March 2006.

which a state is a party.¹⁹⁷ The broad approach of the UPR is therefore appealing as it examines human rights in general without being specific to a single human rights instrument as may be the case with treaty bodies.

As with all enquiries carried out by the UPR process, the enquiry into women's participation in politics is undertaken through a non-confrontational method focussing on 'a cooperative mechanism' that has been referred to as an 'an interactive dialogue'.¹⁹⁸ The reports emanating from the UPR suggest that camaraderie rather than confrontation is encouraged.¹⁹⁹ The UPR offers states an opportunity for introspection and states are encouraged to make changes without feeling the pressure that treaty body proceedings potentially create.²⁰⁰ The setback of the UPR process is that detailed investigations are absent as a wide array of issues are handled with the result that subjects such as women's participation at local government are glossed over as is apparent from the manner in which the four states that are the focus in this study have been handled.

¹⁹⁷ See art 5(e) of the Resolution 60/251 which states the purpose as to '[u]ndertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States'. Based on this article it is clear that during the review, no limitation is placed on which instruments may be referred to but rather the guide is the instruments to which a state has committed itself and also the generally acceptable international standards.

¹⁹⁸ See art 1 & 5(e) of Resolution 60/251. See also FD Gaer 'A voice not an echo: Universal Periodic Review and the UN treaty body system' (2007) 7 *Human Rights Law Review* 109 110 & 128-129.

¹⁹⁹ Gaer (2007) 130-131. See also AM Abebe 'Of shaming and bargaining: African states and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 *Human Rights Law Review* 1 12 & 22. See also ED Redondo 'The Universal Periodic Review of the UN Human Rights Council: An assessment of the first session' (2008) 7 *Chinese Journal of International Law* 721 732.

²⁰⁰ Gaer (2007) 110.

Two main categories can be identified in terms of how Lesotho, Rwanda, South Africa and Uganda have been reviewed. Lesotho, Rwanda and Uganda fall in the first category in that they have been commended for their performance in including women in local government, but at the same time recommendations were made for further improvement. South Africa falls in the second category, in that no discussion ensued on the subject of women's participation in local government. These two categories illustrate the inconsistent manner in which state reviews are conducted.

Lesotho was commended for ensuring increased participation of women at local government level.²⁰¹ At the same time a recommendation was made that it needed to make greater effort to ensure gender equality.²⁰² Rwanda too was commended for its high representation of women in parliament but a recommendation was made to the effect that the high level of women's representation in Parliament needed to be reflected in other areas of decision-making as well.²⁰³ With particular reference to local government, recommendations were made that gender equality needed to be observed at this level as well.²⁰⁴ In essence, the UPR highlighted the lack of uniformity in ensuring that women participated to the same extent as men, across the board, in government entities. In respect of Uganda, it was observed that the country needed to put in place

²⁰¹ Human Rights Council 'Report of the working group on the Universal Periodic Review: Lesotho' A/HRC/15/ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/39/PDF/G1014439.pdf?OpenElement> (accessed 14 September 2011) para 88.

²⁰² Human Rights Council 'Report of the working group on the Universal Periodic Review: Lesotho' A/HRC/15/ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/144/39/PDF/G1014439.pdf?OpenElement> (accessed 14 September 2011) paras 88 & 96(33).

²⁰³ See Human Rights Council 'Report of the working group on the Universal Periodic Review: Rwanda' A/HRC/17/4 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/117/93/PDF/G1111793.pdf?OpenElement> (accessed 14 September 2011) paras 27, 78(13) & 79(10).

²⁰⁴ See Human Rights Council 'Report of the working group on the Universal Periodic Review: Rwanda' A/HRC/17/4 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/117/93/PDF/G1111793.pdf?OpenElement> (accessed 14 September 2011) paras 77(11) & 78(14).

measures that would enable increased participation of women in local government so that their participation is comparable to their presence in Parliament.²⁰⁵

In the second category, the right of women to participate in politics is not dealt with directly and needs to be inferred from the 'interactive dialogue' and the conclusions or recommendations that are made. In South Africa's case, the subject of women's political participation is not specifically reviewed and as a result no recommendations have been made on the subject of their involvement in local government. The subject did not arise in either in the 'interactive dialogue' or in the conclusions and recommendations.²⁰⁶ Silence on the matter could be construed by South Africa that it is performing very well in the area of including women in local government.

A number of criticisms can be levelled against the UPR and its ability to examine states' human rights situations in sufficient detail. First of all the lack of consistency in terms of how the review is done as there is no format on exactly what a report should contain and how it is presented is a set back as comparisons can be difficult to be made and states encouraged to emulate each other.²⁰⁷ In the particular case of South Africa's report, no mention was made of women's political participation in local government, while in the other reports the matter is discussed and recommendations are made. South Africa's report was also presented orally and doubts were raised as to whether consultation with stakeholders such as NGOs had taken place.²⁰⁸ States essentially set

²⁰⁵ See Human Rights Council 'Report of the working group on the Universal Periodic Review: Uganda' A/HRC/19/16 <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/UGSession12.aspx> (accessed 12 January 2012) paras 78 & 111(32).

²⁰⁶ Human Rights Council 'Report of the Working Group on the Universal Periodic Review: South Africa' A/HRC/8/32 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/136/96/PDF/G0813696.pdf?OpenElement> (accessed 12 September 2011).

²⁰⁷ P Sen & M Vincent *Universal Periodic Review of human rights: Towards best practice* (2009) 5

²⁰⁸ T Rathgeber 'The HRC Universal Periodic Review: A preliminary assessment' (2008) 6 *FES Briefing Paper* 1 2. See also Sen & Vincent (2009) 1 6.

the tempo of what is discussed as they determine the issues that they raise in their reports and therefore set the tempo on the issues to be discussed.²⁰⁹ The limited lengths of reports of 20 pages means that the reports cannot provide a detailed appraisal of the human rights situation, contrary to the view of Sen and Vincent who are of the view that the reports provide 'detailed account of human rights on the ground'.²¹⁰ Another criticism is that the rushed manner in which the review process is done, with barely 3 hours allocated to a state to the presentation and discussion of its report means that it is difficult to traverse all key areas of human rights in great detail.

The positive aspect of the UPR is that despite the fact that it lacks a consistent approach in how it reviews states, Lesotho, Rwanda, South Africa and Uganda have been reviewed and the recommendations emanating from the process have generally been well received by the four states. The UPR is therefore proving to be a popular forum for states to be reviewed. Proof of the UPR's popularity can be derived from the fact that all four states have timeously submitted themselves to the UPR review but in comparison to treaty bodies, almost all these states have a history of delayed reporting.

2.7 Conclusion

In this chapter I have analysed different instruments adopted at the UN level which are both binding and non-binding. Based on my analysis I identify four key factors that promote women's political participation. These factors can have a direct bearing on women's political participation at the local government level in Lesotho, Rwanda, South Africa and Uganda. I divide my conclusion into four key issues that are paramount when seeking to realise women's right to political participation at the local government level. First, in light of the numerous instruments and concluding observations, I conclude by establishing what the right to political participation entails. Second, I draw a conclusion

²⁰⁹ Sen & Vincent (2009) 5.

²¹⁰ As above.

on the subject of temporary special measures that I consider as being central to realising women's political participation. Third, I look at the need to provide disaggregated data on women's participation. Fourth, I conclude on the issue of the need for states to domesticate the standards through adoption of constitutional and other legal measures to ensure that women enjoy their right to participate in politics.

2.7.1 The meaning of the 'right to political participation'

Based on the analysis of various human rights instruments in this chapter, it is evident that the UN has prioritised the promotion and protection of women's right to participate in politics in general, but the enjoyment of the right is without a doubt intended to extend to levels such as local government. The right to participate in politics developed incrementally but since the 1990s there was accelerated attention to developing the right further especially through interpretation of existing instruments.

Within the broader right to participate in politics, individuals have a right to access public office through appointment or election and the right extends to local government. The basis of such appointment or election lies in the right to equality and non-discrimination. Furthermore, it is increasingly accepted that appointments and election should be such that either sex is represented in order to be able to participate in issues of governance and impact the development of society. Failure by a state to ensure that women are included in leadership at all levels including local government is tantamount to abrogation of a state's obligations. Of note is the failure by the UN system to provide the exact extent to which women should be included and only requires that women must be included. At the same time, no instrument in any way detracts from equal inclusion of women.

In terms of the right to be elected at local government level, women should not be excluded on grounds that are unfair, unclear or that discriminate against them. Women

should be afforded every opportunity to present their candidacy in elections and laws can be enacted for such a purpose.

In terms of appointment, women should be appointed to all local government positions where principles of equality and non-discrimination should apply. Where necessary, special arrangements may be put in place that ensure women participate effectively. States are expected to enact laws to ensure the realisation of all these objectives.

2.7.2 Using temporary special measures

The use of temporary special measures in order to ensure women's participation in politics is now widely recognised and undisputed at the international level. Temporary special measures can be used without limitation in all areas of society including for purposes of supporting women's inclusion in leadership at the local government level. In fact, if a state has historically excluded women from participating in areas such as local government leadership, it is expected that the state will adopt and vigorously implement temporary special measures to ensure that women are included. Existence and vigorous implementation of temporary special measures is an indicator of commitment to advancement of equality in local government.

In using temporary special measures, states must create conditions to make women's participation a reality, taking into account women's historically disadvantaged position and tailoring any temporary special measures accordingly. International instruments allow for resort to measures such as preferential treatment of women, using quota systems, allocating resources to enable women's participation, and making the work place accommodative to women. The measures that a state uses are not limited and may therefore be innovatively tailored to the unique circumstances of the state in question. Furthermore, the temporary special measures cannot be considered discriminatory if their aim is to achieve equality between women and men. In addition,

any temporary special measure that a state adopts must be implemented and as such should be practical and realisable.

In relation to local government, states must take all necessary measures to ensure that the realisation of the right to participate in politics takes place at the local government level. Temporary special measures may be used to ensure that women are elected and appointed to public office. The temporary special measures that are adopted should not be limited in time but rather they should focus primarily on whether the objective of including women can be guaranteed even in the absence of any temporary special measures. At the local government level, if measures are adopted to enable women's participation, such measures should not be considered as being unfair and discriminatory against men if they are undertaken with the sole objective of ensuring women's inclusion in instances when they have been historically excluded.

2.7.3 Providing data to show the extent of women's political involvement

States are obliged to maintain up-to-date information such as data on women's participation at local government level. The purpose of such information is to help illustrate the reality of women's participation in local government. Any databases that are maintained should be disaggregated in terms of sex and should indicate the exact positions occupied by both women and men. The information and data should be accessible to the public and the data should be reflected in state reports to treaty bodies and other interested institutions to enable such bodies to effectively interrogate the extent of women's inclusion.

2.7.4 Domestication of standards through the adoption of constitutional and other legal measures that promote women's participation

In light of the treaties to which Lesotho, Rwanda, South Africa and Uganda are parties, these states have committed themselves to domesticate the norms by developing constitutional and other legal measures aimed at ensuring women's participation in politics. Through constitutional and other legal frameworks these states must create an atmosphere that is conducive to equality and non-discrimination. The constitutional and legal framework must discourage discriminatory tendencies based on culture, religion or other grounds.

As part of promotion of women's participation in politics, states must provide for realistic measures that can result in increased participation of women. Constitutional provisions and other laws should guarantee the right to be elected and appointed, the use of temporary special measures and the need to provide data on women's participation. In addition, states must take concrete steps to implement these legal provisions and, as a result, give effect to women's participation in areas such as local government.

CHAPTER 3: AFRICAN REGIONAL AND SUB-REGIONAL NORMATIVE STANDARDS ON WOMEN'S POLITICAL PARTICIPATION IN LOCAL GOVERNMENT

- 3.1 Introduction
- 3.2 The right to political participation of women under the Africa human rights system
 - 3.2.1 Contributions of the Organisation of African Unity/African Union and NEPAD to women's political participation
 - (i) The role of the OAU/AU in advancing women's participation in politics
 - (ii) The New Partnership for Africa's Development: The African Peer Review Mechanism and women's political participation
 - 3.2.3 African regional human rights instruments relevant to right political participation
 - (i) African Charter on Human and Peoples' Rights and women's political participation
 - (ii) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
 - (iii) African Charter on Democracy, Elections and Governance
- 3.3 The right to political participation of women under sub-regional economic communities in Africa
 - 3.3.1 The East African Community
 - 3.3.2 The Economic Community of West African States
 - 3.3.3 The Southern Africa Development Community
 - (i) Declaration and Treaty of SADC
 - (ii) The Regional Indicative Strategic Development Plan
 - (iii) The Protocol on Gender and Development
- 3.4 Conclusion
 - 3.4.1 African regional and sub-regional instruments' contribution to clarification of the right to political participation
 - 3.4.2 Contribution to temporary special measures
 - 3.4.3 Is there further clarification on provision of disaggregated data
 - 3.4.4 Is there attention to constitutional and other legal measures

3.1 Introduction

This chapter is divided into two main sections, both of which focus on Africa. The first section deals with measures at the African regional level, while the second section deals

with systems developed at the sub-regional economic community level. At both these levels, the study focuses on the development of arrangements advancing women's participation in politics that can be relied upon in the area of local government. The chapter traces the evolution from mere formal protection of women's rights, including the right to vote and be elected, to measures aimed at substantive realisation of women's right to participate in politics.

The chapter analyses the normative standards developed by African regional and two sub-regional bodies with specific attention focussed on whether these principles expand the understanding and elaborate upon the right to participate in politics as stipulated at the UN level, and whether these principles are applicable to local government. The aim in this chapter is primarily to establish whether anything new is added to the position at the UN level by the African regional and sub-regional levels that can be relied upon to promote women's participation at local government level. At both the African regional and sub-regional levels, binding and non-binding instruments dealing with the right to political participation are examined. The work of the quasi-judicial treaty bodies and courts is examined with a view to understanding how these have contributed to the understanding of the right to participate in politics as it relates particularly to women. The following question is considered: Do African instruments show greater responsiveness to the African reality than is the case with UN instruments?

While analysing the provisions in African regional or sub-regional instruments that protect and promote participation in politics, an initial question to be answered is the extent to which these instruments guarantee women's right to stand for elective office and be appointed to offices at local government level. Do the treaties of African regional and sub-regional arrangements, their courts and quasi-judicial bodies recognise the need for women to be appointed at local government level? The issue of temporary special measures is further examined to establish the extent to which it is provided for at African regional and sub-regional levels. Any requirements about provision of data

and inclusion of the right in constitutional or through other legal measures is also discussed where such arises.

Where possible the discussion will be done in a chronological order according to how the instruments have been adopted.

3.2 The right to political participation of women under the Africa human rights system

Efforts at African unity started in the 1960s with formation of an organisation intended to unite African states.¹ One of the initial objectives of seeking unity was to pursue national independence for countries that were, at that time, still colonised.² In the late 1970s, and the 1980s after most countries had become independent, the focus started to shift to development related matters.³

In the early stages of establishing an African regional body, human rights were viewed within the context of national independence. Individual rights, let alone women's rights, did not feature as a separate subject, in fact, developments at the African regional level have largely been 'paternalistic' until quite recently.⁴ As van Reenen and Combrinck correctly note, there has been a⁵

¹ GJ Naldi 'Future trends in human rights in Africa: The increased role of the OAU?' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 1 & 2.

² As above.

³ Naldi (2002) 2.

⁴ TP van Reenen & H Combrinck 'The UN convention on the rights of persons with disabilities in Africa: Progress after 5 years' (2011) 14 *International Journal on Human Rights* 133 134-135.

⁵ As above.

dynamics of the developments from the essentially patriarchal (paternalistic) African cultural and value systems to more tolerant, inclusive, and in places, more egalitarian systems. These dynamics are evidenced by the gradually introduced references to women's rights, gender equality, the youth and persons with disabilities.

Human rights started to gain prominence in the late 1970s, culminating in the adoption of the African Charter on Human and Peoples' Rights (African Charter) in 1981.⁶ Within the African regional human rights system, women's rights are a new phenomenon, particularly their right to participate in politics.⁷ In comparison to Africa, women's right to participate in politics developed much earlier in the UN system. However, once the right of women to participate in politics was recognised at the African regional level, there has been much progress in a relatively short space of time.

In this section of the study, I analyse the role of key regional institutions in advancing women's right to participate in politics. In this regard I will examine the Organisation of African Unity (OAU), which later became the African Union (AU), and how it has generally handled the issue of women's participation in politics.⁸ The other organisation to be examined is the New Economic Partnership for Africa's Development (NEPAD) and its peer review mechanism – the African Peer Review Mechanism (APRM). In examining NEPAD and its APRM I will briefly analyse Lesotho, Rwanda, South Africa and Uganda's reviews as far as the issue of women's participation in local government is concerned.

⁶ Adopted 27 June 1981 and entered into force 21 October 1986. Lesotho became a party to the Africa Charter on 10 October 1992, Rwanda became a party on 15 July 1983, South Africa became a party on 9 July 1996 and Uganda became a party on 18 May 1985.

⁷ R Murray 'Women's rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa' in D Buss & A Manji (eds) *International law: Modern feminist perspectives* (2005) 253 257.

⁸ In this study whenever the abbreviation OAU/AU is used it will mean 'the OAU and later the AU'.

I will examine the following documents: the OAU Charter,⁹ the Constitutive Act of the African Union (Constitutive Act),¹⁰ the Solemn Declaration on Gender Equality (Solemn Declaration)¹¹ and NEPAD's Declaration on Democracy, Political, Economic and Corporate Governance (Declaration on Democracy).¹² Additionally, I will undertake a detailed analysis of the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women or Women's Protocol)¹³ and the African Charter on Democracy, Elections and Governance.¹⁴ Where *travaux préparatoires* are available, I will integrate them into the discussion. Besides the contribution that these documents may make on women's right to participate in politics, these documents are relevant in this study as Lesotho, Rwanda, South Africa and Uganda are party to all of them.

While analysing the role of African regional institutions and the key human rights instruments and documents, the primary focus will be on how they address the issue of women's right to participate in politics. The documents have been selected based on their contribution to the advancement of human rights in Africa. Efforts will be made to analyse the progress from formal protection to substantive realisation of women's right to participate in politics and how this right can be used for purposes of women's participation at local government level.

⁹ Adopted 25 May 1963.

¹⁰ Adopted 11 July 2000 and entered into force 26 May 2001.

¹¹ Assembly/AU/Decl.12(III), adopted 6-8 July 2004.

¹² Adopted 18 June 2002 by participating Heads of State and Government of the African Union AHG/235 (XXXVIII) Annex 1.

¹³ Adopted 11 July 2003 and entered into force on 25 November 2005.

¹⁴ Adopted 30 January 2007 but is yet to come into force.

3.2.1 Contributions of the Organisation of African Unity/African Union and NEPAD to women's political participation

(i) The role of the OAU/AU in advancing women's participation in politics

Three reasons primarily explain why it is important to analyse women's right to participate in politics from an African regional perspective. First, African regional developments potentially have a greater impact on the realisation of this right than UN standards as African states will have ownership of the process. Second, the relevance of the OAU/AU is that decisions by an African regional organisation can potentially impact on the entire continent including at levels such as local government if such decisions are implemented by the organisation itself. Third, development of women's right to participate in politics, including at the local government level, has to be contextualised within the development of African regional organisations and how they have regarded women's rights through time, key among these organisations is the OAU/AU.

In light of the above, three reasons justifying the analysis of an African regional perspective, there must be an analysis of the role of the OAU/AU in the development of women's rights including that of participating in politics. The OAU did not prioritise the realisation of the right to political participation but once it started to accept the right, it has accelerated efforts to realise it – at least from a legal standpoint.¹⁵ Lesotho, Rwanda, Uganda and South Africa as member states of the OAU/AU have also participated in these efforts.¹⁶

¹⁵ F Banda 'Protocol to the African Charter on the rights of women in Africa' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 441 442.

¹⁶ With the exception of Morocco which withdrew as a result of the OAU recognising the disputed territory of Western Sahara as a sovereign state, all African states are member states of the AU. When the AU replaced the OAU, Lesotho ratified the Constitutive Act on 16 February 2001,

During the era of the OAU, women were largely excluded both at the national level and from the OAU structures. Part of the explanation for the exclusion of women lies in the fact that the organisation was not pre-occupied with individual rights and even less so, the rights of women. Lack of commitment was evident from the fact that the organisation adopted its first major human rights instrument in 1981, 18 years after it was founded. Instruments specific to women's rights were to follow only much later thereby exposing the lack of attention to women's rights that pervaded the organisation for a long time. As an organisation, the OAU itself did not show keenness towards inclusion of women in its leadership and structures and it is therefore not surprising that no attention was paid to promoting women's political participation at states' domestic levels.

However, changes within the OAU started to take place from 1981, with the adoption of the African Charter. Subsequent human rights instruments have addressed some specific concerns including more recently the issue of women's rights. The OAU/AU has since made efforts to ensure that developments of standards at the UN level has been followed by development of similar standards but with specific focus on Africa's peculiar challenges. African instruments add an African regional flavour bringing to the fore issues that are relevant to the region. The relevance of African instruments is that they contextualise the UN norms at the African regional level especially when UN instruments fail to cater for the unique needs of the African continent. The influence of UN instruments on Africa can be seen in the area of women's right to political participation.

Rwanda ratified the instrument on 16 April 2001, South Africa on 3 March 2001 and Uganda on 3 April 2001.

The OAU Charter, as the founding instrument of the organisation, called for equality, freedom and justice.¹⁷ It acknowledged these as essential for the aspiration of the African people.¹⁸ On the face of it, these concepts appear to include women as equals to their male counterparts but in reality that has not been the case. In principle, even though during its formative years the OAU failed to make specific provision for individual human rights, the Charter of the OAU nevertheless acknowledged the existence of the Universal Declaration.¹⁹ One of the purposes of the Charter of the OAU was to promote ‘international cooperation, having regard to the Charter of the United Nations and the Universal Declaration of Human Rights’.²⁰ The reassurance contained here was that at least there was recognition of certain human rights standards which the organisation and its members had to adhere to — but only as far as ‘international cooperation’ was concerned. The reality especially for African women was that for many years the aspirations set out in the Universal Declaration were not attained at least as far as political participation was concerned.

The OAU dealt with human rights within the context of national self-determination.²¹ In the beginning, the OAU’s objectives, activities or decisions did not include women’s

¹⁷ Preamble of the OAU Charter.

¹⁸ At its establishment only two human rights issues seem to have emerged in the OAU Charter — the rights to self-determination and non-discrimination, the latter being focussed primarily on apartheid in South Africa while self-determination was mainly about national independence.

¹⁹ Preamble of the OAU Charter.

²⁰ Art II(1)(e) of the OAU Charter.

²¹ COC Amate *Inside the OAU: Pan-Africanism in practice* (1986) 34. See also R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 1-6. For example the OAU in its Charter was more concerned with issues such as peaceful resolution of disputes — art 3(4), non-interference in internal matters of other African states — art 3(1) & (2), equality of state parties — art 3(1), and self-determination of state parties — art 3(3). Human rights *per se* were not a pre-occupation of the OAU and in instances when their protection and promotion arose, this was within the context of group rights contained within arts 19-12 of the African Charter on Human and Peoples’ Rights. See also Durban Declaration in Tribute to the Organisation on African Unity

rights because these were overshadowed by the pressing concerns of self-determination. It was only much later that the OAU started to be occupied with issues of human rights as set out in instruments such as the Universal Declaration or the ICCPR. The OAU/AU has only made a significant commitment to women's rights in the period after the 1990s.²² The explanation for the significant change resulting in greater attention to women's rights is based on internal factors such as increased demands for democratic government and external factors such as pre-conditions set by either financial lending institutions or non-African governments especially those from Western Europe and North America.²³

Taking into consideration the historical background to the development of the OAU Charter, it is not surprising that it mentions equality and the right of all people to control their destiny.²⁴ It appears that enjoyment of equality and controlling destiny were envisaged within the realm of national independence and not necessarily as an individual's right. However, in light of recent developments, this right can be understood

and on the Launching of the African Union http://www.issafrica.org/AF/RegOrg/unity_to_union/pdfs/au/H2_DBNdecFinal.pdf (accessed 14 September 2011). The predecessor of the OAU — the Community of Independent African States while setting the pursuit of independence for African countries as its primary objective also focussed on issues related to racial discrimination and human dignity. The Community of Independent African States sought unity among African states with another objective being prosperity for African people. Amate (1986) 41.

²² Banda (2008) 442.

²³ J Oloka-Onyango & S Tamale "The personal is political," or why women's rights are indeed human rights: An African perspectives on international feminism' (1995) 17 *Human Rights Quarterly* 691 728-729. Oloka-Onyango & Tamale argue correctly that the calling of ending institutions for 'advancement' of women's rights in Africa is not driven by altruistic reasons but are rather motivated by change of laws and policies in Africa from which they stood to benefit. AM Tripp 'The new political activism in Africa' (2001) 12 *Journal of Democracy* 141 142. See also D Pankhurst 'Women and politics in Africa: The case of Uganda' (2002) 55 *Parliamentary Affairs* 119 120-121.

²⁴ Preamble of the OAU Charter.

to for instance mean that individuals such as women have a right to control their destiny.

The OAU Charter made no special provision for women's involvement in politics. Issues such as participation in local government never arose let alone in relation to women. The main call was that of human rights which was advanced through objection to practices such as racism and colonisation.²⁵ As Murray postulates, the main focus of the OAU Charter 'was on protection of the state, not the individual'.²⁶ Its successor, the AU takes cognisance of the individual and marginalised groups and the difference in the approaches is noted as follows:²⁷

Whereas the OAU was concerned with liberating Africa from colonisation, the AU and other recent initiatives are expected to focus on promoting and protecting human rights *including women's human rights*, consolidating democratic institutions and culture, building new institutions to monitor and promote peace, security and development, encouraging and promoting civil society, and ensuring good governance and the rule of law.

Although the OAU later established the Women, Gender and Development Division (OAU Women's Unit) to advance issues concerning women's rights, the unit's contribution to advancing women's rights was very limited. Part of the reason for its limited performance is attributable to a lack of legal policy framework to support its mandate.²⁸ Furthermore, women did not occupy any influential positions within the organisation and therefore could not make an impact on its strategic policy.²⁹ The result was that women were largely relegated from political participation within the OAU and

²⁵ See for example art II(1)(d) of the OAU Charter.

²⁶ Murray (2004) 7.

²⁷ M Nzomo 'From OAU to AU and NEPAD: Regional integration processes in Africa and African women' (2003) http://www.sarpn.org/documents/d0000608/P622-Gender_NEPAD-AU.pdf (accessed 14 September 2011) 2 (emphasis added).

²⁸ Nzomo (2003) 3.

²⁹ Nzomo (2003) 3.

as such failed to make an impact on matters such as women's participation at states' domestic levels. The state of affairs within the OAU was a reflection of women's reality at the domestic level of most states.

The 1990s ushered in a period when issues affecting women started to be discussed more seriously. As a result, the drafting process of a treaty specific to women was started. External influences such as international financial institutions' requirements stipulated women's involvement as a *conditio sine qua non* for foreign assistance.³⁰ The period marked the onset of a standard-setting era in terms of promotion and protection of women's rights including their right to political participation. The focus on women seems to have arisen out of political expedience.

In its final years, the OAU had started the process of encouraging states to ensure that women were included at all levels of government.³¹ The OAU itself started efforts of changing its own composition and as such the Council of Ministers' 'Decision on Women', called on the OAU to ensure the mainstreaming, greater representation and participation of women in OAU and other key African regional organisations.³² Mainstreaming, greater representation and participation of women would later start to dominate developments related to women. Within the OAU, efforts had been made to try and strengthen the effectiveness of the OAU Women's Unit by requiring that it

³⁰ Murray (2004) 15.

³¹ Decision on the Progress Report of the Secretary-General on the Efforts Deployed Towards Mainstreaming African Women's Concerns into Peace and Sustainable Development Processes' CM/Dec.469 (LXX) 1999. See also OAU Council of Ministers 'Decision on the report of the Secretary-General of the 23 session of the African Union' CM/Dec.535 (LXXII) 2000 http://www.au.int/en/sites/default/files/52CoM_2000b.pdf (accessed 14 September 2011) para 3.

³² OAU Council of Ministers 'Decision on women and gender' CM/Dec.579 (LXXIII) 2001 http://www.chr.up.ac.za/hr_docs/african/docs/cm/cm46.doc (accessed 29 October 2007) paras 2-3.

should be better funded and staffed so that gender issues are mainstreamed within the work of the OAU.³³

With the advent of the AU, efforts at ensuring women's participation became more pronounced. Even though examination of the AU is not the primary focus of this study, a brief examination of how the AU itself is approaching the issue of women's inclusion in its own structures can be an indicator of what it expects states to do at their domestic level.

The AU's approach to women's participation in politics has been markedly different from the OAU. The objectives of the AU point to a commitment for women to play a greater role in African affairs and as such a conclusion can be reached that even at the national level, states are expected to do the same with regard to ensuring inclusion of women in all structures of the state. In support of women's inclusion at all levels, one of the earlier documents emanating from the AU — the Durban Declaration in Tribute to the Organisation of the African Union and on the Launching of the African Union — reiterates the important role that women can play at all levels of society and acknowledges that without their involvement the objectives of the AU cannot be realised.³⁴ Overall the objectives of the AU are geared at ensuring not only the success of the organisation, but more importantly the advancement of the African continent and its people. In order to realise the objectives of the AU, women who represent more than half of the continent's population need to be included at all levels of decision-making including at local government level.

³³ OAU Council of Ministers 'Decision on the Progress Report of the Secretary-General on the Efforts Deployed Towards Mainstreaming African Women's Concerns into Peace and Sustainable Development Processes' CM/Dec.469 (LXX) 1999 http://www.iss.co.za/af/regorg/unity_to_union/pdfs/oau/com/50CoM_1999b.pdf (accessed 14 September 2011).

³⁴ Durban Declaration in Tribute to the Organisation of African Unity and on the Launching of the African Union para 18.

Within the AU secretariat, attention is paid to ensuring inclusion of women at all levels. In this regard, the Kigali Declaration that was adopted at the First AU Ministerial Conference on Human Rights in Africa, called upon AU policy organs to ensure better gender representation within the AU Commission.³⁵ Consequently, the inclusion of women within the AU is applied in practice on the basis that at least half of AU commissioners should be women.³⁶ The commitment to ensuring gender parity within the AU is evident as women constitute half of the commissioners and they occupy the following portfolios: (1) political affairs, (2) human resources, science and technology, (3) trade and industry, and (4) rural economy and agriculture.³⁷ Arguably the most evident example of ensuring women's inclusion in leadership within the AU has been through the recent election of Nkosazana Dlamini-Zuma as the organisation's first woman chairperson.³⁸ Based on the attention paid to ensuring gender parity within the AU Commission, it would seem amiss that at the domestic level states should pay less attention to ensuring gender parity in election or appointment of officials at all levels of the state. A deduction can be made that in essence, the AU as the pre-eminent

³⁵ AU Ministerial Conference on Human Rights in Africa 'Kigali Declaration' MIN/CONF/HRA/Decl.1(I) (adopted on 8 May 2003) <http://www.african-union.org/structure> (accessed 14 September 2011).

³⁶ Art 6 of the Statutes of the Commission of the African Union (Statutes of the AU Commission). In terms of art 6, every region of Africa is entitled to two commissioners, one of whom should be a woman. See also Nzomo (2003) 5.

³⁷ Commissioners Aïsha Abdullahi from Nigeria (Political affairs), Fatima Acyl from Chad (Trade and industry), Nagia Essayed from Libya (Human resources, science and technology), and Rhoda Tumusiime from Uganda (Rural economy and agriculture) 'Decision on the appointment of the commissioners of the African Union' Doc. EX.CL/740(XXI), Assembly/AU/Dec.447(XIX), 15-16 July 2012 [http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20\(XIX\)%20_E_Final.pdf](http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20(XIX)%20_E_Final.pdf) (accessed 29 November 2012).

³⁸ See eg 'Acceptance speech of newly elected African Union Commission Chairperson by South African Home Affairs Minister Dr Nkosazana Dlamini-Zuma' http://www.au.int/en/sites/default/files/d-zuma_AU%20acceptance_16%20July_1_.pdf (accessed 28 September 2012).

organisation of the continent, is setting an example that should be emulated by its member states when they conduct their affairs within their domestic jurisdictions.

Specifically, commitment to inclusion of women at the AU is set out in the Constitutive Act which is the founding document of the AU. The Constitutive Act for example envisions that a woman may lead the organisation, something that the OAU did not envisage.³⁹ Envisaging that a woman could lead the organisation is also a reflection that states are beginning to accept that at the domestic level, women can be in charge to lead whatever institutions that they may be involved in. It is inconceivable that the aspirations of the organisation only end within the organisation and are not applicable outside it.

Unlike the OAU Charter that did not envisage involvement of women and existed in a period when women were for the most part sidelined from the OAU, the AU is intent on being more woman-friendly. An additional objective for the AU to ensure that women effectively participate in politics will be introduced when the Protocol on Amendments to the Constitutive Act of the African Union (Protocol to the Constitutive Act) – enters into force but already Lesotho, Rwanda and South Africa have shown their commitments to its principles of gender-sensitivity by ratifying it.⁴⁰ What the Protocol to the Constitutive Act does is to address issues of gender insensitivity that currently exist

³⁹ See eg Art 20(2) of the Constitutive Act which stipulates that the ‘...Commission shall be composed of the Chairman, his or her deputy or deputies and the Commissioners’.

⁴⁰ Art 3(i) of the Protocol to the Constitutive Act. The Protocol to the Constitutive Act was adopted on 11 July 2003 and has only 27 ratification and needs ratification by two-thirds of the member states of the AU before it can come into force <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 10 November 2012). See also ‘List of countries which have signed, ratified/acceded to the Protocol on the Amendment to the Constitutive Act of the African Union’ <http://www.au.int/en/sites/default/files/amendments%20to%20the%20Constitutive%20Act.pdf> (accessed 10 November 2012).

in the Constitutive Act.⁴¹ Examples of the gender insensitivity in the Constitutive Act include referring to ‘founding fathers’ and ‘chairman’ instead of ‘founders’⁴² and ‘chairperson’.⁴³ What the Protocol to the Constitutive Act seeks to do in the latter case is to show that women may ascend to positions of heads of states and thereby chair the organisation. In its current form of referring to ‘founding fathers’ and ‘chairman’ the Constitutive Act is male focussed. Use of gender sensitive language and its potential impact can also encourage states at their domestic level to be sensitive when addressing matters through development of laws governing areas such as local government.

One of the objectives of the Constitutive Act is to ‘promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments’.⁴⁴ Attaining such an objective requires upholding principles of non-discrimination and equality as stipulated by both UN and African regional instruments. A second objective states that the purpose of the organisation should be to ‘promote democratic principles and institutions, popular participation and good governance’.⁴⁵ Democratic principles necessarily require the equal treatment of sexes in issues of governance and popular participation requires women’s involvement on equal terms with men in all levels of government including local government.

One of the most important principles in the Constitutive Act that can be relied upon to promote women’s involvement stipulates that there should be ‘promotion of gender equality’.⁴⁶ Promotion of gender equality is inclusive of equality in terms of enabling women to participate in politics at all levels and on equal terms with men. For example,

⁴¹ Art 2 of the Protocol to the Constitutive Act.

⁴² Art 2 of the Protocol to the Constitutive Act.

⁴³ Art 6 of the Protocol to the Constitutive Act.

⁴⁴ Art 3(h) of the Constitutive Act.

⁴⁵ Art 3(g) of the Constitutive Act.

⁴⁶ Art 4(l) of the Constitutive Act.

within the AU itself, the Statutes of the African Union Commission stipulate that a specialised unit should be set up to ‘coordinate all activities and programmes of the Commission related to gender issues’.⁴⁷ Logically even at the domestic level member states must domesticate principles on equality and promote equality in areas such as political participation at local government level to ensure that women and men participate equally and therefore states may develop specific bodies to help realise such an objective. The AU further promotes a principle requiring observance of ‘respect for democratic principles, human rights, the rule of law and good governance’.⁴⁸ All these principles would need to be respected at all levels within state parties.

The need to involve women within all sectors of society can be seen in the Rules of Procedure of the AU Assembly which recognise the possibility of women being appointed as the head of the organisation and provide that both the Chairperson and the Deputy Chairperson⁴⁹

shall be competent women or men with proven experience in the relevant field, commensurate leadership qualities and a good track record in government, parliament, international organisations or other relevant sectors of society.

A similar provision exists with respect to the appointment of commissioners of the AU Commission.⁵⁰ Requiring appointees to be individuals with good leadership skills, experience and competency is an acknowledgment that women should be exposed to all positions within society where they can lead and gain the requisite skills.

Emanating from the AU, another development which has the potential to advance women’s involvement in political participation in areas such as local government is the

⁴⁷ Art 12 of the Statutes of the AU Commission.

⁴⁸ Art 4(m) of the Constitutive Act.

⁴⁹ Rules of Procedure of the AU Assembly rule 38(2).

⁵⁰ Rules of Procedure of the AU Assembly rule 39(2).

Solemn Declaration on Gender Equality (Solemn Declaration).⁵¹ Through the Solemn Declaration, states took cognisance of women's exclusion from political participation and have undertaken to redress this shortcoming.⁵² In terms of gender parity, states undertook to ensure that women were equally represented in all AU organs, SRECs, national and local governments. States are to ensure that 50 percent of decision-makers at all levels of government are women.⁵³ These commitments indicate that to some extent measures are in place to correct the past marginalisation of women.

In terms of reporting obligations under the Solemn Declaration, states committed themselves to annually report on measures taken to include women in politics in terms of what the Solemn Declaration stipulates.⁵⁴ The reporting obligations rest with the heads of state and government.⁵⁵ Lesotho, Rwanda, South Africa and Uganda have all submitted reports under the Solemn Declaration.⁵⁶ However, the detail provided on women's participation in local government differs from state to state.⁵⁷ In general

⁵¹ Assembly/AU/Decl.12(III), adopted 6-8 July 2004.

