

IMPLEMENTATION OF THE TWO-THIRDS GENDER RULE IN KENYA: AN
ANALYSIS OF THE TWO-THIRDS GENDER RULE LAW (AMENDMENT) BILL, 2015

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Declaration

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

Signed: 

Date: 22/03/19

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

Signed: 

Ms. Emma Senge

ABSTRACT.

The purpose of this paper is to analyse the two-thirds gender rule in Kenya and to determine whether there are sufficient mechanisms to implement it. This will be done through an analysis of the two-thirds gender rule law (amendment) bill. The two-thirds gender rule was included in the Constitution 2010.¹ This analysis will focus on the affirmative action programmes contemplated in the Constitution of Kenya.² The methodology used to undertake the research is qualitative through library and online research.

¹ Article 81(b) *Constitution of Kenya (2010)*

² Article 27(6), *Constitution of Kenya (2010)*

LIST OF ABBREVIATIONS

1. **TWG** - Technical Working Group
2. **FIDA** – The Federation of Women Lawyers
3. **CREAW** – Centre for Rights Education & Awareness
4. **IEBC**-Independent Electoral and Boundaries Commission

LIST OF CASES

1. *In the Matter of an Application for Advisory Opinion under article 163(6) of the Constitution and In the Matter of Article 8, Article 27(4), Article 27(8), Article 96, Article 98, Article 177(1)(b), Article 116 and Article 125. Article 89(2), Article 89(4), and the Consequential Provisions in the Sixth Schedule Section 27(3) of the Constitution of the Republic of Kenya and In the Matter of the Principle of Gender Representation in the National Assembly and in Senate(2012) eKLR.*
2. *Centre for Rights Education & Awareness (CREAW) v Attorney General & another (2015) eKLR.*

CHAPTER ONE

1. INTRODUCTION

1.1. Background to the Study

‘Women’s concerns in seeking equality in the various aspects of public life, especially in governance, is one that is constantly under discussion, and will continue to be so until the desired results are attained.’³ Women constitute a majority of the world’s population; yet only 22 % are in Parliament. Only in a few countries has the percentage of women in national legislatures reached the critical mass of at least 30%.⁴

The low participation and representation of women in the public and political institutions of the country like the Senate, National Assembly and County Assemblies negates the equity principle that is affirmed and espoused in the Constitution of Kenya.⁵ The Constitution of Kenya provides for affirmative action where the State is required to take legislative and other measures to ensure that no more than two-thirds of the members of the elective or appointive bodies are of the same gender.⁶

The concept of affirmative action means a deliberate move to reforming or eliminating past and present discrimination using a set of public policies and initiatives designed to help on the basis of colour, creed, geographical location, race, origin and gender among others.⁷ The Constitution of Kenya provides compliance with the principle of affirmative action and states that no more than two-thirds of the members of elective bodies shall be of the same gender.⁸

Women in Kenya have been underrepresented in the political facet in Kenya. Studies have shown that from the first general elections that were held in Kenya to the 2013 general elections, men have held majority of the seats in parliament.⁹ There was 4.1% female

³ Osabutey P, ‘Towards an affirmative action law in Ghana: The issues’ *The Chronicle*-thechronicle.com.gh/towards-an-affirmative-action-law-in-ghana-the-issues on 3 March 2018.

⁴ Dahlerup D, ‘From a Small to a Large Minority: Women in Scandinavian Politics’ *Scandinavian Political Studies*, (1988), 275-298.

⁵ Kivoi D, ‘Factors Impeding Political Participation and Representation of Women in Kenya’ *Humanities and Social Sciences* (2014), 174.

⁶ Article 27(8), *Constitution of Kenya* (2010)

⁷ Kaimenyi C, ‘An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya’ *International Journal of Business, Humanities and Technology* (2013), 91.

⁸ Article 81(b), *Constitution of Kenya* (2010)

⁹ Kaimenyi C, ‘An Analysis of Affirmative Action’, 92.

representation in Parliament in 1997, 8.1% in 2002 and 9.8% in 2007 and even with the 2010 Constitution providing for the two-thirds gender rule, the 2013 general elections only saw 16 of the 290 women elected as members of parliament.¹⁰ However, after the 2013 general elections, it was quite evident that there was inadequate representation of women in parliament.

The Attorney General hence foreseeing a possibility of a constitutional crisis in the National Assembly and Senate if the two-thirds gender rule were not achieved by the electoral process alone, sought the Supreme Court's Advisory Opinion.¹¹ In its ruling, the Supreme Court directed that Parliament is under an obligation to have a framework on the realization of the two-thirds Gender rule by 27th August 2015, otherwise it would be rendered unconstitutional.¹²

This ruling was followed by the decision that was made on the 11th December 2012, where the Supreme Court of Kenya delivered a majority decision that the realization of the two-thirds gender principle under Article 81 (b) is progressive.¹³ This application was brought to the High Court by FIDA. The government was hence given time to come up with legislation to effect this rule.¹⁴

In 2015, a petition was launched by CREAW v Attorney General and another¹⁵ at the High Court so as to ensure effecting of the legislation. In the petition, Judge Mumbi Ngugi issued an order of mandamus directing the Attorney General to prepare the relevant bills within 40 days for tabling before parliament for the purposes of implementation of Articles 27(8) and 81(b) of the Constitution of Kenya.¹⁶ This led to the Two-thirds gender rule law (amendment) bill and the Election Offences bill that were brought to parliament following the order. They are commonly referred to as the 'Duale bill and the 'Chepkonga bill'.

The 'Duale bill' seeks to 'top up' the number of women in the National Assembly should the general election fail to meet the constitutional threshold and also introduces clauses for

¹⁰ Kaimenyi C, 'An Analysis of Affirmative Action', 92

¹¹ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation' *The National Women's Steering Committee In partnership with Institute of Economic Affairs* (2015), 9.

¹² Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 9.

¹³ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR

¹⁴ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR

¹⁵ [2015] eKLR.

¹⁶ *Centre for Rights Education & Awareness (CREAW) v Attorney General & another* [2015] eKLR

proportionate allocation of special seats to the number of seats won by a political party after elections.¹⁷ The ‘Duale bill’ states that ‘article 100 of the Constitution requires Parliament to enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities. This Bill seeks to make amendments to the existing laws in order to give effect to Article 100 of the Constitution.’¹⁸

1.2. Statement of the Problem

The two-thirds gender rule was introduced in Kenya’s 2010 constitution as a form of affirmative action. The Constitution provides that not more than two-thirds of the members of elective public bodies shall be of the same gender.¹⁹ The problem this paper seeks to address is an analysis of the ‘Duale bill’ as a measure of implementation of the two-thirds gender principle in Kenya.

1.3. Hypothesis

The paper shall test the following hypotheses;

That the two-thirds gender rule has been implemented in Kenya.

That the ‘Duale bill’ has implemented the two-thirds gender rule in Kenya.

1.4. Research questions

The research questions this paper seeks to answer is:

What measures have been undertaken to the realization of the two-thirds gender rule in Kenya?

To what extent is the ‘Duale bill’ capable of implementing the two-thirds gender rule?

What other measures can be adopted to realize the two-thirds gender rule in Kenya?

