

TRACING THE JOURNEY



TOWARDS IMPLEMENTATION
OF THE TWO THIRDS GENDER PRINCIPLE



Changing You, Transforming All!

TRACING THE JOURNEY: TOWARDS IMPLEMENTATION OF THE TWO THIRDS GENDER PRINCIPLE

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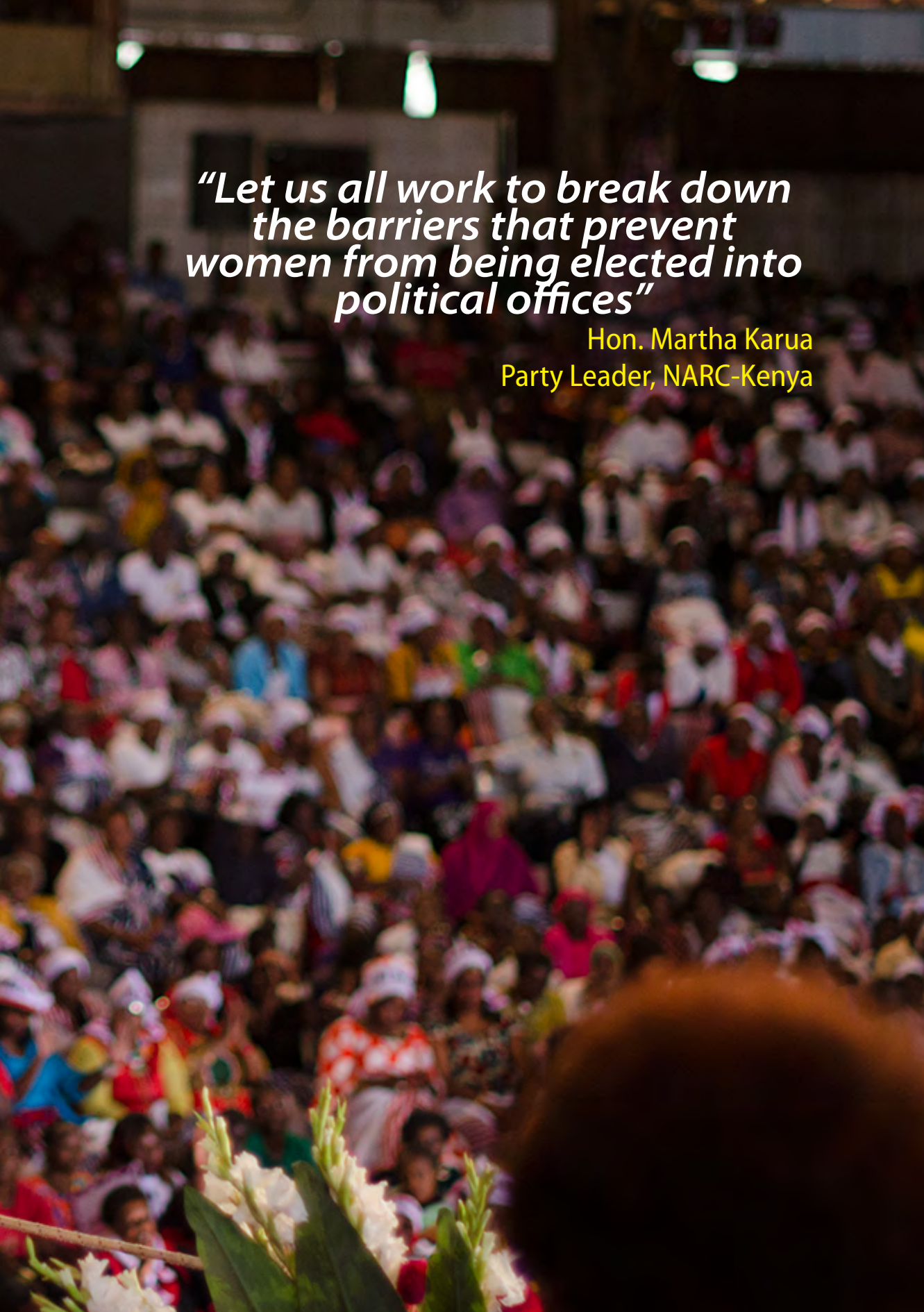
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A large, dense crowd of people is gathered at night, filling the lower two-thirds of the frame. The scene is dimly lit, with some overhead lights visible at the top. The crowd consists of many individuals, some wearing white shirts, and others in more colorful attire. In the bottom foreground, there are some green leaves and white flowers, possibly part of a floral arrangement. The overall atmosphere suggests a significant public event or rally.

***“Let us all work to break down
the barriers that prevent
women from being elected into
political offices”***

**Hon. Martha Karua
Party Leader, NARC-Kenya**

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ABBREVIATIONS

AG:	ATTORNEY GENERAL
CAJ:	COMMISSION ON THE ADMINISTRATION OF JUSTICE
CIC:	COMMISSION ON THE IMPLEMENTATION OF THE CONSTITUTION
CIC:	CONSTITUTION IMPLEMENTATION COMMITTEE
CMD:	CENTRE FOR MULTI-PARTY DEMOCRACY
FIDA:	FEDERATION OF WOMEN LAWYERS
COK:	CONSTITUTION OF KENYA
CREAW:	CENTRE FOR RIGHTS, EDUCATION AND AWARENESS
CRAWN:	COMMUNITY ADVOCACY AND AWARENESS TRUST
CWRS:	COUNTY WOMEN REPRESENTATIVES
IEBC:	INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
KHRC:	KENYA HUMAN RIGHTS COMMISSION
KNCHR:	KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
LSK:	LAW SOCIETY OF KENYA
MCA:	MEMBER OF COUNTY ASSEMBLY
MP:	MEMBER OF PARLIAMENT
NGEC:	NATIONAL GENDER AND EQUALITY COMMISSION
PWDS:	PERSONS WITH DISABILITIES
TWG:	TECHNICAL WORKING GROUP
WEL:	WOMEN'S EMPOWERMENT LINK

FOREWORD



Wangechi L. Moegi

Executive Director
Centre for Rights Education and Awareness

In Article 81, the Constitution of Kenya states that “the electoral system shall comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender”. But implementation of the principle (popularly referred to as the two-thirds gender rule), has been fraught with challenges. The post 2010 experience of getting the relevant law enacted began with a debate on whether the principle should be implemented before or immediately after the first general elections under the new constitution. In this regard, Hon. Mutula Kilonzo developed the Constitution of Kenya Amendment Bill of 2011 to provide for post-election nomination of such number of women necessary to meet the two-thirds gender principle. However, this bill lapsed without being debated.

Towards the end of the Supreme Court deadline, women leaders and civil society organisations became apprehensive that the two-thirds gender law would not be enacted within the stipulated timeframe. The women therefore moved to the High Court seeking to compel the Attorney General to publish the bill, which the court directed to be done within 40 (forty) days. The Constitution of Kenya Amendment Bill (2015), popularly known as the Duale I Bill, was thus published and tabled in parliament for debate. However, it failed to go through.

As a consequence, the 11th parliament failed to meet the Supreme Court deadline of 27th August 2015. However, parliament activated the provision of Article 261(2) of the COK which allowed it to extend the deadline for enactment of the law by one year. Ironically, whereas parliament failed to raise the necessary numbers to pass Duale Bill I, it was able to raise a similar majority to extend the timeline! When the one year extension lapsed, parliament again failed to pass the bill. This meant that by 27th August 2016, parliament had spent all constitutional timelines without enacting the two-thirds gender law.

In September 2016, CREAM and other human rights organizations moved to court seeking to challenge the failure of parliament to pass the law. The National Gender and Equality Commission and the Law Society of Kenya joined to support the case. The High Court, in its judgment delivered in March 2017:

- a) Found that parliament had failed in its constitutional and legal duty to pass the two-thirds gender law.
- b) Determined that such failure occasioned a violation of women's rights and the Constitution.
- c) Directed parliament to enact the law within 60 (sixty) days from the day of judgement.
- d) Noted that if parliament failed to pass the law, any public spirited person could petition the Chief Justice to advise the President to dissolve parliament.



In 2012, the Honourable Attorney General, Prof. Githu Muigai, approached the Supreme Court for an advisory opinion seeking to know whether the principle would be required to be implemented in the 2013 general elections. The Supreme Court allowed parliament a grace period of five years, meaning the law would have to be in place by 27th August 2015. Subsequently, the Office of the Attorney General and the National Gender and Equality Commission established a Technical Working Group (TWG) in 2014 to develop a formula for implementation. Members of the TWG were drawn from constitutional commissions, Law Society of Kenya, and civil society organizations. The TWG generated eight proposals but ultimately settled on a post-election mechanism that required an amendment to the Constitution.

The 60 (sixty) days lapsed without parliament doing its duty. Aggrieved by this turn of events, the petitioners wrote to the Chief Justice, Hon. David Maraga, in June 2017, requesting him to advise the President to dissolve parliament as directed by the High Court and required by the constitution. It remains unknown whether this happened since the Chief Justice had not responded to the letter by the time of this publication. Ultimately, the 11th parliament completed its term without having passed the law or being dissolved.

Following the gazettelement of the results of the 2017 general elections, the composition of the 12th parliament fell below the constitutional threshold of not more than two-thirds of either gender, which would have required that there be at least 117 women in the National Assembly and 23 in the Senate. Because the National Assembly has 23 women elected in single constituency seats, 47 elected county women representatives (CWRs) and six nominated women bringing the tally to 76, it has a deficit of 41 to fulfil the constitutional requirement.

In the Senate, three women were elected, 16 nominated by parliamentary political parties and two nominated (one to represent the youth and the other to represent persons with disabilities). Thus the count for the Senate is 21 hence a deficit of two.

Aggrieved by this shortfall, CREAW and the Community Advocacy and Awareness Trust (CRAWN TRUST) moved to the High Court in August 2017 to challenge the constitutionality of parliament based on its composition. The Federation of Women Lawyers (FIDA Kenya) filed a separate but related case. The two petitions were consolidated and are still pending hearing. The National Gender and Equality Commission and the Law Society of Kenya joined to support the case.

In February 2018, parliament jumpstarted the process of enacting the two-thirds gender law. As a consequence, the High Court directed the petition to be mentioned in January 2019 to allow parliament time to enact the legislation.

The purpose of this publication, therefore, is to highlight these political and legal developments towards implementation of the two-thirds gender principle. Important to note is the lack of political will towards the goal. Secondly is the outright disobedience of court orders by parliament. Thirdly is the flagrant impunity the legislature is showing by continuing to operate yet it is unconstitutional. Passing the two-thirds gender law is a matter of constitutional compliance, yet parliament has made it a matter of political choice.

I hope that this publication will be a useful quick reference on the post-2010 journey towards the implementation of the two-thirds gender principle.

ACKNOWLEDGMENTS

The Centre for Rights Education and Awareness (CREAW) would like to recognize the hundreds of women and men who have dedicated their time and resources to ensuring constitutionalism in Kenya and pursuing actualization of the two-thirds gender principle provided for in the Constitution of Kenya 2010.