⁵² Solemn Declaration on Gender Equality, Assembly/AU/Decl.12(III), preamble.

⁵³ AU Conference of Ministers responsible for women and gender 'Implementation framework of the Solemn Declaration on Gender Equality in Africa', AU/MIN/CONF/WG/3 (I), 12-15 October 2005 <http://www.africa-union.org/root/au/conferences/past/2006/October/WG/doc.htm> (accessed 26 March 2011).

⁵⁴ Solemn Declaration on Gender Equality preamble & art 12.

⁵⁵ Implementation framework of the Solemn Declaration on Gender Equality in Africa.

⁵⁶ South Africa's report to the AU Secretariat on the Implementation of the AU Heads of States' Solemn Declaration on Gender Equality in Africa <http://www.africa-union.org/root/au/conferences/past/2006/October/WG/doc.htm> (accessed 26 March 2011) 21-24. See also Lesotho – African Union Solemn Declaration on Gender Equality in Africa <http://www.africa-union.org/root/au/conferences/past/2006/October/WG/doc.htm> (accessed 26 March 2011). See also 'Rwanda: Report on the implementation of the AU Solemn Declaration in Gender Equality' <http://awro.uneca.org/Country%20Reports.aspx> (accessed 23 January 2012).

⁵⁷ As above.

reporting on women's participation in local government is scanty for all the four states with all states.⁵⁸

In conclusion, therefore, the OAU as an African regional organisation did not contribute much to women's rights during the initial years of its existence. Within the OAU Charter, there were no clear provisions for women's involvement in politics and this matter was never contested as political participation was perceived as a preserve for men. However, towards the end of its existence, the OAU acknowledged the importance of women's rights and evidence of the new commitment can be seen through the introduction of the OAU Women's Unit and the efforts that started to be made. The AU, on the other hand, has made tremendous progress in promoting women's participation in politics culminating in half of its commissioners being women and Nkosazana Dlamini-Zuma as its chairperson. Efforts of the AU are far-reaching and can impact other African regional organisations such as NEPAD.

(ii) The New Partnership for Africa's Development: The African Peer Review Mechanism and women's political participation

The relevance of analysing NEPAD's position on women's participation is based on the fact that it is a novel development by some member states of the AU as a 'socio-economic development programme' with the intention of 'regenerating and reviving' Africa.⁵⁹ In view of the fact that NEPAD is regarded as an engine for development, it is imperative to establish whether its objectives require the participation of all sectors of society. For example, what role does it envisage for women at the local government level?

⁵⁸ As above.

⁵⁹ Declaration for the implementation of the New Partnership for Africa's Development (NEPAD), Assembly/AU/Decl.8 (II) <http://www.africa-union.org/.../Assembly%20final/Decl%20on%20the%20implementation%20of%20NEPAD%20Maputo%202003.pdf> (accessed 25 June 2007).

NEPAD was established as a result of some African leaders seeking development renewal for the continent.⁶⁰ NEPAD was therefore conceived as a partnership between African states, economically richer states, and institutions from the latter states.⁶¹ In the envisaged partnership African states were seeking development and needed richer states and institutions from the latter states to be their supporting partners in the development efforts.⁶² Even though not all African states are involved in NEPAD, the four states under review are some of those that are involved in NEPAD.⁶³ NEPAD has made provision for the existence of the APRM.⁶⁴ Membership to the APRM is voluntary and is open to all member states of the AU.⁶⁵ It provides for reviews of member states in terms of whether they are progressing in achieving NEPAD's objectives. Lesotho, Rwanda, South Africa and Uganda are all members of the APRM and they have all been reviewed.⁶⁶

⁶⁰ The architects of NEPAD were Presidents Abdelaziz Bouteflika of Algeria, Thabo Mbeki of South Africa, Olusegun Obasanjo of Nigeria and Abdoulaye Wade of Senegal. See D Venter & E Neuland *NEPAD and the African renaissance* (2005) 262.

⁶¹ Venter & Neuland (2005) 266 & 267.

⁶² As above.

⁶³ See eg 'NEPAD heads and state and government orientation committee' <http://www.nepad.org/hsgoc-0> (accessed 12 September 2011). The Head of State and Government Orientation Committee (HSGOC) 'provides leadership to the NEPAD process, sets policies, priorities and the programmes of action' and is constituted of member states from different regions of African and these are: East Africa (Ethiopia, Madagascar, Sudan, Rwanda) Central Africa (Cameroon, Congo, DRC, Gabon) North Africa (Egypt, Algeria, Libya, Tunisia) West Africa (Benin, Mali, Nigeria, Senegal) Southern Africa (South Africa, Namibia, Malawi, Lesotho).

⁶⁴ Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI of 9 March 2003.

⁶⁵ L Verwey 'Nepad and civil society participation in the APRM' <http://www.idasa.org.za> (accessed 12 August 2008).

⁶⁶ 'African Peer Review Mechanism' <http://www.nepad.org/economicandcorporategovernance/african-peer-review-mechanism/about> (accessed 24 January 2012).

The APRM process involves periodically reviewing African states which have signed up to be reviewed in four areas that are mostly related to issues of governance. It includes an APRM Panel of Eminent Persons (Eminent Persons).⁶⁷ The purpose of these Eminent Persons is to ensure that the process of review is being undertaken with 'integrity'.⁶⁸ The Eminent Persons review reports and then make recommendations to the heads of state and government who constitute the highest decision-making body of the APRM process. The process itself involves five stages in which⁶⁹ (1) the state being assessed prepares a programme of action on the four areas that the APRM focuses on; (2) the country is visited by the Eminent Persons who assess it in the four areas; (3) the Eminent Persons then prepare a draft country report which they discuss with the state being assessed; (4) the report is finalised by the Eminent Persons; and (5) the report is publicised in African regional and sub-regional bodies.

Through NEPAD, African leaders sought to tackle poverty and ensure development and growth for African states.⁷⁰ To achieve these goals, there was need for fundamental changes in leadership and accountability. The contribution that the APRM can make to women's participation at local government level is that unlike most other mechanisms that monitor state performance, states are visited and a considerable amount of time is

⁶⁷ M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41 45.

⁶⁸ Z Kebonang 'African Peer Review Mechanism: An assessment' (2005) 61 *India Quarterly: A Journal of International Affairs* 138 154.

⁶⁹ J Cillier 'Peace and security through good governance: A guide to the NEPAD African Peer Review Mechanism' (2003) 70 *Institute for Security Studies Paper* 1 3 & 4. See also KR Hope 'Toward good governance and sustainable development: The African Peer Review Mechanism' (2005) 17 *Governance: An International Journal of Policy, Administration, and Institutions* 283 293. See also E Jordaan 'Grist for the sceptic's mill: Rwanda and the African Peer Review Mechanism' (2007) 25 *Journal of Contemporary African Studies* 331 332 & 333.

⁷⁰ Venter & Neuland (2005) 263. See eg 'Millennium Partnership for African Recovery Programme (MAP)' http://www.uneca.org/eca_resources/conference_reports_and_other_documents/nepad/map.pdf (accessed 12 September 2011).

spent analysing the developments in any single state. Local government can therefore be assessed. The process is not rushed and goes into great detail surpassing any other state examination process that looks at an issue such as women's political participation in local government. Ensuring women's inclusion in local government can be further improved if site visits pay greater attention to issues of gender equality.

One of the objectives of NEPAD is to empower women by among other means, ensuring that they are involved in political participation.⁷¹ NEPAD has acknowledged the need to include women in all its long-term goals of which political participation is one.⁷² NEPAD does not develop any new norms or challenge existing ones. Instead, it proceeds on the assumption that the existing human rights instruments are sufficient and only require domestication and active implementation. NEPAD could have clarified women's position in the Declaration on Democracy, Political, Economic and Corporate Governance (Declaration on Democracy) where it has acknowledged principles such as equality of opportunity for citizens.⁷³ The Declaration on Democracy notes that '[i]n Africa's efforts at democracy, good governance and economic reconstruction, women have a central role to play'⁷⁴ Although the Declaration on Democracy provides an action plan to fulfil the requirements of democracy, it has failed to stipulate how state parties can ensure women's involvement in issues of democracy, the democratic process and good governance.⁷⁵ A further undertaking in the Declaration on Democracy is that states bind themselves to promote gender equality, the full and effective integration of women in political and economic development.⁷⁶ However, there is no mention of how these will be realised.

⁷¹ Art 49 of NEPAD.

⁷² Art 67 of NEPAD.

⁷³ Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex 1 of 18 June 2002 <http://www.nepad.org> (accessed 18 March 2008) art 7.

⁷⁴ Art 11 of the Declaration on Democracy.

⁷⁵ See arts 13 & 14 of the Declaration on Democracy.

⁷⁶ Art 22 of the Declaration on Democracy.

Through the APRM state parties are supposed to develop a plan of action with objectives that are linked to budgets and with timeframes for their realisation.⁷⁷ In both Lesotho and Uganda⁷⁸ the APRM recommended that there is a need to improve economic planning and budgetary formulation.⁷⁹ South Africa, on the other hand, is commended for developing budget formulation systems that are ‘highly predictable’ with a government that shows ‘strong budget discipline’.⁸⁰ Budget planning and formulation can have an impact on issues such as temporary special measures because if more resources are made available, temporary special measures will have a better chance of being implemented and adhered to.

In terms of promoting women’s involvement in political participation, the APRM provides for an objective on democracy and good governance in terms of which states are supposed to protect and promote women’s rights.⁸¹ The objective does not single out women in terms of special treatment to realise their right to take part in politics but looks at human rights in general.

The APRM sets standards, indicative criteria and examples of indicators. The focus therefore is on substantive realisation of the rights of women rather than normative

⁷⁷ Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI of 9 March 2003.

⁷⁸ APRM *Country review report: Republic of Uganda* (2009) http://www.afrimap.org/english/images/documents/APRM_Uganda_report_EN.pdf (accessed 12 September 2011) 103. The APR Panel recommended that the Ugandan government needed to ‘[s]tep up the capacity of gender focal points in sectoral ministries with a view to mainstream gender in planning and the national budget’.

⁷⁹ APRM *Country review report: Kingdom of Lesotho* (2010) <http://aprm-au.org/document/country-review-report-kingdom-lesotho> (accessed 12 September 2011) paras 415, 419 & 429.

⁸⁰ APRM *Country review report: Republic of South Africa* (2006) http://www.fhr.org.za/page.php?p_id=77 (accessed 10 September 2011) 125 126 & 132. However, South Africa is also criticised for having underspent budgets due to a shortage of skilled personnel.

⁸¹ Objectives and indicators of APRM para 2.2(g).

elaboration. For example, according to NEPAD's objective of 'promotion and protection of the rights of women',⁸² African states are to be guided by the African Charter, CEDAW and the Beijing Declaration, meaning that these standards should be domesticated. The focus is therefore that states should domesticate already existing standards rather than developing entirely new normative standards.

In terms of the indicative criteria, attention is on formal issues such as monitoring whether states have ratified UN and African human rights instruments and whether the principles in these treaties are reflected within national constitutions and laws.⁸³ The question to be asked in the substantive aspect of the indicative criteria is what states have done to realise women's rights and how this has been manifested in terms of results.⁸⁴ In terms of examples of indicators, accession to treaties and existence of constitutional and legislative provisions would be an indication. Lesotho,⁸⁵ Rwanda,⁸⁶ Uganda⁸⁷ have been encouraged to ensure that UN and African regional norms form part of domestic law. Accordingly, the Country Review Report on Lesotho was critical of Lesotho stating that the inability to 'domesticate, implement and report' on its treaty obligations made it seem as if the country was not willing 'to honour its commitments'.⁸⁸ While international law is superior to domestic law, in Rwanda's case the APRM process established that there was 'lack of adequate compliance'.⁸⁹ Uganda too had ratified numerous instruments but had not adequately domesticated them or

⁸² Objectives and indicators of APRM para 2.9.

⁸³ Objectives and indicators of APRM para 2.9.2(a) & (b).

⁸⁴ Objectives and indicators of APRM para 2.9.2(c) & (d).

⁸⁵ *APRM Country review report: Kingdom of Lesotho* (2010) paras 4.4 & 4.10.

⁸⁶ *APRM Country review report: Rwanda* (2006) http://www.eisa.org.za/aprm/pdf/Countries_Rwanda_APRM_Report.pdf (accessed 10 September 2011) 31. The Country Review Mission to Rwanda established that there was a 'limited extent to which Rwanda had actually implemented the international conventions and protocols to which the country had already acceded'.

⁸⁷ *APRM Country review report: Republic of Uganda* (2009) 224.

⁸⁸ *APRM Country review report: Kingdom of Lesotho* (2010) para 4.10.

⁸⁹ *APRM Country review report: Republic of Rwanda* (2006) 104.

even documented them for purposes of wider dissemination to both state and non-state actors.⁹⁰ Among all the four states, only South Africa was considered as having adequately ‘domesticated’ international norms within its Constitution and domestic laws but even in its case actual implementation was still a challenge.⁹¹

The APRM requires that states need to show signs of progress through what it terms ‘consequential steps’ in areas such as political life.⁹² Accordingly, progress towards ensuring gender equality as an objective can be fulfilled through the indicative criteria that assesses the legal, policy or constitutional measures that are in place to ‘promote gender equality’⁹³ within a state with such measures and policies extending to ensuring that ‘women participate equally in the private and public sectors’.⁹⁴ The emphasis on assessing whether women are involved in political life can extend to areas such as local government which would therefore need to be assessed on whether constitutional measures, laws and policies exist to promote women’s involvement.

The APRM provides that an example of an indicator on women’s participation would be through ‘effectiveness of constitutional, legal, policy and budgetary provisions’.⁹⁵ A way of determining the effectiveness of the indicator on women’s participation would be through the measurement of women’s participation in the public sector which can be shown through indicators such as ‘gender segregated statistics’.⁹⁶ In the case of legal

⁹⁰ APRM Country review report: Republic of Uganda (2009) 224.

⁹¹ APRM Country review report: Republic of South Africa (2006) 5.

⁹² Objectives and indicators of APRM para 2.9.3(a), (b) & (c).

⁹³ Objectives and indicators of APRM para 5.5.2 (a).

⁹⁴ Objectives and indicators of APRM para 5.5.2 (b).

⁹⁵ Objectives and indicators of APRM para 5.5.3(a).

⁹⁶ Objectives and indicators of APRM para 5.5.3(b). The Country Review Mission to Mozambique decried the lack of disaggregated data on vulnerable groups resulting in difficulties of addressing challenges of these groups. See APRM Country review report: Mozambique (2010) <http://www.aprmzambia.org.zm/docs/mozambique.pdf> (accessed 10 October 2012) 351.

and policy development, APRM noted that Lesotho had in place laws, institutions and policies to promote women's rights in areas such as local government.⁹⁷ However, a recommendation was made to the effect that disaggregated data should be 'regular, systemic and comprehensive in the area of gender.'⁹⁸ In Uganda's case, the Country Review Mission established that a 'major issue of concern in development planning in Uganda is lack of gender-disaggregated data'.⁹⁹ Rwanda which has a high representation of women in political positions was at the time of assessment not keeping disaggregated data on budgetary spending that was directly related to women.¹⁰⁰

In conclusion, NEPAD has expanded upon the existing AU system by focusing on the need for African states to domesticate and implement standards that they have bound themselves to observe. NEPAD does not focus on development of new standards but on observation of existing standards especially their realisation. It does not rank the importance of the instruments which it relies upon.

3.2.2 African regional human rights instruments relevant to the right to political participation

Since 1981, a number of human rights instruments have been developed at the African regional level. The first instrument to be adopted dealt with human rights generally but subsequent instruments have addressed specific issues such as women's rights. Within the human rights instruments that have been adopted the issue of women's right to participate in politics is attended to. Initially no specific focus on women took place but

⁹⁷ APRM Country review report: Kingdom of Lesotho (2010) paras 5.5 & 104.

⁹⁸ APRM Country review report: Kingdom of Lesotho (2010) para 778.

⁹⁹ APRM Country review report: Republic of Uganda (2009) 231.

¹⁰⁰ APRM Country review report: Rwanda (2006) 125. According to the APRM country review report 'there are no statistics showing the shares of community development funds that directly address women's issues'.

over time human rights instruments at the African regional level have addressed women specifically.

In the following section, some of the human rights instruments will be analysed with attention paid to how they deal with women's right to political participation. I investigate whether they add new dimensions that can impact on areas such as women's participation in local government. In terms of African regional treaty bodies, the African Commission on Human and Peoples' Rights (African Commission) as the key treaty body will be analysed to establish the extent to which it protects and promotes women's right to political participation and how this could translate to local government.

The African regional instruments that will be discussed are the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on Democracy, Elections and Governance.

(i) African Charter on Human and Peoples' Rights and women's political participation

The African Charter was the first major treaty on human rights to be developed at the African regional level. Since its adoption in 1981, it has inspired the development of other key human rights instruments in Africa. It is the only African regional human rights instrument which has been ratified by all African states.¹⁰¹ The importance of analysing this treaty in terms of how it potentially advances women's right to political participation is that its provisions impact the four states that are the subject of this study as all these states are party to it.

¹⁰¹ See 'List of countries which have signed, ratified/acceded to the African Union Convention on African Charter on Human and Peoples' Rights' <http://www.african-union.org> (accessed 14 August 2012). Lesotho ratified on 10 February 1992, Rwanda ratified on 15 July 1983, South Africa ratified on 9 July 1996 and Uganda ratified on 10 May 1986.

The African Charter is extensive and it deals with human rights generally covering both individual as well as group rights. In dealing with individual rights, this treaty does not make a distinction between men and women. It is meant to be of universal application and as such does not focus on the rights of a specific group. Regarding women's rights, these are only dealt with fleetingly when it provides that:¹⁰²

The State shall ensure the elimination of every discrimination *against women* and also ensure the protection of the rights of *the woman* and the child as stipulated in international declarations and conventions.

Even though the above provision is often interpreted in relation to women within the context of the family, a wider interpretation could affect other areas of women's lives. The provision can be used to address other forms of discrimination which women encounter. These could include their exclusion from participating in politics on equal terms with men. The article in essence complements the principle of non-discrimination articulated in terms of article 2 of the African Charter.¹⁰³

What is striking about the provision in the African Charter and which can be found in other instruments is that the development of women's rights in Africa is often lumped together with children's rights. For example, the Grand Bay Declaration adopted 30 years after the African Charter 'urges all African States to work assiduously towards the elimination of discrimination against women and the abolition of cultural practices which dehumanise or demean *women and children*'.¹⁰⁴ The linking of these two groups sometimes entrenches the view held in some African jurisdictions that women are

¹⁰² Art 18(3) of the African Charter (emphasis added).

¹⁰³ See F Ouguerouz *The African Charter of Human and Peoples' Rights: A comprehensive agenda for human rights* (2003) 85.

¹⁰⁴ Art 6 of the Grand Bay Declaration (Mauritius) and Plan of Action (emphasis added).

perpetual minors.¹⁰⁵ In light of such an approach to women's rights, it may not be surprising that women's right to participate in politics have for a long time not been taken seriously.

At the time of drafting and adopting the African Charter, most African states did not have democratic systems of government. Individuals did not freely participate in the political organs of their countries, for example, at local government level. However, the right for women to participate in politics can be found in a number of provisions within the African Charter. Some of the articles within the African Charter that can be used to claim or promote the right to participate in politics for women include articles dealing with participation in government,¹⁰⁶ non-discrimination,¹⁰⁷ equality,¹⁰⁸ freedom of association,¹⁰⁹ freedom of assembly,¹¹⁰ and freedom from oppression.¹¹¹ All these rights have an impact on women's ability to participate in local government.

The right to participate in politics is guaranteed in terms of article 13. Despite using the term 'his', the article applies equally to men and women. The application to both sexes can be based on article 2 which stipulates that all people are entitled to the rights in the African Charter. However, the use of masculine rather than gender neutral terminology in this and other articles reveals the male-oriented thinking that prevailed at the time.

¹⁰⁵ For example under the customary law of many states in Africa, women are regarded as perpetual minors. FK Makoa 'Gender and politics: A note on gender inequality in Lesotho' (1997) 12 *Journal of Social Development in Africa* 5 7-8. See also JL Daly 'Gender equality rights versus traditional practices: Struggles for control and change in Swaziland' (2001) 18 *Development Southern Africa* 45 48-49. See also P Thwala 'Gender mainstreaming in Swaziland: Issues and lessons learnt' in A Daniel (ed) *Gender mainstreaming experiences from Eastern and Southern Africa* (2010)149 151.

¹⁰⁶ Art 13 of the African Charter.

¹⁰⁷ Art 2 of the African Charter.

¹⁰⁸ As above.

¹⁰⁹ Art 10 of the African Charter.

¹¹⁰ Art 11 of the African Charter.

¹¹¹ Art 20 of the African Charter.

What the inclination to use masculine terminology may suggest is that the exclusion of women was not considered an anomaly.

The right for women to participate in areas such as local government can be associated with provisions in the African Charter such as that which guarantees the right of access to public service. First by affording everyone 'the right of equal access to the public service of his country',¹¹² the implication can be that access includes the services such as those at local government level. A second interpretation can be that everyone has equal rights to access public service positions through election or appointment. The second interpretation would afford women an equal opportunity to access positions such as those at local government level.

The right to participate in government directly or through freely chosen representatives is guaranteed by the African Charter.¹¹³ Broadly interpreted the right to be chosen as a local government representative is included. A claw-back clause, however, attempts to give states power to legislate so that the individual's right has to be exercised within the ambits of the domestic law.¹¹⁴ The implication of the claw-back clause is that states are permitted to legislate and limit an individual's ability to participate in government either directly or through freely chosen representatives. However, as held in the communication of *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, the legislation should not negate the rights guaranteed in the African Charter.¹¹⁵ The African Commission stated that international law should 'always prevail over contradictory national laws'.¹¹⁶ The issue of claw-back clauses has also been dealt with in the cases of *Media Rights Agenda and Others v Nigeria*¹¹⁷ and *Amnesty International v*

¹¹² Art 13(2) of the African Charter.

¹¹³ Art 13(1) of the African Charter.

¹¹⁴ Art 13 of the African Charter. See also Ouguergouz (2003) 177.

¹¹⁵ Communication 102/93 para 66. See also Ouguergouz (2003) 164-165.

¹¹⁶ As above.

¹¹⁷ Communications 105/93, 128/94, 130/94 and 152/96.

Zambia.¹¹⁸ In the *Media Rights Agenda and Others v Nigeria* case, the African Commission held that '[i]nternational human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter'.¹¹⁹ In *Amnesty International v Zambia* the Commission held that claw-back clauses 'must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter'.¹²⁰ Relying on national laws to curtail women's political participation on the basis of culture or religion can be successfully challenged. The pronouncements of the African Commission on the subject of claw-back clauses places a continuous limitation on any attempt by a state to limit a right such as that of political participation a any such action must be verified to establish whether it is not counter to the principles that the African Charter promotes.

Discussing the limitation on article 13, Ouguergouz argues that the limitation could be analogous to article 25 of the ICCPR which guarantees similar rights.¹²¹ The claw-back clause is undermined by article 18(3) which provides for elimination of discrimination on the basis of 'international declarations and conventions'. The ICCPR stipulates that enjoyment of the right to political participation should be 'without unreasonable restriction'.¹²² Not all limitations would be unreasonable, as there might be instances where exclusion is considered reasonable, for instance limitation on the basis of mental health or age may well be regarded as reasonable.¹²³

¹¹⁸ Communication 212/98.

¹¹⁹ Communications 105/93, 128/94, 130/94 and 152/96 para 66.

¹²⁰ Communication 212/98 para 50. See also F Viljoen *International human rights law in Africa* (2012) 330.

¹²¹ Ouguergouz (2003) 177-178.

¹²² As above.

¹²³ Ouguergouz (2003) 178.

The African Charter requires interpretation of its provisions to take into cognisance other international human rights instruments such as those at the UN level.¹²⁴ Moreover, it provides that when interpreting its provisions, consideration can be given to¹²⁵

African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

Therefore the general conclusion on the claw-back clauses would be that when states are domesticating the standards set out in the African Charter, they should not at the same time attempt to negate the rights that the African Charter guarantees.

Additionally, the African Charter has made provision for equality which can be relied upon to secure women's inclusion in political participation on the basis of equality with men. Accordingly, every person is entitled to enjoy the rights in the African Charter without distinctions such as 'race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.¹²⁶ Sex can therefore not be a basis for exclusion of a group from the enjoyment of the rights set out in the African Charter. The 'other status' criteria affords wider latitude in determining grounds on which an individual may not be discriminated against with 'gender' being an example that could fall under the 'other status'.

The principle of non-discrimination and equality as set out in the African Charter¹²⁷ can as well be relied upon to ensure women's participation in politics. This principle is one that is recognised at the international level including in treaties such as the UN

¹²⁴ Art 60 of the African Charter.

¹²⁵ Art 61 of the African Charter.

¹²⁶ Art 2 of the African Charter (emphasis added).

¹²⁷ Arts 2 & 3 of the African Charter.

Charter.¹²⁸ It is from the basis of this principle that both non-discrimination and equality concerning political participation can be deduced from the African Charter. Non-discrimination would not only relate to issues such as race but also in relation to non-discrimination between sexes and upholding the principle of equality of the sexes. As a result, women and men should be able to participate in politics on an equal basis. Therefore in areas such as local government women should not face discrimination. In amplifying the principle of non-discrimination as enshrined in the Africa Charter, Ouguergouz observes as follows:¹²⁹

All States Parties to the African Charter will thus have to ensure on the one hand that there is no discrimination in the implementation of national laws and on the other, that these laws do not themselves discriminate between those at whom they are aimed.

One of the concerns related to non-discrimination as asserted in the African Charter is the use of the term 'distinction' and as Ouguergouz observes 'not every distinction is necessarily discriminatory and equality of treatment is not synonymous with identity of treatment'.¹³⁰ However, while taking into consideration that not every distinction is discriminatory, the exclusion of women from political participation purely because of their sex is not a justifiable distinction and is therefore discriminatory.

The African Charter places duties on individuals in such a manner that it requires the individual to participate in the activities of society. While the African Charter provides that no-one may be compelled to join an association,¹³¹ it places duties on the individual to serve the community, to not compromise national security, strengthen solidarity within the nation, preserve, strengthen and defend national independence, pay taxes, contribute to the moral well-being of the nation and lastly contribute to promotion of

¹²⁸ Ouguergouz (2003) 77-78.

¹²⁹ Ouguergouz (2003) 80.

¹³⁰ Ouguergouz (2003) 81.

¹³¹ Art 10(2) of the African Charter. See also Ouguergouz (2003) 168.

African unity.¹³² All these duties have a political connotation and to an extent would require the involvement of the individual within society. Such involvement can include political participation if these duties are to be realised. Therefore the duties set out within the African Charter can be understood to include the need for the individual to take part in political participation at all levels of the state.

Another right that has a direct implication for political participation is the right to assemble which provided for in the African Charter in the following terms:¹³³

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

The right therefore would enable women to join political parties through which they can be assured of involvement in areas such as local government.

In terms of substantive realisation, the African Commission – an 11 member body consisting of independent experts is charged with the protection and promotion of human and peoples' rights as stipulated in the African Charter.¹³⁴ No specific provision within the African Charter addresses the need for gender or geographical representation in terms of its composition. On the contrary, gender bias can even be derived from the African Commission's Rules of Procedure which refer to 'chairman' and use the term 'he' when referring to the chairperson.¹³⁵ Initially the African Commission was not

¹³² Art 29 of the African Charter.

¹³³ Art 11 of the African Charter.

¹³⁴ Art 30 of the African Charter.

¹³⁵ Rules 17 & 18 of the Rules of Procedure of the African Commission on Human and Peoples' Rights adopted 6 October 1995 http://www.achpr.org/english/_info/rules_en.html (accessed 19 August 2008).

conscious of women's participation but with time, the African Commission has increasingly started to respect both gender balance and geographical representation in its membership. These changes suggest growing acceptance of gender balance in positions of authority.

Over the years, the African Commission has developed various mechanisms that can be relied upon to advance women's right to participate in politics and that can be used to examine the extent to which African Charter principles are domesticated by members states. These mechanisms can be relied upon when interrogating whether women are involved in all areas of life including participation in politics. The measures in question are discussed below in an effort to establish the degree to which each has been used by the African Commission to advance women's participation in politics.

One mechanism in which the right to political participation can be advanced by the African Commission is when individuals or a group file communications regarding violations of human rights. Filing a communication requires the individual or group to bring a complaint before the African Commission after he or she has exhausted domestic remedies or proves that it would not be reasonably possible to exhaust these remedies. The African Commission can then decide on the matter and in its decision it can ask the state party to redress the wrong that has been committed. The decisions are not binding in the legal sense but they carry weight in terms of encouraging states to abide by their obligations under the African Charter. To date, no communication has been decided that is related to women's political participation. Difficulty of accessing the African Commission, lack of information about the African Commission, requirements to exhaust local remedies and exasperation with the non-binding nature of African Commission decisions may be contributory factors explaining why a communication has not been brought to contest women's exclusion from local government where such occurs.

A second mechanism that could be used to advance the right is through examination of state reports submitted to the African Commission. Although the African Charter provides scant information on what should be contained in state reports, guidelines developed by the African Commission have helped to elaborate on what aspects states should concentrate upon when they report. The aim of the guidelines is that states should be able to elaborate on the rights set out in the African Charter so as to create ‘a constructive dialogue’ between states and the African Commission.¹³⁶ A setback to state reporting is that the concluding observations of the African Commission that are related to the state reports which are submitted for official records are not formally available for public scrutiny. The opportunity for public opprobrium to pressurise states where implementation of recommendations of the African Commission is lacking has been reduced. Most concluding observations are sent directly to the concerned state. However, a few concluding observations including that of Rwanda have been made public.¹³⁷ Even in these few cases there is no consistent trend in terms of discussion of

¹³⁶ ‘Guidelines for national periodic reports under the African Charter’, adopted at 5th Ordinary Session *reprinted* in C Heyns (ed) *Human rights law in Africa 1999* (2002) sec I(6).

¹³⁷ ‘Concluding observations and recommendations on the ninth and tenth periodic reports of the Republic of Rwanda’ http://www.achpr.org/english/other/Con_Observations/Rwanda/5th_CO_Rwanda.pdf (accessed 31 January 2012). Others that have been made public in the past include those of Seychelles, Sudan, Togo, Cameroon, and the Democratic Republic of Congo. In the case of Cameroon discrimination against women was discussed even though not within the context of political participation. In other cases such as that of the concluding observations on the initial reports of Seychelles and the Democratic Republic of Congo, the African Commission did not discuss women’s issues at all but by no means does it mean that women do not face discrimination in these states. In the case of Sudan, the African Commission while noting that the country had a quota system which would result in integration of women in government, nevertheless, recommended that the ‘gender dimension’ should be ‘integrated in all the relevant programmes, structures and activities’ of the government and furthermore called for women to be more involved in the running of government. In the case of Togo, the African Commission went even further and mentioned the need to include women not only in the public but also in the private sphere stating that the government should increase ‘the involvement of women in the activities of the public and private sectors, particularly by reducing the poor

women's involvement in politics especially at local government. As an example, in the case of Rwanda, women's participation at local government is not addressed directly by the African Commission, instead a broad statement is made praising Rwanda for the high numbers of women at all levels of government.¹³⁸ No discussion or recommendation is made on the issue of women's participation in politics. The concluding observations on South Africa and Uganda fail to make any mention of women's participation in politics.¹³⁹ In Uganda's case the only aspect of the report that can have a bearing on women's participation in local government is the requirement that the country should in future provide disaggregated data to show how different

representativeness of women in senior sectors'. 'Final observations on the initial report presented by the Republic of Cameroon' http://www.chr.up.ac.za/hr_docs/countries/docs/Concluding%20Observation_Cameroun_%20ENG.doc (accessed 26 March 2010) 3-4. 'Concluding observations of the African Commission on the initial report of the Republic of Seychelles' 39th Ordinary Session <http://www.chr.up.ac.za/index.php/documents-by-theme/african-commission.html> (accessed 12 September 2011). See also 'Concluding observations on the report of the Democratic Republic of Congo (DRC)' http://www.chr.up.ac.za/hr_docs/countries/docs/CONCLUDING%20OBSERVATIONS_DRC%20%5Beng%5D.doc (accessed 26 March 2010). 'Concluding observations on the periodic report of the Republic of Sudan' 35th Ordinary Session <http://www.chr.up.ac.za/index.php/documents-by-theme/african-commission.html> (accessed 19 August 2008). 'Final observations on the presentation of the first periodic report of the Republic of Togo' 31st Ordinary Session <http://www.chr.up.ac.za/index.php/documents-by-theme/african-commission.html> (accessed 19 August 2008).

¹³⁸ 'Concluding observations and recommendations on the ninth and tenth periodic reports of the Republic of Rwanda' 47th Ordinary Session http://www.achpr.org/english/other/Con_Observations/Rwanda/5th_CO_Rwanda.pdf (accessed 31 January 2012) para 19.

¹³⁹ 'Concluding observations of the African Commission on the 3rd periodic report of the Republic of Uganda' 45th Ordinary Session http://www.achpr.org/english/other/Con_Observations/uganda_3rd_rpt.pdf (accessed 31 January 2012). See also 'Concluding observations and recommendations on the first periodic report of the Republic of South Africa' 38th Ordinary Session http://www.achpr.org/english/other/Con_Observations/South%20Africa/2nd_CO_South%20Africa.pdf (accessed 31 January 2012).

rights are being implemented.¹⁴⁰ In essence, Uganda would need to provide data in areas such as women's participation at local government level. In general, in the few concluding observations which are publicly available there is no discussion of women's participation at local government level.

The third option that can be used to protect and promote women's participation in politics and decision-making is through conducting promotional visits to state parties. These promotional visits help the African Commission to assess the status of implementation of human rights at the domestic level. The promotional visits provide the best opportunity to focus on a specific state, making it easier to contextualize historical developments concerning women while taking into consideration the state's obligations. During promotional visits specific attention could be paid on matters such as women's participation in local government. Inconsistency has been displayed in how the matter of women's participation in local government is handled, for instance in Rwanda the matter was not directly addressed but in Lesotho's report the issue of women's participation in local government is noted.¹⁴¹ Lesotho was commended for its efforts in ensuring 'good representation of women in local government', however, it was encouraged to ensure that women were also adequately represented in 'all decision making bodies'.¹⁴² Compounding the failure to consistently discuss the issue of women's participation at local government level is the lack of uniformity in how the promotional visits are conducted, especially in terms of the preparation and structure of reports that arise from such visits. For instance, basic issues such as titles of the promotional reports

¹⁴⁰ Concluding observations of the African Commission on the 3rd periodic report of the Republic of Uganda para 28.

¹⁴¹ African Commission 'Report of the mission of promotion to Burundi by Commissioner Mohamed Abdellahi Ould Babana in Rwanda' 26 January – 2 February 2004 http://www.achpr.org/english/_info/reports_en.html (accessed 1 February 2012) 25. African Commission 'Report of the promotional mission to the Kingdom of Lesotho' 3-7 April 2006 <http://www.chr.up.ac.za> (accessed 18 August 2008) 39.

¹⁴² Report of the promotional mission to the Kingdom of Lesotho (2006) 39.

differ. The inconsistency is manifested further with regard to the questions asked during the visits. These inconsistencies can impact on confidence that states have in the African Commission to apply standards uniformly.

A further observation is that the visits rarely venture outside major urban areas and mostly involve interviews with senior government officials.¹⁴³ In reality urban areas are only partially representative of a state's population but to better appreciate women's participation in local government both rural and urban areas need to be studied. Urban areas are the places where the population is sophisticated and women are more likely to be involved in local government. Focussing primarily on urban areas coupled with the inconsistencies associated with current conducting of promotional visits mean that promotional visits have limitations in terms of what they achieve.

A fourth option which is utilised to further advance women's rights in Africa, is through adoption of resolutions by the African Commission, such resolutions may deal with matters related to women's rights. Some of the resolutions adopted have dealt with issues such as the right to education,¹⁴⁴ right to remedies for victims of sexual violence¹⁴⁵ and some have specifically dealt with the situation of women in Africa.¹⁴⁶ In

¹⁴³ See eg African Commission 'Report of the promotional mission to the Kingdom of Swaziland' 21-25 August 2006 <http://www.chr.up.ac.za> (accessed 18 August 2008). African Commission 'Report of the promotional mission to the Mauritius' 21-25 August 2006 <http://www.chr.up.ac.za> (accessed 18 August 2008). African Commission 'Report of the promotional mission to the Republic of Seychelles' 26-30 July 2004 <http://www.chr.up.ac.za> (accessed 18 August 2008). African Commission 'Report of the promotion mission of Commissioner Rezag Bara to Burkina Faso' 26-30 March 2007 <http://www.chr.up.ac.za> (accessed 18 August 2008).

¹⁴⁴ 'Resolution on human rights education' ACHPR/Res.6(XIV)93 <http://www.achpr.org/english/Special%20Mechanisms/Women/res.6.doc> (accessed 19 August 2008).

¹⁴⁵ 'Resolution on the rights to a remedy and reparation for women and girls victims of sexual violence' ACHPR/Res.111(XXXII) <http://www.achpr.org/english/Special%20Mechanisms/Women/res.14.doc> (accessed 19 August 2008).

some cases resolutions have addressed women's situation in specific countries – for instance in the Democratic Republic of Congo (DRC).¹⁴⁷ To date, no resolution has been adopted on political participation whether at national or local government levels. Where resolutions are adopted that focus on women, they have usually been related to violence against women in times of conflict. Resolutions can be used to address other issues that affect women such as the state of their participation in local government.