¹⁷ Lilian Aluanga: ‘New Proposals to Achieve Two-third gender rule’ Standard Digital, 3 April 2016 <https://www.standardmedia.co.ke/article/2000196994/new-proposals-to-achieve-two-third-gender-rule> on 13 March 2018.

¹⁸ Section 23, *The Two-Third Gender Rule Law (Amendment) Bill* (2015)

¹⁹ Article 81(b), *Constitution of Kenya* (2010)

1.5. Theoretical framework

This study adopts two major theories in seeking to answer the question on actualization of the two-thirds gender rule in Kenya and hence analysing the bill in question. These theories are the **‘The Feminist Legal theory and The Theory of Justice.**

1.5.1. The Feminist Legal Theory

The Feminist Legal theory, also known as feminist jurisprudence, is based on the belief that the law has been fundamental in women's historical subordination.²⁰ It has over the years evolved into four major schools of thought which are formal equality theory, cultural feminism, dominance theory and post-modern or anti-essentialist theory.²¹ The branch that is most essentially important for this study is the formal equality theory and it is grounded in the liberal democratic thought and argues that women in society should be given the same treatment as the men.²²

They have hence examined the competing legal standards of the nature of the law and have attempted to show how the law fails to reflect women's needs and have hence attempted to centralize rather than marginalize their needs.²³ This paper seeks to analyse the works of scholars such as Martha Fineman and Elizabeth Schneider. The theory is relevant to the study as it shall be used to analyse the principle of affirmative action for the two-thirds gender rule.

1.5.2. The Theory of Justice

The Theory of Justice was propounded by scholars such as John Rawls. It seeks to address the concern on equality and justice. He argues that the principles of justice are those in which persons would accept in an initial position of equality.²⁴ John Rawls states that ‘if everyone were stripped of their privileges and social status and made entirely equal, what kind of justice system they would want to be subject to?’ He includes that the only logical choice is to pick a system that treats people equally, regardless of their race, class, gender so as to ensure the concept of justice is realised.²⁵ This theory supports the concept of affirmative action and the realisation of the two-thirds gender principle.

²⁰ Fineman M, ‘Feminist Legal Theory’ *Journal of Gender Social Policy and the Law* (2015), 13.

²¹ Schneider E, ‘Feminist Legal Theory, Feminist Law making, and the Legal Profession’ *Fordham Law Review* (1998), 251-252.

²² Schneider E, ‘Feminist Legal Theory, Feminist Law making, and the Legal Profession’, 251-252.

²³ Fineman M, ‘Feminist Legal Theory’ *Journal of Gender Social Policy and the Law* (2015), 14.

²⁴ Rawls J, ‘A Theory of Justice’ The Belknap Press of Harvard University Press Cambridge, Massachusetts, 1999, 4.

²⁵ Rawls J, ‘A Theory of Justice’, 5

1.6. Literature Review

1.6.1. Political Representation of Women in Kenya

Progress in the area of political participation for women remains slow. In almost, all countries, women have the right to vote on paper, to be eligible for election; appointment to public office, and to exercise public functions on equal terms with men at local, national and international levels. However, in most countries, women participate only marginally at the highest levels of decision making.²⁶

Maria Nzomo in her paper on the General elections in Kenya traces the subordination of women in society to the evolution of the class society into an institutional one where the men were in control of the means of production.²⁷ She further contends that the people who control the economic sphere invariably exercise similar control over the political arena, therefore political leadership and important decision making is subsequently dominated by the men in the society.²⁸

The first Parliament that run from the year 1963 to 1969 did not see any women elected or nominated to parliament. The second parliament that run from 1969 to 1974 saw only one elected woman and one woman nominated to parliament while the third had four elected and two nominated.²⁹ The fourth parliament saw only five elected and one nominated. This trend where there were little to no women represented in parliament continued even up to the 10th parliament that run from 2008 to 2012. The total number of elected women in that parliament was only was only 16 and the total number of nominated members was 6.³⁰

The Constitution states that not more than two-thirds of the members of elective public bodies shall be of the same gender.³¹ The concept of gender equality is one of the principles

²⁶ Nzomo M, 'Women in Kenya's Politics Leadership: The Struggle for Participation in Governance through Affirmative Action' *Heinrich Boll Stiftung* (2011), 16.

²⁷ Nzomo M, 'Women in Kenya's Politics Leadership: The Struggle for Participation in Governance through Affirmative Action', 16.

²⁸ Nzomo M, 'Women in Kenya's Politics Leadership: The Struggle for Participation in Governance through Affirmative Action', 2011, 17.

²⁹ Agutu L, 'Implementation of the two-thirds gender rule in Kenya: The implication for women in Parliament' Unpublished LLB Thesis, Strathmore University Law School, January 2017, 1.

³⁰ Agutu L, 'Implementation of the two-thirds gender rule in Kenya: The implication for women in Parliament' Unpublished LLB Thesis, Strathmore University Law School, January 2017, 1.

³¹ Article 81(b), *Constitution of Kenya* (2010)

protected by the Kenyan Constitution. It states that every person is equal before the law and has the right to equal protection and equal benefit of the law.³²

It further goes on to state that the constitution prohibits discrimination by promoting initiatives aimed at the active promotion of the rights of marginalized groups and minorities, requiring the state to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.³³

The constitution further obliges Parliament to enact legislation to promote the representation in Parliament of marginalized groups, including women.³⁴ Following the advisory opinion issued by the Supreme Court on implementation of Article 81(b) of the Constitution, the Attorney General constituted the TWG to implement the Supreme Court Advisory opinion on the Two-thirds Gender Principle.³⁵

Its mandate was to coordinate the process of developing enabling mechanisms for the attainment of the two-thirds rule within 90 days effective from 11 February 2014, identifying and facilitating key stakeholders engagements towards the process of developing this enabling mechanism; engage such experts or institutions as many as be necessary to facilitate this process.³⁶

1.6.2. The 'Duale' bill

The Duale Bill was then brought to parliament after an order of mandamus was issued by the High Court as an implementation procedure of the two-thirds gender rule in Kenya. It was published on 24 July 2014 and the first reading on 30th July, 2015.³⁷ It was introduced for the 2nd reading in parliament on 22nd March 2016 and the debate was finalised on 19th April 2016. A lot of lobbying was done to marshal the requisite numbers on the day of the vote.³⁸ The Bill needed the support of 233 MPs but when it was put to the vote only 195 votes were cast in favour and 38 votes short. The second vote took place within 5 days and it garnered only 179 votes.³⁹ The Duale bill seeks to give effect to the two-thirds gender principle through the

³² Article 27(1), *Constitution of Kenya* (2010)

³³ Kaimenyi C, 'An Analysis of Affirmative Action,' 94.

³⁴ Article 100, *Constitution of Kenya* (2010)

³⁵ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 10.

³⁶ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 10.

³⁷ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 12.

³⁸ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 12.

³⁹ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 12.

creation of special seats. That will ensure that the gender principle is realised in Parliament over a period of twenty years from the next general election.⁴⁰

This paper seeks to then address the actualization of the two-thirds gender rule in Kenya and carry out an analysis on the Duale bill as a measure to actualization of the two-thirds gender principle.

