

**The Gender Principle and an Appraisal of Institutions' Obligations towards its  
Attainment in Kenya's Parliament.**

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By

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## Declaration

I, OSORO AMY HAZEL MONYENCHE, 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: A.O.

Date: 30/06/2021

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

Signed: James Mutua Mabuti

Mr James Mutua Mabuti.

(On behalf of Ms Patricia Achieng' Ouma)

## **Abstract**

The research is based on the 2:1 gender ratio imposed on the August House by Article 81(b). This is the Constitution's historically motivated assertion of its aspiration enshrined in its Article 27(8) of not more than two-thirds of members constituting elective or appointive bodies to be of one gender. The Article further calls for affirmative action programs, policies as well as legislation to ensure the minority gender is bolstered into spaces where they have not been adequately represented. The targeted gender is stipulated in Article 100; women.

Of the bodies charged with the realisation of this 2:1 gender ratio in parliament, the paper narrowed in on 4- the Judiciary, Legislature, Independent Electoral and Boundaries Commission (IEBC) as well as Political Parties. Upon scrutinising their roles vis-à-vis their efforts towards the Gender Principle, the paper finds a disconnect. A lack of accountability, disrespect for the rule of law and the inexecution for the measures set by the existing laws plague the realisation of the envisaged reform intended by law. This led to it concluding that until there is full respect of the rule of law and the indiscriminate implementation of the current laws, there lies no guarantee or premise that a new or change in laws would lead to a change of heart, mind, narrative or system.

## **List of Abbreviations**

CAJ- Commissioner on Administrative Justice

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

CIC- Commission on the Implementation of the Constitution

CREAW- Centre for Rights Education and Awareness

FIDA-Kenya- Federation of Women Lawyers in Kenya

IEBC- Independent Electoral and Boundaries Commission

KANU- Kenya African National Union

MYWO- Maendeleo Ya Wanawake Organisation

NDI- National Democratic Institute

NGEA- The National Gender and Equality Act (2011)

NGEC- The National Gender and Equality Commission

ODM- Orange Democratic Movement

TWG- Technical Working Group

USAID- United States Agency for International Development

WRP- Women's Rights Program

## List of Cases

*Andrews v. The Law Society of British Columbia* (1989), The Supreme Court of Canada.

*Centre for Rights Education & Awareness v Attorney General & another* (2015) eKLR.

*Centre for Rights Education and Awareness and others v Speaker of the National Assembly* (2016) eKLR.

*Edwards v Attorney-General for Canada* (1930), The Privy Council; The Pearson Case.

*Federation of Women Lawyers in Kenya v Speaker the National Assembly & 4 others* (2018) eKLR.

*In the Matter of the Chief Justice's Petition Nos 1-5 of 2019 and 1 of 2020* (2020) eKLR.

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

*Johnson Muthama v Minister for Justice and Constitutional Affairs and another* (2012) eKLR.

*Katiba Institute v Independent Electoral and Boundaries Commission* (2017) eKLR.

*National Gender and Equality Commission v Independent Electoral and Boundaries Commission and another* (2013) eKLR.

*Re in the Matter of the Interim Independent Electoral Commission* (No. 2 of 2011) eKLR.

*Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* (2019) eKLR.

*Supreme Court Advisory Opinion* (No 2 of 2010) eKLR.



## **List of Legal Instruments**

### **International Legal Instruments**

*Convention of the Elimination of All Forms of Discrimination Against Women* (1984); CEDAW.

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

### **Kenyan Legal Instruments**

*Constitution of Kenya* (1969); The Repealed Constitution.

*Constitution of Kenya* (2010).

*Election Act* (Act No 24 of 2011)

*Election Offences Act* (Act No 37 of 2016).

*Independent Electoral and Boundaries Commission Act* (Act No 9 of 2011).

*National Gender and Equality Commission Act* (2011).

*Political Parties Act* (Act No 11 of 2011).

### **Kenyan Parliamentary Bills**

*Constitution of Kenya (Amendment) Bill* (2014); The Joe Mutambu Initiative.

*Constitution of Kenya (Amendment) Bill* (2019).

*Constitution of Kenya (Amendment) Bill* (Bill No 4 of 2015); The Duale 1 Bill.

*The Punguza Mzigo Constitution of Kenya (Amendment) Bill* (2019).

*The Two-Third Gender Rule Laws (Amendment) Bill* (2015).

## Chapter 1: Introduction

### Background of the Problem

It is no secret that the need for more women in public life is a global issue. Comprehensive efforts towards their inclusion are evidenced by the various laws that defend women's political rights, both municipally and internationally. The Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) advocates for the woman's right to participate and form part of a country's public life.<sup>1</sup> CEDAW also obligates its party States, of which Kenya is one, to modify the patterns of conduct to ensure neither sex is inferior, more so in political life.<sup>2</sup> CEDAW made way for further commitments to the same, like the regional Maputo Protocol which obligates its party states to ensure the increased involvement of women in politics.<sup>3</sup>

Over the ratification of such treaties and giving them equal status to local laws,<sup>4</sup> the 2010 Constitution's stance on women's political inclusion and positive discrimination is clear and recurrent. The Kenyan Constitution explicitly provides for the freedom from gender discrimination.<sup>5</sup> This Constitution has been hailed for creating "a new country" through its transformational societal changes.<sup>6</sup> In fact, its Article 21(3) places an extra obligation on all State bodies and officers to protect the rights of the vulnerable, who previously remained disregarded and excluded.<sup>7</sup> Further, the Constitution recognises women as political minorities who need to be bolstered into power in Article 100 through legislative and other measures as dictated by Article 27(8).<sup>8</sup> Citing the historical problem, it suggests a remedy- the Gender Principle.

The Gender Principle is the imposition of the 2:1 gender ratio in elective or appointive positions, found under Article 81(b).<sup>9</sup> This precondition is an affirmative action campaign

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<sup>1</sup> Article 3, *Convention of the Elimination of All Forms of Discrimination Against Women* (1984).

<sup>2</sup> Article 3, 4, 5 and 7, *Convention of the Elimination of All Forms of Discrimination Against Women* (1984)

<sup>3</sup> Article 5, 9 and 17, *The African Charter of Human and Peoples' Rights on the Rights of Women in Africa* (2003).

<sup>4</sup> Article 2(5) and 2(6), *Constitution of Kenya* (2010).

<sup>5</sup> Article 27, *Constitution of Kenya* (2010).

<sup>6</sup> Mutunga W, 'Keynote Speech by The Chief Justice, Hon Dr Willy Mutunga At the Commencement of the Judicial Marches Week Countrywide on 21 August 2012', eKLR, 22 August 2020 -< <https://cutt.ly/ujSngRr> > on 20 October 2020.

<sup>7</sup> Article 21(3), *Constitution of Kenya* (2010).

<sup>8</sup> Article 100, *Constitution of Kenya* (2010).

<sup>9</sup> Article 81(b), *Constitution of Kenya* (2010).

aimed at pushing women into positions and bodies that were previously impermeable to them and levelling the political playing field to ensure of this. To achieve this noble aspiration, the Constitution enlists various bodies to create as well as ensure the full implementation of mechanisms regarding the realisation of the Gender Principle in Parliament. This historically motivated push to tilt this balance to ensure substantive representation of both genders in Parliament from 2010.<sup>10</sup>

It goes without say that the imposition of the Gender Principle and its extension to Kenya's Parliament by the supreme law of the land is a vital addition and a first in Kenyan domestic policy. However, despite its specifications and delegation of roles to various bodies within the political sphere, there exists nothing to show for it. The electoral system remains unchanged, and the gender imbalance prevails in parliament. It is the object of this paper to evaluate the roles of four state bodies- the Judiciary, the Independent Electoral Boundaries Commission (IEBC), political parties and the legislature- and probe their efforts towards achieving the Gender Principle.

### **Statement of the Problem**

The 2010 Constitution envisions an inclusive political climate with at least a 2:1 gender ratio in Parliament through legislation and supplementary affirmative action programs by bodies within the election process. Though there is a gradual increase of women parliamentarians, no measures exist to ensure the Gender Principle is attained and maintained. Lack of political will is evident as illegitimate parliaments survive and neither legal reforms nor change in the electoral and political environment exist to ensure an inclusive House. The research shall examine the four aforementioned bodies, scrutinising their powers and efforts before concluding whether more could be done to attain the elusive two-thirds gender quota in Parliament come 2022. However, before doing so, the research shall look into the origins and significance of the Gender Principle and affirmative action bolstering women into Parliament. This is vital in grasping the *raison-d'etre* of this rule in Kenya's political context and in and of itself justifies the interrogation.

### **Justification and Significance of the Study**

The achievement of the Gender Principle in Parliament has been a source of debate and concern. It has been highly discussed in the Constitution's 10<sup>th</sup> Anniversary celebrations and

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<sup>10</sup> Article 27(8), *Constitution of Kenya* (2010).

politicised in light of the Chief Justice's advisory opinion for the President to disband the unconstitutional Parliament. The research hopes to shed light on the importance of the Gender Principle in Kenya's democratic society and the role of the IEBC, legislature, political parties and the judiciary in its achievement. It will further probe their efforts, along with the Bills on the Gender Principle. This legal and status quo analysis, supplemented by reports on the political participation of women, may enable one to assess and form an informed opinion on its importance plus what has, can and should be done by the four institutions to achieve the Gender Principle in Kenya's Parliament come 2022.

### **Aim and Objectives**

This research aims at exploring the role and efforts of the legislature, judiciary, political parties, IEBC and the legislature towards fulfilling the Two-Thirds Gender Rule in Parliament.

The achievement of this aim will be facilitated by the following research objectives:

1. Analysing the importance of the Gender Principle in Kenya's Parliament and political context.
2. Assessing the legal amendments alongside the obstacles women politicians' face and consider whether the drawbacks precluding women from meeting the gender threshold in Parliament are catered to.
3. Examining the roles delegated to various institutions vis-à-vis their effort towards the realisation of the Gender Principle in Kenya's Parliament.

### **Research Questions**

The paper mainly aims to discover what more could be done by these institutions to achieve the 2:1 Gender Quota in Parliament. The paper shall also answer:

1. What is the significance of the Gender Principle and the importance of its realisation in Kenya's Parliament?
2. Are the suggested legal amendments plausible and do they address the obstacles inhibiting the realisation of the Gender Principle?
3. What are the obligations owed vis-à-vis the efforts made by the four State institutions regarding the attainment of the Gender Principle?

## **Hypothesis**

This research presumes that:

1. The 2010 Constitution is not being fully implemented to by institutions to ensure the realisation of the Gender Rule in Parliament.
2. There are currently no substantive changes to the law ensuring the 2:1 gender threshold is met by Parliament come 2022 henceforth.
3. There are various institutions directed by law to ensure and implement the Gender Principle in Parliament.
4. The Gender Principle may be achieved once the relevant institutions fully and properly discharge their obligation towards its achievement.