A fifth option that can be utilised to advance women's participation in politics is that of the office of the Special Rapporteur on the Rights of Women in Africa (Rapporteur on Women). This office was established in 1999.¹⁴⁸ It is not a permanent office and extensions are made whenever its duration is about to expire.¹⁴⁹ The terms of reference for the Rapporteur on Women do not specifically state that he or she should deal with

¹⁴⁶ 'Resolution on the status of women in Africa' ACHPR/Res.14(XVI)94 <http://www.achpr.org/english/Special%20Mechanisms/Women/res.14.doc> (accessed 19 August 2008). See also 'Resolution on the situation of women in Africa' ACHPR/Res.14(XVI)94 <http://www.achpr.org/english/Special%20Mechanisms/Women/res.14.doc> (accessed 19 August 2008).

¹⁴⁷ 'Resolution on the situation of women in the Democratic Republic of Congo' ACHPR/Res.103(XXX)06 <http://www.achpr.org/english/Special%20Mechanisms/Women/res.103.doc> (accessed 19 August 2008).

¹⁴⁸ 'Resolution on the designation of the Special Rapporteur on the Rights of Women in Africa' ACHPR/res.38(XXV)99 <http://www.achpr.org/english/Special%20Mechanism/Women/res.38.doc> (accessed 28 August 2008).

¹⁴⁹ Resolution on the designation of a Special Rapporteur on the Rights of Women in Africa. See also 'Resolution on the renewal of the mandate of the term of the Special Rapporteur on the Rights of Women in Africa' ACHPR/Res.63 (XXXIV)03 <http://www.achpr.org/english/Special%20Mechanisms/Women/res.63.doc> (accessed 28 August 2008). 'Resolution on the renewal of the term of the Special Rapporteur on the Rights of Women in Africa' ACHPR/Res.78(XXXVIII)05 (accessed 28 August 2008). 'Resolution on the renewal of the mandate of the Special Rapporteur on the Rights of Women in Africa' ACHPR/Res.112(XXXII)07 http://www.achpr.org/english/resolutions/resolution112_en.htm (accessed 28 August 2008).

the issue of women's participation in politics.¹⁵⁰ The terms of reference are general, requiring the Rapporteur on Women to study 'the situation of the human rights of women in Africa', the Rapporteur on Women should help states to implement their policies which promote and protect women's rights.¹⁵¹ While such general terms do not specify the right to participate in politics, it can be assumed that the right is included and the Rapporteur on Women is free to raise the issue of women's participation in local government. For example, one of the persons who has served as Rapporteur on Women — Commissioner Angela Melo — took the liberty to identify three themes as forming her mandate, namely, violence against women, promotion of education and women's participation in decision-making.¹⁵² The latter aspect is sufficiently wide to cover participation in local government.

In recent years, the Rapporteur on Women has enhanced her work with increased focus on women's rights even though it is an overwhelming task for one person working on a part-time basis to adequately cover 54 AU member states. One method that the Rapporteur on Women can use to advance the promotion and protection of women's participation in politics is through highlighting these issues in the intersession reports that are published by the Rapporteur on Women. These reports indicate the activities that have been undertaken between sessions of the African Commission. The intersession reports have failed to clearly identify specific areas of concern on which the Rapporteur on Women concentrated. Most attention focused on rape, violence against women, and reproductive rights with limited focus on women's involvement in politics.¹⁵³ Even though the Rapporteur on Women may have been involved in issues

¹⁵⁰ C Heyns 'Draft terms of reference for the Special Rapporteur on the Rights of Women in Africa' in C Heyns (ed) *Human rights law in Africa* (2004) 601.

¹⁵¹ Heyns (2004) 602.

¹⁵² Commissioner Angela Melo (Special Rapporteur on the Rights of Women in Africa) 'Mission report to the Republic of Djibouti' (14 to 17 September 2002) para 38.

¹⁵³ Special Rapporteur on the Rights of Women in Africa 'Intersession Activity Report 39 Ordinary Session' 11-25 May 2006 <http://www.achpr.org/english/Special%20Mechanisms/Women/>

related to women, only generalisations are mentioned with little details on substance of what was done. In particular, reporting on women's participation in politics has not received much attention.

The Rapporteur on Women can undertake promotional visits to state parties. However, Intersession Reports of the Rapporteur on Women indicate that state parties do not react timeously to requests for such visits.¹⁵⁴ To date no promotional visits have been conducted to Lesotho, Rwanda, South Africa or Uganda.¹⁵⁵ Where promotional visits by the Rapporteur on Women have taken place, these have been restricted to capital cities thereby making it difficult for the African Commission to have an accurate impression of women's participation in areas such as local government.

The African Charter fails to provide adequate protection of women especially in areas such as political participation. An area such as how women can exercise their right in

intercession_women_39th.doc (accessed 21 August 2008). See also Special Rapporteur on the Rights of Women in Africa 'Intersession Activity Report 40 Ordinary Session' 15-29 November 2006 http://www.achpr.org/english/women/intercession_women_40th.doc (accessed on 21 August 2008). Special Rapporteur on the Rights of Women in Africa 'Intersession Activity Report 41 Ordinary Session' 16-30 May 2007 http://www.achpr.org/english/women/intercession_women_41st.doc (accessed 21 August 2008).

¹⁵⁴ As above.

¹⁵⁵ Promotional visits have been conducted to Djibouti and Sudan. Commissioner Angela Melo (Special Rapporteur on the Rights of Women in Africa) 'Promotional mission report to the Republic of Sudan' (30 March to 4 April 2003) para 148. See also 'Mission report to the Republic of Djibouti' (14-17 September 2002) paras 107 & 115 (j). In the case of Sudan, while the state was commended for making provision for a quota system to ensure women's participation, the Rapporteur on Women did not make any recommendations in her report on how this could be better realised. With regard to Djibouti the Rapporteur on Women was concerned about women's absence in the legislature and their under-representation in government. The Rapporteur on Women recommended that the government should implement 'administrative and other measures' so that women are integrated in decision-making. There was no clarity on what these measures should be.

local government leadership has not been addressed. While women's participation is protected through general provisions, the African Charter fails to recognise the unique conditions under which African women live and does not clearly state any temporary special measures which could be adopted to uplift them. However, the African Charter makes provision for other instruments such as protocols to be developed to supplement its own provisions.¹⁵⁶ As a result the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa has been adopted and as the name suggests focuses on women's rights.

(ii) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

In this part of the chapter, I analyse the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol or Protocol on Women).¹⁵⁷ I consider whether the Protocol on Women broadens women's right to participate in politics when compared to prior instruments.¹⁵⁸ I analyse the specific

¹⁵⁶ Art 66 of the African Charter.

¹⁵⁷ Adopted 11 July 2003 and entered into force 26 May 2001. See 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' http://www.au.int/en/sites/default/files/Rights%20of%20Women_0.pdf (accessed 14 November 2012). Lesotho ratified on 5 November 2004, Rwanda ratified on 1 July 2004, South Africa ratified on 14 January 2005 and Uganda ratified on 22 July 2010.

¹⁵⁸ F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11 18. Viljoen for instance notes that '[s]pearheaded by an increasingly vocal and visible African women's rights movement, debate about the need for an additional instrument to extend the scope and content of women's rights in the African Charter increased, and the notion of a substantive supplement to the Charter gathered momentum'. According to Murray 'the decision to adopt the Protocol was seen as a way to compel the African Commission on Human and

provisions which give rise to women's right to participate in politics and in so doing, I take into account the *travaux préparatoires* to arrive at a better appreciation of the thinking behind some of the provisions. I must state at the onset that the *travaux préparatoires* have limitations because in some cases they lack detail, and do not explain the drafters' choices. I conclude by looking at the uncertainties surrounding the monitoring, implementation and interpretation of the Protocol on Women.

The Protocol on Women is the most prominent AU treaty that addresses women's rights. In analysing the Protocol on Women, it is important to first take cognisance of the fact that none of its provisions have been interpreted by any of the treaty bodies tasked with doing so. Second, the process of adopting the Protocol on Women was complex and time consuming as states and other interested parties debated what the content of the instrument should be.¹⁵⁹ In the end the process was rushed and the final document was heavily criticised for its shortcomings.¹⁶⁰

The Protocol on Women dedicates an entire article to women's participation in politics and decision-making.¹⁶¹ This article was amended on numerous occasions throughout the drafting stages with some of the changes being very minimal.

The provision dealing with women's political participation is not specific to any part of government and is therefore widely framed to include local government. In specific terms the provision (Article 9) is set out as follows:¹⁶²

Peoples' Rights to be attentive to women's rights and, additionally, to give women a sense of ownership over rights at this level'. See also Murray (2005) 253-254.

¹⁵⁹ See eg A Motala 'Non-governmental organisations in the African system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002) 246 266-267.

¹⁶⁰ Banda (2008) 445-453.

¹⁶¹ Art 9 of the Women's Protocol.

¹⁶² As above.

Right to participation in the political and decision-making process

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.

a The title

In the initial draft protocol there was no title to this article.¹⁶³ Later drafts started to adopt a title and the first title was 'right to participation in political process'.¹⁶⁴ The subject of decision-making was excluded from the title. The drafters may have taken it for granted that merely mentioning political participation automatically implies involvement in decision-making. A later draft referred to '[r]ight to participation in the political process and decision-making'.¹⁶⁵ The use of the word 'process' in reference to politics suggests that participation should be on a continuous basis and not limited to an

¹⁶³ Experts meeting on the preparation of a draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women (Nouakchott version 12-14 April 1997). In this draft the article did not have a title and was instead under art 10 where the issue of women's participation was discussed. See also 'Draft Protocol to the African Charter on Women's Rights' (Kigali Draft Protocol) (15 November 1999).

¹⁶⁴ Kigali Draft Protocol.

¹⁶⁵ Art 9 of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as adopted by meeting of government experts, CAB/LEG/66.6/Rev.1 (16 November 2001). See also Art 10 of the 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(1) (12-16 November 2001).

event. The document that was eventually adopted refers to '[r]ight to participation in the political and decision-making process',¹⁶⁶ but this could have been more appropriately referred to as 'processes' to recognise that the two were separate but that both were equally important. The current title takes cognisance of the importance of both and highlights the importance that mere political participation may not result in the ability to be involved in decision-making. While other instruments had often paid attention to political participation and the issue of decision-making had to be inferred, in this case it is clear that both political participation and decision-making should be read into each article and given effect with equal attention.

b Article 9(1) – Specific positive action

A duty is placed on states through the term 'shall', thereby unequivocally requiring states to ensure realisation of the right to political participation for women.¹⁶⁷ Any state that ratified the Protocol on Women is thus compelled to ensure the realisation of women's political participation. Uganda for instance observed the compelling nature of the term 'shall' when it objected to its use in the advancement of some right arguing that the use of the word sets too high a standard to be met by least developed state parties, making the obligation difficult to comply with in the near future'.¹⁶⁸ When ratifying the instrument, Uganda did not enter any reservations and is therefore bound by the standards set out the Protocol on Women. Despite views such as those expressed by Uganda, a state cannot cite limited resources as a reason for non-inclusion of women in political participation within the local government sphere.

¹⁶⁶ Art 9 of the Women's Protocol.

¹⁶⁷ Art 9(1) of the Women's Protocol.

¹⁶⁸ Letter from the Embassy of the Republic of Uganda to the General Secretariat of the OAU XC/AD/27/11 (9 April 2001). Uganda objected to the use of the word with reference to the right to housing but did not object to its use with regard to the right to political participation, meaning that even less developed countries can comply with ensuring women's participation in politics.

State parties are required to implement procedures to ensure the realisation of women's participation in politics. The use of the phrase 'specific positive action' suggests that a significant burden is placed on states. Therefore, the measures a state puts in place need to be precise, detailed, explicit, definite, and constructive. The choice of the term 'specific positive actions' seems to have been partially inspired by the Beijing Declaration which requires governments to set 'specific targets and implementing measures' in essence affirmative action so that equal representation between women and men is achieved.¹⁶⁹ In terms of the Protocol on Women, requiring states to 'take specific positive action' suggests that if a state merely adopts constitutional provisions, legislation or policies but fails to actively implement them, then it has only partially fulfilled its obligations.

Requiring that states should 'promote participative governance' implies that systems of government should be democratic so that every individual is potentially able to take part in the administration of the state at all levels, including local government. Participative governance requires office holders to continuously interact with those whom they govern and leadership should be such that it takes cognisance of the changing circumstances of those who are led. Individuals should therefore continue to have a say in how they are governed and the decisions that are made by those in leadership. Participative governance appears to suggest that equal participation of different parts of the population and interest groups should be involved in issues of governance and as such women should be included in governance so that they can articulate both their interests and perspectives.

While other human rights instruments have tended to discuss equality of women in comparison to men, the Protocol does not consistently follow the pattern of comparing

¹⁶⁹ 'Beijing Declaration and Platform for Action, 4th World Conference on Women' A/CONF.177/20(1995) and A/CONF.177/20/Add.1(1995) <http://www.un.org/womenwatch/daw/beijing/platform/> (accessed 27 October 2010) para 190(a).

women to men. The impression created in this provision is that reference to ‘equal participation of women’ could as well mean equality among women themselves and not necessarily in comparison with men. This interpretation may be questionable. If the Protocol on Women is read in conjunction with other human rights instruments that promote women’s right to political participation, these instruments have tended to promote equality of women in *comparison to men*. The same approach should be adopted in respect of article 9.

The provision that women should participate ‘in the political life of their countries’ could imply that participation in politics be limited to citizens and permanent residents. Such an interpretation would be in line with the provision on political participation in the African Charter. This interpretation is possible in light of the fact that the Women’s Protocol is a protocol to the African Charter. The undertaking that states should ensure that women participate equally in the ‘political life of their countries’ is open to a wide interpretation to include local government.

The Protocol on Women is the first treaty at the African regional level that uses the term ‘affirmative action’ by name and requires states to resort to it to promote women’s participation in politics. For instance, at the UN level, CEDAW had only made reference to ‘temporary special measures’ and ‘appropriate measures’ but had failed to clarify what these were exactly, perhaps if clarity had been provided affirmative action may have been included in ‘appropriate measures’. The Protocol on Women refers to ‘affirmative action’ and ‘enabling legislation’ and compels states to use both of these to ensure women’s inclusion in political participation. Requiring states to use ‘affirmative action and ‘enabling legislation’ was included in the Protocol on Women only in the last major meeting on the Protocol on Women held barely three months before the adoption of the instrument. As a result, there was little time to discuss and provide

further clarify on what was to be expected of states when they used ‘affirmative action’ and ‘enabling legislation’.¹⁷⁰

The eventual position taken by the Protocol on Women on the issue of affirmative action is that it should be the guiding principle in states’ enabling legislation. However, the Protocol on Women does not limit itself to affirmative action and enabling legislation to implement political participation for women but also requires states to consider ‘other measures’. States therefore have wider latitude to decide on what other measures besides affirmative action can be utilised to ensure that women are able to participate equally in the political lives of their countries. The complexity surrounding the measures that can be used suggests that the matter could have been discussed and elaborated upon further.

The provision further stipulates processes that ensure women’s participation and the outcomes that are expected as a result of the affirmative action, enabling legislation or other measures. In both the processes and outcomes, the state should use affirmative action and enabling national legislation to achieve the objectives of the Protocol on Women which include equal participation of women as for example candidates in local government elections.

During the drafting process, the article requiring states to ensure that explicit measures are in place so that women are able to participate in all elections was not contentious

¹⁷⁰ Art 11 of the Kigali Draft Protocol. See also Art 9 of the Draft Protocol CAB/LEG/66.6/Rev.1. See also Letter from Equality Now to Ambassador Djinnit Said — Interim Commissioner for Peace, Security and Political Affairs (13 January 2003). See also Africa Regional Office & others ‘Markup Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (4-5 January 2003).

and states easily agreed on it.¹⁷¹ Participation in elections can mean that women participate as candidates in local government elections.

c Articles 9(1)(a) and (b) – Non-discrimination and equal representation

Participation in elections should take place on the basis of non-discrimination. However, positive discrimination is not excluded if intended to support women candidates especially where they are not adequately represented. As a result affirmative action can be relied upon to ensure that women are able to effectively participate as candidates. Therefore it is permissible that through affirmative action, for example, quotas can be legally introduced to allow for a certain percentage of offices to be contested solely by women candidates.

The Protocol on Women broadens participation in elections and requires that women should be represented ‘equally at all levels with men in all electoral processes’.¹⁷² The Protocol on Women provides no definition of ‘electoral processes’. Does it include the electorate, candidates and officials who manage elections? How does this provision differ from article 9(1)(a) and what value does it add? While article 9(1)(a) addresses elections in general and deals with both the electorate and candidates an inference can be drawn that article 9(1)(b) is both complementary and expansive and by ‘electoral processes’ – it should be extended to candidates and the electorate and even further to those who administer the process of elections. The phrase ‘all electoral processes’ undoubtedly refers to local government as well and is not limited to elections at the

¹⁷¹ See Art 9(1)(a) of the Women’s Protocol. Compare with art 9(1)(a) of the Markup Draft Protocol. See also Art 11(1) of the Kigali Draft Protocol. Art 9(1)(a) of the Draft Protocol CAB/LEG/66.6/Rev.1. See also ad Art 9 of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (as adopted by the meeting of Government Experts in Addis Ababa on 16 November 2001) — see in particular ‘Comments by the Office of the Legal Counsel’ Doc MMT/Dec 2002.

¹⁷² Art 9(1)(b) of the Women’s Protocol.

national level. In earlier drafts, the provision had required that women should be represented equally as their males counterparts 'in all electoral and candidate lists'.¹⁷³ However, the Office of Legal Counsel of the OAU held the view that a provision that guaranteed equal representation in 'all electoral and candidate lists' was unrealistic.¹⁷⁴ The Office of Legal Counsel held the view was that a suggestion of a 50 percent representation may fail to take into consideration issues such as qualifications, whether the women office bearers always advance women's issues and their availability for election.¹⁷⁵

The Office of Legal Counsel suggested that the provision should instead state that 'women have a right to stand for public office and if elected, hold office'.¹⁷⁶ However, the suggestion from the Office of Legal Counsel if adopted was probably not going to advance women's rights substantially as it would not differ markedly from instruments that had always guaranteed everyone the right to be elected. The language to guarantee women's participation needed to be more specific and with backing that ensured that special attention was paid to women's inclusion. Already, instruments that were in existence such as the African Charter advocated equality of sexes and guaranteed the right to participate in politics on equal terms but in reality women's participation had

¹⁷³ Art 10 of the Nouakchott Draft Protocol. See also Art 11(2) of the Kigali Draft Protocol. See also Art 9(1)(b) of the Draft Protocol CAB/LEG/66.6/Rev.1. See also Art 10.1(b) of the 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(1) (12-16 November 2001) para 76. Art 9(1)(b) of the Markup Draft Protocol.

¹⁷⁴ Art 9(3) of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Government Experts in Addis Ababa 2001) — Comments by the Office of the Legal Counsel.

¹⁷⁵ M Nsibirwa 'A brief analysis of the draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2001) 1 *African Human Rights Law Journal* 40 52.

¹⁷⁶ Art 9(3)(b) of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Government Experts in Addis Ababa 2001) — Comments by the Office of the Legal Counsel.

never been equal to that of men and therefore simply restating the position in previous instruments was not going to advance women's position any further. The suggestion by the Office of Legal Counsel to use words such as 'if' left the election of women to chance, meaning that there was no guarantee of their success. The suggestion by the Office of the Legal Counsel was accordingly rejected and in the final provision equal representation 'in all electoral and candidate lists' was changed to the final position requiring that women should be equally represented 'in all processes' thereby allowing for interpretation to extend to candidate lists in all elections.

d Article 9(1)(c) – Equal partners in development

In terms of the Women's Protocol, women are supposed to be 'equal partners with men at all levels of development and implementation of state policy and development programmes'.¹⁷⁷ In the *travaux préparatoires* a suggestion was made that the article should instead state that 'include women equally with men at all levels of development and execution of state policy'¹⁷⁸ or alternatively that 'women are included with men at all levels of development and implementation of state policy'.¹⁷⁹ The requirement for women to be 'equal partners' envisages that they would have ownership in matters of development not only at national but at other levels such as local government. To ensure that women are equal partners, the state can resort to affirmative action, enabling national legislation and other measures so as to accord them equal partnership at all levels including local government level. Being 'equal partners with men at all levels of development' means that women should be active in among others local government. The provision of requiring inclusion of women furthers the principle of elimination of discrimination which among others requires states to modify 'social and

¹⁷⁷ Art 9(1)(c) of the Women's Protocol.

¹⁷⁸ Art 10 of the Experts meeting on the preparation of a draft Protocol to the African Charter on Human and Peoples' Rights Concerning the Rights of Women of 12-14 April 1997.

¹⁷⁹ Art 11(3) of the Draft Protocol to the African Charter on Women's Rights of 15 November 1999.

cultural patterns of conduct' and practices that are based on propagation of inferiority or superiority of one sex including those that stereotype the roles of men and women.¹⁸⁰ A positive duty is placed on states to devise means to change social conduct. As such states should reform existing laws and practices so that they promote and protect the rights of women.¹⁸¹

The Protocol on Women requires states to 'ensure increased and effective representation and participation'.¹⁸² Increased representation reinforces the requirement in the earlier provisions requiring equal representation of women. Increased representation means that in those instances where women have been inadequately represented then affirmative action, enabling legislation and other means can be used to ensure women's increased representation. Effective participation means that women should exercise real authority and not be mere tokens. The provision is onerous because it requires 'increased and effective representation and participation' and therefore all aspects of leadership within a state including local government structures should display an increased and effective participation of women. Effectiveness would entail the ability for women to be included in decisions to be made and implemented.

e Article 9(2) – Increased and effective representation

One of the underlying principles that the Protocol on Women uses in promoting women's involvement in political participation is that of non-discrimination.¹⁸³ The Protocol on Women requires state parties to address non-discrimination using

¹⁸⁰ Art 2(2) of the Women's Protocol.

¹⁸¹ Art 8(f) of the Women's Protocol.

¹⁸² Art 9(2) of the Women's Protocol.

¹⁸³ Art 2 of the Women's Protocol.

‘legislative, institutional and other measures’.¹⁸⁴ States are required to domesticate human rights standards and ‘include in their national constitutions and other legislative instruments, if not already done, the principle of equality and ensure its effective application’.¹⁸⁵ Furthermore, positive action should be taken by state parties to ensure realisation of the rights that they guarantee.

The Protocol on Women has elaborated on the principle of equality first by not merely mentioning equality but by explaining further that it relates to equality between women and men. Second, states are supposed to ensure that their national policies, legislation, programmes, development plans and activities have a gender perspective.¹⁸⁶ The gender perspective in this case could mean ‘women’s perspective’, if one considers that the Protocol on Women defines women as ‘persons of female gender’ instead of ‘persons of female sex’ of course an argument can be proffered that the current definition gives wider protection including to persons who may not be of female sex but who identify themselves as female for instance transgender individuals. The perspectives in this case could include a requirement for policies such as those requiring affirmative action to promote inclusion of women or persons who identify themselves as women in political participation. Third, state parties should ensure that where discrimination against women continues to manifest itself, whether in law or practice, action is taken to implement corrective measures to address the discrimination in question.¹⁸⁷ Both *de jure* and *de facto* approaches have been used to eliminate discrimination against women in this provision. States are required to ensure that they support initiatives taken at the domestic and international levels that are aimed at addressing discrimination against women.¹⁸⁸ The initiatives would include respecting international human rights standards and decisions made by bodies at the international

¹⁸⁴ As above.

¹⁸⁵ Art 2(a) of the Women’s Protocol.

¹⁸⁶ Art 2(c) of the Women’s Protocol.

¹⁸⁷ Art 2(d) of the Women’s Protocol.

¹⁸⁸ Art 2(e) of the Women’s Protocol.

level. States should domesticate these standards in constitutional provisions, legislation, policy and further ensure that they are implemented.

With respect to the implementation, monitoring and interpretation of the Protocol on Women a question arises as to whether the stipulation that '[t]he African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol' suggests that the jurisdiction of the African Commission is entirely excluded from the process.¹⁸⁹ However, it must not be forgotten that the Protocol on Women is intended to complement the African Charter¹⁹⁰ and this point is made clear as states are supposed to submit their country reports in 'accordance with [a]rticle 62 of the African Charter'.¹⁹¹ The fact that these reports are submitted to the African Commission means that the involvement of the African Commission in the implementation, monitoring and interpretation of the Protocol on Women is recognised. Furthermore, the jurisdiction of the African Commission over the Protocol on Women has not been expressly excluded and therefore both the African Court and African Commission have a complementary jurisdiction over the Protocol on Women.¹⁹² As Viljoen has also noted, only a few states have so far accepted jurisdiction of the African Court and therefore if only the African Court's jurisdiction were accepted it would create an 'absurd' situation as those that have not accepted jurisdiction of the African Court would be exempt from allegations of 'violations of the Women's Protocol'.¹⁹³

¹⁸⁹ Art 27 of the Women's Protocol.

¹⁹⁰ Viljoen (2012) 312.

¹⁹¹ Art 26 of the Women's Protocol.

¹⁹² Viljoen (2012) 313. R Murray 'The African Commission and the Court on Human and Peoples' Rights' in RKM Smith & C Van den Anker *The essentials of human rights* (2005) 6 8. Murray had raised concerns that the division of labour related to interpretation undermines what is supposed to be a complementary relationship between these two institutions.

¹⁹³ Viljoen (2012) 313.

In conclusion, the Protocol on Women took into cognisance developments at the UN level. The Protocol on Women addresses some of the unique problems that women in Africa face such as cultural patterns that undermine women in realising their right to political participation. The Protocol on Women promotes women's right to participate in politics but fails to categorically mention local government even though it can be correctly assumed that local government is included. While the Protocol on Women has advanced women's participation in politics it is important to evaluate whether subsequent documents such as the African Charter on Democracy, Elections and Governance add anything new to advancing women's participation in politics.

(iii) African Charter on Democracy, Elections and Governance

The African Charter on Democracy, Elections and Governance (Charter on Democracy) was adopted in 2007.¹⁹⁴ Inspiration for its development was drawn from the Inter-American Democratic Charter, which was adopted in 2001.¹⁹⁵ The Charter on Democracy came into force in 2012, with Lesotho, Rwanda and South Africa among the 15 states whose ratification ensured the Charter on Democracy's entry into force.¹⁹⁶ Uganda is yet to become a party to the Charter on Democracy.

¹⁹⁴ Adopted 30 January 2007. See 'List of countries which have signed, ratified/acceded to the African Charter on Democracy, Elections and Governance' http://www.au.int/en/sites/default/files/Charter%20on%20Democracy%20and%20Governance_0.pdf (accessed 14 November 2012). Lesotho ratified on 9 July 2010, Rwanda ratified on 14 July 2010, South Africa ratified on 24 January 2010 and so far Uganda has only signed, having done so on 18 December 2008.

¹⁹⁵ ER McMahon 'The African Charter on Democracy, Elections and Governance: A positive step on a long path' http://www.afrimap.org/english/images/paper/ACDEG&IADC_McMahon.pdf (accessed 10 September 2012) 3 5.

¹⁹⁶ 'Status list – African Charter on Democracy, Elections and Governance' <http://www.au.int/en/treaties> (accessed 2 October 2012).

Obviously, in terms of its impact state parties' willingness to ratify and implement its provisions at the domestic level will be the eventual indicator of the success of the Charter on Democracy.¹⁹⁷ The contribution of the Charter on Democracy to women's participation may be questionable as it fails to 'adequately' highlight women's role,¹⁹⁸ nevertheless it is important to analyse whether the Charter on Democracy advances women's participation at all as it deals with key issues of democracy, elections and governance on the African continent. All these issues have an impact at local government level. In fact, local government level is dealt with to some extent in the Charter on Democracy through calls for its strengthening.¹⁹⁹ However, gender equality is not mentioned with regard to local government.

The Charter on Democracy has set a number of objectives to advance participation of the entire population. These should also guide member states when they deal with political participation even in local government and, if well implemented, can impact positively on women's participation. The first objective is that elections should be 'regular free and fair' (*sic*) so that governments are both democratic and representative.²⁰⁰ In essence, representative government necessarily entails using criteria that ensure non-discrimination on the basis of sex.

A second objective is that the Charter on Democracy requires states to ensure 'citizen participation ... in the management of public affairs'.²⁰¹ The word 'citizens' obviously encompasses women and men. The Charter's starting point seems to be clear: women and men should be able to participate equally in issues of governance, and one sex

¹⁹⁷ McMahon (2007) 1. See also L Ajong Mbapndah 'African Charter on Democracy, Elections and Governance: Changing times or another mirage? The seriousness of a challenge' (2007) http://www.africanews.com/site/list_messages/14120 (accessed 26 March 2011).

¹⁹⁸ Ajong Mbapndah (2007).

¹⁹⁹ Art 34 of the Charter on Democracy.

²⁰⁰ Art 2(3) of the Charter on Democracy.

²⁰¹ Art 2(10) of the Charter on Democracy.

should not monopolise the 'management of public affairs'. The right to participate in management of public affairs is in line with both the African Charter and the Protocol on Women as it is limited to citizens even though within the Protocol on Women 'citizen' is not specifically used and instead reference is to 'equal participation of women in the political life of *their countries*'.²⁰²

A third important objective is to advance 'gender balance and equality in the governance and development processes'.²⁰³ This objective reinforces earlier instruments such as the Protocol on Women that promote women's participation in politics.

In addition to the objectives set out in the Charter on Democracy, 11 principles have been identified to guide states when they are implementing its provisions.²⁰⁴ Five of these principles can have a direct impact on women's participation in areas such as local government.

The first principle deals with the need for state parties to '[r]espect human rights and democratic principles'.²⁰⁵ In essence principles such those recognised at the UN and African regional levels must be respected. For instance, principles dealing with equality of sexes in areas such as political participation must be respected. Second, states have to promote 'a system of government that is representative'.²⁰⁶ Gender representation can be assumed to be one of the areas of representation and as such should be able to occupy local government positions. Third, states have to promote 'gender equality in public and private institutions'.²⁰⁷ This third principle complements the objective that requires promotion of 'gender balance in the governance and development

²⁰² Art 9(1) of the Women's Protocol (emphasis added).

²⁰³ Art 2(11) of the Charter on Democracy.

²⁰⁴ Art 3 of the Charter on Democracy.

²⁰⁵ Art 3(1) of the Charter on Democracy.

²⁰⁶ Art 3(3) of the Charter on Democracy.

²⁰⁷ Art 3(6) of the Charter on Democracy.

processes’.²⁰⁸ The principle expands on the objective by further requiring that women should be involved in both ‘public and private institutions’. Women should be able to participate in public institutions such as local government. The fourth principle requires states to ensure women ‘[e]ffective participation of citizens in democratic and development processes and in governance of public affairs’.²⁰⁹ The use of the term ‘effective’ implies that those vested with authority should have real and not token authority.

The last principle that can be relied upon to advance women’s participation at local government level requires states to ensure ‘[t]ransparency and fairness in the management of public affairs’.²¹⁰ Transparency could relate to how authority and appointments are exercised in entities such as local government authorities. For instance is women’s involvement taken seriously? Is there a domestication of internationally accepted standards to govern participation of marginalised groups such as women? Are these laws fair and transparent? In terms of how ‘fairness’ is exercised, the inclusion of women on an equal basis with men should be a consideration.

The Charter on Democracy strengthens women’s participation by reiterating the need to ‘eliminate all forms of discrimination, especially those based on political opinion, gender’.²¹¹ While numerous instruments have dealt with the issue of eliminating discrimination, the Charter on Democracy focuses also addresses the subject of non-discrimination but within the context of democracy, elections and governance. Discrimination on bases such as sex affects the advancement of women in these three

²⁰⁸ Art 2(11) of the Charter on Democracy.

²⁰⁹ Art 3(7) of the Charter on Democracy.

²¹⁰ Art 3(8) of the Charter on Democracy.

²¹¹ Art 8(1) of the Charter on Democracy.

areas. The Charter on Democracy therefore requires states to implement both legislation and administrative measures which would guarantee the rights of women.²¹²

In comparison to the Protocol on Women, a positive development of the Charter on Democracy is that many more provisions are dedicated to promote women's participation in politics. The Charter on Democracy requires states to take cognisance of the role that women can play in 'development and strengthening democracy'.²¹³ The Charter on Democracy does not prescribe how women's roles should be recognized, leaving the responsibility to states. States are required to ensure that they²¹⁴

[c]reate the necessary conditions for the full and active participation of women in the decision-making processes and structures at all levels as a fundamental element in the promotion and exercise of a democratic culture.

A possible interpretation of the above provision is that not only should women participate in politics but they should be effectively involved. 'Full and active participation' at all levels encompasses local government as well.

In the Charter on Democracy, women's participation in elections is advanced in the following terms:²¹⁵

States Parties shall take all possible measures to encourage the full and active participation of women in the electoral process and ensure gender parity in representation at all levels, including legislatures.

²¹² Art 8(2) of the Charter on Democracy.

²¹³ Art 29(1) of the Charter on Democracy.

²¹⁴ Art 29(2) of the Charter on Democracy.

²¹⁵ Art 29(3) of the Charter on Democracy.

Women's participation in politics is enhanced by requiring that participation in elections must be on the basis of parity. The use of the term 'gender parity' means that states should ensure that women and men are represented in equal numbers while the term 'gender equality' which had previously been referred to by most instruments requires that attention is paid to ensuring that laws, policies and other measures are in place to ensure women's equal participation. The provision in the Charter on Democracy therefore further clarifies the position in the Protocol on Women that requires states to ensure 'equal participation of women in the political life of their countries'. Lesotho, Rwanda and South Africa are therefore required to ensure gender parity in terms of women's participation in areas such as local government. These states should not only adopt laws, policies and other measures but in actual fact they are obliged to ensure parity between women and men in all levels of government.

States are required to decentralise authority to local government authorities and are also required to ensure that in general they put in place 'conditions for full and active participation of women in the decision-making processes and structures at all levels'.²¹⁶ A key condition for decentralisation is that local authorities must be 'democratically elected'.²¹⁷ Local government should therefore be representative and women should form a vital constituent of local government. In order to ensure a democratic local government internationally accepted principles on human rights must be domesticated by states.

The Charter on Democracy has put in place measures for different role players in order for its provisions to be realised. Besides states, another key player is the AU Commission.²¹⁸ The recognition of focal points to promote principles of the Charter on Democracy within African sub-regional economic communities is a positive

²¹⁶ Arts 29(2) & 34 of the Charter on Democracy.

²¹⁷ Art 34 of the Charter on Democracy.

²¹⁸ Art 44 of the Charter on Democracy.

development even though problems might be experienced in the implementation process in light of the fact that these economic communities are not parties to the instrument.²¹⁹

At the continental level, the AU Commission is supposed to develop benchmarks to guide states and evaluate their performance.²²⁰ The Charter on Democracy requires the AU Commission to 'promote creation of favourable conditions for democratic governance'.²²¹ One shortcoming on the issue of benchmarks is that the Charter on Democracy is vague on the development of benchmarks and 'creation of favourable conditions'. A second problem is that the AU Commission is understaffed and already struggles to undertake its current responsibilities therefore it is doubtful whether it can effectively develop the benchmarks for the Charter on Democracy.

The Charter on Democracy requires states to submit reports to the AU Commission.²²² These reports would be submitted biennially but there are uncertainties as to whether in its current state the AU Commission is well equipped to manage the process effectively. One option would have been to institute a treaty body, however, the counter argument may be that there is already a proliferation of treaty bodies and perhaps the supervisory responsibility should have been accorded to the African Commission. The African Commission already deals with issues of human rights and as Ebobrah has indicated a possibility exists that creative NGOs and lawyers could bring cases before the African Commission that in actual fact deal with provisions set out in the Charter on Democracy.²²³ The African Commission has the requisite expertise to monitor the Charter on Democracy but would require additional support such as

²¹⁹ ST Ebobrah 'The African Charter on Democracy, Elections and Governance: A new dawn for the enthronement of legitimate governance in Africa' (2007) 1 *Malawi Law Journal* 131 149.

²²⁰ Art 44(2)(A)(a) of the Charter on Democracy.

²²¹ Art 44(2)(b) of the Charter on Democracy.

²²² Art 49 of the Charter on Democracy.

²²³ Ebobrah (2007) 151.

financial and human resources to make it more effective to handle additional responsibilities.

As regards sub-regional communities, the Charter on Democracy requires their involvement in implementing its principles.²²⁴ The main obligations placed on sub-regional bodies are to ensure ratification of the Charter on Democracy and then subsequently ensure that states realise their obligations. Despite problems that might be experienced, sub-regional bodies present the best opportunity for greater involvement of states considering that they have fewer members and can therefore effectively monitor areas such as local government.

In terms of state parties' responsibility to achieve the objectives of the Charter on Democracy they are required to domesticate the objectives of the Charter on Democracy.²²⁵ Accordingly they should take action at executive, legislative and administrative levels.²²⁶ These steps are without doubt positive, but at the same time they are not entirely novel in comparison to other instruments that have equally called on states to domesticate international standards and implement measures to ensure realisation of human rights. However, a new dimension introduced by the Charter on Democracy is to require states to disseminate the Charter on Democracy and any legislation that is intended to promote the principles that it espouses.²²⁷ This is a positive development as this requirement would create greater awareness among ordinary people and other stakeholders, and thereby cause additional pressure to be exerted on states to abide by their obligations.

²²⁴ Art 44(2)(B) of the Charter on Democracy.

²²⁵ Art 44(1)(a) of the Charter on Democracy.

²²⁶ As above.

²²⁷ Art 44(1)(b) of the Charter on Democracy.

In another positive development, the Charter on Democracy requires states to ‘promote political will as a necessary condition for the attainment of the goals set forth in this Charter’.²²⁸ While the idea of ‘political will’ would be necessary to achieve goals such as women’s equal participation, no definition is proffered for the term ‘political will’.

