

**ASSESSING THE REALISATION OF THE GENDER RULE IN PARLIAMENT:
IN
LIGHT OF THE POLITICAL HISTORY OF KENYA AND THE ADVISORY
OPINION NO. 2 OF THE SUPREME COURT OF KENYA [2012].**

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Declaration

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

Signed:

Date:

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

Signed:.....

Mrs Eunice Kiumi

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DEDICATION.

To my parents for their support and sacrifice and to God for His continued blessings.

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ABSTRACT.

Women in Kenya have struggled historically to be included in politics. For a long time, women's rights have been sidelined because the male population have been the majority players in politics. Furthermore, the society is yet to accept women as capable of taking up leadership roles as they are still influenced by the patriarchal views embedded in the Kenyan culture. With time, women became aware of their inherent right to equal treatment and began to fight to be included. They did so by forming women movements and running as aspiring election candidates in elections. The likes of Martha Karua and Phoebe Asiyo tabled several affirmative action bills in order to increase the number of women in parliament. This push from female politicians and other factors that shall be discussed in this study led to the inclusion of the two-thirds gender rule in the new Constitution of Kenya. The realisation of this rule was not outlined clearly thus causing havoc for parliament as they were unable to meet this threshold and feared being deemed unconstitutional.

It has been five years since the last general election and parliament has not implemented any bills that would realise the two-thirds rule. This study was thus conducted to assess the capability of realising the two-thirds gender rule in parliament in light of the factors such as looming male superiority in parliament, political parties' dynamics, the political history of Kenya and the nature of this rule. The study shows that political parties play a critical role in determining the number of both men and women in parliament as they are involved in the nomination process. Furthermore, the study notes that Kenya still has patriarchal notions embedded in its society.

In order to realise the two-thirds rule, the study suggests that there be a legal quota for political parties. That is, political parties be subjected to a minimum threshold of the number of women and men they can be nominated to compete in elections. Furthermore, the constitution should be amended to shed clarity on the nature of the two-thirds rule and ways of implementing this rule.

LIST OF ABBREVIATIONS.

ICCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ACHPR	African Charter on Human and People's Rights
AU	African Union
UN	United Nations
UNDP	United Nations Development Programme
CAJ	Commission on Administrative Justice
ICESCR	International Covenant on Economic, Social and Political Rights
JSC	Judicial Service commission
MYWO	Maendeleo Ya Wanawake Organization
KANU	Kenya African National Union
KWPC	Kenya Women's Political Caucus
IEBC	Independent Electoral and Boundaries Commission
RPF	Rwandan Patriotic Front
FWP	Forum of Women Parliamentarians
ANC	African National Congress

LIST OF CASES

In the Matter of The Principle of Gender Representation in The National Assembly and The Senate, Advisory opinion no.2, Supreme Court [2012] eKLR.

CHAPTER ONE

INTRODUCTION

1.1 Background.

Affirmative Action can be defined as a set of measures adopted by institutions, governments, companies and corporations to deal with a history of discrimination and exclusion of particular social groups and to encourage the participation of such groups.¹

The first traces of an affirmative action can be traced back to President John F. Kennedy, who issued Executive Order 10925 in March 1961. The order included a provision that government contractors take affirmative action to ensure that applicants of any race or sex are employed and that such employees are treated equally without regard to their race, creed, colour, or national origin during the course of their employment. This was intended to affirm the government's commitment to promote equal opportunity for all qualified persons and to take action to realise this.²

Gender based affirmative action may be categorised into two; weak and strong affirmative action. The former is the use of procedures to encourage and promote equal opportunity and end discrimination based on gender while the latter is implementing of policies for preferential treatment usually achieved through quota systems, plans or policies. Kenya in establishing an affirmative action to deal with the injustices and inequality women have faced in politics opted to implement a strong affirmative action through the use of quota system.³

¹ Dzodzi Tsikata, 'Affirmative action and the prospects for gender equality in Ghanaian Politics' Women in Broadcasting and Friedrich-Ebert-Stiftung, 2009, 3.

² Office of Equal Opportunity and Diversity, 'A brief history of affirmative action', The Regents of the University of California , June 23 2015 <<http://www.oeod.uci.edu/aa.html>> Accessed on 17th March 2016.

³ Pojman, L, *Philosophy: The quest for truth*, Oxford University Press, New York, 2006.

Quota systems can be implemented either through national legislation or quotas through political parties. The former is where countries for example Kenya's two-thirds rule, have introduced whether through national legislation or political party policies that demand for women representation. The latter involves voluntary implementations by political parties to achieve increased women's participation in their parties.⁴

Affirmative Action for women can be traced back to the nineteenth century in the works of Mary Wollstonecraft known as a "Vindication of the Rights of Women". She believed that due to cultural beliefs, men were deemed as the only sex capable of taking up leadership roles and women were suppressed. Her work was greatly influenced by her environment, where women such as Jean-Jack Rousseau claimed that society only viewed woman as an object of pleasure for men. Over time, women's rights were slowly but surely realised, through amendments in the constitution that advocated for equal rights and participation in all spheres of life.⁵

In Kenya, women have for a long time been perceived to be secondary to men due to the patriarchal culture and societal beliefs that are rooted in the Kenyan society.⁶ The fight by women for equal participation and rights in Kenya can be traced to 1992, where Professor Maria Nzomo at a national women's conference, challenged political parties to increase women's representation and participation.⁷ In 1997, Phoebe Asiyu moved a bill known as the "Phoebe Asiyu Motion" that called for twelve percent seats for women in parliament. The Bill did not pass but this marked the beginning of the National Women's Political Movement lobbying for increased representation of women in parliament. Honourable Martha Karua attempted to introduce Bill Number 32 of 2007 on Affirmative Action that advocated for fifty percent parliamentary seats for women but like its counterparts did not

⁴ Drude Dahlerup, *Using Quota's to Increase Women's Political Participation Representation*, IDEA, 2002, 4.

⁵ Moore B & Bruder K, *Philosophy; The Power of Ideas*, 6ed, McGraw-Hill Humanities/Social Sciences/Languages, 2007, 470.

⁶ <<http://iknowpolitics.org/en/discuss/circles/increasing-young-women%E2%80%99s-engagement-political-parties-2012-07-09-2012-07-30>> Accessed on 17th March 2016.

⁷ Gerface Ojwang', 'Philosophical Analysis of Gender Based Affirmative Action Policy in Kenya with respect to Theory of Justice' Unpublished BA Thesis, Kenyatta University, 2010, 105.

pass.⁸ Kenya being a signatory of the International Convention on Civil and Political Rights that asserts that parties to the Covenant should undertake to implement measures that both men and women enjoy all civil and political rights set forth in the present Covenant⁹, the Convention on the Elimination of All forms of Discrimination Against Women and other conventions that provide for equality had to encompass provisions that promoted equality in the new Constitution. With the provisions in the 2010 Constitution, it seemed that the cry for women's struggle in parliament had come to an end.¹⁰

The 2010 Constitution provided for articles that advocated for equality and freedom from discrimination in all spheres of life and mandated the state to take legislative action and Affirmative Action programmes to redress any disadvantage suffered by groups or individuals as a result of past discrimination.¹¹ Furthermore, it stated that not more than two-thirds of the members of elective bodies shall be of the same gender.¹² It was expected that the 2013 elections would produce an outcome that reflected the said provisions. However this was not the case as the outcome of the election did not meet the two-thirds threshold.¹³

The Attorney General sought an advisory opinion from the Supreme Court in 2012 as Parliament was at the risk of being deemed unconstitutional. In the majority opinion, the Supreme Court was of the opinion that Article 81, examined in the context of other articles, is not capable of been transformed into a full right and cannot be realised immediately without certain measures being taken by the state. If such measures were not taken before the fourth of March election, then the said article would not apply to the

⁸ Gerface Ojwang', 'Philosophical Analysis of Gender Based Affirmative Action Policy in Kenya with respect to Theory of Justice' 105.

⁹Article 2, *International Covenant on Civil and Political Rights*, UN A/Res/ 2200A(XXI) 23rd March 1972.

¹⁰ Maria Nzomo, 'Women in Kenya's Politics Leadership: The Struggle for Participation in Governance through Affirmative Action' *Heinrich Boll Stiftung*, 2011, 16.

¹¹ Article 27(6), *Constitution of Kenya* (2010).

¹² Article 81(b), *Constitution of Kenya* (2010)

¹³ Kabira W & Mbote P, 'Gender Issues in Electoral Politics in Kenya: The Unrealised Constitutional Promise' In Odote C & Musumba L, *Balancing The Scales of Electoral Justice; Resolving Disputes from the 2013 Election in Kenya & Emerging Jurisprudence*, Rome: International Law Development Organisation, 2016, 179.

Parliament elected as a result of the 2013 election. The Court required such legislative measures to be taken by 27 August 2015.¹⁴ As it stands, this still has not achieved in the National Assembly and Senate.

1.2 Statement of the Problem.

The problem that this dissertation attempts to address, is the way forward for the Kenyan Parliament in realising the two-thirds rule as is provided for under Article 81 of the Constitution, its workability in light of the political history and other quota options.

1.3 Justification of the Study.

The Constitution of Kenya prides itself as being the supreme law of the Republic of Kenya thus its provisions must be given unparalleled importance. Article 27(6) of the Constitution gives the state the mandate to take legislative measures to redress any disadvantaged individual or groups that have suffered from past discrimination. Women have for a long time suffered discrimination in Kenya due to outdated societal views and thus failing to realise such a crucial provision in the constitution defeats any attempts to empower them. Material written on the way forward for Kenya after not realising this principle is scarce. This study shall attempt to give a practical and viable solution for Kenya keeping in mind the political history of Kenya.

1.4 Statement of Objectives.

The main objective of this paper is to study the two-thirds rule, its nature and whether it is workable given the political history of Kenya. Furthermore it shall discuss:

- i. The most viable option to realise the gender rule.
- ii. A comparative analysis of Rwanda, South Africa and Sweden who have also introduced a gender quota system and what Kenya can learn or take from them.

1.5 Research Question.

This research shall attempt to address the following questions:

- i. Can the two-thirds rule be achieved without any enforcement action in light of the political history of Kenya?

¹⁴ *In the Matter of The Principle of Gender Representation in The National Assembly and The Senate*, Advisory opinion no.2, Supreme Court [2012] eKLR.

- ii. What is the nature of the two-thirds rule and how does it affect the period of its realisation?
- iii. What is the way forward for Kenya in realising the two-thirds rule?
- iv. Can hard legislative quota systems or voluntary political party quota systems help Kenya realise the two-thirds rule principle.
- v. Are the proposals, detailing recommendations for enforcing the two-thirds rule, submitted to the Attorney General by interested parties workable?

1.6 Literature Review.

Catherine, Emelda and Chege in 'An analysis of Affirmative Action; Two-thirds Gender Rule in Kenya', analysed women's representation and participation from the first to tenth Parliament. The authors recognised that the Constitution of Kenya provides for an Affirmative Action but not a mechanism for its employment and recommend that the government develops programs that address political, social and economic factors that inhibit women's participation in any sphere and that political parties strive to introduce voluntary quotas. This paper however, does not include a comparative analysis.¹⁵

Joan Birika in 'The Two-third Gender Majority Representation Principle: Politics of Gender and the Where Next?' criticises the stretching of the length of time taken by Kenyan legislators to find a mechanism for realising the two-thirds rule. She discussed the various proposals given such as lifting of Article 177 of the Constitution, Affirmative Action seats and leans towards the increase of special seats for women as the most promising option for realising the gender-rule. The author does not discuss the political history of Kenya. The author also fails to give a comparative analysis and discuss in depth about the workability of the proposals given.¹⁶

Professor Maria Nzomo in, 'Impact of Quotas: Accountability of Female 'quota' Mps in Kenya', discussed the impact of quotas in Kenya. Noting that there is a need for a new mechanism for the quota system adapted in Kenya to be realised. The author strongly

¹⁵ Catherine kaimenyi, Emelda kinya & Chege Macharia, 'An analysis of affirmative action: The two-thirds rule in kenya' *International Journal of business, Humanities and Technology* (2013) Vol.3, No. 6.

