

# **Implementation of the Two Thirds Gender Rule in the Kenyan Parliament**

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**Declaration**

I, ATHENA AYAPAN EKOROT, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 5/8/2021

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: *Cecil Abungu* .....

Cecil Abungu

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## **ABSTRACT**

*The purpose of this paper is to analyse the two-thirds gender rule in Kenya and to determine whether there are sufficient mechanisms to implement it. This will be done through a specific look at women in parliament. The Constitution clearly defines that women and men have equal rights, this is rather effected in Article 27(3) which provides that both women and men have the right to equal treatment, including the right to equal opportunities in both political, economic, cultural and social spheres. Furthermore, under Article 27(8) provides that the state shall take legislative measures to implement the two thirds gender rule in order to ensure gender parity, however, until now parliament has not enacted any legislation to implement the two thirds gender principle in order to promote gender equality.*

*This study will be purely based on qualitative research and will use the doctrinal methodology. It will involve the review of statutes and courts jurisprudence as well as secondary data. The findings of this study could therefore be added to the emerging body of literature recommending innovative interpretations of Article 27(8) in a manner that achieves better gender balance in terms of representation in parliament.*

## **LIST OF CASES**

*The Matter of the Principle of the Gender Representation in the National Assembly and the Senate* (2012) eKLR.

*Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

## **LIST OF LEGAL INSTRUMENTS**

*The Constitution of Kenya (2010).*

*Universal Declaration of Human Rights (1948).*

*The Beijing Declaration and Platform for Action (1995).*

*Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).*

## **LIST OF ABBREVIATIONS**

CIC - Commission on the Implementation of the Constitution

CKRC - Constitution of Kenya Review Commission

CEDAW - United Nations Convention on the Elimination of All Forms of  
Discrimination Against Women

JLAC - the Justice and Legal Affairs Committee.

IEBC – Independent Electoral and Boundaries Commission

EMILY - Early Money is Like Yeast

FIDA – The Federation of Women Lawyers

CREAW – Centre for Rights Education & Awareness

UN – United Nations

## CHAPTER 1

### 1 INTRODUCTION

#### 1.1 BACKGROUND OF THE PROBLEM

At the core of the Constitution of Kenya, is the belief that there can only be real progress in society if all citizens participate fully in their governance, and that all, male and female, persons with disabilities and all previously marginalized and excluded groups are included in the affairs of the republic. The struggle to introduce more women in parliament in Kenya can be traced back to 1996 when the Honourable Charity Ngilu moved a motion in parliament on the implementation of the Beijing Platform for Action.<sup>1</sup> Her main suggestion was for more women to be nominated. However, it was not successful. Other women have also made efforts to bring change and achieve equality in parliamentary representation. In fact, in 1997, Honourable Phoebe Asiyo tabled the first affirmative action Bill in parliament, but it failed.<sup>2</sup> Despite the failure, this created an opportunity for other female members of parliament to demand for an increase in the number of women in Parliament. For instance, in 2007, the Honourable Martha Karua tabled the Constitutional (Amendment) Bill, 2007 on affirmative action that aimed at creating fifty automatic seats for women in the 10th Parliament and create additional forty constituencies in Kenya.<sup>3</sup> She defended the creation of fifty special seats as an affirmative action issue, which sought to put women's representation in parliament at par with their population size. This move led to an uproar from other members of parliament who felt that the Honourable Minister had personalized the Bill and that the Bill had major gaps, parliament therefore refused to adopt the Bill.<sup>4</sup>

The struggle to introduce more women in parliament finally bore fruit as the Kenyan Constitution represented a legal framework for gender equality. Notably, inclusion of women in parliament is guaranteed in the Constitution in a couple of provisions, including Article 27(8) that states that the

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<sup>1</sup> Nzomo M, 'Impacts of women in political leadership in Kenya: struggle for participation in governance through affirmative action' University of Nairobi Institute for Diplomacy and International Studies, 2014, 2.

<sup>2</sup> Adawo L, Gikonyo L, Kudu R and Mutoro O, 'History of feminism in Kenya' Nawey.net, 2011, 11.

<sup>3</sup> Nzomo M, 'Impacts of women in political leadership in Kenya: struggle for participation in governance through affirmative action' University of Nairobi Institute for Diplomacy and International Studies, 2014, 2.

<sup>4</sup> Adawo L, Gikonyo L, Kudu R and Mutoro O, 'History of feminism in Kenya' Nawey.net, 2011, 12.

state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender, it places the mandate of ensuring that the two-thirds gender rule is implemented, on the State, through the legislature<sup>5</sup> and this provision is further complimented by Article 97(1) which introduces the office of women representatives in the Kenyan parliament.<sup>6</sup> In Article 81 (b), the Constitution provides that the electoral system shall comply with the principle of Affirmative Action among others that not more than two-thirds of the members of elective public bodies shall be of the same gender.<sup>7</sup> This paper will therefore discuss the two-thirds gender rule, as a form of affirmative action in Kenya, while shedding light on the potential mechanisms for its implementation for the benefit of women in parliament. This main aspect's facet will be to first determine whether there are sufficient mechanisms for implementation of affirmative action in Kenya. This paper will therefore trace and analyse the efforts to implement the commitment through legislation.

The Supreme Court gave a majority advisory opinion on the interpretation of the time frame of the implementation of the two-thirds gender rule. The Court also sought to determine whether the lack of adequate representation of women in Kenya's 11th parliament following Kenya's 2013 general election renders it unconstitutional. The ruling was that the gender equality law is aspirational. The Supreme Court therefore gave a deadline of August 27th, 2015 to the Commission on Administration of Justice to come up with legislation to bring the rule to fruition.<sup>8</sup> To date, there has been no report from the Commission. Later in 2017, another case was filed since parliament failed to fulfil its obligation the Constitution imposes on it.<sup>9</sup> The court gave an order of mandamus directing parliament to take steps to ensure that the required legislation is enacted within a period of sixty days. Up to know parliament is still lagging behind since no legislation is enacted.<sup>10</sup> This means that the two-thirds gender rule still lacks legislation on the method of implementation.

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<sup>5</sup> Equality Rights Trust, 'In the spirit of harambee: Addressing discrimination and inequality in Kenya', 2019, 177.

<sup>6</sup> Article 97(1), *Constitution of Kenya* (2010).

<sup>7</sup> Article 81(b), *Constitution of Kenya* (2010).

<sup>8</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>9</sup> *Centre for Rights Education and Awareness and 2 others v Speaker of the National Assembly and 6 others* (2017) eKLR.

<sup>10</sup> *Centre for Rights Education and Awareness and 2 others v Speaker of the National Assembly and 6 others* (2017) eKLR.

A method provided for in the Constitution for the implementation of this law is through nomination of women candidates. The Constitution in article 177 provides that the county assembly will consist of special seat members to ensure that no more than two-thirds of the membership of the assembly is of the same gender.<sup>11</sup> This is a step in the right direction as women are guaranteed a spot in elective positions. This paper will therefore look at the two-thirds gender rule with regards to women in parliament and analyse whether there are sufficient mechanisms for its implementation.

## **1.2 STATEMENT OF THE PROBLEM**

The two-thirds gender rule is provided for by the Kenya's 2010 Constitution as a form of affirmative action. It states that not more than two thirds of the members of an elective body should be from the same gender.<sup>12</sup> The problem is that historically, women have not been adequately represented in elective bodies and for purposes of this paper, specifically parliament.<sup>13</sup> The inclusion of the two thirds-gender rule in the 2010 Constitution tried to provide a solution. However, the solution seems ineffective as there has been no legislation set up to implement the two-thirds gender rule. This is despite the supreme court placing a deadline of August 27, 2012, which has since passed, for the Commission on the Implementation of the Constitution (CIC) to recommend legislation for the implementation of the law.<sup>14</sup> Consequently, Kenya's 2013 General Election results, saw women still occupying less than a third of parliament.<sup>15</sup> This translates to a larger problem of how the two-thirds gender rule will be implemented to ensure that women occupy at least 33.3% of the parliamentary seats.

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<sup>11</sup> Article 177 (1), *Constitution of Kenya* (2010).

<sup>12</sup> Article 81(b), *Constitution of Kenya* (2010).

<sup>13</sup> Nzomo M, 'Impacts of women in political leadership in Kenya: struggle for participation in governance through affirmative action' University of Nairobi Institute for Diplomacy and International Studies, 2014, 2.

<sup>14</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>15</sup> FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 2013, 47.