In evaluating the domestication and implementation of principles set out in the Charter on Democracy, the AU Commission can rely on other bodies such as the African Commission, the African Court and sub-regional economic communities.²²⁹ However, it may be contended that complaints cannot be brought against state parties in light of the AU Commission’s duty to ‘[c]oordinate evaluation on implementation’ which does not appear to give allowance for complaints or communications to be brought against state parties.²³⁰ In terms of the handling of the biennial reports, the measures to be taken are unclear as the Charter on Democracy simply states that ‘[t]he Assembly shall take appropriate measures aimed at addressing issues raised in the report’.²³¹ The issue of resort to ‘appropriate measures’ is can also be utilised when a state violates provisions of the Charter on Democracy even though the ‘appropriate measures’ are not specified.²³² However, it is possible that if the violation is of a human rights nature then the African Court could handle the matter as it has jurisdiction over any human rights related treaty.²³³

Overall, the Charter on Democracy goes further than other African regional instruments to advance women’s participation in politics especially with regard to developing principles to enable substantive realisation of the right. The principles it espouses can be

²²⁸ Art 44(1)(c) of the Charter on Democracy.

²²⁹ Art 45 of the Charter on Democracy.

²³⁰ Art 45(c) of the Charter on Democracy.

²³¹ Art 49(4) of the Charter on Democracy.

²³² Art 46 of the Charter on Democracy.

²³³ Art 3(1) of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Rights OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

relied upon to promote the equal participation of women in local government. The problematic aspect of the Charter on Democracy seems to be in the area of implementation and monitoring.

3.3 The right to political participation of women under sub-regional economic communities in Africa

In this section of the chapter I analyse the work of two sub-regional economic communities (SRECs) with the primary aim of establishing the extent to which they are vehicles of advancing women's participation in politics. Even though there are five SRECs in the east and southern African regions, my focus is on the two main ones.²³⁴ Below, I first motivate why I have selected the two SRECs that are the basis of my study. Thereafter I examine each SREC individually. In studying each SREC I examine instruments that it has developed and that generally deal with women's right to participate in politics including in the local government sphere. In analysing each SREC, I examine existing institutions with a view to establishing whether they are vested with the authority and if they have been involved in promoting and protecting women's participation in politics.

Besides seeking economic development and integration, some of the five SRECs have a political vision.²³⁵ Some SRECs have a special status because they are recognised by the AU. The decision to recognise only some of them was taken to safeguard against a proliferation of SRECs.²³⁶ The AU decision to place a moratorium on recognising African

²³⁴ Nzomo (2003) 2. East African Community (EAC), Southern African Development Community (SADC), Common Market of Eastern and Southern Africa (COMESA), Southern African Customs Union (SACU), Inter-governmental Agency for Development (IGAD).

²³⁵ Nzomo (2003) 2.

²³⁶ AU Assembly 'Decision on the moratorium on the recognition of regional economic communities (RECs)' Assembly/AU/Dec.112(VII) <http://www.au.int/en/decisions/assembly> (accessed 26 March 2011) para 3.

SRECs resulted in only eight SRECs being recognised by the AU.²³⁷ The SRECs analysed here are among those recognised by the AU.

For purposes of this study, the sub-regional organisations which will be examined with regard to how they address women's participation in politics are the East African Community (EAC) and the Southern African Development Community (SADC). It is important to establish the degree to which SRECs contribute to advancing women's participation in politics. More specifically, do they advance women's rights to participate in local government?

The considerations in selecting the EAC and SADC include the fact that, first, both are recognised by the AU and advance some of the principles of the AU albeit at the sub-regional level.²³⁸ Second, the four states that are focussed upon in this study are either members of the EAC or SADC: Lesotho and South Africa are members of SADC; while Rwanda and Uganda are members of the EAC. Third, the two sub-regional organisations are at different levels of articulating and implementing policies related to women's right to political participation thus allowing for a productive comparison. Fourth, the two organisations have well established and fairly well organised secretariats making it possible to access information for research purposes.

A number of documents emanating from the two SRECs are analysed. In the case of the EAC only the East African Community Treaty (EAC Treaty) will be analysed as it is the only relevant document. In respect of SADC, a greater array of documents are analysed

²³⁷ The SRECs that are recognised by the AU are: Community of Sahel-Saharan States (CEN-SAD), EAC, Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), SADC, Arab Maghreb Union (UMA), COMESA, IGAD. See 'Decision on the moratorium on the recognition of regional economic communities (RECs)' Assembly/AU/Dec.112(VII) (accessed 26 March 2011) para 3.

²³⁸ 'Decision on the moratorium on the recognition of regional economic communities' Assembly/AU/Dec.112(VII) para 3.

and these are the Declaration and Treaty of SADC (SADC Treaty),²³⁹ the Regional Indicative Strategic Development Plan (RISDP), the Charter of Fundamental Social Rights in SADC (Charter of Fundamental Rights),²⁴⁰ the Declaration on Gender and Development (Declaration on Gender),²⁴¹ and the SADC Protocol on Gender and Development (Protocol on Gender).

3.3.1 The East African Community

In terms of its historical development, the EAC has gone through two main phases. First established in 1967, the organisation collapsed in 1977. In terms of focus on women, during the initial period of its existence, no evidence suggests that any attention was paid to women's participation in politics. The second phase started when the organisation was revived in 2001. Since its revival it has grown both in memberships and outlook. In terms of memberships, it now comprises Burundi and Rwanda, in addition to its original members Kenya, Tanzania and Uganda. In terms of outlook, the organisation is working towards establishing a federation that would be headed by a president.²⁴²

As the governing treaty of the EAC, the East African Community Treaty (EAC Treaty) is comprehensive as to the need to advance women's involvement in development. The Treaty has a number of provisions including articles dedicated to women that deal with the role of women in business and in social economic development.²⁴³ If broadly

²³⁹ Signed 17 August 1992.

²⁴⁰ The Charter on Fundamental Rights has been signed by 14 SADC members these being Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

²⁴¹ Adopted 8 September 1997.

²⁴² 'Big ambition, big question-marks: The idea of a United States of East Africa is far less fetched than it was' 3 September 2009 *The Economist* <http://www.economist.com/node/14376512> (accessed 28 September 2012).

²⁴³ Arts 5(e), 6(d), 7(2), 9(5) & 121 of the EAC Treaty.

interpreted, these provisions can guarantee women the right to participate in local government level, especially in the areas of socio-economic development.

One of the objectives of the EAC Treaty that could be interpreted as advancing women's participation at all levels addresses the need to mainstream gender in the endeavours of the organisation and thereby enhance the role of women in among other areas, including political development.²⁴⁴ There is no suggestion that political development cannot be given a wide interpretation that includes developments at the local government level. In essence, actions within the organisation should have resonance at the domestic level of states as the eventuality is that the organisation seeks to change state conduct. For instance, requiring that gender equality must be observed when appointments are made within EAC organs, justifies the inference that gender equality should also be observed at the domestic level.²⁴⁵ It is difficult to imagine that concentration on gender equality would only be required at the organisation's level while disparities in gender equality continue to be tolerated at the state level.

One of the fundamental principles of the EAC recognises values such as 'good governance', 'democracy', 'equal opportunities', 'gender equality' and 'promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.²⁴⁶ Advancement of these values would ensure that women's rights including that of participation in politics are protected and promoted. At the domestic levels upholding such principles would entail their application at all levels of the state including within leadership of local government. The

²⁴⁴ Art 5(e) of the EAC Treaty.

²⁴⁵ Art 9(5) of the EAC Treaty. The treaty provides for the following organs: a summit, council, coordination committee, sectoral committees, East African Court of Justice, East African Legislative Assembly, the secretariat and other organs which the summit may establish. The institutions of the EAC are established by the Summit- see art 9(1)&(2) of the EAC Treaty.

²⁴⁶ Art 6(d) of the EAC Treaty.

EAC Treaty therefore reinforces the principles of equality including such as those promoted within the African Charter.

A further provision that could be relied upon to promote women's participation even at local government level is an article within the EAC Treaty that addresses women's role in socio-economic development and business.²⁴⁷ The Treaty recognises women's contribution to socio-economic development acknowledging that it is not possible to achieve the objectives of the EAC Treaty without women's involvement.²⁴⁸ The acknowledgement of the importance of women's involvement in development means that states are encouraged to include women at all levels of development including at local government. In addition to the inclusion of women in development, states are to take measures that would make such a goal a reality and should for instance 'discourage customs that are discriminatory against women'.²⁴⁹ A further step to ensure that women are accepted in all areas of society includes adopting educational programmes that are 'aimed at changing the negative attitudes' against women.²⁵⁰ All these measures potentially impact on women's ability to participate in local government.

The EAC Treaty in furthering the elimination of negative attitudes requires member states to 'take such measures that shall eliminate prejudices against women and promote the equality of the female gender with that of the male gender in every aspect'.²⁵¹ The EAC Treaty maintains the same position as that found in the Protocol on Women in terms of how the terms 'sex' and 'gender' are used thereby perhaps strengthening the view that persons who identify themselves as women can also claim the same rights as women.²⁵² The provision can in general be relied upon to promote

²⁴⁷ Art 121 of the EAC Treaty.

²⁴⁸ As above.

²⁴⁹ Art 121(b) of the EAC Treaty.

²⁵⁰ Art 121(c) of the EAC Treaty.

²⁵¹ Art 121(e) of the EAC Treaty.

²⁵² See sec 3.2.3(ii) above.

equality in terms of women's participation in leadership at all levels including local government.

Besides the provisions in the EAC Treaty, the organisation has not made additional attempts to address the issues of women. The failure to do so is partially attributable to the fact that the EAC Treaty primarily focuses on economic development and integration. Thus far, the protection of women's rights has been left to UN, African regional and national mechanisms.

A possibility exists to advance women's right through institutional mechanisms such as the East African Court of Justice (EA Court) but at the moment, the EA Court's jurisdiction is limited to the 'interpretation and application' of the EAC Treaty.²⁵³ Regarding human rights issues, the EA Court has held that it does not have the mandate to deal with human rights issues.²⁵⁴ Still, the EA Court maintains that simply because a matter involves aspects of human rights does not bar it from exercising jurisdiction in the matter.²⁵⁵ Therefore, even at the moment, the EA Court can to a limited extent handle matters that have a human rights element.

Even though the EAC Treaty recognises the human rights principles contained in the African Charter, these principles have not yet been adopted through an EAC instrument. However, efforts are currently underway in the East African Legislative Assembly (EALA)

²⁵³ Art 27(1) of the EAC Treaty.

²⁵⁴ *James Katabazi & 21 others v Secretary-General of the EAC & Another* No 1 of 2007 (East African Court of Justice) 15. The EA Court was of the view that 'It is very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect. Both these steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violations of human rights *per se*'.

²⁵⁵ *Katabazi case* 6.

to adopt a human rights instrument for the sub-region.²⁵⁶ Recommendations that have been made so far include the need to pay attention to women's political rights.²⁵⁷ However, even if the instrument is adopted by the EALA, it is uncertain whether it will be endorsed by the heads of state of the EAC in light of the fact that they have as yet to extend the jurisdiction of the EA Court to include human rights. So far their focus has been on trade and economic integration.

Overall, the development of women's rights as part of the efforts of the EAC is still at an infant stage. The EAC has focussed largely on economic development and trade. At the moment women in the region cannot rely on the EAC as a vehicle for the advancement of their political rights in areas such as local government.

3.3.2 The Southern Africa Development Community

SADC, comprising 15 member states,²⁵⁸ has addressed the issue of women's participation in politics especially through two major instruments, the SADC Declaration on Gender and Development and then more recently through the SADC Protocol on Gender and Development. The SADC Declaration on Gender and Development as the name suggests was a non-binding instrument and was a precursor to the more recently adopted SADC Protocol on Gender and Development which is a binding instrument for states that ratify it. Besides guaranteeing the right to participate in politics, SADC is exceptional in focussing on member states' responsibility to realise women's

²⁵⁶ 'Bills before the Assembly' <http://www.eala.org/oldsite041111/parliamentary-business/bills.html> (accessed 2 October 2012).

²⁵⁷ 'Recommendations for a draft Bill of Rights for the East African Community' http://www.kituo-chakatiba.org/index2.php?option=com_docman&task=doc_view&gid=410&Itemid=27 (accessed 2 October 2012).

²⁵⁸ 'SADC member states' <http://www.sadc.int/index/browse/page/465> (accessed 2 October 2012). The SADC member states are: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

participation in politics at the local government level. SADC reiterates the need for affirmative action but goes further by placing timeframes and targets for women's participation. Below, I analyse some of the key instruments of SADC to establish how they contribute to the advancement of women's political participation in general and how these standards can be a catalyst for women's inclusion in local government in particular.

(i) Declaration and Treaty of SADC

The Declaration and Treaty of SADC (SADC Treaty),²⁵⁹ as the founding instrument of SADC, does not have specific provisions relating to women, human rights are dealt with in broad terms. For instance, member states are required to be guided by, among other principles, 'human rights, democracy, and the rule of law'.²⁶⁰ One of the objectives of the organisation is to 'support the socially disadvantaged'.²⁶¹ The guiding principles and objectives as stated above show that equality and non-discrimination through attention to 'socially disadvantaged' members of society were alert to women's exclusion. Arising from these principles and objectives is the understanding that member states would pay attention to women's inclusion in all areas of life including their participation in local government.

In terms of the general principle of non-discrimination, which forms the basis for women's inclusion, the SADC Treaty obliges member states not to discriminate on the basis of gender.²⁶² In fact, non-discrimination on the basis of gender is the first ground that the Treaty identifies, it is arguable that the SADC Treaty provides pride of place to non-discrimination when compared to corresponding clauses at the UN or African

²⁵⁹ Signed 17 August 1992.

²⁶⁰ Art 4(c) of the Declaration and Treaty of SADC 1992.

²⁶¹ Art 5(1)(a) of the Declaration and Treaty of SADC 1992.

²⁶² Art 6(2) of the Declaration and Treaty of SADC 1992.

regional levels where gender was not identified as the first basis for non-discrimination.²⁶³

In terms of ensuring that women become involved in society, the Amended Declaration and Treaty of SADC (Amended SADC Treaty) in 2001 placed the mainstreaming of gender in the process of community building as an additional objective of the organisation.²⁶⁴ Adding mainstreaming of gender again reinforced the attention of SADC to the issue of ensuring equality in areas that could extend to local government especially as community development would be most felt at the local level.

The SADC Treaty and the Amended SADC Treaty set the stage for women's political participation to be taken seriously. Other instruments and policies have further advanced the objectives of the organisation. One such instrument is the Regional Indicative Strategic Development Plan.

(ii) The Regional Indicative Strategic Development Plan

One document that shows SADC's commitment to the inclusion of women politics is the Regional Indicative Strategic Development Plan (RISDP) of 2001.²⁶⁵ Even though it is not legally binding, it sets out timeframes and benchmarks for SADC member states. The RISDP focussed on among other issues the inclusion of women in political positions at all levels of member states.²⁶⁶

²⁶³ See Chapter 2 sec 2.2 & 2.4.3. See also sec 3.2.3(1) above.

²⁶⁴ Art 5(1)(k) of the Amended Declaration and Treaty of SADC 2001.

²⁶⁵ RISDP (2001) 57.

²⁶⁶ RISDP (2001) 58. The RISDP may have inspired the development of the Charter of Fundamental Social Rights in SADC (Charter on Social Rights) that was signed in August 2003 by 14 SADC which included Lesotho and South Africa. The Charter on Social Rights focuses primarily on labour rights and emphasises the need for equality between women and men, it further calls for maintaining a

Through the RISDP for the first time an instrument set clear timelines and targets to be met by member states. First, by 2004 SADC member states should have ratified UN and African regional instruments dealing with gender equality and domesticated provisions of these instruments by the end of the same year.²⁶⁷ Second, by 2005, all member states were to have repealed all laws and policies that discriminated against women.²⁶⁸ Following on these measures, the RISDP set 2005 as the year by which states should have ensured that at least 30 per cent of all officials were women.²⁶⁹ The percentages should have increased to 40 percent by 2010 and then to 50 percent by 2015.²⁷⁰ SADC members were to implement affirmative action measures to ensure that these goals are achieved.²⁷¹ The timelines and targets were applicable at all levels including local government.

To realise the timelines and targets, the RISDP recognised temporary special measures as a necessity and as such states were required to '[a]dopt deliberate and positive measures such as affirmative action, with a view to accelerating gender equality' in political positions.²⁷² Accordingly, merely making constitutional amendments, enacting legislation or adopting policies were inadequate as the reference to the 'deliberate' nature of the measures implies that the measures must be aimed specifically at ensuring women's inclusion.

In terms of mechanisms that could be relied upon to ensure women's inclusion, the RISDP requires member states to 'strengthen gender coordination machineries;

balance between social and work life. These principles would be necessary for women to effectively participate in politics.

²⁶⁷ RISDP (2001) 58.

²⁶⁸ As above.

²⁶⁹ RISDP (2001) 59.

²⁷⁰ As above.

²⁷¹ As above.

²⁷² RISDP (2001) 58.

harmonize them at regional level, and develop a regional gender policy'.²⁷³ The call for harmonisation of gender policy may partially explain why SADC urges member states to ratify international instruments dealing with issues of equality and to domesticate such treaties.²⁷⁴

The RISDP as the first major policy document of SADC laid the ground for issues of women's inclusion at all levels to be taken seriously and in subsequent documents it becomes clear that SADC has continued to take the issue of women's participation seriously.

(iii) The Protocol on Gender and Development

The key SADC instrument advancing women's participation in local government is the SADC Protocol on Gender and Development (Protocol on Gender),²⁷⁵ which needs three more ratifications before it comes into force.²⁷⁶ The 'slow rate of ratification' of the Protocol on Gender can be criticised especially in light of the fact that some of the timeframes set out in the Protocol on Gender are fast approaching and yet the instrument is yet to come into effect.²⁷⁷ Both Lesotho and South Africa have ratified the Protocol on Gender.²⁷⁸ The Protocol on Gender was preceded by the SADC Declaration

²⁷³ As above.

²⁷⁴ As above.

²⁷⁵ SADC/CM/2/2008/8.2 adopted 17 August 2008.

²⁷⁶ Art 41 of the SADC Protocol on Gender.

²⁷⁷ MM Munalula 'SADC Protocol on Gender and Development: Road map to equality?' (2011) 1 *SADC Law Journal* 189. Munalula highlights the fact that some of the goals are supposed to be achieved by 2015.

²⁷⁸ See 'SADC treaty and protocol: Status of protocols not yet in force' as at 27 July 2011 (document supplied by SADC Secretariat). (on file with researcher). According to this document, Lesotho ratified the Protocol on Gender on 23 July 2010. See also 'South Africa: SADC Gender Protocol to come into full force soon' <http://www.genderlinks.org.za/article/south-africa-sadc-gender-protocol-to-come-into-full-force-soon-2011-10-04> (accessed 2 October 2012). South Africa

on Gender and Development (Declaration on Gender).²⁷⁹ To some extent the Declaration on Gender encouraged states to ensure that women's participation increased at all levels within the state. Since the adoption of the Protocol on Gender, the Declaration on Gender has become less relevant especially as it is a non-binding instrument.

Despite the fact that the Declaration on Gender is becoming less relevant, it nevertheless left a lasting positive impression especially through the contribution it made in entrenching women's right, particularly in the Lesotho case of *Molefi Ts'epe v The Independent Electoral Commission and Others (Ts'epe case)* where the issue of according women special treatment in political participation arose.²⁸⁰ In this case the Lesotho Court of Appeal, citing the Declaration on Gender, held that it was permissible for a SADC member state to legislate in a manner which excluded men from contesting local elections in wards set aside exclusively for women candidates.²⁸¹ The case helped to illustrate how instruments agreed at the sub-regional level can impact on the promotion of human rights at the domestic level.²⁸² It can therefore be expected that the Protocol on Gender as a binding instrument would have an even greater impact than its predecessor, the Declaration on Gender.

ratified the Protocol on Gender on 29 October 2012 (Instrument of Ratification supplied by SADC Secretariat). See also 'Department of Women, Children and People with Disabilities progress report April-August 2011' <http://www.pmg.org.za/report/20110914-department-women-child-ren-and-people-disabilities-dwcpd-progress-repo> (accessed 2 October 2012).

²⁷⁹ Declaration on Gender and Development adopted 8 September 1997.

²⁸⁰ Judgment of 30 June 2005, Court of Appeal of Lesotho.

²⁸¹ *Ts'epe case* para 21.

²⁸² 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) 32 *Comparative and International Law Journal of Southern Africa* 351 358.

In comparison to other treaties dealing with women's rights, the Protocol on Gender goes further in clarifying terms related to women's issues.²⁸³ Misunderstandings that could exist when interpreting the document are reduced and furthermore definitions could be used when applying UN or African regional treaties at the SADC level. Useful definitions include 'affirmative action' (defined as 'a policy programme or measure that seeks to redress past discrimination through active measures to ensure equal opportunity and positive outcomes in all spheres of life').²⁸⁴ In relation to political participation, reference to 'active measures' implies that authorities must go beyond development of theoretical frameworks and give life to policies or legal measures that are developed. Only when implemented or if they are capable of implementation measures can qualify as 'affirmative action'. A proper distinction is made between 'gender' and 'sex', with 'gender' being defined as referring to 'roles, duties and responsibilities which are culturally or socially ascribed to women, men, girls and boys'.²⁸⁵ 'Sex' on the other hand is defined as 'the biological differences between females and males'.²⁸⁶ These definitions contained in the Protocol on Gender may prove useful for SADC states as they interpret not only the Protocol on Gender but also other instruments that either do not offer definitions or that have defined some terms wrongly as is the case in the Protocol on Women.²⁸⁷

An emphasis on implementation of human rights is apparent in the Protocol on Gender through emphasis on affirmative action. State parties are obliged to domesticate

²⁸³ Art 1 of the Protocol on Gender and Development adopted 17 August 2008. For example it defines terms such as 'affirmative action' and 'gender' which was not the case in the Declaration in Gender. See also Munalula (2011) 190. Munalula correctly notes that the Protocol on Gender serves the purpose of norm clarification that has taken place through the consolidation of norms into one document.

²⁸⁴ Art 1(2) of the SADC Protocol on Gender.

²⁸⁵ As above.

²⁸⁶ As above.

²⁸⁷ See sec 3.2.3(ii) above.

international principles on affirmative action and implement these through policies or strategies and by setting ‘realistic, measurable targets, timeframes and indicators for achieving gender equality and equity’.²⁸⁸ Measures that the state implements must be focussed on the eradication of every obstacle preventing women ‘from participating meaningfully in all spheres of life and creating a conducive environment for such participation’.²⁸⁹ The actual measures that states undertake can include legislative reforms so that all laws advocating for women’s ‘minority status’ are abolished by 2015. The position is therefore likely to further the policy of the RISDP.²⁹⁰ In terms of legislative measures, states must harmonise national laws, policies and programmes with ‘regional and international instruments’ in order for gender equality to be achieved.²⁹¹

The Protocol on Gender furthers the principle of parity in appointments. The language used in promoting parity is not categorical, with the relevant provision set out as follows:²⁹²

State Parties shall endeavour that by 2015, at least fifty percent of decision-making positions in the public and private sectors are held by women including the use of affirmative action measures as provided in Article 5.

While the term ‘shall’ compels states, at the same time ‘endeavour’ suggests merely making an effort. Therefore states may not have to show that parity has in fact been attained. Still, they are compelled to show that efforts were made to attain parity. The obligation on states may not be extremely onerous, but mere empty gestures will not constitute ‘endeavours’ to satisfy article 12(1).

²⁸⁸ Art 3(d) of the SADC Protocol on Gender.

²⁸⁹ Art 5 of the SADC Protocol on Gender.

²⁹⁰ Art 6(b) of the SADC Protocol on Gender. See RISDP (2001) 58.

²⁹¹ Art 2(1) of the SADC Protocol on Gender.

²⁹² Art 12(1) of the SADC Protocol on Gender.

Besides requiring equal participation of women, the Protocol on Gender gives clear guidelines on what states should do in order for women to participate effectively.²⁹³ The policies, strategies and programmes that states develop should provide support and capacity building opportunities for women in the areas of leadership and gender sensitivity.²⁹⁴ Through support such as capacity-building women would be better prepared for leadership. Gender-sensitivity training for women would create awareness among women leaders on the challenges that women in general face while also sensitizing women about the need to consider men as equals. At the same time implementing ‘public awareness campaigns’ for the general population would create public awareness so that ‘gender training and community mobilisation’ are not perceived as the exclusive domain of women.²⁹⁵ These measures have the potential to ensure effective inclusion of women in politics at all levels.

At the SADC level monitoring implementation of SADC standards can be undertaken through a number of bodies.²⁹⁶ In the first instance, implementation can be achieved through the Committee of Ministers which consists of ministers responsible for gender or women’s affairs in their countries, and second, the Committee of Senior Officials which is composed of officials who are responsible for gender or women’s affairs in their countries, and, third, by the SADC Secretariat.²⁹⁷ SADC has avoided establishing a separate independent body to monitor the implementation of the Protocol on Gender preferring instead to leave the process to politicians and civil servants. Civil society which is quite active in the SADC region has also been sidelined from the entire process. Therefore even though SADC has shown commitment to high standards, the monitoring mechanisms is clearly lacking.

²⁹³ Art 13(2) of the SADC Protocol on Gender.

²⁹⁴ Arts 13(2)(a) & (b) of the SADC Protocol on Gender.

²⁹⁵ Art 13(3) of the SADC Protocol on Gender.

²⁹⁶ Arts 34 & 35 of the SADC Protocol on Gender.

²⁹⁷ Art 34(1) of the SADC Protocol on Gender.

The monitoring mechanisms that have been put in place will in all likelihood not be very credible. Already efforts by the Tribunal of the Community to address issues of human rights concern have resulted in a decision being taken by heads of state and government to revisit the mandate of the Tribunal of the Community so that its new mandate is 'confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States'.²⁹⁸ The change in mandate will in all likelihood result in a drastic decline in human rights litigation as the states in the region have historically been inclined to promoting inter state relations rather than confrontation where human rights are violated. Access to the court by individuals and other bodies had presented an opportunity for people to seek a remedy where they had been failed at their domestic level.²⁹⁹

Regarding the Committee of Ministers whose duties include ensuring implementation of the Protocol on Gender and supervising the committees established under the Protocol on Gender could frustrate other committees in their work if they appear too critical of

²⁹⁸ Final communiqué of the 32nd summit of SADC heads of state and government 18 August 2012 http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique_32nd_Summit_of_Heads_of_States.pdf (accessed 22 November 2012) para 24. C Sasman 'SADC leaders neuter Tribunal' http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=100847&no_cache=1 (accessed 22 November 2012). See also A Pillay 'SADC Tribunal dissolved by unanimous decision of SADC leaders' <http://www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf> (accessed 22 November 2012). A Saurombe 'An analysis and exposition of dispute settlement forum shopping for SADC member states in light of the suspension of the SADC Tribunal' (2011) 23 *SA Mercantile Law Journal* 392-397. See also R Lee 'Southern Africa: Fight goes on to save SADC Tribunal' <http://allafrica.com/stories/201208220369.html> (accessed 2 October 2012). N Madhanire 'Zimbabwe blamed for collapse of SADC Tribunal' <http://www.thestandard.co.zw/2012/08/28/zimbabwe-blamed-for-collapse-of-sadc-tribunal/> (accessed 2 October 2012).

²⁹⁹ R Lee 'SADC heads of state and government summit' <http://www.osisa.org/hrdb/mozambique/Events/sadc-heads-state-and-government-summit> (accessed 22 November 2012).

states.³⁰⁰ The Committee of Ministers can block the work of the Committee of Senior Officials if it considers that the latter's work may embarrass a member state. In turn the Committee of Senior Officials can frustrate the work of the SADC Secretariat in light of the fact that documents related to the Protocol on Gender must first be vetted by the Committee of Senior Officials before they can be submitted to the Committee of Ministers.³⁰¹

Submission and examination of state reports is an additional mechanism that will be used to assess state performance as far as the Protocol on Gender is concerned.³⁰² In terms of the state reports that the SADC Secretariat receives it is unclear what will happen to them and follow-up mechanisms are not specified especially where states fail to submit reports. States are only required to submit their bi-annual reports to the Executive Secretary of SADC whose sole responsibility is to present them to the Council of Ministers and summit of heads of states for them to be considered.³⁰³ It is unclear what happens after the reports are considered and whether findings are made public.

Finally, an additional organ that would have been ideal to ensure adherence to the Protocol on Gender is the Tribunal of the Community (SADC Tribunal).³⁰⁴ One of the responsibilities of the SADC Tribunal is to interpret, apply and give validity to the protocols of SADC and as such the Protocol on Gender could have been within the purview of the SADC Tribunal's responsibilities.³⁰⁵ The procedures in terms of approaching the Tribunal provide that both natural and legal persons can bring cases before the SADC Tribunal meaning that individuals and NGOs could have brought cases

³⁰⁰ Art 34(2) of the SADC Protocol on Gender.

³⁰¹ Art 34(3) of the SADC Protocol on Gender.

³⁰² Art 35(4) of the SADC Protocol on Gender.

³⁰³ Art 35(4) & (5) of the SADC Protocol on Gender.

³⁰⁴ 'Protocol on Tribunal and Rules of Procedure Thereof' adopted 7 August 2000.

³⁰⁵ Art 14(b) of the Protocol on the Tribunal.

based on the Protocol on Gender where necessary.³⁰⁶ All persons have to first exhaust local remedies.³⁰⁷ Already the SADC Tribunal has proven itself through the manner in which it handled a case involving a state party when it found against Zimbabwe in the matter of *Mike Campbell (Pvt) Ltd and Others v Zimbabwe (Campbell case)*,³⁰⁸ where the Tribunal emphasised that the SADC Treaty requires members to act in accordance with principles that include ‘human rights, democracy and the rule of law’.³⁰⁹ However, the SADC Tribunal’s exercise of fierce judicial independence in the *Campbell* case has resulted in it being hamstrung.³¹⁰

SADC has a fairly consistent approach in terms of developing instruments that can advance women’s participation in politics. Besides clarifying standards already developed at the UN and African regional levels, SADC has also gone further and provided clear timelines within which states should achieve the rights that it sets out. However, the mechanisms to monitor, protect and promote women’s rights have not been very well developed to guarantee that states will be scrutinised carefully and where necessary compelled to meet their obligations.

3.4 Conclusion

Both at the AU and SADC levels, the development of principles and mechanisms to promote women’s political participation that can also be relied on for purposes of ensuring women’s inclusion in local government is a recent occurrence, having only started to be vigorously pursued in the 1990s. At the EAC level, very little has been done to address women’s participation in politics. Where EAC instruments focus on human

³⁰⁶ Art 15(2) of the Protocol on the Tribunal.

³⁰⁷ Art 15(2) of the Protocol on the Tribunal.

³⁰⁸ Case no 2/2007 SADC-T (judgment delivered 28 November 2008) 26.

³⁰⁹ *Campbell* case 25-26.

³¹⁰ See Lee (2012). See also Madhanire (2012).

rights, attention is on requiring members states to uphold UN and African regional standards to which they have committed themselves.

Regional and sub-regional developments have extended rather than eroded UN recognised human rights standards dealing with women's right to political participation. Even by merely restating UN standards in African regional and sub-regional instruments, further legitimacy is accorded to UN standards. At the African regional and SADC sub-regional level, standards have to an extent set out more explicitly women's right to participate in politics including at the local government level with greater attention paid to the issue of implementing these standards.

The AU and SADC levels, provide further clarity to UN standards. In instruments such as the Protocol on Women, the Charter on Democracy and the Protocol on Gender strengthen UN standards dealing with temporary special measures. For instance, besides setting specific goals these instruments in some instances require timeframes to be observed, an example being the Protocol on Gender requiring that parity must be attained by 2015. These standards can be relied on for purposes of ensuring women's political participation in local government.

As members of the AU, the four states have committed themselves to a number of key AU human rights instruments and mechanisms. Lesotho and South Africa have committed themselves to additional standards at the SADC level. The instruments and mechanisms at the AU and SADC sub-regional levels are supposed to be utilised to advance human rights, therefore these states' conduct can be scrutinised by treaty bodies especially when state reports are examined. A subject such as the extent to which women are involved in local government can be addressed using the standards at the regional and sub-regional levels.

As a follow up to the previous chapter, in this conclusion I look at the four areas that were identified in the conclusion of Chapter 2. I look at each with a view to establishing whether further clarity is provided by African regional and sub-regional levels.

3.4.1 Further clarity on women's 'right to political participation'

While human rights norms at the regional and sub-regional level have developed from the standards set in UN instruments, African instruments in some cases provide more clarity. Unlike at the UN level, the right of women to participate in politics at local government level has been specifically identified in AU treaties such as the Charter on Democracy, the Protocol on Women while at the sub-regional level, the Protocol on Gender also recognises women's right to participate in politics within local government. Local government is singled out at both the regional and sub-regional levels. UN treaties had only provided for the right in broad terms and participation in local government had to be *inferred* from the general right to political participation.

Women's right to political participation has been more explicitly clarified in treaties adopted under the auspices of the AU and SADC. First, African regional norms emphasise that political participation should not be a preserve for men. Second, the subject of non-discrimination has been addressed within the context of political participation with a clarification that grounds such as political opinion or gender should not be bases of excluding women from political participation. Third, the principle of parity has been introduced in binding instruments requiring that men and women should participate in equal numbers and parity must be observed even in electoral lists. African regional and sub-regional instruments therefore adopt standards that may not have been binding in UN instruments. These standards are now binding on African states.

3.4.2 Contribution to temporary special measures

At both the AU and SADC levels, attention is increasingly focussed on using temporary special measures to achieve parity. No limitation is placed on the temporary special measures to be implemented but for instance the Protocol on Women is unambiguous about the need for states to use affirmative action in order to promote women's political participation at all levels. African states are required to adopt temporary special measures that are precise, detailed, explicit, definite and constructive.³¹¹ SADC member states should in addition ensure that the measures in place are 'realistic, measurable targets, timeframes and indicators for achieving gender equality and equity'.³¹² African instruments both at the AU and SADC level pay greater attention to temporary special measures thereby acknowledging that without resorting to temporary special measures, equality cannot be achieved. Both the AU and SADC levels require states to enact transparent enabling legislation to give effect to temporary special measures.

3.4.3 Providing disaggregated data

Even though African regional and SADC sub-regional instruments have not categorically stated that states must maintain databases on women's political participation, the mere requirement that they should utilise temporary special measures leads to an inference that records must be maintained. Among the records to be maintained would be diachronic databases disaggregated along sex to show whether the temporary special measures are effective. The databases must be regularly updated. The data should be freely and easily accessible by the general public so that they can assess state performance. It would be difficult to imagine how states can prove the efficacy of the temporary special measures without providing data more especially as states are increasingly being required to observe parity in representation.

³¹¹ See chapter 3 sec 3.2.2(ii).

³¹² See chapter 3 sec 3.3.2(iii).

3.4.4 Domestication of standards through constitutional and other legal measures

States are expected to domesticate regional and sub-regional standards. Accordingly, constitutional, legislative and other enabling measures must be undertaken to ensure that the rights that are recognised and to which states have committed themselves are applicable at the domestic level of states.

Attention should be paid to ensure that principles such as those dealing with equality, non-discrimination, the right of women to participate to the same extent as men are adopted in Constitutions and other legislation. Domestication of such principles is important for purposes of realising the right to participate in politics.

CHAPTER 4: THE EXTENT TO WHICH THE LEGAL FRAMEWORKS IN LESOTHO, RWANDA, SOUTH AFRICA AND UGANDA COMPLY WITH INTERNATIONAL STANDARDS ON WOMEN'S POLITICAL PARTICIPATION IN LOCAL GOVERNMENT

4.1	Introduction
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4.2.1	Constitutional provisions relevant to women's political participation in local government
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(i)	Local Government Act of 1997 and amendments intended for women's inclusion
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(i)	Employment Equity Act and women in local government
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4.5.1	Constitutional provisions relevant to women's political participation in local government
4.5.2	The Local Governments Act and women's political participation in local government
4.6	Conclusion

4.1 Introduction

In the previous two chapters I have set out the key principles that have emanated from binding and non-binding instruments that address women's right to participate in politics. The focus in these chapters was to establish the extent to which these principles can be relied upon to promote women's participation at the local government level. By undertaking

the examination of various instruments at the international level, I have been able to identify the key principles that should bind Lesotho, Rwanda, South Africa and Uganda.

The main purpose of this chapter is twofold. First, I identify and examine constitutional and other applicable legal texts in Lesotho, Rwanda, South Africa and Uganda that are relevant to women's right to participate at the local government level. Second, I seek to establish the extent to which these domestic legal provisions comply with the international obligations of these four states, in essence I establish the extent to which international principles have been domesticated. In terms of compliance, I seek first to establish whether the laws of each state enable women to be elected and appointed to local government. A second aspect of examining compliance is through establishing how the laws in the four states have made provision for temporary special measures as stipulated in international instruments.

4.2 Lesotho

4.2.1 Constitutional provisions relevant to women's political participation in local government

Since independence in 1966, Lesotho has experienced periods of political upheaval.¹ The country has adopted two constitutions in its post-independent era, with the current one dating back to 1993.² The current Constitution of Lesotho, which forms the basis of this analysis, was adopted in a decade of increasing awareness about women's rights at the international level. Calls for women's participation in politics were frequently made and became generalised in the global discourse. The Constitution-making was thus a logical space in which the thinking of the era would be reflected.

¹ Z Maundeni 'Political culture as a source of political instability: The case of Lesotho' (2010) 4 *African Journal of Political Science and International Relations* 128-129. See also C Kabemba (ed) 'From military rule to multiparty democracy: Political reforms and challenges in Lesotho' (2003) 2 *EISA Research Report* 5-7. See also FK Makoa 'Electoral reform and political stability in Lesotho' (2004) 4 *African Journal on Conflict Resolution* 79.

² Adopted on 25 March 1993.