1.7. Methodology

The main categories of this research shall be primary sources and secondary sources. The primary sources include the Constitution of Kenya 2010 looking at particular provisions of the two-thirds gender rule and the concept of affirmative action. This study shall also seek to include relevant case law decided in the Kenyan context. The secondary sources will include various literature in the form of articles, journals and books.

1.8. Chapter breakdown

Chapter one introduces the topic of study, gives a basic background of the research question and discusses the problem statement, hypotheses, literature review and methodology of the research study.

Chapter two will examine the theoretical frameworks of the Feminist legal theory and the Theory of Justice.

Chapter three will give an analysis of the 'Duale Bill' in Kenya.

Chapter four will analyse the challenges of implementation of the two-thirds gender rule in Kenya.

Chapter five will give a conclusion of the study by giving recommendations and commenting on the perceived future of the field.

⁴⁰ Felix Olick: New Bill to raise number of MPs' The Star, 23 February 2018 https://www.the-star.co.ke/news/2018/02/23/new-bill-to-raise-number-of-mps_c1719479 on 5 March 2018.

CHAPTER TWO

2. THEORETICAL FRAMEWORK

2.1. Introduction

The insecurity of the woman person due to sex is still widely regarded as a fact of life rather than a pitfall of the law, even as goals more conventionally set by sex equality law, such as equal pay, continue to be largely unrealized as well.⁴¹ This chapter seeks to analyse the feminist legal theory and the theory of justice with a view to analysing the principle of affirmative action for the two-thirds gender rule.

2.2. Feminist Legal Theory

Feminists as a group are concerned with the implications of historic and contemporary exploitation of women within society, seeking the empowerment of women and the transformation of the various institutions that are dominated by men.⁴²

When the term feminism is brought up however, it is necessary to clearly state that there are many differences within feminism, there is a difference in approach, emphasis and objectives that hence make sweeping generalizations difficult.⁴³ Despite the many divergences in the feminist legal theory, it is possible to make some generalizations. Historian Linda Gordon hence notes that feminism is “an analysis of women’s subordination for the purpose of figuring out how to change it.”⁴⁴

The feminist legal theory today has evolved into four major schools of thought: formal equality theory, "cultural feminism," dominance theory, and post-modern or anti-essentialist theory.⁴⁵

Formal equality theory, which is grounded primarily in liberal democratic thought, argues that women should be treated the same as men.⁴⁶ This theory began in the first wave of feminism and early efforts to attain equal treatment pursued two goals. These were the

⁴¹ MacKinnon C, ‘Substantive Equality: A Perspective’ *Minnesota Law Review* (2011), 1.

⁴² Fineman M, ‘Feminist Legal Theory’, 14.

⁴³ Fineman M, ‘Feminist Legal Theory’, 13.

⁴⁴ Gordon L, *The Struggle for Reproductive Freedom: Three Stages of Feminism, in capitalist patriarchy and the case for socialist feminist*, Monthly Review Press, New York, 1979, 107.

⁴⁵ Schneider E, ‘Feminist Legal Theory, Feminist Law making, and the Legal Profession’, 251.

⁴⁶ Schneider E, ‘Feminist Legal Theory, Feminist Law making, and the Legal Profession’, 251.

attainment of equivalent social and political opportunities, and the doing away with legislation intended to protect or simply cabin women by isolating them from the public sphere.⁴⁷

Cultural feminism emphasizes on the need to take into account the "differences" that exist between men and women.⁴⁸ This theory is also called the "difference theory", and it argues that men and women should not be treated the same where they are relevantly different and that women should not be required to assimilate to male norms.⁴⁹

The Dominance theory focusses on the structures that have been placed in society that make men's characteristic the norm from which 'difference' is constructed.⁵⁰ This theory is also known as "radical feminism," and it suggests that men are naturally privileged and women are subordinated, and that law is complicit with other social institutions in perpetuating this dichotomy.⁵¹

Anti-essentialism theory contends that there is no single category female," pointing" instead to the varying perspectives resulting, for example, from the intersection of gender, race and class.⁵² This theory suggests that one has to take into consideration the relational differences between the sexes and the intersection of characteristics like sex, race, and wealth.⁵³

For example, Kimberle Crenshaw criticizes feminist legal theory's failure to reflect African American women's experience of rape⁵⁴, while feminists like Paulette Caldwell explains how employment discrimination law fails to capture discrimination that is motivated by both sex and race.⁵⁵

It is however important to note that the last three theories mentioned in the study above are all theoretical critiques of formal equality theory.⁵⁶ Formal equality theory emerged from the contradictions and political struggles that developed in the course of efforts to implement

⁴⁷ Schneider E, 'Feminist Legal Theory, Feminist Law making, and the Legal Profession', 251.

⁴⁸ Schneider E, 'Feminist Legal Theory, Feminist Law making, and the Legal Profession', 251.

⁴⁹ Levitt N and Robert R, *Feminist Legal Theory: A primer*, New York University Press, New York, 2006, 6.

⁵⁰ Schneider E, 'Feminist Legal Theory, Feminist Law making, and the Legal Profession', 251.

⁵¹ Levitt N and Robert R, *Feminist Legal Theory: A primer*, New York University Press, New York, 2006, 6.

⁵² Schneider E, 'Feminist Legal Theory, Feminist Law making, and the Legal Profession', 251.

⁵³ Schneider E, 'Feminist Legal Theory, Feminist Law making, and the Legal Profession', 251.

⁵⁴ Crenshaw K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' *University of Chicago Legal Forum* (1989), 157.

⁵⁵ Caldwell M, 'A Hair Piece: Perspectives on the Intersection of Race and Gender', *DuKE Lj* (1991), 365.

⁵⁶ Schneider E, 'Feminist Legal Theory, Feminist Law making, and the Legal Profession', 252.

formal equality in practice and addressed the limits of formal equality in redressing sex discrimination.⁵⁷ This will hence form the main focus of my study.

2.2.1. Formal Equality theory v Substantive Equality theory

Equality which is the assertion that human beings are equal and have equal rights is a core tenet in human rights' discourse.⁵⁸ Formal equality operates on the idea that all people should be treated as the same, yet innate human behaviour is flawed. All people operate with some baseline perspective about race, privilege, or age.

It does not consider workplace privilege, which occurs when one person has advantages or realizes benefits over another, even unintentionally where a court finds that there is a similarity or difference between the sexes.

Substantive Equality on the other hand goes beyond the basics of recognizing the equality of all and identifies differences among groups of people with long term goal of greater understanding. It seeks to remove the systemic advantages afforded to the majority group. This is relevant to my study as the two-thirds gender rule considers the minority and marginalized group of women in the society.

2.2.2. Intersectionality

The theory of intersectionality was birthed by Kimberle Crenshaw as she wrote about the experiences of African American women and women of colour in discourses on violence against women.⁵⁹ Intersectionality calls for wholeness in looking at subjects of law that are marginalized in more than one way. Crenshaw argues that focusing on the most privileged group members marginalizes the 'multiply burdened'.⁶⁰

Despite many critiques of the theory argue that its scope is limited to race and feminism, one identity can encapsulate many intersections. This has been observed in dealing with marginalized communities where the concern for the whole community body often masks and

⁵⁷ Schneider E, 'Feminist Legal Theory, Feminist Law making, and the Legal Profession', 252.