¹⁶ Joan Birika, 'The Two-third Gender Majority Representation Principle: Politics of Gender and The Where Next?' *Heinrich Boell Foundation* (2015).

advocates for passing of the Two-thirds Amendment Bill. The study failed to acknowledge the political history of Kenya and did not explain in depth the quota system implemented by Rwanda.¹⁷

Professor Maria Nzomo in 'Representational Politics in Kenya: The Gender Quota and Beyond', believes that an affirmative action can only succeed if implemented within a framework of supportive policies and political environment. The author is of the view that the PR electoral system is the most effective instrument for the implementation of quotas and that a progressive constitution is not enough to secure gender equality. Nzomo discusses political parties and advocates for regulations that would reduce gender bias in political parties. This research is different from Professor Maria's paper in that her paper was written before Kenya's inability to realise the gender rule thus this study shall in detail discuss enforcement mechanisms that may be workable given the political history of Kenya.¹⁸

Professor Wanjiku Kabira and Professor Kameri Mbote in 'Gender in Electoral Politics in Kenya: The Unrealised Constitutional Promise' analyse the political and social hindrances that have surrounded the attempts to meet the two thirds gender rule. The aim is to illustrate the fact that gender equality in politics requires more than law in order to be realised as other factors greatly affect its realisation. Although this book is yet to be published, the abstract offers an idea of what the chapter will entail thus will come assist when carrying out this study.¹⁹

¹⁷ 'Maria Nzomo: Impact of Quotas: Accountability of Female 'quota' mps in Kenya' 2013 <http://www.cmd-kenya.org/files/Impact-of-Quotas-by-Prof-Maria-Nzomo.pdf> on 23 February 2016.

¹⁸ Maria Nzomo, 'Representational politics in Kenya: The gender quota and beyond' *African Research & Resource Forum*, 2012.

¹⁹ Wanjiku Kabira & Kameri Mbote, 'Gender in electoral politics in Kenya: The unrealised constitutional promise' (*Yet to be published Abstract*), 2016, 6. <https://www.google.com/search?q=Wanjiku+Kabira+%26++Kameri+Mbote%2C+%27Gender+in+electoral+politics+in+Kenya%3A+The+unrealised+constitutional+promise%27&ie=utf-8&oe=utf-8>

A UNDP report "Championing Women's Political Leadership: Delivering the One-third Promise in Kenya" suggests that women should unite in order to establish mechanisms to implement gender quotas, effective participation of women in political parties, women movements should remain vigilant in monitoring the implementation of the constitutional quotas. However, this report failed to give a legal enforcement mechanisms that would enable the realisation of the gender rule.²⁰

1.7 Theoretical Framework.

This paper shall borrow from feminist works and shall focus on liberal feminist theories that were developed out of liberal political philosophy. Authors such as Friedan, Rossi, Wollstonecraft focus on equality of rights and opportunities for women and men. Scholars argued that it is only through legal and political avenues, that women can change laws and politics thus allowing them achieve gender justice. This study shall use this theory to expound on the idea of affirmative action for women and where it stems from.²¹

The concept of justice will be also be discussed. Tmekin believes that there is a connection between justice and equality. Equality is regarded as one aspect of the wider spectrum of justice. Nozick's principle of justice leans towards providing a remedy to those who have suffered from a wrong done. Victims of injustice are morally entitled to redress from the ones who caused the injustice or those who have benefitted from the injustice or their descendants.²²This study shall discuss Rawls's theory of justice. Rawls's argues that principles of justice are those principles which persons would accept in an initial position of equality. This theory in conjunction with other theories of justice shall

²⁰ UNDP, "Championing women's political leadership: delivering the one-third promise in Kenya," Report on the regional dialogue on women's political leadership , Safari park hotel Nairobi ,Kenya, 14th- 16th August 2012.

²¹ Katharine Sarikakis ET AL, 'Feminist theory and research' *Stacks_C032.indd 505* ,2008, 505.

²² Gerface Ojwang', 'Philosophical analysis of gender based affirmative action policy in Kenya with respect to theory of justice' Unpublished BA Thesis, Kenyatta University , 2010 , 70.

guide this study in determining the best option for an affirmative action and understanding the importance of an affirmative action.²³

African feminism will also be discussed as it has impacted the strides African countries have taken to increase women's representation in politics. 'It has introduced a new feminist ideology that has provided insight on the experience of African women and differs from the conventional feminist tract.' African feminism attempts to separate itself from western feminism in order to bring to light the peculiar struggles African women have faced. African feminists were the driving force behind the African Union Protocol on the Rights of Women in Africa.²⁴ This protocol includes a commitment to 50:50 gender parity in politics. Their efforts and ideologies will be discussed in depth under chapter 2 of this paper.

1.8 Hypothesis /Assumptions.

- i. That a gender based affirmative action is the best solution for dealing with past discrimination against women.
- ii. Attempts to establish an enforcement mechanism to realise the gender rule have not been fruitful.
- i. A comparative analysis shall be effective in recommending the way forward in Kenya.
- ii. The political history of Kenya will influence the approach this dissertation will take.

²³Rawls J, *A theory of Justice*, Oxford University Press, London, 1971.

²⁴ Gordema Ruvimbo, 'African Feminism: The African woman's struggle for identity' 2010, 2.

<http://awdflibrary.org/bitstream/handle/123456789/424/the%20African%20woman's%20struggle%20for%20identity.pdf?sequence=>> Accessed on 17th March 2016.

1.9 Methodology.

This study shall mostly rely on secondary data and shall analyse journal articles, books, recommendations made by interested parties pertaining the realisation of two-thirds rule in Kenya and any other relevant forms of study.

1.10 Limitations.

This research may be limited by:

- i. Some of the books, journals and other materials may be difficult to access thus may be expensive to purchase.

1.11 Chapter Breakdown.

Chapter one will be an introduction of gender based Affirmative Action in Kenya. It will include the statement of problem and the purpose of this study.

Chapter two will examine the theoretical framework behind this study.

Chapter three will discuss the laws that form the basis of the two-thirds rule, the nature of the gender rule and the Supreme Court ruling.

Chapter four will discuss the political history of Kenya, Kenya's voting trends and recommendations made by interested parties.

Chapter five will entail a comparative analysis of relevant countries that have adopted a gender based Affirmative Action in politics.

Chapter six will give a conclusion of this study and give recommendations for Kenya.

CHAPTER TWO

THEORETICAL FRAMEWORK.

2.1 Introduction.

This chapter shall analyse the theories that form the basis of Affirmative Action and gender based affirmative action. Such theories include concepts of justice, equality and feminism. These theories were the driving force behind affirmative action as they aimed to remedy a gap in society where certain individuals were disadvantaged due to wealth disparities, gender, race, religion etc. The main focus of this chapter will be gender based affirmative action. As earlier mentioned the main aim of a gender based affirmative action is to remedy a history of discrimination based on sex. Below shall be an examination of some theories and how they have impacted or rather led to the formation of gender based affirmative action.

2.2 Rawls Theory of Justice.

Justice according to Rawls is that which in fair conditions, free and equal persons would agree are the basic terms of social cooperation. Principles of justice, he suggests are best chosen by persons when they are in the original position. He coined this as ‘justice for fairness’.²⁵ The structure of society is fundamental for the realisation of justice. This is because society’s structure enables us to understand the way in which institutions distribute fundamental rights and duties and ways in which persons are either disadvantaged or advantaged by virtue of their social status, educational expertise, gender, race etc. A society can only choose principles that are fair if they appreciate, understand and respect the concept of justice. This is only possible if a common concept of justice is accepted and understood by all.²⁶ ‘Fair’ principles are those chosen by persons in an original position described by Rawls as the veil of ignorance. In this position persons are not influenced by social positions, wealth, race, gender etc. They are unaware of such inequalities. It is therefore assumed that they will choose principles that

²⁵ Arneson Dick, ‘John Rawls Theory of Justice; Notes for theories of justice’ USD School of Law, 2008.

<<http://philosophyfaculty.ucsd.edu/faculty/rarneson/Rawlschaps1and2.pdf>> Accessed on 23rd September 2016.

²⁶ Arneson Dick, ‘John Rawls Theory of Justice; Notes for theories of justice’

they deem fair because they fear falling victim to a disadvantaged end. The principles chosen at this stage, Rawls believes, should form a basis, a sort of starting point for lawmakers when formulating policies.²⁷

Rawls discusses justice using two principles. The first principle suggests that certain liberties such as political freedom, freedom of speech and assembly etc should be equal among all citizens without compromise.²⁸ The second principle is social inequality. He suggests that both social and economic inequalities are to be arranged so that they are advantageous to those who are less fortunate and makes available an environment that is open to all and that promotes equal opportunity.²⁹

For Rawls, the basic structure of society is important because it brings to light the social inequalities embedded in society. Such inequalities, he says, are difficult to control because they are present from the start. For example, child cannot chose to be born in a poor family where such child has limited access to education opportunities, good health care etc.³⁰ To remedy this, Rawls suggests a principle called the difference principle. The latter is where the disadvantaged group is identified and measures are taken to encourage the participation of such disadvantaged groups. He further suggests that those who are disadvantaged due to nature; for example by virtue of sex or race should be compensated through special measures. He argues that inequalities in distribution of goods is permissible only if they benefit the least advantaged in society. Justice according to Rawls in the difference principle requires ‘aerating the benefits of those who are less advantaged as a result of social inequalities.’³¹ From this theory we can deduce principles of equal opportunity and measures to benefit the least advantaged. Such measures may

²⁷ Arneson Dick, ‘John Rawls Theory of Justice; Notes for theories of justice’ USD School of Law, 2008.

<<http://philosophyfaculty.ucsd.edu/faculty/rarneson/Rawlschaps1and2.pdf>>

²⁸ Rawls J, *A Theory of Justice*, Rev ed, Harvard University Press, 1999, 220.

²⁹ Rawls J, *A Theory of Justice*, Rev ed, Harvard University Press, 1999, 72.

³⁰ Arneson Dick, ‘John Rawls Theory of Justice; Notes for theories of justice’ USD School of Law, 2008.

<<http://philosophyfaculty.ucsd.edu/faculty/rarneson/Rawlschaps1and2.pdf>>

³¹ Rawls J, *A Theory of Justice*, Rev ed, Harvard University Press, 1999, 224.

include Affirmative Action measures. It would be safe to conclude that the principles laid out by Rawls may be used to argue for affirmative action.

Another theory of justice that differs from Rawls but may be used to defend affirmative action is Edmund Cahn's theory of justice. He believes that in order for justice to be effective one must approach it from its negative side; that is from the side of injustice. For him, there is already a universally accepted definition of what justice is. He believes justice can only be achieved if injustice is the starting point. Cahn defines justice as, 'the operative process of rectifying or averting what would bring about a sense of injustice.'³² Under this concept, society has greater incentive to make a difference when there is need to right a wrong. This can very well be said to be the basis of affirmative action because it is only by identifying discrimination of certain social groups (an injustice) that measures can be taken to remedy this discrimination. Measures such as affirmative action.