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EXECUTIVE SUMMARY

The implementation of the two-thirds gender principle must be understood in the context of the search for broader political inclusion for women. The principle is firmly entrenched in the Constitution of Kenya 2010. This makes its implementation a matter of constitutional compliance rather than choice as the justification was already debated and settled in the constitution making processes. This publication, divided into five parts, documents the milestones in the quest for its implementation.

Part I reflects on the historical and systematic marginalization of women through distinct social and legal imperfections that relegated women to the periphery of public political life. Since the objective of this publication is to trace the post-2010 journey towards implementation, the historical context is highly summarized just to recapitulate on the justification for women's inclusion in political positions.

Part II examines the shift from gender-neutral to gender-sensitive laws that take into account the difficult historical and pre-2010 context. It notes that the clamour for a new constitution was partly attributable to the people's yearning for a new dispensation that embodies greater democracy, respect for human rights, inclusion and representation of all voices— especially of the historically marginalized and special interest groups.

Part III reviews the advocacy and legislative proposals that have been made to get the principle implemented. Part IV focuses on the judicial interventions supporting the realization of the principle. It demonstrates that a robust, independent and functional judiciary is necessary for faithful implementation of the Constitution. This part highlights the various progressive judicial pronouncements on the matter.

Part V takes a look at the parliamentary debates on the issue to show the link between the failure to enact the law and lack of political will. It illustrates that despite robust political rhetoric in support of the two-thirds gender principle, members of parliament have consistently failed to pass the relevant bill.

Nothing reveals this more than the debate at the second reading of the Constitution of Kenya (Amendment) Bill (2015) popularly referred to as the Chepkong'a Bill, which urged for "progressive" realization of the two thirds gender law. It was shocking to see legislators who had publicly expressed unequivocal support for an earlier bill by Hon. Aden Duale Bill beat a hasty retreat during debate on the Chepkong'a Bill.

Part VI calls for reframing of the conversation on the two-thirds gender principle. Its key message is that the Constitution, however eloquent and well-articulated, is not self-

executing on the two-thirds gender principle. There is, therefore, need for a matching culture of compliance. To preserve the constitution's reputation for transformation, this part calls for vigilance and protection of the critical beacons of the Constitution. It also encourages constitutional conversations on inclusion at all levels.

Although the publication focuses on enactment of the two-thirds gender law, it also acknowledges the court judgments on implementation of the principle in appointive positions. A summary of these judgements is contained in the annexure.

PART I: THE CONTEXT

Introduction

At the core of the Constitution of Kenya (COK, 2010) is the belief that there can only be real progress in society if all citizens participate fully in their governance, and that all, male and female, persons with disabilities (PWDs) and all previously marginalized and excluded groups are included in the affairs of the republic.

Specifically, the Constitution provides in Article 81 (b) that “the electoral system shall comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender”. The persistent challenge has been on how to actualise this core commitment in Kenya’s National Assembly and Senate as prescribed. This publication traces the efforts to implement the commitment through legislation.

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

1.1 Overview of Post-Independence Women’s Representation

Kenya has held presidential, parliamentary and local government elections every five years since independence in 1963 in accordance with the country’s Constitution. For most of the independence period, the country operated a one party system of government until 1992 when multiparty democracy was re-introduced through an amendment to the Presidential and National Assembly Elections Act.

The first post-independence general elections served as the harbinger of women’s exclusion from Kenya’s electoral politics. Although women compose at least 50.44% of the population, there was not a single one elected to the legislature in 1963. Since then, the numbers have marginally improved as follows: 4.1% in 1997; 8.1% in 2002; and 9.8% in 2007. As the table below demonstrates, it is only after the promulgation of the new constitution in 2010 that the numbers have substantially increased.

Table 1: Composition of the National Assembly Since 1963

PARLIAMENT	DATE	CONSTITUENCIES	ELECTED WOMEN	TOTAL NOMINATED MEMBERS	NOMINATED WOMEN
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	4
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	2007-2013	210	16	12	6
11TH PARLIAMENT	2013-2017	290	16	12	5
12TH PARLIAMENT	2017-2022	290	23	12	6

Table 2: Composition of the Senate

PARLIAMENT	DATE	COUNTIES	WOMEN ELECTED	NOMINATED MEMBERS YOUTH / TOTAL	NOMINATED MEMBERS WOMEN
11TH PARLIAMENT	2013-2017	47	0	2	2
12TH PARLIAMENT	2017-2022	47	3	2	1

The reasons for women’s exclusion from national elective offices are discussed below.

1.2 Patriarchal Culture

The republic emerged from a deeply patriarchal society run by a council of elders with no significant input from women. In patriarchal society—the rule of fathers—male domination is institutionalized in both private and public spheres of life. In such a society, women are consigned to domestic chores while men dominate the public and productive spheres, including decision-making organs. This bestows on men the power to control all material and socio-political resources including women’s labour and time.

Systematic exclusion of women from the public and productive spheres meant limited access to financial resources to support electoral campaigns. Even where they did have the money, negative cultural stereotypes meant that the public domain was perceived and constructed as an exclusive male territory. This dynamic has continued to persist and explains the historical gender imbalance in political leadership in Kenya.

1.3 Electoral Violence

Elections in Kenya are habitually marked by violence. This culture creates a climate of fear for female candidates as it threatens life and family and also demoralizes and discourages women from seeking competitive political positions.

Further to this, inadequate political socialization of women implies that they lack strategic political information and do not develop the art of oratory required for campaigning. The end result is their continued marginality in mainstream political party hierarchy and absence from corridors where rules of political engagement are shaped and defined.

1.4 Gender-Neutral Laws

The repealed Constitution of Kenya 1969 at first glance displayed the language of non-discrimination and inclusion. For instance, Section 70 stated thus:

Every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, or residence, or other local connection, political opinions, colour, creed or sex but subject to respect to the rights and freedoms of others and for the public interest.

Constitution of Kenya 1969

On the surface, this provision promoted equity. However, its failure to recognize the historical marginalization of women, and make special provisions to cushion them from electoral and political vagaries, meant that the law in fact reinforced de facto discrimination.

Such gender-neutral laws, in a patriarchal society characterized by historical and societal prejudices, meant that women were systematically marginalized and actively suppressed in all spheres of public life.

1.5 First-Past-the-Post Contest

Kenya’s first-past-the-post electoral system or winner takes all, in a predominantly patriarchal society, makes it difficult to achieve women’s inclusion in elective offices. It is less equitable compared to the proportionate member representation system that provides for inbuilt “gender top up” mechanisms. Political contest requires an enormous outlay of social capital which still favours men because of patriarchy. In addition, the first-past-the-post electoral system has produced an overly adversarial and violence-prone political culture in which men thrive because they can hire and retain violent gangs and run nocturnal campaigns at the expense of women candidates.

1.6 Economic Exclusion

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



election campaigns are very expensive and unaffordable for most women candidates.

In the regulations, presidential candidates were allowed to spend up to Kshs.5 billion while candidates running for governor in Nairobi could spend up to Kshs. 433 million in campaigns. Since money is used to popularise candidates, men with more of it had a head-start over women. Further, money skews public choices away from issue-based campaigns.

Although parliament suspended the regulations, it was not because the ceilings were astronomical. Rather, it was because there was confusion on the implementation period since the law required candidates to open campaign finance accounts and set up expenditure committees eight months to the election, yet nominations had not been conducted, thus making it a practical and legal impossibility to enforce them.

1.7 Undemocratic Nominations

Party primaries or nominations in Kenya are often marred by corruption, bribery, and rigging. Most of the time, the outcome is predetermined by the party hierarchy dominated by men. The belief that each party must field strong candidates is often interpreted to mean preference of male over female candidates. The idea that men are more likely to withstand difficult terrains while self-funding their campaigns, as well as sponsoring party activities, effectively locks out women candidates even if they are able to reach the voters. Similarly, direct nominations almost always benefit men because of male domination of the parties. Further, internal party dispute resolution mechanisms are dominated by men whose philosophy is structured by patriarchy. It is for these reasons that women candidates who triumph over male opponents at the primaries are often considered “tough” or “iron ladies”, which reinforces the notion that electoral contests are not for women.

1.8 Influence of International Linkages

The struggle for women’s inclusion in political and decision making processes is related to the global campaign for gender equality. For instance, recognition that women are half of the world population and significantly contribute to development dates back to the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) which entrench the principle of equality. This is elaborated in various instruments including the Beijing Declaration and Platform for Action on Women’s Rights, the Millennium Development Goals and the Sustainable Development Goals.

Specifically, the Beijing Platform for Action, derived from the Fourth World Conference on Women held in 1995, noted that the minimal representation of women in decision making

processes continues to negate democratic principles, including in institutions such as parliament, and subverts the right to political participation as a voter and/or candidate.

The Beijing Platform for Action emphasized that gender equality in decision making is not only a demand for justice or democracy, but also a necessary condition for women’s interests to be taken into account. The motif in the Beijing conference and previous ones held in Mexico (1975), Copenhagen (1980) and Nairobi (1985) is the devoted attention to non-discrimination and equal access to resources towards women’s empowerment. Kenyan women leaders participated robustly in these conferences and applied the resolutions for re-tooling and re-strategizing to address local concerns.



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At exactly 10.27 am yesterday President Kibaki ushered in the Second Republic with the stroke of a pen

PART II: A NEW DAWN

The Shift

The repealed Constitution of Kenya 1969 did not provide for affirmative action measures necessary to reverse systematic and historical marginalization of women. This was addressed in the COK 2010 that was approved through a national referendum and promulgated on 27th August 2010. The design of the new constitution was to inspire national renewal through inclusion and representation of all voices—including especially the historically marginalized and special interest groups.

From Gender-Neutral to Gender-Sensitive Laws

The search for political inclusion in the context of a deeply patriarchal society necessarily required both short and long term strategies. The former would relate to creating an enabling constitutional and legal framework to safeguard women's rights as part of the broader societal entitlements. The repealed constitution recognized the right to equal protection under the law but did not acknowledge the legitimate interest to make the society more equal overall. Therefore, the National Assembly and Presidential Elections Act, now repealed, did not provide special measures to reverse the systematic marginalization of women in the electoral and political processes.

During the constitutional review process, there were clear recommendations that Kenya's laws needed to be reformed to assure women equal enjoyment of their rights to political participation and representation. The new constitution was to be organized around the ideology of inclusion and to shift from the gender-neutral approach which actually entrenched discrimination against women. The new constitution would adopt a gender-sensitive approach taking into account social policy and affirmative action measures to clear the barriers to equal treatment under the law.

In terms of long term strategies, consideration of the cultural and paternalistic context of the right to inclusion and representation in electoral and political processes would be necessary. These would require deeper reflections on societal prejudices against women and promotion of positive aspects of local culture that advance human rights.

While the Constitution would provide a minimum threshold for gender balanced representation, a comprehensive long term strategy to ensure gender parity in electoral and political processes would necessitate programmes and policies designed to remove obstacles that limit women's participation in elections. The State would also be required

to implement a range of anti-discrimination laws and conduct public education to combat social and cultural patterns that reinforce the inferiority of women and perpetuate the superiority of men.