## **Research Methodology**

The research will employ the desktop research methodology. It is fully doctrinal research. In its analysis, interaction and introduction of various material into itself, it will use descriptive, conceptual and evaluative research methods. It will also apply a socio-legal approach to understand and attain an optimal societal perspective in which the Gender Principle will be appreciated, accepted and impactful in Kenya. Normative legal theories, like Constitutionalism and the Rule of law, along with explanatory legal theories would aid the research advance its arguments and help paint the status quo against the ideal situation. This will also be supplemented by the descriptive and analytic approach while explaining and critiquing the status quo to enhance understanding of the state of affairs.

## **Literature Review**

The journey towards women's political equality in Kenya has been an uphill battle. Women strive to break from the social and cultural patterns confining them to domestic and care-giving roles of mothers and wives.<sup>11</sup> The post-independence Kenya reinforced the colonists' inferior view of women.<sup>12</sup> Kenya severely limited women's political and economic power, forcing them to pledge obeisance to the patriarchy to guarantee their protection and survival.

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<sup>11</sup> Iman MT, Sotoudeh M, Enayat H and Rajabi M, 'Construction of The Symbolic Domination Against Women and Their Cultural Strategies Confronting It' 18 (1) *Journal of Economic and Social Research*, 2019, 1060.

<sup>12</sup> Mackinnon C, *Women's Lives, Men's Laws*, Harvard University Press, Cambridge, 2005, 70.

Women were neither party officials nor political candidates in 1963. They remained “background singers and dancers”, backing the men.<sup>13</sup> This may be attributed to the disenfranchising Bill of Rights in the Repealed Constitution, riddled with clawback clauses and complete disregard for women in politics.<sup>14</sup> This was highlighted by the 2003 Taskforce which reviewed women-related laws. This Taskforce pointed out Section 70 of the Repealed Constitution on freedom from discrimination for all, which is followed by Section 82(3) containing a closed list which omitted women from protection from discrimination by law and public officers.<sup>15</sup> Adversely affected by the masculine model of politics, women began their fight for representation in the public domain.

This lack of support by the political class, the law and policy led to the birth of the liberal feminist movement Maendeleo Ya Wanawake Organisation (MYWO). The MYWO became a formidable and the pioneer promoter of women political representation in Kenya.<sup>16</sup> It was thus a huge win for MYWO and Kenyan women when the 2010 Constitution took the imperative to push for and make certain political inclusivity and equality. This it aimed to achieve via legislation, along with supplementary efforts of bodies in the electoral system to realise the Gender Principle in Parliament.

The 2010 Constitution calls for widespread gender mainstreaming. It demands the restructuring of the political and election processes to ensure their transparency and accountability to break the formal political barriers and facilitate the inclusion of political minorities. Professor Nzomo summarises political barriers against women into three and shall be expounded on below: Deeply embedded patriarchy, autocratic institutions and policy as well as the lack of civic sensitisation.<sup>17</sup>

The deeply entrenched socio-cultural patriarchal values in Kenya are evidenced by the male push-back in women’s political successes. Women go through political opposition, despite the Maputo Protocol explicitly securing the woman’s right to a positive cultural context.<sup>18</sup> A

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<sup>13</sup> Owuor E, ‘Women and Political Inclusion in Kenya: A Historical Overview’, 1963-2016, in Bignon J (Ed) *Gender Equality and Political Processes in Kenya: Challenges and Prospects*, Strathmore University Press, Nairobi, 2016, 12.

<sup>14</sup> Section 70 and 82(3), *The Constitution of Kenya* (1969).

<sup>15</sup> Republic of Kenya, *Report of the Task Force Appointed to Review Laws Related to Women*, 1999, 20.

<sup>16</sup> Becker M, Bowman CG and Torrey M (eds) *Feminist Jurisprudence: Taking Women Seriously, Cases and Materials*, West Publishing Company, Minnesota, 1994, 13-15.

<sup>17</sup> Nzomo M, ‘Women in Political Leadership in Kenya: Access, Agenda Setting and Accountability’, August 2014 -< <https://cutt.ly/CfVY0yf> > on 24 September 2020.

<sup>18</sup> Article 17, *The African Charter of Human and Peoples’ Rights on the Rights of Women in Africa* (2003).

positive cultural context means freedom from any threat or actual violence against women anywhere, including politics. This violence in politics is thought to be a tactic by male politicians to assert their dominance in the arena.<sup>19</sup> This may be deduced and evidenced by the arson of Hon Rachael Shebesh's home after being the first lady to win the ODM Party primaries, something that had never occurred to any male contender.<sup>20</sup>

It is ridiculous to repeat ineffective actions, expecting them to yield the expected results. Election laws, known to marginalise women, have not changed much to accommodate or mitigate the adversities they endure.<sup>21</sup> The lack of such reform serves as an indicator of men's determination to maintain the political status quo and speaks to Professor Nzomo's point on undemocratic institutions.<sup>22</sup> It may also be that laws are still heavily influenced by the male politicians, thus leaving the reforms at their mercy. It is one thing to send a thief to catch a thief and a different, difficult and humorous phenomenon altogether to send a thief to catch himself. Asking the male-dominated House to pave way for female counterparts ensues a clash between duty and self-preservation, of which the latter has been notably dominant.<sup>23</sup>

Further, Kenya's election process does not aspire towards women inclusivity. It is reported by the Rift Valley Institute that parliamentary representation of women is largely dependent on political regimes that prioritise gender equality and cultures amenable towards women in power.<sup>24</sup> Currently, the election regime does not cater to the woman politician despite the history of disenfranchisement.<sup>25</sup> For instance, gender-based violence is not a recognised election offence in the Election Offences Act, yet it is reportedly the most prevalent crime against women candidates.<sup>26</sup> Despite making room for women in politics, the Constitution

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<sup>19</sup> Mbote PK, 'The Quest for Equal Gender Representation in Kenya's Parliament: Past and Present Challenges', in Bigeon J (Ed) *Gender Equality and Political Processes in Kenya: Challenges and Prospects*, Strathmore University Press, Nairobi, 2016, 36.

<sup>20</sup> Omoro J, 'Mbita MP's House Burnt Day After Winning ODM Primaries', *The Standard*, 27 April 2017 -< <https://cutt.ly/psM6fYI>> on 30 July 2020.

<sup>21</sup> *The Star*, 'Decade of 2010 Constitution: Rebirth or Failed Promises?', *The Star*, 21 August 2020 -< <https://cutt.ly/AfppLyX>> on 23 August 2020.

<sup>22</sup> Mbote PK, 'The Quest for Equal Gender Representation in Kenya's Parliament' 46.

<sup>23</sup> *The Star*, 'MPs Want to get Rid of 47 Women Reps', *The Star*, 16 July 2019 -< <https://cutt.ly/2foOfCc>> on the 22 August 2020.

<sup>24</sup> Rift Valley Institute Report, *Strengthening the Leadership and Influence of Women in Politics in Kenya*, 2017, 17.

<sup>25</sup> Migiro K, 'New laws ignored, so women trailed in Kenya 2013 election' Thomson Reuters Foundation, 5 December 2013 -< <https://cutt.ly/VdnvUZ>> on 3 August 2020.

<sup>26</sup> National Democratic Institute and the Federation of Women Lawyers-Kenya (FIDA-K), *A Gender Analysis of the 2017 Kenya General Elections*, 2018, 39.

alone may not address this issue and solely transform the society, thus in need of help from both institutions and the law to establish an all-encompassing and fair political environment.

After years of the elevation of men and the subordination of women, it is absurd to expect that passing a few laws will tilt the balance despite the accumulated privilege of men to the impoverishment of women. Because, at the end of the day, laws are just but mere authoritative writing in need of vessels to breathe life into them and execute them. The Judiciary, legislature, IEBC and political parties are four such vehicles empowered differently by the Constitution and charged with the duty of making the Gender Principle a reality in Kenya's Parliament. It is thus rather unfortunate that some organs enlisted have done little to nothing towards its achievement as will be demonstrated in chapters to come.

It is extremely vital for women to have substantial representation and presence in governance. Females make up half the population yet remain inadequately represented in State leadership.<sup>27</sup> Representation is considered a vital component in resource distribution, decision making and important for a group's progress and development.<sup>28</sup> It is for these reasons that the Constitution explicitly provides for measures ensuring substantive representation of all groups in Kenya- a dominantly patriarchal polity. Every polity deserves the best leader chosen from a fair, impartial process, of which their gender does not affect their success. Institutions and laws play different roles towards the realisation of the Gender Principle, making it vital for all to do their part as it affects the success of this constitutional aspiration. It is thus important to probe their efforts and know what has and should be done to actualise the now deemed elusive Gender Principle in Kenya's parliament.

### **Limitations of the Study**

The study is limited to the reliance of newspaper reports on cases that may be filed and heard in the lower courts. Also, the actual cases from the elections dispute tribunal concerning malpractices during the campaigning period are not availed to the public and thus the study's reliance on their reports. This is a limitation as the media are neither trained to interpret the law nor guaranteed to give an unbiased or a full report of the truth of the matter. Nonetheless, the research will seek information from as many sources as it possibly could to have a better and clearer understanding of the matter.

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<sup>27</sup> -< <https://countrysmeters.info/en/World> > on 20 September 2020.

<sup>28</sup> Nzomo M, 'Women in Political Leadership in Kenya: Access, Agenda Setting and Accountability', August 2014 -< <https://cutt.ly/CfVY0yf> > on 24 September 2020.



## **Definition of Terms**

**The Gender Rule/The Gender Principle:** This is the rule under Article 81(b) of the 2010 Constitution that stipulates not more than two-thirds of the members of elective public bodies shall be of the same gender. Its use in the research has been limited to reference Kenya's Parliament.

**The gender ratio/ the gender threshold:** This is in reference to the ratio alluded to by the Gender Rule, which is the Constitution-mandated 2:1 gender ratio of men to women in the August House.

## **Chapter Breakdown**

### **Chapter 1: Introduction and Background to the Problem**

This chapter introduces the Gender Principle and the importance of the Constitution's dictates under Article 27(8) and Article 100. It also gives an overview of the research through the research questions, aims and objectives, its justification and significance. It also stipulates the research's methodology and limitations of the study.

### **Chapter 2: Theoretical framework**

This chapter delves into theories of democracy, substantive equality and justice. Within them, there will also be discussions on Constitutionalism, the rule of law as well as the justification of affirmative action and positive discrimination. These theories shed light and help to understand the stances and reactions of the Constitution, the Law as well as the Judiciary on issues regarding the Gender Principle in Kenya seen in the research.