### **1.3 JUSTIFICATION OF THE STUDY**

This study is justified by the fact that historically in Kenya women have not been adequately represented in parliament.<sup>16</sup> The two-thirds gender rule has then been seen as the solution to Kenya's problems of lack of adequate representation. However, this has been hindered by the lack of adequate mechanisms for the implementation of the two thirds gender rule. The Supreme Court in its advisory opinion set a deadline for the Commission on the Implementation of the Constitution (CIC) to recommend legislation for the implementation of the law.<sup>17</sup> The deadline (August 27th, 2012) has since passed and there are still no structures. The purpose of the law is defeated if it cannot be implemented. This paper therefore seeks to explore whether there are adequate mechanisms for the implementation of the two-thirds gender rule as a method of affirmative action.

### **1.4 SIGNIFICANCE OF THE STUDY**

This study is important because it brings a contribution to the emerging body of literature in Kenya recommending an innovative interpretation of the two-thirds gender principle in order to achieve better gender balance in the Kenyan parliament.

### **1.5 AIM & OBJECTIVES**

The aim of this paper is to give an analysis of the two-thirds gender rule in Kenya as provided for in the Constitution.

The objectives of the study are:

1. Examine the historical consequences that led to the establishment of two thirds gender principle.
2. Analyse the decisions of the courts concerning the implementation of the two thirds gender rule.

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<sup>16</sup> Nzomo M, 'Impacts of women in political leadership in Kenya: struggle for participation in governance through affirmative action' University of Nairobi Institute for Diplomacy and International Studies, 2014, 2.

<sup>17</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

3. Examine the challenges on proposals tabled in parliament on the implementation of the two thirds gender rule.
4. Investigate proposed methods that should be adopted by the Kenyan parliament to implement the constitutional mandate of the two thirds gender rule.

## **1.6 RESEARCH QUESTIONS**

- 2 What are some of the historical consequences that led to the establishment of the two thirds gender rule?
- 3 What are some of the judicial related challenges on the implementation of the two thirds gender rule?
- 4 What are the challenges that parliament face in the implementation of the two thirds gender rule?
- 5 What proposed methods can the Kenya parliament adopt in order to implement the two-thirds gender rule?

## **1.6 THEORETICAL FRAMEWORK**

The presence and the need of women in parliament have been subjected to intense scholarly debates leading to the emergence of different interpretations and different theories. With the aim of analysing the two thirds gender rule in the Kenyan parliament the descriptive and substantive theory have been selected as them being theories of political representation.

There are mainly two different ways to approach the problem of underrepresentation in politics: some studies argue that there need to exist a certain number of female representatives,<sup>18</sup> called the critical mass.<sup>19</sup> While others stress the importance of fewer female politicians that actively push for gender equality.<sup>20</sup> Therefore, the theory of descriptive representation focuses on variations in

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<sup>18</sup> Blomgren E, 'Women and political participation' published, Linnaeus University, Georgia, 2010, 15.

<sup>19</sup> Wängnerud L, 'Women in parliaments: descriptive and substantive representation' *12 Annual Review of Political Science* 1, 2009, 51.

<sup>20</sup> Blomgren E, 'Women and Political Participation' published, Linnaeus University, Georgia, 2010, 16.

the number of women elected to the parliaments, while substantive representation focuses on effects of women's presence in parliament.<sup>21</sup>

Authors who advocate for the election of descriptive representatives identify a number of potential benefits. Stella Rouse argues that one of the benefits of descriptive representation is that it ensures the enhancement of the connection between constituents and their representatives.<sup>22</sup> She moreover considers that the consequent increase in trust in government would be felt by underrepresented groups.<sup>23</sup> A further argument is that descriptive representation also focuses on the improvement of the quality of deliberation among legislators and on the impact on policy outputs.<sup>24</sup> Laurel Weldon studies women politicians who actively promote gender equality.<sup>25</sup> A question arises here as to how the increased number of women in parliaments would be effective in leading to a greater change for women. Moreover, a representation of women can go to the extreme of having more women than men therefore leading to a greater gender imbalance.

Generally descriptive representation is used in comparison to substantive representation. Substantive representation alludes to the representation of specific interests of the represented.<sup>26</sup> Even though women have managed to get more equal representation in numbers, it is not given that their opinions and interests are being taken into consideration.<sup>27</sup> This theory emphasises on women's interest as opposed to numbers. Based upon substantive representation as a theory this research argues that there are certain interests and concerns that arise from women's experiences and that these will be inadequately addressed in a representative system that is dominated by men.<sup>28</sup> The substantive representation theory expresses politically active women themselves should define

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<sup>21</sup> Wängnerud L, 'Women in parliaments', 51.

<sup>22</sup> Rouse S, 'Descriptive representation: understanding the impact of identity on substantive representation of group interests' in Schickler E and Lee F (eds) *The Oxford Handbook of the American Congress*, Oxford University Press, 2011, 247.

<sup>23</sup> Rouse S, 'Descriptive representation', 247.

<sup>24</sup> Rouse S, 'Descriptive representation', 247.

<sup>25</sup> Blomgren E, 'Women and political participation' published, Linnaeus University, Georgia, 2010, 15.

<sup>26</sup> Blomgren E, 'Women and political participation' published, Linnaeus University, Georgia, 2010, 15.

<sup>27</sup> Blomgren E, 'Women and political participation', 15.

<sup>28</sup> Wängnerud L, 'Women in parliaments: descriptive and substantive representation' *12 Annual Review of Political Science* 1, 2009, 59.

women's interests or what they perceive as gender equality; this theory relies on what is labelled as 'subjectively defined interest'.<sup>29</sup>

The theory of descriptive representation states that the number of women in parliament should be more in order for representation to be effective. The substantive representation establishes that women's interests are to be represented as opposed to the number of women in parliament. The adoption of the two thirds gender rule in the Kenyan Constitution appears to follow the descriptive representation by fixing the number at the rate of not more than 33.3% of either gender.<sup>30</sup>

In cases where there is a history of discrimination and mistrust, the election of a descriptive representative will improve communication between the women and the government. Having more women in parliament who have a task of representing women is important because Kenya has faced historical grievances from certain groups such as the women.<sup>31</sup> However, the lack of legislation to implement the two thirds gender rule poses as a threat to women in general and therefore making it hard to achieve gender parity.

The clarity of the distinction between the two theories will therefore be used to analyse the legal framework that organises gender equality in Kenya.

## **1.7 RESEARCH METHODOLOGY**

This study will use a qualitative research design and doctrinal methodology. The doctrinal methodology will involve qualitative analysis of case law and secondary data.

## **1.8 LITERATURE REVIEW**

“A strong and vibrant democracy is possible only when parliament is fully inclusive of the population it represents. Parliaments cannot consider themselves inclusive, however, until they

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<sup>29</sup> Wängnerud L, 'Women in parliaments: descriptive and substantive representation' 59.

<sup>30</sup> Article 97, *Constitution of Kenya* (2010).

<sup>31</sup> Webinar on Equality and Non-Discrimination under the Constitution on 5 August 2020.

can boast the full participation of women”.<sup>32</sup> This study will analyse various scholars’ attempts to discuss the equality in terms of the two-thirds gender principle under affirmative action and the need of women in parliament.

Winifred Kimani examines the two-thirds gender principle in the post 2010 Kenyan context in relation to the elective and appointive positions.<sup>33</sup> She explains that when it comes to the realization of this principle there are various challenges, for instance, the disharmony in the constitutional provisions relating to the principle and lack of clear implementation mechanisms exacerbated by conflicting judicial approaches to the interpretation of this principle.<sup>34</sup> There are various court decisions such as the Supreme Court decision whereby it gave an advisory opinion on this matter stating that the gender based affirmative action is a progressive one.<sup>35</sup> As a result there has been lack of clarity on the methods of implementation of this law.<sup>36</sup>

Kanyi studies the two thirds gender rule from the point of view of affirmative action.<sup>37</sup> She argues that women in Kenya, through their advocacy, succeeded in pushing forth the inclusion of the affirmative action quota to the Constitution in the form of the two thirds gender rule.<sup>38</sup> She further argues that the aim of the two thirds gender rule is to increase the presence of women in institutions such as the national assembly. While the implementation of the office of women representatives has been achieved, the one on the two thirds gender rule is still pending.<sup>39</sup> This is an important discussion to the research problem because it implies that the office is an actual affirmative action provision.

Affirmative action refers to a “deliberate move to reforming or elimination past and present discrimination using a set of public policies and initiatives designed to help on the basis of colour,

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<sup>32</sup> Inter-Parliamentary Union, *Equality in politics: A survey of men and women in parliaments*, 2008, iii.

