

IMPLEMENTATION OF THE TWO-THIRDS GENDER RULE IN KENYA: THE  
IMPLICATION FOR WOMEN IN PARLIAMENT

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**DISSERTATION DECLARATION FORM**

**DECLARATION**

I, LISA AKINYI AGUTU, 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: .....

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

Signed:.....

DESMOND TUTU

## **ABSTRACT**

The purpose of this paper is to analyze the two-thirds gender rule in Kenya and to determine whether there are sufficient mechanisms to implement it.<sup>1</sup> This will be done through a specific look at women in parliament. The two-thirds gender rule was included in the Constitution 2010.<sup>2</sup> This analysis will be done through a comparative study on the mechanisms implemented in Senegal and Uganda for the achievement of gender parity in parliament. Gender parity concerns relative equality in terms of numbers and proportions of women and men, girls and boys.<sup>3</sup> The methodology used to undertake the research is qualitative through library and online research.

The research showed that there are no adequate measures for the implementation of the two-thirds gender rule for women in parliament.<sup>4</sup> Recommendations to remedy this includes the enactment of legislation to further elaborate the specific measures that will be undertaken in order to realize gender parity in parliament through the two-thirds gender rule. Such recommendations include Electoral Laws which would ensure that women are included in decision-making and on a larger scale, nomination to stand for elective posts. This would grant them a better opportunity to be elected.

A major recommendation is strict enforcement of judicial decisions. The Supreme Court advisory opinion of 2012 gave the Commission on Implementation of the Constitution a deadline of August 2012 to recommend legislation for the realization of the two-thirds gender rule.<sup>5</sup> To date there are no Bills that have been tabled concerning the rule. Stricter enforcement would ensure that the two-thirds gender rule is implemented effectively.

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<sup>1</sup> *Constitution of Kenya*, 2010.

<sup>2</sup> Article 81(b), *Constitution of Kenya*, 2010.

<sup>3</sup> Zheng S, 'Gender Statistics Manual: Integrating a gender perspective into statistic' United Nations Statistics Division, 21 May 2005 -

<<http://unstats.un.org/unsd/genderstatmanual/Glossary.ashx>> on 12 December 2016.

<sup>4</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>5</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

## **LIST OF ABBREVIATIONS**

1. **CIC** - Commission on the Implementation of the Constitution
2. **CKRC** - Constitution of Kenya Review Commission
3. **CEDAW** - United Nations Convention on the Elimination of All Forms of Discrimination Against Women
4. **TWG** - Technical Working Group
5. **JLAC** - the Justice and Legal Affairs Committee
6. **LC**- Local Council
7. **WID** - Women in Development
8. **DGPSN** – Délégation a la Protection Sociale et la Solidarité National
9. **IEBC** – Independent Electoral and Boundaries Commission
10. **GAD** – Gender and Development
11. **MGLSD** - Ministry of Gender, Labour, and Social Development
12. **EMILY** - Early Money is Like Yeast
13. **FIDA** – The Federation of Women Lawyers
14. **CREAW** – Centre for Rights Education & Awareness
15. **UN** – United Nations

## **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.*
3. *The Regents of the University of California v Allan Bakke (1978), The Supreme Court of the United States.*

## **CHAPTER ONE**

### **INTRODUCTION**

#### **Background**

‘Women’s concerns in seeking equality in the various aspects of public life, especially in governance, is one that is constantly under discussion, and would continue to be so until the desired results are attained’.<sup>6</sup> Affirmative action is a huge leap in the right direction for Kenya. The history of women’s representation in Kenya’s parliament has not been one with great numbers. The first Parliament (1963 to 1969) saw no women elected or nominated to parliament, the second parliament (1969 to 1974) had only one elected woman and one woman nominated to parliament while the third had four elected and two nominated.<sup>7</sup> The fourth had only five elected and one nominated.<sup>8</sup> This trend where there were little to no women represented in parliament continued even up to the 10<sup>th</sup> parliament (2008-2012). The total number of elected women in that parliament was only 16 and the total number of nominated members was 6.<sup>9</sup>

In the wake of the Constitution 2010 came many new provisions that have changed the way Kenyans approach women’s issues. It has no longer been left to fate to include women in government but it now has a constitutional backing. The Constitution 2010 in article 81 (b) provides that the electoral system shall comply with the principle of Affirmative Action among others that not more than two-thirds of the members of elective public bodies shall be of the same gender.<sup>10</sup> The Constitution in article 27(8) places the mandate of ensuring that the two-thirds gender rule is implemented, on the State, through the legislature.<sup>11</sup>

This paper will therefore discuss the two-thirds gender rule, as a form of affirmative action in Kenya, while shedding light on the potential mechanisms for its implementation for the

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<sup>6</sup>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/](http://thechronicle.com.gh/towards-an-affirmative-action-law-in-ghana-the-issues/)>. On 5 February 2016.

<sup>7</sup> Nyokabi, *Women and Political Leadership*, Heinrich Boll Stiftung, East and Horn of Africa, 2010, 11.

<sup>8</sup> See appendix 1.

<sup>9</sup> See appendix 1.

<sup>10</sup> Article 81(b), *Constitution of Kenya*, 2010.

<sup>11</sup> Article 27(8), *Constitution of Kenya*, 2010.

benefit of women in parliament. This main aspect will have two main facets. The first will determine whether there are sufficient mechanisms for implementation of affirmative action in Kenya. The second will be a comparative study of affirmative action in Uganda and Senegal. This will seek to determine the mechanisms in place in those countries for the implementation of affirmative action and consequently to give recommendations on how Kenya can borrow some of those mechanisms to better implement affirmative action.

The Supreme Court gave a majority advisory opinion on the interpretation of the time frame of the implementation of the two-thirds gender rule. The Court also sought to determine whether the lack of adequate representation of women in Kenya's 11<sup>th</sup> parliament following Kenya's 2013 general election renders it unconstitutional. The ruling was that the gender equality law is aspirational. The Supreme Court therefore gave a deadline of August 27<sup>th</sup> 2015 to the Commission on Administration of Justice to come up with legislation to bring the rule to fruition.<sup>12</sup> To date, there has been no report from the Commission. This means that the two-thirds gender rule still lacks legislation on the method of implementation.

A method provided for in the Constitution for the implementation of this law is through nomination of women candidates. The Constitution in article 177 provides that the county assembly will consist of special seat members to ensure that no more than two-thirds of the membership of the assembly is of the same gender.<sup>13</sup> This is a step in the right direction as women are guaranteed a spot in elective posts.

This paper will therefore look at the two-thirds gender rule with regards to women in parliament and analyze whether there are sufficient mechanisms for its implementation. Recommendations will also be given based on a comparative study in the jurisdictions of Uganda and Senegal where gender affirmative action has been implemented in favour of women in parliament.

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<sup>12</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.

<sup>13</sup> Article 177 (1), *Constitution of Kenya*, 2010.

## **Statement of problem**

The two-thirds gender rule was introduced into Kenya's 2010 Constitution as a form of affirmative action.<sup>14</sup> It provides that not more than two thirds of the members of an elective body should be from the same gender.<sup>15</sup> The problem is that historically, women have not been adequately represented in elective bodies and for purposes of this paper, specifically parliament.<sup>16</sup> The inclusion of the two thirds-gender rule in the 2010 Constitution brought hope to this situation. This hope has slowly dimmed as there has been no legislation set up to implement the two-thirds gender rule. This is despite there being a deadline of August 27 2012, which has since passed, for the Commission on the Implementation of the Constitution (CIC) to recommend legislation for the implementation of the law.<sup>17</sup> Consequently, Kenya's 2013 General Election results, saw women still occupying less than a third of parliament.<sup>18</sup> This translates to a larger problem of how the two-thirds gender rule will be implemented to ensure that women occupy at least 33.3% of the parliamentary seats.

## **Justification of the study**

This study is justified by the fact that historically in Kenya women have not been adequately represented in parliament.<sup>19</sup> The two-thirds gender rule has then been seen as the solution to Kenya's problems of lack of adequate representation.<sup>20</sup> This has led to the passing of affirmative action laws and incorporation of principles of equality and affirmative action in the Constitution.<sup>21</sup> This has been hindered by the lack of adequate mechanisms for the implementation of the law.

The Supreme Court in its advisory opinion set a deadline for the Commission on the Implementation of the Constitution (CIC) to recommend legislation for the implementation

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<sup>14</sup> *Constitution of Kenya*, 2010.

<sup>15</sup> Article 81(b), *Constitution of Kenya*, 2010.

<sup>16</sup> See appendix 1.

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

<sup>18</sup> FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 2013, 47.

<sup>19</sup> See appendix 1.

<sup>20</sup> Article 81(b), *Constitution of Kenya*, 2010.

<sup>21</sup> Article 81(b), *Constitution of Kenya*, 2010.

of the law.<sup>22</sup> The deadline (August 27<sup>th</sup> 2012) has since passed and there are still no structures. The purpose of the law is defeated if it cannot be implemented.

This dissertation therefore seeks to explore whether there are adequate mechanisms for the implementation of the two-thirds gender rule as a method of affirmative action. It will also look at affirmative action measures in Uganda and Senegal that are in place for the realization of gender parity in parliament. This comparative study will seek possible recommendations on how Kenya can better implement the two-thirds gender rule.

### **Statement of Objectives**

The main objective of this paper is to give an analysis of the two-thirds gender rule in Kenya as provided for in the Constitution 2010. Further this paper seeks to determine if there are adequate mechanisms to support the implementation of the two-thirds gender rule in order to increase women's representation in parliament.<sup>23</sup> A comparative study based on Uganda and Senegal will also be done to seek possible recommendations on how Kenya can adopt structures for the implementation of the two-thirds gender rule.