### **Chapter 3: Challenges Women Face in Politics and the Gender Rule Amendment Bills**

The chapter shall delve into the challenges women politicians face in Kenya's political scene. It shall thereafter examine the suggested legislative bills drafted to aid in the fulfilment of the Gender Principle in Kenya's Parliament. After which, the research shall discuss whether the suggested reforms address the challenges encountered by women in politics and the feasibility of the various Bills, answering the second research question.

### **Chapter 4: Institutions Charged with the Realisation of the Two-Thirds Gender Rule**

This chapter examines the role of the Judiciary, IEBC, political parties and the Legislature in implementing the Gender Principle. It shall review their powers vis-à-vis their efforts towards

the achievement of the 2:1 gender ratio in Parliament and equality of women in politics. This shall go to answer the third research question of whether the Judiciary, Legislature, IEBC and political parties have fully discharged the mandate owed to the Gender Principle or are yet to do more towards its achievement.

### **Chapter 5: Conclusion, Findings and Recommendations**

This chapter will conclude the research by summarising the findings and giving its recommendations based on its outcomes.

## **Chapter 2: Theoretical Framework**

### **Introduction**

The need for special measures by both institutions and legislation to bolster women into politics is expressed above. This chapter shall tackle the theories of democracy, substantive equality and justice, which will guide and justify the research's points, arguments and suggestions on the obligation owed and imposed by the Constitution regarding the Gender Principle.

### **The Theory of Democracy**

Democratic theories imply that the decision of the majority has unlimited sovereignty.<sup>29</sup> Dahl describes democracy as “*Demokratia*” meaning ‘the rule of the people’ with its chief characteristics being the ability of sovereign citizens to express their political preference freely.<sup>30</sup> This makes the mark of democracy to be the ability of all to participate equally and collectively in politics. From the chapter above, it is evident that Kenya is riddled with patriarchy, more so in politics. This makes measures like the Gender Principle important to ensure a democracy where both men and women equally compete politically. This research holds this as the democracy envisaged by Articles 27(8), 81(b) and 100 of the Constitution.<sup>31</sup>

An inclusive democracy strives to disperse political power to ensure the protection, representation and participation of minorities in governance.<sup>32</sup> It is geared towards the decentralisation of power from any discriminatory confines, gender being one. The Gender Principle came to remedy the shortcomings of the Kenyan political system by fostering inclusivity in our constitutional democracy.<sup>33</sup> The Constitution, through this rule, envisioned a government that strives for the dispersion of political power to protect and include minorities in governorship and explicitly expresses so in its Article 100.<sup>34</sup> This endeavour is however in a chokehold despite being a constitutional mandate.

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<sup>29</sup> Dahl RA, *A Preface to Democratic Theory*, Chicago University Press, Chicago and London, 1956, 37.

<sup>30</sup> Dahl RA, *Democracy and its Critics*, Yale University Press, New Haven, 1989, 3 and 109-113.

<sup>31</sup> Article 27(8), 81(b) and 100, *Constitution of Kenya* (2010).

<sup>32</sup> United Nations Development Programme, *Human development report 2000: Human rights and human development*, Oxford University Press, New York, 2000, 57.

<sup>33</sup> Albertyn C, ‘Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice’ 34 (3) *South African Journal on Human Rights*, 2018, 442.

<sup>34</sup> United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development*, 57.

The very essence of constitutionalism is based on the people being the source of all the government's authority as the Constitution sets the limitations and systems of operation.<sup>35</sup> This limits the government's liberty to what is permissible by the Constitution and binds them to fulfil and oblige to its dictates.<sup>36</sup> Kenya's Constitution declares its people sovereign with state officers being their agents.<sup>37</sup> This means that institutions such as the Legislature, the IEBC and all state agencies, along with their agents, remain bound to the will of the people and the prescribes of the Constitution. However, this ideal has been challenged by both Kenya's status quo and Rousseau who questioned whether a person who has delegated their power is still free and sovereign.<sup>38</sup>

This valid concern is addressed through three mechanisms highlighted by Tamanaha. First is the limitation of direct democracy to the electorate. Secondly, the separation of powers to reduce or obliterate the chances of abuse of power and institutional domination. Lastly, judicial review to determine the legality of legislation and State actions.<sup>39</sup> These three measures limiting the governor's abilities by law are present in Kenya's context. It is also quite clear that their effectiveness is hinged on the rule of law, being legal safeguards.

The rule of law declares that all are subjected and limited by law, thus none is above it. This shields people from the unpredictable rule of man and the human weakness of ignorance, greed, bias or whim.<sup>40</sup> In Kenya, the Constitution's intention to bind all is seen by it declaring its own supremacy and binding nature to all persons and state organs.<sup>41</sup> Therefore, the non-compliance to its dictates on the Gender Principle by the State, its agents and organs - particularly the IEBC, Legislature and Executive- is a violation of the rule of law and contravenes the essence of having a constitutional democratic State.

For a society to reap the full benefit of a Constitution, the document must be applied entirely and indiscriminately. It is thus impossible for Kenya to achieve the envisaged democratic

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<sup>35</sup> Ogendo HWO, 'The Politics of Change in Kenya since Independence, 1963-1969', 71 (282) *African Affairs*, 1972, 9.

<sup>36</sup> Grewal DS and Purdy J, 'The Original Theory of Constitutionalism' in Tuck R (ed) *The Sleeping Sovereign: The Invention of Modern Democracy* Cambridge University Press, Cambridge, 2016, 6.

<sup>37</sup> Article 1(1), 1(2) and 4(2), *Constitution of Kenya* (2010).

<sup>38</sup> Plattner M, 'Liberalism and Democracy: Can't Have One Without the Other' 77(2) *Foreign Affairs*, 1998, 171-174.

<sup>39</sup> Tamanaha BZ, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, 32, 54 and 55.

<sup>40</sup> Tamanaha BZ, *On the Rule of Law*, 122 and 123.

<sup>41</sup> Article 2(1), *Constitution of Kenya* (2010).

society due to the disrespect for the Constitution, rule of law and the sovereign people's will in the referendum by both the State, its institutions and officers. This violates the State as this disregard contravenes its essence as a democracy.<sup>42</sup>

### **Substantive Equality**

Equity is defined as giving one their due. This is largely contrasted with equality, which is making sure everyone is both seen and treated the same by the law; sameness.<sup>43</sup> The Constitution affirms for the equal enjoyment of rights and freedoms by all but provides instances where preferential treatment is to be employed.<sup>44</sup> This shows its cognisance of difference to cater to the special needs of a group to result in their betterment.<sup>45</sup> This differentiation is applied to Kenya's context to remedy the past injustices occasioned, more so to its political minorities.<sup>46</sup> This recognition of disenfranchisement that necessitates redistribution is in essence substantive equality.<sup>47</sup>

Substantive equality is a foundation upon which a society begins to build a culture of equality and fairness. This it does by dismantling the systems of inequality while acknowledging and addressing the needs of the marginalised in an effort to elevate them to the same level as the enfranchised.<sup>48</sup> Kenya's political scene being mainly patriarchal makes it important to put measures, focused on changing the reality and circumstance of the impoverished to ensure they better access what was previously inaccessible. In the case of the Gender Principle, to ensure that Kenyan women better permeate and participate in the political arena. Substantive equality caters for the specific needs of the minorities with the aim of alleviating them and reduce if not completely obliterate the discrimination. This is all to ensure that none is beneath the other.

It is noteworthy that substantive equality is not clean-cut equality, but a base upon which a society builds a culture of equality and fairness for all. Before gender-neutral in politics, inequalities must cease to exist. Before then, there is need to address the issues women face

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<sup>42</sup> Article 4(2), *Constitution of Kenya* (2010).

<sup>43</sup> *Andrews v. The Law Society of British Columbia* (1989), The Supreme Court of Canada.

<sup>44</sup> Article 19, *Constitution of Kenya* (2010).

<sup>45</sup> Mutiga M, 'Kenya's Women Struggle to End Male Stranglehold on Power' *The Guardian*, 6 January 2017 - <<https://cutt.ly/Es1qdvq>> on 30 July 2020.

<sup>46</sup> Article 22(3), *constitution of Kenya* (2010).

<sup>47</sup> Albertyn C, 'Contested Substantive Equality in the South African Constitution: beyond social inclusion towards systemic justice', 442.

<sup>48</sup> Gathii JT, 'Agenda of the Third World Approached to the International Law (TWAIL)' in Dunoff J and Pollack M (eds) *International Legal Theory: Foundations and Frontiers* Cambridge University Press, Cambridge, 2019, 12.

while seeking political office. Catering to women's needs in politics enables for a more inclusive and conducive democratic environment. Women may be more confident to venture into politics as the barriers of entry to the male dominated political sphere are relaxed and their concerns addressed.<sup>49</sup> This inclusion may also result in better leaders as fair competition creates a platform for one to make an informed and sound decision, based on credentials rather than sideshows which often detriment women's bids.

Taking cognisance and addressing the hurdles political minorities face will go a long way in increasing their participation in politics.<sup>50</sup> Being better protected and supported by the law and there being structures to safeguard this may boost their confidence in their capacity and abilities to try their hand in politics in a positive cultural context.<sup>51</sup> It is thus important for public education and sensitisation of the electorate on the Gender Principle before any affirmative action measures are appreciated and political inclusivity embraced and actualised in Kenya, more so being a land under the rule of the people.

### **The Theory of Justice**

Rawls defines justice as equality for all in basic liberties, social life and all social goods. However, he also opined that inequality is justice if it amounts to the greatest possible benefit for the least well-off.<sup>52</sup> Rawls recognises the need to positively discriminate minorities to ensure justice for them. This splintered into his distributive justice theory, which allows for certain people to be compensated for past injustices endured.<sup>53</sup> The theory allows for institutions to positively discriminate minorities, to make platforms more favourable and accessible to them.<sup>54</sup> This justifies and birthed affirmative action initiatives.

Dworkin defined affirmative action to mean programs launched for the minority groups in society aimed at the correcting the consequences of social historical prejudice.<sup>55</sup> This model is

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<sup>49</sup> Braun M, 'Kenyan Women Struggle in Politics' DW, 8 February 2013, -< <https://cutt.ly/kfpanol>> on 23 August 2020.

<sup>50</sup> Reuters, 'Kenyan Women Candidates Face Curses and Violence' The East African, 5 August 2017-< <https://cutt.ly/QtmPcFg>> on 21 March 2020.

<sup>51</sup> Article 17, The African Charter of Human and Peoples' Rights on the Rights of Women in Africa (2003).