2.3 Dworkin's Theory of Equal Concern and Respect.

This theory calls for government to treat all its citizens with equal concern and respect. That is; all citizens should have equal opportunity and should not be discriminated by the law. Equality before the law presents itself in this theory. Dworkin acknowledges the lack of clarity in the right to liberties and suggests that certain liberties should be afforded special protection before the law. He believes this is necessary because such liberties have the ability to be faced by 'procedural impediments and if left to the utilitarian calculation of general interest and good for all then such liberties may be subjected to external preferences. That is the balance required to be met in utilitarian calculations would be tipped in favour of restrictions such as prejudice and discrimination.'³³ Individuals would fail to treat other individuals as equals thus restricting such liberties to only a few individuals. Dworkin suggests that such liberties be given a preferred status. This will ensure that decisions are not reached by virtue of external preferences and that such liberties are afforded special protection before the law to protect the fundamental rights of

³² Sigler J, 'Edmond Cahn and the Search for Empirical Justice' 12(2), *Villanova Law Review*, 1967, 1-3.

³³ Sigler J, 'Edmond Cahn and the Search for Empirical Justice' 12(2), *Villanova Law Review*, 1967, 2.

citizens to equal concern and respect.³⁴ In my view this theory may have been used to formulate what is now known as fundamental rights. Rights which should be enjoyed by all without discrimination. But such a theory may also be used as a basis for gender based affirmative action such as quota systems. The latter I would say would be used to protect the right to participate in politics. But to secure this right for everyone a quota system is included in order to prevent this right from being influenced by external preferences. For example, because the right to participate in all spheres of life including political life was not interfered with, it has been seen that such right favoured male persons who have for a long time held more political offices than women. If we go by Dworkin's theory, such a right which is capable of been externally influenced should be given preferred status (to protect it from discrimination). Such preferred status, I would assume would be implementing on such right a certain obligation for example a quota system.

The above theories have been used to argue for affirmative action as they encourage fairness, equality of sexes and equal opportunity for all. Under affirmative action there exists gender based affirmative action. Which is the main focus of this paper. Gender based affirmative action is influenced largely by feminism. As will be discussed below, feminists have been largely influenced by the works of Rawls and Dworkin and have used their theories to justify their works. Feminism has played a significant role in gender based affirmative action.

This chapter shall analyse feminists' works by dividing it into western feminism and African feminism. This is because although both have influenced gender based affirmative action, African feminism has contributed to the measures African countries have taken to remedy gender discrimination and because this paper is analysing the two-thirds gender rule in Kenya, African feminism has played an important role. Furthermore, the struggles of women in the west and Africa differ because western women have greater access to education, health care and welfare programmes. Although they still have a somewhat patriarchal culture this cannot be compared to African countries that still have tribal cultures thriving. Therefore, their ideologies and their struggle to fight for equality of women may also differ.

³⁴ Shestack J, 'The Philosophical Foundations of Human Rights' *Oxford University Press*, 1988, 7-10.

2.4 Western Feminism

Western liberal feminists argue for personal autonomy in their works. They have explained as the ability one has to be able to live a life of their own choosing. However such a life is influenced by certain conditions. They believe that women are at a disadvantaged point in choosing the most appropriate life because they are under-represented in the ‘process of democratic self-determination.’³⁵ This they largely blame on the patriarchal nature of institutions. MacKenzie and Stoljar discuss a list of enabling conditions for women to enjoy personal autonomy.³⁶

Those relevant to this paper include a) freedom from limits set by laws such limits include limiting women’s options because society forbids women from having access to such options on the basis that such roles are not for women. Liberal feminist argue that women’s choices should not be guided by such restrictions but by their own sense of self-interest. b) Having access to options. Women’s access to options is restricted because in comparison to the opposite sex they are often economically disadvantaged, discriminated and limited by law.³⁷ It has been accepted across the board by feminists that society’s culture affects women’s options because of the patriarchal background that surrounds most societies. This has made men have an unfair advantage over women when it comes to access to certain opportunities for example political opportunities, employment opportunities etc. Feminists believe that this can only be remedied by the state whose role should be to abolish such restrictions to options or to implement certain systems to encourage women’s participation. Liberal feminists also emphasize the importance of women’s participation in deciding a country’s policies.³⁸

As earlier discussed, it had mentioned that Rawls impacted the works of feminists. This is now evident because some liberal feminists use Rawls argument about basic structure and

³⁵ Mackenzie, Catriona and Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and Social Self*, Oxford University Press, 2000, 13.

³⁶ Mackenzie, Catriona and Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and Social Self*, 14-16.

³⁷ Mackenzie, Catriona and Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and Social Self*, 16-19.

³⁸ Mackinnon and Catherine, *Towards A feminist Theory of the State*, Harvard University Press, 1989, 20.

its importance to distribution of rights and duties to justify their works. They argue that the state should ensure that the basic structure of society distributes benefits and burdens of social cooperation fairly in a way that both men and women can enjoy. Liberal feminists argue that the current structure of distribution is unfair and favours the males. This they blame on the patriarchal nature of the institutions.

Okin is of the view that institutions limit equality and liberty of opportunity because they assign roles according to gender.³⁹ This limits a citizen's freedom of choice because if they are not in the favoured gender then they cannot pursue their desired options. She argues that gender should cease to play a legitimate role in determining choices in a just society. The basic structure of institutions must abolish this mode of assignment if the principle of equality and equal opportunity (as earlier discussed by Rawls) is to be achieved. She not only argues for gender blindness in institutions but also in a family setting. Families should not assign roles according to gender. This will enable them to instil an equality culture at an early point in life.⁴⁰ Other feminists draw from the Rawls argument of inequality. Anne L Alstott argues that the disadvantages women suffer are due to the 'disproportionate share of rights and duties.'⁴¹ That women cannot be in a fair race with men because from women's starting point they have been disadvantaged due to their gender. This she argues must be remedied by state action.⁴²

Liberal feminists argue that other than the patriarchal nature of institutions, another reason why women have suffered disproportion is due to underrepresentation in the political sphere. They argue that women should be included in the process of self-determination.⁴³ They should be allowed to hold public offices and influence the legal making process. If this is not done, it is unlikely that the injustice of the system will be brought to light for public discussion and therefore unlikely that steps will be taken to

³⁹ Okin and Susan, *Justice, Gender and the Family*, Basic Books: New York, 1989, 103.

⁴⁰ Okin and Susan, *Justice, Gender and the Family*, 103.

⁴¹ Alstott, Linda, *No Exit: What Parents Owe Their Children and What Society Owes Parents*, New York: Oxford University Press, 2004, 113.

⁴² Alstott, Linda, *No Exit: What Parents Owe Their Children and What Society Owes Parents*, 113.

⁴³ Green K, 'Freud, Wollstonecraft and Ecofeminism: A Defense of Liberal Feminism,' 16, *Environmental Ethics* 1994, 33.

remedy the situation. To resolve this, some suggest legal mechanisms to include those who have been for a long time excluded. Karen Green suggests, 'guaranteed equal representation'. This includes suggestions such as targets or quotas for women.⁴⁴

2.5 African Feminism.

The term African feminism cannot be defined concretely as there is no universally agreed upon meaning. For African women, feminism is shaped by political eras. These eras are pre-colonial, colonial and post colonial Africa.⁴⁵ Since these eras are not similar across the African continent, the experiences of feminism differ. Despite popular belief African feminism has been in existence but due to linguistics, it was difficult for Africans to coin a phrase for.⁴⁶ This argument detaches itself from the popular belief that African feminism borrows its ideas from western feminism. Gwendolyn Mikell, for example, defines it as, 'African feminism owes its origin to contrasting dynamics than those that produced Western feminism. It has largely been shaped by African Women's resistance to Western dominance within African culture. It does not stem from capitalistic individualism and the patriarchal control over women within capitalist manufacturing societies. The conventional discourse in various western countries about essentialism, the female body, and revolutionary feminism are not apparent in African feminism.'⁴⁷ This definition has been termed by some as conservative and does a disservice to the objective of African Women's Movements.

Pan Africanism was a movement that fought against colonial domination. It is also an ideology that encourages unity among Africans. Women were involved in the fight against colonialism but their role was often overlooked as male dominance exceeded theirs and the latter often got the praise. Charlotte Maxeke founded the Bantu Women's

⁴⁴ Green K, 'Freud, Wollstonecraft and Ecofeminism: A Defense of Liberal Feminism,' 33.

⁴⁵ Ruvimbo Goredem, 'African feminism: The African woman's struggle for identity' <<http://awdflibrary.org/bitstream/handle/123456789/424/the%20African%20woman's%20struggle%20for%20identity.pdf?sequence=>> Accessed on 2nd November 2016.

⁴⁶ Ruvimbo Goredema, 'African feminism: The African woman's struggle for identity'

⁴⁷ Ahikire J, 'African Feminism in context: Reflections on the legitimate battle, victories and Reversals' 19, *African Gender Institute*, 2014, 8.

league in 1918 in South Africa and Huda Sharaawi established in 1923 by the Egyptian Feminist Union. Despite women's fight against colonialism, they were still excluded even after African countries gained independence. The African elite leaders took over and embedded in the political sphere patriarchal notions. Thus calling for women to form feminist movements to pursue the equality principles of the Pan-Africanist vision.⁴⁸

Feminist Pan-Africanism emerged as an ideology whose sole concern was to liberate African women. African women movements may be understood as a sub-set of the wider Pan-African Philosophy of promoting equal rights by fighting against patriarchal ideologies and other social inequalities. Modern African feminism was solidified during the UN decade for women 1975-1985 resulting in feminist scholars and activists spreading widely across the African continent.⁴⁹ African feminists acknowledge the disadvantages African women face in various spheres of life and in an attempt to discuss these problems and seek recommendations, over two hundred African feminists met in Accra in 2006 to develop a Charter of Feminist Principles. At the conference, they recognised that there was a sense of urgency required to encourage women's participation in politics and also to invigorate the formation of feminist movements. They suggested that it is necessary that ideologies of feminism be included in politics to remedy the past history of discrimination that women have faced.⁵⁰

African feminists have achieved a lot in their different countries. They are believed to be the driving force behind the African Union Protocol on the Rights of Women in Africa. This protocol includes a commitment to 50:50 gender parity in politics. This move by the AU's may have encouraged African countries to establish mechanisms to include women

⁴⁸ Winyi N, 'African Women Organizing and Pan-Africanism: The Case of FEMNET.' *The African Women's Journal*, 2013, 6.

⁴⁹ Abdulmelik S, 'The African Women's Movement and Pan-Africanism: Two ships passing silently in the Night?' 6, *The African Women's Development and Communication Network*, 2013, 13.

⁵⁰ Ahikire J, 'African Feminism in Context: Reflections on the Legitimate Battle, Victories and Reversals' 19, *African Gender Institute*, 2014, 10.

in politics. African feminists have also pushed their governments to include them in politics.⁵¹

2.6 Conclusion.

In Kenya the likes of Honourable Phoebe Asiyo, Martha Karua have fought for women's increased representation in parliament. Kenyan women movements that shall be discussed in detail in chapter three have also played a significant role in advocating for equal opportunity and treatment of women. They have borrowed from the ideologies of justice, equal concern, equality of sexes and feminist works. Kenyan feminists and movements have pushed to be included in the political sphere and this may have been the driving force behind the two-thirds gender rule that this paper shall analyse.

⁵¹ Ahikire J, 'African Feminism in Context: Reflections on the Legitimate Battle, Victories and Reversals' 10.

CHAPTER THREE.

HISTORY OF THE TWO-THIRDS GENDER RULE, THE NATURE OF THE RULE AND THE ADVISORY OPINION NO.2 SUPREME COURT RULING.

3.1 Introduction.

This chapter shall discuss the laws that form the basis for the two-thirds gender rule and delve into the controversial question pertaining the nature of the rule. I shall also examine in detail the Supreme Court ruling on the matter.