This will be explored through the following lens;

- a) Whether there are adequate measures in place for the implementation of the two-thirds gender rule in Kenya with regards to women in parliament.
- b) A comparative study of measures undertaken for the implementation of affirmative action for women in parliament based on a study of measures in Uganda and Senegal.
- c) To seek recommendations on how Kenya can adopt some structures to implement the two-thirds gender rule based on the comparative study.

### **Research Question**

1. What measures have been undertaken in Kenya to achieve gender parity in parliament?

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<sup>22</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.

<sup>23</sup> Article 81(b), *Constitution of Kenya*, 2010.

2. Is the two-thirds gender rule an adequate measure of affirmative action to achieve gender parity in parliament?
3. Are there adequate measures for the implementation of the two-thirds gender rule with regards to women in parliament in Kenya?
4. What measures can Kenya adopt in order to implement the two-thirds gender rule?

## **Literature Review**

“A strong and vibrant democracy is possible only when parliament is fully inclusive of the population it represents. Parliaments cannot consider themselves inclusive, however, until they can boast the full participation of women”.<sup>24</sup> This study will analyze various scholars’ attempts to answer various research questions. This includes questions such as: what measures have been undertaken in Kenya in order to achieve gender parity in parliament; whether the two-thirds gender rule is an adequate measure to achieve gender parity in parliament and whether there are adequate measures for the implementation of the two-thirds gender rule.<sup>25</sup> It will also consist of a comparative study in Uganda and Senegal to determine what measures are in place in those jurisdictions for the implementation of gender affirmative action for women in parliament in order to gain insight on what measures Kenya can adopt in order to implement the two-thirds gender rule. This will be through an analysis of the various literary works on affirmative action.

Kennedy Kimani reiterates article 27 of the Constitution of Kenya which states that the rights of women are equal to those of men.<sup>26</sup> It also states that women are entitled to enjoy equal opportunities in the political, social and economic spheres.<sup>27</sup> This then forms the backbone for Article 81(b) of the Constitution which safeguards gender representation in elective public bodies by calling for the electoral system to comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender.<sup>28</sup> This safeguards gender representation in elective public bodies by calling for the electoral system

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<sup>24</sup> Inter-Parliamentary Union, *Equality in politics: A survey of men and women in parliaments*, 2008, iii.

<sup>25</sup> Article 81(b), *Constitution of Kenya*, 2010.

<sup>26</sup> Article 27, *Constitution of Kenya*, 2010.

<sup>27</sup> Kennedy Kimani: ‘The Gender Rule Quagmire: Implementing the Two-Thirds Gender Rule in Kenya’ Institute for Education in Democracy-  
<[iedafrica.org/index.php/policy-legal-reforms/143-the-gender-rule-quagire-implementing-the-two-thirds-gender-principle-in-kenya](http://iedafrica.org/index.php/policy-legal-reforms/143-the-gender-rule-quagire-implementing-the-two-thirds-gender-principle-in-kenya)> on 23 November 2015.

<sup>28</sup> Article 81(b) *Constitution of Kenya*, 2010.

to comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender. Further, article 27 requires the government to enhance the affirmative action cause by passing laws.<sup>29</sup> Despite this, the results of Kenya's March 2013 general election still saw very few women elected which almost caused a constitutional crisis on whether the 11<sup>th</sup> parliament was unconstitutional.<sup>30</sup> The Supreme Court gave an advisory opinion on this matter stating that the gender based affirmative action is a progressive one.<sup>31</sup> As a result there has been lack of clarity on the methods of implementation of this law.<sup>32</sup>

As mentioned before, affirmative refers to a "deliberate move to reforming or elimination past and present discrimination using a set of public policies and initiatives designed to help on the basis of colour, creed, geographical location, race, origin and gender among others".<sup>33</sup>

Catherine Kaimenyi puts a context to the need for gender affirmative action in Kenya. After the 2008 general elections the 11<sup>th</sup> parliament, the number of women was 9.8% with 22 women parliamentarians while in the 2013 election, the first under the Constitution 2010 women representation in parliament was over 19%.<sup>34</sup> This was ensured by the creation of 47 seats dedicated solely to women as well as policies set in place to ensure that parties nominate women into parliament. This percentage is however still low compared to the 33.3% threshold that the two-third gender rule sets out.<sup>35</sup> It will thereby be necessary to analyze the specific mechanisms if any that will be adopted to ensure the realization of the two-thirds gender rule.<sup>36</sup>

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<sup>29</sup>Kennedy Kimani: 'The Gender Rule Quagmire: Implementing the Two-Thirds Gender Rule in Kenya' Institute for Education in Democracy- <[iedafrica.org/index.php/policy-legal-reforms/143-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)> on 23 November 2015'.

<sup>30</sup> 'James Macharia 'UPDATE 3: Kenya high court delays elections to March 2013' Reuters US Edition, 13 January 2012- <[www.reuters.com/article/kenya-elections-idUSL6E8CD1E720120113](http://www.reuters.com/article/kenya-elections-idUSL6E8CD1E720120113)> on 18 March 2016.

<sup>31</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>32</sup> Kennedy Kimani: 'The Gender Rule Quagmire'.

<sup>33</sup> Kaimenyi C, 'An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya' 95.

<sup>34</sup> Kaimenyi C, 'An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya' 95.

<sup>35</sup> See Appendix 1.

<sup>36</sup> Kaimenyi C, 'An Analysis of Affirmative Action: The Two-Thirds Gender Rule in Kenya' 95.

In Uganda, affirmative action was initiated in 1995 when it was enshrined in their constitution.<sup>37</sup> It is provided in the Constitution of Uganda that the state shall take affirmative action in favor of marginalized groups on the basis of gender, age, disability or any other reasons.<sup>38</sup> Uganda passed a law in 1997 called the Local Government Act which provided for structures for the inclusion of women in decision making within government.<sup>39</sup> This Act specified that women should form a third of the membership of local government councils as well as stipulating the number of women appointees on the local government committees and councils.<sup>40</sup>

Another method used in Uganda for implementation of affirmative action is moving decision making to the village as it was seen that women are less constrained and more comfortable when involved in Community affairs.<sup>41</sup> This was facilitated by decentralization of government into a five tier local council structure.<sup>42</sup> In this situation, women are granted the opportunity to run for public office however in addition there are seats set aside specifically to ensure that at least a third of women are represented in councils.<sup>43</sup>

Senegal passed the Gender Parity Law in 2010, a law which created absolute gender equality in all wholly or partially elected institutions.<sup>44</sup> This mandated the drawing up of party lists of candidates, a list, which would include both male and female candidates. This allows women from the outset to be included as from the nomination process, they are given priority. To this end, Senegal also amended its Electoral law to align it with the gender parity principle, ensuring that party lists included both sexes.<sup>45</sup>

The gender parity law has contributed to the number of women in parliamentary seats from 22.7% in 2011 to 42.7% in 2015.<sup>46</sup> This will be elaborated further in the dissertation.

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<sup>37</sup> Johnson D, Hope K, Santa K, 'Women in Ugandan Local Government: The Impact of Affirmative Action' *Gender and Development*. 2003, 8.

<sup>38</sup> Article 32.1, *Constitution of the Republic of Uganda*, 1995

<sup>39</sup> *Local Government Act*, 1997.

<sup>40</sup> *Local Government Act*, 1997.

<sup>41</sup> Johnson D *et al*, 'Women in Ugandan Local Government: The Impact of Affirmative Action', 9.

<sup>42</sup> Johnson D *et al*, 'Women in Ugandan Local Government: The Impact of Affirmative Action', 9

<sup>43</sup> Johnson D *et al* 'Women in Ugandan Local Government: The Impact of Affirmative Action', 15.

<sup>44</sup> *Senegal Gender Parity Law*, 2010.

<sup>45</sup> *Law 92-16*, 1992.

<sup>46</sup> UN Women, *Reflection on Gender Parity in Africa: Gender Parity in Senegal Dakar*, 2011, 19.

## **Theoretical Framework**

This paper will also analyze the works Kimberle Crenshaw on intersectionality, Dworkin, Rawls and the theories of formal and substantive equality. This will be done in order to determine their views on equality and justice and the relation of their theories to affirmative action.

Patricia Kameri-Mbote sets out that human rights at the very base line are guaranteed for all human beings.<sup>47</sup> This includes rights such as equality of all before the law, equal protection of the law, protection from discrimination on grounds such as sex, religion, ethnic origin or tribe, right to own property and freedom of conscience.<sup>48</sup> This refers to formal equality which is equality before the law.

Substantive equality refers to mechanisms that are used to ensure that past discrimination on marginalized groups are redressed and intersectionality refers to the multiplicity of discrimination facing a single group of individual.

The choice of Ronald Dworkin was informed by his concern for equal concern and justice which is the root of affirmative action. This is because affirmative action seeks to remedy the lack of equal opportunity caused by discrimination based on gender or disability among other categories.

Ronald Dworkin speaks of access to justice.<sup>49</sup> His theory of justice comprises of the theory of equality which he takes to mean equal concern. Dworkin mentions that equality of resources is essentially the concretization of equal concern. He takes equal concern to be an important virtue of a sovereign. Equal concern would mean equal access to resources.

This then brings us to affirmative action. Affirmative action seeks to fill in the gaps left by discrimination and unequal concern or treatment for certain individuals in society and ensuring that each individual has equal access to resources through affirmative action.

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<sup>47</sup> 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.

<sup>48</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 4.

<sup>49</sup> Vujadinovic D 'Ronald Dworkin-Theory of Justice', 5.