Lesotho's Constitution displays an awareness and commitment to international standards, suggesting that to an extent, international standards have been domesticated even though women's rights in particular are not given prominence and customary law remains a major impediment to advancing equality.³ However, despite challenges related to customary law, standards such as those set out in CEDAW and the Protocol on Women that promote equality and non-discrimination are reflected in the Constitution – even though the UN and sub-regional instruments offer higher protection.⁴ The principles of equality and non-discrimination are contained within the Bill of Rights of the Constitution and have the potential to impact positively on women's right to political participation if they were to be effectively implemented.⁵ As discussed earlier, equality and non-discrimination are principles that are widely recognised in international law and they can be relied upon to promote women's participation in areas such as local government.⁶ In the case of Lesotho's Constitution, Thabane and Shale have correctly noted that an impediment to the promotion of equality for disadvantaged groups through the use of measures such as affirmative action is affected by the fact that these principles fall under Principles of State Policy which are non-justiciable.⁷

³ T Thabane & I Shale 'The impact of the African Charter and Women's Protocol in Lesotho' in Centre for Human Rights (ed) *The impact of the African Charter and Women's Protocol in selected African states* (2012) 79 81-82.

⁴ See generally chapters 2 & 3.

⁵ KA Acheampong 'Lesotho' in C Heyns *Human Rights Law in Africa* 1203 1218-1219. According to the Lesotho Constitution, the law may not provide for discrimination (Sec 18(1)&(2) and the term extends to categories such as 'sex'). There are, however, instances when discrimination this may be allowed for instance in application of customary law. In Lesotho, the law allows for adoption of temporary special measures in instances when persons may have been discriminated against, Sec 18(4)(e) therefore provides that for instance it will not be considered discriminatory if on the basis of sex, persons are 'accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those or to persons of any such description, is reasonably justifiable in a democratic society'.

⁶ See generally chapters 2 & 3.

⁷ Thabane & Shale (2012) 80-81.

With specific reference to political participation rights, the Lesotho Constitution contains a provision that focuses primarily on guaranteeing the right of political participation to everyone.⁸ The right to participate in politics is recognised in international law, and under Lesotho's Constitution it is set out as the 'right to participate in government' and provides for the right to 'take part in the conduct of public affairs, directly or through freely chosen representatives'.⁹ The provision in the Constitution is set out in the same language as that used by the ICCPR.¹⁰ By guaranteeing the right to 'take part in the conduct of public affairs' on equal terms, the Lesotho Constitution has accepted that both women and men should participate equally in local government. This interpretation can be accorded to this constitutional provision based on the interpretation accorded to 'conduct of public affairs' by the HRC which included local government within the meaning of the term.¹¹

In Lesotho, the right to participate in politics can be further advanced through the Principles of State Policy where the Constitution requires the state to be committed to 'take appropriate measures to promote equality of opportunity for disadvantaged groups in society to enable them to participate fully in all spheres of public life'.¹² This Principle of State Policy mentions three key features that are found in instruments at international level when these instruments seek to address women's participation in politics. The three features being 'take appropriate measures', 'disadvantaged groups' and 'public life'.¹³

With reference to the requirement to 'take appropriate measures', the concept of temporary special measures as recognised at the international level is introduced in the Constitution.¹⁴ In essence, the Constitution unequivocally gives institutions of the state the

⁸ Sec 4(1)(p) of the Lesotho Constitution. See also KA Acheampong 'Lesotho' in C Heyns *Human rights law in Africa* 1203, 1219. Sec 20 of the Lesotho Constitution. In Lesotho, for example, political participation is understood to include universal and equal suffrage, the right to stand in elections and the right to access public service on 'general terms of equality'.

⁹ Sec 20(a) of the Lesotho Constitution.

¹⁰ See chapter 2 sec 2.4.3.

¹¹ As above.

¹² Sec 26(2) of the Lesotho Constitution.

¹³ See generally chapters 2 & 3.

¹⁴ Sec 26(2) Lesotho Constitution.

power to put in place temporary special measures where they are needed in order to ensure the realisation of equality. These temporary special measures should be aimed at ‘disadvantaged groups’.

The term ‘disadvantaged groups’ used in the Constitution refers to groups that have been excluded and that need special attention in order to be able to realise their rights. The reference to ‘disadvantaged’ is not haphazardly chosen, but can be found in instruments to which Lesotho had already been a party at the time when the Constitution was adopted.¹⁵ In the Declaration and Treaty of SADC similar language is used and member states are required to support the ‘socially disadvantaged’.¹⁶ Through the recognition of ‘disadvantaged groups’, Lesotho’s Constitution reflects its commitments to international human rights standards.

Finally, the phrase ‘all spheres of public life’, as has been discussed, encompasses local government.¹⁷ Therefore the state should take measures to ensure that women as a ‘disadvantaged group’ are able to enjoy their right to participate in local government through, for example, being elected or appointed to office on equal terms with men.

While promoting the principle of participation on equal terms, the Constitution contains a provision which, if rigidly implemented, can institutionalise discrimination against women. The Constitution requires that only ‘seniority and competence’ should be considered when promotions are done.¹⁸ A rigid application of the ‘seniority’ principle could have the consequences of continuing to exclude women especially in light of the fact that men have historically had greater access and exposure to positions of authority in public life. In all likelihood they occupy more ‘senior’ positions than women and the principle could ensure the continuation of male dominance. Excessive emphasis on promotion that is based on ‘seniority’ can therefore result in the continued exclusion of women from appointment to certain positions. Historical imbalances and exclusion of women need to be taken into

¹⁵ See generally chapters 2 & 3.

¹⁶ See chapter 3 sec 3.3.2(i).

¹⁷ CEDAW General Recommendation 23 para 5.

¹⁸ Sec 30(c) of the Lesotho Constitution.

consideration when promotions are done to ensure non-exclusion of women in areas such as local government. A progressive interpretation of Lesotho's Constitution may require that greater attention is paid to 'competence' or the ability to develop 'competence' rather than relying excessively on 'seniority'. Women may be competent or could acquire the skills to be competent and therefore should be considered for promotion.

With specific reference to local government, the Constitution recognises the need for the establishment of local government but makes no mention of the need for gender equality to be observed within local government.¹⁹ The provision on local government lacks detail and responsibility for legislating on local government is shifted to the legislature that is required to enact the necessary legislation to govern local government. The responsibility to domesticate international standards as far as local government is concerned has been left to the legislature.

4.2.2 Local government laws relevant to women's political participation in Lesotho

Local government in Lesotho is governed essentially by two pieces of legislation which have undergone numerous amendments to reflect developments at the international level. The primary laws governing local government are the Local Government Act 6 of 1997 (Local Government Act of 1997) and the Local Government Elections Act 42 of 1998 (Local Government Elections Act of 1998). The Local Government Act of 1997 has subsequently been amended by the Local Government Amendment Act 5 of 2004 (Local Government Amendment Act of 2004), the Local Government Amendment Act 6 of 2010 (Local Government Amendment Act of 2010) and the Local Government Amendment Act 2 of 2011 (Local Government Amendment Act of 2011). The Local Government Elections Act has been amended by the Local Government Elections Amendment Act 6 of 2004 (Local Government Elections Amendment Act of 2004) and the Local Government Elections Amendment Act 4 of 2011 (Local Government Elections Amendment Act of 2011). It is within these pieces of legislation that election and appointment of office holders at local government level is regulated.

¹⁹ Sec 106 of the Lesotho Constitution.

(i) Local Government Act of 1997 and amendments intended for women's inclusion

At face value, the Local Government Act of 1997 appears to be a male-oriented law considering that throughout its provisions references are made to 'him', 'his', 'he', or 'chairman', thereby suggesting that the local government environment is the preserve of men.²⁰ Most ordinary people may not even have known that Lesotho's Interpretation Act of 1977 stated that '[w]ords and expressions importing the masculine gender include the female'.²¹ In attempting to provide clarification through the Interpretation Act that reference to men automatically includes women, the error of conflating 'gender' and 'sex' exists and is comparable to what has been identified in the Protocol on Women.²²

Despite the fact that the Local Government Act of 1997 was enacted in the 1990s, during an era when women's rights were a topical subject at the international level, the law did not reflect any commitment to gender equality. By that time, Lesotho had ratified most treaties and committed itself to standards requiring equality, but it was not adopting them at the domestic level.²³ The Act did not, for example, make any mention of the need for women to be appointed or that temporary special measures should be introduced to help advance women's participation in local government. Even in establishing the Local Government Service Commission,²⁴ which was charged with appointing executive members of councils, the Act did not make any provision that women should be appointed among its four commissioners.²⁵

Since the adoption of the Local Government Act of 1997, two amendments have been made that have had a significant impact on women's participation and that seek with varying degrees of success to align Lesotho with its international commitments following treaty ratification. The first amendment was the Local Government Amendment Act of 2004. The

²⁰ See generally Local Government Act 1997.

²¹ Sec 4(2) of the Interpretation Act 19 of 1977.

²² See chapter 3.

²³ See generally chapters 2 & 3.

²⁴ Sec 71(1)(c) of the Local Government Act 1997.

²⁵ Sec 67(3) of the Local Government Act 1997.

amendment took place in the same year in which Lesotho ratified the Protocol on Women thereby suggesting that Lesotho was making efforts to ensure that its domestic laws complied with its international obligations.²⁶ Two important contributions were made by this amendment and these amendments are in line with the Protocol on Women.²⁷ First, gender-sensitive language was introduced, thereby suggesting that local government should be equally accessible to women. Words such as ‘she’, ‘hers’ and ‘her’ were added and the gender neutral term ‘chairperson’ was included so that the law unquestionably promoted the idea that women could be part of local government.²⁸ The changes introduced brought Lesotho in line with the commitments to use language that promoted equality of sexes as was increasingly encouraged by international instruments.²⁹ Second, temporary special measures were introduced as the amendment stipulated that at least one-third of members of all local government councils should be women.³⁰ Besides being able to contest in all wards that men were able to contest elections, in order to fulfil the one-third quota, wards were to be set aside to be contested solely by women. In both cases the electoral system was first-past-the-post. The introduction of a one-third quota for women was in conformity with guidelines in instruments such as the Beijing Declaration and the SADC Declaration on Gender that had called for a ‘critical mass’ in terms of women’s inclusion in decision-making.³¹

As indicated above, the Local Government Amendment Act of 2004 was the first law to introduce temporary special measures in Lesotho with respect to women’s participation in local government. The law was domesticating standards to which Lesotho had committed itself but it was not universally welcomed and the temporary special measures it introduced were subsequently challenged in the *Tse’pe* case.³² In the *Tse’pe* case, the constitutionality of reserving wards for the sole contestation by women was challenged on the basis that

²⁶ Lesotho ratified the Protocol on Women on 5 November 2004. See chapter 3 sec 3.2.2 (ii).

²⁷ See chapter 3.2.2(ii).

²⁸ Sec 2(a) & (c) Local Government (Amendment) Act 5 of 2004.

²⁹ See generally chapters 2 & 3.

³⁰ Sec 4(3) Local Government (Amendment) Act 5 of 2004.

³¹ See chapter 2 sec 2.5.2 & chapter 3 sec 3.3.2(iii).

³² 2005 AHRLR 136 (LeCA 2005).

such a reservation undermined the principles of equality and non-discrimination as espoused in Lesotho's Constitution.³³ In dismissing the complaint, the Lesotho Court of Appeal (Court) emphasised that in fact the Constitution of Lesotho did not object to the use of temporary special measures because these measures were in compliance with Lesotho's commitments at the international level.³⁴ Accordingly, the Court held that Lesotho's obligations in terms of international law 'reinforce the interpretation of section 18(4)(e) of the Constitution and require equality which is substantive, not merely formal, and restitutionary in its reach'.³⁵

Overall, the *Tse'pe* case helped to clarify two important concerns. In the first instance, the *Tse'pe* case reinforced the need to ensure that women's inclusion as elected or appointed members of local government was guaranteed through constitutional and other legal measures that were in line with international standards on women's participation in local government. Second, through the judgment in the *Tse'pe* case, Lesotho was expected to use temporary special measures at local government and as such could be required to prove the measures in place and their efficacy. The proof could include provision of comparative and disaggregated data.

Following the *Tse'pe* case, the temporary special measures have been further amended through the Local Government Amendment Act of 2011. The latest amendment threatens to bring retrogression in women's representation when compared to the Local Government Amendment Act of 2004. The Local Government Amendment Act 2011 provides that an *additional* one third of the total seats should be reserved solely for women but, in actual fact, the special seats reserved for women only account for one quarter of the total seats.³⁶ By way of illustration, in terms of the recent amendment, if an urban council has nine elected members, all these seats can be contested equally by men and women. In addition, one third (in this case three extra seats) of the seats should be set aside for women meaning that the urban council will eventually have a total of twelve seats. The three seats

³³ 2005 AHRLR 136 (LeCA 2005) paras 9-11.

³⁴ 2005 AHRLR 136 (LeCA 2005) para 22.

³⁵ As above.

³⁶ Sec 2(2) Local Government Amendment Act 2 of 2011.

guaranteed for women are allocated on a proportional representation basis according to political party lists.³⁷ The proportion of seats is based on the number of votes that a political party garners in a particular council election.³⁸ Assuming that no woman wins any of the nine seats contested on a first-past-the-post basis, then the only seats available to women will be the three special seats. In such a case the result is that women would only constitute a quarter of the representatives in terms of the latest amendment. In the Local Government Amendment Act of 2004 women were automatically guaranteed one third of the seats in a council regardless of their performance in the seats that were open to women and men. The Local Government Amendment Act of 2011 has an additional shortcoming because it fails to indicate what happens to special seats if all or a substantial number of candidates in a council election were to be independents. The possibility of such a situation occurring exists.³⁹

(ii) Local Government Elections Act 1998 and women's participation in local government elections

The Local Government Elections Act of 1998 makes it clear that 'every person is eligible for election as a member of a Council and may be nominated and elected as a candidate for election in the electoral division'.⁴⁰ The law sidelined women in language similar to that used in the Local Government Act of 1997.⁴¹ Subsequently, the Local Government Elections Amendment Act of 2004 brought the law *in tandem* with accepted international trends

³⁷ As above.

³⁸ As above.

³⁹ See V Shale 'The 2005 Lesotho local government elections: Implications for development and governance' (2005) 4 *Journal of African Elections* 100 109-110. According to Shale during the 2005 local government elections, in one of the districts (Mokhotlong) 64 out of 149 electoral divisions were won by independent candidates. In essence, based on my calculation 42% of the electoral divisions were won by men. The law is unclear on what happens if such a situation were to repeat itself under the most recent amendment. Who would be allocated 42% of the special seats?

⁴⁰ Sec 26(1)(b) Local Government Elections Act 1998.

⁴¹ See generally Local Government Act 1997.

through the adoption of gender-sensitive language.⁴² It can be argued that the amendment was a domestication of international standards as it took place in the same year in which Lesotho ratified to Protocol on Women.⁴³

The Local Government Elections Amendment Act of 2004 recognised the role of women in elections and required individuals and political parties to ‘as far as practicable’ abide by the National Assembly Election Act of 1992.⁴⁴ The National Assembly Election Act states that a political party ‘shall’ not be registered ‘unless its membership is voluntary and open to all citizens of Lesotho without discrimination on the grounds of race, colour, sex’.⁴⁵ The language used in the Local Government Elections Amendment Act of 2004 only requires individuals and political parties to show that ‘as far as possible’ they tried to include women. The law lacks emphasis on the need that women must be included when it requires individuals and parties need only to show that they tried to include women ‘as far as possible’.

The Local Government Elections Amendment Act of 2004 illustrated how states have the freedom to develop temporary special measures and tailor them to their needs. The law makes provision in terms of how women were to be elected to fill the one-third of the seats at local government that were reserved for them.⁴⁶ In essence, every third electoral division was to be set aside to be contested solely by women during the local government elections

⁴² Sec 3 Local Government Elections (Amendment) Act 6 of 2004. In this section it was provided that ‘[t]he principal law is amended by deleting the words “he”, “his” and “him” wherever they appear and substituting the words “he or she”, “his or hers” and “him or her”’.

⁴³ See chapter 3.2.2(ii).

⁴⁴ In particular sec 36A of the National Assembly Election Act 1992. See sec 7 Local Government Elections (Amendment) Act of 2004. The law is unclear on whether the ‘as far as practicable’ requirement extends to application of temporary special measures.

⁴⁵ Sec 36A of the National Assembly Election Act 1992.

⁴⁶ Sec 18 Local Government Elections (Amendment) Act 2004. The provisions stated that:

‘For the first local authority elections, one third of the seats reserved for women shall be from every third electoral division in the Council;

For subsequent local authority elections, one third of the total electoral divisions in each council shall be reserved by rotation, but such rotation shall not exceed two terms of office’.

that were held in 2005, and in subsequent elections a rotational system was to be introduced. The rotation was to be of a limited duration as it could not exceed two rotations per electoral division. However, placing a time limit on rotation was not in conformity with the general understanding of temporary special measures whereby time should not be a key factor but rather that they remain in place until such time that women's participation can be guaranteed without the need for any measures. Therefore, the limitation placed on the rotational system adopted in Lesotho was contrary to the interpretation accorded to temporary special measures by the CEDAW Committee in General Recommendation 25 where the CEDAW Committee held that it is not the time that matters but the result.⁴⁷ By placing limits in terms of time, Lesotho was not adhering to its international commitments.

Following the 2004 amendment, the temporary special measures focussing on women's participation in local government have been further amended through the Local Government Elections Amendment Act of 2011. The amendment addresses the subject of special seats that are set aside for women and followed the challenges against special seats that arose out of the *Tse'pe* case.⁴⁸ The Local Government Elections Amendment Act of 2011 recognises the right of independent candidates to participate in elections but in relation to special seats for women the amendment's main shortcoming is similar to that identified in the Local Government Amendment Act of 2011 where special seats are reserved only for political parties and participation of independent candidates is not envisaged.⁴⁹

In terms of how to arrive at the one third special seats, the Local Government Amendment Elections Act of 2011 requires that if after dividing council seats into three, the result ends in a decimal, the number should be rounded off to the nearest whole number to determine the number of special seats that would be available for women.⁵⁰ An illustration can show that in fact the end result would be that women can end up with even less than one quarter of the seats in councils. If, for example, a council has 13 elected members, then, based on

⁴⁷ See chapter 2 sec 2.4.4.

⁴⁸ See chapter 4 sec 4.2.2 (i). See also chapter 3 sec 3.3.2 (iii).

⁴⁹ Sec 38(3)(a) of the Local Government Elections Amendment Act of 2011.

⁵⁰ Sec 4(a)(ii) of the Local Government Elections Amendment Act of 2011.

the formula, women would only be entitled to four special seats.⁵¹ In the end the council would have a total of 17 members and if women do not win any of the seats contested on a first-past-the-post basis, they would occupy only four seats, meaning that they constitute less than a quarter of council members. Therefore the 2011 amendment guarantees women a lower representation than the critical mass advocated by some international instruments.

If the legislature in Lesotho intended to ensure that women form at least a third of council members at local government, then at least the law should have stipulated that council membership total is divided into two and the number arrived at is what would constitute the special seats reserved for women. In such a case, if a council has 13 members then it would mean that if divided into two the figure would be 6.5 and rounded off to the nearest whole number seven seats would be reserved for women. In such a case the council would have a total of 20 members and of these women would be guaranteed seven seats. Lesotho's current law is therefore not in line with developments at the international level which either encourage equitable representation of women, or in the worst case scenario one third representation of women.

The Local Government Elections Amendment Act of 2011 is supportive of women to stand for election to special seats as no registration fee is required.⁵² However, the law is unclear on whether the exemption from registration fees extends to independent women candidates contesting seats filled through the first-past-the-post system.

4.3 Rwanda

4.3.1 Rwanda's Constitution and women's political participation in local government

Rwanda's Constitution was adopted in 2003 at a time after most international human rights instruments promoting women's rights had been adopted.⁵³ It is therefore not surprising

⁵¹ As above.

⁵² Sec 6(1G) of the Local Government Elections Amendment Act of 2011.

⁵³ Adopted on 26 May 2003 and published on 4 June 2003 in the Official Gazette of the Republic of Rwanda. See generally chapters 2 & 3.

that key standards from international instruments have been domesticated in the Rwandan Constitution to guarantee women the right to participate in local government and that in addition, special attention was paid to the use of temporary special measures. One of the provisions in the Constitution accords all persons the right to stand for elected office if they fulfil the requirements of the law.⁵⁴ The right is guaranteed on the basis of equality and women cannot be excluded from being candidates in elections.

A fundamental principle that has a direct impact on women's participation in areas such as local government is the principle of equality which is contained in the Constitution.⁵⁵ However, the same article in the Constitution that guarantees equality between women and men at the same time guarantees women only 30 percent of decision-making positions.⁵⁶ On the one hand, equality is promoted but, on the other hand, guaranteeing only 30 percent of positions to women falls short of the *equality* principle that is promoted by the Constitution. Guaranteeing only 30 percent inclusion of women is not sufficient especially as parity is what is increasingly being promoted as evident for example in the Solemn Declaration and the Charter on Democracy both of which apply to Rwanda. Of course women could exceed 30 percent but why did the law not make it clear rather than relying on the mere open-ended possibility that women will exceed 30 percent?

The Rwanda constitutional provision on non-discrimination, which is in essence domestication of international standards, can also be relied upon to promote women's equal political participation.⁵⁷ Within the provision on non-discrimination, 'sex' has been identified as one of the grounds on which discrimination is prohibited.⁵⁸ Not only does the Constitution forbid discrimination on the basis of sex but explicitly states that where discrimination is detected the perpetrator will be punished.⁵⁹ Rwanda's Constitution further

⁵⁴ Art 8 of the Constitution of Rwanda.

⁵⁵ Art 9(4) of the Constitution of Rwanda.

⁵⁶ As above.

⁵⁷ See generally chapters 2 & 3.

⁵⁸ Art 11 of the Constitution of Rwanda.

⁵⁹ As above.

prohibits discrimination on any other ground and uses the blanket phrase ‘any other form of discrimination’⁶⁰ to ensure that discrimination on grounds such as gender is addressed.

By promoting principles such as equality and non-discrimination, Rwanda’s Constitution has domesticated principles recognised at the international level⁶¹ that can be relied upon to ensure that women are not excluded from participating in local government in Rwanda whether as elected or appointed officials.

In terms of provisions specific to political participation, Rwanda’s Constitution domesticates international standards by requiring women and men to have *equal access* to elected office,⁶² even though as discussed, the Constitution *guarantees* women a minimum inclusion of only 30 percent.⁶³ When dealing with political organisations, the Constitution takes a more categorical position, as all political organisations are required to adhere to gender equality within their leadership structures.⁶⁴ In essence, parity is required of non-state actors but not state institutions. In fact, the choice of setting a minimum inclusion of 30 percent women is not on the basis of any specific international undertaking by Rwanda. The 30 percent minimum requirement may have been based on arguments that a ‘critical mass’ required at least 30 percent inclusion of women in order for women to make an impact on decision-making.⁶⁵

In relation to local government, the Rwandan Constitution has a provision focussing on local government, but in comparison to the provisions dealing with the Parliament where 30 percent representation of women is required, the provision on local government is silent

⁶⁰ As above.

⁶¹ See generally chapters 2 & 3.

⁶² Art 52 of the Constitution of Rwanda.

⁶³ Art 9(4) of the Constitution of Rwanda.

⁶⁴ Art 54 of the Constitution of Rwanda.

⁶⁵ See eg D Dahlerup ‘Using Quota’s to Increase Women’s Political Representation’ in International IDEA ‘Women in Parliament’ http://www.onlinewomeninpolitics.org/beijing12/Chapter4_Dahlerup.pdf (accessed 7 June 2012).

about quotas for women.⁶⁶ The assumption is therefore that the general provision that requires women to constitute at least 30 percent of all decision-making organs extends to local government, even if the specific provision dealing with local government is silent on a quota for women.

4.3.2 Extent to which Rwanda's local government laws focus on women's political participation

In terms of laws and regulations governing local government, two pieces of legislation and three presidential orders govern local government in Rwanda.⁶⁷ The laws and presidential orders were adopted after most international human rights instruments dealing with women's political participation had been ratified by Rwanda and therefore standards from these instruments have been domesticated to a certain extent as will become apparent in the discussion to follow.⁶⁸ Of the two laws, only one specifically addresses the issue of women's participation. This law, Law 8 of 2006, states that women must constitute at least 30 percent of members of district councils in addition to the person who coordinates the National Council of Women at the district level.⁶⁹ Reference to a 30 percent representation of women is not a specific requirement under the international obligations that bind Rwanda. In fact, two of the instruments to which Rwanda is committed, namely, the Solemn Declaration and the Charter on Democracy, advance the principle of *parity* in the representation of women.⁷⁰

⁶⁶ Arts 76(2), 82 & 167 of the Constitution of Rwanda.

⁶⁷ See Law 8/2006 of 24 February 2006 Determining the organisation and functioning of the district. See also Organic Law 29/2005 of 31 December 2005 Determining the administrative entities of the Republic of Rwanda. Presidential Order 57/01 of 15 October 2006 Determining the structure and functioning of village, cell and sector. See also Presidential Order 28/01 of 6 July 2009 modifying and complementing the Presidential Order 57/01 of 15 October 2006 Determining the responsibilities, structure and functioning of village, cell and sector. See also Presidential Order 01/01 of 3 February 2011 Governing elections of leaders at village, cell and sector levels.

⁶⁸ See generally chapters 2 & 3.

⁶⁹ Art 10(3) & (4) of Law 8/2006 of 24 February 2006.

⁷⁰ See chapter 3 secs 3.2.1(i) & 3.2.2(iii).

At the lowest levels of local government, namely the village, sector and cell levels, the operation of local government is governed by Presidential Orders.⁷¹ The Presidential Order Governing Elections of Leaders at Village, Cell and Sector Levels further domesticates international law in terms of making certain that women will be included in the cell and sector councils and requires that they should constitute at least 30 percent of these councils.⁷² However, in respect of the village executive committee, a quota has not been provided in any of the Presidential orders but an assumption can be made that the constitutional requirement of at least 30 percent inclusion of women also applies in this respect.⁷³

In some cases the Presidential Order is clear on the extent to which women should be represented. For example, in relation to the cell council, one of the persons to be elected should be a person to deal with women's affairs⁷⁴ and at the cell executive committee one of the offices created must deal with women's affairs.⁷⁵ In total, out of the 10 members of executive committees at cell level, at least 30 percent must be women. At the sector level, the Presidential Order is also clear in stating that women must constitute at least 30 percent of the council members including the coordinator of the national council dealing with women's issues.⁷⁶ It appears therefore that right up to the smallest local government unit, women must constitute at least 30 percent of members of various councils or committees. Rwanda's commitment to include women even at the lowest level of local government is therefore unequivocal. The Presidential Order as inspired by the country's Constitution upholds the need for women to be included and as such adheres to international standards

⁷¹ See Presidential Order 57/01 of 15 October 2006 Determining the structure and functioning of village, cell and sector. See also Presidential Order 28/01 of 6 July 2009 and Presidential Order 01/01 of 3 February 2011 Governing elections of leaders at village, cell and sector levels.

⁷² Arts 6 & 8 of Presidential Order 01/01.

⁷³ Arts 11 & 17 of Presidential Order 57/01.

⁷⁴ Art 6(2) of Presidential Order 01/01. The Presidential Order requires that that 'coordinator of the National Women's Council at the Cell level' should be included. See also art 14(2) of Presidential Order 28/01.

⁷⁵ Art 33(9) of Presidential Order 57/01.

⁷⁶ Art 8 of Presidential Order 01/01. See also arts 29(3)&(4) of Presidential Order 28/01.

that require women to be included through election and appointment in all organs within a state.

In terms of being elected to office, legal provisions exist that promote the election of women. At the village, cell and sector levels, the Presidential Order governs elections, while the districts and Kigali elections are governed by the Law Relating to Elections.⁷⁷

According to the Law Relating to Elections, the inclusion of women in elections at district level is made clear by requiring every sector to present two candidates, one of whom must be a woman.⁷⁸ A quota system is therefore introduced in elections at district level and the system ensures that women have an opportunity to participate in elections to the same extent as men. Parity is only required as far as candidacy is concerned but not as far as the outcome of elections. The only requirement is that once a district council is elected, at least 30 percent of councillors should be women.⁷⁹ However, the law fails to indicate exactly how the 30 percent is to be determined. It is only in the City of Kigali Council where the Law has made it clear that women councillors elect from among themselves the women councillors who they would like to see forming part of the Kigali City Council.⁸⁰ The law further provides that women should constitute at least 30 percent of the members of the Executive Committee of the City of Kigali.⁸¹ Besides requiring a 30 percent presence of women, guidance is not provided in terms of the election of the women who would form part of the Executive Committee.

In conclusion, Rwanda has a number of laws governing local government thereby making it easier to understand how local government operates and how the law provides for women's participation. Even when the law has not clearly stated that women should be included, the fact that the Constitution requires a minimum of 30 percent inclusion of

⁷⁷ 27/2010 of 19 June 2010.

⁷⁸ Art 156 of the Law Relating to Elections.

⁷⁹ As above.

⁸⁰ Art 157 of the Law Relating to Elections.

⁸¹ Art 162 of the Law Relating to Elections.

women means that all the different bodies at local government must adhere to this requirement.

The fact that the Constitution provides that at least 30 percent of positions must be occupied by women necessarily leads to a conclusion that records with disaggregated and comparative data must be maintained to prove, if necessary, that the constitutional requirement is adhered to.

4.4 South Africa

4.4.1 Constitutional provisions relevant to women's political participation in local government

The South African Constitution contains a number of provisions that show a domestication of international standards and that can be relied upon to promote women's participation in local government. First, the Constitution recognises the principle of equality and as such forbids discrimination on different bases including 'sex'.⁸² Consequently, in promoting political rights equality should be observed.⁸³ Second, despite the emphasis on equality, the Constitution provides that 'legislative and other measures' may be taken to 'protect and advance persons' who have 'been disadvantaged by unfair discrimination'.⁸⁴ Therefore attention is not only on formal equality but more importantly on substantive equality thereby allowing for the implementation of temporary special measures which are recognised in international law. The constitutional requirement allowing for 'legislation and other measures' to be adopted is in line with South Africa's obligations and applies to areas such as political participation. Through the promotion of 'legislative and other measures', the Constitution has domesticated international standards intent on, for example, promoting the use of temporary special measures in areas such as women's right to participate in politics. Reference to 'other measures' in the Constitution allows for a variety

⁸² Sec 9(3) of the Constitution of the Republic of South Africa, 1996.

⁸³ Sec 19 of the Constitution of South Africa.

⁸⁴ Sec 9(2) of the Constitution of South Africa.

of temporary special measures to be adopted which South Africa considers necessary and which can be tailored to the country's unique circumstances.

With specific reference to political rights, the Constitution addresses issues such as the right to form political parties, recruit members, vote in elections and to be elected.⁸⁵ The promotion of these rights is in line with South Africa's obligations at the international level and can be relied upon for purposes of realising women's participation in local government. One important issue that appears in instruments at the international level, but that is not in the Constitution, is the right of access to public service. As has been discussed, the right to access public service can be broadly understood to include not only receiving services offered by public service but can as well be interpreted to extend to being appointed to public service positions.⁸⁶ Therefore, if the Constitution contained the right to access public service, another avenue would have been available through a constitutional provision and women could claim their right using this alternative route as well.

In relation to local government, the Constitution dedicates 14 sections to the subject of local government.⁸⁷ However, none of the 14 provisions specifically addresses the need or right of women to participate in local government. The closest a provision comes to ensuring inclusion of women is where the Constitution requires that local government objectives should include providing 'democratic and accountable government for local communities'.⁸⁸ Reference to democracy arguably entails women's inclusion. Another provision that is broad enough to ensure that other laws can be enacted to ensure inclusion of women is where the Constitution requires municipal councils to elect their 'executive committee and other committees, subject to national legislation'.⁸⁹ Reference to 'national legislation' in this instance would mean that municipal councils would have to be guided by, for example, the Employment Equity Act which promotes inclusion of marginalised groups such as women.⁹⁰

⁸⁵ Sec 19 of the Constitution of South Africa.

⁸⁶ See chapter 2 sec 2.4.1.

⁸⁷ Secs 151 to 164 of the Constitution of South Africa.

⁸⁸ Sec 152(a) Constitution of South Africa.

⁸⁹ Sec 160(1)(c) Constitution of South Africa.

⁹⁰ 55 of 1998.

The other provisions within the Constitution that deal with local government focus primarily on its structure, role and functioning.

In ensuring that legislation can be enacted to deal with issues such as inclusion of women in local government, the Constitution states that '[a]ny matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation'.⁹¹ Therefore, the expectation is that an issue such as gender equality in local government can be addressed through national legislation and international standards can therefore be domesticated through other laws.

Promotion of women's participation in local government can also be deduced from the section in the Constitution that deals with 'basic values and principles governing public administration'.⁹² One of the principles of public administration that has a bearing on local government and women's participation stipulates as follows⁹³

[p]ublic administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

My understanding of the above principle on public administration is that representation in places such as local government which is undoubtedly part of public administration should include those people who have been excluded in the past. Therefore, this principle dealing with public administration links with the constitutional requirement of the need to protect those 'disadvantaged by unfair discrimination'. In this case, public administration should therefore ensure inclusion of women among other excluded groups. In the appointment of officials in local government, attention needs to be paid to the inclusion of women partly to ensure that local government is 'broadly representative' and also as part of the 'need to redress imbalances of the past'.

⁹¹ Sec 164 Constitution of South Africa.

⁹² Sec 195 Constitution of South Africa.

⁹³ Sec 195(i) Constitution of South Africa

Overall, the Constitution makes no direct reference to women as a category who should be accorded special treatment so that they participate in politics. The Constitution instead emphasises equality and the need to adopt legislation and measures aimed at uplifting persons who have been historically ‘disadvantaged by unfair discrimination’.⁹⁴ In as much as the Constitution promotes equality, the incorporation of standards on women’s right to participate in politics as they exist at the international level has not been adequately included in the Constitution. What the Constitution has done is to leave the responsibility to the legislature to develop national legislation that can guarantee women’s participation. The challenge, however, is that legislation can be more easily tampered with than would have been the case if the rights had been enshrined in the Constitution.

4.4.2 Local government laws that impact on women’s political participation

South Africa has at least seven pieces of legislation that govern the operation of local government.⁹⁵ In addition, four amendments have been effected to some of the seven laws.⁹⁶ Overall, the legislation covers aspects such as demarcation of boundaries, structure of local government, functions and roles of officials at the local government level.

Unlike Lesotho or Rwanda that have limited legislation on local government and that is therefore easier to comprehend, the plethora of legislation in South Africa can create complications when trying to figure out issues such as the extent to which the various laws promote women’s participation in local government. Despite the existence of numerous pieces of legislation on the subject of women’s participation in politics at local government

⁹⁴ Sec 9(2) Constitution of South Africa.

⁹⁵ The legislation and amendments are: Local Government Transitional Act 209 of 1993, Local Government Municipal Demarcation Act 27 of 1998, Local Government Municipal Structures Act 117 of 1998, Local Government Municipal Systems Act 32 of 2000, Local Government Municipal Electoral Act 27 of 2000, Local Government Municipal Finance Management Act 56 of 2003, Local Government Municipal Properties Rates Act 6 of 2004, and the Municipal Fiscal Powers and Functions Act 12 of 2007.

⁹⁶ Local Government Municipal Structures Amendment Act 33 of 2000, Local Government Laws Amendment Act 51 of 2002, Local Government Amendment Act 19 of 2008, Local Government Municipal Electoral Amendment Act 14 of 2010.

level, only three laws specifically address the subject of women's participation in terms of being elected and appointed to local government offices. The laws in question are the Local Government Municipal Demarcation Act of 1998, the Local Government Municipal Structures Act of 1998 and the Local Government Municipal Electoral Act of 2000. In examining the extent to which local government complies with international obligations on women's participation in local government, I limit myself to these three pieces of legislation.

On the whole, South African legislation on local government is quite progressive when compared to other states, with the result that accepted international standards have been reflected in the legislation. For example, unlike most states by the early 1990s attention was already paid to ensuring that language used in South African law was gender sensitive.⁹⁷ Attention to gender neutral legislation arose out of a realisation alluded to in government policy that women had been sidelined from management in local government.⁹⁸ The laws on local government are therefore sensitive to the inclusion of women and often refer to 'chairperson' and 'he or she'⁹⁹ and therefore the development of the law envisioned the possibility of persons from either sex occupying any of the positions in local government. As a result of using gender neutral language South Africa upholds its commitments at the international level where the state has undertaken to promote the inclusion of both women and men in politics including at the local government level.

The commitment to include women in local government is in line with South Africa's obligations at the international level and can be observed from how one of the pieces of legislation tries to ensure that attention is accorded to matters of gender equality when appointments are made. In this regard, the Local Government Municipal Demarcation Act of 1998 requires that when appointing members of the Municipal Demarcation Board the appointing authority should include a member of the constitutionally established

⁹⁷ See eg generally Local Government Transitional Act 1993.

⁹⁸ Sec 2.3 'White Paper on Local Government' 9 March 1998 <http://www.info.gov.za/view/DownloadFileAction?id=108131> (accessed 11 June 2012). The White paper alluded to the fact that women were not 'adequately represented in management echelons'.

⁹⁹ See eg secs 2 & 11 of the Local Government Transitional Act 1993.

Commission on Gender Equality (CGE).¹⁰⁰ The requirement to include a member of the CGE suggests that issues of gender equality were considered important enough to warrant the presence of someone from the CGE. However, besides requiring the presence of a CGE member, there is no further guidance within the law requiring that women must be appointed. The silence in the law on the need to observe gender equality in appointments that are made can lead to the conclusion that perhaps the presence of a CGE member is not necessarily to ensure that women are appointed but rather that persons who are appointed are gender sensitive. A counter argument to this reasoning could be that when appointments are made, the appointing authority has to take cognisance of other national legislation such as the Employment Equity Act and therefore even though the law itself has not been explicit on the inclusion of women in appointments, the Municipal Demarcation Board is required to observe the requirement to include women. In my opinion, the law should have been explicit to avoid conjecture on what the legislature intended. As it stands, though, it should be interpreted to mean that the presence of a CGE member serves both the purposes of ensuring that appointees are gender sensitive while at the same time ensuring that women are also appointed.