3.2 History of the Two-Thirds Gender Rule.

The Two-thirds gender rule stems from the constant struggle women have faced to be included in politics. This has been often been blamed on the prevalent patriarchal nature embedded in our society, inadequate policy framework to curb the issue, undemocratic institutions both private and public and lastly the low levels of gender awareness.⁵²

Kenyan feminists have played a huge role in pushing for increased representation of women. This can be traced back to 1996 when Charity Ngilu pushed for the Beijing Platform for Action to be implemented by parliament. The document was a United Nations declaration whose visionary agenda was to empower women. It included several provisions on equal opportunity and treatment of women and institutional mechanisms such as affirmative action to be taken to encourage women's participation. It also recognised inequality between women and men in the political spheres and decision making forums. However, this implementation was unsuccessful. In 1997, Phoebe Asiyo attempted to pass before parliament the first Affirmative Action Bill. The said Bill sought to increase women's participation in parliament to at least 33%. This was also rejected. In 2000, Beth Mugo tabled the Affirmative Action Bill which was later recommended to the Constitution Review Commission of Kenya which at the time was reviewing the constitution. This was incorporated in the Wako draft which was defeated in the 2005

⁵² Nzomo M, 'Women in Political Leadership in Kenya: Access, Agenda Setting and Accountability' <https://ke.boell.org/sites/default/files/uploads/2014/01/women_in_political_leadership_in_kenya-access_influence-.pdf> Accessed 2nd November 2016.

referendum. The fight did not end there. In 2007, Martha Karua tabled before parliament a bill called, ‘Constitution of Kenya (Amendment) Bill on Affirmative Action. This, like its counterparts was rejected.⁵³ This begs the question whether the male politicians who are the majority in parliament are against female empowerment. This however will be discussed in a later chapter.

Following the various attempts by female politicians and the need to comply with the various international instruments it has ratified, Kenya was under pressure to include in its Constitution, provisions for Affirmative Action plans. Kenya is a signatory of the following; International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Charter on Human and People’s Rights (ACPHR) which entail provisions calling for equal access to opportunity, legislation mechanisms to eliminate discrimination based on gender and mechanisms to encourage women’s participation.

ICCPR Article 2 calls for states to ensure that all individuals enjoy the rights in the covenant without any distinction whatsoever be it gender, race or status.⁵⁴ Article 3 further stipulates that there shall ensure equal enjoyment of both men and women of the rights afforded in the covenant.⁵⁵ Article 25 states that all persons shall have the right and opportunity to take part in public affairs either directly or through chosen representatives without any distinction as stipulated in Article 2.⁵⁶ Article 26 calls for equal protection of the law and equality before the law.⁵⁷

CEDAW, whose main aim is to encourage non-discrimination against women, urges state parties to ensure equality of men and women in their enjoyment of political, civil, social, cultural and economic rights. Article 2 stipulates that, ‘ parties to the convention should

⁵³ Kaimenyi C, Kinya E, Samwel C, ‘An Analysis of Affirmative Action The Two-Thirds Gender Rule in Kenya’ 3(6) *International Journal of Business, Humanities and Technology*, 2013.

⁵⁴ Article 2, *International Covenant on Civil and Political Rights*, UN A/Res/2200A (XXI) 23rd March 1972.

⁵⁵ Article 3, *International Covenant on Civil and Political Rights*.

⁵⁶ Article 25, *International Covenant on Civil and Political Rights*.

⁵⁷ Article 26, *International Covenant on Civil and Political Rights*.

not condone discrimination against women and should pursue using suitable means and without undue delay policies of eliminating discrimination against women and strive: (a) to include the equality principle in their national constitutions or other appropriate legislation (b) to adopt appropriate legislative and other measures that shun against discrimination based on gender (c) to establish special legal protection for the rights of women and to ensure through national courts and other public institutions that women are protected against any form of discrimination. (f) to take all appropriate measures to change or get rid of existing laws, regulations, customs and practices which discriminate women.⁵⁸ Article 3 further stipulates that state parties shall adopt temporary measures that promote equality between men and women. Such measures shall be discontinued when their objective has been met. Most importantly the Convention recognises the impact culture may have on limiting opportunities for women.⁵⁹ This is seen in Article 5 which states that parties should take appropriate measures to change the notions of superiority of men in the cultural system of their society.⁶⁰ Article 7 includes the need for states to take appropriate measures to ensure women are afforded equal rights as men to participate in public and political life. This entails being elected into government voting, taking part in implementation of legislation etc.⁶¹

ACPHR entails provisions that support equality of sexes⁶² and equality before the law. It further stipulates that states should eliminate discrimination against women.⁶³ With all the provisions discussed above, the excessive pressure Kenya faced from the international community to increase opportunities for women and the need for Kenya to adhere to the conventions they ratified or were signatories to, the 2010 Constitution by default had to

⁵⁸ Article 2, *Convention on the Elimination of All Forms of Discrimination Against Women*, UN A/Res/34/18 of 18 December 1979.

⁵⁹ Article 3, *Convention on the Elimination of All Forms of Discrimination against Women*.

⁶⁰ Article 5, *Convention on the Elimination of All Forms of Discrimination against Women*.

⁶¹ Article 7, *Convention on the Elimination of All Forms of Discrimination against Women*.

⁶² Article 19, *African Charter on Human and People's Rights*, 21 October 1986.

⁶³ Article 18(3), *African Charter on Human and People's Rights*.

include provisions of equality and legislative mechanisms to remedy past discrimination of certain groups.⁶⁴ Article 2 of the Constitution stipulates that any treaty or convention ratified by Kenya shall form part of Kenyan law.⁶⁵ It further stipulates that the general rules of international law shall form part of Kenyan law.⁶⁶ This generally meant that ICCPR, CEDAW and ACHR that call for equality of sexes in all spheres of life and mechanisms to eliminate discrimination form part of Kenyan law. This by default meant that Kenyan law would be required to reflect a similar position. Thus the new provisions in the Constitution.

The 2010 Constitution dedicated a whole chapter referred to as the Bill of Rights. Article 27 of the Constitution states that all persons shall be equal before the law.⁶⁷ Both women and men shall have equal rights to opportunities in all spheres of life.⁶⁸ ‘To give full effect to the realisation of the rights guaranteed under this article, the state shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.’⁶⁹

The Constitution requires the electoral system to ensure that no more than two-thirds of the same gender shall be members of public elective bodies.⁷⁰ The membership of both the Senate and National Assembly is provided for under Article 97 and 98. The National Assembly shall consist of three hundred and forty nine members. This includes two hundred and ninety each elected by the registered voters, forty-seven women and twelve members nominated by parliament.⁷¹ The senate shall consist of sixty seven members plus a speaker. Forty seven members each elected by the voters, sixteen women who shall

⁶⁴ Nordström P, ‘Gender and Reconciliation in the New Kenya’ FBA, NCIC, IJR, Policy Brief 3, July 2013. <<https://fba.se/globalassets/gender-and-reconciliation-in-the-new-kenya-policy-brief.pdf>> Accessed on 2nd November 2016.

⁶⁵ Article 2(6), *Constitution of Kenya* (2010).

⁶⁶ Article 2(5), *Constitution of Kenya* (2010).

⁶⁷ Article 27, *Constitution of Kenya* (2010).

⁶⁸ Article 27(3), *Constitution of Kenya* (2010).

⁶⁹ Article 27(6), *Constitution of Kenya* (2010).

⁷⁰ Article 81(b), *Constitution of Kenya* (2010).

⁷¹ Article 97, *Constitution of Kenya* (2010).

be nominated by parliament, two members both male and female to represent the youth , two members both male and female to represent the disabled and the speaker who is an ex-officio member.⁷² Article 100 continues to echo the need for representation of women by calling for parliament to enact legislation to promote the representation of women.⁷³ Members of the County Assembly shall consist of members elected by registered voters of the wards, number of special seats to ensure the two-thirds threshold is met and certain number of members of marginalised groups that is both disabled and youth (this is to be prescribed by parliament) and a speaker who acts as an ex-officio member.⁷⁴

Following the above provisions, during the 2013 general election the two-thirds threshold was not met except at the County Assembly and this was due to the special seats reserved specifically to ensure that the two-thirds threshold is met. The same was not guaranteed for the Senate and National Assembly. Some argued that this rendered parliament unconstitutional as its membership did not conform to the provisions of the Constitution.⁷⁵ This led to the Attorney General seeking an advisory opinion from the Supreme Court on the unconstitutionality of parliament.

3.3 In The Matter of The Principle of Gender Representation In The National Assembly And The Senate [2012] eKLR.

The issues forwarded to the Supreme Court were various but I shall outline those which are relevant to this paper. One of the issues included whether the two-thirds rule was progressive in nature or should be realised during the 2013 general elections. The Attorney General argued that Article 97 and 98 did not guarantee that the two-thirds threshold would be met unlike Article 177. He also recognised the right to vote and participate in formulation of political parties stipulated under Article 38. The Attorney General apprehends that “*it is not guaranteed that nominated persons from the lists of*

⁷² Article 98, *Constitution of Kenya* (2010).

⁷³ Article 100(a), *Constitution of Kenya* (2010).

⁷⁴ Article 177, *Constitution of Kenya* (2010).

⁷⁵ Kimani K, ‘The Gender Rule Quagmire: Implementing the two-thirds gender principle in Kenya’ <<http://iedafrica.org/index.php/policy-legal-reforms/143-the-gender-rule-quagmire-implementing-the-two-thirds-gender-principle-in-kenya>> Accessed on 2nd November 2016.

nominees provided by the political parties will ensure that at least one-third principle in each House will be met.”

The Attorney General further recognised the lack of legal mechanisms to ensure the two-thirds rule is implemented. He argued that the membership of both National Assembly and the Senate did not meet this threshold and should the voters not vote for some women, the only way to deal with this would be to increase nomination of women which would surpass the prescribed numerical numbers for both houses. Due to the tax burdens that the latter would place on citizens, the Attorney General recommended that the two-thirds principle be of a progressive nature. This was met with opposition as some parties like the Commission on Administrative Justice (CAJ) argued for immediate realisation. The chief officer of CAJ argues that parliament has a responsibility under the Constitution to enact laws that promote and encourage representation of women. Here he referred to Article 100 of the constitution. He further argued that parliament had a five year lee-way under the Constitution to ensure that the two-thirds threshold was met.

CAJ's stand was not similar for other interested parties such as The Commission for Implementation of the Constitution and Centre for Multiparty Democracy. The two believed that the interpretation of Article 81 was never controversial. That if it was intended that the principle be progressive, Article 81 would include such a provision indicating its progressivity. They therefore argued that assuming Article 81 is of progressive nature would inconsistent with the comprehensive interpretation of the Constitution. The Katiba Institute backed the immediate realization of the two-thirds gender rule arguing that this threshold was only the minimum and would further act as a starting point for the progressive realization of gender equity. The interested parties that argued against the progressive nature of the two-thirds principle were of the opinion that the Constitution did not intend that the conduct of elections be associated with progressivity because it does not specify as it does for social and economic rights that the said article should be realised progressively. They further argued that it is important to safeguard this principle as women in Kenya have historically been discriminated in the political sphere.⁷⁶

⁷⁶*In The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate* (2012) eKLR.

The Court defined progressive realization as a ‘gradual movement towards a known destination.’ The Court noted that the Constitution draws from CEDAW, ICCPR AND ICESCR. Further noting that the two-thirds threshold is a type of affirmative action aimed at remedying the social injustices against women. The Court went ahead to give an example of the membership of the Judicial Service Commission (JSC). Stating that its provisions ensured for its immediate realization. The specific number of women and men is provided for and easily enforceable. They further noted that three of the membership requirements of the JSC is immediate however, the fourth is progressive as it is dependent on the state’s further action. Furthermore, they recognised that the nature of a right is dependent on many factors such as the language used in the provision, the mechanisms provided for the attainment of the principle, the constitution of the elective body etc. The Court stated that the term ‘shall’ used in Article 81 and 27 is generally assumed to imply a compulsory obligation which would be interpreted as calling for immediate realisation. The Court however does not agree with the latter and is of the view that the gender equity principle is of a progressive nature unless a time frame is specifically given. The word ‘shall’ may be used in a way that implies the working together of various institutions whose co-operation is dependent on each other thus when used in this context it cannot call for immediate realisation but is however used to emphasize the importance of a principle. The Court gave an example of Article 27(6) that calls for the state to take legislative measures to implement the two-thirds principle. Such unclear measures can only be realized progressively because affirmative programmes require “*careful thought, several consultations, methodical design, and co-ordinated discharge. Such measures cannot, by their very nature, be enforced immediately.*”⁷⁷ Unless the state provides for enforcement mechanisms to realize this principle. The Court agreed with Mr Kanjama’s argument that Article 81 is a soft gender quota which required progressivity. They advised that legislative measures should be taken by August 2015 to realize the two thirds rule. This unfortunately was not achieved.⁷⁸

⁷⁷ *In The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate* (2012) eKLR.