Dworkin also mentions human rights to be a major basis for equality. Therefore equal concern seeks to uplift human rights for all individuals.<sup>50</sup>

He moves away from an endowment system towards a distributive scheme of distribution of resources. This involves auctions while noting that individuals would enter such auctions with different endowments causing a rectification system of taxation and insurance to be developed.<sup>51</sup>

John Rawls speaks of justice as an inviolable right of every individual in society. Such rights are not up for political bargaining.<sup>52</sup> He stresses that justice as fairness applies to the basic structure of society.<sup>53</sup>

According to Rawls theories of distributive justice stem from political processes and structures which affect distribution of resources in society.<sup>54</sup> This then brings about the principles of distributive justice, the first of which is egalitarianism which seeks the equal distribution of material resources to each individual. The second is the Difference principle which is of relevance to this paper allowing for divergence from strict equality principles so long as the less advantaged in society will be left better off than they would have if the strict principles were being used.<sup>55</sup>

The above theories support affirmative action by providing that there should be equal concern and justice for each category of people according to Dworkin. John Rawls theory of distributive action also supports affirmative action in that it allows for equality principles to be diverged from for the benefit of the disadvantaged in society.

This will be explored further in the dissertation.

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<sup>50</sup> Vujadinovic D 'Ronald Dworkin-Theory of Justice', 5.

<sup>51</sup> Vujadinovic D 'Ronald Dworkin-Theory of Justice', 6.

<sup>52</sup> Rawls J, *A Theory of Justice*, The Belknap Press of Harvard University Press Cambridge, Massachusetts, 1999, 4.

<sup>53</sup> Rawls J, *A Theory of Justice*, 228.

<sup>54</sup> Julian Lamont: 'Distributive Justice' *The Stanford Encyclopedia of Philosophy* 2 Jan 2013 [plato.stanford.edu/entries/justice-distributive/](http://plato.stanford.edu/entries/justice-distributive/) on 3 March 2016.

<sup>55</sup> 'Julian Lamont: Distributive Justice'.

## **Hypothesis**

This dissertation hypothesizes that Kenya provides a good framework for the establishment of the two-thirds gender rule as a form of affirmative action however it lacks the adequate measures for its implementation.

## **Assumptions**

It is assumed that the enactment of appropriate legislation and taking up certain policy measures will help Kenya achieve gender parity in parliament through the two-thirds gender rule as a form of affirmative action.

## **Research Design & Methodology**

The research will comprise of qualitative research. The qualitative research will entail library and online research which entails the use of sources such as books, journals and relevant legislation. This will be done in order to gain a deeper understanding on the two-thirds gender rule as a form of affirmative action in Kenya, its effect on women's representation in parliament and the mechanisms in place for its implementation.

## **Limitations**

This study will be limited by;

1. The wide scope of affirmative action measures. This has therefore limited the study to focus on the two-thirds gender rule as a form of affirmative action and limiting the study further to its implication on women in parliament.

## **Chapter Breakdown**

This study will be as follows;

### ***Chapter 1***

This chapter will give a brief introduction into affirmative action in Kenya.

### ***Chapter 2***

This chapter will expound on the theoretical framework surrounding affirmative action, expounding on the theories formal equality, substantive equality and intersectionality as well as the theories of Ronald Dworkin and John Rawls.

### ***Chapter 3***

This chapter will comprise of the legal framework surrounding the two-thirds gender rule as a form of affirmative action in Kenya. This will be done by focusing on and the various problems facing the implementation of affirmative action in Kenya and the consequent effect on women in parliament.

### ***Chapter 4***

This chapter will analyze the role of women representatives in Kenya.

### ***Chapter 5***

This chapter will comprise of a comparative study in Senegal and Uganda examining the mechanisms implemented in these jurisdictions to implement affirmative action.

### ***Chapter 6***

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

## **CHAPTER TWO**

### **THEORETICAL FRAMEWORK**

#### **Theory of Equality**

##### *Formal Equality*

Patricia Kameri-Mbote sets out that human rights at the very base line are guaranteed for all human beings.<sup>56</sup> This includes rights such as equality of all before the law, equal protection of the law, protection from discrimination on grounds such as sex, religion, ethnic origin or tribe, right to own property and freedom of conscience.<sup>57</sup> Human rights as a basic right for all human beings deserve their protection and promotion by the government as a responsibility.<sup>58</sup> The Universal Declaration on Human Rights (UDHR) is an international pronouncement of these rights due to every individual.<sup>59</sup> The UDHR concisely states that Rights and Freedoms provided in the declaration are the entitlement of every human being without discrimination on sex, race, colour, language, political or other opinion or other status.<sup>60</sup> This has led to similar international promulgations such as the International Convention on Economic, Social and Cultural Rights (ICESCR) which pronounces the right of every individual to equal enjoyment of economic, social and cultural rights.<sup>61</sup> The International Convention on Civil and Political Rights was also sets out that it is the equal right of men and women to enjoy all civil and political rights.<sup>62</sup> Regionally, the African Charter on Human and People's Rights outlines basic rights applicable to African states.<sup>63</sup> This includes the duty of all States to ensure the elimination of all forms of discrimination against women.

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<sup>56</sup> 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.

<sup>57</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 4.

<sup>58</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 4.

<sup>59</sup> UNGA, *Universal Declaration on Human Rights*, 217A(III) 10 December 1948.

<sup>60</sup> UNGA, *Universal Declaration on Human Rights*.

<sup>61</sup> Article 3, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

<sup>62</sup> Article 3, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

<sup>63</sup> *African Charter on Human and Peoples' Rights*, 27 June 1981, 21 I.L.M. 58.

Nationally, States have entrenched bills of rights into their constitutions to guarantee their citizens protection from violation of their political and civil rights.<sup>64</sup> The Kenyan Constitution contains an elaborate bill of rights outlining various human rights and freedoms.<sup>65</sup>

Despite such international and regional declarations that all men and women have equal rights, there are contradictions which arise from power relations.<sup>66</sup> According to Jeremy Bentham the actual attainment of equality requires more than a normative rights framework declaring everyone equal before the law known as formal equality.<sup>67</sup> This is because on their own, the statements of these rights are unable to deliver equality on their own.<sup>68</sup>

Legal systems can be seen as an obstacle to the obtainment of equality when such rules need to be changed in order to remove inequality.<sup>69</sup> It is therefore necessary to investigate what inequalities are interlaced with the law. *De jure* equality, equality by law can lead to *de facto* discrimination, a consequence not anticipated.<sup>70</sup>

### ***Substantive Equality***

The conception of equality of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) involves the principle of non-discrimination, the principle of state obligation and the principle of substantive equality.<sup>71</sup> The Convention outlines its purpose to eliminate all forms of discrimination against women by its title.<sup>72</sup> The CEDAW defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex whose effect is to impair or nullify the recognition, enjoyment or exercise by women without regard to their marital status on the basis of equality of men and women and equality of human rights.<sup>73</sup>

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<sup>64</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 6.

<sup>65</sup> Chapter IV, *Constitution of Kenya*, 2010.

<sup>66</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 7.

<sup>67</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 7.

<sup>68</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 7.

<sup>69</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 8.

<sup>70</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 8.

<sup>71</sup> *The Convention on the Elimination of All Forms of Discrimination Against Women*, 1979, 1249 UNTS 13.

<sup>72</sup> *The Convention on the Elimination of All Forms of Discrimination Against Women*.

<sup>73</sup> Article 1, *The Convention on the Elimination of All Forms of Discrimination Against Women*.

This therefore translates to a broad definition of discrimination such as any form of restriction such as the restriction of women's rights to decide about their bodies in reproductive health issues proves discriminatory. This may also be expressed in the form of exclusion of women from certain jobs or even the defining of certain jobs as only to be done by women.<sup>74</sup> Article 1 of the CEDAW also recognizes that laws which have the purpose or effect of violating women's rights are discriminatory: whether intentionally, by providing that women cannot own property or those laws whose effect is discriminatory, such as laws preventing women from working dangerous jobs such as night jobs.<sup>75</sup> Discrimination can also be total or partial and can occur at various phases such as the recognition, enjoyment and exercise of rights.<sup>76</sup> This brings about the obligation upon states to recognize the rights of women, provide necessary conditions for the enjoyment of such rights and to create mechanisms for the denouncing of violations and the giving of redress for such violations.<sup>77</sup>

Article 2 of CEDAW requires States to condemn discrimination against women as well as to seek all necessary means to eliminate discrimination against women.<sup>78</sup> This is through the undertaking or practical means to combat discrimination, enactment of legislation and sanctions to prohibit discrimination among other principles.<sup>79</sup>

In order to achieve substantive equality of states, CEDAW requires them to take up actions to achieve equal opportunity for men and women as well as actions to redress inequalities of power among men and women.<sup>80</sup> Actions to achieve equal opportunity include laws and policies. The indication of whether equal opportunity has been achieved by a State is through the results of the policies and laws and not in the laws and policies themselves.<sup>81</sup> According to CEDAW, substantive equality exists if the result of the law is to accord women with equal opportunities as what men have in all aspects of life.<sup>82</sup>

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<sup>74</sup> Facio A, Morgan M, 'Equity or Equality for Women? Understanding CEDAW's Equality Principles' 60(5) *Alabama Law Review*, 2009, 1143.

<sup>75</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1143.

<sup>76</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1143.

<sup>77</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1143.

<sup>78</sup> Article 2, *Convention on the Elimination of all Forms of Discrimination Against Women*.

<sup>79</sup> Article 2, *Convention on the Elimination of all Forms of Discrimination Against Women*.

<sup>80</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1146.

<sup>81</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1147.

<sup>82</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1147.

Differences must be taken into account in order to achieve equal opportunity.<sup>83</sup> Biological differences such as the fact that women give birth and men don't should not result in inequality. No discrimination should be made on the basis of sex among other factors.<sup>84</sup> Biological differences in fact produce inequalities as laws are made with a standard based on the masculine sex.<sup>85</sup> Social order also results in inequality such as vulnerability of women to sexual violence as well as the result of years of subordination of women.<sup>86</sup>

CEDAW also requires that states take up temporary measures in order to rectify inequalities and disadvantages of women with respect to men.<sup>87</sup> Special measures that seek to correct injustices on women and causing *de facto* equality are seen not to be discrimination however they should not be maintained if the desired result of equality is achieved.<sup>88</sup>

### ***Intersectionality***

This is a theory birthed by Kimberle Crenshaw that seeks to show the absence of women of colour in discourses of violence against women.<sup>89</sup> She argues that focusing only on the experiences of a privileged group marginalizes the 'multiply burdened' such as black women.<sup>90</sup> This brings about the problem of treating race and gender as mutually exclusive areas of experience and analysis.<sup>91</sup> An example is marginalized communities where the concern for the whole community body often masks and overshadows the experience of individual members of the community who are marginalized such as youths and women in that community.<sup>92</sup>

This theory brings a reminder that privileging certain treatment over others ignores the fact that some inequalities are mutually constitutive and could result in greater marginalization

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<sup>83</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1147.