<sup>33</sup> Kamau W, ‘Women’s representation in elective and appointive offices in Kenya: towards realisation of the two-thirds gender principle’ *Towards realisation of the two-thirds gender principle*, 2014, 190.

<sup>34</sup> Kamau W, ‘Women’s representation in elective and appointive offices in Kenya: towards realisation of the two-thirds gender principle’ 191.

<sup>35</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>36</sup> Kimani K ‘The Gender Rule Quagmire: Implementing the Two-Thirds Gender Rule in Kenya’

Institute for Education in Democracy, 24 May 2016 - <https://efuru.wordpress.com/2016/05/24/the-kenya-gender-rule-quagmire/> on 3 February 2021.

<sup>37</sup> Kanyi W, ‘Kenyan women’s journey in their quest for affirmative action’ African Women’s Studies Centre at the University of Nairobi, 2013.

<sup>38</sup> Kanyi W, ‘Kenyan women’s journey in their quest for affirmative action’, 5.

<sup>39</sup> Kanyi W, ‘Kenyan women’s journey in their quest for affirmative action’, 6.

creed, geographical location, race, origin and gender among others”.<sup>40</sup> Catherine Kaimenyi puts a context to the need for gender affirmative action in Kenya. After the 2008 general elections the 11th parliament, the number of women was 9.8% with 22 women parliamentarians while in the 2013 election, the first under the Constitution 2010 women representation in parliament was over 19%.<sup>41</sup> This was ensured by the creation of 47 seats dedicated solely to women as well as policies set in place to ensure that parties nominate women into parliament. This percentage is however still low compared to the 33.3% threshold that the two-third gender rule sets out.<sup>42</sup> It will thereby be necessary to analyse the specific mechanisms if any that will be adopted to ensure the realization of the two-thirds gender rule.<sup>43</sup>

Tarunabh Khaitan argues that affirmative action is best understood as a measure designed to benefit any members of a minority group.<sup>44</sup> She analyses the various benefits of affirmative action in the context of US.<sup>45</sup> She further explains that affirmative action measures raise particular legitimacy concern and that it is important to distinguish them, that is, between the legitimacy of the voluntary adoption of an affirmative action measure and the legitimacy of its mandatory imposition by the state.<sup>46</sup> The distinction is important since it helps in understanding Article 27(8) of the Constitution and to aid in the implementation of this particular provision.

When studying the Rwandese parliament Delvin and Elgie<sup>47</sup> discuss the effects of having more women in parliament.<sup>48</sup> 48.75 per cent of members of the national assembly in Rwanda are women making them the country with the highest number of women in parliament in the world.<sup>49</sup> The major effect noted is an overall positive change in the country with legislations encouraging more women in the Rwandese parliament.<sup>50</sup>

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<sup>40</sup> Kaimenyi C, ‘An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya’ 3 *International Journal of Business, Humanities and Technology* 6, 2013, 95.

<sup>41</sup> Kaimenyi C, ‘An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya’ 95.

<sup>42</sup> Kaimenyi C, ‘An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya’ 95.

<sup>43</sup> Kaimenyi C, ‘An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya’ 96.

<sup>44</sup> Khaitan T, ‘A theory of discrimination law’, Oxford University press, 2015, 217.

<sup>45</sup> Khaitan T, ‘A theory of discrimination law’, 217.

<sup>46</sup> Khaitan T, ‘A theory of discrimination law’, 220.

<sup>47</sup> Devlin C and Elgie R, ‘The Effect of Increased Women’s Representation in Parliament: The Case of Rwanda’ 61 *Parliamentary Affairs* 2, 2008.

<sup>48</sup> Devlin C and Elgie R, ‘The Effect of Increased Women’s Representation in Parliament: The Case of Rwanda’, 237.

<sup>49</sup> Devlin C and Elgie R, ‘The Effect of Increased Women’s Representation in Parliament: The Case of Rwanda’, 237.

<sup>50</sup> Devlin C and Elgie R, ‘The Effect of Increased Women’s Representation in Parliament: The Case of Rwanda’, 239.

## **1.9 HYPOTHESES**

This research assumes that Kenya provides a good framework for the establishment of the two-thirds gender rule as a form of affirmative action however it lacks the adequate measures for its implementation therefore, with the enactment of appropriate legislation and taking up certain policy measures will help Kenya achieve gender equality in parliament through the two-thirds gender rule.

## **1.10 CHAPTER BREAKDOWN**

The study will be as follows;

### ***Chapter 1***

This chapter has set the stage for the study by introducing the context of the study.

### ***Chapter 2***

This chapter will discuss the historical consequences that led to the provision of the two thirds gender rule. The inclusion of the two thirds-gender rule in the 2010 Constitution tried to provide a solution however, before, women were not adequately represented in either appointive or elective bodies or in parliament.

### ***Chapter 3***

This chapter will discuss the different court decisions on the two thirds gender rule, expounding on the judicial related challenges on the implementation of the two thirds gender rule in the Kenyan parliament. One of the cases which will be heavily relied on is the supreme advisory opinion which was held gender based affirmative action on the two thirds gender rule seems to be progressive.<sup>51</sup>

### ***Chapter 4***

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<sup>51</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

This chapter will analyse the specific challenges that parliament face that prevents them from taking up its constitutional obligation to pass the required legislation for the implementation of the two thirds gender rule.

### ***Chapter 5***

This chapter will conclude the study by giving recommendations and commenting on the perceived future of the research field.

## CHAPTER 2

### 2. HISTORICAL CONSEQUENCES THAT LED TO THE ESTABLISHMENT OF THE TWO THIRDS GENDER RULE

Gender equality has continued to be a major concern in the Republic of Kenya. Women have been neglected and denied access to national leadership compared to their male counterparts. However, there seems to be hope for our Kenyan women following the promulgation of the 2010 Constitution which has been termed as a transformative Constitution, cited as the most beautiful document in the world.<sup>52</sup> As Stephen Makau puts it, gender inequality is as old as the Old Testament. The Jews men in their prayers used to pray thanking God that they were born men and not women.<sup>53</sup> The Constitution provides in Article 81 (b) that “the electoral system shall comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender”.<sup>54</sup> The persistent challenge has been on how to actualise this core commitment in Kenya’s National Assembly and Senate as prescribed. This paper traces the efforts to implement the commitment through legislation. However, before this particular provision that was not the case for women.

Women have been historically and systematically marginalized through distinct social and legal imperfections that relegated them to the periphery of public political life.<sup>55</sup> The post-independence context in Kenya is particularly important in assessing the struggle for inclusion of women in political and electoral processes. This chapter presents a brief history of the clamour for inclusion and the milestones that women faced as we know them today.

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<sup>52</sup> Wambua S, ‘Realization and the implementation of the two third gender rule as enshrined in the Constitution: The Kenyan case’ Social Science Research Network, 2019, 10.

<sup>53</sup> Wambua S, ‘Realization and the implementation of the two third gender rule as enshrined in the Constitution, 6.

<sup>54</sup> Article 81(b), *Constitution of Kenya* (2010).

<sup>55</sup> Centre for Rights Education and Awareness, *Tracing the journey: Towards implementation of the two thirds gender principle*, 2019, 6.

## 2.1 Pre-colonial Period

In Kenya, before the British colonialists came, the society was still patriarchal.<sup>56</sup> African men made the decisions in the society and set the rules that the community was to live by. This was through the council of elders that existed in most if not all societies.<sup>57</sup> Few women occupied public positions of power. The one common position was that of medicine-woman.<sup>58</sup> Generally, the place of women was largely in the house and looking after the welfare of her homestead. Men on the other hand were generally their own masters. They dictated what was permissible and what was not. Men were the warriors of the community, decision makers, and heads of families and in that capacity, they dictated what was expected of the family. For example, in the Meru community, the Council of Elders known as the “Njuuri Ncheke” is comprised of men only.<sup>59</sup> The resistance to women based on their gender has remained the facilitating tool for keeping of inequity against women notwithstanding the spirit and provisions of the Constitution of Kenya (2010). Women are definitely the key figures for any development to take place.<sup>60</sup>

## 2.2 Overview of Post-Independence Women’s Representation

Since Kenya attained independence in 1963, women have been seeking to effectively participate alongside men, in governance and decision-making in all aspects of public life. But for the first three decades of postcolonial governance, progress was painfully slow due to a combination of structural obstacles such as the deeply embedded patriarchal socio-cultural values such as; undemocratic institutions, buttressed by equally undemocratic and gender blind legal and policy frameworks and low levels of civic and gender awareness.<sup>61</sup> Under this institutional and socio-

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<sup>56</sup> Wambua S, ‘Realization and the implementation of the two third gender rule as enshrined in the Constitution, 7.