<sup>52</sup> Rawls J, *A Theory of Justice*, Harvard University Press, Cambridge, 1972, 53 and 54.

<sup>53</sup> Burns JH and Hart HLA, *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation*, Clarendon Press, London, 1996, 11.

<sup>54</sup> Miller D, 'Distributive Justice: What People Think' in Lamont J (ed), *Distributive Justice*, Routledge, London, 2017, 136-175.

<sup>55</sup> Dworkin R, 'Why Bakke Has No Case' The New York Review of Books, 10 November 1977, -< <https://cutt.ly/xjkr2R9>> on 3 March 2020.

reflected by the 2010 Constitution, which endeavours to bridge the gender gaps in our society and parliament by requiring special measures to be taken to empower women into spaces that were previously impermeable to them.<sup>56</sup> It is thus in the interest of justice to compensate and prevent previous political injustices via implementing the Gender Principle, aimed at increasing women and minorities representation in Kenya's parliament.

According to Marion Young, to ensure that all the people liberally pursue their own ends, their distinct voices need to be represented. She adds that real participatory structures ensure representation and the assertion of various perspectives.<sup>57</sup> The Gender Principle came to ensure that the unique realities of the Kenyan women are represented.<sup>58</sup> It is quite evident from former elections and the attitude of people to women in politics may not facilitate their substantive representation in parliament without affirmative action or legislative help.<sup>59</sup> Therefore, the delay of such measures results in an injustice in itself.

It is obvious that women are unheard, underrepresented and brutalised in their pursuit for political reform.<sup>60</sup> The delay and non-implementation of measures to address their plight results in an unjust society, where they remain subservient to the majority, leaving their voices unheard and needs unaddressed. An injustice indeed.

## **Conclusion**

The theories above answer the inquiry on the importance of the realisation of the Gender Rule in Kenya's Parliament. They also justify the Constitution's mandate for the preferential treatment of women in politics to accord them their due compensation for the injustice of political segregation endured to safeguard equality and fairness in the arena. Despite the Constitution empowering organs to execute the will of the people, they are seen violating the rule of law and denying Kenyans of the promise of an inclusive democracy. This defiance to accord women their constitutional due by some state organs and their agents retains their politically subserviate status. This absence of action to correct this historical anomaly in

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<sup>56</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>57</sup> Young M, *Justice and the Politics of Difference*, Princeton University Press, Princeton, 1990, 116.

<sup>58</sup> Braun M, 'Kenyan Women Struggle in Politics' DW, 8 February 2013, -< <https://cutt.ly/kfpanol> > on 23 August 2020.

<sup>59</sup> Reuters, 'Kenyan Women Candidates Face Curses and Violence' The Daily Nation, 5 August 2017 <<https://cutt.ly/RsZBdQN>> on 29 July 2020.

<sup>60</sup> Mutiga M, 'Kenya's Women Struggle to End Male Stranglehold on Power' The Guardian, 6 January 2017 - < <https://cutt.ly/Es1qdvq> > on 30 July 2020.

Kenya's political scene to ensure substantive equality and equity to women in politics is an injustice to women, the Constitution and the citizens of the Kenyan democracy.



## **Chapter 3: Challenges Women Face in Politics and the Gender Rule Amendment Bills**

### **Introduction**

The above theories justify and speak to the importance of the Gender Rule in Kenya's Parliament. They also reveal the significance of all the agents charged with its implementation to play their given role towards an inclusive and just Parliament and polity. This chapter shall begin by examining the challenges faced by women in politics, followed by an assessment of the various Amendment Bills. This assessment in view of Kenya's reality would help ascertain whether the Bills draw Kenya closer towards realizing the Gender Rule in Parliament and fostering an inclusive democracy.

### **The Challenges Women Face in Politics**

The need to protect female political candidates is dire. Violence propaganda, gender-based discrimination, and lack of support from other women have been identified as hinderances to the effective participation of women in politics.<sup>61</sup> A study by the Inter-Parliamentary Union found that 82% of women politicians face psychological violence while 44% receive threats of harm, such as rape, death, even the abduction of their children.<sup>62</sup> Though industrialisation and modernisation has strengthened the woman's place in community, there is still need for a legislative framework to account for the woman's political experience and address the barriers to their participation. This may make women more confident political aspirants and able competitors against their male counterparts.

A change in law did not change the status quo. In 2017, majority of the women who ran for the first time neither knew how to run their campaigns nor how to work with their political parties.<sup>63</sup> They either had late training that had little or no impact on their campaigns or none at all. The absence of civic education schemes or capacity building initiatives for women candidates greatly disadvantages them since they lack the know-how to run a successful campaign.<sup>64</sup> This affects the effectiveness of their campaigns and their chances of success as public outreach is

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<sup>61</sup> Anyango B, Alupo AA and Opuku MA, 'Women in Politics in Kenya: An Analysis of Participation and Barriers', 7 (1) *Multidisciplinary Journal on Gender Studies*, 2018, 11.

<sup>62</sup> Inter-Parliamentary Union, *Sexism, Harassment and Violence Against Women Parliamentarians*, 2016, 4.

<sup>63</sup> National Democratic Institute and the Federation of Women Lawyers-Kenya (FIDA-K), *A Gender Analysis of the 2017 Kenya General Elections*, 2018, 37.

<sup>64</sup> National Democratic Institute and the Federation of Women Lawyers-Kenya (FIDA-K), *A Gender Analysis of the 2017 Kenya General Elections*, 2018, 37.

vital while pursuing a democratic seat. After years of the elevation of men and the subordination of women, it is absurd to expect that passing a few laws will tilt the balance despite the accumulated privilege of men to the impoverishment of women. More needs to be done to bridge the gapping disparity between the two to enable an equal political environment.

Dr Pankaj finds that women, even while in parliament, only have weak power while men maintain their role as the leaders in politics.<sup>65</sup> This has proven true as Kenyans still view the women representative post as useless, due to the general feel that women are politically disengaged.<sup>66</sup> This may be due to the little to no swing the docket has and the othering by male politicians, and lack of camaraderie from their female counterparts in regular seats, for being benefactors of affirmative action initiatives.<sup>67</sup> This lack of regard for affirmative action has led to discussions to erase both the gender rule and women-rep seat from the Constitution.<sup>68</sup> Until Kenyans understand the vitality of having women representation and respect them as equal political leaders, such programs are futile and even at times diminish the value placed on women leadership.

Amanda Clayton asserts that affirmative action programs do not change the mindsets of the people.<sup>69</sup> It is thus no surprise that the affirmative action programs face great resistance in Kenya. During the debates on Bills legislating the Gender Principle, many arguments strongly opposed the special political treatment of women were tabled in Parliament and over the internet.<sup>70</sup> The same ignorance of the rationale behind the gender rule is displayed, rather regrettably, by the MP John Njoroge who argued that the Gender Bill will just make room for people to nominate their girlfriends.<sup>71</sup> Such arguments, worse off by parliamentarians, trivialise distributive justice initiatives. The need for civic education to make the people alive to the reasons for such a provision and programs by the Constitution is immense.

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<sup>65</sup> Kumar P, 'Participation of Women in Politics: Worldwide experience' 22 (12) *International Organisation of Scientific Research Journal of Humanities and Social Sciences*, 2017, 1 and 9.

<sup>66</sup> Goin C, 'The Jinxed Gender Bill, MPs to Make the 4<sup>th</sup> Attempt Today', Citizen Digital, 27 February 2019 -< <https://cutt.ly/ktbNHpP> > on 15 March 2020.

<sup>67</sup> National Gender and Equality Commission, *Journey to Gender Parity in Political Representation*, 2018, 20.

<sup>68</sup> National Democratic Institute and the Federation of Women Lawyers-Kenya (FIDA-K), *A Gender Analysis of the 2017 Kenya General Elections*, 2018, 39.

<sup>69</sup> Clayton A, 'Women's Political Engagement under Quota-Mandated Female Representation: Evidence from a Randomised Policy Experiment' 48 (3) *Comparative Political Studies*, 2015, 335.

<sup>70</sup> Ikunda H 'Gender Rule Debate calls for Sobriety' The Standard, 20 May 2015 -< <https://cutt.ly/8dk4Nlp> > on 2 August 2020.

<sup>71</sup> Agaya W and Ng'etich J, 'Why Kenyan MPs Shot Down the Gender Bill' The Standard, 6 May 2016 <<https://cutt.ly/pdnzbVI>> on 3 August 2020.

Access to financial resources is essential for effective political participation. FIDA-Kenya reported financing as a major problem in 2013 despite the 2013 Election Campaign Financing Act being in force.<sup>72</sup> The Women's Rights Program reported the profound role finances play in ensuring a woman's electoral victory.<sup>73</sup> Kenya's election trail is riddled with corruption, vote buying and political parties pulling strings to ensure a win.<sup>74</sup> Hence the introduction of the Political Parties Fund by the Political Parties Act intended to regulate and oversee party's income and expenditure is revolutionary.<sup>75</sup> This fund is under the Registrar of Political Parties, an office that has, unfortunately, never been occupied.

The private life of women candidates is unwarrantedly scrutinised. Despite the progress through both international and nation-wide policy reforms, a female candidate's private life may determine their campaign success or undoing.<sup>76</sup> This greatly undervalues women leadership and political candidature, as their professional pursuit is hinged on anything but her competence as a political leader.<sup>77</sup> Such instances undermine the chances of future women as wrong leaders are chosen through the wrong metric applied, which paints the whole demographic in bad light.<sup>78</sup> This tactic is mostly applied by male candidates as they stand to gain from undervaluing women leadership.

The parliamentary representation of women is dependent on political regimes that prioritise and empower women. Such regimes push for gender equality and foster cultures amenable towards women in power.<sup>79</sup> This indicates the need for laws on proportional representation and change in the electoral systems fostering inclusivity. Unfortunately, the reluctance to legislate to ensure women break into politics is best shown by the debates of Bills on the Gender Principle.<sup>80</sup>

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<sup>72</sup> Federation of Women Lawyers in Kenya (FIDA-K), *Key Gains and Challenges, a Gender Audit of Kenya's 2013 Election Process*, 2013, 64.

<sup>73</sup> Netherlands Institute for Multiparty Democracy, *Political Party Financing and Equal Participation of Women in Kenyan Electoral Politics: A Situation Overview*, 2015, 4.

<sup>74</sup> -< <http://www.idea.int/political-finance> > on 22 September 2020.

<sup>75</sup> Section 23, *Political Parties Act* (Act No 11 of 2011).

<sup>76</sup> Kumar P, 'Participation of Women in Politics', 9.

<sup>77</sup> Nation Magazine, 'Is there any substance to our women reps?', Nation Magazine, 21 April 2017 -< <https://cutt.ly/Zfol2Oa>> on 22 of August 2020.