⁵⁸ Kameri-Mbote P, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses,' *International Environmental Law Research Centre*, 2013,

⁵⁹ Kameri-Mbote P, 'Fallacies of Equality and Inequality', 11.

⁶⁰ Kameri-Mbote P, 'Fallacies of Equality and Inequality', 11.

overshadows the experience of individual members of the community who are marginalized such as youths and women in that community.⁶¹

Intersectionality theory emphasizes that privileging the treatment of some inequalities such as regional balance ignores the fact that inequalities are often mutually constitutive and could result in greater marginalization for others.⁶²

2.3. Theory of Justice

In a Theory of Justice, Rawls begins with the statement ‘Justice is the virtue of social institutions, as truth is of systems of thought.’⁶³ This statement basically affirms that a good society is one that is structured in accordance with the principles of justice.

These principles provide a way of assigning rights and duties in the basic institutions of society and hence define the appropriate distribution of the benefits and burdens of social cooperation.⁶⁴ He posits that his theory aims at formulating a conception of the basic structure of society in accordance with social justice which to him is justice as fairness.

John Rawls brings out the main idea of the theory of justice by stating that it entails the principles that free and rational persons who are concerned in the furthering of their own interests would accept in an initial position of equality as defining the fundamental terms of their association.⁶⁵ These principles hence regulate all further agreements such as the kinds of social cooperation that can be entered into and the forms of government that can be established by a society.⁶⁶

He goes on to argue that these principles of justice he speaks about are chosen behind a veil of ignorance hence ensuring that no one is advantaged or disadvantaged in the choice of principles or the outcome of natural chance or social contingencies.⁶⁷

⁶¹ Kameri-Mbote P, ‘Fallacies of Equality and Inequality’, 11.

⁶² Crenshaw K, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’,

⁶³ Rawls J, ‘*A Theory of Justice*, 3

⁶⁴ Rawls J, ‘*A Theory of Justice*, 4

⁶⁵ Rawls J, ‘*A Theory of Justice*, 10

⁶⁶ Rawls J, ‘*A Theory of Justice*, 10

⁶⁷ Rawls J, ‘*A Theory of Justice*, 11

Therefore, the principles of justice are as a result of a fair agreement or bargain. The concept of Justice as Fairness conveys the idea that the principles of justice are agreed upon in an initial situation that is fair.⁶⁸

Rawls posits that we are to imagine a situation where those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and He states that the only way to ensure that persons will select fair principles of justice is to be certain that they do not know how the principles they select might affect them as individuals.⁶⁹

He posits that a person who is behind the "veil of ignorance" is not aware of which side of a social contract he or she will be on and does not know his or her race, class, sex, or status in society.⁷⁰

A person who does not know what privileges he or she will be born with (or without) is, in Rawls' view, more likely to construct a society that does not arbitrarily assign privilege based on characteristics that should have no bearing on what people get.

Rawls believes that a society cannot be just without fairness and equality and believes this veil of ignorance both reveals the biases that exist in society.⁷¹ This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.⁷²

A proper conception of justice allows for the overall prosperity of a society. When a society acts in accordance to these principles of Justice, laws will be made without any biases as parties would be in an 'original position' while making the laws.

2.3.1. Ronald Dworkin

Ronald Dworkin addresses the conception of justice by viewing it as 'equality of resources' as centred on the concept of equality.⁷³ He develops his own conception of liberalism known as liberal equality that is focussed on equality of resources on account of justice. For him,

⁶⁸ Rawls J, 'A Theory of Justice', 11

⁶⁹ <https://plato.stanford.edu/entries/original-position/> accessed on 5 September 2018

⁷⁰ <https://plato.stanford.edu/entries/original-position/> accessed on 5 September 2018

⁷¹ <https://plato.stanford.edu/entries/original-position/> accessed on 5 September 2018

⁷² Rawls J, 'A Theory of Justice', 11

⁷³ Vujadinovic D, 'Ronald Dworkin-Theory of Justice', *European Scientific Journal*, 2012, 4.

equality is his main political value. His theory presupposes that the concept of equality means equal concern which is the sovereign virtue of political communities.⁷⁴

He argues that governments should strive to achieve this form of equality which is the equality of resources. This application of the theory of equal concern gives legitimacy to a liberal-democratic government.⁷⁵ Justice for Dworkin means that government must ensure equal concern for each citizen, which can be achieved through liberal equality which entails equality of resources as an implementation of the principle of equal concern.⁷⁶

Dworkin distinguishes between a person's mental and physical powers which can be attributed to their natural endowment and a person's tastes and ambitions which can be traced back to personal choices.⁷⁷ Therefore, as a result, personal, physical and mental powers should not influence equality of resources, being morally arbitrary characteristics. The distribution should therefore be aimed at an equal share rather than on the basis of one's natural endowments.⁷⁸

Dworkin hence constructed a distributive scheme to achieve his goals. He used it in a context of free market, use of auctions and taxation. This was after he came to the conclusion that 'endowment insensitive' and 'ambition sensitive' systems of distribution were unattainable ideas.⁷⁹ The new theory of distributive scheme was hence based on two assumptions: that an equality of resources presupposes an economic market and that the said equality of resources is a matter of equality in whatever resources are owned privately by individuals.⁸⁰

2.4. Conclusion

The Feminist Legal theory and the theory of justice are relevant to this study as they seek to affirm the principle of affirmative action programmes seeking to redress the two thirds gender rule quagmire.

⁷⁴ Vujadinovic D, 'Ronald Dworkin-Theory of Justice' , 5

⁷⁵ Vujadinovic D, 'Ronald Dworkin-Theory of Justice' , 5

⁷⁶ Vujadinovic D, 'Ronald Dworkin-Theory of Justice' , 5

⁷⁷ Vujadinovic D, 'Ronald Dworkin-Theory of Justice' , 5

⁷⁸ Vujadinovic D, 'Ronald Dworkin-Theory of Justice' , 5

⁷⁹ Vujadinovic D, 'Ronald Dworkin-Theory of Justice' , 6

⁸⁰ Vujadinovic D, 'Ronald Dworkin-Theory of Justice' , 6

CHAPTER THREE.

3. ANALYSIS OF THE TWO-THIRDS GENDER LAW (AMENDMENT) BILL, 2015

Introduction

Inclusivity is a key factor in democratic politics as it ensures that all identity groups have a voice in the policy making process, whether it is defined by gender, ethnicity, religion, region, socioeconomic status, age or education.⁸¹ Diversity in this regard can be achieved by actively ensuring the inclusion of women in the electoral system.⁸²

The uplifting of women in society brings about the overall improvement of society as a whole and the contribution towards better and more efficient governance. This enables women's different concerns to be addressed in the political arena.⁸³

This chapter seeks to analyse the 'Duale Bill' as a measure of implementation of the two-thirds gender rule

3.1. Historical development of women representation in Kenya

Representation of women in Kenya's parliament has been and remains very minimal. Only 9.8% of the tenth parliament was comprised of women, and only 20.7% of the eleventh parliament was comprised of women — the lowest in East Africa.⁸⁴ A country cannot progress in economic, political or social facets without half of its citizens participating meaningfully in the political sphere and the decision making processes in the country.⁸⁵

The Government of Kenya upon realising this key aspect in the country's development process recognised the various issues in the Constitution. The Constitution states that 'parliament shall enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities.'⁸⁶

It further states that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall

⁸¹ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 1.