<sup>57</sup> Kurea G, ‘The implementation of the two third gender rule in the devolved government as stipulated in the Kenyan constitution: the case study of Meru county’ Unpublished, University of Nairobi, Nairobi, 2015, 20.

<sup>58</sup> Wambua S, ‘Realization and the implementation of the two third gender rule as enshrined in the Constitution, 7.

<sup>59</sup> Wambua S, ‘Realization and the implementation of the two third gender rule as enshrined in the Constitution, 8.

<sup>60</sup> Kurea G, ‘The implementation of the two third gender rule in the devolved government as stipulated in the Kenyan constitution: the case study of Meru county’ Unpublished, University of Nairobi, Nairobi, 2015, 20.

<sup>61</sup> Centre for Rights Education and Awareness, *Tracing the journey*, 6.

cultural environment, it is hardly surprising that despite the active and effective role women played in the colonial liberation struggles.<sup>62</sup>

Kenya has held presidential, parliamentary, and local government elections every five years since independence in 1963 in accordance with the country's Constitution. For most of the independence period, the country operated a one-party system of government until 1992 when multiparty democracy was re-introduced through an amendment to the Presidential and National Assembly Elections Act.<sup>63</sup> The first post-independence general elections served as the harbinger of women's exclusion from Kenya's electoral politics. Although women compose at least 50.44% of the population, there was not a single one elected to the legislature in 1963.<sup>64</sup>

The first woman in Kenya elected to hold a political position was Grace Onyango. She holds many firsts such as the first female councillor, the first female mayor in post-independence Kenya, and the first woman elected to Parliament.<sup>65</sup> She achieved all these firsts between 1964 and 1969 and served in Parliament until 1984. She was also the first female parliamentarian to occupy the temporary speaker's chair, before being officially elected Deputy Speaker between 1979 and 1984.<sup>66</sup>

### **2.3 Tracing the Struggle of Women and the Journey Towards the Implementation of the Two Thirds Gender Principle**

The 2010 Constitution unlike the Constitution which was negotiated in the Lancaster house in London in 1963 was framed differently. The process involved struggle for about fifteen years that saw all sectors of the society including women's claim their positions in the constitutional review process.<sup>67</sup> For the Kenyan women, this was according to them a great opportunity to negotiate for their positions in the Kenyan leadership. The women's movement in Kenya has its origin in the

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<sup>62</sup> Centre for Rights Education and Awareness, *Tracing the journey*, 11.

<sup>63</sup> Centre for Rights Education and Awareness, *Tracing the journey*, 11.

<sup>64</sup> Centre for Rights Education and Awareness, *Tracing the journey*, 6.

<sup>65</sup> Adawo L, Gikonyo L, Kudu R and Mutoro O, 'History of feminism in Kenya' Nawey.net, 2011, 11.

<sup>66</sup> Vidija P, 'Most outstanding Kenyan female politicians' The Standard, 8 June 2018 - <https://www.standardmedia.co.ke/lifestyle/article/2001283398/kenyan-most-outstanding-female-politicians> on 1 April 2020.

<sup>67</sup> Wambua S, 'Realization and the implementation of the two third gender rule as enshrined in the Constitution, 8.

self-help groups which existed even in the pre-colonial societies.<sup>68</sup> These women's groups and organizations borrowed largely from the traditional women groups in terms of their philosophy and organization. They worked by demonstrating their desire to work on empowering initiatives such as buying land and property. One of these strong social organizations is the Maendeleo Ya Wanawake Organization (MYWO), a national grass root women's organization that was, formed in 1952, and has survived for all these years.<sup>69</sup>

This organization was initially stated as a welfare organization during the colonial period however, it later became a political force in the country during the 1980s and in the 1990s.<sup>70</sup> The strong political parties of this time, the Kenya African National Union (KANU), recognized the power of this organization and used it to power women's political struggle. In many communities in Kenya, there exist women who organize themselves and take leadership roles in dealing with social-historic and economic together with leadership issues in the society.

The journey of women claiming their positions in the political arena has not begun today neither yesterday, the journey formerly began in February 1992 when women were brought together by the National Council of Women of Kenya and Africa Women's Development and Communication Network (FEMNET) for a National Women's Convention.<sup>71</sup> It was the year of elections and women felt that this was the year of reckoning. They needed to organize themselves. The agenda was how to access political power. Women declared that they were on a journey to elective leadership and other leadership positions. They never looked back. They focused on a struggle for institutional framework for gender mainstreaming which resulted in the establishment of a national gender commission, a ministry in charge of women affairs, children and social services was established, a presidential directive for 30% women's representation in public service, establishment of women's fund and publication of the Sexual Offences Act, among many other gains were achieved during this time and era. It is because of this organizational energy and strategic decisions that the women made between 1997 and 2010 that gave birth to the current Constitution.

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<sup>68</sup> Wambua S, 'Realization and the implementation of the two third gender rule as enshrined in the Constitution, 8.

<sup>69</sup> Kabira W and Kimani E, 'The historical journey of women's leadership in Kenya' 3 *Journal of Emerging Trends in Educational Research and Policy Studies* 6, 2017, 842-849.

<sup>70</sup> Kabira W and Kimani E, 'The historical journey of women's leadership in Kenya', 2017, 842-849.

<sup>71</sup> Kabira W and Kimani E, 'The historical journey of women's leadership in Kenya', 2017, 842-849.

Between 1992 and 1997 after the National Women's Convention, women did not get very far. 1997 was another election year and women knew that without affirmative action, the story of their representation would not change. Hon. Phoebe Asiyo, a woman member of parliament tabled the first motion on Affirmative Action for women's representation in elective positions.<sup>72</sup> Her motion called for parliament to increase the number of women parliamentarians by 18 at least two from each province, and an extra two from the Rift Valley Kenya. This move by Asiyo brought women's organizations and leaders together. In this motion, the government to first introduce a legislation to require all registered political parties to nominate at least one third women candidates to participate in National and Local Authorities elections, to introduce an amendment to the Constitution of Kenya to provide for two parliamentary Constituencies exclusively for women candidates in each administrative province of the Republic of Kenya, and to introduce appropriate legislation to provide funding for all registered political parties and wherever public funding is possible, the amount of funding be linked to the percentage of women candidates fronted by each party.<sup>73</sup>

Hon. Kiraitu Murungi seconded the motion and supported it. Kiraitu proposed an introduction of a quota system to be established at political party level so that one third of all the candidates for civic and parliamentary elections put forward by political parties were women, she supported the motion within the framework of Constitutional and administrative reforms that were seeking for better governance in this country.<sup>74</sup> This motion received a lot of support from other members of the assembly championing for the position of women in the Kenyan parliament. But unfortunately, the motion did not sail through the parliament and was defeated. This was seen as a move to water down the women's effort for representation in the National Assembly.

After this let-down, women met outside parliament after the defeat of the motion and decided to wage an organized battle and to start the long journey to affirmative action of the critical mass representation of women in parliament and other elective bodies. Women spoke with one voice; they decided to continue walking on the path towards their dream of ensuring critical mass in political leadership.<sup>75</sup>38 They formed the Women's Political I Caucus which led the efforts in

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<sup>72</sup> Wambua S, 'Realization and the implementation of the two third gender rule as enshrined in the Constitution, 9.

<sup>73</sup> Wambua S, 'Realization and the implementation of the two third gender rule as enshrined in the Constitution, 10.

<sup>74</sup> Wambua S, 'Realization and the implementation of the two third gender rule as enshrined in the Constitution, 10.

<sup>75</sup> Kabira W and Kimani E, 'The historical journey of women's leadership in Kenya', 2017, 842-849.

collective action of the women's movement. After the 1997 general election, an increased number of women were witnessed in the August House. Hon. Beth Mugo, by then a Member of Parliament introduced a Bill entitled "Affirmative Action" in order to improve and increase representation for marginalized groups, particularly women, in policy making institutions.

The struggle to ensure of 30% women's representation in elective and appointive bodies joined the women and their organizations at the hip. Although the women in Kenya won at this stage of putting their interests of representation in the constitution namely the Affirmative action, the implementation of the said provisions of the constitution that govern gender representation still remain a pipe dream for many.

#### **2.4 The Constitution's Core Commitments**

Despite the fact that many bills were not passed, women did not give up. It actually created an opportunity for other female members of parliament to push for an increase in the number of women in Parliament. In 2007 the Minister for Justice and Constitutional Affairs, the Hon. Martha Karua tabled the Constitutional (Amendment) Bill 2007 on Affirmative Action that aimed at creating 50 automatic seats for women in the 10th Parliament and create additional 40 Constituencies in Kenya. She defended the creation of 50 special seats as an affirmative action issue, which sought to put women's representation in Parliament at par with their population size.