The Constitution's Core Commitments

The view that gender-neutral laws reinforced social injustices and de facto discrimination against women, strongly influenced the constitution's core commitment towards full participation of women in electoral, political and public spheres. Due to the realisation that 'equality' provisions, in and of themselves, would not guarantee equal representation due to the historical exclusion of women, the Constitution embedded certain safeguards for disadvantaged groups.

Article 10 contains the national values and principles of governance which include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development.

Article 27 sets out the non-discrimination provisions providing as follows:

Every person is equal before the law and has the right to equal protection and equal benefit of the law; equality includes the full and equal enjoyment of all rights and fundamental freedoms; women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres; the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth; a person shall not discriminate directly or indirectly against another person on any ground.

Constitution of Kenya 2010

Specifically, Article 27(6) requires the State to "take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination". Further, Article 27(8) requires the State to "take legislative and other measures to implement the principle that

not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”.

With regard to marginalized and special interest groups, Article 81 provides that the electoral system shall comply with the principles that: citizens have the freedom to exercise their political rights under Article 38; not more than two-thirds of the members of elective public bodies shall be of the same gender; and there will be fair representation of persons with disabilities (PWDs).

Article 100 reinforces the above by requiring enactment of legislation to promote the representation in parliament of women, PWDs, youth, ethnic and other minorities and marginalized communities.

Looking at the totality of the constitutional measures and safeguards, the question that emerges is how to bring into reality the constitution’s core commitment to the women of Kenya.

PATHWAY

TWO-THIRDS GENDER PRINCIPLE

THE MUTAMBO BILL

The Constitution of Kenya (Amendment) Bill 2014 proposed by Mwingi Central MP Joe Mutambo

THE DUALE I BILL

The Constitution of Kenya (Amendment) (No.4) Bill 2015, popularly known as the Duale I Bill.

THE CHEPKO BILL

The Constitution of Kenya (Amendment) Bill (2015), referred to as the Chepko Bill, sought to defer implementation of the two-thirds gender principle by proposing to amend Article 81(b) of the Constitution

THE SIJENY BILL

This bill, introduced by Senator Judith Sijeny, echoed the above Duale I Bill entirely.

PART III: THE PATHWAY

Introduction

This part examines the various efforts dedicated towards implementation of the two-thirds gender principle. It is important to observe that despite the short and long term strategies, the quest for implementation introduced fresh challenges that were not anticipated at formulation of the COK 2010. At the level of conceptualization and design, the COK 2010 delivered a significant win for the women of Kenya, and a victory for good governance. The inclusive ideology running through it would help close the gap of systematic exclusion.

However, the makers of the Constitution assumed that its transformative vision would be matched with an equally progressive political culture. This has, unfortunately, not been the case. Since the Constitution is not a self-executing document, it requires altruistic people to implement it. So far, it is apparent that Kenya is short of such people. Thus Kenya's political landscape is yet to fully accommodate the innovations of the Constitution. For instance, since the Constitution binds all persons and institutions (including political parties), one would have imagined that the parties should already have put in place pro-active measures on the two-thirds gender principle in their constitutions and election regulations. As well, political party leaders should declare unequivocal support for any legislative and other measures to guarantee the enactment of the principle. It is in this regard that the initiatives described below have been taken to ensure compliance with the principle.



NG'A

THE DUALE II BILL

The Constitution of Kenya (Amendment) (No.6) Bill (2015, popularly known as the Duale II Bill), was introduced in the National Assembly in February 2018. Similar to the Duale I Bill, it sought to amend articles 97 and 98 of the Constitution

3.1 Advocacy Initiatives

Discussions on the implementation of the two-thirds gender principle have been going on since 2010. A number of initiatives have been attempted in this regard. The first was the formation of the Technical Working Group (TWG) by the Attorney General (AG) on 3 February 2014, comprising of: the Attorney General's Office; Ministry of Devolution and Planning (Directorate on Gender); National Gender and Equality Commission (NGEC); Constitution Implementation Committee (CIC); IEBC; Office of the Registrar of Political Parties; Parliament (Justice and Legal Affairs Committee in the National Assembly and Committee on Legal Affairs and Human Rights in the Senate.); Kenya Women's Parliamentary Association; Federation of Women Lawyers (FIDA-Kenya); and the Commission on the Administration of Justice (CAJ).

A number of proposals were tabled for consideration. While some made specific recommendations to address the attainment of the two-thirds gender principle in elective and appointive offices, others advocated for an overall statutory reform. The proposals were all analyzed and considered in terms of their merit, legality and practicality in the Kenyan context.

3.1.1 Mechanisms without Constitutional Amendments

i. Zoning

This proposal did not require constitutional amendments but creation of 90 constituencies, in the case of National Assembly, and 16 counties, in the case of the Senate, as electoral areas reserved for women. The constitutional and legal justification for zoning is that it is a necessary measure contemplated in articles 27 (6), 8, 81 (b) and 100 of the Constitution. Its justification was that the right to vie for electoral seats is derogable under Article 25. Similarly, the right of citizens to make political choices under Article 38 is subject to reasonable limitations, first in favour of the legitimate needs to implement affirmative action, and second to choose only from among those who have been cleared to contest in the elections. However, political machinations frustrated the implementation of such a mechanism.

Gender Quotas for Party Strongholds

The proposal was a variation of the zoning approach. It was premised on the fact that if political parties commit to implementing the two-thirds gender principle, they must re-organize the nomination of women candidates based on their known strengths. This approach required parties to present lists of candidates that comply with the two-thirds gender principle. However, it imposed an additional obligation upon parties to nominate women candidates from among the existing seats that the party won in the 2013 general elections. If this approach were to be adopted, each party would have nominated women candidates drawn from areas where the party already enjoyed substantial support based on the 2013 election

results. These women would then compete with male contenders from other parties in the electoral area. The assumption here is that the near fanatical regional support for parties would favour the women even if they contested against men.

If this approach were adopted, then political parties would have been required to invoke relevant provisions in their constitutions and the Elections (Political Party Nominations) Regulations 2017 (as amended) and to issue direct nominations to such number of women that are necessary to comply with the two-thirds gender principle. Similarly, the Elections Act would have to be amended to provide for preservation of quotas for women nominees in party strongholds.

However, there would be need for a post-election mechanism to top up the equivalent number of women who may have lost in the elections in order to ensure total compliance. The challenge with this proposal was that the concept of 'party stronghold' is amorphous and changes with time and political dynamics as a strong political party today may not be strong tomorrow and a weak or a non-existent one can be very strong in the next elections. Basing implementation of a law on this kind of uncertainty and subjectivity was not considered prudent as it was likely to cause a lot of confusion in elections. The top up requirement also meant that this proposal was not entirely independent of constitutional amendment to provide for the necessary mechanism.

ii. Best Runner Up

This proposal was that once all the election results have been received, the IEBC would calculate the number of women and men elected. Should the results show that the National Assembly and the Senate did not meet the threshold, the winning candidates in a number of constituencies or counties, as the case may be, would be identified through specific criteria and replaced with the best runner-up candidates who would then be declared the elected legislators.

This mechanism would have guaranteed realization of the two-thirds gender principle. However, it risked changing the composition of parliament and distorting the strength of parliamentary political parties. Furthermore, it would not be attractive to political parties which would have spent a lot of resources in campaigns only to hand over their victory to a candidate from another party for the sake of gender.

iii. Voluntary Quotas

This proposal required political parties to include a requirement in their rules that a certain number of women be nominated during party primaries. It further recommended that

the voluntary quota be made statutory by amending the Elections Act 2011 to have every political party observe the one-third-gender quota in favour of women in their internal party nomination rules. The challenge was that as much as political parties might nominate one specific gender to increase its number in the legislature, the candidate would not be elected if deemed to be weak.

Further, it proposed to make it mandatory for every political party to ensure that at least one-third of its cleared candidates be of either gender. Such provisions would be enforced by de-registering non-compliant parties or denying them their share of the political parties' fund. While this proposal did not guarantee the attainment of the principle, it would have dramatically increased women's chances of getting elected. This mechanism was therefore recommended to complement any other legal quotas considered.

iv. Gender Incentives

The proposal required incorporating voluntary gender quotas through incentives. To encourage political parties to nominate women who stand a chance of being elected, rather than simply comply with statutory obligations., it proposed that section 25 (1) of the Political Parties Act 2011 be amended to provide for financial incentives for political parties bringing women to parliament. An example was to hike the percentage share of state funding to political parties with increased numbers of women elected.

On its own, the mechanism would not guarantee achievement of the two-thirds gender principle. But it would considerably increase the number of women in parliament. It was therefore recommended to complement any other legal quotas considered.

Section 25 of the Political Parties Act has subsequently been amended but not in the manner the proposal anticipated. The amendment provides additional 5% funding to political parties that incorporate women in political party decision making organs. It is therefore a diversionary amendment that does not address the issue at stake.

v. Twinning

In this proposal, political party candidates would be required to contest as pairs/twins and voters choose the preferred ticket. In the case of the National Assembly, for each of the 290 constituencies, and in the case of the Senate, for each of the 47 counties, the candidates run on a ticket of one-woman and one-man or one-man and one-woman, ranked as number one and two. This ranking is the political party's choice through the party primary and is similar to the system of running mates in presidential and gubernatorial elections where a ticket is

a vote to both candidates.

In this post-election mechanism, once all the election results have been received, the IEBC would calculate the number of women and men elected from the winning party tickets considering the first candidate on each ticket. Should the results not comply with the two-thirds gender requirement, the first candidate from each of the winning tickets becomes the Member of Parliament (MP). If not, then affirmative action would be activated so that Candidate 2 (the woman) on the party ticket will be the elected representative. This option gives political parties the prime opportunity and responsibility to secure the gender requirement. At the same time, it provides a remedial affirmative action mechanism. It guarantees that the gender threshold would be attained, does not interfere with the political party strength after elections and does not distort the size of parliament.

3.1.2 Mechanisms Requiring Constitutional Amendments

i. Rotational Seats

For the National Assembly

The proposal was based on assumptions that presented the worst-case scenario that:

- a) None of the 290 constituencies would elect a woman.
- b) None of the 12 special seats to be filled through nomination would be given to a woman (this is possible if all political parties had prioritized a man on top of the political party list and each party gets only one slot). The way to cure this was to make it mandatory for each political party to a woman as the first name on the political party lists.
- c) The only guaranteed seats for women are the 47 county women members to the National Assembly.

The computations would be as follows:

The total membership of the National Assembly = 349 comprising of 290 single constituency seats, 47 CWRs and 12 party nominees.

1. If no woman is elected in the single constituency seats, there would be 290 men + 47 women + 12 men = 302 men + 47 women.
2. 47 women out of 349 is 13.46 % of the National Assembly. Two-thirds = 66.67% while one-third = 33.33%.
3. The deficit would be 19.87% = 70 seats. This is the number of women that would need

to be added to ensure compliance.