<sup>78</sup> Omondi A, 'Kimilili MP Didmus Barasa says Gender Rule Likely to Bring Slay Queens to Parliament', TUKO, 20 November 2018 -<<https://cutt.ly/wdAZ3f8>> on 6 August 2020.

<sup>79</sup> Rift Valley Institute Report, *Strengthening the Leadership and Influence of Women in Politics in Kenya*, 2017, 18.

<sup>80</sup> National Assembly Hansard Report, 25 October 2016, 43.

The history of the disenfranchisement of women began with the birth of this country. The efforts of the Constitution to remedy this historical discrimination in the political arena are being frustrated, even by miniscule and avoidable technicalities.<sup>81</sup> This goes to show the ‘willingness’ of the current political class to remedy the injustice. The representative politics, though clearly addressed by the Constitution, remains a contested issue. This begs the question of whether the suggested Bills tackle the issues women face in politics and would eventually bridge the political gap between the sexes.

## **The Amendment Bills on the Gender Principle**

### **The Constitution Amendment Bills**

Several constitution amendments bills have been tabled to solve the gender inequality in Parliament’s makeup. Some substantive, others contradictory like the Joe Mutambu Bill that suggested the removal of the women representative posts without offering a substitute despite the existing gender disparity.<sup>82</sup> Some offer no resolution, like The Chepkonga Bill that sought to include ‘progressive’ to Article 81(b) as per the Court’s interpretation of the article.<sup>83</sup> Effie Owuor opined that the objective of the Chepkonga Bill is to undermine Article 81(b) by substantiating the delay in fulfilling the Gender Principle in Parliament.<sup>84</sup> These sentiments were shared by many and both the NGENC and the TWG wrote to the Speakers of both Houses voicing their dissatisfaction with the Bill, reading bad faith on Honourable Chepkonga’s part.<sup>85</sup>

A recurring suggestion in Constitution Amendment Bills is for the creation of special seats for women. This is either by adding, reserving or topping up women into Parliament if the ratio is not achieved at the polls. The Duale 1 Bill, proposed a realisation framework through special seats for 20 years and a top-up from party lists upon deficiency.<sup>86</sup> This is replicated in the Sijeny Bill. The Compromise Bill did away with the top-up mechanism but retained the reservation of

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<sup>81</sup> Ikunda H ‘Gender Rule Debate Calls for Sobriety’ The Standard, 20 May 2015 -< <https://cutt.ly/8dk4Nlp> > on 2 August 2020.

<sup>82</sup> *Constitution of Kenya (Amendment) Bill* (2014) - (The Joe Mutambu Initiative) and Article 90(1)(b), *Constitution of Kenya* (2010).

<sup>83</sup> *Supreme Court Advisory Opinion* (No 2 of 2010) eKLR.

<sup>84</sup> Owuor E, ‘Women and Political Inclusion in Kenya: A Historical Overview, 1963-2016’, 37.

<sup>85</sup> National Gender and Equality Commission, *Journey to Gender Parity in Political Representation*, 2018, 17-19.

<sup>86</sup> *Constitution of Kenya (Amendment) Bill* (No 4 of 2015).

seats.<sup>87</sup> The Bill also proposed increasing electoral units by 5; doubling women's posts.<sup>88</sup> All the three Bills flopped after failing to garner the required votes.

Moses Kuria's 'Punguza Mzigo' Bill was the most plausible Constitution Bill on the Gender Principle. The Bill sought to strengthen the senate and national assembly and reduce running costs through reduction of MPs from 416 to 147, with the reserved seats for women reduced from 47 to 16.<sup>89</sup> The Bill was well received by the statesmen and would have achieved the third gender threshold as the 47 electoral units are to elect male and female representatives for each seat. This was the most conceivable solution in a debt-ridden economy. However, the Bill was highly politicised and failed.

### **The Two-Thirds Gender Rule Laws (Amendment) Bill (2015)**

This 2015 Bill (the Gender Bill) differs from the Constitution amendment bills. It suggests amendments to other statutes and bodies to uphold Article 100. There are ten main laws regulating the Kenyan election environment. The Gender Bill only amends five: The National Gender and Equality Act (NGEA), the Political Parties Act, the Elections Act, and the IEBC Act.

The Gender Bill amends to the NGEA extend its mandate over the special groups listed under Article 100. The NGEC is established through Article 59 to ensure gender equality and freedom from discrimination with special regard to special groups, which women form part.<sup>90</sup> Section 8 of the NGEA is amended, tasking the NGEC with overseeing the preparation and implementation of any framework on Article 100.<sup>91</sup> This amendment empowers the NGEC to ensure inclusivity in party list nominees, capacity building of minority candidates and their equitable funding by political parties. These are pertinent issues highlighted in numerous reports, even by the NGEC, that are not explicitly delegated to any other body.<sup>92</sup>

The Gender Bill tackles campaign financing and affirmative action campaigns by political parties in its amendments to the Political Parties Act.<sup>93</sup> It requires political parties to publish

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<sup>87</sup> *Constitution of Kenya (Amendment) Bill* (No 6 of 2015) and Article 177(1)(b), *Constitution of Kenya* (2010).

<sup>88</sup> Article 98(1), *Constitution of Kenya* (2010) and the *Constitution of Kenya (Amendment) Bill* (2019).

<sup>89</sup> *The Punguza Mzigo Constitution of Kenya (Amendment) Bill* (2019).

<sup>90</sup> Section 8, *National Gender and Equality Commission Act* (2011).

<sup>91</sup> *The Two-Third Gender Rule Laws (Amendment) Bill* (2015).

<sup>92</sup> Borgen Magazine, 'Women Candidates Face Setbacks in Kenya's Elections' Borgen Magazine, 19 January 2014 -< <https://cutt.ly/wfVag1W> > on 22 September 2020.

<sup>93</sup> *The Two-Third Gender Rule Laws (Amendment) Bill* (2015) and Section 7 & 29, *Political Parties Act* (2011).

their income and expenditure statements and the composition of their governing body, something not currently directed. The disclosure of the party's budget and financial statements help ensure the political party does not internally disenfranchise political minorities through discriminated fund allocations, which is not uncommon.<sup>94</sup>

Political Parties are also compelled to develop and implement measures ensuring meaningful participation and affirmative action programs for special groups.<sup>95</sup> The political parties affirmative action campaigns are to supplement those in the Act and will increase their investment in its women, empowering and supporting their political careers. Such capacity building and inclusive initiatives by the political parties empower women in politics. These changes are to be ensured by the Special Interest Groups Representative; a novel office created by the Bill under the Registrar of Political Parties office.

The Gender Bill requires the submission of party list and the minutes of the meeting it was prepared in.<sup>96</sup> This would ascertain the substantive involvement of special groups in the formation of the list. The party lists have been a focus in the Constitution amendments as a tool to top-up the deficit needed to achieve the Gender Principle. By ensuring women are at the governing table allows them to better express their needs and interests at this very crucial stage that determines the party's representatives in the ballot and in Parliament.

The Gender Bill tasks the IEBC to ensure voter education and tailor-make a curriculum for minority groups. Further, IEBC is to protect minority candidates. In Kenya's history, voter's ignorance has been costly as politicians take advantage of it to manipulate the voters, an issue highlighted in several reports. The protection of minority candidates is something the current laws fail to do, leaving minorities prone to attacks and intimidation. These amendments if realised will result in a safer, more-conducive political environment and level the playing field by preventing such intimidation.

The Gender Bill targets the electoral institutions and processes. It even introduces new bodies, like the Special Interest Group Representative. It also empowers existing bodies to take up new roles to ensure the 2:1 gender ratio is achieved in parliament. It also introduces checks-and-balances, albeit at the political parties' level, an example of the requirement for the submission

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<sup>94</sup> Ekonga I, 'Role of Political Parties in Promoting Gender Equality in Leadership' Heinrich Boll Stiftung- Feminism and Gender Democracy, 8 February 2013- < <https://cutt.ly/9fVaKqL> > on 20 September 2020.

<sup>95</sup> *The Two-Third Gender Rule Laws (Amendment) Bill* (2015) and Section 7 & 21, *Political Parties Act* (2011).

<sup>96</sup> *The Two-Third Gender Rule Laws (Amendment) Bill* (2015).

of minutes of the meeting to ensure inclusive representation in decision making. From the above analysis, the Gender Bill suggests long-term and pertinent reforms that address pertinent issues in the electoral systems that affect women in politics.

### **Challenges Facing the Enactment of the Gender Rule Amendment Bills**

The Gender Bill and the Constitution Amendment Bills vary in methods and suggestions to achieve the 2:1 gender quota. The importance of such legislation positively discriminating against women has been asserted. On top of this being an obligation by virtue of being a constitutional democracy, various scholarly work and reports speak of the importance of addressing the hardships faced by women in politics. As alluded to in the work and shown in Kenya's electoral climate, it is impossible to remedy injustices without positive discrimination by laws and structures. The presumption that everyone knows the importance of the Constitution's Gender Principle seems untrue. Some debates on the Gender Rule have been taken out of context and the reasoning behind that legislation forgotten, when some MPs opposed the Duale 1 Bill alleging that people will nominate their 'girlfriends' and 'slay queens'.<sup>97</sup> This even led to suggestions to do away with the women rep seats.<sup>98</sup> Personal opinions rather than obeisance to the law prevalent, despite it being contrary and repugnant to the responsibilities of leadership of State officers.<sup>99</sup>

Nevertheless, none of the Bills enshrining the Gender Rule have led to legislation. Throughout the various debates, both in the National Assembly and the Senate on the above Bills, the House was polarised having those who either trivialised or saw the import of the issue.<sup>100</sup> Some people view the implementation of the Gender Rule as a women's issue, rather than the constitutional issue it is. It is interesting that both male and female politicians feel threatened by the prospect of injecting women into the almost exclusive 'Boy's Club'. Some women were averse to the nomination system being applied to "*a House of equity*".<sup>101</sup> This is quite ironic as equity in this context would be for women to attain the a-third threshold. This shows even the political class' lack of appreciation for the rationale behind the Constitution's push for an inclusive Parliament.

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<sup>97</sup> Agaya W and Ng'etich J, 'Why Kenyan MPs Shot Down the Gender Bill' The Standard, 6 May 2016 <<https://cutt.ly/pdnzbVI>> on 3 August 2020.

<sup>98</sup> Mumma CM, 'Why Chepkonga Bills Won't Enact the Gender Principle' Nation, 26 June 2015 - <<https://cutt.ly/SfKahxj>> on 21 September 2020. (The Joe Mutambo Bill of 2014 as well).

<sup>99</sup> Chapter 6, *Constitution of Kenya* (2010).