This move led to an uproar from other members of Parliament who felt that the Hon Minister had personalized the Bill and that the Bill had major gap. Parliament therefore refused to adopt the Bill. Outside Parliament the Hon. Minister received support from women in the civil society, former Members of Parliament, women bodies such as Maendeleo ya Wanawake, the National Women Coordinating Committee, educationists and media specialists.<sup>76</sup>

The struggle for affirmative action then finally bore fruit as the Kenya Constitution which was promulgated in 2010 provides a legal framework for gender equality and women's empowerment. Notably, affirmative action is guaranteed in the Constitution in a couple of provisions including Article 27 (8) that states that the State shall take legislative and other measures to implement the

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<sup>76</sup> Adawo L, Gikonyo L, Kudu R and Mutoro O, 'History of feminism in Kenya' Nawey.net, 2011, 11.

principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.<sup>77</sup> Article 81 (b) provides that not more than two-thirds of the members of elective public bodies shall be of the same gender.<sup>78</sup> The inclusion of two thirds gender rule seems to be an effective solution for women, however, the solution seems ineffective as there has been no legislation set up to implement the two-thirds gender rule. The next chapter will therefore review the courts' efforts to implement the two thirds gender rule.

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<sup>77</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>78</sup> Article 81(b), *Constitution of Kenya* (2010).

## CHAPTER 3

### 3. INTERPRETATION OF THE KENYAN COURTS ON THE CONSTITUTIONAL PROVISIONS OF THE TWO THIRDS GENDER RULE

Kenya being a nation signatory to various international, regional and sub-regional instruments namely such as the Universal Declaration of Human Rights, The Beijing Declaration and Platform for Action, The African Union Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) and the Solemn Declaration on Gender Equality in Africa, has to uphold these principles and pull up their socks to attain equitable gender representation in Parliament.<sup>79</sup> Recognizing this, the Constitution of Kenya 2010, domesticates these commitments to safeguard human rights and fundamental freedoms and entrenches the concept in article 81 (b) that not more than two thirds of the members of elective or appointive bodies shall be of the same gender however, the bone of contention since promulgation of the Constitution is the matrix, logistics and formula in ensuring that each House of Parliament is constituted properly as per the 27th August 2015 deadline that the courts put in the case of *The Matter of the Principle of the Gender Representation in the National Assembly and the Senate*.

Furthermore, the Constitution in article 27(8) requires that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender.<sup>80</sup> To date this provision has not been implemented. The Attorney General on behalf of the Government of Kenya sought direction from the Supreme Court of Kenya through an Advisory Reference in the year 2012. The issue presented before the Supreme Court for direction was whether the enforcement of the two thirds gender principle was realizable immediately or progressively based on articles 27 and 81(b) of the Constitution.<sup>81</sup> Therefore, this chapter seeks to discuss ways in which the court has interpreted the legal provisions of the two thirds gender rule.

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<sup>79</sup> Nzomo M, 'Impacts of women in political leadership in Kenya: struggle for participation in governance through affirmative action' University of Nairobi Institute for Diplomacy and International Studies, 2014, 2.

<sup>80</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>81</sup> *The Matter of the Principle of the Gender Representation in the National Assembly and the Senate* (2012) eKLR.

### 3.1 Gender Equality in Kenya Post 2010 Constitution

Unlike typical liberal Constitutions, Kenya's 2010 Constitution is transformative in character. Liberal constitutions mostly seek to demarcate the mandates of key organs of the state.<sup>82</sup> Transformative constitutions on the other hand seek to bring large-scale egalitarian social, economic, and political change.<sup>83</sup> Its interpretation and application, therefore, requires a value-centric approach that takes account of the historical, social, cultural, and political contexts of the country.<sup>84</sup> Gender representation falls squarely into these categories.<sup>85</sup>

The 2010 Constitution calls for the elimination of all forms of gender-based discrimination and marginalisation. Article 27 (8) requires the state to take policy, legislative and other measures, including affirmative action programmes, to ensure that 'not more than two-thirds of the members of elective or appointive bodies shall be of the same gender'.<sup>86</sup> The Constitution basically requires equality of men and women in all spheres of life, and the elimination of all forms of gender-based discrimination and marginalisation.<sup>87</sup> Parliament has cited lack of quorum and consensus as the main obstacles to the enactment of a law to give effect to the two-thirds gender rule.<sup>88</sup>

The current impasse revolves around the enactment of a gender law, the 2010 constitution requires a blend of legislative, policy and administrative measures.<sup>89</sup> The government can take these measures to implement the rule pending the enactment of the required law. The judiciary and the

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<sup>82</sup> Thiankolu M, 'How Kenya courted a constitutional crisis over parliament's failure to meet gender quotas' The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

<sup>83</sup> Adawo L, Gikonyo L, Kudu R and Mutoro O, 'History of feminism in Kenya' Nawey.net, 2011, 11.

<sup>84</sup> Nzomo M, 'Impacts of women in political leadership in Kenya: struggle for participation in governance through affirmative action' University of Nairobi Institute for Diplomacy and International Studies, 2014, 2.

<sup>85</sup> Thiankolu M, 'How Kenya courted a constitutional crisis over parliament's failure to meet gender quotas' The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

<sup>86</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>87</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>88</sup> Thiankolu M, 'How Kenya courted a constitutional crisis over parliament's failure to meet gender quotas' The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

<sup>89</sup> Thiankolu M, 'How Kenya courted a constitutional crisis over parliament's failure to meet gender quotas' The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

executive are seen to be reconstituted to comply with the rule without a law.<sup>90</sup> Therefore, we see that such has not yet been done since it seems that the ultimate and permanent solution lies in the enactment of the required law.

Why then did the Supreme Court give parliament a deadline to pass laws that would actualise the progressive rights enshrined in the two-thirds gender rule? Probably because the court recognised that lawmakers cannot always be trusted to implement the Constitution.<sup>91</sup> Parliament has tried, but failed on two occasions to pass a bill that would give effect to the two-thirds gender principle.<sup>92</sup> The bill was rejected twice by members whose main argument was that the new provisions would result in a bloated parliament which would add to the heavy taxpayer burden.<sup>93</sup> They also argued that the provision would give women free seats while some members alleged that women hardly contributed to debates in parliament, with others referring to their nominated female colleagues as “idlers” and “busy bodies”.<sup>94</sup>

Parliament has now run out of road. It has exhausted all avenues of delay. The previous High Court order hangs over the house like the sword of Damocles.<sup>95</sup> It now needs to adopt the best mechanism possible. The Constitution has created a paradigm shift and there is no turning back. Parliament must ensure realisation of the gender equality rule.<sup>96</sup>

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<sup>90</sup> Thiankolu M, ‘How Kenya courted a constitutional crisis over parliament’s failure to meet gender quotas’ The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

<sup>91</sup> *The Matter of the Principle of the Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>92</sup> Odhaimbo M, ‘MPs want to get rid of 47 woman reps’ Star, 13 June 2019 - < <https://www.the-star.co.ke/news/2019-07-16-mps-want-to-get-rid-of-47-woman-reps/>> on 9 December 2020.

<sup>93</sup> Odhaimbo M, ‘MPs want to get rid of 47 woman reps’ Star, 13 June 2019 - < <https://www.the-star.co.ke/news/2019-07-16-mps-want-to-get-rid-of-47-woman-reps/>> on 9 December 2020.

<sup>94</sup> Odhaimbo M, ‘MPs want to get rid of 47 woman reps’ Star, 13 June 2019 - < <https://www.the-star.co.ke/news/2019-07-16-mps-want-to-get-rid-of-47-woman-reps/>> on 9 December 2020.

<sup>95</sup> *Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

<sup>96</sup> Thiankolu M, ‘How Kenya courted a constitutional crisis over parliament’s failure to meet gender quotas’ The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

### 3.2 Two Thirds Gender Law

Article 81 (b) provides that not more than two-thirds of the members of elective public bodies shall be of the same gender.<sup>97</sup> These provisions, among others, establish the “two-thirds gender rule”. The previous President, President Kibaki’s last term, before the rule was applied, there were 22 women in a parliament of 222, which was 9.9%. In President Kenyatta’s first term, women made up 19% of the national assembly and 27% of the senate. Currently, women make up 21.78% of the national assembly and 30.88% of the senate.<sup>98</sup> The 2010 constitution required parliament to enact a new law to give effect to this gender provision within five years of its promulgation. Despite the court orders directing it to do so, parliament has yet to enact the law.