<sup>84</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1147.

<sup>85</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1147.

<sup>86</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1147.

<sup>87</sup> Facio A, Morgan M, 'Equity or Equality for Women?', 1148.

<sup>88</sup> Article 4.1, *The Convention on the Elimination of all Forms of Discrimination Against Women*.

<sup>89</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 11.

<sup>90</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 11.

<sup>91</sup> Crenshaw K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' 1989(1), *University of Chicago Legal Forum*, 139.

<sup>92</sup> Kameri-Mbote P, 'Fallacies of Equality and Inequality', 11.

for certain categories of people.<sup>93</sup> The Kenyan Courts in discussing ways through which discrimination on the basis of gender for appointments to the Supreme Court observe that help to the disadvantaged should be based on something more than the female gender.<sup>94</sup> This is due to the fact that it can be noted that females in certain areas of the country face greater hardships than others in other regions of the country.<sup>95</sup> The Court took judicial notice that women in Turkana and other Northern Kenya regions face disadvantages. It is therefore concluded that affirmative actions should address inequality from the grass root on a basis other than gender lest the programmes benefit those already privileged.<sup>96</sup>

Inequalities such as gender have been a part of the human rights policy framework for such a long time that they have sufficient broad strategies which do not easily take up other inequalities.<sup>97</sup> This leads to the emergence of more and less privileged inequalities. Intersecting inequalities should have a robust framework to address them rather than placing them side by side.<sup>98</sup>

### **Ronald Dworkin**

Dworkin defined affirmative action as “programmes specially and specifically launched for disadvantaged, disabled and minority groups of people in the society as effective or at least possibly effective means to a desirable goal, namely to increase the capabilities and chances of disadvantaged, disabled and minority groups of persons so that they can participate in a greater way in development activities and in the process make this group of people realize their daily human needs”.<sup>99</sup>

Affirmative action, as Dworkin stated, should allow marginalized groups to participate in a greater way in development activities as opposed to creating further marginalization. An affirmative action programme should therefore allow those who have suffered disadvantage to access resources in an equitable manner and to allow the rest in society to continue accessing society’s resources. This should be applied in the Kenyan context where women

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<sup>93</sup> Kameri-Mbote P, ‘Fallacies of Equality and Inequality’, 11.

<sup>94</sup> Kameri-Mbote P, ‘Fallacies of Equality and Inequality’, 11.

<sup>95</sup> *Federation of Women Lawyers Kenya (FIDA-K) v Attorney General & another* (2011) eKLR.

<sup>96</sup> *Federation of Women Lawyers Kenya (FIDA-K) v Attorney General & another* (2011) eKLR.

<sup>97</sup> Kameri-Mbote P, ‘Fallacies of Equality and Inequality’, 13.

<sup>98</sup> Kameri-Mbote P, ‘Fallacies of Equality and Inequality’, 13.

<sup>99</sup> Ronald Dworkin ‘Why Bakke has No Case’, -

<<http://www.nybooks.com/articles/1977/11/10/why-bakke-has-no-case/>> - on 26 December 2016.

should be allowed increased access to participate in development activities through their inclusion in decision-making and leadership in areas such as parliament.

Ronald Dworkin represents in his theory of justice that equality means equal concern. He goes further to say that equal concern is the supreme virtue of political communities. The crystallization of the theory of equal concern is found in the equality of resources.<sup>100</sup> It is argued that governments should seek this form of equality that is the equality of resources. This application of the theory of equal concern gives legitimacy to a liberal-democratic government.<sup>101</sup> Equal concern and equality of resources can be seen to be the main virtue of justice.

The standard for equal concern and the respect for human life are found in human rights. It can therefore be seen that the yardstick for political legitimacy is the equal distribution of resources and the respect for human rights.<sup>102</sup> Dworkin distinguishes between an individual's mental and physical powers which can be attributed to their natural endowment and an individual's tastes, preferences and goals which is a result of their personal decisions. It therefore follows that an individual's mental and physical powers should not be the criteria for the equal distribution of resources. This redistribution should aim at an equal share that is distinct from the traits of one's natural bestowment.<sup>103</sup>

This translates to the aspect of this paper being discussed about women's representation in parliament. Despite the different endowments given to men and women, Dworkin calls for both genders to be treated equally. Women should therefore have access to society's resources whereby women should have an equal share of leadership and decision-making positions.

The result of this theory was the development by Dworkin, a distributive scheme consisting of the use of auctions, insurance schemes and taxation. This was after he took notice of the fact that an "endowment insensitive and ambition sensitive" system of distribution was an

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<sup>100</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice' 8(2), *European Scientific Journal*, 2012, 4.

<sup>101</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 5.

<sup>102</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 5.

<sup>103</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 5.

unattainable ideal.<sup>104</sup> The new theory of distribution of resources was premised on two assumptions: that equality of resources entails an economic market which is an actual political institution and that equality of resources is a matter of the private ownership of resources by individuals.<sup>105</sup>

An ambition sensitive and endowment insensitive is believed to be a framework for the initial equal distribution of the goods of the society. It creates a scenario where all the goods of the society are up for sale to which everyone is a participant. This does not only consist of an initial share but an ongoing sharing process that continues to redistribute the resources of the society.<sup>106</sup>

In its rawest form, the idea of equality of resources begins from the point of an equal auction which results from an economic market and applied in a contemplated scenario of a deserted island discovered by immigrants resulting from a shipwreck.<sup>107</sup> In this scenario, an initial auction would be held where each immigrant would have equal purchasing power which they use to bargain for goods which they see fit for their individual needs.<sup>108</sup> Such a situation would contemplate equal concern and only a difference in an individual's ambitions and beliefs.

The perceived result is the preference of one's own goods over the goods of others. Dworkin describes the "envy test" where everyone has been treated with equal consideration and the result is that there is no need to envy the goods of another.<sup>109</sup> In this scenario, no individual can claim to have been treated unequally as they chose their own goods therefore live with the consequences of those choices.<sup>110</sup>

This scheme expresses that justice, as any resultant inequalities, are the product of individual choices and not their individual endowments. In reality such an auction would fail if contemplated in the real world as different people possess different natural assets and

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<sup>104</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 6.

<sup>105</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 6.

<sup>106</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 6.

<sup>107</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 6.

<sup>108</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 7.

<sup>109</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 7.

<sup>110</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 7.

abilities.<sup>111</sup> This would be an invalid way to look at endowments as various people are born into their circumstances.<sup>112</sup>

Dworkin also contemplates the second best option which is an insurance scheme. In this scenario, people are unaware of their natural talents and are susceptible to various disadvantages.<sup>113</sup> Here, everyone decides how much of the initial equal amount of currency they possess that they would like to pay towards the handicapped. This would lead to a scenario where the naturally endowed and talented end up paying for their good fortune.<sup>114</sup> A real life depiction of this scenario according to Dworkin is a tax and redistribution system.

This tax system would be a reflection of Dworkin's contemplated insurance system. In a tax system, premiums are collected from the naturally endowed or advantaged and are then paid out to the disadvantaged through welfare schemes.<sup>115</sup> This system slightly differs from the insurance scheme as everyone's individual endowments cannot be measured.<sup>116</sup> Also, some people may face certain disadvantages as they make the choice not to exploit their individual gifts.<sup>117</sup> Such people cannot be compensated according to Dworkin.

Against the backdrop of Dworkin's systems of redistribution, it can be distinguished that unequal and unfair treatment does not only arise from natural disadvantages.<sup>118</sup> There is also unequal opportunity for different sexes, races, religions or even classes. Justice requires sensitivity in choice as well as social power. The focus of redistribution should therefore also be on the redistribution of social power.<sup>119</sup> This would tackle injustice from the source as opposed to only addressing the consequence of unjust power.<sup>120</sup> Gender today is not limited to physical traits, or the endowments given to males and females, it also embodies the social constructs of what it means to be female and male and this usually translates to power relations between men and women.

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<sup>111</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 7.

<sup>112</sup> Mackinnon C, *Women's Lives, Men's Laws*, Harvard University Press, 2005, 70

<sup>113</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 13.

<sup>114</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 13.

<sup>115</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 13.

<sup>116</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 14.

<sup>117</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 13.

<sup>118</sup> Dworkin R, *A Matter of Principle*, Harvard University Press, Cambridge, 1985, 77.

<sup>119</sup> Vujadinovic D, 'Ronald Dworkin-Theory of Justice', 13.

<sup>120</sup> Kimlicka W, *Contemporary Political Philosophy*, 88.

Justice in Kenya should also embody the redistribution of social power. Men should no longer be the only ones featured at the top of the chain of control while leaving women subjugated and only taking up deputized roles.<sup>121</sup> Women should also be included in every aspect of society especially leadership and decision-making.