<sup>100</sup> National Assembly Hansard Report, 25<sup>th</sup> October 2016, 43.

<sup>101</sup> National Gender and Equality Commission, *Journey to Gender Parity in Political Representation*, 2018, 20.

Increasing parliamentary seats does not dismantle the patriarchal political system. Most Constitution amendments seek to increase parliament's size, something the citizens have not taken to kindly, even in the name of equality.<sup>102</sup> Such a framework may result in a greater injustice to the people of Kenya, who are already buckling under the heavy tax burden, high cost of living and a COVID-hit economy.<sup>103</sup> Increasing the seats may limit women to secure seats segregated for them either by vote or top-up upon a deficiency.<sup>104</sup> Further, increasing the size of the House solely for the achievement of the Gender Principle will lead to women being reduced to seat warmers. The top-up mechanism may also further embed the problem as parties may limit competitive elective posts to men and leave women to be topped-up, and since they have no other role but to achieve the required gender ratio, the public may rebel due to the unjust burden levied in the name of inclusion.<sup>105</sup>

The Gender Bill, on the other hand, provides long term systemic solutions. The Bill targets the electoral institutions and its players, without inflict a financial burden on the already burdened taxpayer. The Bill alters the existent political systems and imposes measures to ensure they are more accommodative, inclusive of and favourable to political minorities. These efforts are evident as the Bill's recommendations address the major concerns faced by women political aspirants in Kenya, like the lack of financial and administrative support at the political party level. The Bill mostly imposes checks and balances to ensure the organs it is mandating are involved and exercise their authority towards the achievement of the Gender Rule in Parliament. Thus, the aversion of parliament towards these reforms is worrisome and shows their distaste for women in politics.

## Conclusion

From the discussion above, some of the amendment bills address the hurdles women face in politics while some aggravate them.<sup>106</sup> The Constitution Amendment Bills focus on the restructuring of Parliament to increase the physical presence of women, with most imposing an

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<sup>102</sup> Daily Nation, 'Caroline Wafula: Chepkonga's Bill a 'Broken Promise' say Women' Daily Nation, 3 August 2015 -<<https://cutt.ly/hfkdAq9>> on 22 August 2020.

<sup>103</sup> Kiruga M 'Kenya in 2020: Higher Taxes, Higher Debt, More Referendums' The Africa Report, 16 January 2020 - <<https://cutt.ly/0tbRns3>> on 20 March 2020.

<sup>104</sup> Guest Writer for Citizen Digital, 'KARUA: Redefining Women Leaders Solidarity Political Participation in Kenya', Citizen Digital, 29 August 2020 -< <https://cutt.ly/ufC4xly> > on 22 September 2020.

<sup>105</sup> Owuor E, 'Women and Political inclusion in Kenya: A Historical Overview, 1963-2016', 10.

<sup>106</sup> *The Two-Third Gender Rule Laws (Amendment) Bill (2015) vis-à-vis the Constitution of Kenya (Amendment) Bill (2014)*.



unjust liability to the overburdened taxpayer and economy and shows the unwillingness to pave way for women leadership; gatekeeping. However, the Gender Bill obligates pre-existing and institutions to pull their weight in levelling the political arena as well as foster women inclusivity and empowerment in politics. It also imposes checks-and-balances to compel them to fulfil their roles. It thus a shock and disappointment that the Gender Bill slumped five times. The political ill-will is demonstrated by some of the drafted Bills, the nature of the debates on the floor of the House and their multiple failure, even due to technicalities such as quorum.<sup>107</sup>

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<sup>107</sup> National Gender and Equality Commission, *Journey to Gender Parity in Political Representation*, 2018, 1720.

## **Chapter 4: Institutions and the Realisation of the Two-Thirds Gender Rule**

### **Introduction**

The need to positively discriminate women in politics is legitimate and vital in the interest of constitutionalism, the rule of law, justice and substantive equality. Though all State organs are charged with the implementation of the Constitution, some key players are pinpointed and given specific roles in the achievement of the Gender Rule. The judiciary, political parties, IEBC and parliament are such organs and the subject of this chapter, which will assess their mandates and efforts to establish whether they have fully exercised their obligation towards the Gender Principle.

### **The Judiciary**

With full appreciation of the importance of the Gender Rule's attainment in the assembly, people have taken to the courts. Their efforts geared to secure substantive participation measures boosting women into public life. threatened by the legislature's illegal complacency to the status quo. The courts have a duty to endorse, promote and fulfil the constitutional rights and fundamental freedoms plus avail amends upon a contravention.<sup>108</sup> This would lead to the court answering questions and taking drastic actions towards a more gender-inclusive House.

The court was instrumental in interpreting Article 27(8). This article calls for legislative and other measures to implement the Gender Principle.<sup>109</sup> The Advisory Opinion of 2012 was a multi-stakeholder inquiry of whether Articles 27(8) and 81(b) were to be progressively or immediately implemented in light of the fast-approaching 2013 elections.<sup>110</sup> The Supreme Court's majority decision was for the progressive realisation of the Gender Principle and set a 2015 deadline.<sup>111</sup>

The then Chief Justice Willy Mutunga delivered a dissenting opinion explaining the vitality of the expediency. He argued that a political and civil rights matters demand immediate realisation.<sup>112</sup> He also opined that it became evident that without the allowance of the nomination of women to top up the deficit, the envisaged gender quota would be a mirage.<sup>113</sup> In retrospect, a ruling for the immediate realisation may have led to the realisation of the Gender

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<sup>108</sup> Article 21(1), *Constitution of Kenya* (2010).

<sup>109</sup> Article 27(8), *Constitution of Kenya* (2010).

<sup>110</sup> *Supreme Court Advisory Opinion* (No 2 of 2010) eKLR.

<sup>111</sup> *In the Matter of the Principle of Gender Representation in the National Assembly & the Senate* (2012) eKLR.

<sup>112</sup> *Supreme Court Advisory Opinion* (No 2 of 2010) eKLR.

<sup>113</sup> Article 177(1)(b), *Constitution of Kenya* (2010).

Principle in the 11<sup>th</sup> Parliament to avoid being declared unconstitutional.<sup>114</sup> The majority opinion was later reflected in a 2012 ruling.<sup>115</sup> A decade later and Justice Mutunga's projection proves accurate.

The court exercises its check-and-balance authority. Justice Mumbi Ngugi's ruling inspired the flurry of activity in parliament that birthed the Duale 1 Constitution Amendment Bill.<sup>116</sup> The ruling on the petition by CREAM against the Attorney General and the CIC after the legislative deadline on Article 100 passed without legislation directed for a bill to be prepared and tabled in Parliament within 40 days.<sup>117</sup> The deduction that the Bills would not exist were it not for the court is fuelled by the fact that none of the proposed bills have materialised to law. The court has also invoked other bodies charged with the realisation of the Gender Principle to exercise their mandate. In the *FIDA Kenya* case (2015), Justice Mwita declared the 12<sup>th</sup> Parliament unconstitutional and tasked the IEBC to bring Parliament to comply with the Gender Rule.<sup>118</sup> This shows the judiciary's recognition of bodies instructed to fulfil the Gender Principle and pushes them to act.

The court has severally dissolved the unconstitutional House. Justice Mativo in his 2017 judgement ruled for the dissolution of Parliament, the default mechanism under Article 261 due to its failure to fully implement the Constitution and legislate the Gender Principle.<sup>119</sup> The appeal on Justice Mativo's judgement by the speakers of both houses was dismissed for lacking merit. During the dismissal, the court took judicial notice of the existence of the Bills, remarking that they were never seriously discussed and lost due to quorum. This demonstrated the lack of good faith effort to implement the Gender Principle by the Houses.<sup>120</sup>

The final order conferred to the Judiciary under Article 261 was employed.<sup>121</sup> This article obliges the President to dissolve Parliament upon the Chief Justice's recommendation.<sup>122</sup> This was in response to the six petitions from as early as 2017 to June 2020.<sup>123</sup> The Constitution

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

<sup>115</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>116</sup> *Constitution of Kenya (Amendment) Bill* (No 4 of 2015).

<sup>117</sup> *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* (2015) eKLR.

<sup>118</sup> *Federation of Women Lawyers in Kenya v Speaker the National Assembly & 4 others* (2018) eKLR.

<sup>119</sup> *Centre for Rights Education and Awareness and others v Speaker of the National Assembly* (2016) KLR.

<sup>120</sup> *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* (2019) eKLR.

<sup>121</sup> *In the Matter of the Chief Justice's Petition Nos 1-5 of 2019 and 1 of 2020* (2020) eKLR.

<sup>122</sup> Article 261(7), *Constitution of Kenya* (2010).

<sup>123</sup> The last one being by the Law Society of Kenya (LSK); The Elephant, 'LSK – Press Statement on Petition

seems to offer no room for contemplation but expects compliance from the President.<sup>124</sup> Nonetheless, with the party system politics in Kenya, the likelihood of the President reacting positively to the recommendation is almost nil. The chances may increase if the presidency was an independent candidate, or if there was strict application and respect for Article 77(2) that bars State officers from holding office in a political party.<sup>125</sup> This mechanism may only be possible under an impartial president with due regard to the rule of law.

In conclusion, *the Pearson Case* introduced the “living tree” constitution interpretation doctrine. The principle was considered crucial for the interpretation and realisation of liberal Constitutions and its reforms. It propounds the broad interpretation of the Constitution by the courts, while considering its spirit and tenor.<sup>126</sup> From the cases analysed above, the Kenyan Judiciary consciously applies this doctrine and takes an active role in protecting and implementing the Constitution. The courts have done all they could, in the interest of justice and rule of law. It is rather unfortunate that the court orders issued mandating the legislation of the Gender Rule and later the dissolution of the House have been disobeyed and seem to leave parliament unrattled.

## **Political Parties**

Political parties are known to frustrate women’s political efforts. When the MYWO was absorbed into KANU, they were treated ruthlessly and considered a time bomb that needed to be diffused.<sup>127</sup> KANU’s structures crippled MYWO’s independence, like the overseeing of their fundraising and spending by KANU’s male party officials.<sup>128</sup> The 2010 Constitution and amendments to the Political Parties Act require their integration and equal engagement within political parties. Article 91(1) requires political parties to respect the rights of minorities to participate in political processes and promote gender parity and fairness.<sup>129</sup> Moreover, the Political Parties Act explicitly forbids the registration of a party if the ratio of men to women

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No.1 of 2020 Law Society of Kenya v Speaker of National Assembly and Speaker of Senate’ *The Elephant*, 30 July 2020 -< <https://cutt.ly/VjSm5Qa> > on 27 October 2020.

<sup>124</sup> The President ‘shall’ in Article 261(7), *Constitution of Kenya* (2010).