The drafters of the Constitution may have foreseen this because they also prescribed the dissolution of parliament, as many times as it takes, until the house fully complies with the requirement.<sup>99</sup> The current state of affairs results from parliament’s failure to enact a law to give effect to the two-thirds gender rule as required by the supreme law.<sup>100</sup>

In 2012 when Attorney General Githu Muigai sought an advisory opinion from the Supreme Court on whether the two-thirds gender rule required immediate or progressive implementation.<sup>101</sup> The Supreme Court held that the two-thirds gender rule required progressive implementation and advised parliament to enact the required law on or before August 27, 2015.<sup>102</sup> However, parliament failed to enact the required law by that date in spite of the Supreme Court’s advisory opinion, citing lack of quorum and consensus.<sup>103</sup> But even the Supreme Court’s intervention, as well as subsequent efforts that included a petition filed against Parliament to implement the gender equity principle, have come to naught.

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<sup>97</sup> Article 81, *Constitution of Kenya* (2010).

<sup>98</sup> Thiankolu M, ‘How Kenya courted a constitutional crisis over parliament’s failure to meet gender quotas’ The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

<sup>99</sup> Article 261, *Constitution of Kenya* (2010).

<sup>100</sup> *The Matter of the Principle of the Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>101</sup> *The Matter of the Principle of the Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>102</sup> *The Matter of the Principle of the Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>103</sup> Odhaimbo M, ‘MPs want to get rid of 47 woman reps’ Star, 13 June 2019 - < <https://www.the-star.co.ke/news/2019-07-16-mps-want-to-get-rid-of-47-woman-reps/>> on 9 December 2020.

This triggered a petition at the High Court under Article 261 (5) of the 2010 Constitution.<sup>104</sup> In June 2015, in the case of *Centre for Rights Education and Awareness & 2 others v The Speaker The National Assembly & 6 Others*, the High Court ordered the Attorney General and the Commission for Implementation of the 2010 Constitution to table a bill before parliament within 40 days.<sup>105</sup> However, Parliament was not able to implement the rule by enacting the necessary legislation before the extension period lapsed.<sup>106</sup>

In its ruling, the High Court noted that the case at hand did not turn on a constitutional provision that lacks clarity, and it restated the applicable constitutional provisions. According to the Court: The Constitution itself is very clear on the question of equality between men and women. The Constitution is very clear on the steps that were to be taken to give full effect to the realization of the two thirds gender rule. The Constitution requires the state to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.<sup>107</sup> Article 27 (8) requires that the state shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies are of the same gender. The period allowed for passing the desired legislation lapsed without the legislation in question being in place.<sup>108</sup> Parliament extended the period by one year but again it failed to enact the required legislation. The extension also lapsed, and that window closed.

The Court held that the National Assembly and the Senate have failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two thirds of the members of the National Assembly and the Senate shall be of the same

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<sup>104</sup> *Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

<sup>105</sup> *Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

<sup>106</sup> Githinji G, 'The Role of Women Representatives in Kenya' The Kenya Monitor, 11 June 2018 - < <https://www.monitor.co.ke/2015/10/19/the-role-of-women-representatives-in-kenya/>> on 30 November 2020.

<sup>107</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>108</sup> Thiankolu M, 'How Kenya courted a constitutional crisis over parliament's failure to meet gender quotas' The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

gender.<sup>109</sup> The Court further held that this failure amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the constitution.<sup>110</sup>

The Court ordered the Parliament and the Attorney General to take steps to ensure that the required legislation is enacted within a period of sixty days from the date of this order and to report the progress to the Chief Justice and that if this order is not duly implemented within the stipulated time period,<sup>111</sup> the Petitioners or any other person shall be at liberty to petition the Chief Justice to advise the President to dissolve Parliament.<sup>112</sup> This led to another High Court case on the matter.

In March 2017, the High Court held that parliament's failure to enact the two-thirds gender law within the prescribed period violated women's rights and was a gross violation of the Constitution.<sup>113</sup> It further held that continued noncompliance would render parliament unconstitutional. Under Article 261(7). The court issued an order directing parliament and the Attorney General to ensure that parliament enacted the required legislation within another period of 60 days.<sup>114</sup> It also held that if parliament failed to enact legislation within the 60 days, any person would be at liberty to petition the chief justice to advise the president to dissolve parliament.<sup>115</sup> Parliament failed again. It did not enact a law to implement the two-thirds gender rule within the 60 days and instead appealed against the court's decision. In April 2019, the Court

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<sup>109</sup> *Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

<sup>110</sup> *Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

<sup>111</sup> *Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

<sup>112</sup> Thiankolu M, 'How Kenya courted a constitutional crisis over parliament's failure to meet gender quotas' The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

<sup>113</sup> *Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

<sup>114</sup> Article 261(7), *Constitution of Kenya* (2010).

<sup>115</sup> *Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

of Appeal dismissed parliament's appeal against the High Court's decision,<sup>116</sup> and held that its continued failure to enact the gender law would result in its dissolution.<sup>117</sup>

The court has stepped in various instances in order to ensure that the law is followed, instead the parliamentarians have not played their part in the implementation of the said law. This may result to the dissolution of parliament under Article 261(7) of the Constitution which states that If Parliament fails to enact legislation, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.<sup>118</sup>

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<sup>116</sup> Thiankolu M, 'How Kenya courted a constitutional crisis over parliament's failure to meet gender quotas' The Conversation, 1 October 2020 - < <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>> on 29 November 2020.

<sup>117</sup>. Odhaimbo M, 'MPs want to get rid of 47 woman reps' Star, 13 June 2019 - < <https://www.the-star.co.ke/news/2019-07-16-mps-want-to-get-rid-of-47-woman-reps/>> on 9 December 2020.

<sup>118</sup> Article 261(7), *Constitution of Kenya* (2010).

## CHAPTER 4

### 4. RATIONALE FOR FAILURE OF PARLIAMENT TO IMPLEMENT THE TWO THIRDS GENDER RULE

Despite the constitutional requirement to ensure gender balance in the National Assembly and the Senate, the number of women Members of Parliament remains low. Considering the advisory opinion of the Supreme Court, failure to achieve the required gender balance could potentially lead to the dissolution of the National Assembly and the Senate.<sup>119</sup> The 2010 Kenyan Constitution entrenches the principle of equality and requires the state to adopt affirmative action programmes and policies to “redress any disadvantages suffered by individuals or groups because of past discrimination”. More specifically, it requires that elective and appointive bodies should be composed of “not more than two-thirds of either gender”.<sup>120</sup> To give effect to this principle, the Constitution requires that the State shall take steps to ensure that not more than two-thirds of members of all elective and appointive positions are not of the same gender.<sup>121</sup>

Ten years after the promulgation of the Constitution of Kenya 2010, there is yet to be enacted a specific legislation to operationalize this constitutional provision on gender equality. In contrast, while the constitution does not exclude the applicability of the two-third-gender principle to the National Assembly and the Senate, the provisions regulating the membership of the two houses do not have provisions to operationalize the principle in these houses.<sup>122</sup> Consequently, the Kenyan Parliament claims that it has been wrongly castigated for failure to enact the relevant legislation following the promulgation of the Constitution.<sup>123</sup> There has been high-level criticism leveled against the Kenyan Parliament, however, the criticism is somewhat misplaced in the parliament’s considered view, for a variety of reasons which this chapter will expound on.

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<sup>119</sup> Mumma C, ‘Kenya’s failure to implement the two-third-gender rule: The prospect of an unconstitutional Parliament’ Constitutionnet, 17 June 2016 -<https://constitutionnet.org/news/kenyas-failure-implement-two-third-gender-rule-prospect-unconstitutional-parliament> on 10 April 2021.

<sup>120</sup> Mumma C, ‘Kenya’s failure to implement the two-third-gender rule: The prospect of an unconstitutional Parliament’ Constitutionnet, 17 June 2016 -<https://constitutionnet.org/news/kenyas-failure-implement-two-third-gender-rule-prospect-unconstitutional-parliament> on 10 April 2021.

<sup>121</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>122</sup> Mumma C, ‘Kenya’s failure to implement the two-third-gender rule: The prospect of an unconstitutional Parliament’ Constitutionnet, 17 June 2016 -<https://constitutionnet.org/news/kenyas-failure-implement-two-third-gender-rule-prospect-unconstitutional-parliament> on 10 April 2021.

<sup>123</sup> Article 27(8), *Constitution of Kenya* (2010).