⁷⁸ *In The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate* (2012) eKLR.

In dissenting opinion of former Chief Justice Willy Mutunga, he was of the view that the nature of such a principle should be immediate given the history of exclusion in politics that women in Kenya have faced and continued to face. Mutunga argues that political parties play a crucial role in ensuring conformity with the two-thirds rule. He argues that political parties' lists in his view should also comply with the two-thirds gender rule. If party lists do not contain a sufficient number of women nominated as viable candidates to contest in the elections then the required number of women in parliament will not be reached. He was of the opinion that the gender principle should be met during the March 2013 elections.⁷⁹

Affirmative Action programmes connote two types of obligations when dealing with the protection of a right; positive and negative. The latter requires the government not to interfere with such a right by implementing negative measures. The former requires the government to protect such rights by implementing measures to encourage it, protect it from infringement or the inclusion of enforcement mechanisms to realise the right. Traditionally, social, economic rights and political rights were to be realised differently; the latter was required immediate realization while the former required progressive realisation.⁸⁰ This is because social and economic rights were dependent on the financial capabilities of countries thus requiring progressive realisation. However the author notes that rights that call for non-discrimination require immediate realisation.⁸¹ The gender rule is a political right which by its historic nature requires immediate realisation.

⁷⁹ *In The Matter Of The Principle Of Gender Representation In The National Assembly And The Senate* (2012) eKLR.

⁸⁰ [https://books.google.co.ke/books?id=oh09sQfyuGMC&pg=PA58&lpg=PA58&dq=What+is+the+nature+of+affirmative+action+programmes\(immediate+or+progressive\)&source=bl&ots=WEMmi5h9KC&sig=ceSMNMbLBzWg1eWLhkpXNimME&hl=en&sa=X&redir_esc=y#v=onepage&q=What%20is%20the%20nature%20of%20affirmative%20action%20programmes\(immediate%20or%20progressive\)&f=false](https://books.google.co.ke/books?id=oh09sQfyuGMC&pg=PA58&lpg=PA58&dq=What+is+the+nature+of+affirmative+action+programmes(immediate+or+progressive)&source=bl&ots=WEMmi5h9KC&sig=ceSMNMbLBzWg1eWLhkpXNimME&hl=en&sa=X&redir_esc=y#v=onepage&q=What%20is%20the%20nature%20of%20affirmative%20action%20programmes(immediate%20or%20progressive)&f=false) Accessed on 3rd

November 2016.

⁸¹ [https://books.google.co.ke/books?id=oh09sQfyuGMC&pg=PA58&lpg=PA58&dq=What+is+the+nature+of+affirmative+action+programmes\(immediate+or+progressive\)&source=bl&ots=WEMmi5h9KC&sig=ceSMNMbLBzWg1eWLhkpXNimME&hl=en&sa=X&redir_esc=y#v=onepage&q=What%20is%20the%20nature%20of%20affirmative%20ac](https://books.google.co.ke/books?id=oh09sQfyuGMC&pg=PA58&lpg=PA58&dq=What+is+the+nature+of+affirmative+action+programmes(immediate+or+progressive)&source=bl&ots=WEMmi5h9KC&sig=ceSMNMbLBzWg1eWLhkpXNimME&hl=en&sa=X&redir_esc=y#v=onepage&q=What%20is%20the%20nature%20of%20affirmative%20ac)

3.4 Conclusion.

The nature of the gender rule is subjective. It is not clear if such a principle is to be realised immediately or progressively. I believe that the history of a country should determine the nature of an Affirmative Action. Considering the fight by feminists to have more women included in politics and the various attempts by interested parties to forward suggestions to parliament on the way forward for Kenya regarding the implementation of the rule have been rejected by parliament, it implies that parliament may not be ready for the increased involvement of women in politics. This laxity has by many been blamed on the patriarchal system still imminent in our society.⁸² The implementation of the gender rule and its importance seems to be downplayed by the Kenyan Parliament. Which has time and again failed to implement any bills forwarded regarding the matter. The realisation of the two-thirds principle cannot be prolonged or else the discrimination that women in politics have faced and still face will never be remedied.

[tion%20programmes\(immediate%20or%20progressive\)&f=false](#)> Accessed on 3rd November 2016.

⁸² Bwisa M, 'Actualization and Implementation of the 'Two-thirds gender Principle' in Kenya' <<http://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya>>Accessed on 3rd November 2016.

CHAPTER FOUR.

WOMEN'S POLITICAL STRUGGLE AND VOTING TRENDS IN KENYA.

4.1 Introduction.

The following chapter shall discuss the political history of Kenya in light of women's struggle to be included in the said sphere. It shall also analyse Kenya's history of voting in order to give a clear indication of whether Kenya as a society has embraced the idea of having women as politicians or if the patriarchal culture is still embedded in the Kenyan society. Furthermore, this chapter shall discuss the various recommendations made by interested parties with regards to the way forward for Kenya in implementing the two-thirds rule.

4.2 Political History of Kenya; Women's struggle.

Historically, many have assumed that only men were involved in Kenya's political struggle. Women's role in politics has often been downplayed due to society's view of a woman's accustomed role. Women's involvement in politics can be traced back to 1901-1909 with the first woman chief Wangu wa Makeri who flouted the patriarchal culture embedded in her society. She rose to the occasion as a leader and did not fall short from performing her required roles as a chief.⁸³ Women organised themselves in groups such as 'ngwatio' among the Kikuyu community and 'mwethya' among the Kamba. These groups were created to protect women from having their interests compromised.⁸⁴

In the 1930's the Mumbi Central Association was formed. It was established in order to allow women to have access to an association as they had been denied membership in the popular male dominated associations.⁸⁵ During the Mau Mau rebellion, women were

⁸³ Nzomo M, 'Women In Political Leadership In Kenya: Access, Agenda Setting & Accountability' Institute of Diplomacy & International Studies, 2011, 3.

⁸⁴ Adawo L, Gikonyo L, Kudu R, Mutoro O, 'History of Feminism in Kenya' AECID, 2011, 2.

⁸⁵ Ngugi R , 'The Kenyan Woman her Historical relationship with the state' *Columbus State University*, 2009, Paper 62, 5.

actively involved in the struggle for independence. Muthoni Likimani a former Mau Mau member published 'Passbook Number F.47927'. In this book she notes that formerly published works highlighting the Mau Mau struggle failed to include the role women played in the struggle for independence.⁸⁶ Women fought alongside men, gathered food for the fighters and were used as agents by the fighters to gather information from the ground. This led to the colonial government creating prison villages. This was aimed at restricting women's movement. In 1952, the Maendeleo Ya Wanawake Organization (MYWO) was formed. At the time, the movement was an agent of the colonial power. Therefore, its motives were not genuine and did not have Kenyan women's interests at heart. They often bribed women to join their movement on condition that they renounce their membership with Mau Mau.⁸⁷ Its main aim was to attempt to reduce nationalist activities. In 1961, a Kenyan woman was voted as the president of MYWO. This vote was aimed at changing the policies of MYWO to favour women. The organisation declared itself independent from the state. However, after independence, MYWO could not be per se declare themselves independent as it was receiving funds from the government. The Government changed MYWO's constitution from a non-governmental organisation to a women's development body of Kenya African National Union (KANU). This meant that women's gains would be limited.⁸⁸ In 1977, late professor Wangari Maathai formed the Green Belt Movement. This movement aimed not only at conservation of the environment but also at increasing women's access to resources such as clean water, healthy and clean environment. This improved women's livelihood by providing job opportunities and enabling them to sustain themselves through agriculture.⁸⁹

The two organisations (MYWO and Green Belt Movement) did not participate much in politics as during the said era the government did not allow for pluralism in the formation of political parties. Also, women were viewed as the weaker sex and often their role was believed to be domesticated. Not forgetting that very few women were allowed access to education and since most politicians at the time were the elite, women could not involve

⁸⁶ Ngugi R, 'The Kenyan Woman her Historical relationship with the state' *Columbus State University*, 2009, Paper 62, 5.

⁸⁷ Ngugi R, 'The Kenyan Woman her Historical relationship with the state' *Columbus State University*, 2009, Paper 62, 5.

⁸⁸ Ngugi R, 'The Kenyan Woman her Historical relationship with the state' *Columbus State University*, 2009, Paper 62, 5.

⁸⁹ Ngugi R, 'The Kenyan Woman her Historical relationship with the state' 5.

themselves accordingly. In 1985, the Federation of Women Lawyers was established. It has strived to educate women on their legal rights and to fight against discrimination of women.⁹⁰

In 1992, there emerged a new political arena where pluralism was accepted. Kenyans were allowed to form and join different political parties. Opening up the political space created a pathway for women to engage in politics and encourage the formation of women's movements. This was illustrated in the 1992 National Women's Convention under the theme: Women's Agenda for a Democratic Kenya. The convention brought together over 2,000 women from across the country who discussed the way forward in which women can be encouraged to participate in politics, increase their access to education and financial growth. In the same year, the League of Kenya Women Voters was formed to educate women on their voting rights. In 1997, The Kenya Women's Political Caucus (KWPC) launched the Women's Political Manifesto for the 2002 General Elections. The manifesto created women's own platform for political participation.⁹¹

In the same year Honourable Phoebe Asiyo brought before parliament an affirmative action bill known as the 'Phoebe Asiyo Motion' that sought to increase women's participation in decision making and positions of leadership to at least 33%. This however did not pass and some who were against it like Honourable Koech argued that the motion was not needed as male members of parliament represented both sexes and that there already existed a female assistant minister.⁹² The position held by Koech clearly depicted the chauvinistic views of the male politicians who at the time were the majority members of parliament.

This however motivated women to continue the struggle to be included in the political field. In 2000, Honourable Beth Mugo tabled a bill known as Affirmative Action Bill

⁹⁰ Kurea G, 'The Implementation Of The Two Third Gender Rule In The Devolved Government As Stipulated In The Kenyan Constitution: The Case Study Of Meru County' University of Nairobi, 2015.

⁹¹ Domingo P, McCullough A, Simbiri F, Wanjala B, 'Women and Power, Shaping the Development of Kenya's 2010 Constitution' Overseas Development Institute, 2016.

⁹² Kanyi M, 'Kenyan Women's Journey in Their Quest for Affirmative Action' Heinrich Böll Stiftung, 2016, 7.

attempting to increase the number of women in parliament to at least 30%. However, like previous bills it did not garner the required support. In 2007, Martha Karua tabled a bill called, 'Constitution of Kenya (Amendment) Bill on Affirmative Action. This was aimed at increasing the number of women in parliament. Like the norm, the bill was rejected.⁹³

Despite the rejection of affirmative action bills, Kenya Women Parliamentary Association (KEWOPA) and other women movements have managed to move bills such as the Children's Act of 2002, the Sexual Offences Act of 2006, the amendment of the Employment Act which increased maternity leave to three months, removal of tax for sanitary towels and lastly they were able to successfully advocate for women to be appointed as chairs and co-chairs of parliamentary committees which were formerly chaired by men.⁹⁴

It is clear that women have struggled to be actively involved in politics and participate in leadership roles despite the gender discrimination they face. Nevertheless, they still occupy less than the minimum threshold required by the Constitution. Although scholars have argued that gender quotas do not automatically translate to feminist quotas and that gender quotas are discriminative. In the sense that women are given a free pass into politics without fair competition with their male counterparts which may not automatically lead to women friendly reforms.⁹⁵ In my view, taking into consideration the active role women have played in an attempt to increase their numbers in parliament and the achievements of KEWOPA and other female movements, this is sufficient proof that they are likely to advocate for women friendly bills.