The implementation of this option proposed clustering of the 290 constituencies into groups of four, where each cluster must elect a woman in four consecutive electoral cycles. The use of lots was proposed to determine the constituencies to be earmarked “woman-only” in each electoral cycle.

For the Senate

The proposal was based on a worst-case scenario where none of the 47 counties elects a woman. Therefore, there would only be 16 women senators nominated by qualifying political parties and two nominated (one to represent PWDs and the other to represent the youth and special interest groups).

The computations would be as follows:

1. The total membership of the Senate is 67 comprising of 47 elected senators, 16 nominated women, two nominated women and two nominated men to represent women, PWDs and special interest groups.
2. If no woman is elected, there would be 47 men + 16 women + 2 men + 2 women = 49 men + 18 women.
3. 18 out of 67 amounts to 26.87 %. Two-thirds = 66.67% while one-third = 33.33%.
4. Therefore, the deficit would be 6.47% or 4.33 seats rounding up to five seats. This is the number of women that would have to be added for compliance.

The implementation would require reservation of the five seats for women in every general election. To ensure that all counties contribute, this mechanism would have to be applied for 10 electoral cycles.

The rotational mechanism is a pre-election mechanism and is guaranteed to realise the two-thirds threshold. Implementing it would require amendments to the Constitution and the Elections Act 2011. But it is inlaid with several problems.

First, what criteria would be used to determine the woman-only constituencies or counties? In the case of the National Assembly, how would the 290 constituencies be clustered into groups of four? What criteria would be followed in clustering these constituencies? Would they be listed numerically from No. 1 to 290 constituencies with 1-4 forming the first cluster and so on or would the selection be random? The linear listing of constituencies is not based on any objective criterion and would obviously be disputed.

Second, would the constituencies be clustered within their counties and selected randomly? What criteria would be used to cluster constituencies in counties? What would happen to

counties with less or more than four constituencies? Which counties would be merged? Would counties with only four constituencies be compelled to elect only women legislators?

Third, if the selection of constituencies or counties is random, who would preside over drawing of the lots to ensure impartiality? If it is the IEBC, then Article 88(4) or 89 of the Constitution would have to be amended. If it is the Registrar of Political Parties, the Political Parties Act 2011 would have to be amended.

As the above arguments show, the determination of the ‘woman-only’ constituencies or counties would be a highly sensitive political process requiring the kind of consensus that cannot be contemplated in Kenya’s fractious political architecture.

While the rotational proposal may be theoretically possible having taken into account the above questions, its constitutionality may also be challenged on whether designating only one gender to contest elections would not contravene Article 25(2) of the Constitution by:

- Locking out men from contesting elections contrary to Article 97(2) which provides that nothing in that article shall be construed as excluding any person from contesting an election in the 290 constituencies; or Article 38(3) (c) which provides that every adult citizen has the right, without unreasonable restrictions, to be a candidate for public office, or office which the citizen is a member and, if elected, to hold office.
- Restricting some sitting members to run for re-election in the constituencies designated as “women-only”.

This option was considered to be too restrictive and was therefore not recommended.

ii. Reconfiguring Constituencies

This proposal was based on two recommendations with regard to the National Assembly.

The first was that the membership be reconstituted as follows:

- a) Two members (a man and a woman) be elected from each of the 47 counties to the National Assembly, with each county constituting a single-member constituency; and
- b) Six members to be nominated by qualifying political parties proportionate to their strength in the National Assembly (in (a) above).

This option would reduce the size of the National Assembly to 100 members and ensure 50% gender parity. However, it would eliminate constituencies as electoral units and unify the electoral system for the Senate with that for the National Assembly. Technically, it would

alter the electoral system hence require a constitutional amendment.

The second option was similar to the first but recommended a reduction of the constituencies from 290 to 150, where:

- a) Two members (one man and one woman) would be elected from each of the 150 constituencies to the National Assembly; and
- b) 20 members would be nominated to represent special interest groups from qualifying political parties, with 50% gender parity.

This option would have reduced the size of the National Assembly from 349 to 320. While it would guarantee 50% gender parity, it would require amendment of Article 97 of the Constitution on the composition of the National Assembly.

iii. Gender Top-up Through Party Lists

This proposal was based on the self-regulating mechanism in Article 177(1) of the Constitution. Referred to as the “top-up” mechanism, the provision requires that members of the county assembly be nominated in such numbers as to ensure that not more than two thirds are of the same gender.

The computations for the National Assembly would be as follows:

1. The total membership of the National Assembly is 349 comprising 290 single constituencies, 47 seats for CWRs and 12 nominated seats.
2. If no woman is elected, there would be 290 men + 47 women + 12 men = 302 men + 47 women.
3. A third of 302 is 151 women.
4. Since 47 women members are already guaranteed, the balance is 151-47=104 women. This is the number that would have to be topped up. It would balloon the National Assembly to 453 members.

The computations for the Senate would be as follows:

1. The total membership of the Senate is 67 comprising of 47 elected members, 16 nominated women and four nominated representatives of women and special interest groups being two men and two women.
2. If no woman is elected, the Senate would have 47 men + 16 women + 2 men + 2 women = 49 men + 18 women = 67.

3. Since the ratio of men to women would be 49:18, men would already have fulfilled the threshold.
4. To ensure that at least one third of the membership is women, there would be need for an additional seven women which would bring the total membership to 74 i.e. 49 men and 25 women.

The topping-up number of 104 women (in the National Assembly) and seven women (in the Senate) would be done by the IEBC to qualifying political parties in proportion to their parliamentary strength. The names would be drawn by the IEBC from the respective party lists in the order of priority.

This pre-election mechanism would require amendments of the COK 2010 and Elections Act 2011. The Kenya Parliamentary Human Rights Caucus and CWRs supported this option. However, it precipitates a situation where the size of parliament would be unknown before elections and would vary from time to time depending on electoral results.

3.2 Legislative Proposals Requiring Constitutional Amendments

The Duale 1 Bill

The Constitution of Kenya (Amendment) (No.4) Bill 2015, popularly known as the Duale I Bill, sought to amend articles 97 and 98 of the Constitution that provide for the fixed membership of the National Assembly and Senate respectively. The amendment sought to increase the number of special seat members necessary to ensure that no more than two-thirds of the members of the two houses are of the same gender. The number of such special seats would be determined after declaration of the results of a general election.

It was basically borrowed from Article 177(1) (b) of the Constitution where the top-up mechanism is applied to county assemblies. Additionally, the bill proposed a “sunset clause” to have the gender top-up nominations lapse after 20 (twenty) years from the date of the first general election after the amendment is enforced. It also sought to amend Article 177(1) (b) to have the sunset clause apply in county assemblies as well.

Further, it sought to eliminate all pre-existing nominated seats in the National Assembly and Senate including those for youth and PWDs and limit the number of terms a person nominated to the special seat could serve to a maximum of two. The sunset clause was deemed problematic if the obstacles to women’s election would not have been addressed by the expiry of the time. At the same time, imposing term limits are of dubious legality because they take away the electorate’s choice.

The bill was tabled and debated in in the National Assembly but was not passed despite two attempts at the vote. It did not get the support of the minimum number of legislators required for constitutional amendments as provided under Article 256(1) (d) of the COK that such a bill is only successful when each house of parliament has passed it in both its second and third readings by not less than two-thirds of all the total membership.

The Sijeny Bill

This bill, introduced by Senator Judith Sijeny, echoed the above Duale I Bill in its entirety. Like its predecessor, it was not passed.

The Mutambo Bill

The Constitution of Kenya (Amendment) Bill 2014 proposed by Mwingi Central MP Joe Mutambo, sought to relieve parliament of the responsibility of passing the two-thirds

gender law. It sought to reduce the number of constituencies to 141 from the current 290 and set the number of counties at 10. It also sought to eliminate the position of CWRs.

The bill further proposed deletion of Article 81 (b) of the Constitution that provides for the

The objective of this bill is to amend the Constitution to provide for the reduction on the membership of the National Assembly and the Senate. There is proposed deletion on the 47 women representatives and 16 women members nominated to the Senate.

Article 81 (b) Constitution of Kenya 2010

one-third gender rule. The Memorandum of the Bill read as follows:

Further, it sought to set the number of elected MCAs to a maximum of 290 down from the current 1,450 and remove the provision for nominated MCAs. It proposed that the number of elected senators be reduced to 20, two per county with each of the 10 (ten) counties electing a man and woman. It proposed that only six people be nominated to the Senate with two members representing the youth, PWDs and marginalized communities.

Since it touched in the Bill of Rights (Article 27(6) with regard to provisions protecting women's rights to political inclusion and affirmed action to redress past discrimination, the bill required a referendum according to Article 255(1) (e) of the COK 2010. Due to public outcry and intense opposition, it was completely ignored and was never prioritized for debate.

The Chepkong'a Bill

The Constitution of Kenya (Amendment) Bill (2015), also referred to as the Chepkong'a Bill, sought to defer implementation of the two-thirds gender principle by proposing to amend Article 81(b) of the Constitution by inserting "progressive implementation" in the provision. It emphasized more on election of women through capacity building, civic education, facilitation and participation in political party affairs so as to "incrementally achieve the two thirds gender principle."

The bill was rigorously opposed as a subversion of the Supreme Court advisory opinion that provided a deadline for implementation of the two-thirds gender principle. As a consequence, it did not proceed through parliamentary debate.

The Duale II Bill

The Constitution of Kenya (Amendment) (No.6) Bill (2015, popularly known as the Duale I Bill, was introduced in the National Assembly in February 2018. Similar to the Duale I Bill, it sought to amend articles 97 and 98 of the Constitution that provide for the fixed membership of the National Assembly and Senate respectively. It also sought to increase the number of special seats necessary to ensure that no more than two-thirds of the members of the two houses are of the same gender. The number of such special seats would be determined after declaration of the results of a general election.

This mechanism, popularly known as the gender top-up, is borrowed from Article 177(1) (b) on the composition of county assemblies. It retained the “sunset clause” but added that parliament may enact legislation to extend it by a further 10 (ten) years.

Like the previous bill, it sought to eliminate all pre-existing nominated seats in the National Assembly and Senate and limit the number of terms a person nominated to the special seat could serve to two. The bill proposed that its implementation be deferred until and after the 2022 general elections. The Duale II Bill was debated in the National Assembly and was due for voting on November 28, 2018 but the vote was deferred when it was evident that the number of members present was not even the minimum required to pass a constitutional amendment.

5

GENDER
EQUALITY



PART IV: JUDICIAL INTERVENTIONS

Judicial Safeguards

One of the defining aspects of the Constitution is that it provides for a robust, independent and functional judiciary. In a poisonous political context, it becomes even more important that the judiciary should be firm and deliberate in defending and promoting the Constitution and its critical commitments. The emergence of a fiercely independent judiciary has proved useful in supporting the gender discourse. This part, therefore, examines the various judicial pronouncements on the implementation of the two-thirds gender principle.