In terms of other appointments such as the composition of local government itself, the Local Government Municipal Structures Act of 1998 (Municipal Structures Act) fails to clearly state that local government structures must observe gender equality.¹⁰¹ The Municipal Structures Act deals with municipalities, the sizes of councils and how they should operate, but makes no specific mention of gender equality or how these bodies can be accommodative of women.¹⁰² Failure to provide clarity on the need to appoint women in the various bodies creates an opportunity for interpretation which may not in all cases favour women's inclusion. With reference to election of office holders, the Municipal Structures Act is silent on gender equality and only states that 'every' citizen has the right to stand for election within the municipal area in which the person can vote.¹⁰³ The general nature of this

¹⁰⁰ Sec 8(1)(b)(iii) of the Local Government Municipal Demarcation Act 1998.

¹⁰¹ Local Government Municipal Structures Act 1998.

¹⁰² See eg Chapter 3 which sets out the composition and membership of municipal councils. Local Government Municipal Structures Act 1998.

¹⁰³ Sec 21(1)(a) of the Local Government Municipal Structures Act 1998.

provision does not accord women any special treatment as is required in international instruments. The position of South Africa expressed through *The White Paper on Local Government* was that introducing a quota system would in the long run affect women's confidence and undermine their ability to stand for elected office on equal terms with men.¹⁰⁴ In order to guarantee women's election especially when considering their historical marginalisation the law should have displayed greater clarity.

It is only at the ward level that temporary special measures have been made clear. First of all, the Municipal Structures Act requires that political parties should 'ensure' that at least 50 percent of the candidates on party lists at the ward level are women and that the women are evenly distributed in the lists.¹⁰⁵ Such an arrangement would ensure that women are elected. Second, within ward committees, metro or local councils are required to make regulations that ensure equitable inclusion of women.¹⁰⁶ In these two instances, temporary special measures have been resorted to in terms of the process and also the desired outcome. Regarding the process during the election, women should constitute 50 percent of candidates on party lists. With regard to the outcome, women should be *equitably* represented in ward committees. However, even though women are guaranteed participation in ward committees, the establishment of these ward committees is the prerogative of metro or local councils and therefore, at least theoretically, if the metro or local council decides not to establish ward committees then women's ability to take part in local government is negatively affected.¹⁰⁷ In addition, ward committees are the lowest level of local government and they are devoid of real authority. Decisions emanating from them are non-binding recommendations.¹⁰⁸ Therefore, the only organs where women are guaranteed parity in representation lack meaningful authority. In order to be in line with international standards, the law should have guaranteed women parity at all levels of local government including in those organs that make binding decisions. In light of the temporary

¹⁰⁴ Sec 3.1 White Paper on Local Government (1998).

¹⁰⁵ See secs 3 & 11(3) of Schedule 1, Part 3 of the Local Government Municipal Structures Act 1998. See also secs 5(3) & 17(5) of Schedule 2, Part 1 of the Local Government Municipal Structures Act 1998.

¹⁰⁶ Sec 73(3)(a)(i) of the Local Government Municipal Structures Act 1998.

¹⁰⁷ Sec 73(1) of the Local Government Municipal Structures Act 1998.

¹⁰⁸ Sec 74(a) of the Local Government Municipal Structures Act 1998.

special measures aimed at the ward level a question arises as to why the legislature considered it necessary to use local government law to guarantee women's participation only at the ward level and not in other organs of local government. Why were temporary special measures not mentioned and applied universally in all local government positions? Surely, considering that the Constitution acknowledged the need to redress instances when persons have been 'disadvantaged by unfair discrimination', such 'disadvantaged unfair discrimination' extended to all levels of local government and was not only limited to the lowest level of local government. Therefore, temporary special measures should have been of wider application.

Another piece of legislation where women's inclusion in local government is addressed is the Local Government Structures Act of 2000 (Local Government Structures Act) that sets out how local government functions.¹⁰⁹ In terms of the Local Government Structures Act, councils must 'promote gender equity in the exercise of the municipality's executive and legislative authority'.¹¹⁰ Accordingly, appointments should reflect sensitivity to gender equality. To better ensure inclusion of women in local government affairs, the Local Government Structures Act requires municipal councils to establish 'mechanisms, processes and procedures' that take into account the special needs of women.¹¹¹ Furthermore appointment of committees that advise municipal councils should ensure that such committees are reflective of gender representation.¹¹² A further provision that can foster women's participation in local government is through the requirement that the administration of local government must be such that municipalities 'provide an equitable, fair, open and non-discriminatory working environment'.¹¹³ These provisions within the

¹⁰⁹ Local Government Municipal Systems Act 2000.

¹¹⁰ Sec 4(h) of the Local Government Municipal Systems Act 2000.

¹¹¹ Sec 17(2) & (3) of the Local Government Municipal Systems Act 2000.

¹¹² Sec 17(4) & 85(3)(e) of the Local Government Municipal Systems Act 2000. See also sec 22(3)(d) of the Local Government Municipal Properties Rates Act 2004. In the Valuation Appeals Board that is established under the Local Government Municipal Properties Rates Act 2004, in terms of sec 58(2) gender representivity must be taken into account when the Member of the Executive Council of a Provincial Government appoints the appeal board.

¹¹³ Sec 51(m) of the Local Government Municipal Systems Act 2000.

Local Government Structures Act can undoubtedly contribute to inclusion of women especially in appointed offices.

In terms of legislation that governs elections and that can impact on women's participation, the Local Government Municipal Electoral Act of 2000¹¹⁴ provides for election of members of local government. The right to participate is extended to everyone but the law does not appear to have specific measures aimed at women as candidates.¹¹⁵ The only indication of support directed at women can be found in the 1998 *White Paper on Local Government*¹¹⁶ but within the Local Government Municipal Electoral Act the only provision that could arguably address women's participation seems to be focussed on women as the electorate. The provision states the following:¹¹⁷

6. Every party and every candidate must—

- (a) respect the right of women to communicate freely with parties and candidates;
- (b) facilitate the full and equal participation of women in political activities;
- (c) ensure the free access of women to all public political meetings, marches, demonstrations, rallies and other public political events: and
- (d) take all reasonable steps to ensure that women are free to engage in any political activities.

My understanding of the above provision is that a duty is placed on political parties and 'every candidate'. The latter obviously includes women candidates to ensure women as the electorate are able to participate in political activities. This provision is not necessarily advancing the interests of women as candidates but rather as the electorate.

¹¹⁴ Local Government Municipal Electoral Act 27 of 2000.

¹¹⁵ Sec 6, Schedule 1 of the Local Government Municipal Electoral Act 2000.

¹¹⁶ Sec E.1. The White Paper on Local Government (1998) had provided that '[m]unicipalities should take active steps to ensure that representatives from groups which tend to be marginalised (such as women, people with disabilities and the poor) are encouraged to stand for elections. One way to achieve this is through running candidate support programmes, which provide information to prospective candidates on issues such as electoral systems and processes, and the functions and operations of local government; and build skills in areas such as public speaking, organising public meetings, fundraising and so forth'.

¹¹⁷ Sec 6, Schedule 1 of the Local Government Municipal Electoral Act 2000.

South Africa's Constitution clearly takes cognisance of the need for marginalised groups such as women to participate on equal terms at all levels of government. In complying with the constitutional commitments, since the early 1990s, South Africa has developed numerous laws and policies that promote women's political participation in local government.¹¹⁸ In addition, several other pieces of legislation have also been developed that elucidate the issue of temporary special measures that can be relied upon to promote women's political participation in areas such as local government. If all these laws and policies are vigorously applied women's political participation in local government is likely to be very high in South Africa.

4.4.3 Other legislation with a bearing on women's political participation in local government

(i) Employment Equity Act of 1998

Besides laws specific to local government, another important law that domesticates international standards, especially on the need for using temporary special measures, that can be relied upon to advance women's participation in local government is the Employment Equity Act.¹¹⁹ The law requires that measures may be designed to ensure that 'diversity' exists in the workplace and that women are represented in the process.¹²⁰ With the exception of constitutional provisions, the Employment Equity Act takes precedence over any other law on matters of affirmative action.¹²¹ The Employment Equity Act identifies

¹¹⁸ According to the Women's Charter for Effective Equality, a coalition of women's organisation called for 'equal opportunity and access to leadership at all levels of government' and also 'equal access to, and representation on, public bodies'. Art 7 of the Women's Charter for Effective Equality (1994), See also 'White Paper on Reconstruction and Development' General Notice 1954 of 1994, '*Batho Pele* 'People First': White Paper on Transforming Public Service Delivery' General Notice 1459 of 1997, White Paper on Local Government (1998), 'South Africa's National Policy Framework for Women's Empowerment and Gender Equality' 2002, Traditional Leadership and Governance Framework Act 41 of 2003, the Communal Land Rights Act 2004.

¹¹⁹ Employment Equity Act 55 of 1998.

¹²⁰ Sec 6(1) of the Employment Equity Act.

¹²¹ Sec 63 of the Employment Equity Act.

municipalities as one of the ‘designated employers’ that must apply the Employment Equity Act and women are one of the ‘designated groups’ that should benefit from the application of the Employment Equity Act.¹²² Within the Employment Equity Act the term ‘temporary special measures’ is not used, instead, reference is to ‘affirmative action’.

The Employment Equity Act aims at the elimination of unfair discrimination but clarifies that affirmative action does not equate to unfair discrimination.¹²³ The clarification that affirmative action should not be equated to unfair discrimination is in conformity with the position adopted at the international level in the justification of using ‘temporary special measures’.¹²⁴

In compliance with international standards requiring provision of data on women’s participation, the Employment Equity Act requires setting of ‘numerical goals’.¹²⁵ The requirement to set ‘numerical goals’ implies that even when reporting on the implementation of the Employment Equity Act comparative and disaggregated data must be provided. Employers are required to furnish reports to show the extent to which the provisions of the Employment Equity Act have taken effect.¹²⁶ The reports are made public thereby opening them to scrutiny. The reason for making the reports public is because they create public opprobrium where compliance is not taking place and put pressure on employers to ensure that the information that is provided is accurate lest more accurate information surfaces.

Municipalities as designated employers are required to achieve equity but they are barred from resorting to quotas in their quest for equity.¹²⁷ The categorical rejection of quotas in municipalities can be linked to rejection of quotas in the White Paper on Local

¹²² Secs 1 & 13(1) of the Employment Equity Act.

¹²³ Sec 5(1) & 6(2) of the Employment Equity Act.

¹²⁴ See chapter 2 sec 2.4.4.

¹²⁵ Sec 15(2)(3) of the Employment Equity Act.

¹²⁶ Sec 21 of the Employment Equity Act.

¹²⁷ Secs 15(2)(d)(i) & 15(3) of the Employment Equity Act.

Government.¹²⁸ However, the failure to adopt a quota system is not in line with South Africa's commitments at the SADC level where quotas and timelines are expected of states in terms of women's participation in politics.¹²⁹

Designated employers are required to put in place an 'employment equity plan' where 'objectives to be achieved each year' are set out and the 'measures' that the designated employer intends to use.¹³⁰ In fact, the plan has to exceed a year but should be less than 5 years and during this timeframe employment equity must be achieved.¹³¹ The law has therefore put in place timeframes within which affirmative action should have taken effect, but there is no limit placed on the use of the affirmative action measures. By not placing a time limit on the use of affirmative action, the law complies with international standards that have made it clear that time limits should not be placed on the use of temporary special measures.¹³²

As part of the implementation of affirmative action, an employer is required to collect information to help establish the 'barriers' in the workplace that affect designated groups.¹³³ Municipalities must therefore collect information on issues such as 'policies, practices, procedures, and the working environment'¹³⁴ in an effort to try and make changes to enable women to participate in local government.

The law furthermore requires the retention and training of people so that they are able to carry out their work. In order to promote women's participation and as a way of ensuring that women are included in areas such as local government, potential employees could include those who have 'formal qualifications' but also extends to those who exhibit the

¹²⁸ Sec 15(3) of the Employment Equity Act. See also sec 3.1 of the White Paper on Local Government (1998). See chapter 4 sec 4.4.2.

¹²⁹ See chapter 3 sec 3.3.2(iii).

¹³⁰ Sec 20(1) & 20(2)(a) & (b) of the Employment Equity Act.

¹³¹ Sec 20(2)(e) of the Employment Equity Act.

¹³² See chapter 2 sec 2.4.4.

¹³³ Sec 19(1) of the Employment Equity Act.

¹³⁴ Sec 19(1) of the Employment Equity Act.

‘capacity to acquire within a reasonable time, the ability to do the job’.¹³⁵ Women because of the limited opportunities that they have had historically could fall in either of these groups and should therefore not be excluded simply because they do not have the requisite qualifications. As long as they show potential, then they should be considered for employment in places such as local government.

The Employment Equity Act undoubtedly promotes the inclusion of women in local government in light of the fact that women are identified as a designated group and municipalities as designated employers to whom the law is addressed. The law, however, seems to suggest that the different municipalities could each adopt a different approach on how to use affirmative action based on its unique circumstances. The law complies with South Africa’s obligations at the international level in promoting women’s participation in local government.

(ii) Promotion of Equality and Prevention of Unfair Discrimination Act of 2000

Another law that can be relied upon to promote women’s participation in local government is the Promotion of Equality and Prevention of Unfair Discrimination Act (Promotion of Equality Act).¹³⁶ This law complements the laws that are discussed that directly relate to local government and furthers objectives in laws such as the Employment Equity Act. One of the objectives in the Promotion of Equality Act is to ‘facilitate the elimination of unfair discrimination’ based on grounds such as gender.¹³⁷ Furthermore, the law seeks to ensure that South Africa complies with its international obligations and specifically mentions CEDAW.¹³⁸ Therefore equality in terms of sex is one of the important issues that the law seeks to address.

¹³⁵ Sec 19(3)(a)&(d) of the Employment Equity Act.

¹³⁶ 4 of 2000.

¹³⁷ Sec 2(c) of the Promotion of Equality Act.

¹³⁸ Secs 2(h)&3(2)(b) of the Promotion of Equality Act.

The law is applicable to local government as '[a]ll' ministers have to 'implement measures' that 'are aimed at the achievement of equality'.¹³⁹ In the process the ministers could address policy issues or practices and could also put in place plans to address inequality.¹⁴⁰ The implication is that at local government level the minister in charge can implement temporary special measures to ensure the inclusion of women. A duty is placed on the state and institutions that perform 'public functions' to 'develop progressive policies' and 'adopt viable action plans for the promotion and achievement of equality' and furthermore prioritise 'the elimination of unfair discrimination'.¹⁴¹ Public institutions such as municipalities are therefore expected to take measures aimed at ensuring equality in areas such as employment.

The law aims at ensuring that discrimination based on 'past or present unfair discrimination' is addressed. The law therefore furthers the provisions of the Constitution with particular reference to the constitutional requirement to 'protect and advance persons' who have 'been disadvantaged by unfair discrimination'¹⁴² and consequently the Promotion of Equality Act seeks to put in place 'measures at all levels to eliminate such discrimination and inequalities'.¹⁴³ Temporary special measures are therefore supported by the Promotion of Equality Act.

The Promotion of Equality Act can be used to advance equality in employment as the law has made it clear that discrimination cannot be used to deny 'access to opportunities'. Reference to 'opportunities' includes among others employment opportunities and to support the view that 'opportunities' includes employment, the Act has makes it clear that the work place is one of the places where the law applies and as such identifies 'labour and employment' as one of the places where 'barriers' should not be created to exclude 'equal access to employment opportunities'.¹⁴⁴

¹³⁹ Sec 25(4) of the Promotion of Equality Act.

¹⁴⁰ Sec 25(4)(a) & (b) of the Promotion of Equality Act.

¹⁴¹ Secs 28(3)(b)(ii),(iii) & (iv) of the Promotion of Equality Act.

¹⁴² Sec 9(2) of the Constitution of South Africa, 1996. See chapter 4 sec 4.4.1.

¹⁴³ Sec 4(2)(b) of the Promotion of Equality Act.

¹⁴⁴ Schedule 1 of the Promotion of Equality Act.

In furthering the use of temporary special measures through the Promotion of Equality Act, the law states that ‘it is not unfair discrimination to take measures designed to protect or advance categories of persons disadvantaged by unfair discrimination or members of such groups or categories of persons’.¹⁴⁵ The essence of such a provision is that groups such as women can benefit from ‘measures’ put in place and such measures could include what has been referred to as ‘affirmative action’ in the Employment Equity Act. In the event that the measures in place are being questioned in terms of their fairness, then among the questions to ask is ‘whether the discrimination has a legitimate purpose’.¹⁴⁶ In fact, asking such a question is in accordance with how the issue of temporary special measures has been defended and justified at the international level.¹⁴⁷

4.5 Uganda

4.5.1 Constitutional provisions promoting women’s political participation in local government

The Ugandan Constitution contains provisions that can be relied upon to promote women’s participation in local government. The first place where Uganda’s Constitution shows commitment to women’s participation in politics is under the national objectives and directive principles of state policy.¹⁴⁸ One of the non-justiciable Principles of State Policy that is referred to as a ‘democratic principle’ states that all people of Uganda should have ‘access to leadership positions at all levels’.¹⁴⁹ Reference to ‘all levels’ means that local government is included. The Constitution also contains a political objective whose aim is to

¹⁴⁵ Sec 14(1) of the Promotion of Equality Act.

¹⁴⁶ Secs 14(3)(f) of the Promotion of Equality Act.

¹⁴⁷ See chapter 2 sec 2.4.3.

¹⁴⁸ ‘National objectives’ are ‘aims... toward which a national policy or strategy is directed and efforts and resources of the nation are applied’. ‘National objectives’ <http://www.thefreedictionary.com/national+objectives> (accessed 29 May 2012). ‘Directive principles’ are ‘guidelines’ that need ‘to be kept in mind while framing laws and policy’. ‘Directive principles in India’ <http://encyclopedia.thefreedictionary.com/directive+principles+of+state+policy> (accessed 29 May 2012).

¹⁴⁹ Sec II(1) of the Constitution of Uganda 1995.

achieve ‘gender balance and fair representation of marginalised groups on all constitutional and other bodies’.¹⁵⁰ The ‘democratic principle’ and the political objective are in line with Uganda’s obligations especially in instruments that call for parity such as the Solemn Declaration.¹⁵¹

Another important principle is where the Constitution commits the state to ensure that individuals take part in the formulation and implementation of policies that affect them.¹⁵² As such, besides requiring equal participation of women and men, the state must ensure that women’s contribution to society is recognised.¹⁵³ One way of recognising women’s contribution could be by ensuring that they are elected and appointed to public office so that they are able to take part in the formulation and implementation of policies.

In terms of specific rights that contribute to women’s participation in local government, the Ugandan Constitution guarantees rights that are recognised in key UN and African regional instruments.¹⁵⁴ In adherence to UN and African regional standards, the Constitution recognises the use of temporary special measures when reference is made to ‘affirmative action’. The Constitution has made it clear that affirmative action can be used when marginalisation is based on, for example, gender.¹⁵⁵ In the Constitution, affirmative action is elevated to a right that women can claim if, for example, the marginalisation was as a result of ‘history, tradition or custom’.¹⁵⁶

In efforts to empower women, article 33 of the Constitution is dedicated to women’s right to ‘full and equal dignity of the person with men’.¹⁵⁷ The provision can be relied upon to advance women’s participation in local government. Requiring ‘equal dignity of the person

¹⁵⁰ Sec VI of the Constitution of Uganda.

¹⁵¹ See chapter 3 sec 3.2.1 (i).

¹⁵² Sec X of the Constitution of Uganda.

¹⁵³ Sec XV of the Constitution of Uganda.

¹⁵⁴ Sec 29(d)&(e) of the Constitution of Uganda.

¹⁵⁵ Sec 33(1) of the Constitution of Uganda.

¹⁵⁶ Sec 32(1) & 33(5) of the Constitution of Uganda.

¹⁵⁷ Sec 33(1) of the Constitution of Uganda.

with men’ is couched in language comparable to that in UN and African regional instruments which while promoting women’s participation made reference to men as an example of the extent to which women should participate.¹⁵⁸ The state is further required to accord women facilities to enable them to ‘realise their full potential and advancement’ adding that the ‘unique status and natural maternal functions’ must be taken into account.¹⁵⁹ In essence the state must create an environment conducive to women’s meaningful participation in society. The Constitution emphasises that women have ‘the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities’.¹⁶⁰ Reference to ‘equal opportunities’ may be interpreted to support advancement of parity in areas such as political life. Equal opportunity in political activities can mean that women should be equally represented in all representative offices including local government.

With specific reference to women’s participation in local government, the Constitution is categorical that at least a third of members of local government councils must be women and therefore laws may be enacted to advance affirmative action to ensure the inclusion of women.¹⁶¹ In addition, two principles can be said to further advance women’s participation in local government even though they do so in broad terms.¹⁶² The first principle requires decentralisation with the aim of ensuring that ‘peoples’ participation and democratic control in decision making’¹⁶³ takes place. The second principle requires the system of local government to ‘be such as to ensure the full realisation of democratic governance at all local government levels’.¹⁶⁴ Both these principles have a bearing on women’s participation because reference to ‘peoples’ includes women and the understanding of ‘democratic governance’ would have to mean that women’s participation is envisaged as the term ‘democratic governance’ suggests the inclusion of everyone.

¹⁵⁸ See chapter 2 sec 2.4.2.

¹⁵⁹ Sec 33(2) of the Constitution of Uganda.

¹⁶⁰ Sec 33(4) of the Constitution of Uganda.

¹⁶¹ Sec 180(2)(b) & (c) of the Constitution of Uganda.

¹⁶² Sec 176 of the Constitution of Uganda.

¹⁶³ Sec 176(2)(b) of the Constitution of Uganda.

¹⁶⁴ Sec 176(2)(c) of the Constitution of Uganda.

4.5.2 The Local Governments Act and women's political participation in local government

Uganda has numerous pieces of legislation that govern local government but for purposes of this study, the legislation relevant to women's participation in politics at local government level is the Local Governments Act.¹⁶⁵ This law has been amended a number of times and one of the reasons for amendment has been so that international standards such as those set out in the Protocol on Women can be domesticated.

In compliance with the Constitution, the Local Governments Act gives prominence to gender equality with two of the objectives of the Local Governments Act stipulating that the law seeks to promote 'democratic participation' and to also establish a 'gender-sensitive administration'.¹⁶⁶ The law re-emphasises that women must form at least one third of local government councils at the district level and in lower local councils and that at least one of the representatives of the specially represented groups, namely, the youth, the disabled and the elderly must be a woman.¹⁶⁷ The inclusion of women has been guaranteed right up to the village or parish council where women must also constitute a third of the members.¹⁶⁸ The law in Uganda has been clear on ensuring that women are represented at all levels of local government and therefore generally adheres to UN and African regional standards requiring the inclusion of women.¹⁶⁹

¹⁶⁵ Chapter 243 of 24 March 1997 as amended by Local Governments Amendment Act 2001, then also amended by Local Governments Amendment Act 2005, further amended by Local Government Amendment Act 2 of 2001 and then Local Government Amendment Act 2 of 2006. Other legislation that is related to local government includes the Local Government Finance Commission Act of 2003, Local Governments Rating Act of 2005 as amended by Local Governments Rating Amendment Act of 2006, Local Authorities Loans Fund Act 239 of 1970.

¹⁶⁶ Sec 2(b) & (c) of the Local Governments Act 1997.

¹⁶⁷ Sec 10 & 23 of the Local Governments Act 1997 as amended by secs 3 and 7 of the Local Governments Amendment Act 2005.

¹⁶⁸ Secs 47(2)(i) & (3) of the Local Governments Act 1997.

¹⁶⁹ In terms of sec 23 of Local Governments Act as amended by sec 7 of the Local Governments Amendment Act 2005, women are to be included in subcounty councils, city division councils, municipal councils, municipal division councils and town councils. In all these sectors women are to

The law is categorical about the inclusion of women in local government councils but fails to have similar guarantees with respect to executive committees. At the district level, for example, in the district executive committees women are only guaranteed one seat out of a possible seven seats.¹⁷⁰ The implication is that women's participation drops to 14 percent when it comes to leadership positions – far less than the one third that is guaranteed by the Constitution for local government councils. Attention should not have been focussed only on elected office but also on appointed office and therefore, if a quota system of a third was in place, the same quota should also have been placed on all other offices where the office holder is appointed. The fact that women are only guaranteed 14 percent suggests that offices in which the individual is appointed have less attention in terms of ensuring gender equality. The appointment of the district executive council members should also have adhered to the promotion of parity.

The promotion of equality through use of terms that are gender sensitive in adherence to trends in UN and African regional developments exists in the Local Governments Act where awareness to gender equality can be seen through the use of neutral terms such as 'chairperson' and use of both masculine and feminine terms such as 'his or her'.¹⁷¹ In all instances where executive committees that are saddled with running the day to day affairs of the lower local government are concerned, the requirement is that at least one of the three secretaries in the executive committee has to be a woman.¹⁷²

In some cases the Local Governments Act has gone to great extents to indicate instances when women have to form part of decision-making structures in local government. For example, in the administrative units existing in both rural and urban areas, offices such as

constitute at least one third of council members, one of two representatives of youths also being a woman, elderly and so is one of disabled representatives being a woman.

¹⁷⁰ Sec 16 (3) of the Local Governments Act 1997.

¹⁷¹ See eg sec 24(1)(c) of the Local Governments Act 1997.

¹⁷² Sec 25(3) of the Local Governments Act 1997 as amended by sec 8 of the Local Governments Amendment Act 2005.

security, finance, production and environmental protection have been established.¹⁷³ However, the only office which is to be guaranteed for women is the office of public health coordinator.¹⁷⁴ Setting aside this office for women seems to suggest that in as much as the law was trying to advance gender equality, it has also kept alive the prejudiced approach of appointing women to offices dealing with 'social' issues, thereby reinforcing gender stereotypes.¹⁷⁵ The requirement of only guaranteeing offices dealing with 'social' issues may also not be in line with the country's commitments at UN and African regional level that require elimination of discrimination based on gender.

In some cases the Local Governments Act has adhered to the need to include women in appointments and, for instance, through the district service commissions, whose functions includes confirming appointments of office holders, the Local Governments Act stipulates that at least one third of the members of these commissions must be women.¹⁷⁶

In terms of appointment to different bodies, gender balance is not set out as a requirement that must be fulfilled.¹⁷⁷ There is no requirement that women should be given special consideration for appointment.¹⁷⁸ The Local Governments Act has gone further to recognise chiefs and the possibility that they could be women or men but no indication is given in terms of how they are appointed.¹⁷⁹

¹⁷³ Sec 45 of Local Governments Act 243 of 24 March 1997 as amended by the Local Governments Amendment Act 2005.

¹⁷⁴ Secs 47(2)(i)&(3) of the Local Governments Act 1997.

¹⁷⁵ C Morna-Lowe 'From rhetoric to reality: Governance and gender equity' in M Ndulo (ed) *Democratic reform in Africa: Its impact on governance and poverty alleviation* 150 167.

¹⁷⁶ Secs 54(2)(a) of Local Governments Act 1997 as amended by sec 13 of the Local Governments Amendment Act 2005.

¹⁷⁷ For eg the secretariat to the district, clerk, chief administrative officer, town clerk all do not require that gender balance be considered when appointments are made. See secs 60-65 of Local Governments Act 1997.

¹⁷⁸ As above.

¹⁷⁹ Sec 69 of the Local Governments Act 1997.

Special measures are in place to ensure election of women to local councils. In order to ensure that women are elected to lower local government councils, the Act provides that the Electoral Commission may join more than one lower local government unit.¹⁸⁰ In essence a special measure is instituted in which case a geographical area is enlarged if necessary in order to ensure that women are elected. Even though temporary special measures exist to ensure women's inclusion during the nomination of candidates for local government councils there is no indication that gender equality must be observed at this level.¹⁸¹ No support is accorded to women candidates and all candidates are to be treated equally during election campaigns.¹⁸²

4.6 Conclusion

Based on the foregoing analysis, it is clear that the principles of equality and non-discrimination have been domesticated in the Constitutions of Lesotho, Rwanda, South Africa and Uganda. These principles can be relied upon to promote equal participation of women in local government in these states. The principles of equality and non-discrimination are domesticated in fulfilment of commitments that these states have made at the international level.

Besides the general provisions on equality and non-discrimination, the Constitutions contain provisions that specifically address the issue of political participation and the right is stated in general terms such that it is capable of being interpreted to include women. In the cases of Rwanda and Uganda the Constitutions are categorical about the minimum extent to which women should participate in local government.¹⁸³ While in Lesotho and South Africa, the Constitutions do not categorically mention the extent to which women should participate, interpretation of the Constitutions certainly allows for women to be included in local government.

¹⁸⁰ Sec 110 of the Local Governments Act 1997.

¹⁸¹ Sec 119 of the Local Governments Act 1997.

¹⁸² Secs 122(7) & 123(1) of the Local Governments Act 1997.

¹⁸³ See chapter 4 sec 4.3.1 above.

In addition to the constitutional provision, all the four states have legislation that advances women's participation in local government. In all the four states, provisions on temporary special measures have been domesticated and these are to be utilised in order to ensure women's inclusion in local government. However, the extent to which and clarity with which the laws provide for temporary special measures differ from state to state. In Rwanda and Uganda, temporary special measures such as quotas are set out clearly in constitutional provisions and further strengthened by other legislation, while in Lesotho and South Africa the use of temporary special measures for purposes of women's inclusion in local government is set out primarily in legislation.

Due to the different approaches in domesticating international standards, especially on the use of temporary special measures, the four states have developed divergent approaches in their efforts to include women in local government. The question therefore arises as to how in reality the four states are actually implementing these provisions and whether the different approaches have yielded the desired result for women to participate in local government. This is the key question that the next chapter will seek to address.

Even though the laws in Lesotho, Rwanda, South Africa and Uganda do not, in all cases, specifically state that records of disaggregated and comparative data must be maintained, it seems obvious that records must be maintained in order to prove the outcome of using temporary special measures. The records would also be necessary for purposes of enabling the four states to fulfil their reporting obligations as such should contain relevant data. It would be an anomaly that these states expect temporary special measures to be used while no records are maintained to show the extent to which these temporary special measures are achieving the desired goals.

CHAPTER 5: BEYOND THE THEORETICAL REALM: EXAMINING THE EXTENT THAT STATE OBLIGATIONS RELATED TO WOMEN'S POLITICAL PARTICIPATION IN LOCAL GOVERNMENT ARE IMPLEMENTED IN LESOTHO, RWANDA, SOUTH AFRICA AND UGANDA

- 5.1 Introduction
- 5.2 Temporary special measures and women's participation in local government
 - 5.2.1 The use of quotas for purposes of including women in local government
 - 5.2.2 Preferential resource allocation to favour women
 - 5.2.3 Preferential targeting of women during recruitment
 - 5.2.4 Reporting on goals and timetables
 - (i) Status of reporting at the UN level
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- 5.3 The extent of women's political participation in local government
 - 5.3.1 Women leaders in Lesotho's local government
 - 5.3.2 Women leaders in Rwanda's local government
 - 5.3.3 Women leaders in South Africa's local government
 - 5.3.4 Women leaders in Uganda's local government
- 5.4 Conclusion

5.1 Introduction

In chapters 2 and 3 the analysis of international normative frameworks revealed that temporary special measures are increasingly recognised and an obligation is placed on states to rely on them.¹ While in chapters 2 and 3 obligations are placed on states, in this section of the study I examine details of their actual application by states. The main objective in this chapter is to establish the extent to which the theoretical commitments to women's political participation in local government made at the international and domestic levels are given effect. This chapter is both descriptive and analytical.

¹ See chapter 2 sec 2.7.2 & chapter 3 sec 3.4.2.

The focus is on two main issues in this chapter, namely, (i) examination of temporary special measures that can give effect to women's political participation in local government and the extent to which these measures are applied in the four states under study, and, (ii) examining comparative and disaggregated data on women's political participation in local government with a view to establishing whether these states are adhering to their commitments made at the international level.

5.2 Temporary special measures and women's participation in local government

Temporary special measures recognised for having 'corrective, compensatory and promotional'² elements form an integral part of efforts to increase women's political participation. In this section of the study I examine whether the four main types of temporary special measures, namely, (1) quotas, (2) preferential resource allocation in favour of women, (3) according preference to women, and (4) reporting on goals and timetables³ are domesticated in the four states and the extent to which they are relied upon in Lesotho, Rwanda, South Africa and Uganda for purposes of promoting women's political participation in local government.

My analysis departs with full awareness that in addition to the four temporary special measures set out above, Lesotho, Rwanda, South Africa and Uganda can develop and implement other — perhaps more innovative — temporary special measures to meet the specific needs of their societies. Furthermore, the efficacy of the four main temporary measures differs. For instance, the implementation of quotas is considered

² See chapter 2 sec 2.4.4.

³ F Raday 'Systematizing the application of different types of temporary special measures under article 4 of CEDAW' in I Boerefijn *et al* (eds) *Temporary special measures: Accelerating de facto equality of women under Article 4 (1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (2003) 35 38 40 41 & 43. Raday in fact identified these 4 categories of temporary special measures and these would also fall broadly within CEDAW's General Recommendation 23.

the most 'interventionist' while reporting on goals and timetable is regarded as the least 'interventionist'.⁴

5.2.1 The use of quotas for purposes of including women in local government

In promoting women's political participation in local government the most common temporary special measure used in the four states is the quota system in which numerical goals are usually stipulated.⁵ All the four states have committed themselves at the international level to use quotas and have subsequently domesticated the international principles in their constitutions or other legal measures.⁶ Quotas are either used voluntarily or through legislative fiat. Lesotho, Rwanda and Uganda have imposed quotas through constitutional or other legal provisions while South African law only encourages voluntary party based quotas.⁷

In principle the quota system requires reservation of positions for exclusive occupation by women in a bid to promote women's participation. The actual percentage of reserved seats may be such that they seek to attain a 'critical mass'.⁸ In Lesotho,⁹ Rwanda¹⁰ and Uganda,¹¹ the focus of the law has been to attain a critical

⁴ F Raday (2003) 38.

⁵ See generally chapter 4.

⁶ See generally chapters 2, 3 & 4.

⁷ See chapter 2 secs 2.2.1, 2.2.2, 3.1, 3.2, 4.2, 5.1 & 5.2.

⁸ The 'critical mass' theory assumes that women once they constitute a certain percentage will have a united sense of purpose and therefore impact on decision-making. W Stokes *Women in contemporary politics* (2005) 23-24. See also Inter Parliamentary Union 'The participation of women and men in decision-making: The parliamentary dimension' <http://www.un.org/womenwatch/daw/egm/eql-men/docs/BP.2%20Background%20Paper%20IPU.pdf> (accessed 2 July 2012) 4.

⁹ See chapter 2 secs 2.2.1 & 2.2.2.

¹⁰ 'Global database of quotas for women: Rwanda' <http://www.quotaproject.org/displayCountry.cfm?CountryCode=RW> (accessed 8 October 2012). Rwanda set a 30% quota for women to participate in decision-making bodies including the legislature and local government.

¹¹ See chapter 2 sec 5.1.

mass of 30 percent which is considered as the point at which women can start to influence decision-making.¹² However, as Stokes had noted on the subject of ‘critical mass’, ‘it implies a degree of certainty in an otherwise very uncertain field; but the fact of the matter is that we do not know when a tilt will become decisive’.¹³

While quotas may be important for purposes of promoting women’s participation, their use must be contextualised in terms of the differences that may exist among women and as such should endeavour to represent these differences existing among women.¹⁴ Local government laws in the four states do not focus on the need for a balance to be struck so that women from all walks of life are represented. No indication exists that in any of the four states the different interests among women are seriously and consistently considered when implementing quota systems in those instances when they are used. Focus is instead primarily on ensuring inclusion of women as a homogenous group and proving that certain percentages are attained.

The fact that in some cases quotas are by legislative fiat is a crucial indicator that generally a degree of legal backing is necessary if women are to be included on a larger scale. Voluntary quotas may not always prove successful even though in the case of South Africa, where a voluntary quota system is used, overall women account

¹² D Dahlerup ‘Do women represent women? Rethinking the “critical mass” theory’ (2006) 2 *Politics and Gender* 494-495.

¹³ Stokes (2005) 24. See also HE Britton *Women in the South African parliament: From resistance to governance* (2005) Kindle Electronic Edition, Location 2048. Britton for instance points out that ‘critical-mass studies do not explain why women are often unable to change much even when their numbers surpass the threshold’.

¹⁴ JW Scott ‘La querelle des femmes in the last twentieth century’ (1997) *New Left Review* 226. See also JS Jaquette ‘Regional differences and contrasting views’ (2001) 12 *Journal of Democracy* 111 120. Jaquette notes that ‘as more women become more involved in electoral politics, there is less chance of agreement among them on core issues. Their differences do not divide easily along left-right continuum, or between those who are feminists and those who are not. Increasingly, feminists themselves disagree on how to define women’s goals’. See also G Geisler *Women and the remaking of politics in Southern Africa: Negotiating autonomy, incorporation and representation* (2004) 17.

for 39 percent of all elected councillors.¹⁵ The percentage is not far behind Lesotho's 49.1 percent, Rwanda's 40.6 percent and Uganda's 47.4 percent.¹⁶ However, in the absence of binding legislation to use a quota, the high inclusion of women cannot be guaranteed in South Africa. At the moment the ruling party, the African National Congress (ANC), is committed to inclusion of women based on its own party policy and this partly accounts for the high inclusion of women in local government.¹⁷ The high levels of including women cannot be guaranteed if a different political party were to assume power because the inclusion is currently done on an *ad hoc* basis without legal backing to compel parties to ensure inclusion of women.¹⁸

Despite criticisms that exist, quotas especially when backed by the law have proved an effective measure of ensuring inclusion of women. The quotas are easier to monitor especially when comparative and disaggregated data is provided. In all the four states, quotas have made a major contribution to the inclusion of women in politics including at the local government level.