⁸² Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 1.

⁸³ Inter-Parliamentary Union, *Equality in politics: A survey of men and women in parliaments*, 2008

⁸⁴ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 1.

⁸⁵ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation', 1.

⁸⁶ Article 100, *Constitution of Kenya* (2010)

be of the same gender.⁸⁷ Despite the gender neutrality of the principle, in consideration of Kenya's political context, it sought to address the underrepresentation of women in the political facet.

Article 27 of the constitution further urges that 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.⁸⁸ The Constitution of Kenya came into effect in 2010, however the requirement that two-thirds of the members of elective or appointive bodies be of the same gender was to come into effect gradually.

3.1.1. Women and the Constitutional Composition of the National Assembly and Senate

Women representation is encapsulated in the composition of Kenya's two national legislative houses. The composition of Kenya's National Assembly is described in Article 97 of the Kenyan Constitution. Of its 349 seats, 290 are for those elected from Kenya's 290 constituencies, 47 are for women elected to represent each county, and 12 seats for nominated individuals to represent youth, persons with disabilities and workers.⁸⁹ This shows a high priority towards affirmative action.

3.1.2. Composition of the National Assembly.

Members elected by the Constituencies	290
Women County Representatives	47
Nominated Members	12
Total	349

The composition of Kenya's senate is described in Article 98 of the constitution and provides for women representation. Of the 67 seats available, 47 are those elected from the 47 counties, 16 are to be reserved for women to be nominated by political parties, two seats for

⁸⁷ Article 27(8), *Constitution of Kenya* (2010)

⁸⁸ Article 27(6), *Constitution of Kenya*(2010)

⁸⁹ Article 97, *Constitution of Kenya*(2010)

those representing the youth(one man and woman), two seats for those representing those with disabilities (one man and woman).⁹⁰

3.1.3. Composition of the Senate.

Members elected by Counties	47
Nominated Women Senators	16
Nominated Youth Representatives	2(one man, one woman)
Nominated disabled Person Representatives	2(one man, one woman)
Total	67

3.1.4. Supreme Court Advisory Opinion on The Implementation of the Two-thirds Gender Rule

The Constitution of Kenya requires that elective bodies comprise of not more than two-thirds of either gender.⁹¹ However, there was no clear mechanism or provision that was put in place for the realization of this rule in the Senate and the National Assembly.⁹² The main challenge was the actual impossibility of realizing the two-thirds principle without an amendment to the existing constitutional or legislative framework.⁹³

Women and men have the right to equal treatment with men, this includes the rights to equal opportunities in the social, political and economic realm.⁹⁴ Emphasis on equality is placed by article 27(6) which provides that the State should take legislative and other measures such as affirmative action programmes in order to ensure the full realization of the provisions of the Constitution on equality and freedom from discrimination.⁹⁵

Further, the Constitution provides that the “State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective bodies shall be of the same gender.”⁹⁶ This is commonly referred to as the “two-thirds gender rule”.

⁹⁰ Article 98, *Constitution of Kenya*(2010)

⁹¹ Article 27(3),*Constitution of Kenya*(2010)

⁹² FIDA, *Key Gains and Challenges: A Gender Audit of Kenya’s 2013 Election Process*, 2013, 37

⁹³ FIDA, *Key Gains and Challenges: A Gender Audit of Kenya’s 2013 Election Process*, 2013, 48

⁹⁴ Article 27(3), *Constitution of Kenya* (2010)

⁹⁵ Article 27(6), *Constitution of Kenya*(2010)

⁹⁶ Article 27(8), *Constitution of Kenya*(2010)

Article 81 of the Constitution charges the electoral system to comply with the two-thirds gender rule in elective public bodies.⁹⁷ This provides an even broader fulfilment of the two-thirds gender rule, by ensuring that even the electoral process will have equal gender representation.

Article 90(1) of the Constitution provides that the elections for parliamentary seats under Articles 97(1) (c) and 98(1) (b) (c) (d) and for members of county assemblies under 177(1) (b) and (c) should be done on the basis of proportional representation through party lists.⁹⁸

This provision goes to ensure that women are included in the party lists and therefore nominated in order to fulfil the two-thirds quota. These articles attempt to enforce the two-thirds gender rule however it lacks sanction to ensure that this quota is fulfilled through party nominations.⁹⁹

After the March 4 2013 general elections in Kenya, the total women elected were as follows: 16 women were elected out of 290 constituency Members of National Assembly, 47 women out of the total 47 County Women Representatives, 82 women out of the total 145 County Assembly Ward Representatives, 6 women elected out of 47 Deputy Governors with no women governors or senators elected.¹⁰⁰ This adds up to a total number of 68 women elected into the National Assembly translating to 19.4% women representation in the National Assembly.¹⁰¹

In the Senate there were no women directly elected, however there were 16 nominated women senators nominated out of the total 16 seats set apart for women and two women representing the youth and the disabled.¹⁰² There were therefore a total of 18 women in the Senate, representing 27% of the total Senate membership.

3.2. Supreme Court Advisory Opinion

The Attorney General, foreseeing a possible constitutional crisis in the National Assembly and Senate if the two-thirds gender rule were not achieved by the electoral process alone, sought the Supreme Court's Advisory Opinion on the implementation of the principle.

⁹⁷ Article 81(b), *Constitution of Kenya*(2010)

⁹⁸ Article 90(1), *Constitution of Kenya*(2010)

⁹⁹ FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 2013, 47

¹⁰⁰ FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 2013, 47

¹⁰¹ FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 2013, 47

¹⁰² Article 98(b) (c) (d), *Constitution of Kenya*, 2010.

His application sought to bring to finality the matter that had previously been filed at the High Court in by the Federation of Women Lawyers, in which the court held that the principle was subject to progressive, not immediate, realization.¹⁰³

The question put to the bench was whether the two-thirds requirement, read with the non-discrimination provision in Article 27 and provisions relating to the composition of the National Assembly and Senate, required immediate or progressive realization and, specifically, whether it was applicable to the March 4, 2013 elections.¹⁰⁴

It was found that the two-thirds gender rule had not yet been transformed into a full right that was capable of enforcement. It was further stated that for the rule to be transformed into a right, certain amendments would have to be made in relation to provisions of National Assembly and Senate.¹⁰⁵

Also, certain legislation would have to be passed pursuant to article 27(8). The court went further to say that the application of the two-thirds gender rule was to be done in a progressive manner. The Court also called upon government, to enact legislation by 27 August 2015.¹⁰⁶

In his dissenting opinion, the Chief Justice gave an analysis of how constitutional provisions should be interpreted. He recognized the need to look at other Constitutional provisions other than the ones that give guidance on the interpretation of the Constitution.¹⁰⁷ The Chief Justice peers into Article 10 of the Constitution of Kenya 2010, which includes among national values and principles, the protection of the marginalized.¹⁰⁸