4.1 Supreme Court Advisory Opinion on Whether to Implement the Two-Thirds Gender Principle Immediately or Progressively

Brief Facts of the Case: Supreme Court Advisory Opinion No. 2 of 2012

This was an application filed by the AG at the Supreme Court in relation to the implementation of the two-thirds gender principle. The advisory opinion was sought on the issue of: whether Article 81(b) of the Constitution required progressive realization of the enforcement of the two-thirds gender rule or the same could be implemented during the general elections scheduled for 4th March, 2013. In short, the Supreme Court was invited to tell Kenyans whether the two-thirds gender principle would apply immediately after the first general election under the COK 2010, or not. And if not, when would it be implemented?

The main concern was lack of a guarantee that the number of women from the lists of nominees provided by political parties would ensure that at least one-third of members in each house of parliament would be of one gender. Further, if the two-thirds gender threshold was not achieved at the ballot, there would be a problem of correcting the deficit since the number of members of the National Assembly and the Senate is predetermined by the Constitution. It was thus necessary to seek the Supreme Court's Opinion ahead of the 4th March 2013 general elections.

Since the advisory opinion was one of general public interest, several bodies sought and were admitted as interested parties. They included the CAJ, IEBC and NGEK. CREAM, the Katiba Institute, the Centre for Multi-party Democracy (CMD), FIDA-Kenya; the Kenya Human Rights Commission (KHRC) and the International Centre for Rights and Governance were admitted as **amicus curiae** (friends of the court).

The Decision

The court arrived at the conclusion that the principle would be realized progressively. However, it stated that the legislative measures for giving effect to the principle should be taken by 27 August, 2015.

4.2 High Court Petition Requiring the Attorney General to Prepare the Bill to Implement the Two-Thirds Gender Principle

Brief Facts of the Case: Centre for Rights Education & Awareness (CREAW) v Attorney General & Another [2015] eKLR

This petition was filed by CREAW in 2015 ahead of the August 27th 2015 deadline by which parliament ought to have taken necessary legislative measures to implement the two-thirds gender principle. The petitioner challenged the failure by the AG and CIC to publish a bill to be considered and passed by parliament in order to bring into force the two-thirds gender rule in the National Assembly and Senate.

The petitioner argued that under Article 261(4) of the Constitution, the AG, in consultation with CIC, had the constitutional obligation to prepare the relevant bills for tabling before parliament as soon as reasonably practicable to enable the latter pass the legislation within the stipulated period. The petitioner argued that from the date of the advisory opinion on 11th December 2012, and indeed from the date of promulgation of the Constitution on 27th August 2010, the AG and CIC were yet to prepare the relevant bill. They further stated that the continued failure to act on the matter was a threat to the Constitution. They therefore sought:

- a) A declaration that, to the extent that the AG and CIC had failed to prepare the relevant bill(s) for tabling before parliament for implementation of the two-thirds gender principle, there was a threat that the Constitution and the Supreme Court advisory opinion would be violated; and
- b) An order compelling the AG and CIC to prepare the relevant bill for tabling before parliament.

The Decision

The court agreed with the petitioners and directed the AG and CIC to prepare the relevant bill for tabling before parliament. It took note of the fact that there had been various processes in the previous year which should have culminated in draft legislation for

presentation to parliament. With this in mind, the court directed that the relevant bill be prepared and submitted to parliament within forty (40) days from the date of judgment.

4.3 High Court Petition Challenging the 11th Parliament's Failure to Pass the Bill to Implement the Two-Thirds Gender Principle

Brief Facts of the Case: Centre for Rights Education & Awareness (CREAW) & 2 Others v Speaker of the National Assembly & 6 Others [2017] eKLR (Petition No. 371 of 2016)

This petition was filed by CREAW, CRAWN TRUST, KHRC, KNCHR, FIDA Kenya, LSK and NGEN to challenge the failure by parliament to pass the necessary legislation giving effect to the two-thirds gender representation rule in the National Assembly and Senate.

At the core of the petition were orders against parliament as follows:

- a) A declaration that the National Assembly and the Senate had failed in their constitutional duty to enact legislation necessary to give effect to the two-thirds gender principle.
- b) An order directing parliament and the AG to take steps to ensure that the required legislation was enacted within the period specified in the order, and to report the progress to the Chief Justice.
- c) An order that if the National Assembly and the Senate failed to enact legislation, the Chief Justice shall advise the President to dissolve parliament and he shall do so.
- d) A declaration that the failure by parliament to enact the legislation amounted to a violation of the rights of women to equality and freedom from discrimination and a violation of the Constitution.
- e) A declaration that in any event, unless the two-thirds gender law was enacted and implemented before the general elections scheduled for 8th August 2017, the resultant National Assembly and Senate, if non-compliant with the two-thirds gender principle, would be unconstitutional.

The Decision

The court agreed with the petitioners that parliament had failed in its duty to enact legislation necessary to give effect to the two-thirds gender principle. It therefore directed parliament and the AG to take steps to ensure that the required legislation was enacted within sixty (60) days from the date of the judgment, and to report the progress to the Chief Justice.

4.3 Appeal at the Court of Appeal Challenging the High Court Judgment that Found that the 11th Parliament had Failed to Pass the Bill to Implement the Two-Thirds Gender Principle

Brief Facts of the Case: [Centre for Rights Education & Awareness \(CREAW\) & 2 Others v Speaker of the National Assembly & 6 Others \[2017\] eKLR](#)

The appeal was filed by parliament to challenge the High Court judgment in Petition No. 371 of 2016 that found that the petitioner had failed to pass the necessary legislation to give effect to the two-thirds gender representation rule in the National Assembly and Senate. At the core of the appeal was an argument that parliament had in fact passed the law in the name of the Political Parties (Amendment) Act where Section 25 was amended to provide that political parties that incorporated women in party decision making organs would receive additional funding. According to parliament, this was an incentive for political parties to comply with the two-thirds gender principle!

The Decision

At the time of publication of this journal, the appeal had been argued but was pending determination. Judgment will be given on notice.

4.4 High Court Petition Challenging the 12th Parliament's Constitutionality for Failing to Comply with the Law on Composition on the Two-Thirds Gender Principle

Brief Facts of the Case: [Centre for Rights Education & Awareness \(CREAW\) & 3 Others v Speaker of the National Assembly & 3 Others \[2017\] eKLR, Petition No. 397 of 2018](#)

This petition was filed by CREAW and CRAWN TRUST, and later consolidated with a similar petition by FIDA Kenya. It argued that the composition of parliament did not meet the two-thirds gender principle, and as such, it was not properly constituted as to be able to transact parliamentary business.

Statistics from the IEBC show that following the 8th August 2017 general elections, only 23 women were elected out of the 290 members of National Assembly elected at the constituency level. In addition, there were 47 CWRs and six (6) women nominated by parliamentary political parties. However, to meet the two thirds gender principle, the National Assembly requires one hundred and seventeen (117) members to be of the opposite gender. Thus the total count of seventy six (76) for women created a shortfall of 41.

At the Senate, only three women were among the 47 elected senators. A further 16 were nominated by parliamentary political parties represented, one nominated to represent the youth and another to represent PWDs. Against the current count of twenty one (21), there is a shortfall of two (2).

Despite these shortfalls, parliament convened for the first sitting on 31st August 2017 pursuant to Article 126(2) which provides that whenever a new house is elected, the President, by notice in the *Kenya Gazette*, shall appoint the place and date for the first sitting of the new house, which shall be not more than thirty days after the election.

Accordingly, the petition sought orders against parliament as follows:

- a) A declaration that the composition of the National Assembly and the Senate has failed to meet the constitutional threshold of the not-more-than two thirds gender principle.
- b) A declaration that the failure by parliament to meet the not-more-than two thirds gender principle amounted to a violation of the rights of women to equality and freedom from discrimination as well as of the Constitution.
- c) An order directing parliament to pass the necessary legislation to implement the two-thirds gender principle.
- d) Any other or further orders that the court may deem fit.

The Decision

At the time of publication of this journal, the petition was pending hearing and determination.

4.5 High Court Petition Seeking to Compel Political Party List of Candidates for Elections to Comply with the Two-Thirds Gender Principle

Brief Facts of the Case: Katiba Institute v Independent Electoral and Boundaries Commission, Petition No.19 of 2017

This petition was filed by Katiba Institute against IEBC. The core argument was that there was no obligation imposed on political parties to comply with the two-thirds gender rule in their nominations ahead of the general elections. As a consequence, the petitioner sought orders as follows:

- a) A declaration that political parties were bound by constitutional provisions on the two-thirds gender principle, and hence any action taken by them, including nomination of

candidates for members of parliament, must comply with those provisions.

- b) A declaration that IEBC was duty-bound to ensure that nominations carried out by political parties met the requirements of the two-thirds gender principle.
- c) A declaration that IEBC was duty-bound to reject any nomination list of a political party that did not comply with the two-thirds gender rule.
- d) An order that IEBC should only accept and process those nomination lists of political parties that met the two-thirds gender rule.

The Decision

The court agreed with the petitioner that political parties are bound by the two-thirds gender principle, and hence their nomination process for candidates for members of parliament must comply with the principle. Accordingly, it directed political parties to take measures to formulate rules and regulations for purposes of complying with the principle during nominations for the 290 constituency based elective positions for members of the National Assembly and 47 county based positions for members of the Senate. However, in order not to disrupt the advanced preparations for the elections, the court directed that the order be applied in the 2022 general elections.





PART V: INSIGHTS FROM PARLIAMENTARY DEBATE ON THE CHEPKONG'A BILL

5.0 Framing

There have been four failed attempts to pass the two thirds gender law. The first two relate to the Duale bills in the National Assembly which failed to muster the number of supporters to pass a constitutional amendment. Similarly, the “Sijeny Bill” failed twice after the Senate was also unable to raise the requisite numbers in its favour. In both cases, members either deliberately stayed away from the legislature or flagrantly voted against the bills. Undeniably, the failure to enact the law is a direct indicator of reluctance by legislators. Their vocal support before voting, therefore, appears to have been meant to please the top political leadership of the ruling coalition and the opposition that had implored them to pass it.

Following the failure to pass the Duale Bill, the Departmental Committee on Justice and Legal Affairs developed its own bill, popularly referred to as the Chepkong’a Bill, dated 28th April 2015. The committee then convened two meetings on 15th and 16th July 2015 where a number of stakeholders discussed the import of the bill. In attendance were: KNCHR, Women’s Empowerment Link (WEL) and the National Women Steering Committee (NWSC). The committee also received joint memoranda from KNCHR, Uraia Trust, NWSC, WEL, FIDA-Kenya, Maendeleo ya Wanawake, Youth Agenda, the African Women’s Development and Communication Network (FEMNET), Ground Trust, GROOTS, Future’s Trust, CREAW, Association of Media Women in Kenya (AMWIK), Action Aid, African Women and Child Feature Service and the United Disabled Persons of Kenya (UPDK). The other memorandum was from Theluthi Mbili Multisectoral Stakeholder Forum and CMD. NGEC also participated in the conference.