5.2.2 Preferential allocation of resources to favour women

The second category of temporary special measures is preferential allocation of resources to favour women. This temporary special measure can be used in conjunction with other measures in order to ensure that women are included in areas such as local government. However, the biggest challenge to the implementation of

¹⁵ See chapter 5 sec 5.3.3 (table 3).

¹⁶ See chapter 5 secs 5.3.1, 5.3.2 & 5.3.4 (tables 1, 2 & 4).

¹⁷ In the case of South Africa it does not have a formalised quota system and representation of women is largely due to party internal policy rather than a requirement by law. Even at local government level where there is an appeal on 50% representation of women, the law states in terms of Local Government Municipal Structures Act 117 of 1998, Schedule 1, Sec 11(3) that '[e]very party must seek to ensure that fifty per cent of the candidates on the party lists are women and that women and men candidates are evenly distributed through the list'. My interpretation here is that the language used in the law is not obligatory but rather advisory.

¹⁸ D Dahlerup & L Freidenvall 'Quotas as a 'fast track' to equal representation of women' (2005) 7 *International Feminist Journal of Politics* 26 34.

this measure in all four states is keeping proper track of its impact. The main obstacle to tracking its efficacy is lack of qualified personnel to monitor and advise on how to best use this temporary special measure. The lack of adequate information on this measure means that the extent of its usage in all four states remains unclear. However, one of the methods of preferential resource allocation that has been used in at least Rwanda, South Africa and Uganda is gender responsive budgeting.

The importance of budgets and how they are crafted can determine whether women's rights are realised. For example, Budlender is of the view that '[h]owever perfect the policy ... it is ultimately the budget which determines what government does and its effect — or lack of it — on each and every citizen'.¹⁹ Using gender responsive budgeting (GRB) is challenging with possible pitfalls of under-budgeting or failing to consider GRB altogether as it is complicated, lengthy, requiring expertise and input from various parties. In general gender budgeting is challenging especially due to 'capacity constraints'.²⁰ To achieve its goal, it must be accurate so that if resources are allocated, they are adequate and can be properly utilised.²¹ Through GRB, governments are required to ensure that the whole budgeting process, whether at the national, provincial or local government level, establishes how expenditure can affect women's lives.²² Budlender advocates for 'performance-oriented' budgets.²³ Through

¹⁹ D Budlender, 'South Africa: The women's budget' <http://www.africafiles.org/article.asp?ID=3865> (accessed October 2009).

²⁰ N Holvoet & L Inberg 'Integrating gender-responsive budgeting into the aid effectiveness agenda: Mozambique country report' <http://www.gender-budgets.org/> (accessed 8 October 2012) 7. See also N Tanzam 'Integrating gender-responsive budgeting into the aid effectiveness agenda: Uganda country study' <http://www.gender-budgets.org/> (accessed 8 October 2009) 21.

²¹ See D Budlender *Budgeting to fulfil gender and human rights commitments* (2004) <http://www.gender-budgets.org> (accessed 8 October 2009) 11.

²² Budlender 'South Africa: The women's budget'. See generally D Budlender 'The political economy of women's budgets in the south' <http://www.gender-budgets.org/> (accessed 8 October 2012). See also D Budlender 'Women's budget initiative' <http://www.gender-budgets.org/> (accessed 8 October 2012).

²³ Budlender (2004) 11.

such budgets, reports are made on the work done and information is provided on programmes undertaken, targets and indicators which were set and whether work carried out previously attained the desired target.²⁴ The GRB process is therefore very demanding and quite technical in nature.

While GRB has been adopted to varying extents in Lesotho, Rwanda, South Africa and Uganda its exact use in relation to local government remains unclear. Rwanda and Uganda have been identified as some of the states that have taken the issue of gender budgeting seriously despite drawbacks such as insufficient human resources.²⁵ In South Africa GRB has reportedly 'lost momentum' even though in the 1990s South Africa was increasingly becoming a world leader in the use of GRB.²⁶

The multi-faceted challenges posed by GRB inevitably affect the realisation of women's rights as revealed in a study conducted on Rwanda.²⁷ First, women's perspectives and interests may not be adequately represented when budgets are prepared.²⁸ Even though NGOs representing women's rights such as those promoting political participation may be involved in the budgeting process their input is limited due to lack of expertise on issues of GRB.²⁹ Second, a disconnect between elite women

²⁴ As above.

²⁵ J Muteshi & T Tizazu 'Integrating gender-responsive budgeting into the aid effectiveness agenda: Ethiopia' <http://www.gender-budgets.org/> (accessed 8 October 2012) 18.

²⁶ Financial and Fiscal Commission 'Chapter 10: Assessing gender responsive budgeting in local government' in *Technical reports chapters: 2013/14 Technical report* 301. The Financial and Fiscal Commission is a South African constitutionally established body that provides information to organs of state, for eg parliament and the executive.

²⁷ D Budlender 'Integrating gender-responsive budgeting into the aid effectiveness agenda: Ten-country overview report' <http://www.gender-budgets.org/> (accessed 8 October 2009) 8.

²⁸ MA Ibraimo 'The gender dimension of Mozambique's budget: An assessment report' (2003) <http://www.gender-budgets.org/contents/view/459/148/> (accessed 8 October 2012) 11 7 13. Ibraimo argues that aggregation of employees by sex lacks in budgets and therefore it is not possible to get a proper perspective in terms of the positions that women occupy. In fact in most cases they occupy low ranks in 'technical or auxiliary tasks, even though they had the same qualifications as men to undertake managerial and leadership roles'.

²⁹ Budlender (2004) 26, 27-29.

and marginalised women may result in inadequate articulation and representation of women's position. For example, women in rural settings may have different needs that may not be adequately catered for in the budget. Third, the failure to provide data on women within the budgets results in inadequate planning and implementation of state policies and the local government arena would not be an exception in this regard. Proper GRB would require provision of adequate and accurate data. A fourth challenge posed by GRB even in relation to women's political participation in local government is lack of comparative data to show how expenditure in relation to male dominated activities such as politics compares to expenditure on women. All these matters do not seem to be well catered for in all the four states.

The complex nature of GRB means that even states such as Rwanda that show high levels of women's participation in politics, do not necessarily have sufficient numbers of skilled people to implement GRB resulting in 'gaps between policy and implementation practices'.³⁰ All policy and legal commitments to include women in local government may be frustrated due to lack of skills. In the case of Rwanda,³¹

[i]n terms of gender planning, there is a very serious lack of gender awareness and skills in the domain of gender analysis, planning and budgeting among the technicians and policy makers at central and local government level. To date it is only the gender focal points that have received basic gender awareness sensitization, while the rest of the staff have not.

The challenges in Rwanda are illustrative of what happens even when a state may be willing to consider using GRB. Despite efforts to carry out GRB training for officials responsible for the budget making process, a skills shortage is still experienced even though Rwanda's budget planning process involves an array of participants who include the government, donors, civil society organisations (CSOs) and the private

³⁰ J Mutamba & C Mbayiha 'Integrating gender-responsive budgeting into the aid effectiveness agenda: Rwanda country report' <http://www.gender-budgets.org/> (accessed 8 October 2012) 5.

³¹ Mutamba & Mbayiha 20.

sector.³² In Rwanda's case the CSOs are weak and ill-equipped to deal with issues of gender and budgeting.³³ What then happens in a case such as Rwanda is the exclusion of a key player that could advocate for support and prioritisation of women during the budgeting process. The end result is that the responsibility for budgeting is left to bureaucrats and the goodwill of politicians to decide on allocations such as those related to advancing women's participation in politics.

In Uganda's case, commitment to the use of GRB has not been a guarantee that GRB is effective.³⁴ In Uganda the GRB process reportedly extends to local government with the CSOs involved raising gender related matters during the budget making process, including, that of women's participation in politics.³⁵ Besides raising issues of concern to women, efforts have been made to simplify the budget process so that ordinary people can understand the entire GRB process.³⁶ The main challenge in Uganda has been identified as a lack of sufficient resources.³⁷ The exact extent of GRB usage to ensure women's political participation in local government could not be established.

³² Mutamba & Mbayiha 24, 26 & 32. Mutamba and Mbayiha are of the view that '[t]here is an acute shortage of gender expertise necessary for gender analysis, planning and budgeting. This is a serious constraint that runs across all institutions. More specifically, not only is the 'supply side' of the knowledge in gender budgeting and planning very limited (although improving) but links between these sources of new knowledge and the end or potential users (e.g. planning officers at District or National level, gender advocates) are often very weak, hence there is an urgent need to develop necessary capacities'.

³³ Mutamba & Mbayiha 24-25. Mutamba and Mbayiha noted that '[t]he role of civil society organizations in the budgeting process is still limited as far as issues like gender budgeting are concerned. In general civil society organizations play an advocacy role in their respective sectors but they are seriously constrained as far as having the capacity to advocate for gender issues is concerned. They are also constrained by lack of planning and budgeting skills in general and gender planning and budgeting in particular and monitoring and evaluation of progress'.

³⁴ N Tanzarn 'Integrating gender-responsive budgeting into the aid effectiveness agenda: Uganda country study' <http://www.gender-budgets.org/> (accessed 8 October 2012) viii.

³⁵ Tanzarn 8, 10,11, 20 & 21.

³⁶ Tanzarn 11.

³⁷ Tanzarn viii.

The use of preferential resource allocation through measures such as GRB can play a vital role in the realization of women's political rights in local government. However, Rwanda, South Africa and Uganda which are using GRB, have not provided clear records on the extent to which this prominent method is used for purposes of ensuring women's political participation within local government.

5.2.3 Preferential targeting of women during recruitment

Preferential treatment or targeting of women differs from quotas because in respect of quotas, numerical goals are set which must be attained. The quotas may be put in place voluntarily or they may be imposed by law. In preferential treatment, overall numerical goals are not set and instead individual candidates are targeted. Preferences themselves may be in two forms, they may either be *weak* or *strong*.³⁸ Using the *weak* system of preferential targeting or treatment, a female candidate needs little or no support in order to be appointed because she is as well qualified as her male competitors.³⁹ Using the *strong* form, the female candidate may not be as well qualified as her male competitors and therefore requires greater support by the appointing authority in order for her to be appointed.⁴⁰

The preferential targeting of women can take the form of selecting or appointing women candidates instead of men candidates when appointments are being made.⁴¹ Preferential targeting can be used to increase the number of women in positions of authority in places such as local government especially where officials are appointed or indirectly elected. It is possible that the practice is used by all four states in appointments or indirect elections but the exact extent of its usage remains unknown in all four states. In the absence of publicly accessible records on discussions of appointments it is difficult to confirm the exact extent of its usage.

³⁸ Raday (2003) 41.

³⁹ L Kytola 'Integrating gender-responsive budgeting into the aid effectiveness agenda: Tanzania country report' <http://www.gender-budgets.org/> (accessed 8 October 2012) 7.

⁴⁰ As above.

⁴¹ Raday (2003) 41-43.

An assumption can be made that the *strong* preference may be used when recruitment of local government officials takes place. In such appointments emphasis on specialised education and relevant experience could result in exclusion of women who in most cases have not had access to education to the same extent as men. Lesotho is an exception in this regard as women in that country have had greater access to education than men.⁴²

Both the *weak* or *strong* preferences are in all likelihood used during local government elections, however, the extent of their usage is not known as no records are maintained with this information. The preferences may be used by political parties to increase women's presence in local government through allocating them to compete for 'safe seats' in first-past-the-post (FPTP) elections.⁴³ Unfortunately, in the absence of publicly available records only assumptions can be made that preferences are used as a temporary special measure for the purpose of increasing women's presence. No information exists of the ruling political parties in Lesotho, Rwanda, South Africa or Uganda using preferences.

The absence of publicly accessible records in Lesotho, Rwanda, South Africa or Uganda means that it is difficult to ascertain the extent to which preferential treatment is used when women are appointed. In all the four states, the information related to interviews during the hiring process of local government officials is not accessible to the public and no data is kept showing the extent to which preferential treatment is used. Only an assumption can be made that in some cases when women are appointed preferential treatment is utilised. In light of the fact that all these four states have committed themselves to ensuring gender equality at the local government level, a conclusion can be drawn that preferences are in fact used when

⁴² According to UNESCO, literacy rates in 2010 stood at 95.6% for women as compared to 83.3% for men. UNESCO Institute for Statistics 'General profile: Lesotho' http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=124&IF_Language=eng&BR_Country=4260&BR_Region=40540 (accessed 28 August 2012).

⁴³ See eg MY Yoon 'Explaining women's legislative representation in Sub-Saharan Africa' (2004) 29 *Legislative Studies Quarterly* 447 457.

recruitment of local government officials takes place even though its exact extent remains unclear.

5.2.4 Reporting on goals and timetables

Reporting on goals and timetables is a temporary special measure even though its contribution is substantially different from the other temporary special measures and is therefore considered the least ‘interventionist’ and only ‘a minimalist form of intervention’.⁴⁴ On its own, it cannot guarantee increased participation of women but instead helps to highlight the extent of women’s participation through provision of updates on the goals and timetables that a state has committed itself to uphold for purposes of women’s inclusion.

What reporting on goals and timetables does is to create awareness about the extent of women’s participation. Where women are insufficiently represented, states may then take appropriate action to correct their shortcomings. Without providing reports on goals and timetables, states and other players would be unable to know whether a state is adhering to its commitments in, for example, political participation. The information provided by state reports helps to illustrate and explain whether goals that are set and the timetables in place are being realised. Reporting on goals and timetables has an additional contribution of helping to bolster the other three temporary special measures by showing the extent to which these are applied and their effect. Accordingly, reporting on goals and timetables as is the case with other temporary special measures should be maintained until such time that women’s participation can be guaranteed even in the absence of reporting.

Reporting on goals and timetables in the area of women’s political participation within local government can be on at least three levels. The first level is where reports are made to UN bodies usually in the light of treaty undertakings. The second level is when reports are submitted to African regional or sub-regional bodies. At the third

⁴⁴ Raday (2003) 38 & 43.

level the responsible ministry (for instance local government) or other public organ avails information and reports to both the general public and other institutions within the state. At all these three levels the reports should contain comparative and disaggregated data on women's participation in local government. Reporting under the first and second levels is in my view very important as observations made by treaty bodies may lead to increased accountability by states.

(i) Status of reporting at the UN level⁴⁵

In terms of submitting reports before UN treaty bodies, three of the four states have submitted reports in terms of their treaty obligations under the ICCPR. Lesotho has only submitted one report since becoming a party to the ICCPR, its second report has been due for more than 10 years.⁴⁶ Lesotho's only report did not contain information on women's political participation within local government but since its submission in 1998 many changes have taken place in the local government sphere.⁴⁷ Lesotho is therefore failing to fulfil its reporting obligations. Uganda too has only submitted one state report.⁴⁸ Uganda's initial report contained little data on women's political participation in local government and no information on goals and timetables is provided.⁴⁹ Rwanda is the only state to have submitted all its state reports.⁵⁰ Rwanda's most recent report provides limited data on women's political participation within local government.⁵¹ South Africa is yet to submit a report under the ICCPR even though the initial state report has been due since 2000.⁵² Overall the four states are not performing optimally both in terms of reporting timely and providing information

⁴⁵ See chapter 2 secs 2.4.3 & 2.6.

⁴⁶ 'Reporting status to human rights treaty bodies' (5 June 2012) <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 21 August 2012).

⁴⁷ See 'Lesotho: Initial report of states parties due in 1993' CCPR/C/81/Add.14 (16 October 1998)

⁴⁸ 'Reporting status to human rights treaty bodies' (5 June 2012). Uganda's second report has been due since 2008.

⁴⁹ 'Initial report: Uganda' CCPR/C/UGA/2003/1 (25 February 2003) paras 81 & 94.

⁵⁰ 'Reporting status to human rights treaty bodies' (5 June 2012).

⁵¹ 'Third periodic report' CCPR/C/RWA/3 (27 November 2007) para 142.

⁵² 'Reporting status to human rights treaty bodies' (5 June 2012).

on women's political participation in local government and also setting out their goals and timetables for ensuring equal participation of women in local government. In the cases of Lesotho, Rwanda and Uganda, the HRC in its concluding observations on the reports submitted has raised concerns about delays in submission of state reports but not about the absence of information about goals and timetables on women's political participation at local government level.⁵³

In terms of reporting before the CEDAW Committee, the track record of the four states is also not very good. The frequency of reporting and content on women's political participation in local government leaves much to be desired. Lesotho's first report was a combination of four overdue reports.⁵⁴ In terms of content, very little information was provided on women's political participation in local government with the report only stating that women constituted 52.8 percent of community councillors.⁵⁵ Provisions of disaggregated data and further analysis of such information was clearly lacking in the report. The report failed to provide any goals and timetables. The CEDAW Committee in its concluding observations on this report commended Lesotho for its use of temporary special measures but was at the same time critical of the delays in submitting state reports.⁵⁶ The criticism of Lesotho in terms of delayed reporting was also levelled against Rwanda where its third report was a combination

⁵³ 'Concluding observations of the HRC: Lesotho' UN Doc CCPR/C/79/Add.106 (8 April 1999) para 2, Lesotho had taken more than 5 years to submit a report and HRC expressed concern about this delay. See also 'Concluding observations of the HRC: Uganda' UN Doc CCPR/CO/80/UGA (4 May 2004) para 2, the HRC in fact was concerned that Uganda had taken more than 7 years to submit a state report. See also 'Concluding observations of the HRC: Rwanda' UN Doc CCPR/C/RWA/CO/3 (7 May 2009).

⁵⁴ 'Reporting status to human rights treaty bodies' (5 June 2012).

⁵⁵ 'Combined initial to fourth periodic reports of states parties: Lesotho' CEDAW/C/LSO/1-4 paras 31, 75, 118, 221 & 255.

⁵⁶ 'Concluding observations of the CEDAW Committee: Lesotho' CEDAW/C/LSO/CO/1-4 (21 October 2011) paras 2 & 18.

of three overdue reports.⁵⁷ The report relied on outdated data dating back to 2001 even though the report was only submitted to the CEDAW Committee in 2007.⁵⁸ In its concluding observations the CEDAW Committee noted with specific reference to local government that women were not well represented and that the state needed to rely on temporary special measures to correct this imbalance.⁵⁹ Even though the data relied upon by the HRC dated as far back as 2001, the under-representation of women particularly in senior positions at local government was still quite low and this situation largely persists.⁶⁰

South Africa's report provided minimal disaggregated and comparative data on women's political participation in local government mentioning only the number of women councillors and municipal managers and failing to provide information on all other local government positions.⁶¹ The South African report covered the period between 2001 and 2009 but the statistics relied upon dated to the 2005 local government elections and failed to take into account changes that may have taken place as a result of staff turnover within local government.⁶² Uganda's state report covered four reporting periods and provided disaggregated and comparative data on women's political participation in local government but the information was incomplete with blank sections in the table illustrating the extent of women's political

⁵⁷ 'Combined fourth, fifth and sixth periodic reports of states parties: Rwanda' CEDAW/C/RWA/6 (19 December 2007). See also 'Concluding observations of the CEDAW Committee: Rwanda' CEDAW/C/RWA/CO/6 (10 February 2009) para 2.

⁵⁸ 'Combined fourth, fifth and sixth periodic reports of states parties: Rwanda (19 December 2007) para 102.

⁵⁹ 'Concluding observations of the CEDAW Committee: Rwanda' (10 February 2009) paras 29 & 30.

⁶⁰ See chapter 5 sec 5.3.2 (table 2).

⁶¹ 'Combined second, third and fourth periodic reports of states parties: South Africa' CEDAW/C/ZAF/2-4 (24 March 2010) 7, 71, 72 & 74.

⁶² 'Combined second, third and fourth periodic reports of states parties: South Africa' (24 March 2010) 2 & 72.

participation in local government.⁶³ The CEDAW Committee's concluding observations on the two states was quite similar with concerns being expressed about the low levels of women's political participation within local government and a request being made that not only should temporary measures be utilised to address the problem but that such measures should be carefully monitored and feedback provided to the CEDAW Committee in the next state report that each state provided.⁶⁴ The request for the measures to be monitored was in essence an endorsement of reporting on goals and timetables.

Regarding reports under the UPR, all the four states have submitted reports that have subsequently been reviewed,⁶⁵ but the reports have similar shortcomings to those identified in reports submitted under the ICCPR and CEDAW. The reports lack detailed information on women's participation in local government. Lesotho's report provides a single percentage on women's political participation in local government.⁶⁶ Rwanda's report does not provide any specific data and only states the constitutional requirement for women to be included in 'all decision making organs'.⁶⁷ Both South Africa and Uganda's reports do not mention the subject of women's political participation in local government.⁶⁸ All the reports do not give an indication of goals

⁶³ 'Combined fourth, fifth, sixth and seventh periodic report of states parties – Uganda' CEDAW/C/UGA/7 (25 May 2009) 7, 71, 72 & 74.

⁶⁴ 'Concluding observations of the CEDAW Committee: South Africa' CEDAW/C/ZAF/CO/4 (4 February 2011) paras 29 & 30. See also 'Concluding observations of the CEDAW Committee: Uganda' CEDAW/C/UGA/CO/7 (22 October 2010) paras 2, 29 & 30.

⁶⁵ 'Calendar of reviews for 1st^t cycle' <http://www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf> (accessed on 22 August 2012). See also 'Calendar of reviews for the 2nd cycle' <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (accessed 22 August 2012).

⁶⁶ 'National report submitted in accordance with paragraph 15(a) of annex to Human Rights Council resolution 5/1: Lesotho' A/HRC/WG.6/8/LSO/1 (22 February 2010) 16.

⁶⁷ 'National report submitted in accordance with paragraph 15(a) of annex to Human Rights Council resolution 5/1: Rwanda' A/HRC/WG.6/10/RWA/1 (8 November 2010) 15.

⁶⁸ 'South Africa's country report to the Human Rights Council's Universal Peer Review Mechanism' (15 April 2008) http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/A_HRC_WG6_1_ZAF_1_E.pdf (accessed 22 August 2012). See also 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution

and timetables related to women's political participation in local government. In terms of the reviews provided through the UPR system, there has been inconsistency in how the state reports of the four countries have been reviewed as far as women's political participation in local government is concerned.⁶⁹ Lesotho, Rwanda and Uganda have been commended for inclusion of women in local government but advised to take further action while in South Africa's case the issue is not raised even though the levels of women's inclusion are comparable to those of Lesotho, Rwanda and South Africa.⁷⁰

In conclusion, therefore, reporting on goals and timetables is not taking place at the UN level as states submit reports that do not give adequate details on women's political participation within local government. The reports are in many cases not submitted on time and when they are eventually submitted the information that is supplied does not reflect the reality in the state parties as dated information is relied upon especially in the data that is supplied.

(ii) Status of reporting at African regional and sub-regional level⁷¹

At the African regional level, all four states submit reports to a number of bodies in terms of their undertakings. The reporting status at the African regional level reveals shortcomings such as those identified at the UN level. The shortcomings include failure to report on time, providing insufficient data and failing to provide goals and timetables aimed at ensuring equal political participation of women in local government. At the African regional level, the states have reported to the African Commission, AU Commission, and under the APRM. None of the four states has

16/21 – South Africa' A/HRC/WG.6/13/ZAF/1 (7 March 2012). See also 'National report submitted in accordance with paragraph 15(a) of the annex to the Human Rights Council resolution 5/1' A/HRC/WG.6/12/UGA/1 (22 July 2011).

⁶⁹ See chapter 2 sec 2.6.

⁷⁰ As above.

⁷¹ See chapter 3 secs 3.2.1(ii) & 3.2.2(i).

reported on the Protocol on Women even though they are all required to submit reports under the Protocol on Women.⁷²

The reports of Lesotho and South Africa under the African Charter have not contained information on women's political participation in local government.⁷³ In the case of South Africa, the African Commission in its concluding observations remarked that the state report contained outdated statistics.⁷⁴ Rwanda's report on the other hand contained selectively cited information with only one local government position (women as vice-mayors in charge of social affairs) where women constituted 90 percent of office holders being mentioned.⁷⁵ The Rwanda report failed to highlight the low representation of women in other positions, such as, vice-mayor position (economic affairs) or district administrative secretaries where presently women account for only 19.4 and 6.5 percent, respectively. However, the African Commission commended Rwanda for the high levels of women's representation 'at all levels of state institutions'.⁷⁶ Besides supplying insufficient information, Lesotho, Rwanda and South Africa have outstanding state reports and are therefore not complying with

⁷² Art 26(1) of the Women's Protocol.

⁷³ 'Initial report on the implementation of the African Charter on Human and People's Rights: To the African Commission on Human and People's Rights, in terms of Article 62' http://www.achpr.org/files/sessions/31st/state-reports/1st-1991-2000/achpr31_staterep_lesotho_2002_eng.pdf (accessed 20 August 2012) para 1.12. See also 'Republic of South Africa: First periodic report on the African Charter on Human and Peoples' Rights: 2001' http://www.achpr.org/files/sessions/38th/state-reports/1st-1994-2001/staterep1_southafrica_2001_eng.pdf (accessed 20 August 2012).

⁷⁴ 'Concluding observations and recommendations on the first periodic report of the Republic of South Africa' http://www.chr.up.ac.za/images/files/documents/ahrdd/southafrica/southafrica_concluding_observations_periodic_report_2005.pdf (accessed 20 August 2012).

⁷⁵ 'The 9th & 10th periodic report of the Republic of Rwanda under the African Charter on Human and Peoples' Rights' http://www.achpr.org/files/sessions/47th/state-reports/9th-10th-2005-2009/state_rep9and10_rwanda_2009_eng.pdf (accessed 20 August 2012).

⁷⁶ 'Concluding observations and recommendations on the ninth and tenth periodic reports of the Republic of Rwanda' 47th Ordinary Session http://www.achpr.org/english/other/Con_Observations/Rwanda/5th_CO_Rwanda.pdf (accessed 31 January 2012) para 19.

their reporting obligations.⁷⁷ Uganda is the only state among the four that is up to date with its reporting requirements before the African Commission.⁷⁸ However, Uganda's most recent report does not provide detailed data on women's political participation at the local government level and only states that '[t]he affirmative action provisions in the Constitutions have been adhered to in this regard, leading to at least 30% representation of women councillors' (sic).⁷⁹ The concluding observations on Uganda's report are yet to be made public.

The four states have also submitted reports to the AU Commission where they report on how they are implementing the Solemn Declaration in their respective domestic spheres.⁸⁰ Lesotho's report contained information showing women's participation in three key positions of local government, however, the information appeared to be incomplete.⁸¹ For example, the report only provides percentages of women as community council secretaries and fails to give their actual number.⁸² South Africa's report is even less helpful with only two sentences dedicated to the subject of women's political participation in local government.⁸³ The report provides no data and

⁷⁷ 'State reporting' <http://www.achpr.org/states/> (accessed 20 August 2012).

⁷⁸ As above.

⁷⁹ 'Periodic report by the Government of Uganda to the African Commission on Human and Peoples' Rights' http://www.achpr.org/files/sessions/49th/state-reports/uganda-4th-2008-2010/staterep4_uganda_2011_eng.pdf (accessed 20 August 2012) 22.

⁸⁰ 'Solemn Declaration on Gender Equality' Assembly/AU/Decl.12(III) para 12. See also 'Guidelines for reporting on the AU Solemn Declaration on Gender Equality' AU/MIN/CONF/WG/2(I). According to the guidelines all states should have submitted their initial reports by 2006 and then second reports should have been submitted in cycles starting in 2008 and should have been completed by 2011. States are required to report every four years.

⁸¹ 'Lesotho: African Union Solemn Declaration on Gender Equality in Africa' <http://www.africa-union.org/root/au/conferences/past/2006/October/WG/doc.htm> (accessed 26 March 2011) 12.

⁸² As above.

⁸³ South Africa's report to the AU Secretariat on the Implementation of the AU Heads of States' Solemn Declaration on Gender Equality in Africa <http://www.africa-union.org/root/au/conferences/past/2006/October/WG/doc.htm> (accessed 26 March 2011) 21-24.

simply states that ‘women comprise 40% of all elected councillors’, the report offers no analysis, neither does it provide goals and timetables on women’s political participation in local government.⁸⁴ In the case of Rwanda the country is meeting its reporting requirements as it has submitted two reports since the adoption of the Solemn Declaration, its latest report covering the period 2006 to 2009.⁸⁵ In its latest report, women’s participation in local government was glossed over with very little information provided, and no goals or timetables to achieve gender equality in connection with women’s political participation in local government were discussed.⁸⁶ Uganda has submitted only one report which is not publicly available.⁸⁷

In terms of reporting under the APRM, the Country Self Assessment Reports (CSARs) submitted by each state should be the ideal documents to shed light on women’s political participation in local government. However, the CSARs are considered confidential documents that are not available to the public. Country Review Reports (CRRs) that emanate from the APRM secretariat are the ones that provide a glimpse into what CSARs contain on issues such as women’s participation in local government and the goals and timetables that states may have in place. The CRRs in many instances quote directly from the CSARs. Based on the CRRs, it appears that CSARs did not provide much in terms of disaggregated data and the goals and timetables to ensure equal participation. Lesotho’s CRR, for example, shows that Lesotho provided data on women’s political participation but local government was not included.⁸⁸ In Rwanda’s case, the CRR notes that ‘Rwanda’s record in the number of women in positions of responsibility is unprecedented in Africa, a shining model of best practice

⁸⁴ As above.

⁸⁵ ‘Second report on measures taken to implement the Solemn Declaration on Gender Equality’ <http://www.migeprof.gov.rw/?Reports,134> (accessed 20 August 2012).

⁸⁶ As above.

⁸⁷ ‘Progress report on the chairperson on the implementation of the Solemn Declaration on Gender Equality in Africa (SDGEA)’ EX.CL/553 (XVI) (25-29 January 2010).

⁸⁸ APRM *Country review report: Kingdom of Lesotho* (2010) <http://aprm-au.org/document/country-review-report-kingdom-lesotho> (accessed 12 September 2011) 84 -85.

worthy of emulation'.⁸⁹ The CRR, however, fails to provide any information that data on women's participation in local government was included in Rwanda's CSAR. Rwanda's CRR further noted that '[w]omen are yet to be fully integrated into local government processes'.⁹⁰ The report made a further conclusion that women needed to be 'trained' so that they fill their allocated quotas.⁹¹ These last two observations on Rwanda suggest that women were not adequately included in local government. The South African report only provided an approximation of the number of women in local government indicating that they constituted 'approximately 40 percent of all local government councillors'.⁹² Uganda's report contained limited disaggregated and comparative data showing that women occupied less than 5 percent of key positions in local government and only accounting for a third of councillors.⁹³ In essence all the four states did not provide sufficient disaggregated and comparative data. In addition they have not provided their goals and timetables on realising women's equal political participation in local government.

At the sub-regional level, there is no requirement for East African states to report on issues of human rights. At the SADC level the Protocol on Gender is yet to come into force and as such no state reports have been submitted to SADC.⁹⁴

In conclusion, state reports to African regional bodies do not contain much information on women's political participation in local government. Even in those instances when some data is provided, the data is very limited. The states have also not provided goals and timetables geared at ensuring equal political participation of

⁸⁹ APRM *Country review report: Rwanda* (2006) http://www.eisa.org.za/aprm/pdf/Countries_Rwanda_APRM_Report.pdf (accessed 10 September 2011) 47.

⁹⁰ As above.

⁹¹ APRM *Country review report: Republic of Rwanda* (2006) 98.

⁹² APRM *Country review report: Republic of South Africa* (2006) http://www.fhr.org.za/page.php?p_id=77 (accessed 10 September 2011) 6 & 27.

⁹³ APRM *Country review report: Republic of Uganda* (2009) http://www.afrimap.org/english/images/documents/APRM_Uganda_report_EN.pdf (accessed 12 September 2011) xxiii & 99.

⁹⁴ See chapter 3 sec 3.3.3(iii).

women in local government. At the African regional level, the four states are not actively implementing the temporary special measure of reporting on goals and timetables.

(iii) Status of reporting at state level

In all four states, state level reporting on women's political participation in local government is limited and focuses primarily on provision of information on women who are elected in direct elections. The results of local government elections are readily available in all four states and obtainable through national electoral commissions.

I was able to obtain disaggregated and comparative data from websites of electoral commissions, and where there were uncertainties, national electoral commissions willingly provided the required clarifications or additional data.⁹⁵ Electoral commissions are therefore reporting on the extent to which women are elected in local government. Besides providing outcomes of elections, there is no evidence that any of the electoral commissions provides reports on goals and timetables on women's political participation in local government.

The greatest challenge on accessing information is related to those positions where individuals are indirectly elected or where they are appointed to office. Without exception, the information is difficult to obtain in all four states. There was no clarity on which national body is charged with providing that information to other state organs or interested persons. It would appear that the ministry charged with local

⁹⁵ Independent Electoral Commission (South Africa) <http://www.elections.org.za/content/> (accessed 15 September 2012).

National Electoral Commission (Rwanda) <http://www.nec.gov.rw> (accessed 15 September 2012).

The Electoral Commission of Uganda <http://www.ec.or.ug/> (accessed 15 September 2012).

Independent Electoral Commission (Lesotho) <http://www.iec.org.ls/> (accessed 15 September 2012).

government should prepare and disseminate information, but no local government ministry official in any of the four states could confirm whether their ministries are responsible for such a task. Since ministries of local government do not consider it their responsibility to keep data on indirectly elected or appointed women officials, information can be difficult to obtain as a researcher is referred from one institution to another. The most reliable source of information on women's political participation within local government was supplied through local government associations, independent researchers or NGOs that have through great effort pieced together information on women's participation.⁹⁶ With particular reference to local government associations, only the South African Local Government Association (SALGA) has tabulated the extent of women's political participation in local government for both elected and non-elected officials but the information is not disaggregated or comparative.⁹⁷ What was clear is that there is no requirement in any of the states to report on goals and timetables as far as women's participation in local government is concerned.

Overall, temporary special measures are used in all four states. Also in this regard, information is not kept consistently. The only temporary special measure that all four states adhere to is the quota system. Preferential resource allocation and according preference to women are probably used in all four states but in the absence of publicly available records, it is difficult to determine the extent of their usage to advance women's political participation in local government. Regarding the use of reporting on goals and timetables, states are not adhering adequately to this

⁹⁶ Eg Genderlinks, a non-government organisation based in Johannesburg, is a good source of information on local government for countries in Southern Africa. Local government association in Lesotho, Rwanda and Uganda also maintain relatively up-to-date information. Lesotho is yet to establish a local government association. Government ministries proved the least helpful in sourcing data. In some cases promises were made on countless times to provide some information and in one case officials apparently needed a 'facilitation' fee (bribe) in order to provide information that is supposed to be in the public domain.

⁹⁷ SALGA 'The current representation and participation of women in local government: 2011 local government elections' (on file with author).

temporary special measure as far as local government is concerned. States provide some data on the extent of women's inclusion in local government but they do not provide information on goals and timetables for ensuring that in the future gender equality in political participation within local government is achieved.

5.3 The extent of women's political participation in local government

Having looked at the temporary special measures and the extent of their usage to promote women's political participation in local government, I now proceed to look at the reality in terms of women's political participation within local government.

In terms of methodological difficulties, the collection of data, aside from local election results, for purposes of this study has met with numerous challenges. Data has been difficult to compile because in the first place, and intriguingly, all the ministries in charge of local governments do not seem to have a centralised database where the information on officials is kept and which can be shared with the public. In all cases, the data that I have compiled has been painstakingly obtained through contacting various players in local government and relying on goodwill to obtain the information. The information has then been crosschecked through telephonic interviews with government officials. With the exception of information supplied by electoral commissions, all government ministries dealing with local government treated the supply of data as a favour rather than an obligation that state organs must fulfil.

Information relating to directly elected councillors was easily obtainable in all four states as electoral commissions posted results on their website. In instance when websites did not have information, officials within electoral commissions supplied the data.

The main challenge that I faced was to access data on indirectly elected and appointed officials. In the case of Rwanda and South Africa, local government associations were fairly well organised and shared information willingly even though accuracy had to be double checked as some of their information was dated. In both Rwanda and South

Africa most municipalities maintain websites where some of the information on office holders is available and as such contacting local governments directly was possible for purposes of verifying information. Getting information on Lesotho was quite a challenge as there is no local government association in Lesotho. Initially, information was obtained through research institutions but this information had to be further verified with numerous officials who work at the district level. Uganda proved to be the most challenging case study because access to information for indirectly elected or appointed officials was very difficult to establish. Despite two government ministries, information was eventually obtained through the Uganda Local Government Association (ULGA).⁹⁸

5.3.1 Women leaders in Lesotho's local government

Table 1: Current disaggregated data of councillors and senior officials in Lesotho's local government⁹⁹

Method of accessing office	Position	F	M	Total	%F
Directly elected	Councillors	627	649	1276	49.1
Indirectly elected	Chairpersons	21	63	84	25
Appointed	Community council secretaries	38	25	63	55.9
	Town clerks	4	7	11	36.4
	District administrators	2	8	10	20
	District council secretaries	3	7	10	30

Table 1 illustrates that women account for only 25 percent of chairpersons, representing a substantial decrease from 49.1 percent women councillors. Chairpersons are indirectly elected, that is, by the directly elected councillors. It is

⁹⁸ The following ministries were contacted in Uganda: Ministry of Local Government and Ministry of Gender, Labour and Social Development.