<sup>125</sup> Article 77(2), *Constitution of Kenya* (2010).

<sup>126</sup> *Edwards v Attorney-General for Canada* (the Persons Case) (1930), The Privy Council.

<sup>127</sup> Nzomo M, ‘Kenyan Women in Politics and Public Decision Making’ in Mikell G (ed) *African Feminism: The Politics of Survival in Sub-Sahara Africa*, University of Pennsylvania Press, Philadelphia, 1997, 240.

<sup>128</sup> Ogot B and Ochieng’ W, *Decolonization and Independence in Kenya*, East African Educational Publishers, Nairobi, 1995, 208.

<sup>129</sup> Article 91(1)(e) and (f), *Constitution of Kenya* (2010).

is more than 2:1 in its membership and leadership.<sup>130</sup> The failure to sustain the ratio may lead to deregistration.<sup>131</sup> This imposition ensures women are involved in party politics and gives them a platform to exercise their leadership capabilities albeit at a party level.

Further, a Political Parties fund is established to ensure inclusion at the party level. The main aim of the fund is to promote the representation of special groups through the Registrar who disburses funds to eligible parties.<sup>132</sup> One qualification is for the political party's registered office bearers to reflect a 2:1 gender ratio.<sup>133</sup> This provision enforces Section 7(2) by providing sanctions for parties whose management do not reflect the gender ratio, further ensuring that women participate in party politics.

The previous point leads to the discussion on the office of the Registrar of Political Parties (the Registrar). This is an independent, corporate person created through Article 260.<sup>134</sup> This Registrar is charged with the registration, regulation, monitoring, investigation and supervision of political parties to ensure adherence to the Act.<sup>135</sup> For such a core office in Kenya's political sphere it is surprising that it has never been occupied. It was not until June 2020 that the president, Uhuru Kenyatta, began shortlisting its candidates.<sup>136</sup> Seeing as most of the changes by the political parties are under the Registrar's supervision, the office's vacancy may denote the reluctance to submit to the reforms by the Constitution and the Political Parties Act.

Also, the Political Parties Act requires political parties to come up with affirmative action programs.<sup>137</sup> Though political parties promise to invest, support, integrate and mainstream women leadership, their pledges remain mere puffs.<sup>138</sup> This has been reported by female candidates who run and claim to have received less funding compared to their male counterparts, while some receive none.<sup>139</sup> The USAID also highlighted the failure of political

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<sup>130</sup> Section 7 (2)(b) and (d), *Political Parties Act* (Act No 11 of 2011).

<sup>131</sup> Section 4 and 21, *Political Parties Act* (Act No 11 of 2011).

<sup>132</sup> Githinji, 'The Purpose of the Political Parties Fund' AfroCave, 29 September 2020 -< <https://www.afrocave.com/political-parties-fund-kenya/> > on 23 September 2020.

<sup>133</sup> Section 25(2), *Political Parties Act* (Act No 11 of 2011).

<sup>134</sup> Article 260, *Constitution of Kenya* (2010) and Part IV, *Political Parties Act* (Act No 11 of 2011).

<sup>135</sup> Section 34, *Political Parties Act* (Act No 11 of 2011).

<sup>136</sup> Mwere D, 'Uhuru on the Spot over Failure to Appoint Registrar of Political Parties' Nation Media Group, 19 August 2020 -< <https://cutt.ly/HfCJ9o8> > on 22 September 2020.

<sup>137</sup> Section 18, *Political Parties Act* (Act No 11 of 2011).

<sup>138</sup> Federation of Women Lawyers in Kenya (FIDA-K), *Key Gains and Challenges, a Gender Audit of Kenya's 2013 Election Process*, 2013, 3.

<sup>139</sup> Institute for War and Peace Reporting (IWPR), *Female Candidates Claim Discrimination in Kenyan Elections*, 2013, 8.

parties to financially support and defend their female political candidates when faced with gender-based violence.<sup>140</sup> These issues both disincentivise women from joining politics and inhibits their chances of success in the campaign trail.

Dominick Omondi affirms that political parties are better placed to drive social change but need the motivation of legislative measures.<sup>141</sup> He says that the political parties' contribution would be investing in women political candidates and endorsing them. This would in turn encourage people to plug into women leadership, more so being a democratic state where parties have great influence over the electorate.<sup>142</sup> The political parties have not been seen championing for women and, on the contrary, male politicians are seen using their masculinity as leverage over their female competitor, which speaks to the perception of political inclusivity as a threat rather than a positive.

The Political Parties Act is a step forward towards inclusive politics. The Political Parties Fund and the office of the Registrar of Political Parties are invaluable initiatives that would lead to great reform, if only acted upon. The reluctance by the political parties towards internal affirmative action programs, like their refusal to adopt the solution tabled by the Katiba Institute on internal measures to be taken to ensure the gender quota's achievement, speaks to their ill will.<sup>143</sup> The ability of political parties in democratic societies to greatly influence the electorate is invaluable.<sup>144</sup> Once political parties believe and invest in women leadership, the electorate will gradually take to it, leading to more empowered women politicians, a more inclusive democracy and the eventual attainment of the gender quota in the House.

## **The IEBC**

The IEBC is the commission responsible for conducting and overseeing referenda to any constitutional office.<sup>145</sup> Above their authority to facilitate the electoral process, register and

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<sup>140</sup> United States Agency for International Development (USAID), *USAID Support for Kenya's 2013 Elections: Rapid Assessment Review*, 2014, 12.

<sup>141</sup> Omondi D, 'The Role of Political Parties in Promoting Women's Political Participation' in Bignon J (ed), *Gender Equality and Political Processes in Kenya: Challenges and Prospects*, Strathmore University Press, Nairobi, 2016, 92.

<sup>142</sup> Sivi-Njonjo K, 'The Path Towards Democracy in Kenya', in Bignon J (ed), *Gender Equality and Political Processes in Kenya: Challenges and Prospects*, Strathmore University Press, Nairobi, 2016, 79-82.

<sup>143</sup> International Institute for Democracy and Electoral Assistance (IDEA), *Electoral system design: The New International Idea Handbook*, 2005, 61.

<sup>144</sup> International Institute for Democracy and Electoral Assistance, *Electoral system design: The New International Idea Handbook*, 2005, 5.

<sup>145</sup> Article 88, *Constitution of Kenya* (2010).

account for the voters and candidates, IEBC is also charged with voter education and the regulation of the candidate's nomination process. The IEBC may also make its own code of conduct and monitor the compliance to election legislation.<sup>146</sup> These responsibilities render it a platform to implement the Constitution's dictates regarding elections, including the Gender Principle.

The IEBC may regulate political parties through its duty to regulate the nomination process and being in charge of candidate registration.<sup>147</sup> Justice Chacha Mwita ruled that IEBC had a duty to ensure that political parties observe the Gender Rule during nominations and reject nomination lists that do not reflect the Gender Principle.<sup>148</sup> This was after IEBC failed to reply to a letter from Katiba Institute inquiring on their efforts towards the realization of the Gender Rule in the 2017 Election. The honourable Judge stated that the onus of enforcing the Gender Rule did not solely rest on legislature and may be achieved even without the legislation connoted in Article 27(8) through institutions like IEBC discharging their duty.

The IEBC as a state organ bears the onus to implement the Constitution. This is highlighted by the *Johnson Muthama Case* (2012) where the citizens expressed concern that their constitutional rights to participate in governance was not being implemented accordingly.<sup>149</sup> The IEBC was also accused by the NGEK of failing to conduct and oversee party elections in 2013 as per Article 90 on seat allocation by party lists.<sup>150</sup> A Namibian case declaring a nation's Constitution as a mirror to the "national soul" was quoted.<sup>151</sup> This influenced the court to order the IEBC to collaborate with political parties and other statutory commissions to immediately place measures enhancing the participation of women and minorities. This is yet to be done.

IEBC is responsible for ensuring the minority gender takes up a-third of the membership of elective and appointive bodies. Yet, no efforts to ensure a structure imposing compliance to the Gender Principle exist. The IEBC has also never rejected party lists not conforming to the Gender Rule, let alone collaborating with political parties and other government institutions to

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<sup>146</sup> Article 88, *Constitution of Kenya* (2010).

<sup>147</sup> Article 88(2)(d) and 88(2)(j), *Constitution of Kenya* (2010).

<sup>148</sup> *Katiba Institute v Independent Electoral and Boundaries Commission* (2017) eKLR.

<sup>149</sup> *Johnson Muthama v Minister for Justice and Constitutional Affairs and another* (2012) eKLR.

<sup>150</sup> *National Gender and Equality Commission v Independent Electoral and Boundaries Commission and another* (2013) eKLR.

<sup>151</sup> *Re in the Matter of the Interim Independent Electoral Commission* (No. 2 of 2011) eKLR.

ensure adherence to the rule. It is only when such a body stops being complacent that the systems change as it seems to be the Constitution's way or no way at all.

## **The Legislature**

Most works regarding the challenges of women in politics attribute the gender imbalance in public life to a prejudiced electoral system. A system biased against women, making it harder for them to compete and penetrate the political scene.<sup>152</sup> To address this, the Constitution instructs parliament to enact laws guaranteeing gender parity in politics and attack the scaffolding that thwart women representation in parliament.<sup>153</sup> The legislature plays a key role in ensuring inclusivity in parliament by changing the laws that make the realm impermeable to women.<sup>154</sup> The significance of their role is observed by the Constitution repeatedly calling for legislative measures to impose and facilitate the Gender Rule in Parliament.<sup>155</sup> A decade from its promulgation, the legislature is yet to discharge this imperative. The closest the country has been to the enactment of such laws is parliamentary bills.

The legislature was to cause a ripple effect of the Gender Principle by transformative laws geared towards making the electoral system more accessible to minorities. The changes were to ensure equity, fair competition and inclusivity.<sup>156</sup> The gender-neutral laws have proven to be unfruitful as they do not take into account the woman's experience or try ease their difficulties, like violence against candidates has no sanction despite its prevalence.<sup>157</sup>

The current electoral laws are generic and gender neutral. Some efforts have been made to legislate the rule, but not assert it, like the Elections Act speaks of the promotion of gender equality without providing any mechanism or body to actualise it.<sup>158</sup> The Acts contain no affirmative action programs to kickstart society's emancipation from the patriarchal model. The Election Offences Act neither protect women nor deter violent attacks against them despite

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<sup>152</sup> Kameri-Mbote P, 'The Quest for Equal Gender Representation in Kenya's Parliament', 64.

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

<sup>154</sup> Article 94, *Constitution of Kenya* (2010).

<sup>155</sup> Fifth Schedule, *Constitution of Kenya* (2010).