The clear message from the stakeholders was that the proposed Chepkong’a Bill was bad in law, offended the Constitution and was a brazen disregard of the Supreme Court advisory opinion and other judicial determinations on the matter of the two thirds gender principle. Nonetheless, the Chairman of the Departmental Committee on Justice and Legal Affairs, Hon. Samuel Chepkong’a, declined to withdraw the bill although it went ahead and failed in parliament.

The shift in positions by legislators who had publicly supported the two-thirds gender rule bill reveals lack of determination to enact the law in full compliance with the Constitution and the judicial pronouncements on the matter. Nothing reveals the true standpoints of legislators than the debate at the second reading of the said Chepkong’a Bill, which are recorded in the electronic version of the Official Hansard Report and excerpts of which are reproduced below.

It will be seen that the men were universally of the same opinion except for a slim minority while the women were unanimous on their position.

5.1 Excerpts from Members' Contributions

a. Male Legislators



Hon. Samuel Chepkong'a: We cannot force people to do things which they think are not cultural to them. The Constitution recognises the cultures of every ethnic group in this country. There were serious misgivings in the various options we considered. We came to the conclusion that if we pass the progressive implementation of this constitutional requirement, we will be able to achieve it in less than 10 years. The objective of this bill is, therefore, to propose an amendment to Article 81, as I have already stated, to insert “progressive realization of two-thirds gender rule (Hansard, Page 16 of Tuesday, 25th October, 2016 at 2.30 p.m.).

Hon. Aden Duale: Hon. Speaker, as I second, I want to go on record before the great women of this house and the ones outside that our intention and spirit for the attainment of the two-thirds gender rule has not changed. In my community, you change gears when you are faced with a serious matter.”

Hon. Speaker, my colleagues who were in the last parliament will agree with me that the new Constitution 2010 under Article 27(8) provides that the State and parliament are under obligation to put in place legislative measures to implement the principle that not more than two-thirds of members of elective or appointive bodies shall be of the same gender. We must be very candid to ourselves. Has the executive and the judiciary implemented the two-thirds gender rule? Someone needs to tell us where they have done that. I can say without fear of contradiction that they have not. The Supreme Court does not reflect gender proportions. (Hansard, Page 18 of Tuesday, 25th October, 2016 at 2.30 p.m.)





Hon. Tom Kajwang’: I am delighted to support this bill....I like the way this amendment has been worded. It says; “progressive implementation of legislation.” That is important for me because I have always wondered how the two-thirds gender rule would be plucked from the Constitution and be implemented without an enabling legislation (Hansard, Page 21 of Tuesday, 25th October, 2016 at 2.30 p.m.).

Hon. Irungu Kang’ata: I agree with those people who are saying that this push for increased women’s representation through nomination is purely a fight for the elite women. It does not resonate with the common woman down there. If you were to push for it to change so that it becomes a fight for an increased representation in your county, it would make sense. You will have what is called “legitimacy”. This is “legitimacy” in the sense that you are in this house through voting. It means you have been voted upon. That makes a lot of sense and that is the only way I can support this idea. I need to be counted as one of those members of parliament who are sitting on the fence on this issue (Hansard, Page 27 of Tuesday, 25th October, 2016 at 2.30 p.m.).



Hon. Opondo Kaluma: I do not believe there is a woman outside there who wants free things. Issues such as how we get to increase the number of women here are matters to be negotiated and are details that can only go in legislation and not in the Constitution. If you put it in the Constitution, it will be so hard to change even when you need that change. So, I request my brothers and sisters in this house to be open about this thing. Let us not just oppose it because it is “a woman-man thing (Page 35 of Tuesday, 25th October, 2016 at 2.30 p.m.).

Hon. Francis Ganya: This is not a rubber-stamp parliament. One way or another, a decision has been made. We voted with you; we stood with you. But I am sure we will still cross that bridge when the right time comes. I support this bill, Hon. Deputy Speaker (Page 40 of Tuesday, 25th October, 2016 at 2.30 p.m.).





Hon. James Nyikal: One thing about this bill is the way it has come into parliament. The members of the committee tell us that this bill was not agreed on at the committee level. The second thing is that this bill was brought abruptly. I would have expected, at least, the House Business Committee to discuss it. I am afraid it did not. The third thing about the bill is that it is too simplistic. It does not address the issues at hand and it does not give confidence to our female colleagues that, if we decide to go the progressive way, the matter will be subjected to a legal process. I understand that in politics, there are difficulties in accepting the progressive method. Let us go the progressive

way. Let us give it a chance to work out proper legislation that will take this into consideration. I, therefore, find it very difficult to support this bill in those circumstances. It was not brought in good faith (Page 47 of Tuesday, 25th October, 2016 at 2.30 p.m.).

b. Female Legislators

Hon. Priscilla Nyokabi: Hon. Speaker, on the matter of two-thirds, we have never had a sadder day. Today we gather here to discuss a bill seeking to postpone the promise of progressive realization of the two-thirds gender rule that was made to the women of Kenya. We are seeking to remove it completely from the Constitution. It is, indeed, very sad. Let me start by declaring that we have a very good Justice and Legal Affairs Committee. As a committee, we had a meeting today to vet and approve the nominee for the position of the Deputy Chief Justice of the Republic of Kenya. However, on the matter of two-thirds gender rule, we have a male and a female Justice and Legal Affairs Committee. This is because the female members of the committee have never agreed to the bill that is before the house. They did not accept it then and they do not accept it even today.”



The committee has 25 male members and four female members. It is a committee of 29 members. Even the composition of the committee should comply with the two-thirds gender rule. No matter how much we oppose these bills, they always find their way to the floor of this house. I want women in this house, and women of Kenya generally, to know that the bill before this house today is nothing but a show of might; that the 25 men of the committee were able to canvass, collude and do many things to bring this bill here today. That shows how much we need more women in parliament. The two-thirds gender rule matter is a live debate. We have

come here before, and members are aware. I thank all the members who supported the first bill (Bill No.4). We were able to get 195 members, including Hon. Chepkong’ a himself. Hon. Duale moved that particular bill. This is a democracy and we attained 195 votes. We required 38 more votes for that bill to go through. The answer is not to go back to the starting line but ...to rise up from the 195 votes. The bill that we are discussing today should not be taking us back to zero but ...giving us a position from the 195 votes (Hansard, Page 23 of Tuesday, 25th October, 2016 at 2.30 p.m.).



Hon. Millie Mabona: From the outset, I vehemently oppose this bill. I respectfully disagree with the Supreme Court because if they were not clear about the obvious meaning in the Constitution, the next way of interpreting the Constitution would have been going to the legislative history which they failed to do....They would have known that we vehemently opposed the word “progression” when it comes to women. I remember that when we defeated the other constitution, I was vehemently opposed to it because of the word “progressive”. I still vehemently oppose this because of the issue of progression (Page 30 of Tuesday, 25th October, 2016 at 2.30 p.m.).

Hon. Mary Otuch: Thank you, Hon. Deputy Speaker. At the outset, I oppose this bill. This bill is a let-down to the women of Kenya. I am surprised listening to our male colleagues alleging that we want more women in this house. When Kenyans voted for the new constitution, in their wisdom, they provided for the two-thirds gender principle. They said that no one gender shall comprise more than two-thirds of the membership of this house. This parliament was expected to provide a formula. I am an accountant and a formula is supposed to give a solution. What is progressive? That will not give any results because there are no numbers attached to it. It is not saying anything. We should come up with an agreeable formula that addresses and ensures that in elective positions, we have one-third of women in this house (Page 31 of Tuesday, 25th October, 2016 at 2.30 p.m.).





Hon. Fatuma Ibrahim Ali: Thank you, Hon. Deputy Speaker for giving me the opportunity to contribute to this bill. At the outset, I want to oppose it. I have been a sad mother and member of parliament for the last four years that the issue of two-thirds gender actualization has been debated. Hon. Speaker, the Leader of the Majority Party has said that they are doing a reverse. In my view, in terms of achieving the two-thirds gender principle, Kenya has reversed 100 years. Kenya is a signatory to many international instruments that require this country to achieve gender equality. Progressive realisation of the two-thirds gender principle is nothing. It is just a game. It is just like a sentence in a book. It is just meant

to cheat Kenyan men and women (Page 31 of Tuesday, 25th October, 2016 at 2.30 p.m.).

Hon. Roselinda Tuyu: Thank you, Hon. Deputy Speaker. At the outset, I want to vehemently oppose this bill. When it comes to gender issues in this country, the term “progressive” simply means “would not do it” and “cannot do it”. There are no two meanings to the term “progressive” when it comes to gender equity. We will be duping Kenyans and women of Kenya talking about this “animal” called “progressive”. The bill is unconstitutional because it does not offer us a solution to a principle that was voted for and supported by a majority of Kenyans during the referendum in 2010 (Page 32 of Tuesday, 25th October, 2016 at 2.30 p.m.).



Hon. Alice Wahome: The Kenyan society spoke when we passed the Constitution of the Republic of Kenya in 2010. Within that constitution, the country captured in articles 27, 81 and 100 the case of marginalization, affirmative action and marginalized groups. To date, we have done nothing as the National Assembly to bring legislative mechanisms to support those provisions. It is appalling and regrettable that four and a half years will end and this parliament continues, through some of our colleagues here, to joke about a serious matter like this one. It is a coup against the Kenyan Constitution for this parliament to fail to legislate and

support it. We even had timeframes within which this house was supposed to come up with

legislation. Why does it become an issue only when the question of gender is spoken about?

“When I see Hon. Kaluma, Hon. T.J. Kajwang’ and Hon. Jakoyo, I see very far in terms of political hypocrisy in this matter. When I see Hon. Chepkong’a and Hon. Duale saying this bill is good, I see very far. I believe the political heavyweights in this country across the board are not behind the two-thirds gender principle. If they were, we would not be here allowing a chair of a very serious committee to come back with this particular amendment (Page 36 of Tuesday, 25th October, 2016 at 2.30 p.m.).



Hon. Christine Ombaka: Like fellow women here, I would like to oppose this. But I want to highlight a few things. First, let me congratulate the men in this house who have been behind women. There are quite a number of men who are with us. I also want to congratulate my party leader who was here when we were voting on this bill. Many members have highlighted the fact that this bill is not going to help women. There is this catchword that is being used in the bill. It is “progressive”. It looks positive because something that is progressive moves on and improves your life but, this “progressive” thing we have in this bill is a bit on the blind side because you cannot identify how

“progressive” is going to be measured (Page 38 of Tuesday, 25th October, 2016 at 2.30 p.m.).