These national values and principles are to be considered in the application or interpretation of the Constitution. Article 259 of the Constitution also provides that the Constitution should

¹⁰³ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

¹⁰⁴ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

¹⁰⁵ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

¹⁰⁶ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

¹⁰⁷ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

¹⁰⁸ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

be interpreted in a manner that promotes its principles and values as well as advances human rights.¹⁰⁹

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

This bill was proposed by a Technical Working Group under the leadership of the Attorney General. The bill was then signed by Adan Duale and is commonly referred to as the 'Duale Bill'. The bill seeks to amend various existing laws so as to give effect to Article 100 of the Constitution of Kenya.¹¹⁰

Article 100 of the Constitution requires parliament to enact legislation to promote the representation in Parliament of women, youth, and persons with disabilities, ethnic minorities and marginalized communities in elective and appointive positions and for connected purposes.¹¹¹

The bill provides for the amendments to five Acts; the Political Parties Act, the Elections Act, the Independent Electoral and Boundaries Commission Act and the National Gender and Equality Act, to compel parties, the electoral commission and county governments to consider interests of special interest groups.¹¹²

3.3.1. National Gender and Equality Commission Act (No.11 of 2011)

Clause 2 of the Bill proposes to amend section 2 of the National Gender and Equality Commission Act, 2011 by introducing a new definition of the word "special interest groups" as eligible demographic groups of the Kenyan population which are specified under Article 100 of the Constitution.¹¹³

Clause 3 of the Bill proposes to amend section 8 of the Act in order to expand the mandate of the Commission in operationalizing the provisions of Article 100 of the Constitution, through among other activities, monitoring implementation of affirmative action programmes, identify and address the challenges faced by the special interest groups.¹¹⁴

¹⁰⁹ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

¹¹⁰ *The Two-Third Gender Rule Laws Amendment Bill* (2015)

¹¹¹ Article 100, *Constitution of Kenya* (2010)

¹¹² *The Two-Third Gender Rule Laws Amendment Bill* (2015)

¹¹³ *The Two-Third Gender Rule Laws Amendment Bill* (2015)

¹¹⁴ *The Two-Third Gender Rule Laws Amendment Bill* (2015)

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

The Bill proposes to amend the Political Parties Act in order to provide for additional requirements for a political party to be eligible for registration. A political party should have the requisite number of representation of persons with disabilities. The Bill also proposes to amend the conditions set out under section 7 of the Act for registering a political party and deregistration of a political party under section 21 (1)(c) if it does not adhere to the rules of nomination of candidates with respect to the special interests groups.¹¹⁵

The Bill also proposes to amend section 29(1) (b) to require a political party to specifically publish in its statement of income and expenditure the amount allocated and expended on the special interest groups. It includes the composition of the governing body representation of persons with disabilities and should also have a disaggregate data information on persons with disabilities.¹¹⁶

The amendment also further emphasizes that the publication of the notice of any change in the constitution of the political party should be in a manner and form that is accessible on its website. The Bill also proposes to include representation of special interest groups in the membership of the selection committee for recruiting the Registrar of political parties.¹¹⁷

3.3.3. The Elections Act (No. 24 of 2011)

The Bill proposes to amend the Elections Act to require political parties to submit the party list together with signed minutes of all members present during the party nominations. It also provides for the provision of adequate security to special interest groups during election campaigns.¹¹⁸

It is also proposes that the Commission shall be given powers to make Regulations to ensure the progressive realization of the principle that not more than two-thirds of members of elective public bodies shall be of the same gender and the promotion of representation in Parliament of special interest groups.¹¹⁹

¹¹⁵ *The Two-Third Gender Rule Laws Amendment Bill (2015)*

¹¹⁶ *The Two-Third Gender Rule Laws Amendment Bill (2015)*

¹¹⁷ *The Two-Third Gender Rule Laws Amendment Bill (2015)*

¹¹⁸ *The Two-Third Gender Rule Laws Amendment Bill (2015)*

¹¹⁹ *The Two-Third Gender Rule Laws Amendment Bill (2015)*

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

The Bill proposes to amend the Independent Electoral and Boundaries Commission Act to provide for disaggregation of the data on the voters' rolls on the basis of disability and ensure that conduct the nominations of the party lists is in line with Article 90 of the Constitution.

The Bill obligates the Inspector General to ensure that women candidates and candidates who have any kind of disability are adequately protected during the entire campaign period and on the day of voting.¹²⁰

3.3.5. The County Governments Act (No. 17 of 20.12)

The Bill proposes to amend the County Government's Act to include into the membership of the county assembly no less than five percent of elected members who are men are persons with disabilities and not less than five of women members nominated under Article 177 (b) are persons with disabilities. It emphasizes the proper constitution of county assemblies to ensure that at least five percent of the members are persons with disabilities and women.¹²¹

This bill essentially seeks to ensure that the principle of affirmative action is realised in both the National Assembly and the Senate through a top-up mechanism of members elected. It also proposes that those who will be nominated for special seats should serve for a maximum of two terms. It further adds that any person who is elected to any House of parliament or legislative assembly by way of nomination shall enjoy such a nomination to a maximum of two terms.¹²²

3.4. Conclusion

The Duale bill seeks to give effect to the two-thirds gender principle through the creation of special seats. This will ensure that the gender principle is realised in Parliament over a period of twenty years from the next general election.

¹²⁰ *The Two-Third Gender Rule Laws Amendment Bill (2015)*

¹²¹ *The Two-Third Gender Rule Laws Amendment Bill (2015)*

¹²² *The Two-Third Gender Rule Laws Amendment Bill (2015)*

CHAPTER FOUR

4. CHALLENGES FACING THE IMPLEMENTATION OF THE TWO-THIRDS GENDER RULE IN KENYA

4.1.Introduction

Kenya's constitution came into effect in 2010, but the requirement that not more than two-thirds of members of elective or appointive bodies be of the same gender was to come into effect gradually. The current policy debate concerns how to implement the requirement in the face of too few women being elected to comprise at least one third of the National Assembly and Senate.¹²³

4.2.Descriptive and Substantive Representation

Hanna Pitkin in the Cost of Representation gives a working definition on the forms of representation that exists in any given society. She states that representation of any kind is two- fold, descriptive and substantive.¹²⁴

Descriptive representation is mainly concerned with the representative's characteristics vis-à-vis those whom s/he represents, thus representation is seen from the shared characteristics between the one representing and those being represented. Pitkin describes representation as being dependent on the representative's characteristics, on what he is or is like, on being something rather than doing something.¹²⁵

The representative does not act for others; he stands for them, by virtue of correspondence or connection between them, a resemblance or reflection. In political terms, what seems important is less what the legislature does than how it is composed.

In light of descriptive representation, women represent other women's needs in parliament. 'A female MP [member of parliament] represents women merely by her presence in office, since only women can descriptively represent other women.'¹²⁶ A further emphasis on descriptive representation is described by Mansbridge as he describes that descriptive

¹²³ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation' The National Women's Steering Committee In partnership with Institute of Economic Affairs (2015), 1.