<sup>156</sup> Braun M, 'Kenyan Women Struggle in Politics' DW, 8 February 2013 -< <https://cutt.ly/kfpanol>> on 23 August 2020.

<sup>157</sup> Lichoma W, 'Gender Equality Challenges in Kenya and Africa' Gender Equality: International Challenges and Strategies for Success Conference Organized by the Australian Federal Police at The Australian High Commission, London, 28 June 2017.

<sup>158</sup> *The Two-Third Gender Rule Laws (Amendment) Bill* (2015).



being an electoral offence under undue influence.<sup>159</sup> It has no prescribed punishment in the Act and the Penal Code despite its pervasiveness.

Though the Acts were enacted after the 2010 Constitution, no statute, save for the Political Parties Act, recognises the need for affirmative action programs instructed by Article 27(6). Little to no effort towards the recognition and addressing the political challenges women face. The current law's inadequacy apparent as various bills have been tabled before Parliament with the effort to breathe life into the two-thirds gender rule into electoral statutes.

Lastly, the political ill-will of parliament is apparent. As seen in the previous chapter, the Gender Bill (2015) would have greatly revolutionised the political environment, but the Bill died due to quorum hitches.<sup>160</sup> Their continued disobedience of court orders speaks to this too. Despite being required to enact laws on the Gender Principle, the institution remains undeterred despite not fulfilling this constitutional responsibility, leading to its instructed disbanding.<sup>161</sup> Nonetheless, the unconstitutional House still stands and there remains no legislation on the Gender Principle despite all the pressure and the failure of its achievement in the 2013 and 2017 elections.

## **Conclusion**

Definitely, more can be done by these institutions to achieve the Gender Principle. The court has exercised its mandate within its jurisdiction and the prayers of the petitioners. However, there is aversion by political parties to discharge their affirmative action mandate and failing to generate party lists compliant with the 2:1 gender threshold. The IEBC is neither seen facilitating the nomination process nor rejecting party lists that do not adhere to the Gender Principle. The IEBC has not collaborated or moderating any organ to realise the Gender Principle in the Elections. The political ill-will of the legislature is seen by the lack of legislation despite the 2015 deadline, the threat of and actual disbandment as well as their continuous defiance of court orders. The above analysis answers that indeed more can be done by institutions to realise a Gender Principle-compliant house in 2022. They have not fully discharged their functions regarding the Gender Principle, displaying the lack of respect for the Constitution and the rule of law.

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<sup>159</sup> Section 10, *Election Offences Act* (Act No 37 of 2016).

<sup>160</sup> Agaya W and Ng'etich J, 'Why Kenyan MPs Shot Down the Gender Bill' *The Standard*, 6 May 2016 <<https://cutt.ly/pdnzbVI>> on 3 August 2020.

<sup>161</sup> The mandate under Articles 27(8) and 81(b), *Constitution of Kenya* (2010).

## **Chapter 5: Conclusion, Findings and recommendations**

### **Introduction**

After all the discussions above, this final chapter shall summarise its findings and conclusions on its three research questions. Thereafter, it shall make its recommendations on what the four institutions, the subjects of the paper, are not doing and should do to realise the Gender Principle in Parliament based on its findings.

### **Conclusion and Findings**

The paper questioned the significance of the Gender Principle and the importance of its realisation in Kenya's parliament. As pointed out, post-independence Kenya was a political patriarchy. The inscription of the Gender Principle in the Constitution is an attempt by both the law and its makers to transform Kenya's political sphere to foster gender inclusivity. Through this, there has been a slight but notable improvement to women's political participation, which is greatly attributed to Article 81(b) of the Gender Principle and Article 27(8) on affirmative action programs. It is because of the set gender ratio that the senate nominated women in efforts to attain the 2:1 gender ratio.<sup>162</sup> Women have also greatly benefitted from the affirmative action program of women representative, which has been used by some as a launching pad for their political careers.

Further, the Constitution charged the legislature to come up with legislation to aid achieve the Gender Principle by 2015. Despite there being no laws in force, there exists Amendment Bills. This led the research to question the plausibility of the Bills and whether they address the obstacles inhibiting the realisation of the Gender Principle in Parliament. The Gender Bill sought to address the barriers women politicians face in the elections. This it did by increasing the mandate of already existent bodies while introducing checks-and-balances.<sup>163</sup> However, the Constitution Amendment Bills sought to address the presence of women in parliament, which is a veneer, superficial and expensive solution that does not address the structural and institutional discrimination of women embedded in Kenya's political and electoral system. It is also unclear what role these women would hold, other than mere seat warmers which is not the aim of the Constitution. Through this analysis, the research concludes the Gender Bill

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<sup>162</sup> Akwei I, 'Six Women Have Made History in Kenya For Being the First Women to Win Seats as Governors and Senators Since the Promulgation of the 2010 Constitution' *The Voice of Africa*, 11 August 2017 -< <https://cutt.ly/ijDzUOG> > on 20 January 2021.

<sup>163</sup> *The Two-Third Gender Rule Laws (Amendment) Bill* (2015).

(2015) as the most plausible and appropriate bill, which bore great promise in facilitating an inclusive political sphere, fostering the Gender Principle's fulfilment.

Since the Constitution also delegated responsibility to various organs, the research sought to question the obligations owed by them towards the Gender Principle. The research narrowed on the Judiciary, Legislature, IEBC and political parties, all main players in the election scene. Out of the four, only the Judiciary seems to have substantively discharged its mandate towards the Gender Principle. The adamance of some, like the Legislature, is evident by the blatant disregard of court orders and other checks-and-balances put in place. The unwillingness by the three leaves the pursuit of a gender inclusive parliament to the Constitution and the Judiciary. It is thus rather unfortunate that despite there being bodies empowered to achieve the Gender Principle both in reality and its legislation, there is nothing to show. This may be attributed to the lack of action by institutions within the election realm to fully address the plight of women and fulfil their delegated mandate towards the Gender Rule's attainment in Parliament.

The four bodies discussed above clearly play different but important roles in the realisation of an inclusive parliament. It is a shame that some have done little to nothing towards its achievement as seen in Chapter 4. From the analysis, one may conclude that upon the full exercise of each of their mandates towards the Gender Principle, the Rule may be achieved. The deliberate and voluntary action by these four bodies, in collaboration with other players, may see to addressing women's plight in politics and thus increase their participation leading to the achievement of the Gender Principle and an inclusive democracy. This assertion has informed the recommendations below.

## **Recommendations**

The court may prescribe measures to facilitate the achievement of the Constitution's ideals. It is noteworthy that stakeholders, like the NGEC, CIC and the CAJ, had wanted the Attorney General to request the Supreme Court to grant structural orders facilitating the immediate implementation of Article 97 and 98 in 2012.<sup>164</sup> Such a claim highlights the court's capacity to safeguard both the interests of minorities and uphold the Constitution's purpose and principles.<sup>165</sup> If not for the Attorney General's aversion to invoke this authority, the court would have come up with a structure to implement the Gender Principle in time for the 2013 election.

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<sup>164</sup> National Gender and Equality Commission, *Journey to Gender Parity in Political Representation*, 2018, 18 and Article 97 and 98, *Constitution of Kenya* (2010).

<sup>165</sup> Article 21 and 159(2)(e), *constitution of Kenya* (2010).

Therefore, the Judiciary may be approached to chart a path for the achievement of the Gender Principle, a power well within its capacity in response to a petition as it may not act *Suo moto*.

The IEBC should begin by fully exercising its given mandate under the Constitution and the IEBC Act.<sup>166</sup> It should facilitate the creation of the party lists and reject any list that is not compliant with the Constitution's directive of the Gender Rule.<sup>167</sup> It should also work with other statutory institutions, like the NGEC, to come up with a framework to enforce the Gender Principle and address the various challenges faced by female candidates in politics. There is also need for general sensitisation of Kenyans on the Gender Principle, which could be done via the IEBC's voter education function and in collaboration with other organs like the NGEC. This is because not everyone recognises it as a problem and thus civic education on the importance of such a rule is vital. The IEBC should also exercise its regulatory role to sanction any gender-based violence against political candidates, the greatest barrier faced by women candidates.<sup>168</sup>

Reordering history is difficult and personal to a community. Thus, there is need to contextualise solutions. In Kenya, political parties greatly influence the electorate and thus are very instrumental in fostering acceptance of the Gender Rule.<sup>169</sup> They are essential in driving leadership-open conversations with the people regarding the Gender Principle and inclusivity. If political parties implement the affirmative action structures imposed to them by the law to empower, support and invest in women leadership, this will greatly improve both the woman politician's qualification and chances of success as seen in the reports. Also, measures protecting female politicians from gender-based violence should be established at the party level. However, there is need for the male polity to let go of the ideology that including and empowering women into politics is a zero-sum game of winner and loser, which is not the case.

The vitality of the role of the legislature is incommensurable. The law is the scaffolding on which the institutions and societal actions are built from through its directions and sanctions. There is definite need for direction and sanctions to propel the institutions towards pursuing the Gender Principle. Additionally, laws addressing the plight of women politicians are very crucial in boosting their confidence to participate in the arena as there exists remedies and

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<sup>166</sup> Part 2 of Chapter 7, *Constitution of Kenya* (2010).

<sup>167</sup> Article 90, *Constitution of Kenya* (2010) and Section 4, *Independent Electoral and Boundaries Commission Act* (Act No 9 of 2011).

<sup>168</sup> Section 4, *Independent Electoral and Boundaries Commission* (Act No 9 of 2011).

<sup>169</sup> Sivi-Njonjo K, 'The Path Towards Democracy in Kenya', 82.

safeguards in case of foul play. The Legislature should legislate in collaboration with the stakeholders in the election space to ensure comprehensive laws, which are not superfluous. This will also foster accountability of the institutions. All in all, a framework for the realisation of the Gender Principle in Kenya's parliament is fundamental and its absence has led to the Gender Principle's elusiveness in 2013 and 2017.

Lastly, the office of the Registrar of Political Parties should be filled.<sup>170</sup> Reports of the sidelining women in campaign fund allocation and the failure of political parties to integrate, support and invest in women may be attributed to the empty Registrar's office.<sup>171</sup> If the office abides by the Constitution and has respect for the rule of law once appointed, the promise that this oversight body has towards realising the Gender Principle is great. This is as it regulates political parties, which are the fundamental unit of the electoral sphere. This recommendation is made with the hope that the office will fully respect the rule of law and carry out its mandate indiscriminately.

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<sup>170</sup> Part IV, *Political Parties Act* (Act No 11 of 2011).

<sup>171</sup> National Democratic Institute and the Federation of Women Lawyers-Kenya (FIDA-K), *A Gender Analysis of the 2017 Kenya General Elections*, 2018, 39.

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