Hon. Cecily Mbarire: Thank you, Hon. Deputy Speaker, for giving me this opportunity to stand and join my colleagues in opposing this bill. I want to put it on record that this is the most retrogressive legislative proposal I have seen being brought to this floor. It says nothing. It simply tries to hoodwink the women of Kenya to believe that there is anything being done about that right that was enshrined in the Constitution. Let me say this: I am really disappointed with the Chairman of the Departmental Committee on Justice and Legal Affairs, Hon. Chepkong’a. The reason I am disappointed with him is that, as Hon. Alice Wahome stated when she spoke, we had a very candid and open conversation around the two-thirds gender rule and the bills that had been brought on this floor. After the Duale Bill was shown the door, we had a conversation with the Chairman, Hon. Chepkong’a. He accepted that there was need to bring a new bill, but with clear timelines, clear numbers and a clear formula of how to get there. That he



can now sneak back the very same bill that we vehemently opposed, a bill we sat down with him and the Leader of the Majority Party to say no to, is to show that the voices of women count for nothing on this floor (Page 40 of Tuesday, 25th October, 2016 at 2.30 p.m.).



Hon. Rachel Ameso: Nasimama kupinga mswada huu kwa sababu unaelezea mwendo wa pole. Mwendo wa pole pole ni mwendo wa yule mzee kobe ambaye tumekuwa tukisoma tukiwa katika shule za chekechea. Kweli ndugu zetu wabunge wa kiume wangukuwa na nia ya kutusaidia ili idadi ya akina mama iongezeke katika bunge letu la kitaifa, wangetupatia namna ya kufanya hiyo hesabu ili tuweze kujua moja ukiongeza moja utapata mbili. Lakini hapa hawajatuelezea lolote. Inamaanisha kwamba hili neno “pole pole” ama vile wameliweka katika lugha ya kimombo ‘progressive’ ni njia moja ambayo hakuna lolote litatendeka hata kesho kutwa

(Page 42 of Tuesday, 25th October, 2016 at 2.30 p.m.).

Translation of the above: I stand to oppose this motion because it is slowing us down just like the proverbial tortoise we read about when we were young. If our male colleagues really wanted to help us increase the number of women in the national Assembly, they would give us a formula. The word “progressive” here means nothing will happen even the day after tomorrow.

Hon. Wanjiku Muhia: I stand to oppose this bill. I also ask every other member who is here to oppose Hon. Chepkong’a’s bill. He seems to have a hidden agenda considering the timing. He has rushed to the house to tell us that things are going haywire. It is very unfortunate for Hon. Jakoyo and other colleagues to compare women to roads. This is pure incitement of Kenyans...There was a time when this house had 210 Members from 210 constituencies. When we increased the constituencies to 290, the issue of roads did not arise (Page 44 of Tuesday, 25th October, 2016 at 2.30 p.m.).





Hon. Mary Seneta: Thank you, Hon. Deputy Speaker, for giving me this chance to also contribute to this important bill. At the outset, I want to oppose. I want to tell Kenyans that this bill is a public relations game that is being played. It has been brought to the house to show that parliament is doing something about gender. I oppose this bill because it is withdrawing all the gains that we have made under the new constitutional dispensation. Kenyans fought for the new constitution. Women stand to gain a lot from the new constitution. Today is a very sad day for women. If we pass this bill, we will take them backwards. This bill has some gimmick words like “progressive”, which means we

can take even 10 years to comply with the two-thirds gender rule. It means we can have five women in five years or in 10 years. The word “progressive” means there is nothing that is restricted. It means we can as well not achieve the one-third gender. Therefore, I urge this house to sit again and do something serious to show that we need proper representation of women in this house (Page 45 of Tuesday, 25th October, 2016 at 2.30 p.m.).

Hon. Sunjeev Birdi: Thank you, Hon. Deputy Speaker, for giving me this opportunity to contribute. I oppose this bill. I respect Hon. Chepkong’ a, and I would have respected him more if he sat with us from the beginning of this bill to the end to see what each member of parliament has to say about it. I would like to present myself as a case. It is a very interesting case. Who would have thought that in the history of Kenya, there would be a member of parliament who would represent the interests of minority groups and happens to be an Indian and a woman at that? It would have been a dream, but it was made possible by affirmative action. Members of parliament worked very hard to get this constitution.... Their work enabled people like me to be in parliament today (Page 47 of Tuesday, 25th October, 2016 at 2.30 p.m.).



PART VI: REFRAMING THE CONVERSATION

The Problem from a Constitutional Context

A historical inquiry on the journey towards inclusion of women in public spheres, especially participation in political and decision making processes, has been long and winding, and can only match the history of the republic. The promulgation of the COK 2010 marked the crack of a new dawn in so far as the struggle for inclusion of women in public and political life was concerned. In fact, it was believed that organizing the Constitution around the ideology of inclusion meant that the strategic battle had been won. However, experience from 2010 shows that the Constitution is only known for its political and symbolic value, and not its practical effectiveness. If the implementation of the two-thirds gender principle is to be regarded as a yardstick for measuring success, then the inevitable conclusion is that the Constitution has failed to inspire national renewal and inclusion as was intended.

Lessons from 2010 indicate that the Constitution, however eloquent and well-articulated, is not self-executing. It requires and relies on key pillars to enable it to germinate, grow and flourish. The Constitution presupposed that its transformative potential would be implemented in the context of a matching culture of compliance. Otherwise, its aggressive human rights posture and transformative potential can easily be falsified and vision completely dimmed. Indeed, the failure by parliament to pass the two-thirds gender law is a chilling reminder of the constitution's declining influence, barely eight years after promulgation.

To revive the Constitution and preserve its reputation as our article of faith, and a tool for social change and transformation, Kenyans must safeguard its critical pillars. If these are weakened or removed, the integrity of the Constitution will be significantly weakened and nothing which it has promised will be achievable.

Critical Pre-conditions for Implementation of the Constitution

It can be argued that faithful implementation of the COK 2010 is dependent on four main factors: a robust framework, judicial independence, public vigilance and political culture. Each is briefly discussed below.

i. Robust Framework

If the Constitution is highly regarded, it is because of its robust architecture and design. The Constitution is deliberate in requiring a shift from gender-neutral to gender-sensitive laws. It appreciates the historical context in which women's rights are to be recalibrated and realised. The inclusive design recognises that in order to reverse the historical and systematic marginalisation of women, a more robust strategy ought to be implemented. This is the

historical and foundational justification for the two-thirds gender principle.

The motif in the Constitution is the ideology of inclusion while addressing and redressing historical injustices and marginalization. It is thus not possible to tinker with or completely remove the two-thirds gender principle without fatally damaging the constitution's core commitment and integrity.

Indeed, the Constitution envisions changes to its framework, but only to fortify not falsify its founding philosophy. Any changes that interfere with its basic structure and integrity must be considered as "unconstitutional" regardless of whether they are effected by parliament or approved in a referendum. There is nothing contentious or controversial about preserving the constitution's core commitments. The sovereign power of the people to change, adjust and reenact it presupposes that such alterations will be strengthen and not weaken its framework and arrangement of power.

ii. Independent Judiciary

The COK 2010 mandates a shift in the legal culture. Part of this shift is the emergence of a robust, independent, competent and functional judiciary able to uphold the rule of law, inspire public confidence and dispense justice without fear or favour. In the exercise of its authority, the judiciary is subject only to the Constitution and the law and shall not be subject to the control or direction of any other person or authority.

Accordingly, at the level of design, the Constitution has delivered what should be a bold judiciary, and clothed it with fine statutory linen to dispense justice without fear of blackmail. It intends the judiciary to be fiercely independent, distinct and free from manipulation of the political wing of government, especially the executive. The boldness of the renewed judiciary has been fully highlighted in the matter of the two-thirds gender principle. The judiciary has consistently interpreted the law in favour of immediate and definitive realisation of the two-thirds gender principle.

iii. Vigilant Public

In the order and practice of governance, a vigilant public, whether as individuals acting independently, or as organized civil society, is necessary to safeguard constitutional gains. As can be expected with the introduction of a new technique of governance, there are always challenges of implementation, and the two-thirds gender principle has fully highlighted them. A people willing to take up public interest litigation can play a critical role in helping to promote the rule of law and catalyze social transformation. The Constitution has expanded the space for the public to engage more robustly in governance and in demanding faithful implementation of the supreme law of the land by allowing any public-spirited person to challenge anything unconstitutional.

The quest for implementation of the two-thirds gender principle has animated what public vigilance is all about. The several court cases relating to the matter show that the people have responded well to the responsibility to defend the Constitution, by relentlessly demanding compliance with the law and requiring public officials to act in tandem.

Public interest litigation has quickly emerged as an effective tool for demanding accountability and compliance with the law. Whenever the values and ideals enshrined in the Constitution are breached or threatened with violation, individuals have instituted public interest cases to reclaim the constitutional commitments. This has in turn contributed to the emergence of a constitutional culture because public officials can expect to be held accountable for their acts of omission and/or commission.

iv. Political Culture

One of the defining aspects of a transformative constitution is that it commands a shift in the political culture. It is possible to predict what such a constitution will produce (in terms of promoting an egalitarian society) if there exists a caring political culture. The debate on the Chepkong’ a Bill shows that Kenya’s political culture is yet to fully align with the intentions of the Constitution.

Since the Constitution binds all persons and institutions, the political elite, administration in power and political opposition must be actively involved in promoting its faithful implementation by: respecting its supremacy; operating within its confines; and accepting the judicial determinations. Only if these are done will the constitutional guarantees be realised.

v. Conclusion

Tracing the journey of the implementation of the two-thirds gender principle leads to one conclusion: that a good constitution, in and of itself, does not guarantee protection of fundamental rights and freedoms. Whereas the Constitution has altered the legal scene, and embedded gender-sensitive laws, the prescribed minimum threshold for women’s representation is yet to be achieved in Kenya despite clear constitutional timelines and judicial orders on the same.

This can only be attributed to impunity. Parliament does not consider enactment of the two-thirds gender law a matter of constitutional compliance but an issue of political convenience. It is important that parliament be fully co-opted into the inclusive philosophy of the Constitution that has opened up space for women’s representation in elective and appointive positions. Otherwise, it would be impossible to safeguard women’s rights.