#### 4.1 Does State as Provided by the Constitution Equate to Parliament?

According to Article 27(8) of the Constitution it is the State that is empowered to ensure that two-thirds of members of all elective and appointive positions are not of the same gender.<sup>124</sup> As a concept, the State is a form of political community and refers to a conglomeration of various organs.<sup>125</sup> According to the statement by the speaker of the National Assembly, the State must be distinguished from the government which refers to a group of people who are usually in charge of state apparatus.<sup>126</sup> The various arms of government include the Executive, Parliament and the Judiciary as well as Independent Constitutional Commissions. It is therefore the State as a broad entity that is vested with the obligation to take measures towards ensuring gender parity. An understanding of the entire law-making process indicates that it is not solely upon Parliament to have a law enacted.<sup>127</sup> Bills may originate from anywhere including from the public through petitions for presentation in Parliament, subsequently processed through the House and then finally presented to the President for assent.<sup>128</sup>

Parliament also argued that previously, there have been a number of initiatives and efforts that have attempted to amend the Constitution of Kenya 2010 to provide for top ups through nominations of persons of the least represented gender or even to scrap the two-thirds gender rule contained under Article 177 of the Constitution with respect to county assembly members altogether. However, all these efforts have not succeeded in Parliament.<sup>129</sup>

The speaker of the National Assembly consequently insists that there is no express constitutional edict directed at Parliament requiring it to pass legislation to ensure compliance with the two-thirds

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<sup>124</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>125</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>126</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>127</sup> Mumma C, 'Kenya's failure to implement the two-third-gender rule: The prospect of an unconstitutional Parliament' Constitutionnet, 17 June 2016 -<https://constitutionnet.org/news/kenyas-failure-implement-two-third-gender-rule-prospect-unconstitutional-parliament> on 10 April 2021.

<sup>127</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>128</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>129</sup> Article 177, *Constitution of Kenya* (2010).

gender principle with respect to Members of Parliament.<sup>130</sup> While this is provided with respect to Members of County Assemblies under Article 177 and Article 197 of the Constitution which expressly require the creation of special seats to ensure compliance with the gender principle,<sup>131</sup> there are no such mechanisms provided for in the provisions with respect to Members of Parliament. Admittedly, nothing would have been easier than for the Kenyan people to have expressly provided for such mechanisms in the Constitution as they did with respect to Members of County Assemblies, if at all they desired Parliament to bear the responsibility of passing such legislation. The obligation to take measures to ensure two-thirds principle in all elective and appointive positions as provided for under Article 27 of the Constitution is on the State as a body rather than Parliament as a single institution. This particular interpretation is further confirmed by the fact that the two-thirds gender rule with respect to Members of Parliament is not one of the pieces of legislation envisaged under Article 261(1) in the Fifth Schedule of the Constitution. The relevant Fifth Schedule in fact makes no mention of any legislation to be passed by Parliament arising from Article 27 of the Constitution upon which Parliament has been blamed so harshly.<sup>132</sup> Aptly put by the speaker, it is therefore not the case that there is an express command by the Constitution on Parliament as a body to pass a two-thirds gender rule with respect to Members of Parliament.

#### **4.2 Parliament's Obligation Concerning the Two Thirds Gender Rule**

The other direct and express constitutional obligation on Parliament to pass legislation relating to promotion of representation of women, among marginalised persons, in Parliament is to be found in Article 100 of the Constitution. The relevant provision provides that Parliament shall enact legislation to promote the representation in Parliament of, women, persons with disabilities, youth, ethnic and other minorities, and marginalised communities.<sup>133</sup> This particular provision means that the only direct obligation on Parliament is passing a law that ensures that all these marginalised

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<sup>130</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>131</sup> Article 177 and Article 197, *Constitution of Kenya* (2010).

<sup>132</sup> <sup>132</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021

<sup>133</sup> Article 100, *Constitution of Kenya* (2010).

groups including women are represented in Parliament. But there is no mention of particular proportions that are set out as is the case with Article 177 and 197 on Members of County Assemblies as argued by Parliament.<sup>134</sup> According to the Speaker of the National assembly any court decision relating to passage of legislation to ensure representation of women in Parliament can only be founded on article 100 of the Constitution and not article 27 as has been argued.<sup>135</sup>

### **4.3 Should only Parliament Bear the Responsibility of Enactment and the Implementation of the Two Thirds Gender Rule?**

Parliament is highly criticised due to the delay and the lack of implementation of the two thirds gender principle; therefore, they argue that relatedly and in any event, they have not witnessed the same energy directed at other public bodies and state agencies and constitutional commissions that are either elective or appointive even where they are not gender compliant.<sup>136</sup> Despite the huge attention that has been placed on Parliament, gender parity compliance on the part of the Executive especially the Cabinet, Judiciary including in the Supreme Court and other key state agencies has not been met. In particular, the Law Society of Kenya Council, which is an elective position of lawyers and which regulates the profession is currently according to the statement issued by the Speaker of the National Assembly not compliant to the two-thirds gender principle.<sup>137</sup>

Further, the State also refers to the polity or the electorate or the sovereign who are the people. It is incumbent upon and the responsibility of the people in exercise of their sovereign will through the ballot to give effect to the constitutional provisions on gender parity by ensuring they vote in their representatives to ensure compliance with respect to elective offices.

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<sup>134</sup> Muturi J, ‘Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?’ Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>135</sup> Muturi J, ‘Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?’ Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>136</sup> Mumma C, ‘Kenya’s failure to implement the two-third-gender rule: The prospect of an unconstitutional Parliament’ Constitutionnet, 17 June 2016 -<https://constitutionnet.org/news/kenyas-failure-implement-two-third-gender-rule-prospect-unconstitutional-parliament> on 10 April 2021.

<sup>137</sup> Muturi J, ‘Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?’ Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

It then falls upon the Executive to ensure compliance with the gender parity dictates in appointive offices. A significant part of compliance required with respect to various elective and appointive positions does not necessarily require specific legislation enacted by Parliament. In any case, there is already a guiding theme and broad constitutional principle set out under the supreme law, the Constitution of Kenya 2010. The larger problem is structural in nature and also on account of lack of necessary goodwill. It is therefore somewhat misplaced to place the blame entirely on Parliament for failure to achieve gender parity in various elective and appointive positions.<sup>138</sup>

#### **4.4 Process of Implementation of the Two Thirds Gender Rule**

It is also disconcerting that the clamour according to Parliament to pass legislation to ensure two-thirds gender principle potentially violates the sovereign will of the electorate at least to the extent that such legislation will demand top ups or nominations of women.<sup>139</sup> Excepting the cost implications, this is akin to fundamentally altering the sovereign will of the people who go to the ballot to elect their representatives in a constitutional democracy. One of the main roles of Members of Parliament is to make law, approve budgets and check on the Executive. Legislators exercise their legislative and oversight functions through voting. At present, if parliament were to nominate women legislators to comply with the two-thirds gender principle in Parliament, the Parliament would have to nominate up to 100 women legislators. The logic that Parliament uses is that given that legislators decide through voting in Parliament, this would in essence mean that there are an additional 100 votes of nominated women legislators, yet these legislators are not a direct expression of the will of the people. That elected legislators wield more legitimacy relative to nominated legislators can be deduced from Article 123 of the Constitution with respect to voting in the Senate. In the said provision, while all Senators who were registered voters of a particular county during elections constitute a single delegation for purposes of making decisions in the Senate,<sup>140</sup> it is the elected Senator of the particular county who is usually the head of such

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<sup>138</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>139</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>140</sup> Article 123, *Constitution of Kenya* (2010).

delegation. What is more, is the elected Senator as the head of delegation who usually has the priority in voting on matters affecting counties and under the Senate Standing Orders, the head of delegation can refuse to delegate voting to another member of their delegation. This impliedly demonstrates the supremacy of elected Senators, principally on account of being directly elected by the people.<sup>141</sup>

#### 4.5 High Court Ruling on the Previous Parliament

There has also been an argument to the effect that the High Court sitting in a constitutional petition<sup>142</sup> already called for dissolution of Parliament if it failed to pass the relevant law within 60 days of the judgment.<sup>143</sup> The said judgment was issued on 29th March 2017 and it has been over three years since. However, the speaker of the National Assembly stated that it need be clarified that the said decision was directed at the then Eleventh Parliament whose term ended after the General Elections in 2017.<sup>144</sup> The judgment provided that any person could petition the Chief Justice to advise the President to dissolve Parliament if the relevant legislation was not passed within sixty days. But the term of that Parliament expired upon General Elections in August 2017 and a new Twelfth Parliament,<sup>145</sup> which is the current Parliament that assumed office. While Parliament is a body that enjoys perpetual succession, it is made up of individual members some of whom are not usually re-elected. Accordingly, there is no court order directed against the current Parliament as to kick-start the process for dissolution of the current Parliament as provided by Article 260 of the Constitution.<sup>146</sup>

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<sup>141</sup> Muturi J, ‘Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?’ Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>142</sup> *Centre for Rights Education and Awareness & 2 Others v the Speaker of the National Assembly & 6 Others* (2017) eKLR.