¹²⁴ Barasa V, 'More Women in the Kenyan Parliament: Do Numbers Really Matter?' Published Degree Thesis, e University of Hull, Department of Social Sciences, August, 2011, 7

¹²⁵ Barasa V, 'More Women in the Kenyan Parliament: Do Numbers Really Matter?' Published Degree Thesis, e University of Hull, Department of Social Sciences, August, 2011, 8

¹²⁶ Pitkin H and Birkler J, 'The concept of representation', University of California Press, Berkley, 1967.

representatives can denote not only visible characteristics such as skin colour or gender, but also shared experiences, so that a representative with a background in farming is to that degree a descriptive representative of his or her farmer constituents.¹²⁷

Substantive representation on the hand involves taking a deliberate action where 'actions or his opinions, or both must correspond to or be in accord with the wishes, or needs, or interests, of those for whom he acts, that he must put himself in their place, take their part, act as they would act.'¹²⁸ Representation is hence clearly distinguished between acting for', (substantive) and acting on behalf of (descriptive, also symbolic representation).

Participation in political leadership for women is against the background of discrete challenges of socio-cultural, economic nature, and political exclusion in governance structures.¹²⁹ These social and economic disadvantages create barriers towards political leadership for women.

4.3. Cost of Representation

Unfortunately, many public figures, including women in both elected and nominated positions, have claimed that full implementation of the two-thirds requirement is expensive. Some have claimed that it is prohibitively expensive, and should not be implemented because it is too expensive. However, these individuals have failed to provide the cost of implementation that is, they argue, too high for the Kenyan taxpayer.¹³⁰

A study was conducted to establish to estimate the direct costs of achieving the two-thirds gender rule would be in Kenya. The main essence of this study is to understand the additional costs that would be borne by Kenyan taxpayers in order to achieve a parliamentary result where no gender comprises more than 66.66% of the total composition in both the National Assembly and The Senate.¹³¹

¹²⁷ Barasa V, 'More Women in the Kenyan Parliament: Do Numbers Really Matter?' Published Degree Thesis, e University of Hull, Department of Social Sciences, August, 2011, 7

¹²⁸ Pitkin H and Birkler J, 'The concept of representation', University of California Press, Berkley, 1967, 8

¹²⁹ Kivoi D, 'Factors Impeding Political Participation and Representation of Women in Kenya' Humanities and Social Sciences, (2014), 174.

¹³⁰ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation' The National Women's Steering Committee In partnership with Institute of Economic Affairs (2015), 1.

¹³¹ Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation' The National Women's Steering Committee In partnership with Institute of Economic Affairs (2015), 1.

4.4.Poverty and women's representation

Rural poverty is a major challenge for women wishing to participate in electoral politics in Kenya. The economic gap between the rural and urban parts of Kenya is rife. Kenya's urban population is 37% compared to 63% of the population that live in the rural areas.¹³²

Despite rapid urbanization, many Kenyans still live in rural areas and a majority of these are women who also have limited access to resources, and this makes it difficult for them to compete favourably with men in national politics.¹³³ Although the number of women gaining entry into parliament has increased steadily over the years, there have been no studies conducted on the impact of this numerical increment on legislative priorities that expand women's rights and status in Kenya, perhaps because there have been so few women serving in most levels of public office that it seemed premature to ask this question.¹³⁴

¹³² Barasa V, 'More Women in the Kenyan Parliament: Do Numbers Really Matter?' Published Degree Thesis, e University of Hull, Department of Social Sciences, August, 2011, 18.

¹³³ Barasa V, 'More Women in the Kenyan Parliament: Do Numbers Really Matter?' Published Degree Thesis, e University of Hull, Department of Social Sciences, August, 2011,18.

¹³⁴ Barasa V, 'More Women in the Kenyan Parliament: Do Numbers Really Matter?' Published Degree Thesis, e University of Hull, Department of Social Sciences,August,2011,18

CHAPTER FIVE

5. CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

As evidence in the preceding chapters and research of this paper, Kenya has failed to implement the mechanisms that have been put in place for the implementation of the two-thirds gender rule. This has been extensively discussed in chapter three where the Duale bill has been analysed and presented as a measure of implementation of the two-thirds gender rule. The Constitution of Kenya 2010 outlines several provisions which establish affirmative action for the purpose of redressing the effects of marginalizing specific groups of society. This paper specifically contemplates the provisions in relation to women.

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

To date, there has been no action taken to implement the two-thirds gender rule in the form of legislation or relevant policies. Despite the many bills that have been tabled in parliament, each one has been rejected.

At the onset, this research paper sought to analyse the two-thirds gender amendment bill with a view to proving it as a proper measure of implementation of the two-thirds gender rule as enshrined in the Constitution of Kenya.

5.2. Conclusion

This research paper was guided by three research questions. The first question was, what measures have been undertaken to the realization of the two-thirds gender rule in Kenya? The second question was, to what extent is the 'Duale bill' capable of implementing the two-thirds gender rule? And the last research question this paper sought to answer was, what other measures can be adopted to realize the two-thirds gender rule in Kenya?

In addition, the study sought to test two hypothesis, namely, first, that the two-thirds gender rule has been implemented in Kenya and second, that the 'Duale bill' has implemented the two-thirds gender rule in Kenya.

5.3.Recommendations

Based on the comparative study of the jurisdictions of Rwanda and Uganda in regard to the cost of implementation, and their success in the implementation of affirmative action, below are some recommendations that Kenya can undertake. This will ensure that Kenya implements the two-thirds gender rule which would lead Kenya closer to the realization of gender parity.

5.3.1. Use of Provisions of Article 177(b) and (c) in Article 97 and 98 of the Constitution of Kenya

This involves self-regulation where members are elected using a topping- up mechanism as suggested by the 'Duale bill'.¹³⁵ Article 177 contemplates a situation where the county assembly consists of the number of special seat members necessary to ensure that no more than two-thirds of the members of an elective body are of the same gender.¹³⁶ Such a method, proposed by the Technical Working Group will ensure that if the one third minimum threshold for women in parliament is not met, then special seats will be established to meet this threshold.¹³⁷

5.3.2. Enacting relevant legislation

An example of such laws would include Electoral laws. Such a law would be one that ensures that women are purposely included from the point of party nominations. The laws should also mandate the implementation of party-driven measures to ensure that elections are more inclusive. This would include the mandating of reform of party by-laws, the requirement for policy documents to comply with the quest for gender parity, recruitment and preparation of women for leadership roles.