However, despite the efforts and strides women movements have made towards equal opportunity for women, it is noted that women have shied away from joining political parties.⁹⁶ This has been attributed to lack of finances and major political party backing.

⁹³ Nzomo M, 'Women In Political Leadership In Kenya: Access, Agenda Setting & Accountability' Institute of Diplomacy & International Studies, 2011, 6-7.

⁹⁴ Kabira W, Kimani E, 'The Historical Journey of Women's Leadership in Kenya' 3(6), *Journal of Emerging Trends in Educational Research and Policy Studies*, 2012, 5-7.

⁹⁵ Kabira W & Mbote P, 'Gender Issues in Electoral Politics in Kenya: The Unrealised Constitutional Promise' 182.

⁹⁶ <<http://www.shitemi.com/politics/women-still-shy-to-join-elective-politics/>> Accessed on 4th November 2016.

Research has shown that women were more popular in urban areas as compared to rural areas because most voters in urban areas are educated and are slowly moving away from patriarchal views. Furthermore, the introduction of special women seats was misinterpreted by voters making them believe that women could only be voted for special seats and not other political seats. This is blamed on poor civic education. Winnie Maru a political aspirant who vied on a United Republican Party asserts that women aspirants were taken through training and were encouraged to join political parties but declined. However, she believes that voting trends have shown that voters are still not ready to vote for women. She explains that in some constituencies women were discouraged from vying for some elective positions due to cultural issues.⁹⁷

The latter is evident in a case study carried in Meru County where 90% of the respondents indicated that culture affects how voters will vote. Further suggesting that women are viewed as the weaker sex with no political voice. This they blamed on the social set-up where women are seen as domestic beings incapable of taking up leadership role resulting in more male politicians in the region.⁹⁸ I am of the view that women tend to shy away from joining political parties due to the various obstacles such as insufficient funding, corruption in political parties, negative media etc that they anticipate facing.

4.3 Voting Trends in Kenya.

Below is a table illustrating the number of women who have been voted into the National Assembly between 1963-2013.

ELECTION YEAR	NUMBER OF WOMEN ELECTED	NUMBER OF WOMEN NOMINATED	NUMBER OF SPECIAL SEATS FOR WOMEN	PERCENTAGE OF WOMEN IN PARLIAMENT.
1963	0	0	None	0
1969	1	1	None	1.2

⁹⁷ <<http://www.shitemi.com/politics/women-still-shy-to-join-elective-politics/>> Accessed on 4th December 2016.

⁹⁸ Kurea G, 'The Implementation Of The Two Third Gender Rule In The Devolved Government As Stipulated In The Kenyan Constitution: The Case Study Of Meru County' University of Nairobi, 2015, 48-50.

1974	4	2	None	3.5
1979	5	1	None	2.9
1983	2	1	None	1.7
1988	2	0	None	1.1
1992	6	1	None	3
1997	4	5	None	1.4
2002	10	8	None	7.1
2007	16	6	None	8.9
2013	16	5	47	19.1 ⁹⁹

From the above table we can deduce that the 2013 election had the highest women in parliament however, this was due to the introduction of the reserved seats for women in the Constitution as the number of women elected in 2013 was similar to that of 2007. Despite the two-thirds pre-requisite under the Constitution, both the National Assembly and Senate were unable to meet the minimum number of sexes required.

Below is a table illustrating the number of both male and female members in the different political entities.

POLITICAL ENTITY	TITLE	NUMBER OF MEN	NUMBER OF WOMEN	PERCENTAGE OF WOMEN
Senate	Members	49	18	26.8%
National Assembly	Members	281	68	19.4%
County Assembly	Members	1479	762	34% ¹⁰⁰

⁹⁹ USAID/Kenya, *Women's Leadership as a Route to Greater Empowerment: Kenya Case Study*, September 29 2014, 22.

¹⁰⁰ USAID/Kenya, *Women's Leadership as a Route to Greater Empowerment: Kenya Case Study*, September 29 2014, 23.

No women were elected as governors or senators despite vying for the said posts. Only the County Assembly was able to meet the two-thirds threshold due to the specific constitutional provisions that provide for special seats. It would seem from the voting trends that Kenyans have often voted against women candidates. Thus giving an indication that the society has not yet fully accepted or refuses to see women as politicians and leaders.

It should also be noted that Political Parties did not comply with the two-thirds threshold when nominating aspiring candidates to vie for political seats. For example National Alliance Party did not forward any female candidates to vie for governors seats. The United Democratic Party had thirty five contesting for several seats. However, only 9% of the total aspirants were female.¹⁰¹

The selection and nomination process within Political Parties tends to disfavour women as male candidates are often nominated to compete for top seats such as governor or senator positions. This is often due to the undemocratic nature of the parties and also the funding of political parties. The latter is controlled by men who by virtue of this determine the constitution of these parties. Women politicians contested this male dominated funding by proposing that the funding of political parties be shared among members, this was strongly opposed. Political Parties have often been given the title of ‘gatekeepers’. In the sense that they can control whether the two-thirds threshold is met through their candidate selection process. They however have been the biggest obstacle towards achieving the two-thirds principle as they have often excluded women in the race for powerful seats.¹⁰²

The conditions for registration of political parties is stipulated under section 7 stating that not more than two-thirds of the governing body should be of the same gender and should reflect gender balance.¹⁰³ Political parties are also prohibited to receive funds if more than

¹⁰¹ Youth Agenda, ‘Youth Political Parties Participation In 2012/2013 Nomination Process’ <[2013http://www.youthagenda.org/images/stories/downloads/youth%20in%20political%20parties.pdf](http://www.youthagenda.org/images/stories/downloads/youth%20in%20political%20parties.pdf)> Accessed on 4th November 2016.

¹⁰² Kanyi M, ‘Kenyan Women’s Journey in Their Quest for Affirmative Action’ Heinrich Böll Stiftung, 2016, 8-9.

¹⁰³ Section 7, *Political Parties Act* (2012).

two-thirds of its registered office bearers are of the same gender.¹⁰⁴ Due to the age of most of the Political Parties and the fact that they were founded before the amendments to the Political Parties Act, they were unable to meet the criteria stipulated. This duty to ensure that Political Parties conform to the criteria set out in the act lies on the Independent Electoral and Boundaries Commission (IEBC). The role of IEBC is stipulated under Article 88(4) of the Constitution which includes, regulating of the nomination process by which parties choose persons to compete in elections and ensuring compliance of legislation by political parties.¹⁰⁵ IEBC was mandated with the responsibility of ensuring that political parties complied with the necessary legislation which included ensuring compliance with the two-thirds threshold. They failed to ensure this especially during the political parties' nomination process leaving women aspirants discriminated against as they were not afforded the chance to compete in the election race.¹⁰⁶

The media is another deterrent to women's political participation. Some women politicians argue that media stations often charge them for airtime once they are become aware that they are politicians. This is to their disadvantage as they are often limited on resources especially upcoming female politicians. They are also afraid to have their families brought to the lime light. Complaints have emerged that women politicians are given less coverage in the media as compared to their male counterparts.¹⁰⁷ It is also noted that some media houses are controlled by political heavyweights who tend to control what the media portrays.¹⁰⁸ Less coverage time given to female politicians in comparison to their male counterparts begs the question; is the media simply portraying the society's outlook that women are not considered capable of taking up political roles?

¹⁰⁴ Section 25(2)(b), *Political Parties Act* (2012).

¹⁰⁵ Article 88(4), *Constitution of Kenya* (2010).

¹⁰⁶ FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 2013, 28.

¹⁰⁷ USAID/Kenya, *Women's Leadership as a Route to Greater Empowerment: Kenya Case Study*, September 29 2014, 15.

¹⁰⁸ USAID/Kenya, *Women's Leadership as a Route to Greater Empowerment: Kenya Case Study*, 15.

4.4 Recommendations Made by Interested Parties to Implement the Two-Thirds Gender Rule.

The National Women's Steering Committee proposed the following to enforce the two-thirds threshold;

- A quota rotation of the two hundred and ninety constituencies. During every election 290 constituencies would come up with 4 adjacent constituencies and select one of them to be specifically reserved for women. This means that any political party nominating a candidate in the constituency to compete in the elections or any independent candidate vying shall be a woman. Numerically, this would mean a total of 290 divided by 4 which is 72.5 at every election. This would result in 73 women representatives plus the already provided for 47 special seats for women thus totalling 120 women as members of the National Assembly. Upon calculation only 117 women MPs are required to realize the two-thirds gender rule, this mechanism would easily ensure its realization. Unfortunately, this did not garner support from the members of parliament.¹⁰⁹
- The second recommendation was amendment of Article 97 and 98 of the Constitution. Inserting the clause, 'the number of special seat members necessary to ensure that no more than two-thirds of the membership of the National Assembly are of the same gender' and 'The members shall be nominated by political parties in proportion to the National Assembly seats received by the political party at the general election'. Both clauses would apply for the National Assembly and Senate. These amendments did not materialize as the Attorney General sought advice from the Supreme Court on the matter.¹¹⁰

After the Supreme Court ruling that advised for enforcement mechanisms to implement the two-thirds rule, parties were requested to put together workable recommendations. The National Assembly's Justice and Legal Affairs Committee, led by Honourable Samuel Chepkonga, proposed amending of the Constitution. He suggested that Article 81(b) be realised progressively. This meant that the words 'progressive realisation' would

¹⁰⁹ Kanyi M, 'Kenyan Women's Journey in Their Quest for Affirmative Action' Heinrich Böll Stiftung, 2016, 11.

¹¹⁰ Kanyi M, 'Kenyan Women's Journey in Their Quest for Affirmative Action' 12.

be included under the provision. This was rejected by women politicians who claimed it was a delay tactic by male politicians who are the majority in parliament. Others proposed increasing the number of special seats for women. This was contested by the Institute of Economic Affairs who argued that this would be a heavy tax burden for citizens as it would cost 21.1 million per year for additional seats in the National Assembly and 31.3 million for additional seats in the Senate.¹¹¹ Honourable Aden Duale tabled a proposed bill that aimed at increasing the number of women to be elected at both the National Assembly and the Senate. It proposes to introduce proportionate allocation of special seats to the number of seats won by a political party after elections. It further proposes a 20 year time line within which the gender rule should be implemented further providing that those elected shall serve for two terms. This was rejected in parliament.¹¹²

4.5 Conclusion.

Parliament has been questioned for their laxity in accepting any of the bills tabled before them. Are male politicians fearful of their women counterparts or does the patriarchal nature of our society still linger in our midst? It is difficult to understand the laxity behind parliament's decisions and why a simple provision in the Constitution cannot be realized. I believe that male politicians are yet to accept women as their equals and are yet to respect what they are capable of bringing to the table. Some male politicians like Deputy minority leader Jakoyo Midiwo claims, 'women politicians are simply 'busybodies', 'idlers' who squander public funds saying that they rarely contribute to debates.'¹¹³ Kenyan women have not been afforded a chance to flourish politically and prolonging the realisation of the two-thirds threshold in my view goes against what the Constitution

¹¹¹ < [HTTP://WWW.SIDINT.NET/CONTENT/ACTUALIZATION-AND-IMPLEMENTATION-TWO-THIRDS-GENDER-PRINCIPLE-KENYA](http://www.sidint.net/content/ACTUALIZATION-AND-IMPLEMENTATION-TWO-THIRDS-GENDER-PRINCIPLE-KENYA)> ACCESSED ON 4TH NOVEMBER 2016.