<sup>143</sup> Article 260, *Constitution of Kenya* (2010).

<sup>144</sup> Muturi J, ‘Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?’ Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>145</sup> Muturi J, ‘Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?’ Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021

<sup>146</sup> Article 260, *Constitution of Kenya* (2010).

## 4.6 Dissolution of Parliament

In any case, the clamour for dissolution of the current Parliament on account of failure to enact the two-third gender legislation is at the very least, unrealistic. There is nowhere in the current Constitution as claimed by the Speaker of the National Assembly that the onus is placed on Parliament as an institution to ensure there is gender parity in State organs.<sup>147</sup> Parliament argued that in fact, dissolution of Parliament will necessitate a by-election in all constituencies,<sup>148</sup> nearly akin to a General Election. Given the expensive nature of elections as exemplified by the last 2017 General Elections, there does not appear to be any good reason for insisting on dissolution of Parliament according to the speaker. Even more fundamentally, he argued that there is no particular guarantee that were by-elections to be conducted throughout the country under the extant First Past the Post electoral system, the obtaining electoral results would be gender compliant.<sup>149</sup> This is especially the case since the factors that have contributed to few women being elected to office such as high cost of campaigns, electoral violence and cultural attitudes have not yet been eliminated.

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<sup>147</sup> Article 260, *Constitution of Kenya* (2010).

<sup>148</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021

<sup>149</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021

## CHAPTER 5

### 5. SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

#### 5.1 Summary of Findings

##### 5.1.1 Lack of Adequate mechanisms for the Implementation of the Two Thirds Gender Rule

As evidence in the preceding chapters of this paper, Kenya lacks adequate mechanisms, for the implementation of the two-thirds gender rule. The Constitution of Kenya 2010 outlines several provisions which establish affirmative action for the purpose of redressing the effects of marginalizing specific groups of society. This paper specifically contemplates the provisions in relation to women.

The provisions in the Constitution 2010 are clearly outlined however there have been no consequent steps taken in order to implement these crucial provisions.<sup>150</sup> The Supreme Court advisory opinion of 2012 established that the realization of the two-thirds gender rule was to be progressive.<sup>151</sup> In turn, the Supreme Court set a deadline for the Commission on the Implementation of the Constitution (CIC) to table the relevant Bills before parliament in order to implement the two-thirds gender rule. To date, there has been no action taken to implement the two-thirds gender rule in the form of legislation or relevant policies.

##### 5.1.2 Lack of Political Unwillingness

There is lack of political will to ensure that the two-thirds gender rule comes to fruition. This has been visited in chapter 3, where parliament argues that it is not mandated to implement the two thirds gender rule as stated in Article 27(8). According to Article 27(8) it requires the state as a body and not parliament alone to ensure they have taken legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive

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<sup>150</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>151</sup> *The Constitution of Kenya (Amendment Bill) 2015* published by Samuel Chepkong'a, Chairperson, Justice and Legal Affairs Committee on 30 April 2015.

bodies shall be of the same gender.<sup>152</sup> There is sure general unwillingness to enact legislation to realize the two-thirds gender rule.

## **5.2 Recommendations**

### **5.2.1 Enacting relevant legislation**

Article 27(8) provides that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.<sup>153</sup> There are consequences for not enacting relevant laws providing for the two thirds gender rule. Article 261(7) provides that if parliament fails to enact legislation, then the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.<sup>154</sup>

The laws should also mandate the implementation of party-driven measures to ensure that elections are more inclusive. This would include the mandating of reform of party by-laws, the requirement for policy documents to comply with the quest for gender equality, recruitment and preparation of women for leadership roles.<sup>155</sup> Such laws should also specifically touch on party constitutions as this constitutive document provides the true benchmark of the commitment of a party towards ensuring there is gender equity in the electoral process.<sup>156</sup>

These laws should also ensure that parties declare their unwavering support for gender parity through their policy statements. They should also ensure that women actively take part in the decision-making of the parties, take up key roles as opposed to deputized roles in order that they may be able to have a meaningful say in the process.<sup>157</sup> This can be achieved through quotas dictating the number of women who would take up key roles in the party.<sup>158</sup>

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<sup>152</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>153</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>154</sup> Article 261(7), *Constitution of Kenya* (2010).

<sup>155</sup> National Democratic Institute, Win with women global action plan National Democratic Institute, 2005, 17.

<sup>156</sup> National Democratic Institute, Win with women global action plan National Democratic Institute, 2005, 17.

<sup>157</sup> National Democratic Institute, Win with women global action plan National Democratic Institute, 2005, 20.

<sup>158</sup> National Democratic Institute, Win with women global action plan National Democratic Institute, 2005, 20.

### **5.2.2 Education of Voters**

Women have continuously been side-lined from positions of leadership due to stereotypes that have been constantly perpetuated. This can be done through civic education as well as party driven campaigns.<sup>159</sup> Political parties during their campaigns can incorporate messages that attempt to undo the stereotypes and promote the idea of women in leadership.<sup>160</sup>

### **5.2.3 Economic Inclusion**

Kenya's deeply patriarchal society effectively means that women have been relegated to the reproductive spheres. As a consequence, men are the ultimate decision-makers and controllers of economic resources. As a result, men have had greater economic opportunities to mobilize financial resources necessary for the expensive political campaigns.<sup>161</sup> For instance, the 2017 general elections campaign finance regulations gazetted by the Independent Electoral and Boundaries Commission (IEBC) reveals that Kenya's election campaigns are very expensive and unaffordable for most women candidates.<sup>162</sup>

### **5.2.4 Preparing women for leadership**

There should be active measures to recruit and prepare women for leadership. An example of an organization carrying out the same work is Early Money is Like Yeast (EMILY's list) in the United States.<sup>163</sup> This organization takes up the role of recruiting women and taking them through training that will equip them to become good leaders. In Kenya despite there being organisations to help women leaders, these organisations or even the political parties should be active in order to prepare Kenyan women for leadership.

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<sup>159</sup> Biegon J, Gender Equality and Political Processes in Kenya, 111.

<sup>160</sup> Biegon J, Gender Equality and Political Processes in Kenya, 111.

<sup>161</sup> Centre for Rights Education and Awareness, *Tracing the journey: Towards implementation of the two thirds gender principle*, 2019, 6.

<sup>162</sup> Centre for Rights Education and Awareness, *Tracing the journey*, 6.

<sup>163</sup> Biegon J, Gender Equality and Political Processes in Kenya, 106.

### 5.3 Conclusion

Women contribute a whole lot to the society; they play an important role and therefore it is equally important to ensure that they have the opportunity to take up leadership positions and roles to represent these specific interests. In Kenya, women have been marginalized for a very long time and time is ripe to change the status quo and embrace what the 2010 Constitution advocates for. The Constitution is very clear and unambiguous to be followed by everyone including those in authority. The provisions therein concerning the gender equality are so fundamentally entrenched in the Constitution to the extent that not even the Parliament can oust them, and if at all there arises any ambiguity about any provision of the Constitution, any party has got the right to approach the courts for an advisory opinion concerning the unclear provision. The state therefore is under obligation and has got no excuse at all to refuse to implement the two thirds gender rule.

Given the current efforts and initiatives to amend the Constitution that are currently underway such as the Building Bridges Initiative (BBI),<sup>164</sup> the issue on two-thirds gender rule can be subjected to a referendum in the event the same happens.<sup>165</sup> Owing to the cost implications of implementing the two-thirds gender rule through other mechanisms such as nomination and topping up, it is prudent if the matter were to be subjected to the people once more for a revaluation or to propose ways of achieving two-thirds gender rule. Importantly, parliament should also play its part in enacting an appropriate legislation for the implementation of the two thirds gender principle.

Kenya is approaching another election year and there are still no mechanisms to implement affirmative action through the two thirds gender principle. It is hoped that this will force the relevant stakeholders to go back to the drawing board and establish working implementation mechanisms of the two thirds gender rule to avoid a similar situation to that after the previous elections where not enough women were part of the elective bodies.

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<sup>164</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

<sup>165</sup> Muturi J, 'Two-Thirds Gender Rule: Is Parliament the Proverbial Punching Bag?' Kenya Law, 21 September 2020 -<http://kenyalaw.org/kenyalawblog/national-assembly-speakers-statement-on-the-gender-rule/> on 10 April 2021.

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