Matrix of Related Two Thirds Cases

YEAR	CASE	LEAD PETITIONER & OTHER PARTIES	ISSUES	RESOLUTION
	CREAW v Attorney General & Another Petition No 182 of 2015 Filed May, 2015	CREAW(Petitioners) AG,CIC(Respondents) KEWOPA(Kenya Women Parliamentary Association, Centre for Multiparty Development(Interested Parties)	This petition was filed as a follow up to the advisory opinion issued by the Supreme Court where the court gave the National Assembly and the senate till 27/08/2015 to have enacted legislation that would give effect to the not more than 2/3 gender principle. The petitioners contended that the AG had failed in his responsibility as per Article 261(4) of the constitution by failing to prepare the relevant bill for tabling before parliament as required by the law to enable parliament enact legislation within the period specified and therefore violating Article 27(8) and Article 81(b) as read with Article 100 and the Supreme Court Advisory Opinion. The petitioners sought orders to have the AG and the CIC compelled to prepare the relevant bill for tabling in Parliament for purposes of implementation of Articles 27(8) and 81(b) of the constitution. The respondents argued that the petition was premature as of 27/08/2015 deadline had yet to lapse and that parliament still had time to extend the timeline for enacting legislation.	The court agreed that the AG and CIC had failed in discharging their mandate and as such as they had argued that they had set in motion some processes for the legislation, nothing concrete had been done between the date of the Advisory opinion of 11/12/2012. The judge ordered that the respondents to prepare the relevant bill to be tabled in parliament within the next 40 days for the purposes of effecting the 2/3 gender principle, however amenable to tricks from the respondent in its suggestion that it was cognizant that the 27/08/2015 supreme court deadline was 60 days away and hoped that through the timeline, the National Assembly would use it to consider the extension of time compliance

YEAR	CASE	LEAD PETITIONER & OTHER PARTIES	ISSUES	RESOLUTION
2016	National Gender & Equality Commission v Cabinet Secretary, Minister of Interior & Coordination of National Government & 2 others (petition 12 of 2016)	NGEC (Petitioner CS, Minister of Interior Security & Coordination of National	The Kenya Law Report only shows the ruling but the intent of the petition from the ruling was to challenge the amendments made to the National Police Service Act that would eventually undermine the quality guaranteed under the constitution for women in terms of the provision of Article 27(8). The petitioners sought a declaration of constitutional invalidity of the impugned amendments (Miscellaneous Amendment 2015, December). The then Deputy Inspector General of Police Ms Grace Kaindi had just been relieved of her duties and a replacement for her in the interim had been given. The government however, while arguing that the replacement only in the interim also had an argument where it claimed that the Inspector General of Police and the deputy IG did not comprise of a full body and therefore the argument that the replacement should have been a man was misconceived	

	<p>Adrian Kamotho Njenga v CS,Ministry of ICT,Petition No 203 of 2016 Filed May,2016</p>	<p>Adrian Kamotho,CS Ministry of ICT.The Communications Authority of Kenya as interested parties plus 7 other Interested Parties who were the board members appointed by the CS of ICT</p>	<p>The petition filed seeking orders against the CS,ICT for violating Article 27 of the constitution in the constitution of the board of Communications Authority of Kenya and the petitioners wanted the court to compel CAK to comply with the 2/3 gender requirements. The respondents argued that the appointment of the requisite 7 members by the CS was in addition to the Chairperson of the board appointed by the president, 3 persons representing their respective permanent secretaries of the ministries and the 7 appointees by the CS to constitute a whole board. The CS, it was argued considered regional and gender balances as well as performance of Individual Candidates. In the end two women and 3 men were successful in compliance with the gender requirements. The respondent also claimed he had no control over who sat at the board as the representatives of the PS's and the chairperson who was appointed by the president. The respondent submitted that 4 of the 11 members of the board were women making the board gender principle compliant.</p>	<p>Justice Lenaola decided that the ultimate test of compliance on the gender ratio composition should be the substantive appointment process and not the shortlisting stage as he would not be privy to the deliberations made during the short listing stage. He however noted that out of the 28 people, only 9 women versus 19 men were shortlisted. It was held that the board of 4 females and 7 males read with the language of Article 27(4) understanding of what a body is properly constituted as no gender was falling below the 1/3 mark.</p>
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2011	FIDA-K & 5 Others v Attorney General Petition 102 of 2011	FIDA-K, CREAW, League of Kenyan Women voters, Women in Law & Development in Africa (WILDAF),Caucas for Women leadership & COVAW(Petitioners)AG, JSC(Respondents United Disabled Persons of Kenya, Kenya Women Political Alliance, National Council of women Kenya, ICPC,KPT,Kituo Cha Sheria,Association Of Media Women in Kenya,Tax Watch Forum (Interested Parties) CIC(Amicus Curiae)	FIDA-K filed this petition challenging the recommendations of Five Supreme Court Judges to the president for violating Article 27(4) of the constitution. Of the 5 Judges recommended by the JSC only one was a woman bringing the total constitution of the supreme court bench at only 2 women and 5 men. The court refused to delve into mathematical formulae introduced by the petitioners to ascertain the right percentages for anybody while trying to conceive the right number of men and women for the 2/3 gender rule to be ascribed to. Instead the court focused on the meaning of Article 27 of the Constitution on its interpretation, meaning and effect in the circumstances at hand. It reckoned that judicial Appointments should be based on merit, non-discrimination and should reflect the overall diversity of the People Of Kenya	This petition was dismissed by the court arguing that the appointments had been made within the law and that until the state acted on policies and programmes as envisaged by Article 27(6) and 8 and the legislature had legislated accordingly to set the formulae mechanisms and standards to implement the spirit of the constitution within the time set frame. The court advised women to remain vigilant and keep the state on their toes in regards to legislation. The JSC had expressed legitimate discretion within the parameters of the law and that the petitioners had failed to prove otherwise. The court stated that Article 27 did not give an immediate and enforceable right to any particular gender in so far as the not more than 2/3 gender principle was concerned and it was unreasonable and unrealistic for the petitioners to expect that as the issue in court would/could be resolved through enabling legislation by parliament
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<p>Milkah Adhiambo Otieno & Another v AG & 2 others Petition 33 of 2011, Filed on 23/7/2011</p>	<p>Milkah Adhiambo, Betty Chipchirchir (Petitioners) AG, Kenya Sugar Board, Nicholas Odongo (Respondents)</p>	<p>The petitioners brought this petition seeking the declaration of the sugar board elections to be rendered null and void for the failure in putting appropriate measures to ensure women were elected to the board as they were sugarcane farmers and deserved to be represented on the board. At the time elections had just been concluded and no woman had been elected to sit on the board</p>	<p>The court agreed with the respondents that the petition had been filed prematurely as the board of 13 members was yet to be constituted and only then would the matter of compliance with Article 27(8) be conversed. The process of constituting the board was on going and had just been temporarily stopped by the court and that the other members who had been elected, five of them were men. The court instructed the respondent to ensure that the whole list of the board members would ensure to include that not more than the 2/3 gender principle was complied with. It was hoped that the state with other agencies would undertake necessary legislative measure to address inequalities and marginalization of historically disadvantaged groups such as women. The decision stated that state had other measures apart from legislation to ensure the requirements of Article 27(8) were complied with in turn departing from the progressive tone set out earlier on the FIDA-K case.</p>
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2012	In the Matter of the Principle of Gender Representation in the National Assembly and Senate	AG-Applicant Commission On Administrative	This advisory was applied for by the Attorney General seeking guidance on whether articles 81(b) as read with 27(6) & 8 & Articles 198,97,98,197(b),116 & 125 require progressive realization and the enforcement of the 1/3 gender rule or requires the same to be implemented during the general election to be held 4/03/2013(then)	It was held that the not more than 2/3 gender rule as provided for by the constitution could not be enforced immediately and had to be applied progressively. The court gave the National Assembly and the Senate until 27/08/2015 to have put legislation on the principle as prescribed by the Article 100 of the constitution
	CREAW & 8others v AG & Another petition 207 & 208 of 2012	CREAW,Caucas For Women leadership, Women in Law &Development in Africa, Development Through Media(DTM),COVAW,Young Women in leadership, enter for policy & Conflict, Patrick Njuguna and Charles Omanga(Petitioners) AG-Respondents	Among the issues contested or rather being litigated was the deployment/appointment of 47 county commissioners by the president 37 of whom were men and only 10 were women in clear contravention on the principle of gender equality for not meeting the not more than 2/3 threshold. The respondents alleged that they were not enough women qualified to be appointed as county commissioners in spite of conceding that they were at least 26 women who were District Commissioners who had the necessary paramilitary skills and leadership training. This was in spite of the respondents having picked from the 10 women from this number and yet they would have needed to pick only five more to meet the minimum threshold to meet Article 27(8) requirements	The court while deciding on the progressive realization argument advance was that Article 21 of the constitution imposed as an immediate test on the state to adhere to the not more than 2/3 gender rule immediately and that the rights subjective to the progressive realization test were the Economic and Social rights as they required allocation of resources and therefore the states obligation were subject to availability of resources unlike appointments and the like.

	<p>Minister For Internal Security & Provincial Administration v CREAW & 8 others Civil Appeal No.218 of 2012</p>	<p>Same Parties</p>	<p>The court argued that the appointments had been done within the transition period of inception of the constitution of 2010 and strictly speaking the appointments as at the time, the president still had executive powers to issue such orders. On gender argument, the court held perhaps the judge was ahead of her time while issuing the lower court's decision. Suggesting that the immediate realization argument advanced was harsh and the progressive test would have been a better path and thus would not have rendered the Gazette Notice 6937 of 23/05/2012 unconstitutional, null and void</p>	
<p>2015</p>	<p>Marilyn Kamuru Muthoni & 2 others v AG & Another Petition 566 of 2015 Filed and amended petition 8/01/2016</p>	<p>Marilyn Kamuru, Daisy Doreen, Jerop Amdany-</p>	<p>This petition was filed to contest the appointments to the cabinet by the president for contravening the 2/3 gender principle. The president went ahead to swear in new appointees as cabinet secretaries and hence the amended petition to challenge the cabinet as it is now for contravening the 2/3 gender principle. The respondent among other arguments of the cabinet not falling into the strict definition of a body as envisaged by Article 27(8) also brought up the progressive argument saying that the principle was one to be effected progressively.</p>	<p>Justice Onguto explained that the constitution prohibited the state from maintaining gender imbalance in appointive and elective positions and that the constitution did not impose a lesser duty on the president and the National Assembly. The court reiterated that article 27(4) on appointive positions could be realized immediately and in any event the not more than 2/3 gender principle provided a bare minimum.</p>

REFERENCES

Court Cases

1. Supreme Court Advisory Opinion No. 2 of 2012.
2. Centre for Rights Education & Awareness (CREAW) v Attorney General & Another [2015] eKLR.
3. Centre for Rights Education & Awareness (CREAW) & 2 Others v Speaker of the National Assembly & 6 Others [2017] eKLR (Petition No. 371 of 2016).
4. Centre for Rights Education & Awareness (CREAW) & 2 Others v Speaker of the National Assembly & 6 Others [2017] eKLR.
5. Katiba Institute v Independent Electoral and Boundaries Commission, Petition No.19 of 2017.
6. Centre for Rights Education & Awareness (CREAW) & 3 Others v Speaker of the National Assembly & 3 Others [2017] eKLR, Petition No. 397 of 2018.

Publications

1. Constitution of Kenya Review Commission, **The Final Report of the Constitution of Kenya Review Commission**, 2005.
2. Mbondeny , M.K. et al, **Human Rights and Democratic Governance in Kenya: A post-2007 Appraisal**, 2005, Pretoria University Law Press (PULP).
3. International Commission of Jurists, **Gender Equality and Political Processes in Kenya**, Strathmore University Press, 2016.
4. Mutunga, W. **The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court’s Decisions**. Available online at <http://www.saflii.org/za/journals/SPECJU/2015/6.html>
5. Technical Working Group, **Proposals on the Attainment of the Two Thirds Gender Principle**, 2015, available online. See also Institute for Economic Affairs, 2015 available at www.ieakenya.or.ke/downloads
6. Wanyande, P., “Electoral politics and election outcomes in Kenya, In: **Africa Development**, Vol. XXXI, No. 3, 2006, pp. 62–80

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