¹¹² Lilian Aluanga, 'Kenya's two-third constitutional gender rule could be implemented by June 2016' <<http://www.constitutionnet.org/news/kenyas-two-third-constitutional-gender-rule-could-be-implemented-june-2016>> Accessed on 4th November 2016.

¹¹³ <<http://www.standardmedia.co.ke/article/2000196994/new-proposals-to-achieve-two-third-gender-rule>> Accessed on 4th November 2016.

envisioned which is political equality, non-discrimination and addressing a history of patriarchy that prevented women to participate in politics.

CHAPTER 5

COMPARATIVE ANALYSIS

5.1 Introduction

This chapter shall assess other jurisdictions with regard to the gender quota systems they have adopted and how they have been able to ensure their implementation in comparison to the Kenyan situation. The study of other jurisdictions shall be used to suggest recommendations for the Kenyan Parliament with regards to the way forward for the realization of the two-thirds rule. It is important to note that most Nordic Countries rank top in terms of countries with the highest number of women. However these countries have achieved this through voluntary political party quotas. Most countries that only have legislative quotas rank do not feature in the top ten countries with the highest number of women in parliament.¹¹⁴

5.2 Rwanda.

Rwanda has recorded the highest number of women representatives in parliament in the world. This coming from a country that not long ago was affected by genocide, lost a significant number of its population and had to rebuild its country, is enough evidence that gender quotas can be implemented if a country is driven to this achieving such an end.

The impact of genocide resulted in change of gender roles. Women had to head the household as the men were either prisoners of war, members of militia or were killed as a result of the war. Traditionally, Rwandese women depended fully on their husbands to cater for their economic needs. They were not allowed to participate in commercial activities or have any political say. However, this changed as women were forced due to the prevailing circumstances to take up men's perceived societal roles. Women slowly

¹¹⁴<<http://www.quotaproject.org/country.cfm>> Accessed on 17th December 2016.

found themselves engaging in economic activities to secure their families needs. Elite women found themselves pursuing careers and higher education.¹¹⁵

Although Rwanda claims to be a multiparty state it is no secret one the Rwandan Patriotic Front (RPF) controls the country's politics.¹¹⁶ RPF endorsed a government known as Government of National Unity. In 1998, the government embarked on a democratization journey. Despite its efforts, RPF continued to have an impact on politics by vetting aspiring political candidates. Furthermore, they would influence voters in some communities by directing them on which candidates to vote for beforehand, silencing the media and restricting the growth of opposition part. This was a clear depiction of their failure to democratise the state.¹¹⁷

Rwanda has pursued three different quotas that is party quotas, reserved seats and legislative quotas. The first type of reserved seats were created administratively where female candidates vied for seats that were specifically reserved for them. This was at the district level elections.¹¹⁸ In 2000, Rwanda embarked on drafting a new constitution where a commission was formed to advice on the same. Three members in the commission were women. Women movements such as Collectifs Pro-Femmes/Twese Hamwe took an active role to ensure that equality, women's rights and empowerment were included in the new Constitution. In 2003 a new Constitution was adopted. It entailed a commitment to equal rights between men and women and also reserved seats for women in the lower house of Parliament and Chamber Deputies. The Constitution further grants women at least 30% representation in decision making bodies. The Constitution is progressive when it comes to the realisation of equality rights.¹¹⁹

¹¹⁵Burnet, Jennie E, 'Women Have Found Respect: Gender Quotas, Symbolic Representation and Female Empowerment in Rwanda' 3 *Anthropology Faculty Publications* (2011), 11-12.

¹¹⁶ Burnet, Jennie E, 'Women Have Found Respect,' 8.

¹¹⁷ Burnet, Jennie E, 'Women Have Found Respect,' 8.

¹¹⁸ Burnet, Jennie E , 'Women Have Found Respect,' 12.

¹¹⁹Elizabeth P, 'Rwanda: Women Hold Up Half the Parliament' In Julie B and Azza K, *Women in Parliament: Beyond Numbers*, Stockholm: International Institute for Democracy and Electoral Assistance, 2005, 155.

Rwanda's Constitution outlines that 30% of the seats in the Senate should at be held by women. Furthermore, twenty four seats are reserved for women in the chamber of deputies and only be contested by women. Lastly, the Ministry of Gender and Women in Development established a women's council. Women are elected at the smallest administrative unit by women only and at each successive administrative level. The council is comprised of ten members who are involved in local training of citizens and spreading women's rights and awareness.¹²⁰

Party quotas, though not legislatively provided for, have existed since 1994 after the creation of the transitional government. Political parties nominated women for government executive positions and further included them in party nomination lists for government positions. The state party RPF has included gender equality notions in its party politics.¹²¹ Legislatively, they were not left unrepresented as there was established the Forum of Women Parliamentarians (FWP).¹²² In 1998, FWP made significant strides in pushing for women's rights and policies. It managed to change inheritance laws enabling women to inherit from their fathers'. Furthermore, women were allowed to claim their own property before marriage. That is women's property before marriage remained theirs during and after the marriage. They also managed to include gender quotas in the constitution. In 2006 they pushed for a Gender-Based Violence bill which was later approved in 2008 making domestic violence illegal.¹²³ Other women gains included codified children's rights, increased rights for pregnant women such as breastfeeding at work.¹²⁴

Unfortunately, despite the high number of women in parliament in Rwanda, scholars believe that women have not benefitted as much legislatively.¹²⁵ As earlier stated Rwanda is governed under an authoritarian regime. Therefore most women are members of RPF and before elections are vetted by RPF thus their loyalties lie with RPF. Therefore, before

¹²⁰ Elizabeth, 'Rwanda: Women hold up half the Parliament', 157.

¹²¹ Burnet, Jennie E, 'Women Have Found Respect', 13.

¹²² Elizabeth, 'Rwanda: Women hold up half the Parliament', 157-158.

¹²³ Burnet, Jennie E, 'Women Have Found Respect', 14.

¹²⁴ Burnet, Jennie E, 'Women Have Found Respect', 9.

¹²⁵ Burnet, Jennie E, 'Women Have Found Respect', 9.

forwarding a gender bill they must seek approval from RPF.¹²⁶ This however does not mean that gender quotas have failed. As several bills have been approved to protect women's rights and more women are involved in the political sphere. Most importantly, gender quotas have affected societal views about women. The increased representation of women in parliament has made helped Rwandese women gain confidence and embark in commercial activities and aim to head organisation.¹²⁷

A survey that was conducted showed that more women in Rwanda feel free to air their views in public without fear of being publicly shamed. Many women have also been elected for posts and seats that are not reserved for them. More girls have enrolled in school and more Rwandese women in the working class. Interviewees claimed that women have gained respect in the society and husbands have refrained from beating their wives due to gender based violence awareness. This they linked to the gender quotas. Depicting that the Rwandan society view women as capable women.¹²⁸

For the Rwandan case, in addition to the reserved seats for women, women have been elected for other non-reserved seats thus competing fairly with men in elections. The society has changed its outlook on the role of women and are slowly moving from a patriarchal system. Moreover, women movements and organisations have played a huge role in legislation and the formation of similar movements continue to be encouraged. Most importantly the government and political parties are in full support of women inclusion, awareness and empowerment thus making it easier for the 30% threshold to be met in decision making bodies.

5.3 Sweden.

Sweden is one of the countries that has a high number of women in parliament comprising of 43.6% of women.¹²⁹ Surprisingly, Sweden does not have legal quotas or

¹²⁶ Burnet, Jennie E , 'Women Have Found Respect', 9.

¹²⁷ Burnet, Jennie E , 'Women Have Found Respect', 15.

¹²⁸ Freidenvall L, 'Women's political representation and gender quotas; the Swedish case' Department of Political Science Stockholm University, Working Paper Series Number 2, 2003, 17.

¹²⁹ <<https://www.weforum.org/agenda/2015/09/countries-most-women-in-parliament/>>

Accessed on 17th December 2016.

reserved seats for women but this has not hindered them from achieving increased representation of women. These incredible numbers were not easily reached and were achieved through voluntary political party quotas. A political party quota is a strategy (ies) taken by political parties to increase the membership of women in their parties or increase the number of women who will be nominated to elective posts through their party.¹³⁰ The struggle for equality can be traced to 1919 when the Swedish Parliament tabled the right to vote for women. Women were allowed to vote in 1921 although much was not achieved as the society did not allow women to voice their opinions nor were they viewed as capable of making sound political choices. This did not deter women from fighting to be included. Thus leading them to form women movements who not only pushed for equal rights but also equal opportunities.¹³¹ By 1971 women occupied only 14% of the total number of members in parliament. However by 1988 the number of women in parliament further increased to 38%. Except in 1991 when the number of women in parliament decreased, the number of women in the Swedish Parliament has been increasing ever since.¹³² Surprisingly only three out of seven political parties have adopted electoral gender quotas. It would be expected that with the high number of women in parliament that most political parties would have adopted such quotas but this is not the case. However, analysts have equated this to several factors. For starters the society's view has changed and pushed for equality and increased representation of women. This resulted in political parties in Sweden looking into ways of increasing the number of women in their parties. Another element that led to political parties adopting measures to increase women's numbers was party competition. The fact that one party took the initiative to include women forced other parties to include women as well.¹³³

¹³⁰ Freidenvall L, 'Women's political representation and gender quotas; the Swedish case', 10.

¹³¹ Viivi Brunila, Baptiste Duguit and Zena Iovino, 'Women in politics in Sweden,' <<http://www.mv.helsinki.fi/home/holli/01sweden.htm>> Accessed on 27th December 2016.

¹³² Freidenvall L, 'Women's political representation and gender quotas; the Swedish case' 4.

¹³³ Freidenvall L, 'Women's political representation and gender quotas; the Swedish case' 5.

I shall discuss some of the strategies taken by popular political parties in Sweden. 1981, the Green Party was formed and with the growing need to include women in politics they adopted a quota provision. This provision called for a minimum of 40 percent membership of either gender in boards and committees. In 1987 the provision was amended to include electoral lists. That is at least 40% of either gender on electoral lists. It was further amended in 1997 to include at least 50 per cent of either gender minus one. In 1987, the Left Party followed suit by introducing a policy of at least the same number or percentage of women on party lists as women members in the constituency. This was later amended in 1990 to include at least 40% of either gender. Further changes were made to the policy in 1993 that called for at least 50 percent of women representation. The Social Democratic Party which is the largest political party in Sweden moved from party strategies to quotas. This was demonstrated in 1987 when they implemented a minimum representation of 40 percent of either gender at all levels within the party. This changed in 1990 where the party called for equal representation of both genders. In 1993 a new system was introduced known as the zipping system. This system meant that women and men would be alternated on the party lists.¹³⁴

Sweden has achieved many equality and gender friendly bills. For instance in 1965 a law was passed to criminalise rape in marriages. In 1975 the Abortion Act was introduced allowing women to terminate pregnancies during the first 18 weeks. In 1998 Parliament introduced an act on Violence Against Women which further led to formation of organisations such as National Clearinghouse on Violence against Women and National Centre for Knowledge on Men's Violence against Women. The latter was tasked by the Swedish government to raise awareness on violence against women.¹³⁵ In 1999 an act was introduced that prohibited the purchase of sexual services. The increase of parental leave in 2002. Gender equality at work was emphasized stating that both sexes should be treated equally without any discriminatory distinctions. Gender mainstreaming was adopted by the Swedish government in a bid to achieve the government's gender equality strategies. Thus in 2014 the government assigned to 41 government agencies the duty to promote gender mainstreaming through the Gender Mainstreaming in Government

¹³⁴Freidenvall L, 'Women's political representation and gender quotas; the Swedish case' 11.