### **John Rawls**

John Rawls posits that a conception of justice includes “equality for all, both in the basic liberties of social a life and also in distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality”.<sup>122</sup>

This refers to positive discrimination as a corrective tool to redress past injustices.<sup>123</sup> Lawrence Mute puts forward that legislation (in other words affirmative action programmes) that is enacted to help a category of people to the exclusion of others should ensure that this specific help uplifts that marginalized category to the level where they are equal to the other members of society.<sup>124</sup>

Rawls also refers to justice is the first virtue of social institutions.<sup>125</sup> He goes ahead to say that each person has an inviolability which is founded in justice that cannot be taken away or overridden by the welfare of society.<sup>126</sup> He says that the rights which are birthed by justice cannot be the subject of political bargaining.<sup>127</sup>

Rawls sets out that justice as a conception of fairness begins with the most general choice that a group of people might make together in their initial position of a social contract. This choice would be one of a conception of justice that would guide and regulate all following criticism and reform of institutions.<sup>128</sup> Justice as fairness according to him must be considered from a point of view that the initial situation consists of the parties as rational and

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<sup>121</sup> Biegon J, *Gender Equality and Political Processes in Kenya: Challenges and Prospects*, Strathmore University Press, Nairobi, 2016, 154.

<sup>122</sup> Rawls J, *A Theory of Justice*, 53.

<sup>123</sup> Mute L, ‘The Blind and the Law’ Unpublished LL.B Dissertation, University of Nairobi, Nairobi, 1992, 25.

<sup>124</sup> Mute L, ‘The Blind and the Law’, 25.

<sup>125</sup> Rawls J, *A Theory of Justice*, 4.

<sup>126</sup> Rawls J, *A Theory of Justice*, 4.

<sup>127</sup> Rawls J, *A Theory of Justice*, 5.

<sup>128</sup> Rawls J, *A Theory of Justice*, 12.

mutually disinterested.<sup>129</sup> In making this assumption, it should then be determined, a choice such parties would make in this original position.

He puts forward that the parties in their original position would choose two separate principles: equality in the allocation of rights and compensation as a remedy to inequalities.<sup>130</sup> These principles are based on the fact that those with better natural endowments which are undeserved by all, can expect cooperation from others in the working of a scheme to improve the welfare of others.<sup>131</sup>

Rawls in a theory of justice outlines that the principles of social justice form the basic fabric of society.<sup>132</sup> These are the principles that govern the assignment of rights and duties and work to facilitate the distribution of “benefits and burdens of social life”.<sup>133</sup> He outlines that an institution exists at a specific time and place and when the actions which are outlined by it are carried out consistently with the public understanding that the rules are to be followed.<sup>134</sup> The principle of formal justice is the unbiased and consistent administration of laws and institutions in spite of their substantive and underlying principles.<sup>135</sup> It follows that rules or institutions can be executed equally yet still be unjust. It does not sufficiently secure the interests of substantive justice.

Rawls distinguishes between two principles of justice. The first outlines the basic liberties the most important among them being political liberty which is the right to vote and hold public office, freedom of speech, liberty of conscience and freedom of thought, freedom of the person, right to hold personal property and the freedom from arbitrary arrest and seizure as defined by the rule of law.<sup>136</sup> The first principle provides that each of the above liberties is to be equal.<sup>137</sup>

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<sup>129</sup> Rawls J, *A Theory of Justice*, 12.

<sup>130</sup> Rawls J, *A Theory of Justice*, 13.

<sup>131</sup> Rawls J, *A Theory of Justice*, 14.

<sup>132</sup> Rawls J, *A Theory of Justice*, 47.

<sup>133</sup> Rawls J, *A Theory of Justice*, 47.

<sup>134</sup> Rawls J, *A Theory of Justice*, 48.

<sup>135</sup> Rawls J, *A Theory of Justice*, 49.

<sup>136</sup> Rawls J, *A Theory of Justice*, 53.

<sup>137</sup> Rawls J, *A Theory of Justice*, 53.

The second principle of justice outlines that the distribution of wealth need not be equal however it ought to be advantageous to all members of society at any given time. It also outlines that positions of authority and responsibility should be accessible to all.

It is therefore necessary for a well-ordered society, one aligned to the perpetuation of the good of society, to be effectively regulated by a public conception of justice. <sup>138</sup>The implication of this well-ordered society is that there will have a strong and active desire to act according to the principles of justice. <sup>139</sup>A proper conception of justice allows for the overall prosperity of a society.

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<sup>138</sup> Rawls J, *A Theory of Justice*, 397.

<sup>139</sup> Rawls J, *A Theory of Justice*, 398.

## **CHAPTER THREE**

### **THE TWO-THIRDS GENDER RULE: PROBLEMS FACING ITS IMPLEMENTATION**

#### **Background**

Inclusion of women in parliament is said to produce more equitable societies and delivers a stronger and more representative democracy.<sup>140</sup> With the uplifting of women, comes the overall improvement of society as a whole and the contribution towards better and more efficient governance.<sup>141</sup> This allows for different concerns, especially those that specifically affect women to be highlighted and new priorities to be brought forward into the political agenda.<sup>142</sup>

Affirmative action in the Kenyan parliament has recently taken a firm stance in seeking equal gender representation. According to Ronald Dworkin, affirmative action includes specially and specifically launched programmes for the disadvantaged, disabled and minority groups, to increase their capabilities and allow them to participate in a greater way in development activities.<sup>143</sup> This has been the root of the affirmative action movement in Kenya, the quest for equal opportunity regardless of gender or any other basis of discrimination.

It has been argued that in order to ensure that all human beings pursue their desired ends, real participatory measures in which people with all their diversities put across their views on various social problems, which would promote the representation of each of the diverse views.<sup>144</sup>

In Kenya, there has been a build up to what is now known as the two-thirds gender rule as enshrined in the constitution. In 1997, Phoebe Asiyo tabled a motion for affirmative action. This was done to increase representation of women in parliament to at least 33.3%.<sup>145</sup> This

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<sup>140</sup> Inter-Parliamentary Union, *Equality in politics: A survey of men and women in parliaments*, 2008, 5.

<sup>141</sup> Inter-Parliamentary Union, *Equality in politics: A survey of men and women in parliaments*, 2008, 5.

<sup>142</sup> Inter-Parliamentary Union, *Equality in politics: A survey of men and women in parliaments*, 2008,, 6.

<sup>143</sup> Ronald Dworkin 'Why Bakke has No Case', <http://www.nybooks.com/articles/archives/1977/nov/10/why-bakke-has-no-case/> on 26 December 2016.

<sup>144</sup> Young M, *Justice and the Politics of Difference*, 1990, 116.

<sup>145</sup> Biegon J, *Gender Equality and Political Processes in Kenya,: Challenges and Prospects*, Strathmore University Press, Nairobi, 2016, 154.

was unsuccessful as the motion was defeated. Later on in 2000 Beth Mugo tabled a similar motion which was then forwarded to the Constitution of Kenya Review Commission (CKRC).<sup>146</sup> It was defeated too. There was another attempt to realize gender equality through the Proposed New Constitution of Kenya (2005 Draft Constitution).<sup>147</sup> This hope could not be realized due to its rejection in the 2005 referendum.<sup>148</sup> Before the 2007 general elections the then Minister for Justice and Constitutional Affairs Martha Karua tabled a motion to amend the Repealed Constitution. This amendment sought to establish 50 parliamentary seats for women.<sup>149</sup> The motion was soundly rejected due to lack of quorum.

### **The Two-Thirds Gender Rule**

The various mechanisms undertaken to promote women's representation in political positions has been through quotas, reserved seats and other mechanisms introduced through constitutions. Article 4 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) sets out that state parties should adopt temporary special measures to accelerate *de facto* equality among men and women.<sup>150</sup> Kenya ratified this convention in 1985.<sup>151</sup> Kenya also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) showing its firm stance in the quest for gender equality.<sup>152</sup>

Against this backdrop, there was a semblance of progress that was seen through the promulgation of a New Constitution in 2010.<sup>153</sup> The Constitution 2010 expansively embodies gender equality. The focus of this paper is how the Constitution caters for women in parliament through affirmative action.

The Constitution contemplates various methods to ensure equal representation. This is through quotas as well as reservation of seats for women. The Constitution dictates that

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<sup>146</sup> Kabira WM, *Time for Harvest: Women and Constitution Making in Kenya*, University of Nairobi Press, Nairobi, 2012, 40

<sup>147</sup> Kenya Gazette Supplement No 63, 22 August 2005.

<sup>148</sup> Kabira, *Time for Harvest: Women and Constitution Making in Kenya*, 92.

<sup>149</sup> *The Constitution of Kenya (Amendment) Bill*, 2007.

<sup>150</sup> Article 4, *The Convention on the Elimination of All Forms of Discrimination Against Women*.

<sup>151</sup> *The Convention on the Elimination of All Forms of Discrimination Against Women*.

<sup>152</sup> African Union Protocol to the African Charter on Human and People Rights On The Rights of Women in Africa, entered into force November 2005.

<sup>153</sup> *Constitution of Kenya*, 2010.

women and men have the right to equal treatment, including the right to equal opportunities in political, economic and social spheres.<sup>154</sup> This is fortified 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.<sup>155</sup> 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.”<sup>156</sup> This is also known as the “two-thirds gender rule”.

Article 81 of the Constitution charges the electoral system to comply with the two-third gender rule in elective public bodies.<sup>157</sup> 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.<sup>158</sup> 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.

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 1.450 County Assembly Ward Representatives, 6 women elected out of 47 Deputy Governors with no women governors or senators elected.<sup>159</sup> This adds up to a total number of 68 women elected into the National Assembly translating to 19.4% women representation in the National

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<sup>154</sup> Article 27(3), *Constitution of Kenya*, 2010.

<sup>155</sup> Article 27(6), *Constitution of Kenya*, 2010.

<sup>156</sup> Article 27(8), *Constitution of Kenya*, 2010.

<sup>157</sup> Article 81(b), *Constitution of Kenya*, 2010.

<sup>158</sup> Article 90(1), *Constitution of Kenya*, 2010.

<sup>159</sup> FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 2013, 47.

Assembly.<sup>160</sup> This is not close to the stipulated minimum of a third (33.3%) that women should occupy.