5.3.3. Funding

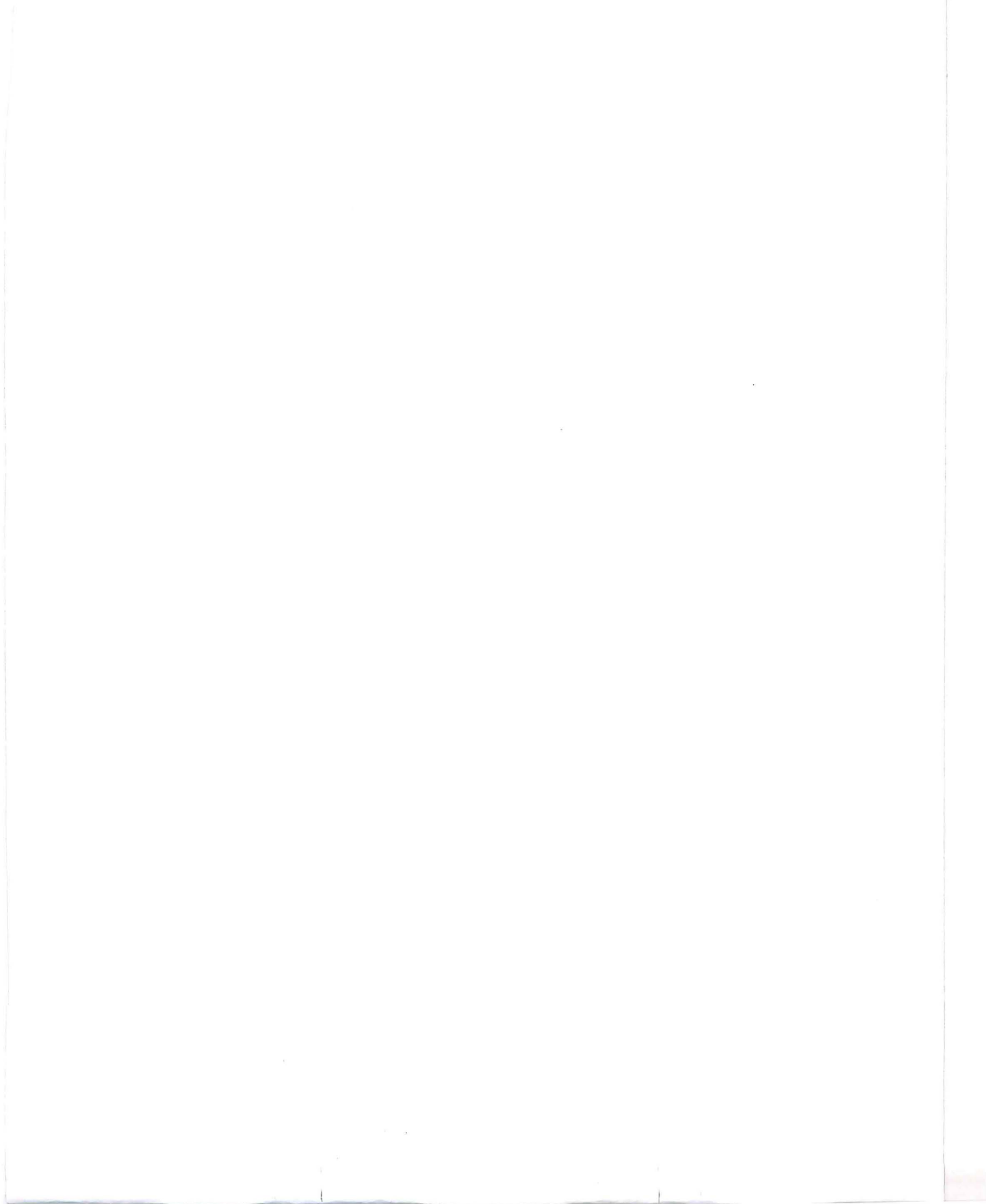
This is an important aspect of inclusion of women as several of the programmes require a lot of money for the implementation. This would include state funding which can be used for the purposes of promotion of historically excluded groups including women.¹³⁸ Political parties can take up these funds for the implementation of programmes for the uplifting of women.

¹³⁵ Article 177(1)(b), *Constitution of Kenya* (2010)

¹³⁶ Article 177(1), *Constitution of Kenya* (2010)

¹³⁷ FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 2013, 37

¹³⁸ Section 26 (1) (a), *Political Parties Act*, 2011



BIBLIOGRAPHY

Legislation

Constitution of Kenya (2010)

The Two-Third Gender Rule Law (Amendment) Bill (2015)

Political Parties Act, 2011

Case law

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR

Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR

Text books

Biegon J, *Gender Equality and Political Processes in Kenya: Challenges and Prospects*, Strathmore University Press, Nairobi, 2016.

Gordon L, *The Struggle for Reproductive Freedom: Three Stages of Feminism, in capitalist patriarchy and the case for socialist feminist*, Monthly Review Press, New York, 1979.

Levitt N and Robert R, *Feminist Legal Theory: A primer*, New York University Press, New York, 2006.

Pitkin H and Birkler J, *The concept of representation*, University of California Press, Berkley, 1967.

Rawls J, *A Theory of Justice*, The Belknap Press of Harvard University Press Cambridge, Massachusetts, 1999.

Journal Articles

Amdany D, 'Implementing the Constitutional Two-Thirds Gender Principle: The Cost of Representation' *The National Women's Steering Committee In partnership with Institute of Economic Affairs* (2015).

Caldwell M, 'A Hair Piece: Perspectives on the Intersection of Race and Gender', *DuKE Lj* (1991).

Crenshaw K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' *University of Chicago Legal Forum* (1989)

Dahlerup D, 'From a Small to a Large Minority: Women in Scandinavian Politics' *Scandinavian Political Studies*, (1988).

Fineman M, 'Feminist Legal Theory' *Journal of Gender Social Policy and the Law* (2015).

Kivoi D, 'Factors Impeding Political Participation and Representation of Women in Kenya' *Humanities and Social Sciences* (2014).

Kaimenyi C, 'An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya' *International Journal of Business, Humanities and Technology* (2013).

MacKinnon C, 'Substantive Equality: A Perspective' *Minnesota Law Review*, (1998)

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

Schneider E, 'Feminist Legal Theory, Feminist Law making, and the Legal Profession' *Fordham Law Review* (1998).

Vujadinovic D, 'Ronald Dworkin-Theory of Justice', *European Scientific Journal*, (2012).

Theses

Agutu L, 'Implementation of the two-thirds gender rule in Kenya: The implication for women in Parliament' Strathmore University Law School, January 2017, 1.

Barasa V, 'More Women in the Kenyan Parliament: Do Numbers Really Matter?' Published Degree Thesis, University of Hull, Department of Social Sciences, August, 2011, 7.

Conference Papers

FIDA, Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process, 2013, 48

Newspaper Articles

Osabutey P, 'Towards an affirmative action law in Ghana: The issues' *The Chronicle*-thechronicle.com.gh/towards-an-affirmative-action-law-in-ghana-the-issues on 3 March 2018.

Lilian Aluanga: 'New Proposals to Achieve Two-third gender rule' *Standard Digital*, 3 April 2016 <https://www.standardmedia.co.ke/article/2000196994/new-proposals-to-achieve-two-third-gender-rule> on 13 March 2018.

Felix Olick: New Bill to raise number of MPs' The Star, 23 February 2018 https://www.the-star.co.ke/news/2018/02/23/new-bill-to-raise-number-of-mps_c1719479 accessed on 5 March 2018.

Websites

Kameri-Mbote P, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses' International Environmental Law Research Centre, 2013, 4 - <http://www.ielrc.org/content/w1301.pdf> on 3 March 2017

<https://plato.stanford.edu/entries/original-position/> accessed on 5 September 2018