⁹⁹ Sources of data: Chieftainship and local governance in Lesotho 21. 'Gender strategy for local government in Lesotho' 6 & 16. 'The women are coming: Women's participation in Lesotho local governance' 6. Independent Electoral Commission (Lesotho) <http://www.iec.org.ls/> Ministry of Local Government and Chieftainship Affairs.

surprising that half an 'electorate' comprising almost 50 percent women elect only 25 percent women for position of chairperson.

Besides directly elected and indirectly elected office holders, some office holders are appointed to their positions either by the Public Service Commission as is the case with district administrators or the Local Government Service Commission which appoints town clerks, community council secretaries and district council secretaries. With the exception of community chair persons, the appointments are not reflective of the high numbers of women who are elected as councillors.

As indicated in Table 1, the highest representation of women is among directly elected officials, where women account for 49.1 percent of councillors. The legal framework in Lesotho setting quotas for women has therefore made an impact on the extent to which women are elected as councillors and where the law is not explicit on women's participation, for example, among indirectly elected, nominated and appointed officials the percentage of women reduces rather drastically with the exception of community council secretaries. Among councillors, parity is almost attained and as such Lesotho almost fulfilled its undertakings especially those at the sub-regional level to where it commits itself to ensuring parity between women and men by 2015.¹⁰⁰ The high inclusion of women among councillors in fact surpasses Lesotho's legal stipulations that set quotas for women's participation in local government.¹⁰¹

In relation to indirectly elected, nominated or appointed officials, the percentage of women decreases rather drastically. For instance, chairpersons and district administrators are 25 and 20 percent, respectively. In the absence of support through the law, it is clear that women in Lesotho are not able to attain parity by 2015 as is required by SADC's Protocol on Gender.

¹⁰⁰ See chapter 3 sec 3.3.3(iv). See also chapter 3 sec 3.2.3(iii) and chapter 2 sec 2.4.4.

¹⁰¹ See chapter 4 sec 2.2.1 & 2.2.2.

Even though women account for almost half of the councillors, the percentage of indirectly elected, nominated and appointed officials is far from attaining the parity requirement set by instruments such as the Protocol on Gender that requires parity in all decision-making positions by 2015.¹⁰² Considering that women account for almost half of the councillors, it is disconcerting that indirectly elected or nominated women do not reflect the same extent of women's presence as that reflected by their presence among councillors. Is it possible that women who are appointed primarily to ensure the presence of women's voice fail to push an agenda that ensures greater inclusion of women?

Among all senior officials dealing with local government, the lowest percentage of women's inclusion is found among district administrators. Interestingly, these officials are appointed by the Ministry of Local Government and Chieftainship. The Ministry has therefore missed an opportunity to prove central government's commitment to principles of gender equality.¹⁰³ Lesotho's Ministry of Local Government and Chieftainship's failure to ensure that women are appointed to the same extent as men among district administrators seems to undermine the country's constitutional principle that requires the state to 'take appropriate measures to promote equality of opportunity'.¹⁰⁴

In conclusion, Lesotho is still far from achieving its commitments to ensuring equal participation of women and men in local government. Despite the fact that much progress has been made towards achieving parity among councillors, beyond this position, in all other positions Lesotho seems unlikely to attain parity as is stipulated by the Protocol on Gender.¹⁰⁵ In the absence of legislative guidance requiring inclusion

¹⁰² Genderlinks 'Getting the balance right: Gender in the 2011 Lesotho local government election' 5 & 9.

¹⁰³ Appointment of officials was confirmed by an official in the Ministry of Local Government and Chieftainship. The official requested anonymity.

¹⁰⁴ See chapter 4 sec 2.1.

¹⁰⁵ See chapter 3 sec 3.3.2(iii).

of women as indirectly elected, nominated or appointed officials, women will be unable to attain parity in political participation within local government.

Part of the problem why Lesotho is not attaining parity may be related to inaccessibility of data. For example, in understanding research on women's participation in local government, access to data has proven a challenging task. With the exception of directly elected councillors in which case data was accessible through the Independent Electoral Commission of Lesotho, all other data was obtained through contacting several officials. Not a single office could provide all the data. The absence of information means that even decision-makers who can play a role in reversing under representation of women, are not able to appreciate the gravity of the situation. They may therefore react slowly to ensuring parity between women and men in local government offices. I noticed during my research that there was a general confidence that women were very well represented in local government with officials indicating that Lesotho was nearly attaining the SADC stipulated parity in representation. However, the reality that most officials were seemingly unaware of was that Lesotho's exceptional performance was only as far as councillors were concerned. The high representation of women among councillors should as well be reflected in all other positions within local government.

5.3.2 Women leaders in Rwanda's local government

Table 2: Current disaggregated data - councillors and senior officials in Rwanda's local government¹⁰⁶

Method of accessing office	Position	F	M	Total	%F
Directly elected	Village councillors	28635	45435	74070	38.7
	Cell councillors	13410	17126	30536	43.9
Indirectly elected	Sector councillors	3899	4755	8654	45
	District councillors	354	466	820	43.2
	Mayors (districts & Kigali)	3	28	31	9.7
	Vice-mayors (social affairs)	26	5	31	83.9
	Vice-mayors (economic affairs)	6	25	31	19.4
	Presidents of district council	1	30	31	3.2
Appointed	District executive secretaries	2	29	31	6.5

Based on the available statistics as reflected in Table 2, women's inclusion in local government has exceeded the constitutional and legal requirement of having at least 30 percent women in positions. However, it is clear that the law has not been effectively applied in all positions, as a number of positions in local government have inclusion of women that falls far below the constitutionally mandated 30 percent. The law is clearly not vigorously implemented in all cases. As was the case with Lesotho, the highest representation of women is among directly elected councillors. Among other office holders, women are found in high numbers among vice-mayors responsible for social affairs. The inclusion of women in local government is therefore very low. Due to the low levels of women's representation in most local government leadership, it is not surprising that Rwanda's country reports to African regional and UN bodies fail to mention their exact extent, opting instead to draw attention to the high representation of women through providing general information.

¹⁰⁶ Sources of data: Rwanda Association of Local Government Authorities (RALGA). Websites of all 31 local government entities, National Electoral Commission (Rwanda) website. Ministry of Local Government.

The staggeringly high inclusion of 83.9 percent women as vice-mayor in charge of social affairs masks the fact that the law requires that women should form 30 percent of all decision-making positions.¹⁰⁷ At the district level, in order to ensure that the three person executive meet the constitutional muster, one member has to be a woman and it appears that women have then been included but relegated to dealing with social issues rather than other matters of general importance such as economic affairs. By appointing women predominantly to the social affairs portfolio, authorities in Rwanda are allowing the perpetuation of prejudice against women whereby because of gender discrimination women had been confined to roles such as child rearing and home care. The position of vice-mayor in charge of social affairs involves work related to social, cultural and educational matters.¹⁰⁸ The position of vice-mayor for social affairs is in fact less senior to the one of economic affairs because in the event of the absence of the mayor, the vice-mayor in charge of economic affairs automatically becomes the acting mayor.¹⁰⁹ In comparison to the social affairs position, the vice-mayor responsible for economic matters deals with a great number of activities that have an impact on the economic development of the district¹¹⁰ and therefore can have a greater significance in lifting women out of poverty, for example. Women have therefore been relegated to the less influential position.

By disproportionately appointing women to the social affairs portfolio, Rwanda is allowing the continuation of gender based discrimination against women. Even though Rwanda has committed itself to ensuring increased political participation of women, it still compartmentalises women to 'motherly' roles in public life. As has been

¹⁰⁷ See chapter 4 sec 3.1

¹⁰⁸ See art 83 of the Law 8/2006 of 24 February 2006 Determining the organisation and functioning of the district.

¹⁰⁹ See art 82(1) of Law 8/2006 of 24 February 2006 Determining the organisation and functioning of the district.

¹¹⁰ See art 82 Law 8/2006 of 24 February 2006 Determining the organisation and functioning of the district.

discussed, Rwanda has committed itself to non-discrimination and the principle of non-discrimination has been adopted in the country's domestic legal framework.¹¹¹

In other key areas in local government, such as mayors, presidents or councils and district executive secretaries, women account for less than 10 percent in each of these positions. Rwanda is therefore not adhering to its commitments and is even flouting its own Constitution where it has categorically indicated that women should account for at least 30 percent in all decision-making positions.¹¹² The same phenomenon as that identified in Lesotho is observed in Rwanda whereby women are well represented among directly elected councillors but beyond that, their numbers dwindle with a few women included in most of the senior leadership positions in local government. Rwanda is far from realising women's equal participation in most positions within local government. The 'critical mass' theory that Rwanda was trying to uphold through its constitutional and other legal provisions is most certainly not adhered to in terms of inclusion of women in local government where positions of influence are concerned.¹¹³

The predominant election of women as vice-mayors in charge of social affairs in Rwanda reinforces the view that in instances when women are appointed they are appointed to positions that reinforce gender stereotypes. The fact that women are elected as vice-mayors for social matters shows that they are expected to perform 'domestic' functions even though on this occasion this is happening in a public sphere. In light of the commitments that Rwanda has made to ensure equality and non-discrimination it appears that allowing this situation to manifest itself shows a failure to uphold non-discrimination principles such as, for instance, non-discrimination on the basis of sex and gender. A comparison between the election of women to social affairs portfolios and in others portfolios invariably leads to a conclusion of discrimination against women. The relegation of women to social affairs reinforces the

¹¹¹ See chapter 4 sec 4.1.

¹¹² As above.

¹¹³ As above.

prejudice that women are incapable in other key positions and this view is supported by the data in Table 2 that shows low women's representation in other key positions such as mayors, vice-mayors in charge of economic development, presidents of councils and district council secretaries.

The indirect election of women to positions such as mayors, vice-mayors and presidents of council is done by an electoral college constituted of fellow councillors where at the sector and district levels women account for 43.2 and 45 percent, respectively. However, the presence of women in such large numbers has not translated to women being as well represented in most appointed or some of the more senior positions among indirectly elected officials. The question then arises whether women in capacities such as local government councillors in actual fact represent and advance the interests of women as whole. The low inclusion of women in some of the appointed or indirectly elected capacities begs the question whether women councillors ever work in a block to ensure that women are appointed and indirectly elected to senior local government offices.

5.3.3 Women leaders in South Africa's local government

Table 3: Current disaggregated data of councillors and senior officials in South Africa's local government¹¹⁴

Method of accessing office	Position	F	M	Total	%F
Directly elected	Councillors	3761	5886	9647	39
Indirectly elected	Mayors	133	145	278	47.8
	Chief whips	36	242	278	12.9
	Speakers	103	175	278	37.1
Appointed	Municipal managers	25	253	278	9

¹¹⁴ Sources of data: South African Local Government Association and South African Independent Electoral Commission website <http://www.elections.org.za> (10 September 2012).

As indicated in Table 3 above, women account for 39 percent of elected councillors. South Africa, therefore, lags behind the 50 percent mark of including women in all decision-making positions and in all likelihood it is unlikely to achieve parity in most local government positions by 2015 as is required by the Protocol on Gender.¹¹⁵ Where South Africa could achieve parity is in relation to mayors. Women currently constitute 47.8 percent of mayors and if before 2015, there are six vacancies among existing mayors and these were subsequently filled by women, then parity would be attained as is required under the Protocol on Gender.¹¹⁶

The failure to attain higher levels of inclusion of women in some positions can be partially attributed to a failure of the law to be categorical on the extent to which women should be included. The fact that there are so many pieces of legislation may be negatively affecting the extent to which women are included in local government as the local government law is not always clear about the extent to which women should be included.

In positions such as chief whips and even more importantly, municipal managers, women's inclusion remains quite low at 12.9 and 9 percent respectively. Thus far, South Africa has not adequately utilised temporary special measures as accepted in its own constitutional and legal provisions to ensure better inclusion of women in some of the local government positions such as chief whips and municipal managers. Temporary special measures could be better utilised for inclusion of women in positions where office holders are appointed, for instance, municipal managers. The low levels of women's inclusion in key positions such as municipal managers may serve to reinforce prejudices towards women as leaders.

¹¹⁵ See chapter 3 sec 3.3.4.

¹¹⁶ As above.

5.3.4 Women leaders in Uganda's local government

Table 4: Current disaggregated data of councillors and senior officials in Uganda's local government¹¹⁷

Method of accessing office	Position	F	M	Total	%F
Directly elected	Councillors	6421	7122	13543	47.4
	District/city chairpersons	2	110	112	1.8
	Municipal chairpersons	2	23	25	8
	Sub-county chairpersons	20	1286	1288	1.5
	Municipal mayors	1	22	23	4.3
Indirectly elected	Speakers	17	93	110	15.5
Appointed	Chief administrative officers	8	71	79	10.1
	Deputy chief admin officers	8	94	102	7.8

The statistics from Uganda as set out in Table 4 above show the same trend as that identified in Lesotho, Rwanda and South Africa, where women are better represented among directly elected local government officials. However, the high representation of women is limited to councillors where they account for 47.4 percent of councillors. In other directly elected capacities women's numbers reduce dramatically. The high levels of women's inclusion among councillors is credited to Uganda's legal framework that has provided for temporary special measures to promote women's inclusion.

With regard to elected office women's inclusion is much lower. For instance, in the case of Chief Administrative Officers, women account for only 10.1 percent of the current occupants of the office but as deputy Chief Administrative Officers, the

¹¹⁷ Sources of data: The Electoral Commission of Uganda <http://www.ec.or.ug/> (accessed 14 September 2012). Additional data supplied by Uganda Local Government Association. There were 32 vacancies among Chief Administrative Officers and 9 vacancies for the post of Deputy Chief Administrative Officer. The calculation made in the table does not include these vacancies.

situation of women does not show any improvement as women account for only 7.8 percent of office holders. In fact, if the representation of women as deputies is compared to, for instance, deputy mayors in Rwanda, there has been a greater inclination to appoint women in the deputising capacity but in Uganda's case they are few appointments of women whether in the main position or as deputies.

Uganda's inclusion of women among decision-makers at the local government is the lowest among all the four states even though the country has often been praised for its strides to include women in positions of authority.¹¹⁸ In the absence of laws that specifically promote women's political participation in all offices at local government level, women's representation dwindles drastically.

5.4 Conclusion

Clearly, a number of temporary special measures exist that can be relied upon in order to ensure women's political participation in local government. The challenge with the identified temporary special measures is that with the exception of quotas, information on the extent to which all the other measures are used is not in the public domain.

Regarding the actual extent of women's political participation within senior leadership positions in local government, information is not readily available. Difficulties to access information has resulted in reduced pressure both from within and outside of government to ensure that women are better included in local government. The limited data on women's participation at local government level has created an obstacle for a detailed study to be undertaken of the extent of women's involvement at the level of local government. The extent of women's participation remains largely

¹¹⁸ D Pankhurst 'Women and politics in Africa: The case of Uganda' (2002) 55 *Parliamentary Affairs* 199-225. See also R Skaine 'Women's leadership in Africa' in J O'Connor (ed) *Gender and women's leadership: A reference handbook* (2010) 345-346. See also African Development Bank Group *et al Assessing progress in Africa toward the Millennium Development Goals: MDG report 2011* 39.

unknown as consolidated information is not readily available. Despite the fact that all four states have shown an increase in the numbers of women who are involved in leadership within local government, the reality is that despite domestication of international standards, states have not consistently ensured that women are equally included in political participation at the local government level. Women's political participation has not increased in all sections of local government and in some cases increases are limited to offices that serve to advance gender stereotypes, as is the case of vice-mayors in Rwanda.

Overall the four states have made some efforts but their failure to provide full disclosure on the extent of women's political participation both at the domestic and international levels means that states are not entirely adhering to their commitment on the need to report on their goals and the timetables in place. It is quite clear that information on women's political participation at local government level is not centralised and therefore details on women's actual participation are murky in most states. The only information that is publicly available is that related to women's election as councillors. States have been more effective in domesticating international principles but focus has been predominantly on ensuring that women are elected to positions such as councillors and the law does not provide adequately for indirect election or appointment of women.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

- 6.1 Introduction
- 6.2 Synopsis of findings
 - 6.2.1 Obligation at the United Nations level
 - 6.2.2 Regional and sub-regional obligations
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 - 6.2.4 States performance in upholding obligations at their domestic levels
- 6.3 Conclusion
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6.1 Introduction

In this study using both a descriptive and analytical approach, I set out to examine the subject of women's political participation at the local government with specific focus on the norms that bind states and the actual impact of these norms. The reasons for undertaking the study included the fact that in comparison to other levels of government, local government even though recognised as important, has not received much attention as far as the analysis of norms that can impact on women's political participation is concerned.¹

The study focussed on four states that are drawn from the East and Southern African regions. In each of the four states women constitute at least half of the population. Establishing both the legal framework that provides a basis for their participation and the actual extent of their participation was important for purposes of revealing whether there is a correlation between what the law provides and the reality of women's inclusion in local government.

The study set out to investigate whether the development of norms at the international level adequately focus on women's political participation and whether in particular these norms advance women's political participation at the local government level. In analysing the developments at the UN level, I sought to establish the key obligations that states must uphold when promoting and protecting women's right to political participation at the local

¹ See chapter 1 sec 1.1.

government level.² At the African regional and sub-regional levels, I examined the extent to which principles developed at the UN level have been supplemented if at all by African instruments and African treaty bodies.³ Besides examining the development of norms at the international level, I further examined the extent to which states have domesticated the principles promoted at the international level.⁴ Finally, with a view to highlighting whether states implement their obligations, I examined the actual extent to which women participate in politics at the local government level.⁵

This final chapter provides a synopsis of findings in the previous substantive chapters followed by recommendations.

6.2 Synopsis of findings

6.2.1 Obligations at the UN level

Chapter 2, sets out to establish the extent to which the UN has sought to protect and promote women's right to participate in politics. In the process, a number of treaties were examined including the UN Charter, CPRW, ICCPR and CEDAW. In addition, two important non-binding instruments were examined, namely, the Vienna Declaration and the Beijing Platform.

What the study established is that Lesotho, Rwanda, South Africa and Uganda are parties to the key human rights instruments that protect and promote women's right to participate in politics. These states recognise the standards that are widely accepted on the subject of women's political participation.

The analysis of instruments such as the UN Charter, CPRW, ICCPR, CEDAW and the work of treaty bodies has revealed that since the formation of the UN, the organisation has grappled

² See chapter 2.

³ See chapter 3.

⁴ See chapter 4.

⁵ See chapter 5.

with the issue of equality and non-discrimination. With specific reference to political participation, initially, the development of human rights norms sought to promote women's political participation through the broader provisions on non-discrimination on grounds such as *sex*. The hope was that by granting human rights on equal terms and prohibiting discrimination in particular, women's rights would be adequately protected in all areas of human endeavour including the political arena.⁶ However, it did not take long before there was a realisation that special attention needed to be paid to women's political participation. These views culminated in the first ever women's right treaty adopted by the UN — the CPRW — focussing on the subject of women's right to political participation. Since the adoption of the CPRW, other instruments have subsequently been adopted that have sought to further entrench women's right to political participation. However, even though political participation has been advanced, the local government level has not been specifically focussed upon. Instead, the development of women's right to political participation has been advanced in general terms intended for application at all levels of society.

Women's right to participate in politics has been enhanced through the work of treaty bodies that have elaborated on the understanding of the right even though they have rarely focussed on local government. Treaty bodies' most important contribution to the subject of political participation has been through their clarifications rendered in General Comments. Another contribution of treaty bodies — albeit in a limited manner — has taken place when state reports are examined and treaty bodies provide their concluding observations on these reports. For instance in binding instruments, such as the ICCPR and CEDAW, the provisions that deal with political participation have been further enhanced by general comments and concluding observations emanating from treaty bodies.⁷

Treaties adopted at the UN level have placed an obligation on states to ensure that women have an inalienable right to participate in politics at all levels of the state.⁸ The right for

⁶ See chapter 2 sec 2.3.

⁷ See chapter 2 secs 2.4.3 & 2.4.4.

⁸ See chapter 2 sec 2.7.1.

women to participate in politics has been couched in a manner that allows women to stand as candidates for directly or indirectly elected office and to be appointed to office. States must therefore ensure that measures are in place to guarantee that women can be elected or appointed to office. For instance, constitutions, laws and policies must be in place to ensure that women are not unfairly discriminated against in terms of their right to participate in politics.⁹

Further, obligations placed on states are that they must put in place temporary special measures so that where women's political participation cannot be guaranteed, temporary special measures are utilised for purposes of ensuring women's political participation. The development of the temporary special measures arose out of a realisation that for women to enjoy their right to political participation to the same extent as men, special measures had to be put in place to help guarantee women's inclusion. Besides adopting the measures, states are required to ensure that in actual fact the measures are implemented. In order to ensure maximum results, states are at liberty to devise measures that are most suitable for their local conditions and that can best guarantee women's political participation. Any temporary special measures in place may be relied upon for as long as is necessary and should only be discontinued if women's political participation can be guaranteed without reliance on temporary special measures. Failure by a state to implement the temporary special measures is an abrogation of a state's responsibilities.

In using temporary special measures, maintenance of databases is identified as important and such databases should contain information on women's political participation at all levels of state authority, including the local government level. The databases should be disaggregated on the basis of sex and they should be accessible to the public. Through the provision of data the extent of women's political participation will be better appreciated and where necessary measures will be taken to address any shortcomings.

⁹ See chapter 2 secs 2.4.4 & 2.7.4.

6.2.2 African regional and sub-regional obligations

I set out to establish whether there is further elaboration of UN standards by African regional and sub-regional instruments. What the study has revealed is that the evolution of the right of women to participate in politics is fairly recent at the African regional and sub-regional levels. Until the 1990s, the OAU for instance did not pay much attention to women's rights. However, since the 1990s much progress has been made to consolidate the position adopted at the UN level. Women's rights, including that of political participation, have been widely recognised through their inclusion in a number of African instruments most especially the Protocol on Women and the Charter on Democracy. African instruments have certainly not eroded the standards set by the UN but instead they have further elaborated and extended the rights. For instance, unlike at the UN level where no particular quota is set, at the African regional and SADC sub-regional levels, instruments have clearly stated that parity must be observed.¹⁰

With regard to monitoring mechanisms, African treaty bodies dealing with human rights paid attention to women's political participation even though attention to local government was limited.¹¹ For instance, the African Commission's Rapporteur on Women, during state visits conducted to the four states that have been reviewed, failed to specifically address women's political participation in local government; the APRM process has not paid sufficient attention to women's inclusion in local government; and the African Commission has not made any pronouncement focussing specifically on the subject. Consequently, opportunities to promote and ensure conformity to women's right to political participation within local government have as a result been missed.

At the sub-regional level, the EAC has done very little to advance women's right to political participation, preferring instead to remain focussed largely on economic development and sub-regional integration. Efforts to adopt a Bill of Rights for the EAC region are still underway even though at this stage it is uncertain as to whether the document will be

¹⁰ See chapter 3 sec 3.2.1(i) & 3.2.3(iii) & 3.3.2(iii).

¹¹ See chapter 3 sec 3.2.3(i).

adopted any time soon and whether in fact it will address the issue of women's political participation.

SADC has proved progressive in terms of the elaboration of the normative framework. SADC's Protocol on Gender is uncompromising in requiring that states should observe parity between men and women in all areas of decision-making. At the SADC level, timeframes have been set for states to realise parity thereby setting very clear parameters in terms of the goals that states should pursue and when the goals should be achieved.

African regional and sub-regional levels do not erode the principles that are recognised at the UN level, they instead extend them. Important contributions of the AU and SADC levels include formalising the exact extent to which women should be included in decision-making positions, in both cases states are required to observe parity. Another important contribution of the AU and SADC levels is emphasis on the need for states to rely on temporary special measures and to also domesticate standards. Both the regional and sub-regional levels have paid special attention to the issue of implementation of standards at the domestic level of states.

6.2.3 Domestication of norms

In terms of domestication of international norms, all the four states have adopted international standards to varying degrees within their constitutions and in other pieces of legislation. The four states' constitutions for example contain provisions on equality and non-discrimination, both of which are identified as key starting points of ensuring women's equal participation in politics. With the exception of Lesotho, all the other three state's constitutions contain provision that deal directly with women's political participation in local government. In the cases of Rwanda and Uganda, the Constitutions even contain specific provisions dealing with quotas for women.¹²

¹² See chapter 4 sec 4.3.1 & 4.5.1.

In the study, it became apparent that local government legislation in all the four states promotes and protects women's right to participate in politics at the local government level. However, the actual extent to which the right to participate in politics is guaranteed differs from state to state. Lesotho, Rwanda and Uganda go to great lengths to spell out how women's political participation in local government should take place, particularly with regard to directly elected officials.¹³ However, their laws fail to provide details on indirectly elected or appointed officials. Most importantly, none of the four states guarantee parity between women and men in terms of political participation in local government. Lesotho and South Africa, by virtue of being parties to the SADC Protocol on Gender, are required to realise parity by 2015, if the Protocol on Gender comes into force soon as is expected.¹⁴ However, there is no sign that either state has started to take steps to ensure that laws are amended and measures are put into place that will ensure that parity in all decision-making positions including at local government is achieved by 2015.¹⁵

Besides recognising women's right to political participation in local government, the laws in the four states contain principles related to the use of temporary special measures. However, the laws in the four states do not make any provision for states to report and provide data on women's political participation. The consequence of failing to provide for reports and databases is that examining state performance in the implementation of temporary special measures with respect to women's inclusion becomes a major challenge. In the case of South Africa, to a limited extent its affirmative action law could be used to collect data on women's political participation in local government because the law requires all employers to provide affirmative action related data about their employees. The affirmative action law is, however, of general application and deals with all previously disadvantaged groups and therefore women as a group do not receive special attention but are instead subsumed within previously disadvantaged groups.

¹³ See chapter 4 secs 4.2, 4.3 & 4.5.

¹⁴ 'South Africa: SADC Gender Protocol to come into full force soon' <http://www.genderlinks.org.za/article/south-africa-sadc-gender-protocol-to-come-into-full-force-soon-2011-10-04> (accessed 2 October 2012).

¹⁵ See chapter 3 sec 3.3.2(iii).

The existence of numerous pieces of legislation that deal with local government in each of the four states poses a challenge in terms of interpretation and application of the law. For example, South Africa has at least seven pieces of legislation on local government meaning that reconciling how these laws protect and promote women's political participation is not an easy task.¹⁶ The existence of numerous pieces of legislation presents the possibility that the interpretation of the law may not consistently advance women's political participation within local government.

Even though Lesotho, Rwanda, South Africa and Uganda have ratified numerous human rights treaties, the extent of domesticating these treaty obligations differs from state to state. A number of reasons explain the disparities between states in terms of domestication of international standards. First, the four states do not possess the same will to implement the international standards to which they have committed themselves. Second, to varying extents established traditions counter efforts aimed at ensuring that these international norms take root at the domestic level. A clear example of such resistance was exhibited in Lesotho in the *Ts'epe* case.¹⁷ Third, lack of knowledge on how to exactly implement provisions of international treaties continues to hinder their domestication. And finally, the four states have not provided sufficient resources (human and financial) for purposes of ensuring that domestication takes place.

Even though for domestication to be successful there must be a comprehensive approach by central government, federal governments, local governments, civil society and the individual, there is no synergy among these key players in any of the four states. The result is that domestication of norms related to women's political participation in local government is negatively affected in all four states. Besides central government adopting legislation that is related to international obligations, the level to which federal government, local government, civil society and the individual are involved in the process implementation of this legislation is neither clear nor consistently pursued. Of particular concern is the failure by any of the four states to pay adequate attention to the issue of 'human action' and how this affects domestication. For instance there appear to be no concerted efforts to

¹⁶ See chapter 4 sec 4.4.2.

¹⁷ See chapter 3 sec 3.3.2(iii).

educate the general population so that women's political participation in local governments is socialised within the general population.

As a further force of domestication, sanctions which can be relied upon to promote domestication are not adequately utilised in any of the four states. The laws or policy do not place sanctions on officials or other key players for failing to adhere to international obligations. Officials and other key players are therefore not motivated to comply with international obligations that require women to participate equally in local government.

Despite the challenges that are identified on the subject of domestication, there are nevertheless some clear signs that point to a level of domestication of international standards in the four states. First, the existence of international standards has clearly resulted in all the four states altering their national agenda as far as women's participation in local government is concerned. As such greater attention is paid to women's inclusion in local government in all the four states. Second, leveraging domestication through litigation has taken place in at least one of the four states with the result that Lesotho is now increasingly paying attention to ensuring inclusion of women in local government leadership. Third, domestication has also happened through empowering political mobilisation as greater awareness is being created which is relied upon by civil society to advocate for greater inclusion of women in local government.

6.2.4 States' performance in upholding obligations at the domestic levels

The study has revealed that the four states under review have made efforts to ensure that in practice, they uphold their constitutional and legal obligations related to women's political participation within local government — especially where the law is categorical on the extent to which women should be included. To a certain extent, besides domesticating their international obligations, states have implemented these standards. For instance, to a limited extent, temporary special measures have been employed and they have played an important role in ensuring that women are included in some of the leadership positions at the local government level. In all the four states temporary special measures have impacted positively on ensuring that women are elected as councillors.

Of the different temporary special measures, the quota system is the most commonly utilised and it has proved to be quite effective. The use of other temporary special measures is difficult to ascertain as states have failed to provide reliable information on their usage. For instance, information is not readily available on the extent to which states use (1) preferential allocation of resources to favour women, (2) according preference to women, or (3) reporting on goals and timetables. The lack of information on these temporary special measures is exacerbated by the failure to clearly state who has the responsibility to report, how frequent reporting should be, the structure of the reports and where these reports should be submitted.

Deficiencies in the implementation of temporary special measures may be a major hindrance to women's political participation in some spheres of local government. Even when temporary special measures are used, the failure to report on these means that decision-makers charged with ensuring women's inclusion have little information on which to base future decisions on women's political participation. The few reports that are produced such as state reports, contain incomplete and sometimes inaccurate information, rendering them of limited value.

Overall, in all the four states, the inclusion of women in local government leadership is inconsistent. In some cases, particularly in directly elected capacities, women are fairly well represented in all four states. However, the same does not apply to all other positions in local government. One of the main factors explaining the inconsistency in women's political participation is the failure to vigorously and uniformly apply the principles that advance women's political participation. Women too may be a contributory factor to women's under-representation because the assumption is that, as councillors, they should lobby for women to be included in other positions to the same extent as they are elected as councillors.

6.3 Conclusion

International law recognises that the right to political participation extends to the local government sphere and furthermore that women and men should enjoy this right on a basis

of equality. Lesotho, Rwanda, South Africa and Uganda, have undertaken efforts to domesticate the international norms and they have developed local government laws that recognise the need for women to be included in local government.

Even though the four states are bound by similar standards at the international level, the extent to which the norms are domesticated differs from state to state. Despite the differences, in each of the four states, a relatively high percentage of women have been elected to local government leadership positions especially in the capacity of councillors. In other positions, the inclusion of women in local government is inconsistent. In their efforts to implement international obligations, states seem to be overly focussed on directly elected offices.

An important contribution of international human rights law is to require states to rely on temporary special measures for purposes of promoting women's inclusion. Accordingly, the four states have adopted compulsory quotas to be implemented at the local government level. However, the imposition of temporary special measures is not the only route that guarantees women political participation in local government. Political will is equally important as is evident in post-1994 South Africa where legislated quotas have not been the main driver of women's inclusion in local government.¹⁸

States have not been consistent in ensuring political participation of women. A comparison that can highlight the disparity is if, for instance, the percentage of local government is compared to members of the legislature. While Rwanda, South Africa and Uganda have high percentages of women in their legislatures,¹⁹ at local government level, the statistics are not similar to what they are in the legislature. Rwanda and South Africa, have high percentages of women in parliament but women's participation in local government as councillors is lower than that in parliament. This suggests that inclusion of women may not be as vigorously pursued as it is for the more public positions. In Lesotho and Uganda, the reverse

¹⁸ See chapter 5 sec 5.2.1.

¹⁹ Inter Parliamentary Union 'Women in national parliaments' (31 October 2012)
<http://www.ipu.org/wmn-e/classif.htm> (accessed 13 November 2012).

is the case, these states have higher percentages of women as councillors when compared to the percentage of women parliamentarians. States are therefore not approaching the issue of women's political participation in a consistent fashion.

In the four states, the positive narrative of including women in local government is largely confined to directly elected councillors and consequently women are fairly well represented as councillors. State organs may be fixated on the election of women as councillors and fail to examine the extent to which women are represented in other capacities. The fixation on women councillors is betrayed by the fact that even in the few instances when states provide statistics on women's participation in local government, for instance when reporting to treaty bodies, they suppress information on the low levels of women's inclusion in most of the other local government positions. This partial provision of data exacerbates women's exclusion as decision-makers are unable to appreciate the extent of women's inclusion in indirectly elected or appointed capacities.

In terms of treaty body contribution to protecting and promoting the right, so far, treaty bodies including the CEDAW Committee have not adequately interrogated the subject of women's political participation with specific reference to local government. Treaty bodies have failed to adequately investigate the lack of details in state reports. Furthermore, treaty bodies have not developed a consistent approach to examining the subject of women's political participation in local government. Therefore there are no minimum standards that states are expected to observe.

The research has revealed that, despite the existence of international norms which have been domesticated by states, in reality women are not in all cases adequately included in local government leadership in Lesotho, Rwanda, South Africa and Uganda. The findings are that women's political participation at local government level in all four states is similar in some respects. In essence, at the level of directly elected officials — especially councillors — there are high numbers of women in the four states ranging from 39 to 49.1 percent. However, within other levels of local government, for example, among indirectly elected or appointed officials, the numbers differ markedly in some cases women accounting for less than 10 percent of office holders.

6.4 Recommendations

6.4.1 Recommendations for the international level

Any future development of the right to political participation must pay attention to the issue of local government as this is the level of government that most affects women's day-to-day existence. It is important to consider further elaboration of women's leadership roles. For example, the elaboration of the right could be in relation to appointed and indirectly elected capacities.

International treaty bodies must create greater awareness about the importance of women's right to political participation within local government. The treaty bodies must, for example, consistently and carefully interrogate states on their performance in terms of women's political participation at local government level. According greater attention to women's political participation will in all likelihood bring about increased efforts by states to ensure that women are better represented throughout local government. Treaty bodies should focus on examining the temporary special measures in place, analysing data that states provide in order to establish whether it is consistent with efforts to include women in local government. Treaty bodies must insist that state reports contain detailed comparative and disaggregated data on women's political participation within local government. Through such requirements, it will be possible to assess progress or lack thereof in terms of women's political participation at the local government level. Such scrutiny will also raise the profile of local government and draw the attention of state parties to addressing shortcomings where they exist.

With specific reference to African regional bodies, the African Commission must consistently raise questions on women's political participation in local government when examining state reports. In addition, the Rapporteur on Women should also ensure that the issue of women's political participation receives adequate attention when promotional visits are conducted and the findings must be set out in the Special Rapporteur's report. The APRM system should also pay greater attention to interrogating the issue of women's political participation in local government.

6.4.2 Recommendations for states

State institutions, in particular ministries of local government, should be required to maintain easily accessible and understandable databases showing the extent of women's inclusion in local government leadership. Such databases should observe at least five criteria. First, the databases should be disaggregated on the basis of sex. Second, the databases should provide a diachronic picture of developments over time. Third, the databases should include information on all positions within local government. Fourth, databases should also be presented in an easy to understand fashion, to enable ordinary members of the public to scrutinise women's political participation in local government. Fifth, the databases should be maintained on websites of the relevant ministries and summarised versions should be published and widely disseminated from time to time to ensure that they reach as wide an audience as possible. These five criteria would allow for the inclusion of women to be scrutinised and tracked both in comparison to men and also over time to help determine whether progress is being made.

States must be required to utilise temporary special measures more effectively. While quota systems have been applied, these must continue to be used rigorously and information on their usage must be kept and updated. Other temporary special measures whose application is not well documented, need to be promoted so that they are used consistently. Information on the usage of the temporary special measures must be provided in reports on women's inclusion in local government. States must also examine the modalities of preferential allocation of resources and accord preference to women. Temporary special measures that are specifically aimed at local government must be developed and implemented. These could include targeted recruitment of women to ensure that among appointed officials, the numbers of women increases. States must also make concerted efforts to report on the impact of temporary special measures that they implement.

What has become clear in the study is that the protection and promotion of women's political participation may be hindered because of proliferation of laws. Where the law is simple, clear and consistent, the chances of increasing the number of women in key positions will increase. It is still important to have laws that advance women's inclusion in

local government, because without them, women's inclusion in local government is undermined and cannot be guaranteed. However, the laws must be simple, clear and consistent to reduce uncertainties in interpretation. States should consider consolidating some of their laws on local government.

States need to take active measures to sensitize women in order to avoid women's collusion in their own inequality. Women should be sensitised and educated to address internalised stereotypes so that those who are empowered in turn focus on empowering other women. The need to address stereotypes will be a fulfilment of the Protocol on Women which requires states to eliminate discrimination against women.²⁰ The measures that states put in place to sensitise and educate women must be reported upon in state reports.

Overall with regard to the issue of domestication states have to continue altering national agendas, they must also be receptive both to leveraging litigation and political mobilisation that seeks to ensure women's equal political participation in local government. In addition both human and financial resources must be dedicated to the cause of ensuring that international norms are domesticated. Greater attention should be focussed on socialising society so that women's equal participation receives wider acceptance. States must also ensure that sanctions are in place so that where laws are not domesticated those responsible are sanctioned accordingly.

6.4.3 Area for further research

There may be a number of questions raised that are left unanswered. For example, investigating how best to elaborate the exact international norms so that they guarantee women's equal political participation in local government in indirectly elected and

²⁰ For instance in this regard, art 2(2) of the Women's Protocol provides as follows:

'States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other 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'.

appointed capacities is a possible area of further research. Another question that can be researched is the discrepancy on why women, even though they constitute high numbers as councillors, do not seemingly elect women in other positions. The latter question may be best answered by sociologists and anthropologists.

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