¹³⁵ <<https://sweden.se/society/gender-equality-in-sweden/>> Accessed on 17th December 2016.

Agencies programme.¹³⁶ Like Rwanda, both Sweden's government and political parties have played a big role in promoting and encouraging women empowerment and equality. However, women movements and society also pushed political parties to make reforms.

5.4 South Africa.

South Africa has the second highest number of women in parliament in Africa after Rwanda.¹³⁷ It has achieved this through increased pressure from South African women and political party quotas. The struggle to have women included in politics started a while back in 1912 when the African National Congress (ANC) was formed. ANC at the time did not allow women to join as full members they participated on the side and had no voting rights. Despite this women pushed to participate in ANC activities and in 1913 formed their own association known as the Bantu Women's League.¹³⁸ The latter concerned itself with women's issues and brought them to light. As a result of their efforts to promote women's rights and equality in 1944 ANC changed its policies and granted women full membership into the party. Women continued to push for representation and in 1948 the ANC Women's League was formed. It aimed at uniting women from all walks of life in order to correctly address their concerns. This led to the formation of the Federation of South African Women in 1954 that was backed by the ANC Women's League.¹³⁹ The Federation had many achievements including encouraging women to participate in politics, formulating the Women's Charter and organising mass campaigns that led it to be observed as the National Women's day. During the armed struggle in the country, women continued to participate actively. They worked closely with ANC. Thus leading to ANC's commitment to include women's agendas in their party policies and framework. During negotiation between ANC and colonisers to end apartheid, the ANC Women's League formed the Women's National Coalition (WNC).

¹³⁶ <<https://sweden.se/society/gender-equality-in-sweden/>> Accessed on 17th December 2016.

¹³⁷ <<https://www.weforum.org/agenda/2015/09/countries-most-women-in-parliament/>> Accessed 17th December 2016.

¹³⁸ Myakayaka-Manzini M, 'Political Party Quotas in South Africa' Pretoria South Africa, 11–12th November 2003, 1.

¹³⁹ Myakayaka-Manzini M, 'Political Party Quotas in South Africa', 2.

WNC brought together other women movements to create a charter that articulated women's concerns.¹⁴⁰ In 1991 during the ANC conference the ANC Women's league tabled a motion for 30% representation of women in decision making structures of ANC. This was not agreed on but following the 1994 election ANC elected one third of women to the national and provincial legislatures. This resulted to women occupying 25% of the seats at National Assembly. The ANC government did not stop there. They appointed women ministers and other executive roles.¹⁴¹ In 1999 South African National Assembly reached 30% representation of women. In 2002 ANC included in its party policies a voluntary 30% gender quota for women. This led to the increase of women representation to 33% and 44% in the 2009 election. ANC amended its gender quota to 50% at both national and local levels.¹⁴² By 2009, South Africa had achieved incredible strides by having women taking up 42% of cabinet positions and 44% in parliament. South Africa has come a long way in its attempts to encourage and promote women's rights. There has been established a National Gender Machinery which had sub institutions namely the Office on the Status of Women (OSW), the Commission on Gender Equality (CGE), the Parliamentary Joint Monitoring Committee (JMC). This machinery works closely with the Local government. The Gender Policy Framework was established to emphasize the importance of the National Gender Machinery, ensure government compliance with gender equality and increase gender equality awareness.¹⁴³ Furthermore, South African Parliament has formulated the following bills; the Choice of Termination of Pregnancy Act (1997), the Domestic Violence Act, the Maintenance Act (1998) , Customary Law Act (1998) , Customary Marriages Recognition Act (1998), the Employment Equity Act (1999) and the Skills Development Act (1999).¹⁴⁴ The South African government has

¹⁴⁰ Myakayaka-Manzini M, 'Political Party Quotas in South Africa', 2.

¹⁴¹ Myakayaka-Manzini M, 'Political party quotas in South Africa', 3.

¹⁴² Hills J, 'Addressing gender quotas in South Africa: Women empowerment and gender equality legislation' 20(1), *Deakin Law Review*, 2015, 157.

¹⁴³ Hills J, 'Addressing gender quotas in South Africa: Women empowerment and gender equality legislation', **167**.

¹⁴⁴ 'Women's empowerment and gender equality a draft policy discussion document for the city of Cape Town,'

<https://www.westerncape.gov.za/text/2004/8/draft_gender_policy_updated_july04.pdf>

Accessed on 29th December 2016.

shown its commitment to promote and achieve gender equality by adopting the Beijing Platform for Action, being a signatory to the South African Development Community Declaration on Gender, the Addendum on Violence against Women and ratifying CEDAW. The Constitution includes in its provisions the importance of equality prohibiting any form of discrimination on gender grounds. There has been adopted the National Gender Policy Framework on Women's Empowerment and Gender Equality adopted in 2000, the Commission on Gender Equality, provincial Offices on the Status of Women and The establishment of the Human Rights Commission.¹⁴⁵ In 2014, parliament passed the Women Empowerment and Gender Equality Bill which called for 50% representation of women in decision making structures. The bill requires companies to undergo and complete a gender equality analysis in order to reduce gender disparities. Companies will have two years after adopting the act to comply with its provisions. Non-compliance will result to either a fine or criminal charges. The Bill requires both public bodies and private bodies to formulate and disclose the strategies they will take to achieve 50 per cent representation of women within their bodies. However, this requirement is of progressive nature and dependent on available resources of the bodies. Bodies such as the Department of Labour's Commission on Employment Equity, Department of Performance Monitoring and Evaluation in the Presidency together with the minister of Labour have been mandated to monitor the compliance of the bill.¹⁴⁶

5.5 Lessons from the comparative study.

The above countries have support from their government and political parties. Despite Sweden and South Africa not having a legislative quota they have been able to achieve great number of women in parliament. This is because their political parties have embedded in their policies and strategies ways of including women and promoting gender equality. As seen above political parties play a huge role in determining the number of women that will be in parliament. Furthermore, it has been seen that once women are

¹⁴⁵ 'Women's empowerment and gender equality a draft policy discussion document for the city of Cape Town,'

<https://www.westerncape.gov.za/text/2004/8/draft_gender_policy_updated_july04.pdf>

Accessed on 29th December 2016.

¹⁴⁶ Hills J, 'Addressing gender quotas in South Africa: Women empowerment and gender equality legislation', 172.

more involved in politics, society changes their patriarchal views and begins to see women as more than just housekeepers as in the case of Rwanda where women are voted for in non-reserved seats and compete equally with men. Coincidentally, both South Africa and Rwanda began rebuilding their countries after 1994 unlike Kenya that had independence since 1964. This speaks volumes with regard to the Kenyan government, society and political parties. The Kenyan government and political parties does not hold gender equality with great importance thus has not made it a priority. This would explain the laxity of Parliament in implementing any bills that promote the realisation of the two thirds rule.

CHAPTER 6

RECOMMENDATIONS AND CONCLUSIONS.

6.1 Introduction.

This chapter shall discuss recommendations the findings, recommendations and conclusions of the study with regard to assessing the realisation of the two-thirds rule in the Kenyan Parliament.

6.2 Findings.

1. Laxity of Kenyan Parliament.

As discussed in chapter 4, parliament has tabled many bills regarding how to implement the two-third rule but has failed to adopt any of the suggested bills. Male politicians have pushed for the gender rule to be realised progressively despite the constitution giving no indication that it is a progressive right.

2. Lack of motivation by political parties.

Political parties in Kenya have failed to comply with the Political Parties Act during their nomination process. The political parties that promised to include women in their parties and encourage their participation have failed to implement these promises. As seen in chapter four, women are only nominated by parties for seats reserved exclusively for women and few are nominated for other elective posts are very few indicating that political parties do not give women an opportunity to stand for certain posts for example that of governor or senator. Furthermore, political parties have failed to introduce political party quotas.

3. Patriarchal views still linger in the Kenyan society

A study that was done in Meru county discussed under chapter four indicates that voters are still influenced by society norms. Society has not yet comes to terms with the idea of Kenyan women being capable of taking up leadership roles.

4. Government and IEBC have contributed to the gender rule not being realised

The Kenyan government unlike the South African government and Rwandese government has taken very little initiative to ensure gender equality. Chapter 5

indicates the initiatives other governments have taken to promote gender equality and representation. Although the Kenyan government has recently committed itself to achieving gender equality by 2030 it would seem that they keep prolonging the gender issues. IEBC also failed to ensure that political parties complied with legislation during the nomination process despite being mandated to do so.

6.3 Recommendations.

1. Need for legislative accuracy

The constitution needs to be clear on whether the two-thirds should be of progressive or immediate realizations. As discussed in chapter 3, the Supreme Court was of the view that the rule is of a progressive nature as it requires the working together of several bodies thus cannot be realised immediately. However, they advised that measures should be taken to implement future policies that will achieve the two-thirds rule. Not all judges were of the same opinion and former Chief Justice Willy Mutunga suggested that the rule be realised immediately following the discrimination women have faced.

2. Need for a legislative Political Party Quota.

As discussed in chapter four, political parties hold a lot of power in determining the number of women that will be elected to parliament. Despite this being the case, Kenyan political parties have done little to encourage women's participation. Following the laxity of political parties, I would recommend that a legislative reform be made requiring political parties to nominate a certain number of women for elective positions. Unlike South Africa and Sweden political parties that have taken it upon themselves to include policies and strategies to promote women's inclusion, Kenyan political parties cannot be left to do the same voluntarily as they lack motivation and are not concerned with women's welfare.

3. Need for women empowerment programs and sensitization.

There is a great need for women empowerment programs especially in rural areas where women are still perceived as the weaker sex. Citizens in such areas require

education on gender equality and respect for women. Like in Rwanda where they have established women's councils in rural areas in order to educate people on gender equality and to set an example of women leadership. This is necessary in Kenya in order to change their backdated views.

4. Need for women to participate in politics.

As indicated in chapter 4, women are afraid of engaging in politics fearing its tainted nature. However if Kenya is to ever achieve the two-thirds rule, women must participate actively in politics despite the constraints they may face such as finances. It is important that they avail themselves to political parties and even for political party nominations.

6.4 Conclusion.

This study has been able to meet its objectives and tackle the statement of problem. The objectives of this study were to discuss the following;

- a) Nature of the two-thirds rule. This was discussed in chapter three indicating that the nature of such a rule is subjective. Others deem it to be of great importance and thus should be of immediate realization while others indicate that it should be slowly realized because it involves the working together of various institutions.
- b) The workability of the two-thirds rule given the political history of Kenya. This was discussed in depth in chapter four. Women's struggle in politics was highlighted and it was concluded that two-thirds gender rule cannot be ignored because given the political history of Kenya where women's issues have been ignored and political parties have not taken initiatives to increase women representation. Politicians have discredited the importance of women representation going as far as mocking the already existing women politicians calling them idlers and busy bodies.
- c) Suggest the most viable option for Kenya to realize the two-thirds rule. As this chapter indicates, the most viable option in my opinion is a legislative political party quota. The role of political parties in achieving the two thirds rule cannot be overemphasized. As indicated in chapter 4, political parties are the corner stone of

the political sphere and as discussed in chapter 5 they have played a significant role in other countries achieving high number of women in their national assemblies.

This study has further shown the importance of women's representation in Parliament. Not only does it ensure women friendly bills are implemented but also goes a long way in changing the views of society for instance in Rwanda where women have gained respect and can articulate their views without fear of dismissal. Furthermore, more women in Rwanda have gained confidence and began engaging in commercial activities and taking up leadership roles. Most importantly Rwandan society has voted in women who contested for non-reserved seats showing that they have confidence that women are great leaders and are no longer influenced by patriarchal notions. It is important that Kenyan women be afforded this chance and following the laxity of parliament, government and political parties in promoting the realization of the gender rule; stringent and accurate legislative measures are the only way forward for Kenya.

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