In the Senate there were no women directly elected, however there are 16 nominated women senators nominated out of the total 16 seats set apart for women and two women representing the youth and the disabled.<sup>161</sup> There are therefore a total of 18 women in the Senate, representing 27% of the total Senate membership.

Despite the Constitutional provisions mandating women's inclusion in parliament, the performance has fallen short. The techniques such as quotas and reservation of seats for women have proven to be insufficient. Women still do not hold enough influential positions in parliament.

Notwithstanding the progress made, the two-thirds gender rule leaves the question as to whether the 11<sup>th</sup> parliament is unconstitutional. To this end, the Attorney General sought a Supreme Court advisory opinion to determine whether or not the 11<sup>th</sup> parliament is unconstitutional.<sup>162</sup> The question put forward to the bench was whether the two-thirds gender rule, read together with the non-discrimination provision of article 27 and provisions relating to the composition of National assembly and Senate, required immediate or progressive realization. To that end it was also to be determined whether or not those provisions applied to the March 4 2013 general election. It was found that the two-thirds gender rule had not yet been transformed into a full right that was capable of enforcement.<sup>163</sup>

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.<sup>164</sup> 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 to

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<sup>160</sup> FIDA, *Key Gains and Challenges: A Gender Audit of Kenya's 2013 Election Process*, 2013, 48.

<sup>161</sup> Article 98(b) (c) (d), *Constitution of Kenya*, 2010.

<sup>162</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>163</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>164</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

effect the rule. This date has since passed leaving no measures for the implementation of the two-thirds gender rule.

In his dissenting opinion, the Chief Justice gave an analysis of how constitutional provisions should be interpreted.<sup>165</sup> He recognized the need to look at other Constitutional provisions other than the ones that give guidance on the interpretation of the Constitution.<sup>166</sup> 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.<sup>167</sup> These national values and principles are to be considered in the application or interpretation of the Constitution.<sup>168</sup> Article 259 of the Constitution also provides that the Constitution should be interpreted in a manner that promotes its principles and values as well as advances human rights.<sup>169</sup> The Chief Justice also relies on Article 20 of the Constitution which requires courts in their interpretation of the Constitution to promote values based on human dignity, equality, equity and freedom.<sup>170</sup> Based on these articles of the constitution, the Supreme Court adopts an interpretation of the constitution that is purposive, promoting the dreams and aspirations of the Kenyan people.<sup>171</sup>

Such interpretations speaks to the Attorney General's opinion that the use of the word "shall" in Article 81(b) of the Constitution is instructive on the obligation that the two-thirds gender rule is to be realized progressively.<sup>172</sup> The Chief Justice in the dissenting opinion provides that reducing a constitutional provision to a single word is inconsistent with a purposive approach required by the Constitution 2010 as discussed above.<sup>173</sup> Article 27 of the Constitution together with the CEDAW, which operates in Kenyan law by virtue of Article

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<sup>165</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>166</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>167</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>168</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>169</sup> Article 259, *Constitution of Kenya*, 2010.

<sup>170</sup> Article 20, *Constitution of Kenya*, 2010.

<sup>171</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>172</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>173</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

2(6) of the Constitution due to its accession in 1984; provide that the disenfranchisement of women is a form of discrimination.<sup>174</sup> These provisions call for the removal of discrimination to bring about gender equality through the uplifting of women representation in political office.<sup>175</sup> The Chief justice takes notice that equality in this context does not only consist of equality before the law but also substantive equality.<sup>176</sup> Substantive equality requires the undertaking of measures to redress historical subordination of women.<sup>177</sup> Such measures are to be immediate and not progressive. This is because a progressive approach would lead to discrimination by providing women with the right to equal opportunity and then taking it away through a progressive realization of the provision.<sup>178</sup>

Article 177 (1) (b) of the Constitution provides clear proof of immediate realization of the two-thirds gender rule.<sup>179</sup> It would then be subversive of the Constitution to provide women vying for women representation in the counties with rights and deny their counterparts vying for seats in Parliament and the Senate with similar rights<sup>180</sup>. This would lead to an unconstitutional position.<sup>181</sup> This Article, read together with Article 27(4), 27(8) and 81(b) give proof that the two-thirds gender rule is to be immediately realized.<sup>182</sup>

A High Court petition was then launched against the Attorney General and the Commission on the Implementation of the Constitution (CIC) due to their failure to table the relevant Bills before parliament for the fulfilment of the requirements of Articles 27(8) and 81(b) of the 2010 Constitution read together with the Supreme Court Advisory Opinion. The petition

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<sup>174</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>175</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>176</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>177</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>178</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>179</sup> Article 177(1) (b), *Constitution of Kenya*, 2010.

<sup>180</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>181</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>182</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

sought a ruling that the respondent had failed, refused and neglected their duty.<sup>183</sup> The court agreed and ruled that the respondents had gone against their obligation under Article 261(4) of the Constitution to prepare relevant Bills to be tabled before Parliament within a reasonable period to enable Parliament to enact legislation within the required period.<sup>184</sup> The respondents were then directed to prepare the relevant Bills before the end of 40 days from 26 June 2015.<sup>185</sup>

To this end, a Technical Working Group (TWG) was formed by the Attorney General on 3 February 2014. It was given the task of coordinating the development of mechanisms for the attainment of the two-thirds gender rule.<sup>186</sup> The TWG proposed a Constitutional Amendment bill to introduce provisions that would allow a gender top up through party lists to address the existing deficit. This was soundly rejected by the Justice and Legal Affairs Committee (JLAC) as several laws would consequently have to be amended such as the Political Parties Act and the IEBC Act. The JLAC preferred a more progressive approach. This led to the Constitution of Kenya (Amendment) bill, 2015 (the Chepkong'a Bill).<sup>187</sup> This bill was eventually lobbied against, leading to the Duale bill. This Bill was published on 24 July 2014 and it set a requirement that beneficiaries of affirmative action occupy office for a maximum of two terms.<sup>188</sup> The Bill was defeated. The Supreme Court then extended the timeline to find mechanisms for the implementation of the two-thirds gender rule by a year to 27 August 2016.

## **Conclusion**

The provisions of the Constitution 2010 seek to pave the way for equal gender representation in parliament. Several provisions are set out for the achievement of equal gender representation such as through affirmative action, specifically the two-thirds gender rule. This cause remains futile so long as there lacks adequate mechanisms for its implementation.

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<sup>183</sup> *Centre for Rights Education & Awareness (CREAW) v Attorney General & another (2015) eKLR.*

<sup>184</sup> *Centre for Rights Education & Awareness (CREAW) v Attorney General & another (2015) eKLR.*

<sup>185</sup> *Centre for Rights Education & Awareness (CREAW) v Attorney General & another (2015) eKLR.*

<sup>186</sup> National Gender and Equality Commission (NGEC), *Legal Opinion on the not More Than Two-Thirds Gender Principle bills in Parliament*, 2016.

<sup>187</sup> *The Constitution of Kenya (Amendment Bill) 2015* published by Samuel Chepkong'a, Chairperson, Justice and Legal Affairs Committee on 30 April 2015.

<sup>188</sup> *Two-Third gender Rule Laws (Amendment Bill) 2015* tabled by Aden Duale, majority Leader, National assembly on 31 July 2015.

There have been several efforts to try and adopt various mechanisms to implement the two-thirds gender rule however such efforts are constantly defeated. The next chapter will do a comparative study on Uganda and Senegal, countries which have adopted mechanisms for the achievement of gender parity, in a bid to seek recommendations of how Kenya may achieve its quest for equal gender representation in parliament.

## **CHAPTER FOUR**

### **THE ROLE OF WOMEN REPRESENTATIVES**

Article 97(1) of the Constitution provides for the composition of the National Assembly which includes 47 women elected by registered voters in each county.<sup>189</sup> Article 100 of the Constitution classifies women as a special interest group.<sup>190</sup> Article 27(3) of the Constitution guarantees women equal opportunity in the political sphere.<sup>191</sup> Article 27(6) of the Constitution stipulates that affirmative action programmes shall be designed to redress any past injustices caused to marginalized groups.<sup>192</sup>

#### **Role of Women Representatives in Parliament**

##### ***Legislation***

Women representatives as part of parliament play a role in legislation. They enact legislation that will possibly impact the lives of the Kenyan people and more specifically, women.<sup>193</sup> This includes the role of women in repealing discriminatory laws and customs such as laws in relation to land, Female Genital Mutilation as well as access to resources.<sup>194</sup>

Women, through private or party sponsored bills can have a strong stance on policies that favour gender as well as family-friendly infrastructure such as health and housing.<sup>195</sup>

##### ***Engendering the Budget***

Women representatives have a role to play in ensuring that the people are aware of and participate in budget making processes.<sup>196</sup> They also play a large role in ensuring that the Executive publishes a Citizen Budget and allows adequate time for the citizenry to

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<sup>189</sup> Article 97(1), *Constitution of Kenya*, 2010.

<sup>190</sup> Article 100, *Constitution of Kenya*, 2010.

<sup>191</sup> Article 27(3), *Constitution of Kenya*, 2010.

<sup>192</sup> Article 27(6), *Constitution of Kenya*, 2010.

<sup>193</sup> Article 95(2), *Constitution of Kenya*, 2010.

<sup>194</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

<sup>195</sup> Article 95(2), *Constitution of Kenya*, 2010.

<sup>196</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

participate in the budget making process.<sup>197</sup> They should also ensure that the provisional budget includes all issues that the counties they represent face. They should ensure that they critically analyse policy proposals from the executive branch.<sup>198</sup>

### ***Vetting of appointees***

Women representatives should ensure that appointees to various offices meet the minimum one third gender threshold. They should also promote representation of other marginalized groups such as the youth and people with disabilities.<sup>199</sup>

### ***Constitutional Amendment***

As legislators, they play a role in ensuring that amendments to the Constitutions meet the interests of the people of Kenya especially special interest groups.<sup>200</sup>

### ***Protection of the Constitution, democratic governance and rule of law***

Women representatives have a role in ensuring that everyone is treated equally in front of the law and that the Constitution and other laws are not violated. They also have a role in ensuring that the Constitution and other laws are not violated.<sup>201</sup>

## **Result of presence of Women Representatives in Parliament**

### ***Guaranteeing Equality for Women in Parliament***

Women representatives complement the current number of women in parliament by boosting the representation of women in the 11<sup>th</sup> parliament by 23% however this percentage remains below the required 33% threshold.<sup>202</sup>

### ***Affirmative Action Social Development Fund***

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<sup>197</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

<sup>198</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

<sup>199</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

<sup>200</sup> Article 94(3), *Constitution of Kenya*, 2010.

<sup>201</sup> Article 3(1), *Constitution of Kenya*, 2010.

<sup>202</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

Women representatives have set aside a fund known as the Affirmative Action Social Development Fund.<sup>203</sup> This is a fund similar to the Constituency Development Fund (CDF). This fund has been used by women representatives to enable them to implement their projects at county level.<sup>204</sup> This fund has helped in the recuperation of sexual assault survivors as well as nurturing helpless young people.<sup>205</sup> The High Court ruled CDF unconstitutional however they play a role in oversight of the implementation of the fund.<sup>206</sup>

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<sup>203</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

<sup>204</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

<sup>205</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

<sup>206</sup> Githinji G, 'The Role of Women Representatives in Kenya'. August 18 2016-  
< <https://www.politicalkenyan.com/role-of-women-representatives-in-kenya/>> on 3 March 2017.

## **CHAPTER FIVE**

### **A COMPARATIVE STUDY**

#### **Introduction**

The Convention on the Elimination of All Forms of Discrimination Against Women is a manifestation of State party's intention to condemn all forms of discrimination against women and to pursue all necessary means and policy to eliminate all forms of discrimination against women.<sup>207</sup>

Article 4 of the CEDAW mentions the need for States to take up affirmative action measures to realize equal opportunity and treatment for both men and women.<sup>208</sup>

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) was adopted in Maputo, Mozambique on 11 July 2003 and came into force on 25 November 2015.<sup>209</sup> It was adopted as a hallmark of women's human rights and gender equality.

Article 9 of this protocol provides for the right that women have to political and decision-making processes.<sup>210</sup> It further expounds that States should take positive action measures to promote participative governance and equal participation of women in political life through affirmative action, enabling national legislation and other measures to ensure that:

- there is non-discriminative participation of women in elections,
- there is equal representation of women in electoral processes,
- Equality of men and women at all levels of development.

This Article also provides that State parties should ensure increased and effective representation and participation of women in decision-making.<sup>211</sup>

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<sup>207</sup> Article 2, *CEDAW*.

<sup>208</sup> Article 4, *CEDAW*.

<sup>209</sup> *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003.

<sup>210</sup> Article 9(1), *African Women's Protocol*, 2003.

<sup>211</sup> Article 9(2), *African Women's Protocol*, 2003.

These provisions of the African Women's Protocol place the mandate of promoting equality of men and women on States. This is through inclusive participation and representation of women in political life at all levels of decision-making. This further crystallizes the commitment of member States to create a level-playing field for men and women.

### **Comparative Study**

This Chapter will look into two States: Senegal and Uganda which have ratified the African women's protocol and how they are implementing Article 9 of the same and Article 4 of the CEDAW.

#### ***Senegal***

The history of women's representation was not a promising one although from 1963-2012, there has been significant progress, from 1 woman parliamentarian in 1963 to 64 in 2012.<sup>212</sup> Between 1978 to 1983, the number of women in parliament increased by 8 (10.83%). The period of 2007-2012 also saw an increase in women's representation in parliament with an increase of 37, a percentage of 44.6% representation of women due to the application of the Gender Parity law.<sup>213</sup>

Senegal ratified The Protocol the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in December 2004. In 2010, Senegal enacted a Gender Parity law.<sup>214</sup> This law ensured gender equality in all elected institutions whether wholly or partially.<sup>215</sup> This law made it an obligation for party lists to embody equality and alternately include both male and female candidates.<sup>216</sup> This ensured that women featured in both leading and deputized roles and not only the tail end of the lists.<sup>217</sup> All parties which do not comply with this law, whose candidates' lists are not gender parity compliant, are rejected.<sup>218</sup> Senegal also aligned its Electoral law 1992 with its Gender Parity law of 2012. To this effect

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<sup>212</sup> Sane A, *Gender Inequality in the Process of Good Governance: The Case of the Senegalese Parliament*, 2015, 10.

<sup>213</sup> Sane A, *Gender Inequality in the Process of Good Governance*, 10.

<sup>214</sup> *Senegal Gender Parity Law*, 2010.

<sup>215</sup> Biegon J, *Gender Equality and Political Processes in Kenya, : Challenges and Prospects*, Strathmore University Press, Nairobi, 2016, 154.

<sup>216</sup> Article 2, *Senegal Gender Parity Law*, 2010.

<sup>217</sup> UN Women, *Reflections on Gender Parity in Africa: Gender Parity in Senegal Dakar*, 2011, 19

<sup>218</sup> Article 2, *Senegal Gender Parity Law*, 2010.

Article L.145 applies the gender parity rule by ensuring that all parties submit candidates' lists containing both genders alternately.<sup>219</sup>

### *Effect of the Parity Law in Senegal*

The Gender Parity law was applied in the Senegal legislative elections of July 2012. The result of this was that there was 44.6% representation of women in parliament, a historic record of 64 women out of 150 parliamentarians.<sup>220</sup>

The result of more women being voted into parliament has been positive. The increased number of women in parliament, having more influence, voted in a nationality law.<sup>221</sup> The effect of this law is that women could now give citizenship to their children regardless of their father's nationality. Women parliamentarians can be seen to be reaching into issues that were fairly disregarded when women were not well represented in parliament.

There has also been the creation of the Social Protection and National Solidarity Agency (DGPSN a French acronym) which establishes an effective State intervention in the field of Social Welfare and National Solidarity.<sup>222</sup> The women in parliament also took up initiatives such as allowances to be given to Senegalese families.

### *Uganda*

Uganda ratified the Maputo Protocol on 22 July 2010.<sup>223</sup> Uganda was a few steps ahead as they already had a legal framework that sought to facilitate the attainment of gender parity in politics, specifically parliament. In 1995, Uganda included an affirmative action clause to protect the rights of marginalized groups including women to address past imbalances.<sup>224</sup> The Constitution also provides for the reservation of one seat in each district for women, a total of

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<sup>219</sup> Article L.145, *Law 92-16 of 1992 as amended by law 2012-01 of 2012*.

<sup>220</sup> UN Women, *Gender, Governance and Women's Political Participation*, March 13 2013-  
<<http://www.un-instraw.org/oldproyecto-participacionpolitica/general/gender-governance-and-women-s-political-participation.html>> on 25 February 2016.

<sup>221</sup> Sane A, *Gender Inequality in the Process of Good Governance*, 24.

<sup>222</sup> Sane A, *Gender Inequality in the Process of Good Governance*, 31.

<sup>223</sup> African Union, Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa —<http://www.achpr.org/instruments/women-protocol/ratification/> viewed on 2 November 2016.

<sup>224</sup> Article 32.1, *Constitution of the Republic of Uganda*, 1995.

112 women district representatives in parliament from each of the 112 districts in Uganda.<sup>225</sup> As a result, the Parliamentary Elections Act, 2001 was passed elaborating on the procedure necessary to select and elect the women representatives.<sup>226</sup>

Consequently the Local Government Act was passed in 1997 to lay the groundwork for the implementation of affirmative action.<sup>227</sup> It stipulated that: women councilors must form a third of the membership of local government councils, it also stipulated the minimum number of women that should be appointed into local government statutory committees and commissions.<sup>228</sup> This Act was consequently implemented in the elections of 1998.<sup>229</sup>

Playing a complimentary role to the legislation of affirmative action is the central government which has provided structures for the decentralization political and financial roles of government.<sup>230</sup> This has been seen to take decision making closer to the subjects of decisions. The local government structure has been divided into three tiers. This includes the Local Council 1 (LC1) which refers to the village administrative structure.<sup>231</sup> This structure forms the basic rural and political unit of administration in Uganda.<sup>232</sup> It consists of an executive committee which has been appointed by the village council for the purposes of governance in the village.<sup>233</sup> The next tiers of Local Council are LC2 (parish level, covering several villages); LC3 (sub-county); LC4 (county); and finally LC5 (district).<sup>234</sup>

### *Effect of Affirmative Action in Uganda*

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<sup>225</sup> Article 78(1) (b), *Constitution of Uganda*, 1995.

<sup>226</sup> Article 11, *Parliamentary Elections Act*, 2001.

<sup>227</sup> *Local Government Act* (1997).

<sup>228</sup> *Local Government Act* (1997).

<sup>229</sup> Johnson D, Hope K, Santa K, 'Women in Ugandan Local Government: The Impact of Affirmative Action' 11(3), *Gender & Development*, 2003, 8.

<sup>230</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 9.

<sup>231</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 9.

<sup>232</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 9.

<sup>233</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 9.

<sup>234</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 16.

Women have had influence over budgetary decisions.<sup>235</sup> There has been seen to be an impact in the allocation of funds as women, bringing a different dimension to decision making have lobbied for facilities that help the whole society such as health.<sup>236</sup>

More money has also been allocated towards the women's vote. At the LC3 and LC5 levels, these funds have been used to mobilize and sensitize women on their rights and on particular issues that affect them.<sup>237</sup> This includes health issues such as nutrition and immunization of children. The women councilors play a large role in this as they go out into the villages and talk to the women on particular issues.

Another impact of affirmative action is the provision that at least one third of the seats in the Local Council Courts (LC1 courts) were mandatorily reserved for women.<sup>238</sup> It provides for an accessible conflict resolution system, for villagers who may not have the access or capacity to approach higher courts.<sup>239</sup>

### **Problems Facing the Implementation of Gender Affirmative Action Laws in Senegal and Uganda.**

Below are cross-cutting problems found to have been affecting the implementation of Gender Affirmative Action Laws facing women in politics, especially parliament, in Senegal and Uganda.

1. The institutional structure undermines the legislation and policies supporting affirmative action.<sup>240</sup>

In Uganda the central ministry necessary for Gender issues constantly underwent restructuring in name and strategy. There was a move from a Women in Development (WID) focus towards a Gender and Development (GAD) focus. Currently, the national-level institution for policy development on gender is the Ministry of Gender, Labour, and Social Development (MGLSD).<sup>241</sup>

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<sup>235</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 16.

<sup>236</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 16.

<sup>237</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 17.

<sup>238</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 17.

<sup>239</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 17.

<sup>240</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 10.

<sup>241</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 10.

2. Limited resources are allocated towards the institutions responsible for the inclusion of women in decision making.<sup>242</sup>

This was a major limitation as implementation was difficult if the institutions necessary for this lacked the funds. In Uganda the National Gender Policy of 1997 could not be implemented due to lack of funds allocated to the Ministry of Gender, Labour, and Social Development (MGLSD).<sup>243</sup>

3. The lack of training on the rules and regulations of the parliament<sup>244</sup> and the lack of skills and understanding.<sup>245</sup>

In both Senegal and Uganda a major problem was the lack of formal education of the women. This led to their limited understanding in their requirements on the job as well as a limitation to their language. Many could therefore not read or write or communicate in a language other than the local one. This problem was identified in Uganda.<sup>246</sup> In Senegal the problem was that there was a requirement for official laws and texts to be in French however the understanding of French was very limited.<sup>247</sup>

4. Men's fears over gender power relations

Several men upon being interviewed revealed that the new found independence of women in having a job and earning a salary would cause them to leave their homes.<sup>248</sup> The Senegalese patriarchal attitudes stemmed from a misconception of Islam that women should not challenge the ideas of male authorities.<sup>249</sup>

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<sup>242</sup> Sane A, *Gender Inequality in the Process of Good Governance*, 27.

<sup>243</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 10.

<sup>244</sup> Sane A, *Gender Inequality in the Process of Good Governance*, 27.

<sup>245</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 10.

<sup>246</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 11.

<sup>247</sup> Sane A, *Gender Inequality in the Process of Good Governance*, 27.

<sup>248</sup> Johnson D, *et al*, 'Women in Ugandan Local Government', 12.

<sup>249</sup> Sane A, *Gender Inequality in the Process of Good Governance*, 31.

## **CHAPTER SIX**

### **FINDINGS, RECOMMENDATIONS AND CONCLUSION**

#### **Findings**

#### ***Kenya Lacks Adequate Mechanisms for the Implementation of the Two-Thirds Gender Rule***

As evidence in the preceding chapters of this paper, Kenya lacks adequate mechanisms, for the implementation of the two-thirds gender rule. This has been visited in chapter 3, where the various provisions of Kenyan law have been analyzed. The Constitution of Kenya 2010 outlines several provisions which establish affirmative action for the purpose of redressing the effects of marginalizing specific groups of society. This paper specifically contemplates the provisions in relation to women.

The provisions in the Constitution 2010 are clearly outlined however there have been no consequent steps taken in order to implement these crucial provisions.<sup>250</sup> The Supreme Court advisory opinion of 2012 established that the realization of the two-thirds gender rule was to be progressive.<sup>251</sup> In turn, the Supreme Court set a deadline for the Commission on the Implementation of the Constitution (CIC) to table the relevant Bills before parliament in order to implement the two-thirds gender rule.

To date, there has been no action taken to implement the two-thirds gender rule in the form of legislation or relevant policies.

#### ***Lack of Political Unwillingness***

There is lack of political will to ensure that the two-thirds gender rule comes to fruition. There was a Constitution of Kenya (Amendment) bill, 2015 (the Chepkong'a Bill).<sup>252</sup> This bill was lobbied against, leading to the Duale bill. This Bill was published on 24 July 2014

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<sup>250</sup> *Constitution of Kenya, 2010.*

<sup>251</sup> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR.

<sup>252</sup> *The Constitution of Kenya (Amendment Bill) 2015* published by Samuel Chepkong'a, Chairperson, Justice and Legal Affairs Committee on 30 April 2015.

and it set a requirement that beneficiaries of affirmative action occupy office for a maximum of two terms.<sup>253</sup> The Bill was defeated. There is general unwillingness to enact legislation to realize the two-thirds gender rule.

### **Recommendations**

Based on the comparative study of the jurisdictions of Senegal and Uganda, 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.

#### ***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.<sup>254</sup> 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.<sup>255</sup> 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.<sup>256</sup>

#### ***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. In Senegal the concept of “Zebra lists” is one such example. This is where party nomination lists would include nominees from both genders listed alternately such that women do not only receive deputized roles but equally top roles.<sup>257</sup>

The laws should also mandate the implementation of party-driven measures to ensure that elections are more inclusive. This would include the mandating of reform of party by-laws,

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<sup>253</sup> *Two-Third gender Rule Laws (Amendment Bill) 2015* tabled by Aden Duale, majority Leader, National assembly on 31 July 2015.

<sup>254</sup> Article 177(1), *Constitution of Kenya*, 2010.

<sup>255</sup> Article 177(1)(b), *Constitution of Kenya*, 2010.

<sup>256</sup> FIDA, *Key Gains and Challenges: A Gender Audit of Kenya’s 2013 Election Process*, 2013, 37.

<sup>257</sup> Article L.145, *Law 92-16 of 1992 as amended by law 2012-01 of 2012*.

the requirement for policy documents to comply with the quest for gender parity, recruitment and preparation of women for leadership roles.<sup>258</sup>

Such laws should also specifically touch on party constitutions as this constitutive document provides the true benchmark of the commitment of a party towards ensuring there is gender equity in the electoral process.<sup>259</sup> These laws should also ensure that parties declare their unwavering support for gender parity through their policy statements.

These laws should also ensure that women actively take part in the decision-making of the parties. These laws should ensure that women take up key roles as opposed to deputized roles in order that they may be able to have a meaningful say in the process.<sup>260</sup> This can be achieved through quotas dictating the number of women who would take up key roles in the party.<sup>261</sup>

The implementation of the above may be achieved through auditing or any other form of evaluation.

The strengthening of women's wings in political parties is also a necessary tool.

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

There should be active measures to recruit and prepare women for leadership. An example of an organization carrying out the same work is Early Money is Like Yeast (EMILY's list) in the United States.<sup>262</sup> This organization takes up the role of recruiting women and taking them through training that will equip them to become good leaders. In Kenya this can be taken up by organizations or even the political parties.

### ***Financing***

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<sup>258</sup> National Democratic Institute, *Win with women global action plan* National Democratic Institute, 2005.

<sup>259</sup> National Democratic Institute & United Nations Development Program, *Empowering women for stronger political parties*, 17.

<sup>260</sup> National Democratic Institute & United Nations Development Program, *Empowering women for stronger political parties*, 17.

<sup>261</sup> National Democratic Institute & United Nations Development Program, *Empowering women for stronger political parties* 20.

<sup>262</sup> Biegon J, *Gender Equality and Political Processes in Kenya*, 106.

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.<sup>263</sup> Political parties can take up these funds for the implementation of programmes for the uplifting of women. These funds can be used in establishing the women's wings in the political parties as well as recruiting and training women. Private sources of funds may also be sought through private firms and other fund-raising activities.<sup>264</sup>

### ***Education of voters***

Women have continuously been sidelined from positions of leadership due to stereotypes that have been constantly perpetuated. This can be done through civic education as well as party – driven campaigns.<sup>265</sup> Political parties during their campaigns can incorporate messages that attempt to undo the stereotypes and promote the idea of women in leadership.<sup>266</sup>

### **Conclusion**

Women play an important role in society and therefore it is equally important to ensure that they take up leadership roles to represent these specific interests. In Kenya, the quest for gender parity in political life began in 2010 with the promulgation of the New Constitution which mandated affirmative action programmes to redress the problems of marginalization of women. The two-thirds gender rule set out in the Constitution is supposed to ensure that not more than two thirds of one gender will occupy elective bodies. This has been a good start for Kenya however it has been derailed by the lack of adequate mechanisms for its implementation. This paper has analyzed other jurisdictions and their manner of implementing affirmative action. Kenya can pick up a few of those mechanisms as discussed in the recommendations. Kenya is in another election year and there are still no mechanisms to implement affirmative action. It is hoped that this will force the relevant stake-holders to go back to the drawing board and establish working implementation mechanisms of the two-thirds gender rule to avoid a similar situation to that after the 2013 elections where not enough women were part of the elective bodies.

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<sup>263</sup> Section 26 (1) (a), *Political Parties Act*, 2011.

<sup>264</sup> Biegon J, *Gender Equality and Political Processes in Kenya*, 108.

<sup>265</sup> Biegon J, *Gender Equality and Political Processes in Kenya*, 111.

<sup>266</sup> Biegon J, *Gender Equality and Political Processes in Kenya*, 111.



## **APPENDICES**

### **Appendix 1**

Parliament	Period	Total No. of Constituencies	No. of Women Elected	Available Slots for Nomination	No. of Women Nominated
1st parliament	1963-1969	158	0	12	0
2nd parliament	1969-1974	158	1	12	1
3rd parliament	1974-1979	158	4	12	2
4th parliament	1979-1983	158	5	12	1
5th parliament	1983-1988	158	2	12	1
6th parliament	1988-1992	188	2	12	0
7th parliament	1992-1997	188	6	12	1
8th parliament	1997-2002	210	4	12	5
9th parliament	2002-2007	210	10	12	8
10th parliament	2007-2012	210	16	12	6

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